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COMMENTS

THE CONSTITUTIONAL AUTHORITY OF THE FEDERAL GOVERNMENT IN STATE CRIMINAL PROCEEDINGS THAT INVOLVE U.S. TREATY OBLIGATIONS OR AFFECT U.S. FOREIGN RELATIONS

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I.

Does the United States have the constitutional authority to make binding commitments and to require state compliance on matters that affect state criminal proceedings? The perception, both outside the United States and within the United States government, seems to be that it does not. For example, in the *Soering*[1] case, which involved an action in the European Court of Human Rights to prevent the extradition from the United Kingdom to the United States of someone charged with a capital crime in Virginia, the Court stated: "[I]n respect of offences against State laws the Federal authorities have no legally binding power to provide, in an appropriate extradition case, an assurance that the death penalty will not be imposed or carried out. In such cases the power rests with the State."[2] In the *Breard* case, following a unanimous decision by the International Court of Justice (I.C.J.) that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings,"[3] Madeleine Albright wrote a letter to the governor of Virginia, requesting him to stay Breard's execution.

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1. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

2. *Id.*at 28. Great Britain also apparently assumed that the federal government did not have the authority to do so. In its note to the United States, requesting assurance that "the death penalty, if imposed, will not be carried out," Great Britain stated,

> [*s*]*hould it not be possible on constitutional grounds for the United States Government to give such an assurance*, the United Kingdom authorities ask that the United States Government undertake to recommend to the appropriate authorities that the death penalty should not be imposed or, if imposed, should not be executed.

Id. at 12 (emphasis added).

3. Case Concerning the Vienna Convention on Consular Relations, Paraguay v. United States, 1998 I.C.J. (Interim Protection Order of Apr. 9) (Judges Schwebel, Oda and Koroma attached separate declarations to the opinion.). Text of decision available at <http://www. I.C.J. -cij.org/idocket/ipaus/ipausframe.htm>.

In her letter, the Secretary of State said:

> I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention. The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.[4]

She did not, however, say that for all those reasons the United States had decided to comply with the provisional measures indicated by the I.C.J. to stay the execution and was so notifying the governor. Rather, she wrote, "[i]n light of the Court's request, the unique and difficult foreign policy issues, and other problems created by the Court's provisional measures, *I therefore request that you exercise your powers as Governor and stay Mr. Breard's execution*."[5] Moreover, she added, "[i]t is only with great reluctance that I make this request."[6]

In its brief to the Supreme Court, signed by the Legal Adviser, the U.S. government took the position that it could not require Virginia to stay the execution. After arguing that the I.C.J. decision is "precatory rather than mandatory," the brief states:

> But in any event, the "measures at [the government's] disposal" are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The "measures at [the United States'] disposal" under our Constitution may in some cases include only persuasion—such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution—and not legal compulsion through the judicial system. That is the

4. Letter from Madeleine Albright, Secretary of State, *United States Department of State*, to James Gilmore, Governor, *Commonwealth of Virginia* (Apr. 13, 1998) (copy on file with author).

5. *Id.* (emphasis added).

6. *Id.*

situation here.[7]

In a letter to the International Court of Justice following Breard's execution, David R. Andrews, the Legal Adviser, noted that the Secretary of State requested the governor of Virginia to stay the execution, and concluded:

> This Court's April 9 Order indicated that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." The United States has taken "the Court's indications seriously into account." Through its actions, culminating in the Secretary of State's April 13 request to the Governor of Virginia to stay Mr. Breard's execution on account of this Court's indication of provisional measures, *the United States took all measures lawfully at its disposal to do what the Court requested.*[8]

II.

It may well be, as the United States government argued, that (1) "there is no basis for concluding that the assistance of a consular officer would have changed the outcome of the criminal proceedings,"[9] and that (2) "the remedy Paraguay seeks—[setting aside the conviction]—is not supported by the Convention's text, its negotiating history, or the subsequent practice of state parties."[10] Further, that (3) Breard's failure to raise the issue earlier precluded him from raising it on federal habeas corpus and that (4) the Eleventh Amendment precluded the action by Paraguay. But none of these arguments dispose of the question whether the United States government had the constitutional authority to require Virginia to stay the execution. I believe that it did. It is unthinkable that the federal government lacks the power under the Constitution to comply with an order of the International Court of Justice, precatory or mandatory, if it determines that it is in the interest of the United States to do so. I also believe, contrary to the views expressed by the European Court in the *Soering* case,[11] that federal authorities do have legally binding power to provide, in an appropriate extradition case, that the death

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7. Brief for the United States as Amicus Curiae at 51, Paraguay v. Gilmore, 523 U.S. 371 (1998) (No. 97-1390, 125 Orig.) (brackets in original) [hereinafter U.S. Amicus Brief].

8. Letter from David R. Andrews, Legal Adviser, *United States Department of State*, to Eduardo Valencia-Ospina, Registrar, *International Court of Justice* (Apr. 15, 1998) (citation omitted) (emphasis added) (copy on file with author).

9. U.S. Amicus Brief, *supra* note 7, at 13.

10. *Id.*

11. *See supra* text accompanying note 2.

penalty will not be imposed or carried out.[12]

Article VI of the Constitution provides that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land."[13] The *Soering* case involved an extradition treaty between the United States and the United Kingdom. The *Breard* case involves three treaties to which the United States is a party: the Vienna Convention on Consular Relations,[14] the U.N. Charter,[15] and the Statute of the International Court of Justice.[16] These treaties are all clearly within the treaty power of the United States. They all deal with matters that have traditionally been the subject of treaties and that are clearly of international concern.[17]

Nor are states' rights a limitation on the treaty power. That view was rejected by the Supreme Court over a half century ago.[18] *Missouri v. Holland* makes clear that the United States may enter into treaties on matters that are otherwise exclusively within the jurisdiction of the states and that Congress may enact legislation to implement a treaty even if in the absence of the treaty it could not regulate the conduct. Thus, there can be no doubt that Congress could adopt legislation to implement these treaties and that such legislation would supersede state law.[19] For example, Congress could adopt legislation providing that whenever an extradition treaty permits a contracting party to condition extradition on a promise that the death penalty will not be imposed, the Secretary of State may make such a commitment and that that commitment

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12. *See infra* text at notes 20-28.

13. U.S. CONST. art. VI, § 2, cl. 2.

14. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36(1)(b) provides, "if [the foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, . . . a national of that State is arrested . . . . *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*" *Id.* art. 36, para. 1(b) (emphasis added).

15. The U.N. Charter states: "Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. CHARTER art. 94, para. 1.

16. Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1055 [hereinafter I.C.J. Statute]. Technically the Statute of the I.C.J. is not a separate treaty, but part of the U.N. Charter. *See* U.N. CHARTER art. 92. Article 41 of the I.C.J. Statute provides that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." I.C.J. Statute, art. 41, 59 Stat. 1055, 1061.

17. It had been suggested at one time that treaties must deal with matters of "international concern." RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 117(a) (1965). The present Restatement rejects that position. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 302 cmt. c & reporters note 2 (1986). For a recent discussion of "international concern" as a limitation on the treaty power and criticism of the Restatement (Third) position, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 429-32 (1998).

18. *See* Missouri v. Holland, 252 U.S. 416 (1920).

19. U.S. CONST. art. I, § 8, cl. 18; *Holland*, 252 U.S. at 432.

will be binding on the state in which the extradited person is tried. Similarly, Congress could enact legislation specifically authorizing the Attorney General to bring an action to enforce a judgment of the I.C.J. if the Executive deems it in the national interest to do so. However, such legislation is not a prerequisite for executive action, either in the *Soering* situation or in the *Breard* case.

Legislation is not the exclusive means of implementing a treaty. Treaties may also be implemented by an exchange of notes between the Secretary of State and the appropriate person in the other state or international organization concerned.[20] Although the practice in the United States is apparently for the Secretary of State to forward requests regarding non-imposition of the death penalty to the state in which the accused is to be tried, that is a matter of policy, not constitutional requirement. Thus, in the *Soering* case, had the Secretary of State chosen to respond to the United Kingdom's request for assurances that the death penalty, "if imposed, will not be carried out"[21] with a note giving such assurances, rather than forwarding the request to Virginia, the assurances would have been binding on Virginia. Similarly, in the *Breard* case, had the Secretary of State, instead of merely "requesting" the governor of Virginia to stay Breard's execution, written a note to Paraguay, the I.C.J., or both, stating that notwithstanding the United States' disagreement with Paraguay's position that the failure to inform Breard of his right to consult his consul requires vacating the judgment, the United States would comply with the I.C.J. decision to stay the execution, that would have been binding on Virginia. The reason for that is that an exchange of notes between the United States and another country involving the implementation of a treaty constitutes

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20. *See* GREEN HAYWOOD HACKWORTH, 5 DIGEST OF INTERNATIONAL LAW 397 (1942); HUNTER MILLER, 1 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 10 (1931); JOHN BASSETT MOORE, 5 A DIGEST OF INTERNATIONAL LAW 215 (1906). *See also* MAJORIE M. WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW 195 (1970) (noting that the Foreign Affairs Manual of the United States provides that the "executive agreement form" may be used for agreements "made pursuant to or in accordance with . . . a treaty."). Numerous such agreements have been made involving the North Atlantic Treaty. In testimony before the Senate Judiciary Committee in 1953, in connection with proposals that Congress regulate executive agreements, Secretary of State John Foster Dulles estimated that there were about ten thousand such agreements made under the North Atlantic Treaty. *Id.* at 231. For recent examples of such agreements, see Agreement Regarding U.S. Approval for Retransfer of U.S. Defense Articles and Services to NATO for Purposes of Supporting the NATO-led Implementation Force, Exchange of letters at Brussels, Dec. 18, 1995, Hein's No. KAV 4495, Temp. State Dept. No. 96-19; Agreement Regarding the Transfer of USG-origin Spare Parts and Components Maintained and Serviced by NAMSO (North Atlantic Treaty Organization Maintenance and Supply Organization), Exchange of notes at Brussels and Capellen, Nov. 16, 1992 and March 5, 1993, Hein's No. KAV 3511, Temp. State Dept. No. 93-67. *See also infra* note 60 for a discussion of the Agreement Between the United States and the German Democratic Republic.

21. *See supra* note 2.

a valid executive agreement[22] and that executive agreements, like treaties, supersede inconsistent state law.[23]

In *Belmont*[24] and *Pink*[25] the Supreme Court held that an exchange of notes between Litvinov, the Commissar for Foreign Affairs of the Soviet Union, and President Franklin Delano Roosevelt, whereby the United States recognized the Soviet Union and the Soviet Union assigned its claims to property located in the United States to the United States, constituted an executive agreement. Moreover, that agreement superseded New York law, which denied effect to confiscatory takings. In *Belmont* the Court said:

> [C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.[26]

In *Pink* the Supreme Court stated:

> We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.[27]

The agreement in *Belmont* and *Pink* was a sole executive agreement. The President's authority to enter that agreement stemmed from the President's power to recognize foreign governments. If, as the Supreme Court held in the *Belmont* and *Pink* cases, an executive agreement based on the President's authority to recognize foreign governments—an authority that is

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22. *See* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

23. *See Pink*, 315 U.S. 203; *Belmont*, 301 U.S. 324.

24. *Belmont*, 301 U.S. at 331.

25. *Pink*, 315 U.S. at 230.

26. *Belmont*, 301 U.S. at 331(citations omitted).

27. *Pink*, 315 U.S. at 233-34.

not even mentioned in the Constitution but derived from the President's authority to receive ambassadors[28]—is sufficient to supersede state laws, a fortiori an executive agreement implementing a treaty entered into by the President with the advice and consent of two-thirds of the Senate, on matters that are clearly within the treaty power of the United States, is sufficient to supersede state law.

As a policy matter, the federal government may prefer not to grant assurances concerning the imposition of the death penalty in state criminal cases, leaving it to each state to decide whether it wishes to give the requested assurances or to forego the extradition.[29] It is unlikely, however, that as a policy matter the United States would prefer to leave it to each state to decide whether to comply with an order of the International Court of Justice.[30]

III.

Nor should the federal government's authority to implement an I.C.J. decision depend on whether the decision is mandatory or precatory. In opposing the stay of execution, the government argued that an order indicating provisional remedies is not binding, that the language of Article 41(1) of the I.C.J. statute is precatory.[31] The implication seems to be that if the decision were binding the federal government could implement it, but because it is not, the government cannot implement it. Commentators differ on whether I.C.J.

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28. Professor Henkin notes that "[w]hile making treaties and appointing ambassadors are described as 'powers' of the President (Article II, section 2), receiving ambassadors is included in section 3 which does not speak in terms of power but lists things the President 'shall' or 'may' do." LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 41 (1972). Hamilton characterized the President's receiving ambassadors as "more a matter of dignity than of authority" and as "a circumstance which will be without consequence in the administration of government." THE FEDERALIST NO. 69, at 388 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

29. Following the European Court of Human Rights decision in the *Soering* case, Virginia gave the requested assurances, Soering was extradited, and he is serving a life sentence. *See* Ronan Doherty, Note, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1302-03 (1996).

30. There may be instances in which the United States will decide not to comply with an order of the I.C.J., as it did in the *Nicaragua* case. *See* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), 1986 I.C.J. 14 (merits). But that decision, too, should be made by the federal government, not left to each state. In the oft-quoted words of Madison, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations." THE FEDERALIST NO. 42 (James Madison).

31. U.S. Amicus Brief, *supra* note 7, at 49-51. For the language of Article 41, *see supra* note 16.

decisions indicating provisional measures are binding.[32] But, even if the government is correct that I.C.J. orders indicating provisional measures are not binding, surely the decision, whether to comply with the provisional measures that the International Court has indicated "ought to be taken,"[33] is for the federal government to make. As has repeatedly been stated by the Supreme Court, in matters that affect our foreign relations it is essential that the United States "speak with one voice."[34]

The government's brief gives reasons and cites authorities in support of its position that provisional measures are precatory, not mandatory.[35] The government's brief gives no reasons and cites no authority for its conclusion that international obligations that are not mandatory cannot be enforced by the federal courts. While there does not appear to be a decision directly on point, the Supreme Court has made clear in other contexts that the power of the federal government to supersede state law is not limited to action that the United States is *obligated* to take by international law. In *Sabbatino*,[36] the Court required states to apply the Act of State Doctrine, though it specifically recognized that the doctrine was not "*compelled*" by "international law."[37] In

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32. *See* SHABTAI ROSENNE, 3 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996 § III.340, at 1434 (3d ed. 1997); Bernard H. Oxman, *Jurisdiction and the Power to Indicate Provisional Measures*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 323, 331-33, (Lori F. Damrosch ed., 1987). Professor Vagts, who is critical of the Supreme Court's decision denying a stay, nevertheless states, "[t]o be sure, the binding character and enforceability of provisional measures are subject to some doubt." Detlev F. Vagts, Editorial Comments, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 461-62 (1998). Shabtai Rosenne, one of the leading authorities on the I.C.J., appears to take the position that there is an obligation to comply with a provisional order. *See* ROSENNE, *supra*, § I.48, at 240 (although a provisional "order is not on the same footing as a judgment from the point of view of the Security Council's powers under Article 94 of the Charter, . . . it is a decision and, so long as it is in force, it comes within the conventional and customary obligations to comply with the decision of the Court, incumbent upon every litigating State.").

33. I.C.J. Statute, art. 41, 59 Stat. 1055, 1061.

34. *See, e.g.*, Japan Lines, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 (1979); Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976). In her letter to the governor of Virginia, and in her public discussion of the problem, though not in the brief to the Supreme Court, the Secretary of State made clear that this is a matter that may seriously affect our foreign relations. *See* text at note 4 *supra*.

35. U.S. Amicus Brief, *supra* note 7, at 49-51.

36. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

37. *Id.* at 427 (emphasis added). The Court had earlier stated,

> That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly. No international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments, and apparently no claim has ever been raised before an international tribunal that failure to apply the act of state

Zschernig v. Miller,[38] the Court invalidated a state probate statute, which the Court believed might have an adverse effect on foreign relations, even though the state law did not violate any treaty obligations of the United States. The Court said,

> The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy. Yet, *even in [the] absence of a treaty, a State's policy may disturb foreign relations*. . . . "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or *permitted*, by a government."[39]

The policy considerations generally given in support of federal supremacy, such as the need for uniformity,[40] that the consequences of any action "will be felt by the nation as a whole,"[41] or the "potential for disruption

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doctrine constitutes a breach of international obligation.

Id. at 421-22 (citations omitted).

38. Zschernig v. Miller, 389 U.S. 429 (1968).

39. *Id.* at 440 (emphasis added) (quoting Hines v. Davidowitz, 312 U.S. 52, 64 (1941)).

40. ITEL Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 85 (1993) (foreign commerce); Japan Lines, Ltd. v. County of Los Angeles, 441 U.S. 434, *passim* (1979) (foreign commerce); Hines v. Davidowitz, 312 U.S. 52, 72 (1941) (alien registration); Board of Trustees v. United States, 289 U.S. 48, 59 (1933) (foreign commerce); The Chinese Exclusion Case, 130 U.S. 581, 605 (1889) (immigration).

41. *Japan Lines*, 441 U.S. at 451; *Zschernig*, 389 U.S. at 429; Chy Lung v. Freeman, 92 U.S. 275 (1875) (mem.). *Chy Lung* involved a California statute that required the master of a vessel to post a bond for certain classes of passengers to ensure that the state would not have to bear the expenses for their support and authorized the State Commissioner of Immigration to charge for making certain examinations and preparing certain documents. In holding the statute unconstitutional, the Court said:

> [I]f this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal

or embarrassment"[42] to the government in its relations with other states, apply with great force in this case, irrespective of whether the order of the I.C.J. is mandatory or precatory. This is clearly an area where there is need for uniformity, where the consequences will be felt by the nation as a whole, and where there is not only potential but actual embarrassment to the United States in its relations with other states. As the Secretary of State stressed, "the immediate execution of Mr. Breard . . . could be seen as a denial by the United States of the significance of international law and the Court's processes," and could have "negative consequences for the *many U.S. citizens who live and travel abroad.*"[43]

Moreover, whatever the distinction between "precatory" and "mandatory," the United States clearly believes that provisional measures impose some obligation on states. In the hostage crisis, the United States

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government? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

Id. at 279-80. *See also*, THE FEDERALIST NO. 80 (Alexander Hamilton). Hamilton stated:

[T]he peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquillity. A distinction may perhaps be imagined between cases arising upon treaties and the law of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulation in a treaty or the general law of nations.

THE FEDERALIST NO. 80, at 444-45 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

42. *Zschernig*, 389 U.S. at 429. *See also Sabbatino* , 376 U.S. at 398.

43. Letter from Madeleine Albright, *supra* note 4 (emphasis added).

sought[44] and obtained provisional measures[45] against Iran. President Carter criticized Iran for its failure to release the U.S. hostages, despite the I.C.J. decision indicating provisional measures and a Security Council resolution calling upon Iran to do so;[46] and Secretary of State Cyrus Vance urged the Security Council to adopt "a resolution which would condemn Iran's failure to comply with earlier actions of the Security Council and of the International Court calling for the immediate release of all the hostages."[47] The Security Council adopted a resolution which "deplored the continued detention of the hostages contrary to Security Council Resolution 457 (1979) and the order of the International Court of Justice of 15 December 1979 (S/1369)."[48] In his oral argument before the I.C.J. on the merits phase of the case, Robert B. Owen, the then Legal Adviser to the Department of State, after reviewing the

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44. In his oral argument before the I.C.J., Benjamin R. Civiletti, the then Attorney General of the United States said, "[w]e who speak the sober language of jurisprudence say the United States is seeking the 'indication of provisional measures.' What we are asking this Court for is the quickest possible action to end a barbaric captivity and to save human lives." *Reprinted in* DEP'T ST. BULL., Feb. 1980, at 41.

45. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Dec. 15). In that case the Court indicated provisional measures that Iran

> should immediately ensure that the premises of the United States Embassy, Chancery and Consulates[,] be restored to the possession of the United States authorities under their exclusive control, . . . should ensure that the immediate release, without any exception, of all persons of United States [origin] who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or have been held as hostages elsewhere, and afford full protection of all such persons, . . . [and should] afford to all the diplomatic and consular personnel of the United States the full protection, privileges and immunities to which they are entitled . . . , including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran.

Id. at 20-21.

46. President Carter stated:

> The Government of Iran must realize that it cannot flaunt with impunity the expressed will of the world community. . . . The world community must support the legal machinery it has established so that the United Nations and the International Court of Justice will continue to be relevant in settling serious disputes which threaten peace among nations.

DEP'T ST. BULL., Feb. 1980, at 53, *reprinted in* THE WASH. POST, Dec. 22, 1979, at A16. The I.C.J. decision to which the President referred was the order entered on December 15, 1979, indicating provisional measures; the decision on the merits was issued on May 24, 1980, after the President's speech. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3 (May 24).

47. Speech of Secretary of State Vance to the U.N. Security Council, Dec. 29, 1979, *reprinted in* DEP'T ST. BULL., Feb. 1980, at 67.

48. S.C. Res. 461, U.N. SCOR, 34th Sess., 2184th mtg. at 24, U.N. Doc. S/INF/35 (1979).

efforts by the United States to gain release of the hostages, said,

> the most important of these efforts was our institution of the present proceeding before this Court. . . . [A]t the time we filed our application we had in mind that as a member of the United Nations, Iran had finally undertaken, pursuant to Article 94, paragraph 1, of the U.N. Charter, to comply with the decisions of this Court in any case to which Iran might be a party. Accordingly, it was the hope and expectation of the United States that the Government of Iran, *in compliance with its formal commitments and obligations, would obey any and all orders and judgments which might be entered by this Court in the course of the present litigation.*[49]

The very fact that the matter is the subject of a treaty brings it within the scope of federal authority. The Supreme Court has repeatedly stated, in a variety of contexts, that in matters that affect foreign affairs the federal government is supreme[50] and that in the realm of foreign affairs, "with its

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49. Robert B. Owen, Oral Argument before the I.C.J. (Mar. 18, 1980), *reprinted in* DEP'T ST. BULL., May 1980, at 42 (emphasis added). Owen did, however, draw a distinction between provisional measures and a judgment on the merits. In explaining why the Court should enter a judgment directing Iran "to take specific action to terminate its continuing unlawful conduct," even though Iran had disregarded the order indicating provisional measures, Owen said,

> I am keenly aware of the fact that at an earlier stage in this case we asked the Court for somewhat similar relief in the form of provisional measures and that Iran's subsequent refusal to comply with the resulting provisional measures has surely created doubt as to whether it will comply with the final judgment of this Court. In response, I will simply draw an obvious legal distinction.
>
> Within the community of international legal scholars there is at least some doubt as to whether an indication of provisional measures under article 41 of the Court's Statute is binding and enforceable, but there can be no equivalent doubt about a judgment of the Court on the merits. Conceivably, the authorities in Iran have felt that they were not legally bound by the provisional measures indicated by the Court on 15 December. But article 94 of the U.N. Charter specifically requires obedience to the final judgment on the merits and provides for its enforcement.

Id. at 54.

50. *See* Zschernig v. Miller, 389 U.S. 429, 436 (1968) ("[F]oreign affairs and international relations [are] matters which the Constitution entrusts *solely* to the Federal Government.") (emphasis added); Banco Nacional de Cuba v. Sabbatino 376 U.S. 398, 425 (1964) ("[O]ur relations with other members of the international community must be treated *exclusively* as an aspect of federal law.") (emphasis added); United States v. Pink, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, *or impairs the policy* or provisions of, a treaty or of an international compact or agreement.") (emphasis added); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government . . . imperatively requires

important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."[51] The decision whether to comply with the I.C.J. order in the *Breard* case clearly implicates American foreign relations. In her letter to the governor of Virginia, the Secretary of State spoke of the "unique and difficult foreign policy issues" involved and "the possible negative consequences for the many U.S. citizens who live and travel abroad."[52] She stressed that the immediate execution of Breard could be seen by other states "as a denial by the United States of the significance of international law" and could "limit our ability to ensure that Americans are protected when living or traveling abroad."[53] In response to a question following a speech at Howard University, the Secretary of State said, "it is very important . . . to assure ourselves that our citizens, were they to find themselves in any trouble whenever abroad, . . . would be accorded these rights."[54] It is inconceivable that had these arguments been made by the United States in the Supreme Court in support of a stay it would have been denied.

IV.

In sum, I believe that based on Article VI of the Constitution and a long line of Supreme Court decisions, the United States had the authority to comply with the decision of the I.C.J. indicating provisional measures. The Executive could have done so in a number of ways. First, had the Secretary of State informed Virginia that the Executive had decided to comply with the order of the I.C.J. and that Virginia was required to stay the execution, Virginia would in all probability have complied. Alternatively, had the United States taken the position in the Supreme Court that the President had decided to comply with the order of the I.C.J. and asked the Court to stay the execution pending a decision on the merits, the Court probably would have done so. The Supreme Court has long deferred to the State Department on matters involving

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that federal power in the field affecting foreign relations *be left entirely free* from local interference.") (emphasis added); United States v. Belmont, 301 U.S. 324, 330 (1937) ("Governmental power over external affairs . . . is vested *exclusively* in the national government.") (emphasis added).

51. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

52. *See* text at note 4 *supra*.

53. *See* text at note 4 *supra*.

54. Madeleine Albright, Remarks and Question and Answer Session at Howard University (April 14, 1998) (transcript on file with author).

foreign affairs,[55] and in this case the Court specifically requested the views of the government.[56] Conversely, the Executive's failure to request a stay made it unlikely that the Court would do so given its strong deference to the Executive on matters of foreign affairs.[57] Finally, the government could have brought an action to enjoin the execution.[58] The United States has standing to bring an action to "carry out our treaty obligations" and no statute was necessary to authorize the suit.[59] Whichever approach the government chose, the obligations of the United States under the Consular Convention, the U.N. Charter, and the Statute of the International Court of Justice provided ample basis for the assertion of federal authority over the matter. But, if the Executive had any doubt that it had the authority based on these treaties alone, because they do not provide explicitly for the implementation of I.C.J. decisions indicating provisional measures, it could have entered into an

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55. *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972) ("We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.") (plurality opinion); Banco Nacional de Cuba v. Sabbatino 376 U.S. 398 (1964); Ex Parte Republic of Peru, 318 U.S. 578 (1943); Williams v. Suffolk, 38 U.S. (13 Pet.) 415 (1839). *See also* Justice Powell's concurring opinion in *First National City Bank*, in which he states,

> Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this. . . . When it is shown that a conflict in those roles exists, I believe that the judiciary should defer . . . .

First National City Bank, 406 U.S. 759, 775-76.

56. U.S. Amicus Brief, *supra* note 7, at 1.

57. In *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court held that the State Department's silence in the face of a request by Mexico for sovereign immunity required it to deny immunity. The Court said, "It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35.

58. *See* Sanitary District of Chicago v. United States, 266 U.S. 405 (1925); United States v. Arlington, 669 F.2d. 925 (4th Cir. 1982) (holding that the United States can sue to enjoin a state from breaching treaty obligations); United States v. Arlington, 326 F.2d 929 (4th Cir. 1964) (noting that the United States can bring action to enforce its policies where national interest is involved; it need not have statutory authorization). In the latter case, involving the improper imposition of property tax on a member of the armed forces, the court said,

> Here we find that the interest of the national government in the proper implementation of its policies and programs involving the national defense is such as to vest in it the non-statutory right to maintain this action. Under these circumstances the incapacity of the individual plaintiff to maintain his action is immaterial since he may find shelter under the Government's umbrella.

326 F.2d 929, 932-33.

59. *Sanitary District of Chicago*, 266 U.S. at 425. Such an action by the United States would not have been precluded by the Eleventh Amendment or by limitations on habeas corpus.

executive agreement through an exchange of notes with Paraguay promising to stay the execution.[60]

The *Breard* case raised interesting and important questions about the limits of habeas corpus under the new statute and about the scope of the Eleventh Amendment. But, perhaps the most important question it raised is whether the United States has the constitutional authority to ensure compliance with judgments of the International Court of Justice or must leave that to the decision of each state. It would seem that to state the question is to answer it. It is unthinkable that the federal government would not have the authority. *Missouri v. Holland, Belmont,* and *Pink* make clear that it does. Yet, the government took the position in *Breard* that it lacked the authority. That is, perhaps, the most troubling aspect of the case.

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60. *See* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); United States v. Arlington, 669 F. 2d 925 (4th Cir. 1982). That is exactly what the Executive did in the *Arlington* case. In that case the United States entered into an agreement with the German Democratic Republic (GDR) in 1974, which established diplomatic relations between the two countries, but which apparently did not provide for tax exemption for property used for residential purposes. Virginia imposed a tax on such property owned by the GDR, obtained a judgment against the GDR, and imposed a lien on the property. When the GDR protested to the State Department, the United States entered into an agreement with the GDR, signed by a Deputy Assistant Secretary of State, which provided for tax exemption for property "used exclusively for purposes of their diplomatic missions, including residences for the staff of their diplomatic missions . . . ." *Id.* at 928. The United States then brought an action for a declaratory judgment voiding the assessments and liens and an injunction prohibiting the county from further attempts to collect the taxes. The Court of Appeals held that the United States could "sue to enforce its policies and laws"; that the 1974 and 1979 agreements between the United States and the GDR must be accorded "the dignity of formal treaties," *id.* at 932, and that Virginia could not tax the property.

COMPARATIVE ANALOGIES: *SULLIVAN* VISITS THE COMMONWEALTH

Marie-France Major*

In three recent decisions, the courts of three different countries have used the comparative method to fashion a judicial solution to a particular problem. In trying to reconcile free speech issues with concerns for the protection of individual reputations, the House of Lords in *Derbyshire County Council*,[1] the High Court of Australia in *Theophanous*,[2] and the Supreme Court of Canada in *Hill*[3] all referred to the American decision of *Sullivan*.[4] An examination of these decisions demonstrates the tendency of courts to engage in comparative analysis when faced with difficult problems.[5] They also illustrate how the comparative method and comparative materials constitute a source of inspiration for legal decisions by offering a wide array of solutions.[6]

The three recent Commonwealth decisions are clear examples of the different ways in which foreign materials can be used by courts.[7] The English decision illustrates how courts can engage in comparative analysis to extrapolate general principles which are then applied to a particular issue. The Australian decision demonstrates how national courts can refer to foreign jurisprudence to copy or fashion a solution to the problem they are faced with, whereas the Canadian decision shows how courts can use the comparative method in order to reject a particular solution.

I. THE ISSUE: DEFAMATORY PUBLICATION

In *Derbyshire*, *Theophanous*, and *Hill*, plaintiffs had brought defamation actions and were seeking damages for loss of reputation. The issue before the courts was whether the persons who had published or uttered damaging words

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1. Derbyshire CC v. Times Newspapers Ltd., All E.R. 1011 (1993).

2. Theophanous v. Herald & Weekly Times Ltd. (1994) 124 A.L.R. 1 (Austl.).

3. Hill v. Church of Scientology [1995] 2 S.C.R. 1130 (Can.).

4. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

5. *See* T. Koopmans, *Comparative Law and the Courts*, 45 INT'L & COMP. L.Q. 545 (1996).

6. *See* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 15 (1987). *See also* ALAN WATSON, LEGAL TRANSPLANTS (1974) (providing positive and negative aspects of comparative analysis).

7. For further discussion of the uses of the comparative method, see W. J. Kamba, *Comparative Law: A Theoretical Framework*, 23 INT'L & COMP. L.Q. 485 (1974); Rene Cassin, *Droits de L'homme et Méthode Comparative*, REVUE INT. DE DROIT COMPARÉ 449 (1968); PETER DE CRUZ, A MODERN APPROACH TO COMPARATIVE LAW (1993); ZWEIGERT & KÖTZ, *supra* note 6.

could escape liability. To resolve that issue, the courts had to examine whether the existing defamation laws established an appropriate balance between two sets of conflicting values: those of reputation and those of freedom of expression.

The defamation laws which the courts had before them essentially established that, in order to recover damages, a plaintiff had to prove that the material complained of was defamatory and that it referred to the plaintiff. Inferences of falsity and malice favored the plaintiff.[8] Defendants, in turn, could defend themselves by pleading justification, fair comment, or privilege.[9] Thus, a person who published an assertion of fact or a comment was guilty of a tort and liable for damages unless he or she could positively justify or excuse the publication in the particular circumstances of the case. Proof of the publication of the defamatory statement discharged the plaintiff's onus and cast upon the defendant the burden of establishing some defense.

II. THE SOURCE: *NEW YORK TIMES V. SULLIVAN*[10]

The action in *Sullivan* arose because of an editorial advertisement placed in the *New York Times*. The advertisement, which supported the civil rights movement, specifically referred to and described an incident of police abuse in Montgomery, Alabama. Despite not being mentioned by name, Sullivan, who was an elected commissioner from Montgomery, sued the *New York Times* for libel.[11] A jury awarded him $500,000 in damages.[12]

On appeal, the Supreme Court reversed the decision.[13] Referring to the First Amendment guarantee of freedom of expression, the Court placed restrictions on the operation of the law of defamation. The Court affirmed that, when allegations which would ordinarily be defamatory were made of a public official in relation to his official conduct, an action by him would not succeed unless he proved with convincing clarity that, at the time the defamatory statements were made, the defendant either knew them to be false

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8. In defamation proceedings a plaintiff bears no onus of establishing either the falsity of the defamatory statement or the existence of malice.

9. *See generally* R. BROWN, THE LAW OF DEFAMATION IN CANADA (2d ed. 1994); ROBERT MARTIN, MEDIA LAW (1997); PETER F. CARTER-RUCK ET AL., CARTER-RUCK ON LIBEL AND SLANDER, (4th ed. 1992); JOHN G. FLEMING, THE LAW OF TORTS (8th ed. 1992).

10. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

11. Sullivan, whose particular duty was to supervise the police department, argued that the advertisement would be read as referring to him. *Id.* at 258.

12. This amount was awarded despite the fact that only 35 copies of the edition of the *New York Times* which carried the advertisement were circulated in Montgomery, and only 394 copies were circulated in the state of Alabama. *Id.* at 260 n.3.

13. The Alabama Supreme Court had upheld the amount of damages. *Id.* at 256. For discussion of the *Sullivan* decision, see ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

or was reckless as to whether they were or not.[14] In the Court's view, only this standard would provide sufficient "breathing space" for criticism of public officials, and for the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[15]

Two principles were established in *Sullivan.* The first being that the Bill of Rights reaches judicial orders enforcing the libel laws of a state in private litigation. The common law of defamation constitutes government action because the application of the Constitution depends on the fact of state power.[16] The second principle is that the common law presumptions of falsity and malice impose an unconstitutional fetter upon freedom of speech, for they have a tendency to "chill expression." Since critics of official conduct must guarantee the truth of all factual assertions or else suffer libel judgements, they are bound to engage in self-censorship.[17]

The crux of the Court's argument is that allowance of the defense of truth, with the burden of proving it on the defendant, does not guarantee that only false speech is deterred. It is often too difficult to prove the truth of the alleged libel in all its factual particulars. Under the existing rule, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[18] The traditional common law rule not only assures that critics shy away from making controversial statements but it also has the effect of limiting the diversity of public debate.[19] The *Sullivan* test is thus premised on the notion that a rule which has a "chilling effect" on speech constitutes a greater evil than a rule which permits false information to enter the public arena.

III. THE SEARCHERS: THE COMMONWEALTH COMES A'LOOKING

In *Theophanous*, in *Derbyshire* and in *Hill*, national courts examined whether the modifications engrafted upon the common law of libel by the United States Supreme Court were appropriate for them.[20] They had to decide

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14. *See Sullivan*, 376 U.S. at 280. The standard of "convincing clarity" is more rigorous than the preponderance of the evidence standard which normally applies in civil actions.

15. *Id.* at 270.

16. The Court affirmed that "[i]t matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute." *Id.* at 265. In its view, "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *Id.*

17. *Id.* at 279.

18. *Id.*

19. *Id.*

20. This issue also recently arose in India. In *Rajogopal v. State of Tamil Nadu* (1994) 6 S.C.C. 524, the Indian Supreme Court, following *Sullivan,* held that a public official cannot recover libel damages for a false and defamatory publication about his official conduct unless

whether their free speech jurisprudence should follow the American path.[21] The debate was therefore whether, and to what extent, they should import foreign rules and a foreign philosophy into their own legal and political culture.

IV. AUSTRALIA'S SOLUTION

The *Theophanous*[22] case arose out of defamation proceedings which were initiated by a member of the Commonwealth Parliament against a newspaper. The newspaper had published a letter to the editor that was critical of the representative's views and competence. One of the defenses raised by the newspaper was based on the implied freedom of political communication in the Australian Constitution.[23]

The court started its decision by confirming the existence of an implied freedom of communication with respect to discussion of government and political matters.[24] This implied freedom of communication was not limited to communication between the electors and the elected. Rather, it extended to members of society generally.[25] Since the publication at issue related to the views, performance, and capacity of a member of Parliament, the publication

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he proves that the publication was made with reckless disregard for truth.

21. For a discussion of the importance of free speech within each country, see generally Michael Kirby, *Freedom of Expression—Some Recent Australian Developments*, 19 COMMONWEALTH L. BULL. 1778 (1993); W. S. Tarnopolsky, *Freedom of Expression in Canada*, 19 COMMONWEALTH L. BULL. 1769 (1993); and Lord Woolf of Barnes, *Freedom of Expression: An English Perspective*, 19 COMMONWEALTH L. BULL. 1743 (1993).

22. *See* Theophanous v. Herald &Weekly Times Ltd. (1994) 124 A.L.R. 1 (Austl.). For discussion of the decision and of its impact, see A. E. Cassimatis, *Defamation—The Constitutional Public Officer Defence*, TORT L. REV. 25 (1996); Timothy H. Jones, *Freedom of Political Communication in Australia*, 45 INT'L & COMP. L.Q. 392 (1996); Ian Loveland, *Australia Takes the Plunge*, 146 N.L.J. 1558 (1996); James A. Thomson, *Slouching Towards Tenterfield: The Constitutionalization of Tort Law in Australia*, 3 TORT L. REV. 81 (1995); F. A. Trindale, *'Political Discussion' and the Law of Defamation*, 111 LAW Q. REV. 199 (1995); and Sally Walker, *The Impact of the High Court's Free Speech Cases on Defamation Law*, 17 SYDNEY L.R. 43 (1995).

23. *Theophanous*, 124 A.L.R. at 11. The defendants claimed that the "freedom of communication" principle offered a defense even to false information in certain circumstances. The principle was first used to invalidate Acts criminalizing criticism of government bodies and prohibiting party political advertisements on television and radio. *See* Australian Capital Television v. Commonwealth of Australia (1992) 108 A.L.R. 577 and Nationwide News Party v. Wills (1992) 108 A.L.R. 681. In those two cases, the High Court extrapolated from the provisions of the Australian Federal Constitution, and more particularly from the concept of representative government, an implied freedom of communication in relation to "political discussion." The court affirmed that this implied freedom was necessary to ensure the efficacious working of representative democracy.

24. Three of the court's seven members joined a plurality opinion authored by Chief Justice Mason. Justice Deane concurred in the result but wrote a separate judgment.

25. *Theophanous*, 124 A.L.R. at 12.

fell within the range of "political discussion."[26]

In examining the relationship and links that exist between the implied freedom and the common law, the court maintained that whenever the Constitution, expressly or by implication, is at variance with a doctrine of the common law, it is the latter which must yield to the former.[27] According to the court, "when the purpose of the implication is to protect the efficacious working of the system of representative government mandated by the Constitution, the freedom which is implied should be understood as being capable of extending to freedom from restraints imposed by law, whether statute law or common law."[28]

The court then turned its attention to the question of whether the existing laws of defamation inhibited freedom of communication. Relying on American jurisprudence, the court affirmed that "an implication of freedom of communication, the purpose of which is to ensure the efficacy of representative democracy, must extend to protect political discussion from exposure to onerous criminal and civil liability if the implication is to be effective in achieving its purpose."[29] The court's position was that the balance of the law of defamation was tilted too far in favor of the protection of the reputation of individual politicians, at the expense of freedom of communication and the efficient functioning of the democratic society.[30] The problem with the existing law was that it "seriously inhibit[ed] freedom of communication on political matters, especially in relation to the views, conduct and suitability for office of an elected representative of the people in the Australian Parliament."[31]

Having determined that the existing law of defamation was unconstitutional, the court then went on to articulate which principles would be consistent with the implied constitutional guarantee. In its view, Australian constitutional law required that a disseminator of false information about politicians' behavior in, and suitability for, public office have a complete defense to a defamation claim brought by politicians if they could demonstrate (a) that they "[were] unaware of the falsity of the material published"; (b) that they "did not publish the material recklessly, that is, not caring whether the material was true or false"; and (c) that "publication was reasonable in the

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26. *Id.*

27. *Id.* at 15.

28. *Id.* at 16-17.

29. *Id.* at 18.

30. *Id.* at 20. The court dismissed the argument that the common law reflected an appropriate balance between the competing interests of freedom of expression and the protection of the rights of defamed individuals. The common law, in the opinion of the court, could not do so because "the courts have not taken account of the fact that there is an implied freedom of communication." *Id.* at 19.

31. *Id.* at 23.

circumstances."[32] To establish reasonableness defendants must either show that they took some steps to check the accuracy of the impugned material or show that it was otherwise justified in publishing without taking such steps or steps which were adequate.[33]

The plurality's decision in *Theophanous* was clearly influenced by the *Sullivan* decision,[34] despite the warnings of Chief Justice Mason that American jurisprudence should be "treat[ed] with some caution"[35] in light of the fact that American constitutional provisions relating to speech are different from those found in Australia. While the First Amendment protects in an explicit way freedom of expression generally, the Australian Constitution protects, in an implicit fashion only, freedom of communication in matters of political discussion, and only because such speech constitutes an indispensable element in ensuring the efficacious working of democracy and government.[36]

The Australian court utilized the *Sullivan* judgment to bolster its decision that "freedom of communication" could not be construed simply as a negative constraint on legislative power and that the freedom had to be respected by all governmental agencies, including the courts, when interpreting statutes and applying the common law.[37] It further referred to

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32. *Id.* at 26. Justice Deane, the fourth member of the majority, would have gone further in the application of the implied constitutional guarantee. His position was that the constitutional guarantee operated so as "to preclude completely the application of . . . defamation laws to impose liability in damages upon the citizen for the publication of statements about the official conduct or suitability of a member of the Parliament or other holder of [a] high Commonwealth office." *Id.* at 61. He rejected the idea of importing the *Sullivan* test into Australian law, for such a test did not sufficiently protect political communications. *Id.* at 59-61.

33. The High Court also expanded the defense of qualified privilege in relation to defamatory communications made in newspapers in the course of "political discussion." *Id.* at 25-26.

34. *See also* Ian Loveland, Sullivan v. The New York Times *Goes Down Under*, 1996 PUB. L. 126.

35. *Theophanous*, 124 A.L.R. at 14.

36. In dissent, Justice Brennan argued that the plurality should not have invoked the *Sullivan* decision to the extent it did. His position was that "the assistance which cases decided under other Constitutions or Conventions can give in determining the scope of the freedom is extremely limited." *Id.* at 39. American jurisprudence, in Justice Brennan's opinion, should be referred to with caution because the United States Constitution is different from the Australian Constitution and because the history which has affected the interpretation of the First and Fourteenth Amendments is different from Australia's history. *Id.* at 41. He rejected *Sullivan* as a model for the Australian court because "[i]n this country, following the long tradition of the common law, we have accepted that personal reputation is a proper subject of protection, no less for those in public office as for private citizens." *Id.*

37. *Id.* at 16-17. Despite Justice Brennan's argument that comparisons with other jurisdictions were pointless, he nonetheless referred to the *Canadian Charter of Rights* and the Canadian decisions establishing that judicial decisions do not constitute "governmental action." *Id.* at 42-43.

Sullivan to support its conclusion that defamation laws constitute effective tools for politicians to "chill" free speech.[38] Having determined that existing defamation laws were unconstitutional, the plurality also invoked *Sullivan* to support its belief that the efficacious workings of representative democracy and government did not demand that all actors involved in political discussions be granted an absolute immunity. If the *Sullivan* Court had rejected an absolutist approach, then surely the Australian court, with only its implicit guarantee, need not fashion an absolute exemption.[39]

It is when formulating a test or a list of criteria to be used to determine liability or non-liability in defamation actions that differences between the positions of the American and Australian courts arise. While continuing to refer to the *Sullivan* decision, the Australian court does so in a different manner. At this point, the court begins by pointing out the problems associated with the American decision. This technique allows the court to distance itself from the *Sullivan* solution and to justify its own position. Having hailed the *Sullivan* judgment in the first part of its decision, the Australian court must explain why it decided not to incorporate into Australian law the "actual malice" test developed in the United States. Thus the Australian court, within the same judgment, both hails the beneficial effects of the *Sullivan* decision and emphasizes criticism associated with it.

Although the test developed by the Australian court is clearly influenced by the decision in *Sullivan*, it departs from American law in significant ways. Most notably, the Australian defense articulated in *Theophanous* operates only in respect of "political discussion." After criticizing the United States Supreme Court's extension of the *Sullivan* rationale to candidates for political office, public administrators, and public figures, the Australian court observed "that these extensions, other than the extension to cover candidates for public office, should not form part of our law."[40]

The court in *Theophanous* further distanced itself from American law by stipulating that the burden of proving the three parts of the Australian

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38. *Id.* at 18-20. As Loveland posits, the court accepted that the common law chilled freedom of speech in Australia without any empirical evidence. His position is that "the absence of any reference at all to the political difficulties that libel law has caused in modern Australia . . . opens the court to the accusation that it has simply been seduced by grand theory and compelling rhetoric." *See* Loveland, *supra* note 34, at 130.

39. *Theophanous*, 124 A.L.R. at 20-21. The court refers to Justice Black's judgment in *Sullivan* but explains that his absolutist views were rejected by Justice Brennan.

40. *Id.* at 21. Earlier in its judgment, the court affirmed "that political discussion includ[ed] discussion of the conduct, policies or fitness for office of government, political parties, public officers and those seeking public office." *Id.* at 13. "The concept also includ[ed] discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate . . . ." *Id.* The court acknowledged the difficulty of drawing a distinction between political discussion and other forms of expression but argued that "it should be possible to develop, by means of decisions in particular cases, an acceptable limit to the type of discussion which falls within the constitutional protection." *Id.*

defense (that is, no knowledge of falsehood, absence of recklessness, and reasonableness) rested on the defendant. It justified this departure on the grounds that the laws of the United States give insufficient weight to individual reputation.[41] Its solution was to adopt a variant of the *Sullivan* test, a variant that would recognize more clearly the values of Australian culture. The court thus went to great lengths to make clear that it was not adopting or introducing into Australian jurisprudence the actual malice test created in *Sullivan*.

The Australian judgment demonstrates how the comparative technique can be utilized by courts. When faced with difficult questions, especially constitutional questions, national courts can learn from the experience of other countries. Foreign jurisprudence can be used to demonstrate the desirability of reforming domestic laws as well as the impact that such reforms may have.[42] Furthermore, the decision illustrates that domestic courts need not, and must not, uncritically import foreign rules into their national systems. Foreign legal rules that work in another system, may need to be adapted to reflect the realities and differences, be they cultural, constitutional, or economic, of the importing country.[43]

V. THE UNITED KINGDOM QUANDARY

In *Derbyshire,* a municipal council brought a defamation action against the publisher of a newspaper. The claim for damages arose from articles concerning the authority's management of certain funds. The issue before the courts was whether a local authority could sue for libel in respect of "words which reflect on it in its governmental and administrative functions."[44] Although at first instance the court rejected the newspaper's contention that councils lacked the legal capacity to bring a libel action over criticism of their

41. The court affirmed that "[e]ven assuming that, in conformity with *Sullivan*, the test is confined to plaintiffs who are public officials, in our view it gives inadequate protection to reputation." *Id.* at 22. It further held that "the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States." *Id.* at 23. For discussion of the lack of importance of individual reputation in American society, see Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 1 (1980).

42. While courts must examine the actual rules developed in other jurisdictions, they must go further than simply examining and referring to one particular court decision. National courts must also examine how such foreign rules have been interpreted, as well as the impact such rules have actually had. *See* Michael Chesterman, *The Money or the Truth: Defamation Reform in Australia and the USA*, 18(2) UNSW L.J. 300 (1995).

43. As Loveland explains, "[u]ncritical importation of foreign rules cannot . . . be acceptable . . . because of the uniqueness of Australia's political culture—against which American or other principles might chafe and rub." Loveland, *supra* note 34, at 139.

44. Derbyshire CC v. Times Newspapers Ltd., All E.R. 1013 (1993).

"governing reputation,"[45] on appeal the decision was reversed.[46] The House of Lords upheld the decision of the Court of Appeal but on different grounds.[47]

While the Court of Appeal had resorted to the European Convention on Human Rights to decide that a local authority could not sue in defamation to protect its governmental reputation, the House of Lords found no reason to rely on the Convention.[48] Lord Keith, writing for the majority, argued that considerations of policy were determinative of the issue. Because governmental bodies are different from other corporations, they must be "open to uninhibited public criticism."[49] Anyone who attempts to stifle or fetter such criticism commits "political censorship of the most insidious and objectionable kind."[50] In the Court's view, the problem with allowing governmental entities to have recourse to civil actions for defamation, is that it would "inevitably have an inhibiting effect on freedom of speech."[51]

Lord Keith relied on United States, Commonwealth, and South African authorities to support his policy arguments to the effect that the threat of civil actions for libel have a tendency to chill speech. He had no misgivings in referring to, and utilizing, the arguments expounded in *Sullivan* to support his conclusions.[52] His position was to the effect that the public interest considerations which underlay the *Sullivan* decision were equally valid in English law.[53] This, despite the fact that Britain does not possess an express constitutional guarantee of the right of free speech that is equivalent to the

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45. 4 All E.R. 795 (1991). Justice Morland held that a local authority, like all other corporations, could sue for libel.

46. 1 Q.B. 770 (1992).

47. For discussion of the decision, see Alistair Bonnington, *Public Figure v. Private Person*, 147 N.L.J. 270 (1997) and Lord Lester of Herne Hill, Comment, *Defaming Politicians and Public Officials*, 1995 PUB. L. 1.

48. Lord Keith did affirm, however, that in the field of freedom of expression, there was no difference in principle between English law on the subject and article 10 of the Convention. *Derbyshire*, All E.R. at 1021. For a discussion of this issue, see also Ian Loveland, *Defaming MPs: A Question of Constitutional Law?*, 146 N.L.J. 714 (1996) and Stephanie Palmer, *Freedom of Expression, Democracy and the European Convention on Human Rights*, 52 C.L.J. 363 (1993).

49. *Derbyshire*, All E.R. at 1017.

50. *Id.* at 1018.

51. *Id.* at 1017.

52. That the Lords would refer to American case law is somewhat surprising, since, as late as 1991, the Report on Defamation Law and Practice recommended that the philosophy of *Sullivan* should not be adopted into English law. *See Report on Practice and Procedure in Defamation*, Supreme Court Procedure Committee (Neil, L.J., Chairman), Lord Chancellor's Department (1991); Bonnington, *supra* note 47, at 270.

53. *Derbyshire*, All E.R. at 1018. Nowhere is the influence of the *Sullivan* decision more evident than in Lord Keith's observations that "[q]uite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public." *Id.*

American First Amendment,[54] and despite the fact that British society, unlike American society, adheres to a system of parliamentary sovereignty.[55]

The decision of the Lords was therefore that, under the common law of England, a local authority does not have the right to maintain an action of damages for defamatory matter reflecting on its governmental and administrative functions.[56] Their position was to the effect that not only is there no public interest favoring the right of governmental bodies "to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech."[57] The Lords also maintained that although local authorities could not initiate defamation actions, individual councillors could do so.[58]

Despite engaging in comparative analysis and referring to the decision in *Sullivan*,[59] the House of Lords did not adopt or incorporate the actual malice test into English law.[60] The reality is that they did not fashion any test

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54. The Lords nowhere explain the divergent conceptions of reputation which exist in the United States and in England. Traditionally, English libel law has attached more weight to reputation rights than the United States. *See* Eric Barendt, *Libel and Freedom of Speech in English Law*, 15 P.L. 449, 457 (1994); Thomas Gibbons, *Defamation Reconsidered*, 16 OXFORD J. OF LEGAL STUDIES 587 (1996); Lord Woolf of Barnes, *supra* note 21. For the American position on the importance of reputational rights, see *supra* note 41.

55. *See* Ian Loveland, *Defamation of 'Government': Taking Lessons from America?*, 14 LEGAL STUD. 206, 222-25 (1994).

56. Local authorities can protect their reputation by using alternate remedies. For example, they could start actions for malicious falsehoods or they could simply defend themselves through more speech of their own.

57. *Derbyshire*, All E.R. at 1019.

58. *Id.* at 1020. According to Lord Keith, a publication that attacks the activities of the authority "will necessarily be an attack on the body of councillors which represents the controlling party, or on the executives who carry on the day-to-day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation." *Id.*

59. References to American cases stopped with the 1964 *Sullivan* decision. Lord Keith did not find it necessary to discuss the impact the decision has had on the actual development of libel law in the United States. As Loveland explains, "[i]n conducting only so cursory a survey of the United States' constitutional landscape, Lord Keith decline[s] to mine a seam of case law which, while undoubtedly unstable, nevertheless offers an extraordinary rich array of raw materials from which to sculpt several considered arguments as to how extensive a scope should be afforded to any reform of libel law." *See* Loveland, *supra* note 55, at 212-13.

60. As Loveland and Sharland point out, "[t]here seems to be little sympathy among English judges for the direct importation of *Sullivan* into domestic common law." Andrew Sharland & Ian Loveland, *The Defamation Act 1996 and Political Libels*, 1997 PUB. L. 113, 123. An attempt to introduce an amendment to have the public figure concept recognized in the Defamation Bill in 1996 was unsuccessful. According to Loveland and Sharland, "given that such reforms were omitted from the 1996 Act, it would seem inappropriate for the courts to take such an initiative." *Id.* Under English law, therefore, there is no recognition of a general privilege to defame a prominent individual who holds a public position on the grounds that what is said expresses the writer's honest and reasonable belief on a matter which is one of public

that resembles the one expounded in that decision. In fact, by ruling that public authorities are completely precluded from starting libel actions, the Lords set aside the *Sullivan* rationale to the effect that the First Amendment does not afford complete immunity to public officials from libel suits.[61]

What the *Derbyshire* court does, is invoke *Sullivan* and American jurisprudence to extrapolate general principles. Thus, *Sullivan* is relied on to establish the importance of free speech in the context of criticism of government and to explain that libel laws are worrisome since they have a tendency to "chill" freedom of speech. Having set out these principles, the Lords then rely on them as justification to revise the political libel laws of England. If free speech in the context of political discussion merits protection and if libel laws have a chilling effect, then surely courts are warranted in giving priority to speech claims over those of other competing interests.

VI. THE CANADIAN APPROACH

The proceedings in *Hill* arose after representatives of the Church of Scientology and their counsel Manning held a press conference outside a courthouse.[62] At this conference, Manning commented upon allegations contained in a notice of motion by which Scientology intended to start criminal proceedings against Crown attorney Casey Hill. The notice of motion alleged that Hill had misled a judge and had breached orders sealing certain documents belonging to the Church of Scientology.[63] After contempt proceedings, which determined that the allegations against the Crown attorney were untrue and without foundation, Hill commenced an action for damages in libel.[64] Both the Church of Scientology and its counsel were found to have defamed Hill.[65]

Before the Supreme Court, Manning and the Church of Scientology invoked the *Canadian Charter of Rights and Freedoms*.[66] Their allegation was to the effect that the common law of defamation unreasonably restricted free expression.[67] In their view, for the common law of defamation to

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interest. *See* Blackshaw v. Lord, Q.B. 1, 26 (1984).

61. *See* Barendt, *supra* note 54, at 452.

62. Hill v. Church of Scientology [1995] 2 S.C.R. 1130, 1140 (Can.).

63. *Id.* at 1140-41. Manning was wearing a barrister's gown when he spoke to the media.

64. *Id.* at 1141.

65. Following the trial, Manning and the Church of Scientology were found jointly liable for general damages in the amount of $300,000. The Church of Scientology was also found liable for aggravated damages of $500,000 and for punitive damages of $800,000. The appeal from this judgment was dismissed by the Court of Appeals. *See* [1994] 18 O.R.3d 385.

66. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

67. The appellant attorney also raised the defense of qualified privilege which attaches to reports relating to judicial proceedings.

establish a proper balance between the values of reputation and expression, the actual malice standard of liability articulated in *Sullivan* had to be adopted.[68]

In its judgment, the court reaffirmed[69] that although the *Charter* could not be applied directly to scrutinize the common law of defamation in private litigation,[70] it had to be developed in accordance with *Charter* values.[71] To determine whether the common law of defamation complied with the underlying values of the *Charter,* the court examined whether the common law struck an appropriate balance between the competing values of reputation and freedom of expression.[72] Despite recognizing that freedom of expression is crucial to democratic society, the court argued that defamatory speech is only tenuously related to the core values which underlie section 2(b) of the *Charter.*[73] The court also affirmed that the protection of a person's reputation

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68. *Hill*, 2 S.C.R. at 1158-59.

69. In *R.W.D.S.U. v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573, the court addressed the *Charter*'s application to the common law. Its decision was to the effect that the *Charter* does not apply where a private action is governed by the common law but that the *Charter* does apply to the common law in " public litigation." The court acknowledged that, even though the *Charter* did not apply to the common law in the context of private litigation, the *Charter* would affect the common law because the judiciary should "apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution." *Id.* at 603. For further discussion of the issue, see June Ross, *The Common Law of Defamation Fails to Enter the Age of the Charter*, XXXV ALBERTA L. REV. 117 (1996).

70. For discussion of the different approaches of the Canadian and American courts on this subject, see John G. Fleming, *Libel and Constitutional Free Speech, in* INTERNATIONAL ACADEMY OF COMPARATIVE LAW, XIIITH INTERNATIONAL CONGRESS—GENERAL REPORTS 673 (1990).

71. "[T]he party who alleges that the common law is inconsistent with the *Charter* . . . bear[s] the onus of proving both that the common law fails to comply with *Charter* values and that, when those values are balanced, the common law should be modified." *Hill*, 2 S.C.R. at 1171.

72. According to the court, "whatever is 'added to the field of libel is taken from the field of free debate.'" *Id.* at 1172 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)). For the view that defamation law in Canada accords too much protection to individual reputation, see Rodney A. Smolla, *Balancing Freedom of Expression and Protection of Reputation Under Canada's Charter of Rights and Freedoms, in* FREEDOM OF EXPRESSION AND THE CHARTER 272 (David Schneiderman ed., 1991), and D. A. Alderson, *The Constitutionalization of Defamation: American and Canadian Approaches to Constitutional Regulation of Speech*, 15 ADVOC. Q. 385 (1993).

73. *Hill*, 2 S.C.R. at 1174. According to the Court, "defamatory statements . . . are inimical to the search for truth." *Id.* They do not "enhance self-development" and they do not "lead to . . . participation in the affairs of the community." *Id.* False and injurious statements are not only "detrimental to the advancement of these values," but they are "harmful to the interests of a free and democratic society." *Id.*; *but see* M. David Lepofsky, *Making Sense of the Libel Chill Debate: Do Libel Laws "Chill" the Exercise of Freedom of Expression?*, 1994 NAT. J. CONST. L. 168 (questioning the Supreme Court of Canada's interpretation of section 2(b) of the Charter).

from defamatory speech constitutes a worthy interest in a democratic society.[74]

Having established the importance of reputation within Canadian society, the court then turned its attention to *Sullivan*. Since it did not wish to incorporate the actual malice test into Canadian law, the court sought to distance itself from that decision. To this end, the court affirmed that the social and political context within which *Sullivan* arose was completely different from the one that existed in *Hill*.[75] In *Sullivan*, the speech involved was political; the media was entangled in the conflict, and there existed fears that the existing defamation laws would have a chilling effect on the media.[76] On the other hand, the appeal in *Hill* did not involve political commentary about government policies and the media was not directly implicated in the conflict.[77] The Court also noted that government officials in Canada, contrarily to the situation in the United States, did not enjoy the benefit of a qualified privilege as regards to their public statements.[78] Its position was that "in Canada[,] there is no broad privilege accorded to the public statements of government officials which needs to be counterbalanced by a similar right for private individuals."[79]

To demonstrate the dangers associated with the American solution, the court focused on American academic and judicial[80] criticism of the actual malice rule. Dissatisfaction with the achievements of the decision rests on the fact that, since *Sullivan*, "libel actions have increased . . . in both number and size of awards."[81] The increase in litigation and the requirements of actual malice have also put "pressure on the fact-finding process since courts are now required to make determinations as to who is a public figure and what is a matter of . . . public concern."[82] Furthermore, the decision, according to the court, has shifted the focus of defamation actions from truth to fault. The

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74. The Court linked protection of individual reputation with rights of privacy and personal dignity. Its position was that "although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights." *Hill*, 2 S.C.R. at 1179.

75. According to the court, "[n]one of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar." *Id.* at 1188.

76. *Id.* at 1180-81.

77. *Id.* at 1188. After reviewing jury verdicts in Canada, the court was of the opinion that "there is no danger of numerous large awards threatening the viability of media organizations." *Id.*

78. In the United States, government officials enjoy a qualified privilege with respect to materials published in the course of conducting the affairs of government.

79. *Hill*, 2 S.C.R. at 1188.

80. The court referred to Justice White's judgment in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) and to the dissenting opinion of two Justices in *Coughlin v. Westinghouse Broadcasting & Cable Inc.*, 476 U.S. 1187 (1986).

81. *Hill*, 2 S.C.R. at 1182.

82. *Id.*

detrimental results associated with this change include: denial of opportunity for the plaintiff to "establish the falsity of the defamatory statements and to determine the consequent reputational harm"; necessity of "detailed inquiry into matters of media procedure"; "increase[s in] the cost of litigation; and a depreca[tion of] truth in public discourse."[83]

In order to emphasize that rejecting the American solution would not mean that Canada stood alone in protecting individual reputation above freedom of expression, the court referred to the English and Australian decisions in *Derbyshire* and in *Theophanous*. It pointed out that both the House of Lords and the High Court of Australia recently declined to adopt the *Sullivan* actual malice requirement.[84] For added measure, the court mentioned that numerous international law reform organizations have also criticized the *Sullivan* rule.[85]

The court's conclusion was to the effect that, since the *Sullivan* standard of liability was the subject of much criticism in the United States and elsewhere and since the actual malice standard rule had "not been followed in the United Kingdom or Australia, [there was] no reason for adopting it in Canada in an action between private litigants."[86] Not only was the existing law of defamation not "unduly restrictive or inhibiting", but it "surely [was] not requiring too much of individuals that they ascertain the truth of the allegations they publish."[87] The court's position was that, because "the common law of defamation complie[d] with the underlying values of the *Charter*" in its application to the parties in that action, there was "no need to amend or alter it."[88]

Despite using the comparative method to fashion its judgment, the court did not engage in an extensive comparative analysis.[89] Although it had before it foreign jurisprudence which specifically examined how free speech and reputational interests could best be reconciled in the context of defamation laws, the court, in assessing the approaches and solutions adopted by foreign countries, focused mainly on criticism surrounding the American solution.[90]

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83. *Id.* at 1182-83.

84. *Id.* at 1185-86. Interestingly, the court did discuss the fact that both Australian and English courts have recognized that defamation laws have a tendency to "chill speech." *Id.*

85. *Id.* at 1186-87.

86. *Id.* at 1187.

87. *Id.*

88. *Id.* at 1188.

89. For discussion of the use of the comparative method within Canada, see José Woehrling, *Le Rôle du Droit Comparé Dans la Jurisprudence des Droits de la Personne—Rapport Canadien*, *in* THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 449 (Armand de Mestral et al. eds., 1986).

90. Courts in New Zealand have also focused on the criticism surrounding the *Sullivan* decision in order to justify their rejection of the actual malice test. *See* Grant Huscroft, *David Lange and the Law of Defamation*, 1997 N.Z.L.J. 112.

Although the court referred to the decisions in *Theophanous* and in *Derbyshire*, it did so only to point out that both cases specifically rejected the "malice" standard of liability. Thus, it barely addressed the Australian and English courts' conclusions that libel laws "chill" speech[91] and it ignored the Australian High Court's affirmation that despite some degree of balancing in the common law, the judges who developed it were not concerned with freedom of expression in a constitutional sense and so did not give it adequate weight in their balancing process.[92] Furthermore, the Canadian court did not address in what ways the Australian court chose to modify the common law. Such a stratagem is not surprising, considering that the Supreme Court's invocation of foreign jurisprudence was mainly to buttress its initial conclusion that the malice standard should not be adopted in Canadian law.

VII. CONCLUSION

Traditionally, one area of law where courts are prone to engage in comparative analysis is that of constitutional law. When dealing with fundamental rights issues such as free expression, national courts often turn to foreign jurisprudence to examine how other countries have sought to reconcile free expression rights with other competing values and what solutions they have found to particular problems.[93] Foreign jurisprudence is useful since it provides a yardstick by which to measure the desirability and the impact that particular reforms may have.

One factor which plays a crucial role in determining whether a foreign solution should be transplanted elsewhere is the international standing of the donor country.[94] It is always easier and more feasible for a national court to refer to, and to adopt, a foreign solution when it emanates from a country that commands both economic and legal respect within the world community.[95]

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91. The court simply criticized the lack of "any evidentiary basis upon which to adjudicate [the] constitutional attack." *Hill*, 2 S.C.R. at 1163.

92. That the court ignored this factor is suprising since this very same court had invoked it in *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835 (Can.).

93. *See generally* Albrecht Weber, *The Role of Comparative Law in the Civil Liberties Jurisprudence of the German Courts*, *in* THE LIMITATIONS OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 525 (Armand de Mestral et al eds., 1986); Helmut Steinberger, *General Report on the Role of Comparative Law In Civil Liberties Jurisprudence*, *in* THE LIMITATIONS OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 575 (Armand de Mestral et al eds., 1986).

94. For a discussion of the issue, see WATSON, *supra* note 6, chs. 7, 8, 15.

95. The high respect accorded to the American Supreme Court, especially as regards its jurisprudence in the area of free speech, is clearly evident in all three Commonwealth decisions. While the Canadian Supreme Court ultimately decides not to adopt the American approach on the issue of libel, it does not dismiss the *Sullivan* decision as inconsequential. Indeed, before rejecting the American solution, the court goes to great lengths in demonstrating the negative aspects associated with the decision.

Another factor is that of sheer quantity. As more countries lean towards a particular position, it becomes more difficult for a national court to go against the tide. While the argument can be made that one country has made a mistake in adopting a particular solution, it becomes much more difficult to advance that numerous countries which have examined a somewhat identical issue have taken the wrong path.[96]

While national courts may rely on comparative materials in order to find a solution to the problem they are faced with, they need not blindly adopt the foreign approach.[97] As the decisions in *Theaphonous, Derbyshire,* and *Hill* demonstrate, foreign solutions are not necessarily appropriate for a particular country. This is particularly true whenever the answer to a problem requires that courts involve themselves in a balancing of values.[98] Values, after all, have a direct link to cultural identity.[99]

The existence of such links, however, does not mean that courts should shy away from comparative analogies. By pointing out that different solutions to a problem are possible, such analogies often force courts to re-evaluate their own position as regards the weight to be accorded to certain values. In the area of libel law, for example, an examination of the *Sullivan* decision forced Canadian, Australian, and English courts to ask themselves why, if, and to what extent, they should protect reputational rights above free speech rights.

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96. Herein lies one of the dangers associated with comparative analogies. National courts may find it easier to simply incorporate into their own systems ready-made rules that are widely accepted rather than seek innovative solutions that require time to formulate and that are subject to criticism both at the national and the international level. This problem, however, is somewhat offset by the fact that legal rules are rarely transplanted wholly from one system to another. The process of modification which usually accompanies the act of transplanting ensures that legal rules are constantly being reformulated.

97. The issue of whether courts should engage in comparative analogies is somewhat different from that of whether foreign solutions should be incorporated without modifications into different settings. While numerous authors agree that comparative analogies are useful (see, for example, Koopmans, *supra* note 5), few go so far as to advance that the process of transplanting should proceed without any modifications (see, for example, ZWEIGERT & KÖTZ, *supra* note 6, at 16). One must also remember that, although a national court may seem to be adopting the language of a particular foreign rule or decision, once transplanted, the rule may operate in a totally different way within the receiving society than it does within the donor country. For further discussion of this issue, see WATSON, *supra* note 6, ch. 3.

98. While one could advance that in many areas of law legal rules are "not peculiarly devised for the particular society in which they now operate" (see WATSON, *supra* note 6, at 96), such argument has less force within the constitutional sphere. When national courts develop constitutional rules, more often than not, these rules are formulated to operate within a particular context since they reflect and incorporate a set of national values.

99. For further discussion of this issue, see Sidney Kentridge, *Freedom of Speech: Is It the Primary Right*, 45 INT'L & COMP. L.Q. 253 (1996) and Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).

At the very least, the comparative analogy in *Theaphonous*, *Derbyshire*, and *Hill* provided national courts with assistance in framing the legal and cultural questions that they had to address.

REALIZING UNIVERSAL HUMAN RIGHTS NORMS THROUGH REGIONAL HUMAN RIGHTS MECHANISMS: REINVIGORATING THE AFRICAN SYSTEM

George William Mugwanya*

I. INTRODUCTION

On December 10, 1999, the international community celebrated the 50th Anniversary of the Universal Declaration of Human Rights (UDHR). The UDHR, adopted by the United Nations General Assembly on December 10, 1948, is the centerpiece of the international human rights revolution. It is the first comprehensive statement enumerating the basic rights of the individual as promulgated by a universal international organization—the United Nations (U.N.). The Declaration states a common understanding of the peoples of the world concerning the inalienable rights of all members of the human family and constitutes an obligation for the members of the international community. The successes that have been accomplished since the creation of the United Nations in 1945 and the adoption of the UDHR in 1948 must be applauded. On the other hand, however, it is very pertinent to step back and identify challenges hindering the human rights revolution and the possible ways to address them. The cardinal aim of the human rights revolution that began with the establishment of the U.N. Charter and the adoption of the UDHR, followed by a host of other international and regional human rights instruments, was to ensure, inter alia, the respect for and protection of human rights and fundamental freedoms of the entire human family everywhere. The ultimate aim was to ensure that human rights were translated into reality at the grassroots (within each state's jurisdiction) and be meaningful in people's lives.

The purpose of this Article is to examine the promise of regional human rights systems in the realization of universal norms. Of particular pertinence, the Article analyzes and appraises the role and effectiveness of the African regional human rights system in the realization of universal human rights. The challenges facing the African system are examined and the possible ways to

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reinvigorate the system are identified. The Article argues that while in the protection and realization of human rights focus ultimately falls on what happens at the grassroots, the role of supra-national instruments, institutions, and structures at the global and regional levels cannot be overemphasized. The Article underscores the pivotal role of the global system, but demonstrates that regional human rights systems are better placed, and can therefore be more effective than systems with universal scope in impacting and influencing the realization of human rights at the grassroots. In this regard, the efforts by the United Nations to encourage and support the creation of regional arrangements must be saluted.

Following this Introduction, a brief commentary is made on the human rights revolution, its successes, prospects, as well as its challenges—the human rights *problematique*. The promise of the regional human rights systems in general and the status quo of the African system in particular, constitute Part III of the discussion. Part IV addresses the strengths and challenges of the African human rights system. The discussion appraises and assesses the effectiveness of the African human rights system and identifies the challenges facing the system. Part V offers proposals to reinvigorate the African regional human rights system.

II. THE GLOBAL HUMAN RIGHTS REVOLUTION: SUCCESSES, PROSPECTS, AND CHALLENGES

The adoption of the U.N. Charter in 1945 set in motion a human rights revolution that culminated in the internationalization and humanization of international law. Due to the widely shared conviction in the course of World War II prior to and in the course of which millions were mercilessly persecuted and killed by the Nazis in effectuating Hitler's Third Reich government policy of eliminating all Jews (euphemistically labeled the "final solution to the Jewish Question"), the Allied powers fought the war to vindicate human rights and fundamental freedoms "for all." Human rights issues were no longer to be viewed as an exclusively domestic issue; they were to be viewed collectively as a matter of common interest born out of man as a human being regardless of national boundaries. The horrors of the Second World War and the consequent awareness of the close connection between respect for human dignity and peace motivated the U.N. Charter's qualitative leap towards the promotion of human rights "for all." The conviction in the universal respect for human rights was above all carried forward with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, the International Covenant on Civil and Political Rights (ICCPR) with an Optional Protocol, the International Covenant on Economic, Social, and Cultural Rights (ICESCR)—the three of which are collectively known as the "International Bill of Rights"—and a host of other human rights

instruments.[1] The result is a vast body of legal norms, a veritable human rights code that gives meaning to the phrase "human rights and fundamental freedoms" and clarifies the obligations of member states imposed by Articles 55 and 56 of the U.N. Charter. Today, despite any controversies in which the concept of human rights may be enmeshed,[2] it is generally accepted that human rights are universal.[3] They are inalienable and inherent birthrights that are due and enure to every human being in any society regardless of any distinction. Further, notwithstanding the fact that different implementation measures are called for as regards civil and political rights vis-à-vis economic, social, and cultural rights, this does not mean any divisibility or hierarchy of rights, but interdependence. States are under an obligation to give effect to

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1. These instruments have been adopted by the U.N. and its specialized agencies. *See, e.g.*, Second Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No 49, U.N. Doc. A/44/49 (1990); Convention on the Rights of the Child, G.A. Res 44/25, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/736 (1989); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, U.N. Doc. A/RES/34/180 (1980); International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 244 (entered into force July 18, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 7, 1966, 660 U.N.T.S 195 (entered into force Jan. 4, 1969); Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII), U.N. GAOR, 18th Sess., Supp. No. 15, U.N. Doc. A/5515 (1963); Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277. *See generally* THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 58-78 (2d ed. 1995) (listing some of the major U.N. human rights treaties).

2. On some of these controversies, see generally Maurice Cranston, *Human Rights, Real or Supposed, in* POLITICAL THEORY AND THE RIGHTS OF MAN 43 (David Raphael ed., 1967) (arguing against the expansion of traditional human rights, which are civil and political in nature, into social and economic rights); HUMAN RIGHTS: PROBLEMS, PERSPECTIVES AND TEXTS (F. E. Dowrick ed., 1979) (examining human rights from a inter-disciplinary perspective); HUMAN RIGHTS: FROM RHETORIC TO REALITY (Tom Campbell et al. eds., 1986) (offering an analysis of various human rights issues, such as reproductive rights, medical treatment, criminal procedure, and labor issues); INTERNATIONAL PROTECTION OF HUMAN RIGHTS (Asbjörn Eide & August Schou eds., 1968) (acknowledging the need for more deliberate and expansive implementation of human rights measures worldwide).

3. On this consensus, see Vienna Declaration and Programme of Action U.N., GAOR, World Conf. on Hum. Rts., 48th Sess., 22nd plen. mtg. ¶ 15, U.N. Doc. A/CONF. 157/24, [hereinafter Vienna Declaration]; BUERGENTHAL, *supra* note 1, at 19; UNITED NATIONS, HUMAN RIGHTS: QUESTIONS AND ANSWERS 4 (1987); Francesco Francioni, *The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience, in* ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 15, 16 (Benedetto Conforti & Francesco Francioni eds., 1997); Kofi A. Annan, *Strengthening United Nations Action in the Field of Human Rights: Prospects and Priorities*, 10 HARV. HUM. RTS. J. 1 (1997); Louis Henkin, *Rights Here and There*, 81 COLUM. L. REV. 1582 (1981).

both categories of rights.[4]

In order to implement human rights norms, and call on states to account for human rights violations, the international community has over the years put in place various institutions and mechanisms. The U.N. Economic and Social Council (ECOSOC) Resolution 1235 of 1967, followed by ECOSOC Resolution 1503 of 1970, laid the foundation of the U.N. Charter-based systems for the protection of human rights. By and large, all the various U.N. Charter organs and specialized agencies have played a direct or indirect role in the realization of human rights.[5] The Charter-based mechanisms have been buttressed by treaty-based institutions and mechanisms for the promotion and protection of human rights. The mid-to-late 1970s witnessed the establishment of the U.N. Human Rights Committee as an enforcement mechanism for the ICCPR. Similarly, as regards the ICESCR, starting in 1976, the ECOSOC adopted a series of resolutions that culminated in the establishment of a Committee on Economic, Social, and Cultural Rights as a permanent body to promote the implementation of the Covenant. Further, the Committee on the Elimination of Racial Discrimination (CERD) came into being with the entry into force of the International Convention on the Elimination of Racial Discrimination. Various other treaty-based institutions such as the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Committee on the Rights of the Child are all in place, while specialized agencies of the U.N., such as the U.N. Educational, Scientific and Cultural Organization (UNESCO) and the International Labour Organization (ILO) have over the years adopted special mechanisms for dealing with human rights violations falling within their scope of competence.[6]

Further, the end of the Cold War reinforced the international human rights movement. It liberated international efforts to promote human rights from the ideological conflicts and political sloganeering of the past vices that had for decades forced the international community to close its eyes to massive violations of human rights committed by states. Recent efforts by the international community to hold individuals, and not only states, internationally criminally responsible for heinous human rights violations, the evolving emphasis on the protection of individuals belonging to minority groups, and the role the Security Council is beginning to play under Chapter

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4. *See* Vienna Declaration, *supra* note 3, para. 5.

5. *See* Boutros Boutros-Ghali, *Introduction, in* UNITED NATIONS, THE UNITED NATIONS AND HUMAN RIGHTS 1945-1995, at 3, 9-18 (1995). *See also* B. G. RAMCHARAN, THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, FORTY YEARS AFTER THE UNIVERSAL DECLARATION 246-58 (1989) (concentrating on the main general organs of the United Nations, such as the Security Council, the General Assembly, the Economic and Social Council, and the Commission on Human Rights).

6. *See, e.g.*, UNESCO 104 EX/Decision (1978).

VII of the U.N. Charter in dealing with massive violations of human rights, all point to a genuine maturing of approaches the international community is adopting in the struggle to foster the protection of human rights.

A. *The Human Rights Problematique*

The foregoing does not suggest that everything is running well and that both the international and national systems designed to ensure the respect for and the realization of human rights are all in place and working effectively. Despite the increased importance assigned to the pursuit of human rights during the latter part of this century, the commission of human rights violations has continued the world over, and in several instances such commissions have taken place on a massive scale. Indeed, this has been the case despite a predicated decrease in the incidence of human rights violations resulting from the dissolution of the Communist Soviet bloc in 1989 and the movement towards democracy.[7] However, human rights conditions have been more precarious on the African continent.[8] In spite of the optimism inspired by the attainment of independence, Africa has failed to achieve universal adherence to international human rights norms. The recent carnage in Rwanda, the ongoing political strife in southern Sudan, northern and western Uganda, Zaire, Lesotho, Burundi, and Somalia, that have left thousands dead, and caused a horrific violation of a host of other rights and fundamental freedoms, exemplify the all-too-familiar difficulties of human rights enforcement in Africa. Even within societies that may be described as "democracies," human rights remain illusory in the day-to-day lives of the majority. The world at large and Africa in particular, stands poised between the extremities of hope and despair.

B. *Implementation*

Against the backdrop of the human rights situation the world over, and more lamentably that in Africa, the basic challenge facing the human rights revolution is that of implementation. In the half century since the inception of the human rights revolution, one of the cardinal successes of this revolution has been in the elaboration of human rights norms, and the numbers of states bound by these norms. Today, it is generally agreed that there is no shortage of human rights norms. The most pressing problem is the implementation of these norms at the "grass roots"and making them meaningful in people's lives.

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7. This hope was alluded to in the Charter of Paris for a New Europe, 1990, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 474 (Ian Brownlie ed., 3d ed. 1992).

8. *See generally* AMNESTY INTERNATIONAL, ANNUAL REPORT (1990) (reporting human rights abuse in all African states).

As Kofi Annan, the U.N. Secretary General has noted:

> After the years invested in the elaboration of an international code of conduct in human rights—as embodied in international conventions and other legally binding instruments—the priority now is to translate these norms and standards into national legislation and national practices, thus bringing about real change in peoples' lives.[9]

The U.N. High Commissioner for Human Rights has also observed:

> In general, I believe that we all agree that there is no shortage of international human rights standards. Nor, unfortunately, is there a shortage of situations demanding improvement of respect for human rights. Our basic challenge is to implement human rights standards and make human rights meaningful in people's lives.[10]

III. THE PROMISE OF REGIONAL HUMAN RIGHTS ARRANGEMENTS: THE STATUS QUO OF THE AFRICAN SYSTEM

The normative and institutional evolution of international human rights law at the global level played a prominent role in encouraging the creation of regional human rights systems in Europe, the Americas, Africa, and more recently the emerging systems in Asia and the Arab States. The U.N.'s role in encouraging the creation of regional human rights systems must be saluted.[11] Regional systems have served as both institutional and normative building blocks and instruments for the realization of human rights at the grassroots.

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9. Annan, *supra* note 3, at 1.

10. U.N. ESCOR. 52d Sess., at 4, U.N. Doc. E/CN.4/1996/50/Add. 1 (1995).

11. At the U.N.'s beginning, it was believed that regional approaches to human rights might detract from the universality of human rights, and therefore the wisdom of encouraging the creation of regional human rights systems was to some extent doubted and resisted by the U.N. This view later changed, particularly as the European and Inter-American systems were evolving. In fact, through an ad hoc study group, the U.N. actually considered creating regional human rights regimes of its own. However, the U.N. ultimately concluded that the member states themselves bore the responsibility for forming regional human rights systems. Thus, via Resolution 32/127, the U.N. General Assembly asked states not belonging to human rights regimes "to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights." *See* G.A. Res. 32/127, 32 U.N. GAOR, 105th plen. mtg., U.N. Doc. A/32/458 (1977), *reprinted in* 31 U.N.Y.B. 740 (1977). Two subsequent resolutions reiterated the General Assembly's call: G.A. Res. 33/167, 33 U.N. GAOR, 90th plen. mtg., U.N. Doc. A/33/509 (1978), *reprinted in* 33 U.N.Y.B. 871 (1979). *See generally* Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987).

Over the years, regional systems, particularly those established in Europe and the Americas, have provided the necessary intermediary between state domestic institutions which violate or fail to enforce human rights and the global human rights system which alone cannot provide redress to all individual victims of human rights violations. At the global level, no permanent human rights court has thus far been created to allow individual complaints against governments for violations of human rights. It was at the regional level, in Europe, that the first system allowing for effective individual complaints against governments for violations of human rights was created. This system became the model of human rights realization in the other regional systems—the Inter-American system has a court, and the African system is in the process of creating one. Regional systems have served to fill gaps in the global human rights mechanisms. They have fruitfully complemented the global human rights system by impacting and influencing domestic human rights practice in member states. Although each regional system has its own issues and concerns arising out of diversity in each system's origins, all of them have elements of uniformity. All regional systems began as the global human rights system was developing and they were inspired by universal norms as embodied, inter alia, in the UDHR.

Regional systems are better placed and can therefore be more effective than systems with universal scope. Regional systems are flexible and have the ability to change as conditions around them change and sometimes do so quickly. This is because proposals for change in regional systems are likely to be meet less resistance than those of the global system. The great number of states with different traditions that are involved in the global system make implementation more complicated. On the other hand, shared legal, political, socioeconomic, intellectual, and cultural traditions and aspirations within a regional setting are more likely and do serve as cardinal bases for particularized and effective human rights protections at the regional level. The drafters of the African Charter were well driven by this conviction.[12] Within the regional arena, shared traditions create homogeneity which facilitates debate over the substance of the rights protected and assist in the development of more or less familiar systems of redress, thereby enhancing the actual promotion and protection of human rights.[13] Geographical

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12. It was asserted:

> All that could be said about this document [the Charter]. . . is that it strives to secure a certain equilibrium, and to emphasize certain principles and guidelines of our Organization [the OAU] as well as the aspirations of the African peoples. It seeks not to isolate man from society, but as well that society must not swallow the individual. Such is the wisdom that was to be recalled from the very beginning of the proceedings.

OAU Doc. AHG/102/XVII, Nairobi, June 1981, at 22.

13. *See* THOMAS BUERGENTHAL, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U. L. REV. 155, 156 (1980).

proximity and cultural propinquity inherent within a regional framework make more probable the investigation and remedying of human rights violations. In the absence of a regional or global police force or army or prison to enforce compliance with international human rights obligations, supra-national institutions have to rely more on shame and pressure mechanisms, such as economic sanctions, the severance of diplomatic relations, sport, and other ties against the recalcitrant state. These mechanisms are likely to be more effective in respect of those states in a regional arrangement where states are in constant contact. Geographical proximity in regional systems leads to socioeconomic, environmental, and security interdependence which more easily forces a recalcitrant state once isolated to comply with its international human rights obligations. These realities place regional human rights systems in a strong position to enforce universal human rights norms.

A. *The African Charter on Human and Peoples' Rights*[14] *and The African Commission Human and Peoples' Rights*

From the foregoing analysis, it is clear that the adoption of the African Charter on Human and Peoples' Rights must, per se, constitute a fundamental input in the struggle for the realization of international human rights norms on the African continent. The system must strive to improve human rights on the African continent.

The African Charter was adopted by the Assembly of Heads of State Government in 1981 and came into force in 1986. As of January 1998, the Charter had been ratified by fifty-one states of the fifty-three Organisation of African Unity (OAU) members.[15] The African system is designed to function within the institutional framework of the OAU. The Charter incorporates many of the rights as embodied in other supra-national human rights instruments. However, there are some differences between the Charter and the two regional systems. First, the Charter brings together the three dimensions of rights under one roof, namely civil and political rights; economic, social, and cultural rights; and "people's rights" (sometimes also called collective or solidarity rights—an individual can only enjoy these rights in a collective sense as a member of the community).[16] Second, the Charter

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14. *See* African Charter on Human and Peoples' Rights, O.A.U. Doc CAB/LEG/67/3/Rev.5 (entered into force Oct. 21, 1986), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 551 (Ian Brownlie ed., 3d ed. 1992) [hereinafter African Charter].

15. Ethiopia and Eritrea have not ratified the Charter.

16. *See* Wolfgang Benedek, *The Rights of Peoples: The Main Issues*, 16 BULLETIN OF AUSTRALIAN SOCIETY OF LEGAL PHILOSOPHY 71-79 (No. 56, 1991). Under the Charter, people's rights include the right to existence, the right to self-determination, peace, and development, and the right to a general satisfactory environment. *See* African Charter, *supra* note 14, arts. 19-24, at 556-57.

incorporates the individual's duties towards the family and society, the state, and the international community.[17] Third, apart from omitting some rights, many of the rights it enumerates are drafted with less judicial precision and permit more restrictions (claw-backs) than the two regional treaties.[18] Additionally, the Charter omits a derogation clause. Last, the Charter does not create a court of human rights.[19] Instead, it establishes an African Commission on Human and Peoples' Rights (the Commission). The Commission is invested with promotional and quasi-judicial functions. The promotional mandate is broad. It includes the power to undertake studies, convene conferences, initiate publication programs, disseminate information, and collaborate with national and local institutions concerned with human and people's rights.[20] The quasi-judicial powers of the Commission include so-called interpretative powers and powers applicable to the resolution of disputes involving allegation of human rights violations. The Commission has the jurisdiction to interpret "all the provisions of the . . . Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU."[21] Unlike the other systems, in dealing with violations of human rights, the African system envisages not only inter-state and individual communications procedures, but also a special procedure for situations of gross and systematic violations.[22]

Since its inception, the Commission has endeavored to discharge its mandate.[23] In general, the Commission started off very cautiously.[24] Gradually, however, the Commission has established itself as an institution of some importance.[25] Over the years, the Commission has augmented its role beyond the likely intention of the drafters and has displayed features of

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17. *See* African Charter, *supra* note 14, arts. 27-29, at 558. Duties include the duty to serve one's national community, preserve and strengthen national independence and territorial integrity, preserve and strengthen social and national solidarity, and not to compromise national security. *Id.*

18. *See infra* Part IV.

19. The African system is now in the process of establishing a human rights court. *See* June 8, 1998, Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights, OAU/LEG/EXP/AFCHPR/PROT (III), *reprinted in* 9 AFR. J. INT'L & COMP. L. 953 (1997) [hereinafter Draft Protocol].

20. *See* African Charter, *supra* note 14, art. 45(1)(a), at 561.

21. *See id.* art. 45(3), at 561.

22. *See id.* art. 58, at 564.

23. *See* EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES (1996).

24. In its very first session in Addis Ababa, the Secretary-General cautiously set the pace of the Commission by exhorting the members on the sensitivity and difficulties that are encountered in the promotion of human rights in Africa. *See* 24 AFR. RES. BULL. 8387, 8387-88 (1987).

25. *See* ANKUMAH, *supra* note 23.

activism in enforcing human rights. The ability of the Commission to write its own rules of procedure has enhanced its functioning and allowed it to expand its role considerably.[26] In its First Annual Report, the Commission "felt that the magnitude and complex nature of the tasks it had to carry out demanded that it should stand on a solid foundation."[27] There are a number of instances of activism on the part of the Commission. It suffices to mention a few: Article 58 of the Charter limits the protective role of the Commission by confining it to cases that reveal a series of gross and systematic violations—the Commission is mandated to draw the attention of the OAU Assembly, and the Assembly may then instruct the Commission to undertake an investigation and draw up a report. It appears that a literal reading of the Charter excluded from the Commission's jurisdiction separate individual cases unless they were of an urgent nature.[28] Notwithstanding these constraints, the Commission from its third session entertains individual complaints that do not reveal a series of violations. This approach, which has bolstered the Commission's protective role, was mandated by its Rules of Procedure.[29] Other areas include "completing" the right to fair trial in Article 7,[30] freedom of association,[31] as well as furnishing content to the right to self-determination.[32] The Commission, drawing on precedents established by the

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26. *See* Rules of Procedure of the African Commission on Human and Peoples' Rights, Doc. ACHPR/RP/XIX (1996).

27. At para. 15 of the Report.

28. *See* Rachel Murray, *Decisions by the African Commission on Individual Communications Under the African Charter on Human and People's Rights*, 46 INT'L & COMP. L.Q. 412 (1997).

29. Commission Rules of Procedure adopted at its 2nd Ordinary Session.

30. In its 11th Session, the Commission adopted a resolution on the Right to Recourse Procedure and Fair Trial. It stressed, inter alia, that the right includes the right to be informed promptly at the time of arrest in a language one understands of the reason for the arrest and of any charges, the right to be brought before a judicial officer promptly after arrest or detention, and the right to be brought to trial within a reasonable time or to be released. It further clarified that the right to defense includes the right to have adequate time and facilities for the preparation of that defense, and the right to communicate in confidence with counsel of one's choice. The right also includes the right to free assistance of an interpreter at the trial.

31. Under Article 10(1) of the Charter, the right to freely associate is conditional on the requirement that one "abides by the law." *See* African Charter, *supra* note 14, art. 10(1), at 554. The wide powers of states to infract the right are limited by the Commission's resolution on the right to associate (adopted at its 11th session). The Resolution calls on states not to "enact provisions which would limit the exercise of this freedom." (Fifth Annual Activity Report). Further, state regulation of the right "should be consistent with the States's obligations under the Charter."

32. *See* Communication 75/92 (*Katangese People's Congress v. Zaire*). The applicants requested the Commission to declare the right of the Katangese "people" to complete sovereign independence, thus enabling them to secede from Zaire (now DRC). The Commission in rejecting the communication noted, inter alia, that self-determination can be attained in various ways, including independence, federalism, confederalism, local government, and unitarism, and that to allow an action incompatible with a state's territorial integrity, there must be "concrete

European Commission of Human Rights and Inter-American Commission on Human Rights, has made findings crucial to the realization of human rights in Africa. These include continuity of obligations notwithstanding change of government,[33] the presumption of the truth of the allegations if government fails to respond,[34] and state responsibility for failure to act.[35] In 1990, in order to expand the Commission's reach throughout the continent, the Commission adopted a resolution on the establishment of committees on human rights and other similar organs at national, regional, and sub-regional levels.[36] It also encouraged member states to take appropriate measures to establish human rights institutions. Other innovative steps which are gradually developing include the Commission's sanctioning of provisional measures despite a lack of specific reference to such measures in the Charter,[37] on-site visits,[38] special rapporteur reports (e.g., one on summary and extra-judicial killings), and follow-up actions.[39]

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evidence of violations of human rights to the point that the territorial integrity of the state should be called to question." Although the Commission may be criticized for setting a very high standard (thereby "overprotecting" the territorial integrity of states at the expense of human rights), it endeavored to give content to the right. From the findings of the Commission, it is clear that the right operates not only against "colonizer" but against any oppressor. The right extends to groups within a state who are persecuted and consistently denied a say in government.

33. *See* Joined cases 83/92, 91/93 *Jean Yaovi Degli (On behalf of Corporal N. Bikagani), Union Interafricaine des Droits de l'Homme, Commission Internationale de Juristes v. Togo.*

34. *See, e.g.*, Communications No. 25/89, 47/90, 56/91, 100/93, *World Organization Against Torture, Lawyer's Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v. Zaire.* Annex VIII, at 7 [hereinafter *World Organization Against Torture*]. A similar approach is embodied in Art. 42 of the Regulations of the Inter-American Commission on Human Rights.

35. In Communication 74/92, *Commission Nationale des Droits de l'homme et des Libertes v. Chad*, the Commission found that if a state neglects to ensure the rights in the Charter, this constitutes a violation. The Commission found that Chad was in violation of the Charter for failing to provide security and stability in the country, thereby allowing massive violations to take place. This approach, similar to that taken in the Inter-American decision in *Velasquez Rodriguez* (I. - A. Court H. R, Series C: Dec. & Jug. No. 4, 1988) has expounded on the state duty provided for under Art. 1 of the Charter.

36. *See* Annex VIII, 11 HUM. RTS. L.J. 401 (1990).

37. *See* Rule 111 of the Commission's Rules of Procedure (1996).

38. For example, the Commission has sent missions to Nigeria, Sudan, Burundi, Mauritania, and Rwanda.

39. For instance, the Commission's endeavor to verify that its recommendations to the state to remedy violations (e.g., release of victims), has been complied with by bringing the file to the defendant state during a commission's mission. *See* Case 87/93, *The Constitutional Rights Project in re Zamani Lakwot & 6 Others v. Nigeria.*

IV. STRENGTHS AND CHALLENGES OF THE AFRICAN HUMAN RIGHTS SYSTEM: AN APPRAISAL

On the one hand, the Charter, when compared to her sister systems in Europe and the Americas, shows some advantages in some respects both in its substantive and procedural provisions. For example, the Charter is the most comprehensive instrument in existence that embodies under one roof the three dimensions of rights; namely, civil and political rights; economic, social, and cultural rights; as well as people's rights, sometimes also called "solidarity or collective"rights, which an individual can only enjoy in a collective sense as a member of the community. By so doing, the Charter endeavors to give effect to the indivisibility and interdependence of human rights. Similarly, its inclusion of solidarity rights is an innovation that undoubtedly constitutes an essential development in the conceptualization of human rights in general. The Charter also provides more liberal access to its procedures than other international human rights instruments. Unlike the two regional systems which require state declaration of recognition of the competence of the implementing organs to receive petitions, the Charter does not request such declaration, and opens the doors for both individuals and non-governmental organizations (NGOs) whether national, African, or international, to file petitions. Apart from conferring quasi-judicial functions, the Charter bestows upon the Commission a promotional mandate that appears to surpass the mandates of the European and Inter-American Commissions.

On the other hand, the African system faces various challenges which have made it lag behind the two systems in Europe and the Americas. First, the adoption of the African Charter with its unabashedly "Africanist Philosophy"[40] has fueled the raging debate in international human rights circles on the universal pluralistic nature of human rights. It has been a question of much controversy as to whether the African Charter was meant to pursue a trend towards "African Culturalism" or to enforce "universal" human rights norms.[41] It has also been argued that some positions are taken in regional and international human rights instruments which conflict with African cultural norms. These controversies have served as stumbling blocks for the African system to serve as a vehicle for the realization of universal norms. However, as already noted herein, like the other regional human rights systems, the African system has its own issues and concerns—which influenced its innovations and emphases. This notwithstanding, like the other

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40. In the Preamble, the Charter bases itself on "the virtues of [African] tradition and the values of African civilization" and that the duty to promote human rights has to take into account "the importance traditionally attached to these rights and freedoms in Africa." *See* African Charter, *supra* note 14, at 551-52.

41. *See* Makawu wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995).

regional systems, it was inspired by universal norms as enunciated in the UDHR and other international human rights instruments. The innovative aspects of the Charter merely enrich the human rights corpus and are not intended to detract from universal human rights norms. The Charter deferred to "universalism" in the Preamble[42] and in Articles 60 and 61.[43] As seen above, in various cases, the African Commission has adopted doctrines established in the case law of other international human rights institutions.

Second, the Charter omits a multiplicity of rights and fails to interdict certain violations. For instance, the Charter does not protect the right to privacy (i.e., the right to respect for private and family life, home, and correspondence), nor interdict forced or compulsory labor. There is no right to vote and be elected in periodical elections by secret ballot, nor does the Charter embody democratic concepts such as universal suffrage and free and fair elections.[44] The right of a national not to be expelled and the right to

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42. One of the objectives of the Charter is to "promote international cooperation having due regard to the United Nations and the Universal Declaration of Human Rights." *See* African Charter, *supra* note 14, art. 45(3), at 561. In the Preamble, African states reaffirm "the adherence to the principles of human and people's rights and freedoms contained in the declarations, conventions and other international instruments adopted by the OAU, the Movement for Non-Aligned Countries and the United Nations." *Id.*

43. Under Article 60,

> [t]he Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and Peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the specialized Agencies of the United Nations of which the parties to the present Charter are members.

African Charter, *supra* note 14, art. 60, at 565.

Under Article 61,

> [t]he Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

Id. art. 61.

44. In its 19th session, the Commission adopted a resolution on "electoral process and participatory governance." Applauding elections in Benin, the Sierra Leon, and the Comoros as part of the transition to democratic rule in these countries, the Commission asserted that elections are the only means by which people can elect democratically the government of their choice in conformity with the Charter. It called on governments to take measures to ensure the credibility of electoral processes, and stressed the duty of states to provide the material needs of the electoral supervisory bodies. Ninth Annual Activity Report, Annex VII at 9.

marry are omitted, while the right to fair trial[45] suffers various shortcomings.

The many claw-back clauses tend to water down the contents of the rights and give wide powers to states to derogate from their human rights obligations.[46] The Charter also omits a derogation clause.[47]

The rather open access to communications is seriously undercut by a very lengthy procedure which communications have to undergo. Under Article 58 of the Charter, communications have to be brought to the knowledge of the state concerned. In the past, the Commission has interpreted the provision restrictively, deferring consideration of the case until the state reacted. The Commission's recent approach of presuming the truth of allegations from the silence of government and its proceeding to consider petitions notwithstanding a state's silence[48] must be saluted.

The lack of publicity of the Commission's work is a ghost that has

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45. The Commission has tried to remedy some of the omissions in its resolution on Right to Recourse Procedure and Fair Trial. *See supra* note 29.

46. Many of the clauses embody nebulous and open-ended clauses, and are not qualified as "necessary in a democratic society" as found in the European and American Conventions. *See* Arts. 8-11 of the ECHR, and Arts. 15-16 of the AMCHR. For instance, some rights are to be enjoyed "subject to law and order," "within the law," if one "abides by the law." Some rights may also be restricted for the protection of "national security," "public order," or "public health." It is argued that although some of the phrases used are found in other international instruments, the African Charter "claw-back" regime tends to overemphasize the "exceptions" and gives wide powers to states at the expense of the rule. However, the developing jurisprudence of the African Commission tries to insist on the effective enjoyment of the rights. *See* Case 101/93, *Civil Liberties Organization*, in *re Nigeria Bar Association v Nigeria*, 9 - 10.

47. The Charter, in Part II (dealing with duties) merely mentions "collective security" but not "public emergency." *See* African Charter, *supra* note 14, art. 27(2), at 558. In view of the difference in character, scope, and circumstances in which limitations and derogations may be imposed, it is untenable to attempt to argue that the many limitation clauses (claw-backs) make a derogation clause unnecessary. For this argument, see, for example, Rose M. D'Sa, *Human and Peoples' Rights: Distinctive Features of the African Charter*, 29 JOURNAL OF AFRICAN LAW 72, 75-76 (1985). As to the nature of limitation and derogation clauses, see SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY (1989) (presenting an exhaustive and scholarly examination of the International Law Association's Paris Minimum Standards of Human Rights Norms in a State of Emergency that was promulgated in 1984); Gerald Erasmus, *Limitation and Suspension, in* RIGHTS AND CONSTITUTIONALISM, (Dawid van Wyk et al. eds., 1994); *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights 1984, reprinted in* 7 HUM. RTS. Q. 3-88 (1985) (consisting of commentary and working papers on limitation provisions and derogation clauses as compiled by a group of international law experts); JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992) (analyzing the main principles regulating human rights in emergencies as contained in the derogation clauses and in general international law). The Commission has held that the absence of a derogation clause in the Charter means that the Charter as a whole remains in force even during periods of armed conflict. *See* Communication 74/92, *Commission Nationale de l'homme et des Libertes v. Chad*, AHG/207 (XXXII) Annex VIII at 12). In practice, this may be impracticable; a derogation clause is necessary to regulate derogations.

48. *See* Communication No. 25/89/47/90, 56/91, 100/93, *supra* note 34.

dangerously assailed the human rights project. Under Article 59(1) of the Charter, all measures taken within the provisions of the Charter (on the procedure of the Commission) shall remain confidential until such a time as the Assembly of Heads of States and Government shall otherwise decide. Barring the Commission from reporting individual cases, the defendant states, or the stage reached by individual cases, denies vital protection to victims of human rights violations. Under Article 59(3), "[t]he report of the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government."[49] It is unfortunate to vest a power in the Assembly to "veto" the Commission's publication of its annual report. The Commission's Rules of Procedure presuming that publication is permitted unless directed otherwise is commendable.[50]

Until 1998 with the adoption of an Additional Protocol to establish a court,[51] the African Charter did not create a court of human rights. Only a commission was put in place, and given a mandate with a number of lacunas.

V. THE WAY FORWARD: CONCLUSIONS AND RECOMMENDATIONS FOR REINVIGORATING THE AFRICAN SYSTEM

The adoption of the African Charter constitutes an important input in the human rights revolution on the African continent. Over the years, within the African system, like the two regional systems, some steps have been taken in the direction of complementing and reinforcing the global system in the realization of universal norms, while at the same time responding to the particular problems in the region.

However, there is a need for further normative, institutional, and procedural reforms to make the system more effective. There is a need to adopt additional protocols to supplement the Charter and add the rights omitted. Although the Commission has tried to expound on the protections in the Charter, this is not enough.

The Charter also needs revisions in various respects. There is a need to further streamline and reinvigorate the Commission's mandate. Provisions that inhibit the publicity of the Commission's work should be revised. Although the Commission was created by the OAU, its mandate should be

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49. African Charter, *supra* note 14, art. 59(3), at 564.

50. *See* Rule 77 of the Commission's Rules of Procedure, *supra* note 26.

51. This Protocol is not yet in force. The African system is in the process of creating a court of human rights. *See* Draft Protocol, *supra* note 19, at 953. Under Article 34(3) of the Protocol, "[t]he Protocol shall come into force thirty days after fifteen instruments of ratification . . . have been deposited." *Id.* at 960. The competence of the Court to receive petitions is limited to those states that ratify the Protocol and also file a declaration accepting the competence of the Court. *See id.* art. 34(6), at 960.

expanded so that it becomes more accountable to the people rather than to the Heads of State and Government. The Commission's close association with the OAU is necessary—inter alia, the OAU serves as an outlet of the Commission and forms the medium through which the Commission's activities are brought to the attention of the people and the leaders. However, the Commission must remain independent from the Heads of State and Government—the members of which are often the targets of human rights claims—and the OAU must not impose restrictions that hinder or compromise its work. The Commission's financial dependence on the OAU hampers the Commission's general activities. The OAU's considerable control over the activities of the Commission and its say as to what activities the Commission may undertake need to be revised. In addition, vesting final decision making in the OAU Assembly of Heads of State and Government and not in the Commission, needs revision. The current working relationship between the Commission and the Assembly gives powerful states the ability to moderate or even silence the findings of the Commission.

Impartiality and independence of action are central to the effective functioning of an organ charged with the protection of human rights. Indeed, elected members of the Commission must take an oath of impartiality.[52] However, the election of ambassadors or other officials from governments—governments that are the targets of human rights claims—to the Commission, renders the impartiality and independence of the Commission illusory and should be revised.

There is a need to address the various claw-back clauses that tend to water down the contents of the guarantees. A general limitation clause would be ideal. A derogation clause should be added to regulate state action before and during emergencies.

There is a need to establish additional bodies, particularly a court to complement the Commission. There is an urgent need for a judicial organ in the nature of a court to undertake effective adjudication of complaints, render enforceable judgements, offer remedies to victims, and make states more accountable for violations of human rights. Like the Commission, the court must be an independent institution and its activities must not be inhibited by the OAU.

Since its inception, the Commission has experienced serious financial constraints due to poor funding from the OAU and has had to rely on funding from external sources. The Commission should consistently call on the member states to deliver and respect their obligations under the Charter, notwithstanding the financial constraints they face. African governments have perpetually relegated meeting their human rights obligations at the periphery. The Commission must consistently fight this vice.

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52. *See* African Charter, *supra* note 14, art. 38, at 560.

THE INTERNATIONAL LEGAL OBLIGATION TO TEACH WORLDISM IN U.S. CLASSROOMS

Scott Pasternack*

I. INTRODUCTION

In the 1997 State of the Union address, United States President Bill Clinton set forth his seven priorities in education[1] that have helped to inspire passage of new curriculum statutes from legislatures and completion of new curriculum frameworks from education departments[2] in U.S. states throughout the country. However, while encouraging a greater understanding and appreciation of the world through developments such as Internet 2000[3] and multiculturalism, both the President and the U.S. states omit an important foundational element: the history, structure, and laws of international and

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1. *See President's & Secretary's Priorities* <http://www.ed.gov/inits.html> [hereinafter *Priorities*].

2. *See, e.g., California Primary Schools* <http://www.cde.ca.gov/cilbranch/eltdiv/98hssadoption.htm> for California.

3. "Every classroom will be connected to the Internet by the year 2000 and all students will be technologically literate." Initiative 6. *See Priorities, supra* note 1.

regional institutions (what I hereafter term "worldism").[4]

Legislative mandates to teach worldism in U.S. schools are long overdue. The United Nations General Assembly ("General Assembly" or "G.A.") has called continually for nations that are members in the organization ("Member States") to "study the possibility of introducing topics of international law in the curricula of schools at primary and secondary levels."[5] Both the General Assembly and the United Nations Economic and Social Council ("ECOSOC") recommend that Member States "take measures . . . to encourage the teaching of the United Nations Charter and the purposes and principles, the structure, background and activities of the United Nations in the schools and institutes of higher learning of their countries, with particular emphasis on such instruction in elementary and secondary schools."[6] Although some U.S. state social studies frameworks include

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4. Such a course would act as an umbrella covering many topics in addition to the basic organization and operations of the United Nations, Organization of American States and other international and regional institutions. For example, on the topic of international human rights, a common subject currently covered in many classrooms, the "history" component of worldism would include the history of human rights bodies like the United Nations ("U.N.") Commission on Human Rights; the "structure" component of worldism would include the structure of current human rights bodies like the U.N. Commissioner on Human Rights; and the "law" component of worldism would include aspects of human rights law such as the Universal Declaration on Human Rights, treaties, and worldwide human rights struggles and legal efforts.

5. The General Assembly has passed four resolutions during the 1990-1999 United Nations Decade of International Law declared in G.A. Resolution 44/23 that each include this provision: G.A. Res. 45/40, Annex (Programme for the activities to be commenced during the first term (1990-1992) of the United Nations Decade of International Law), Part IV, para. 2 (<gopher://gopher.un.org:70/00/ga/recs/45/40>(visited Dec. 1, 1998)); G.A. Res. 47/32, Annex (Programme for the activities to be commenced during the second term (1993-1994) of the United Nations Decade of International Law), Part IV, para. 2 (<gopher://gopher.un.org: 70/00/ga/recs/47/32> (visited Dec. 1, 1998)); G.A. Res. 49/50, Annex (Programme for the activities for the third term (1995-1996) of the United Nations Decade of International Law), Part IV, para. 2 (<gopher://gopher.un.org:70/00/ga/recs/49/50> (visited Dec. 1, 1998)) ; G.A. Res. 51/157, Annex (Programme for the activities to be commenced for the final term (1997-1999) of the United Nations Decade of International Law), Part IV, para. 15 (<gopher://gopher.un.org/00/ga/recs/51/RES51-EN.157> (visited Dec. 1, 1998)). These four resolutions inspired the General Assembly to include a similar provision on teaching international law in primary and secondary curricula in its biannual resolution on the United Nations Program of Assistance in the Teaching, Study and Dissemination and Wider Appreciation of International Law ("U.N. Program of Assistance"). *Compare* G.A. Res. 40/66, 40 U.N. GAOR, Supp. 53 at 303, para. 8, U.N. Doc. A/40/53 (1985) (existing before the passage of any U.N. Decade resolution), *with* G.A. Res. 52/152, U.N. GAOR, 52nd Sess., Supp. 49 at 369, para. 13, U.N. Doc. A/52/49 (1997) (existing after the passage of the first term U.N. Decade resolution; passage of the next resolution on the subject will occur in the 54th Session.). For a list of U.N. Program of Assistance resolutions from the original (G.A. Res. 2099(XX)) until 1993 (G.A. Res. 48/29), see *Report of the Secretary General*, U.N. GAOR, 50th Sess., Annexes at Agenda Item 39 at note 1, U.N. Doc. A/50/726 (1995).

6. G.A. Res. 137(II), 2 U.N. GAOR, Resolutions at 45, U.N. Doc A/519 (1947). Although the General Assembly initiated the effort to teach about the United Nations, it transferred the program to ECOSOC in that Resolution. ECOSOC then expanded the scope to

aspects of the United Nations, multilateralism, and international human rights in world history or post-Cold War studies courses,[7] no U.S. state legislature has amended its social studies curriculum statutes to mandate worldism together with already required federal, state, and local civics classes.[8]

So many legitimate activities in this world—e.g., economic, military, technological, medical, energy, law enforcement—depend on the joint effort of two or more nations rather than the work of just one: such bilateral and multilateral approaches create greater economies of scale and a better and safer quality of life for humanity. That nations cling to their risk-averse sense of sovereignty in the name of security only serves to undermine this process. However, since the end of World War II when the United States profited greatly from Europe's misery, the United States has maintained, and during the Cold War fought to preserve, a hegemonic order for itself. The mandated components of federal, state, and local civics classes in U.S. primary and secondary schools ensure that U.S. citizens accept this hegemony without question (there are few people in the United States who could imagine a better form of government).[9] At the dawn of a new millenium, such insularity hinders progress and truly risks downfall. If the United States intends to avoid declining like other great nations in history, it needs to embrace the realities of regional and international institutions—their history, their structure, and their laws—instead of avoiding them. The United States must introduce these concepts fully into the popular way of thinking.

Just as required federal, state, and local civics classes implant children and adolescents with the seeds of patriotism that flower when they reach adulthood into a basic appreciation and loyalty for the United States as a civil

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include the specialized agencies of the United Nations and to require Member States to report to the Secretary-General and the United Nations Education, Scientific and Cultural Organization (UNESCO) on their progress. *See infra* note 19.

7. *See,e.g.*,<http://www.doe.mass.edu/edreform/standards> (pertaining to Massachusetts); <http://www.cde.ca.gov/secondary> (pertaining to California); <http://www.state.vt.us/educ/stand/h%ss.htm> (pertaining to Vermont); <http://www.edneb.org/IPS/Issu/SS/SocSStnd.html> (pertaining to Nebraska).

8. *See, e.g.*, CAL. EDUC. CODE §§ 51210, 51220, 51226.3 (West 1998); FL. STAT. ANN. § 233.061 (West 1999); MASS. GEN. LAWS ANN., c. 71, § 2 (West 1998); NEB. REV. STAT. § 79-724 (1996); N.M. STAT. ANN. § 22-13-11 (Michie 1998); VT. STAT. ANN. tit. 16, § 906(b)(2) (1998). *See also infra* note 12.

9. Consider this provision in the Nebraska education laws: "In at least two grades of every high school, at least three periods per week shall be devoted to the teaching of civics, during which courses specific attention shall be given to the following matters: . . . (b) The benefits and advantages of our form of government and the dangers and fallacies of Nazism, Communism, and similar ideologies[.]" NEB. REV. STAT. § 79-724(5) (1996). In addition, most U.S. state curriculum statutes explicitly require class time devoted to the study of the U.S. flag, the fostering of patriotism, or both. *See, e.g.*, CONN. GEN. STAT. ANN. § 10-18 (West 1998); IND. CODE ANN. § 20-10.1-4-4 (1998); WASH. REV. CODE ANN. § 28A.230.140 and § 28A.230.150 (West 1998).

society, so too will mandated worldism classes at the primary and secondary school levels cultivate in the U.S. population a similar respect for the history, structure, and laws of international and regional institutions. Recent scholarship on approaches in teaching about international law and its institutions focuses on supplementing undergraduate government curricula[10] or law school curricula[11] but not on changing primary and secondary school curricula.[12] The freshman international relations course taken at age eighteen is simply too little too late; imagine how ingrained the cherishing of the history, interpretation, and text of the U.S. Constitution might be if U.S. citizens were not required to learn about such elements until they attended college.

This Article poses and responds to three significant questions in order to demonstrate the importance of revising primary and secondary school social studies curricula to include mandatory worldism classes. First, why must the United States teach worldism? Second, if the United States must teach worldism, why start the teaching at the primary and secondary school level? Third, if the United States must start teaching worldism at the primary and secondary school level, what changes need to occur in U.S. education laws to implement this mandate?

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10. *See* Basil Karp, *Teaching the Global Perspective in American National Government: A Selected Resource Guide*, 25 PS: POLITICAL SCIENCE AND POLITICS 703 (1992).

11. *See* John A. Barrett, Jr., *International Legal Education in U.S. Law Schools: Plenty of Offerings, but Too Few Students*, 31 INT'L LAW. 845 (1997); *Symposium on the Teaching of International Criminal Law*, 1 TOURO J. TRANSNAT'L L. 129 (1988); *Teaching International Relations and International Organizations in International Law Courses: Constructing the State-of-the-Art International Law Course*, 87 AM. SOC. INT'L. L. PROC. 398 (1993).

12. According to a joint U.N. Secretary-General and UNESCO summary of a U.S. Department of Education report entitled *Teaching about the United Nations in the United States of America, 1960-63*, "[t]he opinion of many American educators is that much more can be done to strengthen and improve teaching about the international scene. More and better school materials need to be prepared, teachers should have improved, in-service courses, and more effective methods of teaching need to be employed, including the use of educational television." *Report of the Secretary-General of the United Nations and the Director General of the United Nations Educational, Scientific and Cultural Organization on the Teaching of the Purposes and Principles, the Structure and Activities of the United Nations and the Specialized Agencies in the Schools and Other Education Institutions of Members States, in* U.N. ESCOR, 37th Sess., Annex 33 at 66, U.N. Doc. E/3875 and Add. 1-3 (1964).

Although the U.S. and U.N. reports are more than 30 years old, the most to have occurred since the 1960s is the incorporation of teaching and educational materials into already existing curricula. *See, e.g.*, Helena Benitez, *Globalization in U.S. History: Six Strategies*, 58 SOC. EDUC. 142 (1994); Betty A. Reardon, *Human Rights and Values Education: Using the International Standards*, 58 SOC. EDUC. 427 (1994); Felisha Tibbitts, *On Human Dignity: The Need for Human Rights Education*, 60 SOC. EDUC. 428 (1996); Ron Wheeler, *Post-Cold War Social Studies*, 58 SOC. EDUC. 287 (1994). *See also* 58 SOC. EDUC. (1996) (devoting entire issue to the U.N.'s fiftieth anniversary); 56 SOC. EDUC. (1992) (devoting entire issue to the Convention on the Rights of the Child). These articles neither discuss lobbying for legislative change nor mandating the teaching of these subjects.

II. WHY MUST THE UNITED STATES TEACH WORLDISM?

International law and regional law morally and legally obligate the United States to teach worldism. The Charter of the United Nations ("U.N. Charter") mandates "promoting international cooperation in the political field and encouraging the progressive development of international law . . . ."[13] The U.N. Charter legally binds the United States to help fulfill this obligation.[14] Similarly, at the regional level, the Charter of the Organization of American States ("OAS Charter")[15] proclaims generally that "[i]nternational law is the standard of conduct of States in their reciprocal relations"[16] and calls on one of its organs "to promote the progressive development . . . of international law[.]"[17] Like the U.N. Charter, the OAS Charter legally binds the United States.

A. *The Obligation in U.N. and OAS Resolutions and Declarations*

Following the U.N. Charter's mandate, the General Assembly and ECOSOC have, since inception, passed numerous resolutions requiring, recommending, and inviting Member States to teach components of worldism. These resolutions bind the United States morally as a voting member of each body. Some of these resolutions focus on teaching about international institutions, one of worldism's components, in primary and secondary school. In its initial resolution on the Teaching of the Purposes and Principles, the Structure and Activities of the United Nations in the Schools of Member States, the General Assembly states:

> *Considering* that knowledge and understanding of the aims and activities of the United Nations are essential in promoting and assuring general interest and popular support

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13. CHARTER OF THE UNITED NATIONS (as amended) [hereinafter U.N. CHARTER], at art. 13, para. 1, *reprinted in* INTERNATIONAL LAW: SELECTED DOCUMENTS 1, 5 (Barry E. Carter & Phillip R. Trimble eds., 1991) (latest amendments at 24 U.S.T. 2225) [hereinafter SELECTED DOCUMENTS].

14. The United States signed the U.N. Charter in San Francisco on June 26, 1945, and became a member of the organization at that time. As a self-executing treaty to which the United States is party, the U.N. Charter provisions legally binds the United States because "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, § 2.

15. CHARTER OF THE ORGANIZATION OF AMERICAN STATES, 2 U.S.T. 2394; amended effective 1970, 21 U.S.T. 607, T.I.A.S. No. 6847, *reprinted in* SELECTED DOCUMENTS, *supra* note 13, at 237 [hereinafter OAS CHARTER].

16. *Id.* art. 3(a), *reprinted in* SELECTED DOCUMENTS, *supra* note 13, at 238.

17. *Id.* art. 105, *reprinted in* SELECTED DOCUMENTS, *supra* note 13, at 256.

> of its work;
>
> *Recommends* to all Member Governments that they take measures at the earliest possible date to encourage the teaching of the United Nations Charter and the purposes and principles, the structure, background and activities of the United Nations in the schools and institutes of higher learning of their countries, with particular emphasis on such instruction in elementary and secondary schools[.][18]

ECOSOC succeeded the General Assembly in continuing this effort and passed its first resolution on the subject a year later:

> *Realizing* that, for the successful functioning of the United Nations and its specialized agencies, it is essential that their purposes, principles and activities be widely known in order to develop among all the peoples of the world a realization of the benefits which can be derived from international organization, and of the proper ways of utilizing the existing instruments of international collaboration;
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> . . . .
>
> *Recommends* that Member States make full use of the information and advice which the United Nations and the United Nations Educational, Scientific and Cultural Organization can provide on the subject and intensify their efforts to promote in their respective territories the teaching of the purposes, principles, structure and activities of the United Nations and its specialized agencies.[19]

Other United Nations resolutions focus on teaching about international law, another of worldism's components, and have grown to include specific reference to primary and secondary schools. Initially, the General Assembly writes:

> *Considering* that one of the most effective means of furthering the development of international law consists in promoting public interest in this subject and using the media of education and publicity to familiarize the peoples with the principles and rules that govern international relations;
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> *Considering* that greater knowledge of and fuller

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18. G.A. Res. 137(II), 2 U.N.GAOR, Resolutions at 45-46, U.N. Doc. A/519 (1947).
19. ECOSOC Res. 170(VII), ESCOR, 7th Session, Resolutions at 72 (1948).

> information on the aims, purposes and structure of the United Nations constitute another positive method of assisting the development of international law, of which the United Nations is the main instrument . . .
>
> *Resolves* to request the Government of Member States:
>
> 1. To take appropriate measures to extend the teaching of international law in all its phases, including its development and codification, in the universities and higher educational institutions of each country that are under government control or over which Governments have some influence or to initiate such teaching where it is not yet provided;
>
> 2. To promote similar teaching regarding the aims, purposes, structure and operation of the United Nations in conjunction with paragraph 1 above and in accordance with resolution 137(II) adopted by the General Assembly on 17 November 1947, on the teaching of the purposes and principles, the structure and activities of the United Nations in the schools of Member States[.] [20]

This resolution evolved into the United Nations Program of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. [21] By the 1990s, the General Assembly's encouragement in these resolutions to teach international law explicitly referred to primary and secondary schools.[22]

The repeated passage from 1947 to the present of these General Assembly and ECOSOC resolutions[23] not only morally binds the United States but also demonstrates state practice and perhaps even sufficient *opinio juris sive necessitatis* to make the obligations legally binding on the United States as customary international law.[24] Similar OAS resolutions passed pursuant to

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20. G.A. Res. 176(II), 2 U.N.GAOR, Resolutions at 110-11, U.N. Doc. A/519 (1947).

21. *See supra* note 5.

22. *See supra* note 5.

23. Regarding later action on teaching about international institutions, see ECOSOC Res. 748 (XXIX), ESCOR 29th Session, Resolutions, Supp. No. 1 at 4-5, U.N. Doc. E/3373 (1960); ECOSOC Decision No. 6, ESCOR 48th Session, Resolutions and Decisions, Supp. No. 1A at 20 (1970). Regarding later action on teaching about international law, see *supra* note 5.

24. *See* Article 38(1)(b) of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, Bevans 1179 ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . (b) international custom, as evidence of a general practice accepted as law."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) & § 102 cmts. b & c, reporters note 2.

Customary international law is one of the two primary sources of international law, the other being international agreements such as treaties. *See id.* § 102(1) & cmt. l. "Customary

the OAS Charter mandates discussed above emphasize the importance of teaching about international and regional law.[25]

The legislative history of the above-mentioned U.N. resolutions points to a central role that the United States played in drafting the texts and upholding the message. For example, on G.A. Resolution 137(II), Eleanor Roosevelt, representing the United States in the General Assembly's Third Committee, announced U.S. support specifically for the first preambulary paragraph and the first main paragraph quoted above.[26] In the General Assembly Plenary Meetings, Mrs. Roosevelt actively participated by forging a compromise between the Third Committee draft and a Cuban amendment to create the adopted version of G.A. Resolution 137(II).[27] Meanwhile, in ECOSOC, the United States spoke of universal recognition of the importance of teaching about the United Nations and its specialized agencies,[28] praised the Secretary General for his efforts toward that end,[29] and stated that "[t]eaching about the United Nations should be a continuous programme and ought to be interwoven throughout the student's curriculum so that children might know what repercussions the decisions taken by the United Nations ha[ve] on their daily life."[30]

In addition to these United Nations resolutions, Article 26(2) of the Universal Declaration of Human Rights ("UDHR") proclaims that education "shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace."[31] The United States again played an active role in drafting this language and supporting its intent. A joint U.S.-Mexican amendment added to Article 26(2) the phrase "shall further the activities of

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international law results from a general and consistent practice of states followed by them from a sense of legal obligation." *Id.* § 102(2). Generally speaking, nation-states who are part of the international system are bound to any practice that ripens into customary international law unless they consistently indicate their dissent and the practice at issue is not a peremptory norm. *See id.* § 102 cmts. a, d and k & reporters note 2.

25. *See generally* AG/RES. 1471 (XXVII—O/97)(1997 7th plen. sess.) (adopting the Inter-American Program for the Development of International Law); *Declaration of Panama on the Inter-American Contribution to the Development and Codification of International Law*, AG/DEC. 12 (XXVI—O/96) (emphasizing the importance of instruction about international and regional law).

26. *See* U.N. GAOR, 3d Comm., 2d Sess., 81st mtg. at 217, U.N. Doc. A/C.3/SR.81 (1947). Lebanon's draft of the first main paragraph can be found at 2 U.N. GAOR, Annex 13a at 267, U.N. Doc. A/C.3/190 (1947). China's draft of the first preambulary paragraph can be found at 2 U.N. GAOR, Annex 13b at 267-68, U.N. Doc. A/C.3/195 (1947).

27. *See* U.N. GAOR, 2d Sess., 117th plen. mtg. at 1036-37, U.N. Doc. A/SR.117 (1947).

28. U.N. ESCOR, 7th Sess., 198th mtg. at 367, U.N. Doc. E/SR.198 (1948).

29. U.N. ESCOR, 8th Sess., 233d mtg. at 69, U.N. Doc. E/SR.233 (1948).

30. *Id.*

31. Universal Declaration of Human Rights, December 10, 1948, G.A. Res. 217 (III 1948), at art. 26(2), *reprinted in* SELECTED DOCUMENTS, *supra* note 13, at 352, 356.

the United Nations for the maintenance of peace."[32] The drafters intended this language to incorporate and more widely disseminate the principles of G.A. Resolution 137(II).[33] The combination of the implication in Article 26(2) and the explication in G.A. Resolution 137(II) strengthens the obligation on the part of Member States to teach in schools about the purposes, principles, structure, and activities of the United Nations and its specialized agencies.[34] Consequently, the United States, as a drafter of the portion of Article 26(2) promoting awareness of worldism, as a party to the Universal Declaration on Human Rights, and as a member of the General Assembly, is bound to meet this obligation.

B. *The Obligation in Treaties*

Apart from U.N. resolutions and declarations, the general right to education in various multilateral human rights conventions with which the

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32. *See* 3 U.N. GAOR, 3d comm., Annexes to Summ. Records at 84, U.N. Doc. A/C.3/356 (1948) (joint U.S.-Mex. amendment). *See also* 3 U.N. GAOR, 3d comm., 147th mtg. at 596, U.N. Doc. A/C.3/SR.147 (1948-49)(documenting the United States introduction of the joint amendment at the 147th meeting of the Third Committee); 3 U.N. GAOR, 3d Comm., 148th mtg. at 604, U.N. Doc. A/C.3/SR.148 (1948-49) (documenting the Third Committee's adoption of the amendment at the next meeting). The World Jewish Congress ("WJC") proposed the original text for this provision during a session of the Working Group on the Declaration on Human Rights ("Working Group") which met throughout the second session of ECOSOC's Commission on Human Rights ("Commission"). *See Report of the Working Group on the Declaration on Human Rights*, U.N. ESCOR, Comm'n on Human Rights, 2d Sess. at 14, U.N. Doc. E/CN.4/57 (1947). Then in its third session, the Commission subsequently amended both the WJC text and the Working Group draft before forwarding to the plenary session of ECOSOC the following draft provision: "Education shall be directed to the full development of the human personality, to the strengthening of respect for human rights and fundamental freedoms and to the promotion of international goodwill[,] and to the combatting of the spirit of intolerance and hatred against the nations or racial or religious groups." U.N. ESCOR, Comm'n on Human Rights, 3d Sess., 69th mtg. at 9, U.N. Doc. E/CN.4/SR.69 (1948). ECOSOC referred this provision, along with the rest of the draft Declaration on Human Rights, to the General Assembly who delegated it to its Third Committee. There the United States and Mexico introduced their joint amendment which became part of the final text of the Universal Declaration on Human Rights. *See supra* note 31.

33. *See* G.A. Res. 137(II), 3 U.N. GAOR, 3d Comm., 146th mtg. at 582-83, U.N. Doc. A/C.3/SR.146 (1948-49) (noting that at this meeting the Mexican delegate stated, regarding the proposal for adding the instant United Nations language to Article 26(2), that "[i]f such a provision were included in the declaration, [then G.A. Res. 137(II)] would obtain a far wider hearing."

34. *See* RESTATEMENT (THIRD), *supra* note 24, § 103 cmt. c & reporters note 2 (stating that "[r]esolutions by a principal organ of an organization interpreting the charter of the organization [i.e., G.A. Resolution 137(II) interpreting Article 13 of the U.N. Charter] *may be* entitled to greater weight. . . . [and d]eclarations interpreting a charter [i.e.,Univeral Declaration of Human Rights interpreting Articles 55 and 56 of the U.N. Charter] *are* entitled to considerable weight if they are unanimous or nearly unanimous and have the support of all the principal members." (emphasis added)).

United States either should or must comply often includes a content component that implicitly calls for worldism in school curriculum. Article 13(1) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") states that parties "agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace."[35] Article 29(1)(b) of the Convention on the Rights of the Child ("CRC") directs education to include "[t]he development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations."[36] Article 5(1)(a) of the UNESCO Convention Against Discrimination in Education ("CADE") states that "[e]ducation shall be directed to . . . the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace."[37]

Although only the U.N. Charter and the OAS Charter directly bind the United States, international law requires nations to comply with, if not specifically obey, the education provision of these other documents. For the instruments that the United States has signed but not ratified (i.e., ICESCR and CRC), Article 18 of the Vienna Convention on the Law of Treaties[38] obligates this country not to act contrary to the object and purpose of the provisions of those conventions.[39] For the instruments to which the United States is not a signatory (i.e., CADE), "the standards contained [therein] . . . are either part of customary international law or are the most important

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35. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 13, para. 1, 993 U.N.T.S. 3, *reprinted in* SELECTED DOCUMENTS, *supra* note 13, at 376, 380.

36. Convention on the Rights of the Child, November 20, 1989, art. 29(1)(b), 28 I.L.M. 1448, 1468 (1989), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 193 (Ian Brownlie ed., 3d ed. 1991)[hereinafter BASIC DOCUMENTS].

37. December 14, 1960, art. 5(1)(a), 429 U.N.T.S. 93, *reprinted in* BASIC DOCUMENTS, *supra* note 36, at 234, 236.

38. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, U.N. Doc. A/CONF. 39/27, *reprinted in* SELECTED DOCUMENTS, *supra* note 13, at 51, 56.

39. Despite the fact that the U.S. Senate has not yet ratified the Vienna Convention, the U.S. Department of State has said that "the Convention is already generally recognized as the authoritative guide to current treaty law and practice." RESTATEMENT (THIRD), *supra* note 24, at 145 (quoting S.Exec.Doc.L. 92d Cong., 1st sess. (1971) at 1). Furthermore, the U.S. Department of State regards particular Vienna Convention articles as codifying existing international law, and federal courts have treated particular provisions as authoritative. RESTATEMENT (THIRD), *supra* note 24, at 145, note 2 (citing various *Digest of U.S. Practice in International Law* pages and federal court cases). Thus, the United States has assented to being bound by the Vienna Convention just like any other customary international law or treaty law obligation.

evidence of the content of customary international human rights law."[40] Given these understandings, the spirit of international law demands mandatory teaching of worldism under U.S. education laws in state and federal statutes, regulations, and directives. Such teaching is best begun at the primary and secondary school level.

III. WHY START TEACHING WORLDISM AT THE PRIMARY AND SECONDARY SCHOOL LEVEL?

Changing federal and state education laws to provide for mandatory teaching of worldism at the primary and secondary school level will improve the attitude of citizens toward the legitimacy of international and regional organizations as governing bodies. In the United States, an underlying consensus among the citizenry that one should respect domestic laws and the institutions that create, implement, and interpret them allows for the expected and effective enforcement of penal codes and bargained-for agreements. However, most U.S. citizens lack an equal level of respect for international laws and the institutions that create, implement, and interpret them. Arguably, a key explanation for the difference in respect for domestic law and international law is that U.S. states require repeated primary and secondary school coursework in federal, state, and local civics in order to cultivate respect for the U.S. Constitution and society's laws whereas no U.S. state requires primary and secondary school coursework in worldism which might instill a similar attitude toward international and regional laws.

A. *U.S. Research in Support of Primary and Secondary School Teaching*

A report[41] from the U.S. National Commission for UNESCO at the U.S.

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40. Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L. L. J. 291, 321 (1983). *See* Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 639 (1992); Stephen Knight, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HASTINGS INT'L. & COMP. L. REV. 183, 198 (1995); Connie de la Vega, *Protecting Economic, Social and Cultural Rights*, 15 WHITTIER L. REV. 471, 471-72 & n. 59 (1994). At issue here is which, if not all, elements (i.e., non-discrimination, free for all, content of what is taught) that comprise an international human right to education has crystallized into a customary legal obligation and, therefore, binds the United States regardless of whether the United States has ratified particular instruments.

41. THOMAS BUERGENTHAL & JUDITH V. TORNEY, U.S. DEP'T OF STATE, INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL EDUCATION (1976) [hereinafter BUERGENTHAL & TORNEY].

Department of State analyzing a 1974 UNESCO Recommendation[42] strongly supports the position that worldism must be taught at the primary and secondary school level to have an effective impact. The authors of the report—Professors Thomas Buergenthal and Judith V. Torney—devote one chapter to "Major Research Findings Concerning Students' International Knowledge and Attitudes"[43] in order, inter alia, to give greater meaning to the following principle from the UNESCO Recommendation:

> In order to enable every person . . . to promote international solidarity and co-operation, which are necessary in solving the world problems affecting the individuals' and the communities' life and exercise of fundamental rights and freedoms, the following objectives should be regarded as major guiding principles of educational policy:
>
> > (a) an international dimension and a global perspective in education at all levels and in all its forms;
> > (b) understanding and respect for all peoples, their cultures, civilizations, values and ways of life, including domestic ethnic cultures and cultures of other nations;
> > (c) awareness of the increasing global interdependence between peoples and nations;
> > (d) abilities to communicate with others;
> > (e) awareness not only of the right but also of the duties incumbent upon individuals, social groups and nations toward each other;
> > (f) understanding of the necessity for international solidarity and co-operation readiness on the part of the individual to participate in solving the problems of his community, his country and the world at

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42. *U.N.E.S.C.O. Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms*, 18th Session of UNESCO, November 19, 1974 [hereinafter *UNESCO Recommendation*]. As a member of UNESCO at the time of the eighteenth session (October 17, 1974 to November 23, 1974), the United States helped draft the UNESCO Recommendation and became a party to it. "[A]s their name suggests, recommendations are non-obligatory statements of principles or norms which [UNESCO] recommends should be applied or implement by [its] Member States." BUERGENTHAL & TORNEY, *supra* note 41, at 3. Thus, by a legislative or quasi-legislative act, the 1974 UNESCO Recommendation *invites* but does not compel United States compliance with its provisions. *See id.* at 10-11.

43. *See* BUERGENTHAL & TORNEY, *supra* note 41, at 102-23.

large.[44]

The authors begin the chapter by citing a then-recent education study from the National Council on Social Studies which drew the following conclusions:

> VI. International learning begins early in life.
> VII. International learning is cumulative . . . what children learn at one age builds upon and is influenced by what they have previously learned.
> VIII. The time of middle childhood (grades three through eight) is an important period in international learning.
> IX. The beliefs, attitudes, values, and knowledge individuals develop about the world differ—each individual student brings his or her own particular configuration of orientations toward the world.
> X. The mass media, especially television and newspapers [and, today, the Internet], play an important role in children's international learning.[45]

From an analysis of similar research studies, the authors determine that:

> [P]ositive national identity is established very early and forms part of the child's *perspective* for viewing the activity of other nations and of his own, as well as the future of international society. The period before the age of fourteen is especially important because the child's openness to

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44. *UNESCO Recommendation*, *supra* note 42, Preamble, para. 7. At the time that UNESCO passed the recommendation, the United States was still a Member State. Therefore, pursuant to the preamble of the UNESCO Recommendation, the United States had a duty to take legislative or other steps to give effect to the above provision. Moreover, "[a]lthough [the United States] ha[s] no legal obligation to give effect to the provisions [such as this one] of a UNESCO recommendation, [it] is required by the UNESCO Constitution to bring the recommendation to the attention of those national agencies in [this] country that are empowered to regulate and act upon the subjects dealt with in the recommendation. . . ." Since the 1974 UNESCO Recommendation deals with diverse educational practices, policies and programs, the U.S. government would seem to be under an obligation to transmit copies of the instrument to all chief state school officers, to major private education organizations, to the U.S. Commissioner of Education and to the U.S. Congress. The subjects covered by the Recommendation fall within the general jurisdiction of the States of the Union because they concern education, but many related policies are today also governed by federal guidelines." BUERGENTHAL & TORNEY, *supra* note 41, at 3. *See also UNESCO Recommendation*, *supra* note 42, Preamble, para. 8.

45. RICHARD C. REMY ET AL., INTERNATIONAL LEARNING AND INTERNATIONAL EDUCATION IN A GLOBAL AGE 39-40 (1975).

> diversity in this period is more likely to foster positive international *attitudes*. Exaggerated support for his own national government . . . may curtail the child's positive orientations toward other nations [or, presumably, regional organizations and international organizations]. . . In the United States students tend to possess less knowledge about international than about national matters and to be *less motivated* to participate in discussion of international affairs outside the classroom than are the students of other countries.
>
> Studies of attitudes and knowledge about the UN typically conclude that children perceive it as an organization which feeds the hungry and tries to make peace. The ideas of adolescents are somewhat more sophisticated. . . .
>
> Action to improve education must take place on all levels of instruction and in a variety of modes. An international or intercultural dimension should be an explicit and implicit part of classroom functioning. There appears to be no reason why the global perspective cannot be fostered through many subjects of study without detracting from the mastery of prescribed subject matter. . . .
>
> The UNESCO Recommendation has given the appropriate breadth of focus. . . . A new course here or a new extra-curricular project there will not even approximate the degree of understanding of other peoples of the world, their problems and aspirations which will be needed by present-day students to become well-balanced and socially effective adults.[46]

Although the above report is more than twenty years old, the authors' conclusions are still timely, particularly since the importance of fostering international attitudes is arguably more urgent today than twenty years ago. Current education experts remain concerned: "While the need for global and international studies education is generally accepted, there is no agreement as to what it means, or how this need can be implemented in our nation's schools."[47] To provide an effective solution to this continual dilemma, our

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46. BUERGENTHAL & TORNEY, *supra* note 41, at 122-23.

47. Andrew Smith, *A Brief History of Pre-Collegiate Global and International Studies Education, in* EDUCATION FOR AMERICA'S ROLE IN WORLD AFFAIRS 1, 17 (John Fonte & Andre Ryerson eds., 1994). *Cf.* THE TEACHING OF CONTEMPORARY WORLD ISSUES (UNESCO & World Confederation of Organizations of the Teaching Profession eds., 1986) (furnishing ideas from a number of educators from different countries addressing such major issues as peace, human rights, and international understanding and cooperation); Rudolf Pfeifer, *Main Themes of the UNESCO Recommendation, in* TEACHING FOR INTERNATIONAL UNDERSTANDING, PEACE

federal government should encourage U.S. state legislatures to pass social studies curriculum statutes that mandate teaching worldism at the primary and secondary school level or, otherwise, accept the limitations of the status quo.

B. *The Status Quo in the Absence of Primary and Secondary School Teaching*

Failing to teach worldism at the primary and secondary school level and thereby depriving future generations of a better awareness of the history, structure, and laws of international and regional organizations will perpetuate a status quo among the current adult population that neither appreciates nor understands the benefits and efficiencies of greater U.S. participation in and respect for the organizations and the laws at the regional and global level. This status quo sanctions disregard for (and sometimes ignorance about) these organizations and laws by U.S. judicial, legislative, and executive branches of government in their public sector work, even while the private sector already recognizes these benefits and efficiencies to some degree.[48]

1. *The Judiciary*

Many federal and state courts either do not know how and when to refer to international law or consider it unimportant. Judicial opinions reflect more than a simple lack of understanding about international law (a deficiency which an introductory course taken by judges or their clerks in law school would have corrected). An attitude that legal sources outside the realm of the federal and state constitutions and statutes are secondary and unimportant law (if even law at all) combined with a deference to public policy permits a seeming lack of good sense in these courts' reasoning.

In *United States v. Alvarez-Machain*,[49] Chief Justice Rehnquist demonstrated his lack of concern for international law when he opined, with a 6-3 majority, that the Supreme Court had personal jurisdiction over a defendant brought to the United States not pursuant to the procedure set forth

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AND HUMAN RIGHTS 23-30 (Norman J. Graves et al. eds., 1984) (outlining the interrelationship between international efforts aimed at such areas as peace, discrimination, the environment, and education). A worldism course could cover thoroughly the subjects discussed in the latter two UNESCO publications. *See supra* note 4.

48. *See* Paul Beckett & Christopher Rhoads, *Deutsche Bank, Bankers Trust Formalize Deal*, WALL ST. J., Nov. 30, 1998, at A4 (reporting on the largest foreign acquisition of a U.S. bank); Agis Salpukis, *Continental Picks Air Canada Bid for a Merger to End Bankruptcy*, N.Y. TIMES, Nov. 10 1992, at A1 (reporting on the Air Canada-Continental Airlines merger); Barrett Seaman and Ron Stodghill II, *The Daimler-Chrysler Deal: Here Comes the Road Test*, TIME, May 18, 1998, at 66 (discussing "the triumph of the global economy and the end of car companies as national emblems of industrial might.").

49. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

in the binding U.S.-Mexican extradition treaty but by means of forcible abduction undertaken in Mexico by U.S. federal agents. Many legal scholars have criticized the Court's reasoning in this case.[50] First, when analyzing the text of the treaty, Rehnquist failed to apply or even consider Articles 31 to 33 of the Vienna Convention on the Law of Treaties[51] concerning the jurisprudence of treaty interpretation, referring instead to standard domestic statutory interpretation.[52] Second, the Court completely ignored customary international law[53] when it concluded that forcible abduction by the United States was legally permissible because "[t]he Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs."[54] Absent a specific treaty provision, the Supreme Court should have referred to customary international law as the other primary source of law that governs activities between states. Had the Court looked to this source, it would have concluded easily, as did the dissent,[55] that the United States' behavior violated customary international law: the United States used force against the territorial integrity of Mexico and, in the absence of consent from the foreign

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50. *See* Michael J. Glennon, *State-sponsored Abduction: A Comment on* United States v. Alvarez-Machain, 86 AM. J. INT'L. L. 746 (1992); John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on* United States v. Alvarez-Machain, 68 NOTRE DAME L. REV. 723 (1993); Rosemary Rayfuse, *International Abduction and the United States Supreme Court: The Law of the Jungle Reins*, 42 INT'L. & COMP. L. Q. 882 (1993);.

51. *See supra* note 38.

52. *See Alvarez-Machain*, 504 U.S. at 663.

53. *See supra* note 24.

54. *Alvarez-Machain*, 504 U.S. at 663.

55. *See Alvarez-Machain*, 504 U.S. at 670 (stating that the case "involves a violation of the territorial integrity of that other country [i.e., Mexico], with which this country has signed an extradition treaty."); *id.* at 671 (concluding from a "fair reading of the treaty" and "applicable principles of international law" that the Supreme Court should have affirmed the decisions from the federal district and appellate courts).

The dissent continued:

> It is true, as the Court notes, that there is no express promise by either party to refrain from forcible abductions in the territory of the other nation. Relying on that omission, the Court, in effect, concludes that the Treaty merely creates an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self-help whenever they deem force more expeditious than legal process. If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, the options would be equally available because they, too, were not explicitly prohibited by the Treaty.

Id. at 674 (citations omitted); *id.* at 680-681 (citing to international legal scholars such as Oppenheim and Henkin as sources of international law and referring to the "rule against invading the territorial integrity of a treaty partner."); *id.* at 682 (calling the abduction a "flagrant violation of international law" and supporting this position with a note discussing customary international law).

government, violated Mexico's sovereignty. Moreover, the United States committed a criminal act: kidnapping is prohibited under both U.S. and Mexican penal law. The Court demonstrated a general lack of awareness of and an attitude against the importance of international law in order to deliver an opinion that accorded with public policy and that condoned kidnapping.[56]

Lower court opinions illustrate similar disregard for international and regional law. The Eleventh Circuit once held that the President, acting directly or acting indirectly through his cabinet, has the power to "disregard international law in service of domestic needs[.]"[57] Therefore, in the instant case, the Attorney General's controlling act—"termination of the status review plan and [the] decision to incarcerate [unadmitted Cuban aliens] indefinitely[,] pending efforts to deport"—could constitute "a sufficient basis for affirming the trial court's finding that international law does not control."[58] In *Sei Fujii v. California*, the California Supreme Court discriminately struck down the California District Court's application of U.N. Charter provisions in an alien land discrimination case while simultaneously upholding the lower court's ruling:

> [nothing in U.N. Charter] . . . indicate[s] that these provisions were intended to become rules of law for the courts of this country upon the ratification of the Charter.
>
> The language used in Articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals. . . .
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> . . . .
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> [Articles 55 and 56] lack the mandatory quality and definiteness which would indicate an intent to create

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56. Compare the recent opinion of the United Kingdom's House of Lords (that nation's highest court) over granting diplomatic immunity to General Pinochet of Chile: the majority, as well as the minority, looked heavily to many different sources of international law in reaching its holding that Pinochet should not be granted diplomatic immunity because actions like genocide, torture and hostage-taking are not within the range of normal activities for a head of state. Regina v. Bartle *and the Commissioner of Police for the Metropolis and others, ex parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division);* Regina v. Evans *and another and the Commissioner of Police for the Metropolis and others, ex parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division).* Text of decisionavailable athttp://www.parliament.the-stationary-office.co.uk/pa/ld199899/ldjudgmt/jd981125/pino01.htm>.

57. Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Cir. 1986), *cert. denied*, 479 U.S. 889 (1986).

58. *Id. But see* Richard Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 75 n. 150 (1990) (quoting Louis Henkin for the proposition that such a principle of serving domestic needs does not exist).

> justiciable rights in private persons immediately upon ratification.[59]

The California Supreme Court completely ignored that the U.S. Constitution, through its Supremacy Clause in Article VI, *does* intend to make the provisions of the U.N. Charter "rules of law for the courts of this country upon the ratification of the Charter"[60] just like any other treaty obligation in this country. Nevertheless, U.S. courts continue to follow *Sei Fujii*.[61]

This judicial immunity from international and regional law seems to have occurred only in the last fifty years when U.S. courts have had to witness the evolution of international and regional organizations and to face these institutions' growing legal authority. Consider the position of the Supreme Court at the turn of the last century: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . ."[62] Justice O'Connor recently spoke of the need for federal and state courts to return to this trend:

> By negotiating and approving treaties and agreements which create transnational tribunals and prescribe their relationship with our domestic courts, the political branches of our government are asking the judiciary to not abstain from its usual adjudicatory function. They are ascribing a role for the courts in these specified areas of international relations. . . . Just as state courts are expected to follow the dictates of the Constitution and federal statutes, I think domestic courts should faithfully recognize the obligations imposed by international law.[63]

That the current judiciary often refuses to uphold international and regional law in its decision-making indicates a lack of respect for the legitimacy of international and regional institutions and their laws that best serves public policy and the citizenry. Were teaching of worldism mandatory, the U.S. population would demand from their courts an interpretation of the law that properly incorporates these regional and international authorities.

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59. Sei Fujii v. California, 242 P.2d 617, 621-22 (Cal. 1952).

60. *Sei Fujii*, 242 P.2d at 621.

61. *See* THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 312-315 (2d. ed. 1995).

62. The Paquete Habana, 175 U.S. 677, 700 (1900).

63. Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 40-42 (1995-96).

2. *The Legislature*

In addition to examining the judiciary's recalcitrance, consider several recent activities in the United States Congress—arguably the most representative branch of government—where the words and deeds of its members reflect the current position of its constituents toward international legal obligations. The Senate has not ratified those international human rights agreements that the President, pursuant to Article II of the Constitution, has signed, thereby "maintaining [the U.S.] custom of generally leading multilateral efforts to draft international human rights instruments, and then allowing them to languish on the U.S. political agenda."[64]

In November 1995, former Senator Bob Dole introduced the World Trade Organization ("WTO") Dispute Settlement Review Commission Act[65] ("WTO Act") as part of the implementing legislation for the long awaited General Agreement on Tariffs and Trade ("GATT") completed in 1994. The WTO Act would have established a five-member panel of U.S. federal circuit judges[66] to review decisions[67] from the dispute-settlement panels[68] and the Appellate Body[69] to advise whether the United States would have to follow the decision;[70] the panel would review such decisions only if the United States appeared as a defendant and the decision was adverse to the United States or the United States appeared as a complaining party and the United States Trade Representative requested the review.[71] In essence, the WTO Act insured U.S. judicial sovereignty over a binding ruling from an international judicial body. The presumptiveness of the WTO Act would be tantamount to the New York state legislature's passage of a law granting to the New York Court of Appeals a right to review U.S. Supreme Court decisions that adversely impacted the State of New York in order to determine whether the State of New York really should follow such rulings. Although former Senator Dole's measure died in

64. James E. Dorsey, *International Human Rights*, 31 INT'L LAW. 659, 665 (1997). In addition to the human rights treaties mentioned *infra*, the list also includes the Convention on the Elimination of All Forms of Discrimination Against Women.

65. S. 1438, 104th Cong. (1995) The counterpart House bill was H.R. 1434, 104th Cong. (1995).

66. S. 1438, § 3(b)(1).

67. *See Understanding on Rules and Procedures Governing the Settlement of Disputes* (Understanding), Annex 2 to *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts, G.A.T.T.*, 1994 (WTO Agreement), *reprinted in* ERNST-ULRICH PETERSMANN, THE G.A.T.T. / W.T.O. DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT, art. 19, at 319 (1997)[hereinafter Understanding]. Section 101(d)(16) of the WTO Agreement makes the Understanding an "integral part of this [WTO] Agreement, binding on all Members." *Id.* at 177.

68. *See id.* art. 6, at 296-97.

69. *See id.* art. 17.1, at 303.

70. *See* S. 1438, § 4(a)(1).

71. *See id.*

committee,[72] his and other Congressional members' comments at the time that he introduced the bill demonstrate the strong legislative commitment to protecting U.S. sovereignty.[73]

More recently, partisan politics over abortion and concern for the lack of accountability and administrative efficiency plaguing the U.N. Secretariat kept the House of Representatives from allocating sufficient funds to pay in full both U.S. membership dues and arrearages to the United Nations.[74] Consequently, the United States remains in violation of Article 17(2) of the U.N. Charter and on the verge of losing its General Assembly vote.[75] Yet, in a contractual sense, a U.S. promise to pay membership dues operates independently of the United Nation's promise to spend and operate with efficiency and accountability; instead of taking the unlawful step of withholding dues, the United States should take the lawful steps of using its Security Council veto power, General Assembly voting power, and general coalition building tactics to hold the Secretariat and other bodies more accountable and to streamline the spending practices of the organization and its specialized agencies.

Whether addressing human rights, international trade, or U.N. Charter obligations, Congressional reaction to the structure and laws of regional and international organizations echoes a voice from the average U.S. citizen who favors ignoring or, at least, weakening participation in and obligations from organizations and laws at the regional and international level.

3. *The Executive*

Like congressionally-initiated activity, executive branch efforts

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72. *See* CCH Congressional Index 1995-1996 at 21 (concerning S. 1438) and 33 (concerning H.R. 1434).

73. *See generally*, Matthew Schaefer, *National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance*, 11 ST. JOHN'S J. LEGAL COMMENT. 307, 341-49 (1996)(providing a brief history of the Dole Bill and its underlying theories).

74. *See* Foreign Affairs Reform and Restructuring Act of 1998 (Enrolled Bill), H.R. 1757, 105th Cong. (1998) ("Bill"). Although § 2301 of the Bill appropriated money ($1 billion for fiscal year 1998; $475 million for fiscal year 1999; $244 million for fiscal year 2000) to the U.S. Department of State to pay almost all of the United States' membership dues and arrearages for the United Nations, its peacekeeping efforts, and its specialized agencies, President Clinton vetoed the Bill because § 1816, the result of a Republican Party-sponsored partisan amendment, prohibited the availability of such appropriations for any population assistance funds of any non-governmental organization, private organization, or multilateral organization (including the United Nations and its specialized agencies) that performed, counseled, or lobbied for abortions except in the case of rape, incest, or the endangerment of the life of the mother.

75. *See Department of State, International Organizations and Peacekeeping, Hearings Before the Subcomm. on Depts' of Commerce, Justice, State and the Judiciary Appropriations of the House Comm. on Appropriations*, 105th Cong. 307-361 (1998).

demonstrate an attitude of isolationism and sovereignty protection. Since 1984, the United States remains dissociated from UNESCO[76] despite that organization's subsequent correction of the grounds that the United States originally cited when it withdrew.[77] The executive branch has not taken any steps to change this status.

In addition to its continued absence from UNESCO, the Clinton Administration recently decided to join China, Iran, Iraq, Israel, Libya and Yemen (and to break from the position of European and Canadian allies) in not signing the Rome Convention to establish a permanent United Nations International Criminal Court ("ICC") to adjudicate crimes against humanity (e.g., genocide, war crimes).[78] After the executive branch reported this opposition vote to the Senate Foreign Relations Subcommittee on Operations in a July 1998 hearing, the Senate fervently proclaimed its opposition to the ICC, its support of U.S. sovereignty, and its commitment to block the ratification of the Convention by other nations.[79] The executive and legislative branches primarily oppose the ICC out of concern that U.S. service

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76. *See The Activities of UNESCO Since the U.S. Withdrawal*, U.S. Department of State Publication No. 9771 at 1-2 (1990); *United Nations—Financial Issues and U.S. Arrears*, General Accounting Office Publication No. NSIAD-98-201BR (1998) <http://www.access.gpo.gov/cgi-bin/getdoc.cgi?dbname= gao&docid=f:ns98201b.txt>.

77. *See* John E. Noyes ed., THE UNITED NATIONS AT FIFTY: PROPOSALS FOR IMPROVING ITS EFFECTIVENESS 134-41 (1997).

78. *See Is a U. N. International Criminal Court in the U. S. National Interest?: Hearings Before the Subcomm. on International Operations*, 105th Cong., 26-32 (statement of the Honorable David J. Scheffer, Ambassador-at-Large for War Crime Issues) (forthcoming 1999 for July 23, 1998 hearing) [hereinafter *International Operations*].

79. *See id.* at 7, where Senator Gramm states:

> Now, we must affirm that the United States will not cede its sovereignty to an institution which claims to have the power to override the United States legal system and to pass judgment on our foreign policy actions. . . . The only fail-safe way to ensure these results is to make sure that this treaty never is ratified by the 60 nations necessary for it to go into force. Should this court come into existence, we must have a firm policy of total non-cooperation, no funding, no acceptance of its jurisdiction, no acknowledgment of its rulings, and absolutely not referral of cases by the Security Council.

See id. at 16-17, where Senator Helms states:

> [W]e must . . . I think be aggressively opposed to this court. . . . So long as there is breath in me, the United States will never—and I repeat never, never—allow its national security decision to be judged by an international criminal court. . . . It is an outrage that will have grave consequences for our bilateral relations with every one of the countries that signs and ratifies this treaty, and they better understand this at the outset.

See id. at 21-22, where Senator Ashcroft states:

> The international criminal court in my judgment represents a clear and continuing threat to the national interests of the United States despite our decision not to participate. . . No aspect of the court is more troubling, though, than the fact that it has been framed without any apparent respect for and indeed in direct contravention of the United States Constitution.

men and women and U.S. government decisionmakers would surrender substantial due process rights if tried for allegedly committing a crime against humanity before an international judicial body comprising, at least in part, foreign judges rather than before domestic civilian and military courts of solely U.S. judges.[80] However, as questions and comments from the Senate hearing confirmed, the risk of an unfair or unjust trial before the ICC, let alone a trial at all, does not realistically exist.[81] Overall, opposition to the formation of the ICC in order to protect U.S. sovereignty depicts international law and its institutions as an unknown "other" that is anathema to U.S. foreign policy and legal interests:[82] such ignorance from present elected U.S. officials deepens the need for incorporating worldism into the schooling of future elected U.S. officials and future voter-constituents.

Finally, in the area of human rights, despite the Senate's recent adoption of the International Covenant on Civil and Political Rights ("ICCPR") and the U.S. Department of State's efforts to obtain ratification of the other international human rights instruments discussed above, the White House has not sought Senate confirmation on international and regional human rights instruments that grant U.S. citizens a right of individual petition against the U.S. government. Instead, the executive branch continues to protect the sovereignty of administrative and judicial legal decisions and to uphold the jurisprudence of the Eleventh Amendment. At the international level, the Optional Protocol to the ICCPR ("Optional Protocol")[83] provides a right of

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80. *See id.* at 7 (quoting Senator Gramm as stating, "We must refuse to allow our soldiers and Government officials to be exposed to trial for promoting the national security interests of the United States and deny the international court's self-declared right to investigate, prosecute, convict and punish U.S. citizens for supposed crimes committed on American soil which is arguably unconstitutional."); *see id.* at 15 (Senator Helms stating that "In short, this treaty represents a very real threat to our military personnel . . . ."); *see also id.* at 22-23 (quoting Senator Ashcroft as stating that "First and foremost, I remain concerned by the possibility that Americans could be dragged before this court and denied the protection of the Bill of Rights . . . .").

81. *See id.* at 41-42 (quoting Senator Feinstein as asking how realistic an unfair prosecution against an individual U.S. soldier or the United States would be in light of all of the Rome Convention's safeguards); *see id.* (quoting Professor Scharf as explaining that five levels of protection exist against politically frivolous suits brought in the I.C.C. against the United States or any of its government or military personnel).

82. *See id.* at 2-3 (quoting Senator Gramm as stating that "[T]he proposed I.C.C. is not part of the international system. It sits alone and above the system, and that is by design . . . ."); *see id.* at 14 (quoting Senator Helms as stating that "the Rome treaty is irreparably flawed."); *see id.* at 21 (quoting Senator Ashcroft as stating that "[t]he international criminal court in my judgment represents a clear and continuing threat to the national security interest of the United States despite our decision not to participate.").

83. International Covenant on Civil and Political Rights, December 16, 1966, Optional Protocol, 999 U.N.T.S. 171(1967), *reprinted in* SELECTED DOCUMENTS, *supra* note 13, at 373 [hereinafter Optional Protocol].

individual petition for guarantees in the ICCPR[84] Although the United States recently ratified the ICCPR, the United States is not a party to the Optional Protocol. At the regional level, Article 44 of the American Convention on Human Rights ("American Convention") provides a similar right of individual petition at the regional level by allowing "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization [of American States], [to] . . . lodge petitions with the [Inter-American] Commission containing denunciations or complaints of violation of this [American] Convention by a State Party"[85] and, ultimately, to receive a decision from the Inter-American Court of Human Rights. As with the Optional Protocol, the United States is not a party to the American Convention.[86]

Given the conclusions from the Buergenthal and Torney study, resistance and inactivity on the part of the courthouses, the Capitol, and the Cabinet merely replay the general lack of respect for the legitimacy of the history, structure, and laws of international and regional organizations among the U.S. population. Mandatory teaching of worldism at the primary and secondary school levels is the key to changing this status quo: "[W]e are presently educating children who will, by their actions as adult citizens . . . determine the shapes of law and the administration of justice, social and political institutions, and whether a state of war or peace will prevail."[87] With that much potential power, children today must receive more formal instruction in worldism than U.S. state curriculum statutes currently mandate.

IV. WHAT CHANGES TO U.S. EDUCATION LAWS NEED TO OCCUR?

If the United States accepts the premise that primary and secondary schools should teach worldism, then the responsibility for change rests primarily with three parties: U.S. state legislatures need to change curriculum statutes; U.S. state education departments need to promulgate new rules and regulations to implement such changed statutes; and local school boards need to develop the details of such curricula and oversee their administration. Efforts must start at the legislative level because statutory mandates are the only effective way to guarantee that schools adequately teach worldism,

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84. International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171, *reprinted in* SELECTED DOCUMENTS, *supra* note 13, at 357.

85. American Convention on Human Rights, November 22, 1969, art. 44, 9 I.L.M. 673 (1970), *reprinted in* SELECTED DOCUMENTS, *supra* note 13, at 463; *see also* arts. 34-51, *supra* note 13, at 461-466 (regarding the Inter-American Commission of Human Rights)[hereinafter American Convention].

86. *See id.* at 451.

87. BUERGENTHAL & TORNEY, *supra* note 41, at 115. Although the quote referred to children of the 1980s, the conclusion remains true today.

properly train teachers, and sufficiently allocate their federal, state, and local funds. "Without adequate funding, piecemeal low budget efforts are likely to continue for the forseeable future similar to the type of efforts pursued in the past."[88] Although non-profit education organizations in the United States aim to increase worldism teaching efforts, they have not yet focused on lobbying for legislative change.[89]

Current curriculum statutes, regulations, and standards in each of the fifty states, territories, and abroad (i.e., U.S. Department of Defense schools) do not require schools to cover worldism for a child to complete primary and secondary school.[90] Local school boards, administrators and teachers often incorporate aspects of the United Nations, multilateralism, and human rights into world history and post-Cold War studies courses.[91] However, the only

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88. Smith, *supra* note 47, at 17.

89. Recent efforts undertaken by the National Council on Social Studies, the Council of Chief State School Officers, the Stanford Program on International and Cross-Cultural Education, and other similar non-profits include: (1) encompassing primary as well as secondary schools; (2) drafting standards; (3) educating teachers; (4) establishing state level international studies center; (5) obtaining state level legislative support; and (6) expanding in the direction of telecommunication. Paul Haakenson, *Recent Trends in Global/International Education*, ERIC DIGEST 1 (1994). Even with all of these positive developments, none lobbies for legislative change to make worldism a required course. Moreover, the global and international education that these efforts envision fall short of the depth and breadth of federal, state, and local civics classes:

> For over 25 years, the field of global/international education has attempted to develop a rationale and resources to support educators who make explorations of the world and its peoples a part of their curriculum. Many educators have written that in order to be fully prepared for the complexities of the 21st century, young people should be imbued with a global perspective. Attaining this world view may involve several approaches, including the study of cultures, languages, international issues, responsible citizenship in an interdependent world, and global connections within local communities.

Id.

90. Although not yet incorporated into the Wisconsin statutes as a mandated class, the social studies performance standards for political science and citizenship from the Wisconsin Department of Public Instruction include components of worldism. *See State of Wisconsin Dept. of Public Instruction–Wisconsin Model Academic Standards* <http://www.dpi.state.wi.us/dpi/standards/ssc8.html>. The standards require students by the eighth grade to describe the role of international organizations such as military alliances and trade associations and require students by the twelfth grade to explain the United States role in international organizations such as the United Nations, North American Treaty Alliance, the World Bank, the International Monetary Fund, and the North American Free Trade Agreement. *See id.*

91. *See* Susan Graseck, *Teaching Foreign Policy in the Post-Cold War Era*, ERIC DIGEST (1993) (discussing the need for U.S. students to develop an understanding of the issues shaping international relations); John Douglas Hoge & Rodney F. Allen, *Teaching About Our World Community: Guidelines and Resources*, *in* SOCIAL STUDIES AND THE YOUNG LEARNER (1991)(discussing how to teach students about other cultures and countries); John J. Patrick, *Global Trends in Civic Education for Democracy*, ERIC DIGEST (1997) (discussing how "[t]eachers are requiring students to compare institutions of constitutional democracy in their own country with insitutions in other democracies of the contemporary world . . . [in an effort]

components of social studies curricula that state statutes actually *require* include (1) the history of the United States and, often, the history of the student's state of residence; (2) the organization of the United States government and, often, the organization of the student's state government, local government, or both; and (3) aspects of civil and criminal law at the federal, state, and local levels.[92] The absence of required classes concerning worldism sends a message to children, parents, teachers, and the community that the history, structure, and laws of international and regional organizations simply are not as important or as legitimate as the history, structure, and laws of federal, state, and local organizations. Unless students elect to enroll in a course on the subject or one of their teachers opts to cover aspects of worldism, those students may graduate high school not knowing that the U.N. and the OAS exist, and not understanding the concepts of a treaty or a resolution. Lacking such a background by the time one becomes a voting citizen and working adult affects the ability of this nation as a whole to advance the cause of international law, develop the efficiency of international and regional organizations, and know the advantages in citizens' daily lives for having done so.[93]

Recent changes to education statutes in the states of Florida, Nebraska, and California to require aspects of multiculturalism in social studies curricula provide a model for similar statutory changes that might be made to mandate worldism. Florida statutes, entitled "Required instruction", set forth mandatory curriculum requirements for all Florida public schools.[94] In 1994, the legislature supplemented the statutes to incorporate teaching about the Holocaust[95] and about the history of African-Americans in the United States and the State of Florida before, during, and after slavery.[96] In 1998, the legislature added subsections to incorporate, respectively, the study of the contributions of Hispanics[97] and the contributions of women[98] to the history of the United States.

The State of Nebraska added five statutes in 1992 to provide for multicultural education in its schools. The first provision defines multicultural education.[99] The second requires the development and

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to diminish ethnocentrism."). December 20, 1999 Efforts discussed in these position papers do not fully encompass teaching about international and regional institutions—their history, structure, and laws—but focus instead on nation-states in the global community, whether the United States or another country.

92. *See* statutory provisions cited *supra* note 9.

93. *See supra* text accompanying notes 30 and 31.

94. FLA. STAT. ANN. § 233.061 (West 1998).

95. 1994 Fla. Sess. Law Serv., ch. 94-114, § 1 (West).

96. 1994 Fla. Sess. Law Serv., ch. 94-225, § 1(West).

97. 1998 Fla. Sess. Law Serv., ch. 98-229, § 1 (West).

98. 1998 Fla. Sess. Law Serv., ch. 98-421, § 2 (West).

99. NEB. REV. STAT. § 79-719 (1996).

incorporation of multicultural education into the curriculum of kindergarten through twelfth grade (K-12).[100] The third statute sets forth the duty of school districts to provide evidence of such development and incorporation in order to retain accreditation status.[101] The fourth provision prescribes that the State Department of Education design a process to evaluate the implementation and effectiveness of each multicultural education program.[102] Finally, the fifth statute authorizes the State Department of Education to adopt and promulgate rules and regulations to carry out the new statutory provisions.[103] In addition to legislative changes, the Nebraska Department of Education passed rules, effective October 11, 1993, implementing the legislature's new multicultural education program.[104] Today, Nebraska students in grades K-12 complete one multicultural education component for each year of study.

Providing a third example, the State of California amended the social studies curriculum of its education laws to include aspects of multiculturalism.[105] In 1992, the legislature expanded the human rights component of the seventh through twelfth grade social studies curriculum to include explicitly the study of U.S. slavery and the Holocaust.[106] In 1993, the

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100. NEB. REV. STAT. § 79-720 (1996).

101. NEB. REV. STAT. § 79-721 (1996).

102. NEB. REV. STAT. § 79-722 (1996).

103. NEB. REV. STAT. § 79-723 (1996).

104. NEB. ADMIN. R. & REGS., tit. 92, c. 16.

105. For grades one to six the curriculum covers six subjects: the history, resources, development, and government of California and the United States; the development of the American economic system; the relations of persons to the natural environment; eastern and western cultures; human rights issues; and use of natural resources. CAL. EDUC. CODE § 51210(c) (West 1998). For grades seven to twelve, the curriculum also covers six subjects: the history, resources, development, and government of California and the United States; the American legal system, the juvenile and adult criminal justice systems, and the rights and duties of citizens under civil and criminal law and the state and federal constitutions; the development of the American economic system; the relations of persons to the natural environment; eastern and western cultures; and human rights issues, particularly genocide, slavery, the Holocaust and contemporary issues. CAL. EDUC. CODE § 51220(b) (West 1998). Moreover, to graduate from high school, the state requires at a minimum the completion of three social studies courses that cover (1) the history and geography of the United States, (2) the history, culture and geography of the world, (3) the government and civics of the United States and (4) economics. CAL. EDUC. CODE § 51225.3(a)(1)(D) (West 1998).

106. Section 1 of Assembly Bill No. 3216 (1991-1992 Regular Session) amended Section 51220(b) of the Education Code to read "human rights issues, with particular attention to the study of the inhumanity of genocide, slavery, and the Holocaust, and contemporary issues" and added Section 51226.3 in its entirety in order to detail curriculum frameworks primarily at the high school level that would cover these new areas. As evidence of the legislature's intent for changing the law, the Legislative Counsel's Digest states:

> Existing law prescribes the adopted course of study for grades 7 to 12, inclusive, including a course in social sciences that is required to include instruction in human rights issues.
>
> This bill would require that this instruction include study of slavery and the Holocaust, thereby imposing a state-mandated local program.

legislature changed the wording of the social studies curriculum component concerning the environment from gender specific to gender neutral, which, in effect, resulted in the addition of women's studies to the curriculum.[107]

V. CONCLUSION

Just as history classes need multiculturalism to provide students with an accurate telling of the past, so government classes need worldism to provide students with an accurate telling of the present as well as the future.

> International law is law like other law, promoting order, guiding, restraining, regulating behavior. States, the principal addressees of international law, treat it as law, consider themselves bound by it, attend to it with a sense of legal obligation and with concern for the consequences of violation. Some states refer to international law in their constitutions; many incorporate it into their domestic legal systems; all take account of it in their governmental institutional arrangements and in their international relations.[108]

Despite this statement, the enforceability of the international legal system remains "in a rough and rudimentary form"[109] in contrast to the enforceability of U.S. federal, state and local law. For the most part, U.S. citizens and their governing bodies do not show the same respect for the legitimacy of international law and its institutions as for the legitimacy of domestic law and its institutions.

This Article has demonstrated not only that a change in attitude must

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> This bill also would require the State Department of Education to incorporate, into publications that provide examples of curriculum resources for teacher use, those materials developed by private sources that are age-appropriate and consistent with the subject frameworks on history and social science that deal with human rights violations, genocide, slavery, and the Holocaust.

CAL. EDUC. CODE § 51226.3 (West 1998).

The bill went through three amendments since its February 20, 1992 introduction. The first two occurred in the Assembly on April 6, 1992 and May 11, 1992 and focused only on genocide and the Holocaust; the third took place in the Senate on August 17, 1992 and added slavery to the expanded human rights list. *Id.*

107. Section 47 of Assembly Bill 2211 (1992-1993 Regular Session) changed "man's relations to his human and natural environment" to "the relationship of humans to their natural environment," thus ensuring that women's relations as well as men's relations would be studied.

108. RESTATEMENT (THIRD), *supra* note 24, at 17.

109. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 M.L.R. 1 (1956), *cited in* D.J. HARRIS, CASES AND MATERIALS OF INTERNATIONAL LAW 6 (3d ed. 1983).

occur, but that to be most effective, such change must originate with the social studies curriculum statutes that govern U.S. schools throughout the fifty states and overseas. The teaching of worldism—that is, the history, structure, and law of international and regional institutions—in the educational institutions of this country cannot be limited to merely a specialization for lawyers and law students, a concentration for undergraduate and graduate students or an elective for high school seniors. It must become part of the basic primary and secondary school curriculum in order to raise awareness among the general U.S. population to a level that will tolerate, permit, and hopefully even demand the strengthening of international and regional law at the domestic level. Such strengthening will ready the United States for the global realities of the new millennium.

WHY COME TO TRAINING CAMP OUT OF SHAPE WHEN YOU CAN WORK OUT IN THE OFF-SEASON AND LOWER YOUR TAXES: THE TAXATION OF PROFESSIONAL ATHLETES

I. INTRODUCTION

Professional athletics have long been a part of North American culture. Throughout the United States and Canada, fans have been attending sporting events in the four major sports[1] for decades. However, when your favorite team loses on a last second goal by the opposing team's star player, fans can take comfort in the fact that the opposing player will be paying the price for his success back to the fan in the form of taxes.[2]

With the increase in players' salaries over the past couple of decades, the "jock tax"[3] has been an increasingly popular measure among taxing jurisdictions as an attempt to apply income taxes to the salaries of visiting professional baseball, basketball, hockey, and football players.[4] In addition,

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1. For purposes of this Note, the four major sports include: baseball, basketball, hockey, and football.

2. *See* Larry Williams & Sean Horgan, *From Rock Icon to Ice King, State Wants Taxes From the Stars*, THE HARTFORD COURANT, Aug. 17, 1995, at A1.

3. The jock tax refers to the "concept of multiple income taxation of professional athletes ...." Elizabeth C. Ekmekjian, *The Jock Tax: State and Local Income Taxation of Professional Athletes*, 4 SETON HALL J. SPORT L. 229, 230 (1994).

4. *See* Karen Pierog, *Players on Both Sides Take a Look at the Jock Tax Contest: Taxes on Salaries of Professional Athletes*, THE BOND BUYER, Aug. 14, 1992, at 5. Reasons why athletes are being singled out for taxation include:

> 1) [t]heir earnings have risen rapidly over the past decade[;] 2) [i]t usually is easy to determine when these well-known athletes are present in a particular taxing jurisdiction[;] 3) [t]here is firm constitutional authority for imposing taxes on athletes who perform in jurisdictions outside their home states[;] 4) [f]or most jurisdictions, imposition of the tax does not require new statutory authority[;] 5) [a]s nonresidents, the athletes cannot express their displeasure in the voting booth[; and] 6) [t]he athletes cannot respond by avoiding the taxing jurisdiction, since the sites at which they play are determined for them. These factors, coupled with the increased fiscal pressures faced by many state and local governments, have led to increased enforcement against athletes of nonresident tax laws that in most instances have been on the books for many years.

Robert Plattner, *FTA Recommendations on Taxing Nonresident Athletes Could Have Wider Application*, 5 J. MULTISTATE TAX'N 36, 36 (1995).

The jock tax has become a selective tax because states that tax nonresident athletes often do not tax other individuals who have greater contacts with the state. *See* Ekmekjian, *supra* note 3, at 244; Tim Novak, *Tax Penalty for Traveling*, CHI. SUN-TIMES, Mar. 23, 1997, at 21; Earl C. Gottschalk Jr., *Welcome, Traveler: Some States and Cities With Income Taxes Go After Rich Visitors*, WALL ST. J., Apr. 15, 1993, at A1. *See generally* James Overstreet, *Good News*

baseball,[5] basketball,[6] and hockey[7] also have franchises in Canada. Therefore, the athletes who participate in these sports end up paying income tax to Canada on both the federal and provincial levels as well as to the United States. Taxation in the United States is assessed at the federal, state, and local levels. The tax policy is nearly a century old, but it has not been practiced very much until recently when the salaries of professional athletes began to soar.[8]

The focus of this Note is on the allocation methods used to determine the tax liability professional athletes face in the different tax jurisdictions in which they perform and how athletes can work with these allocation methods to ease some of their tax burden. Part II focuses on residency requirements used to determine whether the athlete is a resident of the United States or Canada for tax purposes as well as residency requirements within the states themselves which are used to determine how the athletes are taxed. Part II also discusses the assessment of income taxes in both Canada and the United States. Part III focuses on the different allocation methods which have been used in the past to allocate the income tax owed to Revenue Canada,[9] and the United States on the federal, state, and local levels. Part IV focuses on planning tools the athlete can utilize in the form of contract negotiation in order to use the allocation methods to the athlete's advantage and thus decrease the athlete's nonresident income tax liability.

II. RESIDENCY AND TAXATION

A. *Canadian Residency*

For any taxpayer, the place of residence determines tax rates and which taxing authority has jurisdiction. "The term 'resident' is not defined in the

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for Oilers Players and Their Opponents: No Tennessee Taxes, MEM. BUS. J., Sept. 29, 1997, at 1 (discussing selective enforcement of taxation on athletes using the illustration that Federal Express pilots are not being taxed when they land at the airport in a nonresident taxing jurisdiction).

5. Baseball's franchises in Canada include the American League's Toronto Blue Jays and the National League's Montreal Expos. *See ESPN.com: Major League Baseball Standings* (visited Oct. 29, 1998) <http://ESPN.SportsZone.com/mlb/standings/>.

6. Basketball's franchises in Canada include the Toronto Raptors and the Vancouver Grizzlies. *See ESPN.com: NBA Standings* (visited Oct. 29, 1998) <http://ESPN.SportsZone.com/nba/standings/index.html>.

7. Hockey's franchises in Canada include: the Montreal Canadiens, the Toronto Maple Leafs, the Calgary Flames, the Edmonton Oilers, the Vancouver Canucks, and the Ottawa Senators. *See ESPN.com: NHL Standings* (visited Oct. 29, 1998) <http://ESPN.SportsZone.com/nhl/standings/>.

8. *See* Overstreet, *supra* note 4, at 1.

9. Revenue Canada is Canada's equivalent of the United States Internal Revenue Service (IRS).

Income Tax Act" in Canada.[10] In Canada, residents are liable for income tax on their world income.[11] Nonresidents are liable for tax on their Canadian-source income[12] from employment, carrying on of a business, and disposition of taxable capital property.[13] In Canada, residency is determined in one of four ways: full-time resident, ordinarily resident, deemed resident, or part-time resident.[14]

1. *Full-Time Resident*

The first method used to determine whether an athlete may be considered a resident of Canada is based on the idea of "full-time" residency. Full-time residency is determined by examining whether there were residential ties within Canada.[15]

Leading case law has established that residence is a "continuing state of relationship between a person and a place which arises from the durable concurrence of a number of circumstances."[16] Considerations for determining a "continuing state of relationship" include: the maintenance of a dwelling suitable for year round occupancy,[17] the fact that a spouse or dependent

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10. Revenue Canada, *Determination of an Individual's Residence Status*, IT-221R2, Feb. 25, 1983 as amended by Feb. 20, 1991 (visited Nov. 4, 1998) <http://www.rc.gc.ca/ E/pub/tp/ i221r2et/i221r2e.txt.html> [hereinafter IT-221R2]. "The Courts have held that an individual is resident in Canada for tax purposes if Canada is the place where he, in the settled routine of his life, regularly, normally or customarily lives. In making this determination, all of the relevant facts in each case must be considered." *Id.*

11. *See* Income Tax Act, R.S.C. 1952, c.148, as am. S.C. 1970-71-72, c. 63 and subsequently Part I § 2(1) (Can.) (1996); DELOITTE AND TOUCHE L.L.P. CANADA 14.01 RESIDENCE AND NONRESIDENCE, PART 7 INCOME TAXES ON INDIVIDUALS, CH. 14 COMPUTATION OF PERSONAL INCOME TAXES [hereinafter DELOITTE AND TOUCHE 14.01]; John Salmas, *Professional Athletes Taxed to Death? Even They Can Strike Out!!!*, 4 SPORTS LAW. J. 255, 256-57 (1997).

12. Source income is defined as the income earned from the place where the services are performed. *See* Jeffrey L. Krasney, *State Income Taxation of Nonresident Professional Athletes*, 2 SPORTS LAW. J. 127, 132 n.19 (1995); DELOITTE AND TOUCHE 14.01, *supra* note 11.

13. *See* DELOITTE AND TOUCHE 14.01, *supra* note 11.

14. *See* Salmas, *supra* note 11, at 257.

15. *See* IT-221R2, *supra* note 10; Salmas, *supra* note 11, at 257.

16. Salmas, *supra* note 11, at 257 (quoting Thomson v. M.N.R., [1946] C.T.C. 52, 2 D.T.C. 812 (S.C.C.) at 816).

17. An individual will generally be considered not to have severed his residential ties with Canada if he maintained property (vacant or otherwise), leased the property at non-arm's length, or leased the property at arm's length with the right to terminate the lease on short notice. *See* IT-221R2, *supra* note 10.

remains in Canada,[18] and the existence of personal property and social ties within Canada.[19]

2. *Ordinarily Resident*

A second method for determining Canadian residency is whether the individual is "ordinarily resident." Case law considering "ordinarily resident" status looks at "an individual's present habits, regularity and length of visits, ties within the jurisdiction and elsewhere, and permanence of [the] stay abroad."[20] Cases have defined ordinarily resident as "the place where in the settled routine of his life, he regularly, normally or customarily lives."[21]

3. *Deemed Resident*

A third method used to determine whether an individual may be considered a resident of Canada for tax purposes is by being deemed resident. "An individual who sojourns[22] . . . in Canada for a total of 183 days or more in any calendar year is deemed by the Income Tax Act to be [a] resident in Canada for the entire year."[23] In addition, "the individual must be a resident of another country during the 183 (or more) days in question."[24]

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18. "An exception to this may occur where an individual and his spouse are legally separated and the individual has permanently severed all other residential ties within Canada." *Id.* If an individual maintains a dwelling in support of someone in Canada, after that individual has left Canada, the individual will not be considered to have severed his residential ties within Canada. *See id.*

19. Examples of this include: "(a) provincial hospitalization and medical insurance coverage, (b) a seasonal residence in Canada, (c) professional or other memberships in Canada . . . , and (d) family allowance payments. *Id.* "Where such ties are retained within Canada, the Department of Revenue may examine the reasons for their retention to determine if these ties are significant enough to conclude that the individual is a continuing resident of Canada while absent. *Id. See generally* Salmas, *supra* note 11, at 257-58 (discussing the example of Paul Molitor, a professional baseball player who was a United States resident, but would also be considered a Canadian resident based on the "full-time" residency determination).

20. Salmas, *supra* note 11, at 258.

21. *Id.* (quoting The Queen v. K.F. Reeder, [1975] C.T.C. 256, 75 D.T.C. 5160).

22. To sojourn means to be temporarily present. *See* IT-221R2, *supra* note 10.

23. *Id. See also* Salmas, *supra* note 11, at 259 (stating that an individual must sojourn in Canada for at least 183 days to be deemed resident).

24. IT-221R2, *supra* note 10. However, if after taking up residency in another country in the first half of a calendar year, the individual returns often enough to have sojourned in Canada for a total of 183 days or more during the calendar while a non-resident, he will be deemed to be a resident in Canada for the entire year. *See id.*

4. *Part-Time Resident*

The final method used to determine whether an individual will be considered a resident of Canada is whether he is determined to be a part-time resident. Where an individual enters Canada, as other than a sojourner, and establishes residential ties with Canada,[25] he will be considered to have become a resident of Canada for tax purposes on the date he entered Canada.[26]

Thus, if the athlete is considered either a full-time resident, ordinarily resident, deemed resident, or part-time resident, he or she will be considered a resident of Canada for tax purposes and is therefore subject to tax on his world income. The athlete's world-wide income is only subject to tax for the actual time in which he was a resident.[27]

B. *Canadian Taxation*

Once an individual has been determined to be a resident of Canada by the Canadian taxing jurisdiction, it is important to determine the tax which will be applied. Generally, Canada taxes the world-wide income of everyone who is a resident of Canada at any time during the year including income that is earned in Canada by nonresidents.[28] The Canadian taxing jurisdiction covers world-wide income from sources both within and without Canada.[29] Nonresidents of Canada are liable for ordinary income tax payable in respect of employment or business income.[30] Professional athletes are considered

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25. For purposes of this Note, an individual who is a citizen of another country but plays for a Canadian-based team would qualify as an individual who enters Canada as someone other than a sojourner. *See generally* Salmas, *supra* note 11, at 260 (discussing the situation of Roberto Alomar and the fact that he would be deemed as a part-time resident therefore not a sojourner).

26. *See* IT-221R2, *supra* note 10.

27. *See* Salmas, *supra* note 11, at 260.

28. *See* 955-2nd, Tax Management Foreign Income Portfolios, Business Operations in Canada, BNA, sec. VI. Principal Taxes para. A. Income Tax, A-22, Oct. 13, 1997. *See also* DELOITTE AND TOUCHE 14.01, *supra* note 11 (stating that individual residents of Canada are liable for income tax on their worldwide income).

29. *See* 955-2nd, Tax Management Foreign Income Portfolios, Business Operations in Canada, BNA, sec. VII. Income taxation para. B. The Canadian tax net 2. The tax base for Canadian residents, A-30, Oct. 13, 1997.

30. *See id.* sec. VII. Income taxation para. B. The Canadian tax net 3. The tax base for nonresidents of Canada, A-30. *See also* DELOITTE AND TOUCHE 14.01, *supra* note 11 (stating that nonresidents are liable on Canadian-source income including income from employment in Canada as well as income from carrying on a business in Canada). In general, business profits earned in Canada by nonresidents are not subject to Canadian income tax unless they were engaged in business in Canada under paragraph 2(3)(b) of the Income Tax Act. *See* Richard G. Tremblay, *Permanent Establishments in Canada*, 2 J. INT'L TAX'N 305, 305 (1992).

engaged in a trade or business.[31] However, if a nonresident is carrying on a business in Canada, he may be exempt from Canadian tax based on the operation of a Canadian bilateral tax treaty.[32] An athlete who is protected by a treaty "is subject to Canadian tax on his business profits only to the extent that these are attributable to a permanent establishment in Canada."[33] Article 16 of the United States-Canada Income Tax Treaty, Artistes and athletes, states that earnings are subject to tax in the country of residence and in the country where the services are performed if gross receipts plus expenses reimbursed to the athlete, and borne on the athlete's behalf, exceed fifteen thousand dollars in the currency of the country of non-residence for the taxable year involved.[34] However, the provisions of Article Sixteen "shall not apply to the income of an athlete in respect of an employment with a team

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31. In Canada, business is broadly defined to include a profession, calling, trade, manufacture, or undertaking of any kind. *See* 955-2nd, Tax Management Foreign Income Portfolios, Business Operations in Canada, BNA, sec. VII. para. B. The Canadian tax net 3. The tax base for nonresidents of Canada a. Business Income, A-30, Oct. 13, 1997.

32. *See id.* at A-31.

33. *Id.*; United States-Canada Income Tax Convention, Article VII Business Profits, Aug. 16, 1984; Double Taxation Taxes on Income and Capital Convention Between the United States of America and Canada, Article VII Business Profits, Aug. 16, 1984, U.S.-Ca., 1984 WL 161896 [hereinafter Double Taxation Convention]. Both the United States-Canada Income Tax Convention and the Double Taxation Convention state:

> business profits of a resident of a Contracting State shall be taxable only in that State unless the resident carries on business in the other Contracting State through a permanent establishment situated therein. If the resident carries on, or has carried on, business as aforesaid, the business profits of the resident may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

United States-Canada Income Tax Convention, art. VII; Double Taxation Convention, art VII. A permanent establishment is defined according to each separate treaty. *See* 955-2nd, Tax Management Foreign Income Portfolios, Business Operations in Canada, BNA, sec. VII. para. B. The Canadian tax net 3. The tax base for nonresidents of Canada a. Business Income, A-30, Oct. 13, 1997.

34. *See* United States-Canada Income Tax Convention, Article XVI Artistes and athletes, Aug. 16, 1984; Double Taxation Convention *supra* note 33, at Article XVI. The United States-Canada Income Tax Convention and the Double Taxation Convention state:

> income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State, except where the amount of the gross receipts derived by such entertainer or athlete, including expenses reimbursed to him or borne on his behalf, from such activities do not exceed fifteen thousand dollars ($15,000) in the currency of that other State for the calendar year concerned.

United States-Canada Income Tax Convention, art. XVI; Double Taxation Convention, art. XVI.

Tax treaties exist for two primary reasons. First, they attempt to prevent the problem of double taxation. *See infra* note 74. Second, treaties help to prevent the evasion of tax responsibility. *See* Debra Dobray & Tim Kreatschman, *Taxation Issues Facing the Foreign Athlete or Entertainer*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 265, 278 (1988).

which participates in a league with regularly scheduled games in both Contracting States."[35]

For professional athletes in Canada, income from employment may include income from: (1) salaries;[36] (2) bonuses;[37] (3) fees;[38] (4) living and travelling expenses; (5) honoraria; (6) payment for time lost from other employment; (7) commuting expenses; (8) free use of automobiles; (9) awards;[39] (10) payments made by a club on a player's behalf that would otherwise be a non-deductible expense incurred by the player;[40] and (11) other benefits.[41] The income tax payable is then determined by applying a percentage rate to the taxpayer's taxable income.[42] The taxable income of the athlete is then subjected to a system of progressive taxation.[43]

In addition to the Canadian federal tax, all Canadian provinces impose income taxes on individuals. In order to simplify collections, however, all provinces except Quebec charge their provincial tax as a fixed percentage of the federal tax payable and the federal government collects the tax from the provinces.[44] These tax rates vary from forty-five and a half percent of the federal tax in Alberta to sixty-nine percent of the federal tax in

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35. United States-Canada Income Tax Convention, *supra* note 33, art. XVI. *See also* Double Taxation Convention, *supra* note 33, art. XVI (stating the same language as the U.S.-Canada Treaty); Paul Weisman & Ronald Rale, *U.S. Taxation of Athletes in U.S. and Abroad*, 1 J. INT'L TAX'N 218, 221 (1990) ("An exemption negates the Article 16 special provision where the athlete is performing services as an employee of a team that participates in a league with regularly scheduled games in both countries.").

36. Salaries also include income from personal service contracts. *See* IT168R3 Athletes and Players Employed by Football, Hockey and Similar Clubs, May 13, 1991 (visited Nov. 4, 1998) <http://www.rc.gc.ca/E/pub/tp/i168r3et/i168r3e.txt.hml>.

37. Bonuses may be given for good performance, for an all-star rating, or for signing bonuses, among others. *See id.*

38. These include fees for promotional activities or other special services performed on behalf of the club. *See id.*

39. These include cash as well as the fair market value of bonds, automobiles, and other merchandise. *See id.*

40. This may include agent's fees, legal fees, income taxes, and fines to name a few. *See id.*

41. *See id.*

42. *See* 955-2nd, Tax Management Foreign Income Portfolios, Business Operations in Canada, BNA, sec. VII. Income taxation para. E. Computation of Income, A-51, Oct. 13, 1997.

43. *See* 955-2nd, Tax Management Foreign Income Portfolios, Business Operations in Canada, BNA, sec. VII. Income taxation para. E. Computation of Income 1. Individuals, A-51, Oct. 13, 1997, states:

The federal rates are as follows and are subject to indexing:

Taxable Income	Tax
Up to $29,590	17%
$29,590-$59,180	$5,030 plus 26% on the next $29,590
Over $59,180	$12,724 plus 29% on the remainder

Id.

44. *See id.* sec. VII. Income taxation para. A. Provincial income tax, A-27.

Newfoundland.[45] A surtax is also imposed on higher-income individuals in most provinces.[46] The "standard" provincial rate, however, is fifty-two percent.[47]

C. *Determining United States Residency*

In determining the residency of a U.S. citizen, the Internal Revenue Code (IRC) applies. "[A]n individual who is a lawful permanent resident of the United States at any time during the calendar year is a [United States] resident."[48] However, a nonresident may be considered a U.S. citizen for tax purposes under IRC section 7701 based on the "green card" and "substantial presence" tests.

1. *The Green Card Test*

Under the IRC, "[a]n individual who holds or applies for an alien registration card—a 'green card'—during the calendar year attains [United States] resident status."[49] In applying the green card test, IRC section 7701(b)(3)(C)(i)-(ii) applies.[50] In lieu of obtaining a green card, a foreign athlete may also obtain a temporary work permit which will allow the athlete to work in the United States for up to one year.[51] However, not all nonresident aliens wish to go through the process of obtaining a green card. Therefore, since most foreign athletes typically obtain a temporary work permit as opposed to obtaining a green card, the alternative "substantial presence" test is the more appropriate test for determining whether a foreign athlete will be considered a resident of the United States for income tax purposes.[52]

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45. *See id.*

46. *See id.*

47. *See* 955-2nd, Tax Management Foreign Income Portfolios, Business Operations in Canada, BNA, sec. VII. Income taxation para. E. Computation of Income 1. Individuals, A-51, Oct. 13, 1997.

48. Stephanie C. Evans, *U.S. Taxation of International Athletes: A Reexamination of the Artiste and Athlete Article in Tax Treaties*, 29 GEO. WASH. J. INT'L L. & ECON. 297, 299 (1995).

49. *Id.* at 299-300.

50. I.R.C. § 7701(b)(3)(C) (1998). I.R.C. § 7701(b)(3)(C) states:

> [s]ubparagraph (B) shall not apply to any individual with respect to any current year if at any time during such year: such individual had an application for adjustment of status pending, or such individual took other steps to apply for status as a lawful permanent resident of the United States.

Id.

51. *See* Evans, *supra* note 48, at 300.

52. *See id.* at 300.

2. *Substantial Presence Test*

Under IRC section 7701(b)(3), an athlete meets the substantial presence test if he or she is "present in the United States on at least 31 days during the calendar year"[53] and "the sum of the number of days on which such individual was present in the United States during the current year and the [two] preceding calendar years . . . equals or exceeds 183 days[.]"[54] The 183-day requirement is calculated by counting each day of presence in the United States for the current taxable year as one full day.[55] Each day of presence in the United States for the first preceding calendar year counts as one-third of a day and each day of presence in the United States for the second preceding taxable year counts as one-sixth of a day.[56] However, an exemption applies for athletes who are temporarily in the United States in order to compete in charitable sporting events which are described in IRC section 274(l)(1)(B).[57] Therefore, days in which athletes are present in the United States for charitable sporting events will not be included in calculating the 183 days under the substantial presence test. In addition, when an athlete is present in the United States for less than 183 days during the calendar year, has a closer connection to a single foreign country than to the United States, has a tax home for the entire calendar year which is located in the same foreign country for which a closer connection is claimed, and is not currently taking steps to become a lawful permanent resident, that individual will not be considered a resident under the substantial presence test.[58]

D. *United States Taxation*

Once an individual is determined to be a resident of the United States

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53. I.R.C. § 7701(b)(3)(A)(i) (1998).

54. I.R.C. § 7701(b)(3)(A)(ii) (1998).

55. *See* Evans, *supra* note 48, at 300.

56. *See* I.R.C. § 7701(b)(3)(A)(ii) (1998); Evans, *supra* note 48, at 300.

57. *See* I.R.C. § 7701(b)(5)(A)(iv) (1998); Evans, *supra* note 48 at 300. In addition, altruistic, diplomatic, and educational desires have led Congress to allow foreigners to enter the United States and not have to worry about paying taxes. Examples of these situations include:

> 1) where an individual stays in [the United States] for an excessive period of time due to medical reasons; 2) where an individual is employed in a job related to a foreign government; and 3) where an individual is a visiting teacher, trainee, or student. Another exemption is [given] to those individuals who: 1) stays [sic] in the United States for under six months; 2) maintain a foreign tax home; and 3) can show a greater relationship to a foreign nation than to the United States.

Bennet Susser, *Achieving Parity in the Taxation of Nonresident Alien Entertainers*, 5 CARDOZO ARTS & ENT. L.J. 613, 622-23 (1986). The third exemption usually applies to foreign athletes and entertainers. *See id.* at 623.

58. *See* Ernest R. Larkins, *Individual Tax Planning: Resident vs. Nonresident May Be Critical*, 7 J. INT'L TAX'N 410, 414 (1996).

for tax purposes, the IRC again applies in order to determine the individual's tax liability. If an athlete is considered a U.S. citizen or resident alien of the United States for tax purposes, the athlete is: (1) subject to income tax on his United States income;[59] (2) subject to U.S. income tax on all of his foreign-source income;[60] (3) may be subject to tax on shares he owns in a foreign corporation on his pro rata share of the corporation's earnings if the corporation is either a foreign personal holding company or a controlled foreign corporation; (4) subject to U.S. income tax on all of his capital gains derived from both U.S. and foreign sources; (5) subject to U.S. gift tax on all gifts he makes of either U.S. or foreign property; (6) subject to U.S. tax on transfers by the individual of appreciated securities or property to a foreign company; and (7) subject to tax upon death on his estate based on all property owned by the individual whether it is located in the United States or anywhere else in the world.[61]

Under the IRC, "[a] nonresident alien individual engaged in trade or business within the United States during the taxable year shall be taxed . . . on his taxable income which is effectively connected with the conduct of a trade or business within the United States."[62] Non-resident alien athletes performing in the United States are engaged in a trade or business and are subject to tax on their U.S. earnings.[63]

The IRC provides that United States citizens as well as resident aliens are subject to tax on their world-wide income according to the general graduated tax rate scheme.[64] Income which is effectively connected with a United States trade or business is taxed, after allowable deductions, at the graduated rates applicable to United States citizens and resident aliens.[65] An

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59. *See* Marshall J. Langer, *When Does A Nonresident Alien Become A Resident for U.S. Tax Purposes?*, 1976 J. OF TAX'N 220. *See also* Weisman & Rale, *supra* note 35, at 218 (discussing what is included in world-wide income). The article states:

> Items that are generally includable in income of athletes who are U.S. citizens, resident aliens, or nonresident aliens include: wages, bonuses, loans having an interest rate below the applicable Federal rate to the extent of any imputed interest, and the value of meals and lodgings that are not furnished for the convenience of an employer on the employer's premises. Items that are excludable from the income of such athletes are: workers' compensation payments, damages paid for personal injuries, and medical reimbursement payments under an employer's health plan where no deduction was previously taken.

Id. at 222.

60. *See* Langer, *supra* note 59, at 220. However, an individual may generally take a foreign tax credit for foreign taxes paid. *See id.*

61. *See id.*

62. I.R.C. § 871(b)(1) (1998).

63. *Id.*; Weisman & Rale, *supra* note 35, at 218.

64. *See* Weisman & Rale, *supra* note 35, at 218. *See generally* I.R.C. § 1 (illustrating the different methods in which individuals can file their income taxes).

65. *See* I.R.C. § 871(b)(1) (1998); Dobray & Kreatschman, *supra* note 34, at 266.

athlete's federal taxable income is calculated by taking the athlete's gross income[66] and subtracting allowable deductions.[67] "Income from United States sources which is not effectively connected with a trade or business in the United States, is taxed without an allowance for deductions at a flat rate of thirty percent, unless that rate is reduced by a tax treaty."[68]

Today, many athletes playing for professional teams have regular season games in both the United States and Canada. Therefore, they have income both from within and without the United States. IRC section 861(a)(3) provides in part that compensation for labor or personal services performed in the United States shall be treated as income from sources within the United States.[69] IRC section 862(a)(3) provides that "compensation for labor or personal services performed without the United States" shall be treated as income from sources without the United States.[70] Income Tax Regulation section 1.861-4(b) allocates the income earned by the athlete within and without the United States.[71] Section 1.861-4(b)(1) provides that, for taxable years beginning after December 31, 1975, if no accurate allocation or segregation of compensation for labor or personal services performed in the United States can be made, or when the labor or service is performed partly within the United States and partly without the United States, the amount to be included in gross income of a nonresident alien shall be determined on the time basis. This is the basis that most accurately reflects the proper source of

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66. "[G]ross income includes wages, signing bonuses, performance bonuses, prize money, endorsements, royalties, license fees, personal appearance fees, gifts, and imputed interest on interest free loans." Ekmekjian, *supra* note 3, at 231.

67. *See id.*

68. Dobray & Kreatschman, *supra* note 34, at 272. *See also* I.R.C. § 871(a) (1998) (stating that a tax of 30% is imposed on a nonresident alien individual on the amount received from sources within the United States).

69. *See* I.R.C. § 861(a)(3) (1998). I.R.C. § 861(a)(3) also provides that the income of some nonresident athletes or entertainers who perform personal services may be exempt from United States income if they are only in the United States for a brief time and the income earned is minimal. The income from personal services performed in the United States will be exempt if: 1) the services are performed as an employee or under a contract with a nonresident alien individual, foreign partnership or corporation not engaged in a trade or business in the United States; 2) the services are performed while the nonresident alien is temporarily present in the United States for a period not to exceed a total of 90 days during the tax year; and 3) the compensation for the services does not exceed $3,000. *See* I.R.C. § 861(a)(3).

70. I.R.C. § 862(a)(3) (1998).

71. *See* Treas. Reg. § 1.861-4(b).

income[72] under the facts and circumstances of the particular case.[73] However, income from sources without the United States will generally not be treated as taxable income within the United States and therefore will not be taxed.[74]

E. *State Taxation*

In addition to taxation at the United States federal level, athletes are also

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72. Most often, the income is allocated on a time basis using the duty days method. *See infra* Part III.A.

> [T]hat is, the amount to be included in gross income will be that amount which bears the same relation to total compensation as the number of days of performance of labor or services within the United States bears to the total number of days of performance of labor or services for which the payment is made.

Richard Gould, *1993 California Tax Policy Conference: Apportionment of Compensation Paid to Nonresident Professional Athletes*, 93 ST. TAX NOTES 232-2, Dec. 3, 1993.

73. *See* Treas. Reg. § 1.861-4(b); Gould, *supra* note 72.

74. *See* I.R.C. § 864(c)(4)(A) (1998). This provision helps alleviate the problem of double taxation. Double taxation refers to the problem that would occur if income were to be taxed both by the United States and Canada on the total income which is earned by the athlete. The problem of double taxation also occurs on the state level where athletes could be taxed by multiple states on the same base income received. *See infra* Part III.F.

The United States accomplishes relief from double taxation through a foreign tax credit. *See* Kimberly J. Tan Majure & Nancy S. Lindholm, *New U.S. Model Treaty Revises Business Profits, Residence Rules*, 7 J. INT'L TAX'N 532, 532 (1996). Under the foreign tax credit, a qualified taxpayer is allowed a tax credit for foreign income taxes paid which will, in turn, reduce the taxpayer's U.S. income tax liability. *See* Marc Yassinger, *An Updated Consideration of a Taxing Problem: The Harmonization of State and Local Tax Laws Affecting Nonresident Professional Athletes*, 19 HASTINGS COMM. & ENT. L.J. 751, 764 (1997). Section 911(a) of the IRC states that "there shall be excluded from the gross income of such individual, and exempt from taxation under this subtitle, for any taxable year- (1) the foreign earned income for such individual. . . ." I.R.C. § 911(a)(1) (1998). In addition, § 911(b)(2)(A) states "[t]he foreign earned income of an individual which may be excluded under subsection (a)(1) for any taxable year shall not exceed the amount of foreign earned income computed on a daily basis at an annual rate of $70,000." I.R.C. § 911(b)(2)(A) (1998). This applies for taxable years beginning on or before December 31, 1997. *See* I.R.C. § 911(b)(2)(A). For years beginning after December 31, 1997, the I.R.C. states:

> [t]he foreign earned income of an individual which may be excluded under subsection (a)(1) for any taxable year shall not exceed the amount of foreign earned income computed on a daily basis at an annual rate equal to the exclusion amount for the calendar year in which such taxable year begins.

I.R.C. § 911 (b)(2)(A). Thus, an athlete will get a credit of up to $70,000 on his U.S. income tax for the amount of money earned in Canada or any other foreign country if earned before December 31, 1997. If earned after December 31, 1997, the athlete will get a credit not to exceed the amount of foreign earned credit equal to the exclusion amount for the calendar year in which the taxable year begins. However, the foreign tax credit is subject to a limitation in that "the credit cannot exceed the same proportion of [the athlete's] U.S. tax, which the taxable income earned in the foreign country bears to [the athlete's] entire taxable income for the year." William H. Baker, *The Tax Significance of Place of Residence for Professional Athletes*, 1 MARQ. SPORTS L.J. 1, 31-32 (1990).

taxed on income at the state and local levels based on the state and local graduated rates.

In professional team sports, athletes compete for their teams in several different states within the United States.[75] Thus, athletes perform services in both their home state[76] as well as the states in which they play their away games. Since these athletes are engaging in a trade or business in each state, they are subject to income tax on the income they earn in every state.

Athletes are taxed by their home state based on their total income earned.[77] In addition, because athletes travel extensively to other states to compete in their respective team's games, the nonresident athlete may be subject to the income tax of the state in which he plays those games.[78]

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75. For a list of states which have professional teams for football, baseball, basketball, and hockey see K.P.M.G. PEAT MARWICK, TAX PLANNING FOR PROFESSIONAL ATHLETES, exhibit I.

76. Home state refers to the state in which the athlete's team is located. *See* Baker, *supra* note 74, at 14.

77. *See* Krasney, *supra* note 12, at 133.

78. *See id.* at 129. California and New York were at the forefront in taxing nonresident athletes. *See* Richard E. Green, *The Taxing Profession of Major League Baseball: A Comparative Analysis of Nonresident Taxation*, 5 SPORTS LAW.J. 273, 281 (1998). In response to these states taking an aggressive stance on collection of athletes' income taxes, other states have enforced retaliatory taxes in order to recover the money in taxes that would otherwise have been paid to the resident state. An example of this is Illinois which proposed a state tax on nonresident athletes when they performed in Illinois. The tax was titled "Michael Jordan's Revenge" and was adopted July 29, 1992. *See* Ekmekjian, *supra* note 3, at 235. The tax was imposed because states were taking a big cut of Michael Jordan's salary. The Illinois tax only applies to athletes from states which have laws that impose a nonresident income tax on athletes who play for Illinois teams. *See id. See also* Novak, *supra* note 4, at 21 (discussing "Michael Jordan's Revenge" and stating that this retaliatory tax was levied against athletes who play for teams which impose a tax against Illinois athletes after the Chicago Bulls had to pay income taxes to California. The tax was imposed after the Bulls beat the Los Angeles Lakers to win the Bulls' first NBA championship).

Although states have begun imposing retaliatory taxes, there are some states which refuse to tax athletes or entertainers who come to their state to perform. An example is the state of Georgia. Georgia's governor, Zen Miller, vetoed a bill which "would have required nonresident professional athletes and performers to pay state income taxes" to Georgia. Ekmekjian, *supra* note 3, at 237. Miller's reason for not imposing a tax was he feared that the tax would make Georgia "less appealing for athletes and entertainers." *Id. See also* Elliot Almond, *Pro Athletes Find Rules Taxing: States Concoct Ways to Collect From Visiting Stars*, MILWAUKEE JOURNAL SENTINEL, Apr. 19, 1998, at 9 (discussing Georgia Governor Zen Miller's decision to veto an entertainer tax in 1992 and stating that it would discourage entertainers from coming to Georgia to perform). In addition, some cities have also refused to impose local income taxes on nonresident athletes and performers. An example is Pittsburgh which refused to impose an income tax on nonresident athletes, citing that imposing an income tax on visiting athletes and entertainers "would cause musicians and artists to avoid performing in Pittsburgh." Ekmekjian, *supra* note 3, at 237.

Generally, however, athletes are taxed on a "source basis"[79] and are only taxed on the portion of their income which is earned in the taxing state.[80] Presently, forty-three states and the District of Columbia impose a tax on personal income.[81]

Since athletes compete in regularly scheduled games in several different states,[82] they earn income in several states and subsequently must file income tax returns in each jurisdiction. This has led to a serious problem because professional athletes are required to file returns in as many as twenty-four different states as well as the District of Columbia and several Canadian provinces.[83]

In order to solve the problem of multiple filing, the Federation of Tax Administrators (FTA) set up a Task Force to determine possible solutions.[84] The task force has recommended "four options for resolving the uniformity

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79. Taxation on a source basis is defined as income that "is taxable where it is earned or where the services giving rise to the income were performed." Federation of Tax Administrators, *FTA Report, State Income Taxation of Nonresident Professional Team Athletes, March 1994*, 94 ST. TAX NOTES 72-43, April 14, 1994 [hereinafter *FTA Report*]. The justification for taxing on a source basis is "that the state provides services to nonresidents who earn income in the state, and that sourcing is necessary to prevent low-tax states from becoming tax havens... for high-income [athletes] with income from several states." Andrew J. Hoerner, *A Nation of Migrants: When a Taxpayer Has Income from Several States*, 92 ST. TAX NOTES 71-13, Apr. 13, 1992.

80. *See FTA Report*, *supra* note 79.

81. States with no income tax include: Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming. *See* Almond, *supra* note 78, at 9; Baker, *supra* note 74, at 3; Yassinger, *supra* note 74, at 763.

82. Athletes also have regularly scheduled games in Canada. An example can be illustrated using Chicago's professional teams and their team schedules for baseball, basketball, and hockey. In baseball, for the 1998 season, the Chicago Cubs had 162 total games with three games played in Canada. *See Chicago Cubs Team Schedule: Baseball news, scores, standings, stats and more from ESPN SportsZone* (visited Jan. 23, 1999) <http://www.espn.go.com>. In basketball, for the 1996-1997 season, the Chicago Bulls had a total of 90 games, three of which were played in Canada. *See Chicago season schedule* (visited Jan. 23, 1999) <http://www.espn.go.com>. In hockey, for the 1996-1997 season, the Chicago Blackhawks had a total of 82 regular season games of which 10 games were played in Canada. *Chicago season schedule* (visited Jan. 23, 1999) <http://www.espn.go.com>.

83. *See* Plattner, *supra* note 4, at 37 n.3. In Major League Baseball, teams reside in 17 different states as well as in two Canadian provinces. The National Basketball Association has teams which reside in 20 different states as well as the District of Columbia and two Canadian Provinces. The National Football League has teams in 21 different states and the District of Columbia. The National Hockey League has teams in 13 different states as well as the District of Columbia and six franchises in Canada. This, in turn, has led many athletes to complain about the difficulty of filing their tax returns. *See generally* Novak, *supra* note 4, at 21 (discussing the difficulties posed by having to file multiple tax returns).

84. *See FTA report*, *supra* note 79.

and compliance issues involved in the taxation of nonresident team members."[85]

1. *Uniform Apportionment Model*

"The essence of a uniform [apportionment model] is an agreement among states hosting professional sports teams to treat all nonresident professional athletes playing in their respective states in the same manner."[86] This would provide for a consistent approach to the division of income by all states taxing nonresident team members.[87] "Athletes would allocate their income for tax purposes in the same way for each state in which they play."[88] This model would help address several problems facing athletes and tax authorities including "compliance, uniformity,[89] discrimination, and interstate tax warfare."[90]

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85. *Id.* The task force also made two recommendations to the states in regard to why there needs to be uniformity in filing. The first was that "[s]tates should adopt a uniform formula for apportioning the income of team members." *Id.* The task force stated that "[u]niformity is the key to insuring complete taxation of the income and appropriate treatment of the taxpayer as well as effectively forestalling any potential federal government intervention. In addition, the compliance burden facing taxpayers, teams and states can be addressed effectively only through a consistent method of taxation." *Id.*

The second recommendation was that "[s]tates should take affirmative steps to reduce the return filing and compliance burden facing team members and sports teams." *Id.* The task force stated:

> [t]he practical difficulties and costs associated with the filing of tax returns in each of the states in which team members and teams perform are substantial and real and should be addressed by the states. State tax agencies also face compliance burdens in attempting to enforce their tax laws on an individual team member basis and in processing multiple returns with relatively small liabilities. The adoption of simplified filing approaches will help promote voluntary compliance among team members and teams and is thus in the best long-term interests of the states. The Task Force specifically recommends that states adopt either a simplified withholding system or a composite tax return alternative to allow the team members' return filing responsibilities to be met with a single, annual filing in each state on behalf of all eligible members of the team.

Id.

86. Krasney, *supra* note 12, at 159. *See also* Plattner, *supra* note 4, at 38 (stating that uniformity is a way of taking "affirmative steps to reduce filing and compliance burdens imposed on the athletes and their teams").

87. *See FTA Report*, *supra* note 79.

88. Krasney, *supra* note 12, at 159. *See also* Ekmekjian, *supra* note 3, at 247-48 (stating that a uniform apportionment model would have the states adopt similar allocation and enforcement regulations).

89. The lack of a uniform system for filing places an unreasonable burden on professional athletes and may lead to incomplete compliance. The result of this may lead to haphazard compliance efforts by athletes, and arbitrary and unfair enforcement efforts on behalf of state tax administrators. *See* Krasney, *supra* note 12, at 159; Yassinger, *supra* note 74, at 762.

90. Krasney, *supra* note 12, at 159.

2. *Home State Apportionment*

A second approach recommended by the FTA is the home state apportionment method. Under this approach, "all compensation received by an athlete would be deemed to have been earned in the state where the athlete plays his home games[,]"[91] or otherwise maintained the team's primary facilities.[92] Therefore, the athlete would only have to file returns in his team's home state and in his or her state of residency.[93] In addition, "states would continue to collect the same amount of tax revenues without the current compliance burdens."[94] Other advantages to this formula are that "it is simple to comply with and easy to enforce."[95] This would also help to avoid the problem of double taxation.[96]

Although home state apportionment is the favored model of the various players' associations, there are some disadvantages. The major disadvantage with this method of apportionment is the potential conflict with the United States Constitution. Home state apportionment would obligate the home state to require a nonresident to include in their tax base income which is derived from services performed outside of the state.[97] Another disadvantage is that the home state apportionment method "tends to merge together the two taxing concepts of source and residence."[98] A final disadvantage is that athletes will

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91. *Id.* at 162. This method of apportionment is also the system which is most favored by the various players associations. *See id.*; Leslie A. Ringle, *State and Local Taxation of Nonresident Professional Athletes*, 2 SPORTS LAW J. 169, 181-82 (1995).

Because half of the games an athlete plays are in the state of the home team and half of the games are away games, home state apportionment would result in a state receiving about the same amount of revenue it would if it apportioned the income of all visiting teams. *See id.* at 182; *FTA Report*, *supra* note 79, n.6.

> [A] team member would face roughly the same total liability as if all teams apportioned income for games played away from home, dependent on several variables including the parity of total salary levels among teams, the parity in the amount of time spent in-state and out-of-state by a team member, and parity in income tax rates among states.

Id.

92. *See* Yassinger, *supra* note 74, at 761; Plattner, *supra* note 4, at 38; Ringle, *supra* note 91, at 181.

93. *See* Krasney, *supra* note 12, at 162; Ringle, *supra* note 91, at 182; Green, *supra* note 78, at 300.

94. Ringle, *supra* note 91, at 182.

95. Krasney, *supra* note 12, at 163.

96. *See id. See also supra* note 74 (discussing the problem of double taxation).

97. *See* Ringle, *supra* note 91, at 182. This is not a problem if the athlete is a resident of the home state. However, if the athlete is a nonresident, the home state may be in violation of the due process clause. *See id.*; *FTA Report*, *supra* note 79, n.9; Yassinger, *supra* note 74, at 761.

98. Krasney, *supra* note 12, at 163. Source refers to the place where the income is earned as opposed to residence which refers to where the athlete is domiciled. *Id.*

The concept of source and residence are merged because the home state, in the context

avoid double taxation "only if their state of residence provides a credit for taxes paid to their home state."[99] In addition, if this method is used, "municipalities would lose the ability to tax nonresident professional athletes."[100]

3. *Base State Model*

The third recommendation by the FTA task force is the base state model. Under this approach, the tax return filing responsibilities are "satisfied by a single filing with the state in which the team was domiciled, which state would, in turn, be responsible for providing the relevant information and funds to all other states involved[.]"[101] However, a problem with this approach is that states are often ill-equipped with the resources and funds necessary to perform such a task.[102]

4. *Partnership Model*

The final recommendation by the FTA task force is the partnership model. Under this approach, the tax return filing responsibilities are satisfied through a composite or consolidated return filed on behalf of all eligible team

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of home state apportionment, refers to the state in which the athlete plays his home games. However, the state where the athlete plays his home games may not be the state of residency of the athlete. The problem with this is that the concepts of source and residence are competing theories under which the states have established their taxing jurisdictions. *See id.*

99. *Id.* For a list of states that provide tax credits, see *infra* note 106.

100. Krasney, *supra* note 12, at 163. The reason municipalities would lose their ability to tax is because the taxes would be issued and collected by the state as opposed to the municipality. Thus, it is the state which is taxing and collecting and not the municipality. If the municipality wants to collect taxes, they would have to collect from the state. *See id.*

101. *FTA report*, *supra* note 79. *See also* Plattner, *supra* note 4, at 38 (stating that an athlete could file a single return with the state in which the athlete is domiciled); Ringle, *supra* note 91, at 180 (addressing that the athlete need only file a return in the state where the athlete is domiciled); Yassinger, *supra* note 74, at 762 (discussing that an athlete would be responsible for filing a single return in the state in which the athlete is domiciled). *See generally* Ekmekjian, *supra* note 3, at 248 (describing the base state model as the composite return system and a centralized filing system where the athlete is required "to file one state return and have that state allocate the tax payments to the other states based on a predetermined formula"). This approach is similar to the International Fuel Tax Agreement (IFTA) which apportions tax liability on interstate motor carrier fuel use. Under IFTA, an interstate carrier is liable for fuel tax on the basis of the proportion of miles traveled in each state. A carrier files a single tax return in the "base state" or state of domicile rather than filing with each state in which he traveled. The base state then provides payments and information to any other state in which the carrier operated. *See FTA report*, *supra* note 79, at n.7.

102. *See* Ekmekjian, *supra* note 3, at 248.

members.[103] This may be a good solution because the teams themselves are in the best position to have all of the pertinent tax information required. This model has been endorsed by some teams.[104]

F. *Tax Credits*

Once the filing requirements have been determined, the next focus for the athlete is to determine the amount taxable to each taxing jurisdiction in which they participate and how the tax is to be calculated. To avoid double taxation,[105] the home states and states of residency provide tax credits for income that is allocable to nonresident states.[106] However, "[b]ecause the state issues a credit, the athlete's overall tax bill remains unchanged."[107] The "purpose of a tax credit is to avoid double taxation of nonresident income."[108] The states have varying policies in regard to tax credits. A number of states only provide a tax credit if the nonresident state allows a similar credit. As of

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103. *See* Yassinger, *supra* note 74, at 762; Green, *supra* note 78, at 300; Plattner, *supra* note 4, at 38. This model may be analogized "to a scheme in which many states permit large multi-state partnerships to file a composite return on behalf of nonresident partners." Yassinger, *supra* note 74, at 762. *See generally FTA report*, *supra* note 79, at n.18 (stating that this option is similar to current provisions in other states which allow composite return filings by partnerships on behalf of nonresident partners).

104. *See* Yassinger, *supra* note 74, at 762.

105. *See supra* note 74. *But see* Plattner, *supra* note 4, at 36 (stating that there is fear of potential double taxation notwithstanding the income tax credit which is generally offered by states to their residents).

106. *See* Krasney, *supra* note 12, at 134 n.28. States that allow tax credits include: Alabama, Arizona, Arkansas, California, Colorado, Delaware, the District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, West Virginia, and Wisconsin. *See id.* at 134 n.30. *See also* Green, *supra* note 78, at 296 (addressing some of the states that have allowed tax credits); Overstreet, *supra* note 4, at A1 (noting that states allow tax credits); Ringle, *supra* note 91, at 171 (mentioning that athletes' states of residence generally offer tax credits); Williams & Horgan, *supra* note 2, at A1 (stating that states allow tax credits).

107. Ekmekjian, *supra* note 3, at 241. *See also* Gottschalk, *supra* note 4, at A1 (stating that it ends up becoming a "zero sum game" because an athlete will get a tax credit for paying taxes in another state in which he plays); Yassinger, *supra* note 74, at 763 (stating that since states grant credits for income taxes paid in other states, an athlete theoretically should not be paying any additional state tax).

108. Krasney, *supra* note 12, at 134. Each state grants a tax credit for the taxes paid to other states. *See* Yassinger, *supra* note 74, at 762-63. "In order to compensate for the reciprocal loss of this potential tax revenue due to the granting of the credit, states have been virtually forced to take a more active stance in collecting taxes from nonresident professional athletes." *Id.* However, athletes who reside in states which do not assess any state income tax are now responsible for paying nonresident taxes to the states which aggressively tax nonresident athletes. Thus, the athletes end up having to pay state income taxes to the states in which they compete. *See* Green, *supra* note 78, at 292.

1995, only eighteen states granted residents tax credits for any income taxes paid to other states.[109] However, three states grant no tax credit for taxes paid to other states.[110] States will often place restrictions on tax credits they allow. The most common restriction is to allow a credit only for taxes paid to a nonresident state on income derived from sources within the nonresident state.[111] A second restriction is to grant a credit if the other state's income tax is levied regardless of where the athlete is a resident or is domiciled.[112] The third restriction is that a credit will only be allowed for tax paid on earned or business income.[113]

In addition to tax credits, some states also have reciprocal tax agreements with other states.[114] Reciprocal agreements "allow the taxation of

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109. *See* Krasney, *supra* note 12, at 134-35. The states that allow credits only if the credits allowed are reciprocal are: Alabama, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, New Mexico, North Dakota, Ohio, Pennsylvania and Wisconsin. *See id.* at 135 n.31.

110. *See id.* at 135. Those states are Connecticut, New Hampshire, and Tennessee. *See id.* at 135 n.32.

111. *See id.* at 135. States that use this restriction include: Arizona, Arkansas, California, Delaware, Maine, Missouri, Montana, Nebraska, New York, Oklahoma, Oregon, Utah, Vermont, and West Virginia as well as the District of Columbia. *See id.* at 135 n.33; Ringle, *supra* note 91, at 181. *But see* Green, *supra* note 78, at 279 n.48 ("Colorado Department of Revenue extends a courtesy and does not require athletes associated with non-Colorado sports to file a Colorado income tax return.").

112. *See* Krasney, *supra* note 12, at 135. States that use this restriction include Arizona, California, Hawaii, Idaho, Louisiana, and Montana. *See id.* at 135 n.34. *But see* Baker, *supra* note 74, at 27 (discussing the situation where an athlete is a resident of one state but resides during the sports season in the state of his home team. This athlete would be a resident of his home state for income tax purposes and may or may not receive a credit for income taxes paid to the home state depending on the laws of the home state.).

113. *See* Krasney, *supra* note 12, at 135. The only state which allows a credit for tax paid on earned or business income is Virginia. *See id.* at 135 n.35.

114. Currently, 15 states have reciprocal agreements with other states. The states in the left hand column each have reciprocal agreements with the states listed to the right of that state.

Illinois: Iowa, Indiana, Kentucky, Michigan, and Wisconsin
Indiana: Illinois, Kentucky, Michigan, Ohio, Pennsylvania, and Wisconsin
Iowa: Illinois
Kentucky: Illinois, Indiana, Michigan, Virginia, West Virginia, and Wisconsin
Maryland: District of Columbia, Pennsylvania, Virginia, West Virginia, and Wisconsin
Michigan: Indiana, Iowa, Kentucky, Minnesota, Ohio, and Wisconsin
Minnesota: Michigan, North Dakota, and Wisconsin
Montana: North Dakota
New Jersey: Pennsylvania
North Dakota: Minnesota and Montana
Ohio: Indiana, Kentucky, Michigan, Pennsylvania, and West Virginia
Pennsylvania: Indiana, Maryland, New Jersey, Ohio, Virginia, and West Virginia
Virginia: District of Columbia, Maryland, and West Virginia
Wisconsin: Illinois, Indiana, Kentucky, Maryland, Michigan, and Minnesota
West Virginia: Kentucky, Maryland, Ohio, Pennsylvania, and Virginia.

all income of a resident of one of the states that is [a] party to the agreement and earned in either of the states to be taxed in the taxpayer's state of residence."[115]

However, one problem with the credit system is the variation in tax rates between the states.[116] Thus, the state of residency will only give a tax credit for the income tax which the state of residency applies. Anything over that percentage will still be owed to the nonresident state.[117] Conversely, if the athlete's state of residency taxes at a higher rate on income earned than the nonresident state, the athlete will get a full credit from his state for the tax allocable to the nonresident state. In addition, states vary on the amount of income they will tax. For example, California taxes athletes' total income as opposed to New York which only taxes the income earned in New York.[118]

Besides the problem associated with the application of different tax rates from state to state, the difference in tax rates also affects the athlete's choice of where to perform. For example, if an athlete performs as a member of a team that plays in Missouri, where the tax rate is only 6%, and is traded to California where the tax rate is 9.3%, and the athlete is earning the same salary, the athlete's contract will be worth at least 3.3% less than it was before the athlete was traded to the California team.[119] In addition, many athletes

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See Hoerner, *supra* note 79.

115. *Id.*

116. For example, California taxes at a rate of 9.3% on income in excess of $23,950, Cal. Rev. & Tax Code § 17041 (West 1983 & Supp. 1989), and New York imposes a rate of 8% on income exceeding $12,400, N.Y. Tax Law § 601 (McKinney 1984 & Supp. 1988). *See* Baker, *supra* note 74, at 3. North Dakota taxes at a rate of 12% on income over $50,000, Montana imposes a rate of 11% minus $1,897 for income in excess of $66,400, Hawaii taxes at a rate of 10% for income over $41,000, Iowa taxes at a rate of 9.98% for income over $48,645, the District of Columbia taxes at a rate of 9.5% on income over $20,000, Oregon taxes at a rate of 9% for income over $5,400, Maine taxes at a rate of 8.5% on income over $16,500, Minnesota taxes at a rate of 8.5% for income over $93,340, and New Mexico taxes at a rate of 8.5% for income in excess of $100,000. *See* Mark Nowlin, *The Tug for Taxes*, THE SAN DIEGO UNION & TRIB., May 25, 1997, at C15.

117. An example of this can be demonstrated by using the tax rates of Missouri and California. Missouri taxes individuals at a rate of 6% for all income in excess of $9,000. This rate applies to all nonresident athletes. Missouri also offers a credit to athletes for the percentage of their income that the nonresident state has taxed. However, since Missouri only has a 6% rate of tax, if the athlete performs in California where they apply a 9.3% tax rate, the athlete will still owe 3.3% in taxes to California. Thus if California taxes an athlete on $100,000 of his income, the athlete still owes $3,300 to California. *See* Green, *supra* note 78, at 287-88.

118. *See* Overstreet, *supra* note 4, at 1. *Compare* Cal. Rev. & Tax Code § 17041 (West 1998) *and* N.Y. Tax Law § 1304 (West 1998) (showing the difference in how the tax rates are applied).

119. An example of this is illustrated by looking at the situation of Juwan Howard, a basketball player for the Miami Heat. Howard had a $100 million contract with the Miami Heat. When Howard was traded to the Washington (D.C.) Bullets, now the Washington (D.C.) Wizards, Howard lost $4.2 million on the trade in taxes. *See* Chris Jenkins, *The Tug for Taxes:*

prefer to play in the states which have no income tax[120] or even decide to change residency to states that have no income tax.[121] Despite having to pay taxes to nonresident states, athletes are able to maximize their income by minimizing their tax liability by choosing to live in a state that does not impose state income taxes.[122] Thus, when free agents go shopping for a team, those states with no state income tax will likely be higher on the list. In addition, this would deter athletes who may be thinking of playing for a Canadian based team where the tax rates are even more exorbitant.[123]

III. ALLOCATION METHODS

Athletes owe taxes to Canada as well as the United States at the federal, state, and local levels. In order to determine how the taxes will be allocated, different allocation methods have been used. These allocation methods include the duty days method, the games played method, and the de minimus rule.

These Days, Uncle Sam Isn't the Only One Reaching for a Piece of Those Big Paychecks, SAN DIEGO UNION & TRIB., May 25, 1997, at C1.

Due to situations such as this, if a player is negotiating a contract with a team in a state with a higher income tax, the athlete may demand a more lucrative salary. *See* Green, *supra* note 78, at 299. "[A] player might even decide to accept a lower salary with a team in a state that has no income tax instead of a higher salary from a team in a state with a significant state income tax." Baker, *supra* note 74, at 4. An example of this may be demonstrated by looking at the decision of free agent Alex Fernandez, a former member of the Chicago White Sox. Fernandez reportedly considered a five year offer from the Cleveland Indians for $38 million but instead accepted a reported five year, $36 million contract with the Florida Marlins. Fernandez was cited as commenting that one of his reasons for accepting a lower offer was that Florida did not have a state income tax so the offers were virtually the same. *See* Sheldon I. Banoff and Richard M. Lipton, *Want to Sign Free Agents? Lower Your State Taxes!*, J. TAX'N 127, 127 (1997).

120. For a list of the states which do not impose an income tax, see *supra* note 81.

121. An example of this can be illustrated by the advice agents give to their clients. As stated by the vice president of IMG, a Cleveland-based management firm that handles some of the world's richest athletes, "[t]he first move for a golfer is definitely to move to Florida, especially if you're a California resident[.]" Jenkins, *supra* note 119, at C1.

Another reason to move to a state with no personal income tax is if the athlete will be receiving a signing bonus. *See* Tom Weir, *Facing a Wealth of Decisions Taxation: Saving Key Issues Athletes Need to Understand*, USA TODAY, Aug. 26, 1998, at 03C.

122. *See* Green, *supra* note 78, at 292; Jenkins, *supra* note 119, at C1; Nowlin, *supra* note 116, at C15.

123. *See* Elliot Almond, *Athletes Playing in Canada Face a Ferocious Tax Bite*, SEATTLE TIMES, Apr. 19, 1998, at 9; Jenkins, *supra* note 119, at C1. In addition to the high tax rates in Canada, athletes are forced to put clauses in their contracts that they want to be paid in American as opposed to Canadian dollars because the Canadian dollar is worth less than the American dollar. *Id.*

A. *Duty Days*

Once jurisdictions began taxing athletes on their income earned within that taxing jurisdiction, it was important to find some uniform method in which to allocate the athlete's income throughout the different taxing jurisdictions. In order to help solve this problem, a Task Force was created by the Federation of Tax Administrators (FTA).[124] Based on the Task Force recommendations, the most widely used apportionment formula that allocates income between taxing jurisdictions is the duty days method.[125]

Under this formula, duty days include "all days from the beginning of pre-season training through the last day in which the team competes."[126] Duty days also include days in which the individual is required to perform services that fall outside of the above mentioned period such as instructional leagues, "all-star" games, or other promotional events.[127] Duty days also include "days during the off-season when a team member undertakes training activities as part of a team-imposed program, but ONLY IF CONDUCTED AT THE FACILITIES OF THE TEAM."[128]

> Each duty day will be assigned to the state in which the service is performed. Days in which a team member is on the disabled list AND performing no services for the team will not be apportioned to any particular state, but will be included in the total number of duty days for apportionment purposes.[129]

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124. *See* Plattner, *supra* note 4, at 36. *See generally* Hoerner, *supra* note 79 (discussing that the purpose of the FTA task force was to help determine the appropriate and uniform methods for apportionment of income, and to improve compliance through improved withholding systems).

125. *See* Dan Weissman, *Professionals Face Hodgepodge of State Rules: Taxing Athletes Confuses the Goal,* STAR-LEDGER, Oct. 29, 1995, *available in* 1995 WL 11792033.

126. Gould, *supra* note 72. *See also* Ekmekjian, *supra* note 3, at 238 (stating that duty days include all days from the beginning of the team's official pre-season training through the last game in which the team competes including post-season games); Ringle, *supra* note 91, at 174 (mentioning that duty days include all days from the beginning of official preseason training through the last game in which the team competes).

127. *See FTA Report, supra* note 79; Paul R. Comeau & Mark S. Klein, *New York's Revised Audit Guidelines for Nonresident Allocations Raise Questions,* 5 J. MULTISTATE TAX'N 263, 267 (1996); Gould, *supra* note 72; Yassinger, *supra* note 74, at 758.

128. *FTA Report, supra* note 79.

129. *Id. See also* Gould, *supra* note 72 (stating that days in which the athlete is injured are considered duty days and are assigned to the home state); Salmas, *supra* note 11, at 270 (discussing that duty days include days in which the athlete is disabled). *See generally* Jenkins, *supra* note 119, at C1 (mentioning that in Missouri, an athlete will be required to pay taxes for days that the athlete was on the disabled list and did not make the trip, as well as in situations where a pitcher for a baseball team does not pitch that day).

Travel days are also included in the apportionment formula. Travel days which include a game, a required practice, or a meeting or other service, are apportioned to the state in which the game, practice, or service is conducted.[130] "Travel days involving no game, practice or required service will not be apportioned to any particular state, but will be included in the total number of duty days."[131]

The income which is to be apportioned by the duty days formula includes all compensation paid to a team member for the performance of team service including regular and pre-season games, as well as performing required training or otherwise performing required services.[132] Income which is not included in this formula consists of "strike benefits, severance pay, termination pay, contract buy-out payments, relocation payments and other payments not related to the performance of services."[133]

This formula applies to active team members, team members on the disabled list, and other persons required to travel with and perform services on behalf of a professional team including coaches, managers, and trainers.[134] The formula is designed to apply to any professional sports team.[135] However,

> [i]f it is determined that the [duty days] formula does not fairly apportion a team member's income, the state tax agency may require the team member to use an alternative formula prescribed by the agency. In addition, the team member may request approval of the state tax agency to use an alternative apportionment formula if it is considered that the [duty days] formula produces an unfair result.[136]

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130. *See FTA Report*, *supra* note 79; Comeau & Klein, *supra* note 127, at 267; Yassinger, *supra* note 74, at 758-59.

131. *FTA Report*, *supra* note 79. *See also* Ringle, *supra* note 91, at 183-84 (stating that travel days not involving a game, practice, or team meeting are included in the total number of duty days but not apportioned to any particular state); Green, *supra* note 78, at 285 (discussing the example of a New York resident athlete and stating that travel days not involving a game, practice, team meeting, or other team event are not considered duty days spent in New York State but are considered in the total duty days spent both within and without New York State).

132. *See FTA Report*, *supra* note 79; Comeau & Klein, *supra* note 127, at 267.

133. *FTA Report*, *supra* note 79. *See also* Comeau & Klein, *supra* note 127, at 267 (stating that strike benefits, severance or termination pay, and certain other benefits are not included); Weissman, *supra* note 125 (stating that players will not be taxed for days on the disabled list, severance pay, termination pay, or contract buy-out payments).

134. *See* Comeau & Klein, *supra* note 127, at 267; Gould, *supra* note 72.

135. *See FTA Report*, *supra* note 79.

136. *Id. See also* Yassinger, *supra* note 74, at 759 (stating that if the state tax agency determines that the duty days formula does not apportion an athlete's income fairly, the state tax agency may require the athlete to use an alternative formula which is approved by the state tax agency). *But see* In the Matter of the Appeal of Joseph Barry Carroll, 1987 Cal. Tax LEXIS 75, at *1 (1987) (State Board of Equalization of the State of California) (per curiam) (holding that where Carroll, a professional basketball player, wanted to apportion his income based on

Thus, the amount of tax allocated to the taxing agency is determined by taking the total number of duty days allocated to the taxing agency and dividing them by the total number of duty days. That ratio is then multiplied by the athletes total taxable income in order to determine the amount that is allocated to each taxing agency.[137]

The duty days formula is the most widely used formula because it most accurately allocates income between the different taxing jurisdictions.[138] Since its inception, several states who had not previously used this method, have adopted a formula similar to that which the FTA has proposed.[139] Today, almost all states use the duty days formula to allocate income between taxing jurisdictions, as does Canada.[140] The duty days method is also used to allocate income under the income tax treaty between the United States and Canada[141] and is used by the IRS for allocation purposes.[142] Although the FTA report only addresses the applicability of the duty days apportionment method for athletes who play basketball, baseball, football, and hockey, other leagues which are likely to take advantage of this method include: the Continental Basketball Association, the Arena Football League, Major League Soccer, and minor league baseball.[143]

B. *Games Played*

A second method of allocation that has been used by athletes to apportion their income between the different taxing jurisdictions is the "games played" method. Under this method, "compensation to the athlete is apportioned based on the ratio of games played in a particular jurisdiction to

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the games played formula, Carroll had to use the duty days apportionment formula).

137.
$$\frac{\text{Number of duty days performed in the taxing jurisdiction}}{\text{Total number of duty days allocable}} \times \text{taxable income} = \text{amount of income}$$

138. *See* Weissman, *supra* note 125.

139. *See* Iowa Department of Revenue and Finance, *Iowa Department of Revenue and Finance Proposes to Change Rules for Taxing Compensation of Nonresident Athletes,* 95 ST. TAX NOTES 116-H, June 16, 1995; New Jersey Division of Taxation, *New Jersey Division of Taxation to Establish Apportionment Method to be Used by Nonresident Athletes,* 95 ST. TAX NOTES 194-22, Oct. 6, 1995; Department of Revenue, *Wisconsin Department of Revenue Proposes Allocation Rule for Professional Athletes,* 96 ST. TAX NOTES 1-47, Jan. 2, 1996.

140. *See generally* Green, *supra* note 78, at 285-92 (noting that some taxing jurisdictions that use the duty days formula include: California, New York, Ohio, Missouri, Minnesota, Wisconsin, Illinois, New Jersey, and Canada).

141. *See* Krasney, *supra* note 12, at 137. *See generally* Salmas, *supra* note 11, at 272-75 (discussing the application of the Canada-United States Income Tax Convention).

142. *See* Ringle, *supra* note 91, at 175.

143. *See* Yassinger, *supra* note 74, at 767-68.

the total [number of] games played."[144] Pre-season and post-season games are also included as total games in determining the applicable ratio.[145] This ratio is then multiplied by the athlete's taxable income in order to determine the taxable income allocable to the particular taxing jurisdiction.[146]

The benefit of using this allocation method is that, unlike the duty days method, it is easy to determine what the numbers in the ratio are since they are simply the number of games in which the athlete performed.[147] However, the games played formula does have its shortcomings. Unlike the duty days formula, the games played formula fails to reflect that athletes are paid for services in addition to game performances such as practice days,[148] team meetings,[149] and public relations activities.[150] A second problem regarding the games played method is that this method of taxing leads to an inequality in the apportionment of income taxed in the nonresident jurisdictions in which they perform.[151] In addition, using a games played formula generally means higher revenues for the taxing body since the denominator of the fraction is reduced, as compared to the duty days formula.[152]

Due to these problems, states have abandoned the games played formula in favor of the duty days formula. The last major state to use the games

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144. Krasney, *supra* note 12, at 137. For a discussion of the games played method, see Pierog, *supra* note 4, at 5; Ekmekjian, *supra* note 3, at 240; Green, *supra* note 78, at 284-85; Ringle, *supra* note 91, at 178; Yassinger, *supra* note 74, at 760-61.

145. *See* Comeau & Klein, *supra* note 127, at 267; Ekmekjian, *supra* note 3, at 240. Krasney, *supra* note 12, at 138.

146. An illustration for the calculation of tax using the games played method is:

$$\frac{\text{Total number of games played in the taxing jurisdiction}}{\text{Total number of games played}} \times \text{total income} = \text{total income allocable}$$

147. *See* Plattner, *supra* note 4, at 37.

148. *See* Krasney, *supra* note 12, at 138; Ekmekjian, *supra* note 3, at 240; Green, *supra* note 78, at 285; Overstreet, *supra* note 4, at 1.

149. *See* Yassinger, *supra* note 74, at 761; Ekmekjian, *supra* note 3, at 240.

150. *See* Plattner, *supra* note 4, at 37; Ekmekjian, *supra* note 3, at 240.

151. *See* Overstreet, *supra* note 4, at 1. For example, when a football player plays a game on Sunday, he is only in that taxing jurisdiction for a few days. However, one-sixteenth of his income will be taxed in that nonresident jurisdiction (this is excluding pre-season and post-season games and assumes that the regular season is sixteen games long). This can be compared to the duty days method where the ratio would be 2/180. This amount of the athlete's income will be taxed in that nonresident jurisdiction. The difference in ratios between the duty days and games played formulas most likely differs the least for baseball players, since they have more games and less practices as compared to athletes performing in football, basketball, and hockey. *See* Green, *supra* note 78, at 285.

152. *See* Ringle, *supra* note 91, at 179; Plattner, *supra* note 4, at 37. *See generally* Susser, *supra* note 57, at 640-41 (illustrating the problem of higher revenue for the taxing state with the example of a rock star).

played formula was New York.[153] However, effective January 1, 1995, New York switched to the duty days method of apportionment.[154]

C. *De Minimus Visits Exception*

A final method in which an athlete's income may be allocated is based on the de minimus exception. This is not so much a method of allocation as it is a reprieve that certain states give to visiting athletes to ease their tax burdens. States that use the de minimus visits exemption, "exempt certain individuals who are deemed to have had only minimal contacts with the taxing state from nonresident taxation."[155]

IV. CONTRACT PLANNING

An athlete's career is never certain due to fierce competition in the various professional sports leagues, as well as the possibility of injury. Therefore, it is important for the athlete to save money during what may be a short career to provide for a long retirement.[156] One way an athlete may be able to keep more of his earnings is by using the duty days method to structure his employment contract in such a way as to include off-season conditioning in his contract, thereby increasing the denominator of the duty days fraction. By increasing the denominator of the fraction, the duty days ratio will decrease and thus, when the ratio is multiplied by the athlete's income, the athlete will have less taxable income, thereby decreasing the athlete's tax liability.[157]

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153. *See* Green, *supra* note 78, at 284-85. Other states which have utilized the games played formula include Oregon and Pennsylvania. *See* Ekmekjian, *supra* note 3, at 240.

154. *See* Comeau & Klein, *supra* note 127, at 267; Green, *supra* note 78, at 285; *New York State Department of Taxation and Finance Adopts Personal Income Tax Amendments Concerning Professional Athletes,* 94 ST. TAX NOTES 208-29, Oct. 27, 1994.

155. Krasney, *supra* note 12, at 138. New Jersey will exempt those who maintain a permanent place of residence elsewhere and spend no more than thirty days of the taxable year in New Jersey. *See id.* Massachussetts has a de minimus exception where athletes are exempt from tax if they spend less than ten days in Massachussetts. *See id.* at 139; Almond, *supra* note 78, at 9. Still other states such as Minnesota, Missouri, and Wisconsin exempt nonresident athletes from tax when their income is below a certain dollar amount. *See* Krasney, *supra* note 12, at 139; Ekmekjian, *supra* note 3, at 246.

156. *See* GREGORY J. REED, TAX PLANNING AND CONTRACT NEGOTIATION TECHNIQUES FOR CREATIVE PERSONS, PROFESSIONAL ATHLETES, AND ENTERTAINERS 6 (1978) (stating that creative persons, professional athletes, and entertainers have become increasingly aware of the need to conserve capital in order that they may continue to live according to the manner in which they are accustomed).

157. This is especially true when the athlete is a resident of a state that does not have a state income tax. If the athlete is a resident of a state that does not have a state income tax, the only state income tax the athlete will pay is when the athlete must travel to away games. Thus, by including mandatory training programs in the off-season, the athlete will decrease his ratio for

A. *Case History*

This section will discuss two cases in which courts have been called on to decide whether off-season conditioning may be included in the application of duty days.[158] Under the facts of both cases the courts held that off-season conditioning will not be included in duty days.[159] However, the cases do suggest that it is possible that off-season conditioning may be included under certain circumstances.[160]

The first of these cases is *Stemkowski v. Commissioner*.[161] Peter Stemkowski was a professional hockey player and a Canadian resident during the off-season. One of the issues in *Stemkowski* was:

> [w]hether the Tax Court correctly held that the stated salary in the NHL Standard Player's Contract covered only the services of [the] taxpayer during the regular hockey season and not during the off-season, training camp, or the play-offs, so that only the time a player spent in Canada during the regular season could be used to calculate the portion of his salary excludable from his United States income.[162]

The court held that the contract did not cover off-season services, but that the contract did compensate for training camp and the play-offs as well as the regular season.[163] The court reasoned that "[f]itness is not a service performed in fulfillment of the contract but a condition of employment."[164] The court also reasoned that there was no evidence that Stemkowski was required to follow any mandatory conditioning program nor was Stemkowski under any club supervision during the off-season.[165] However, one interpretation of the court's decision may be that if Stemkowski had proven that he was required by his contract to follow a mandatory conditioning

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out-of-state tax purposes and therefore lower his total income tax liability.

158. *See, e.g.*, Stemkowski v. Commissioner, 690 F.2d 40 (2nd Cir. 1982); Favell v. United States, 16 Cl. Ct. 700 (1989).

159. *Stemkowski*, 690 F.2d at 45; *Favell*, 16 Cl. Ct. at 722.

160. Both of these cases were decided before the FTA's task force report on the unification of taxation issue. *See* Gould, *supra* note 72.

161. *Id.* at 40.

162. *Id.* at 42.

163. *See id.* at 45. The court stated: "We agree with the Commissioner and the Tax Court that the contract does not cover off-season services, but we hold that the Tax Court's finding that the contract does not compensate for training camp and the play-offs as well as the regular season is clearly erroneous." *Id.*

164. *Id.* at 46.

165. *See id.* at 46. The court stated that "[t]here was no evidence that Stemkowski was required to follow any mandatory conditioning program or was under any club supervision during the off-season." *Id.*

program in the off-season and did this training under club supervision, he would have been able to include these days in the duty days formula, thus decreasing his tax liability.

The second of these cases is *Favell v. United States*.[166] The issue in *Favell* was "whether . . . the Standard Player's Contracts at issue compensate[d] the hockey player for off-season activities, which would in turn allow the off-season period to be included in the time basis or income allocation formula and thereby reduce the hockey player's gross taxable United States income."[167] The court held that the provision in the Standard Player's Contract created a condition of employment rather than a promise to perform these conditioning activities in the off-season.[168] The court reasoned that the language in the contract "to report to the Club training camp at the time and place fixed by the Club in good physical condition" would be read by a reasonable person to mean that off-season training was an employment condition and not a promise.[169] Therefore, the court concluded that since off-season conditioning is a condition of employment and not a promise, off-season conditioning could not be included as duty days.[170] The court also stated that since there were no mandatory off-season conditioning programs required by the contract, the off-season conditioning could not be included in the duty days time allocation formula.[171] Thus, as in *Stemkowski*, the language used by the *Favell* court may be interpreted to mean that if Favell had been

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166. *Favell*, 16 Cl. Ct. at 700.

167. *Id.* at 719. The plaintiff argued that he was paid for compensation for services performed throughout the entire year so the denominator of the fraction should be 365 days. The government argued that the contract could only be read as a condition of employment and not as a promise, thus the denominator of the fraction should not be 365 days. *See id.* at 721.

168. *See id.* The court stated:

> a condition creates no right or duty in and of itself, but merely acts as a limiting or modifying contract provision. "A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." If a condition does not occur, whether through breach or other cause, the party fails to meet the condition, and acquires no right to enforce the promise. A contractual promise or obligation, on the other hand, raises a duty to perform a service and its breach subjects the promisor to liability and damages, but does not necessarily excuse performance by the other contracting party.

Id.

169. *See id.* at 722. The court stated:

> [a] plain reading of this contract clause and specifically focusing on the punctuation of the clause, could only lead a reasonable person to conclude that the words "in good physical condition" modify the remainder of the clause, "to report to the Club training camp at the time and place fixed by the Club," and describe the condition placed upon the hockey player upon arrival at the training camp.

Id.

170. *See id.*

171. *Favell*, 16 Cl. Ct. at 725.

required by his contract to participate in a mandatory conditioning program, those conditioning days would have been included in the duty days time allocation formula.

B. *Standard Player's Contract*

The clauses of the Standard Player's Contract[172] which pertain to the conditioning of a professional athlete in a team sport are as follows:

> 7. Physical condition of player.
> (a) Standard.
> The player represents and warrants that he is and shall continue to be sufficiently highly skilled in all types of [insert the sport] team play, to play professional [insert sport] of the caliber required by the League and by the Club, *and that he is and shall continue to be in excellent physical condition, and shall perform his services hereunder to the complete satisfaction of the Club and its Head Coach.*[173]
>
> (b) Failure to maintain standard.
> The Club shall have the right to terminate this Agreement should any of the following events occur: (i) *if the Player fails to establish his excellent physical condition to the satisfaction of the Club physician at the physical examination;* (ii) if (after having so established his excellent physical condition), *in the opinion of the Head Coach, the Player does not maintain himself in such excellent physical condition* . . . .[174]

The following provisions are excerpts from a Standard Player's Contract which is used for the National Football League (NFL).

> 8. PHYSICAL CONDITION
> Player represents to Club that he is and will maintain himself in excellent physical condition. . . . If Player fails to establish

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172. The Standard Player's Contract is a contract provided for by the various professional leagues in order to set minimum uniform provisions in which players and their agents may follow. The Standard Player's Contract is applicable to all athletes of the respective leagues to the extent that the athletes decide to use the Standard Player's Contract as their employment. Thus, the Standard Player's Contract will apply to both U.S. as well as Canadian athletes.

173. 13 RABKIN & JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS § 12.74 (1988) (emphasis added).

174. *Id.* (emphasis added).

> or maintain his excellent physical condition to the satisfaction of the Club physician, or make the required full and complete disclosure and good faith responses to the Club physician, then Club may terminate this contract.[175]
>
> FILING
> This contract will be valid and binding upon Player and Club immediately upon execution. . . . The Commissioner will have the right to disapprove this contract on reasonable grounds, including but not limited to an attempt by the parties to abridge or impair the rights of any other club, uncertainty or incompleteness in expression of the parties' respective rights and obligations, or conflict between the terms of this contract and any collective bargaining agreement then in existence. . . . On the receipt of notice of disapproval and termination, both parties will be relieved of their respective rights and obligations under this contract.[176]

SPECIAL PROVISIONS

This paragraph of the Standard Player's Contract is the section where the parties may insert additional provisions including signing bonuses or incentive or performance bonuses.[177] This may also be the section of the Standard Player's Contract where an athlete, wishing to include off-season conditioning programs, may state this desire in a manner such that it will be interpreted as a promise as opposed to a condition of employment. This may also be the section of the Standard Player's Contract where the athlete describes what the conditioning program consists of and where the conditioning is to be performed.

However, any additional provisions that are included in the special provisions section of paragraph twenty-four are still subject to paragraph nineteen and the commissioner may disapprove.[178] Most often, it is the provisions in paragraph twenty-four which trigger disapproval if the terms added are so vague or incomplete that a dispute is likely to arise, or if the added terms will impair the rights of some other club in the same league as the athlete under contract.[179]

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175. Gary R. Roberts, *The First Annual Sports Dollars & Sense Conference: A Symposium on Sports Industry Contracts and Negotiations—INTERPRETING THE NFL PLAYER CONTRACT*, 3 MARQ. SPORTS L.J. 29, 40 (1992).

176. *Id.* at 42-43.

177. *See id.* at 37.

178. *See id.*

179. *See id.* at 37-38.

C. *Application of Duty Days to Player's Contract*

By applying the language from the FTA report regarding duty days[180] to *Stemkowski* and *Favell*, it is clear that an athlete will be able to include days in which he participates in training and conditioning during the off-season, as long as the conditioning program is specified in his contract and is performed at the facilities of the team with which he is under contract.[181] If the contract is framed so that the off-season conditioning is a promise as opposed to a condition of employment, the athlete will be able to decrease the denominator in his duty days fraction which, in turn, will make the ratio smaller and thus decrease his tax liability outside the state or locality of residence.

In both *Stemkowski* and *Favell*, the courts held the provisions in the standard players contracts in regard to off-season conditioning were conditions of employment and not promises of employment; therefore, those days could not be included as duty days in calculating the allocation of income owed to taxing agencies.[182] However, both of these cases were decided before the recommendations given by the FTA.[183] By applying the recommendations offered by the FTA regarding what days may be considered duty days, it is clear that an athlete would be able to include off-season conditioning as duty days, thereby decreasing the denominator in the ratio of calculating their duty days, and thus decreasing the athlete's nonresident tax liability.

The pertinent provisions of the FTA report state that "duty days includes [sic] days during the off-season when a team member undertakes training activities as part of a team-imposed program, but ONLY IF CONDUCTED AT THE FACILITIES OF THE TEAM."[184] From this language it is clear that if the contract is set up so as to make it a requirement that the athlete must perform off-season conditioning, and the conditioning consists of a "team-imposed program" which is "conducted at the facilities of the team," the athlete may be able to include these days as duty days and thus decrease his

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180. *See supra* Part III.A.

181. *See generally* Lloyd E. Shefsky & Daniel G. Pappano, *Recent Tax Issues Affecting Foreign Athletes—Playing Hockey in the United States*, 8 U. MIAMI ENT. & SPORTS L. REV. 71, 82 (1991) (discussing that if off-season training is to be considered compensation under the player's contract, the contract must be drafted to create an obligation on the athlete to engage in training activities). The article states: "The lesson of *Favell* [and] *Stemkowski* . . . is clear: if off-season training programs are going to be considered compensated contractual obligations, the hockey player's contract must be drafted to create an *obligation* upon the players to engage in specific training activities." *Id.*

182. *See, e.g., Stemkowski*, 690 F.2d at 45; *Favell*, 16 Cl. Ct. 721.

183. *See* Gould, *supra* note 72. This is important because the FTA report suggests that duty days may include days during the off-season when a team member participates in training activities as part of a team-imposed program, if conducted at the facilities of the team. *See FTA report, supra* note 79.

184. *FTA Report, supra* note 79.

nonresident tax liability.[185]

An example of this application can be illustrated by applying the FTA report's recommendations to the case of *Wilson v. Franchise Tax Board of California*.[186] If Wilson had trained in the off-season in a program structured by the Raiders and on the Raiders' facilities, Wilson would have been able to include those days in which he trained during the off-season in the denominator of his duty days fraction, thereby decreasing his nonresident tax liability. This method could also be applied to the Standard Players Contracts in both the *Stemkowski* and *Favell* cases and would increase the denominator in the duty days ratio in order to decrease the athlete's nonresident tax liability.

In addition to the athlete decreasing his tax liability by including the off-season conditioning program in calculating his duty days ratio, an athlete will also be able to receive a deduction as a business expense for those expenses incurred while conditioning.[187] The conditioning expenses can be deducted as long as the physical activity engaged in is work-related as opposed to recreational.[188]

D. *Recommendation of New Contract*

Based on the idea that, by using the FTA report, athletes will be able to

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185. *See* Gould, *supra* note 72.

186. Wilson v. Franchise Tax Board, 25 Cal. Rptr. 2d 282 (Cal. Ct. App. 1993). In that case, Mark Wilson, a quarterback for the Los Angeles Raiders, sued the California Franchise Tax Board for a refund on taxes which he was charged while playing for the Raiders. *See id.* at 282. Wilson argued that the denominator of his duty days fraction should be every day of the year, because under his contract, he either worked or had to be available for work every day of the year. *See id.* at 286. The issues were whether Wilson's off-season conditioning counted as duty days and whether Wilson was to be available for work every day of the year. *See id.* at 287. The court held that "Wilson's contracts did not require year round availability or participation in off-season football activity." *Id.* at 288. The court reasoned that the contract did not require any participation in off-season activity and that the provisions in his Standard Player's Contract covered one season which did not include the off-season. *See id.* Although the coaches stated that they thought off-season football activity was mandatory, they conceded that it was not part of the contract and that Wilson engaged in off-season football activity because of Wilson's obligation as an athlete coupled with the fear of being cut. *See id.*

The court also looked at *Newman v. Franchise Tax Board* to reason that not every day of the year should be included in Wilson's contract. In that case, Paul Newman, an actor, was under an exclusive contract which required him to be available on an "on-call" basis for an eleven week period during filming. *See* Newman v. Franchise Tax Board, 256 Cal. Rptr. 503, 504 (Cal. Ct. App. 1989). The court held that Newman's duty days included all the days in which he was on the set or "on-call." *Id.* at 507. The court distinguished Wilson's situation from *Newman* in that Wilson was not "on-call" and therefore could not include every day of the year in determining the total number of duty days in the denominator of his duty days ratio. *See Wilson*, 25 Cal. Rptr. 2d at 289.

187. *See* Dobray & Kreatschman, *supra* note 34, at 275.

188. *See id.* at 275 n.65.

include off-season conditioning programs in their allocation of duty days, it is important to determine what provisions are necessary to include in the Standard Player's Contract[189] or any contract for a professional athlete in order to accomplish this end.

The relevant portions of the Standard Player's Contract in *Favell* state:

> The Player . . . agrees,
> (a) to report to the Club training camp at the time and place fixed by the Club, in good physical condition,
> (b) to keep himself in good physical condition at all times during the season,
> (c) to give his best services and loyalty to the Club and to play hockey only for the Club unless his contract is released, assigned, exchanged or loaned by the Club,
> (d) to co-operate with the Club and participate in any and all promotional activities of the Club and the League which will in the opinion of the Club promote the welfare of the Club or professional hockey generally,
> (e) to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interests of the Club, the League or professional hockey generally.[190]

Paragraph (a) can be rewritten to state that the athlete *agrees to* or *promises to* report to training camp in good physical condition at the time and place fixed by the club. By stating the language such that the athlete agrees to or promises to report to training camp in good physical condition, the language could only be interpreted as a promise to report in good physical condition. Thus, reporting to training camp will be a promise in the contract as opposed to a condition. Therefore, the athlete would be able to include those days in the off-season in which he trained in order to decrease his tax liability.

In addition, the contract must state the regimen in which the athlete is to perform his off-season conditioning, as well as state that the training must take place at the facilities of the team of which the athlete is a member. Thus, the contract must state something to the effect that the athlete promises to train in a team-supervised conditioning program for three hours per day and five

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189. For purposes of this analysis, the Note will refer to the Standard Player's Contract which was used in *Favell v. United States*, 16 Cl. Ct. 700 (1989).

190. *Id.* at 705-06. *See also* Shefsky & Pappano, *supra* note 181, at 78-79 n.40 (citing the language from the Standard Player's Contract in *Favell*).

days a week. The program should include strength training[191] and conditioning.[192] These contract provisions should be included either in the portion of the contract where it states that the athlete must report to training camp in good physical condition or, if using a standard player's contract, the language may be inserted in paragraph twenty-four in the section regarding special provisions. Once the contract is drafted, the last step is to present it to the commissioner of the league for his approval based upon paragraph nineteen.

If the commissioner affirms the contract and states that it does not violate any of the league's policies, it is clear that the athlete will be able to include these off-season conditioning days in his calculation of duty days and thereby decrease his nonresident tax liability. Based on the FTA report and recommendations, the athlete will be engaged in conditioning activities which are specified in his contract and will be performing the activities at the facilities of his team.

V. CONCLUSION

Professional athletics have long been a part of our North American culture. Often, professional athletes are considered to be above the common individual because of their unique talents and abilities. However, professional athletes are very similar to the average individual in the fact that they cannot escape the two certainties of life: death and taxes.[193]

With the expansion of professional sports and the inclusion of more teams in professional football, hockey, baseball, and basketball, there are more venues in which athletes must participate, and consequently more venues in which to pay taxes. These expansion franchises are moving north of the United States into Canada where an additional taxing agency comes into play. Thus, athletes may be liable for tax on their income at the Canadian federal and provincial rates, as well as for income tax to the United States on the federal, state, and local levels. Due to this multiple taxation, it is imperative that an athlete have a tax plan in order to comply with these filing requirements. In addition and perhaps more importantly, an athlete should have a tax plan to save money for retirement based upon the shorter average career of professional athletes as compared to other careers.[194]

Since the inception of the FTA report[195] regarding duty day apportionment of taxation for professional athletes, it is clear that the athlete

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191. For example, strength training would likely include weight training.

192. For example, conditioning could include anything from running or jogging to riding a stationary bike or swimming.

193. *See* Salmas, *supra* note 11, at 256.

194. *See id.*

195. *See FTA Report*, *supra* note 79.

may be able to structure his or her contract in such a way as to minimize nonresident tax liability. By including off-season conditioning in the employment contract, as well as stating the conditioning regimen and that the conditioning will take place at the team's facilities, these off-season days become duty days.

Based on case law[196] which has addressed the issue of whether professional athletes may include off-season conditioning as duty days in determining the applicable ratio of duty days, it is clear that if athletes structure their contracts in such a way as to make off-season conditioning a promise as opposed to a condition of employment, these days may be included in the duty days formula.

In future cases, issues which may arise in regard to this interpretation of case law may revolve around whether the conditioning program was fully specified in the contract, as well as whether it was sufficiently stated in the contract that the athlete is to perform this off-season conditioning at the facilities of the team. Thus, it is important for agents and attorneys of professional athletes to take special care in drafting the athlete's employment contracts.

This Note urges inclusion of the following contract terms in professional athlete's employment contracts: (1) the training regimen; (2) the location of the facility at which the athlete will be performing his or her conditioning; and (3) that the conditioning will be supervised and mandated either by a coach of the athlete's team or the team's trainer. If the professional athlete's contract includes these promises, the case law as well as FTA recommendations demonstrate that athletes will be able to decrease their nonresident tax liability while remaining in shape during the off-season.

*Jeffrey Adams**

196. *See, e.g.*, Stemkowski v. Commissioner, 690 F.2d 40 (2nd Cir. 1982); Favell v. United States, 16 Cl. Ct. 700 (1989). *See also supra* Part IV.A. and accompanying text for a discussion of the analysis of both *Stemkowski* and *Favell*.

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HAS EL DORADO CRUMBLED SO SOON AFTER ITS CORNERSTONE WAS LAID?: THE STATE OF INTERNATIONAL REFUGEE LAW AND THE REPATRIATION OF BOSNIANS IN GERMANY

"Remember. Refugees are not a threat. They are threatened. They are not a burden on society. They carry society's burden."[1]

I. INTRODUCTION

Refugee protection affects everyone, and the fate of displaced peoples is intimately, albeit seemingly indirectly, linked to our own well-being. As the number of refugees in the world continues to rise[2] and the need to protect them is greater than ever,[3] the plight of refugees and other displaced persons remains a paramount international concern "not only because of its humanitarian significance, but also because of its impact on peace, security[,] and stability, [without which the] world cannot reach a new order . . . ."[4]

Although refugee crises in the world abound,[5] perhaps the most vivid contemporary illustration embedded in the Western consciousness of the tragedy and complexity involved in dealing with those driven from their homelands lies in the aftermath of the most recent civil war in the former Yugoslavia.[6] The mass displacement of Bosnians produced by this conflict,

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1. JEAN TRIER, ORGANIZATIONS THAT HELP THE WORLD: UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 55 (1994) (quoting a United Nations High Commissioner for Refugees publication).

2. In 1970 there were 2.5 million refugees in the world. The number rose to around 11 million in the early 1980s and had increased to an estimated 18.2 million by 1993. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES 1993, at iii [hereinafter STATE OF THE WORLD'S REFUGEES 1993]. The U.S. Committee for Refugees recently reported that although refugees and asylum seekers worldwide had decreased from 15.3 million in 1995 to 14.5 million in 1996, there were also an estimated additional 19 million displaced persons in 1996. Wendy Koch, *Flow of Refugees Hits Lowest Level in Seven Years, One Reason Is Fewer Countries Are Willing to Take Them, Group Says*, S.F. EXAMINER, May 20, 1997, at A13.

3. STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at iii (citing the regularity and pervasiveness of persecution, human rights violations, and armed conflict as causes for current refugee crises).

4. *Id.* (quoting the United Nations High Commissioner for Refugees, Ms. Sadako Ogata).

5. *See generally*, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, WHEN REFUGEES GO HOME (Tim Allen & Hubert Morsink eds., 1994) (examining the numerous refugee movements within Africa).

6. As hostilities in this region escalated and peace talks ensued, the issue of how to deal with the numerous people forced from their homes came to overshadow the negotiations between the warring parties. Ulrike Davy, *Refugees from Bosnia and Herzegovina: Are They Genuine?*, 18 SUFFOLK TRANSNAT'L L. REV. 53, 61 (1995).

Europe's first refugee crisis of substantial proportions since World War II,[7] presented a formidable burden to the central and western European nations, most notably Germany.[8]

Responding to the outbreak of civil war in Yugoslavia in 1991, Germany absorbed approximately 350,000 of the 380,000 Bosnian refugees who arrived in western Europe.[9] Instead of processing this mass of people through traditional asylum procedure—an act that would have received considerable opposition from the German people—the German government secured public support for the measure by offering *Duldung*,[10] or "temporary protection status" (TPS),[11] a humanitarian initiative providing "temporary refuge due to

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In fact, the very nature of the conflict entailed taking the offensive against civilian population centers. The Serbs employed this approach not only to minimize military casualties, but more importantly to achieve ethnic cleansing by driving non-Serb ethnic groups from the area so that only Serbs remained. *See* WAYNE BERT, THE RELUCTANT SUPERPOWER: UNITED STATES' POLICY IN BOSNIA, 1991-95, at 50-52 (1997).

It should be noted that the Serbs were not the only faction alleged to have committed atrocities toward civilians during the fighting. *See id.* at 50.

7. BERT, *supra* note 6, at 155; Davy, *supra* note 6, at 61; *see also* STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 31 (stating that of the some 1.2 million who fled the conflict in the former Yugoslavia, at least 600,000 sought refuge "outside of the immediately affected region.").

8. The war in the former Yugoslavia generated a "mass outflow" from the region of some one million persons, representing about 5% of the country's population, who were seeking "at least temporary protection in Central and Western Europe." Judith Kumin, *Asylum in Europe: Sharing or Shifting the Burden?, in* WORLD REFUGEE SURVEY 1995, at 28, 31 (U.S. Committee for Refugees ed., 1995). *See also* William Drozdiak, *Germany Escalates Drive to Repatriate Bosnians; U.N. Says Refugees' Return Could Imperil Peace*, WASH. POST, Apr. 3, 1997, at A28 (stating that Germany hosts more Bosnian refugees than all European nations combined, with four times as many Bosnian refugees as the next most accommodating host country, Austria); *Germany Should Not Repatriate Bosnians Who Can't Go Home, U.S. Says*, DEUTSCHE PRESSE-AGENTUR, May 21, 1997, *available in* 1997 WL DCHPA 15:37:00 (noting that Germany admitted some 350,000 Bosnains since 1992, far more than any other country); *U.S. Backs German Decision to Return Bosnian Refugees*, DEUTSCHE PRESSE-AGENTUR, Sept. 20, 1996, *available in* 1996 WL DCHPA 15:30:00 (quoting a U.S. state department official who acknowledged the massive burden that Germany undertook in accepting the Bosnian refugees).

9. Colleen V. Thouez, *New Directions in Refugee Protection*, 22 FLETCHER F. WORLD AFF. 89, 98 (1998).

10. In terms of Germany's refugee and asylum policies, the term is loosely translated as "toleration." AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA ALL THE WAY HOME: SAFE "MINORITY RETURNS" AS A JUST REMEDY AND FOR A SECURE FUTURE 25-26 (1998) [hereinafter AMNESTY].

11. Thouez, *supra* note 9; *see also* STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 40-41 (providing an overview of the concept of temporary protection, its increased acceptance by Western governments in addressing refugee dilemmas, particularly in response to the need to provide asylum for the large numbers of people fleeing from the most recent Yugoslav war).

extraordinary circumstances,"[12] such as war. Thus, although TPS falls short of "full refugee status"[13] and the attendant benefits[14] that such status confers upon refugees and asylum seekers,[15] it stands as a contemporary response to changing refugee needs that is consonant with the developing international refugee law principle of repatriation[16] as the preferred solution to refugee situations.[17]

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12. Thouez, *supra* note 9, at 98. The principle of temporary protection status, being significantly less generous than an outright offer of asylum, fit well into the "heightened restrictionism" that had begun to define European asylum policy in the 1980s. *Id.*

13. TPS permits those "who might not qualify for refugee status to remain at the discretion of the authorities until it is deemed safe for them to return home." STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 41.

14. The significant difference between refugees and asylum seekers, i.e., those desirous of refugee status, should be noted:

> Formally recognized refugees enjoy full civil, social and political rights with the exception of the right to vote. The situation of asylum-seekers and "de facto" refugees is marked by restrictive socio-economic measures, such as limitations on freedom of movement, reduced social aid given in kind [and] not in cash, medical and dental treatment only in cases of acute illness or pain, housing in collective accommodation centers and only limited access to the labour market.

UNHCR Country Profiles—Germany (visited Sept. 15, 1998) <http://www.unhcr.ch/world/euro/germany.htm>.

15. A refugee is defined as "[s]omeone who has fled his or her country because he [or] she fears persecution based on race, religion, nationality, social group, or political opinion. The definition is sometimes expanded to include people fleeing war or other armed conflict." U.S. Committee for Refugees, *Worldwide Refugee Information: Glossary of Terms* [hereinafter *Glossary*] (visited Sept. 17, 1998) <http://www.refugees.org/world/glossary.htm>.

An asylum seeker, on the other hand, is "[s]omeone who claims to be a refugee. Often, an asylum seeker must undergo a legal procedure in which the host country decides if he [or] she qualifies for refugee status. International law recognizes the right to seek asylum, but does not oblige states to provide it." *Id.*

For the purposes of this Note, the terms "refugee" and "asylum seeker" may at times be used interchangeably, despite their technically different meanings, unless specified otherwise by the context.

16. TPS recognizes the limited opportunities for masses of asylum seekers to integrate completely into the countries that have received them and stands for the notion that "[p]ermanent exile is neither necessary nor desirable for most people [who are driven from their homelands]." STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 40.

In lieu of a right to permanent residence in the host country, TPS affords these displaced people the necessary assistance and protection "for the duration of the violence and disorder that displaced them, followed by assistance to reintegrate in their own societies when conditions permit them to return." *Id.* Thus, not only does TPS attempt to return migrants to the lives they knew prior to being uprooted, but it preserves "the idea of return in order to avoid collaborating, however unwillingly, in the crime of 'ethnic cleansing.'" *Id.* at 41. As such, TPS is sensitive to refugees' immediate and long-term needs.

17. *See* Hiram A. Ruiz, *Repatriation: Tackling Protection and Assistance Concerns; in* WORLD REFUGEE SURVEY 1993, at 20, 20 (U.S. Committee for Refugees ed., 1993) (quoting the U.N. High Commissioner for Refugees, Ms. Sadako Ogata, as proclaiming "the 1990s as the 'decade of repatriation.'"). In this manner, TPS, because of its ultimate goal of repatriation, signals a reaffirmation of the world's commitment to refugees because "voluntary repatriation

However, Germany's attempts to repatriate those Bosnians whose three-year protected status period expired in October of 1996 encountered fierce resistance by opposition groups who protested these repatriations as violative of *non-refoulement* principles.[18] As a result, hundreds of thousands of Bosnian refugees remain in Germany to date, their futures uncertain. Now that over two years have passed since the German government officially terminated TPS for the Bosnian refugees, the German people are increasingly viewing TPS as merely another means of permanent future asylum for foreigners.[19] It is not surprising that the German government is receiving harsh criticism on this sensitive issue, regardless of whether it tries to appease the refugees or the social and economic concerns of the German plebiscite.[20]

As Germany addresses this refugee dilemma, it must decide the proper scope for maintaining its migration control policies while affording adequate protection to those Bosnian refugees who still need it.[21] There are some indications that Germany's highly-vaunted commitment to human rights[22] is being undermined by the idea that "domestic law and order,"[23] not refugee protection, is the direction in which the country is moving.

Germany's answer to this dilemma is critical, as it will likely dictate in large part the manner in which other European Union nations deal with similar

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has been presented as the best way to resolve the global refugees problem, and good intentions have been voiced about the need to assist returnees for some time after arrival in their countries of origin in order to ensure that they attain viable livelihoods." WHEN REFUGEES GO HOME, *supra* note 5, at 1. Surprisingly, "very little information has been available about what has happened to those refugees who went home in the past." *Id.*

18. Although Germany has monitored TPS to ensure that it remains temporary, "the German government has faced mounting pressure to respect the international principles of *non-refoulement* and to not involuntarily repatriate Bosnian refugees [until conditions in their homeland are conducive to their return]." Thouez, *supra* note 9, at 100; *see also infra* Part IV. for a discussion of the numerous difficulties that are dissuading Bosnians from returning home.

19. *See* Thouez, *supra* note 9, at 90. There exists a general view that "temporary asylum in the past leads to permanent settlement in the future." *Id.*

20. *See* Yojana Sharma, *Refugees-Germany: Bosnians Caught in Germany's Election Crossfire*, INTER PRESS SERV., Sept. 8, 1998, *available in* 1998 WL 5989163 (observing that Germany has been criticized by U.S. Secretary of State Madeleine Albright for tightening its refugee policy prior to the September 1998 elections but also noting the significant percentages of Germans polled who responded that they "would vote for far-right parties which lead off on anti-foreigner policies.").

21. The manner in which the rights of the state are balanced against the rights of refugees bears upon the future of the principle of asylum itself. *See* James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 117-18 (1997).

22. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES 1995, at 202 [hereinafter STATE OF THE WORLD'S REFUGEES 1995].

23. Tony Czuczka, *Europe Pulls in the Welcome Mat*, SEATTLE TIMES, Jan. 16, 1998, at A10.

refugee crises in the future.[24] Regrettably, it appears as if the international community is already receptive to shifting the focus of refugee law away from the migrants and more toward state interests.[25]

This Note stands for the proposition that, although Germany has been an invaluable sanctuary for displaced peoples since the end of World War II, its current policies toward repatriating Bosnian refugees should be tempered by a more liberal view of temporary protection as a long-term, but not indefinite, approach to the extremely complex repatriation situation in Bosnia Herzegovina. To help Germany effectuate a more effective repatriation scheme for these people, the international community, in the spirit of the *Convention Relating to the Status of Refugees*[26] that so prominently defines international refugee law, must shoulder more of Germany's burden in accommodating refugees and must be more aggressive in rectifying the situations that initially uprooted the Bosnian refugees.

Part II of this Note discusses the history of asylum law and its relation to Germany's refugee policies in a modern context. Part III assesses the current social, political, and economic climate in Germany and its effect on the Bosnian refugees and other foreigners still living there. This Part will also examine Germany's citizenship laws and their potential effects on foreigners and Bosnians in Germany. Part IV evaluates the current situation in Bosnia and Bosnia's ability to absorb the repatriation of Bosnian refugees from abroad. Finally, Part V explores some of the repatriation programs for Bosnian refugees from Germany and suggests other multilateral approaches to provide for the special needs of these refugees upon return to their war-torn homeland.

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24. *See* Sam Blay & Andreas Zimmermann, *Recent Changes in German Refugee Law: A Critical Assessment*, 88 AM. J. INT'L L. 361, 377 (1994) (predicting "the beginning of the end of liberal asylum laws in Europe" by noting that "the German situation appears indicative of emerging trends in refugee law in Western Europe generally."); Davy, *supra* note 6, at 62 (observing that after Germany and Switzerland imposed visa requirements for Bosnian refugees in 1992, several other Western European nations adopted the same policy).

See also Richard A. C. Cort, *Resettlement of Refugees: National or International Duty?*, 32 TEX. INT'L L.J. 307, 324-25 (1997) (noting the contagious nature of "compassion fatigue" among nations toward refugees and how countries such as Canada, France, and the United Kingdom, following Germany's lead, have enacted "restrictions that limit the ability of asylum-seekers to gain access to these countries.").

25. *See* Cort, *supra* note 24, at 327 (citing a decreased "spirit of cooperation [within the international community] that dominated the refugee climate in the years following World War II" and evidence that refugee protection "is not operating in the best interests of the people who are least able to protect themselves—the refugees.").

26. *See infra* notes 42-44 and accompanying text.

II. THE EVOLUTION OF INTERNATIONAL REFUGEE LAW

A. *From Early Origins to Widespread Acceptance*

History is replete with instances of migrants fleeing their homes and homelands for fear of their lives and safety.[27] Indeed, "[t]he right to seek sanctuary is one of civilization's oldest principles,"[28] dating back some 3500 years in a multitude of forms and among various ancient cultures.[29] Ironically, notwithstanding the tragic and pervasive presence of refugee movements throughout human history, it was not until the twentieth century that the international community, prompted largely by two world wars that displaced millions,[30] undertook coordinated measures toward improving the plight of refugees.[31]

In spite of the tremendous progress that has occurred in international refugee law,[32] however, the precise focus of asylum in safeguarding refugees remains uncertain among the competing interests of the state and those seeking protection.[33] Prior to and including the beginning of the twentieth

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27. TRIER, *supra* note 1, at 14; *see also* COVEY T. OLIVER ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 825 (4th ed. 1995) ("So long as the level of human rights protections varies among the states of the world, the individual will continue the age-old human practice of leaving a state where he is oppressed to live in another state where, he believes, his rights will be protected.").

28. TRIER, *supra* note 1, at 14-15.

29. STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 33.

30. *See* TRIER, *supra* note 1, at 15-16; *see also* Cort, *supra* note 24, at 311-12 (noting that the early years of the twentieth century "opened a new episode in refugee affairs" marked by "massive refugee movement and resettlement.").

31. TRIER, *supra* note 1, at 15.

32. Since the end of World War II, the international community has contributed substantially to improving the plight of refugees. This is a praiseworthy accomplishment considering that

> [t]he effort to assist refugees to stay alive through their initial peril, to return to their homes if circumstances permit, to resettle in new lands if only that way is open and to avoid a squandering of human energy while their fates are determined reflects large-scale organized, transnational activity.

Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L.Q. 833, 836 n.17 (1993).

33. "[R]efugees are considered to possess a right to seek asylum in other countries . . . [and] receiving states are under no legal obligation, other than for purely humanitarian reasons, to accept refugees and to provide them with a place of permanent sanctuary." Cort, *supra* note 24, at 311. These conflicting principles lead to tension between the rights of asylum seekers and those of host countries. *See id.*

Despite the polarity in the rights of these parties, refugee law attempts to accommodate both. "The critical right of at-risk people to seek asylum will survive only if the mechanisms of international refugee protection can be reconceived to minimize conflict with the legitimate migration control objectives of states, and dependably and equitably to share responsibilities and burdens." Hathaway *supra* note 21, at 117-18. *See also* OLIVER ET AL., *supra* note 27, at 826 (doubting the willingness of the international community to grant asylum

century, the concept of asylum deferred to state interests over an individual's right to protection.[34] Yet even as humanitarian concerns for refugees have become increasingly important,[35] an absolute right to asylum has not been established,[36] even under the *Universal Declaration of Human Rights* (UDHR),[37] and it appears as if modern refugee law in many respects resembles the original framework for dealing with displaced peoples.[38]

But even if the turn of the twentieth century did not mark the establishment of a new and novel approach to refugee law, the impact of an international and multilateral approach to these traditional principles cannot be overstated.[39] The international community's commitment to refugee protection was memorialized in the early and middle portions of the twentieth century through the establishment of various refugee organizations[40] that

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unconditionally but recognizing its commitment to humanitarian objectives).

34. *See* STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 33.

35. *See infra* notes 37-41 and accompanying text for a discussion of the international instruments that embody this humanitarian emphasis. *See also* Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 253 (1996) (commenting on the vitality of the 1951 Convention "in moderating the impulse of States to focus too narrowly on their own material or security needs at the expense of their essential humanitarian obligations to forced migrants.").

36. *See* OLIVER ET AL., *supra* note 27, at 825. *See also* Cort, *supra* note 24, at 309 (noting the absence of a fundamental governmental duty to accept refugees and the state's power, constrained only by international custom, to treat refugees as it pleases).

37. G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR].

Pertaining to the asylum principle, Article 14(1) of the UDHR states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." *Id.* art. 14, para. 1. Article 14(2) adds that "[t]his right may not be invoked in the case of prosecutions genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations." *Id.* art. 14, para. 2.

38. Scholars in the fifteenth and sixteenth centuries were already "considering the implications of the movement of individuals across national boundaries." Cort, *supra* note 24, at 311. Hugo Grotius contended that "'[a] permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary to avoid strifes.'" *Id.*

Scholars further developed this reasoning in the eighteenth century. In 1758, the writer Emerich de Vattel stated that "'no Nation may, without good reason, refuse even a perpetual residence to a man who has been driven from his country,'" but qualified this asserted right of the individual asylum seeker in that "'every Nation has the right to refuse to admit an alien into its territory when to do so would expose it to evident danger or cause it serious trouble.'" *Id.*

39. *See supra* note 32 and accompanying text.

40. The first international body dedicated to refugee affairs was created in 1921 when the League of Nations appointed Fridtjof Nansen as its first High Commissioner for Refugees. *See* TRIER, *supra* note 1, at 16. Nansen had directed relief operations for the International Committee of the Red Cross in Russia in response to the mass starvation created by the Russian Revolution in 1917. *See id*; *see also* Kathleen Marie Whitney, *Does the European Convention on Human Rights Protect Refugees from "Safe" Countries?*, 26 GA. J. INT'L & COMP. L. 375, 378 (1997) (discussing how forced migration "became an issue" in 1917 as millions fled the Russian Revolution and in 1922 upon the "collapse of the Ottoman [E]mpire").

eventually culminated in the United Nations High Commissioner for Refugees (UNHCR) in 1950.[41] The following year, the UNHCR adopted the *Convention Dealing with the Status of Refugees* (1951 Convention),[42] and in 1967 the UNHCR ratified the *Protocol Relating to the Status of Refugees* (1967 Protocol)[43] to expand certain refugee rights under the 1951 Convention. These documents stand as the "cornerstone" of refugee protection,[44] particularly through the 1951 Refugee Convention's promulgation in Article 33[45] of the most fundamental principle of refugee protection—*non-refoulement*.[46]

While this international solidarity has significantly advanced refugee causes around the globe,[47] refugee law in recent years has changed dramatically since it was envisioned and "consolidated" in the earlier parts of

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"From 1922 to 1933, the League of Nations dealt with refugees from Russia, Armenia, and a number of other countries," but it recognized a need for a more permanent system of refugee protection when the Nazis expelled large numbers of Germans in 1933. *Id.* The newly-formed United Nations created the International Refugee Organization (IRO), which operated from 1946 to 1950. *See id.*

Interestingly, a strong correlation exists between the persecution of the Bosnian Muslims and the expulsion of Jews from Germany in 1933. As noted by Ignatz Bubis, chairman of the central council of Jews in Germany, "[t]he expulsion terror practices in Bosnia today is quite comparable to what happened from the beginning of the Third Reich to the outbreak of the war[,]" though he "limited his comparison of the Bosnian plight to that of the Jews before the 'systematic annihilation of the Jewish people.'" Jewish Telegraphic Agency, *Bosnian Muslims Suffering like Jews Under Nazis, Official Says* (visited Sept. 15, 1998) <http://www.shamash.org/jb/bk950728/imuslims.htm>. Thus, the impetus for forming a permanent system of international refugee protection in 1933 has found renewed relevance in modern-day Bosnia.

41. In 1950 the U.N. General Assembly replaced the IRO with the United Nations High Commissioner for Refugees. *See* Whitney, *supra* note 40, at 380.

42. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention or 1951 Convention].

43. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

44. The Executive Committee of the Programme of the UNHCR recently declared the 1951 Convention and its 1967 Protocol "as the 'cornerstone' and the 'centre of the international legal framework for the protection of refugees.'" Fitzpatrick, *supra* note 35, at 229. *See also* Newmark, *supra* note 32, at 834 & n.4 (noting that the 1951 Convention and 1967 Protocol are the "principal instruments benefiting refugees.").

45. This article prohibits "refoulement" as follows: "No [c]ontracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 1951 Refugee Convention, *supra* note 42, art. 33.

46. *See* Newmark, *supra* note 32, at 834. "The principle of non-refoulement is the foundation stone of international protection . . . ." *Id.* at 834 n.5 "This principle [of non-refoulement] . . . can be regarded as the cornerstone of refugee law." *Id.*

47. *See supra* note 32 and accompanying text.

this century.[48] Regrettably, the increased difficulty presented by modern refugee crises has prompted numerous countries, many formerly bastions of refugee protection, to limit their willingness to provide asylum.[49] This course of action threatens not only the refugees' lives and safety, but also the concept of asylum itself.[50]

History suggests that countries were more receptive to providing asylum as long as they were not required to incur an overly onerous burden in accommodating displaced persons. Now that a growing number of desperate refugee situations are occurring regularly,[51] such as the fallout from the civil strife in Bosnia Herzegovina, the international community's commitment to protecting displaced peoples stands at a crossroads. Germany, as a Western power traditionally sympathetic to refugee causes,[52] now has the opportunity unequivocally to reaffirm the world's responsibility to refugees by positively influencing its neighbors[53] that the correct course of action in repatriating the Bosnian refugees may not be the most immediately expedient and economical one.[54]

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48. At the end of World War II and at the outset of the Cold War, "the causes of the [then] contemporary refugee problems did not seem excessively complicated. The governments of the countries that produced refugees were assumed not to be susceptible to international pressure concerning the treatment of their citizens." STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 14. In contrast, the "refugee problems of the 1990s are characterized by their complexity . . . and cannot be treated in isolation from the conditions that give rise to them—nor can those conditions be isolated from refugee concerns." *Id.* at 13.

49. *See generally* Koch, *supra* note 2 (noting that the principle of asylum is coming under attack by Westerners who are increasingly cynical that refugees are primarily seeking better employment opportunities); Stephen S. Rosenfeld, *Wise Asylum Policy Is in American Interest*, HOUSTON CHRON., May 29, 1997, *available in* 1997 WL 6560011 (citing the end of the Cold War, compassion fatigue, social and economic tension, and other political pressures to explain why certain countries are seeking to expel refugees within their borders or to prevent their entry altogether); *Study Faults Protection for Refugees*, DEUTSCHE PRESSE-AGENTUR, May 19, 1997, *available in* 1998 WL DCHPA 20:16:00 (observing "a continuing deterioration in the quality of protection and assistance countries are willing to offer to those fleeing persecution and violence" and criticizing Germany's plans to force Bosnian refugees to repatriate).

See also Hathaway, *supra* note 21, at 117 (noting that governments are hesitant to offer significant refugee protection because they view it as an "uncontrolled 'back door' route to permanent immigration" and that both the duty to admit refugees and the costs associated with their arrival are unequally distributed among governments).

50. *See USCR's World Refugee Survey Shows Asylum Eroding in More Countries*, U.S. NEWSWIRE, May 20, 1997, *available in* 1997 WL 5712935.

51. *See, e.g.*, WHEN REFUGEES GO HOME, *supra* note 5.

52. *See infra* Part II.B.

53. *See supra* note 24 and accompanying text. *See also* Thouez, *supra* note 9, at 89 (describing Germany as a "regional hegemon" and a preferred destination for refugees).

54. Sharma, *supra* note 20 (quoting the Archbishop of Berlin's spokesperson who stated that German politicians need "the courage and honesty" to concede that the Bosnian refugees may need "long term" protection in Germany because of the inhospitable conditions in the former Yugoslavia). Further, forced, uncoordinated deportations and involuntary repatriations "send refugees to the wrong places and 'play into the hands of the hard-liners' who want to halt

B. *Germany's Generous Role in International Refugee Law: Atoning for the Sins of a Nazi Past and Building with Foreign Labor*

Germany does not treat the concept of asylum lightly.[55] In responding to the refugee tragedies created by the Third Reich, Germany adopted some of the world's most liberal asylum policies,[56] embodied originally in Article 16 of the German Constitution, the *Grundgesetz* (Basic Law).[57] While the purpose of article 16 was to protect the politically persecuted, German courts repeatedly demonstrated a propensity to interpret this constitutional provision broadly, ensuring asylum seekers with at least a lengthy respite in Germany before their asylum requests were finally decided.[58] This accommodating asylum application procedure quickly made Germany the choice destination for refugees in Europe.[59]

'the creation of a truly single Bosnia with two truly multi-ethnic entities.'" *Id.* (citing the U.S. State Department).

55. "Political asylum remains an extremely sensitive subject in Germany, which is burdened with the legacy of its Nazi past." *German Social Democrats May Support Refugee Curb*, WALL ST. J. EUR., Mar. 13, 1992, *available in* 1992 WL WSJE 2040861.

56. "West Germany adopted its liberal political asylum rules after World War II, as an atonement for the refugees driven abroad by the Third Reich." *Id.; see also* Blay, *supra* note 24, at 362 n.7 (stating that Germany's former constitutional grant of the right to asylum resulted from "Germany's experience with the political persecution that accompanied Nazism and the fact that many German emigrants in those days had severe difficulties finding a safe haven from persecution."); *Germany's Flawed Response*, WALL ST. J. EUR., June 1, 1993, *available in* 1993 WL WSJE 2038408 (citing Germany's adoption of the world's most liberal asylum laws as a penitential response to its racist and xenophobic Nazi past).

57. Grundgesetz [Constitution] [GG] art. 16 (F.R.G). Immediately following the Second World War and until its recent amendment in December 1992, the German Constitution provided that "persons persecuted on political grounds shall enjoy the right of asylum." *Id.* art. 16, para. 2.

58. Because the German courts interpreted article 16(2) liberally, a lengthy and complex process ensued whereby the applicant's claim was evaluated; during this period, the German government fed and housed the applicant at a substantial cost. *See* Blay *supra* note 24, at 362. Thus, as only a small percentage of applicants were eventually granted refugee status, the problem with Article 16(2) arose from permitting applicants, who were years later denied refugee status, "to stay pending consideration of their application[s]." *Id.* In effect, these monies primarily supported those deemed ineligible for asylum in Germany.

59. Although Germany's advanced economy attracts certain asylum seekers, Germany is hardly the only such economy in Western Europe. *See id.* at 377. As such, while "the economic situation in itself does not explain the country's attraction for asylum seekers," Germany's particularly long "preamendment procedure for asylum applications and determinations" has been credited with drawing "economic refugees" to Germany for years of state-subsidized living. *Id.*

See also WORLD REFUGEE SURVEY 1998, at 4 tbl. 3 (U.S. Committee for Refugees ed., 1998) (highlighting the disproportionately large number of asylum applicants that Germany has received in the past decade compared with other countries); *Fewer Refugees Seek Asylum in EU States*, AGENCE FRANCE-PRESSE, Mar. 23, 1998, *available in* 1998 WL 2246638 (noting that Germany has been the choice destination for asylum seekers from Turkey, the former Yugoslavia, and Iraq for the past four years); *Immigrants Are Genetically Tested to Prove*

Nearly half a century after adopting these generous asylum procedures, however, Germany's asylum policies began to collapse under their own largesse. Mass migrations into Germany further compromised the country's unstable economic foundation that was burdened with additional economic and social issues brought about by the reunification of East and West Germany.[60] Such economic and political pressures prompted the German government to take the controversial step of amending Article 16 of its Basic Law in 1993[61] to stem the "uncontrolled flood" of refugees pouring into Germany.[62] Moreover, aside from the administrative costs of processing these foreigners, the Germans were also continuing to subsidize their lengthy stays in Germany,[63] not to mention the additional hidden costs associated with

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Claims of Kin in Germany, CHICAGO TRIB., Jan. 24, 1998, *available in* 1998 WL 2817997 (crediting Germany's liberal asylum policies and generous welfare benefits with making it Europe's choice destination among refugees); Elizabeth Neuffer, *Europe Slow to Respond as Refugee Woes Mount*, BOSTON GLOBE, Feb. 5, 1998, at A1 (noting that since 1993 Germany has received half of all asylum requests in Europe).

60. Panikos Panayi, *Racial Exclusionism in the New Germany*, *in* GERMANY SINCE REUNIFICATION: THE DOMESTIC AND EXTERNAL CONSEQUENCES 129, 134-39 (Klaus Larres ed., 1998). Amidst the rising costs of reunification, the German public questioned the cost of examining so many asylum requests, which amounted to DM 8 billion (approximately $5 billion) in 1993 alone. *See* STATE OF THE WORLD'S REFUGEES 1995, *supra* note 22, at 202.

61. "'Politically persecuted enjoy the right to asylum.' This simple sentence, part of Article 16 of the German constitution, has been the focus of one of the longest and most heated debates in the Federal Republic's history." STATE OF THE WORLD'S REFUGEES 1995, *supra* note 22, at 202. Following a lengthy debate about the moral, political, and legal ramifications of amending the Basic Law, the German legislature amended Article 16 "to deny asylum in Germany to anyone who enters the country having passed through another country considered to be 'safe.'" Kumin, *supra* note 8, at 30. Safe countries were defined "as those where the 1951 Refugee Convention and the European Human Rights Convention are applied." *Id.* This amendment provided Germany a large degree of insulation against asylum seekers as all nine nations that share a land border with Germany are classified as "safe," including Poland and the Czech Republic, whose asylum programs and policies are still in their nascent stages. *See id.*

See also Blay, *supra* note 24, at 363 (describing the replacement of Article 16(2) with Article 16(a), which broadened the authority to deny asylum applications from applicants who had entered Germany from a country deemed by Germany to have adequate refugee protection capacity).

62. Panayi, *supra* note 60, at 143. *See also* Kumin, *supra* note 8, at 29 ("The asylum system was overwhelmed, xenophobic acts multiplied, and with no prospect of a European burden-sharing arrangement in sight, Germany amended its Constitution, which previously had guaranteed that 'politically persecuted enjoy the right to asylum.'").

63. Most asylum seekers in Germany survive from welfare programs until their application is eventually considered, a lengthy process that "often takes years." Czuczka, *supra* note 23. Such applicants are entitled to housing and a $900 monthly stipend which, when "[m]ultiplied by 1.6 million refugees, . . . cost the increasingly resentful German taxpayer up to $8.2 billion a year." *Id. See also supra* note 58 and accompanying text for a discussion of the lengthy asylum application process in Germany.

foreigners that were borne by German society.[64] Thus, the burgeoning costs of supporting asylum seekers, combined with Germany's own economic and social difficulties, proved to be more of a burden than the German people were willing to undertake, as evidenced by the 1993 constitutional amendment restricting the right of asylum.[65]

But Germany's substantial support and favorable treatment of asylum seekers and refugees was not purely altruistic; Germany has also benefitted tremendously from the fruits of foreign labor.[66] Not only were outside labor sources integral in rebuilding Germany after the Second World War, but foreign workers have also been willing to accept low-paying jobs that most Germans find unattractive and are thus unwilling to accept.[67]

Yet despite Germany's constitutional tightening of its asylum policies,[68] its stance toward refugee protection nonetheless remains liberal.[69] In order to appreciate the particular difficulties that Germany is currently facing with the Bosnian refugees within its borders, an examination of the country's unique economic and political situation following reunification, as well as its singularly troubling and stigmatizing Nazi past, is instructive.

III. THE SOCIAL, POLITICAL, AND ECONOMIC CLIMATE IN GERMANY: REUNIFIED GERMAN SOIL AS INFERTILE GROUND FOR REFUGEE SYMPATHY

A. *Economic Woes: Bad Economy, Bad for Foreigners*

While the fall of the Berlin Wall in 1987 heralded another triumph for

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64. *See Migration News: Europe* (visited Sept. 15, 1998) <http://migration.ucdavis.edu/By-Month/MN-Vol-3-96/mn_dec_96.html>. An estimated 500,000 illegal jobs—unauthorized foreigners and Germans working for unreported wages—cost the country $65 million in lost income and payroll taxes. *See id.* Furthermore, employers spent a total of DM 117 billion ($76 billion) on unemployment insurance, early retirement benefits, and other jobless programs for the unemployed in Germany in 1995. *See id.*

65. *See supra* notes 60-62 and accompanying text.

66. *See* Panayi, *supra* note 60, at 130-31. At the end of the nineteenth century, Germany had transformed from a net exporter to a net importer of labor. *See id.* Labor importation continued in Germany in various forms to supplement domestic labor shortages, from the "exploitative" forced labor system established by the Nazis in World War II to the ethnic Germans who returned to their homeland soon after the massive disruption of the war. *Id.* As this source of ethnic German labor became increasingly unavailable due to the construction of the Berlin Wall, Germany looked to countries such as Spain, Greece, Turkey, Portugal, and Yugoslavia for workers. *See id.*

67. "The overwhelming majority of migrant workers were employed in unskilled and low-skilled jobs, involving heave, dirty, and dangerous work . . . ." *Id.* at 130; *see also Germany's Flawed Response, supra* note 56 (stating that foreigners come to Germany prepared to work hard for nominal wages at jobs that Germany's skilled and well-paid work force is unwilling to accept).

68. *See supra* note 61 and accompanying text.

69. *See* Czuczka, *supra* note 23.

freedom and democracy, Germany continues to struggle with several perplexing issues associated with its reunification.[70] The fiscal consequences of melding a market with a command economy will present substantial obstacles to Germany's economic prospects for many years.[71] Perhaps the most pressing domestic issue exacerbated by German reunification is unemployment,[72] which continues to plague the country, despite recently falling under four million.[73] Yet in spite of this glimmer of success in the labor market, many scholars remain concerned that Germany's economic troubles will persist well into the next century, negating most speculation that reunified Germany will transform into an economic "superpower."[74]

Mass migrations of refugees and asylum seekers into Germany have further compromised the country's unstable economic foundation.[75] As these foreigners stay in Germany, Germans suffering under the current economic uncertainty are fearful and resentful that outsiders are usurping much needed housing and welfare benefits provided by the state.[76] Unfortunately, Germany's bleak economic prognosis for the next several years, or possibly decades,[77] has aroused an alarming degree of anti-foreigner sentiment in the country.

B. *"Demons" from the Past:*[78] *The Permanent Specter of Nazism and Xenophobia in Contemporary Germany*

Racism, neo-Nazism, and xenophobic attitudes are not unique to Germany[79] and are arguably stronger and more widespread in other

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70. *See* Panayi, *supra* note 60, at 1.

71. *See id.* at 63.

72. *See id.* at 134.

73. Recent data indicate that unemployment in Germany has fallen below the politically-significant four million mark. NPR NEWS BROADCAST, Oct. 6, 1998. Joblessness in western Germany is around 10.3% and near 16.7% in the eastern part of the country. *See id.* The excessively high unemployment in eastern Germany is credited as a significant factor in removing Chancellor Helmut Kohl and his political party, the Christian Democratic Union, from their long-standing majority in German government. *See id.*

74. Panayi, *supra* note 60, at 1.

75. *See id.* at 134-35.

76. *See* Czuczka, *supra* note 23.

77. *See* Panayi, *supra* note 60, at 1-2.

78. "[O]ne must question whether the 'memory' of Nazism can ever be eradicated from German national consciousness." *Id.* at 133-34. The unification crisis that arose in 1989 is credited with awaking the "demons of the Nazi past to make another appearance . . . ." *Id.*

79. "Racial exclusionism has guided the history of Germany in the same way as it has done in all other nation states. It has always been a core ideology." *Id. See also* Ralph Atkins, *Bonn Offers Good Home to Watchdog*, FIN. TIMES, Apr. 14, 1997, at 13 (stating that "it would be wrong to conclude Germany is witnessing a worrying outbreak of xenophobia" and that "Germany has no particular hostility towards outsiders.").

countries.[80] In fact, Germans have demonstrated a firm commitment to human rights pertaining to refugee-related issues.[81] Germany, however, with its recent inundation of outsiders, has once again demonstrated that it is far from immune to anti-foreigner sentiment.[82]

It is Germany's guilt-ridden Nazi legacy that is directing a large portion of its reaction to accommodating refugees. Germany is not only concerned with the burdens and costs of subsidizing refugees, but also with the possibility of violence against foreigners and the inevitable stigmatization of Nazism that would accompany such violence.[83] Foreign Minister Klaus Kinkel has described this phenomenon "as a threat to the nation's 'inner balance'—code words for the fear that more refugees mean more anti-foreigner attacks by rightist radicals."[84]

Tragically, this substantial threat has materialized into lethal altercations

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80. *See generally* Atkins, *supra* note 79 (asserting that Jean-Marie Le Pen's National Front in France is far stronger than any ultra-right movements in Germany); *Law: EC Ministers Reject Appeal to Share Refugee Burden*, WALL ST. J. EUR., Dec. 1, 1992, *available in* 1992 WL WSJE 2023990 (citing Britain's extremely restrictive immigration and asylum laws as evidence of rising "anti-foreigner sentiment and racial tension" in Western Europe); Alan Travis & Ian Traynor, *Asylum: Britain's Little Refugee Problem*, THE GUARDIAN, Oct. 22, 1997, *available in* 1997 WL 14736605 (discussing the hatred expressed in Britain toward Czech and Slovak gypsies, "with even young schoolchildren talking about them as 'bogus, welfare scroungers, beggars, dirty and disgusting.'").

81. In 1992, Dr. Richard von Weizsäcker, the Federal President of Germany, was awarded the Nansen Medal for his "outstanding services to the cause of refugees." STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 171. This honor was bestowed upon Dr. von Weizsäcker in recognition of his "campaign against violent attacks on asylum-seekers and xenophobia." *Id.*; *see also supra* note 22 and accompanying text (noting Germany's post-World War II observance of human rights).

For a brief discussion of Fridtjof Nansen, the first High Commissioner for Refugees whose legacy this award commemorates, see *supra* note 35 and accompanying text.

82. *See* PETER KÖPF, STICHWORT: AUSLÄNDERFEINDLICHKEIT [Keyword: Xenophobia] 61 (1996). In a 1993 study conducted by the University of Potsdam of youth in Brandenburg, the young Germans interviewed either completely or partially agreed with the following as reasons for their xenophobia toward asylum seekers: because they want to live comfortably at Germany's expense (85.8%); they resort quickly to violence and crime (77.5%); most asylum seekers are lazy (77.6%); they are dirty and generally unkempt (75.8%); they have irritated Germans on several occasions (47.3%); they take away jobs from Germans (73.5%); they aggravate the housing shortage (85.1%); they are inferior in comparison to Germans (83%). *Id.* (translation by author).

The original text reads: "Als Gründe für ihre Feindlichkeit gegen Asylbewerber stimmten die Jugendlichen "völlig" oder "teilweise" folgenden Aussagen zu: weil Asylbewerber auf Kosten Deutschlands gut leben wollen (85,8 Prozent); schnell zu Gewalt und Kriminalität neigen (76,5 Prozent); meistens faul sind (77,6 Prozent); dreckig und körperlich ungepflegt sind (75,8 Prozent); mich schon mehrmals belästigt haben (47,3 Prozent); uns die Arbeitsplätze wegnehmen (73,5 Prozent); die Wohnsituation weiter verschärfen (85,1 Prozent); im Vergleich zu uns Deutschen minderwertig sind (83 Prozent)." *Id.*

83. *See* Czuczka, *supra* note 23.

84. *Id.*

at times between German extremist groups and foreigners living in Germany.[85] As such, although Germany is not a particularly egregious xenophobe,[86] and may in fact be more hospitable to refugees and foreigners in general than many other countries, it remains impossible for Germany to sever its ties to the horrors committed by the Third Reich. This indelible guilt continues to pressure politicians to adopt more restrictive asylum policies, exemplified by their willingness to repatriate, and even forcefully deport, Bosnian refugees as quickly as possible.[87]

C. *Political Considerations: Asylum Policy as a Divisive Issue*

In addition to inducing the German government to respond to ugly and dangerous acts of xenophobia, refugee and foreigner issues are also eliciting purely political responses to gains made by far-right German political parties.[88] Many of these groups operate on the fringes of legality in that they propound ideas exceedingly close to the moratorium that has been placed on

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85. *See* Timothy Aeppel, *Violence Against Foreigners: Germany's Efforts to Tighten Asylum Law May be Hurt by Violent Attack on Refugees*, WALL ST. J. EUR., Aug. 26, 1992, *available in* 1992 WL WSJE 2027810 [hereinafter Aeppel, *Violence Against Foreigners*]. Indeed, the very presence of foreigners in Germany is inciting some Germans to violence. *See id.* The Rostock incident cited in this article was considered to be "by far the most serious attack on foreigners in Germany since unification" and was analogized to another particularly violent episode in the eastern German town of Hoyerswerda. *Id. See also* Panayi, *supra* note 60, at 135-39 (detailing the racist violence that occurred in Hoyerswerda and Rostock).

86. *See supra* notes 80-81 and accompanying text.

87. *See* Sharma, *supra* note 20.

88. Timothy Aeppel, *Kohl Bloc Supports Changes to Tighten Refugee Policy*, WALL ST. J. EUR., Oct. 16, 1992, *available in* 1992 WL WSJE 2026932 [hereinafter Aeppel, *Kohl Bloc*]. *See also* Panayi, *supra* note 60, at 95 (commenting on the significant gains made by the far-right Republican Party as a result of the large influx of refugees).

The controversial amendment to Article 16 of the Basic Law did curb the flow of foreigners into Germany, which resulted in fewer acts of violence perpetrated against them. *See id.* at 3. This political maneuvering by the majority Christian Democratic Union (CDU) and other conservative political parties appeared to persuade many nationalistic voters to reintegrate into the party shortly before the 1994 general election.

Recent polls have suggested that 13% of Germans would vote for rightist parties that tout anti-foreigner policies. *See* Sharma, *supra* note 20. The percentage is higher in eastern Germany, with 17% of those polled stating they would vote for the far-right, compared to 13% in western Germany. *See id.*

It is therefore not surprising that both of Germany's major political parties, the Christian Democratic Union (CDU) and Social Democratic Party (SDP) are taking a tough stance on the asylum issue. Since the amendment of Article 16 of the German Constitution, neo-Nazi attacks have precipitously declined, as has support for the far-right groups "which have lost their biggest vote-grabbing issue." *German High Court Upholds Strict Asylum Law*, DEUTSCHE PRESSE-AGENTUR, May 14, 1996, *available in* 1996 WL DCHPA 05:12:00.

overtly Nazi practices in Germany.[89] While these organizations are technically political in nature, their underlying ideologies approximate the beliefs of those engaged in violent attacks on foreigners in Germany.[90]

Fortunately for the Bosnian refugees, they do not appear to be the targets of violent foreigner attacks.[91] They have, however, become political scapegoats in the 1998 election year in Germany, similar to other foreigners in previous election years.[92] Moreover, increased support for rightist groups, attested to both by voting trends[93] and implicit participation in attacks on foreigners,[94] demonstrates the imminent potential for rapid dissemination of xenophobia in modern-day Germany.

While this foreseeable xenophobic trend has yet to assume statistically-noteworthy proportions, now would be an opportune time to address the causes of such anti-foreigner tendencies. Because Germany is settling into a period of post-election calm in which the political atmosphere has been somewhat diffused and optimism is emerging,[95] the opportunity is ripe for attempting to cure the xenophobia that threatens to poison the country.

If Germany fails to address the underlying causes of anti-foreigner sentiment, especially as it is manifested toward the Bosnians enjoying temporary protection status, it could tacitly be acceding to the demands of those in Bosnia Herzegovina who oppose integration of those displaced by the war.[96] As such, the refugees are being victimized twice, both at home and abroad, with no real options available to them.

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89. *See* Panayi, *supra* note 60, at 141. These organizations, namely the "old-established NPD [National Democratic Party]," the DVU [*Deutsche Volksunion*, or German People's Union], and the Republican Party [*Republikaner*], have not adopted an overtly neo-Nazi ideology in order to avoid banishment, but they remain far more nationalistic than any of the other mainstream German political parties. *See id.* Some of the more controversial positions adopted by these groups include supporting the collective over the individual and calling for more radical measures in dealing with foreigners, including "deportation and further tightening of the right of asylum, guaranteed under the federal constitution." *Id.*

In addition to blaming immigrants for Germany's unemployment, social problems, and national identity crisis, these groups also hold that Germany should take pride in its past and shed the guilt associated with Nazism. *See id.*

90. *See id.*

91. *See* Aeppel, *Violence Against Foreigners*, *supra* note 85.

92. *See* Sharma, *supra* note 20.

93. *See id.*

94. The anti-foreigner attacks and violence in Rostock and Hoyerswerda were characterized by masses of onlookers who watched silently or even cheered the attackers. *See* Aeppel, *Violence Against Foreigners*, *supra* note 85. This passivity may disturbingly reflect underlying support of xenophobic activity. *See id.*

95. *See* NPR, *supra* note 73 and accompanying text.

96. *See* Sharma, *supra* note 20 (noting that uncoordinated repatriation schemes solidify plans for ethnic cleansing by impeding "the creation of a truly single Bosnia with two truly multi-ethnic entities.").

D. *Changing German Attitudes: A Long-Term Approach to a More Integrated and Tolerant German State*

1. *Minor Economic Considerations: A Small but Logical Starting Point*

Altering existing German attitudes toward foreigners who live in Germany and who benefit from its wealth in the midst of high unemployment and significant reunification costs cannot reasonably be expected to occur quickly and on a large scale. Nonetheless, Germany's current political climate is ready[97] to start the process whereby foreigners may begin to receive increased acceptance in Germany, to the benefit of both the foreigners and the German people.

Similar to the inertia of German attitudes toward foreigners, the economic situation in Germany most likely will not improve dramatically anytime soon.[98] But this dismal economic forecast should not succeed as an excuse to exclude foreigners generally and Bosnians specifically from helping cure Germany's fiscal troubles. By including foreigners in the country's labor efforts at a minimal detriment to German workers,[99] Germany not only maximizes its overall labor efficiency, but also takes the first steps toward assimilating these people into German society. Although implementing these measures may be limited in scope, Germany can nevertheless do so with relative ease. Moreover, the symbolic significance of such measures lies in the fact that they can serve as a starting point for changing underlying resentment among Germans toward foreigners.

First of all, German labor efficiency could be bolstered by permitting asylum seekers, such as Bosnians under temporary protection status, to work in positions that Germans are unwilling to assume.[100] Second, the German federal government should assist the *Länder* (states) in reapportioning Bosnian refugees based on specific labor needs of the particular states.[101] Finally, in conjunction with the second suggestion, states eager to deport or forcibly repatriate Bosnian refugees, such as the conservative state of Bavaria,[102] should be given the option of transferring them instead to another *Land* (state) within Germany that is willing and able to accept the additional

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97. *See* NPR, *supra* note 73.

98. *See supra* text accompanying note 74.

99. *See supra* note 67 and accompanying text.

100. *See supra* note 67 and accompanying text.

101. When the federal government originally shifted responsibility for the Bosnian refugees among the several states, it did so without accounting for differences in labor demands in these states. *See* Sharma, *supra* note 20. As such, the federal government sought to distribute the burden of these refugees equally to the states, but not necessarily in the most effective manner. *See id.*

102. *Bavaria First State to Begin Deporting Bosnian Refugees*, SAN DIEGO DAILY TRANSCRIPT, Oct. 10, 1996.

refugee burden. Such a transfer could serve the multifaceted purpose of removing the Bosnians from potentially hostile environs, of demonstrating to the expelling state that it retains some autonomy in regulating refugees and asylum seekers within its borders,[103] and of redistributing laborers to another area where they are more welcome and productive.[104]

2. *Integration as a Means of Addressing the Causes of the Problem*

While the aforementioned suggestions on ameliorating xenophobic attitudes toward the Bosnian refugees may provide some short-term relief to the refugees themselves and the burdened German states,[105] more permanent, and perhaps more controversial[106] and meaningful steps must be taken to diminish the anti-foreigner and anti-refugee sentiment of which Germany is particularly fearful.[107] One effective measure Germany could adopt to provide a more durable solution to xenophobic concerns would be to relax the citizenship requirements for foreigners who have lived in Germany for a substantial amount of time and have demonstrated a desire to assimilate into and contribute to German society and culture.

In their current form, Germany's citizenship laws, in contrast to its refugee laws,[108] are the most restrictive in the European Union, based on the

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103. Naturally, the expelling state would be expected to bear the costs of transporting these refugees to the accepting state, and would most likely be expected to share some of the costs of relocating and providing for their continued support as well. In spite of this lingering financial burden, the expelling state may still be willing to pay this price in order to quell xenophobic tensions among its local citizenry. While this financial obligation undoubtedly decreases the expelling state's autonomy, it does so only minimally when the possibility of repatriating the refugees to their homeland would constitute *refoulement* and thus be in derogation of well-established principles of refugee law. *See* 1951 Refugee Convention, *supra* note 42, art. 33; *see also supra* note 46 and accompanying text for a discussion of *non-refoulement* as the focus of international refugee law.

Moreover, by creating this transfer option, states averse to the idea of accommodating refugees and asylum seekers for a protracted period of time may be more willing to assist in extenuating refugee crises in the future, knowing that they can later shift this refugee burden to another state at a minimal cost.

104. *See supra* note 67 and accompanying text.

105. *See supra* Part III.A.

106. *German Citizenship*, THE IRISH TIMES, April 23, 1997, *available in* 1997 WL 7388046 ("Citizenship and nationality laws are among the most difficult and intractable constitutional issues in contemporary political communities.").

107. *See supra* notes 55-56 and accompanying text.

108. "A Germany which has been so generous in playing host to migrant workers and refugees[—]a natural role for Europe's strongest economy and emerging predominant power[—] must find a way to develop the means to accommodate those who have contributed so much to its own development." *German Citizenship, supra* note 106. *But see supra* Part III.A. for a discussion of Germany's uncertain economic foundation. While Germany may presently have one of Europe's strongest economy, it is by no means positioned to support unqualified masses of foreigners.

archaic concept of *jus sanguinis*.[109] Adherence to this principle may be adduced in large part to a prevalent attitude in Germany that the country is not one of immigrants,[110] notwithstanding the numerous ways in which foreigners have accessed and continue to enter the country.[111] Even though non-Germans have devised various means to get into Germany, less than ten percent of Germany's population is comprised of such non-Germans.[112] Ironically, Germany's citizenship structure renders it virtually impossible for those who are not ethnic Germans to attain citizenship status.[113] This irony of the country's citizenship procedures is manifested in the fact that *Aussiedler*[114]—"individuals and families of German origin"—are virtually entitled to instant citizenship, while other foreigners can live and work in Germany "for decades without gaining that status."[115] While the desire of many *Aussiedler* to return to their origins is understandable, most, if not all, have contributed far less to Germany's prosperity over the past decades than the numerous foreigners living in Germany.[116]

At first glance, it appears that liberalizing German citizenship laws will have little direct impact on the Bosnians currently residing in Germany.

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109. Germany's imperial citizenship laws date from 1913 and are based on the European tradition of *jus sanguinis*, or nationality by blood or ancestral descent. *See German Citizenship, supra* note 106. This policy has ensured that only a small number of foreigners who come to Germany can attain citizenship. *See id.*

110. *See* Thomas P. Spieker, *Despite Seven Million Aliens, Germany Says it Has No Immigrants*, DEUTSCHE PRESSE-AGENTUR, Sept. 29, 1996, *available in* 1996 WL DCHPA 21:06:00. Official German policy provides generous provisions to foreigners temporarily in Germany, but it does not offer the option of settlement. *See id.* The prevailing attitude among conservative German politicians is that "Germany is not a country of immigration," corroborated by the fact that "[n]one of the foreigners currently living in Germany is legally defined as an immigrant," a word that remains extremely controversial for the German leadership. *Id.*

It should be noted that even the more liberal German political parties want a quota system imposed so that the influx does not run unchecked. *See id.*

111. *See id.* (noting that "[l]arge-scale planned migration" has been occurring in Germany in a variety of forms for over 40 years).

112. *See id.*

113. *See* Aeppel, *Kohl Bloc, supra* note 88.

114. Aussiedler are Germans who have lived outside of Germany for many generations in places such as the former Soviet Union, Poland, and Romania. *See* STATE OF THE WORLD'S REFUGEES 1995, *supra* note 22, at 202. Aussiedler are practically guaranteed German citizenship upon their return to Germany, despite the fact that many of these people have retained little of their German heritage, including the ability to speak German. *See id.*

115. Aeppel, *Kohl Bloc, supra* note 88.

116. Volkmar Schultz, a member of the Social Democratic Party (SDP) in Germany's lower parliamentary house (*Bundestag*) likened the current immigrant dilemma in Germany to the rallying cry of the American Revolution: "No taxation without representation." Foreign workers who have consistently paid their taxes over the years, but who are not entitled to the same rights and privileges as German citizens, such as voting, have voiced similar grievances as the American colonists. Volkmar Shultz, Address to the Indianapolis-Cologne Sister Cities Committee (Oct. 6, 1998) [hereinafter Schultz].

Concededly, the Bosnian refugees do not stand, or even wish,[117] to benefit firsthand from a more accommodating citizenship framework in Germany. However, as it is becoming increasingly apparent that the Bosnians will be staying in Germany longer than was initially anticipated,[118] they do stand to benefit from a German public more tolerant of foreigners, as do other nationalities presently living in Germany. This tolerance can be developed through changing the country's prohibitive citizenship laws which, in addition to helping the country cope with its pending refugee and foreigner dilemmas, will also make Germany more adept and sensitive to dealing with future refugee crises. This long-term approach toward refugee protection is especially critical as the international community's commitment to asylum principles has been exhibiting signs of erosion.[119]

Some would still argue that the prospect of loosening German citizenship requirements poses the substantial risk of encouraging waves of indigent "economic immigrants"[120] to flock to Germany and of inciting racial tensions as outsiders move into Germany and compete for limited jobs and other social welfare benefits.[121] But Germany's 1993 amendment to Article 16 of its Basic Law has been extremely effective in reducing the overall number of asylum applications in Germany,[122] thus debunking speculation that the country will be inundated by more refugees and asylum seekers than in previous years. Furthermore, even the more liberal German politicians are in agreement with their conservative counterparts that flexible safeguards should be incorporated into changes of Germany's citizenship laws to prevent the excesses cited by those opposed to more liberal grants of citizenship to foreigners in Germany.[123]

Contrary to political rhetoric, although Germany may not be a traditional

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117. Most of these uprooted people want to return to Bosnia and this is generally deemed the best course of action for these people in this, the "decade of repatriation." *See supra* note 17 and accompanying text; *see also Bosnia's Homeless*, *infra* note 145 (citing fear of persecution as the only impediment to the Bosnians' general desire to return home).

118. *See infra* Part IV.

119. *See supra* notes 24-25 and accompanying text.

120. *See* Blay, *supra* note 24, at 377 (noting the resentment toward "economic refugees" and their precarious status in refugee law).

121. *See* Spieker, *supra* note 110; *see also* Aeppel, *Kohl Bloc*, *supra* note 88 (noting that average Germans, particularly in the "economically depressed" former East Germany, perceive foreigners "as competition for scarce social benefits and apartments.").

122. *See supra* note 61 and accompanying text; *see also Number of Asylum-Seekers 60% Down in Germany*, AGENCE FRANCE-PRESSE, Jan. 6, 1995, *available in* 1995 WL 7738826 (citing the effectiveness of Germany's recent constitutional amendment in restricting the right to asylum).

123. *See* Spieker, *supra* note 110. One of the precautionary measures would impose immigration quotas, favored even by "those approving of immigration . . . ." *Id.* Others include preserving a "legal means" to curtail immigration in times of high unemployment and housing shortages. *Id.* In addition, those parties most sympathetic to citizenship law reform would take into account the foreigner's ability to speak German. *See id.*

destination of immigration for refugees seeking permanent resettlement,[124] its ties to immigration are not as tenuous as some top German officials would suggest.[125] When the first three hundred modern immigrants arrived in post-war Germany from northern Italy in the mid-1950s, they worked low-paying farm jobs.[126] As the country's *Wirtshaftswunder* (Economic Miracle) gained momentum, Germany recruited more foreign labor from abroad, but harbored no intentions of integrating these guest workers under the assumption that they would voluntarily return to their home countries.[127] Contrary to this expectation, however, these men's families began to join them in their newly-adopted country, prompting Germany to ban foreign recruitment in 1973.[128] Irrespective of these attempts to exclude foreigners, Germany, consistent with its heavy use of foreign labor throughout the century,[129] had already, albeit perhaps unwittingly, made these foreigners an integral part of Germany itself, not unlike the United States had done with African slaves.[130]

While the situation of the Bosnian refugees and foreigners in Germany is distinct from the African-American experience in the United States, integration nevertheless remains a viable option for changing German attitudes toward outsiders and for reestablishing Germany as Europe's El Dorado[131] for migrants who genuinely need protection.[132] Now that Germany has elected a new government that is markedly more receptive to the idea of broadening the country's citizenship laws, the "political leadership" is aptly situated to

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124. The United States, Canada, Australia, and New Zealand are considered traditional countries of resettlement for refugees. *See UNHCR Says Exiled Myanmar Students Will Cooperate with Resettlement*, AGENCE FRANCE-PRESSE, Oct. 28, 1999, *available in* 1999 WL 25133225 (contrasting the willingness of the United States, Canada, Australia, and New Zealand to resettle refugees with the traditional unwillingness of some European countries to such refugee resettlement). Of the 43,000 resettlement places requested by the UNHCR each year, 60% are provided by the United States. *See* Karin Landgren, *Reconciliation: Forgiveness in the Time of Repatriation*, *in* WORLD REFUGEE SURVEY 1998, *supra* note 59, at 20, 20.

125. *See* Spieker, *supra* note 110 and accompanying text.

126. *See id.*

127. *See id.*

128. *See id.*

129. *See supra* note 66 and accompanying text.

130. *Cf.* Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) ("The destinies of the [black and white] races, in [the United States], are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.").

131. "El Dorado" is defined as "a fabulously rich region; a golden opportunity." THE NEW AMERICAN WEBSTER HANDY COLLEGE DICTIONARY 225 (3d ed. 1995). This term is common parlance in refugee law, symbolizing a secure and enduring sanctuary for refugees. *See, e.g.*, Daniel Benjamin, *Huddled Masses: New Prosperity and Freedom Are Drawing Refugees to the Countries of the Former East Bloc*, WALL ST. J. EUR., Oct. 3, 1994, at R14 (observing the significant role that Germany's constitutional amendment to Article 16(a) of its Basic Law has had in shutting the "golden door to El Dorado" of Western Europe).

132. *See* BERT, *supra* note 6, at 98-99.

effectuate these controversial, but ultimately necessary and beneficial changes.[133] Such reform is capable of realigning the international community down the humanitarian path originally conceived for the protection of displaced peoples.

IV. THE CURRENT SITUATION IN BOSNIA HERZEGOVINA AND ITS ABILITY TO ABSORB BOSNIAN RETURNEES FROM GERMANY

A. *The 1992-1995 Yugoslav War: Complex Origins and Troublesome Aftermath*

The war in the former Yugoslavia that caused the lingering refugee crisis in Germany began on March 1, 1992, when Bosnian Croats and Bosnian Muslims voted overwhelmingly for independence and sovereignty, contrary to the Bosnian Serbs who refused to participate in the vote.[134] Shortly thereafter in April, the Bosnian Serbs seized large areas of land in and around Bosnia Herzegovina in response to the international community's formal recognition of Bosnia Herzegovina as an independent state.[135] It took the Bosnian Serbs only days to exert control over more than sixty percent of this territory.[136] Although the hostilities that began in 1992 formally ended with the signing of the Dayton Peace Accords (DPA) in 1995,[137] the issue of displaced peoples, both inside and outside of Bosnia Herzegovina, has been a major concern surrounding the conflict.[138]

To comprehend more completely the difficulties that refugees are encountering upon their return to Bosnia Herzegovina, it is useful to acknowledge some of the typical problems generally facing refugees who repatriate to their war-torn homelands.[139] In the case of the Bosnian refugees, however, there exists an additional degree of difficulty injected into the repatriation scenario, born out of centuries of political conquest and strife.[140] Thus, while the precise causes of the ethnic hatred and ethnic cleansing in Bosnia Herzegovina remain somewhat unclear,[141] the most recent "Yugoslav conflict [nonetheless] introduced a degree of complexity that is unusual even

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133. *Id.*

134. *See* Davy, *supra* note 6, at 53.

135. *See id.* at 55.

136. *See id.*

137. General Framework for the Dayton Peace Agreement, Annex 7, signed in Dayton, Ohio, United States of America on November 21, 1995, 35 I.L.M. 89.

138. *See* Davy, *supra* note 6, at 61.

139. *See, e.g.*, WHEN REFUGEES GO HOME, *supra* note 5, at 34-46; *see also infra* Part IV.C-D. for a more detailed discussion of obstacles confronting refugees repatriating to areas devastated by combat, genocide, and ethnic cleansing.

140. *See* BERT, *supra* note 6, at 23-43.

141. *See id.* at 98-106.

in religiously and culturally pluralistic societies riven with conflict and strife."[142]

It is this complexity, carried over into the post-war period, that is so greatly impeding the return of the Bosnian refugees to their homes.

B. *An Extended Commitment by the International Community*

When Germany agreed to provide temporary protection status (TPS) for the Bosnian refugees in 1992, there was an explicit understanding between the Bosnian and German governments that Germany's acceptance of and responsibility for these people would be temporary.[143] This stipulation was consistent with both modern asylum trends[144] as well as the overwhelming desire by the Bosnian refugees to return home as soon as conditions permitted.[145]

Many assumed that repatriation could occur soon after the hostilities had ceased and the DPA had been signed.[146] In fact, the "express purpose" of the DPA was "to restore Bosnia as a multiethnic state and guarantee the right of return for all Bosnians...."[147] For Germany's benefit, the timely repatriation of the Bosnian refugees would begin to ease Germany's substantial subsidization of these people and assuage anti-foreigner sentiment and violence.[148] As further justification for quickly repatriating the Bosnians, Germany cited the altruistic motive of preparing for a flood of refugees from the impending crisis in Kosovo, although there was little evidence at the time that such a wave of people was imminent.[149]

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142. *Id.* at 93.

143. *See* Thouez, *supra* note 9, at 98.

144. *See* Landgren, *supra* note 124, at 20-21. "As the total number of refugees continues to grow, temporary protection followed by voluntary repatriation is now seen as the most practical and, in the majority of cases, the most satisfactory means of protecting many of today's refugees, the great majority of whom are fleeing from armed conflict." *Id.* (footnote omitted).

See also supra note 17 and accompanying text for a discussion of repatriation as the desired outcome of refugee situations.

145. *See Bosnia's Homeless*, WALL ST. J. EUR., Oct. 14, 1996, *available in* 1996 WL WSJE 10752418 (acknowledging that the majority of Bosnians in Germany would prefer to return to their homeland than remain in asylum, but remain apprehensive that they will be subjected to persecution upon return).

146. *See supra* text accompanying note 137.

147. *Bosnia's Homeless, supra* note 145.

148. *See supra* Part III.A-B.

149. "For the time being the actual flow [of refugees from Kosovo] into western Europe is really not that great, although... certainly there is a constant trickle...." Michael Thurston, *Europe Braces for Kosovo Refugee Wave*, AGENCE FRANCE-PRESSE, Aug. 6, 1998, *available in* 1998 WL 16573486 (quoting Maki Shinohara of the UNHCR). Authorities are not predicting a repeat of the mass exodus of people that accompanied the Yugoslav war in 1992, but the situation in Kosovo is nonetheless being closely monitored "after a surge in asylum requests by people fleeing the troubled Serbian province [of Kosovo]." *Id.*

Likewise, the Bosnian government, at least initially, desired a timely repatriation of the Bosnian refugees, but for different reasons, namely to aid in rebuilding the country's devastated infrastructure and "brain drain"[150] and to reestablish some overall sense of normalcy.[151]

Even the United States, at least near the time of the ratification of the DPA, was supportive of Germany's efforts to relieve itself of the tremendous sacrifices it had made in coping with the Bosnian refugees.[152] Had the United States not initially supported Germany's efforts to repatriate the Bosnian refugees, American diplomacy would have been admitting that the Agreement had failed "in its most basic promise that Bosnia's refugees would be able to return safely to their homelands."[153] American confidence in a speedy and efficient return of refugees from abroad was evidenced further by the Clinton administration's limited commitment of NATO troops in the region.[154]

But the shortcomings of the DPA and snares to repatriation soon demonstrated that returning the Bosnian refugees to their former homes and lives would take considerably longer than was originally contemplated.[155] Despite this concession and entreaties from the Bosnian government for a return scheme more attuned to the area's limited capability to handle the returning refugees,[156] Germany continued to repatriate these people.[157]

The Bosnian refugees themselves were also reluctant to repatriate, notwithstanding their general wish to return home as soon as possible.[158] Haunted by unspeakable atrocities from the war,[159] as well as reports of being

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See also Clive Freeman, *Many Bosnian Refugees Still Hesitant About Returning Home*, DEUTSCHE PRESSE-AGENTUR, May 20, 1998, *available in* 1998 WL 20:07:00 (citing a German official who was disheartened by the fact that temporary protection may not be available for Kosovo refugees because the instrument of TPS is continually being abused).

150. "A country like Bosnia Herzegovina with two-and-a-half million people cannot exist if 600,000 refugees remain outside the country. People who have qualifications and have had a good schooling are needed there . . . in order to stabilise the area." Freeman, *supra* note 149 (quoting Barbara John, Berlin's Commissioner for Foreigners' Affairs and a member of the liberal wing of the Christian Democratic Union (CDU)).

151. One of the highest profile groups that Germany returned to Bosnia was 31 "hollow-eyed 'orphan' children." Ralph Atkins, *Bonn Offers Good Home to Watchdog*, FIN. TIMES, Apr. 14, 1997, *available in* 1997 WL 3786386. Although news images of these children prompted criticism of German repatriation policies, "[t]heir return was in fact eagerly sought by authorities in their homeland where their original rescue was seen in some quarters as amounting to a kidnap. Most of them are not strictly orphans; rather their parents were unable to look after them." *Id.*

152. *See Bosnia's Homeless, supra* note 145.

153. *Id.*

154. *See id.*

155. *See infra* Part IV.C-D.

156. *See* Sharma, *supra* note 20.

157. *See id.*

158. *See Bosnia's Homeless, supra* note 145.

159. *See* BERT, *supra* note 6, at 50-57.

met with violence and intimidation upon return through existing repatriation programs,[160] many Bosnian refugees wanted assurances that they would be unimpeded when they decided to return.[161] One deportee even took the extreme measure of hijacking his flight home to ensure that he would not be subjected to some of the horrors that he perceived awaited him in Bosnia Herzegovina, preferring instead to be incarcerated in Germany than to live in "freedom" in his homeland.[162]

C. *Traditional Obstacles Inherent in the Aftermath of Armed Conflict*

Like most refugees and displaced peoples, the Bosnians in Germany and within Bosnia Herzegovina's internal borders have been uprooted by armed conflict.[163] Similarly, although the repatriation movement in Bosnia Herzegovina is unique, it shares some common characteristics with other repatriations that are responding to the aftermath of war.[164] Most significantly, repatriation often occurs in the midst of conflict, or "at least in a context of continuing instability or insecurity."[165] Against this imperfect backdrop, formidable problems arise concerning the protection of the Bosnian refugees returning to their homes.[166]

But protecting refugees from acts of violence and aggression stands as only one of the numerous obstacles that refugees, like the Bosnians, encounter when they return. Perhaps the most pressing issue upon return for refugees in Bosnia Herzegovina is the quality of housing.[167] Unfortunately, however, accommodating the returning refugees and displaced persons appears to be one of the most significant difficulties faced by the Bosnian government due to the massive damage inflicted upon the nation's infrastructure during the

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160. "The treatment of about 4,000 Muslims still living in Republika Srpska in 1997 became the barometer refugees and displaced persons used to measure the feasibility of their return. Most evidence pointed to discrimination and harassment aimed at forcing minorities out of their homes, especially the elderly." WORLD REFUGEE SURVEY 1998, *supra* note 59, at 166.

161. *See* Freeman, *supra* note 149.

162. *See Bosnian Deportee Hijacks Plane*, AGENCE FRANCE-PRESSE, Jan 7, 1997, *available in* 1997 WL 2036049.

163. *See* STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 67.

164. *See id.* at 103.

165. *Id.*

166. *See id.*

167. *See* AMNESTY, *supra* note 10, at 24 n.30. "Among factors important for return, quality of housing received the highest rating, with 97[%] of respondents indicating it as an important factor . . . ." *Id.*

war,[168] particularly the housing.[169]

Yet despite the notable success that the United Nations High Commissioner for Refugees (UNHCR) has had in rebuilding the "habitable accommodation" in Bosnia Herzegovina,[170] other aspects inherent to post-war conditions in the country are exacerbating the housing shortage. For one, the progress of the UNHCR's "shelter project" simply cannot compensate for the massive reconstruction projects necessary to absorb those large numbers of Bosnian refugees and displaced persons who have not yet returned home.[171] These reconstruction efforts are complicated further by the fact that Bosnia Herzegovina's population is drastically smaller and weaker than before the war,[172] and ethnic groups within Bosnia Herzegovina are even deliberately destroying housing in order to prevent returns by other ethnic groups, usually minorities.[173]

In addition, even if Bosnian refugees are able to find adequate housing when they return, there exists the constant threat that they are merely occupying the home of another ethnic group, subjecting the occupying family to future uncertainties of displacement.[174] This unsettled scenario of doubt in accommodation falls far short of international refugee law's aim of providing returnees with a "durable solution" through repatriation.[175]

Finally, although Bosnia Herzegovina represents a repatriation situation more complex than many post-war return schemes,[176] in addition to the safety and housing concerns of returnees, there exist other "traditional," yet significant barriers to repatriation in Bosnia Herzegovina. These obstacles

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168. *See UNHCR, The State of the World's Refugees 1997-98: A Humanitarian Agenda* (visited Sept. 15, 1998) <http://www.unhcr.ch/sowr97/box4_4.htm> [hereinafter *Humanitarian Agenda*]. "While it is impossible to estimate the total amount of war damage in Bosnia, it is clear that the cost of reconstruction will run into many billions of dollars." *Id.*

169. "A major obstacle to the return of displaced Bosnians has been the shortage of habitable accommodation throughout much of the country. It is estimated that 60[%] of Bosnia's housing was either damaged or destroyed during the war." *Id.*

170. *See id.*

171. *Id.*

172. *See id.*

173. *See* AMNESTY, *supra* note 10, at 16-17. In this regard, the fear of personal safety and desire to secure housing are closely related. *See id.* To this end, it should be noted that such wanton destruction of housing has "sent a clear message to those thinking of returning to their homes that their efforts to reconstruct them can be thwarted in a single act of violence." *Id.*

174. *See generally id.* at 7-21, 24 (noting the additional difficulties posed by repatriating refugees from abroad "in respect of . . . relocation gridlock . . . [which in part can be described as] refugees repatriating from abroad who cannot return to their own homes [who] have been sheltered in housing belonging to people who are themselves displaced or refugees."). *Id.*

175. *See Glossary, supra* note 15. A "durable solution" is defined as one that will provide the returnee with permanent, safe, and livable conditions upon return. *Id.*

176. *See infra* Part IV.D.

include unemployment,[177] "war taxes,"[178] depletion of intellectual and physical labor resources,[179] landmines,[180] and overburdened urban populations.[181]

All of these factors, especially when considered cumulatively, present an extremely intricate and complicated backdrop against which the international community, and Germany in particular,[182] is attempting to repatriate the Bosnian refugees. This already desperate situation assumes an even bleaker outlook when the unique and ghastly aspect of ethnic cleansing and attempted genocide is added to Bosnia Herzegovina's existing "traditional" obstacles to repatriation.

D. *Genocide and Ethnic Cleansing as Obstacles to Repatriation*

Following the Holocaust in the 1940s, the international community

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177. *See* AMNESTY, *supra* note 10, at 24 n.30 (citing employment opportunities as receiving a high rating (81 %) among factors important to Bosnian refugees); *see also Humanitarian Agenda*, *supra* note 168 ("[U]nemployment is estimated at between 65 and 75 [%].").

178. *See* WORLD REFUGEE SURVEY 1998, *supra* note 59, at 168. Some local authorities in Bosnia Herzegovina have implemented a "war tax," typically disproportionately on minorities, "as a retroactive contribution for the war effort." *Id.* For example, local Bosnian Croat authorities demanded a tax from returning Muslims as "an alternative for service in the Croat militia[,]" and the tax in Repbublika Srpska "was calculated at 100 Deutsche Marks for each month during the war that the person was outside Republika Srpska." *Id.*

179. *See Humanitarian Agenda*, *supra* note 168 (acknowledging not only the smaller and physically weaker population in post-war Yugoslavia, but also the "[l]arge numbers of highly qualified people [who] have left, and are perhaps the refugees who are least likely to return.").

180. The Dayton Peace Agreement mandates that the former warring factions, not international military forces, are responsible for mine clearance. *See* WORLD REFUGEE SURVEY 1998, *supra* note 59, at 169. Unfortunately, "[d]espite enormous pressure from the international community, Bosnia's former warring factions have been extremely slow to address this issue." *Humanitarian Agenda*, *supra* note 168.

Landmines in Bosnia, estimated by some at up to six million, are responsible not only for human casualties and injuries that appear to be directly proportional to the rate at which refugees are attempting to return, but the mines are also substantially hindering reconstruction and development projects. *See* WORLD REFUGEE SURVEY 1998, *supra* note 59, at 169. The inability to clear mines in the area is attributable to "lack of local expertise in this area, the absence of accurate mine field records[,] and the country's severe winters, when much of the ground is frozen and covered with snow." *Humanitarian Agenda*, *supra* note 168. Furthermore, international efforts to help alleviate this problem have been stalled by limited funding, thereby restricting mine clearance to currently populated areas and not those of potential refugee return. *See* WORLD REFUGEE SURVEY 1998, *supra* note 59, at 169.

181. Bosnia's substantial landmine problem will likely render the country's agricultural sector, upon which it is heavily reliant, "an economically stagnant wasteland." *Humanitarian Agenda*, *supra* note 168. This in turn will leave rural regions inaccessible, forcing masses of people to urban areas already plagued with unemployment and thus "exacerbating the country's existing social and political tensions." *Id.*

182. *See* AMNESTY, *supra* note 10, at 25 (citing UNHCR estimates that 95,000 of the 110,000 refugees returning to Bosnia Herzegovina in 1997 came from Germany).

vowed "never again" to stand by idly when the threat of genocide emerged, but recent conflicts around the globe suggest that ours is an "increasingly genocide-prone" world.[183] Indeed, the fact that genocide is still occurring over half a century since the end of the Nazi atrocities in World War II indicates "that there is no reason to believe the 'never again' rhetoric.'"[184]

At least in part, the recurrence of genocide in our modern world can be attributed to the international community's reluctance to intervene against other countries that decide to commit such human rights abuses against their own people and within their own borders.[185] Such reluctance to interfere with another nation's sovereignty is understandable, but it may not always be justifiable when severe human rights violations, such as genocide and ethnic cleansing, are at stake.[186]

The perpetration or attempted perpetration of genocide and ethnic cleansing are reprehensible standing alone, but they unfortunately extend their destructive power and effects into repatriation efforts, thus further complicating the process of successfully returning those who have observed and been victimized by these practices.[187] Ethnic cleansing and genocide frustrate the expectations of host countries that are focused on the timely return of refugees who have witnessed these unfathomable horrors.[188] One writer on the subject has even commented that reconciliation in divided societies, such as Bosnia Herzegovina, will require much time, assuming that reconciliation is even possible at some future date.[189] This notion stands in opposition to the Western preference of repatriating refugees on some type of predictable and quantifiable basis.[190]

In contrast, however, such an expectation by the West is neither realistic[191] nor beneficial to any of the parties involved.[192] The "psychological

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183. Roger P. Winter, *The Year in Review*, *in* WORLD REFUGEE SURVEY 1998, *supra* note 59, at 14, 19.

184. *Id.*

185. *See id.*

186. *See* BERT, *supra* note 6, at 14. Intervention of another country's sovereignty "will continue to be made on a case-by-case basis, the kind of analysis that will allow consideration of the numerous variables, and the varying weight and priority that will have to be assigned to them depending on the circumstances of each unique case." *Id.* The author also suggests that in the particular case of Bosnia Herzegovina, U.S. and European policy at the outset of the 1992 war in Yugoslavia was flawed in that it should have adopted a more militant and proactive approach to the situation much earlier than it finally did in 1995. *See id.* at xxi.

187. *See* Landgren, *supra* note 124, at 24.

188. *See id.*

189. *See id.* (quoting Fergal Keane, who, having observed factional killing in Ireland, wrote that "[i]t is difficult to accept such a thesis [that reconciliation is not forthcoming] because it suggests that the West must be prepared for a long and frequently unprofitable engagement with these divided societies.").

190. *See id.*

191. *See id.*

192. *See id.*

and emotional framework" for reconciliation in areas like Bosnia provides compelling evidence that eradicating the causes that forced the refugees to flee in the first place will take far longer than anticipated.[193] Nevertheless, ensuring a durable solution will ultimately be the most effective and humane manner in which refugees can reestablish relationships with their homelands and in which the international community can help itself and the former refugees avert such a crisis in the future.[194]

Considering the current situation in Bosnia Herzegovina and the monumental obstacles impeding repatriation there, the international community, especially Germany, should reconsider its eagerness to repatriate the Bosnian refugees. Instead, Germany and the international community need to remove the time element from this complicated repatriation dilemma in order to ensure more durable solutions for the Bosnian refugees.

V. RESPONSES TO THE BOSNIAN REFUGEE CRISIS

A. *German Adherence to International Refugee Law Precepts: Complying in Letter, but with Shortsighted Spirit*

In many regards, Germany's human rights record concerning refugees and asylum seekers has been progressive, compassionate, and commendable.[195] Similarly, Germany, by offering temporary protection status (TPS), has more or less provided generously for the Bosnians who sought refuge within its borders,[196] despite allegations to the contrary.[197] Now that the Bosnians' TPS has officially expired in Germany,[198] the focus must shift to the appropriate repatriation scheme for these people.

Repatriation has recently been adopted over more traditional measures as the preferred solution to refugee dilemmas,[199] signifying a shift from "exilic bias" to a "proactive, homeland-oriented, and holistic approach."[200]

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193. *Id.*

194. *See id.*

195. *See supra* Part II.B.

196. *See supra* text accompanying notes 9-12.

197. *See Bonn Rejects U.S. Attack on Refugee Repatriation*, XINHUA ENGLISH NEWSWIRE, May 22, 1997, *available in* 1997 WL 3763395. German Interior Minister Manfred Kanther noted that of the 30,000 Bosnian refugees who had left Germany, only 191 had been expelled. *See id.*

198. *See supra* note 18 and accompanying text.

199. *See* Landgren, *supra* note 124, at 20. "Traditional solutions for refugees are threefold: local integration in the country to which they have fled; resettlement in a third country; or voluntary repatriation to their own country." *Id.* (footnote omitted). Although voluntary repatriation has not exclusively replaced the other traditional solutions, governments are systematically refusing to offer local integration, and only 10 governments worldwide offer resettlement to refugees. *See id.*

200. *Id.*

Therefore, it would appear that because Germany is utilizing the recognized international refugee law principle of voluntary repatriation, it is assisting the returning Bosnians in the most efficient and humane manner possible. It should be noted, however, that while repatriation has received considerable praise in resolving refugee crises,[201] the concept has only recently gained credibility[202] and even today its consequences are not fully understood.[203] As such, Germany should not establish the dangerous precedent of fostering an unquestioning reliance on repatriation;[204] rather, Germany should endeavor to implement this concept in a meaningful and enduring manner, without imposing inflexible deadlines on the process.[205]

B. *Creative Problem Solving at the Local Level: A Potential Prototype?*

While many uncertainties and difficulties surround the question of how Germany will conduct the repatriation of the Bosnian refugees, it remains clear that answers will likely be provided at a local level.[206] There also exists evidence that local approaches to repatriation have enjoyed a high level of

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201. *See supra* note 17 and accompanying text.

202. Refugee scholars have effectively demonstrated that "most refugee movements have tended to result in permanent exile." WHEN REFUGEES GO HOME, *supra* note 5, at 21. Simpson, who conducted studies of Europe's refugees during the inter-war years, asserted that "repatriation was so unlikely an occurrence as to be almost insignificant as 'a practical instrument of solution.'" *Id.* As late as 1969, Norwood corroborated these findings in his research on religious refugees throughout history. *See id.* This conclusion has been given further credence by the fact that since the Second World War, few of the major refugee movements have led to subsequent repatriations. *See id.*

203. Repatriation is premised on the assumption that because it is the most desirable of the traditional solutions, it must necessarily be the least problematic. *See id.* Not surprisingly, repatriation remains the least researched of these solutions by far, but the extant research about repatriation demonstrates that it "is anything but problem-free" and that "there is a dire need for a much better understanding of the conditions under which refugees return . . . and how their rehabilitation and reintegration can be more effectively facilitated." *Id.*

204. *See supra* note 24 and accompanying text.

205. Although rapid repatriation is not inherently bad, its success is largely determined by the "nature, duration, and legacy of the conflict." Landgren, *supra* note 124, at 21. In light of the "fundamental tension between speed and sustainability" in most repatriation schemes, "[t]he hallmarks of current conflicts militate against rapid repatriation . . . ." *Id.*

In addition to having reasonable expectations about the time frame in which repatriation can occur, donor governments must also treat repatriation as a long-term investment by covering the up-front costs necessary for a successful return of the refugees. *See* Winter, *supra* note 183, at 18.

206. Bosnian refugees have cost German municipalities approximately $1.67 billion annually. *See* Neil King, Jr., *Movable East: German Mayor Finds an Unusual Solution to Bosnian Refugees*, WALL ST. J. EUR., Apr. 22, 1998, *available in* 1998 WL WSJE 3515331.

success in other parts of the world.[207] One town in Germany has already unleashed a promising and "novel repatriation program" that has attracted attention both from around the country and the world.[208]

In Düren, Germany, Mayor Josef Vosen, unlike most other German local politicians,[209] has opted for a proactive approach to the local Bosnian refugee dilemma.[210] Like most of the Bosnian refugees in Germany, those in Düren are attempting to return to areas in which they will be ethnic minorities.[211] But despite the unique difficulties posed by minority returns, Mayor Vosen negotiated a compromise whereby the Bosnian Muslims in his town would begin to move back to areas near their home town of Modrica that is presently occupied by Serbs.[212] These Bosnian Muslims will eventually return to their original homes when the Serbs living there are reasonably able to return to their homes.[213] In this manner, Mayor Vosen has observed basic tenets of international refugee law and the DPA so as to provide these refugees with the hope of a durable solution.[214]

Admittedly, the example of one German mayor's plan for the Bosnian refugees in his town may not work for all German municipalities, but his thorough approach and dedication to a durable solution at least provide a basis for an ultimately successful repatriation.[215]

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207. *See* Landgren, *supra* note 124, at 22 (crediting "the use of small-scale, quick-impact projects in Nicaragua . . . with 'reconciling and reintegrating groups of people with different interests and political allegiances.'") (footnote omitted).

208. *See* King, *supra* note 206.

209. To persuade Bosnian refugees to return home, German cities have typically relied on monetary perks and threats of expulsion, but with limited success. *See id.*

210. *See id.*

211. *See* AMNESTY, *supra* note 10, at 21. The UNHCR estimates that of the approximately 600,000 Bosnian refugees, the vast "majority of prospective returnees originate from areas where they would form part of the minority population upon return." *Id.* In Düren's case, the refugees are Muslims attempting to return to a Serb-held area, although the same problems exist for Serb and Croat minority returnees. *See* King, *supra* note 206.

212. *See* King, *supra* note 206.

213. *See id.*; *see also supra* note 174 for a discussion of the problems associated with ethnic groups occupying the home of other ethnic groups.

214. *See* King, *supra* note 206. More specifically, Mayor Vosen personally inspected the town of Modrica, as well as the area where he proposed to build housing for Düren's Bosnian refugees. *See id.* He also enabled some of the refugees to make the same observations for themselves. *See id.* As a result, the refugees were able to make the informed decisions necessary for truly voluntary repatriation, which is essential to the concept of *non-refoulement*. *See* Thouez, *supra* note 9, at 100; *see also infra* Part IV. for a discussion of the numerous obstacles facing the Bosnian refugees upon return to their homes in Bosnia Herzegovina.

Additionally, Mayor Vosen complied with the Dayton Peace Agreement by building movable houses, thereby reducing the potential that ethnic divisions wrought by the war would be reestablished. *See* King, *supra* note 206; *Bosnia's Homeless, supra* note 145.

215. *See* King, *supra* note 206.

C. *The International Community: Overlooking Reconciliation?*

International organizations, most notably the UNHCR, have played a vital role in assisting the return of the Bosnian refugees.[216] Programs such as the "Open Cities" initiative[217] and cross-entity bus lines[218] are facilitating movements linked to return.[219] While such activities are positive influences that provide essential support, "they are not guaranteed to beget civic culture or to compel reconciliation."[220]

The importance of mechanisms that support reconciliation in societies that have been devastated by genocide and ethnic cleansing lies in the fact that they can begin the lengthy process of structuring the "psychological and emotional framework" for reconciliation and forgiveness.[221] Such programs are often anathema to donor governments, not only because of the time and expense involved with them, but also because they do not produce measurable results, making their efficacy more difficult to assess.[222]

In spite of their alleged shortcomings, reconciliation support mechanisms stand as the logical starting point for successful repatriation of the Bosnian refugees and ultimately for new stability and order in the region.[223] Because reconciliation is closely related to individual and cultural factors,[224] these mechanisms become particularly relevant considering that they are the most realistic means through which a desire for healing and

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216. *See* Landgren, *supra* note 124, at 22.

217. "Under UNHCR's 'Open Cities' initiative, cities where reconciliation between ethnic communities is possible openly declare themselves as such. Towns where this commitment is confirmed through the return and reintegration of minorities receive international assistance, particularly for reconstruction." *Id.*

218. *See UNHCR: Funding and Donor Relations* (visited Sept. 15, 1998) <http://www.unhcr.ch/fdrs/midyear/yug.htm>.

219. Other programs have focused on ensuring citizenship to minorities, fair property laws, mine clearance, monitoring the safety of returnees, supervising reconstruction, and equal participation in political life. *See* Landgren, *supra* note 124, at 22.

220. *Id.*

221. *Id.* at 25. International criminal tribunals, truth commissions, and peace education have been the primary reconciliation mechanisms employed in areas that have experienced war and abuse. *See id.* at 23. For perspective, however, it should be noted that reconciliation can sometimes "occur only over the span of generations, if at all." *Id.* at 25. This appears to be the case in the former Yugoslavia, where Sarejevo residents told a visiting President Clinton that the most important thing that the United States could do for Bosnia was to "[s]tay . . . . [f]or at least fifty years." *Id.* at 22.

222. *See id.* at 24.

223. Truth commissions, one of the reconciliation support mechanisms, foster not only reconciliation among groups, but also help create a "moral framework for a different kind of society." *Id.* (footnote omitted).

224. *See id.*

forgiveness can be instilled.[225]

Finally, at least one of the reconciliation mechanisms, peace education, "can begin in countries of asylum, and even before conflict abates."[226] Unlike teaching refugees necessary practical skills,[227] however, host countries that address the threshold issue of peace education take the first step toward providing repatriates a durable solution. Moreover, such countries of asylum seek to minimize the likelihood of future refugee tragedies by eradicating the underlying causes of the present refugee dilemma.[228]

VI. CONCLUSION

The current status of international refugee law remains uncertain. As countries are beginning to view migrants as an ever-increasing burden, the focus of refugee law appears to be shifting more toward state than humanitarian interests. Although it is axiomatic that states must retain some autonomy over their immigration and asylum policies, the world cannot afford to ignore the age-old and recurring plight of refugees.

Germany, now home to hundreds of thousands of Bosnian refugees, has the opportunity to lead the international community back in the direction of focusing on the needs of displaced peoples. By liberalizing its citizenship laws and attempting to integrate foreigners into its society, Germany can begin the process of dispelling anti-foreigner sentiment. While this may not be an immediate process, the current political climate in Germany is conducive for such change.

For the time being, however, Germany, with the aid of the international community, should accept that the repatriation of the Bosnian refugees will not be conducted as readily as was initially envisioned. The conditions in Bosnia Herzegovina are simply too unstable for successful repatriation to occur without *refoulement*. With some patience and funding, however, Germany and the international community can devise creative, perhaps local, approaches to ensure durable solutions for Bosnian refugees upon their return home.

Not only is such an approach in the best interests of the Bosnian refugees, but it also accommodates the needs of Germany and the rest of the world by providing for a more stable future in Bosnia and the Balkans.

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225. It is simply "impossible for people and societies that have experienced ethnic cleansing and genocide to respond to expectations of host states, donor countries, and international agencies that they get over it, go home, and move on." *Id.* at 24.

226. *Id.*

227. *See* Beverlee Bruce, *Preparing for Repatriation: The Case for Skills Training in Refugee Camps* (visited Sept. 17, 1998) <http://www.refugees.org/world/articles/repatriation_wor_sum97.htm>.

228. *See* Landgren, *supra* note 124, at 24.

Perhaps more significantly, this approach could signal an unequivocal reaffirmation of commitment to the world's refugees, thereby creating an atmosphere in which the international community can rebuild El Dorado to its former greatness.

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ANTIDUMPING BEYOND THE GATT 1994: SUPPORTING INTERNATIONAL ENACTMENT OF LEGISLATION PROVIDING SUPPLEMENTAL REMEDIES

I. INTRODUCTION

The General Agreement on Tariffs and Trade (General Agreement or GATT)[1] has been characterized as a major force in the promotion of international peace and prosperity.[2] The GATT accomplished global peace and prosperity by establishing a nondiscriminatory trade environment by reducing tariffs and other barriers to international trade.[3] But in 1995, after seven years of negotiation, a new set of global trade rules took effect, that should make nations reconsider whether peace and prosperity are best promoted by broad-scope reductions in international trade barriers.[4] These new rules are embodied in the *Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations* (Final Act).[5] It is yet to be seen what the full impact will be upon the world in result of the Uruguay Round Agreements. Some studies claim economic prosperity will shower the earth while other studies claim that the industrial world will become destabilized and impoverished while the third world will be cruelly ravaged.[6] One of the areas of the agreement that continues to divide critics is the

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1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187 [hereinafter GATT].

2. *See* Roger P. Alford, Note, *Why a Private Right of Action Against Dumping Would Violate GATT*, 66 N.Y.U. L. REV. 696, 696 (1991).

3. *See id.*

4. *See* Joseph F. Dennin, *Introduction* to [Treaties Binder 1] LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION (Joseph F. Dennin ed., 1995).

5. Apr. 15, 1994, [Treaties Binder 1] LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION 5 (1995), 33 I.L.M. 1125 (1994) [hereinafter Final Act]. For a detailed breakdown of the components of the Final Act, see Philip Raworth, *WTO: Introduction*, *in* [Commentary Binder 1] LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION, at A-13 (Joseph F. Dennin ed., 1995). Of importance here, the central component of the Final Act, the *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement), contains the multilateral agreements on trade in goods under Annex 1A. *See id.* Annex 1A contains the GATT, which is now popularly recognized as the General Agreement on Tariffs and Trade 1994 (GATT 1994). *See id. See also* 19 U.S.C. § 1677(31) (1994) ("The term 'GATT 1994' means the General Agreement on Tariffs and Trade annexed to the WTO Agreement.").

6. Dennin, *supra* note 4. Dennin notes that "few of those who debated the Final Act's implementing legislation, and fewer still of those who would be significantly affected by it, had a first-hand familiarity with the Act's thousand-plus pages of agreements, understandings, decisions and schedules." *Id.* This general lack of familiarity with the whole of the Final Act has bred uncertainty over what its end will hold for the nations of the world. Division among the critics is a natural result of the uncertainty.

implementation and extent of antidumping measures in the GATT 1994.[7]

A. *Dumping Defined*

Before discussing antidumping measures, it is necessary to understand what dumping is in the context of international trade. To begin, "[n]o serious examination has ever been undertaken to determine exactly what a proper definition of dumping should be."[8] Nevertheless, the GATT 1994 has defined dumping as introducing a product of a country "into the commerce of another country at less than its normal value."[9] Less than normal value is defined as:

> less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.
>
> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when . . . such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[10]

In contrast, U.S. courts have used this definition for dumping: "'price discrimination between purchasers in different national markets.'"[11]

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7. *See* Alan M. Dunn, *Antidumping, in* THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 239, 282 (Terence P. Stewart ed., 1996); Alford, *supra* note 2, at 697. The antidumping measures are located in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization* [hereinafter WTO Agreement], Annex 1A, [Treaties Binder 1] LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION, at I-167 (1995), 33 I.L.M. 1144 (1994) [hereinafter Antidumping Agreement].

8. Gary N. Horlick & Eleanor C. Shea, *The World Trade Organization Antidumping Agreement,* 7 INT'L Q. 685, 688 (1995). The practice of dumping has been known to exist long before World War I. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 402 F. Supp. 251, 259 (E.D. Penn. 1975).

9. Antidumping Agreement art. 2, para. 1.

10. Antidumping Agreement art. 2, paras. 1-2.

11. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 723 F.2d 319, 322 (3d Cir. 1983), *rev'd in part*, 475 U.S. 574 (1986); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 494 F. Supp. 1190, 1194 (E.D. Penn. 1980), *rev'd in part*, 723 F.2d 319 (3d Cir. 1983),

Several types of dumping–sporadic, continuous, and predatory–have been recognized.[12] Sporadic dumping is the "occasional sale of overstock" in the international marketplace at greatly reduced prices.[13] There may be a particular urgency to sell overstock of perishable goods quickly for example.[14] The foreign manufacturer's intention is to relieve itself of excess inventory while keeping the price of its products stable in its home market.[15]

Continuous dumping seeks to achieve economies of scale.[16] Manufacturing a larger volume of goods is generally more efficient because the marginal cost of producing each unit is reduced, thereby reducing total costs for the manufacturer.[17] Not only are the manufacturer's fixed costs (or overhead) spread over the greater number of units produced, its variable costs (or unit cost) are reduced as the manufacturer becomes more efficient at producing each extra unit.[18] This is known as the experience curve.[19] "Provided a product's average price exceeds its average cost of production, the producer is assured a sustained profit from overall sales."[20] But it is important to note that continuous dumping manufacturers have a long term perspective on profits. Often the manufacturer will not significantly benefit from increased production via the experience curve in the short term, and so,

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rev'd in part, 475 U.S. 574 (1986); *Zenith Radio*, 402 F. Supp. at 259 (quoting J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 4 (1923)). Under 19 U.S.C. § 1677(34) (1994), "the sale or likely sale of goods at less than fair value" is dumping.

12. *See* Alford, *supra* note 2, at 703. A last, unusual type of dumping is claimed to exist— social dumping. Social dumping is caused when a manufacturer sells its product at a lower price than comparable products in a foreign market as a result of lower labor or environmental standards in its home market. *See* GABRIELLE MARCEAU, ANTI-DUMPING AND ANTI-TRUST ISSUES IN FREE-TRADE AREAS 50 (1994). For environmentalists, social dumping also extends to products that are sold at a lower price than comparable products in a foreign market as a result of savings gained from manufacturing a less environmentally-friendly product. *See id.* at 50 n.185.

13. Alford, *supra* note 2, at 703. *See also* Bart S. Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 LAW & POL'Y INT'L BUS. 85, 88 (1973).

14. *See* Jewel Foliage Co. v. Uniflora Overseas Fla., Inc., 497 F. Supp. 513, 518 (M.D. Fla. 1980).

15. *See* Alford, *supra* note 2, at 703-04.

16. *See* Fisher, *supra* note 13, at 89; Alford, *supra* note 2, at 703.

17. *See* Fisher, *supra* note 13, at 89; Alford, *supra* note 2, at 703. *See also* Stephen F. Moller, Comment, *Free Trade Realism in the International Market: Towards a Sensible, Privately-Enforced Antidumping Statute*, 33 SANTA CLARA L. REV. 931, 939 (1993).

18. *See generally* Alford, *supra* note 2, at 703-04; Moller, *supra* note 17, at 938-40.

19. *See* Moller, *supra* note 17, at 940. Moller also states in his hypothetical: "The doubling of production and sales of a product reduces the total cost of taking the product to the market place by twenty to thirty percent." *Id.*

20. Alford, *supra* note 2, at 704. *See also* Fisher, *supra* note 13, at 89. Thus, even if the manufacturer fails to sell its entire inventory, continuous dumping may be profitable. However, there will be an optimal amount of production for the manufacturer that will maximize total profits. This optimal point will depend on the conditions of supply and demand in the market for the manufacturer's product.

operate at a loss. The manufacturer is gambling that the short term losses will be outweighed by the long term profits as the experience curve cost reductions accelerate.

Predatory dumping is hostile in nature because it is used to forestall the development of or eliminate competition through aggressive price cutting.[21] The manufacturer's intent is to gain market share or a monopoly.[22] Once the producer meets its aim by crushing the competition, it raises the prices on its goods to recover its losses from the price cutting.[23]

What all three types of dumping have in common is that all promote market inefficiency.[24] Producers that resort to dumping are engaging in unfair price competition.[25] By reducing prices below cost of production and a reasonable profit (an inefficient act), producers seek to drive out the competition, gain market share, and ultimately reap monopoly profits.[26] This is most obvious with predatory dumping. In the case of continuous dumping, a manufacturer is assured that its long term profits outweigh its short term losses through a monopoly in its market at the end of the short term. Even sporadic dumping is inefficient since "its purpose is to minimize losses that are then passed on to competitors."[27] Efficient producers are able to absorb their own losses and continue to compete without resorting to dumping schemes in an efficient market.[28]

B. *The Current State of Antidumping Measures*

The United States government and the European Community Commission see themselves as "users of antidumping laws, rather than as exporting countries."[29] Since the United States and the European Community are the world's largest exporters, this stance may seem rather unusual.[30] In some respects, this stance reflects trade politics where such countries with large internal markets are able to advocate protectionism over access to international markets for their exports.[31] But it is undeniable that such countries are also seen as attractive markets to the would be dumper since

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21. *See* John J. Barcelo III, *Antidumping Laws as Barriers to Trade—TheUnited States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 499 (1972); Alford, *supra* note 2, at 704.

22. *See* Barcelo, *supra* note 21, at 499; Alford, *supra* note 2, at 704.

23. *See* Barcelo, *supra* note 21, at 500; Alford, *supra* note 2, at 704.

24. *See* Alford, *supra* note 2, at 704.

25. *See id.*; Moller, *supra* note 17, at 967.

26. *See* Alford, *supra* note 2, at 704-05; Moller, *supra* note 17, at 967.

27. Moller, *supra* note 17, at 967.

28. *See id.*; Alford, *supra* note 2, at 704.

29. Horlick & Shea, *supra* note 8, at 692.

30. *See id.*

31. *See id.*

their consumers have the wealth to buy many products beyond their basic needs.

In response to dumping concerns, the General Agreement's remedy to injurious dumping is the use of antidumping duties.[32] However, U.S. producers claim that the GATT 1994 does not go far enough to protect them from dumping.[33] In particular, the GATT 1994 does not allow the injured producers to collect damages from the dumper.[34] Thus, if the imposition of an antidumping duty is slow to occur, the dumper may gain a significant market share advantage against its competitors.[35] Furthermore, since retroactive duties are limited,[36] dumping becomes a "risk[-]free, no-lose proposition."[37]

Despite the lack of a private remedy for injured producers in the GATT 1994, currently the United States allows a private right of action against dumpers through the 1916 Antidumping Act (1916 Act).[38] The 1916 Act provides criminal penalties and allows civil damages to be collected from dumpers.[39] But for the fact that this obscure law was never abrogated when the United States implemented the GATT 1994, the 1916 Act stands in clear contradiction to the express remedies provided in the General Agreement.[40] Such nontariff barriers by the United States are said to deteriorate the GATT 1994.[41]

Many critics have claimed that the 1916 Act is ineffective against dumping.[42] In fact, only three years after its enactment, the U.S. Tariff Commission agreed that the Act was ineffective.[43] However, within roughly the past thirty years, the 1916 Act has gained in popularity as both a weapon to halt and a salve to heal injurious dumping.[44] Currently there is a complaint

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32. *See* Philip Raworth, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Code"), in* [Commentary Binder 1] LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION B-35, B-40 (Joseph F. Dennin ed., 1995); Alford, *supra* note 2, at 726.

33. *See* Moller, *supra* note 17, at 950-51; Alford, *supra* note 2, at 697-98.

34. *See* Raworth, *supra* note 32, at B-40; Alford, *supra* note 2, at 698; Moller, *supra* note 17, at 950-51.

35. *See* Moller, *supra* note 17, at 951.

36. *See* Raworth, *supra* note 32, at B-40; Alford, *supra* note 2, at 698.

37. Alford, *supra* note 2, at 698.

38. 15 U.S.C. § 72 (1994).

39. *See id.*

40. *See* John Zarocostas, *E.U. Seeks to Stop Obscure U.S. Law*, 20 NAT'L L.J. A12 (1998).

41. *See* Marie Louise Hurabiell, Comment, *Protectionism Versus Free Trade: Implementing the GATT Antidumping Agreement in the United States*, 16 U. PA. J. INT'L BUS. L. 567, 577 (1995).

42. *See id.* at 575; Alford, *supra* note 2, at 712; Moller, *supra* note 17, at 950.

43. *See* Moller, *supra* note 17, at 952.

44. *See* Geneva Steel Co. v. Ranger Steel Supply Corp., 980 F. Supp. 1209, 1214 (D. Utah 1997).

filed by the European Union with the World Trade Organization demanding that the law be repealed for being in violation of the GATT 1994.[45] Although a case has never been successful on the merits under the 1916 Act,[46] the mere threat of litigation may have a positive effect on the discouragement of dumping. On the other hand, the European Union claims that the 1916 Act only disrupts trade.[47]

Either way, the decision reached by the World Trade Organization has special significance because the panel decision will be binding (unless there is a consensus to reject the decision) as a result of the Uruguay Round Agreements.[48] Thus, it is important to recognize the goals of the 1916 Act and the Act's usefulness as a tool to achieve both the goals of the Act and of the GATT 1994. Nations should have the flexibility under the GATT 1994 to pass legislation entitling their citizens to supplementary remedies, particularly to a private antidumping remedy, to resolve shortcomings of the GATT 1994 remedies, benefit domestic economies, and ultimately strengthen national security.

Before proceeding, it is useful to understand the history of the 1916 Act. This history from the Act's inception is detailed in Part II. Afterward, details of the GATT 1994 and the remedies provided therein will be discussed, and a comparison of the GATT 1994 remedies with those of the 1916 Act will be made in Part III. Before concluding, the advantages of supplementary remedies to the GATT 1994 will be presented in Part IV.

II. HISTORY OF THE 1916 ANTIDUMPING ACT

The first antidumping law in the United States was the 1916 Antidumping Act.[49] The 1916 Act is still unique because it is the only U.S. law against dumping that is not administratively enforced.[50] The purpose behind the Act is to "protect domestic industries from dumping by their

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45. *See* Zarocostas, *supra* note 40, at A12. The European Union decided to file the complaint after informal talks with the United States failed to persuade the United States to repeal the law. *See* Richard Lawrence, *E.U. Fights 1916 U.S. Law in Steel Anti-Dumping Case*, J. OF COM., Oct. 23, 1997, at 2A, *available in* LEXIS, News Library, Joc File.

46. *See* Moller, *supra* note 17, at 941. *See also* Geneva Steel, 980 F. Supp. at 1214. But there is one instance in which a plaintiff prevailed in an unpublished default judgment. *See* Consolidated Int'l Automotive, Inc. v. Chen, 51 F.3d 279, 1995 WL 139347 (9th Cir. 1995).

47. *See* Zarocostas, *supra* note 40, at A12.

48. *See* Dennin, *supra* note 4. It is also important to recognize how many countries will be impacted by any decision made. In 1947, the GATT had only 23 participating countries. *See* Hurabiell, *supra* note 41, at 569 n.12. In contrast, 124 countries participated in the Uruguay Round. *See id.*

49. *See* Moller, *supra* note 17, at 941.

50. *See id.* at 939.

foreign competitors."[51] The text of the Act makes this purpose quite apparent:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided, That such act or acts be done with intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.*[52]

The main interest that the 1916 Act seeks to protect is that of domestic manufacturers.[53] But courts have also recognized that the Act protects U.S. importers as well.[54]

A. *Legislative History*

This move to protect domestic industry stemmed from Congressional concerns about the aftermath of World War I.[55] During World War I, American enterprise was doing especially well.[56] This success was due to a

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51. Western Concrete Structures Co., Inc. v. Mitsui & Co. (U.S.A.), Inc., 760 F.2d 1013, 1019 (9th Cir. 1985). *See also* Moller, *supra* note 17, at 944.

52. 15 U.S.C. § 72 (1994) (emphasis added).

53. *See* Schwimmer v. Sony Corp. of Am., 471 F. Supp. 793, 797 (E.D.N.Y. 1979).

54. *See Western Concrete*, 760 F.2d at 1019; Isra Fruit Ltd. v. Agrexco Agric. Export Co. Ltd., 631 F. Supp. 984, 989 (S.D.N.Y. 1986); Jewel Foliage Co. v. Uniflora Overseas Fla., Inc., 497 F. Supp. 513, 516 (M.D. Fla. 1980). In *Isra Fruit*, the court held that allowing only manufacturers to "vindicate their losses," and not importers, "does not fairly perceive the consequences of the illegal activity. The harm to the markets of the United States being the same, the importer should not be denied the right to avail itself of the [1916] Act's protections." 631 F. Supp. at 989.

55. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 494 F. Supp. 1190, 1219 (E.D. Penn. 1980), *rev'd in part*, 723 F.2d 319 (3d Cir. 1983), *rev'd in part*, 475 U.S. 574 (1986); Geneva Steel Co. v. Ranger Steel Supply Corp., 980 F. Supp. 1209, 1212 (D. Utah 1997).

56. *See Zenith Radio*, 494 F. Supp. at 1219; *Geneva Steel*, 980 F. Supp. at 1212.

lack of European competition because European resources were turned toward national defense.[57] Importation of competing European goods was "impossible," and "American goods which had previously been made only under the shelter of high duties were exported heavily to markets abroad."[58] But there was a fear that U.S. fortune would fade when the war ended.[59] It was believed that European manufacturers, which had been actively engaged in supporting the war effort, would aggressively try to recover the market share they had lost in the United States.[60] Next, there was a "rise of anti-German sentiment" and a "widespread popular conviction that German enterprises were particularly vicious perpetrators of predatory dumping" during this period.[61] This in part caused pressure to increase tariffs in the United States.[62] Additionally, the Republican Party strongly supported protective tariffs during this period.[63] Republicans felt that tariffs offered the best defense against foreign competition which would allow America to diversify its industries, develop its resources, and preserve national employment for its workers.[64]

There was also a strong political atmosphere in the United States that was opposed to the creation of cartels and monopolies.[65] After all, just two years prior to the Act's passage (1914), the Sixty-Third Congress passed such legislation as the Clayton Antitrust Act,[66] which prohibited price discrimination.[67] Price discrimination was seen as "an important contributor

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57. *See Geneva Steel*, 980 F. Supp. at 1212.

58. *Zenith Radio*, 494 F. Supp. at 1219.

59. *See id.*; *Geneva Steel*, 980 F. Supp. at 1212.

60. *See Zenith Radio*, 494 F. Supp. at 1219, 1222; *Geneva Steel*, 980 F. Supp. at 1212.

61. J. Michael Finger, *The Origins and Evolutions of Antidumping Regulation*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 13, 18 (J. Michael Finger & Nellie T. Artis eds., 1993).

62. *See id.*

63. *See Zenith Radio*, 494 F. Supp. at 1218-19.

64. *See id.* In 1912, the Republican Party Platform stated:

> We re[-]affirm our belief in a protective tariff. The Republican tariff policy has been of the greatest benefit to the country, developing our resources, diversifying our industries, and protecting our workmen against competition with cheaper labor abroad, thus establishing for our wage-earners the American standard of living. The protective tariff is so woven into the fabric of our industrial and agricultural life that to substitute for it a tariff for revenue only would destroy many industries and throw millions of our people out of employment.

Id. (quoting from NATIONAL PARTY PLATFORMS, 1840-1956, at 168-69 (K. Parker & D. Johnson eds., 1956)).

65. *See* Moller, *supra* note 17, at 944. "The Democratic Congresses, consonant with Party tradition in the era [the early twentieth century], were vigorously opposed to anticompetitive and monopolistic practices." *Zenith Radio*, 494 F. Supp. at 1217.

66. 15 U.S.C. § 12 *et seq.* (1994). See in particular 15 U.S.C. § 13.

67. *See Zenith Radio*, 494 F. Supp. at 1217 (outlining the history of U.S. antitrust law).

to the growth of monopoly."[68] In fact, the 1916 Act is "functionally similar" to the Clayton Antitrust Act in terms of its prohibition on price discrimination, but it applies the prohibition to international commerce.[69]

Unlike the Republicans, the Democratic Party favored lower tariffs.[70] The Democrats believed that lower tariffs would create competition against domestic cartels by allowing foreign manufacturers increased access to the U.S. marketplace.[71] However, the Democrats were also wary of the possibility of the use of unfair trade practices such as dumping by European manufacturers.[72] Thus, in order to protect newly created and expanding industries in the United States, and yet stay true to its opposition to protective tariffs, the 1916 Act was recommended by President Woodrow Wilson's administration.[73]

The result was that the Antidumping Act was signed into law on September 8, 1916.[74] The Act was contained in section 801 of the Revenue Act of 1916.[75] During its passage, there was "very little debate on the antidumping clause" in Congress.[76] But it was clear that Congress was afraid of unfair European competition and that, through the 1916 Act, Congress intended to place foreign producers on the same footing as domestic producers

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68. *Id.*

69. *Id.* at 1213.

70. Helmac Products Corp. v. Roth (Plastics) Corp., 814 F. Supp. 560, 566 (E.D. Mich. 1992). Note that the Democratic Party had a majority in both houses of Congress throughout this period, 1913-1917. *See Zenith Radio*, 494 F. Supp. at 1217.

71. *See* Moller, *supra* note 17, at 944. The Democratic Party Platform of 1912 stated:

> We declare it to be a fundamental principle of the Democratic [P]arty that the Federal government, under the Constitution, has no right or power to impose or collect tariff duties, except for the purpose of revenue, and we demand that the collection of such taxes shall be limited to the necessities of government honestly and economically administered. The high Republican tariff is the principal cause of the unequal distribution of wealth; it is a system of taxation which makes the rich richer and the poor poorer; under its operations the American farmer and laboring man are the chief sufferers; it raises the cost of the necessaries of life to them, but does not protect their product or wages. . . . We favor the immediate downward revision of the existing high and in many cases prohibitive tariff duties, insisting that material reductions be speedily made upon the necessaries of life. Articles entering into competition with trust-controlled products and articles of American manufacture which are sold abroad more cheaply than at home should be put upon the free list. . . . We appeal to the American people to support us in our demand for a tariff for revenue only.

Zenith Radio, 494 F. Supp. at 1217-18 (alteration in original) (quoting from NATIONAL PARTY PLATFORMS, 1840-1956, at 168-69 (K. Parker & D. Johnson eds., 1956)).

72. *See Helmac Products*, 814 F. Supp. at 566; Moller, *supra* note 17, at 944.

73. *See Helmac Products*, 814 F. Supp. at 566; *Zenith Radio*, 494 F. Supp. at 1220.

74. *See Zenith Radio*, 494 F. Supp. at 1217.

75. *See id.* at 1220.

76. *Id.* at 1221.

that were constrained by federal antitrust law.[77]

After enactment, it was not until 1935 that a judicial opinion was published citing the 1916 Act.[78] Until 1980, there had never been a case decided on its merits under the Act.[79]

B. *A Protectionist Versus an Antitrust Statute*

The slow development of the case law along with the lack of Congressional debate has left some fundamental questions about the 1916 Act unanswered. One such issue is whether the Act is essentially a protectionist statute or an antitrust statute. Logically, the 1916 Act has both an antitrust element and a protectionist element.

In *Geneva Steel Co. v. Ranger Steel Supply Corp.*,[80] the issue was raised whether the plaintiff needed to allege an antitrust injury or predatory pricing in order to state a claim under the 1916 Act. In resolving the issue, the court held that the Act's plain meaning applied.[81] The court found that the plaintiff only needed to allege that the defendant lowered prices with the intent to destroy, injure, or prevent the establishment of an industry of the United States to state a claim.[82] Therefore, since the Act was "designed to protect United States industry," the 1916 Act was not simply an antitrust statute, and hence, antitrust injury or predatory price discrimination was not essential in making a claim.[83]

However, in contrast, the court in *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*[84] came to the opposite conclusion. Based on the similarities between the text of the 1916 Act and the text of the Clayton Antitrust Act of 1914 and other antitrust laws in terms of standing, damage provisions, penalties, and language, the court held that the 1916 Act was an antitrust, not a protectionist, statute.[85] Similarly, in *Helmac Products Corp. v. Roth Corp.*,[86] the court held that a period of four years was appropriate for the statute of limitations under the 1916 Act after examining its legislative

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77. *See id.* at 1221-23.

78. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 402 F. Supp. 251, 254 (E.D. Penn. 1975). The first reported opinion was *H. Wagner & Adler Co. v. Mali*, 74 F.2d 666 (2d Cir. 1935).

79. *See* Moller, *supra* note 17, at 941.

80. 980 F. Supp. 1209 (D. Utah 1997).

81. *See id.* at 1215.

82. *See id.* To view the relevant language of the 1916 Act, see *supra* emphasized text accompanying note 52.

83. *Geneva Steel*, 980 F. Supp. at 1215. *Accord* Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., 35 F. Supp. 2d 597, 604 (S.D. Ohio 1999).

84. 494 F. Supp. 1190 (E.D. Penn. 1980), *rev'd in part*, 723 F.2d 319 (3d Cir. 1983), *rev'd in part*, 475 U.S. 574 (1986).

85. *See id.* at 1214-15.

86. 814 F. Supp. 560 (E.D. Mich. 1992).

history because the Act was analogous to the antitrust statutes, such as the Clayton Antitrust Act.[87] But the court also said that the 1916 Act need not be "interpreted consistently with the antitrust statutes in all situations."[88]

Although opinions are divided in the courts and among the commentators,[89] the narrow antitrust view overlooks the protection given especially to U.S. industry in the plain meaning of the Act. The antitrust view has been dominant in the past, but the broader interpretation that recognizes a protectionist bent in the Act is gaining hold. Given the strength of the argument that recognizes both the antitrust and protectionist attributes, the trend can be expected to continue.

C. *Application Difficulties of the Act*

Perhaps the greatest criticism that can be leveled against the 1916 Act is that it has been ineffective in deterring dumping.[90] For example, "there have been four attempts to enforce the criminal provisions of the Act, but none was [sic] successful."[91] The civil claims made under the Act, although more numerous, have also had little success.[92]

There are two reasons for the 1916 Act's ineffectiveness: difficulties in obtaining evidence and difficulties in proving the required intent.[93] Because the 1916 Act is both a civil and a criminal statute, the Fifth Amendment will prevent discovery of evidence that may tend to incriminate the defendant if the defendant is an individual.[94] Proving intent is also burdensome because specific predatory intent is required under the 1916 Act.[95] However, the predatory intent requirement may be established by inference, even if the defendant has only a "small market share" that makes successful injury of

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87. *See id.* at 566-67.

88. *Id.* at 567.

89. For example, see Moller, *supra* note 17, at 942-45, for the antitrust view of the 1916 Act, and see Note, *Rethinking the 1916 Antidumping Act*, 110 HARV. L. REV. 1555 (1997), for the protectionist viewpoint.

90. *See* Moller, *supra* note 17, at 950-51; Alford, *supra* note 2, at 713.

91. Geneva Steel Co. v. Ranger Steel Supply Corp., 980 F. Supp. 1209, 1214 (D. Utah 1997).

92. *See id.*; Moller, *supra* note 17, at 951. "However, a filing [under the 1916 Act] is not categorically frivolous merely because of the probable difficulties a plaintiff faces bringing a claim." Consolidated Int'l Automotive, Inc. v. Chen, 51 F.3d 279, 1995 WL 139347, at *2 (9th Cir. 1995).

93. *See* Moller, *supra* note 17, at 952.

94. *See id.*; H. Wagner & Adler Co. v. Mali, 74 F.2d 666, 669-70 (2d Cir. 1935).

95. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 402 F. Supp. 251, 259 (E.D. Penn. 1975); Alford, *supra* note 2, at 712.

American industry unlikely.[96] Thus, given the broad net that is cast, it is sensible to require some amount of difficulty in proving liability under the 1916 Act so that the innocent are not ensnared.

D. *Remedies Provided*

As previously mentioned, the 1916 Act provides both criminal and civil penalties.[97] Although this has been claimed to be a handicap,[98] it is not uncommon to provide both types of penalties in a statute,[99] such as with the federal RICO statute.[100] The full text of the penalties under the 1916 Act follow:

> Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, *shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both,* in the discretion of the court.
>
> Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover threefold the damages sustained,* and the cost of the suit, including a reasonable attorney's fee.[101]

With the difficulties in obtaining evidence and proving the Act's required intent, the criminal penalties are comparatively light. However, the treble damages available in a successful civil suit are attractive in spite of these difficulties. The potential severity of the damages may even encourage defendants to settle before the case comes to trial.

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96. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 494 F. Supp. 1190, 1201 n.12 (E.D. Penn. 1980), *rev'd in part*, 723 F.2d 319 (3d Cir. 1983), *rev'd in part*, 475 U.S. 574 (1986). For a discussion of the predatory intent required in domestic antitrust statutes as compared to the 1916 Act, see generally *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 35 F. Supp. 2d 597 (S.D. Ohio 1999).

97. *See supra* text accompanying note 39.

98. *See* Moller, *supra* note 17, at 952.

99. *See* Geneva Steel Co. v. Ranger Steel Supply Corp., 980 F. Supp. 1209, 1216 (D. Utah 1997).

100. *See* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1994).

101. 15 U.S.C. § 72 (1994) (emphasis added).

III. A COMPARISON OF ANTIDUMPING UNDER THE GATT 1994 AND THE 1916 ACT

A. *The Principles of the GATT 1994 and Antidumping*

The General Agreement is based on three central principles: trade liberalization, nondiscriminatory trade, and multilateral negotiations on trade.[102] The first principle, trade liberalization, essentially means the reduction of tariff and nontariff barriers to trade.[103] The second principle, nondiscrimination, requires that all World Trade Organization members are to give equal treatment to other members. Furthermore, products of foreign origin are to receive "no less favorable treatment than products of domestic origin."[104] The third and last principle, multilateral negotiations, means that trade conditions are to be discussed such that the terms of the agreement are "'reciprocal and mutually advantageous' to all" members.[105]

It is important to note that dumping does not violate any of the underlying principles of the GATT 1994.[106] In fact, many critics note that the antidumping remedies provided in Article VI are an anomaly in the general framework of the GATT 1994.[107] Article VI is seen as a compromise rather than an achievement of the negotiations since it gives countries "permission to impose import restrictions."[108] This is clearly in opposition to the General Agreement's goal of reducing barriers to international trade.

However, the antidumping provisions of the General Agreement have gained more acceptance. First, as a result of the Uruguay Round, all signatories of the Final Act must adhere to the Antidumping Agreement in order to obtain membership in the World Trade Organization.[109] Second, trade liberalization, which has substantially reduced tariffs, has brought increased exposure to foreign competition for domestic producers.[110] This has changed the policies of many countries. In the 1970's, "only four nations were active users of antidumping laws—Australia, New Zealand, the European

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102. *See* Alford, *supra* note 2, at 701-02.

103. *See id.* at 701; WTO Agreement preamble, para. 4.

104. Alford, *supra* note 2, at 702; WTO Agreement preamble, para. 4 (The WTO Agreement calls for "the elimination of discriminatory treatment in international trade relations.").

105. Alford, *supra* note 2, at 702; WTO Agreement preamble, para. 4.

106. *See* Hurabiell, *supra* note 41, at 572.

107. *See id.* at 572-73; Alford, *supra* note 2, at 707. *See also* J. Michael Finger, *Reform, in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 57, 63 (J. Michael Finger & Nellie T. Artis eds., 1993).

108. Finger, *supra* note 107, at 63.

109. *See* Dunn, *supra* note 7, at 282; Philip A. Akakwam, *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, 5 MINN. J. GLOBAL TRADE 277, 310 n.161 (1996).

110. *See* Dunn, *supra* note 7, at 282.

Community," and the United States.[111] Now such nations as Japan and Singapore, whose governments have been strongly against the use of antidumping measures, "have begun to apply antidumping duties in some instances."[112] Even "developing countries . . . have begun applying antidumping duties to imports with increasing frequency."[113] Thus, the trend is moving counter to the original principles of the General Agreement.

B. *The Conflicts Between the GATT 1994 and the 1916 Act*

Although there is increased use of antidumping measures in the GATT 1994, it is not clear that supplemental measures such as the 1916 Act are in agreement with the GATT 1994. There are three major conflicts between the GATT 1994 and the 1916 Act that have been raised: material injury, investigation, and available remedies.[114]

Under the GATT 1994, antidumping measures may only be undertaken upon a showing of a "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry."[115] What makes an injury "material" is still problematic because it is left up to national interpretation.[116] "Material retardation" has also been left unexplained.[117] The United States has defined material injury as "harm which is not inconsequential, immaterial, or unimportant."[118] Unlike the GATT 1994, material injury need not be shown under the 1916 Act. All that is required is proof that a foreign producer lowered its prices with the intent to injure, destroy, or prevent the establishment of United States industry or to restrain or monopolize trade and commerce in the subject market.[119] Thus, the 1916 Act is in conflict with the GATT 1994 as to the

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111. *Id.*

112. *Id.* Antidumping measures have seen increased use in the past decade. *See* Akakwam, *supra* note 109, at 277.

113. Dunn, *supra* note 7, at 283.

114. Each of these conflicts has been raised as part of the European Union's complaint to the World Trade Organization over the 1916 Act.

115. Antidumping Agreement art. 3 n.9.

116. *See* RAINER M. BIERWAGEN, GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTI-DUMPING LAWS 90 (1990). "The actual practice [of determining material injury] has neither the objective to relieve customs authorities of the necessity of examining every importation for possible dumping nor does it . . . screen out all small cases on an equal basis, nor ensure that 'domestic industry' or welfare is harmed by reason of dumped imports." *Id.* at 90-91.

117. *See* Raworth, *supra* note 32, at B-39.

118. 19 U.S.C. § 1677(7)(A) (1994). For a further examination of material injury, see BIERWAGEN, *supra* note 116, at 90-93.

119. *See* 15 U.S.C. § 72 (1994). The relevant part of the section is reproduced at *supra* text accompanying note 52. *See also* Western Concrete Structures Co., Inc. v. Mitsui & Co. (U.S.A.), Inc., 760 F.2d 1013, 1019 (9th Cir. 1985); Geneva Steel Co. v. Ranger Steel Supply Corp., 980 F. Supp. 1209, 1215 (D. Utah 1997); Helmac Products Corp. v. Roth (Plastics)

need to show material injury, threat, or retardation.

The GATT 1994 also requires that an investigation be held to determine imposition of antidumping measures.[120] The investigation is initiated by a private application or unilaterally by government authorities.[121] A private application "must be supported by domestic producers whose collective output constitutes more than [fifty percent] of the total production of those domestic producers who have expressed an opinion on the application."[122] Additionally, a minimum of twenty-five percent of the total domestic production of the like product is needed by domestic producers expressly supporting the private application to initiate an investigation.[123] In any case, evidence must be sufficient to show "dumping, injury, and a causal link between the two" to trigger an investigation.[124] Once an investigation is initiated, a private party may appear at hearings and submit briefs, but otherwise has "little power" to affect the outcome.[125] But under the 1916 Act, a private party may avoid government investigation altogether and file suit directly in a federal district court.[126] Such action is in conflict with the requirement of investigation before any dumping remedy may be had under the GATT 1994.

Last, the General Agreement has three available remedies: "provisional measures, undertakings and definitive antidumping duties."[127] Provisional measures include duties, cash deposits, or bonds imposed as a result of a "preliminary affirmative determination of dumping causing injury."[128] An exporter may also give a "voluntary undertaking to revise prices or to cease dumping" after a preliminary affirmative determination.[129] Last, definitive antidumping duties are available upon a final determination of material injury, threat of material injury, or material retardation.[130] In any case, the duties

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Corp., 814 F. Supp. 560, 574 (E.D. Mich. 1992).

120. *See generally* Antidumping Agreement art. 5. The new provisions in the Antidumping Agreement regarding initiation of investigations are "intended to make the process more transparent and fair and to protect against frivolous claims." Horlick & Shea, *supra* note 8, at 703.

121. *See* Raworth, *supra* note 32, at B-39.

122. *Id.*

123. *See id.*

124. *Id. See also* Horlick & Shea, *supra* note 8, at 703.

125. *See* Alford, *supra* note 2, at 710.

126. *See* 15 U.S.C. § 72, para. 3 (1994).

127. Raworth, *supra* note 32, at B-40. *See generally* Antidumping Agreement arts. 7-9.

128. Raworth, *supra* note 32, at B-40. The provisional measures must also be deemed necessary to prevent continued injury to the domestic industry during the investigation. *See id.*

129. *Id.*

130. *See id.*

"may not exceed the margin of dumping."[131] In contrast, the 1916 Act's criminal and civil remedies are unlike the remedies provided in the GATT 1994.[132] These remedies are also not in accord with the GATT 1994 principles of trade liberalization (the 1916 Act is a nontariff barrier) and nondiscriminatory trade (dumping nations are treated less favorably than nondumping nations under the 1916 Act).[133] Thus, the 1916 Act again conflicts with the GATT 1994.

C. *The 1916 Act, the GATT 1994, and Lacunae*

Given the conflicts between the 1916 Act and the GATT 1994 (material injury, investigation, and available remedies), it would appear that the 1916 Act violates the GATT 1994. But this is not necessarily the case. Although the Antidumping Agreement is exhaustive in that World Trade Organization members are not allowed to take independent antidumping measures, it is unclear whether the Antidumping Agreement is "'self-contained,' [*i.e.*] whether lacunae[134] may only be filled by the GATT, now by the WTO [World Trade Organization], and possibly through dispute settlement procedures."[135]

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131. *Id.* The margin of dumping is the difference between the normal value of the dumped goods and their export price. *Id.* at B-37. For a detailed explanation over how normal value is determined, see *id.* at B-37 to B-38. See *supra* note 10 and accompanying text, for the general guidelines for determining normal value in the Antidumping Agreement. When domestic sales in the exporting country are too few to make the normal value determination by comparable price, the United States prefers to use third country prices to assess the normal value. *See* Raworth, *supra* note 32, at B-37. By comparison, the European Union finds third country prices unreliable, and prefers to use the alternative method, which is the exporter's cost of production plus other reasonable costs and a reasonable profit. *See id.* at B-37 to B-38. Export price is typically determined by the transaction price listed in the commercial invoice. *See id.* at B-38. See *id.*, for more information on export price determination. Upon determination of normal value and export price, to calculate the margin of dumping, the comparison made between them must be "at the same level of trade (normally ex factory) and[,] in respect of sales made[,] at nearly as possible the same time." *Id.* Typically, either a comparison of weighted-average prices or individual transaction prices is made. *See id.*; Horlick & Shea, *supra* note 8, at 705. For more details on this comparison, see Raworth, *supra* note 32, at B-38. If the resulting margin of dumping is "less than 2% of the export price, it is considered *de minimis*." *Id.* When the margin of dumping is *de minimis*, "[t]here shall be immediate termination" of the investigation and no antidumping duties shall be imposed. Antidumping Agreement art. 5, para. 8. *See* Raworth, *supra* note 32, at B-38; Horlick & Shea, *supra* note 8, at 708.

132. *See* Alford, *supra* note 2, at 726.

133. *See id.*

134. Lacunae is a term which means missing parts, empty spaces, or gaps. *See* WEBSTER'S II NEW RIVERSIDE DICTIONARY 393 (1984). "Lacunae" are distinguished from "vague concepts" in the GATT 1994 in that vague concepts occur when negotiators address an issue and lacunae occur when negotiators do not address an issue. *See* Jacques H. J. Bourgeois, *Anti-Dumping Law, in* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 302 (Ernst-Ulrich Petersmann ed., 1997).

135. Bourgeois, *supra* note 134, at 303.

Supplemental remedies to the GATT 1994 provided by national legislation (such as the 1916 Act) qualify as lacunae.[136] One suggested solution to this conflict has been to allow legislation providing supplemental remedies as long as the fundamental principles of the GATT 1994 are not violated.[137]

But there is a question of whether the negotiators of the General Agreement ever intended that the fundamental principles be anything more than a guide, rather than a chain, to the enactment of national trade legislation. The United States, ever mindful of its national sovereignty, provided in its implementing legislation the following: "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."[138]

Moreover, as the Uruguay Round progressed, amendments to the antidumping provisions of the General Agreement became of principal importance to most of the nations that ratified the Final Act.[139] Given the amount of attention that the Antidumping Agreement received during the round of negotiations, coupled with the increased use of the General Agreement's antidumping provisions internationally in recent years, it seems unlikely that the possibility of nations enacting laws like the 1916 Act was mistakenly overlooked by its negotiators. In other words, such laws are lacunae. Therefore, the GATT 1994 may authorize the passage of such laws

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136. *See id.*

137. *See id.*; Alford, *supra* note 2, at 729-32. See also Horlick & Shea, *supra* note 8, at 710-12, on dispute settlement. Developing a solution that provides a proper balance between national sovereignty and international coordination is not an easy task. *See* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 212 (1996). Stating the issue more precisely:

> The problem is how to formulate and articulate the necessary mediating principle or principles between the international policy values for which a dispute settlement is desired, on the one hand, and the remaining important policy values of preserving national 'sovereign' authority both as a check and balance against centralized power, and as a means to facilitate good government decisions close to the constituencies affected, on the other hand.

Id. World Trade Organization panels should be wary not to adopt activist postures in solving disputes among participating members. *See id.* Activism "could well alienate members, thus threatening the stability of the GATT/WTO dispute settlement procedure itself." *Id.* See Akakwam, *supra* note 109, at 277, for further commentary on the appropriate standard of review for panel decisions on antidumping.

138. 19 U.S.C. § 3512(a)(1) (1994). *See also* Terence P. Stewart, *The Uruguay Round Agreements Act: An Overview of Major Issues and Potential Trouble Spots*, *in* THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 29, 38-40 (1996) (quoting Ambassador Kantor's November 23, 1994 letter to Senator Dole). *Cf.* Horlick & Shea, *supra* note 8, at 709 (supporting use of anticircumvention measures).

139. *See* Dunn, *supra* note 7, at 239. For a detailed negotiating history of the Uruguay Round Antidumping Agreement, see Horlick & Shea, *supra* note 8, at 686-703.

by implication from its silence. Even if this conclusion is somewhat of a stretch, the 1916 Act itself may be permissible under the General Agreement by being grandfathered in as existing legislation.[140] If this is so, what should prevent other nations from enacting similar laws to afford their citizens the same protection as citizens of the United States? This question as it applies to supplemental remedies is examined in the next Part.

IV. SUPPLEMENTARY REMEDIES AND THE GATT 1994

Although the fundamental principles of the General Agreement[141] are indeed sound and logical, it has been agreed by the Final Act signatories that instances of injurious dumping should form an exception to these principles.[142] To the extent that remedies are deemed appropriate,[143] the question remains whether current antidumping remedies are the best solution to the problem. In answering this question, nations should have the flexibility under the GATT 1994 to pass legislation entitling their citizens to supplementary remedies, particularly to a private antidumping remedy, to resolve shortcomings of the GATT 1994 remedies, benefit domestic economies, and ultimately strengthen national security.

A. *The Need to Resolve Shortcomings in the GATT 1994*

National legislation should be applied as needed to resolve shortcomings of the GATT 1994 remedies consisting of failure to adequately deter dumping and lack of compensation for the injured industry. The failure of the GATT 1994 remedies in providing adequate deterrence to dumping begins with the slow administrative procedures that implement them. [144] The speed at which antidumping duties are implemented is critical because the remedy is generally prospective.[145] Provisional measures may only be applied after sixty

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140. *See* Alford, *supra* note 2, at 720-21.

141. *See supra* text accompanying notes 102-05.

142. *See supra* text accompanying notes 115-18.

143. *See supra* text accompanying notes 106-08.

144. *See* Note, *supra* note 89, at 1555; Moller, *supra* note 17, at 954. An investigation of the alleged dumping may only begin when there is sufficient evidence and sufficient support for a private application by or on behalf of the domestic industry. *See* Antidumping Agreement art. 5, paras. 2-4. *See also supra* text accompanying notes 121-24. The latter requirement entails that an applicant must canvass domestic producers prior to submitting an application. *See* Raworth, *supra* note 32, at B-39. The investigation itself may take as long as 18 months. *See* Antidumping Agreement art. 5, para. 10. Further slowness may occur through incompetence in administrative enforcement of antidumping measures. *See* Moller, *supra* note 17, at 954 (citing an example in the semiconductor industry).

145. *See* Note, *supra* note 89, at 1555; Alford, *supra* note 2, at 714-15; Moller, *supra* note 17, at 954.

days from the start of the investigation.[146] "[F]inal anti-dumping duties may be levied retroactively for the period for which provisional measures applied" upon a final determination that there was material injury, or that there would have been material injury without the protection of the provisional measures, to the domestic industry.[147] "Retroactive anti-dumping duties may even be levied on products that entered the country up to [ninety] days prior to the date of application of the provisional duties, although they may not affect products that entered prior to the date when the investigation was initiated."[148] However, in cases of material retardation or when there is a material threat of injury alone, retroactive duties are not permitted.[149] The limits to the retroactive duties and procedural delays can amount to a great deal of harm to domestic industry. A sudden dumping of foreign goods into a domestic market may cause "irreparable damage on domestic industries" as a result.[150] Lacking a suitable retroactive remedy also amounts to a "risk[-]free, no-lose proposition" for the dumping foreign producer.[151] The slow procedures are aggravated by the ability of foreign companies to circumvent the Antidumping Agreement.[152] For example, foreign producers have circumvented antidumping measures by assembling products "in third countries in whole or in part from components and parts produced in the exporting country."[153]

The second shortcoming of the GATT 1994 is its failure to compensate domestic industry injured by dumping. For instance, under the current system, antidumping duties imposed on foreign producers in the United States are retained by the U.S. government.[154] The injured domestic manufacturer or importer may gain a victory as a result of making a private application as outlined in the GATT 1994,[155] but the victory is a hollow one. A ruined business is all that may remain for the domestic producer.[156] Even if the business survives, the domestic producer is still deprived of capital needed to re-attain its former market position.[157] This is an injustice to domestic

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146. *See* Antidumping Agreement art. 7, para. 3. *See also supra* text accompanying note 128.

147. Raworth, *supra* note 32, at B-40. *See also* Antidumping Agreement art. 10, para. 2.

148. Raworth, *supra* note 32, at B-40.

149. *See id.*; Antidumping Agreement art. 10, para. 2.

150. Moller, *supra* note 17, at 954.

151. Alford, *supra* note 2, at 713.

152. *See id.* at 713-14; Note, *supra* note 89, at 1555.

153. Horlick & Shea, *supra* note 8, at 696. The European Community has faced this tactic and imposed "an antidumping duty on copiers from Japan to machines assembled in California." *Id.*

154. *See* Alford, *supra* note 2, at 715; Moller, *supra* note 17, at 954; Note, *supra* note 89, at 1555.

155. *See supra* text accompanying notes 120-25.

156. *See* Alford, *supra* note 2, at 715.

157. *See* Note, *supra* note 89, at 1555.

producers.[158]

Despite the two shortcomings of the GATT 1994 advanced above, national legislation as a cure may be deemed discriminatory to foreign producers.[159] First, a foreign producer may be faced with having to defend itself in two forums.[160] With the 1916 Act in the United States, the two forums are the International Trade Commission and the federal courts.[161] Second, a foreign producer may not have the same national legislation in its home country, making the balance unequal.[162] Although there is an element of discrimination shown in these two points, it must be remembered that dumping is the reason for the discrimination, not ordinary trade in goods. Dumping brings with it market inefficiency, and as such, dumping should not be afforded the same respect as legitimate trade.[163] It was for this reason (unfair price competition producing market inefficiency) that there is an Antidumping Agreement in the GATT 1994.[164] Hence, shortcomings of the GATT 1994 remedies, failure to deter dumping adequately and lack of compensation for the injured domestic producers, should permit resolution by national legislation.

B. *Benefits to Domestic Economies*

Supplemental remedies to those provided in the GATT 1994 can also benefit domestic economies. A foreign producer engages in unfair price competition when it dumps goods, creating market inefficiency.[165] Although the dumping may be efficient from the producer's perspective because it takes advantage of the experience curve and economies of scale,[166] the end result is market inefficiency when competitors are driven out of the market and a monopoly is created.[167] Once the producer gains a monopoly, the inevitable result is that fewer goods will be manufactured at a higher price to consumers to maximize the producer's profit.[168] Potential competitors will also be discouraged from entering the monopolized market if predatory dumping may

158. *See* Alford, *supra* note 2, at 715.

159. *See id.* at 741. Recall that nondiscriminatory trade is a fundamental principle of the GATT 1994. *See id.* at 702; WTO Agreement preamble, para. 4.

160. *See* Alford, *supra* note 2, at 702.

161. *See* Geneva Steel Co. v. Ranger Steel Supply Corp., 980 F. Supp. 1209, 1211 (D. Utah 1997); Alford, *supra* note 2, at 709-10; Note, *supra* note 89, at 1555-56.

162. *See* Alford, *supra* note 2, at 741.

163. *See supra* text accompanying notes 24-28.

164. *See* Hurabiell, *supra* note 41, at 572.

165. *See supra* text accompanying notes 24-25.

166. *See supra* text accompanying notes 16-20.

167. *See supra* text accompanying notes 24-26.

168. *See* Moller, *supra* note 17, at 933. A monopoly is not necessary to achieve a similar result. *See id.* The producer only needs to gain a high enough market share to become a price-setter in the industry. *See id.*

be resumed at any time by the foreign producer to protect its interests.[169]

Besides the ruination of the existing (and any future) domestic industry and the harm done to consumers, there are clearly extended effects. There are losses to investors in those ruined domestic industries.[170] Industry employees also lose their jobs.[171] All of the preceding cut tax revenue.[172] In sum, dumping on a wide scale can cause a decline in domestic productivity, economic depression, and a lower standard of living.[173] To prevent these ill economic effects, it is wise to take additional national legislative measures when the GATT 1994 fails to provide the required antidumping protection.

Some critics have reached the conclusion that any antidumping remedy is bad for an economy despite a growing support for these measures.[174] They argue that "antidumping laws do more harm than good"[175] because they are concerned with protectionism rather than economic predation.[176] They claim that the "implicit economics" is poor because the gains will exceed the losses to domestic interests from dumping.[177] Domestic consumers, who some claim are the "larger half of the relevant economics" (domestic producers compose the smaller half), are benefitted by lower prices more than they and the domestic producers are harmed by the economic losses caused by the dumping.[178] Jobs lost in one industry can be offset by gains in another industry.[179] On the other hand, a domestic producer protected by antidumping laws may result in lessened competition, which will allow it to keep prices higher on its products or allow it to lower product quality.[180] Thus, it is argued that by aiding the injured domestic producer, there is a form of wealth distribution.[181] In essence, critics claim that the market is self-regulating,[182] and that "the availability of an alternative supplier is the best defense against a predatory seller."[183] Thus, as long as markets remain open to international

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169. *See id.* at 964.

170. *See id.* at 951.

171. *See id.* at 951, 964; Hurabiell, *supra* note 41, at 600-01.

172. *See* Moller, *supra* note 17, at 964.

173. *See id.* at 951.

174. *See supra* text accompanying notes 109-13.

175. Hurabiell, *supra* note 41, at 601. *See also* Finger, *supra* note 107, at 64.

176. *See* Finger, *supra* note 107, at 64; Patrick Chisholm, *Abolish the Anti-Dumping Law*, J. OF COM., Oct. 30, 1998, at 4A, *available in* LEXIS, News Library, Joc File.

177. Finger, *supra* note 107, at 64.

178. *Id.* at 64-65 & n.4.

179. *See id.* at 64. An example is the U.S. cut flower industry. *See id.* Jobs and profits were lost by domestic growers from dumping, but employment and profit gains were made by flower distributors in the United States. *See id.*

180. *See* Hurabiell, *supra* note 41, at 601. *See also* Moller, *supra* note 17, at 935.

181. *See* Hurabiell, *supra* note 41, at 601.

182. *See id.*

183. Finger, *supra* note 107, at 64 n.4.

competition, predatory competition will be contained.[184] However, the world economy is more complex than any economic theory can account for. It is difficult to accurately tabulate the net benefit or loss to a society from antidumping regulations.[185] Often it is easier to overstate the benefit of lower prices to consumers because it is more widely dispersed. But those gains can be short-lived if the dumping drives competition out of the subject market.[186] Thus, the fortunes of both domestic consumers and domestic producers may be more closely tied than what has been previously credited.[187] Furthermore, alternative suppliers may not always be available in an open market in an imperfect world to keep prices low. In any case, one can expect price volatility in a market that openly allows dumping, as there would be waves of unfair price competition followed by monopoly profits.[188]

Critics also claim that there are nonpredatory economic reasons for dumping that should prevent the use of antidumping measures.[189] First, a producer "may set different domestic and export prices in response to varying demand conditions."[190] Second, a producer may dump its products in order to sell them before obsolescence.[191] Third, dumping may occur as a result of lowering a product's price in order to match the price of the competition.[192] These amount to procompetitive reasons for dumping.

However, since the types of dumping described generally cause no injury that would particularly concern national legislators, the solution is careful drafting of supplementary antidumping laws so as not to necessarily encompass them in their remedies. The solution to varying demand conditions is to determine dumping based on cost of production plus other reasonable costs and a reasonable profit.[193] Dumping in order to avoid obsolescence is inefficient,[194] but it is likely that domestic producers are also drastically lowering prices to avoid greater losses with obsolescence. Thus, the product cannot be said to be less than its normal value, and so, may not really be

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184. *See id.*

185. It is suggested that an antidumping investigation should focus on "national economic interest" that takes into account the net benefit to a nation of applying an antidumping measure. *Id.* at 70. But such an analysis seems inherently unworkable by the complexity of any such computation.

186. *See supra* text accompanying notes 65-73.

187. *See* Moller, *supra* note 17, at 935. "[M]ost people in society wear one hat as producers in the work place and another hat as consumers. Hence, when domestic producers are economically damaged, consumers also suffer . . . ." *Id.*

188. *See supra* text accompanying notes 65-69.

189. *See* Alford, *supra* note 2, at 705.

190. *Id.*

191. *See id.*

192. *See id.* at 705-06.

193. *See supra* text accompanying note 10.

194. *See supra* text accompanying notes 27-28.

dumping.[195] Dumping to match the competition can be addressed as dumping to meet varying demand conditions. Hence, supplementary remedies to the GATT 1994 can benefit domestic economies.

C. *Strengthening National Security*

Nations should have the most flexibility to implement supplementary remedies to those provided in the GATT 1994 when a nation's security is at stake. This is because the existing framework of the GATT 1994 assumes that the primary concern of producers internationally is consumers and corporate profitability.[196] Although this may be true for countries like the United States, other member countries follow a form of capitalism that is more closely tied to national policy and achieving national objectives.[197] Americans may fail to recognize that business activity is closely related to national interests in other countries such as Japan.[198] In such countries, business and government work as one to achieve national goals.[199] National goals can include any number of aspirations: maintaining national employment, economic expansion, international prestige in an industry, or military might.[200]

One successful method for attaining these goals is dumping.[201] To consumers, the low prices that attend dumping are viewed as a gift, but predatory dumping can extract a high price from them in the long term.[202] To support the march to dominance in a particular industry via dumping, the

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195. *See supra* text accompanying notes 9-11.

196. *See* Moller, *supra* note 17, at 958.

197. *See id.* "Despite the preoccupation with market share that exists within segments of the international market, antitrust enforcers continue to assume that all market participants value profit-maximization over growth." Wesley A. Cann, Jr., *Internationalizing Our Views Toward Recoupment and Market Power: Attacking the Antidumping/Antitrust Dichotomy Through WTO-Consistent Global Welfare Theory*, 17 U. PA. J. INT'L ECON. L. 69, 169 (1996).

198. *See* Moller, *supra* note 17, at 958-62. For an extended discussion over the ties between business and government in Japan, see Fisher, *supra* note 13, at 114-17.

199. *See* Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., 35 F. Supp. 2d 597, 604 (S.D. Ohio 1999) (International trade "is frequently conducted by companies owned, controlled, or subsidized by foreign governments."); Moller, *supra* note 17, at 962.

200. *See* Stewart, *supra* note 138, at 51; Moller, *supra* note 17, at 958; Note, *supra* note 89, at 1565. A federal court listed the following possible national goals:

> A foreign government may decide that it is more beneficial for one or more industries to increase both international and U.S. market shares and to continue to manufacture products, provide employment to its citizens, recoup government investment in what might be an otherwise idle plant, receive hard currency from the sale of exports, or simply protect powerful local economic interests, even though products are sold at a loss.

Wheeling-Pittsburgh Steel, 35 F. Supp. 2d at 604.

201. *See* Moller, *supra* note 17, at 959.

202. *See id. See also supra* text accompanying notes 165-73.

foreign producer will be subsidized by its government.[203] Allowing a foreign producer to reap monopoly profits in its home market by not having or ignoring antitrust laws is a popular method that governments use to subsidize strategic industries.[204] As the dumping producer strengthens its market share on the domestic market and gains full advantage of the experience curve and economies of scale, the producer will also gain a technological advantage against its competitors .[205] Domestic producers will be less able to spend on research and development (R&D), as they are squeezed out of the market by the dumping.[206] At the same time, the foreign producer will be able to invest more and more in R&D as its costs decrease and its subsidies remain in place.[207] In high growth technological industries, R&D is critical to the producer's future competitiveness and ultimately to its survival.[208] Without R&D, a producer may earn profits one year, but be out of business the next year.[209]

Beyond the economic harm, loss of technological industries can be especially harmful in matters concerning national security.[210] Governments that subsidize dumping often focus on technological industries as a source of prestige or power. The industry can be as mundane as electric golf cart manufacturing.[211] Allegations of dumping by Americans against the Japanese are quite well known. The Japanese have been accused of dumping computer chips from the late seventies to the mid-eighties in order to dominate the semiconductor industry.[212] They have also been accused of dumping consumer electronic products (CEP) into the United States.[213] In *Zenith Radio*,[214] it was alleged that Japanese CEP makers conspired to keep prices artificially high in Japan to enable them to dump their products in the United States. Although it may be doubtful that such dumping poses an immediate threat to national security, the power of technological development is

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203. *See* Stewart, *supra* note 138, at 51; Moller, *supra* note 17, at 933; Note, *supra* note 89, at 1566.

204. *See* Moller, *supra* note 17, at 933; Note, *supra* note 89, at 1566.

205. *See* Moller, *supra* note 17, at 940.

206. *See id.*

207. *See id.*

208. *See id.* at 948.

209. *See id.*

210. *See id.* at 960-61.

211. In *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978), it was alleged that Polish manufacturers (then operating in a controlled economy) were dumping electric golf carts into the United States.

212. *See* Moller, *supra* note 17, at 945-50. The U.S. Commerce Department and the U.S. International Trade Commission found that the Japanese were in fact dumping computer chips; however, the problem was resolved when a political solution was reached. *See id.* at 950.

213. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 723 F.2d 319, 328 (3d Cir. 1983), *rev'd in part*, 475 U.S. 574 (1986).

214. *See id.*

undeniable. What may be a complex toy today could be the weapon of tomorrow. Thus, it is important for nations to protect against predation of their technological industries.

Nations also need to protect industries that more closely aid in war. For example, agricultural products are essential because "[a]n army marches on its stomach."[215] "Japan has been very strong on this point in maintaining its domestic market for rice closed to foreign producers."[216] Such a market closure makes particular sense in Japan since, unlike the United States, the "bread basket" of the world, Japan has limited agricultural land in relation to its population. Excessive reliance on other nations for their dietary staples would be devastating in a time of war when international supply lines are slowed or halted. Energy resource development may also be sensitive for national security reasons. In modern mechanized warfare, fuel is essential for mobility of the armed forces. Navy warships, air force jets, and army tanks and jeeps all need fuel merely to come to the battlefield. Additionally, in a war economy, great amounts of energy are required by domestic industry to produce weapons of war. Thus, it makes sense for nations to encourage and protect domestic development of energy resources. Such protection was demanded in *Superior Coal Co. v. Ruhrkohle, A.G.*,[217] where it was alleged under the 1916 Act that coal and coke products were dumped in the United States by producers from West Germany while fixing a higher price in their homeland. Finally, the steel and steel mill products industry has been highly prized by nations for the employment base it provides and its value for building military strength.[218] As a result, steel is often overproduced, which leads to dumping.[219] An example of steel dumping can be found in *Geneva Steel*,[220] where it was asserted that Ukraine and Russia had kept producing steel for "political and social reasons."[221] In those countries, while they

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215. JOHN BARTLETT, FAMILIAR QUOTATIONS 505 (Emily Morison Beck ed., 14th ed., Little, Brown and Co. 1968) (1855) (The quotation is attributed to Napoleon I (Napoleon Bonaparte)). *See* MARCEAU, *supra* note 12, at 47-48.

216. MARCEAU, *supra* note 12, at 48.

217. 83 F.R.D. 414, 417 (E.D. Penn. 1979).

218. *See* Stewart, *supra* note 138, at 51.

219. *Id.*

220. 980 F. Supp. 1209 (D. Utah 1997).

221. *Id.* at 1211. Another recent case alleging that Russia dumped steel into the United States in violation of the 1916 Act is *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 35 F. Supp. 2d 597 (S.D. Ohio 1999). Recently, following the "'unprecedented surges in low-priced steel imports from Russia last year,'" the United States and the Russian Federation reached agreements to reduce imports of steel mill products from Russia and to suspend the current U.S. antidumping investigation of Russian steel mill products. DEP'T OF COM., COMMERCE SECRETARY WILLIAM M. DALEY ANNOUNCES AGREEMENTS SHARPLY REDUCING IMPORTS OF RUSSIAN STEEL (1999). But the agreements do not preclude the U.S. steel industry from filing dumping cases. *See id.*

Other nations also have been exposed to dumped steel from Russia. A formal

formed the Soviet Union, steel was needed in high quantities to build the Soviet Union's own military machine.[222] When the Cold War ended, steel was still being produced at the same rate to preserve employment and obtain hard currency, not for profitability.[223] So, agricultural, energy resource, and steel production and development are basic to supporting the military, and hence, need additional protections to benefit the national security.

Passing national legislation to provide supplementary private remedies is particularly useful in aiding national security in areas that may otherwise be overlooked when the GATT 1994 remedies are used alone. A private remedy would take disputes a step away from the political arena when the national government would prefer not to get directly involved. After all, imposing an antidumping duty on a nation that is an ally may be a controversial political move.[224] Furthermore, world peace is promoted because imbalances between nations in terms of technology, agriculture, energy, and steel that are caused by dumping are reduced in a nonpolitical fashion. Nations gain added assurance that industries that are necessary for effective national security are not withered by predatory trade practices. As a result, there is less opportunity for nations to exploit weaknesses of neighboring nations through military action, and instead, they will seek alternative solutions to international conflicts. Nations may still have weaknesses affecting national security, but those weaknesses should not be created by dumping. Thus, nations should retain flexibility to enact supplemental remedies to those provided in the GATT 1994 to strengthen national security.

V. CONCLUSION

Nations should have the flexibility under the GATT 1994 to pass legislation entitling their citizens to supplementary remedies, particularly a private antidumping remedy, to resolve shortcomings of the GATT 1994 remedies, benefit domestic economies, and ultimately strengthen national security. The 1916 Act provides an adequate baseline for the flexibility needed by the member nations of the World Trade Organization. Although some claim that the Act is ineffective, the fact that the statute has never been abrogated indicates that "more was expected of the statute than originally

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investigation is being conducted by the Chinese government as a result of a complaint alleging that Russian steelmakers are dumping steel into China as well. *See* John Helmer, *Russian Steel Faces Chinese Embargo*, J. OF COM., Apr. 12, 1999, at 3A, *available in* LEXIS, News Library, Joc File. A Canadian investigation has already determined that steel had been dumped into Canada by Russian steelmakers. *See* Valerie Lawton, *Steel Dumping Penalties Upheld*, TORONTO STAR, June 2, 1999, *available in* LEXIS, News Library, Tstar File.

222. *See Geneva Steel*, 980 F. Supp. at 1224.

223. *See id.*

224. *See* Moller, *supra* note 17, at 956.

intended. But more importantly, Congress apparently recognized that the [1916] Act plugged a hole in the other unfair competition legislation."[225] Nations need supplementary remedies as the 1916 Act provides to navigate around the slow administrative procedures and to provide compensation to domestic industry injured by dumping to regain competitiveness. The 1916 Act empowers producers to take an active role in stopping injurious dumping before their businesses are crippled. Although the requirement of specific intent is a difficult hurdle to clear, the potential recovery of treble damages is sufficient encouragement for producers to start litigation. Alternative remedies also benefit domestic economies by thwarting inefficient dumping, preserving industry, and protecting consumers from foreign monopolies. Although domestic consumers do not always receive the lowest possible price for goods, there is more stability in the domestic market with strengthened antidumping regulations. Consumers are less subject to dramatic price swings from dumping followed by monopoly profits, job losses, and shifts in employment. On a national level, supplemental remedies help prevent the negative economic impacts of dumping: domestic productivity declines, economic depression, and declines in the domestic standard of living. Last, supplementary remedies can strengthen national security by protecting technological, agricultural, energy, and steel industries from injurious dumping. Effectively combating dumping preserves national research and development and those industries that aid in war. Additional private remedies pave a nonpolitical way to resolving dumping conflicts while preventing imbalances that could encourage international aggression. In sum, the independent action of sovereign nations under the general framework of the GATT 1994 is best for each nation and the world.

Adam C. Hawkins[*]

225. Jewel Foliage Co. v. Uniflora Overseas Fla., Inc., 497 F. Supp. 513, 516 (M.D. Fla. 1980). *See also* Isra Fruit Ltd. v. Agrexco Agric. Export Co. Ltd., 631 F. Supp. 984, 989 (S.D.N.Y. 1986); Schwimmer v. Sony Corp. of Am., 471 F. Supp. 793 (E.D.N.Y. 1979) ("The act is perhaps used to attack different evils today.").

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THE SMART MONEY IS ON PROSECUTIONS: USING THE FEDERAL INTERSTATE WIRE ACT TO PROSECUTE OFFSHORE TELEPHONE GAMBLING SERVICES

I. INTRODUCTION

Placing a wager on a sporting event in the United States has never been easier than it is today. One need not leave the comforts of home in order to be transported to a part of the world where gambling on sports is not only legal, but the only business in town.[1] While advances in communications technology allow individuals to instantaneously conduct business throughout the world, these same advances also permit people to engage in some less than desirable communications, like telephone sports gambling.

Gambling on sporting events is illegal in every state except Nevada.[2] For many years a person who wished to bet on an athletic event either had to take a vacation to Las Vegas, or much more commonly, place an illegal bet with a local bookie. While this practice is still quite common,[3] many Americans are now taking their gambling money overseas where gambling is legal. The islands of the Caribbean have become the home of a booming telephone sports gambling industry which takes advantage of the fact that the practice of betting on sports in most of America is illegal. The market for offshore sports betting services can be seen from conservative estimates that place the number of these services in the Caribbean and Central America at sixty,[4] twenty-five of which are located on the island country of Antigua.[5]

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1. *See* The Antiguan government's Free Trade Zone & Processing Homepage (visited Sep. 25, 1998) <http://www.atgftpzone.com>. The government of Antigua created a free trade zone in which it licenses businesses to operate within their country for an annual licensing fee. The businesses receive considerable tax and economic benefits. All of the nearly 30 companies who are licensed within the zone are either telephone sports gambling services or online casinos.

2. Nevada permits many forms of gambling including sports books. Sports books are operated by many casinos and permit individuals to wager on all different types of sporting events. The State of Oregon permits an unusual form of sports gambling through their state lottery system. Individuals may try to correctly predict the scores of National Football League games in order to win prizes. Profits from the lottery go to support athletic programs at various public universities in the state of Oregon. In 1997, the lottery gave $441,899 to the University of Oregon; $427,571 to Oregon State University; and $265,423 to Portland State University. Ken Goe, *To NCAA Tournament, Oregon Is a Bad Bet*, PORTLAND OREGONIAN, Mar. 17, 1998, at E1.

3. The Council on Compulsive Gambling estimated that Americans bet $84 billion illegally on sporting events in 1995. The number was up from $8 billion in 1983 according to a study by Christiansen/Cummings Associates, a New York-based research firm. Dan McGraw, *The National Bet: Laying an Illegal Wager on a Sports Games Has Never Been Easier, and More Americans Are Doing It Than Ever*, U.S. NEWS & WORLD REP., Apr. 7, 1997, at 50.

4. *See* Brent Pulley, *Some Bookies Heading Offshore to Make a Quick, Tax-Free Buck*, DALLAS MORNING NEWS, Feb. 6, 1998, at 42A.

5. *Id.*

Others have even placed the total number of offshore betting services to be closer to one hundred.[6] The number of services is sure to grow considering that they have only just begun to operate within the past several years. Additionally, there is no reason to believe that America's appetite for gambling will diminish within the foreseeable future.

With so many of these services eagerly seeking the business of American citizens and the large number of people who are more than willing to press their luck betting on sporting events,[7] it becomes necessary to examine the legality of the rapidly increasing phenomenon of American citizens placing wagers with offshore telephone sports betting services. The Federal Interstate Wire Act of 1961 (Wire Act)[8] is the most relevant U.S. statute which deals with the use of telephone communications in conducting gambling activities. The statute prohibits the use of wire communication for the transmission of bets or wagers in interstate or foreign commerce.[9] While this statute would seem to apply to someone who uses a telephone to place a wager on a sporting event with a foreign service, no court has successfully prosecuted an American citizen for placing a bet with one of these services. Additionally, only persons who are citizens of the United States have ever been convicted of violating this Act by providing a service through which American citizens are able to wager on sports.

The U.S. government faces many problems in attempting to enforce the Wire Act against individuals involved in this enterprise. First, many questions arise as to whether a U.S. court can maintain jurisdiction over an individual or company which is located completely outside of the United States. Second, because a court has held that in drafting this statute, "Congress did not contemplate prohibiting the acts of mere players,"[10] it is unclear who may be prosecuted under this statute. Finally, the government's policy of leaving gambling regulation to the states has created the impression that it is unwilling to spend valuable crime fighting resources enforcing gambling laws.[11]

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6. *See* Dan McGraw, *All Bets Are Off for Offshore Bookmakers*, U.S. NEWS & WORLD REP., Mar. 16, 1998.

7. While it is difficult to determine the number of people who are utilizing these services, one may surmise that the number is quite large when you consider that World Wide Tele-Sports, a telephone betting service in Antigua, takes an average of 35,000 bets per week. *See* Mike Fish, *Places Better Known for Beaches Are Now Havens for the Legally Dubious Business of Phone/Internet Betting*, ATLANTA J. CONST., Dec. 28, 1997, at E1.

8. 18 U.S.C. § 1084 (1994).

9. *Id.*

10. United States v. Barborian, 528 F. Supp. 324 (D.R.I. 1981).

11. Many have criticized the federal government's policy of leaving gambling regulation to the states. Robert Goodman, a prominent critic of the policy of allowing individual states to regulate gambling, argues that the federal government should implement some national reforms and controls of gambling in the United States. He contends that stricter federal control and oversight of gambling will help to diminish the competition that exists among states to promote their gambling opportunities. Goodman recommends the creation of a "national commission

While the history of enforcing current U.S. laws prohibiting Americans from wagering on sporting events with offshore services is limited at best, the Wire Act should provide a basis on which the government can prosecute offshore services. The issue likely will not be whether the government can prosecute these services under the Wire Act, but rather whether the government will have the motivation to do so. The United States must make every effort to control this burgeoning industry, or existing state laws prohibiting sports gambling will be made obsolete. Absent these efforts to enforce the Wire Act, betting on sports in America will continue to be as easy as picking up the phone.

Part II of this Note will describe the recent growth of offshore telephone sports gambling services, detailing both some of the reasons for the rapid increase in the number of services operating and some of the sociological problems that accompany gambling. Part III will outline existing U.S. laws that could be applied to offshore gambling services. In addition, Part IV will examine some of the difficulties that U.S. courts have faced in trying to prosecute cases under current laws. This Part will include a discussion of jurisdictional issues, enforcement problems, and concerns relating to the conflicting laws of the United States and many of the nations which host offshore gambling services. Part V of the Note will forward the proposal that the United States should attempt to aggressively prosecute offshore services under the Wire Act.

II. OFFSHORE TELEPHONE SPORTS GAMBLING SERVICES

Part II will provide background on the recent proliferation of telephone sports gambling services located in the Carribean and Central America and describe some of the concerns which have arisen with them. It will also briefly compare telephone sports gambling services with their more publicized competitors on the Internet.

A. *The Growth of Offshore Betting Services*

When considering the immense size of America's gambling appetite, there is little wonder that offshore betting services have enjoyed such an astonishing period of growth since their beginnings in the early 1990s. It is estimated that the amount of money wagered in the United States each year

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to assess the local and national impact of expanded gambling on the American economy . . . [and] [t]he development of innovative investment opportunities for the public, to provide alternatives to the present attractions of pure gambling opportunities." Robert Goodman, *We Need a Federal Plan To Control Gambling, in* LEGALIZED GAMBLING FOR AND AGAINST 307, 317-18 (Rod L. Evans & Mark Hance eds., 1998).

may exceed $500 billion.[12] Indeed, it was estimated that in 1989, thirty-one percent of all American adults gambled weekly in some form or another.[13] While there is little doubt that gambling is much more prevalent today than it once was with the spread of riverboat gambling and state lotteries, the increasing number of states that permit various forms of gambling act to legitimize the activity. Nelson Rose, a respected gambling law expert, argues that "[g]overnment no longer merely *allows* some form of gambling to exist—it now actively *promotes* gambling" through its operation of state lotteries.[14]

Of the $500 billion wagered both legally and illegally each year in the United States, the Council on Compulsive Gambling estimates that nearly $100 billion was wagered illegally on sporting events.[15] To put some perspective on that figure, the drug trade in the United States is only estimated to be approximately $49 billion.[16]

While most bettors still place wagers with the traditional neighborhood bookmaker, offshore betting services have been increasingly offering competition and attempting to get a bigger piece of the American gambling market. Some say that these services already capture between one and five percent of the $100 billion wagered illegally on sports each year.[17] This figure is sure to rise as more and more Americans become aware of the relative convenience of placing wagers over the telephone.

As a consequence of the large amount of money that could be available to offshore gambling services, it is not surprising to learn that their numbers have grown dramatically within the past few years. The island nation of Antigua provides a point of reference with which to gauge this increase. In the early 1990s, there were only four small telephone sports gambling services located on the island; today, there are more than twenty-five.[18] An average service may have an operation budget of five million dollars per year, taking wagers as large as twenty thousand dollars.[19] These numbers are likely to increase considering that offshore betting services have only been in operation for less than ten years.

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12. Evan I. Schwartz, *Wanna Bet*, WIRED, (visited October 12, 1999) <http://wired.com/wired/3.10/archive/3.10/gambling.html>. This statistic includes money wagered through state lotteries, money wagered in American Indian, Nevada, and New Jersey casinos, and money wagered in the many states which now permit river boat casinos.

13. Ante Z. Udovicic, *Sports and Gambling: A Good Mix?*, 8 MARQ. SPORTS L.J. 401 (1998).

14. Nelson Rose, *Gambling and the Law—Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 97 (1992).

15. *See* McGraw, *supra* note 3.

16. *Id.*

17. *See* Pulley, *supra* note 4.

18. *See* Fish, *supra* note 7.

19. *See id.*

B. *Reasons for the Growth of Offshore Betting Services*

Sandy beaches and warm climates are not the only reasons why gambling entrepreneurs have been drawn to the Caribbean. A number of island nations have taken great steps toward attracting these services to their countries. For instance, Antigua created a free trade zone which offers a number of benefits to the gambling services which have located there. The free trade zone encompasses one hundred acres of prime real estate on which businesses enjoy complete freedom from personal taxes and all corporate taxes.[20] Among the other benefits to operating a sports betting service in Antigua is the availability of confidential offshore bank accounts which can be used by both the services and their clients.[21] One critical advantage to operating a service in Antigua, as compared to some other less advanced nation, is that Antigua maintains an undersea fiber optic link connecting itself to the United States.[22] The import of an advanced telephone communication link capable of handling millions of calls at the same time should not be overlooked when considering the attractiveness that countries like Antigua offer for companies whose entire business involves quickly answering telephone calls from the United States.

While the benefits of operating a betting service in a country like Antigua seem fairly clear, there is little doubt that the host country receives a great deal in return from this symbiotic relationship. The most tangible benefit to a country such as Antigua in licensing these betting services is receiving an annual licensing fee of $75,000.[23] Taxes on overseas phone calls also offer an additional source of revenue from which a host country can enjoy. One estimate has the average betting service phone bill running between $50,000 and $100,000 per month.[24] A country collecting twenty percent of that would receive between ten and twenty thousand dollars per per month for each betting service. In addition to the revenues which are collected by these host countries, betting services, like any industry, create jobs. Up to this point, nearly four hundred jobs have been created in the small island nation of Antigua alone.[25] The economy has also benefitted from the influx of wealthy entrepreneurs.[26]

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20. *See* Antigua's Free Trade Zone Homepage, *supra* note 1.
21. *See* Fish, *supra* note 7.
22. *See id.*
23. *See id.*
24. *See id.*
25. *See id.*
26. "The real benefit to the country's economy comes from the rather lavish lifestyle of the expatriate Americans and other foreigners who tend to buy the biggest houses, drive the most expensive cars and eat gourmet food." Matthew McAllester, *High-Tech Gambling*, NEWSDAY, May 4, 1997, at F8.

C. *Concerns Regarding Offshore Betting Services*

While both the operators of betting services and the countries that host them receive benefits from their association, a number of concerns have been raised about the social problems for which these services help to contribute.[27] One of the main concerns raised by many is that because these services are so accessible and one needs only a telephone and a credit card to start betting, people will be able to get in over their heads very quickly. Tom Grey, Director of the National Coalition Against Legalized Gambling, notes that "gambling is a disease to five percent of the population. That group will, if we let them, entertain themselves into bankruptcy. So obviously, the more available and accessible you make gambling, the more you compound the problem."[28] In addition to bankruptcy,[29] evidence indicates that some gamblers turn to crime in order to support their habit. Of the five percent of the population for whom gambling is an addiction, ninety percent will turn to stealing, embezzling at work, insurance fraud, and writing bad checks in order to support their gambling habit.[30] As with many other crimes, the costs of paying for these activities are spread to society as a whole.

While the accessibility of telephone gambling contributes and probably worsens the problems and costs of compulsive gambling to gamblers and society alike, offshore betting services have government officials worried for another reason. Many government officials fear that the proliferation of these services will provide American criminals with a fairly easy means of laundering criminal profits. John M. Winer, a high-ranking State Department official, claims that "if you want to launder money, this is the way to do it."[31] Winer fears that criminals will set up sophisticated wagers on games in which the criminal will bet enough money on each team involved in a game so that they will only lose the vigorish, the small percentage of a wager which is kept by the service. Winer claims that this money would then become an invisible

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27. For a critical analysis of the perceived relationship between legalized gambling and the harm it causes society, see Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 WHITTIER L. REV. 579, 600-608 (1997).

28. Steven Crist, *All Bets Are Off*, SPORTS ILLUSTRATED, Jan. 26, 1998, at 82.

29. One study estimates that more than 20% of all compulsive gamblers will file for bankruptcy as a result of their gambling losses. *Gambling and Bankruptcies* (visited Nov. 14, 1998) <http://www.800gambler.org/bankrupt.htm>. The study also revealed that "[t]he 298 counties which have legalized gambling within their borders had a 1996 bankruptcy filing rate that was eighteen percent higher than filings in counties with no gambling, and the bankruptcy rate was thirty-five percent higher than the average in counties with five or more gambling establishments. *Id.* George Yacik, vice president of SMR Research, the firm that conducted the study, indicated that "gambling may be the fastest growing cause . . . [of all personal bankruptcy filings.]" *Id.*

30. McGraw, *supra* note 3. "Up to eighty percent of all compulsive gamblers contemplate suicide, and fourteen percent actually attempt it." *Id.*

31. *See* Crist, *supra* note 28.

profit that now appears to be clean.[32] Because these services do not report to the Internal Revenue Service regarding the bets and potential winnings of customers, there is no way for the government to detect a criminal's money laundering scheme using an offshore betting service.

Another concern that the government has with regard to these services is that, unlike licensed casinos and other forms of legalized gambling, the U.S. government cannot regulate these services to ensure their legitimacy. As one might expect with an industry that is already blurring the line between legality and illegality, there have been several scam operations that have accepted wagers of bettors and then disappeared with their money.[33] Because the U.S. government does not retain any control over these operations, bettors who lose their money in many Caribbean and Central American countries are left without remedy.

D. *Internet Gambling Versus Telephone Gambling*

The increase in popularity of offshore telephone gambling services has led to the birth of a new type of overseas gambling called on-line gambling.[34] On-line gambling services have begun springing up on the same Caribbean islands that play host to telephone services. While they have yet to gain the same popularity as telephone services, Internet casinos and gambling services have the potential to dominate the gambling market of the next decade.[35] The

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32. *See id.*

33. Panama and Belize, in particular, have seen gambling operations vanish without paying their customers. Mike Fish, *Gamblers Virtual Paradise: Should It Be Outlawed? Regulated? Or Left Alone*, ATLANTA J. CONST., Dec. 28, 1997, at E9.

34. *See generally* Seth Gorman & Antony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L.J. 667 (1996) (arguing that Internet gambling services that agree to submit to United States jurisdiction and who block access to minors should be conditionally legalized); Claire Ann Koeger, *Here Come the Cybercops 3: Betting on the Net*, 22 NOVA L. REV. 545 (1998) (arguing that federal regulation of Internet gambling is not needed, and that such regulation should be left to the states who wish to prohibit the activity); Scott M. Montpas, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. DAYTON L. REV. 163 (1996) (urging the United States to seek agreements with countries hosting Internet gambling services creating uniform policies regarding their regulation); Mark G. Tratos, *Gaming on the Internet*, 3 STAN. J.L. BUS. & FIN. 101 (1997) (hypothesizing that Internet gambling will not be able to sustain significant financial success until customers are able to feel confident that they will actually receive the money that they may win).

35. It is estimated that Internet gambling might take in as much as $10 billion in revenue from the United States alone. *Chance a Flutter on the Internet: Hi-Tech Firms Scent Big Profits as Betting and Blackjack Make Their Debuts on the Information Superhighway*, EVENING STANDARD, June 5, 1995, at 38. One Internet gaming service, Interactive Gaming Communications Corp., claims to have taken bets totaling $47.8 million in 1995, with a profit of $2.5 million. Rick Weber, *Offshore Services Sidestep U.S. Law*, NEWS PRESS, Jan. 26, 1997, *available in* WL 9360393.

same uncertainty exists as to the legality of Internet gambling sites as it does to telephone gambling services. While some urge that the Wire Act prohibits placing wagers on sporting events over the Internet because phone lines are being used to transfer the wager,[36] there has only been one conviction for operating an Internet gambling service overseas.[37]

III. APPLICABILITY OF U.S. LAWS TO OFFSHORE GAMBLING SERVICES

The Wire Act[38] and the Travel Act[39] are statutes that govern the placing of wagers by Americans with these overseas services. Because these statutes were drafted long before the first offshore gambling service opened its door, their direct applicability has been questioned by many.

A. *The Federal Interstate Wire Act*

The Federal Interstate Wire Act provides:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both. [40]

Courts have read this statute to require two elements which must be

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36. *See* Gorman & Loo, *supra* note 34, at 671.

37. In September 1998, the state of Missouri gained the first conviction for operating an Internet gambling site. Michael Francis Simone plead guilty to a misdemeanor count of promoting gambling. His publicly-traded company, the Pennsylvania-based Interactive Gaming & Communications Corp., was also found guilty on the same charge. The company will pay a $5000 fine while Simone was fined $2500.

38. 18 U.S.C. § 1084 (1994).

39. 18 U.S.C. § 1952 (1998).

40. 18 U.S.C. § 1084(a). Section 1084(b) contains an exception to the statute "for the transmission of information assisting in wagering from a State or foreign country where betting on that sporting event or contest is legal." *Id.* at § 1084(b). Notice how this exception is not applicable in the case of Americans calling offshore services because the telephone call is not being made from a place where betting on sporting events is legal; rather, it is being made to a place where betting on sporting events is legal. A further exception to the statute allows the transmission of information assisting in the placing of bets or wagers when it is used for the purpose of news reporting of that sporting event or contest.

present in order to convict under this statute: (1) the defendant must be in the business of betting or wagering; and (2) the defendant must knowingly use a wire communication facility to transmit information assisting in the placing of bets or wagers.[41] Because wagers and information assisting in the placing of wagers are being transmitted over telephone lines from individuals in the United States to companies in the Caribbean and Central America, thus meeting the interstate or foreign commerce requirement explicitly stated in the statute, the Wire Act seems applicable to this activity.

The element which requires the defendant to be in the business of betting or wagering has opened quite a large loophole through which many bettors are able to escape prosecution. Although there is no requirement that the defendant be exclusively engaged in the business of betting or wagering,[42] the court in *United States v. Barborian* held that "Congress did not contemplate prohibiting the acts of mere bettors."[43] In this case, the court said that a person wagering an average of eight hundred to one thousand dollars per day, three or four times per week, did not meet the requirement of "being engaged in the business of betting or wagering,"[44] as is required by the statute. Further, the court held that "Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets, and not mere betting."[45] The court reasoned that including bettors within the definition of "being in the business of betting" would "make the implication of criminality turn on the expertise of the bettor and the quantum of money wagered."[46]

The implications of this decision are quite significant with respect to offshore betting services and the people who use them. A strict reading of the case would prohibit the government from prosecuting Americans who simply place wagers with these overseas services.[47] While the case was correctly decided based on the limited legislative history regarding the definition of a

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41. United States v. Alpirn, 307 F. Supp. 452 (D.N.Y. 1969). *See also* United States v. Florea, 541 F.2d 568 (6th Cir. 1976) (upholding the conviction of individuals found guilty of transmitting wagering information across state lines where defendants were found to have engaged in the business of betting or wagering and that information assisting in the placing of bets was transmitted across state lines).

42. *See* United States v. Reeder, 614 F.2d 1179 (8th Cir. 1980). *See also* United States v. Scavo, 593 F.2d 837 (8th Cir. 1979) (upholding a jury instruction excluding a "mere bettor or customer from liability under § 1084.").

43. United States v. Barborian, 528 F. Supp 324, 328-29 (D.R.I. 1981). *See* United States v. Scavo, 593 F.2d 837, 843 (8th Cir. 1979).

44. 18 U.S.C. § 1084 (1994).

45. United States v. Barborian, 528 F. Supp. at 328.

46. *Id.* at 329.

47. While the Barborian ruling prevents individual bettors from being prosecuted for placing wagers with offshore services, some states including California and Massachusetts have enacted gambling statutes that permit the prosecution of individuals who place wagers via telephone. *See* Cal. Penal Code Sec. 337(a)(i) (West 1988); Mass. Gen. L. ch. 271, Sec. 17 (West 1995).

gambling or betting business,[48] the outcome severely limits the means by which the U.S. government may attempt to prohibit Americans from placing wagers with foreign services. As a result of the *Barborian* decision, the U.S. government must now attempt to prosecute the operators of offshore gambling services because they, and not the individual gamblers back in the United States, are the only ones who are "in the business of betting or wagering."[49]

B. *The Travel Act*

While the Wire Act seems to apply to betting services that accept wagers via telephone calls from the United States, the Travel Act may also serve to prohibit this activity. The Travel Act provides for a fine, up to twenty years in prison, or both for anyone who,

> travels in interstate or foreign commerce or uses the mail or any facility in interstate commerce with intent to distribute the proceeds of any unlawful activity . . . mean[ing] any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States.[50]

The elements necessary for a conviction under the Travel Act are: (1) defendants be found to have traveled in interstate or foreign commerce or to have used a facility in interstate or foreign commerce; (2) with the intent to take certain types of actions in pursuit of an unlawful activity.[51] Courts have

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48. At the time Congress passed the Wire Act into law, the United States was in the midst of its fight against organized crime. Gambling rings traditionally have been one of the biggest money makers for organized crime. The Wire Act represented an attempt by Congress to enhance law enforcement's ability to control organized crime and gambling. The legislative history behind the statute underscores this concern with organized crime's control of illegal gambling in the United States.

> The purpose of the bill is to assist the various states and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce. H.R. REP. NO. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631.

While the statute may have provided an effective tool to prosecute individuals involved in an on-going, gambling business, it did nothing to prohibit individuals from simply placing wagers with gambling operations.

49. 18 U.S.C.§ 1084 (1994).

50. 18 U.S.C. § 1952 (a)-(b).

51. United States v. Slack, 408 F. Supp. 190 (D. Del. 1975).

held that a "facility," for the purposes of this section, includes a telephone,[52] because when someone uses a telephone, "a voice or a message can be and is actually transported over state lines to the same extent as materials are transported over state lines in moving vehicles."[53]

While a person who uses a telephone to place bets with an offshore betting service meets the requirement necessitating the use of a "facility in interstate or foreign commerce,"[54] the statute also requires the activity to be an unlawful activity. For the Travel Act to be applicable to this type of gambling activity, a court would have to either find that placing bets with an offshore service is a violation of a state or federal law, or that a service's acceptance of a bet from a citizen residing in the United States is a violation of a state or federal law. Because the Wire Act seems to at least prohibit a foreign service from accepting wagers made by U.S. citizens,[55] the Travel Act could also be used to prosecute offshore services accepting wagers from Americans.

The Travel Act, like the Wire Act, does not seem to apply to cases where an individual bettor places wagers with an offshore betting service because the Act refers to activities of "business enterprise[s]"[56] involved in gambling. Courts have uniformly read the Travel Act to apply to business enterprises that are involved in a continuous course of conduct and not just sporadic, casual involvement in a proscribed activity.[57] It is doubtful that a court would include an individual who places wagers with an offshore betting service within the definition of a business enterprise. Rather, a court would likely hold that a "mere bettor" did not constitute a "gambling business" sufficient to meet that requirement in the Wire Act.[58] Because an individual bettor placing wagers with an offshore service most likely does not meet the definition of a "business enterprise," the Travel Act could not be used to prohibit individuals from placing bets with offshore services.

Although the Travel Act, like the Wire Act, was primarily drafted to help local authorities fight organized crime when their organizations and

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52. *See* United States v. Smith, 209 F. Supp. 907 (D. Ill. 1962). *See also* Menedez v. United States, 393 F.2d 312 (5th Cir. 1968) (upholding a defendant's conviction for using long distance telephone calls to aid, promote, and manage a lottery in violation of Florida law).

53. United States v. Smith, 209 F. Supp. at 916.

54. 18 U.S.C. § 1952 (a)-(b).

55. *See supra* text accompanying notes 38-49.

56. 18 U.S.C. § 1952 (B)(1).

57. United States v. Donaway, 447 F.2d 940 (9th Cir. 1971) (holding that evidence that a defendant placed a bet for another person was insufficient to prove that the defendant was engaged in a "business enterprise" within the language of the statute); *See also* United States v. Perez, 700 F.2d 1232 (8th Cir. 1983) (requiring evidence of a continuous enterprise and at least one act in interstate commerce in furtherance of that enterprise).

58. *See* United States v. Barborian, 528 F. supp. 324, 328-29 (D.R.I. 1981).

activities extend beyond state and local boundaries,[59] the Travel Act is broad enough to include offshore gambling operations in its definition of "business enterprise."[60] A company whose entire business revolves around accepting wagers from mostly U.S. citizens calling from the United States falls within the requirement for a "business enterprise" that carries on a continuous course of criminal conduct.[61]

The Travel Act seems to prohibit offshore services from using telephone communications to accept wagers from citizens of the United States. Because an individual bettor does not seem to meet the requirement for a "business enterprise," the Travel Act cannot be used to prosecute individuals who place wagers with these offshore services as long as they are not themselves acting on behalf of a criminal enterprise. As a result, both the Wire Act and the Travel Act, as they are currently written, can only be used to attempt to prosecute offshore services.

IV. PROBLEMS OF ENFORCEMENT

While the Wire Act and the Travel Act seem to offer tools with which the U.S. government could attack the problem of U.S. citizens sidestepping anti-gambling legislation at home by placing wagers abroad, there are questions regarding the enforceability of those laws against individuals outside the United States. The biggest issue surrounding the enforceability of these Acts concerns the ability of United States courts to maintain jurisdiction over individuals located outside the United States.

A. *Questions of Jurisdiction*

Although the U.S. government could use either the Wire Act or the Travel Act to attempt to prosecute offshore betting operations that direct their services at U.S. citizens, no court would be able to proceed with the case

59. United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974). *See also* U.S. v. Altobella, 442 F.2d 310 (7th Cir. 1971).

60. The court in Spinelli v. United States held that the statute is sufficiently broad to sustain the conviction of a petty hoodlum as long as it is established that a defendant is engaged in a proscribed gambling activity as a business enterprise. Spinelli v. U.S. 382 F.2d 871 (8th Cir. 1967).

61. *See* United States v. Donaway 447 F.2d 940 (9th Cir. 1971).

unless they have personal jurisdiction[62] over the defendant.[63] In order for jurisdiction to be appropriate, a defendant must have sufficient minimum contacts with the forum state such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[64] Courts have adopted a two-prong test for determining when a court's exercise of jurisdiction over a defendant is appropriate. First, jurisdiction may be appropriate in cases where the defendant "purposefully directed his activities at residents of the forum,"[65] and thus manifestly "availed himself of the privilege of conducting business there."[66] This portion of the test provides that a court might still be able to acquire jurisdiction over a defendant even though the defendant never set foot in the forum state.[67] Examples of what might be considered sufficient minimum contacts with the forum state include "designing the product for the market in the forum State, advertising in the forum State, and establishing channels for providing regular advice to customers in the forum state."[68]

The second portion of the test requires that "the defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice."[69] A court will examine the nature and scope of a defendant's contacts with the forum state to determine if the defendant "should reasonably anticipate being haled into

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62. A court would exercise general jurisdiction, as opposed to specific jurisdiction, over an offshore gambling service because the suit would not be "arising out of or related to the defendant's contacts with the forum." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984). *See* Calder v. Jones, 465 U.S. 783, 786 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

63. For a discussion of the unique problem courts face in exercising jurisdiction over foreign defendants, see Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983). Lilly argues for the adoption of an "aggregated contacts" standard that would allow a court to exercise jurisdiction over an alien defendant when that alien had accumulated sufficient minimum contacts with the United States as a whole. A defendant's failure to maintain minimum contacts with any one forum would not bar the exercise of jurisdiction by a court if the defendant had accumulated the required amount of contacts with the United States, and if the exercise of jurisdiction over that defendant was reasonable. *See also Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdiction Standard*, 95HARV. L. REV. 470 (1981); Brian B. Frasch, *National Contacts as a Basis For in Personam Jurisdiction over Aliens in Federal Question Suits*, 70 CALIF. L. REV. 686 (1982).

64. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

65. Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985). *See also* Hanson v. Denkla, 357 U.S. 235, 253 (1958); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984).

66. Burger King v. Rudzewicz, 471 U.S. at 476.

67. The physical presence of the defendant in the forum state was once a "prerequisite to its rendition of a judgment personally binding him." *Id.* (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1877)).

68. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987).

69. World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 313 (1980) (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1946)).

court there."[70] If a court finds that from the nature and amount of contacts a defendant has with the forum state that it would not surprise the defendant to "be haled into court there,"[71] then the court may properly exercise jurisdiction over the defendant.

Offshore services will argue that they cannot be subjected to the jurisdiction of U.S. courts because they are not physically located within the United States and because they may not have sufficient minimum contacts with the United States to make the exercise of jurisdiction reasonable. In support of this argument, they may look to the decisions of various courts which have not permitted the exercise of jurisdiction over an alien defendant in circumstances similar to those present in the case of offshore betting services. For instance, one court has ruled that telephone calls between an alien defendant and a forum state, standing alone, are "insufficient to satisfy the requirements of due process."[72] In that case a Kansas corporation was sued by an Arkansas corporation in the United States District Court for the Eastern District of Arkansas. The Kansas company did not maintain an office or any agents in Kansas, nor did it send any representative to Arkansas to complete the business deal which was the basis for the suit. The court upheld a lower court's ruling that a company does not subject itself to the jurisdiction of a court in a different forum if the only contacts it has with the forum are through telephone calls. Similarly, a court held that a defendant who conducted business through an "800" toll-free telephone number was not subject to the jurisdiction of the court.[73] The court found that toll-free telephone calls creating three invoices for the sale of plastic bags combined with a single written communication between the defendant and the plaintiff in a different forum did not represent "sufficient transaction" necessary to support the court's exercise of jurisdiction.[74] Offshore services will likely point to these court rulings as support for their argument that they are not subject to the jurisdiction of U.S. courts.

Likewise, offshore services will contend that the advertisement they place in U.S. magazines and on national radio shows do not rise to the level of directed activities at the United States[75] which "availed [themselves] of the

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70. World Wide Volkswagen, 444 U.S. at 297. *See* Kulko v. California Superior Court, 436 U.S. 84, 97-98 (1978); Shaffer v. Heitner, 433 U.S. 186, 216 (1977). When a company purposefully avails itself of the privileges and benefits of the forum state, it places itself on notice that it may be subject to potential suits there and cannot take steps to "alleviate the risk of burdensome litigation." World Wide Volkswagen Corp. v. Woodson, 444 U.S. at 297.

71. World Wide Volkswagen Corp. v. Woodson, 444 U.S. at 297.

72. T.J. Raney & Sons, Inc. v. Security Savings & Loan, 749 F.2d 523, 525 (8th Cir. 1984).

73. Standard Enter., Inc. v. Bag-It, Inc., 673 F. Supp. 1216, 1220 (S.D.N.Y. 1987).

74. *Id.* at 1220.

75. *See* Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985).

privilege of conducting business there."[76] Courts have reached differing conclusions as to whether placing advertisements in publications that reach the forum permit a court of that forum to exercise jurisdiction against the nonresident defendant. In *U.S. Securities and Exchange Commission v. Carillo*, the court found that the advertisements of an alien defendant could support a court's exercise of jurisdiction.[77] In that case, a Costa Rican corporation placed advertisements regarding the sale of unregistered U.S. securities in two airlines' in-flight magazines. The court found that the advertisements were enough to allow for a court's exercise of jurisdiction because the corporation purposefully availed itself of the privilege of doing business in the forum.[78] The court reasoned that the articles were reasonably calculated to reach readers in the American forum because they were in English and because the corporation knew that the magazines would be carried into the country aboard U.S. airlines.[79]

A court would likely conclude that it would be proper to exercise jurisdiction over an offshore betting service, even if the service is located completely outside of the United States. Following the two-prong jurisdiction analysis developed by the courts, a court would need to determine whether an offshore betting service "purposefully directed his activities at members of the forum."[80] One means by which services direct their business activities to the United States is by advertising on national radio programs, in national sports magazines, and in newspapers, as well as in smaller, regional magazines which target specific areas of the country.[81] By placing the advertisements, offshore services are attempting to directly solicit business customers, and therefore business, from the United States. In addition to advertising in magazines and newspapers and on the radio, many offshore services maintain their own web pages which provide toll-free telephone numbers for their services, information regarding the rules and procedures for opening and maintaining an account, up to the minute betting lines on games, and even statements claiming that these services are completely legal.[82] The act of

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76. *Id.* at 475.

77. U.S. Securities and Exch. Comm. v. Carrillo, 115 F.3d 1540 (11th Cir. 1997).

78. *Id.* at 1545.

79. *Id.*

80. Burger King v. Rudzewicz, 471 U.S. at 472.

81. "The ads for friendly sounding sports books like Galaxy Sports, EZBet, and Sports Offshore describe user-friendly services and, more importantly claim that such betting is perfectly legal." Dan McGraw, *Super Sunday, Super Bets: Offshore Sports-Betting Services Boom, One state fights back,* U.S. NEWS & WORLD REP., Jan. 26, 1998, at 54. Entire World Wide Web sites have been created which do nothing more than advertise for offshore betting services. *See Welcome to Bettors World* (visited Nov. 3, 1998) <http://www.bettorsworld.com>.

82. *See generally* Global Sports Connection, (visited Nov. 3, 1998) <http.200.9.63.212>, World Wide Tele-Sports, (visited Nov. 3, 1998) <http://www.betwwts.com> ("To ensure complete legality, all transactions and wagers shall be considered originating from and governed

sending hundreds of advertisements to the United States in various mediums would seem to satisfy the first prong of the jurisdictional analysis—the purposeful direction of activities towards the United States.[83]

Another manner in which offshore services direct their activities towards the United States is through the specific tailoring of their service for customers in the United States.[84] Many services advertise the fact that they remain open until the last sports games on the West Coast or Hawaii begin so that American bettors will have the opportunity to wager on every game played in the United States on a given day. Indeed, many services only provide betting lines on sporting events in the United States. This is really no surprise considering that people placing wagers with these services are almost exclusively Americans who are unable to legally place the wagers at home.[85] Additionally, services claim that all their telephone operators speak clear and understandable English so that Americans will be assured that they can accurately place their wagers.[86] By specifically setting up their services to cater to American customers, the only customers they have, betting services "indicate an intent or purpose to serve the market of the forum state,"[87] in this case, the United States. This purposeful direction of activities towards the United States satisfies the first prong of jurisdiction analysis.

In addition to directly designing their services for the United States gambling market, betting services also maintain direct contacts with the United States when they send customers' winnings from the Caribbean back to the United States in the form of checks via the United States Postal Service and various overnight mail services. Many services also frequently mail and e-mail customers announcing various promotions and other customer service information. These mailings represent further contacts between overseas services and the United States.

The receipt of frequent telephone calls from the United States likewise represents an activity conducted with a resident of the United States. It cannot be said that just because the offshore services are not the ones placing the calls, that they are then not directing their services to the United States. The nature of telephone gambling is that customers call the service when they wish to place a wager. A court would likely find an argument that these services are only receiving calls and not placing them an unpersuasive attempt to avoid

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by the laws of Costa Rica."). *See also* Caribbean Sports Book, (visited Nov. 3, 1998) <http://www.caribsports.com> (indicating the legality of non-U.S. gambling operations).

83. Burger King v. Rudzewicz, 471 U.S. at 472.

84. *See supra* note 68 and accompanying text.

85. The main reason that Americans are the only ones placing wagers with these services is that gambling on sports is legal in most Western countries. Great Britain, for instance, has legal sports books spread throughout most cities.

86. *See, e.g.*, World Wide Tele-Sports, *supra* note 82.

87. Asahi Metal Ind. Co. v. Superior Court, 480 U.S. 102, 112 (1987).

the exercise of jurisdiction.

Taken as a whole, the advertisements in print and on the radio, the web sites which advertise offshore services, the direct tailoring of their product to the United States market, the acts of sending checks and other mailings to customers all over the United States, and the receipt of frequent telephone calls represents the purposeful availment by an overseas service to the benefits of conducting business in the forum of the United States.[88]

The second prong of the jurisdictional test asks whether the nature and scope of the defendant's contacts with the forum are such that it "would not be surprised to be haled into court there."[89] A court would likely rule that because of the steps taken by offshore services to tailor their services to the needs of U.S. residents, they would not be surprised if they were haled into a U.S. court. A court would also likely be persuaded that these services are subject to U.S. jurisdiction because more than ninety percent of their customers come from the United States.[90] Indeed, offshore services are quite aware that the law regarding their ability to accept wagers from U.S. citizens is unclear. The fact that they have had to move to the Caribbean to open a telephone sports betting service that accepts virtually all of its business from the United States indicates that they are running a risk that this activity may not be legal. Therefore, a court's exercise of jurisdiction over an offshore service would not be a "surprise," it would be "reasonable,"[91] and it would not offend "traditional notions of fair play and substantial justice."[92]

B. *Attempts to Enforce the Wire Act Against Offshore Services*

While it seems that a U.S. court could exercise jurisdiction over offshore gambling services which conduct their business through telephone calls with customers in the United States and who advertise in national magazines and on national radio shows,[93] the government has avoided this issue altogether by selectively prosecuting cases in which jurisdiction will clearly be permissible. The case of *United States v. Blair*[94] represents the only example of a person being successfully prosecuted for violating the Wire Act by accepting bets placed by American citizens on sporting events. The defendant in that case was charged with, and plead guilty to violations of the Wire Act for accepting

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88. Burger King v. Rudzewicz, 471 U.S. at 472.

89. *See supra* notes 70-72 and accompanying text.

90. *See* Steven Crist, *All Bets Are Off: The U.S. Is on the Verge of an Explosion in Internet Sports Betting That Could Change the Face of Gambling in this Country Forever. But Is It Legal? And Even If It Isn't, Can It Be Stopped?*, SPORTS ILLUSTRATED, Jan. 26, 1998, at 82.

91. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

92. *Id.*

93. *See supra* notes 80-88 and accompanying text.

94. United States v. Blair, 54 F.3d 639 (10th Cir. 1995).

wagers on college and professional basketball games from Oklahoma residents while he was living in the Dominican Republic. Whether the federal district court had proper jurisdiction in this case was not at issue because the defendant was an American citizen, and U.S. courts have traditionally exercised jurisdiction over U.S. citizens residing abroad.

The March 1998 arrest of twenty-one individuals who worked for offshore gambling operations offers an example of how federal prosecutors have avoided the more serious questions regarding the enforceability of the Wire Act against foreign services. Six different offshore services, four of which exclusively accepted wagers over the telephone, had employees who were charged.[95] The highly-publicized indictments serve the useful purpose of bringing the issues surrounding offshore sports gambling services into a more prominent light,[96] although it is questionable whether they will have any significant impact beyond this. Importantly, all twenty-one individuals who were indicted were American citizens so, similar to the *Blair* case, the court in which these cases were brought will not be saddled with the question of whether they have personal jurisdiction over the defendants. In addition, it seems as though all of the services which were involved in the arrests had at least a portion of their business in the United States.[97] Again, prosecutors have avoided the question of whether a court would have jurisdiction over a service that lies completely outside of the United States by carefully selecting services which carried on a portion of their business in the United States. Another interesting aspect of this case is that the individuals were not charged with violating the Wire Act, but instead were charged with conspiracy to

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95. John Borland, *Sting Nets More Web Gambling Operators*, CMP TECHWEB, Mar. 26, 1998, *available in* 1998 WL 9294748.

96. The indictments gave federal prosecutors the opportunity to make some clear and forewarning statements surrounding their plans to combat offshore gambling. Mary Jo White, U.S. attorney for the southern district of New York, stated that "[w]e will continue to monitor and vigorously prosecute offshore sports betting operations that engage in this blatantly illegal activity." *Id.* Attorney General Janet Reno, in referring to offshore betting services, proclaimed, "You can't hide online and you can't hide offshore." John Borland, *Arrest Shake Net Gamers*, CMP TECHWEB, Mar. 6, 1998, *available in* 1998 WL 9294246. These statements are in sharp contrast to those made by John Russell, a Justice Department Spokesman regarding offshore services: "We have no jurisdiction. The offense has not been made on U.S. soil." *See* Pulley, *supra* note 4.

97. The FBI has evidence that some of the defendants were working in the United States as well as in various Caribbean countries. Envelopes with return addresses of Costa Rica, Curacao, and the Dominican Republic actually had postmarks from Florida, Texas, and Nevada and carried U.S. stamps. Similarly, the telephone numbers which were used by these services were actually issued to U.S. companies. Finally, checks written by defendants acting on behalf of their gambling services, were drawn on U.S. banks. Nelson Rose, *Internet Operator Arrested*, ANDREWS GAMING INDUSTRY LITIG. REP., Apr. 1998.

violate the Wire Act.[98] As a result, "[p]rosecutors do not have to prove the defendants transmitted any bet by wire to another country[,]" as is required by the Wire Act.[99] Instead, they only must prove that more than one person agreed to transmit a wager over telephone lines, and that at least one of them took some overt act in furtherance of the conspiracy.[100] By prosecuting the defendants only for conspiracy to violate the Wire Act, the government once again sidestepped the larger question of whether individuals operating offshore telephone gambling services could be convicted under the Wire Act. The minimal criminal requirements for a conspiracy conviction in this case combined with the relative certainty that a court would exercise jurisdiction over these defendants who carried on a portion of their business within the United States make the likelihood of convictions in this case quite high.[101] As a result, we have no clear judicial statement regarding the Wire Act and its effectiveness in dealing with this rapidly expanding industry.

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98. Conspiracy charges almost always coincide with charges for the substantive offense to serve as a form of "piling on" to give prosecutors greater leverage in plea bargain negotiations. *See generally Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959) (discussing developments with respect to criminal conspiracy).

99. Rose, *supra* note 97.

100. The four elements necessary for a conspiracy conviction are (1) an agreement between at least two parties; (2) to achieve an illegal goal; (3) with knowledge of the conspiracy and with actual participation in the conspiracy; and (4) at least one conspirator committed an overt act in furtherance of the conspiracy. 18 U.S.C. § 371 (1994); United States v. Park, 68 F.3d 860, 866 (5th Cir. 1995) (holding that the government must prove: an agreement to obstruct justice, knowing and voluntary participation by the defendant, and at least one overt act committed in furtherance of the agreement). For a conspiracy to take place, the object of the conspiracy must be the violation of a specific federal statute. United States v. Arch Trading Co., 987 F.2d 1087, 1091 (4th Cir. 1993) (holding that "offense" for the purposes of § 371 includes violation of executive orders where Congress has provided criminal sanctions for such violations). Interestingly, however, there is no requirement that the conspirators intend or know that the conspiracy will violate a federal statute. *See* United States v. Cyprian, 23 F.3d 1189, 1201-02 (7th Cir. 1994) (holding that prosecutors need only prove that the defendant knew he was interfering with the Internal Revenue Service's ability to collect taxes, and not that he knew he was violating the law). *See also* United States v. Blackmon, 839 F.2d 900, 908 (2d Cir. 1988) (holding that conviction for conspiracy to commit wire fraud does not require forseeability of interstate nature of wire communication). The fact that the conspirators need not know that their activities will violate a federal statute greatly enhances the government's ability to prosecute offshore gambling services for a conspiracy to violate the Wire Act because the defendants will be prevented from asserting the defense that they did not know that accepting wagers from American citizens was a violation of the Wire Act.

101. The conspiracy charges should be easy to prove because there is little doubt that defendants working for the service were in agreement to take wagers from American citizens, with knowledge of the agreement to take wagers, and that at least one party committed an overt act in furtherance of the conspiracy. Any act such as registering a new client, accepting a telephone call from a customer placing a wager, or sending a customer's winnings back to the United States will fit the overt act requirement for a conspiracy charge.

C. *Conflicts of Law*

Although it seems as though the United States could apply the Wire Act to offshore services that accept wagers from U.S. citizens, and in most cases a U.S. court could exercise jurisdiction over such a service, a more interesting question might be whether it would be fair for the U.S. to arrest and prosecute individuals who are engaged in conduct that is fully licensed by another country which is their home country. Many Caribbean nations have begun to license betting services[102] and to recognize the economic benefits that come from playing host to these rapidly expanding companies.[103] Because many of these countries have taken a very aggressive approach to attracting gambling services, it is unlikely that they will sit idly by and watch the United States attempt to prosecute these revenue building, job creating services out of business.[104]

The Restatement (Third) of the Foreign Relations Law of the United States describes situations in which a state may properly prescribe laws applying "to the activities, relations, or status of persons, or the interests of persons in things."[105] Section 402 of the Restatement permits a state to maintain jurisdiction to prescribe laws regarding "conduct outside its territory that has or is intended to have substantial effect within its territory."[106] Stated

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102. *See supra* note 1. Like Antigua, Grenada has begun to license services and offers a number of benefits to companies that move to Grenada from other nations. One betting service, Sports International, recently moved from Antigua to Grenada when the Grenadian government offered them the right to sell master licenses to services moving to Grenada. Mike Fish, *Gamblers Virtual Paradise: Should It Be outlawed? Regulated? Or Left Alone?*, ATLANTA J. CONST., Dec. 28, 1997, at E9.

103. *See supra* notes 23-26 and accompanying text.

104. Referring to the arrest of 21 individuals involved in telephone and on-line gambling, Gyneth McAllister, a gaming consultant to the free trade zone of Antigua, has said that "[i]f any of the Antiguan companies' employees are convicted, then the government may protest, or re-evaluate its extradition agreements with the [United States] . . . [because] it could be that the U.S. is operating outside their legal bound." John Borland, *Offshore Gambling Havens Standing Firm*, CMP TECHWEB, Apr. 1, 1998, *available in* 1998, WL 9294875.

105. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a)(1987). For a summary discussion of the Restatement and its effect on extraterritorial jurisdiction, see Kathleen Hixson, *Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT'L L.J. 127 (1988).

106. *Id.* § 402(1)(c). This notion has been limited over the years by an old canon of statutory construction adopted by the U.S. Supreme Court which held that federal law should not be applied extraterritorially unless a statute expressed a clear intention to regulate activities occurring outside of the United States. *See* New York Cent. R.R. v. Chisholm, 268 U.S. 29, 31 (1925) ("Legislation is presumptively territorial and confined to limits over which the law-making powers has jurisdiction.") (quoting Sandberg v. McDonald, 248 U.S. 185, 195 (1918)); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) ("Legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."). Subsequent court decisions have eroded reliance on a strict territorial presumption. *See* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (applying the "effects doctrine"

another way, the United States would be able to exercise jurisdiction over an alien defendant under the "effects doctrine" of jurisdiction if it was reasonably foreseeable that the activity in question would produce effects in the United States.[107] The exercise of jurisdiction over conduct which takes place outside a state's territory is subject to the restriction of section 403 of the Restatement. "Even when one of the bases for jurisdiction under § 403 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[108] The Restatement then lists a number of factors that must be weighed to determine if the exercise of jurisdiction over a party or activity of another state might be unreasonable. Included in these factors are:

> [t]he connections, such as nationality, residence, or economic activity; between the regulating state and the person principally responsible for the activity to be regulated; the character of the activity to be regulated; the importance of regulation to the regulating state; the extent to which other states regulate such activities; the degree to which the desirability of such regulation is generally accepted; and the likelihood of conflict with regulation by another state.[109]

If after considering these factors it seems reasonable that two separate

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of extraterritorial jurisdiction permitting the application of the Sherman Anti-Trust Act to a Canadian company participating in an international aluminum cartel).

107. *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."). Courts have endeavored to extend this principle articulated by Justice Holmes to cases involving foreign defendants. *See, e.g.*, Chua Han Mow v. United States, 730 F.2d 1308, 1311-12 (9th Cir. 1984) (applying the *Strassheim* principle to conduct in Malaysia involving drugs intended for distribution in the United States). For an analysis of the extraterritorial application of U.S. federal criminal legislation, see Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992).

108. *See supra* note 105 § 403(1).

109. *Id.* § 403(2)(b)(c). The Restatement provides some additional factors which must be considered in evaluating conflicts of jurisdictional problems:

> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; . . . (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

Id.

states might be able to properly exercise jurisdiction over a person or thing, "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction," and the state with clearly the greater interest shall be the one to maintain jurisdiction.[110]

The operation of a gambling service which almost exclusively accepts wagers from residents of the United States satisfies the "effects doctrine" of jurisdiction discussed in the Restatement. It is indeed reasonably foreseeable that accepting wagers on sporting events from U.S. citizens will produce "effects" in the United States. The effects are illustrated in the one to five billion dollars that Americans wager through these overseas services[111] that might otherwise be spent within the U.S. economy. Effects can also be seen in the societal problems which always accompany gambling such as bankruptcy, increased levels of theft and other related crimes, suicide, and underage gambling. The "effects doctrine" of extraterritorial jurisdiction is satisfied in this case, permitting the United States to prescribe laws concerning an activity that greatly impacts the United States.

After determining that the United States has jurisdiction to prescribe laws regarding telephone gambling services who accept most of their business from residents of the United States, the reasonableness of the exercise of jurisdiction must be analyzed. First, there are strong connections between the regulating state, the United States, and the person principally responsible for the activity to be regulated, the owners and other employees of the offshore gambling services.[112] Most of the services are either owned, or at least partially financed by American citizens. This close connection argues in favor of permitting the United States to regulate these services since to do otherwise, would be to allow American citizens to circumvent federal laws to their financial advantage simply by moving their unlawful operations outside of the country.

Second, the fact that the activity in question in this instance is gambling, also supports a conclusion that the exercise of jurisdiction in this case would be reasonable. Throughout history, gambling has always been a highly regulated activity, both in this country and abroad. It seems only reasonable to permit the United States to prohibit overseas companies from doing what their American counterparts cannot: accept wagers on sporting events from American citizens. The fact that these services are designed specifically to

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110. *See id.* § 403(3). Many commentators have come to criticize the Restatement's reasonableness test arguing that U.S. courts will often overlook and minimize the interests of another state in regulating an activity while overestimating the United States' interest in doing the same. *See* Born, *supra* note 107, at 94-99; Harold G. Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 1, 24 (1984).

111. *See supra* note 17 and accompanying text.

112. This is a necessary requirement under Restatement § 403(2)(b). *See supra* note 4.

cater to American customers[113] further supports the conclusion that the United States should be allowed to exercise jurisdiction over them even though the services are acting within the laws of their own country. The nature of telephone gambling services is such that the location of the service is not as important as the location of the individuals who are placing the bets. The many social concerns which accompany gambling will not be felt in Antigua or other countries that host these services because their residents are not the ones who are gambling. Indeed, although countries like Antigua permit and license telephone gambling services, they do not permit their own residents to use the services.[114] It is the United States where the problems associated with gambling such as the commission of crimes to support gambling habits, gambling by minors, gambling induced bankruptcy, and the use of these services to launder criminal proceeds[115] will become apparent because it is Americans who almost exclusively wager with these services. Because the effects of telephone gambling will primarily be felt in the United States, the exercise of jurisdiction by United States courts over this foreign-based industry should be permitted.

Although the United States should be permitted to exercise jurisdiction over individuals who operate offshore gambling services, there may be some problems in obtaining custody of these individuals. One manner in which the United States could acquire custody of a criminal defendant would be through extradition.[116] Typically, a nation seeking the extradition of a person residing in another country will formally request that the nation in question arrest the defendant and then permit them to transfer him back to the country seeking extradition so that he may be tried. Normally, however, a country will only agree to an extradition of a person residing within their country if the crime for which the defendant is charged with is also a crime in its own country.[117]

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113. *See supra* notes 81-83 and accompanying text.

114. Gyneth McAllister, the supervisor of all gambling on Antigua notes that "[t]he average Antiguan on the street hasn't a clue what goes on inside these offices, and isn't supposed to. You can't walk in off the street and place a bet." Indeed, there is only one casino on the island nation of Antigua and, it is not permitted to take wagers on sports. Fish, *supra* note 7. For a detailed comparison of various forms of gaming regulation around the, world see GAMING AND PUBLIC POLICY: INTERNATIONAL PERSPECTIVES (William R. Eadington & Judy A. Cornelius eds., 1991).

115. *See supra* notes 30-32 and accompanying text.

116. Extradition is defined as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands surrender." Terlinder v. Ames, 184 U.S. 270, 289 (1991). Bilateral treaties are the general vehicles used to extradite common criminals.

117. *See generally* M. Cherif Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 388 (3d. ed. 1996) (asserting the notion that a country will not extradite a person unless their alleged crime would also be a crime in their country is referred to as double criminality).

Because telephone gambling is not a crime in the countries that host telephone betting services, a country could refuse to extradite an individual charged with violating the Wire Act or any other U.S. statute which purports to prohibit gambling on sporting events. This is especially true if a country felt strongly about protecting one of their most important economic industries.

Likewise, the United States may have difficulty apprehending defendants under the doctrine of comity. "International comity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law."[118] A nation may agree to give up custody of an individual under the doctrine of comity as a demonstration of good faith or as a matter of international etiquette. As with extradition, a nation may not easily agree to hand over individuals operating offshore gambling services when these businesses are not only legal in their country, but are fully licensed by the government.

V. SOLUTIONS

There are perhaps as many possible solutions to the problem of U.S. residents using offshore telephone gambling services to circumvent anti-gambling legislation as there are arguments why those solutions should not be used. This Part will examine a few of the possible solutions, detailing both arguments for and against their implementation. In addition, this Note proposes that the Wire Act should be sufficient to initiate prosecutions against offshore gambling services, and that the United States should take a much more aggressive approach to prosecuting cases under the Wire Act. Other potential solutions that will be discussed are to amend the Wire Act so that individual bettors may be prosecuted for placing wagers with offshore gambling services, and the legalization of telephone gambling in the United States.

A. *Aggressive Prosecution of Gambling Services Under the Wire Act*

Despite statements to the contrary,[119] the Wire Act should provide a means by which the U.S. government can prosecute offshore gambling

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118. United States v. Nippon Paper Indus., 109 F.3d 1, 8 (1st Cir. 1997). *See, e.g.*, Jay Hall, *International Comity and U.S. Federal Common Law*, 84 AM. SOC'Y INT'L L. PROC. 326 (1990).

119. *See* Kenneth A. Feeling & Ronald E. Wiggins, *Despite Rough Talk From Prosecutors and Despite Indictments of Those Charged with Internet Gambling, No Court Has Held That U.S. Law Prohibits Such Betting*, NAT. J., Mar. 30, 1998, at B7. Justice Department spokesman John Russell, in referring to offshore telephone and Internet gambling services remarked, "We have no jurisdiction. The offense has not been made on U.S. soil." *Id.*

services. Although the Wire Act does not permit the prosecution of individual bettors who are deemed not be involved in the business of betting,[120] individuals working for offshore services are subject to criminal liability under the statute because they are accepting wagers over telephone wires that originate in the United States.

The main concern with the application of the Wire Act to overseas services is the issue of whether a court can exercise jurisdiction over individuals employed by gambling services that do not maintain any part of their business in the United States. The answer to that question seems to be yes because these services maintain sufficient contacts with the United States to warrant the exercise of jurisdiction.[121] The advertisements they place in U.S. magazines and on national radio programs, the checks and correspondence they send to their customers in the United States, and the manner in which they design and cater their services almost exclusively toward U.S. customers, taken cumulatively, represent sufficient minimum contacts with the United States to make the exercise of jurisdiction acceptable.

In addition, jurisdiction over many gambling services operators would likely be permissible because most of the services are owned and controlled by American citizens. A court would likely conclude that American operators of gambling services "should reasonably anticipate being haled into court"[122] in the United States when their businesses are designed purely to accept wagers from American citizens. American citizens conducting gambling services are obviously aware that accepting wagers on sporting events is illegal in the United States. The fact that many services go to great pains to insist that the betting transaction is taking place in the Caribbean, and that no part of their operations lie within the United States only supports the conclusion that these services operate in the Caribbean in order to conduct business with American customers that would be illegal if it was located with the United States. The United States must not allow individuals to take advantage of advances in communications technology to intentionally violate federal and state laws simply by moving offshore. To do so would make every federal and state law prohibiting betting on sports obsolete, because although someone cannot now wager on sporting events with companies located in the United States, they can very easily do so by calling offshore services. An aggressive approach to prosecuting offshore betting services under the Wire Act may only be tempered by the U.S. government's ability to obtain custody over a potential criminal defendant. As noted earlier, it is unlikely that a Caribbean country which benefits greatly from hosting these services will be eager to relinquish an individual to the United States so that he or she can be

120. United States v. Barborian, 528 F. Supp. 324 (D.R.I. 1981).

121. *See supra* notes 62-92 and accompanying text.

122. World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

prosecuted under the Wire Act.[123] In contrast, however, a Caribbean island nation whose primary industry is tourism, and more importantly hosting American tourists, would also not want to do anything to offend the United States government for fear of economic or trade retaliation. Seen in this light, perhaps a country such as Antigua may be reluctantly willing to surrender an individual maintaining an overseas gambling operation over to the United States for prosecution under the auspices of international comity.[124] Any discussion about how the United States may obtain defendants for the purpose of holding them for trial is guided by unclear precedent considering that many defendants residing outside of the United States who have been indicted for crimes in the United States generally turn themselves over to U.S. authorities without protest.[125]

B. *Amend the Wire Act to Prohibit Individuals from Placing Wagers*

One of the chief criticisms of the Wire Act and its application to offshore betting services has been its limited scope. Because the Wire Act only applies to individuals who are "engaged in the business of betting or wagering,"[126] and because courts have held that Congress did not intend for casual bettors to be included in the definition of persons engaged in the business of betting,[127] the only available means for controlling this burgeoning industry is to prosecute individuals who work for and operate offshore services, as these individuals are the only ones who are technically "in the business of betting or wagering." One proposal that would alleviate the problem would be to amend the Wire Act so that individual bettors using the telephone to transmit bets could be prosecuted the same as those who are working for gambling services, and thus are engaged in the business of betting

The Internet Gambling Prohibition Act of 1997 proposed to amend the

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123. The extradition agreement signed between the United States and the governments of the countries comprising the Organization of Eastern Caribbean States (Antigua and Barbuda, Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines) defines an extraditable offense as one that is punishable under the laws in both Contracting States by deprivation of liberty for a period of more than one year or by a more severe penalty." Extradition Treaty, Oct. 10, 1996, S. Treaty Doc. No. 105-19, art. 2, *available in* 1996 WL 913075. As conducting a telephone gambling business is not a crime in countries such as Antigua, the United States may not be able to obtain custody over defendants through formal extradition procedures. Neither is it likely that a defendant would consent to surrender under the treaty which would allow the requested state to surrender the individual over to the United States. *Id.* art. 15.

124. *See* Bassiouni, *supra* note 117.

125. Just one week after the March 1998 arrest of 14 individuals charged with conspiracy to violate the Wire Act, 11 had either been arrested or had voluntarily turned themselves over to U.S. authorities.

126. 18 U.S.C. § 1084 (a).

127. United States v. Barborian 528 F. Supp. 324, 328-29 (D.R.I. 1981).

Wire Act so that it would become applicable to individual bettors.[128] While this amendment deals specifically with Internet gambling operations and not simply telephone services, this alteration should be applied to telephone services as well. Allowing the United States to prosecute individuals as well as those engaged in the business of betting would provide prosecutors more flexibility in attempting to control this exploding industry. Similarly, by simply prosecuting individuals for betting with these services, the government need not face some of the difficult issues relating to obtaining jurisdiction and custody of defendants who are living outside of the United States.

The main argument against amending the Wire Act to permit the prosecution of individuals who place bets with gambling services is one based on the practicality of enforcing such a law. While perhaps serving as a mild deterrent to those who wish to bet offshore, it is doubtful that this change in the law would reap significant benefits because it would be nearly unenforceable. Prosecuting gambling cases in the United States is not as glamorous as it was when the government cracked down on organized crime's control of gambling in the 1960s. Similarly, the federal government and the states, alike, provide little funding for gambling prosecutions. As a result, it would be unwise to spend this money attempting to prosecute individual bettors who may only wager a few hundred dollars a week. A much more cost-efficient approach would be to prosecute the services who accept wagers under the existing statute, instead of amending the law to attempt to stop individuals from placing bets.

C. *Legalize Telephone Gambling*

One final solution to the problem of Americans placing bets overseas would be to legalize telephone gambling in the United States. Many argue that it is hypocritical for the federal government and the states to ban this form of gambling when they so actively promote other forms of gambling such as lotteries and river boat casinos. Permitting Americans to place wagers with U.S. gambling services and casinos would have the natural benefit of allowing the government to regulate this activity. As it is today, the United States has no means through which it can ensure the legitimacy of these services. Also,

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128. The Bill proposed to amend the Act by adding the following paragraph:

> Whoever other than a person described in paragraph (1) knowingly uses a communication facility for the transmission or receipt in interstate or foreign commerce of bets or wagers, information assisting in the placing of bets or wagers, or a communication that entitles the transmitter or receiver to the opportunity to receive money or credit as a result of bets or wagers, shall be fined not more than $2,500 imprisoned not more than six months, or both.

Internet Gambling Prohibition Act, S. 474, 105th Cong., 1st Sess. (1997). In addition to this change, the Bill would also amend the Wire Act to specifically cover services who accepts bets via the Internet.

by legalizing this activity, the U.S. government could enjoy a new source of revenue from the taxes it would collect from these services.

The arguments against legalizing telephone gambling mostly deal with concerns over how the increased accessibility of gambling may affect gamblers and non-gamblers alike. Considering the social problems that traditionally follow gambling,[129] it would seem unwise to permit sports betting services to open up on street corners throughout the country. There is some evidence that America's gambling fever may be subsiding somewhat,[130] and the legalization of sports gambling would go against this positive trend. Moreover, by legalizing the use of sports gambling services, the United States would likely be seen as having thrown their hands in the air as a sign of defeat, when the government has not yet made a conscientious effort to enforce the Wire Act against these services.

VI. CONCLUSION

Offshore telephone gambling services have taken advantage of advances in communication technology to provide a service to U.S. citizens that is not otherwise legal in the United States. Attracted by the sandy beaches and warm climates, as many as one-hundred telephone gambling services have sprung up in the Caribbean and Central America. Many nations provide a number of benefits including corporate and personal tax breaks, reduced lease payments on prime real estate, and guaranteed banking services free from U.S. regulators. All of these factors combined with the outbreak of gambling fever in the United States have served to make these businesses very profitable.

Although the Federal Interstate Wire Act prohibits the transmission of information assisting in the placing of bets or wagers in interstate or foreign commerce, the United States has been slow to utilize this statute to prosecute offshore services whose customers are almost exclusively U.S. citizens. The primary question surrounding the enforceability of the statute against offshore services centers around the issue of whether U.S. courts can exercise jurisdiction over an activity that occurs completely outside of the United States. A court would likely maintain jurisdiction because gambling services maintain numerous "contacts" with the United States and it is foreseeable that, as a result of conducting continuous business with U.S. citizens, the operators

129. *See supra* notes 27-29.
130. *See* Rose, *supra* note 14.

of services might be "haled into court" in the United States. Offshore gambling is a societal menace that must be reckoned with and the Wire Act stands as the best alternative for dealing with the problem.

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