INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW

VOLUME 15

2004-2005

INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW

Volume 15 2004 Number 1

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NOTES

INTERNATIONAL ANTITRUST — WHAT LAW IN ACTION?

Damjan Kukovec[1]

I. INTRODUCTION

Prohibition of the General Electric/Honeywell merger by the European Commission[2] and the difference of opinion between the European Commission and the Federal Trade Commission (FTC) over the Boeing/McDonnell Douglas (MCD)[3] merger shook transatlantic relations. Indeed, these different decisions almost escalated into a trade war.[4] Disputes arising out of antitrust enforcement, problems caused by the polycentric world of decision-makers on the world stage, and questions of market access sparked an intense debate on the international antitrust regime, as well as on the world order in general. The most frequently discussed possible solutions to disputed issues in international antitrust law are the World Trade Organization (WTO), the Organization for Economic Co-operation and Development (OECD), an independent antitrust

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1. LL.M. (Harvard Law School, 2002), dipl.iur. (University of Ljubljana, 2001). Many thanks to Prof. William P. Alford, Prof. David W. Kennedy, Prof. Morton J. Horrowitz, Oren Bracha, and Prof. Thomas E. Kauper for their advice. I also owe special thanks to Prof. Boštjan M. Zupančič, Justice of the European Court of Human Rights, for his lectures on jurisprudence at the University of Ljubljana. An earlier version of this Article was written in partial fulfillment of the LL.M. criteria at Harvard Law School. This Article is dedicated to the memory of my grandmother, Amanda Mahkovec.

2. Case COMP/M.2220, General Electric/Honeywell v. Commission (2001), http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_048/l_04820040218en00010085.pdf (last visited Nov. 23, 2004), *appeal docketed*, Case T-210/01, Action brought on 12 September 2001 by the General Electric Company against the Commission of the European Communities, http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_331/c_33120011124en00240025.pdf [hereinafter *GE/Honeywell*].

3. Decision 97/816/EC, Commission Decision of July 30, 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement, 1997 O.J. (L 336) 16 [hereinafter *Boeing/MCD*] (approving the Boeing/McDonnell Douglas merger under conditions); Joint Statement by Chairman Robert Pitofsky & Commissioners Janet D. Steiger, Roscoe B. Starek III & Christine A. Varney, Federal Trade Commission, *In the Matter of the Boeing Company/McDonnell Douglas Corporation*, File No. 971-0051 (July 1997), http://www.ftc.gov/lopa/1997/07/boeingsta.htm (approving the Boeing/McDonnell Douglas merger with an unprecedented statement) [hereinafter *In re Boeing*].

4. *See, e.g.*, Merit E. Janow, *Transatlantic Cooperation in Competition Policy*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 44 (Simon J. Evenett et al. eds., 2000); Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust*, 15 SYRACUSE J. INT'L L. & COM. 263, 276 (2002) ("The Commission's subsequent decision to block the [GE] merger resulted in political pressure on Bush to retaliate with trade sanctions, raising the spectre of an antitrust-inspired trade war.").

organization, bilateral cooperation, and positive comity.[5] These issues arose parallel to the debate on the "legalization"[6] of international law and a shift away from power politics.[7]

This Article attempts to establish what the law in action[8] is, and examines the consequences of both the current regime and some of the proposed regimes, including their distributive consequences. Furthermore, it demonstrates that some of the arguments and proposals in international antitrust discourse are "paper rules,"[9] or proposals without any real effect in the international arena, and that some proposals may have hidden undesired effects. This Article also attempts to show the fallacy of the dichotomy between reason and force[10] in international law and international relations and the fallacy of the liberal model.

Part II examines the concept of the extraterritorial effect and how it compares to the principle of territoriality. It also attempts to explain why disputes in international merger review occur. It demonstrates very limited applicability of liberal international relations theory to international antitrust

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5. *See generally* Janow, *supra* note 4; Eleanor M. Fox, *Competition Law and the Millenium Round*, 2 J. INT'L ECON. L. 665 (1999); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L. L. 491 (2000); Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142 (2001).

6. *See, e.g.*, Anne-Marie Slaughter, *International Law and International Relations*, *in* 285 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 204-11 (Académie de Droit International ed., 2000).

7. Anne-Marie Slaughter, *Interdisciplinary Approaches to International Economic Law: Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 730-31 (1995) [hereinafter Slaughter, *Liberal International Relations Theory and International Economic Law*] (arguing that the focus on interests rather than on power in turn shifts attention away from territory, or other sources of state power, to the modes and accuracy of representation of social interests); *see also* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L. L.J. 191, 219 (2003) [hereinafter Slaughter, *A Global Community of Courts*] (arguing that relations between judges in a global community of courts are shaped by the ultimate need, in a world of law, to rely on reason rather than force).

8. *See* Oliver Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-61 (1897):

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only about the material consequences which such knowledge enables him to predict. . . . What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may, or may not coincide with the decisions. [The bad man] does not care two straws for the axioms or deductions, but . . . he does want to know what the Massachusetts or English courts are likely to do in fact. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Id.

9. *See* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931).

10. *See, e.g.*, Slaughter, *A Global Community of Courts*, *supra* note 7. For the opinion that reason may not be pluralist, and thus problematic, see Damjan Kukovec, Cultural Relativism, International Criminal Courts and International Relations (May 2002) (unpublished manuscript, on file with author) and Damjan Kukovec, Changing Conceptions of Sovereignty (Dec. 30, 2000) (unpublished manuscript, on file with Harvard Law School and author).

law. Does the concept of positive comity work? How is the Third World caught in the middle of transatlantic disputes? Should every country be exercising extraterritorial jurisdiction? Part III examines the question of national bias and international commercial arbitration, and problems of adjudication in international law. It is argued that the non-discrimination principle cannot be effective in international antitrust. Part IV deals with the relationship between trade and non-trade issues and the general problem of the proliferation of decision-makers in international law.

II. EXTRATERRITORIAL EFFECT

A. Problems With the Concept of Extraterritorial Effect

According to Fiebig,[11] there now seems to be a consensus that an effect on competition within a specific territory may constitute a legitimate nexus upon which to base jurisdiction over activities occurring outside of that territory. Nevertheless, extraterritorial effect can prove to be a problematic concept.

The United States was the first to use the extraterritorial effect in antitrust law.[12] However, as "an interference with the authority of another sovereign, which the other state concerned might justly resent," Justice Holmes claimed that extraterritoriality was "contrary to the comity of nations."[13] Slaughter, on the other hand, argues that the wording of *American Banana Co. v. United Fruit Co.*[14] reflected a world of strictly-bound national territories in which legislative power was co-extensive with physical power over a defined territory. Extraterritorial effect is a negation of the realist[15] account of "[s]tates as billiard balls: opaque, hard, clearly defined spheres interacting through collision with one another."[16] The principle of territorial protection and "the rule of reason remain closely tied to territory, and with it, to lurking notions of physical power."[17] Slaughter argues that it is therefore "important to push beyond a posited or even asserted concept of state interest to examine the actual interests

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11. Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L L. & BUS. 233, 237 (2000).

12. Youri Devuyst, *Transatlantic Competition Relations, in* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 127, 130-31 (Mark A. Pollack & Gregory C. Shaffer eds., 2001).

13. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

14. *Id.*

15. Throughout this Article, the term "realist" refers to the paradigm in international relations theory which claims that power determines the outcomes of state interactions, that international law is epiphenomenal, and that states are primary actors in the international system. The term "legal realist" refers to the jurisprudential school of reform jurisprudence. *See, e.g.*, AMERICAN LEGAL REALISM 3-8 (William W. Fisher III et al. eds., 1993).

16. Slaughter, *supra* note 6, at 34.

17. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 736.

of individuals and groups as represented by the state" and to use the principle of extraterritoriality.[18]

The theory of antitrust has traditionally dealt with disputes between a firm engaging in an anticompetitive practice, such as a cartel,[19] and the public interest, that is to say consumers who are represented by antitrust regulators. In these cases, agencies are often forced to cooperate with each other if they are to prosecute such practices effectively, particularly where the acts involved transcend national borders.[20] The authorities therefore have a common opponent, the corporation, which Fox vividly described as the "common evil."[21] This is where the original conflict between the "public interest" and the corporation is preserved.

Under the current world antitrust regime, merger disputes are different. As a result of the extraterritorial effect, there are two or possibly more horizontal-level decision-makers who decide whether the transaction, such as the merger between General Electric (GE) and Honeywell or Boeing and MCD is compatible with antitrust laws. Thus, a veto right[22] is established by which the most prohibitive enforcer prevails.[23] A major foreign transaction can be prohibited, which foreign governments and interests resent, particularly if the same transaction was cleared at home. The issue in dispute with merger review is not previous or ongoing anticompetitive practice, but the decision of the regulator itself,[24] which will or has already been taken within tight deadlines. The conflict here is not an administration-corporation conflict, but a conflict between governments representing the interests of their constituencies. Different decisions have almost sparked trade wars, and have been the cause of transatlantic disputes. The conflict between the regulator and the corporation escalates into a dispute between nations[25] through the exercise of the veto right.

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18. *Id.*

19. Joel I. Klein, Remarks to the Royal Institute of International Affairs, http://www.usdoj.gov/atr/public/speeches/jikspch.htm (Nov. 18, 1996) (noting that international cartel cases, in which competitors in various countries come together privately to fix prices or allocate territories worldwide, can have an impact on trade by taking enormous amounts of money out of the pockets of consumers around the world).

20. *See* Spencer Weber Waller, *Anticartel Cooperation, in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 98, 98-99 (Simon J. Evenett et al. eds., 2000); Tarullo, *supra* note 5, at 491.

21. Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM J. INT'L. L. 1, n.2 (1997).

22. Simon J. Evenett et. al., *Antitrust Policy in an Evolving Global Marketplace, in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 1, 17, 21-22 (Simon J. Evenett et al. eds., 2000).

23. Eleanor M. Fox, *Global Problems In a World Of National Law*, 34 NEW ENG. L. REV. 11, 12 (1999).

24. This was demonstrated by the outcry of politicians, the media, and eventually academia. *See infra* Part III. A.

25. *See* Thomas M. Franck, *The Independence and Impartiality of International Judges*, 83 AM. SOC'Y INT'L L. PROC. 508, 520 (1989).

Why are the United States and the European Union primarily exercising the extraterritorial effect, and why are antitrust disputes only between them? First, the scale of economic cooperation between the two entities is unprecedented.[26] Cross-border flows of goods create international policy externalities, which in turn create incentives for policy coordination.[27] Second, and most importantly, these jurisdictions are both able to effectively enforce their decisions.[28] A country's effectiveness in applying its antitrust laws extraterritorially depends on its ability to obtain jurisdiction over the defendants, and enforce any resulting judgment against the defendants' assets. In both of these areas, the United States and the European Union enjoy a distinct advantage by virtue of their size.[29] A foreign defendant is likely to have more contacts with the United States or the European Union on which personal jurisdiction might be based, as well as more assets in the United States or the European Union against which a judgment might be enforced, than is the case with a smaller country.[30]

States, as agents of interests, outside the European Union and the United States, do not have the same veto right. Extraterritorial effect, as it is known today, creates only a limited number of effective decision-makers as the enforcement of such a decision rests on the economic power of the enforcer's jurisdiction. There was no dispute, no collision with other nations, no talk of "right" or "wrong" outside the discourse between the European Union and United States. Although, in both merger cases there was undoubtedly a conflict of interest between the merging firm and consumers in many countries around the world, as Boeing and GE sell far beyond the United States and European Union markets.[31]

This is true, both in countries that have adopted and have not adopted antitrust rules. National and international society is permeated with conflicts of interests.[32] Thus, it follows that there are more silent conflicts of interests than

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26. *See, e.g.*, Janow, *supra* note 4, at 29-30.

27. Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 J. COMMON MARKET STUD. 473, 485 (1993).

28. *See* William S. Dodge, *Antitrust and the Draft Hague Judgments*, 32 J. L. POL'Y & INT'L. BUS. 363, 364, 380-84 (2001).

29. *Id.*

30. *Id.*

31. For information on Boeing's deliveries in 1997, see Boeing Report, *at* http://active.boeing.com/commercial/orders/displaystandardreport.cfm?optReportType=Delivery&cboReportMonth=12&cboReportQuarter=&optTimePeriod=Yearly&cboReportYear=1997& ViewReportS=View+Report (last visited Nov. 15, 2004). For General Electric's activities, see GE's web page, *at* http://www.ge.com/en/ge/country.html (n.d.) (last visited Nov. 22, 2004).

32. *See* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 76 (Walter Kaufmann ed., Walter Kaufmann & R. J. Hollingdale trans., Vintage Books 1989) (1887) ("[L]ife operates *essentially*, that is in its basic functions, through injury, assault, exploitation, destruction and simply cannot be thought of at all without this character."); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 54 INT'L. ORG. 513, 517 (1997) (arguing that "liberal theory rejects the utopian notion that an *automatic* harmony of

there are actual disputes.[33] This claim is nothing but a procedural extension of the position that ground rules of permission are just as important as ground rules of prohibition.[34] Permitting ability of some and inability of the rest to exercise extraterritorial effect is as important as prohibiting the rest to exercise it.

Zupančič argues that within the framework of criminal procedure, conflict of interest and equality of power in a concrete case are the bases for legal disputes where there can be any talk of "right" or "wrong."[35] The same is true, as will further be shown, for other fields, such as international antitrust. The concept of power under Zupančič's premise is most closely related to that of Deutsch, who argued that "to have power means not to have to give in, and to force the environment or the other person to do so."[36] "Power in this narrow sense is the priority of output over intake, the ability to talk instead of listen . . . the ability to afford not to learn."[37] This equality of power on the world stage is not necessarily realist power possessed by one of the conflicting parties in absolute terms.[38] It is just as well the liberal "willingness of governments to mobilize and expend social resources for foreign policy purposes," or "strong preference for the issue at stake . . . ."[39] Only after equality of power in this sense has been established in a concrete "issue at stake"[40] can a real dispute in need of an equitable solution be discussed.

Not all regulators are equally powerful, which is why the only interests examined are those of individuals in powerful jurisdictions.[41] Third World consumers and companies or those from comparatively small, developed countries have absolutely no power when a merger has negative effects on them and their respective societies. Thus, for example, the Zambian Competition Commission could not effectively prohibit the GE/Honeywell merger no matter

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interests exists among individuals and groups in society; scarcity and differentiation introduce an inevitable measure of competition").

33. Two scenarios clearly show this. Either a person victimizes another person because there is no regulation of the activity of the victimizing person, or someone is not able to voice his say and interest, although the relationship is regulated. The end result is the same. *Compare* DUNCAN KENNEDY, SEXY DRESSING ETC. 90-91 (1993).

34. *Id.*

35. *See* BOŠTJAN M. ZUPANČIČ, PRVINE PRAVNE KULTURE 199 (1995) (arguing that a legal dispute is artificially created in criminal procedure); BOŠTJAN M. ZUPANČIČ, ODLOČBE IN RAZPRAVE 255 (1991).

36. KARL W. DEUTSCH, THE NERVES OF GOVERNMENT 111 (1966).

37. *Id. Cf.* ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 64 (1975) ("Power is the capacity to command, to subordinate the will of others to one's own will.").

38. *See* Moravcsik, *supra* note 32, at 519 (explaining that realists and institutionalists assume that states "automatically maximize fixed, homogenious conceptions of security, sovereignty or wealth per se . . . .").

39. *Id.* at 524 (emphasis omitted).

40. *Id.*

41. *See, e.g.*, Eleanor. M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L. L. 911, 922, n.30 (2003) (citing cases which may have affected Mexico); *see also* Fox, *supra* note 23, at 12 ("[L]ess developed and developing countries lack the power to reach and discipline offshore actors that harm them.").

how much they as well as possible competitors and consumers in its market wished to, regardless of their preferences and interests.[42] On the other hand, any merger occurring in other parts of the world is subject to careful scrutiny by the two jurisdictions that are able to effectively exercise extraterritorial power.[43]

Antitrust discourse, therefore, remains primarily between the United States and the European Union: Is the judicialized system of the United States "right;" is the "dominance test" "right" or "wrong;" or is "the substantial lessening of competition test" "right?"[44] Are the goals of competition law to promote market competition and efficiency, or should it strengthen the economic and social cohesion?[45] Should the GE/Honeywell merger be cleared? Academic debate focuses almost exclusively on these two jurisdictions and the interactions between them. Technical assistance on antitrust law is offered to other countries by either the United States or the European Union.[46]

The debate within the International Competition Network also involves other countries, but seems to be in the shadow of "the biggest elephants" of world trade,[47] and does not deal with concrete cases and disputes.[48] Other

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42. See also Dodge, *supra* note 28, at 380-84 (noting that "[a]lthough in the past and at present there may have been an effect by foreign companies and their anticompetitive actions on the consumers of small countries, they did not have the power to enforce it"). For the argument that liberal international relations theory is not applicable to international antitrust see infra Part II. A.

43. *See, e.g.*, Case T-102/96, Gencor Ltd. v. Commission, 1999 E.C.R. 753 (2001). In the United States, thresholds for jurisdiction under Section 7 of the Clayton Act (15 U.S.C. § 1981 (2003)) are lower than those under the European Merger Regulation. *Cf. infra* note 156. Nevertheless, individual countries of the European Union can also effectively prosecute a merger under their individual antitrust laws. Their respective economies are similarly much larger proportionally than those of the rest of the world, so that they could again effectively exercise the "effects doctrine" vis-à-vis the smaller jurisdictions.

44. *See, e.g.*, Henry Huser & Frederic Depoortere, *Substantive Enforcement Standards in Horizontal Mergers Under the EC Merger Regulation, in* ANTITRUST 44 (2002).

45. *See, e.g.*, Yeo Jin Chun, *The GE-Honeywell Merger Debacle: The Enforcement of Antitrust/Competition Laws Across the Atlantic Pond*, 15 N.Y. INT'L L. REV. 61 (2002) (arguing that the former is the U.S. approach and the latter European).

46. Evenett et al., *supra* note 22, at 24.

47. Pascal Lamy, US-EU: The Biggest Trading Elephants in the Jungle—But Will They Behave?, Address before the Economic Strategy Institute (June 7, 2001), http://www.econstrat.org/publications/plamy.htm (last visited Nov. 19, 2004). The International Competition Network (ICN) was created with essential support from the two jurisdictions. The International Competition Network, *History*, http://www.internationalcompetitionnetwork.org/history.html (n.d.) (last visited Nov. 27, 2004). Although contributions to projects are made from all members, none can match the expertise and resources of the European Commission, the Department of Justice, and the Federal Trade Commission. *Id.*

48. The ICN is project-driven. It will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure. The ICN will generate recommendations on best practices and it will be left to the individual antitrust agencies to decide whether and how to implement them. Where the ICN reaches consensus on recommendations arising from the projects, it will be left to the individual antitrust agencies to decide whether and how to implement the recommendation. International Competition Network, Memorandum on the Establishment and

states are simply not real participants in the discourse. Prior to the 1980s, when the Commission did not enforce the extraterritorial principle, there were no disputes. Blocking statutes[49] were a first echo of the inability to reciprocate extraterritorial effect. There was a conflict of interest, but there were no disputes like those that have arisen in the last decade, because only one jurisdiction was exercising the law of extraterritorial effect. The situation eventually resulted in the European Union's equivalent to the United States.[50]

Outcomes of merger investigations and their enforcement are reserved for the two powerful agents of group and individual interests, irrespective of the preferences of the others. Devuyst explains that "what really sets competition relations apart from trade policy is that the FTC, the Department of Justice, and the European Commission are all under a legal duty to act independently and on the basis of the law when assessing antitrust cases."[51] The decisions of the competition authorities are not made on the basis of a bargaining process, but according to law,[52] and according to "reason rather than force."[53] Law is an independent variable, and economic power is a fixed premise. Therefore, international antitrust issues are not subject to negotiation. Those who do not have the power to enforce law will not be able to protect their constituencies; rather, only the powerful ones will be able to do so.

Liberal theory holds that the outcome of state interactions is a function, at least in the first instance, not of relative power capabilities but of the configuration and intensity of state preferences.[54] Liberal theory assumes that the pattern of interdependent state preferences imposes a binding constraint on state behavior, and thus, each state seeks to realize its distinctive preferences under varying constraints imposed by the preferences of other states. "What states want is the primary determinant of what they do."[55] Thus, variation in ends not means matters most.[56] However, it sometimes is not just what states want and how much they want it, but also who makes the decision. The ultimate arbiters in competition cases are not presidents or prime ministers, but

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Operation of the International Competition Network, *at* http://www.internationalcompetition network.org/mou.pdf (last visited Nov. 22, 2004).

49. Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 644-45 (2001). Two years after *Alcoa*, the United States attempted to gather Canadian evidence in price fixing proceedings against U.S. and Canadian paper firms, which led to the adoption of blocking statutes designed to frustrate discovery by many U.S. trading partners. *See* Alcoa S.S. Co. Inc. v. M/V Nordic Regent, 645 F. 2d 147, 152 (2d Cir. 1980).

50. *See* Dodge, *supra* note 28, at 381 ("[S]ince the 1980s, the European Union has begun to apply its competition law extraterritorially in ways that mirror the United States.").

51. Devuyst, *supra* note 12, at 150-51.

52. For the Antitrust Division's independence from undue influence by other federal agencies, see Thomas E. Kauper, *Politics and the Justice Department: A View from the Trenches*, 9 J.L. & POL. 257, 258 (1993); *see also* Fox, *supra* note 21, at 18 (noting that a domestic antitrust agency is not always immune from statist pressures from above).

53. Slaughter, *A Global Community of Courts*, *supra* note 7, at 219.

54. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 728.

55. Moravcsik, *supra* note 32, at 521.

56. *Id.* at 522.

rather the courts.[57] Negotiations take place at the level of remedies,[58] but not at the level of adjustments of the outcomes of merger reviews, according to other policies pursued by states such as the United States and the European Union.

Liberal theory, on the other hand, applies to the strategic calculations of governments and national leaders.[59] It is based on an assumption more consistent with basic theories of bargaining and negotiation than the assumptions underlying realism, as the willingness of states to expend resources or make concessions is itself primarily a function of preferences rather than capabilities.[60] Bargaining, and thus liberal international relations theory, are therefore applicable to international antitrust insofar as it is admissible to say that agency and court decisions[61] in liberal states[62] in disputes between liberal or non-liberal states[63] are or can be influenced by national leaders. If they are

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57. *See* Devuyst, *supra* note 12, at 151 ("The regulatory cooperation dynamics based on law . . . is therefore what really characterizes antitrust cooperation in comparison with most other areas of transatlantic relations.").

58. *See, e.g., id.* at 144 (explaining how the deadlock in negotiations between Boeing and the European Commission was broken by Boeing through a last-minute concession).

59. Moravcsik, *supra* note 32, at 513, 520-23.

60. *Id.* at 523.

61. Antitrust decisions both in the European Union and in the United States enter the court system. In the European Union, they enter through the Court of First Instance and European Court of Justice (ECJ). *See* EC TREATY art. 225. In the United States antitrust decisions enter through a federal court to the U.S. Supreme Court. *See, e.g.*, MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER A GUIDE TO THE OPERATION OF UNITED STATES, EUROPEAN UNION, AND OTHER KEY COMPETITION LAWS IN THE GLOBAL ECONOMY 34-35 (2d ed. 2001). Devuyst explains that any Commission decision deviating from the principles of the ECJ is likely to be overturned. This leaves little margin for political bargaining. *See* Devuyst, *supra* note 12, at 150.

62. Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1910 (1992):

> Liberal states operate in a 'zone of law,' in which domestic courts regulate transnational relations under domestic law. Courts within this zone evaluate and apply the domestic law of foreign states in accordance with general pluralist principles of mutual respect and interest-balancing. Nonliberal states, by contrast, operate in a 'zone of politics,' in which domestic courts either play no role in the resolution of transnational disputes or allow themselves to be guided by the political branches.

Id. This is not to say that the courts of liberal states are not subject to a range of nonlegal influences, both political and personal. It is to claim, however, at least for the purposes of this hypothetical model, that the courts of liberal states operate in a sphere distinct from that of the political branches. The legislature may pass the laws, and the executive may decide when and to what extent to enforce them, but their actual interpretation and application in a particular case is for the courts alone.

63. For this distinction, see *id.* at 1960-61.

> [L]iberal internationalist model . . . predicts that the courts of liberal states will seek to safeguard their autonomy even at the cost of foregoing their normal adjudicatory function. They themselves can determine when the limits of that function, and by implication, the limits of law in the international realm, have been reached, and can voluntarily cede their place to the political branches.

not so influenced, liberal international relations theory cannot be applied to international antitrust.[64] If, on the other hand, the premise that courts are influenced by national leaders is adopted, Slaughter's model of a global community of independent courts[65] in which "participating judges see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavor that transcends national borders,"[66] where the "'end of justice,' the special province of judges,"[67] reigns supreme, rests on feeble grounds. If the middle ground is taken, that court decisions may sometimes be influenced by governments and sometimes not, both propositions are at best relative.

Disputes and disputes arising from litigation of underlying disputes[68] are therefore not "themselves inevitable byproducts of a globalizing economy."[69] Rather, they are determined by ground rules.[70] If law is an independent variable,[71] reality must to some extent be a dependent one. The concept of extraterritorial effect is not based on "lurking notions of power,"[72] but on the conflict of individual and group interests represented by states.[73] Yet law in action, and the distributive approach beginning with the group conflict and asking how it is affected by legal institutions,[74] show us that the end result of the extraterritorial effect is strikingly similar to that of the principle of territoriality, favoring the interests of individuals and groups from powerful

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Id. In cases involving nonliberal states, the tension between judicial autonomy and an inclination to allow the executive to dictate the result will continue.

64. Moravcsik, *supra* note 32, at 518.

> In the liberal conception of domestic politics, the state is not an actor but a representative institution constantly subject to capture and recapture, construction and reconstruction by coalitions of social actors. Representative institutions and practices constitute the critical 'transmission belt' by which the preferences and social power of individuals and groups are translated into state policy.

Id. Liberal international relations theory can therefore, if at all, be used for antitrust relations among "nonliberal" states, those whose executive and judiciary are not truly separated. That is, of course, when such a country acquires the ability to effectively enforce antitrust.

65. Slaughter, *A Global Community of Courts*, *supra* note 7, at 218-19.

66. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 738 ("[R]eliance on a foreign sovereign's claim of interest in a specific case may reflect nothing more than an individual litigant's ability to pressure the Foreign Office, a relatively costless benefit a government can provide to its citizens on a case by case basis.").

67. Slaughter, *A Global Community of Courts*, *supra* note 7, at 210.

68. *See* Franck, *supra* note 25.

69. Slaughter, *A Global Community of Courts*, *supra* note 7, at 218.

70. For the possibility of "revolutionary" changes in the distribution of income, wealth, power, and knowledge between social groups by changing ground rules, see KENNEDY, *supra* note 33, at 84-85, 107.

71. Independent from power in realist terms. *See infra* note 83. On the dependence between facts and norms, see *infra* Part III. B.

72. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 736.

73. *Id.* at 729-31.

74. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 66 (1997).

jurisdictions.[75] The "ground rules"[76] remain similar although they are premised on supposedly completely divergent theories of "the way the world works."[77] The principle of territoriality as opposed to the principle of extraterritoriality is therefore more closely tied to the notion of direct physical control than to that of physical power.[78]

Physical power is very much connected with economic power in the modern world,[79] and economic power is a key factor in the effectiveness of extraterritorial effect. This argument against extraterritoriality is therefore not based on Holmes' Austinian[80] objection that it infringes upon state sovereignty. It is rather based on the fact that the extraterritorial effect, which triggers duplication of decision-making and creates disputes when equally powerful interests collide,[81] otherwise works more or less invisibly in favor of interests from powerful jurisdictions. Inability to exercise extraterritorial effect is by no means one of the most pressing problems of the developing world. But this shows how the "inevitable" [82] ground rules are tilted in favor of the two established ones.

As Thomas Franck proclaims, "we are finally in a 'post-ontological era.'"[83] But he also emphasized the focus on how fair international law is.[84] Law is an independent variable in the international arena, but the key question becomes how this law plays out, and specifically in international antitrust, who has the power to enforce their ex post facto logical explanation of their

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75. *See also infra* Part II. C.

76. *See* KENNEDY, *supra* note 74, at 74.

77. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 719.

78. *Contra id.* at 736.

79. Calls for a permanent membership of Japan, Germany, and Italy in the Security Council of the United Nations, which is a realist structure (*see infra* note 353), are not a coincidence. *See, e.g.*, The Ministry of Foreign Affairs of Japan, Visit to Europe By Prime Minister Keizo Obuchi, *at* http://www.mofa.go.jp/region/europe/pmv9901/speech.html (January 18, 1999); *see also Four Nations Launch UN Seat Bid,* BBC NEWS, *at*, http://news.bbc.co.uk/1/hi/world/americas/3678736.stm (Sept. 22, 2004); *Germany Slams Italy over UN Plan*, BBC NEWS, *at* http://news.bbc.co.uk/1/hi/world/europe/3689796.stm (Sept. 25, 2004).

80. For John Austin's account of sovereignty, see generally, DENNIS LLOYD, THE IDEA OF LAW 177-78 (1991).

81. Tarullo, *supra* note 5, at 492 ("[T]he challenges in international enforcement tend to involve companies from countries that already have competition laws."). The European Union is powerful economically and, therefore, powerful in international trade and antitrust, but not militarily. *See, e.g.*, ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 19-42 (2003).

82. *Compare* Slaughter, *A Global Community of Courts, supra* note 7, at 218.

83. Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View, in* THE RELEVANCE OF INTERNATIONAL LAW 133, 142 (Karl W. Deutsch & Stanley Hoffmann eds., 1968); *see* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205 (1993).

84. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7-9 (1995).

decision.[85] The "legalization"[86] of international law therefore does not necessarily entail restraint of powerful governments and the interests they represent,[87] but, at least in antitrust, their protection.[88] It is therefore no wonder that Slaughter has argued that "many commentators denounced the renewed presumption of territoriality as a giant step backwards to a rigid and out-moded principle that would handicap U.S. law-enforcement efforts."[89]

B. Why are the Outcomes of Merger Proceedings Different?

The problem, which stems from the extraterritorial effect where parties (i.e., governments) involved in the dispute as a result of different enforcement[90] are on an equal footing, is that two or more decision-makers deciding on the same matter will often make different decisions in hard cases. When a foreign agency prohibits a transaction, or allows it only under imposition of heavy remedies, a dispute on enforcement occurs if the domestic agency clears the same transaction. Extraterritorial effect is therefore a constant potential cause for dispute. The goal of agencies in both jurisdictions is to protect consumers.[91] Why then are the outcomes of merger proceedings different?

As a result of the extraterritorial effect it is possible that decisions will be different if investigations are made into different markets with different market situations. A corporation might have a different position on different markets. Nonetheless, different market situations do not appear to have been the key problem in the two big merger cases.[92] Different enforcement and doctrinal approaches, though based on relatively similar legal norms,[93] were cited in addition to national bias[94] as the most important reasons for diverging opinions.

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85. *See infra* Part III. B.

86. *Compare* Slaughter, *supra* note 6.

87. According to liberal international relations theory, states are the agents of individual and group interests. This means that the law designed to achieve specific international outcomes does not have states as its subjects, but rather the individuals and groups that states are assumed to represent. *See* Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 729.

88. *Compare* Slaughter, *supra* note 6, at 210.

89. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 736.

90. *See* Franck, *supra* note 25, at 520.

91. *See, e.g.*, Francesco Guerrera & Andrew Hill, *US Official challenges Monti Claim*, FIN. TIMES, May 9, 2002, at 7 (reporting that both European Commissioner Mario Monti and U.S. Department of Justice Deputy Attorney General William Kolasky claim that the goal of competition policy is the protection of consumers).

92. *See* Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers, *Range Effects: The United States Perspective*, *at* http://www.usdoj.gov/atr/public/international/9550.pdf (last visited Oct. 4, 2004) [hereinafter Roundtable on Portfolio Effects].

93. *See generally* Thomas E. Kauper, *Merger Control in the United States and the European Union: Some Observations*, 74 ST. JOHN'S L. REV. 305, 312 (2000).

94. *See infra* Part III. A.

Standards of merger review are different in different jurisdictions.[95] Even within jurisdictions, it is not always clear which standard to use and how to use them.[96] The Canadian discussion on whether to adopt a "total surplus" or "consumer surplus" standard[97] or the fact that the FTC and the Department of Justice, which have long had concurrent authority, have not always agreed with each other[98] are most instructive in this respect. In light of the comments above regarding power and the ability of the powerful to enforce their decisions, Japan surprisingly does not exercise its extraterritorial effect.[99] This is because the principle of consumer welfare has not retained the same importance in its antitrust laws, which effectively means voluntary taxation of domestic consumers for subsidy purposes.[100]

The problem of different approaches is particularly troublesome in the area of merger review, where theories underlying decisions have shown a history of significant change,[101] making consensus on the correct theories even more difficult. As competition policy changes with new market conditions and new learning in economics, specifying binding antitrust rules with too much precision would be misguided.[102] Similarly, Janow suggests that although

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95. Fiebig divides the existing merger control regimes into three categories based on their substantive standard of review: "(1) regimes which prohibit the creation or strengthening of a dominant position (2) regimes which prohibit the substantial lessening of competition [or] (3) regimes which consider both the effect on competition and other policy concerns." *See* Fiebig, *supra* note 11, at 252-53.

96. Eleanor M. Fox, *U.S. and European Merger Policy—Fault Lines and Bridges Mergers That Create Incentives for Exclusionary Practices*, 10 GEO. MASON L. REV. 471, 475 (2002) (arguing that "[i]n a given hard case, different outcomes may follow from indeterminate economics or different orientations of American jurists").

97. *See* Commissioner of Competition v. Superior Propane Inc., [2003] 3 F.C. 529 (Can.), *available at* http://decisions.fct-cf.gc.ca/fct/2003/2003fca53.html (last visited October 4, 2004).

98. *See* Donald L. Flexner & Mark A. Racanelli, *Merger Control and State Aids Panel: State And Federal Antitrust Enforcement in the United States: Collision Or Harmony?*, 9 CONN. J. INT'L L. 501, 502 (1994).

99. A recently concluded agreement between the European Union and Japan may nonetheless indicate a move in a different direction. *See* Agreement Between the Government of Japan and the European Community Concerning Cooperation on Anticompetitive Activities, Sept. 10, 1994, http://europa.eu.int/comm/competition/international/bilateral/japan/inv_en.pdf (last visited October 4, 2004).

100. Diane P. Wood, *International Competition Policy in a Diverse World: Can One Size Fit All? In* 1991 FORDHAM CORP. L. INST., EC AND US COMPETITION LAW AND POLICY 71-85 (Barry E. Hawk ed. 1992), *reprinted in* JOHN H. JACKSON ET AL., INTERNATIONAL ECONOMIC RELATIONS 1128-29 (4th ed. 2002).

101. *Id.* at 1127 ("American antitrust has changed, and changed again, over its century of existence, in the way that it approaches business practices and the precise practices that it condemns."). For the changed U.S. attitude to the range effects theory, see Roundtable on Portfolio Effects, *supra* note 92.

102. Tarullo, *supra* note 5, at 478; *cf.* Morris R. Cohen, *The Process of Judicial Legislation*, 48 AM. L. REV. 161, 184-185 (1914) ("To make a detailed description of specific human actions forbidden or allowed and their consequences would be an endless and impossible task.").

cross-fertilization is constructive and important, it seems unlikely to ever be complete.[103]

Furthermore, abstract legal rules and economic analysis cannot be separated from political life and society. Even if standards are unified in all jurisdictions, there will be no "one right answer"[104] in each of them. Antitrust has always interacted with ideology.[105] Belief in the autonomy of the economic sphere is erroneous, as economic life is dependent on and conditioned by a framework that is moral, political, social, and legal.[106] In the quest for the universal, it should not be forgotten that a nation's values on resource allocation, social preferences, economic freedoms, and cultural matters have a critical role to play in shaping both its competition and its enforcement policies.[107]

Dworkin is the only one (beside the Langdellian formalists) to claim that there is "one right answer" to a legal dispute in "hard cases." Nevertheless, even his account of the "one right answer" rests on the premise of the right answer within a particular legal system. His dimension of "fit" assumes that one political theory is *pro tanto* a better justification in a modern, developed, and complex system. The second dimension—the dimension of political morality—supposes that if two justifications provide an equally good fit with the legal materials, one nevertheless provides a better justification than the other if it comes closer to capturing the people's rights within a complex and comprehensive legal system of a particular jurisdiction.[108] Though Slaughter conceded that "no one answer is the right one"[109] and many times emphasized that her model is rooted in the pluralism of multiple legal systems,[110] she largely ignores both the argument of fit and of political morality and argues that, as choice of law principles converge, the particular forum in which a dispute is heard will become increasingly irrelevant.[111] It follows that, regardless of the

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103. Janow, *supra* note 4, at 51.

104. RONALD DWORKIN, A MATTER OF PRINCIPLE 143-45 (1985).

105. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 10 (1993) (referring to antitrust as a subcategory of ideology, as a microcosm in which larger movements of our society are reflected, and perhaps, in some small but significant way, reinforced or generated).

106. *Compare* Wilhelm Röpke, *Economic Order and International Law, in* RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 209, 209-10 (Académie de Droit International ed., 1954).

107. Richard B. Bilder & Susan L. Karamanian, Recent Book on International Law: Book Reviews, 96 AM. J. INT'L L. 1012, 1015 (2002) (reviewing MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER: A GUIDE TO THE OPERATION OF THE UNITED STATES, EUROPEAN UNION, AND OTHER KEY COMPETITION LAWS IN THE GLOBAL ECONOMY (2001)). For a similar argument, see Wood, *supra* note 100 (arguing that one size may not fit all).

108. DWORKIN, *supra* note 104, at 143-145.

109. Slaughter, *A Global Community of Courts*, *supra* note 7, at 203.

110. *Id.* at 203, 217, 219.

111. *Id.* at 209.

extent to which laws are harmonized,[112] extraterritorial effect will create disputes arising from different enforcement in different jurisdictions.

Furthermore, American and E.U. procedural systems are different and a source of mistrust,[113] but even if they are completely harmonized the problem of different decision-making will not be alleviated. This is not to say that procedural harmonization, such as harmonization of the notification procedure, would not help the business community to cope with different procedural systems.[114] It merely means that neither harmonization of substance nor of process will help create the same outcomes in hard cases when decisions are taken against the background of a different legal system.

C. *What if all Countries Were to Adopt Antitrust Laws and Enforce Them Extraterritorially?*

The question arises whether all countries should be able to exercise extraterritorial effect. Tarullo argues that antitrust problems do not currently pose the kind of threat to world economic welfare that requires a response, so the approach to antitrust problems should be more incremental than dramatic.[115] But he also admits that they may increase as international economic transactions continue to increase relative to overall economic activity.[116] This may be true at the current time (although Tarullo's Article came before the *GE/Honeywell* dispute).

In order to enable small countries to exercise their extraterritorial effect, Dodge proposes reciprocal enforcement of antitrust judgments ensured by a Hague convention, so the assets available for enforcing any country's

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112. *Contra* Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 740 ("Over the long term . . . bringing the conflict to this kind of a head is likely to invite Executive intervention to reach an agreement harmonizing the laws in question or establishing mutually agreed principles for interpretation and application of those laws.").

113. In the United States, regulators must bring an action in federal court to have the transaction enjoined. The European Commission does not need to seek judicial approval to block a proposed transaction—it may do so directly. Jack Welch complained that in the European procedure, "the prosecutor is also the judge." Jack Welch, *The Prosecutor is Also the Judge*, TIME, Jul. 16, 2001, http://www.time.com/time/magazine/story/0,9171,1101010716-166688,00.html. Although the Commission's decisions can be challenged in the Court of First Instance and appealed to the ECJ, the petitioning parties may be reluctant to appeal given the time and cost involved and minimal likelihood of success. *See* Erin E. Holland, Note, *Using Merger Review to Cure Prior Conduct: The European Commission's GE/Honeywell Decision*, 103 COLUM. L. REV. 74, 78 (2003).

114. *See, e.g.*, Janow, *supra* note 4, at 48-50 (arguing that it would appear highly desirable to harmonize the essential rules on merger control procedures); Jürgen Basedow, *Conflict of Laws, Comparative Law and Civil Law: International Antitrust: From Extraterritorial Application to Harmonization*, 60 LA. L. REV. 1037, 1051 (2000) (arguing that "states should conclude a multilateral convention establishing some basic procedural duties of notification, information and consultation.").

115. Tarullo, *supra* note 5, at 479.

116. *Id.*

judgments would increase to include the defendant's assets in any country that is a party to the convention. With respect to both jurisdiction and enforcement, the size advantage and economic power of the United States and the European Union would be stripped away.[117] Dodge favors the spread of extraterritorial effect in the name of fairness,[118] but his proposal, combined with the fact that merger review deals with probabilities not certainties,[119] and that different decisions are bound to occur, would bring all governments and the interests they represent to the same level, and lead to the dispute-generating mechanism of the twenty-first century.

If everyone were empowered to exercise extraterritorial effect, there would be many more disputes.[120] As there would be more decision-makers judging the same transaction, the chances of someone exercising their veto right would increase significantly. A "'litigation' explosion" would render visible what was there all along.[121] With more and more developing countries drafting antitrust legislation, the problem of greater numbers of regulators will only increase. Prior to 1990, only twenty-eight countries had some form of antitrust or competition legislation. Today more than eighty countries[122] have such laws, and at least twenty more are in the process of drafting them.[123]

The proposal to allow all nations to exercise extraterritorial effect brings us to another contradiction. The question of whether forms of competition common in the developed world would benefit the developing world is beyond the scope of this Article, but it appears that many global policy-makers believe that a free market, coupled with antitrust law, benefits their development.[124] Not all scholars would agree,[125] although no one has disputed that developing

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117. Dodge, *supra* note 28, at 387-89.

118. *Id.* at 390.

119. *See* STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 2 (1993) ("The best experts can only assert probabilities or tendencies, not certainties. Whether courts should prohibit conduct as violative of the antitrust laws thus necessarily turns on a third value judgment, about the degree of certainty that should be required before an individual is prohibited from freely pursuing private goals.").

120. *Compare* Slaughter, *A Global Community of Courts*, *supra* note 7, at 218.

121. KENNEDY, *supra* note 33, at 91.

122. "Approximately 80 WTO Member countries, including some 50 developing and transition countries, have adopted competition laws . . . ." WTO, Trade and Competition Policy: Working group set up by Singapore Ministerial, *at* http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/16comp_e.htm (last visited Nov. 22, 2004).

123. *See* Barry A. Pupkin, *The Internationalization of Antitrust Law and the Increased Convergence of US and EU Antitrust Law* (Jan. 16, 2001), *at* http://www.ssd.com/files/tbl_s29Publications/FileUpload5689/8799/pupkin.pdf (last visited Nov. 22, 2004).

124. Communication from the European Community and its Member States, Working Group on the Interaction between Trade and Competition Policy, May 25 1999, WT/WGTCP/W/115 ("The discussions in the Group have shown that there is a general recognition that competition policy should be considered as a tool for development."); *see also* Shyam Khemani, *Competition Policy: An Engine for Growth*, GLOBAL COMP. REV. 20, 23 (1997).

125. For the opinion that forms of competition known by the developed countries are not perfect for the developing world, see, e.g., ALICE AMSDEN, THE RISE OF 'THE REST' –

countries require a strong international antitrust regime to protect them against foreign action.[126]

In Slaughter's interest analysis, developing countries must adopt antitrust laws in their national legislation, otherwise they would have no substantive interest in the case, and their laws would never be applied.[127] Furthermore, their forum may never be the most appropriate, even under the first step of Slaughter's test, which is met by determining whether the suit states a claim on which relief may be granted under their law.[128] This is logical, as their internal law could not be applied due to the lack of antitrust legislation. In the language of the classical interest analysis, by choosing their laws or forum, their competing policy would not be furthered[129] as they have no antitrust policy.

However, this would force them to pass antitrust laws and embrace neo-liberal economics only to protect them against foreign acts. If they are not enforcing antitrust internally, they lack an "interest" in the enforcement of antitrust in transnational relations. And the enforcement stakes can be high.[130] Similarly, should antitrust be incorporated into the WTO, as proposed by the European Union,[131] the only consequence may be the introduction of antitrust law to countries that do not need it. Even worse, it may hamper their development.[132] Thus, a WTO norm, or the above-mentioned interest analysis, might lead to undesired side-effects.

D. Positive Comity

Is positive comity a solution to disputes caused by the extraterritorial effect? Positive comity is based on the recognition that anticompetitive

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CHALLENGES TO THE WEST FROM LATE INDUSTRIALIZING ECONOMIES 140 (2001) (arguing that the "Latecomer" (successful countries of East Asia) forms of competition were different than the ones the West had known, and argues that in theory and practice, the nature of competition varied historically. Perfectly competitive markets may have made the North Atlantic rich, but they were fundamentally dysfunctional in "the rest" for most of the half century after World War II).

126. *See* Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property, Berkeley Program in Law & Economics, Working Paper Series.* Paper 36, 12-13 (Nov. 7, 2000), http://repositories.cdlib.org/blewp/36 (arguing that the developing countries would be in favor of a strong international antitrust regime).

127. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 742 ("The existence of national legislation is the best indicator of those interests.").

128. *Id.* at 737-39.

129. Bruce Posnak, *Choice Of Law—Interest Analysis: They Still Don't Get It*, 40 WAYNE L. REV. 1121, 1125 (1994); *see infra* Part II. D.

130. *See supra* Part II. A. *Compare* Slaughter, *A Global Community of Courts*, *supra* note 7, at 212 ("Contrary to appearances, however, adequate forum determinations do not depend on first world versus third world status. Determinations of outright bias or other corruption are relatively rare."). For questions of national bias, see *infra* Part III. A.

131. *See* Sir Leon Brittan, Vice-President of the European Commission, The Need for a Multilateral Framework of Competition Rules, Address Before the OECD Conference on Trade and Competition (June 30, 1999) (transcript on file with author).

132. *See* AMSDEN, *supra* note 125, at 140.

activities occurring within the territory of one party to the agreement may adversely affect the interests of another party.[133] It means that a party to an agreement invokes, upon request of another, its domestic competition law to remove anticompetitive practices that occur within its jurisdiction and that adversely affect another party's interests.[134] The desired end result is that only one forum decides, so the problem of increased numbers of decision-makers is alleviated.[135]

Positive comity does not yet apply to merger review. This is not because the concept itself could not be applied to mergers, but rather "because of the short statutory deadlines on both sides of the Atlantic."[136] The proposal for application of positive comity to mergers, which calls for increased cross-border cooperation among competition enforcement agencies in the area of merger review, includes: "The adoption of work-sharing arrangements among enforcement agencies, whereby in most cases remedial steps taken by the agency in the jurisdiction having the greatest interest in a particular merger will be deemed sufficient to satisfy competition problems in all jurisdictions having an interest in the transaction . . . ."[137] This stems from the mistaken belief of interest-balancing inherent in the concept of positive comity. Positive comity has invited both criticism[138] and praise.[139] However, positive comity, in its balancing of interests approach, is jurisprudentially false, and thus, a "paper rule"[140] in international antitrust without any real effect.

It is impossible to determine which jurisdiction has a greater interest in the outcome of the investigation under positive comity and Slaughter's liberal international relations test, which assesses the true configuration of state

133. *See* James F. Rill et al., *Case Study: The Amadeus Global Travel Distribution Case*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 195, 195 (Simon J. Evenett et al. eds., 2000).

134. European Communities – United States Agreement on the Application of Their Competition Law, Sept. 23, 1991, U.S.-EC, 30 U.S.T 1487, art V, 1497-98 [hereinafter Agreement on the Application of Competition Laws].

135. *See* Devuyst, *supra* note 12, at 136.

136. *See* Janow, *supra* note 4, at 33.

137. Edward M. Graham, *Economic Considerations in Merger Review*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 57, 76 (Simon J. Evenett et al. eds., 2000).

138. *See, e.g.*, Mitsuo Matsushita, *International Cooperation in the Enforcement of Competition Policy*, 1 WASH. U. GLOBAL STUD. L. REV. 463, 471 (2002) (arguing that positive comity "is out of the question" when competition policies of two countries are "entirely inconsistent with each other"); James R. Atwood, *Positive Comity–Is it a Positive Step?*, 1992 FORDHAM CORP. LAW INST. 79, 87-88 (Barry E. Hawk ed., 1993) (arguing that positive comity could only work where both governments involved already have a direct interest in prosecuting because the behavior in question directly affects them, in which case, cooperation is likely to occur anyway, and any desire to undertake an investigation on behalf of a foreign government risks a domestic backlash).

139. *See* Dodge, *supra* note 28, at 387 (noting that "the U.S. Department of Justice continues to trumpet positive comity as a success").

140. Llewellyn, *supra* note 9, at 1237.

interests—that is to say the actual interests of individuals and groups as represented by the state.[141] This becomes particularly clear if the enquiry is moved away from the classic billiard ball of the state,[142] and focuses from a liberal perspective on groups with an interest in the outcome of merger review or other investigation.

This test is problematic both politically and jurisprudentially. Though consumers are the ones who are supposed to be protected by antitrust laws,[143] the interest of jurisdictions in merger review extends far beyond them.[144] Which country's shareholders, workers, competitors, and consumers have the bigger interest? Will a Brussels or Washington law firm or office deal with the case? Whose desire to win the case (i.e., receive or not receive the merger clearance or have the outcome of the cartel investigation be an enormous fine or not) is greater? Who has the greater desire to keep, get, or lose their job at the outcome of the investigation?[145] All the consequences of a merger are difficult to predict, even to the merging parties themselves.[146] The precise economic repercussions of a merger on society are impossible to determine[147] irrespective of whether a particular constituency, including all consumers, competitors, and workers, emanates from one jurisdiction, or whether the workers, shareholders, voters, and management of the merging parties come from different jurisdictions. In either case an unquantifiable interest will be weighed. Furthermore, economic forces flow with great rapidity from one country to the next, and often-discussed concepts such as sovereignty and independence can mislead when applied to today's world economy.[148] One could not possibly distinguish whether consumers, competitors, and employees in the European

141. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 736-37.

142. Slaughter, *supra* note 6, at 34.

143. According to the Chicago School, "the exclusive goal of antitrust adjudication . . . is the maximization of consumer welfare." *See, e.g.*, BORK, *supra* note 105, at XI.

144. *Infra* notes 165-69 and accompanying text.

145. Jack Welch, for instance, wrote a book, JACK: WHAT I'VE LEARNED LEADING A GREAT COMPANY AND GREAT PEOPLE (2001), on his path to retirement. Can his – overly represented – interest in comparison to CEOs of much smaller corporations or small consumers who are, in most cases, blissfully unaware of the consequences of a merger, cartel investigation, etc., be weighed against the interest of these consumers or other CEOs and workers who, as a consequence of a prohibition, retained/lost their jobs? *Compare* Moravcsik, *supra* note 32, at 518 (arguing that every government represents some individuals and groups more fully than others).

146. *See* Linda Corman, *Left at the Altar (Failure of Some Merger Agreements)*, MAGAZINE FOR SENIOR OFFICIALS, June 1998 (explaining that many merger deals do not go through, sometimes despite the regulators' approval, as was the case in the failed BT/MCI merger, because previously unknown information appears or simply because of the unpredictable market).

147. KENNEDY, *supra* note 74, at 287-88 (arguing that efficiency does not "produce clear answers to the question what rules will maximize consumer welfare, let alone a dynamic theory of welfare over time").

148. JOHN H. JACKSON ET AL., INTERNATIONAL ECONOMIC RELATIONS 1 (4th ed. 2002).

Union or the United States had a bigger interest in the Boeing/MCD or GE/Honeywell mergers. Would the United States have a bigger interest than the European Union in a merger between British Airways and American Airlines?[149]

Currie's traditional conflict of laws interest analysis[150] differs from the proposed interest-balancing approach. The interest of the jurisdiction under positive comity and Slaughter's suggestion is the interest in the outcome of the merger review or other antitrust investigation. This makes the two tests completely different, and indeed the latter impossible. As Posnak writes, "an interested state" in a conflict of laws is one whose competing law policy would be furthered if that law were applied—nothing more and nothing less. "A state may have an 'interest' even if it has no interest in [the outcome of] the case . . . ."[151] Slaughter, however, in establishing jurisdiction,[152] presupposes the balancing of interests in the litigation's outcome or antitrust investigation. According to Slaughter, interest cannot be measured by contacts with territory per se.[153] From a liberal perspective, the real measure of "state" interest is the interest of whichever segment of society the state represents. The state's interest will vary to the extent that the individuals making up this segment are affected. It is therefore important to examine the actual interests of individuals and groups as represented by the state, as well as how far they extend.[154] These interests are the economic and political interests[155] of subgroups in a society, and are interests in the outcome of the case. They are, however, impossible to quantify or balance.

Furthermore, there are vast economic and, consequently, political stakes in merger review. A merger dispute between the European Union and the United States by definition cannot be smaller than the threshold that the European Union is imposing in order to invoke its competence.[156] As for the

149. Flag carriers are one of the most vivid examples of impossibility to balance interests. For more on the potential merger, see *Possible American Airlines–British Airways Merger*, http://www.americanbritishairways.com/newsroom/recentarticles/dji080301.htm (on file with author).

150. Posnak, *supra* note 129, at 1123-32.

151. *Id.* at 1125.

152. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 737.

153. *See id. See also* Slaughter, *A Global Community of Courts*, *supra* note 7, at 210.

154. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 736-39.

155. *Compare* Burley, *supra* note 62, at 1963 ("[J]udges respond . . . to individualized assessments of the particular economic or political interests at stake on the facts of a given case.").

156. The European Union's thresholds are higher than the ones in the Clayton Act. The European Commission does not hear a case unless a combined aggregate turnover of all the undertakings concerned is more than 5000 million Euros and the aggregate Community-wide turnover of at least two of the undertakings concerned is more than 250 million Euros, unless each of the undertakings concerned achieves more than two-thirds of its Community-wide turnover within one and the same Member State. *See* Council Regulation 139/2004, 2004 O.J.

Boeing/MCD merger, it has been estimated that between 1970 and the early 2020s, Airbus's entry will have reduced Boeing's profits by $100 billion.[157] Any Airbus profits will have been achieved at the considerable expense of the shareholders of the Boeing Corporation, and perhaps the taxpayers of the United States.[158] Additionally, in the European Union, the aircraft industry employs 500,000 people. It is an industry in expansion and its technology affects many other industries. This is of essential importance in an age in which many labor-intensive industries are moving to the Third World.[159] Thus, it is difficult to imagine that a competition authority would defer its decision to a regulator who has an unquantifiably "greater" interest in the outcome of the case. As there is no one right answer in hard cases, relinquishing the veto right[160] is even more problematic.

Moreover, as Slaughter argues, interests cannot be defined by what a state claims in the context of a particular case, as state institutions have little to lose by identifying their interest with that of the individual litigant. There is no consensus on giving decision-making powers even to an "impartial" international organization, let alone to a state protecting opposite, or at least divergent, interests.[161] Acquiescence regarding the fact that another jurisdiction has a bigger interest in the outcome would also mean a dangerous qualitative step towards the substantive outcome of cases. Indeed, an economic analysis and projection resembling that in the actual merger review would be necessary in order to determine what economic consequences a merger would have on consumers in a particular territory.

In *Amadeus Global Travel Distribution Case*,[162] a positive comity request was made precisely because both jurisdictions had an interest, but only the European Commission could effectively prosecute. Positive comity is thus useful only for enforcement purposes, where one of the jurisdictions is otherwise unable to prosecute anticompetitive behavior. For instance, if consumers will be negatively affected in one of the jurisdictions, and "anticompetitive activities at issue do not have a direct, substantial, and reasonably foreseeable impact on the requesting party's consumers,"[163] assuming the goal of antitrust is to protect consumers, the requesting party's agency will not be able to write a decision based on anticompetitive effects on

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(L 24) 1 [hereinafter European Merger Regulation]. The previous merger regulation from 1989 contained the same thresholds. *See* Council Regulation 4064/89, 1989 O.J. (L 395) 1. Member states' competition authorities are competent in cases below this threshold.

157. Damien Neven & Paul Seabright, *European Industrial Policy: The Airbus Case*, 10 ECON. POL'Y 313, 319 (1995).

158. *Id.* at 344.

159. *See* NICOLAS MOUSSIS, ACCESS TO EUROPEAN UNION 333 (1999).

160. Evenett et al., *supra* note 22, at 21.

161. *See, e.g,* Janow, *supra* note 4, at 51 ("Few national authorities (or legislative bodies) are willing to sign away authority to review a transaction if domestic competitive effects are implicated or local firms are potentially affected.").

162. *See, e.g.*, Rill et al., *supra* note 133, at 195-98.

163. Devuyst, *supra* note 12, at 136.

their territory.[164] This is why in *Amadeus*, one cannot talk about deferral, as the FTC did not have the power to enforce anything, and thus had nothing to defer nor any right of enforcement to relinquish.

Furthermore, there was no balancing of interests in regard to which jurisdiction had a bigger interest. American consumers had no direct interest, but the United States' jurisdiction still had an immeasurable interest in the outcome of the investigation. Otherwise, the FTC would not have made the request.[165] This further shows that the interest of the jurisdiction goes well beyond the interest of consumers, although antitrust authorities in the two major jurisdictions are always keen to assert that consumer protection is the sole goal of their competition policy.[166] It is therefore not surprising that the Agreement Between the Government of the United States of America and the European Communities Regarding the Application of Their Competition Laws states that a party may request initiation of enforcement activities if "its important interests" are adversely affected, and not if "the important interests of the consumers on its territory" are adversely affected.[167]

Moreover, as Duncan Kennedy explains, the outcome of adjudication, a particular rule definition, be it by an administrative agency or an appellate court, is important not only to individual litigants but is also an important "stake" to the opposing intelligentsia.[168] Similarly, this shows that the outcome of adjudication has wider repercussions in a society than the mere interests of individual litigants or corporations involved in alleged anticompetitive activity, although sometimes the direct stakes for the others are solely[169] ideological and do not have a direct economic consequence. In *Amadeus*, both jurisdictions

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164. As Fiebig realized, "it is much easier to identify which merger will not be of legitimate concern to national regulators than to identify which mergers will be of legitimate concern for national regulators" and should thus be prohibited. Fiebig, *supra* note 11, at 253. This effectively means that it is easy to recognize if there is no interest at all, but more difficult to recognize how big the interest is, if it is actually present.

165. Under Article V, the basic prerequisite for the agency to make a request is to have an important interest. Agreement on the Application of Competiton Laws, *supra* note 134, at 1497-98.

166. *See* Guerrera & Hill, *supra* note 91; *see also* Edward T. Swaine, *"Competition, Not Competitors," Nor Canards: Ways of Criticizing the Commission*, 23 U. PA. J. INT'L. ECON. L. 597, 604 (2002) (arguing that the United States' claim that the European Commission inappropriately concerns itself with competitors, not competition, is "perhaps the single most quoted aphorism in U.S. antitrust jurisprudence").

167. *See* Agreement on the Application of Competition Laws, *supra* note 134; *see also* Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, Preamble, U.S.-EC, 37 I.L.M. 1071 [hereinafter Agreement on Positive Comity Principles].

168. KENNEDY, *supra* note 74, at 43, 64, 67. Kennedy also argues that "[i]deological intelligentsias would be 'interested' in appellate adjudication even if judges made rules by tossing coins, for the simple reason that these coin tosses would dispose of significant stakes." *Id.* at 69.

169. The word "solely" is used in this sentence in the antitrust context, because in this field of law, as also in many others, ideological stakes are usually coupled with vast economic stakes.

and their respective governments had an interest. Which party to the agreement or dispute had a bigger interest could not be determined and was not even attempted.

Slaughter again defended the concept of interest analysis in establishing the most suitable forum.[170] Referring to *Spiliada Maritime Corp. v. Cansulex*,[171] and to a line of other cases, she argued that in establishing jurisdiction courts take into consideration the "interest of all the parties" as opposed to the "territorial theory of jurisdiction."[172] She claimed "there has been a distinct shift toward the recognition, on a case by case basis, of a 'natural' or 'most appropriate' forum among the courts of the world."[173] However, cases such as *Spiliada*[174] address the issue of forum non conveniens, where courts place importance on issues such as the availability of witnesses, legislation governing relevant transactions, and the place where the parties reside and carry on their business.[175] This enables the parties to more easily exercise their (procedural) rights. This is not because parties from one jurisdiction would have a bigger substantive interest in the outcome of the process, which was Slaughter's liberal international relations suggestion[176] and what the concept of positive comity presupposes. The latter concepts cannot develop on a case-by-case basis or any other basis.

In addition, forum non conveniens is not a solution to the problem caused by the extraterritorial effect, as a particular jurisdiction may use its extraterritorial effect despite the facts which are taken into consideration in the forum non conveniens approach. The core idea of the extraterritorial effect is to regulate activity outside domestic territory as it impacts on the enforcer's jurisdiction. Thus, the fact that it is more convenient for the parties to exercise their rights in a particular forum becomes completely irrelevant.

E. Is Cooperation Enough?

As has been seen, simple abstract policy convergence will not prevent different decisions.[177] Can cooperation on concrete cases achieve such a result?

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170. Slaughter, *A Global Community of Courts*, *supra* note 7, at 205-19.

171. Spiliada Maritime Corp. v. Cansulex Ltd., 1 A.C. 460, 476 (H.L. 1987).

172. Slaughter, *A Global Community of Courts*, *supra* note 7, at 209-10.

173. *Id.* at 210.

174. *Spiliada Maritime Corp.*, 1 A.C. at 476. The *Spiliada* case contains the slogan that a foreign forum may be more suitable "for the interests of all the parties and the ends of justice." *Id.*

175. *See, e.g.*, Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgment*, 37 TEX. INT'L L.J. 467, 471-74 (2002).

176. *See* Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 736-39.

177. *See supra* Part II. B. *See also* Charles A. James, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Reconciling Divergent Enforcement Policies: Where Do We Go From Here?, Address presented at the Fordham Corporate Law Institute 28th Annual Conference on International Law and Policy (October 25, 2001), *at* http://www.usdoj.gov/

"[I]nternational law is not a simple abstraction such as 'the law governing relations among states,' but is instead 'a set of particular human projects situated in time and place.'"[178] In line with this argument, it is not up to the agreements that will determine the outcome of the cooperation, but rather the actual concrete project of cooperation or dispute resolution.

Bilateral cooperation has been developed particularly in relations between the European Union and the United States,[179] which is not surprising, as they are the only ones who are truly involved in international antitrust discourse. Cooperation is of extreme importance for effective prosecution of international cartels, since much of the alleged conduct takes place outside domestic territory and much of the evidence is located beyond the domestic regulator's reach.[180] It is also extremely important in order to avoid both duplication of work and the reaching of divergent decisions.[181]

In the *Boeing/MCD* decision, the Commission stated that it complied with all the regulations of the Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws. Nevertheless, requirements of notification,[182] exchange of information[183] where the actions of one country's regulators may affect the other country's interests, cooperation, coordination in enforcement activities,[184] and consultation[185] were obviously not

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atr/public/speeches/9395.htm.

> The sometimes blurry line between antitrust enforcement and economic regulation leaves considerable room for interpretation in the formation of competition law doctrine, and in the exercise of appropriate prosecutorial discretion. Thus, jurisdictions with facially similar competition laws can have significantly divergent policies and reach different conclusions, depending upon how each agency interprets its mandate to protect competition. If these areas of divergence overtake our zone of commonality, multi- jurisdictional competition law enforcement can frustrate, not facilitate, free trade flows . . . .

Id. For a contrary opinion, see Tarullo, *supra* note 5, at 496 ("The regulatory-convergence approach holds the most promise for dealing with transnational anticompetitive conduct.").

178. Benedict Kingsbury, *Foreword: Is The Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 691 (1999).

179. *See, e.g.*, Joint EU-US action plan, http://www.eurunion.org/partner/actplan.htm (last visited Nov. 27, 2004) (laying foundations for bilateral and multilateral cooperation in competition policy); Agreement on the Application of Competition Laws, *supra* note 134; US-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations*, http://europa.eu.int/comm/competition/mergers/others/eu_us.pdf (n.d.) (last visited Nov. 27, 2004).

180. *See, e.g.*, Klein, *supra* note 19 (noting that in the GE/DeBeers case, where the Department of Justice filed criminal antitrust charges against a U.S. company, "much of the alleged conduct relating to the cartel took place in Europe, and much of the evidence was located overseas and, consequently, beyond the Justice Department's reach.").

181. *See* Devuyst, *supra* note 12, at 132.

182. *See* Agreement on the Application of Competition Laws, *supra* note 134, art. II, at 1493-95.

183. *Id.* art. III, at 1495-96.

184. *Id.* art. IV, at 1496-98.

185. *Id.* art. VII at 1500-01; *cf.* Guzman, *supra* note 5, at 1145:

enough to prevent the different decisions. A new 1999 Agreement, supplementing the previous one, emphasizes positive comity, and contains an important article on the deferral or suspension of investigations in reliance on enforcement activity by the requested party.[186] Arrangements on attendance in hearings and avoiding duplication of work were added. However, the *GE/Honeywell* dispute ensued only two years later. In this case, "the two antitrust agencies reached fundamentally different conclusions despite analyzing the identical product and geographic markets, hearing the same arguments from parties and third-parties, considering the same theories of competitive harm, and largely having access to the same set of facts."[187]

Conflicts are most likely to arise in cases where either agency can make the decision without having to cooperate with the other. Unlike in other antitrust cases,[188] merger review evidence is provided to the agency in the notification or a related document.[189] Although disagreements on enforcement can arise in cartel investigations, just as they do in merger review,[190] the drive to cooperate is stronger, because often the very precondition for enforcement in international cartel cases is cooperation. In addition, there is no veto right to block a transaction on another country's territory.

Although some scholars and officials argued that the *Boeing/MCD* dispute was an exception in generally cooperative transatlantic relations,[191] and therefore not in need of a solution or conflict-based approach,[192] the rhetoric changed significantly following the *GE/Honeywell* dispute. It has since been acknowledged that inconsistent decisions can follow a period of tremendous cooperation,[193] leading to the conclusion that cooperative efforts and good

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> [A]lthough . . . bilateral agreements play an important role in the enforcement of antitrust laws, it is important to note that they do not go beyond the sharing of information. None of the agreements represent a compromise of domestic control over enforcement or any other loss of sovereignty. . . . There is no coordination of substantive laws, no establishment of minimum standards, and no accounting for the impact of one state's substantive laws on other states.

186. *See* Agreement on Positive Comity Principles, *supra* note 167, art. IV, at 1073-1074.

187. Roundtable on Portfolio Effects, *supra* note 92, at 20.

188. *See, e.g.*, Tarullo, *supra* note 5, at 491.

189. *See, e.g.*, European Merger Regulation, *supra* note 156, art. 11.

190. *See, e.g.*, Fox, *supra* note 41, at 923 (noting that "Charles James, then an Assistant Attorney General in Charge of Antitrust, 'warned' Europe not to reprehend Microsoft for conduct allowed under U.S. law").

191. *See, e.g.*, Tarullo, *supra* note 5, at 482 ("One is tempted to conclude that, for now, the Boeing case is an exception to the rule of productive consultation.").

192. *See* Devuyst, *supra* note 12, at 142.

193. James, *supra* note 177.

> Our experience with the proposed General Electric/Honeywell merger demonstrates, however, that close cooperation and goodwill between antitrust agencies does not guarantee consistent results in individual cases. A good working relationship cannot overcome significant differences in views about the proper scope of antitrust law in national and world markets. The U.S. and EU agencies reached inconsistent decisions despite a tremendous amount of co-ordination over several months. In fact, I do not believe that we could have worked together more closely. Our staffs talked on the phone frequently and had

intentions are sometimes not enough.[194]

III. NATIONAL BIAS AND INTERNATIONAL INSTITUTIONAL ARRANGEMENTS

A. National Bias or Perhaps a Different Doctrinal Approach?

The question arises as to whether international law can deal with the problem of the polycentric world of decision-makers. If disagreement on enforcement cannot be solved by cooperation or positive comity, can it be solved ex post, after a decision is made?

Merger review is the most politically sensitive area of antitrust enforcement due to its immense impact on competitors, suppliers, customers, and local communities, and because it attracts wide publicity.[195] It is no wonder that the question of national bias was at the forefront of both major merger disputes. Politicians, the press, and scholars had very different views of the disputed decisions and actions taken by regulatory bodies on each side of the Atlantic. Are there solid grounds for the allegations of national bias? Is different decision-making a consequence of different doctrinal approaches?

Boeing/MCD was the first case that nearly resulted in a trade war. When the FTC cleared the merger, they issued an unprecedented statement that "the national champion argument does not explain today's decision."[196] Nevertheless, the press and politicians reacted fiercely to both decisions.[197] The

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> extensive meetings in Washington and Brussels; the EC staff had access to our economic expert; and we had extensive substantive discussions at the very highest policy levels about the evidence and the theories the two agencies were pursuing. The glaringly inconsistent decisions, then, were not the product of a failure of co-operation or a lack of effort by either agency to ascertain the other agency's point of view.

Id.

194. *Id.*

> Cooperative efforts and good intentions, however, are sometimes not enough . . . . This difference . . . demonstrates that close cooperation and goodwill between antitrust agencies do not guarantee consistent results in individual cases. It would be hard to imagine how we could have cooperated more closely. Rather, it is a simple, but rather fundamental, doctrinal disagreement over the economic purposes and scope of antitrust enforcement.

Id. But cf. Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 347 (2001) (arguing that regulatory agencies networking with their counterparts have created a web of fast, flexible, and effective relations); *accord* Kenneth W. Abbott, *Recent Book on International Law: Book Review: Transatlantic Governance in the Global Economy*, 98 AM. J. INT'L L. 220 (2004) (reviewing ANNE-MARIE SLAUGHTER, TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY (Mark A. Pollack & Gregory C. Shaffer eds., 2003)) (arguing that transgovernmental networks, "'the real new world order,' are normatively desirable because they are 'fast, flexible, and effective'").

195. *See* ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 353 (4th ed. 1994) (1976).

196. *In re Boeing*, *supra* note 3.

197. "As confirming proof of their fears of political intervention, Americans could recite pledges by top EU officials to protect Airbus at all costs from U.S. efforts to safeguard American aerospace firms." William E. Kovacic, *Transatlantic Turbulence: The Boeing–*

United States suspected that the European Union was seeking to protect the interests of Airbus Industries, while the European Union considered that the merger was favored by the United States because it would create a national champion.[198] Scholars were divided. Sykes and Guzman supported the theory of national bias,[199] while Kovacic and Fox argued that the difference between the decisions was primarily doctrinal. Fox maintained that, following precedent set by its earlier challenge to the Aérospatiale-Alenia/de Havilland merger,[200] the European Commission was motivated by concerns of possible future predatory action by Boeing.[201] Kovacic pointed out many adverse consequences on competition that were not taken into consideration by the FTC.[202] Nevertheless, he concluded that it was probably only the different doctrine that was causing the disputes.[203] A similar story repeated itself in the GE/Honeywell merger. Despite fierce criticism of bias,[204] Swaine did not

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McDonnell Douglas Merger and International Competition Policy, 68 ANTITRUST L.J. 805, 841 (2001). In contrast,

> European government leaders were sure to view the US antitrust process through a lens shaped by longstanding US government hostility toward Airbus. They could recall how President Bill Clinton had criticized his immediate predecessors for doing too little to help American producers subdue Airbus and had promised that the Clinton administration would do more.

Id. at 840. U.S. commentators were highly critical of the role Airbus, a European competitor of Boeing, played in the Commission proceedings, and the mutual recriminations were sharp and rancorous. Swaine, *supra* note 49, at 630. The competition between Boeing and Airbus was also a cause for dispute between the European Union and the United States before the GATT. In 1987 the United States accused the European Union of unfair government procurement. Further negotiations eased the tensions, but the dispute was never really settled. Steven Pearlstein & Anne Swardson, *US, Europe Clash Over Airline Deal*, WASH. POST, July 17, 1997, at A1.

198. Stevens, *supra* note 4, at 275.

199. Guzman, *supra* note 5, at 1152 ("It is only necessary to assume that governments and regulators favor their own constituents over foreigners, a reasonable assumption that is present in virtually any model of country behavior."). Sykes emphasizes that national antitrust policy decisions are not in fact made systematically on the basis of careful national welfare calculations. Yet there are enough examples of self-interested national policies and decisions, such as Federal Trade Commission approval of the Boeing/McDonnell Douglas merger, and the European Community challenge to it, to suggest that national policy-makers give more weight to domestic interests than to foreign interests. Alan O. Sykes, *Externalities in Open Economy Antitrust and Their Applications for International Competition Policy*, 23 HARV. J.L. & PUB. POL'Y. 89, 92-93 (1999).

200. Fox was criticizing the European approach in the case *Aérospatiale Alenia/de Havilland* on similar grounds. Eleanor M. Fox, *Merger Control in the EEC – Towards a European Merger Jurisprudence*, 1991 FORDHAM CORP. L. INST. 738-39 (Barry E. Hawk, ed. 1992).

201. Eleanor M. Fox, *Antitrust Regulation Across National Borders*, 16 BROOKINGS REV. 30, 30-32 (1998).

202. Kovacic, *supra* note 197, at 830-31.

203. *Id.* at 872-73.

204. *See, e.g.*, Stevens, *supra* note 4, at 276 ("President George W. Bush intervened to indicate his support for GE's acquisition of Honeywell, prompting an angry rebuke from Mario Monti that the investigation was 'a matter of law and economics, not politics.'"). Many critics in the United States, including the press, were openly criticizing the European Union - specifically the European Commissioner Mario Monti - as biased and protectionist. *See* Ariana

believe the European Commission was developing a new antitrust theory for application in this case, or that the theory was a result of a bias against American companies.[205]

Kauper believes that both the Antitrust Division and the Federal Trade Commission have functioned relatively free of interference or influence by other government agencies charged with elements of national economic or industrial policy. "[Due to the] potential influence . . . [of] . . . such external pressures on EC decision-making, . . . criticism of the Commission's approach to the Boeing-McDonnell Douglas case as trade policy oriented or more pejoratively, protectionist has at least the ring of plausibility."[206] But can national bias ever be proven?

B. Adjudication Versus Legislation

Can the problem of presumably discriminatory decisions be solved by a system of review by the WTO or by an independent world antitrust forum?[207] Fox's proposal suggested that a dispute resolution panel could determine, on the basis of the record and with deference to the national court, whether the national law was non-discriminatorily applied.[208] The solution to different decision-making would, in her opinion, be solved by a consensus on some cosmopolitan principles.[209] Two of these principles are: (1) Nations should apply their antitrust laws without discrimination based on nationality; and (2) Nations should not allow "national champion" interests to trump competition interests. They should neither enforce nor withhold enforcement in the interests of a national champion.[210]

Eunjung Cha, *Microsoft's Euro-Foe: EU's Antitrust Chief Hints He Will Continue Case*, WASH. POST, Nov. 15, 2001, at Financial, E01 ("[he is] trying to use his position to give European companies an advantage over American ones. . . . [H]e is more interested in protecting corporate rivals of companies he's investigating than he is in weighing the interests of consumers.").

205. Knowledge@Wharton, Wharton School of the University of Pennsylvania, *GE and Honeywell fail to tie the knot*, CNET News.com, *at* http://news.com.com/2009-1017-269583.html?legacy=cnet (last modified Jul. 8, 2001) (quoting Edward T. Swaine: "I don't agree with the EC on the substance of its decision, but I can't say I was terribly surprised.").

206. Kauper, *supra* note 93, at 319.

207. *See* Fox, *supra* note 5, at 1135, *reprinted in* JACKSON ET AL., *supra* note 148 (arguing that a free standing World Competition Forum should be created) [hereinafter Fox, *Competition Law Reprint*]. Recently, Fox seems to have shifted her position to favoring the WTO more; Fox, *supra* note 41.

208. Fox, *Competition Law Reprint, supra* note 207, at 1132-33; Fox, *supra* note 41, at 930. *See also* Communication from the European Community and Its Member States, WT/WGTCP/W/115 (May 25, 1999) (stating that one of the provisions of the WTO agreement would require the enforcement of competition legislation based on nondiscrimination and transparency).

209. Eleanor M. Fox, *Competition Law: Linking the World, in* TRANSATLANTIC REGULATORY COOPERATION 243, 250-52 (George A. Bermann et al. eds., 2000).

210. *Id.*

Non-discriminatory provisions are important and enforceable in WTO law, and are known as the "most favored nation"[211] or "national treatment" provisions.[212] However, "most favored nation" and "national treatment" apply to generally applicable laws, regulations and requirements, or measures, not to adjudication.[213] There are two possibilities of discrimination in legislation. If the language of the statute is discriminatory, discrimination can easily be grasped (A must be treated differently than B because he is A and has A features).[214] The second possibility is to test the consequences of legislation that is indiscriminate on its surface, or develop a measure of whether some people (or goods belonging to some people) are actually being treated differently to others.

The purpose of the national treatment and most favored nation provisions is, thus, to determine whether there is different treatment of domestic and foreign companies. It determines whether there is outright discrimination or a negative effect of the state on foreign producers in comparison to domestic producers, which usually means a reduction of imports as a result of the legislation.[215] These are the physical events which are "public," may in principle be observed by anyone, and can be "described with reference to any

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211. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art I., 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

212. *Id.* art. III.

213. The principle of national treatment is contained in the GATT, Article III (4), which requires national treatment in respect of all laws, regulations, and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of goods. It is also found in Article XVII of the General Agreement On Trade In Services, in respect of all measures affecting the supply of services. General Agreement On Trade In Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1B, art. XVII, 33 I.L.M. 1168 (1994) [hereinafter GATS]. The main provisions in which the principle of "most-favored nation" is found include Article I of the GATT, and Article II of the GATS, where the principle also applies to "measures."

214. This type of discrimination is not hidden in the "private;" it is obvious from the language. Examples of such discrimination in E.U. law include compulsory veterinary inspections on imported (i.e., non-Italian) goods (Case 87/75, Bresciani v. Amministrazione Italiana delle Finanze, 1976 E.C.R 129 (as to Article 25 of the EC Treaty)), having to pay for two roadworthiness tests if your car is bought abroad, (Case 50/85, Bernhard Schloh v. Auto Contrôle Technique, 1986 E.C.R. 1855, (1987) (In this case a violation of Article 28 of the EC Treaty was in question)). Examples from WTO law include a requirement that imported and domestic beef be sold in different stores (*Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161, 169 AB/R (Jan. 10, 2001)) and a law establishing a fund used to grant special credit terms for the purchase of domestic agricultural machinery (Italian Discrimination Against Imported Agricultural Machinery, L/833 – 7S/60, at 1 (October 23, 1958).

215. Examples from E.U. law include taxing wine much more heavily than beer by a country which produces a lot of beer and almost no wine, where the United Kingdom was found to be in breach of Article 90 of the EC Treaty (Case 170/78, Commission v. United Kingdom (1983) E.C.R 2265); taxing cars gradually up to a particular power rating, and imposing a high flat-rate for cars above this particular rate, by a country which does not produce cars above this power rating, where a breech of Article 90 of the EC Treaty was again the issue (Case 112/84, Humblot v. Directeur des Services Fiscaux (1985) E.C.R 1367).

convenient physical framework at any convenient level of description."[216] The will of the legislator thus transforms itself into an empirically verifiable matter. In legislation, all the consequences of legislation are not legitimate. Discrimination is not a legitimate result.

The goal of decision-making is to reach a decision. All the results of adjudication are legitimate, legal, and put to the decision-maker's disposal if they satisfy the lax standard of not being discretionary. The outcome of adjudication can be a verdict of guilty or not guilty, damages can be awarded or not awarded, a merger can be cleared or not cleared, a corporation may have to pay a fine as a result of anti-competitive behavior or it may not. Frank wrote that when a judge writes an explanation, she writes the apology for her decision. Although she phrases the decision in terms of formal law, she often arrives at her decision before she tries to explain it, and this is where the biases come into play. After the judge has so decided, she writes her "opinion." But, this explanation is often truncated, incomplete, frequently unreal, artificial, distorted, or in a large measure, an afterthought. It omits all mention of many factors that led the judge to decide the case. These opinions are ex post facto or censored expositions. In legal realist terms the decision is made according to will, not reason, whereas the explanation of the decision is made according to reason.[217] The discriminatory decision is, thus, in the will that cannot be penetrated; it remains in the sphere of the "private."[218] Only the aforementioned legitimate outcomes of adjudication are physical events, which are public in that they may be observed by anyone, although in a relative sense.

Discretion of adjudicatory bodies can, to some extent, be judged ex post facto. In American jurisprudence, the prevalent test is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."[219] In French jurisprudence, the prevalent test is "*détournement des pouvoirs*" or "abuse of right."[220] As an illustration, there has been a frequent problem in antidumping cases regarding how much deference a panel should give to the decision of a national antidumping authority that material injury to domestic industry was demonstrated by the presented facts.[221] The WTO Anti-dumping Agreement provides that in its assessments of the facts, the panel shall determine whether the national anti-dumping authority's evaluation of the facts

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216. DAVID HODGSON, THE MIND MATTERS: CONSCIOUSNESS AND CHOICE IN A QUANTUM WORLD 55 (Oxford University Press 1991).

217. Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645, 653 (1932); *see also* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEAS OF THE LEGAL PROFESSION 196 (1993).

218. HODGSON, *supra* note 216, at 54-55 (arguing that mental events are private to the subject involved and impenetrable even if a machine capable of 'decoding' patterns of a person's brain activity is invented).

219. 5 U.S.C.A. § 706(2)(D); *see also* JACKSON ET AL., *supra* note 148, at 113-14.

220. L. NEVILLE BROWN ET. AL., FRENCH ADMINISTRATIVE LAW 229 (Oxford University Press 4th ed. 1993).

221. JACKSON ET AL., *supra* note 148, at 289-90.

was unbiased and objective. If the evaluation was unbiased and proper, even though the panel might have reached a different conclusion, the evaluation will not be overturned.[222] All of these can be used only to prove the most egregious forms of discrimination. If the false motivation behind the decision cannot be discerned from the reasoned ex post facto explanation, the decision will be deemed correct.

It can thus be shown for example that only Japanese people are affected by the legislative act. However, it may be very difficult to prove that a particular Japanese person was convicted because he was Japanese,[223] or that a particular merger was blocked because two Japanese companies decided to merge, unless this is patently obvious from the reasoned decision. National bias and discrimination are hidden in the logical ex post facto explanation and are not able to be articulated. It could not be proven that the FTC or European Commission decisions in the *GE/Honeywell* and *Boeing/MCD* cases were arbitrary and capricious. Thus, a nondiscrimination standard, as proposed by Fox, cannot effectively grasp and alleviate the discriminatory application of laws. Given the legal realist description of decision-making, none of the above standards will solve the problem of different or biased decision-making in the WTO, or in any other international organization.

Furthermore, Fox's proposal provides for a reviewing body to examine only whether laws are non-discriminatorily applied, without resolving facts.[224] However, the distinction between norms and facts in this context may not prove to be useful. According to Frank, a judge needs to find the law and define the case to which she must apply it. These tasks require a number of controversial choices. She chooses the norm according to a prior decision regarding which facts she will use in decision-making, causing other facts of the case to be excluded in the process. She justifies the choice of the norm with the facts chosen. She then goes back from the norm to the facts and makes another choice, and so on.[225]

A valid analysis trying to review non-discriminatory application of laws to a particular set of facts could not ignore facts. The norm is chosen according to facts, and facts determine the meaning of the norm.[226] Given the difficulties

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222. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 17.6(ii), 1868 U.N.T.S. 201.

223. *Compare* Furman v. Georgia, 408 U.S. 238, 253 (1972) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black.") (5-4 decision, Douglas J., concurring). Similarly, the German Federal Constitutional Court's Schumman formula would also not be of help as it entails a thorough constitutional review. Nor can the formula grasp the one-time discriminatory attitude of the decision-maker as described above.

224. Fox, *Competition Law Reprint, supra* note 207, at 1133.

225. *See* Frank, *supra* note 217, at 653-656.

226. For the relativity of the separation of facts and norms, see UNGER, *supra* note 37 at 32.

> If there are no intelligible essences, there is no predetermined classification of the world . . . . In other words, a fact becomes what it is for us because of the way

of allocating decision-making authority between agencies and courts, and the complications this standard is causing even on the national level,[227] where the competence of the reviewing body is not problematic as to the question of supranationalism, this standard cannot provide a useful standard of review. In practice, it could not work without giving explicit law-making powers to the reviewing body.[228]

Moreover, this decision-making process is a fortiori even more problematic in the case of merger review. The facts a decision-maker applies to the norm are not past events, but rather products of a theory of future behavior the decision-maker chooses to use, and these facts are uncertain events. Merger review deals with probabilities, not certainties,[229] which makes it even more susceptible to discretion, and thus to political and national bias.

The claim of national bias cannot be articulated, whether it is a product of state pressure,[230] or the unconscious.[231] Therefore, challenging court decisions on the grounds of bias is next to impossible. A reasoned decision cannot be crushed. Falk argues that the presentation of why one decides a case the way one does is premised on the professional code of discourse that deliberately tries to disguise that bias in the context of justification. Thus, one is up against a kind of impediment that can never really be addressed.[232] Therefore, any standards of review are appropriate for evaluating the bias of regulatory bodies or courts, and will not be able to deal with the problem of discriminatory decisions.

> we categorize it. How we classify it depends on the categories available to us in the language we speak, or in the theory we use, and on our ability to replenish the fund of categories on our disposal.

Id.

227. *See, e.g.*, ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 449-60 (2d ed. 2001).

228. *See infra* Part III. E.

229. *See* ROSS, *supra* note 119.

230. Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 738 ("[R]eliance on a foreign sovereign's claim of interest in a specific case may reflect nothing more than an individual litigant's ability to pressure the Foreign Office, a relatively costless benefit a government can provide to its citizens on a case by case basis.").

231. Holmes, *supra* note 8, at 465-66 ("The language of decision-making is mainly the language of logic . . . . Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.").

232. *See* Richard Falk, *The Independence and Impartiality of International Judges*, 83 AM. SOC'Y INT'L L. PROC. 508, 517 (1989); *see also* FRIEDRICH NIETZSCHE, THE WILL TO POWER, 151 (Walter Kaufmann & R. J. Hollingdale trans., Vintage Books 2d. ed.1968) (1901).

> The necessity of false values. – One can refute a judgment by proving its conditionality: the need to retain it is not thereby removed. False values cannot be eradicated by reasons any more than astigmatism in the eyes of an invalid. One must grasp the need for their existence: they are a consequence of causes which have nothing to do with reasons.

Id.

C. *Economic and Efficiency Approach – Can National Bias be Alleviated?*

Fox argues that politics should be left out of antitrust and that the efficiency standard alone should be taken into account.[233] However, economic analysis is prone to ideology and bias just as well. According to Duncan Kennedy, efficiency is not an apolitical, distributively-neutral criterion, or one in which there is no place for political decision-making.[234] An older stance is that efficiencies are very difficult to prove.[235] Today, the whole efficiency analysis is built on likelihood in the same way as the rest of the merger review.[236] Lande and Langenfeld maintain that since merger analysis has moved from reliance on surrogates towards unilateral anticompetitive effects, the application of econometric analysis of market data, and game-theory based simulation programs, there "does not appear to be an ideological bias involved in the government's new methodology."[237] Nevertheless, as they show, there are problems with obtaining necessary data in a form that is of sufficient quality. Furthermore, how economic theories are applied to a particular set of facts is crucial.[238] For example, consider how the borderline between the efficiency "offense" and efficiency "defense" is drawn, or what evidence is needed to support a particular case for buyer power.[239] The outcome depends on which economic theories you use and, essentially, which evidence is given more weight.

Predictions on the future are a key and inherent part of merger review,[240] thus the scope for manipulation is non-negligible. One can ex post facto justify a decision in one way or the other. There is no neutral economic baseline to replace an impossible neutral legal baseline.[241] Economic or "un-ideological"

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233. Eleanor M. Fox, *Lessons From Boeing: A Modest Proposal to Keep Politics Out of Antitrust*, ANTITRUST REP., Nov. 1997, at 19.

234. KENNEDY, *supra* note 74, at 288.

235. *See, e.g.*, David T. Scheffman, *Merger Policy And Enforcement At The Federal Trade Commission: The Economist's View*, 54 ANTITRUST L.J. 1, 117, 120 (1985).

> Efficiencies have been the most difficult thing to get really convincing evidence on, because you are dealing there with a very speculative thing: What will happen after the merger? . . . [I]n GM-Toyota we spent a great deal of time on analyzing the potential for efficiencies. It is a very difficult issue to get at . . . .

Id.

236. *See* ROSS, *supra* note 119.

237. Robert H. Lande & James Langenfeld, *From The Surrogates To Stories: The Evolution of Federal Merger Policy*, 11 ANTITRUST 5, 7 (1997).

238. *See, e.g.*, INTERNATIONAL CHAMBER OF COMMERCE, COMMISSION ON COMPETITION, COMMENTS ON EUROPEAN COMMISSION DRAFT NOTICE ON THE APPRAISAL OF HORIZONTAL MERGERS, http://www.iccwbo.org/home/statements_rules/statements/2003/ec_draft_horizontal_mergers.asp (Apr. 30, 2003).

239. *See, e.g.*, Press Release, Europa, Commission Adopts Comprehensive Reform of EU Merger Control (Dec. 11, 2002), http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/1856|0|RAPID&lg=EN (last visited Nov. 19, 2004).

240. *See* Fiebig, *supra* note 11, at 237 ("Merger control laws are generally preventative in nature, i.e. they seek to prevent a structural restraint of competition prior to its occurrence.").

241. KENNEDY, *supra* note 74, at 288.

assumptions will, therefore, in no circumstance, overcome the problem of national bias.

D. A Lesson From International Commercial Arbitration

As has been discussed, foreign parties do not trust domestic courts. They sometimes fear that the courts of the other contracting party's state will favor its own nationals or be subservient to national interests.[242] A survey conducted among international commercial arbitration specialists on the relevance of specific factors in decisions to use this dispute resolution method revealed that neutrality/impartiality is the most relevant reason, followed by the existence of treaties, ensuring enforcement of the award.[243] "Two values are central to the decision-making process: impartiality (neutrality) and balance (equal procedural chances offered to both sides),"[244] both of which can be offered by arbitration as opposed to domestic courts. The results of the survey may be explained by distrust of "the others:" "When different outcomes occur within the U.S. system, this phenomenon is not regarded as illegitimate; it is a fact of life in an open and evolving system. But when a foreign enforcer stops a merger of U.S.-based firms, there are cries of illegitimacy."[245]

Jung offers a psychological explanation. He claims that human iniquity stems from the great universal misperception that people are merely what their consciousness knows of themselves. This is why they regard themselves as harmless. They do not deny that terrible things have happened and still go on happening, but believe that it is always "the others" who do them.[246] Nevertheless, a factor of national bias in decision-making cannot be excluded. It is not necessarily a consequence of an external pressure by interest groups, but that the world is judged according to how individuals perceive themselves, based on their (collective)[247] identity.[248] The judge therefore loses her role as

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242. *See, e.g.*, W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 2-3 (1995) ("Parties seek to avoid these forums for fear that they will be at a disadvantage due to unfamiliarity with the jurisdiction's language and procedures, preferences of the judge, and possibly even national bias.").

243. *See* TIBOR VÁRADY, JOHN J. BARCELÓ III & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION 395, 396 (1999) (stating that seventy-two percent said that the former and sixty-four percent that the latter reason is highly relevant).

244. *Id.* at 26.

245. Fox, *supra* note 96, at 476; *see also* Tarullo, *supra* note 5, at 497 ("Even a good-faith, consistent application of existing doctrine to a particular transaction or practice of foreign companies might be perceived by the foreign country as hostile, no matter what its own competition enforcers may explain about the other country's law.").

246. CARL GUSTAV JUNG, THE UNDISCOVERED SELF 67 (2002).

247. Smith claims that nations—and national identity—are formed on a definite historic territory, a common economy, with territorial mobility throughout, a shared public, mass education-based culture, and common legal rights and duties for all members. Anthony D. Smith, *The Formation of National Identity*, *in* IDENTITY 129, 135 (Henry Harris ed., 1995).

248. *See* JONATHAN GLOVER, THE PHILOSOPHY AND PSYCHOLOGY OF PERSONAL IDENTITY

an impartial observer in a process and can identify herself with one of the parties. "The struggle between independence and partiality is particularly evident among judges in international tribunals" and "affects members of most non-plenary treaty organs."[249]

In the International Court of Justice (ICJ), for example, an empirical study reveals that judges of the ICJ, whose country is a litigant, vote more frequently in their country's favor.[250] For these reasons, international commercial arbitration is flourishing in disputes between individuals of liberal states,[251] where courts are, as Slaughter claims, supposed to be impartial.[252] Concerns of national bias arise in countries where the judiciary is relatively independent.

Many dispute-resolution systems[253] have acknowledged the problem of national bias and the futility of detecting it. These systems attempt to avoid bias by employing a special composition of international bodies. The implementation of these bodies is the closest countries have come to eliminating the problem of national bias.

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154 (1988) (suggesting that there are "links between our outlook and our conception of ourselves").

249. William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study Of Equitable Distribution*, 39 COLUM. J. TRANSNAT'L L. 299, 344 (2001).

250. *See* John P. Gaffney, *Due Process In The World Trade Organization: The Need For Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173, 1201-02 (1999); *see also* Edith Brown Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 123, 126 (Lori Fisler Damrosch ed., 1987).

251. *See, e.g.*, Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 TEX. INT'L L.J. 43, 87 (2002) (noting that "more and more multinational businesses turn to arbitration to resolve commercial disputes").

252. For Slaughter's divergent opinion on international commercial arbitration see Slaughter, *A Global Community of Courts*, *supra* note 7, at 204.

> Such battles have long been the subject of private international law, and have also fueled the growth of international commercial arbitration. Today, however, the question facing judges around the world, in the words of Judge, now Justice, Breyer, is how to 'help the world's legal systems work together, in harmony, rather than at cross purposes.'

Id. *Compare* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1112 (2000).

> Such battles have long been the stuff of private international law; they have also fueled the growth of international commercial arbitration. . . . What is new is the rise of a distinct and meaningful concept of 'judicial comity,' deference not to foreign law or foreign national interests, but specifically to foreign courts.

Id.

253. Including the International Court of Justice, where, ironically, it is a judge's partiality to his or her personal, intellectual, and legal development that brings legitimacy to the tribunal. *See* THOMAS M. FRANCK, THE STRUCTURE OF IMPARTIALITY: EXAMINING THE RIDDLE OF ONE LAW IN A FRAGMENTED WORLD 289 (1968). *See, e.g.*, Lucille M. Ponte & Erika M. Brown, *Resolving Information Technology Disputes After NAFTA: A Practical Comparison of Domestic and International Arbitration*, 7 TUL. J. INT'L & COMP. L. 43, 59 (1999) (explaining that in NAFTA, for instance, in the selection of arbitrators, the "parties may decide to select

E. Unification Within an International Organization

If the problem of different decisions cannot be effectively solved by nondiscrimination clauses, cooperation, or positive comity, can a national authority's decision be struck out at the level of international law on the grounds that its interpretation of international agreements was impermissible,[254] or that it failed to properly enforce them?[255]

The Sherman and Clayton Act, as well as Articles 81 and 82 of the Treaty of Rome, have always been models for an indeterminate legal norm,[256] the fleshing out of this skeleton being left to the federal courts[257] or administrative agencies. Competition policy depends on experienced enforcers and judges who apply general statutes appropriately in complicated and differing market circumstances.[258] It developed to a large extent through court activism.[259] The crucial role of the decision-maker, and the legal system in which he or she is operating, can also be seen in the institution of quantitative restrictions and measures with equivalent effect, as this is an institution of both the European Union and WTO law. This jurisprudence clearly shows the difference between a supranational and international organization.

The Treaty Establishing the European Community (EC Treaty) and the General Agreement on Tariffs and Trade (GATT) share similar provisions and fundamental features.[260] Pierre Pescatore notes that "the draftsmen of the EEC Treaty have summarized with continental succinctness what the GATT expresses with Anglo-Saxon discursiveness."[261] Indeed, the wording of the prohibition of quantitative restrictions and measures having equivalent effect is very similar. Compare Article 28 of the EC Treaty with Article XI.1 of GATT:

> Article 28. of the EC Treaty:
>
> Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.
>
> Article XI.1 GATT:
>
> No prohibitions or restrictions other than duties, taxes or other

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arbitrators that equally reflect the backgrounds of each of the participants or choose arbitrators from other unrelated countries").

254. *Compare supra* note 222 and accompanying text.

255. Tarullo, *supra* note 5, at 492.

256. *See* Kauper, *supra* note 93, at 310. For Article 81 of the EC Treaty see generally PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW, TEXT, CASES & MATERIALS 938, 962 (Oxford University Press 3d ed. 2003).

257. Kauper, *supra* note 93, at 310.

258. Tarullo, supra note 5, at 490.

259. *See generally* BORK, *supra* note 105, at 72-89.

260. PIERRE PESCATORE, INTRODUCTION TO THE EUROPEAN COMMUNITY AND GATT XV-XVII (Meinhard Hilf et al. eds., 1986).

261. *Id.* at XV.

> charges, whether made effective through quotas, import or export licenses or other measures, shell be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . . .

The language of the exceptions in Article 30 of the EC Treaty, and of Article XX of the GATT, is even more similar.[262] Law in action, however, is in many important respects quite different. Article 28 of the EC Treaty has been interpreted very broadly by the European Court of Justice (ECJ). In the *Dassonville* case, the Court held that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" are forbidden.[263] Interpretation of Article XI of the GATT is also quite broad,[264] but not as broad as the *Dassonville* decision. The dispute settlement body has ruled that legislation requiring a competent body to act in violation of the GATT violates the Agreement, even though there has been no opportunity to implement such a requirement. On the other hand, however, legislation merely giving authorities the power to act in violation of the GATT is, unlike following *Dassonville* in E.U. law, in itself not inconsistent with the General Agreement.[265]

In decisions such as the famous *Cassis de Dijon* case,[266] the ECJ has tremendously developed E.U. law. Elimination of discriminatory barriers to trade, which was also to some extent achieved by the WTO, is a necessary condition for a common market, but it is not sufficient. There are many rules

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262. *See* EC TREATY; GATT, *supra* note 211.

263. Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837.

264. *See, e.g.*, Japan – Trade in Semi-Conductors, L/6309 – 35S/116 (May 4, 1988) (stating that Article XI:1, unlike other provisions of the General Agreement, does not refer to laws or regulations but more broadly to measures, which indicates clearly that any measure instituted or maintained by a contracting party that restricts the exportation or sale for export of products is covered by this provision, irrespective of the legal status of the measure).

265. *See* GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594, 33-34 (1991) (not adopted), *available at* http://www.worldtradelaw.net/reports/gattpanels/tunadolphinI.pdf (Sept. 3, 1991). The American statute authorized the competent body to extend the prohibition of importation of tuna to other products. The question raised was whether mere authorization of the statute to act inconsistently with Article XI of GATT constituted, in itself, a measure in conflict with the GATT. *See id.* Although not overruling this decision, the decision on Section 301 of the U.S. Trade Act of 1974, as to Article XXIII of GATT, clearly shows a different trend. Panel Report, Section 301: United States – Sections 301-310 of the Trade Act of 1974 WT/DS152/R (Dec. 22, 1999) (adopted Jan. 27, 2000), *available at* http://www.sice.oas.org/DISPUTE/wto/tract01e.asp [hereinafter WTO Decision on the U.S. Trade Act]. "In treaties which concern only the relations between states, state responsibility is incurred only when an actual violation takes place. By contrast, in a treaty the benefits of which depend in part on the activity of individual operators [sic] the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable 'chilling effect' on the economic activities of individuals." *Id.* at para. 7.81; *see* Trade Act, Pub. L. No. 93-618, §§ 301-10 (1974) (codified at 19 U.S.C. §§ 2411-2420).

266. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 1979 E.C.R. 649.

that, on their face, do not discriminate between products from different countries, but can nonetheless be an obstacle to the free movement of goods.[267] In *Cassis de Dijon*, the ECJ ruled that if a particular good can legally be sold in one member state, it can also be sold in other member states, unless a mandatory requirement can be invoked.[268] WTO dispute settlement bodies were unable to achieve such a far-reaching result.

Ensuing "post-*Cassis*"[269] cases of the ECJ, and cases such as *Cinétheque*, *Torfaen*, and *Keck*[270] are therefore also unthinkable in the WTO system. Competition policy, which Wesseling describes as positive integration, developed simultaneously with negative integration,[271] and not in isolation from other developments in E.U. law. It was informed by developments taking place in related legal, political, and economic community fields.[272] The developing common market required a common regulatory policy.[273] Negative integration (free trade) and positive integration (antitrust regulation) therefore go hand-in-hand, and the latter cannot overcome the former. In other words, discourse on international integration of competition policy cannot go much further than discourse on free trade.[274] WTO jurisprudence on quantitative restrictions shows the limits in comparison with the jurisprudence of the ECJ.

The WTO is an organization of public international law, a specialized agency of the United Nations under Article 57 of the Charter of the United

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267. CRAIG & DE BÚRCA, *supra* note 256, at 636.

268. *See id.* at 638.

269. *Id.* at 639-40.

270. Case 61/84, Cinétheque v. Fédération Nationale des Cinémas Français, 1985 E.C.R. 2605; Case 145/88, Torfaen v. B&Q 1989 E.C.R. 3851; Case 268/91, Criminal Proceedings against Keck and Mithouard 1993 E.C.R. I-6097. All three cases deal with limits to the Cassis jurisprudence regarding the selling arrangements, and conditions on which all goods were sold. *See generally* CRAIG & DE BÚRCA, *supra* note 256, at 641-58.

271. Wesseling defines positive integration as the "positive" regulatory rules of the market, such as antitrust, as opposed to the negative integration, which refers to measures which advance market integration by eliminating barriers and promote free flow of goods, services, capital and labor. REIN WESSELING, THE MODERNIZATION OF EC ANTITRUST LAW 59-60 (2000).

272. *Id.* at 51.

273. Both are dynamically connected—common market requires competition policy and one of the goals of EC competition law is the creation of a single market. *See* CRAIG & DE BÚRCA, *supra* note 256, at 936-37; Lee McGowan & Stephen Wilks, *The First Supranational Policy in the European Union: Competition Policy*, 28 EUR. J. POL. RES. 141, 141 (1995) (arguing that competition policy has not constituted an end in itself, but rather the central means towards the fundamental goals laid down in the Rome Treaty: the establishment of the internal market, the approximation of economic policy, the promotion of harmonious development between the member states, economic expansion, and a higher standard of living for consumers).

274. This is not to say that some regulatory cooperation should not be present in areas such as environment, irrespective of whether there is any free trade cooperation. It is to say, however, that an institution which does not have as much power on negative integration as the ECJ or the European Commission will also not be as powerful with regard to positive integration. The distinction between positive and negative integration itself is artificial. *Compare* WESSELING, *supra* note 271, at 32. The distinction could also be challenged on the legal realist rejection of the difference between rules of intervention and non-intervention. *Compare* KENNEDY, *supra* note 34 and accompanying text.

Nations.[275] It is not a supranational organization such as the European Union,[276] which allows the ECJ, as "chief architect"[277] of E.U. law, far greater leeway in deciding cases, and determining the rights and obligations of states. The ECJ may also decide on the rights and obligations of individuals. This is probably one of the reasons behind the Understanding of the Rules and Procedures Governing the Settlement of Disputes provision. This provision states that members recognize that the WTO dispute settlement system serves the rights and obligations of members under the covered agreements and clarifies the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

"Recommendations and rulings of the Dispute Settlement Body (DSB) cannot add to or diminish the rights and obligations provided for in the covered agreements."[278] This rule is questionable under all jurisprudential rules, with the exception of Langdellian formalists or Montesquieu's description of judges, as the mouth that pronounces the words of the law.[279] Duncan Kennedy distinguishes between five leading theories of adjudication typologies: Hart's (deduction + judicial legislation); Unger's (judicial legislation); Raz's (deduction + limiting rules + judicial legislation); MacCormick's (deduction + coherence + judicial legislation); Dworkin's (deduction + coherence + personal political theory); and Civilians' (deduction + coherence).[280] None of these would argue that in "hard cases" a decision-maker does not add to or diminish the rights and obligations provided for in the statute or agreement.[281]

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275. U.N. CHARTER art. 57.

276. *See, e.g.*, Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 287-88 (1997).

> The term 'supranational' . . . is typically used to identify a particular type of international organization that is empowered to exercise directly some of the functions otherwise reserved to states. The distinguishing feature . . . is the greater transfer of or limitation on state sovereignty involved in the establishment of a supranational organization. . . . More precise definitions of supranational organizations emphasize their ability to penetrate the surface of the state.

Id.

277. HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICY MAKING 3 (1986).

278. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf. [hereinafter Understanding on Dispute Settlement].

279. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, bk XI, ch 6 at 163 (Anne M. Cohler et al. eds. & trans., Cambridge University Press 1989) (1748).

280. KENNEDY, *supra* note 74, at 37.

281. Dworkin, for example, argues that the judge discovers rights and does not invent new rights retrospectively. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-100 (1977). This, however, does not mean the judge discovers the rights which are explicitly provided in the statute.

In WTO law, the rights of non-parties to make amicus submissions,[282] that a member state is limited in prescribing environmental standards for the goods sold on its territory[283] or that a member state bears responsibility for acts of all departments of government, including its judiciary,[284] are just some of the examples of rights and obligations definitely not provided for in the covered agreements. It is difficult to determine the exact impact of this norm on constraining dispute settlement bodies. Though its goal could not possibly be achieved in full, this norm may have contributed to the more restraining system and nature of WTO law, which makes the argument of fit[285] quite different from the one in E.U. law.

This analysis shows that the same norm works differently in different institutions and legal systems.[286] Two conclusions can therefore be drawn. First, paper rules in international organizations should not be created if they are not able to achieve the desired result. Second, if a norm works differently in different adjudicatory institutions,[287] which all add to or diminish rights and obligations at least in "hard cases," then at minimum adjudicatory institutions do have an independent impact.[288] International law is thus by no means epiphenomenal. In the above categorization[289] (which leaves out formalists), any addition to deduction proves that any international adjudicatory body has an independent impact, at least in hard cases.

A further emanation of the public international law nature of the WTO is its lax standards of review. WTO law would not be able to unify different (doctrinal) approaches. The WTO Antidumping Agreement provides that where the panel finds that a relevant provision of the Agreement admits more than one permissible interpretation, it shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of these permissible interpretations.[290] This is similar to Article 11 of the Dispute Settlement Understanding,[291] not a total deference to the findings of the national

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282. *See* GATT Secretariat, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW (Nov. 21, 2001) [hereinafter *U.S. Shrimp Products*]. *See also* JACKSON ET AL., *supra* note 148, at 316-17.

283. *See generally U.S. Shrimp Products*, *supra* note 282.

284. *Id.* at para. 173.

285. DWORKIN, *supra* note 104.

286. *Compare* Tarullo, *supra* note 5, at 486. Thus, it is essential which organization, or forum, makes the decision. *Contra* Slaughter, *A Global Community of Courts*, *supra* note 7, at 209 ("As choice of law principles converge, the particular forum in which a dispute is heard will become increasingly irrelevant.").

287. *Compare* Tarullo, *supra* note 5, at 486. For Dworkin's argument of fit, see DWORKIN, *supra* note 104.

288. *Compare* John. J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5, at 7, 8, 11 (1995).

289. KENNEDY, *supra* note 74, at 37.

290. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 17.6(ii), 1868 U.N.T.S. 201.

291. Understanding on Dispute Settlement, *supra* note 278.

authorities, but it is not a de novo review either.[292]

A harsher standard is in place as far as the Agreement on Safeguards is concerned. A panel must find that an explanation is not adequate if an alternative explanation of the facts is plausible and the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[293] Nevertheless, an important difference must be noted. In the case of safeguard measures, the issue in dispute is a member state's decision to apply safeguard measures against other member states. A panel's action concerns settlement of disputes between members regarding their rights and obligations under WTO law.[294]

In antidumping, the panel is, although in a dispute between member states, dealing with a member state's decision on the actions of individuals.[295] Unlike in E.U. law, individuals are not subjects of WTO law.[296] Nonetheless, if private parties are permitted to interfere with free market forces, and to restrain trade between countries, a concern has been raised that they may effectively replace the government-imposed barriers to trade that the WTO system is supposed to meet.[297] There have been suggestions that the WTO should deal with the actions of individuals. Nevertheless, serious ones[298] do not depart, to a large degree, from the established doctrine that the WTO Agreement, and specifically Article XI of the GATT, refers only to policies or actions of governments, and does not cover those of private parties.[299]

The decision to adopt antitrust laws, a particular type of antitrust law, as well as their enforcement go to the heart of a state's constitutional system.[300]

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292. *Compare* GATT Secretariat, *EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS26 & 48AB/R (Appellate Body Report, February 13, 1998), para. 117.

293. GATT Secretariat, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177 & 178/AB/R (May 16, 2001), para. 106.

294. Understanding on Dispute Settlement, *supra* note 278, at art. 1(1).

295. JACKSON ET AL., *supra* note 148, at 696 (noting that the GATT does not forbid dumping since companies, not governments, dump).

296. WTO Decision on the U.S. Trade Act, *supra* note 265, at para. 7.72; *see* GIUSEPPE SCHIAVONE, INTERNATIONAL ORGANIZATIONS: A DICTIONARY DIRECTORY 3 (3d ed. 1993) ("Supranational organizations have the ability to make decisions which are directly binding upon member states, public and private enterprises, as well as individuals within these states, whereas traditional international organizations can act or execute decisions only by or through member states.").

297. JACKSON ET AL., *supra* note 148, at 1110.

298. *See, e.g.*, Tarullo, *supra* note 5, at 503 (stating that the WTO should deal with "import barriers that arise because of governmental and private actions that, for historical or regulatory reasons, are essentially inextricable").

299. GATT Dispute Panel Report on Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/10 (Aug. 31, 2001); GATT Dispute Panel Report on Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (Apr. 22, 1998) ("There is no obligation of the Member States to exclude the possibility that state measures would enable private parties to directly or indirectly obstruct trade, if state measures by themselves do not obstruct trade.").

300. The U.S. Supreme Court, for example, believes that "antitrust laws . . . are as

The role of courts in society has been one of the key questions of antitrust law.[301] The role of unelected judges is already problematic at the national level.[302] Giving decision-making power to the New Prince[303] is a fortiori more problematic at the international level, as it involves the question of the loss of sovereignty.[304] An organization with a low level of accountability, legitimacy, and transparency, such as the WTO,[305] cannot play the role of governing the behavior of private parties. Involvement of competition policy in the WTO would by itself not change the WTO's legitimacy,[306] rather the structure and substantive and procedural law would. Any supranational powers as developed in the European Community[307] are therefore out of the question.

An effective de novo review of national authorities' decisions would de facto entail conferring obligations on individuals. By effectively reviewing national antitrust authorities' decisions on the actions of individuals, the WTO would decide on an individual's obligations and not merely on government violations of international agreements on proper enforcement.[308] This would be a quantum leap in the WTO's approach to individuals. The problems it poses

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important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental freedoms." United States v. Topco, 405 U.S. 596, 610 (1972).

301. *See, e.g.*, BORK, *supra* note 105, at 16 (arguing that antitrust history should constitute a warning about the adjudicative process and the danger of relying upon courts to evolve major social policy).

302. *See, e.g.*, Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 731, 805-24 (1983).

303. *Compare* Frank I. Michelman, *Bush v. Gore: Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001).

304. The International Competition Network also recognized the realities of the polycentric organization of the competition world. One of its guiding principles is the principle of sovereignty. William J. Kolasky, Address at the International Bar Association Sixth Competition Conference, http://www.usdoj.gov/atr/public/speeches/200234.pdf (Sept. 20, 2002); *see also* Klein, *supra* note 19.

305. *See* Giandomenico Majone, *International Regulatory Cooperation: A Neo-Institutionalist Approach*, *in* TRANSATLANTIC REGULATORY COOPERATION 119, 143 (George A. Bermann et al. eds., 2000) ("The delegation of policy-making powers to politically independent, or non-majoritarian, institutions immediately raises the issue of democratic accountability."). For WTO's legitimacy, see Ralph Nader & Lori Wallach, *GATT, NAFTA, and the Subversion of the Democratic Process*, *in* THE CASE AGAINST THE GLOBAL ECONOMY 92 (Jerry Mander & Edward Goldsmith eds., 1996); Tarullo, *supra* note 5, at 494. For WTO's transparency, see JACKSON ET AL., *supra* note 148, at 316.

306. *Contra* Ernst-Ulrich Petersman, *Globalization and Transatlantic Regulatory Cooperation: Proposals for EU-US Initiatives to Further Constitutionalize International Law*, *in* TRANSATLANTIC REGULATORY COOPERATION 615, 620 (George A. Bermann et al. eds., 2000) ("The traditional focus of competition policy on general consumer welfare, individual rights, and judicial protection would enhance the democratic legitimacy of WTO law and its political acceptance by "civil society.").

307. *See* Council Regulation 17, 1962 O.J. 13 (204) 1 (setting out the European Commission's supranational powers, which are essential for the existence of the common competition policy); NICHOLAS MOUSSIS, GUIDE TO EUROPEAN POLICIES 229 (2002).

308. *Cf.* Tarullo, *supra* note 5, at 490 (the adjudicatory role of "WTO dispute settlement panels would require a more or less explicit delegation of 'lawmaking' authority to those panels . . . .").

are that it would be introduced by stealth, and that the concept of individuals as subjects is, as explained above, currently unacceptable in the WTO system. Denying that the WTO, like any adjudicatory body, is limiting rights and extending obligations would be even more problematic in cases dealing with activities of individuals. Lax WTO review tests are therefore rightly too lax to be able to effectively review merger decisions and achieve their unification.

Although WTO law is by no means epiphenomenal, limits do exist, as can be seen both with the measures having equivalent to quantitative restrictions, and with its powers on individuals. The WTO would have an independent impact on international antitrust, as will be further shown below, but could not at the same time effectively deal with different (doctrinal) approaches, or effectively review discriminatory decisions. Differences in national merger enforcement portrayed by the two big cases are therefore here to stay.

IV. THE CLASH BETWEEN ANTITRUST AND INTERNATIONAL TRADE

Should the WTO be given a limited role dealing only with rights and obligations of states in antitrust adjudication? Is the opposition of U.S. lawyers and regulators[309] and some developing countries,[310] who argue that WTO decision-making would compromise antitrust with trade issues warranted?

Tarullo, for example, argues that the market-access orientation of WTO panels might lead them to rule that the conduct in question was in violation of the law, regardless of whether this conduct was efficient or defensible from the perspective of antitrust law.[311] Tarullo warns that "even where the norms can be reconciled in principle, the practical implementation of an arrangement in a particular institutional context may tend to favor one norm over another."[312]

The experience of E.U. law confirms American doubts. The jurisprudence of the ECJ is very instructive, as it deals with the tension between access to the market and competition concerns. Agreements, containing provisions which have the effect of partitioning the market along national lines,

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309. *See* Tarullo, *supra* note 5, at 493; Fox, *supra* note 209, at 248 ("[A] multilateral or plurilateral initiative would lead to corruption of the antitrust principles (which aid consumers) by trade principles (which protect competitors)."); Fox, *Competition Law Reprint*, *supra* note 207, at 1133.

310. *See, e.g.*, Daniel Pruzin, *Trade Officials Assess Winners, Losers In Aftermath of Doha Ministerial Meeting*, 18 INT'L TRADE REP. (BNA) 1856 (Nov. 22, 2001) (noting that in the Doha round, India raised a concern that the benefits of International antitrust regulation will go to foreign corporations, and that the WTO will listen to developed countries' market access concern and not to the benefits of consumers in the developing countries).

311. Tarullo, *supra* note 5, at 493.

312. *Id.* at 487. Domination of one policy has also mirrored in disagreements between national constitutional courts, or courts of equivalent rank, and the ECJ, where the relationship as far as European Community Law is concerned eventually became vertical, and could not remain horizontal if the goal of a common market – free trade – was to be achieved. *See generally* CRAIG & DE BÚRCA, *supra* note 256, at 275-316.

are likely to be treated harshly by the ECJ.[313] Indeed, the ECJ argued that a violation of Article 81 of the Treaty, prohibiting anticompetitive practices "which may affect trade between Member States," exists even if an anticompetitive agreement is confined to a single member state, where the activity in question reinforces compartmentalization of markets on a national basis.[314] In a clash between market access and efficiency, the ECJ has shown its preference for the former.[315]

Similarly, the primary goal of the WTO is free trade, thus the prohibition of barriers to trade.[316] General U.S. opposition to the WTO as the forum for antitrust disputes[317] therefore seems to be warranted. Although at first glance the goals of free trade and antitrust seem to be the same (free trade in the broadest sense),[318] it is obvious at the implementation level that they may actually conflict.

Creating a completely new World Competition Forum[319] may avoid the problem of decision-making in which market access would have priority over antitrust issues. But can decision-making on antitrust and market access really be completely separated? The breadth and range of the ideology of free trade can be seen in the jurisprudence of the ECJ, as well as in the whole array of functions the European Union performs, instead of or alongside member states.[320] "Trade policy increasingly implicates the clash, or potential clash, of liberal commercial values with regulatory or other non-trade aims."[321] Antitrust may thus be just another issue in line with others that unsuccessfully clashed

313. CRAIG & DE BÚRCA, *supra* note 256, at 957.

314. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 54-55 (2000). *See* Case 8/72, Vereeniging van Cementhandelaren v. Commission, 1972 E.C.R. 977, paras. 29-30.

315. *See* Case 58/64, Consten and Grundig v. Commission, 1966 E.C.R. 299. In this case, the ECJ decided that since the exclusive distribution agreement was aimed at isolating the French market for Grundig products and artificially maintained separate markets within the Community, for products of a very-well known brand, it distorted competition within the Common Market. De Búrca's critique is practically the same as Tarullo's critique of the WTO dealing with competition policy. She argues that if one were engaging in a pure economic analysis, which involved trade-offs between the pro and anti competitive effects of the agreement, then even absolute territorial protection might be warranted; the protection might be necessary to enable the manufacturer to penetrate a new market, and any reduction in intra-brand competition would be more than offset by inter-brand competition. *See* CRAIG & DE BÚRCA, *supra* note 256, at 957. Thus, opening markets may sometimes not be the most efficient option.

316. *See* Tarullo, *supra* note 5, at 479.

317. *See, e.g.*, Klein, *supra* note 19.

318. *See* JACKSON ET AL., *supra* note 148, at 1110.

319. Fox, *supra* note 5, at 670-78.

320. Though the level of integration between the two organizations differs significantly, this does not mean that WTO law touches many less areas of social reality in quantitative terms. This can be seen from the exceptions to free trade of goods in Article XX of the General Agreement on Tariffs and Trade. *See* GATT, *supra* note 211, at art. XX; EC TREATY art. 30.

321. Tarullo, *supra* note 5, at 489.

with trade in the WTO, such as the environment,[322] labor standards,[323] and potentially intellectual property.[324] Practically any field of social life therefore conflicts, or at least has a potential to conflict, with the ideology of free trade:

> Every field of business regulation is a trade issue, and trade is dependent on every other area of business regulation. This fact is analogous to the fact in domestic society that every field of business regulation affects the market and the market is dependent on every area of public policy.[325]

In this respect, it is difficult to clearly separate trade issues on the one hand, and antitrust issues—or any other issue such as the environment or labor— on the other, and thus antitrust issues which are trade issues and those which are not.[326] In the *Shrimp/Turtle* case, for example, one could not separate the question of the environment and the question of free trade.[327]

Questions from any field of social reality can be framed in the language of free trade and thus become trade issues.[328] This is why it should not be surprising that the WTO is deciding on issues such as the environment, human rights, and labor.[329] Once a decision-making body is confronted with abstract rules and concrete questions, one cannot expect that they will avoid other areas of social reality that conflict with the broad theory of international trade. If the DSB want to solve a dispute without resorting to non-liquet,[330] they will touch on these issues willy-nilly. The drafters of the GATT obviously anticipated such a development, otherwise there would not be so many exceptions to free

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322. *U.S. Shrimp Products*, *supra* note 282.

323. For the relationship between trade and labor, and consequently between ILO and WTO, see Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL L. REV. 885 (2003).

324. For the clash of intellectual property rights with the principles of free market, see, e.g., CRAIG & DE BÚRCA, *supra* note 256, at 1088-89.

325. Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 60 (1996).

326. *Cf.* Tarullo, *supra* note 5, at 479 (arguing that "no matter how adroitly the two sets of norms [antitrust and trade] are reconciled in theory, they cannot realistically be expected to remain in happy equipoise in practice").

327. *See U.S. Shrimp Products*, *supra* note 282.

328. *See* Brian Langille, *Fair Trade is Free Trade's Destiny*, *in* 2 FAIR TRADE AND HARMONIZATION 231 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); *see also* Tarullo, *supra* note 5, at 492-93 (arguing that an argument for market access violation could be framed because of the lack of antitrust enforcement). Similarly, abortion, which one would hold either as a fundamental human right or its violation, was categorized by the ECJ as a service within the meaning of Article 49 of the EC Treaty. *See* Case 159/90, Society for the Protection of Unborn Children v. Grogan, 62 E.C.R. 849 (1991). Consequently, there is a long line of cases in which there have been overlaps between the ECJ and the European Court of Human Rights ("ECHR"). *See* CRAIG & DE BÚRCA, *supra* note 256, at 365-68.

329. *Cf.* Tarullo, *supra* note 5, at 489 ("Even some supporters of the contemporary, legalized system fear that the dispute settlement process is being stretched to its limits.").

330. JACKSON ET AL., *supra* note 148, at 300.

trade.[331] Adding the fact that at least in hard cases an adjudicatory body will extend obligations and shrink rights, there should be no surprise at the current situation in which the WTO is a decision-maker on nearly every area of social reality.

Despite the fact that these questions often cannot be separated, should an international antitrust organization, an international environmental organization,[332] or an organization be created for every policy which the populace would like to advance with decision-making powers similar to those of the WTO? Should the same powers be given to existing organizations, such as the International Labor Organization (ILO)?

First, giving the same powers as those held by the WTO to any other organization is not realistic, given the outrage at the WTO's presumably "supranational" decision-making powers[333] and the simple fact that the overly represented interests[334] care more about free trade than about the environment, poverty, and other policies per se. Second, even if such a consensus does exist, a settlement of conflicts is unlikely between trade and non-trade issues, should these organizations have the same decision-making powers as the WTO. As has been seen in international merger review, horizontal proliferation of tribunals can be troublesome. Polycentric decision-making on the same issue can create stalemates and disputes, particularly when all voices are heard.[335]

Fox believes that there are antitrust issues, which are trade issues that can thus be dealt with by the WTO.[336] By incorporating them within the WTO, however, market access would be given priority over other efficiency concerns, as is shown by the jurisprudence of the ECJ. According to Fox, there are other antitrust issues that are not trade issues, which are at the heart of competition law and deserve to be placed on "competition" ground.[337] Thus, a free-standing World Competition Forum should be created. However, if such a distinction is possible, if there are antitrust issues that are trade issues and others that are not, there is no reason why the non-trade issues could not be incorporated into the WTO. If trade/non-trade separation is possible, the fear that market access concerns would override antitrust concerns would not be justified, as these

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331. *See* GATT, *supra* note 211, at art. XX; EC TREATY art. 30.

332. *See, e.g.*, JOHN WHALLEY & BEN ZISSIMOS, A WORLD ENVIRONMENTAL ORGANIZATION? (2002).

333. *See* Nader & Wallach, *supra* note 305, at 94.

334. *See* comment, *supra* note 145.

335. *See* Tarullo, *supra* note 5, at 500. Similarly, a concern has been raised about the proliferation of international courts and tribunals in a horizontal legal arrangement addressing the same dispute, without adequate rules for dealing with overlapping jurisdiction. *See* Kingsbury, *supra* note 178, at 683.

336. *See* Fox, *supra* note 5, at 671 (arguing that there are three types of market access restraints that should be dealt with in the WTO: (1) exclusions by monopoly or dominant firms; (2) cartels with boycotts; and (3) vertical restraints such as exclusive dealing by the few leading firms in high barrier, concentrated markets – while other antitrust issues should be dealt with in an independent forum).

337. *Id.*

issues are not connected. Given the WTO's advantages, which separate it from the faith of the World Intellectual Property Organization (WIPO),[338] there is no reason why, in line with the "separation" argument, these issues should not be dealt with by the WTO.

Furthermore, a system in which one organization would presumably decide on environmental or antitrust issues and the other on trade concerning the same dispute, should be avoided. If, however, jurisdictional lines are drawn, they will not be able to be drawn on the trade/non-trade separation, as these issues often cannot be separated within a concrete case. As a norm works differently in different institutions and legal systems,[339] stakes of jurisdictional separation would be high.

Given both the impossibility in the near future of forming other adjudicative organizations in the international arena similar to the WTO, and concerns about separating trade and non-trade issues, other international organizations such as the WIPO, the ILO, and a potential World Competition Forum[340] could be incorporated into the existing WTO dispute resolution system when particular non-trade issues are in dispute–that is, of course, under the belief that this would produce better results than non-adjudicative resolution of conflicts. At first this could be furthered with an obligatory consultative role, which might leave an open door for a later transformation into the form of a co-decision.[341] In this way other policies, which until now have constituted relatively silent voices, may be more effectively voiced, avoiding stalemate and duplication.

V. CONCLUSION

Disputes are themselves inevitable byproducts of a globalizing economy. Interest-balancing, non-discrimination clauses, fast and flexible cooperation practices, or new and established organizations would solve them, and ideally all nations should adopt antitrust laws, and be able to exercise extraterritorial effect to do away with lurking notions of physical power embodied in the principle of territoriality. It is not important who decides the case, as courts act as a global community where justice and reason reign supreme. It all appears very determinate and "natural."[342]

However, law in action and its distributive evaluation show that it is not. Having multiple decision-makers on the horizontal level deciding on the same activity raises the problem of how the "legalization" of international law will cope with a polycentric world. Conflicts arising from extraterritorial effect, out

338. Guzman, *supra* note 126, at 19-26.

339. *See supra* Part II. B.

340. Fox, *Competition Law Reprint*, *supra* note 207.

341. The experience of the European Parliament is most instructive in this context. *See* CRAIG & DE BÚRCA, *supra* note 256, at 79-80.

342. *See* Slaughter, *A Global Community of Courts*, *supra* note 7, at 210.

of a mirror image of the principle of territoriality, can to some extent be managed only until this doctrine works in a distributively unjust way, where some interests are voiced and others are not. A "fair"[343] version of extraterritorial effect would produce more disputes than the world community can handle under the current arrangements.

Neglecting the role of power and the role of struggle for power[344] can thus result in a promotion of power. Power means not only physical and economic power, but also the power of logic,[345] the power of the established,[346] and many other types of power,[347] and most importantly the combination of powers. Rules that are not premised on the power-relations explanation of the world can just as well favor the powerful. Evaluation of the law in action[348] will tell us which individuals and groups are winning, and which ones losing, in the competition between interests,[349] and how law—the background rules—contributes to this process.[350]

The power of reason[351] cannot be overcome, due to both lax standards of international law and the nature of adjudication. Moreover, it is not realistic to crush a national court's authority, its reasoned decision, and the resulting "acquired" rights after a final decision is made at national level. "What is, is right."[352] The world must therefore face up to what has been created—an

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343. Dodge, *supra* note 28, at 390.

344. *See* Slaughter, *Liberal International Relations Theory and International Economic Law*, *supra* note 7, at 742 ("The Liberal approach analyzes extraterritoriality as a regulatory problem rather than a power problem.").

345. *See, e.g.*, Barry Stroud, *Wittgenstein and Logical Necessity*, *in* WITTGENSTEIN'S PHILOSOPHICAL INVESTIGATIONS 477–496 (Pitcher ed., 1966). For Hegel's account of absolute reason, see, e.g., 7 FREDERICK COPLESTON S. J., A HISTORY OF PHILOSOPHY: 18TH AND 19TH CENTURY GERMAN PHILOSOPHY 190 (Doubleday Dell Publishing 1999) (1963).

346. ROBERTO M. UNGER, POLITICS: THE CENTRAL TEXTS 75 (1997) (warning that an advance toward disentrancement should not be mistaken for a move toward anarchy); *cf.* KENNEDY, *supra* note 74, at 236 ("According to the legitimation hypothesis, the particular set of hierarchies that constitute our social arrangements look more natural, more necessary, and more just than they 'really' are.").

347. For power as defined by Deutsch, see DEUTSCH, *supra* note 36. For Unger's account of power, see UNGER, *supra* note 37. For an account of power as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization, see 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 93 (1978).

348. Holmes, *supra* note 8.

349. Moravcsik, *supra* note 32, at 517.

350. *See* David Kennedy, *Background Noise? The Underlying Politics of Global Governance*, 21 HARV. INT'L REV. 52, 57 (1999); *see also* KENNEDY, *supra* note 74, at 74.

351. *See* Holmes, *supra* note 8, at 465-66 ("The language of decision-making is mainly the language of logic . . . . Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."); NIETZSCHE, *supra* note 232, at 277-78 (arguing that categories of reason have mistakenly "counted as a priori, as beyond experience, as irrefutable" and that "their utility alone is their 'truth'"). See also supporting authority contained within *supra* note 345.

352. Morris R. Cohen, Book Review, 22 CORNELL L.Q. 171, 177 (1936) (reviewing EDWARD S. ROBINSON, LAW AND THE LAWYERS (1935)).

effective veto right that, when exercised, escalates into a dispute between nations. This veto right is at least as strong as the veto right of the permanent members of the Security Council of the United Nations,[353] due to economic power and the fact that once a decision has been taken, we have moved into the realm of the power of reason.

353. For the argument that the privilege of the great powers sitting on the Security Council is premised on the realist international relations theory, see Burley, *supra* note 83, at 207 n.6.

HOW CAN THE UNITED STATES CORRECT MULTI-NATIONAL CORPORATIONS' ENVIRONMENTAL ABUSES COMMITTED IN THE NAME OF TRADE?

Elizabeth Barrett Ristroph*

I. INTRODUCTION

The marriage between international trade and environmental protection policy needs counseling. Left to its own devices, this troubled union has produced the Multi-National Corporation (MNC)—a child that manages to escape the discipline of both Papa Trade and Mother Earth. The externalities of this uncontrolled being have led to a race to the bottom in terms of environmental protection, wages, consumer protection, health and welfare, and social responsibility.

In response to the ascent of MNCs, a working alliance has arisen amongst national industrial advocates, labor interests, and those concerned with environmental and human rights abuses. Commentators who are adversaries on the national playing field agree that, in the international arena, there is a need to leash the MNC and restore order. Thus far, environmentally oriented trade remedies (such as the unilateral measures that led to the Tuna-Dolphin dispute between Mexico and the U.S.) have been insufficient. To target the environmental abuses of MNCs, the United States needs to reconsider its trade strategy, and supplement this strategy with multilateral environmental measures.

II. MNCs HAVE DEVELOPED A CORPORATE STRUCTURE THAT ALLOWS THEM TO TAKE ADVANTAGE OF DISPARATE LEGAL AND ECONOMIC SYSTEMS

A. MNCs Place Their Production Facilities Where They Will be Subject to the Least Amount of Restriction.

As long as the cost of doing business (whether this results from low wages, under-priced resources, or less restrictive laws) is cheaper in a developing country, it makes economic sense for the MNC to operate there. The corporate decision-makers have little incentive to achieve environmental standards beyond those that will actually be enforced in the host country. The host country decision-makers are no more inclined than their corporate counterparts to enforce environmental standards if it means slowing

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* Barrett Ristroph, a graduate of Tulane Law School and attorney with the Louisiana law firm of Talbot, Carmouche, & Marcello, does her part by suing multi-national oil companies for environmental contamination.

development or drawing from social welfare resources. And if the host government *did* attempt to renegotiate the environmental rules, the MNC could always find another lesser-developed (but more receptive) country in which to base its production.

MNCs are also able to take advantage of having an information monopoly over the local populations in which their facilities are located. MNCs have sometimes deliberately withheld information from communities or even governments to avoid any adverse resistance to potentially hazardous facilities.[1] In other cases, MNCs have resisted worst-case scenarios when preparing environmental impact assessments for their projects due to implementation expenses.[2] As a result of their information leverage, MNCs can disguise their activities to appear much safer and less detrimental to the environment.

B. By Maintaining Distant Production Facilities, the Unpleasant Characteristics of MNC Production Facilities are Less Likely to Initiate Opposition.

When an MNC locates its headquarters in one country, but puts its base of operation in a different country, there is a significant physical separation between production and consumption. This separation allows consumers to ignore the environmental harm that their consumption may be causing in a different country. For example, when rain forests are cleared in Latin America to make way for beef production, the average North American McDonald's customer remains blissfully unaware of the resource depletion her hamburger has caused. As long as the ecological damage costs are left out of the price of the Big Mac, the hamburger customer's state of ignorance can persist.

C. MNCs are not Directly Subject to International Law.

International environmental law agreements regulate sovereigns rather than the entities within these sovereigns. Lesser-developed sovereigns, in many cases, have less wealth than the MNCs themselves,[3] but are expected to control the foreign-owned entities that they host.[4] Problematically, there is usually not

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1. *Transnational Corporations and Environmental Management in Selected Asian and Pacific Developing Countries*, U.N. Economic & Social Commission for Asia and the Pacific, UNCTC Publications Series B, No. 13 (1988).

2. *Id.*

3. Of the largest 100 economies in the world, fifty-one are now corporations. Sarah Anderson & John Cavanaugh, *Top 200: The Rise of Corporate Global Power*, Institute for Policy Studies (2000), *at* http://www.ips-dc.org/reports/top200text.htm (n.d.) (last visited Nov. 14, 2004).

4. *E.g.*, Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations, April 15, 1994, Legal Instruments – Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/03-fa_e.htm

a sufficient normative structure outlining just *how* the host country should control such wealthy and powerful entities. In the absence of a normative structure, countries can easily claim that their broad sovereign right to develop is more important than the equally broad need to control MNCs' environmental abuses.[5]

D. MNCs can Limit Their Liability.

The use of limited liability externalizes the cost of doing business. By providing for liability only to the extent of the corporation's assets, limited liability shields the owners of corporations (who are the stockholders in publicly traded corporations) from some of the costs of doing business. The advantages to this system are that investors (including stockholders) are encouraged to invest, and receive higher dividends in return. The disadvantages are apparent when an injured plaintiff cannot fully recover damages from a corporation. Likewise, the public does not fully recover the costs of environmental damages that the corporation externalizes. The public, rather than the corporation, pays for the damage (in terms of health care and other costs) and in return gets higher dividends. Problematically, the people who are receiving these dividends are often not the same as the ones who are suffering the most severe pollution costs. Pollution occurs more often in poorer areas—particularly in poorer countries—while the stockholders tend to form part of a more affluent society. Thus, the ultimate cost-bearers of environmental degradation have little say.

The use of subsidiary corporations adds an additional layer of externalization. The subsidiary is often located in a poor country where it is easy to pollute, while the parent company and stockholders are in the wealthier country that has strict environmental laws. Not only are stockholders protected by the limited liability of the parent company, they are also protected by the fact that it is extremely difficult to "pierce the corporate veil" to reach the assets of the parent company.[6] Further, American courts typically refuse to assert

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[hereinafter Final Act], art. 13, http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (last visited Nov. 11, 2004) [hereinafter SPS Agreement].

5. For example, in *Ullonoa Flores v. S. Peru Copper Co.*, 253 F. Supp. 2d 510, 522, 524 (S.D.N.Y. 2002), in order to counter the plaintiffs' allegations of gross human and environmental rights violations based on the Rio Declaration and other sources, the court noted that the Rio Declaration also acknowledges "the 'sovereign right' of nations to control the level of environmental exploitation within their territories." *Id.* at 521. In addition, the "rights" submitted by plaintiffs "are not 'sufficiently determinate' to show that the nations of the world universally prohibit the sort of conduct that plaintiffs allege in this case." *Id.*

6. Liability requires that corporate formalities were wholly disregarded by a pervasively controlling parent or fraud or its equivalent was perpetrated on third parties. The traditional reference point is *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925) (citing Conley v. Mathieson Alkali Works, 190 U.S. 406 (1903)), in which the Supreme Court held that "use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction" of the state in which the subsidiary is incorporated. *Cf.* United States v. Scophony Corp. of Am., 333 U.S. 795, 813 (1948) (lowering the burden for piercing the corporate veil.).

jurisdiction over a foreign subsidiary that has no links to the forum except its relationship to its American parent.[7] As a result, a plaintiff injured by the subsidiary's actions will have a difficult time getting into an American court.

Environmental harm adds another twist to this scenario because in many situations the consequences of corporate abuse have long latency periods.[8] It may be a couple of decades before a river becomes undrinkable or cancer manifests itself in significant portions of a local population. Even if this damage is linked to the subsidiary's actions, and even if this results in heavy losses for the subsidiary, the parent company has many years during which it can profit.

III. THE WTO FACILITATES THE UNCHECKED OPERATION AND ENVIRONMENTAL ABUSES OF MNCS.

A. The WTO Facilitates Trade at the Expense of Environmental Protection.

The General Agreement on Tariffs and Trade (GATT) was born in an exhausted and depleted post-war society. Liberalizing trade seemed like the best way to aid war-torn countries and to keep them from falling prey to the Communists.[9] There was little thought as to the long-term consequences of imbalanced trade, or to how increased global trade would affect a country's authority to enact environmental and social policies. As long as the United States could maintain a strong currency, seigniorage, the bull market, and high interest rates, it had little incentive to upset this trend towards increasing imports.

Although GATT was born outside of a proper treaty, it was "legitimized" by the Agreement on the World Trade Organization (WTO) in 1994.[10] With

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7. Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1160 (5th Cir. 1983) (stating that the jurisdiction of an American Court over a foreign subsidiary often depends on an "alter ego" theory, which is control by the parent over the internal business operations and affairs of the subsidiary that is "greater than that normally associated with common ownerships and directorship"). Thus, if a plaintiff cannot hold the parent company liable based on the evidence, it is unlikely to get the jurisdiction necessary to sue the subsidiary. *See id.*

8. *See* Patrick J. Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(a) of the American Law Institute's Principles of Corporate Governance*, 66 WASH. L. REV. 413, 440 (1991).

9. *See, e.g.*, Joseph R. Glancy, Jr., *Building Bridges: U.S. Policy Toward FRG Trade with Eastern Europe: 1961-1968*, *in* ESSAYS IN HISTORY 39 (1997), http://www.etext.virginia.edu/jounrals/EH/EH39/glance39.html (last visited Sept, 23, 2004); POLICY PLANNING COUNCIL, U.S. POLICY ON TRADE WITH THE EUROPEAN SOVIET BLOC 42-51 (July 26, 1963) (on file at John F. Kennedy Library, National Security Files, Box 310) (discussing Kennedy's attempts to amend the Trade Expansion Act in a way that would give him greater flexibility to grant or deny Most-Favored Nation status to any area determined to be "dominated or controlled by the foreign government or the foreign organization controlling the world Communist movement").

10. WTO, *WTO Legal Texts*, *at* http://www.wto.org/English/docs_e/legal_e/legal_e.htm

147 members from countries in various degrees of development,[11] and with both regulatory and juridical power, the WTO is by far the most central control on world trade policy. But the WTO is a trade organization, designed to promote the relatively short-term economic interests of those who are most able to control it. Its mandate is to reduce tariffs and destroy barriers to trade.[12]

Several provisions of the WTO Agreement may have direct or indirect effects on environmental policy. One example is Article XI, which prohibits the use of quotas and import bans. This makes it difficult for a country to limit or ban the import of an environmentally harmful product without justification. Nor can a country ban a particular product from one country that uses detrimental environmental practices, yet accept the same product from another country. Under the unconditional most-favored-nation (MFN) rule,[13] a country that grants a concession to one member must grant it unconditionally to all members. This means that a country is unable to reward those countries that enact protections for the environment, workers, and general health and welfare without granting these same rewards to all countries.

The production or process method (PPM) rule also conflicts with environmental protection policy by preventing discrimination between similar products based on their particular production or process method.[14] This rule prohibits a country from banning the import of goods manufactured by a foreign MNC on the ground that the product's production violated environmental norms.

MNCs can take advantage of the WTO's PPM rule in order to sell seemingly identical products manufactured with inadequate social and environmental standards. MNCs may also contribute to pollution or accelerate the extraction of natural resources without remediating sites to their former status. For example, although petroleum exploitation and development in Ecuador resulted in the spillage of 17 million gallons of oil from the Trans-Ecuadorian Pipeline between 1982 and 1990,[15] the United States could not

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(last visited Sept. 25, 2004) (The- "Final Act" signed in Marrakesh is an umbrella policy to which WTO agreements on goods, services and intellectual property, dispute settlement, trade policy review mechanism and the plurilateral agreements are attached. *See also* Final Act, *supra* note 4.

11. WTO, *Members and Observers, at* http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sept. 23, 2004).

12. WTO, *Principles of the Trading System, at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Sept. 23, 2004) ("Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) . . . .").

13. General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, http://www.wto.org/English/docs_e/legal_e/26-gats_01_e.htm (last visited Sept. 25, 2004) [hereinafter GATS]. *See also* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm (last visited Nov. 14, 2004) [hereinafter TRIPS].

14. *See* WTO, *CTE on: How Environmental Taxes and Other Requirements Fit In, at* http://www.wto.org/english/tratop_e/envir_e/cte03_e.htm (last visited Nov. 14, 2004).

15. Raissa S. Lerner & Tina M. Meldrum, *Debt, Oil, and Indigenous Peoples: The Effect of United States Development Policies in Ecuador's Amazon Basin*, 5 HARV. HUM. RTS. J. 174,

have banned Ecuadorian oil on this basis, because it appears to be just like any other oil. Nor could the particular MNCs involved be brought before a WTO dispute panel proceeding, because only the host country is answerable to the WTO.[16] Once again, there is a conflict of interest between a host country's duty to apply environmental sanctions against its corporations, and the country's potential to benefit from the corporation's production and exports.

The Agreement on Technical Barriers to Trade (TBT Agreement) extends the trade protection of WTO to ensure that non-tariff barriers, including technical standards, do not act as trade barriers. Eco-labeling schemes, whether voluntary and mandatory, are examples of such barriers.[17]

The most important GATT article under which many countries have (unsuccessfully) defended environmental protection policies is Article XX of GATT. This article contains a list of general exceptions that allow countries to pass protective measures in the interests of certain national policies. For instance, a country can adopt measures "necessary to protect public morals, ... human, animal or plant life or health,"[18] and "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[19]

When put to the test, GATT and WTO dispute panels have adopted rulings that limit the environmental application of these exceptions. For instance, no environmental law has ever been upheld on the grounds that it was necessary to protect the public morals under GATT article XX(a). The famous Tuna-Dolphin disputes[20] ruled out the use of article XX as a tool to influence a foreign country's sub par environmental policies and practices.

178-79 (1992).

16. SPS Agreement, *supra* note 4. It the responsibility of the host country to ensure that non-governmental entities within its borders comply with the agreement. *See* SPS article 13 ("Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement.").

17. Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf (last visited Sept. 23, 2004) (stating that the TBT Agreement does not apply to "sanitary and phytosanitary" measures, such as rules or standards pertaining to food or pesticide health or safety requirements) [hereinafter TBT Agreement].

18. SPS Agreement, *supra* note 4 (addressing national laws that protect humans, animals, and plants from risks of food additives, contaminants or toxins).

19. General Agreement on Tariffs and Trade, Apr. 15, 1994, WTO Agreement, art. XVI, http://www.wto.org/English/tratop_e/tratop_e?envir_e/issu4.htm#gatt20 (last visited Sept. 23, 2004) [hereinafter GATT 1994].

20. Tuna-Dolphin I (United States Restrictions on Imports of Tuna (Mexico v. United States)), GATT Doc. DS21/R (Sept. 3, 1991), 30 I.L.M. 1594 (1991) [hereinafter Tuna-Dolphin I]; Tuna-Dolphin II (United States Restrictions on Imports of Tuna (European Economic Community and the Netherlands v. United States)), GATT Doc. DS29/R (Jan. 16, 1994), 33 I.L.M. 839 (1994)) [hereinafter Tuna-Dolphin II].

The WTO has a forum for addressing environmental issues, the Committee on Trade and the Environment. In theory, this committee is supposed to work towards increasing transparency and access to information in the dispute process. It is also supposed to support multilateral environmental agreements (MEAs) outside of the WTO, and encourage WTO/MEA members to seek recourse first in the MEA. However, in spite of the fact that some MEAs directly conflict with the WTO,[21] the Committee has made no effort to bridge these inconsistencies, or even clarify the WTO's relation to the MEAs.[22] The WTO's approach contrasts with that of the North American Free Trade Agreement (NAFTA), which at least in name provides that specified MEAs will take precedence over the provisions of the agreement.[23]

B. What Appears to be "Free" Trade is Actually Asymmetrical, Resulting in a Trade Imbalance.

Even though trade is supposed to be "free" in the WTO system, it is in fact asymmetrical. The WTO system allows lesser-developed host countries to place substantial tariffs on products from the United States, while the reverse is not so. [24] U. S. trade laws have not been able to control this asymmetry because the United States has little say in the WTO regime. This is because voting in the WTO relies mainly upon the "one country one vote"[25] principle, and the United States does not have a large trading block like the other developed countries in the European Union.[26] However, Japan and the other developed Asian countries are not disadvantaged to the same degree, because their undervalued currencies enable high export volumes.[27]

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21. When the Basel Convention and the Montreal Protocol are applied between WTO parties, they arguably violate article I (Most Favored Nation), III (National Treatment), and XI (Quantitative Import Restrictions) of GATT. With respect to the countries that are members of the MEA, it can be said that they have waived their rights to dispute the provisions of the MEA within WTO (Article XXV contains a waiver provision that allows for across the board exceptions to its various proscriptions, such as for MEAs.). The same cannot be said with respect to non-members of the MEAs, such that eventual WTO challenge is possible.

22. *See* John Nagel, *Hope Dims for Environmental Accords After Collapse of WTO Talks in Cancun*, 26 INT'L ENV'T REP. 922, 922 (2003).

23. North American Free Trade Agreement, Dec. 17, 1992, art. 104, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=80#A104 (last visited Nov. 14, 2004) [hereinafter NAFTA].

24. Under GATT article XXVIII, developing states can provide subsidies for export industries that are otherwise illegal for industrialized states. GATT 1994, *supra* note 19.

25. WTO, *Whose WTO Is It Anyway?*, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (last visited Sept. 23 , 2004).

26. UNDP, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORD 121 (Oxford University Press 2002), *available at* http://www.hdr.undp.org/reports/global/2002/en/ (last visited Sept. 24, 2004) (illustrating that many developing countries have no voice at all, for example, "[i]n 2000, as many as 15 African countries did not have a representative at WTOP headquarters in Geneva . . . While Mauritis, a very small country, had five").

27. Robert E. Scott, *Soaring Imports from China Push U.S. Trade Deficit to New Record*,

The imbalance between the U.S. imports and exports is the most telling indicator of the asymmetry in the international trading system. The aggregate U.S. trade deficit in February 2003 was $489 billion, equivalent to 5% of the U.S. gross domestic product.[28] U.S. imports are now almost 50% larger than U.S. exports.[29] With this deficit comes wage stagnation, underemployment,[30] increased national debt,[31] stock market advances that exceed actual earnings, and an overvalued dollar.[32]

Asymmetry facilitates the relocation of MNC production facilities by making it relatively easier to import goods into the United States than into more closed countries. Once MNCs transfer their forces of production abroad, American production declines, and the United States exports fewer products. Because the developing countries where MNC production facilities relocate are not subject to the vigorous export restrictions to which the United States has

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Economic Policy Institute, http://www.epinet.org/content/cfm/webfeatures_econindicators-tradepict20040813 (Feb. 13, 2004) (last visited Sept. 24, 2004).

> The U.S. trade deficit with the Pacific Rim increased 7% in 2003, reflecting deep changes in the structure of trade with Asia. The U.S. deficit with Japan fell 6%, but Japan's global trade (current account) surplus increased by 12%. Increasingly, Japan and other newly industrializing countries in Asia are exporting their component products to the United States through low-wage assemblers in China, Mexico, and elsewhere in Latin America.

Id.

28. *See id.*

29. *Id.*

30. Joel R. Paul, *The New York University-University of Virginia Conference on Exploring the Limits of International Law: Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285, 302, n.30 (2003) (The threat of job loss weakens workers' collective bargaining powers and ability to organize unions and illustrates that NAFTA contribute to this phenomenon. Since NAFTA was signed in 1993, the rise in the United States' trade deficit with Canada and Mexico through 2002 has caused the displacement of production that supported 879,280 U.S. jobs—resulting in net job losses in each of the 50 states). Paul states that "[m]any [U.S.] industries have relocated their manufacturing from industrialized countries with high-wage union labor to developing countries with low-wage non-union labor. U.S. workers usually end up with lower-paying jobs in the services sector." *Id. See also* ROBERT E. SCOTT, ECONOMIC POLICY INSTITUTE BRIEFING PAPER #147, THE HIGH PRICE OF 'FREE' TRADE: NAFTA'S FAILURE HAS COST THE UNITED STATES JOBS ACROSS THE NATION (Nov. 17, 2003), *at* http://www.epinet.org/content.cfm/briefingpapers_bp147 (last visited Sept. 25, 2004).

31. Council of Economic Advisors, *Economic Report of the President*, Table B-78, http//:www.gpoaccess.gov/eop/download.html (Feb. 2004) (last visited Sept. 26, 2004) (showing that the U.S. gross federal debt has nearly doubled in the last ten years, from about $4.6 trillion in 1994 to about $7.5 trillion in 2003).

32. Scott, *supra* note 27.

> The gain in the real value of the dollar between 1995 and 2002 helps explain the rapid growth of the U.S. trade deficit results. The dollar began to rise significantly in 1997 and peaked in 2002 .... It usually takes twelve to eighteen months for the . . . trade balance to respond to a change in the value of the currency. However, the U.S. trade deficit has continued to rise in real terms and as a share of GDP, through the ninth quarter after the dollar peaked in February of 2002. The dollar, however, must fall much more to help the trade deficit reach a sustainable level of the trade deficit.

Id.

conceded, MNCs are able to export the finished products from their host countries back to Americans with relative ease. This means that Americans are importing more foreign goods and exporting more consumer dollars.

The result is a vicious cycle in which Americans increasingly import (spend) more than they are capable of producing (earning). American consumers have no incentive to break this cycle, as long as they are paying low prices for cheap imported goods. The "consumer culture" is engrained in the population not only by the constant barrage of product advertisements from the media, but also by the ease with which individuals can obtain credit or declare bankruptcy. Foreign countries that have favorable import access to this market likewise have no incentive to break the cycle. The refusal of many net exporter countries to devalue their currencies in order to balance trade affirms their desire to maintain this asymmetry. [33]

While the United States is becoming more dependent on MNC imports, developing countries are becoming accustomed to inflows of foreign capital from MNC investment in their countries.[34] Further, the advantage that MNCs in developing countries have over domestic industries[35] discourages the development of local corporations. Once domestic corporations go out of business, countries are left with industries that may not have the best interests of the domestic populous in mind.

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33. Japan took active measures to prop up the dollar. In the fall of 2001, Japan spent the equivalent of 2.3 trillion yen (approximately $18 billion) during ten different interventions, boosting the dollar against the yen and helping its export producers. *Dollar is Expected to Consolidate or Rebound Slightly This Week,* DOW JONES NEWSWIRE, May 27, 2002. Between mid-May and early June 2002, Japan intervened in the foreign exchange markets to slow the dollar's decline. *Japan Intervenes in FX, Sells Yen – MOF Source,* DOW JONES NEWSWIRE, June 2004.

34. Press Release, Trade and Foreign Direct Investment (Oct. 9, 1996), http://www.wto.org/english/news_e/pres96_e/pr057_e.htm (last visited Sept. 25, 2004) (urging greater WTO involvement in foreign direct investment, and stating that the financial crises of the 1990s in Latin America and Asia impeded the access of many developing countries to syndicated bank loans. Many countries have come to rely more on foreign direct investment, which is more permanent and dependable than the other forms of capital transfer). The amount of net capital flows to developing countries in terms of direct investment increased more than ten-fold between 1990 and 2000. MICHAEL MELVIN, INTERNATIONAL MONEY & FINANCE 122 (2004).

35. PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 15 (1995). MNCs have a greater capacity to locate productive facilities across national borders, to exploit local-factor inputs and to trade factor inputs between affiliates in different countries. MNCs are better able to exploit know-how in foreign markets without losing control of the technology, and are capable of organizing their managerial structures globally along the most suitable lines of divisional authority. *Id.* P. R. Brahmananda, *Macro Effects of Tax Reforms,* BUSINESS LINE, Nov. 23, 2002, *available at* http://www.blonnet.com/2002/11/23/stories/20021123000 60800.htm (last visited Sept. 26, 2004) ("Because of their size and scope of operations, there are other types of non-competitive advantages, which such large companies and MNCs can obtain, including the relatively high influence they can wield on governments and the personnel in developing countries.").

This imbalance places the United States in a delicate position because ultimately the value of the dollar will crash, and many of the United States' own forces of production will go out of business. Thus, the United States faces not only a goods-production crisis,[36] but also the total loss of its ability to regulate the processes that produce its consumer goods. When the forces of production leave the United States, the environmental and social controls that the United States would impose on them leave, too.

C. *The WTO Overrides the National Political Process.*

The governing interests of the WTO do not necessarily match national interests. In agreeing to GATT principles, such as the most favored nation clause, the United States and other national governments relinquished the power to condition trade and investment on their own (often popularly elected) societal standards. Trade controls under the WTO extend far into the core of what previously seemed to be entirely domestic decisions. The Government Procurement Code, for instance, prevents a state from discriminating against foreign companies who provide the government with any sort of purchase, lease, or the combination of products and services.[37] This agreement could hinder "green government procurement" practices such as those that are currently being developed in the United States and Europe.[38]

The United States has a federal scheme to control its states' participation in an environmental race-to-the-bottom to attract industry. There is no such control in the WTO.[39] Whereas the U. S. federal government sets the minimum

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36. Scott, *supra* note 27. ("A rapid, uncontrolled decline in the dollar could push the U.S. economy into a sharp recession."). In his testimony before the House Committee on Financial Services on February 11th, normally circumspect Federal Reserve Chairman Alan Greenspan acknowledged this risk: "[G]iven the already substantial accumulation of dollar-denominated debt, foreign investors, both private and official, may become less willing to absorb ever-growing claims on U.S. residents." Alan Greenspan, Chairman, Federal Reserve, Testimony Before the House Committee on Financial Services (Feb. 11, 2004) (transcript on file with author).

37. The original 1947 GATT did not contemplate regulated government services. The Agreement on Government Procurement (1994) was signed in Marrakesh in 1994 at the same time as the Agreement Establishing the WTO. It is a pluri-lateral agreement, such that not all WTO Members are bound by it. *See* WTO, *Government procurement: The plurilateral agreement, at* http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (n.d.) (Last visited Nov. 18, 2004).

38. Douglas F. Brennan, *Trade and Environmental Goals at a Crossroads: Challenges for Global Treaties and National Environmental Regulation*, 20 INT'L ENV'T REP. 133, 134 (1997).

39. NAFTA, on the other hand, makes an explicit attempt to prevent the race-to-the-bottom by providing that the members should not seem to attract or retain investments by waiving, offering to waive, derogating from, or offering to derogate from domestic health, safety, or environmental measures. NAFTA, *supra* note 23, at art. 1114.. In practice, however, NAFTA disputes have not made use of these provisions in an environmentally beneficial manner. An example is *Metalclad Corp. v. United Mexican States* brought under Chapter 11's provision for foreign investors to challenge environmental or other government regulations that

standards that states may choose to supplement (as in the Clean Air Act), the WTO sets de facto ceilings on standards.[40] Domestic standards on health, the environment, and public safety that go beyond international standards must pass a stringent test to fit within the exceptions to GATT.[41]

Lesser-developed countries may benefit from being able to send more exports to the United States, but they lose the ability to control their own macro-economic policy. WTO members are not permitted to provide specific domestic subsidies that aid any specific import-competing industry or any export subsidies for non-primary products, such as manufactured goods or processed foods.[42] Thus, the domestic industries of developing countries do not enjoy the same advantage that U.S. domestic industries benefited from when the United States was developing.[43]

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interfere with their investments. 40 I.L.M. 36 (I.C.S.I.D. 2001). The Tribunal incorporated three objectives of NAFTA that it believed were relevant to interpreting Chapter 11, including increasing transparency, increasing investment opportunities, and ensuring a predictable commercial framework for investors. The Tribunal even stated that it was the objective of Chapter 11 to ensure the successful implementation of investment initiatives, even though nothing in NAFTA states this. The Tribunal ignored NAFTA's environmental objectives to pursue economic development in a manner consistent with environmental protection and conservation, and to promote sustainable development. *Id.*

40. The WTO takes the position that its encouragement of international standards "does not mean that these constitute a floor on national standards, nor a ceiling," and that "the SPS Agreement explicitly permits governments to impose more stringent requirements than the international standards." However, governments that do not adhere to international standards "may be required to justify their higher standard if this difference gives rise to a trade dispute." WTO, *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (n.d.) (last visited Nov. 8, 2004). In fact, the outcome of all disputes under the SPS Agreement thus far indicates that higher standards are de facto impossible to justify. *See* GATT Dispute Panel Report on Japan – Measures Affecting the Importation of Apples, WT/DS245/R (July 15, 2003); GATT Dispute Panel Report on Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches, WT/DS238/R (Feb. 14, 2003); GATT Dispute Panel Report on Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/R (May 3, 2002); GATT Appellate Body Report on Japan – Measures Affecting Agricultural Products, WT/DS76/8 (Mar, 19 1999); Appellate Body Report on Australia – Measures Affecting Importation of Salmon, WT/DS18/AB/R (Nov. 6, 1998); GATT Appellate Body Report on European Communities – Measures Affecting Meat and Meat Products, WT/DS26/17 – WT/DS48/15 (Jan. 14, 1999).

41. LORI WALLACH & MICHELLE SFORZA, THE WTO: FIVE YEARS OF REASONS TO RESIST CORPORATE GLOBALIZATION 18 (1999).

42. *See* GATT 1994, *supra* note 19, at art. XVI; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm [hereinafter Subsidies and Countervailing Measures]; *see also* Press Release, World Trade Organization, Burkina Faso (November 1998), *at* http://www.wto.org/english/tratop_e/tpr_e/tp89_e.htm (last visited Sept. 25, 2004) (making the strange argument that Burkina Faso's tariffs on imported manufacturing goods are not favorable to the development of Burkina's manufacturing sector).

43. MNCs with production facilities in developing countries are not at the same disadvantage, because they do not need subsidies as much as the domestic industries do. Their financial situation is less closely linked to the host country than that of the domestic industries. Further, the operation of MNCs in these poor countries does not guarantee that profits will trickle down into the general populous. *See* Kay Treakle, *Ecuador: Structural Adjustment and*

While the United States has allowed the WTO and its international trade mandate to overshadow domestic U.S. environmental policies, it has refused to allow the internationally agreed-upon Kyoto Protocol to change domestic policy. On November 12, 1998, the United States signed the Kyoto Protocol, which calls for a reduction of greenhouse gases. But President Bush reneged this agreement later, stating in a March 13, 2000 letter to four Republican senators that his administration would not seek to restrict the emission of carbon dioxide by power plants.[44] Bush cited a U.S. Energy Department report stating that such restrictions would lead to higher energy costs.[45]

D. The WTO Enables MNCs to Reap the Benefits of Intellectual Property at the Expense of People in Developing Countries.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides exclusive patent protection for the products of many MNCs, including pharmaceutical and agricultural chemical products,[46] new plant and seed varieties,[47] and production processes. An MNC can acquire a monopoly over the natural resources of a developing country if it can demonstrate that it has created a "new" chemical or species variety. The MNC is then entitled to WTO-enforced patent protection for twenty years.

Although Article 27(2) contains a limited exception allowing members to refuse patents for exploitative inventions in their territory if "necessary" to protect "public order or morality," and if exclusion of the invention from patentability is the only way to prevent its commercial exploitation, it does not extend either patent or geographic protection to the traditional knowledge of indigenous people. And like other aspects of the WTO agreement, TRIPS prevents lesser-developed countries from passing protectionist laws.

Under the WTO rules, nearly one thousand patents have already been granted for genetically modified versions of five major crops, the food staples of poor countries: rice, wheat, maize, soybeans and sorghum.[48] Nearly 70% of these patents are held by six MNCs (Aventis, Dow, DuPont, Mitsui, Monsanto and Syngenta), which control 30% of the global seed market.[49] Many of the "new" varieties are virtually identical to the strains grown in poorer countries

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Indigenous and Environmental Resistance, *in* THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS 219 (Jonathan A. Fox & L. David Brown eds., 1998); Chantell Taylor, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers' Rights*, 28 DENV. J. INT'L L. & POL'Y 401, 411-12 (2000).

44. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L.. 626, 649 (2001).

45. *Id.*

46. TRIPS, *supra* note 13, at art. 27.

47. *See International Union for the Protection of New Varieties of Plants (UPOV)*, *at* http://www.upov.int/ (last visited Sept. 25, 2004).

48. *Seeds of Change*, JAPAN WKLY MONITOR, Mar. 4, 2002, *available at* 2002 WL 17033039.

49. *Id.*

for centuries.[50] But poor farmers, who cannot afford to prove that their traditional strains are distinct from patented strains, face having to pay royalties on their products that pass through international trade.[51]

A recent example from India concerns efforts by an American MNC, W. R. Grace & Co., to develop a biopesticide from the seeds of the neem tree. Indian farmers and environmentalists opposed allowing Grace to patent the product, partly because of fears that the supply of neem seeds would be reduced in India so that locals will have to purchase the MNC product.[52]

E. The WTO's Dispute Resolution System is Skewed to Advance the Interests of Trade and MNCs.

Another source of controversy in the WTO is the very process that was designed to resolve controversies—the dispute panel system and the appeals body.[53] Any member of the WTO who has a dispute with another member over an environmental issue or other policy may invoke a WTO dispute resolution panel.[54] Members may use the WTO's dispute settlement process to acquire permission to impose trade sanctions on other members that fail to comply with the SBS or TBT agreements. Dispute Panel Resolutions require unanimous agreement for reversal.[55]

1. The decision-making process is secretive and unchecked.

Dispute panels lack the transparency that would be found in a U.S. court. There is no way for an outsider to determine which panelist expressed an opinion in the panel report.[56] Nor is there any provision for open information exchange. The only way for Non Governmental Organizations (NGOs) or concerned parties to offer input is to submit an amicus curie brief that the governing country of the party has approved.[57] Furthermore, there is no provision for a neutral expert to assist a dispute panel with technical or

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50. *Id.*

51. Michael Woods, *Food for Thought: The Biopiracy of Jasmine and Basmati Rice*, 13 ALB. L.J. SCI. & TECH. 123, 130 (2002).

52. *Kanataka Farmers Target Cargill Again*, DOWN TO EARTH, Aug. 31, 1993, at 16 (referring to the destruction of a processing unit in India owned by the TNC Cargill Seeds).

53. The present system was established in the Uruguay Round's Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *available at* http://www.wto.org/english/docs_e/legal_e/53-ddsu_e.htm (last visited Nov. 15, 2004).

54. Legal Texts: The WTO Agreements, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding (last visited Sept. 6, 2004).

55. *See* Final Act *supra* note 4.

56. Annex 2 of the WTO Agreement, Article 14(3), Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1, (Dec.ember 11, 1996).

57. *See* WALLACH & SFORZA, *supra* note 41, at 24.

scientific information. WTO panels are allowed, but not required, to use experts, and the names of these experts are kept secret until the end of the case.[58]

The WTO lacks an effective process to avoid conflicts of interest. Disclosure of conflicts of interest is voluntary, and concern is geared towards preserving the personal privacy of panelists.[59] Such a conflict emerged when the WTO appointed to a panel an International Chamber of Commerce representative who also served on the board of Nestlé. The case dealt with the WTO's challenge of the Helms-Burton sanctions against foreign investors in Cuba, where Nestlé has a plant.[60]

The Appellate Body, which consists of permanently appointed officials, experiences another conflict of interest. This panel must decide in every case whether to apply domestic law or the law of their employers, the WTO, which empowers specific, named international standard-setting agencies to create rules for food and product safety, and health. But these outside agencies are no less subject to charges of agency capture. For instance, the Codex Alimentarius, which sets forth the model food safety standards,[61] and the International Organization on Standardization, an observer organization that establishes technical, product, and environmental standards, are private, industry-operated organizations that are closed to public scrutiny. The standards that these bodies set tend to be weaker than those of the governments of developed countries.[62]

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58. *Id.*

59. *See* GATT Secretariat, *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 6, WT/DSB/RC/1 (Dec. 11, 1996).

> Panelists shall disclose any information that could reasonably be expected to be known to them at the time which . . . is likely to affect or give rise to justifiable doubts as to their independence or impartiality . . . . These disclosure requirements shall not extend to the identification of matters whose relevance to the issues to be considered in the proceedings would be insignificant. They shall take into account the need to respect the personal privacy of those to whom these Rules apply.

Id. Significantly, a conflict of interest in itself is *not* grounds for disqualification:

> [F]ailure to disclose, as such, shall not be a sufficient ground for disqualification unless there is also evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.

Id.

60. *See* WALLACH & SFORZA, *supra* note 41, at 23. For a record of this dispute, see GATT Appellate Body Report on U.S. – Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R (Jan. 2, 2002).

61. Governments that were members of the 1979 TBT Agreement agreed to use relevant international standards (such as those for food safety developed by the Codex) except when they considered that these standards would not adequately protect health.

62. One example is Codex's lower standards for permissible levels of DDT, which is banned in the United States. Public Citizen, BRIEFING BOOK FOR THE 103RD CONG, WHY VOTERS ARE CONCERNED: ENVIRONMENTAL AND CONSUMER PROBLEMS IN GATT AND NAFTA 24 (Nov. 1992). *See also Symposium on Issues Confronting the World Trading System* --

2. *The burden of proof reflects the WTO's pro-trade bias.*

Given that there is a heavy burden of proof on a country to justify trade restrictions based on environmental protection policies, the "environmental" aspects of the WTO Agreement are often not functional.[63] The record of cases resolved by WTO dispute panels concerning challenges under Article XX of GATT, the SPS Agreement, and the TBT Agreement demonstrates that the challenger has the advantage. Of eight cases relating to environmental and health safety significance over the last eight years, only one was resolved in favor of the respondent.[64] In that case, there was no technical violation; rather, the challenger was claiming a non-violation injury.[65]

Summary Reports by the Moderators, http://www.wto.org/english/forums_e/ngo_e_symp2001_repsps_e.htm (July 6-7, 2001) (last visited Sept. 25, 2004).

63. The WTO agreement itself does not establish a burden of proof. The most relevant articles are Article 2.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("A country adopting a measure to protect human, animal or plant life or health has the burden of proving that the measure is based on "sufficient scientific evidence."), Article 5.6 of the SPS Agreement ("[M]embers shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility."), and Article 2.2 of the Agreement on Technical Barriers to Trade (standards and labels that constitute a technical barrier to trade must be justified with "available scientific and technical information, related processing technology or intended end-uses of products."). SPS Agreement, *supra* note *4*, at arts. 2.2 and 5.5; TBT Agreement, *supra* note 17. However, Dispute Panels have established their own mechanism for allocating the burden of proof. Once the complainant makes a prima facie case of a violation, the burden shifts to the country with the challenged measure to prove that its measure is justified. *See* Tuna-Dolphin I and II, *supra* note 20, at para. 5.22 ("[T]he practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation.").

64. These cases are as follows:

1. GATT Dispute Panel Report on Japan- Measures Affecting the Importation of Apples, at 155.
2. GATT Dispute Panel Report on Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches, WT/DS238/R (Feb. 12, 2003).
3. GATT Dispute Panel Report on Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/R (May 3, 2002).
4. GATT Appellate Body Report on Japan – Measures Affecting Agricultural Products, WT/DS76/8, (Mar. 19 1999).
5. GATT Dispute Panel Report on Australia – Measures Affecting Importation of Salmon, WT/DS18/R (June 12, 1998).
6. GATT Appellate Body Report on European Communities – Measures Affecting Meat and Meat Products, WT/DS58/AB/R (Nov. 6, 1998).
7. GATT Dispute Panel Report on U.S. – Import Prohibition of Shrimp and Shrimp Products, DS58/AB/R (Nov. 6, 1998).
8. GATT Appellate Body Report on U.S. – Standards for Reformulated and Conventional Gasoline, WT/DS2/A13/R (May 20, 1996).

See WTO, *Index of Disputes Issues, at* http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk1 (n.d.) (last visited Nov. 15, 2004).

65. Europe survived Canada's claim against its health protection measures only because the measures did not technically constitute a violation of the TBT Agreement. Rather, Canada had claimed injury from a non-violation. The Panel specifically did *not* support Europe's

The threat of a successful WTO challenge results in a chilling effect on countries' inclinations to initiate new environmental or human rights laws.[66] Moreover, MNCs can pressure lesser-developed countries to change their laws before a matter ever comes under the consideration of the WTO.

F. The WTO Rewards Members for Attacking the Environmental Policies of Other Members.

The WTO decisions are fair to the extent that they even-handedly put an end to all attempts to unilaterally regulate the environmental policy of foreign countries. The United States does not get to impose its standards for tuna on Europe, and Europe does not get to impose its stance against beef hormones on the United States. Australia is not allowed to quarantine raw salmon imports to protect its indigenous fish population, and the Unites States is not allowed to protect its publicly inspected beef market against the introduction of Australia's privately inspected beef. The fact that each of these members has only taken the "environmental" stance when its regulation is being challenged makes it easy for a WTO dispute panel to put a flat ban on any environmental measure that could also have a protectionist objective. In the race to the bottom, there is no room for pious, self-promoting environmentalism.

What has led to a system in which a country acts as an environmentalist one day and an "anti-protectionist" the next? It is the peculiar manner in which the present international trade system gives no rewards for championing the environmental cause, even if the cause is popularly elected in a given democratic country. The only rewards come from championing the anti-protectionist cause.

For example, even though the United States does not produce bananas for export, it went to bat for Chiquita Brands International against the European Union's the Lomé Convention.[67] This convention, which gave preference to the banana producers from former E.U. colonies, was struck down under the principle of most favored nation. When the European Union delayed implementation of the WTO ruling, the United States imposed trade sanctions against the European Union worth $190 million annually.[68]

The results of this perverse system of rewards are that environmental standards sink to the lowest common denominator, while the principles of Most Favored Nation and non-discrimination assume the highest denominator. MNCs may sit back and watch while potential host countries battle each other

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position that "there cannot be a 'legitimate expectation' in the case of a measure that concerns the protection of human health." GATT Dispute Panel Report on European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (Sept. 18, 2000).

66. Ralph Nader, *Introduction* to WALLACH & SFORZA, *supra* note 41, at 10.

67. GATT Appellate Body Report on U.S. – Import Measures on Certain Products from the European Communities, WT/DS165/13 (Jan. 19, 2001).

68. Press Release, U.S. Mission to the E.U., WTO Authorizes U.S. to Retaliate in Banana Dispute, (Apr. 20, 1990) (on file with author).

in the name of removing protectionist barriers. The result is a frenzy to tear down trade barriers and erect MNC production facilities. In the end, the MNC quietly settles down in the country that has won the race to the bottom in a desperate attempt to attract it.

IV. BALANCING TRADE IS THE FIRST STEP TO CONTROL MNCS

If the United States corrected its trade imbalance by matching the value of its imports to that of its exports, then it would import fewer MNC goods made under sub par environmental and labor standards. Instead, the United States would be forced to produce more of its own goods, which would be subject to American environmental and social controls.

The solution of balancing the system of imports and exports as a whole is preferable to piecemeal sanctions that only address isolated environmental problems. Another benefit of balancing the entire trade system is that it avoids policy trade-offs between the competing interests that are injured by MNC practices (i.e., environmental protection, wages, consumer protection, health and welfare, social responsibility, and macro-economic unsustainability). It is less controversial for a decision-maker to call for balancing the United States' current accounts deficit than to advocate a unilateral measure to address environmental problems.

A. The United States Should First Consider Remedies Within the WTO System.

1. The United States could get limited support under provisions for the balance of payments.

The United States could balance its trade deficit under articles XII and XVIII of GATT, and the Balance of Payments Declaration. Under Article XII, a WTO member may impose quantitative restrictions that are otherwise prohibited in order to "safeguard its external financial position and its balance of payments," where these restrictions are required either "to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves," or if the member has "very low monetary reserves, to achieve a reasonable rate of increase in its reserves." [69]

However, this method of balancing trade has its limits. The measures that the United States would use would have to be as minimal as possible in order to address the imbalance. The measures could not discriminate between different countries, would have to avoid unnecessary damage to commercial and economic interests of other contracting parties, and would eventually have to be

69. GATT art. XVIII sets forth more lenient criteria for developing countries. It does not require that the threat of a serious decline in the member's monetary reserves be "imminent" or "very low." Rather, reserves must be "inadequate." GATT 1994, *supra* note 19, at art. XVIII.

phased out.[70] Also, this method would require consultation with the International Monetary Fund (IMF), which has the final say as to what qualifies as a decline in the member country's monetary reserves.[71] Just because the IMF finds that the United States has balance of payments difficulties does not mean that the WTO would allow the United States to impose trade-based corrective measures.[72] A further problem is the extent to which the United States could rely on the IMF for funding. The IMF has nowhere near what is needed to correct the US imbalance.[73]

Thus, while the United States could rely on IMF funding to a limited extent, the IMF would play a more important role in making the necessary factual findings that would allow the United States to take trade measures to correct the balance itself. Significantly, the United States has a great deal more influence over the IMF than it has over the WTO because of the IMF's financially weighted voting scheme (in which the United States has about seventeen percent of the vote[74]).

2. The United States could get limited support under provisions for tariffs, safeguards, and subsidies.

The United States could impose an overall, non-discriminatory tariff of ten percent to fifteen percent on imports. This would give U.S. industry an advantage over MNCs whose production forces are based in other countries. But the tariff would have to meet the GATT 1994 requirements: (1) the tariff is "equivalent to an internal tax" of a "like domestic product;" (2) the tariff is a

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70. *Id.*

71. GATT Article XV provides that in the context of balance of payments problems, contracting parties "shall consult fully with the International Monetary Fund [and] shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves, or a reasonable rate of increase in its monetary reserves." *Id.* at art. XV.

72. This happened to the United States. in 1971, when the IMF had found that the United States was experiencing balance-of-payments difficulties, but the GATT panel did not approve the particular measure chosen by the United States to respond to those difficulties. Thus, while the IMF is the finder of fact, the WTO panel is the applier of the law. *See* Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, 96 AM. J .INT'L .L. 561, 579 n.86 (2002).

73. The total amount of SDRs that the IMF had available for lending as of March 2004 was 212.8 billion SDRs, which is about U.S. $280 billion. International Monetary Fund, *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, http://www.imf.org/external/np/sec/memdir/members.htm (last updated Nov. 12, 2004) [hereinafter *IMF Quotas*]. While in theory this could cover the United States' current account balance (which was -$135.0 billion as of 2003, according to the 2004 Economic Report of the President, Table B-103), only those currencies generally accepted for settlement of international accounts are useful for drawings by states. ANDREAS E. LOWENFELD, INTERNATIONAL ECONOMIC LAW 512 (2002). Typically, states receive initial payments of 25% of the member state's quota in the IMF (which would be less than 1 billion SDRs, since the U.S.'s quota is about 17%), and later drawings are allowed with increased conditionality. *Id.* at 513.

74. *IMF Quotas*, *supra* note 73.

justifiable "anti-dumping or countervailing duty," or (3) the tariff consists of "charges commensurate with the cost of services rendered" (for instance, the cost of transporting or handling a product).[75]

Additionally, the tariffs the United States could impose would have to be consistent with the concessions it has made in its schedule. The United States' schedule not only sets forth its tariff commitments, it is a common agreement among all WTO members.[76] Once a country has committed to a schedule, it can change its commitment only after negotiating with its trading partners, which could mean compensating them for loss of trade.[77] If the United States were to adopt a new tariff that differs from the type mentioned in its schedule, or results in higher charges, other members who have become accustomed to their present levels of exports would have grounds for protesting. A WTO panel could then invalidate the tariff.[78] However, the United States could survive a dispute panel if it could prove that it imposed the same "tariffs" on its own industry. Thus, "tariffs" would have to take on a form similar to sales tax.

The United States might be able to impose temporary tariffs to correct its trade imbalance if it could pass the tariffs as "safeguards" under Article XIX of GATT 1994 and the Safeguards Agreement. But the United States would have to show that U.S. industry is experiencing serious injury, and that the serious injury is caused by increased imports.[79] Even then, the remedy is limited. The duration of the safeguard measure typically cannot exceed four years,[80] and requires that the imposing country grant some sort of compensation to affected members.[81]

Finally, the United States could grant non-industry-specific subsidies (in the form of grants or tax breaks) to its own domestic producers under GATT Art. III(8)(a). But this would be less desirable than tariffs, since subsidies would drain U.S. government reserves rather than bring revenue. Also, to avoid prejudicing another WTO member, any specific subsidization of a product could not exceed five percent.[82]

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75. GATT 1994, *supra* note 19, at art. II, para. 2(a).

76. *Id.* at art. II, para. 1(b)(ii).

77. WTO, *Members' Commitments, at* http://www.wto.org/english/tratop_e/schedules_e/goods_ schedules_e.htm (last visited Sept.6, 2004).

78. GATT Appellate Body Report on Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/11 (Apr. 23, 1998).

79. Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal-e/25-safg.pdf (last visited Sept. 26, 2004) [hereinafter Safeguards].

80. *Id.* at art. 7.

81. *Id.* at arts. 8, 12.

82. Agreement on Subsidies and Countervailing Measures, *supra* note 42.

B. The United States has a Limited Ability to Apply its own Trade Remedies in Conjunction With WTO Rules.

1. If justified, the United States can impose sanctions for unfair trade practices.

U.S. trade law allows for additional remedies to the trade imbalance, which do not necessarily conflict with the WTO.[83] These measures could also stand on their own in the absence of a regulatory force like the WTO. Under the WTO Agreement, however, these measures usually must be justified as remedies for unfair trade practices (i.e., countervailing duties against foreign subsidies and anti-dumping measures). The United States has to make a strong showing that the foreign country actually used a subsidy or discriminatory price, and that the resulting substantial injury threatens U.S. industries.[84] Recently, the only private U.S. trade remedy with fairly strong prospects is the Section 337 proceeding for infringement of U.S. domestic intellectual property rights.[85]

2. The United States can devalue the dollar.

A different approach involves devaluing the dollar to increase exports and discourage imports. The over-valued dollar under the current system acts like a tax on U.S. exports and a subsidy to U.S. imports.[86] Devaluation lowers the

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83. *See* Trade Act, 19 U.S.C. §§ 2101-2495 (2000). The act targets disruptive acts by foreign industrial policies without the need to show evidence of dumping or subsidies. This law strengthened the President's authority to impose sanctions unilaterally by eliminating the requirement that the President observe international obligations before taking action against unfair trade practices. It expanded the President's authority to impose tariff and non-tariff import restrictions. The only showing must be unfairness on the part of a foreign government and injury of U.S. interests. Section 203 provides for trade restrictions in the form of tariffs, quotas, or marketing agreements when increased imports are substantial cause of injury to domestic injury. Section 122 provides for balance of payments emergencies. Section 125 allows the President to terminate international agreements. Section 321 provides antidumping remedies, and Section 331 provides countervailing duties for subsidies. *See also* Agriculture Adjustment Act of 1933, 7 U.S.C. §§ 601-624 (1994) (allows restrictions to protect U. S. agriculture price supports); Agriculture Act of 1956, 7 U.S.C. § 1854 (1982) (authorizes international agreements to regulate trade in agriculture commodities).

84. William A. Lovett, *Current World Trade Agenda: GATT, Regionalism, and Unresolved Asymmetry Problems*, 62 FORDHAM L. REV. 2001, 2031 (1994) [hereinafter Lovett, *Current World Trade Agendga*].

85. *Id.*

86. Robert A. Blecker, *The Benefits of a Lower Dollar, How the High Dollar has Hurt U.S. Manufacturing Producers and Why the Dollar Still Needs to Fall Further*, Economic Policy Institute, http://www.epinet.org/content.cfm/briefingpapers_may03bp_lowerdollar (May 30, 2003) (last visited Nov. 15, 2004). A 30% fall in the dollar from 1985 to 1988 was required to reduce the real trade deficit from about 2% of GDP to 1% of GDP by 1989. The dollar stayed down in that range through 1997, and the deficit stayed around 1% of GDP (except when the recession of 1990-91 pulled the deficit down to zero). *Id.*

price of domestic exports to foreigners in order to increase the demand for exports (provided that demand is elastic). It also raises the price of imports, reducing the demand for foreign goods.

Even though the dollar fell about 16% in 2002, this was not enough to offset its 51% gain on other major currencies (such as the Japanese yen, British pound, the Euro and its predecessors) between April 1995 and February 2002.[87] To bring down the 2003 deficit of 5% of GDP will require a much larger devaluation of the dollar.[88] The Federal Reserve could either increase the money supply enough to erase the dollar's over-valuation, or raise interest rates to increase the overseas demand for dollars.

Devaluation is not likely to be popular, especially since it is paid for by the middle class electorate.[89] However, of all the remedies, it is most directly connected with the American problem of over-consumption—the ultimate fuel for MNC growth.

C. The United States may Have to Rely on Trade Remedies Outside of the WTO.

Because the United States acquiesced to the established asymmetrical trade regime, most foreign governments regard their privileges relative to the United States (in terms of tariffs on U.S. goods, for instance) as status quo. Few nations (and few Americans) appreciate that the imbalance is unsustainable. Moreover, other indebted nations are unable to change the system in order to accept more U.S. goods. The fact that many countries have financial debts to the United States only strains what are already poor trade relations. At the same time, debt finance proceeds from these countries are not enough to correct trade balance.

The United States is not forever bound to be part of an asymmetrical trade regime. The United States, or any other country, has the right to withdraw from the WTO Agreement by giving six months notice.[90] The United States could then impose general, across-the-board tariffs[91] on imports without concern for violating its WTO schedule, or compensating other members for any reduction in trade. Without the pressure of the unconditional Most Favored Nation

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87. *Id.*

88. Scott, *supra* note 27.

89. Lower economic classes more often depend on domestic goods, while the uppermost classes tend to retain their wealth through a variety of holdings in spite of the general economic situation.

90. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XV, 61 Stat. A-3, 55 U.N.T.S. 187 (allowing WTO withdrawal for any member after six months notice to the Director General). Professor William Lovett cautions that timing for withdrawal is crucial: The United States would not want to withdraw at a time it would be expecting to call on allies in the war against terrorism. William A. Lovett, *Reflections on the WTO Doha Ministerial: Bargaining Challenges and Conflicting Interests: Implementing the Doha Round,* 17 AM. U. INT'L L. REV. 951, 986 (2002) [hereinafter Lovett, *Reflections*].

91. Lovett, *Current World Trade Agenda*, *supra* note 84, at 2028.

clause, individual countries or groups of countries could then negotiate with the United States for bilateral or regional trade agreements based on reciprocal terms.[92] The default trade regime would impose an indiscriminate tariff against imports, assuring that the United States would not be more open than any of its partners.

As a substitute for safeguards or tariffs, some have advocated voluntary restraint agreements (VRAs).[93] VRAs bar producers in one nation from exporting more than a specified amount of a product to another nation. Unlike safeguards or general tariffs, VRAs limit the restrictive measures to a particular country (or set of countries). The restricted country readily accepts the agreement if it reduces supply enough to raise the price of the limited goods. In that case, however, the exporting country would reap the benefits of the raised prices. Tariffs are preferable in this sense, because the proceeds from raising the price go to the importing nation that has assessed the tariff.[94]

In addition to levying tariffs, the United States would also need to focus on its industry, and renewal industry to the extent that much of its production has gone abroad.[95] The government could develop a list of significantly disrupted U.S. industries that qualify for subsidies in the form of loan guarantees[96] and technology grants.

V. ENVIRONMENTAL MEASURES ARE ALSO NECESSARY TO CONTROL MNCS.

The trade imbalance is an important key to the MNC problem, but there are other keys that are less tangible. One of the most important troublemakers

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92. Professor Lovett notes that most of the U.S. trade-current account deficit problem arises out of only a few relationships: U.S.-Japan trade; U.S.-China Trade; U.S.-ASEAN trade; and, to a lesser extent, U.S.-EU trade and U.S.-NAFTA trade. "This is a short and manageable list of bilateral-regional relationships." Lovett, *Reflections, supra* note, 90 at 984.

93. Safeguards, *supra* note 79.

94. Daniel J. Gifford, Antitrust and Trade Issues: Similarities, Differences, and Relationships, 44 DEPAUL L. REV. 1049, 1085 (1995).

95. The United States could find itself in a situation similar to that of Argentina. After Argentina pegged its peso to the dollar, Argentine consumers were able to afford more foreign goods. They consumed foreign goods to the point that many Argentine industries (including Grundig, an internationally significant electronics manufacturer) went out of business. Now that Argentines can no longer afford foreign goods, they will have to find a way to revitalize their own industries. *See* Eduardo Conesa, *La Dolarizacion: Costos y Beneficios*, Macroconsul No. 41, Apr. 1999, *available at* http://www.cess.org.ar/macro/40-abr99/0499doc1.htm (last visited Nov. 11, 2004).

96. Loan guarantee programs have the most value for industries that produce non-market benefits. Presumably, private lenders and investors already receive the normal market benefits of credit transactions. The non-market benefits would have to be significant enough to risk taxpayers' money in the event that the firms that receive guarantees but later fail. *See* Governor Edward. M. Gramlich, The Federal Reserve Board, Remarks before the National Economists Club (April 24, 2003), at http://www.federalreserve.gov/boarddocs/speeches/2003/20030424/default.htm (last visited Sept. 26, 2004).

is an old adversary to environmentalists - apathy. Neither the consumer who enjoys the short-term benefit of cheap "made-in-Taiwan" goods, nor the MNC that is reeling in the profits, has an immediate concern about the long term environmental and social damage wrought by MNCs.

There is more than one method in the international regulatory scheme to raise the environmental "common denominator" and reduce apathy. One strategy has been to develop international laws that bind countries in spite of their apathetic constituencies. Another more voluntary strategy has been to target consumers directly, and allow MNCs to court them with their environmental righteousness. Finally, a somewhat shaky international judicial system has emerged alongside national judiciaries to right past wrongs and increase public access to justice.

A. International Laws Target States, but are not Powerful Enough to Overshadow Compete With the WTO or Affect MNCs.

1. Hard law is binding but difficult to achieve.

"Hard law" norms, found in treaties such as the WTO Agreement, are binding international laws that create legal duties. Because countries are likely to suffer negative consequences for breaking these legal duties, they will probably comply. Hard law is useful where effective compliance requires intrusive verification and the application of sanctions, and where that can be achieved only through a treaty instrument.[97] Problematically, it is very difficult to get countries to agree on multi-lateral treaties, particularly when they address something as controversial as environmental protection.

Customary international law is another type of hard law. It often lies outside of treaties. An action violates customary international law when no state condones the action, there are normative criteria that define violations of the law, and the law is nonderogable.[98]

There is very little customary international environmental law. Declarations of substantive environmental rights such as those found in the Stockholm Declaration[99] and the Rio Declaration[100] are often considered

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97. *See also* Richard L. Williamson, Jr., *Is International Law Relevant to Arms Control?: Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT'L L. 59, 71 (2003).

98. *See* Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 370 (E.D. La. 1997); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("A customary norm binds all States if it comes from the general and consistent practice of States and is followed by States out of a sense of legal obligation.").

99. Declaration of the U.N. Conference on the Human Environment, U.N. Doc. A/CONF.48/14 (1972), *reprinted in* 11 I.L.M. 1416, 1417 (1972) [hereinafter Human Environment].

100. U.N. Conference on Environment and Development: Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

aspirational rather than normative.[101] Conventions that do recognize environmental rights do so with qualifications.[102] U.S. courts have often been hostile to the idea of inherent environmental rights.[103] The only universal recognition at this time seems to be a prohibition against trans-boundary pollution.[104] Thus, hard law has not yet become an effective tool for controlling environmental abuses committed by MNCs.

2. Soft law is less binding but easier to achieve.

Because of the great difficulty in achieving the unanimous consensus that a treaty requires, international environmental law-making has shifted toward "soft law." Soft law generally consists of nonbinding resolutions that authorize conduct by states that might otherwise be questioned (i.e., extra-territorial assertions of environmental norms), but do not mandate particular actions. Soft law ranges from the very general, aspirational declarations of United Nations conferences to the more functional multi-lateral environmental agreements (MEAs) that allow for the creation of norms.

The more general soft law-establishing conferences have not been very useful in the realm of international trade law, although they may eventually serve as testimony to international consciousness of environmental obligations.[105] The Stockholm Conference of 1972 established a mantra for

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101. Andy Weiner, *The Forest and the Trees: Sustainable Development and Human Rights in the Context of Cambodia*, 151 U. PA. L. REV. 1543, 1574 (2003).

102. One example is the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, which is qualified to the extent that resources are available for a state to take protective measures. Additional Protocol to the American Convention on Human Rights In the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador" (Nov. 17, 1988), http://www.worldpolicy.org/globalrights/treaties/achr-esc.html (last visited Nov. 15, 2004).

> The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

Id.

103. *E.g.*, Ullonoa Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003).

104. *See, e.g.*, Trail Smelter Arbitration, 3 REP. INTL'L ARBITRAL AWARDS 1911 (1941) [hereinafter Trail Smelter Arbitration].

> [N]o state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."

Id. See also Corfu Channel Case, 1949 I.C.J. 4, 21; Lake Lanoux Arbitration (Affaire du Lac Lanoux), 12 REP. INTL'L ARBITRAL AWARDS 281 (1957).

105. A. KISS, THE INTERNATIONAL PROTECTION OF THE ENVIRONMENT IN THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 1069 (R. Macdonald & D. Johnston eds., 1983).

environmental conservation,[106] but did not refer to GATT, or discuss how the projects contemplated in the Stockholm Action Plan might meld with trade law. The Rio Conference of 1992 made more progress in terms of making the environment a worldwide media event. It directed contracting countries toward environmental responsibility, but lacked a system of obligations or enforcement mechanisms. However, the Rio Conference drew the line at interfering with GATT measures to prevent protectionism.[107]

3. Framework conventions are a semi-hard law alternative.

An interesting development in international environmental law is the emergence of framework conventions. These conventions achieve broad consensus among member states on the basic principles while leaving the normative standards and enforcement mechanisms to be set later by majority vote.[108] It is in this context that relatively successful agreements on the regulation of chlorofluorocarbons (CFCs),[109] hazardous waste,[110] and endangered species[111] have developed.

The Montreal Protocol provides an encouraging example. Activists from the United States in conjunction with the United Nations Environmental Programme, initiated a framework convention under which parties committed themselves to research the ozone-depleting effects of CFCs, and to harmonize policies on CFCs. In later meetings, participating states agreed to a gradual phase out of CFCs. Member states could trade CFCs with each other, as long as they conformed to the overall standards of the Protocol.[112] But member states

106. The first principle of Stockholm is that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being." Human Environment, *supra* note 99.

107. *See* Rio Declaration, *supra* note 100. ("Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."). *See also* United Nations Framework Convention on Climate Change, art. 3(5), May 9, 1992, *reprinted in* 31 I.L.M. 849 (1992) ("Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.").

108. While the basic principles become "hard law" for the signatories, the same "soft law" problems arise when countries fail to agree on particularized norms and methods of enforcement.

109. U.N.: Protocol on Substances that Deplete the Ozone Layer, Doc. A/Conf.146/4/Rev.1 Sep. 16, 1987, *reprinted in* 26 I.L.M. 1550 (1987) [hereinafter Montreal Protocol].

110. U.N. Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act and Test of Basel Convention, U.N. Doc. A/Conf.123/3/Rev.1 (Mar. 22, 1989), *reprinted in* 28 I.L.M. 649 (1989).

111. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

112. Montreal Protocol, *supra* note 109, at art. 4A.

could not accept products containing CFCs or products produced using CFCs from non-member states.[113]

These trade restrictions on states outside of the Protocol were arguably subject to challenge under GATT. First, allowing trade of CFCs within the Protocol, but excluding this treatment to non-members, would violate GATT's Article I Most Favored Nation clause (under which a concession granted to one party has to be granted to all parties). Second, restricting a like product based solely on the manner in which it was made would violate Article III, which requires like treatment of like products no matter how they were made. But interestingly, no challenges have been raised, and members of the Montreal Protocol have successfully applied their own environmental law to non-members of the Protocol. The fact that these provisions have not been challenged by a WTO member probably reflects the degree of global consensus on this issue, suggesting that multi-lateral, negotiated agreements (when possible) will always be more successful than unilaterally imposed sanctions (as in the Tuna-Dolphin cases).

But whether MEA-made law could work for products other than CFCs is unclear. The Montreal Protocol enjoyed success, first, because there was already substantial and alarming evidence of the problem, and second, because there were adequate (although slightly more expensive) substitutes for CFCs. An MEA to stop global warming would have to deal with those who still contend that there is no problem, as well as the huge lobbies and market forces that want to continue to use fossil fuels.

4. Neither hard law nor soft law has directly targeted MNCs.

Instruments of soft law and hard law target states rather than non-state entities. When liability is assigned in cases of trans-border pollution for instance, the liability is placed on the state that houses the polluting entity.[114] Except for those cases in which the polluting industry has come forward voluntarily to accept responsibility,[115] it is up to the state to indemnify the offending MNC. But, a poor developing country may not want to stunt its production by sanctioning the MNC to which it is host. Thus, while conventions such as the Montreal Protocol have enjoyed some success in streamlining the environmental regulatory capacity of states, they have not been able to specifically target MNCs.

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113. *Id.*

114. *See* Trail Smelter Arbitration, *supra* note 104.

115. An example is the case of the Sandoz facility in Switzerland, which caused a fire and chemical toxin release into internationally shared waters. Sandoz received, and paid, substantial claims for damages. The specific amount of international compensation was settled privately and paid without judicial action. *See* Astrid Boos-Hersberger, *Transboundary Water Pollution and State Responsibility: The Sandoz Spill*, 4 ANN. SURV. INT'L & COMP. L. 103 (1997).

B. Standards That Directly Target MNCs and Consumers are Slowly Developing.

1. International standards for MNCs are voluntary.

International efforts regarding self-regulatory schema for MNCs date back to 1976, when ten countries under the banner of the Organization for Economic Cooperation and Development (OECD) agreed upon the Declaration on International Investment and Multinational Enterprises. This Declaration included the Guidelines for Multinational Enterprises, which were revised in 2000.[116] These guidelines establish principles and standards with respect to the environment and other areas. Similarly, The Global Compact between the U.N. and the world business community (proposed by U.N. Secretary-General Kofi Annan at the 1999 World Economic Forum in Davos) "asks" companies to support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility, and encourage the development and diffusion of environmentally friendly technologies.[117] But while these statements may eventually form a basis for soft law, they might just as easily remain the platitudes of global officials patting each other on the back.

ISO 14001, another standard for environmental management, is commonly cited by corporate and government officials as the most important international environmental standard for MNC operations.[118] ISO 14001 was adopted in 1996 by the International Standards Organization (ISO), an NGO that promotes international standardization for technologies, in order to "help rationalize the international trading process."[119] Rather than impose substantive requirements, ISO 14001 is a procedural checklist for a management system. To be certified under ISO 14001, a company must: (1) establish an environmental policy to comply with national laws and a commitment to work towards continual improvement and pollution prevention; and (2) develop an internal process to manage and review that policy. Transparency is not required.

Problematically, MNCs have a clear advantage when it comes to comprehending environmental technology and international standards, and may use and dispense with this knowledge at their benefit. This explains why

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116. *See* Organization for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises: Focus Responsible Supply Chain Management*, ANNUAL REPORT 2002, http://www1.oecd.org/publications/e-book/2002011e.pdf (last visited Nov. 15, 2004).

117. *See* The Global Compact, *at* http://www.unglobalcompact.org (last visited Nov. 15, 2003). The Global Compact was formally launched as a coalition of global leaders from the world of business, labor, and civil society organizations at the U.N. Headquarters on July 26, 2000. *Id.*

118. *Environmental Management Systems - Specifications with Guidance for Use*, AMERICAN NATIONAL STANDARDS INSTITUTE/INTERNATIONAL ORG. FOR STANDARDIZATION, Sept. 1, 1996.

119. International Organization for Standardization, *About ISO: Introduction, at* http://www.iso.org/iso/en/aboutiso/introduction/index.html (last modified Feb. 16, 2004).

companies such as Occidental Petroleum in Ecuador have refused to publicly disclose the precise standards that govern its operations, and why government officials are not fully informed about the company's standards and practices.[120] Further, without enforcement mechanisms or support from States or their consumers, voluntary standards are unlikely to be successful.

2. Environmental labeling schemes have had mixed results.

Environmental labeling consists of mandatory or voluntary government schemes to advertise environmentally important information to the consumer. A government could require labels stating that a good contains an environmentally harmful substance, or was produced with an environmentally harmful method. Under more content-neutral schemes, certain products must be labeled in order to disclose information to the consumer that the government has determined to be of importance.[121] The information may or may not reveal negative facts concerning the product.

Voluntary labeling schemes may convey a single attribute about a product, for example, that it is "biodegradable," "recyclable," or "ozone friendly."[122] Voluntary "multi-criteria" eco-labeling programs are more common. This type of program uses a "seal of approval" or a content-neutral "report card."[123] The labeling is either government-sponsored or operated solely by a private, third-party certification organization.

Proponents of free trade object to labeling programs, asserting that they will act as non-tariff trade barriers in contravention of the WTO Agreement.[124] The question of whether an environmental labeling program constitutes an illegal, non-tariff trade barrier will probably depend on whether it is mandatory or voluntary, and whether it governs a product characteristic or a PPM.[125] The WTO Agreement will not support the unilateral attempt by one country to impose its environmental or conservation PPM laws on another through use of a mandatory labeling scheme that enforces an import ban.[126] It will, however,

120. Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289, 337 (2001).

121. Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT'L ENVTL. L. REV. 599, 604 (1999).

122. *Id.*

123. Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205, 220 (1996).

124. *E.g.*, UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, STATEMENT OF THE U.S. COUNCIL FOR INTERNATIONAL BUSINESS ON TRADE BARRIERS WHICH ARISE FROM GOVERNMENT-SPONSORED ECO-LABELING PROGRAMS 1 (1995).

125. Staffin, *supra* note 123, at 220.

126. GATT Secretariat, *Trade and the Environment*, MTN.TNC/W/ 7 (1992).

support a labeling program that applies equally to all countries based on the actual circumstances of production, rather than the country's policies on production.[127]

3. Some MNCs have imposed codes on themselves for the purpose of public relations.

In response to pressure for transparency, some MNCs have come up with their own codes of conduct (often in the context of hazardous waste disposal). Dow Chemical and the Chemical Manufacturers' Association (CMA) have produced some of the most exemplary codes. "The Dow codes address plant safety, product stewardship, public communications, regulatory compliance, and waste reduction in considerable detail and prescriptive language."[128] The CMA codes apply to the association's 180 member firms and currently address community awareness and emergency response, pollution prevention, process safety, distribution, and employee health and safety.[129] Some federal agencies have offered additional incentives for developing environmental codes. For instance, the U.S. Environmental Protection Agency (EPA) offered regulatory deferrals as an incentive for firms that voluntarily reduce their use of certain toxic chemicals.[130]

Although they are voluntary and heterogeneous, private codes are proliferating throughout the developed world. However, environmental codes used by MNCs in their countries of origin, and other developed nations, do not have similar influence over MNC activities in developing nations.[131] This suggests that the driving force behind codes is pressure from educated consumers and government regulation.

Codes pledging uniform practices and environmental technologies among developed and developing countries could mitigate this problem, but would also create new conflicts and problems. First, there is something inherently suspicious about delegating the power to write environmental law to a foreign oil company. Environmental law should not be based on negotiations between special interests and a small group of officials who belong to a discredited and distrusted political class.[132] Second, "MNCs would be likely to object to this solution, claiming that it unduly limits management discretion and that it would

127. Tuna-Dolphin I, *supra* note 20; Tuna-Dolphin II, *supra* note 20.

128. Michael S. Baram, *Multinational Corporations, Private Codes, and Technology Transfer for Sustainable Development*, 24 ENVTL. L. 33, 47-48 (1994).

129. *Id.*

130. *See NOTICES ENVIRONMENTAL PROTECTION AGENCY Pollution Prevention Strategy*, 56 Fed. Reg. 7,849, 7,861-64 (Feb. 26, 1991).

131. For instance, CMA's codes say nothing about application beyond the U.S. subsidiaries operating in developing nations that lack comparable associations. These codes allow for a good deal of discretion to use practices and technologies that might not be consistent with the industry codes of developed countries.

132. *See* Kimerling, *supra* note 120, at 392-394.

promote 'unnecessarily expensive' methods of environmental protection."[133] Third, host countries that have independently determined their requirements for environmental protection might also object to this solution.[134] Close collaboration between a public international organization and MNCs in each of several industrial sectors is needed to produce consensus codes setting forth uniform practices and technology transfer obligations for all MNCs involved, irrespective of their home and host countries.[135]

C. *Judicial Controls Have Emerged as a Measure of Last Resort.*

1. International panels on the level of the WTO dispute system have yet to evolve.

While WTO panels do not provide injured individuals the standing needed to pursue claims against MNCs, there are other international and regional enforcement systems with the capacity to review individual claims. Among these are the United Nations International Court of Justice, the Permanent Court of Arbitration, and the European Court of Justice.[136] United Nations and regional human rights fora have also begun to consider whether certain environmental claims amount to human rights violations in the United Nation's Human Rights Committee, the European Court on Human Rights, and the Inter-American Court for Human Rights.[137] However, because there is a lack of customary international environmental law that these courts can rely on, litigants are often unable to state a claim. Those who have cast environmental injuries as human rights violations by states have been far more successful.[138]

The 2002 Rome Treaty for an International Criminal Court (ICC) explicitly acknowledges environmental crimes, but only in the context of war.[139] Given this narrow jurisdiction, litigants may be more successful

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133. Baram, *supra* note 129, at 58.

134. *Id.*

135. *Id.*

136. Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities,* 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 207 (2001).

137. *Id.*

138. *E.g.,* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. C.H.R., Ser. C./doc. 79 (2001), http://www.law.arizona.edu/Journals/AJICL/AJICL2002/vol191/KJudgment.pdf (asserting property rights of indigenous tribes and human rights violations against Nicaragua); Lopez Ostra v. Spain, App. No. 16798/90, 20 Eur. Hum. Rts. 20 Eur. Ct. H.R. (ser. A) at 303 (1994), http://www.indianlaw.org/IACHR_Judgment_Official_English.pdf (last visited Sept. 26, 2004) (asserting health violations against Spain regarding air pollution).

139. The court has jurisdiction over an intentional attack launched with "the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated . . . ." The Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 37 I.L.M. 999, art. 8(2)(b)(iv), http://www.un.org/law/icc/statute/99_corr//.htm (last visited Sept. 26, 2004) [hereinafter Rome Statute of ICC].

framing an act as a crime against humanity under article 7(1)(k), which prohibits actions "causing great suffering, or serious injury to body or to mental or physical health."[140] Unlike the International Court of Justice,[141] the International Criminal Court may assert jurisdiction over non-state actors[142] such as MNCs.

2. National justice systems are more evolved than international panels but there are often jurisdiction problems.

In the United States, private civil law has been the overwhelming force for inducing compliance with environmental laws, and deterring the derogation of these laws. Both injured victims and shareholders have the opportunity to directly target MNCs.

a. Injured foreign plaintiffs have not had much success in the United States

Given that many judiciaries in the host countries of MNCs are weak, plaintiffs have often tried to bring suit in U.S. courts. However, foreign plaintiffs have thus far had little success in bringing tort claims against MNCs. A number of Alien Torts Claims Act (ATCA)[143] cases against MNCs for international environmental rights violations have just begun to make their way through the U.S. court system. As of yet, none have found an MNC liable for a massive environmental tort.

Courts have some discretion to accept cases involving foreign plaintiffs and domestic defendants. However, they have tended to dismiss such cases on bases of forum non conveniens, failure to join indispensable parties, or lack of subject matter jurisdiction.[144] Other problems with the ATCA relate to its narrow application, with respect to the types of actions [145] and the actor.[146]

Another difficult aspect of international torts is assigning liability among the various actors. "For instance, in the case of the 1990 Iraqi invasion of

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140. *Id.*

141. *See* Statute of the International Court of Justice, *opened for signature* Oct. 24, 1945, art. 34, para. 1 ("Only states may be parties in cases before the Court.").

142. *See* Rome State of the ICC, *supra* note 139, *at* art. 1 (The Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.").

143. 28 U.S.C. § 1350 (2003).

144. In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 809 F.2d 195 (2d Cir. 1987).

145. Courts have construed the statute narrowly, finding that it "applies only to shockingly egregious violations of universally recognized principles of international law." Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983).

146. *See* Doe v. Unocal Corp., 963 F. Supp. 880, 890 (C.D. Cal. 1997). While the ATCA has been found to apply to private corporations, at present, judicial interpretation requires that a corporation act in concert with a State for liability to incur under ATCA. *Id.*

Kuwait, many of the chemicals responsible for environmental and human harm are considered "dual use," meaning they could be used both for military as well as agricultural and industrial purposes.[147] In that case, the MNCs of many industrialized nations provided the Iraqi government with the chemicals that caused the damage. This leads to complex questions of joint liability between multiple MNCs and between MNCs and their host countries.

b. Shareholder actions are a largely unexplored avenue.

Injunctive shareholder actions are possible if the shareholders discover that their corporation is engaging in unlawful activity, and that the enforcement entity has declined to take the appropriate action.[148] Likewise, shareholders may be able to take action if they learn that the corporation is engaging in a series of torts and that the victims of such torts are unlikely to bring actions against the corporation, "perhaps because, as in the case of many environmental torts, the injuries will become obvious only years later."[149] In that case, shareholders could bring an ultra vires suit against the corporation to enjoin its unlawful activity.[150] In practice, however, it is difficult to bring such actions against MNCs. Not only are MNCs often in compliance with the laws of the jurisdiction that is hosting its production facilities, they may have an easier time concealing their actions in these jurisdictions (depending on disclosure laws).

An innovative method to gain management's attention would be for shareholders to propose and vote on binding amendments in company bylaws that would direct company policy. *International Brotherhood of Teamsters v. Fleming Cos.*[151] tested the validity of this process. In that case, the Oklahoma Supreme Court upheld the Teamsters' amendment of a bylaw to prevent the board from issuing a poison pill without shareholder approval. The Teamsters had submitted a proxy proposal for the annual board meeting concerning the proposed amendment, which included a provision for majority vote by shareholders. When the board refused to include the resolution in its proxy statement, the Teamsters sued. The Oklahoma Supreme Court held that "under Oklahoma law there is no exclusive authority granted boards of directors to

147. Kalas, *supra* note 136, at 207.

148. In 1855, the Supreme Court said that it was:

> no longer doubted, either in England or the United States, that courts of equity . . . have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals and profits.

Dodge v. Woolsey, 59 U.S. 331, 341 (1855).

149. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1353 (2001).

150. *Id.*

151. International Bhd. of Teamsters Gen. Fund v. Fleming Cos., 975 P.2d 907 (Okla. 1999).

create and implement shareholder rights plans, where shareholder objection is brought and passes through official channels."[152] Shareholders concerned about environmental abuses could act as a class to first attempt to amend a bylaw, and then to bring suit if MNC management fails to accept the amendment.

VI. WHAT IS THE OPTIMUM COMBINATION OF TRADE AND ENVIRONMENTAL MEASURES TO CONTROL MNCS?

The environmental abuses of MNCs can best be addressed with a system of controls directed at balancing the U.S.'s trade deficit, supplemented with environmentally oriented measures to target specific abuses and raise consumer awareness. In terms of pure efficacy, trade remedies that direct national economic policies are likely to have greater force in an international arena than "soft law" controls oriented towards greater environmental protection. It is easier and faster for the United States to reduce its imports than it is for the United States to convince other countries to join in international environmental agreements, or face the criticism that comes with unilateral environmental measures. But trade remedies alone are not enough to break through the apathy that the average consumer experiences, to foster a spirit of international environmental cooperation, or to remedy past environmental wrongs. With these concerns in mind, there are several fresh "environmental" solutions that might be used to supplement trade remedies.

A. Some Environmentally Oriented Remedies Could be Implemented With Small Changes to the Existing Trade Structure.

1. Public access could be increased.

The heads of member states in the WTO have an overwhelming interest in preserving their positions in the world trade regime. Accordingly, states tend to bring action against "anti-environmental" policies only when these measures disadvantage the complaining state's trade position. Given the burden of proof and the pro-trade slant of the dispute panels, there is no one to act simply on behalf of environmental interests. Member states should resolve the conflict of interest they have between protecting the environment and promoting trade by establishing separate entities to act as ombudsmen for environmental interests.

A model for these "environmental ombudsmen" is the system found in Italy, where the national government gives standing to NGOs to bring environmental claims.[153] The NGOs must be present in all five regions of the country, be established prior to the cause of action, be certified by the

152. *Id.*

153. Istituzione del ministero dell'ambiente e norme in materia di danno ambientale, 162 Supplemento ordinario alla Gazz. Uff. [Presidential Decree 349, July 8, 1986].

government, and have democratically elected board members. Certified NGOs may initiate suit or intervene in existing suits without having to allege particular injury. This relieves the state from the burden of environmental guardianship and provides a measure of balance.

2. Multilateral Environmental Agreements could be created within the WTO.

The WTO already permits groups of states to form side agreements known as "codes," which address a wide range of issue-areas not directly touched on by the GATT.[154] Codes operate as independent treaties by "binding signatories and creating independent obligations and compliance mechanisms."[155]

An environmental code would be most successful if it could change the basis for conveying most favored nation status by allowing countries to adopt more stringent environmental standards than allowed by the WTO, and according corresponding benefits only to the other countries in the code. For instance, member states in the code could impose countervailing duties on products manufactured by non-member countries that fail to meet the code's environmental standards. Similarly, countries within the code could allow anti-dumping remedies on the basis that the total social costs in the producing country, including pollution as well as ordinary product costs, are greater than the price charged within the importing state. Such a code would be similar to the Montreal Protocol, which actually allows members to assert controls over non-members (thus far without WTO-based challenges). Perhaps the fact that these agreements are multi-lateral means that they are less likely to be challenged by the "anti-protectionists" than similar, unnegotiated restrictions imposed unilaterally by individual countries.

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154. The following agreements were negotiated during the Tokyo Round of GATT negotiations: Tokyo Round Agreements, Understandings, Decisions and Declarations; Agreement on Government Procurement; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Customs Valuation Code); Agreement on Import Licensing Procedures; Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code); Agreement on Technical Barriers to Trade (Standards Code); Agreement on Trade in Civil Aircraft; Declaration on Trade Measures Taken for Balance-of-Payments Purposes; Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause); International Dairy Agreement; International Bovine Meat Agreement; Safeguard Action for Development Purposes; Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. Most of these agreements were superseded by new agreements negotiated during the Uruguay Round. For the full texts, see WorldTradeLaw.net, *Tokyo Round Agreements, Understandings, Decisions and Declarations, at* http://www.worldtradelaw.net/tokyoround/ (n.d.) (last visited Nov. 19, 2004).

155. Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679, 771 (2003).

The duties suggested here could, in theory, become part of the WTO as a whole if a country were able to successfully frame the less stringent standards of the exporting country as an export subsidy.[156] After all, environmental standards cost, and where governments fail to impose them, they allow manufacturers to save on compliance costs.[157] Likewise, where governments fail to enforce fines for environmental violations, they are foregoing a revenue, (and therefore offering a subsidy).[158] However, a challenger seeking to use these theories would have to prove that the "subsidy" is impermissible under the WTO. If the "subsidy" is framed as non-specific general industrial support, it would probably survive a challenge.[159]

Significantly, the proposed reforms discussed here address only state actions. They do not directly target MNCs. Judicial instruments are better able to target MNCs because they can deal with different situations on an ad hoc basis more effectively than a political process can.

B. Judicial Remedies are Needed to Directly Target Individual MNCs.

1. Judicial remedies would be far more likely to work if environmental rights were considered part of customary international law.

One of the main reasons why the ATCA has not been a successful tool for redress against MNCs in U.S. courts is the hesitance of judges to bring environmental rights under the banner of rights that makes up the law of nations.[160] But, there are many reasons why environmental rights and the trade

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156. If the proposed duties are found to violate the WTO Agreement, their proponents may seek to pursue them under a general exception to the WTO Agreement, or an amendment. Article IX of the WTO Agreement allows for a waiver of WTO obligations in "exceptional circumstances" provided that "any such decision shall be taken by three fourths of the Members unless otherwise provided for." However, waivers typically last only a year, and cannot cover cases that fall under any other exceptions or escape clauses of the GATT. Policy objectives do not constitute exceptional circumstances since such objectives are based on achieving future circumstances. *See* Understanding in Respect of Waivers of Obligations under the GATT 1994, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal_e/11-25_e.htm. The procedure for amending the WTO Agreement under Article XXX, which also requires a three-fourths vote, would be no more difficult and could guarantee a more sustainable result. *Id.*

157. *See generally* Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1353-57 (1992) (discussing further the cost of compliance with environmental standards).

158. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 42.

159. *Id.* at art. 8.

160. *E.g.*, Ullonoa Flores v. S. Peru Copper Corp., 343 F.3d 140, 146-47 (2d Cir. 2003). The hesitance of courts to accept the briefing of Professor Jordan Paust from the Law Center of the University of Houston, and Professor Gunther Handl from Tulane University Law School, who cited numerous international documents as evidence of the rights asserted by plaintiffs under international law, is disturbing. It appears that the court improperly tried to apply *Ullonoa Flores* as precedent even though the facts and claims in that case were distinguishable from those in *Ullonoa Flores*. *See id.*

of products that harm environmental rights—generate sufficient international concern to warrant treatment under customary international law. First, provisions for environmental protection have found their way into the major laws and constitutions of a number of representative states. There are a number of constitutions that provide the right to a clean environment, ranging from Argentina[161] to Russia[162] to the Philippines,[163] with corresponding national supreme court cases upholding these rights. Further, it can be argued that environmental rights are of mutual concern because one nation's actions can have an impact on the rest of the world. In particular, trade has trans-boundary effects and may unfairly disadvantage members of one country (the host country) as a result of its lesser-developed status.

If the right to a clean environment is recognized as a law of nations, then (1) countries would have a more legitimate basis for using trade measures to protect their environment, and (2) individuals and countries injured by abusive MNC practices would have a cause of action against the MNCs in an international court, as well as in many national courts.

2. Injured individuals should have a right of action against MNCs in their countries of incorporation, with an appeal to an international WTO/UN committee.

At the time of the original GATT, the nation-state was the largest player in the international arena, and corporations were "creatures of the state" in which they were incorporated.[164] Today, corporations exist in an international context with the specific intent to transact business worldwide. Unlike the

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161. Const. Arg. art. XXXXI, http://www.hrcr.org/docs/Argentine_Const/First_Part.html (last visited Sept. 25, 2004); see Katan c/ P.E.N. (Secreteria de Intereses Maritimos) s/ Amparo (La Ley 1983-D-567).

162. KONST RF art. XXXXII, http://www.fipc.ru/fipc/constit/ch2.html (last visited Sept. 25, 2004); *see* Petition of the Social-Ecological Union, and others, to void orders of the Government of the Russian Federation and others about the removal from protection of woods of "First Group," May 12 1999, *decided* December 5, 1999], http://webcenter.ru/~ecojuris/RJURIS/vsles3.htm.

163. PHIL CONST. art. 2, §§ 15-16; *see* Minors Oposa v. Sec'y of the Dep't of Env't & Natural Res., 33 I.L.M. 173 (1994).

164. *See, e.g.*, Yazoo & Mississippi Valley R.R. Co. v. Clarksdale, 257 U.S. 10, 26 (1921) ("The corporation is completely a creature of a state, and it is usually within the function of the creator to say how the creature shall be brought before judicial tribunals."); Hale v. Henkel, 201 U.S. 43, 74-75 (1906).

> [T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers.

Id. at 75.

restrictive charters of the 1800s, today's charters allow corporations to conduct any form of business not prohibited.[165] At the same time, the power of the nation-state has declined relative to international organizations, cultural divisions within states, and MNCs. The notion that corporations can only be governed by the rules of their places of incorporation must be modified to reflect the shift in powers and functions. National borders should not allow international players to escape liability. MNCs should be prepared to respond to international law.

Currently, injured plaintiffs have no meaningful forum where they can bring a claim against an offending MNC.[166] Recognizing that neither their workers nor their environment benefits from unchecked MNC activity, developed countries should form a treaty that grants standing to a foreign plaintiff to bring an action against an MNC in the parent company's state of incorporation.

The treaty would first have to define MNC, for example as an economic entity in whatever legal form, which owns, controls, or manages operations, either alone or in conjunction with other entities in two or more countries. The treaty should set the minimum number of employees needed to constitute an MNC, and clarify the term "employment" to include independent contractors or anyone who receives material compensation from an MNC.

The treaty should also establish an appeals court with representatives from both the WTO and the U.N. When a plaintiff has exhausted the remedies of the MNC's company of incorporation, the plaintiff would have standing to make an appeal before this court. NGOs that could demonstrate an injury resulting from a particular MNC would have the same access as an injured individual. The court must be allowed to impose fines against the MNC sufficient to make the plaintiff whole.

VII. WHAT IS THE OUTLOOK FOR THE GLOBALIZED ENVIRONMENT?

This paper has analyzed the increasing lack of social and environmental controls under the present trade regime, and how MNCs have benefited from and contributed to this system. It has presented measures to correct the trade imbalance, thereby reducing MNCs' incentives to relocate production forces in developing countries with inadequate social and environmental controls. Some reforms are possible within the existing system, but others may require withdrawal from the WTO. Because large-scale trade-balancing reforms may

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165. *See* Gregory A. Mark, *Crisis in Confidence: Corporate Governance and Professional Ethics Post Enron Sponsored by Wiggins & Dana: The Legal History of Corporate Scandal: Some Observations on the Ancestry and Significance of the Enron Era*, 35 CONN. L. REV. 1073, 1079 (2003); Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 426-427 (2003).

166. It is difficult to argue that injured plaintiffs, often indigent and without the benefit of contingency fees, should take advantage of the weak judicial institutions of the lesser-developed country that is host to the offending MNC.

not target all of the factors that allow MNCs to commit environmental abuses, reforms that are specifically oriented to environmental protection may be necessary. This paper has analyzed the existing proposals for reform and offered additional suggestions.

At the heart of the problem is the degree to which consumers want cheap products, and are not prepared to make sacrifices for vague and broad goals like balancing deficits and protecting the global environment. But with the realization that the United States needs to match its imports to its exports should come the realization that there may be less choice for its consumers. Clearly, this could be a big disappointment for people who have come to rely on cheap clothing made in MNC-owned overseas sweatshops. At the same time, American manufacturers could seize on the patriotic idea of doing more with less as a selling point. The concept is similar to environmental labeling because the consumer is pacified by knowing she has selected a morally superior product. One example is the decision of Patagonia, an outdoor equipment manufacturer, to limit the number of different styles of ski pants they manufacture. Patagonia's rationale was that since all of their different products come at some environmental costs limiting the number of styles pants they make would eliminate some of these costs.[167] Yvon Chouinard, the founder of the company, explained the rationale as follows: "Last year, when we decided to limit our growth, we also committed ourselves to a life-span of a hundred years. A company that intends to be around that long will live within its resources, care for its people, and do everything it can to satisfy its community of customers."[168] After all, do people really need more than two styles of ski pants from which to choose?

167. PATAGONIA CATALOG 2 (Winter 1992).
168. *Id.*

"WHICH ONE OF YOU DID IT?" CRIMINAL LIABILITY FOR "CAUSING OR ALLOWING" THE DEATH OF A CHILD

Lissa Griffin*

I. INTRODUCTION

In the United States, the statistics on child abuse and homicide are absolutely staggering. Homicide is the leading cause of death for children under one year of age, and at least five children die each day from abuse and neglect by those who are obligated to protect them.[1] Regrettably, although the homicides are attributable to the acts of persons who supposedly care for the children, it frequently is difficult to identify the culprits.

Child homicide creates special problems for prosecutors. By its nature, child homicide occurs most frequently in the privacy of the home. In a case involving multiple defendants—for example, two parents or caretakers—proof frequently is unavailable to identify the person who actively caused physical harm to the child (the "active abuser") and the person who, although aware of the active abuse, failed to prevent it, or failed to get medical treatment for the injured child (the "passive abuser"). It frequently is difficult to determine the relative culpability of the responsible parties. Because there are no living witnesses, the prosecution cannot prove where or exactly how the crime took place, or who, aside from an active abuser, was present. While forensic evidence may prove that the death was non-accidental and the approximate time of death, such evidence still may be unable to clarify who committed the fatal act or acts, or who was present when they were committed. Given these circumstances, even though it is clear that someone caused the death of a helpless child, those who committed the acts may either not be charged, or if prosecuted, will likely be acquitted or have the charges dismissed.

Neither U.S. courts nor the state legislatures have dealt with this problem. While much has been written about the omission-liability of a passive child abuser, all of the literature assumes that the prosecution has been able to in fact identify and differentiate the passive from the active abuser.[2] No state court or

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* Professor of Law, Pace University School of Law. The author wishes to thank Professor Bennett L. Gershman and Professor Phil Bates for their invaluable assistance. The title of this article is based on the title of an article by Professor Glanville Williams. Professor Williams's article addresses the same problems of prosecuting child homicide addressed in this article, but in the context of the United Kingdom. "Causing or Allowing the Death of a Child or Vulnerable Adult" is the title of legislation recently passed by the English Parliament to address the same problems.

1. *See* U.S. DEP'T OF HEALTH AND HUMAN SERV., A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES 16 (1995).

2. *See, e.g.*, Christine A. Martin, *Murder by Child Abuse – Who's Responsible after State*

legislature has proposed an effective method of overcoming the evidentiary insufficiency inherent in this most horrible of crimes—the murder of an innocent child.

In the absence of any effective domestic remedy, one needs to look to foreign law. Confronted with similarly horrifying statistics and similar prosecutorial problems, the English Parliament[3] recently enacted legislation to solve the problems inherent in prosecuting multiple defendants in a child homicide case.

Part II of this article analyzes how current U.S. criminal law addresses the problem of securing a homicide conviction where multiple defendants are accused in a child's non-accidental death. Part III sets forth the English response: a statute that includes (1) a new substantive crime; (2) a permissible negative inference against a defendant who fails to account for the non-accidental death of a child for whom he or she is responsible; and (3) delay of a motion to dismiss for failure to establish a prima facie case until after the defense has been presented or the jury has been allowed to draw the negative inference. The English response in light of U.S. law is analyzed, and its efficacy in meeting the prosecutor's evidentiary problems is evaluated. The article concludes that the English response should be adopted here, despite the controversial proposal that the jury in such a case be allowed to draw a negative inference against a defendant who bears responsibility for a child, who fails to account for that child's non-accidental death.

II. PROSECUTING MULTIPLE DEFENDANTS FOR CHILD HOMICIDE: EXISTING U.S. LAW

A. *Difficulties in Establishing Guilt*

Where a child suffers a non-accidental death, and more than one defendant is involved, there are two methods of establishing culpability. First, the culpability of both parties for homicide may be established under an accomplice liability theory. Second, where accomplice liability cannot be proven, one defendant may be prosecuted for the homicide as an active abuser, and the other may be prosecuted for either reckless homicide (generally, manslaughter), or under a protection or prevention statute, such as endangering the welfare of a child. However, in either scenario, the prosecutor must

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v. Jackson, 24 SEATTLE U.L. REV. 663 (2000); Nancy A. Tanck, Note, *Commendable or Condemnable? Criminal Liability for Parents who Fail to Protect their Children from Abuse*, 1987 WIS. L. REV. 659 (1987); Ricki Rhein, Note, *Assessing Criminal Liability for the Passive Parent: Why New York Should Hold the Passive Parent Criminally Liable*, 9 CARDOZO WOMEN'S L.J. 627 (2003); Bryan A. Liang & Wendy L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 HARV. J. ON LEGIS. 397 (1999); Jean Peters-Baker, Note, *Punishing the Passive Parent; Ending a Cycle of Violence*, 65 U. MO. KAN. CITY L. REV. 1003 (1997).

3. This article makes reference to "England" and "English" rather than to the United Kingdom because the legislation as enacted would apply to the courts in England and Wales, and not in the entire United Kingdom.

establish which of the defendants inflicted the fatal injury and which was aware that the injury occurred.

These problems are illustrated in the case of *People v. Wong*.[4] In *Wong*, a three-month old infant died of shaken baby syndrome.[5] The shaking had occurred in the apartment of the child's two babysitters, Eugene and Mary Wong, with whom the child resided six days a week. After a lengthy investigation, in which the Wongs gave incomplete and contradictory statements, the prosecution charged Mr. and Mrs. Wong with first and second degree manslaughter, and endangering the welfare of a child.[6]

At trial, the prosecution's medical evidence proved that the fatal shaking of the child occurred in the one-bedroom apartment at some time during a two and one-half hour period at night, in which the defendants acknowledged to the police that they were both at home and caring for the child.[7] The infant slept in the defendants' bedroom. A medical expert testified that the shaking required to cause shaken baby syndrome does not necessarily leave visible exterior marks; that the infant would "cry sharply" and then, within 30 minutes, slip into a gradual coma that could resemble sleep.[8] There was also medical evidence that "prompt medical attention can prevent fatality" in cases such as this one.[9]

At the close of the prosecution's case, the defense moved to dismiss the charges against both defendants. The defense argued that since the prosecution could not prove who was the active and who was the passive abuser, the defendants could not be found guilty.[10] In response, the prosecution argued that each defendant was culpable because, even though there was no proof of the defendants' respective roles, at least one of them had shaken the baby and the other had failed to intervene.[11] The motion to dismiss was denied.[12]

Both defendants were convicted of manslaughter in the first and second degrees, and endangering the welfare of a child.[13] On appeal, the court modified the judgment by dismissing the convictions for manslaughter in the first degree on the unrelated ground that the finding that the defendants had acted or failed to act "with intent to cause serious physical injury" was against the weight of the evidence.[14] The court upheld the convictions for

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4. 619 N.E.2d 377 (N.Y. 1993).

5. *Id.* at 380. Shaken baby syndrome occurs when an infant under the age of one year is shaken violently, causing the head to snap back and forth. *Id.* The movement of the brain inside the head leads to ruptured blood vessels, hemorrhage, and swelling, but does not necessarily result in any visible injuries. *Id.*

6. N.Y. PENAL LAW §§ 125.15, 125.20, 260.10 (Consol. 2004).

7. *Wong*, 619 N.E.2d at 379.

8. *Id.* at 380.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* N.Y. PENAL LAW § 125.20; *see also* People v. Wong, 588 N.Y.S.2d 119 (N.Y. App. Div. 1992).

manslaughter in the second degree and for endangering the welfare of a child. Over a two-justice dissent, the court rejected the contention that the prosecution had failed to produce sufficient evidence of the time and place of death to show that the passive defendant failed to perform a duty imposed by law.[15]

The defendants appealed to the New York Court of Appeals, which, where the court reversed the remaining convictions and dismissed the indictment against both defendants.[16] The court agreed with the defense that: (1) the evidence was insufficient to prove who was the active and who was the passive abuser; (2) the evidence was insufficient to prove the guilt of the passive defendant; and (3) without evidence that both defendants were guilty, the convictions of both defendants had to be reversed.[17]

According to the court, without proof of exactly when and where the death occurred, the passive defendant's mere presence in the apartment during the relevant time period was insufficient to establish criminal liability. The court held that the prosecution failed to prove that the passive defendant had a duty to seek medical care, because there was insufficient evidence that the passive parent knew of the need for such care. While both defendants admitted being awake and tending to the child during a two and one-half hour period when the shaking was likely to have occurred and although the apartment had only one bedroom, there was no proof that the two were continuously together. According to the court, it was certainly likely that one of them left the room at some point. Contrary to the State's contention that it would have been coincidence for the shaking to occur at that time, the Court considered it quite plausible that a person inclined to abuse a child would wait until he was alone with the child to do so.[18] Thus, absent proof that the passive defendant was personally aware that the shaking had occurred, he could not be convicted. Without that evidence, the jury could not have concluded that the passive defendant was aware of a risk that the infant would die without prompt medical attention. Without that awareness, there was no liability for failing to act:[19]

> In the absence of any evidence to show how, or at least where, the abusive acts had occurred and which room or rooms the two defendants had been in, there was no basis for the jury to infer that the 'passive' defendant had actually witnessed the shaking – a form of abuse that would leave no visible external marks.[20]

15. *Wong*, 619 N.E.2d at 380.
16. *Id.* at 383.
17. *Id.* at 381-383.
18. *Id.* at 382.
19. *Id.* at 382-83.
20. *Id.* at 382.

A theory that was not pursued by the prosecutors in *Wong*, which might have established that the passive abuser should have known or did know about the risk of serious physical injury, is based on the history of abuse of other children who had been left in the Wongs' care. In the lower court, the prosecution proceeded on the theory that the active defendant had shaken the child, and the passive defendant was personally aware of the shaking, and therefore of the risk that the infant would die without prompt medical treatment. In upholding the defendants' convictions, however, the Appellate Division suggested a different theory: "[T]hat the 'passive' defendant was criminally culpable for knowingly permitting his or her spouse to tend to a crying child in a late-night situation that was likely to provoke abuse."[21]

This theory is premised on the evidence admitted at trial to demonstrate that other children entrusted to the Wongs' care had also been abused.[22] As the majority in the appellate division explained, evidence that there had been prior vicious acts of abuse, that both defendants had been interviewed by a social worker about those acts, and that the defendants participated in the decision to continue their babysitting service established both the knowledge of the passive defendant and a "blatant disregard for the welfare of the child."[23] Moreover, both defendants made statements admitting that they were aware that the infant had been crying for two hours in the early morning before the fatal abuse occurred. "Under such circumstances, commonly known to be an exhausting, frustrating and emotionally wearing experience, to leave the child at the mercy of a known child abuser would be, without more, a conscious disregard of a substantial risk of death . . . ."[24]

As the court of appeals noted, however, this theory was not submitted to the jury. The evidence of prior incidents of abuse was admitted only to rebut a defense of accident or mistake.[25] Had the theory been properly raised, the

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21. *Id* at 383.

22. *Wong*, 588 N.Y.S.2d at 122. As summarized by the Appellate Division, that evidence is as follows:

> In March 1988, 18-month-old Kevin Hung, when taken by his father to the hospital after spending a month with the Wongs, was found to have a second degree burn on the sole of his foot, bruises on his face and body, and fractures, one recent and one several weeks old, in each leg. As a result, he was hospitalized for 13 days. Earlier, on a visit, Kevin's father had observed a burn on the child's mouth, but had dismissed it as an accident when Mrs. Wong told him that Kevin had tried to taste some hot soup which she had left out to cool. In June of 1988, shortly before Kwok-Wei Jiang came into the Wongs' care, 11/2-month-old Jenny Chan was taken to the hospital by her father when he visited her at the Wongs' and saw that her face was badly discolored and that she was completely unresponsive. Mrs. Wong claimed that she had found the baby in that condition when she awoke and suggested that it was due to an "internal problem." Jenny was hospitalized for three days.

Id.

23. *Id.* at 125.

24. *Id.* at 125-26.

25. *Wong*, 619 N.E.2d at 383.

defendants might have been convicted on the grounds that one of them was the principal and one the accomplice.

Reluctantly, the Court of Appeals reversed both convictions:

> We are duty bound to reverse these two defendants' convictions because the alternative – incarcerating both individuals for a crime of which only one is demonstrably culpable – is an unacceptable option in a system that is based on personal accountability and presumes each accused to be innocent until proven otherwise.[26]

What becomes clear from *Wong* is that none of the weapons in the prosecutor's traditional arsenal was adequate to avoid this result. First, there were no eyewitnesses. Second, the forensic investigation and resulting evidence, although complete, were not sufficient. Evidence regarding cause of death and time of death could not establish the defendants' culpability without proof of where each of the defendants was when the death occurred. Moreover, absent visible bruises or signs of distress, there was insufficient proof that the passive defendant actually witnessed the shaking or was otherwise aware that anything fatal had occurred or that anything needed to be done to help the child. Without such proof, there was no *mens rea* to establish liability based on the failure to act.

Of course, the prosecutor could have granted immunity to one of the defendants, and thus secured an eyewitness.[27] But in the context of child homicide, with the absence of important information, the prosecutor's choice of which party to immunize is particularly vulnerable to error. The role of the respective parties in causing the child's death is exactly what the prosecutor does not know. Even if the prosecutor guesses correctly, a guilty party could go free.[28] But if the prosecutor guesses wrongly, the active, more culpable abuser goes free. Unlike other situations requiring a decision to grant immunity, in this case the prosecutor has a full fifty percent chance of being wrong. On the other hand, it may be that both parties are equally responsible, for example, on an aiding and abetting theory. Thus, although it is clear that someone is responsible for the child's death, the power to grant immunity may not help at all, or may be surrounded by so much guess work that there is an increased and unacceptable risk that a child's murderer will be freed.[29]

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26. *Id.* (Bellacosa, J., dissenting).

27. *See* N.Y. CRIM. PROC. LAW § 50.10 (Consol. 2004) (providing full transactional immunity in New York).

28. The passive abuser, for example a mother, may have violated a duty to prevent commission of an assault upon her child or for failing to secure medical attention.

29. *See* N.Y. PENAL LAW §§ 500.05, 500.10 (Consol. 2004); N.Y. SOC. SERV. LAW § 383-b(5) (Consol. 2004). Even if the prosecutor guesses correctly, immunity may not solve the problem. The immunized spouse still would have a privilege against testifying against his or her spouse. In New York, where only confidential communications remain privileged, the

B. Accomplice Liability

Where two or more defendants are present and responsible for the care of a child at the time the child sustains non-accidental fatal injuries, both defendants may be found guilty of intentional or reckless homicide under a theory of accomplice liability, even if the prosecution cannot prove who was the active abuser and who was the passive abuser. In such a case there is sufficient evidence for the jury to infer that both parties either intended the fatal result, or because they were both present, were aware of the injury and of the risk of death and assisted in bringing it about. In a case like *Wong*, however, where the prosecution cannot prove exactly when the fatal abuse occurred or who was present, accomplice liability cannot be sustained. While it is clear in such a case that someone committed murder or manslaughter, unless both defendants can be proven guilty, neither can be convicted.[30]

Accomplice liability may also be sustained under so-called "accountability" statutes.[31] Under these statutes, the failure to prevent child abuse will render the passive participant criminally liable as an accomplice for the active abuser's crime, whether for homicide or assault.

Three cases illustrate the application of accomplice liability principles. First, in *Lane v. Commonwealth*,[32] a mother and her companion were prosecuted together under an accountability theory for assaulting her two-year-old daughter. Their defense was that the injuries resulted from an accidental fall down stairs. Lane was charged with aiding and abetting her companion to commit assault. The medical evidence showed that the victim had sustained many bruises, abrasions, and contusions, including a skull fracture. Lane was found guilty of complicity to commit assault in the first degree and her companion was found guilty of the assault. However, the trial judge set aside Lane's conviction on the ground that Lane had no legal duty to prevent the assault.[33]

The Supreme Court of Kentucky affirmed the court of appeals' reversal of the trial court's ruling. The court of appeals held that parents have a legal duty to provide safety to their children. The majority found support in recently

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immunized spouse might be compelled to testify against the other one. *See* N.Y. PENAL LAW §§ 500.05, 500.10; N.Y. SOC. SERV. LAW § 393-b(5) (2004); People v. Allman, 342 N.Y.S.2d 896 (N.Y. App. Div. 1973) (holding that because social services law suspends confidential communications privilege between husband and wife in proceedings involving child abuse, a wife may testify that she saw her husband hit their child and that he would not let her telephone for assistance); *accord* Adams v. State, 563 S.W.2d 804, 809 (Tenn. Crim. App. 1978) (holding that a wife may testify to husband's fatal assault on child as exception to privileged marital communication). But what would be the result? Still, a potentially guilty party would go free.

30. *See*, People v. Wong, 619 N.E.2d 377, 383 (N.Y. 1993).

31. *See, e.g.*, State v. Fabritz, 348 A.2d 275 (Md. 1975) (relying on MD. ANN. CODE ART. 27 § 35(a) (1982), current version at MD. CODE ANN. FAM. LAW art. 27, § 35(b) (Supp. 1986)); *see also* State v. Williquette, 385 N.W.2d 145 (Wis. 1986) (relying on WIS. STAT. § 940.201 (1985-1986)).

32. 956 S.W.2d 874 (Ky. 1997).

33. *Id.* at 875.

enacted statutes designed to protect a child's fundamental right to safety.[34] The concurring justice found the duty in the common law, based upon the special relationship between a dependant child and his or her parents.[35] In either event, the court found that the requirement of an *actus reus* was satisfied by the mother's failure to fulfill that duty. Moreover, the requisite accomplice *mens rea* was based on the defendant's knowledge or awareness of risk. The court held that a person who knows that his or her child is in a dangerous situation and fails to take action to protect the child presumably intends the consequences of the inaction, which is to facilitate the offense.[36]

Similarly, in *Palmer v. State*,[37] the Supreme Court of Maryland upheld the conviction of a mother for involuntary manslaughter based on her "gross, or criminal, negligence in permitting her paramour to inflict, upon her twenty months' old child, prolonged and brutal beatings that finally resulted in the child's death . . . ."[38] The court premised the mother's duty primarily on Maryland's nurturing statute, which requires parents to supply "support, care, nurture, welfare and education" to their children.[39]

Finally, in *State v. Walden*,[40] a mother was convicted of aiding and abetting an assault solely on the ground that she was present when her child was assaulted but failed to take reasonable steps to prevent the assault. The court recognized a parental duty to take affirmative action to prevent harm to a child.[41]

These authorities would not support culpability in cases such as *Wong*. In these three cases, the prosecution was able to prove who was the active abuser

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34. *See* KY. REV. STAT. ANN. § 620.020 (Michie 2004) (providing for a fundamental right to be free from personal injury); KY. REV. STAT. ANN. § 405.020 (Michie 2003) (duty to "nurture", which court held does not permit tolerance of personal injury); KY. REV. STAT. ANN. § 508.100 (Michie 2004) (Criminal abuse in the first degree is committed when a person who has custody of a child intentionally permits the child to be placed in a situation that may cause him or her serious physical injury.).

35. *Lane*, 956 S.W.2d at 876-77 (Cooper, J., concurring).

36. *Id.* at 876; *see also* State v. Miranda, 715 A.2d 680 (Conn. 1998) (imposing accomplice liability for permitting a child to be assaulted).

37. 164 A.2d 467 (Md. 1960).

38. *Id.* at 468.

39. *Id.* (quoting MD. CODE ANN., FAM. LAW. Art. 72 A, § 1 (1957 code), current version at § 5-203 (2003)).

40. 293 S.E.2d 780 (N.C. 1982).

41. *Id.* at 786.

> We believe that to require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent. Further, we believe this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute.

Id. at 785-86; *see also* Michael v. State, 767 P.2d 193 (Alaska Ct. App. 1988), rev'd on other grounds, Michael v. State, 805 P.2d 371 (Alaska 1991); P.S. v. State, 565 So.2d 1209 (Ala. Crim. App. 1990); People v. Peters, 586 N.E.2d 469 (Ill. App. Ct. 1991); People v. Peabody, 119 Cal. Rptr. 80 (Cal. Ct. App. 1975); State v. Adams, 557 P.2d 586 (N.M. Ct. App. 1976).

of the child and who was the passive abuser. In *Wong*, that proof was missing In these three cases, the prosecution was able to prove that the passive defendant knew about the abuse or was aware of the risk of abuse, either because he or she witnessed the abuse or because of the visibility of the victim's injuries. In *Wong*, again, there was no such evidence.[42]

C. *Protection and Prevention Statutes*

Many jurisdictions recognize a separate non-homicide crime based on a common-law parental duty to prevent the abuse of a child, punishable with criminal penalties. Again, this duty is based on the special personal relationship between parents and children, and the fact that the parent has undertaken to provide safety to the child. Generically, that duty is violated when the defendant is aware of and consciously disregards a substantial and unjustifiable risk of death or injury. At that point, criminal penalties may be imposed under so called "failure to protect," "endangering the welfare," or "contributing to the dependency" statutes.[43] In these jurisdictions, the passive parent is held criminally culpable not for the active abuser's conduct, but rather for his or her own conduct in, for example, permitting a child to be exposed to great bodily injury,[44] neglecting a child, failing to provide medical care,[45] exposing a child to abuse,[46] or failing to report abuse of his or her child.[47] These crimes generally are classified as misdemeanors, and carry lesser sentences than the homicide statutes, even where the underlying conduct causes a child's death.[48] For this reason alone, they may be considered as an

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42. 619 N.E.2d 377, 382-83 (N.Y. 1993).

43. *See, e.g.*, ALA. STAT. § 26-15-1 (Michie 1992); ARIZ. REV. STAT. ANN. § 13-3619 (West 1978); 13-3623B; CAL. PENAL CODE § 273(a) (West 1988 & Supp. 1994); MINN. STAT. ANN. § 609.378(2)(b)(1-2) (West 1987 & Supp. 1993); N.J. STAT. ANN. §§ 9:6-1 (West 1987), 2C:24-4(a) (West 1995).

44. *See, e.g.*, State v. Peters, 780 P.2d 602, 606 (Idaho Ct. App. 1989); State v. Walden, 293 S.E.2d 780, 787 (N.C. 1982).

45. *See, e.g.*, People v. Sally, 544 N.Y.S.2d 680, 681-82 (1989) (noting that by not securing medical treatment for a child while the child was being abused by his stepfather, resulting in injuries so severe that the defendant was aware that the child required medical attention, the defendant was guilty of violating the common law duty to protect).

46. *See, e.g.*, N.Y. PENAL LAW § 260.10[2] (Consol. 2004). "A parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old" is guilty if he or she "fails or refuses to exercise reasonable diligence in the control of such a child to prevent [the child] from becoming an 'abused child,' a 'neglected child,' a 'juvenile delinquent' . . . ." *Id.* One of the purposes of this statute is to establish "the duty of one parent to protect the child from the other parent." *Id. See also* People v. Carroll, 715 N.E.2d 500, 501 (N.Y. 1999) (quoting William C. Donnino, *Practice Commentaries*, *in* 39 MCKINNEY'S CONSOL. LAWS OF N.Y. 348).

47. Seattle v. Eun Yong Shin, 748 P.2d 643 (Wash. Ct. App. 1988).

48. *See, e.g.*, N.Y. PENAL LAW § 260.10 (stating that endangering the welfare of a child is a misdemeanor, which carries a maximum sentence of one year incarceration); ARIZ. REV. STAT. ANN. § 13-3619 (West 2004) (providing a class 2 misdemeanor for permitting life, health or morals of minor to be imperiled by neglect, abuse or immoral associations). *But see, e.g.*, ARK.

inadequate substitute where one of the defendants has clearly caused the death of a child.

For example, in *People v. Carroll*,[49] the New York Court of Appeals upheld a conviction for endangering the welfare of a child where the defendant, the stepmother of a child who was beaten to death by the father, failed to alert the authorities or summon medical assistance. The beatings occurred over the course of several days, and the defendant witnessed most of the violence. The court held that the evidence established that the defendant was acting as "the functional equivalent" of the child's parent at the relevant time, and had an obligation to take action to protect or help the child.[50]

In *Wong*, the proof would still have been inadequate to establish the defendants' liability under these statutes. Again, as with the accomplice liability cases, the active and passive abuser are each clearly identified, and there is proof, based on the timing, manner, and extent of the injuries inflicted, that the passive abuser had or should have had knowledge of the active abuser's conduct. In *Wong*, of course, this was the precise evidentiary gap. There was no evidence distinguishing the roles of the two defendants, no evidence of precisely when the fatal abuse was committed, and no evidence of who was present at the time. Accordingly, there was insufficient evidence that the passive defendant was aware of the risk of death, or that emergency medical assistance was required.[51]

III. THE ENGLISH RESPONSE

A. *The Wong Problem in England: Regina v. Lane*

In England, as in the United States, existing law provides that if the evidence shows that one of two accused must have committed a crime, but the prosecution cannot prove which of them committed it, both must be acquitted.[52] This is true in cases of child abuse resulting in death, where two defendants are responsible for the care of a child. In *Regina v. Lane*,[53] the court of appeal held that both defendants were required to be acquitted under these circumstances.[54]

CODE ANN. § 5-27-221(a)(3) (Michie 2004) (permitting that abuse of a minor is a class B felony if the abuse consists of sexual intercourse, deviate sexual activity, or caused serious physical injury or death; otherwise, it is a class D felony).

49. 715 N.E.2d 500 (N.Y. 1999).

50. *Id.* at 502.

51. People v. Wong, 619 N.E.2d 377 ,383 (N.Y. 1993).

52. Regina v. Lane, 82 Crim. App. R. 5 (1986); Regina v. Bellman, 86 Crim. App. R. 40 (1988).

53. 82 Crim. App. R. 5 (1986).

54. *Id. See also* Aston and Mason 94 Crim. App R. 180 (1992), *quoted in* LAW COMM'N, CHILDREN: THEIR NON-ACCIDENTAL DEATH OR SERIOUS INJURY 282 (2003) [hereinafter Commission Report].

> We have felt forced to come to the unwelcome conclusion that there was nothing in the evidence at the close of the prosecution case which indicated that one of the appellants rather than the other was responsible for inflicting the fatal injuries

The facts in *Lane* are very similar to those in *Wong*, and create the same prosecutorial problems. There, a mother and stepfather were jointly responsible for the care of their child, who sustained a fractured skull sometime between noon and 8:30 p.m. Each parent had been absent from the home at times and present at times during this period. Both denied responsibility for the injuries.

The judge rejected the English equivalent of a motion to dismiss for failure to establish a prima facie case. The prosecution argued, and the court instructed the jurors, that they could draw an inference that both defendants were culpable because they both bore responsibility for the child. Neither defendant testified, and both were convicted.[55] The court of appeals held that in the absence of evidence showing: (1) both defendants were present when the child was fatally injured; or (2) the non-striking parent was actively involved in the harm to the child, the jury should not have been invited to draw an inference that, in the absence of an innocent explanation, the parents were jointly responsible.

B. Curing the Wong Problem in England

Confronted with similar frightful statistics,[56] and the same prosecutorial handicaps, the English government appointed a commission to study the issue. A comprehensive Law Commission Consultative Report on the subject, "Children: Their Non-Accidental Death or Serious Injury," followed.[57] Thereafter, legislation was passed creating a new crime called, "Causing or Allowing the Death of a Child or Vulnerable Adult."[58] The same statute should be adopted in the United States.

> .... Nor can we find any evidence upon which the jury might have concluded that the two of them were acting in concert.

Id.

55. *Lane*, 82 Crim. App. R. at 5-11.

56. Commission Report, *supra* note 54, at 15-18.

57. *Id.*

58. Domestic Violence, Crime and Victim's Act, 2004, c. 28, §§ 5-7. The English statute reads as follows:

> (1) A person ("D") is guilty of an offence if—
>
> (a) a child or vulnerable adult ("V") dies as a result of the unlawful act of a person who—
>
> (i) was a member of the same household as V, and
>
> (ii) had frequent contact with him,
>
> (b) D was such a person at the time of that act,
>
> (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
>
> (d) either D was the person whose act caused V's death or--
>
> (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
>
> (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
>
> (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.

(2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.
(3) If D was not the mother or father of V--
  (a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused V's death;
  (b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.
(4) For the purposes of this section--
  (a) a person is to be regarded as a "member" of a particular household,even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;
  (b) where V lived in different households at different times, "the same household as V" refers to the household in which V was living at the time of the act that caused V's death.
(5) For the purposes of this section an "unlawful" act is one that--
  (a) constitutes an offence, or
  (b) would constitute an offence but for being the act of--
    (i) a person under the age of ten, or
    (ii) a person entitled to rely on a defence of insanity.
  Paragraph (b) does not apply to an act of D.
(6) In this section—
  "act" includes a course of conduct and also includes omission;
  "child" means a person under the age of 16;
  "serious" harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861 (c 100);
  "vulnerable adult" means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.
(7) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.

Id. § 5. Section 6 of the statute, entitled "Evidence and procedure" adopts the existing permissible negative inference based on silence and requires that the decision on the motion to dismiss for failure to state a case to answer be delayed until after all of the evidence has been presented. It reads as follows:

(1) Subsections (2) to (4) apply where a person ("the defendant") is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 5 in respect of the same death ("the section 5 offence").
(2) Where by virtue of section 35(3) of the Criminal Justice and Public Order Act 1994 (c 33) a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant's failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty—
  (a) of murder or manslaughter, or
  (b) of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter,
  even if there would otherwise be no case for him to answer in relation to that offence.
(3) The charge of murder or manslaughter is not to be dismissed under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (c 37) (unless the section 5 offence is dismissed).
(4) At the defendant's trial the question whether there is a case for the defendant to answer on the charge of murder or manslaughter is not to be considered before

IV. ADOPTING THE ENGLISH CURE

A. *A New Substantive Offense*

The English statute creates a new crime that applies where: (1) a child dies as a result of unlawful conduct; (2) a member of the child's household caused the death, (3) the death occurred in anticipated circumstances; and (4) the defendant was or should have been aware of the risk, but either caused the death or did not take reasonable steps to prevent it. The prosecution does not need to show which member or members of the household actively caused the death and which passively failed to prevent it. This crime is categorized as a homicide offense.

Evidentiary and procedural changes also accompany the new law. Specifically, the jury may draw a negative inference against any defendant who fails to account for the manner of fatal injury either to the police or at trial. The decision on the motion to dismiss is then delayed until the close of all the evidence to allow either the defendants' statements, or the negative inferences against them, to be counted as part of the evidence in determining whether the prosecution has established a prima facie case. Once that proof is included, the motion to dismiss is rarely granted.

The new statute contains all of the elements that must be established before the state may punish conduct: *actus reus*, *mens rea*, and causation. The statute would also make it possible to establish liability for homicide by two or more persons responsible for a child when that child dies. The possibility of acquittal, dismissal, or conviction of a mere misdemeanor in such a circumstance could be avoided in many cases.

1. Actus Reus

Two issues arise concerning the *actus reus*, whether there is a duty to act and what evidence may be offered in defense of that duty.

a. Duty to Act

The statute recognizes a duty to provide a safe environment for a child. This includes not physically harming the child, as well as not failing to prevent harm of which a person responsible for the child was or should have been aware. The class of persons to whom the statute would apply would be narrower than that within the traditional universe of adults, who under the common law doctrine have a special relationship status that carries with it a duty to provide a safe environment for a child.[59] Under the statute, only those

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> the close of all the evidence (or, if at some earlier time he ceases to be charged with the section 5 offence, before that earlier time). . . .

Id. § 6.

59. *See* Statute, *supra* note 58.

responsible adults who live in the victim's household are included. This would include the Wongs, in whose household the child lived for six days out of every week. It would also include a parent or step-parent who lives with the child, and the paramour or companion of a residential parent, assuming that person had frequent contact with the child. On the other hand, unlike traditional common law omission cases, the existence of a special status relationship would not be enough on its own to establish culpability under this statute. For example, a father or mother who did not reside and have frequent contact with the child at the time of the non-accidental injury could not be found guilty, despite the parental relationship, even if that parent was aware of a risk of serious injury.

Like existing protection and prevention statutes, this statute would also exclude public employees such as social workers or childcare workers. Under the new statute, these categories of outsiders will not be liable, since they are not members of the victim's household. The same will be true for doctors or nurses who come into contact with the child, however frequently. Moreover, the requirement that the defendant have "frequent contact" with the victim would prevent the liability of occasional visitors, paramours, guests, or those who happen to be present at the scene.[60] This requirement, combined with the requirement that the death occur in anticipated circumstances, would also preclude a parent's liability for conduct by a stranger or transient visitor, of which he or she had no notice. Thus, the inattentive parent whose child is kidnapped from a playground and killed would not be held criminally responsible for the death.

b. Defense to Failure to Act

Under the statute, it would be a defense that the defendant "could not reasonably have been expected to take" steps to protect the child, because, for example, to do so would have subjected him or her to serious physical injury. A defendant should be convicted under this statute only where the prosecution proves that any reasonable person in the defendant's position would have taken action. Indeed, "in the commonplace situations in which offences are committed against children it will be a matter of obvious common sense to identify what it was reasonable to expect the responsible person to do."[61]

This provision has two collateral benefits. First, it permits a battered spouse, generally a mother, to interpose a defense to the crime that does not exist in all U.S. jurisdictions.[62] That is, the battered woman would be

60. *See, e.g.*, Johnson v. State, 506 S.E.2d. 374 (Ga. 1998) (holding that defendant could not be found liable for fatal abuse of a child where he spent the night downstairs at his sister's while sister and boyfriend killed child upstairs). *Id.*

61. Commission Report, *supra* note 54, at 55.

62. For a complete discussion of existing failure-to-protect legislation and how it fails to consider the battered spouse's circumstances, see V. Pualani Enos, *Recent Development: Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused*

permitted to prove her own abuse in her defense, and then argue that a reasonable person in her circumstances could not have taken action to prevent the death. A full-blown duress defense would not be required.[63] Second, the existence of this defense might also encourage the passive abuser to give her account of how the child died. This might in turn result in more exposure and even prosecutions of batterers. Third, proof of other violence would be available for the jury to consider on any accompanying count of murder or manslaughter that the defendant and any co-defendant also faced.[64]

2. *Mens Rea: Intent or Awareness of Risk*

The *mens rea* requirement for liability under the statute is satisfied by proof that the defendant either (1) intentionally harmed the child or (2) had notice of a high level of risk of serious physical harm to the child. The "intent" standard is the traditional intent required for general criminal culpability.[65] The standard covers the active abuser and the accomplice to active abuse.

The awareness-of-risk standard is applicable to the passive abuser. It contains both an objective and subjective element, and would cover two categories of defendants: (1) a person in the defendant's circumstances who is aware of or ought to be aware of the risk of serious physical harm being caused by an unlawful act by someone (i.e., the responsible adult who is careful enough to be aware of the risk but does not act reasonably to prevent the result), and (2) the responsible adult who is not aware because he or she is culpably inattentive.[66] The test is not whether a "reasonable person" would be aware of the risk of death to the child. Instead, the test is whether a reasonable person in the defendant's situation would be aware of a significant risk of serious physical harm.[67]

As noted above, an additional *mens rea* requirement is that the offense be committed in the kind of circumstances the person anticipated or should have

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Children, 19 HARV. WOMEN'S L.J. 229 (1996) (arguing, inter alia, that the failure to employ a "reasonableness" standard in favor of strict liability for the passive parent is improper).

63. Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 587 (1998); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 208-09 (2d ed. 1986). Courts have not yet identified what acts would be considered to put parents in sufficient danger to excuse their failure to protect a child, probably because such evidence generally would result in an acquittal.

64. Commission Report, *supra* note 54, at 96.

65. Generically, a person intends a result when it is his or her conscious purpose to bring it about. *See* BLACK'S LAW DICTIONARY 314 (7th ed. 2000).

66. Commission Report, *supra* note 54, at 53.

67. This is consistent with protection and prevention statutes that consider the culpability of a battered or abused spouse. *See, e.g.*, State v. Williquette, 385 N.W.2d 145 (Wis. 1986) (providing an objective standard for determining what constitutes child abuse and doing away with the requirement of other mens rea); State v. Walden, 293 S.E.2d 780, 787 (N.C. 1982) ("The failure of a parent who is present to take all steps reasonably possible to protect the parent's child from attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed.").

anticipated, and by a person who lives with and who has frequent contact with the child. It is not sufficient that there be awareness of a risk that a child might be the victim of some intervening offense, or some offense by someone who does not live with the child. For example, there would be no liability for a grieving parent whose child is kidnapped while playing out of the parent's sight, even if the parent had been culpably inattentive. Nor would there be liability for a parent who allows a child to be alone with an abusive parent, where the child is harmed by another individual during that time. The risk is of anticipated, deliberately inflicted harm as a result of an illegal act.

This statute would support the culpability of both parties regardless of whether the prosecution can establish who is the active and who is the passive abuser, so long as the injury to the child was visible to both parties. Thus, in *Lane*, where the infant suffered physical injuries, the defendants could now be held liable even without proof of their respective roles, because whoever was the passive abuser would or should have been aware of the risk of serious physical injury. In addition, awareness of a risk of serious physical injury could be established by proof of a pattern of continuing abuse or of prior serious abuse, of which the passive defendant would have been aware.

It is not clear, however, that the proof in *Wong* could have satisfied this statute. *Wong* was not a case, like *Lane*, in which the visible nature of the child's injuries would reasonably have been noticed by someone in the defendants' circumstances. Indeed, *Wong* presents the almost unique circumstance in which the prosecution lacked proof not only of when the baby was fatally harmed, but also of who was present when the harm occurred. In *Wong*, the prosecution also could not prove that anyone not present at the moment of abuse would have been aware of the injury or of the need to act, because, uniquely, the injury left no external bruises. Indeed, the Court of Appeals specifically noted that the symptoms of shaken baby syndrome—a gradual fall into a comatose state with no external injuries—could easily be mistaken for the quieting down of the child.[68]

3. *Causation*

To establish culpability under the statute, proof of causation must, of course, be present. Generally, this should not be difficult for the prosecution to prove. There will almost always be medical testimony that the child died of non-accidental causes. Under the statute, this proof would be sufficient to support the liability of both defendants. Thus, in *Palmer v. State*,[69] the court affirmed a mother's involuntary manslaughter conviction for negligently

68. *See* People v. Wong, 619 N.E.2d 377 (N.Y. 1993). For cases like *Wong*, the evidentiary and procedural changes suggested in the statute—a negative inference based on a duty to account for the non-accidental death of a child, and the accompanying delay of the motion to dismiss to permit that account or the inference from its absence—would be required.

69. 164 A.2d 467 (Md. 1960).

permitting her child to be abused even though she was not the active abuser. The court reasoned that "to constitute the cause of the harm, it is not necessary that [the mother's] act be the sole reason for the realization of the harm which has been sustained by the [child.]"[70] By keeping the child in proximity to the harm, the court reasoned that the mother indirectly contributed to the abuse. Where liability is premised on a failure to promptly secure medical treatment or care, the proof that frequently exists in prosecutions now—that earlier medical attention would have averted the death—would also be sufficient to establish that the conduct of the passive defendant was a proximate cause of death.

In conclusion, in those cases where it is not possible to establish traditional intent or accomplice liability, the statute would provide an alternative homicide statute under which to secure a conviction. In addition, where it is not possible to identify which of two or more defendants was the active or passive abuser, the statute permits a finding of criminal culpability for both, so long as there is evidence to establish sufficient awareness of risk on behalf of both defendants, either because of the defendant's presence at the time of the abuse, the visible nature of the injuries sustained, or a past history of abuse. In the unique circumstance where the prosecution cannot prove when the abuse occurred or who was present, and where the abuse leaves no visible signs, the new statute will probably not be successful absent adoption of the proposed procedural and evidentiary changes that are discussed below.

B. Drawing a Negative Inference From the Failure to Account for the Non-Accidental Death of a Child

1. English Law

The English statute provides that the court and jury be allowed to draw a negative inference against any defendants who fail to give a statement before or at trial concerning how the child's death occurred. Although this may appear shocking to the U.S. reader, the law in England has allowed such an inference to be drawn in all criminal cases for at least a decade.

Unlike in the United States, in England the right to remain silent is not absolute. Pursuant to the Criminal Justice and Public Order Act 1994 § 35(3) ("CJPOA"), a jury may draw "such inferences as appear proper" against a defendant who: (1) remains silent or fails to answer a question during questioning by the police after being properly cautioned; (2) remains silent at trial; or (3) proves facts at trial inconsistent with those given in response to earlier police questioning.[71]

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70. *Id.* at 474 (quoting 1 CHARLES E. WHARTON, CRIMINAL LAW AND PROCEDURE 68 (2d ed. 1976).

71. Criminal Justice and Public Order Act, 1994, §34 (Eng.). The English statute provides, in substance, that where a defendant gives evidence and relies on a fact he or she failed to mention to the police, or if a defendant does not give evidence or gives evidence but unreasonably refuses to answer a question, the court or jury may again draw such inference as

Under the statute, when a defendant is charged with murder or manslaughter and the new criminal offense, the jury may draw a negative inference against the defendant as to all charges when that defendant either fails to account for the homicide to the police, fails to give an account at trial, or gives an account at both times but those accounts are inconsistent.

The legality of the CJPOA inference under the European Code of Human Rights, and the ways in which it has been implicated, are beyond the scope of this article.[72] It is sufficient to note that the proposed statute would allow the drawing of the inference against a silent defendant both as to the crime of causing or allowing the death of a child, and as to any accompanying charge of homicide.

2. *The Negative Inference under U.S. Law*

a. *Drawing a Negative Inference Based on a Duty to Report*

In cases like *Wong*, prosecuted under the new statute, where the prosecution can prove the non-accidental death of a child, can narrow down the group of responsible parties, but cannot prove the defendants' relative guilt, the duty to provide a safe environment for a child should be construed to include the duty to account for that child's non-accidental death. The failure to so account could then permit a negative inference against the non-reporting defendant. This was a solution proposed by the Commission in England;[73] however, this solution does not appear in the final statute submitted to the Queen. Instead, Parliament simply relied on the existing statutory inference from silence and proposed a delay in the motion to dismiss so that this inference could form part of the prosecution's prima facie case.

Statutes creating a duty to report child abuse already exist in every state of the United States, and extend the duty to doctors, nurses, and others who are likely to be in a position to report child abuse. Under these statutes, a person

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appear proper. *Id.* As to facts that the defendant did mention on being questioned and could reasonably have been expected to mention, the court or jury may draw such inferences from the failure as appear proper. *Id.* Section 38(3) prohibits a conviction based solely on such an inference. *Id.* §38(3). These sections have been upheld by the European Court of Human Rights (ECHR).. *See, e.g.*, Condron v. United Kingdom 31 Eur. Ct. H.R. 1 (2001); Murray v. United Kingdom 22 Eur. Ct. H.R. 29 (1996).

72. The ECHR has held that the limitations on the right to silence are consistent with the European Code of Human Rights. Commission Report, *supra* note 54, at 40-43. It was the Commission's position, as well, that Article 6 would not be violated because of: (1) the fundamental importance of the duty owed to the child under Articles 2 and 3; (2) the unsatisfactory state of the current law; (3) the safeguards described before a jury may draw a negative inference; and (4) the fact that the jury must be sure of the defendant's guilt before convicting. *Id.* Finally, the Commission recommended that a trial judge be under a duty to withdraw the case form the jury when he considers that any conviction would be unsafe or the trial would otherwise be unfair. The Commission explicitly noted that this safeguard might be particularly important if an adverse inference from silence was likely to be an important factor in the jury's considerations. *Id.*

73. *Id.* at 35-36.

can be prosecuted for failing to report suspected abuse.[74] These statutes reflect a unanimous recognition that child abuse is a problem of staggering dimension, and that children can be better protected by encouraging reporting.[75] Indeed, in some jurisdictions, a parent's failure to account for abuse of a child is considered proof that the family situation is unlikely to change for the better, and is thus part of the basis for terminating parental rights.[76] Moreover, as previously discussed in Part II, some states hold parents criminally liable for failing to prevent abuse (by reporting or otherwise), either under an aiding and abetting theory for homicide or assault, or under a protection and prevention statute.[77] Thus, the duty to report already exists in some form.

As part of the new statute, a presumption should be created that would permit the jury to draw a negative inference against one of multiple defendants charged under the statute where that defendant has failed to account for the non-accidental death of a child. The inference would be based on the responsible defendant's duty to account consistent with that defendant's Fifth Amendment privilege. Thus, the failure to account for the non-accidental death would be sufficient to provide an inference that the reason for the failure is that the account would be self-incriminatory.

California v. Byers[78] is the Supreme Court's major statement on the constitutionality of duty-to-report statutes. *Byers* was a plurality opinion written by Chief Justice Burger, where the Court analyzed a California statute requiring any driver involved in a vehicular accident that resulted in property damage to stop at the scene and leave his or her name and address. Although the so-called "stop and identify" statute was potentially self-incriminatory, the Court upheld it.[79]

The Court began its analysis by noting that it was "balancing the public need on the one hand, and the individual claim to constitutional protections on

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74. *See* Caroline Trost, Note: *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183 n.63 (1998).

75. *See, e.g.*, TENN. CODE. ANN.. § 37-1-402(a) (1996).

> The purpose of this part is to protect children whose physical or mental health and welfare are adversely affected by brutality, abuse or neglect by requiring reporting of suspected cases by any person having cause to believe that such case exists. It is intended that, as a result of such reports, the protective services of the state shall be brought to bear on the situation to prevent further abuses, to safeguard and enhance the welfare of children, and to preserve family life. This part shall be administered and interpreted to provide the greatest possible protection as promptly as possible for children.

Id. *See also* N.J. STAT. ANN. §§ 9:6-8.8 (West 1993) (providing "for the protection of children . . . who have had serious injury inflicted upon them by other than accidental means").

76. *See, e.g.*, West Virginia Dep't. of Health and Human Res. *ex rel.* Wright v. Doris S., 475 S.E.2d 865 (W. Va. 1996); Adoption of Larry, 750 N.E.2d 475 (Mass. 2001).

77. *See* discussion *supra* Part II.

78. 402 U.S. 424 (1971).

79. *Id.* at 432.

the other," and that "neither interest can be treated lightly."[80] Reviewing other duty-to-report requirements, the Court noted:

> In each of these situations there is some possibility of prosecution—often a very real one—for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be "a link in the chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.[81]

Reviewing its precedent, the Court explained that the question is not the possibility of incrimination, but whether the duty to report presents a "substantial hazard of self-incrimination."[82] That determination in turn depends on the answers to the following questions: (1) is the statute aimed at the public at large or at a "highly selective group inherently suspect of criminal activities;"[83] (2) is the statutory purpose "essentially regulatory" or is it aimed at facilitating the criminal conviction of the reporter; and (3) is the statute designed to disclose inherently illegal activity of the reporter?[84]

In *Byers*, the Court concluded that the statute was aimed at a sufficiently large portion of society (drivers involved in accidents) that it could not be deemed to address a "highly selective group inherently suspect of criminal activities." The fact that it was aimed at accident participants, many of whom, like Byers, might be guilty of criminal conduct, did not change the fact that driving, and even being involved in an accident, does not necessarily involve criminal conduct.[85] As to the second criterion, the Court noted that despite the collateral criminal consequences of disclosing one's name and address, and the possibility that this increased the likelihood of prosecution, the statute's main purpose was essentially to regulate motor vehicle use. The duty to report—that property damage has occurred—indicated that the duty's purpose was properly to impose responsibility for economic compensation for any property damage.[86]

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80. *Id.* at 427.

81. *Id.* at 428.

82. *Id.* at 429 (quoting U.S. v. Sullivan, 274 U.S. 259 (1927)).

83. *Id.* (quoting Albertson v. SACB, 382 U.S. 70, 79 (1965)).

84. *Id.* at 430.

85. *Id.* at 431. *Compare* Albertson, 382 U.S. at 79 (holding that an order requiring registration by members of communist organizations violates the Fifth Amendment); Haynes v. United States, 390 U.S. 85 (1968) (holding that an order requiring registration of firearm involved inherently criminal activity and therefore violated the Fifth Amendment).

86. The Court explained:

> Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence. Here the compelled disclosure of identity could have led

Similarly, although the statute might provide a link in the chain of evidence needed to prosecute for criminal conduct that may have occurred, the Court held that the driver's self-reporting would not be the sole evidence against a driver in any criminal case. In short, the Court concluded:

> The disclosure of inherently illegal activity is inherently risky. Our decisions in *Albertson* and the cases following illustrate that truism. But disclosure with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination involved in *Marchetti*, *Grosso*, and *Haynes*. Furthermore, the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment.[87]

The Court applied its analysis in *Byers* in a case where the safety of a child was at issue. Again, the Court upheld the duty to report.

In *Baltimore City Dep't of Social Servs. v. Bouknight*,[88] in a seven-judge majority decision authored by Justice O'Connor, the Court held that a parent's duty to produce a child in response to a court order trumps the parent's right against self-incrimination, even in a case where the authorities suspect that the child has been murdered by the parent.[89] In *Bouknight*, a mother who had custody of her child pursuant to a court order refused to comply with another court order to produce her child. The authorities believed the child had been abused and had died as a result. The Maryland Court of Appeals struck the lower court's order holding the mother in contempt on grounds that the act of production forced Bouknight to admit "a measure of continuing control and dominion over Maurice's person in circumstances in which 'Bouknight has a reasonable apprehension that she will be prosecuted.'"[90] Accordingly, the court found the contempt order unconstitutional.[91]

Again, as in *Byers*, despite the obvious self-incriminatory implications of the duty to produce a child under the circumstances presented, the Supreme Court reversed and held that Bouknight could not invoke her Fifth Amendment right against self-incrimination to resist the order to produce her child.[92] The

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> to a charge that might not have been made had the driver fled the scene; but this is true only in the same sense that a taxpayer can be charged on the basis of the contents of a tax return or failure to file an income tax form. There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement.

Byers, 402 U.S. at 434.

87. *Id.* at 431. Interestingly, Byers was indeed later charged with the substantive criminal offense of overtaking another vehicle. *Id.* at 424.

88. 493 U.S. 549 (1990).

89. For the purposes of the decision, the Court assumed that the act of production was testimonial in nature. *Id.* at 555.

90. *Id.* at 554 (quoting In re Maurice M, 550 A.2d 1135, 1141 (Md. 1988)).

91. *Bouknight*, 493 U.S. at 554.

92. *Id.* at 562.

Court used the same three-part test it used in *Byers* to determine if the duty violated the Fifth Amendment.

First, the Court found that persons who care for children pursuant to custody orders are not members of "a selective group inherently suspect of criminal activities" even though they may have been found by the court to be unable to give proper care to a child.[93] Second, it found that the statute did not "focu[s] almost exclusively on conduct which is criminal."[94] Even though the mother was suspected of criminal activity, the Court explained:

> Even when criminal conduct may exist, the court may properly request production and return of the child, and enforce that request through exercise of the contempt power, for reasons related entirely to the child's well-being and through measures unrelated to criminal law enforcement or investigation.[95]

Finally, the Court observed that it was "not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings."[96] It did note, however, that using immunity "is not appropriate where a significant element of the regulatory requirement is to aid law enforcement."[97]

Using the *Byers* and *Bouknight* criteria, imposing a duty on an individual to account for the non-accidental death of a child for whom he or she is responsible should survive Fifth Amendment scrutiny. First, the duty to account is directed toward parents, or those standing in responsible positions to children. This is not a "highly select group inherently suspect of criminal activity."[98] While it could be argued that the statute is really aimed at those caretakers whose children have been abused, the same argument was made in *Byers* and *Bouknight* — that the statute was aimed at criminal activity (drivers who caused accidents or caretakers who abused their children) and thus at people who were likely to be found to have engaged in criminal conduct. That argument was rejected because the Court found no necessary correlation between causing an accident and criminal conduct[99] or between having court ordered child custody because of deficient parenting and criminal conduct.[100] Similarly, the fact that one reports that one's child has been killed does not necessarily mean that the reporter has himself or herself engaged in criminal

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93. *Id.* at 559-60 (quoting Marchetti v. United States, 390 U.S. 39, 57 (1968) (quoting Albertson v. SACB, 382 U.S. 70, 79)).

94. California v. Byers, 402 U.S. 424, 454 (1971) (Harlan, J., concurring).

95. *Bouknight*, 493 U.S. at 561.

96. *Id.*

97. *Id.* at 562.

98. *Byers*, 402 U.S. at 429.

99. *See supra* note 83 and accompanying text.

100. *See supra* note 92 and accompanying text.

conduct. Indeed, it is more likely that the act of reporting will be proof that the caretaker has *not* engaged in any crime either as an accomplice or for failure to protect. In addition, in many states, these individuals already have a civil duty to account for harm to a child.

Second, the proposed duty to account could be sustained as having a regulatory purpose besides facilitating the reporter's criminal conviction. Indeed, the proposed duty to account would be no more than an extension of the existing statutory duties to report that apply to third parties. The purpose of the duty is to protect children from harm at the hands of their caregivers by both encouraging reporting and accurately identifying the abusers. Third, the proposed duty is not impermissibly designed to "disclose the illegal acts of the reporter."[101] In fact, the duty is aimed at exposing the culpability of the active abuser who causes the child's death.

Finally, under U.S. law, the safeguards accompanying the drawing of the inference in the criminal context may be sufficient to minimize the impact on the Fifth Amendment right, thus protecting the right against self-incrimination. To be sure, the defendant must be advised of the permissible inference when questioned by the authorities; this would be added to the standard *Miranda* warnings where the non-accidental death of a child is suspected.

b. The Supreme Court's No-Inference Precedent

Having established a duty to account for the non-accidental death of a child, the jury should be allowed to draw a negative inference against a non-reporting defendant during a prosecution under the new statute. The inference is supported by the following factors: (1) the importance of protecting children from murder at the hands of those who are supposed to care for them; (2) the fact that the inference rests on a substantive, common-law duty to provide safety; (3) the limited circumstance under which the inference would be available, that is, only where the prosecution cannot prove the guilt of two or more responsible parties for the death of a child for whom they were responsible. Under these circumstances, the drawing of the inference should be sustained under the Fifth Amendment.

The Fifth Amendment provides, in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In *Griffin v. California*,[102] the Supreme Court held that neither a court nor a prosecutor may comment on a defendant's silence. Under *Griffin*, no negative inference whatsoever may be drawn from the defendant's silence because such an inference would chill the defendant's exercise of that right by making its exercise costly.[103]

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101. *See supra* note 92 and accompanying text.
102. 380 U.S. 609 (1965).
103. *Id.* at 615.

The Supreme Court has adhered to this conclusion. Sixteen years after *Griffin*, in *Carter v. Kentucky*, the Court reaffirmed that a defendant has a right to have an instruction given to the jury that the jury may not draw any inferences from the defendant's failure to testify.[104] Moreover, in the 1999 case of *Mitchell v. United States*,[105] the Court, by a five-to-four majority, extended the no-comment rule to sentencing proceedings, refusing to allow a judge to rely on a defendant's failure to contest certain factual assertions that served to increase her sentence. The majority eloquently (and quite relevantly to a comparative analysis) defended the no-adverse-inference rule as follows:

> The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.[106]

To be sure, the Supreme Court has chosen to stick to its no-adverse-inference rule. Indeed, as the quote from *Mitchell* implies, one difference between the United States and other countries (including England) is that the United States remains a resolutely rights-based, accusatorial system.[107] Before the recent domestic adoption of the ECHR, England was not a rights-based system by any means. Although England recognized many rights of accused persons similar to the United States, it has no written constitution or bill of rights. Moreover, as a monarchy, English judicial process has remained more inquisitorial than the U.S. system, with more emphasis on the obligations of its citizens as subjects than in the United States. The U.S. system is still built upon protecting against conviction of the innocent and limiting the authority of the sovereign rather than viewing its citizens as subjects.

Nevertheless, consistent with the Fifth Amendment, a defendant charged with the new crime of causing or allowing the death of a child should have a substantive duty to account for the death of the child. Where it is clear that someone has caused the non-accidental death of a child, and where the prosecution cannot otherwise prove its case (such as in the circumstances of *Wong* and *Lane*), the Court should uphold a negative inference against the non-reporting defendant. Like juries in England, a U.S. jury would be instructed that it could consider the non-reporting defendant's failure to account for the

104. Carter v. Kentucky, 450 U.S. 288 (1981), *remanded to* 620 S.W.2d 320 (Ky. 1981).
105. 526 U.S. 314 (1999).
106. *Id.* at 330.
107. *Id.*

child's death. If the jury believes the failure to account is based on the fact that the defendant is responsible for the death under the new statute, then the jury could draw the negative inference. The jury could also consider the defendant's explanation for his or her failure to account in evaluating whether to draw a negative inference. As in England, the jury would also be instructed that it could not base a verdict of guilty on the inference alone. And, as in England, the court would retain the power to vacate a conviction if it concluded that the inference played too large a role in the jury's verdict.

c. Delaying the Decision on the Motion to Dismiss

Finally, what of the statutory provision delaying the decision on whether there is a case to answer until the close of all of the evidence? Like the U.S. motion to dismiss at the end of the prosecution's case, in England there is a procedural rule that requires a judge to dismiss a case at the close of the prosecution's case where a properly directed jury could not convict (there is "no case to answer").[108] According to the Commission, it is the operation of this rule that prevents the prosecution from properly convicting those responsible for child abuse, because under traditional principles the evidence is insufficient at the close of the prosecution's case to establish the defendant's relative culpability. As the Commission noted, the requirement that this decision be made after the close of the prosecution's case makes no logical sense in a child abuse case, where the only witness (because the child is dead or too young to speak) is the defendant, who by that time will not have been heard from. Thus, the Commission recommended that the decision whether to send the case to the jury be made only after the defendant's case. That is, the often taken-for-granted procedure should be changed to abolish the decision on whether there is a case to answer, and to substitute the decision whether the case should go to the jury, which decision would properly be made at the end of all of the evidence.

Delay of the motion to dismiss would likely survive constitutional scrutiny in the United States. To be sure, a defendant is entitled to a determination that the prosecution has established a prima facie case in which the evidence is sufficient to go to the jury.[109] While it is preferable for the motion to be made at the end of the prosecution's case, so that the defendant knows whether he should attempt to rebut the prosecution's case, the determination of sufficiency can be reserved until after the jury verdict and can be made until seven days after the jury has been discharged.[110] Thus, under U.S. law, there would be no constitutional barrier to delaying the motion to dismiss until after the close of all of the evidence.

108. Galbraith [1981] 1 W.L.R. 1039.
109. Jackson v. Virginia, 443 U.S. 307 (1979).
110. FED. R. CRIM. P. 29(c).

V. CONCLUSION

This article supports the enactment in the United States of a statute similar to England's new statute. Like its English counterpart, this statute would impose the same criminal responsibility on each member of a small, definable group of members of a deceased child's household for the child's non-accidental death and would not require proof as to which person was the active or passive abuser. The new offense would be classified as a homicide offense. It would establish culpability for homicide, but the sentence would be less than that for other homicides. At the very least, then, the statute would impose a sentence that is greater than that currently available under Endangering the Welfare of a Child statutes, which are misdemeanors in most jurisdictions even where the defendant's conduct causes death.[111] At the same time, this new statute would prevent acquittal in those jurisdictions that do not recognize omission liability for failure to prevent abuse or to seek medical assistance.

In other cases, however, the key to successful prosecution is the drawing of a negative inference from the failure to account and the delay of the motion to dismiss. Under established Supreme Court precedent, the U.S. courts could recognize an evidentiary inference against a defendant who fails to account for the death of a child for whom he or she is responsible under the proposed statute that would be permissible in a case in which the defendants are charged under the statute. A proper balance of the state's interest in and need for the inference and the limited incursion on the Fifth Amendment right to remain silent would prevent the acquittal of all parties where it is clear that one or both of them are responsible for murdering a helpless child.

111. *See, e.g.*, N.Y. PENAL LAW § 260.10 (stating that endangering the welfare of a child is an A misdemeanor); People v. Carroll, 715 N.E.2d 500 (N.Y. 1999).

PRIMOGENITURE AND ILLEGITIMACY IN AFRICAN CUSTOMARY LAW: THE BATTLE FOR SURVIVAL OF CULTURE

Jelili A. Omotola*

Nowadays, African cultures seem threatened by the effects of rapid socio-economic transformation processes and by the invasion of foreign models and mass cultural products. The ways of life, the ancestral values, the endogenous forms of solidarity and expression, the traditional knowledge and know-how are marginalized or lost. The rich diversity of local cultures, oral traditions, and languages as well as the African cultural and natural heritage are also seriously endangered.[1]

I. INTRODUCTION

African culture has been battling for its survival from the days of colonialism.[2] In recent times, especially with the introduction of new constitutions in Africa, the culture of African people has faced new challenges. This Article discusses the threat of extinction faced by African culture. It seeks to put the culture in true perspective, using primogeniture and illegitimacy as examples. The aim is to show its relevance, and to counsel caution in its handling by Governments and other institutions. For practical reasons, the courts' approach to African culture will be the centerpiece of the Article, since its continued existence depends largely on the attitude of judges towards it. The Article will disclose differing judicial attitudes in the interpretation of constitutional provisions. The African Charter on Human and Peoples' Rights

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* LL.B., LL.M., Ph.D. (London) Senior Advocate of Nigeria, Honorary Research Associate, University of the Witwatersrand. The idea of this article occurred to me after my Staff Seminar at the University of Capetown in May 2002. I am grateful to my Colleagues at the University of the Witwatersrand, School of Law, for their useful comments on earlier drafts of this article: Ian Currie, Lawrence Monnye, and Likhapa Mbatha of the Centre for Applied Legal Studies (CALS). Thanks also go to my other colleagues in the School of Law for their contributions during the Staff Seminar at which this article was first presented.

1. *See* The United Nations Educational, Scientific and Cultural Organization, Medium-Term Strategy (2002-2007) for the Africa Region, July 1-4, 2002, Dakar, Senegal, para. 48, pt. V Culture [hereinafter Medium-Term Strategy].

2. *See* M. Pieterse, *It's a 'Black Thing': Upholding Culture and Customary Law in a Society Founded on Non-racialism*, 17 S. AFR. J. HUM. RTS. 364, 368 (2001). The author observes that "[c]olonial powers regarded the indigenous populations of conquered territories as uncivilised [sic] 'savages' and viewed indigenous law as a set of primitive rules, which was irrational, inseparably linked with religion . . . ." *Id.*

is brought into focus. It will be stressed that when interpreting the Charter, all of its provisions must be taken together so as to give full effect to it. The article is divided into two sections. Section A discusses the primogeniture rule, while the discussion of illegitimacy follows in Section B. The Article concludes by making recommendations, which hopefully, will ensure the survival of African culture.

II. THE PRIMOGENITURE RULE

Primogeniture has been in existence in Africa since the early times. It permits only male issues to inherit the property of a person who dies intestate. The rule has been criticized on the ground that it prohibits female children from inheriting.[3]

The discussion will start with the celebrated case of *Mthembu v. Letsela*[4] decided in South Africa. Here, the intestate had been in an apparent customary relationship with the Appellant. The deceased, his parents, the Appellant and her two daughters lived together on a ninety-nine year lease property registered in his name. His only child, Tembi, was one of the Appellant's daughters. The first Respondent, the father of an intestate, claimed title to the house and instituted proceedings for eviction against the Appellant and her daughter. The Magistrate, who had earlier made an order for the deceased's estate to devolve according to customary law, was the second Respondent.

The Appellant alleged that there was a customary marriage between her and the deceased. In support of this allegation, she attached to her affidavit a copy of an acknowledgment of receipt of the first installment of R 900 towards her *lobola* of 2000.00. The balance was to be paid soon thereafter. The deceased, however, died before it could be paid. The Appellant challenged the validity of the customary law rule preventing Tembi from inheriting due to her gender. She also claimed that she and her daughter could not be evicted from the property.

The matter first came before Justice Le Roux in the High Court. The learned judge was unable to resolve the factual dispute relating to the existence of a customary marriage between the parties. He referred that issue for oral evidence and adjourned the matter indefinitely. With regard to the constitutionality of the customary law rule of primogeniture, he said:

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3. *See* V. Bronstein, Reconceptualizing the Customary Law Debate in South Africa, 14 S. AFR. J. HUM. RTS. 388 (1998); K. L. Robinson, The Minority and Subordinate Status of African Women Under Customary Law, 11 S. AFR. J. HUM. RTS. 457 (1995). *See generally* T. W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 86 (1995); W. V. Meide, Gender Equality v. Right to Culture: Debunking the Perceived Conflicts Preventing the Reform of the Marital Property Regime of the 'Official Version' of Customary Law, 116 S. AFR. L.J. 100 (1999).

4. 2000 (3) SA 867 (CC).

> If one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture (a feature which has been called 'one of the most hallowed principles of customary law'), I find it difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination' as used in Section 8 of the Constitution .... I cannot accept the submission that the succession rule is necessarily in conflict with Section 8. It follows that even if this rule is *prima facie* discriminatory on grounds of sex or gender and the presumption contained in Section 8(4) comes into operation this presumption has been refuted by the concomitant duty of support.[5]

When the matter later came before Judge Mynhardt at the second High Court trial, the learned judge remarked:

> The applicable African customary law of succession in the present case is to the effect that Tembi cannot be regarded as the deceased's heir and that the first respondent is his heir. This is so because of the principle, or system, of primogeniture, which is applied in African customary law .... If I were to accede to Mr[.] Trengove's request and declare the customary law rule of succession invalid because it offends against public policy, I would, I believe, be applying Western norms to a rule of customary law, which is still adhered to and applied by many African people.[6]

He held that there was no marriage between the parties. Thus, it was unnecessary to discuss the constitutionality of the rule, because Tembi was illegitimate and would not be eligible to inherit even if she were a male. This decision will be analyzed further under Section B, when the discussion turns to illegitimacy.

On appeal to the Supreme Court of Appeal, Judge Mpati , delivering the judgment of the Court, said:

> The customary law of succession in Southern Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family head is his heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue the second son becomes heir; if he be [sic] dead leaving no male issue the third son succeeds and so on through the

5. Mthembu v. Letsela, 1997 (2) SA 936, 945 (citing BENNETT, *supra* note 3, at 400).
6. Mthembu v. Letsela, 1992 (2) SA 675, 679.

> sons of the family head. Where the family head dies leaving no male issue his father succeeds. It follows that in terms of this system of succession, whether or not Tembi is the deceased's legitimate child, being female, she does not qualify as heir to the deceased's estate. Women generally do not inherit in customary law. When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family. He is obliged to support and maintain them, if necessary from his own resources, and not to expel them from his home.[7]

The Court held, however, that the Constitution could not apply since it did not have retroactive effect.

In the recent case of *Nonkululeko Bhe v. Khayelisha,*[8] the third Applicant and the deceased lived together as husband and wife for a period of twelve years. Two minor children were born of the relationship. They are the first and second Applicants in the case. The deceased acquired an immovable property during his lifetime and lived there with the three Applicants until the time of his death. After his death the three Applicants continued to live on the property. The second Respondent claimed that he was the intestate's heir by virtue of African customary law and, therefore, entitled to inherit his property. He also indicated that he intended to sell the property to defray the funeral expenses incurred as a result of the deceased's death. Judge Ngwenya noted that the attitude of the courts towards African customary law has been a cause for concern. He referred to the case of *Du Plessis v. De Klerk*[9] in which Judge Mokgoro said that "customary law [has been] lamentably marginalised, and allowed to degenerate into a vitrified set of norms alienated from its roots in the community."[10] In spite of these remarks, Judge Ngwenya proceeded to declare:

> We should make it clear in this judgment that a situation whereby a male person will be preferred to a female person for purposes of inheritance can no longer withstand constitutional scrutiny. That constitutes discrimination before the law. To put it plainly, African females, irrespective of age or social status, are entitled to inherit from their parents' intestate like any male person. This does not mean that there may not be

7. *Mthembu*, (3) SA at 876.

8. No. 9489/2002 (C.H.C. Sept. 25, 2003) (unreported judgment of the Cape High Court delivered by Ngwenya, J. (on file with author).

9. 1996 (3) SA 850 (CC).

10. *Id.*

> instances where differentiation on gender line may not be justified for purposes of certain rituals. As long as this does not amount to disinherison or prejudice to any female descendant. On the facts before us, therefore, the first two applicants are decided to be the sole heirs to the deceased's estate and they are entitled to inherit equally.[11]

This decision amounts to overturning the customary law rule of primogeniture without any regard to its implications.

The case of *Mthembu v. Letsela* was referred to by counsel for the Respondents but was not discussed because the Constitution was not applicable to it. There were, of course, important issues relating to the primogeniture rule which were discussed by the courts in *Mthembu*, which were not considered by the learned judge in this case. Two considerations might have influenced his decision. First, the Respondent planned to sell the house to meet funeral expenses. Although this is outrageous, it is not a sufficient reason for declaring invalid the custom of the people, which is seen as the keystone of their culture. The best the court could have done was to make an order preventing the sale of the property and thereby "not throw out the baby with the bath water."[12] Second, Counsel for the Applicants was smart enough to bring sentiment to becloud the decision of the learned judge by making it appear as if the primogeniture rule was introduced by the Black Administration Act and against the Blacks. Counsel argued and the Judge agreed that "the only reason why the first two applicants are not entitled to inherit from their father's estate *ab interstatio* in these proceedings is threefold. Firstly, they are black, secondly they are females, and thirdly they are illegitimate."[13]

In truth, the Act does not introduce the rule, but recognizes it as part of African culture. This point was stressed in *Mthembu* by Judge Mpati when dealing with the regulations promulgated under the Act. The learned judge said:

> What needs to be stressed from the outset is that the regulation in issue did not introduce something foreign to Black persons, as was the case in *Machika en Andere v. Staatspresident en Andere*. It merely gave legislative recognition to a principle or system which had been in existence and followed, at least, for decades.[14]

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11. *Nonkululeko Bhe*, No. 9489/2002.

12. *See* Masango v. Masango S 66-86 (unreported judgment of the Supreme Court of Zimbabwe) (on file with author); *see also* Matambo v. Matambo, 1969 (3) SA 717 (RA).

13. *See Nonkululeko Bhe*, No. 9489/2002.

14. *Mthembu*, 2000 (3) SA at 880; *see also* Machika en Andere v. Staatspresident en Andere, 1989 (4) SA 19 (T).

If Judge Ngwenya had examined the rule more carefully, and had considered the views expressed on it by other judges, he probably would have followed the path of caution. The primogeniture rule in customary law is similar to the common law rule under which all the realty (immovable properties) vested in the intestate passed to his heir, the eldest male child, subject to the rights of the surviving spouse. Some chattels (movable properties) known as heirloom also descended to the heir. At common law the heir takes beneficially, but in customary law he takes on behalf of the family. The court did not tamper with the common law rule, but required Parliament to intervene in 1925 when it deemed fit to do so after full investigation and consultation.[15]

In Mthembu v. Letsela, Judge Mynardt declined an invitation by counsel to develop the Customary Law rule. He said:

> In the present case I therefore decline the invitation to develop the customary law of succession which excludes women from participating in intestacy and which also excludes children who are not the eldest male child. In any event, because the development of that rule, . . . would affect not only the customary law of succession but also the customary family law rules, I think that such development should rather be undertaken by Parliament and in this regard I can do no better than to repeat, in regard to customary law, what was said by [Judge] Kentridge . . . in . . . the *Du Plessis* case, . . . in regard to the common law, namely[:]'The radical amelioration of the common law has hitherto been a function of Parliament; there is no reason to believe that Parliament will not continue to exercise that function.[16]

Judge Mpati with the Supreme Court of Appeal, also declined to develop the rule, preferring to leave it to the South African Law Commission, who are in a better position to make proper recommendations to Parliament. The learned judge said:

> [Counsel] contended that the rule is based on 'inequality, arbitrariness, intolerance and inequity', all of which are repugnant to the new constitutional order. He urged us to develop the rule . . . so as to allow all descendants, whether male or female, legitimate or illegitimate, to participate in intestacy . . . we would be ill-equipped to develop the rule for lack of relevant information. Any development of the rule

15. *See* R. E. MEGARRY & H. W. R. WADE, THE LAW OF REAL PROPERTY 539-48 (5th ed. 1984).

16. *Mthembu*, 1998 (2) SA at 686-87.

> would be better left to the legislature after a process of full investigation and consultation, such as is currently being undertaken by the Law Commission.[17]

In the case of *Magaya v. Magaya,*[18] discussed later, Judge Muchechetere insisted that the function of reform of the rule is that of the legislature, and not the court. In this regard he observed:

> Matters of reform should be left to the legislature .... In the case of succession a court could not simply rule customary norms void; it would have to stipulate how much widows could inherit and in what circumstances. Details of this nature cannot be determined in judicial proceedings. The proper medium for reform would be legislation, which permits full investigation of the social context and consultation with interested groups.[19]

Section 6 of the South African Promotion of Equality and Prevention of Unfair Discrimination Act[20] provides that "neither the State nor any person may unfairly discriminate against any person." Section 8 of the Act also provides that, "subject to Section 6, no person may unfairly discriminate against any person on the ground of gender, including the system of preventing women from inheriting family property."[21] These new statutory provisions came into effect after *Mthembu.*

The question, therefore, is whether these provisions will have the effect of invalidating the primogeniture rule. To answer that question, one must ask whether the new provisions are covered by the 1996 Constitution. In comparing the Constitution and the Act, the only difference is the specific reference in the Act to discrimination, which prevents women from inheriting family property. Therefore, the question is whether those provisions of the Act add anything to what the Constitution already covers in Section 9. Subsection 4 of Section 9 provides that "no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)."[22] The grounds listed in the latter subsection are "race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[23] Discrimination on ground of sex is included in this provision. Therefore, the Act did not add

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17. *Mthembu*, 2000 (3) SA at 881, 883.
18. 1999 (1) ZLR 100 (S).
19. *Id.* at 114.
20. South African Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.).
21. *Id.* § 8, para. (c).
22. *Id.* § 6.
23. S. AFR. CONST. § 9(4).

materially to the existing provisions in Section 9 of the Constitution. Under the Constitution and the new Act, discrimination must be shown to be fair. Section 9(5)[24] of the 1996 Constitution, like Section 8(4)[25] of the 1993 Constitution, put the burden of proof of the fairness of the discrimination on the person who wants to take advantage of the discrimination. The 1993 Constitution requires prima facie proof of discrimination, which is presumed to be sufficient proof thereof. Under the 1996 Constitution, discrimination is unfair unless it is established that the discrimination is fair. Both the Constitution and the Act are concerned with unfair discrimination and not discrimination *per se.*

In the Nigerian case of *Mojekwu v. Mojekwu,*[26] a well-known case in that country, the Appellant claimed that the deceased, the owner of the property, was his father's only brother who predeceased his father. The deceased had two wives, the Respondent, Caroline, and another wife, Janet. Caroline had a son who died in 1970, and had no issue. Janet had two daughters. The deceased bought the property in dispute from the Mgbelekeke family of Onisha under *Kola* tenancy.[27] The Appellant claimed that he inherited the property under the native law and custom of Nnewi, which is their home, because he was the eldest surviving son of his father and the eldest male in the Mojekwu family. He paid the necessary *kola*, as consideration to the Mgbelekeke family, who recognized him as a kola tenant. Respondent denied Appellant's claim. Under the Mgbelekeke family customary law of *Onitsha,* both male and female children can inherit the property of an intestate. The customary law of Nnewi is known as *Oli-ekpe,*[28] and under it only males can inherit. The trial judge decided that the applicable law is the *lex situs*, that is, the law where the land is situated. In this case, the customary law was therefore that of the Mgbelekeke family of *Onitsha,* and not the *Oli-ekpe.*

The Nigerian Court of Appeal agreed with the trial judge that the applicable law is the *lex situs*, which is the Mgbelekeke family customary law. Justice Niki Tobi, delivering the judgment of the court, expressed the following view on the *Oli-ekpe* custom:

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24. *Id.* § 9(5). This section provides that "[d]iscrimination on one or more ground listed in subsection (3) is unfair unless it is established that the discrimination is fair." *Id.*

25. *Id.* § 8(4). This section provides that "prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established." *Id.*

26. 1997 (7) N.W.L.R. 283 (Nig.).

27. *Id.* at 301. Section 2 of the Kola Tenancy Law of 1935 (of then Eastern Region of Nigeria) defines a Kola tenancy as a right of use and occupation of any land, which is enjoyed by any native in virtue of a Kola or other token payment made by such native or any predecessor in title or in virtue of a grant for which no payment in money or in kind was enacted. The significant legal incident of a Kola tenancy is that the tenant has a limited right of disposal. The Kola tenant enjoys all the rights of an absolute owner but not the right of absolute disposition. *Id.*

28. *Oli-ekpe* is sometimes referred to as *Ili-kpe.*

> The appellant claims to be that "Oli-ekpe". Is such a custom consistent with equity and fairplay in an egalitarian society such as ours where the civilized sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs, which discriminate against the womenfolk in this country. They are regarded as inferior to the menfolk. Why should it be so? All human beings, male and female are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional is antithesis to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi Oli ekpe custom relied upon by the appellant are not consistent with our civilized world in which we all live today, including the appellant. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that God, the Creator of Human being, is also the final authority of who should be male and female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the Oli-ekpe custom of Nnewi is repugnant to natural justice, equity and good conscience.[29]

Oli-ekpe custom should not be seen as contrary to natural justice, equity, and good conscience. Female children are not prevented from benefiting. The family property that the heir inherits is to be used for the benefit of all family members who will fall under his care. It does not belong to him in his personal capacity. What is inequitable in asking property to be held for others or in saying males should hold for females, so long as no one that is entitled is thereby deprived?

This is the principle upon which the English Trust was founded in order to keep the property safe and ensure evenhandedness in its administration. Under English law, property could be held in trust by one person known as trustee, on behalf of others who are called beneficiaries. Sometimes, the trustee also has beneficial interest in the property, and will, in the circumstance, have dual capacity.[30] The learned justice referred to the custom as unconstitutional

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29. *Mojekwu*, 1997 (7) N.W.L.R. at 304-05.

30. *See* G. W. KEETON & L. A. SHERIDAN, THE LAW OF TRUSTS 2-6 (12th ed. 1993) (discussing the definition of trusts); *see also* Jacobs, *Law of Trusts in Australia in* R. P.

and antithetical to a society based on the tenets of democracy. He said, "any form of societal discrimination on grounds of sex, apart from being unconstitutional is antithesis to a society built on the tenets of democracy, which we have freely chosen as a people."[31] Since his judgment was delivered in 1997, the only Constitution that could apply in Nigeria was the Federal Republic of Nigeria Constitution of 1979. Most of its provisions were suspended, abrogated, or modified by the Military in 1984, by its Decree No. 1 of 1984. Although fundamental rights relating to discrimination, contained in Section 39, Chapter IV of the Constitution, were preserved, it is doubtful whether this provision would justify the dismissal of the primogeniture rule, especially considering the provisions of Section 20 of the same Constitution, which provide for the protection of Nigerian culture.

In *Magaya v. Magaya,*[32] another celebrated case decided by the Supreme Court of Zimbabwe, the deceased had two wives by customary law marriage. Appellant, a female, was the only child by the first wife, and the Respondent was one of the three sons by the second wife. Appellant was the eldest child of the deceased. Respondent's brother was the eldest of the three sons and eligible to succeed the deceased, but declined to take up heirship. He said that he would be unable to look after the family. The Community Court appointed Appellant as the heiress to the estate, without notifying the Respondent and other interested parties. The court later cancelled the appointment of Appellant upon application by Respondent challenging the appointment. The presiding magistrate awarded the heirship to Respondent because the customary law rule of intestate succession favored males over females. The court relied on section 68 (1) of the Zimbabwe Administration of Estates Act,[33] which provided that if an African married according to customary law or custom dies intestate, his estate must be administered and distributed according to the customs and usages of the tribe or people to which he belonged.

On appeal to the Supreme Court of Zimbabwe, the Court held that, although the rule constitutes a prima facie discrimination against females, and therefore could be a prima facie breach of the Constitution of Zimbabwe, which by section 23(1) and (2) forbid discrimination on grounds of race, tribe, place of origin, political opinion, color or creed, the exemption in Section 23(3) excludes application of this provision in matters relating to succession and the application of African customary law. Based on these grounds, the court dismissed the appeal. Judge Muchechetere, delivered the lead judgment and rationalized the rule thus:

> In my understanding of African society, especially that of a patrilineal nature, the perpetual discrimination against women stems from the fact that women were always regarded as

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MEAGHER & W. M. C. GUMOW, JACOBS' LAW OF TRUSTS IN AUSTRALIA 1-6 (4th ed. 1977).

31. *Mojekwu*, 1997 (7) N.W.L.R. at 304.

32. 1999 (1) ZLR 100 (S).

33. Zimbabwe Administrations of Estates Act, ch. 68(1) (Nig.).

> persons who would eventually leave their original family on marriage, after the payment of roora/*lobola*, to join the family of their husbands. It was reasoned that in their new situation—a member of the husband's family—they could not be heads of their original families, as they were more likely to subordinate the interests of the original family to those of the new family. It was therefore reasoned that in their new situation they would not be able to look after the original family. It was also reasoned that the appointment of female heirs would be tantamount to diverting the property of the original family to that of the new family. This would most likely occur on the death of a female heir. Then her property would be inherited by her children who would be members of her new family. This in my view would be a distortion of the principles underlying customary law of succession and inheritance.[34]

Muchcchetere stressed the obligations of the heir towards the family, as did Le Roux, and Mpati, in *Mthembu*. He also acknowledged the responsibility of the heir under customary law to maintain and support the family of the deceased and referred to two cases in support: *Masango v. Masango*[35] and *Matambo v. Matambo*[36]. Indeed, in *Masango*, the judge refused to grant an order to evict the heir's late father's wife and children because the heir did not provide alternative accommodation for them. Assuming, therefore, that the duty of support is central to the primogeniture rule, how may it be enforced? Is it enough to refuse eviction as in *Masango* or can the court do more, so as to disentitle an heir who abandons his responsibilities to the family?

In *Matombo v. Matombo*, the court approved a departure where the most senior male was bypassed, and the bulk of the property of the deceased was given to a junior male, on the ground that if all the property was given to the most senior for the rest of the family, he might not deal with it to the best advantage of all other members of the family.[37]

The ground upon which the rule was saved in *Mthembu*, namely the concomitant duty of support, must be enforced by the courts in such a way that it does not impose empty obligations on the heirs. Members of the family of the deceased must have *locus standi* to compel the successor to fulfill his customary law duties. Failure to fulfill this duty should be made a civil wrong. In its discussion paper on customary law, the South African Law Commission

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34. *Magaya*, 1999 (1) ZLR at 109; *cf.* AJ Kerr, The Bill of Rights in the New Constitution and Customary Law, 114 S. AFR. L.J. 346 (1997).

35. S-66-86 (unreported judgment of the Supreme Court of Zimbabwe) (on file with author).

36. 1969 (3) SA 717, 717G (RA).

37. *Cf. Magaya*, 1999 (1) ZLR at 109 (where the eldest son declined voluntarily on the ground that he would not be able to fulfill obligations attaching to the inheritance).

expressed concern about the efficacy of this concomitant duty of support.[38] It said:

> Admittedly, the heir has a duty to maintain the deceased's dependant out of the estate, and, on the strength of this duty, it has been held that customary law formally complies with the Bill of Rights. Even so, the law is no longer effective to achieve its major purpose, which is to provide a material basis of support for the deceased's surviving spouse and immediate descendants. The time has therefore come to amend customary rules that discriminate on grounds of gender, age, or birth and to give the deceased's immediate family more secure rights.[39]

While one may agree with the concern expressed by the Commission, this will not justify its call for the abrogation of the rule. The task lies not in the abrogation, but rather in ensuring compliance with the rule. The approach of the Court in *Masango* and *Matambo*, which seeks to ensure compliance, ought to be followed. Only those who can comply with the duty of support should be allowed to assume hiership. The primogeniture rule is inherently of great value, and as admitted elsewhere in the Commission's Paper, the rule has long been assumed to be the "keystone of customary law"[40] because it seeks to strengthen the family rather than the individual. For that reason, it should be preserved.

In *Ryland v. Edros,*[41] it was held that the courts must take into account the plural nature of South African society when interpreting the Constitution, and the duty was placed on the judiciary to apply the values of equality and tolerance of diversity. This was also echoed in another South African case, *Amod v. Multilateral Motor Vehicle Accidents Fund,*[42] where Judge Mohamed held that to deny the appellant compensation on the ground that the only duty of support, which the law will protect, is that flowing from a marriage solemnized and recognized by one faith or philosophy, to the exclusion of others, is an untenable basis for the determination of the *boni mores* of society. The following two cases will show the attitude of courts in other societies to the issue of culture.

The first is the Canadian case of *Attorney-General v. Lavell.*[43] The case involved two appeals, which were taken together. In the first appeal, Respondent, L, was an Indian woman who married a Non-Indian. As a result,

38. South African Law Commission, Discussion Paper 93, Project 90 (2000).
39. *Id.* at para. 4.1 (Background to the Investigation).
40. *Id.* at para. 4.2.6 (Intestate succession).
41. 1997 (2) SA 690 (CC).
42. 1999 (4) SA 1319 (CC).
43. [1974] S.C.R. 1349.

her name was removed from the Indian Register pursuant to Section 12(1)(b) of the Indian Act, 1970, which provided that a woman who marries a Non-Indian is not entitled to be registered. The matter was referred to a county court Judge, sitting as *persona designata* under the Act, and he upheld the decision. The Federal Court of Appeal set his decision aside, but on further appeal by the Attorney General to the Supreme Court of Canada, the Court restored the decision earlier reached by the county court Judge, which favored the interests of the Indian community and allowed the appeal.

In the second appeal, *Isaac v. Bedard*, Respondent, B, was also an Indian woman who had married and separated from her Non-Indian husband.[44] She lived off the reserve during the subsistence of the marriage. When they separated she returned to the reserve to live in the house bequeathed to her in terms of her mother's will. The Appellants, members of the Six Nations Council, requested the District Supervisor to serve a notice to quit on the respondent. She was also served a resolution ordering her to dispose of property she held. The Supreme Court of Ontario found in favor of the respondent by declaring Section 12(1)(b) of the Indian Act inoperative, and the notice to quit, along the resolution, of no effect.

On a direct appeal to the Supreme Court of Canada by the Six Nations Council, the Court found the section operative and allowed the appeal by a majority of three to one. The court held that the Canadian Bill of Rights could not render the impugned provisions inoperative because Section. 91(24) of the British North America Act of 1867 vested exclusive legislative authority in Parliament to legislate in relation to Indians and lands reserved for Indians. This power could not be exercised without enacting laws establishing qualifications required to entitle persons to enjoy Indian status and the rights and privileges of Indians under the Act. "The conditions imposed by Parliament for the use and occupation of Crown Lands reserved for Indians are a necessary part of the structure created by Parliament for the internal administration of the life of Indians on reserves and their entitlement to the use and benefit of Crown land situate thereon."[45] They were imposed in the discharge by Parliament of its constitutional function under the said provision and a change in those conditions must be effected for that purpose. "Parliament, in statutorily proclaiming certain fundamental rights in general terms in the Canadian Bill of Rights, cannot have intended to override the provisions of the Indian Act."[46]

The provision in Section 12(1)(b) was challenged on the ground that it infringed the Respondents' rights to equality before the law. The court held, however, that equality before the law is not effective to invoke the egalitarian concept, as enshrined in the 14 Amendment of the US Constitution.[47] The

44. Isaac v. Bedard, (1973) D.L.R. 481.
45. *Id.* at 481-82.
46. *Id.* at 482.
47. *Id.*

court stated that it must be read in its context as a part of the rule of law and means equality in the administration or application of the law by the authorities charged with enforcement of the law. Further, no inequality in the administration and enforcement of the law, as between Indian men and women, flows as a necessary result of the application of Section 12(1)(b) of the Indian Act. On equality before the law, Judge Ritchiesaid:

> [T]he question to be determined in these appeals is confined to deciding whether the Parliament of Canada in defining the prerequisites of Indian status so as not to include women of Indian birth who have chosen to marry non-Indians, enacted a law which cannot be sensibly construed and applied without abrogating, abridging or infringing the rights of such women to equality before the law.[48]

He added:

> Equality before the law . . . carries the meaning of equal subjection of all classes to the ordinary law of the land as *administered by the ordinary Courts*, and in my opinion the phrase "equality before the law" as employed in Section 1(b) of the *Bill of Rights* is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary Courts of the land.[49]

The second case, *Santa Clara Pueblo v. Martinez*,[50] was decided in the United States. In that case, Respondents, a female member of the Santa Clara Pueblo tribe and her daughter, brought an action for declaratory and injunctive relief against petitioners, the Pueblo and its Governor, alleging that a Pueblo ordinance that denied tribal membership to the children of female members who marry outside the tribe, but not similarly situated children of men of that tribe, violated Title I of the Indian Civil Rights Act of 1968. Title I provides that "no Indian Tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws."[51]

Indeed, the court noted the central purpose of the Indian Civil Rights Act, which was, "to secure for the American Indian the broad constitutional rights afforded to other Americans and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments."[52] However, it was observed that Indian tribes have long been recognized as immune at common law from

48. *Id.* at 494.
49. *Id.* at 495.
50. 436 U.S. 49 (1978).
51. *Id.* at 51; *see also* Indian Civil Rights Act, 25 U.S.C.S. §§ 1301-1303 (1968).
52. *Martinez*, 436 U.S. at 61.

suit, traditionally enjoyed by sovereign powers. Also, tribal sovereignty is subject to the superior and plenary control of Congress. Thus, without express congressional authorization to the contrary, the Indian tribes are exempt from suit. Therefore, if Congress wished to waive this immunity, it would do so expressly by legislation rather than by implication. The court held that the Respondents' suit against Pueblo was accordingly barred by its sovereign immunity.[53]

Title I of the Indian Civil Rights Act of 1968,[54] does not authorize the bringing of civil actions for declaratory or injunctive relief, nor can such authority be implied. The remedy of an injunctive and declaratory relief is of a civil nature. For that reason, it was not available to the Respondents. The court found that the only remedial provision, which Congress supplied in Title I, is the privilege of the writ of habeas corpus. This remedy is made available "to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."[55] Respondents were not in the situation described in the Title. It is clear that the privilege can be exercised only in the criminal law context.

Bearing in mind the legislative purpose of protecting tribal sovereignty, Congress settled on habeas corpus as the exclusive means for federal-court review of tribal proceedings and chose a less intrusive review mechanism.[56] This was based on its legislative investigation into tribal compliance with constitutional norms in both civil and criminal contexts, which revealed that most serious abuses of tribal power occurred in the administration of criminal justice.[57] Justice Marshall found that, "[i]n light of this finding, and given Congress' desire not to intrude needlessly on tribal self-government, it is not surprising that Congress chose at this stage to provide for federal review only in habeas corpus proceedings."[58] Accordingly, the majority of the Court (per Justice Marshall) held that Section 1302 did not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

In arriving at its decision, the court rejected proposals for federal review of alleged violations of the Act arising in a civil context,[59] noting that since Congress did not expose tribal officials to the full array of federal remedies, as are federal and state officials, it may also be considered that "resolution of statutory issues under Section 1302 and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."[60]

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53. *Id.* at 58.
54. 25 U.S.C. §§ 1301-1303.
55. *Martinez*, 436 U.S. at 58 (quoting 25 U.S.C. § 1303).
56. *Id.* at 67.
57. *Id.* at 71.
58. *Id.*
59. *Id.* at 72.
60. *Id.* at 71.

These two cases no doubt demonstrate global concern for the protection of culture and traditional institutions. The effect of the decisions in these cases is that discrimination between men and women in a culture is not new and is not necessarily inequitable. It should also be added that the Governments of both countries are mindful of the need for the preservation of culture and made such provisions, which enabled the courts to decide as they did.

The need for the preservation of culture was also stressed in the African Banjul Charter on Human and Peoples' Rights.[61] In *Attorney-General v. Dow,*[62] the Court of Appeal in Botswana had to interpret the provisions of the Botswana Citizenship Act,[63] which provided that "a person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth: (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana."[64] The claim of the Respondent was that the Act breached her fundamental rights because it specifically made a discriminatory provision in that, while a male Botswana citizen could pass citizenship to his children born out of wedlock, she could not do so by virtue of being a woman.[65] The issue was whether Section 15 of the Botswana Constitution,[66] which forbids any law that is discriminatory on grounds of race, place of origin, political opinions, color, creed, or sex, precluded the enactment of legislation containing provisions that are *prima facie* discriminatory against women, such as in the Citizenship Act. Judge Aguda referred to Articles 2, 3, and 18(3) of the African Charter on Human and Peoples' Rights, and reached the conclusion that the charter expects all persons to be treated equally, without discrimination on ground of sex, and that since Botswana is a party to the Charter, it cannot allow its national legislation to make provisions that will be in conflict with her international undertaking.

It is submitted that Aguda. was wrong in not reading the African Charter as a whole, as he was urged when interpreting the Constitution. The learned judge had said while interpreting the Botswana Constitution that, "[i]t will be doing violence to the Constitution to take a particular provision and interpret it [one way]."[67] If he had done the same with reference to the African Charter and had brought into view all relevant provisions of the Charter for consideration, he would have discovered that the Charter expects the court to

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61. OAU Document, 21 I.L.M. 58 (1982). This was adopted by the 18th Assembly of the Heads of State and Government of the Organization of African Unity (OAU), now African Union (AU) on June 27, 1981 at Nairobi, Kenya; it entered into force on October 21, 1986. *Id.*

62. (1991) L.R.C. (Const.) 574 (Bots.).

63. Botswana Citizenship Act 25 of 1982 (amended by Act. 17 of 1984).

64. *Id.*

65. *See Dow,* (1991) L.R.C. (Cons.) 574 (Bots.). In terms of the law in force prior to the Citizenship Act, the child born before the marriage was a Botswana citizen, whereas in terms of the Act, the children born during the marriage were not citizens of Botswana, and therefore were aliens in the land of their birth.

66. BOTS. CONST. ch. II, § 15 (amended 1987).

67. *Dow,* (1991) L.R.C. (Const.) at 688.

take cognizance of the values and traditions of the African people in reaching its decision. With specific reference to Article 18(3), Aguda said:

> One may be permitted once more to note the African Charter on Human and Peoples' Rights Article 18(3). It says emphatically that 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions'. In my view there is clear obligation on this country like on all other African states signatories to the Charter to ensure the elimination of every discrimination against their women folk.[68]

But other provisions, which ought to have been considered, are Preamble 4, Articles 17(3), 18(1), 18(2), and 29(1). Preamble 4 of the Charter requires State Parties to the Charter to take into consideration the virtues of their historical tradition and the values of African civilization, which will inspire and characterize their reflection on the concept of human and people's rights. Article 17(3) provides that the promotion and protection of moral and traditional values recognized by the community shall be the duty of the state. Article 18(3) relied upon by the learned judge, is preceded by paragraphs 1 and 2. Paragraph 1 provides that the family shall be the natural unit and basis of society; it shall be protected by the state, which shall take care of its physical health and morals. Paragraph 2 provides that the state shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community. Lastly, Article 29(1) enjoins the individual to preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect his parents at all times and to maintain them in case of need.

These provisions point to the fact that the Charter was concerned about the preservation of African culture and values including the centrality of family in African traditions. Any provision in the Charter that may appear to negate or contradict this concern must be read subject thereto. It is most unfortunate that Judge Aguda did nothing of the sort and took Articles 2, 3, and 18(3) as if they were the only Articles in the Charter. It is submitted that in the special circumstance of African culture, which is informed by the need to ensure the sustenance of the family and its property, the African Charter contains enough provisions to call for care. Judge Muchechetere said in *Magaya*:

> In my view, all the courts can do is to uphold the actual and true intention and purport of African Customary law of succession against abuse, as was done in the *Masango* case. . . . "The obligation to care for family members, which

68. *Id.* at 674.

> lies at the heart of the African social system, is a vital and fundamental value, which Africa's Charter on Human and Peoples' Rights is careful to stress." Paragraph 4 of the Preamble to the Charter urges parties to pay heed to "the virtues of the African historical tradition and the values of African civilization" and Chapter 2 provides an inventory of the duties that individuals owe their families and society. Article 29(1), in particular, states that each person is obliged to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.[69]

These are vital injunctions in the reading of the Charter, and indeed in interpreting any of its provisions. Aguda fell into error when he did not inquire into the rationale behind the African custom before criticizing it. He showed his distaste for the custom, which he thought discriminated against women, by stating:

> In considering whether this court can interpret [S]ection 15 of the Constitution in such a way as to authorize legislation, which in its term and intent is meant to discriminate on ground of sex, in this case the female sex, it appears to me that, now more than ever before, the whole world has realized that discrimination on ground of sex, like that institution which was in times gone by permissible both by most religions and the conscience of men of those times, namely, slavery, can no longer be permitted or even tolerated, more so by the law.[70]

Judge Purckrin, sitting in the same court, disagreed. He said:

> I do not perceive that it is my duty as a Judge of this court to impose my personal convictions upon an interpretation of the Constitution, for to do so would, in my respectful view, permit this court to become the overlord of the constitution rather than its guardian.[71]

He added:

> I am of the view that the Constitution, and particularly Section 15, thereof, does not preclude the legislature from enacting a

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69. *Magaya*, 1999 (1) ZLR 100, 113-14 (S) (citing Masango, S 66-86 and quoting BENNETT, *Supra* note 3, at 6.

70. *Dow*, (1991) L.R.C (Cons.) 574 (Bots.).

71. *Id.*

> statute which provides that citizenship shall pass in a patrilineal but not matrilineal fashion. In my view the provisions of Section 15 of the Constitution are clear and it is not necessary to invoke such extraneous aids to interpretation as Botswana's international obligations under various conventions and the like.[72]

III. ILLEGITIMACY

African society does not recognize the concept of illegitimacy as it is used in the Western world.[73] Many writers on African customary law accept this view.[74] Bennett writes: "Illegitimacy is said to have no place in customary law since 'birth in or out of wedlock is irrelevant to the child's status in the community or its legal rights and duties.' The legal disadvantages of illegitimacy are indeed not as great in customary law as they used to be in western legal systems."[75] However, it may not be correct to say that the concept of illegitimacy is unknown to customary law. Coker argues:

> It is generally supposed that there is no status of illegitimacy in native law and custom: this, however, is not correct, for there is a status of illegitimacy as opposed to that of legitimacy. The latter entitles the subject *ipso facto* to succeed to property; the former disentitles the subject from so succeeding, unless his rights are "legalised by an acknowledgment of paternity" by the father.[76]

Illegitimacy is the result of lack of marriage between biological parents; therefore, any discussion about illegitimacy must involve an inquiry into the relationship of these parties.

Inheritance, in general, is reserved for children born of a valid marriage. However, customary law appears to be flexible on this issue, leaning against illegitimacy at every opportunity. In the past, illegitimate children were most unfavored by society, which regarded them as issues of immorality, *filius nullius*. When an attempt was made to change their status, majority opinion, especially in England, did not like equating the legal position of illegitimate

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72. *Id.*

73. *See generally* E. Schoeman, *Choice of Law and Legitimacy: Back to 1917?*, 116 S. AFR. L.J. 288, 292 (1999) (discussing the "lawful wedlock theory" and legitimacy).

74. *See* S. M. Seymour, *Proof of Legitimacy or Illegitimacy, in* BANTU LAW IN SOUTH AFRICA 226 (3d. ed. 1970); T. W. BENNETT, A SOURCE BOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 358 (1991); S. Burman, *Illegitimacy and the African Family in a Changing South Africa, in* ACTA JURIDICA 36 (T.W. Bennett et al. eds., 1991).

75. *See* BENNETT, *supra* note 74, at 358.

76. G. B. A. COKER, FAMILY PROPERTY AMONG THE YORUBAS 266 (African Universities Press, Lagos, 3rd ed. 1966).

children with that of legitimate ones for fear that such a step might weaken respect for marriage and the family.[77]

In African custom, absence of marriage does not preclude a father from having access to his children. Whether a father plays a role as a custodial parent, or just as guardian, depends on whether he abides by certain customary rules. Even where there is no marriage, the father of a child can have custodial rights to the child. For example, in some parts of Southern Africa when the natural father pays *isondlo*[78] he obtains custody and guardianship of the child.[79] The courts originally refused to apply this rule because it was regarded as child-trafficking, and against public policy.[80] In other parts of Africa, acknowledgement of paternity is sufficient to transfer a child into the father's family, just, as *isondlo* achieves the same result. In this regard, it is not a requirement that the father must be married to the mother of the child.

In *Subuola Alake v. Bisi Pratt*,[81] the West African Court of Appeal held that "the evidence in this case is that under Yoruba law and custom all legitimate children are entitled to share in their father's estate, and the Appellants having been held to be legitimate, the question of their parents' marriage is not a relevant subject for investigation."[82] Likewise, in *Savage v. Macfoy*,[83] Justice Osborne, expressed the following view:

> The principle governing intestate succession among the Yoruba is that all children whether legitimate or not will inherit from their intestate deceased father. The only proviso is that the father of an illegitimate child must acknowledge paternity of his illegitimate child. In this respect there appears to be no difference between children born in native wedlock and the offspring of fortuitous connection, provided paternity has been acknowledged.[84]

Illegitimacy ceases to be relevant once children belonging to a deceased person are, or have been shown to be, his or there has been evidence of his acknowledgment of the children. The child becomes legitimate at the point of acknowledgment of his or her paternity, which may be at birth. A child who has been so acknowledged cannot be described as illegitimate. If his or her

77. A. H. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750-1950, 395 (Butterworths, London, 1980).

78. The transfer of a beast intended to compensate the family that brought up the child for the expenses incurred by the woman's family.

79. *See* The Law of South Africa: Indigenous Law 32 para. 146 (on file with author).

80. Mpawa v. Labano, 1938 NAC 121 (S).

81. 15 W.A.C.A. 20; *see also* In re. Herbert Macauley, 13 W.A.C.A. 304 (1951).

82. *Alake* 15 W.A.C.A. at 20-21.

83. (1909) R.G.C.R. 504.

84. *Id.* at 508.

natural parents decide to marry, the child is not 'legitimated' for the purposes of customary law.

Returning to the decision of the South African Court of Appeal in *Mthembu*,[85] which dealt with the issue of illegitimacy, there the court held that Tembi was an illegitimate child because there was no customary marriage between her mother and the deceased. The facts of this case have been stated under the primogeniture rule. The issue of marriage came before Judge Mynhardt, of the High Court. No evidence was offered on this issue. Counsel agreed that the matter should be decided on the basis that there had been no customary marriage. The learned judge, therefore, reached the conclusion that there was no customary marriage between the parties. He said:

> Both the applicant and the first respondent decided not to adduce any evidence. The application must accordingly be determined on the basis that the applicant and the deceased were not married to each other and that Tembi was born out of wedlock.[86]

Later he said:

> In the present case the applicant was not married to the deceased. Her child, Tembi, is therefore an illegitimate child vis-a-vis the deceased and his family. Tembi has no right to inherit from the deceased. That is so simply because she is not the legitimate child of the deceased. It matters not that Tembi is a girl. Even an illegitimate son would have had no right to inherit intestate from the deceased. The disqualification of Tembi . . . flows, therefore, from her status as illegitimate child and not from the fact that she is a girl and that the system of primogeniture is applied in customary law. In my view there cannot therefore be any talk of unfair discrimination on the grounds of sex or gender in the present case. It also follows that the value of equality has not been infringed. Moreover, Tembi has not been deprived of her right to support from her guardian. She had that right since birth and she is still entitled to be maintained and supported by her guardian.[87]

What the learned judge is saying here is that since he proceeded on the basis that Tembi is illegitimate because of absence of marriage between her parents, there can be no talk of unfair discrimination on the ground of sex or gender. Mpati, of the Supreme Court of Appeal, agreed with him and said:

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85. 2000 (3) SA 867 (CC).
86. Mthembu v. Letscla, 1998 (2) SA 675, 679 (T).
87. *Id.* at 686.

> As the court a *quo* held, Tembi, of course, is excluded from inheriting because she is illegitimate. The question of gender discrimination is not reached in this case and it is not desirable to address a question of such constitutional importance in a case in which it is academic. She would be in the same position as, for example, illegitimate male children.[88]

Counsel for the Appellant argued at the court, that the deceased child had been legitimized since the bridewealth had been paid in part. Mpati replied:

> *In casu*, it is common cause that no customary union existed between the appellant and the deceased when Tembi was born. It is also common cause that no customary union was entered into subsequent to her birth. It follows that although part of the bridewealth was paid, without a customary union between her parents, Tembi was not legitimised. Mynhardt J was accordingly correct in holding that Tembi is illegitimate.[89]

It is unfortunate that evidence was not offered at the trial on the issue of marriage and that the case was determined on the basis that Appellant and the deceased were not married to each other. When the issue of marriage was argued at the Supreme Court of Appeal, the Court decided that there was no marriage between the deceased and Tembi's mother, because for there to be a customary marriage there must be payment of bridewealth and marriage. Counsel for the Appellant sought support for his argument that bridewealth was sufficient to constitute marriage. He quoted Burman as saying:

> In customary law a child born within a customary union is presumed to be legitimate and thus part of its father's family. However, as outlined above, the crucial element in the marriage which transfers the child into the father's family is not the ceremony, as in civil law, but the payment of bridewealth, at least in part.[90]

Mpati said that counsel misread this passage and that the author "speaks of the crucial 'element in the marriage' which transfers the child into the father's family as being payment of bridewealth or part of it."[91] There must, he said, be a marriage distinct from payment of bridewealth. It is submitted that the court,

88. *Mthembu*, 2000 (3) SA at 882.
89. *Id.* at 879.
90. *Id.* at 878 (quoting Burman, *supra* note 74).
91. Id.

insisting that customary law requires both payment of bridewealth and marriage, as two separate requirements, begs the question. Burman could not be understood as saying that this is the rule, as she said elsewhere:

> A customary-law union, in practice if not as clearly in the text books, is a process rather than an event. By paying bridewealth (termed *lobola* among the Xhosa) to a woman's natal family, a man obtains rights over her and her offspring, and undertakes certain corresponding duties. In this way the woman and children are incorporated into his patriline and the wife's guardian forfeits his claims to them, though he retains residual rights of guardianship for the rest of her life. But payment of bridewealth may take many years or, indeed, may never be completed. While the maternal family may invoke their right to the children until such time as bridewealth is paid, they are very unlikely to do so as long as there remains the expectation – or hope – that the father will yet honour the bridewealth agreement.[92]

Mbatha also notes that, "[t]he conceptual separation of these two processes is misleading since they often take place at the same time."[93] Mpati referred to a statement in Warner[94] in support of his view. The learned author said that "in customary law[,] payment of bridewealth and marriage were required to legitimate children."[95]

This statement is incorrect. In *Mabena v.Letsoalo* ,[96] the court defined a customary marriage as comprising two distinct legal actions: (i) the marriage agreement, which traditionally required the consent of the bride, the bridegroom, and the guardian of the bride, and (ii) the *lobolo* agreement, which traditionally required the consent of the guardian of the bride and the guardian of the bridegroom.[97] The court did not define a customary marriage as requiring (i) marriage and (ii) payment of *lobola* as two different things. In that case, the only action that was established was payment of *lobola* to the bride's mother, and it was also shown that the payment was made by friends of the deceased. Yet the court concluded that there was a valid marriage in accordance with customary law.[98]

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92. Burman, *supra* note 74, at 38.

93. Likhapha Mbatha, *Reforming the Customary Law of Succession*, 18 S. AFR. J. HUM. RTS. 259, 276 (2002).

94. H. WARNER, DIGEST OF SOUTH AFRICAN NATIVE CIVIL CASE LAW §§ 1894-1957 (1961).

95. *Id.* at 47-50 (Custom in Transkeian Territories and other areas, Claim by Natural Father of a Child: Pondo Custom).

96. Mabena v. Letsoalo, 1998 (2) SA 1068 (T).

97. *Id.* at 1073.

98. *Id.* at 1075.

In *Bhe*, discussed above, there was a dispute as to the payment of *lobola*. While the Applicant claimed that no *lobola* was paid, the Respondent said that it was paid. The Court resolved the issue in favor of the second Respondent, and held that the first and second Applicants were legitimate.[99] Judge Ngwenya said that it has never been a requirement under customary law to pay *lobola* before a marriage is consummated. All that is needed is agreement for *lobola*. It may be deferred so long as circumstances do not permit payment.[100]

The South African Recognition of Customary Marriages Act of 1998[101] appears now to have resolved the problem, if any existed before, since it provides in Section 3(1) as follows:

> For a customary marriage entered into after commencement of this Act to be valid,
> (a) The prospective spouses-
> (i) Must both be above the age of 18 years; and
> (ii) Must both consent to be married to each other under customary law; and
> (b) The marriage must be negotiated and entered into or celebrated in accordance with customary law.

Apart from the minimum age of eighteen years and the consent of the parties, the only other requirement in this subsection is that the marriage must be negotiated and entered into or celebrated in accordance with customary law. The Act does not require both to take place before customary marriage can be valid. The words used by the Act are "negotiated" and "entered into" or "celebrated." These words are used as disjunctive and not conjunctive, requiring either one or the other, but not both.

Although *lobola* is not made a requirement of customary marriage by this Act, it was featured in Section four, which deals with registration of customary marriages. This Subsection included *lobola* as one of the particulars that a registering officer must record when registering a marriage. This does not make the payment of *lobola* a requirement of a valid customary marriage for the purposes of the Act. Reference to *lobola* is also found in the definition section of the Act, as follows:

> Lobolo means the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka*, or by any other name, which a prospective

99. Nonkululeko Bhe v. Khayelisha, No. 9489/2002 (C.H.C. Sept. 25, 2003) (unreported judgment of the Cape High Court delivered by Ngwenya, J.) (on file with author).

100. *Id.*

101. § 1 of Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

> husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.[102]

The conclusion may be reached that, even though *lobola* is not made a requirement of a valid customary marriage, the practice is recognized by the Act, and indeed the payment of it, either in whole or in part, is the best evidence that a marriage was negotiated and entered into in accordance with customary law within the meaning of this Act.

Before leaving this issue, the constitutionality of the concept of illegitimacy must be considered. In South Africa, Sections 9(3) and (4) of the 1996 Constitution prohibit discrimination on ground of birth.[103] The 1993 Constitution, Section 8(2) did not refer to birth, although it included social origin as a ground for which discrimination is prohibited.[104] Some writers have argued that prohibition of discrimination on ground of social origin included birth, and this meant that illegitimacy was caught by the provision in Section 8(2).[105] They concluded that discrimination against illegitimate children was prohibited by this provision. The 1996 Constitution, in addition to including social origin, now adds birth as one of the grounds upon which discrimination is prohibited. It is clear, therefore, that discrimination on the grounds of illegitimacy is caught by this provision.

Indeed, in 1997 the South African Constitutional Court, in *Fraser v. Children's Court,*[106] held that an unmarried father of an illegitimate child may insist that his consent be obtained in the adoption of his child. The father of the illegitimate child had in this case challenged the provision of Section 18(4)(d) of the Child Care Act[107] in so far as it dispenses with father's consent for the adoption of an illegitimate child. The main ground of attack was that the provision was inconsistent with Section 8 of the Interim Constitution, as it violated the right to equality and the right of every person not to be unfairly discriminated against. The court held that the provision impermissibly discriminated between married fathers and unmarried fathers.[108] Parliament was directed to correct the defect by an appropriate statutory provision within a period of two years. It appears that there has since been compliance with this directive of the court.

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102. *Id.*

103. S. AFR. CONST. §§ 9(3)- 9(4) (amended 1996).

104. *Id.* § 8(2).

105. Angelo Pantazis & Tshepo Mosikatsana, *Children's Rights, in* CONSTITUTIONAL LAW OF SOUTH AFRICA 33-1 (M. Chaskalson et al. eds., 1999) (referring to the tenth report of the Technical Committee on Fundamental Rights during Transition, where it is said that social origin was deemed to encompass birth, class, and status).

106. 1997 (2) BCLR 153 (CC).

107. § 18(4)(d) of Child Care Act of 1983 (S. Afr.).

108. *Fraser*, 1997 (2) BCLR at 153.

The substituted Section 18(4)(d) of the Act now provides that in the case of a child born out of wedlock, the consent of both the mother and the natural father is required.[109] Although this case does not deal directly with illegitimacy, the Constitutional Court may already be moving in this direction by striking out the provision in a statute that discriminates against an unmarried father of an illegitimate child. Further, in *Bhe*, the learned judge observed that whether the first and second Applicants are legitimate or not does not affect the consequences flowing from the status of the legal relationship between their parents at the time of their fathers' death.[110] He said also that, in his view, even if the children were illegitimate, he would not refuse them the relief sought in the light of the constitutional era in which we live.[111] This supports the earlier argument that the concept of illegitimacy is in conflict with the provisions of the South African Constitution against discrimination.

The Nigerian Constitution[112] provides that "no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth." Illegitimacy as a concept will also be affected by this provision in the Constitution.[113] Chapter 3 of the Constitution of Zimbabwe[114] does not contain a prohibition of discrimination on the ground of birth. Illegitimacy under customary law will therefore not be affected in that country. In Ghana, Section 17 of the Constitution,[115] which prohibits discrimination, does not include birth. The same applies to the Constitution of Botswana,[116] which does not include discrimination on grounds of birth. It is arguable that the Constitutions of Ghana and Botswana will affect the concept of illegitimacy in their countries, since they both include prohibition against discrimination on the grounds of social status.

IV. LATER DEVELOPMENTS

The treatment of children equally, irrespective of their parents' marital status, is now popularized as human rights culture. Many countries the world over have been finding solutions to the plight of children who are being disinherited on the ground that they are illegitimate due to the absence of

109. *See* § 4 of Adoption Matters Amendment Act 56 of 1998 (S. Afr.).

110. Nonkululeko Bhe v. Khayelisha, No. 9489/2002 (C.H.C. Sept. 25, 2003) (unreported judgment of the Cape High Court delivered by Ngwenya, J.) (on file with author).

111. *Fraser*, 1997 (2) BCLR at 153.

112. NIG. CONST. § 42 (2) (1999).

113. It was however held in *Da Costa v. Fasehun*, suit No. M/150/80 (unreported decision dated May 22, 1981, by the, High Court of Lagos, Nigeria) while interpreting Section 39(2) of the Nigerian Constitution of 1979, that the provision will not confer a right of inheritance to children born out of wedlock on the ground that it will be contrary to public policy.

114. ZIMB. CONST. amend. XVI, ch. 3 (2000).

115. GHANA CONST. § 17 (1992) (Discrimination is prohibited on grounds of gender, race, color, political opinion, religion, creed or social, or economic status).

116. BOTS. CONST. (1996) (Discrimination is prohibited on grounds of gender, race, color, political opinion, religion, creed, or social status.).

marriage between their parents. For example, originally in England, in accordance with the general rule at common law, only legitimate persons and those claiming a relationship through legitimate persons could participate in intestate succession. In 1969 the Family Law Reform Act permitted illegitimate children and their parents to succeed each other.[117] Now, its Family Law Reform Act of 1987[118] provides that, for the purposes of the distribution of the estate of an intestate, any relationship shall be construed without regard to whether the parents of the deceased, the claimant or any person through whom the claimant is related to the deceased were married to each other.

New Zealand has also removed the distinction between legitimate and illegitimate issue. Section 3(1) of its Status of Children Act provides that "the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other."[119]

Additionally, the International Covenant on Economic, Social and Cultural Rights requires equality of status for all children. It reads:

> Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour [sic] should be prohibited and punishable by law.[120]

Bennett thinks that, "this implies abolition of the stigma of illegitimacy."[121] It is doubtful whether this view is correct. It appears the Article referred to here contemplates a situation where the state takes measures to protect children. In doing so, the state should not discriminate on the basis of the parentage of such children, which could include illegitimacy. The provision cannot be said to prohibit illegitimacy.

The European Convention on the Legal Status of Children Born out of Wedlock provides that "a child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its

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117. *See* Family Law Reform Act, ch. 46, § 14 (1969) (Eng.).

118. Family Law Reform Act, ch. 42, § 18 (1987) (Eng.), *reviewed by* N. LOWE & G. DOUGLAS, FAMILY LAW 879 (Butterworths, Dublin, 9th ed. 1998).

119. Status of Children Act, 1969 (N.Z.).

120. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

121. T. W. Bennett, *Compatibility of African Customary Law and Human Rights, in* ACTA JURIDICA 18, 27 (T. W. Bennett et al. eds., 1991).

father's or mother's family, as if it had been born in wedlock."[122] This Convention, rather than the one referred to earlier, is perhaps more relevant to the issue of elimination of the stigma of illegitimacy.

In Africa, post-colonial governments have paid close attention to customary law of succession. For example, Malawi's Wills and Inheritance Act,[123] was enacted to reconcile the interests of customary law heirs with those of surviving spouses and children. In Ghana, the Intestate Succession Law was enacted in 1985,[124] which provides for the surviving spouses and children to inherit the house and household chattels. Zambia enacted the Intestate Succession Act of 1989 to achieve the same equitable distribution among the spouses and children of an intestate. In Zimbabwe, the Administration of Estates Amendment Act of 1997 was enacted to introduce a new code of intestate succession applicable to anyone subject to customary law at the time of his death.[125]

The situation in South Africa offers perhaps the biggest challenge.[126] In this country, there have even been calls for harmonization of the common law and customary law systems.[127] The law commission of the country has also suggested that "[i]nstead of attempting to reform customary law, the common law could be substituted."[128] It recommends[129] that the Intestate Succession Act be made applicable to estates that are subject to customary law.[130] South

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122. European Convention on the Legal Status of Children Born out of Wedlock, art. 9 (1975) (The convention was opened for signature on 15th September 1975 and for ratification on 11th August 1978. As of October 12, 2004 only twenty-one countries had signed and ratified it.).

123. Wills and Inheritance Act of 1967, para. 25 (Malawi).

124. *See* G. R. Woodman, *Ghana Reforms the Law of Intestate Succession*, 29 J. AFR. L. 118 (1985) (discussing Ghana's Intestate Succession Law).

125. *See generally* South African Law Commission, *supra* note 38, at para. 4.4 (discussing Zimbabwe's Administration of Estates Act of 1997).

126. A draft bill on the Amendment of Customary Law of Succession was tabled before Parliament in 1998 but was withdrawn after objections to the bill were raised by interested parties. Now there is a new draft bill that is to be tabled in Parliament, which seeks to repeal the illegitimacy rule and the rule of primogeniture, the duty of an heir to support the family of the deceased person, and which makes provision for surviving spouses.

127. *See* I. Currie, *Indigenous Law*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 36 (M. Chaskalson et al. eds., 1999); M. Pieterse, *supra* note 2; J. D. Van Der Vyver, *Human Rights Aspects of the Dual System Applying to Blacks in South Africa*, 15 COMP. & INT'L L.J. S. AFR. 306 (1982).

128. South African Law Comission, *supra* note 38, at para. 3.1.

129. *Id.* at para. 4.2. *See generally* South African Law Commission, Discussion Paper 82, Project 90, Harmonisation of the Common Law and the Indeginous Law (1999).

130. Section 1(2) of the Intestate Succession Act 81 of 1987 provides that "[n]otwithstanding any [l]aw or common law . . . illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation." *Id.* § 1(2). Subsection (4)(b) expressly excludes estates that are subject to customary law, by providing that "[i]n the application of this section –'intestate estate' includes any part of any estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act, . . . does not apply." *Id.* § 1(4)(b). Section 23(1) and (2) provide that: "All movable property belonging to a Black and allotted by him or accruing under Black Law or Custom to any woman

Africa, like many countries on the continent, has to contend with the clash between the common law and customary law.

The conflict that exists between these two systems has currently moved to the Constitution and customary law.[131] The new call for harmonization must be seen in that light. The proponents of harmonization are no doubt aware that the Constitutions of many African countries are largely based on common law principles. They must also know that any harmonization process will result in customary law being absorbed into the common law. Caution is, therefore, called-for in dealing with this issue. Pieterse notes:

> South African law has in the past been overwhelmingly Eurocentric. Cultural preferences of a small sector of the South African community have been forced onto the majority of the population. The Constitutional commitments to non-racialism, respect of cultural diversity and equality before the law thus require that African cultural values are no longer treated as "inferior". For South African Law truly to be legitimate, it must reflect the cultural perceptions of the majority of its citizens. There is further no reason why cultural interests should be restricted to the realm of customary law and not also infiltrate other areas of South African law.[132]

A harmonized legal system must first meet the precondition of harmonizing relations among people across races and cultures. Realistically, this still remains a dream in many countries in Africa. The problem with the concept of a single legal system is that it assumes that such a system is what people need. On the contrary, what is needed is recognition that African customs exist, that the majority of African people still live by them, and that they must therefore be protected. The South African Law Commission made the same point with regard to the call for harmonization of the law of succession in South Africa. It said:

> While this solution would have the advantage of providing a single law of succession for the whole country, it should not be adopted without careful consideration, for different cultural groups may be unwilling to surrender their legal heritages. Maintaining a policy of dualism accepts the fact of South

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with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black Law and Custom." All land in Tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve, upon his death, upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10). *Id.* § 23(1)(2).

131. For a more detailed discussion on this issue, see C. Himonga and C. Bosch, *The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?*, S. AFR. L.J. 117, 364 (2000).

132. Pieterse, *supra* note 2, at 390-91.

> Africa's legal and cultural diversity, a reality that the Constitution demands we respect.[133]

Kerr also writes:

> Change is needed; but, especially in a democracy, those affected by customary law need to have an opportunity to state their views with the assurance that 85 percent of their system of law will not need to come from other sources. This is not to say that the values in the Bill of Rights are to be disregarded. If those affected by customary law are persuaded to adopt new values, such of those values as the legislature(s) adopt and enact are incorporated into customary law.[134]

V. CONCLUSION

The question of the compatibility of the primogeniture rule with the Constitutions of African countries will continue to be the subject of debate. As shown, in some cases the Constitutions exclude customary law from their application. In others, there is no such exception, but the Constitutions provide for the recognition of culture. What then is the future of African culture in an era of constitutional provisions for equality and non-discrimination? The answer lies in calling for a more conscious effort on the part of African Governments to ensure the preservation of African culture by avoiding constitutional provisions that will override it. The African Charter on Human and Peoples' Rights should be reviewed in the light of the decision in *Attorney-General v. Dow.* Its provisions should expressly be made subject to the preservation of African culture and values in line with Preamble 4. The review must include Articles 60 and 61 of the Charter, that is, those Articles relating to applicable principles. These Articles appear to suggest that African practices are matters for subsidiary measures and should only be considered when they are not inconsistent with international norms of human and peoples' rights.

When Africans take a keen interest in the cultures of the continent, they earn the stigma of being romanticists, who desire to live in the past. Yet, Western cultures decimate African cultures, destroy the African moral fiber and lead to atrophy of the social fabric of African societies.[135] The old order treated African customs with contempt. The new order recognizes them only insofar as they conform to democratic values. It treats African customs with caution and

133. *See* South African Law Commission; *supra* note 38, at para. 3.1.

134. A. J. Kerr, *Inheritance in Customary Law Under the Interim Constitution and Under the Present Constitution*, 115 S. AFR. L.J. 262, 269 (1998).

135. *See* Medium-Term Strategy, *supra* note 1 (stating the UNESCO medium term strategy for the Africa region quoted at the beginning of this article).

the result is that they are vulnerable. When African customary law receives mention, it is less than what it deserves. The only bridge that exists between the new and the old is that both have failed to give African customary law full recognition and protection. The old order made assumptions about what is wrong and right for African people. The new order continues to make those assumptions on the pretext that it is the people themselves who have made the choice through their Constitutions.

This century is regarded as the century of Africa in which she must come into her own, shed the shackles of dependence, and put herself on the path of self-expression. The African Millennium under the African Union must not be in name only. The vision that the expression encapsulates has to be concretized. In this millennium, African Union must strive to unite Africans across the continent around the same values and ideals, instill in them pride for their cultures, traditions, and beliefs. There must be continuous learning about African culture, beyond treating it as purely tourism, an exotic delicacy exclusively reserved for consumption by tourists.

IS YOUR MEDICAL INFORMATION SAFE? A COMPARISION OF COMPREHENSIVE AND SECTORAL PRIVACY AND SECURITY LAWS

Rebecca L. Woodard[1]

I. INTRODUCTION

The privacy of an individual's personal information has long been considered sacred.[2] The use of electronic data and communication has rapidly changed the way the world communicates.[3] Globalization,[4] convergence,[5] and multi-media[6] have all impacted the security of data and information.[7] There has been an increase in the weight placed on security of data because of the changes in the way data is stored and transferred.[8] When information is stored and/or transferred electronically, there is increased potential for the information to be misused or mishandled, leading to an infringement of individual privacy.[9]

This Note will look at why personal information, and specifically personal health information, should be protected and how governments around

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1. J.D., Indiana University School of Law – Indianapolis, 2005 *(expected);* B.S., Physical Therapy, Northeastern University, Boston, Massachusetts, 2000.

2. *See generally* RESTATEMENT (SECOND) OF TORTS: INVASION OF PRIVACY § 652B (1977); *see also* David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments,* 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 3 (Fall 1999).

3. *See* John Graubert & Jill Coleman, *The Impact of Technological Change in the Canada/U.S. Context: Consumer Protection and Antitrust Enforcement at the Speed of Light: The FTC Meets the Internet,* 25 CAN.-U.S. L.J. 275, 275 (1999).

4. Banisar *supra* note 2, at 5. "GLOBALIZATION removes geographical limitations to the flow of data. The development of the Internet is perhaps the best known example of a global technology." *Id.*

5. *Id.* "CONVERGENCE is leading to the elimination of technological barriers between systems. Modern information systems are increasing inter-operable with other systems, and can mutually exchange and process different forms of data." *Id.*

6. *Id.* "MULTI-MEDIA fuses many forms of transmission and expression of data and images so that information gathered in a certain form can be easily translated into other forms." *Id.*

7. *Id.* at 4-5.

8. *See* William J. Kambas, *A Safety Net in the E-Marketplace: The Safe Harbor Principles Offer Comprehensive Privacy Protection Without Stopping Data Flow,* 9 ILSA J. INT'L & COMP. L. 149, 168 (2002).

9. *See id.*

> Collection of consumer data will inevitably yield files of consumer data. Once these files are created, they must be protected from misuse (both internal and external) and from inadvertent dissemination. Measures must be taken to ensure the security of information collected. That which is not secure cannot be considered private.

Id.

the world are addressing current and potential security problems. Part II looks at a brief history of the privacy and security of personal health information and how it has evolved with the integration of technology. Part III focuses on how personal information can be misused and why it is so important to maintain the security of personal health information. Part IV addresses the history of privacy laws in the United States, Canada, and the United Kingdom. Part V is dedicated to current and future privacy and security laws. Part VI looks at the issues of compliance and penalties for violations of the regulations. Lastly, Part VII looks at the strengths and weaknesses of the different methods of regulation..

II. THE CHANGES IN THE PRIVACY AND SECURITY OF PERSONAL INFORMATION

There have been many changes in the way societies view privacy since the days when Warren and Brandeis described privacy as the "right to be left alone."[10] In 1948, the Universal Declaration of Human Rights stated that "[n]o one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour [sic] or reputation. Everyone has the right to the protection of the law against such interferences or attacks."[11] The concept of keeping medical information private has existed since at least 400 B.C. when Hippocrates wrote the Hippocratic Oath.[12] "Whatever, in connection with my professional practice or not, in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret."[13] Through time, the Oath has changed; nevertheless, the emphasis on privacy of health information remains strong.[14]

With the growth of electronic technology, the methods of collecting, storing, and transferring data have changed in two major ways.[15] Prior to the

10. *See* Banisar, *supra* note 2, at 8 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 193 (1890)).

11. *Id.* at 8 (quoting Human Rights Web, U.N. Universal Declaration of Human Rights, at http://www.hrweb.org/legal/udhr.html (July 6, 1994) (ed. Jan. 27, 1997)).

12. *See* Hippocrates, *The Oath,* The Internet Classics Archive, Francis Adams trans., http://classics.mit.edu/Hippocrates/hippooath.html (n.d.) (last visited September 7, 2004).

13. *Id.*

14. *See* Louis Lasagna, *The Hippocratic Oath – Modern Version, Nova Online, at* http://www.pbs.org/wgbh/nova/doctors/oath_modern.html (n.d.) (last visited Oct. 30, 2004). "I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know." *Id.* The Modern Oath was "[w]ritten in 1964 by Louis Lasagna, Academic Dean of the School of Medicine at Tufts University, and used in many medical schools today." *Id.*

15. *See* WILLIAM STALLINGS, NETWORK SECURITY ESSENTIALS, APPLICATIONS AND STANDARDS 2 (2d ed. 2003).

use of computer technology, data was secured physically and administratively.[16] Technology has led to the need for new security components.[17] First, there is the new "need for automated tools for protecting files and other information stored on the computer."[18] Computer security is "[t]he generic name for the collection of tools designed to protect data and to thwart hackers."[19]

The second change is the need for securing the systems that carry the data.[20] "Network security measures are needed to protect data during their transmission."[21] Essentially, all organizations "interconnect their data processing equipment with a collection of interconnected networks. Such a collection is often referred to as an internet, and the term internet security is used."[22] The need for computer security and network security cannot be clearly distinguished, and both must be addressed to ensure data remains private.[23]

There are two types of network security attacks, passive and active.[24] Passive attacks obtain information from the system but do not disrupt the system.[25] Active attacks, on the other hand, do modify the data.[26] Passive attacks can be further divided into two types, the "release of message contents" and "traffic analysis."[27] Both types of passive attacks are harder to detect than active attacks because they do not affect the data, and the transmission appears to have been normal.[28] Although active attacks may be easier to detect, they are more difficult to prevent.[29]

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16. *Id.* "An example of the former is the use of rugged filing cabinets with a combination lock and for storing sensitive documents. An example of the latter is personnel screening procedures used during the hiring process." *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.*

24. *Id.* at 5.

25. *See id.* "Passive attacks are in the nature of eavesdropping on, or monitoring of, transmissions. The goal of the opponent is to obtain information being transmitted." *Id.*

26. *Id.* at 7. "Active attacks involve some modification of the data stream or the creation of a false stream and can be subdivided into four categories: masquerade, replay, modification of messages, and denial of service." *Id.*

27. *Id.* at 5.

> The **release of message contents** is easily understood . . . . A telephone conversation, an electronic mail message, and a transferred file may contain sensitive or confidential information. We would like to prevent an opponent from learning the contents of these transmissions.
>
> A second type of passive attack, **traffic analysis** is subtler . . . . Suppose that we had a way of masking the contents of messages or other information traffic so that opponents, even if they captured the message, could not extract the information from the message.

Id.

28. *Id.* at 6.

29. *Id.* at 9.

The growing use of computers has significantly increased the preexisting problems with ensuring the privacy and security of health data.[30] "Health information is perhaps the most intimate, personal, and sensitive of any information maintained about an individual. As the nation's health care system grows in size, scope, and integration, the susceptibility of that information to disclosure will also increase."[31] The major dilemma in the health care field is how to balance the individual's rights to the privacy of his or her medical records with the use of a system that improves communication, decreases costs, and improves quality of care.[32] Without a certain expectation of privacy, patients will be unwilling to disclose critical information that may be detrimental to their health care.[33]

III. HOW YOUR INFORMATION CAN BE MISUSED

Currently, there are three general types of misuses of health data with the use of electronic data storage and transmission: "individuals who misuse medical data," "use of personal health data for marketing," and "institutional practices that do cause unambiguous harm to identifiable individuals."[34] There are numerous examples of cases of individual misuse of personal data.[35] For example, "Arthur Ashe's positive HIV status was disclosed by a health care

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30. *See* Paul Starr, *Health and the Right to Privacy*, 25 AM. J.L. & MED. 193, 196 (1999).

31. Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451, 454 (1995).

32. *See* Mark Weitz et al., *In Whose Interest? Current Issues in Communicating Personal Health Information: A Canadian Perspective*, 31 J.L. MED. & ETHICS 292 (2003).

33. Irwin Kleinman, MD et al., *Bioethics for Clinicians: 8. Confidentiality*, 156 CANADIAN MED. ASSOC. J. 521, 522 (Feb. 15, 1997), http://www.utoronto.ca/jcb/about/publications/521.pdf (last visited Oct. 11, 2004). The following is a Canadian perspective on "why confidentiality is important:"

> Without an understanding that their disclosures will be kept secret, patients may withhold personal information. This can hinder physicians in their efforts to provide effective interventions or to pursue certain public health goals. For example, some patients may not feel secure in confiding a drug or alcohol dependence and thus may not have the benefit of treatment. Others may refrain from disclosing information that could alert the physician to the potential for harm or violence to others.
>
> Respect for the confidentiality of patient information is not based solely on therapeutic considerations or social utility, however. Of equal, if not greater, importance is the physician's duty to respect patient autonomy in medical decision-making. Competent patients have the right to control the use of information pertaining to themselves. They have the right to determine the time and manner in which sensitive information is revealed to family members, friends and others.

Id.

34. Starr, *supra* note 30, at 197-98.

35. *See id; see also* Health Privacy Project, Medical Privacy Stories, *at* http://www.healthprivacy.org/usr_doc/Privacy_storiesupd.pdf (last updated Nov. 10, 2003) [hereinafter Health Privacy Project].

worker and published by the media without his permission,"[36] and a New York Congresswoman's history of depression was revealed, during a primary election, in a fax from the hospital to the local media.[37] There was also a misuse of data when the identities of 4,000 HIV positive individuals were exposed by a public health worker who sent a disk with the names to the newspaper.[38] All of these examples of data misuse represent an individual's ability to take advantage of the personal data to which they have access.[39]

The second type of misuse of data is "the use of personal health data for marketing and other purposes where the harm to the individual is ambiguous or relatively small."[40] For example, there have been privacy violations when pharmacists have admitted disclosing the list of customers for marketing purposes.[41]

The third general type of misuse of data is the "institutional practices that do cause unambiguous harm to identifiable individuals." This occurs when businesses or organizations get their hands on individual data to discriminate in the way they operate.[42] There are financial incentives to keeping personal health information private.[43] Employers have used health information to discriminate against employees when it is available.[44] Additionally, health information has been used to discriminate against individuals in the business setting.[45]

Today, there are many reasons for keeping personal health information private.[46] Generally, the public fears embarrassment or harm to their reputation when personal heath information becomes known.[47] In 1977, the United States Supreme Court acknowledged the "individual interest in avoiding disclosure of personal matters," in *Whalen v. Roe*.[48] Nevertheless, the court held that a New

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36. Starr, *supra* note 30, at 197.

37. *Id.*

38. *Id.*

39. *See id.*

40. *Id.* See also Health Privacy Project, *supra* note 35, for additional examples of the misuse of data for marketing.

41. Starr, *supra* note 30, at 197.

42. *See id.* at 198.

43. *See id. See also* Health Privacy Project, *supra* note 35.

44. Charity Scott, *Is Too Much Privacy Bad for Your Health? An Introduction to the Laws, Ethics, and HIPAA Rule on Medical Privacy*, 17 GA. ST. U. L. REV. 481, 486 (2000). Survey of "Fortune 500 employers admitted using their employees' medical records in making employment decisions." *Id.* at 487.

45. *Id.* at 487. For example, "[i]n one well-known account, a banker allegedly was able to use computerized medical records to determine which of his customers had cancer, and he called their loans early." *Id.*

46. *See generally id. See also infra* Part II.

47. *Id.*

48. 429 U.S. 589, 599-600 (1977). In the opinion Professor Kurland was quoted saying:

> The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be

York statute, which recorded the identity of all individuals who received prescriptions for certain classes of drugs in a state database, was not in violation of the Constitution.[49]

Not only has the collection and storage of information changed, but it has become a part of everyday business and is "completely legal."[50] Internet provider companies collect data on their users for advertisers.[51] Health information is also becoming big business.[52]

> As health care has been transformed into a complex industry representing one-seventh of the economy, organizations of all kinds—employers, insurers, plans, networks, systems, pharmaceutical makers, device makers and many others—have had growing interests in data to control their costs, increase their revenues or improve their performance in some other dimension. They have been willing to invest in information, to pay for information, to sell information—information itself has become a business.[53]

Despite the business incentives to use and collect health information, there are strong incentives to protect the information.[54] According to Gostin, there are two independent reasons for protecting health information.[55] The first reason is simple: "the personal nature of health data."[56] The second reason is more complex.[57] The rapid transition to electronic records has the potential to lead to increased harm to the patient, to the providers, and to the patient-provider relationship due to the vast amount of data that can be stored on individuals.[58] Both reasons are significant incentives to find solutions for current potential problems of medical records disclosure.[59]

> free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion.

Id. at 599 n.24.

49. *Id.* at 603-04.

50. *See* Jessica Litman, *Cyberspace and Privacy: A New Legal Paradigm? Information Privacy/Information Property,* 52 STAN. L. REV. 1283, 1284 (2000).

51. *Id.*

52. Starr, *supra* note 30, at 196.

53. *Id.*

54. *See* Lawrence O. Gostin etal, *The Nationalization of Health Information Privacy Protections,* 8 CONN. INS. L.J. 283, 284-85 (2001-02) [hereinafter *Nationalization of Health Information Privacy Protections*].

55. *Id. at 284.*

56. *Id.*

57. *See id. at 284-85.*

58. *See id.* Gostin describes the second reason as:

> [T]he rapid shift from paper to electronic records. Health information used by health providers, insurers, and data processors can include intimate details about the patient's mental and physical health as well as information about their social behaviors, personal relationships, and financial status. Unwarranted disclosures

At this point, Canada, the United States, Europe, New Zealand, and Australia have all passed or are in the process of passing legislation that will affect how health information can be used.[60] Each government has acknowledged the need for regulation in this area; nevertheless, there is little standardization in their approaches.[61] This Note will look at the progress of privacy rights of patients in the United States, Canada, and the United Kingdom. It will focus on the current and forthcoming legislation that is available to protect an individual's personal health information. It will also look at what security provisions are in place to protect the data, as well as the penalties for violations. This Note will also compare how each government views personal information and how that affects policy-making. Lastly, it is the goal of this Note is to determine whether one system is more successful than the others and to identify changes that should be made.

IV. THE HISTORY OF PRIVACY OF HEALTH INFORMATION

There are different models of privacy protections that governments can employ, with some approaches used in combination.[62] The four major methods of protection are comprehensive laws, sectoral laws, self-regulation, and technologies of privacy.[63] The United States, Canada, and Europe all have a history of legislative action that focuses on the protection of information and individual privacy.[64]

Comprehensive laws are used by creating a general law that "governs the collection, use and dissemination of personal information by both the public and private sectors."[65] This is the method used by the European Union, and a variation of this method is also being used in Canada.[66] The system used in Canada is a "co-regulatory model," which has the industry developing the standards and implementing them, while the standards are overseen by the governmental privacy agency.[67]

Sectoral laws are created through separate legislation for each industry, rather than having a general data protection law.[68] This is a more complicated system because it requires more legislation and "protections frequently lag

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of this information could lead to societal stigmatization and discrimination by employers, insurers, and others, as well as a loss of patient trust in medical providers.

Id.

59. *See id.*

60. Weitz et al., *supra* note 32.

61. *See id.*

62. *See* Banisar, *supra* note 2, at 13-14.

63. *Id.*

64. *See id.* at 14-15. For a more detailed explanation of the legislative history of data protection see *id.* at 10-13.

65. *Id.* at 13.

66. *Id.* at 13-14.

67. *Id.*

68. *See id.*

behind" the technology.[69] The United States uses this type of system, and "[t]he lack of legal protections for medical and genetic information in the U.S. is a striking example of the limitations of these laws."[70] Nevertheless, sectoral laws can be a positive supplement to comprehensive legislation.[71]

Self-regulation places the burden on the industry or entity to "establish codes of practice."[72] The model of self-regulation makes it difficult to ensure enforcement, and the codes have a propensity to be weak.[73] However, as of 1999, self-regulation was the "policy promoted by the governments of the U.S., Japan, and Singapore."[74]

Lastly, privacy can be regulated by the use of privacy technology.[75] Technology-based systems give the user privacy protections by using different technologies including: "encryption, anonymous remailers, proxy servers, digital cash and smart cards.[76] Questions remain about security and trustworthiness of these systems. Recently, the European Commission evaluated some of the technologies and stated that the technological tools would not replace a legal framework, but could be used to compliment the existing laws."[77]

A. The United States

The United States does not have comprehensive privacy laws that pertain to all types of private industries.[78] In addition, the United States lacks a single agency that oversees privacy,[79] Instead, the United States uses industry specific rules.[80] For example, there are consumer protection laws for personal information contained in bank, credit card, other financial records, and even video rentals.[81] In 1996, the U.S. Congress enacted The Health Insurance Portability and Accountability Act of 1996 (HIPAA).[82] HIPAA provides

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69. *Id.*

70. *Id.* This article was written in 1999, prior to the current HIPAA regulations. However, the new laws continue to be sectoral in nature. *See* Health Insurance Portability & Accountability Act of 1996, *infra* note 82.

71. *Banisar, supra* note 2, at 13-14.

72. *Id. at* 14.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 108.

79. *Id.* at 109. "The Federal Trade Commission (FTC) has oversight and enforcement powers for laws protecting consumer credit information and fair trading practices, but has no authority to enforce privacy rights, other than those arising from fraudulent or deceptive trade practices." *Id.* at 109.

80. *See id.*

81. *Id.*

82. *See* Health Insurance Portability & Accountability Act of 1996, Pub. L. No. 104-191 (1996) (codified at 45 C.F.R. pts. 160, 162 & 164).

mandates for the Department of Health and Human Services to adopt standards for the security of electronic health information,[83] draft mandates for providers to comply, and to recommend privacy regulations to Congress within twelve months.[84] If nothing has been accomplished by Congress, then the Department of Health and Human Services may create regulations[85] for the bill, pre-empt state law,[86] and provide civil penalties for violations.[87]

HIPAA was developed by the U.S. Department of Health and Human Services and has come into effect in stages, including the Privacy Rule in 2003[88] and the Security Rule,[89] which was finalized in February 2003, but does not require full compliance until April 21, 2005.[90] The Privacy Rule generally covers any "individually identifiable health information."[91]

The HIPAA Security Rule was developed because, until this point, "no standard measures exist[ed] in the health care industry that address[ed] all aspects of the security of electronic health information while it [was] being stored or during the exchange of that information between entities."[92] "The purpose of this final rule is to adopt national standards for safeguards to protect

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To amend the Internal Revenue Code of 1986 to improve portability and continuity of health coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes.

Id.

83. *Id.* § 1173. This section states that:

(1) IN GENERAL. The Secretary shall adopt standards for transactions, and data elements for such transactions, to enable health information to be exchanged electronically that are appropriate for --

(A) the financial and administrative transactions described in paragraph (2); and

(B) other financial and administrative transactions determined appropriate by the Secretary, consistent with the goals of improving the operation of the health care system and reducing administrative costs.

Id. See *id.* § 1173(a)(2) for a list of transactions referred to in paragraph (1).

84. *See id.* § 1174.

85. *See id.* § 1175.

86. *See id.* § 1178.

87. *See id.* § 1176.

88. *See* Standards for Privacy of Individually Identifiable Health Information; Final Rule, 67 Fed. Reg. 53,182 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160, 162 & 164).

89. *See* Health Insurance Reform: Security Standards; Final Rule, 68 Fed. Reg. 8,334, 8,334 (Feb. 20, 2003) (codified at 45 C.F.R. pts. 160, 162, 164).

90. *Id.*

91. *See* Dept. of Health and Human Services, Protecting Personal Health Information in Research: Understanding the HIPAA Privacy Rule, NIH Publ. num. 03-5388, p. 2 (2002), http://www.privacyruleandresearch.nih.gov/pr_02.asp (last revised Sept. 25, 2003)

The Privacy Rule establishes minimum Federal Standards for protecting the privacy of individually identifiable health information. The Rule confers certain rights on individuals, including rights to access and amend their health information and to obtain a record of when and why their PHI [personal health information] has been shared with others for certain purposes.

Id.

92. Health Insurance Reform: Security Standards; Final Rule, 68 Fed. Reg. at 8,334.

the confidentiality, integrity, and availability of electronic protected health information."[93] The Security Rule applies when the data is in the custody of the covered entities and during transmission of the data.[94]

B. Canada

The Canadian method of protecting data is different than the new HIPAA[95] rules in the United States in that it does not apply exclusively to health information.[96] In 2000, Canada enacted the Personal Information Protection and Electronic Documents Act (Canadian Act).[97] The purpose of the act is:

> to support and promote electronic commerce by protecting personal information that is collected, used or disclosed in certain circumstances, by providing for the use of electronic means to communicate or record information or transactions and by amending the Canada Evidence Act, the Statutory Instruments Act and the Statute Revision Act[.][98]

The Act is broken into five parts.[99] "Part 1 of this enactment establishes a right to the protection of personal information collected, used or disclosed in the course of commercial activities . . . ."[100] This includes all private and governmental operations both within Canada and internationally.[101] Additionally, it provides that the Privacy Commissioner will be responsible for taking complaints.[102] Part 2 of the Canadian Act looks at using electronic data storage where regulations provide for the use of paper records as well as for the

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93. *Id.*

94. *Id.*

95. *See generally* Health Insurance Portability & Accountability Act of 1996.

96. Personal Information Protection and Electronic Documents Act, R.S.C., ch. 5 (2000) (Can.), http://www.privcom.gc.ca/legislation/02_06_01_e.agp (last visited Oct. 19, 2003).

97. *Id.*

98. *Id.*

99. *Id.* at Summary.

100. *Id.*

> The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Id. at 4, pt. 1, § 3.

101. *See id.*

102. *See id.* at 25, pt. 2. "The purpose of this Part is to provide for the use of electronic alternatives in the manner provided for in this Part where federal laws contemplate the use of paper record or communicate information or transactions." *Id.*

use of electronic signatures.[103] Part 3 of the Canadian Act "amends the *Canadian Evidence Act* to facilitate the admissibility of electronic documents" and provides for how they can be used.[104] Parts 4 and 5 address the publication of documents electronically.[105] Parts 1 and 2 are the most relevant to the protection of health information and its security because Part 1 defines what information is considered "personal health information,"[106] and Part 2 looks at the computer security aspects of the information and the regulation thereof.[107]

C. *The United Kingdom*

In 1998, the United Kingdom enacted the Data Protection Act 1998.[108] The Data Protection Act generally includes an explanation of the rights of data subjects,[109] the role of the data controllers,[110] those exempted from the Act,[111] and enforcement of the Act.[112] The exemptions provided for in The Data Protection Act are extensive; they include exemptions for national security, crime and taxation, health, education, social work, regulatory activity, and more.[113] The Freedom of Information Act 2000 (FOIA)[114] was enacted in order to create a "[g]eneral right of access to information held by public authorities."[115] FOIA is intended to "amend the Data Protection Act of 1998 and the Public Records Act of 1958."[116] It broadened the rights created in the Data Protection Act.[117] "[FOIA] creates a statutory right of access, provides for

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103. *Id.* at Summary.

104. *Id.*

105. *Id.*

106. *See id.* at 3, pt. 1.

107. *See id.* at 29, pt. 2.

108. *See* Data Protection Act, 1998, c. 29 (Eng.), http://www.hmso.gov.uk/acts/acts1998/19980029.htm (last visited Oct.11, 2004). The purpose of the Act is to create "[a]n act to make new provision for the regulation of the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information." *Id.*

109. *See id.* at pt. II, § 7.

110. *Id.* at pt. I, § 1(1). Data controller means "a person who (either alone or jointly in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be processed." *Id.*

111. *Id.* at pt. IV.

112. *See generally id.*

113. *See generally id.* at pt. IV.

114. Freedom of Information Act, 2000, c. 36 (Eng.) (2000), http://www.legislation.hmso.gov.uk/acts/acts2000/20000036.htm (last visited Sept 7, 2004).

115. *Id.*

116. *Id.* An Act to make provision for the disclosure of information held by public authorities or by persons providing services for them and to amend the Data Protection Act of 1998 and the Public Records Act of 1958; and for connected purposes. *Id.*

117. *See id.* at pt. I, § 1. "(1) Any person making a request for information to a public authority is entitled[:] (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him." *Id.* See the Data Protection Act, 1998, c. 29 (Eng.) for the rights originally conferred in the Data Protection Act.

a more extensive scheme for making information publicly available, and covers a much wider range of public authorities including: local government, National Health Service bodies, schools and colleges, the police, and other public bodies and offices."[118]

The Data Protection Act and FOIA are both in compliance with the 1995 European Union Directive 95/46/EC (Directive 95/46/EC)[119] on the protection of individuals with regard to the processing of data and on the free movement of such data.[120] The general objective of the Directive 95/46/EC is to ensure that the member states:

> [P]rotect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. Member states shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph [one]."[121]

The Directive sets up a structure to define what data is protected, who is responsible for the protection of data, and guidelines on how it is to be protected.[122]

More recently, the European Union put out Directive 2002/58/EC of the European Parliament, and of the Council of July 12, 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector.[123] The member states of the European Union are required to comply with the directives, and as of January 2000, the European Union had taken action against five member states for non-compliance.[124]

V. PRIVACY AND SECURITY RULES

A. United States

The Privacy Rule created under HIPAA was developed to increase consumer confidence in privacy by requiring that the entities involved in heath

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118. Explanatory Notes to Freedom of Information Act, 2000, c. 36 (Eng.), http://www.hmso.gov.uk/acts/en2000/2000en36.htm (last visited Oct. 19, 2003).

119. Council Directive 95/46/EC, 1995 O.J. (L 281) 31. Article 4 National Law Applicable, states that: "[e]ach Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data . . . ." *Id.* at ch. I, art. 4.

120. *See id.*

121. *Id.* at ch. I, art. 1.

122. *See generally id.*

123. Council Directive 2002/58/EC, 2002 O.J. (L 201) 37.

124. *Data Protection: Commission Takes Five Member States to Court,* Press Release Rapid, Brussels (Jan. 11, 2000), http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/00/10/AGED7dg=EN&display= (last visited Oct. 19, 2003) (on file with author).

care "guard against misuse" of information and "limit the sharing of such information."[125] Further, it gives consumers new rights to access and control the information.[126] The United States defines exactly what information is covered by HIPAA in the Privacy Rule.[127] The rule covers three types of organizations: health plans, health care clearinghouses, and health care providers who conduct business electronically.[128] Health plans are given a broad definition and provide exclusions for some limited government programs.[129] Heath care clearinghouses are the organizations that process

125. *See* Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. at 53,182.

126. *See id.*

127. *See* Dep't of Health and Human Services Administrative Services and Related Requirements, 45 C.F.R. § 160.103 (1999). This section provides an extensive list of definitions. *See id.*

128. 45 C.F.R. § 160.102 (2002).

129. *See* 45 C.F.R. § 160.103 (2002), which provides:

> Health plan means an individual or group plan that provides, or pays the cost of, medical care (as defined in section 2791(a)(2) of the PHS Act, 42 U.S.C. 300gg-91(a)(2)). (1) Health plan includes the following, singly or in combination: (i) A group health plan, as defined in this section. (ii) A health insurance issuer, as defined in this section. (iii) An HMO, as defined in this section. (iv) Part A or Part B of the Medicare program under title XVIII of the Act. (v) The Medicaid program under title XIX of the Act, 42 U.S.C. 1396, et seq. (vi) An issuer of a Medicare supplemental policy (as defined in section 1882(g)(1) of the Act, 42 U.S.C. 1395ss(g)(1)). (vii) An issuer of a long-term care policy, excluding a nursing home fixed-indemnity policy. (viii) An employee welfare benefit plan or any other arrangement that is established or maintained for the purpose of offering or providing health benefits to the employees of two or more employers. (ix) The health care program for active military personnel under title 10 of the United States Code. (x) The veterans health care program under 38 U.S.C. chapter 17. (xi) The Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) (as defined in 10 U.S.C. 1072(4)). (xii) The Indian Health Service program under the Indian Health Care Improvement Act, 25 U.S.C. 1601, et seq. (xiii) The Federal Employees Health Benefits Program under 5 U.S.C. 8902, et seq. (xiv) An approved State child health plan under title XXI of the Act, providing benefits for child health assistance that meet the requirements of section 2103 of the Act, 42 U.S.C. 1397, et seq. (xv) The Medicare+Choice program under Part C of title XVIII of the Act, 42 U.S.C. 1395w-21 through 1395w-28. (xvi) A high risk pool that is a mechanism established under State law to provide health insurance coverage or comparable coverage to eligible individuals. (xvii) Any other individual or group plan, or combination of individual or group plans, that provides or pays for the cost of medical care (as defined in section 2791(a)(2) of the PHS Act, 42 U.S.C. 300gg-91(a)(2)). (2) Health plan excludes: (i) Any policy, plan, or program to the extent that it provides, or pays for the cost of, excepted benefits that are listed in section 2791(c)(1) of the PHS Act, 42 U.S.C. 300gg-91(c)(1); and (ii) A government-funded program (other than one listed in paragraph (1)(i)-(xvi) of this definition): (A) Whose principal purpose is other than providing, or paying the cost of, health care; or (B) Whose principal activity is: (1) The direct provision of health care to persons; or (2) The making of grants to fund the direct provision of health care to persons.

health information in some manner.[130] Health care providers include all medical and healthcare professionals that bill for services.[131]

The code also explicitly describes what information is protected.[132] "Protected health information means individually identifiable health information . . . ."[133] This includes information that is transmitted or maintained by electronic media or any other means.[134] Protected health information does not include some individually identifiable health information that is defined in some specific education and employment records, as identified by statute.[135] "Transaction means the transmission of information between two parties to carry out financial or administrative activities related to healthcare."[136] This includes:

> (1) Health care claims or equivalent encounter information. (2) Health care payment and remittance advice. (3) Coordination of benefits. (4) Health care claim status. (5) Enrollment and disenrollment in a health plan. (6) Eligibility

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130. *Id.*

Health care clearinghouse means a public or private entity, including a billing service, repricing company, community health management information system or community health information system, and "value-added" networks and switches, that does either of the following functions: (1) Processes or facilitates the processing of health information received from another entity in a nonstandard format or containing nonstandard data content into standard data elements or a standard transaction. (2) Receives a standard transaction from another entity and processes or facilitates the processing of health information into nonstandard format or nonstandard data content for the receiving entity.

Id.

131. *See id.*

Health care provider means a provider of services (as defined in section 1861(u) of the Act, 42 U.S.C. 1395x(u)), a provider of medical or health services (as defined in section 1861(s) of the Act, 42 U.S.C. 1395x(s)), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.

Id.

132. *See id.*

133. *Id.*

134. *Id.*

135. *Id.*

(2) Protected health information excludes individually identifiable health information in: (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g; (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); and (iii) Employment records held by a covered entity in its role as employer.

Id.

136. *Id.*

> for a health plan. (7) Health plan premium payments. (8) Referral certification and authorization. (9) First report of injury. (10) Health claims attachments. (11) Other transactions that the Secretary may prescribe by regulation.[137]

The Code of Federal Regulations sets out the Administrative Requirements in Part 162.[138] Part of the purpose of the new rules is to improve the Administrative Simplicity.[139] Code sets are used make the data manageable.[140] There are medical data code sets and nonmedical data code sets that the covered entities must use.[141] Medical data code sets are used "at the time the health care is furnished,"[142] and nonmedical code sets are used "at the time the transaction is initiated."[143]

Part 164 of the Code of Federal Regulations defines the "security standards for the protection of electronic protected health information."[144] Generally, there are four things that the covered entities must do.[145] First, covered entities must "[e]nsure the confidentiality, integrity, and availability of all electronic protected health information the covered entity creates, receives, maintains, or transmits."[146] Second, they must "[p]rotect against any reasonably anticipated threats or hazards to the security or integrity of such information."[147] Third, they must "[p]rotect against any reasonably anticipated uses or disclosures of such information that are not permitted or required . . . ."[148] Lastly, the covered entity must "[e]nsure compliance . . . by its workforce."[149]

There is some flexibility given to the covered entities in how they comply with the four general requirements as long as they can put into practice the

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137. *Id.*

138. *See generally* 45 C.F.R. § 162 (2003).

139. *See* Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. at 53,182.

> [S]ections 261-264 of the statute were designed to improve the efficiency and effectiveness of the health care system by facilitating the electronic exchange of information with respect to certain financial and administrative transactions carried out by health plans, health care clearinghouses, and health care providers who transmit information electronically in connection with such transactions.

Id.

140. *See* 45 C.F.R. § 162.103. "Code set means any set of codes used to encode data elements, such as tables of terms, medical concepts, medical diagnostic codes, or medical procedure codes. A code set includes the codes and the description of the codes." *Id.* For more detailed definitions and examples of the code sets see 45 C.F.R. § 162.1002 (2003).

141. 45 C.F.R. § 162.1000 (2002).

142. *Id.* § 162.1000(a).

143. *Id.* § 162.1000(b).

144. 45 C.F.R. § 164.306 (2003).

145. *Id.* § 164.306(a).

146. *Id.* § 164.306(a)(1).

147. *Id.* § 164.306(a)(2).

148. *Id.* § 164.306(a)(3).

149. *Id.* § 164.306(a)(4).

standards of the Security Rule.[150] This gives the covered entity the flexibility to factor in the size of the organization, their "technical infrastructure, hardware, and software security capabilities," the costs associated with the technology, and the potential for risk to the electronically protected health information.[151] There are some standards for which compliance is mandatory.[152]

There are two types of specifications found in the Security Rule: those that are required and those that are addressable.[153] For the required standards the "covered entity must implement" the standards;[154] however, the requirements are different when the standard is addressable.[155] When a provision is deemed addressable, the covered entity must: "[a]ssess whether each implementation specification is a reasonable and appropriate safeguard in its environment, when analyzed with reference to the likely contribution to protecting the entity's electronic protected health information."[156] Following the assessment, the entity must: "[i]mplement the implementation specification if reasonable and appropriate."[157] If the specification is not appropriate, then the entity must document why it was not appropriate and implement a substitute appropriate measure.[158] Lastly, there must be regular review and modification of the covered entity's protection of electronic health information.[159]

All of the security measures are broken down into three types of safeguards used to protect information: administrative, physical, and technical.[160] Administrative safeguards function by using "policies and procedures, to manage the selection, development, implementation, and maintenance of security measures to protect electronic protected health information and to manage the conduct of the covered entity's workforce in relation to the protection of that information."[161]

There are eight mandatory administrative standards, which include: devising a security management process,[162] assigned security responsibility,[163] workforce security,[164] information access management,[165] security awareness

150. *See id.* § 164.306(b).
151. *Id.* § 164.306(b)(2).
152. *Id.* § 164.306(c).
153. *Id.* § 164.306(d)(1).
154. *Id.* § 164.306(d)(2).
155. *See id.* § 164.306(d)(3).
156. *Id.* § 164.306(d)(3)(i).
157. *Id.* § 164.306(d)(3)(A).
158. *Id.* § 164.306(d)(3)(B).
159. *Id.* § 164.306(e).
160. 45 C.F.R. § 164.304.
161. *Id.*
162. 45 C.F.R. § 164.308(a)(1) (2003). The process must include specifications for risk analysis, risk management, a sanction policy and an information system activity review. *Id.*
163. *Id.* § 164.308(a)(2). This provision ensures that there is an identified person responsible for compliance with the security provisions. *Id.*
164. *Id.* § 164.308(a)(3). This section requires that covered entities have the appropriate access to information and that individuals that do not have access cannot get unauthorized access. *Id.* However, the specifications of this provision are addressable rather than required.

and training,[166] security incident procedures,[167] contingency plan,[168] and finally, the covered entity must provide for periodic evaluation of the system.[169] In addition to the required provisions, they may allow "a business associate to create, receive, maintain, or transmit electronic protected health information on the covered entity's behalf only if the covered entity obtains satisfactory assurances . . . that the business associate will appropriately safeguard the information."[170]

Physical safeguards include "physical measures, policies, and procedures to protect a covered entity's electronic information systems and related buildings and equipment, from natural and environmental hazards and unauthorized intrusion."[171] There are four standards for physical safeguards.[172] First, a covered entity must provide facility access controls that prevent unauthorized access to where the information is stored; this includes having contingency operations, a facility security plan, access control and validation procedures, and proper maintenance records.[173] Second, there must be policies and procedures for utilization of a workstation.[174] Third, there must be provisions for workstation security.[175] Finally, there must be policies and procedures that apply to device and media control.[176]

Id. The addressable specification include authorization/supervision, clearance and termination procedures. *Id.*

165. *Id.* § 164.308(a)(4). This provision has a combination of required and addressable provisions. *Id.* If the entity uses a health care clearinghouse, they must confirm that the clearinghouse also complies with the provisions and the addressable provision deals with access to workstations and modification of that access. *Id.* Work station is defined as "an electronic computing device, for example, a laptop or desktop computer, or any device that performs similar functions, and electronic media is stored in an immediate environment." 45 C.F.R. § 164.304.

166. 45 C.F.R. § 164.308(a)(5). This training must apply to the entire workforce, including management. *Id.*

167. *Id.* § 164.308(a)(6). The provision requires there be a response and the reporting of all incidents. *Id.* "Security incident means the attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with systems operations in an information system." 45 C.F.R. § 164.304.

168. 45 C.F.R. § 164.308(a)(7). This includes having a backup system, disaster recovery plan, emergency operation mode, testing of the plans, and assessment. *Id.*

169. *Id.* § 164.308(a)(8).

170. *Id.* § 164.308(b)(1).

171. 45 C.F.R. § 164.304.

172. 45 C.F.R. § 164.310.

173. *Id.* § 164.310(a).

174. *Id.* § 164.310(b). "Implement policies and procedures that specify the proper functions to be performed, the manner in which those functions are to be performed, and the physical attributes of the surroundings of a specific workstation or class of workstation that can access electronic protected health information." *Id.*

175. *Id.* § 164.310(c). "Implement physical safeguards for all workstations that access electronic protected health information, to restrict access to authorized users." *Id.*

176. *Id.* § 164.310(d). "Implement policies and procedures to address the final disposition of electronic protected health information, and/or the hardware or electronic media on which it is stored." *Id.*

With regard to security of a workstation, this includes the technology and the policy and procedures for its use that protect electronic protected health information and control access to it.[177] There are five standards for technical safeguards, part of which are required, and part of which are accessible.[178] First, there must be access controls including unique user identification, emergency access procedures, automatic logoff, and encryption and decryption of data.[179] Next, there must be audit controls[180] as well as policies and procedures to protect the integrity of the data.[181] The fourth standard provides for policies and procedures for person or entity authentication for those seeking access to electronic protected health information.[182] The last technical safeguard is transmission security, which includes integrity controls and encryption.[183]

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177. *See* 45 C.F.R. § 164.304.

178. *See generally* 45 C.F.R. § 164.312 (2003).

179. *Id.* § 164.312(a).

> (a)(1) Standard: Access control. Implement technical policies and procedures for electronic information systems that maintain electronic protected health information to allow access only to those persons or software programs that have been granted access rights as specified in § 164.308(a)(4). (2) Implementation specifications: (i) Unique user identification (Required). Assign a unique name and/or number for identifying and tracking user identity. (ii) Emergency access procedure (Required). Establish (and implement as needed) procedures for obtaining necessary electronic protected health information during an emergency. (iii) Automatic logoff (Addressable). Implement electronic procedures that terminate an electronic session after a predetermined time of inactivity. (iv) Encryption and decryption (Addressable). Implement a mechanism to encrypt and decrypt electronic protected health information.

Id.

180. *Id.* § 164.312(b). "Implement hardware, software, and/or procedural mechanisms that record and examine activity in information systems that contain or use electronic protected health information." *Id.*

181. *See id.* § 164.312(c). This is accomplished by having a system that authenticates electronic health information to prevent it from improper alteration or destruction. *See id.*

182. *Id.* § 164.312(d). Authentication is defined as "the corroboration that a person is the one claimed." 45 C.F.R. § 164.304.

183. 45 C.F.R. § 164.312(e), which provides:

> Implement technical security measures to guard against unauthorized access to electronic protected health information that is being transmitted over an electronic communications network. (2) Implementation specifications: (i) Integrity controls (Addressable). Implement security measures to ensure that electronically transmitted electronic protected health information is not improperly modified without detection until disposed of. (ii) Encryption (Addressable). Implement a mechanism to encrypt electronic protected health information whenever deemed appropriate.

B. Canada

The Canadian Act is set up to generally protect all personal information that is connected with electronic communication or storage.[184] The act differentiates between personal information and personal health information.[185] Personal information is "information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization."[186] The definition of personal health information is defined more specifically.

> "[P]ersonal health information"[,] with respect to an individual, whether living or deceased, means (a) information concerning the physical or mental health of the individual; (b) information concerning any health service provided to the individual; (c) information concerning the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual; (d) information collected in the course of providing health services to the individual; or (e) information that is collected incidentally to the provision of health services to the individual.[187]

The Canadian Act essentially applies to all organizations[188] that use or collect personal information.[189] However, there are a few exceptions.[190] The Act does not apply to government institutions that fall under the Privacy Act,[191] individuals maintaining information for personal use,[192] or an organization using it "for journalistic, artistic or literary purposes."[193] The Act mandates

184. *See* Personal Information Protection and Electronic Documents Act, R.S.C. ch. 5 (2000) (Can.).

185. *See id.* at pt. 1.

186. *Id.* at pt. 1, §2.

187. *Id.*

188. *See id.* The Canadian Act defines "organization" as including "an association, a partnership, a person and a trade union." *Id.*

189. *See id.* at pt. 1.

190. *See id.*

191. *Id.* at pt. 1, § 4(2).

192. *Id.* The act does not apply to people maintaining information for the personal use so long as it is not being used; "any individual in respect of personal information that the individual collects, uses or discloses for personal or domestic purposes and does not collect, use or disclose the information for any other purpose." *Id.*

193. *Id.* "[A]ny organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose." *Id.*

compliance for all organizations,[194] and allows collection of information for reasonable purposes.[195] The statute also outlines the circumstances when information can be collected "without knowledge or consent."[196]

> [A]n organization may collect personal information without the knowledge or consent of the individual only if (a) the collection of data is clearly in the interest of the individual and consent can not be obtained in a timely way; (b) it is reasonable to expect that the collection with the knowledge or consent of the individual would comprise the availability or the accuracy of the information and the collection is reasonable for the purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province; (c) the collection is solely for journalistic, artistic or literary purposes; or (d) the information is publicly available and is specified by the regulations.[197]

Furthermore, there is a provision for the use of data without permission.[198] Information may be used without permission if the organization comes across the information and thinks that it would be helpful for the investigation of previous, current, or future crimes, and the information is used in investigating the crime.[199] Personal information can also be used without consent in situations where there is an emergent threat to life or security,[200] or for academic and research purposes.[201]

There are also provisions for when information can be disclosed without consent.[202] Personal information may be disclosed without consent when it is made to an official or counsel representing the client,[203] for debt collection,[204]

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194. *Id.* at pt. 1, div. 1. All mandates are indicated with the use of the word "shall" and recommendations are indicated with the word "should." *Id.*

195. *See id.* at pt 1, div. 1. "An organization may collect, use or disclose personal information for purposes that a reasonable person would consider are appropriate in the circumstances." *Id.* at pt. 1, div. 1, § 5(3).

196. *Id.* at pt. 1, div. 1, § 7.

197. *Id.*

198. *Id.* at pt. 1, div. 1, § 7(2).

199. *Id.*

200. *Id.*

201. *Id.* at pt. 1. div. 1, § 7(2)(c). The statute defines the academic exception as when:

> it is used for statistical, or scholarly study or research, purposes that cannot be achieved without using the information, the information is used in a manner that will ensure its confidentiality, it is impracticable to obtain consent and the organization informs the Commissioner of the use before the information is used.

Id.

202. *Id.* at pt.1, div. 1, § 7(3).

203. *Id.* Information may be disclosed when "made to, in the Province of Quebec, an advocate or notary, or in any other province, a barrister or solicitor who is representing the organization." *Id.* at pt. 1, div. 1, § 7(3)(a).

when complying with an order of the court,[205] and to a government official that has requested the information for the purpose of national security, law enforcement, and administration of the law.[206] There are additional permitted disclosures for investigation, research, emergency situations, and the conservation of records.[207]

Part 2 of the Canadian Act addresses electronic documents.[208] The Canadian Act defines data as "representations of information or concepts, in any form."[209] It defines an electronic document as "data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or computer system or other similar device."[210] "It includes a display, printout or other output of that data."[211]

There are ten principles set forth in Schedule 1 of the Canadian Act: 1) accountability, 2) identifying purposes, 3) consent, 4) limiting collection, 5) limiting use disclosure and retention, 6) accuracy, 7) safeguards, 8) openness, 9) individual access, and 10) challenging compliance.[212] The seventh principle, entitled safeguards, provides that the information will be protected differently depending on the "sensitivity of the information."[213] The rule does not define which information is sensitive.[214]

> The form of consent sought by the organization may vary, depending upon the circumstances and the type of information. In determining the form of consent to use, organizations shall take into account the sensitivity of the information. Although some information (for example, medical records and income records) is almost always considered to be sensitive, any information can be sensitive, depending on the context. For example, the names and addresses of subscribers to a newsmagazine would generally not be considered sensitive information. However, the names and addresses of subscribers to some special-interest magazines might be considered sensitive.[215]

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204. *Id.* at pt. 1, div. 1, § 7(3)(b).
205. *Id.* at pt. 1, div. 1, § 7(3)(c).
206. *Id.* at pt. 1, div. 1, § 7(3)(d).
207. *Id.* at pt. 1, div. 1, § 7(3).
208. *See id.* at pt. 2, § 32 for a definition of the purpose of Part 2 of the Canadian Act. *See supra* text accompanying note 102.
209. *Id.* at pt. 2, § 31.
210. *Id.*
211. *Id.*
212. *Id.* at sched. 1, § 5.
213. *Id.* at sched. 1, § 4.7.2.
214. *See id.*
215. *Id.* at sched. 1, § 4.3.4.

The Act requires that information be protected no matter what method is used for storage.[216] The Canadian Act outlines the methods of protection including physical,[217] organizational,[218] and technological measures.[219] The Act does not give specifications for how the data should be technologically protected, but says that technological measures would include "the use of passwords and encryption."[220]

C. *United Kingdom*

The Data Protection Act in the United Kingdom is the statute responsible for the protection of personal information.[221] The Data Protection Act differentiates between personal data[222] and "sensitive personal data."[223] Part I

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216. *See id.* at sched. 1, § 4.7.1. "The security safeguards shall protect personal information against loss or theft, as well as unauthorized access, disclosure, copying, use, or modification. Organizations shall protect personal information regardless of the format in which it is held." *Id.*

217. *Id.* at sched. 1, § 4.7.3(a). Some examples of physical measures are "locked filing cabinets and restricted access to offices." *Id.*

218. *Id.* at sched. 1, § 4.7.3(b). Organizational measures could include: "security clearances and limiting access on a 'need-to-know' basis." *Id.*

219. *Id.* Encryption is "[t]he conversion of plaintext or data into unintelligible form by the means of a reversible translation, based on a translation table or algorithm. Also called enciphering." STALLINGS, *supra* note 15, at 377. A password is "[a] character string used to authenticate an identity. Knowledge of the password and its associated user ID is considered proof of authorization to use capabilities associated with the user ID." *Id.* at 378.

220. Personal Information Protection and Electronic Documents Act sched. 1, § 4.7.3(c).

221. *See generally* Data Protection Act, 1998, c. 29 (Eng.), See *supra* text accompanying note 108 for the purpose of the Data Protection Act.

222. *Id.* at pt. I, §1.

> In this Act, unless the context otherwise requires "data" means information which – (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose, (b) is recorded with the intention that it should by means of such equipment, (c) is recorded as part of a relevant filing system, or (d) does not fall within paragraph (a) (b) or (c) but forms part of an accessible record as defined by section 68 . . . .

Id. Personal data is defined as:

> [D]ata which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into possession of the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

Id. Sensitive Personal data is defined as:

> Personal data consisting of information as to – (a) the racial or ethnic origin of the data subject, (b) his political opinions, (c) his religious beliefs or other beliefs of similar nature, (d) whether he is a member of a trade union (within the meaning of the Trade Unions and Labour Relations (Consolidations) Act 1992), (e) his physical or mental health condition, (f) his sexual life, (g) the commission or alleged commission by him of any offense, or (h) any proceeding fro any offense committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Id. at pt. I, § 2.

Schedule 2 outlines the protection of personal data.[224] Part I Schedule 3 outlines the protection of sensitive personal data.[225]

Part II of the Data Protection Act sets forth "the rights of data subjects and others."[226] It conveys the right of the individual to know whether information is being collected about them,[227] and if there is information being collected, they have the right to "be given by the data controller a description of (i) the personal data of which that individual is the data subject, (ii) the purpose for which they are being or are to be processed, and (iii) the recipients or classes of recipients to whom they are or may be disclosed . . . ."[228] Individuals have the right to the information, the source who supplied the data,[229] and the purpose of the collection of data.[230]

The individual is given the right to "prevent processing likely to cause damage or distress,"[231] the "right to prevent processing for purposes of direct marketing,"[232] and "rights in relation to automated decision-taking."[233]

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223. *See id.* at pt. I, § 2; *see also supra* text accompanying note 222.
224. *See id.* at pt. I, sched. 2.
225. *See id.* at pt. I, sched. 3.
226. *Id.* at pt. II.
227. *See id.* at pt. II § 7(1)(a).
228. *Id.* at pt. II, § 7(b)(i)-(iii).
229. *Id.* at pt. II, § 7(c)(i)-(ii).
230. *Id.* at pt. II, § 7(d).

> [W]here the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in the decision-taking.

Id.

231. *Id.* at pt. II, § 10.

> [A]n individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing or processing for a specified purpose or in a specific manner, and personal data in respect of which he is the data subject, on the ground that for specified reasons – (a) the processing of those data or in that manner is causing or is likely to cause substantial damage or substantial distress to him or another and (b) that damage or distress is or would be unwarranted.

Id.

232. *Id.* at pt. II, § 11.

> (1) An individual is entitled at any time by notice in writing to a data controller to require the data controller to at the end of such period as is reasonable in the circumstances to cease, or not to begin processing for the purposes of direct marketing personal data in respect of which he is the data subject. (2) If the court is satisfied, on the application of any person who has given a notice under subsection (1), that the data controller has failed to comply with the notice, the court may order him to take such steps for complying with notice as the court thinks fit. (3) In this section "direct-marketing" means the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals.

Id.

Part IV provides the exemptions to the previous parts.[234] There are a number of exemptions including national security,[235] crime and taxation,[236] and "health, education and social work."[237] "The Secretary of State may by order exempt from the subject information provisions, or modify those provisions, in relation to, personal data consisting of information as to the physical or mental health condition of the data subject."[238]

The Data Protection Act is based on the European Union Directive 95/46/EC[239] of the European Parliament and of the Council of October 24, 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[240] Section III defines special

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233. *Id.* at pt. II, § 12. The individual can require that important decisions made about the individual are not made single-handedly by the automated processing of personal data. *See id.*

234. *See id.* at pt. IV.

235. *Id.* at pt. IV, § 28. "Personal Data are exempt from any of the provisions of - (a) the data protection principles, (b) Parts II, III, and V, and (c) section 55, if the exemption from that provision is required for the purpose of safeguarding national security." *Id.*

236. *Id.* at pt. IV, § 29.

> (1) Personal data processed for any of the following purposes - (a) the prevention or detection of crime, (b) the apprehension or prosecution of offenders, or (c) the assessment or collection of any tax or duty or of any imposition of a similar nature, are exempt from the first data protection principle.

Id.

237. *Id.* at pt. IV, § 30.

238. *Id.*

239. *See* Banisar, *supra* note 2, at 105; *see also* Council Directive 95/46/EC, 1995 O.J. (L 281) 31.

240. *See* Banisar, *supra* note 2, at 105. The following definitions are set forth in the Directive:

> (a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more specific factors to his physical, physiological, mental, economic, cultural or social identity; (b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, alteration, retrieval, consultation, use disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction; (c) 'personal data filing system' ('filing system') shall mean any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographic basis; (d) 'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law; (e) 'processor' shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller; (f) 'third party' shall mean and natural or legal person, public authority, agency or other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data; (g) 'recipient' shall mean a natural or legal person, public authority, agency or any other body to whom data are disclosed,

categories of data.[241] "Member states shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life."[242] The Act also provides for exceptions to this rule.[243]

> Paragraph 1 shall not apply where processing of the data is required for the purposes of preventative medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.[244]

Directive 95/46/EC also sets forth provisions for when the data should be given to the subject,[245] when the data subject has the "right of access,"[246] and when the data subject has the "right to object."[247] Additionally, Directive 95/46/EC addresses the "confidentially and security of processing," which is addressed below.[248]

VI. COMPLIANCE AND PENALTIES

A. *United States*

The Privacy Rule allows for the Secretary of Health and Human Services[249] to develop the policies and procedures for compliance.[250] There are two main principles for compliance, cooperation and assistance.[251] Individuals

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> whether a third party or not; however, authorities which may receive data in a framework of a particular inquiry shall not be regarded as recipients; (h) 'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to the personal data relating to him being processed.

Council Directive 95/46/EC, 1995 O.J. (L 281) 31, at ch. I, art. 2.

241. *See* Council Directive 95/46/EC, 1995 O.J. (L 281) 31, at ch. II, § III.

242. *Id.* at art. 8(1).

243. *See id.* at art. 8(3).

244. *Id.*

245. *Id.* § IV, art. 10.

246. *Id.* § IV, art. 12.

247. *Id.* § VII, art. 14. This section includes the subject's right to object and "automated individual decisions." *Id.* at § VII, art. 15.

248. *Id.* § VIII, art. 16-17. For more information about the security provisions see *infra* Part 4.

249. 45 C.F.R. § 160.103 (2003). "Secretary means the Secretary of Health and Human Services or any other officer or employee of HHS to whom the authority involved has been delegated." *Id.*

250. 45 C.F.R. § 160.304.

251. *Id.*

are given the right to file a complaint with the Secretary if they believe that a covered entity is noncompliant with the privacy provisions.[252] Once the Secretary receives the individual's complaint, he "may" investigate, and the investigation may "include a review of pertinent policies, procedures, or practices of the covered entity and of the circumstance regarding any alleged acts or omissions concerning compliance.[253] Additionally, the Secretary has the authority to perform compliance reviews.[254]

The Privacy Rule also sets out the responsibilities for covered entities to participate in compliance.[255] The Secretary is responsible for imposing mandatory penalties when organizations violate the statute.[256] However, the Secretary does have the exclusive authority to "settle any issue or case or to compromise any penalty."[257]

B. Canada

Division Two of the Canadian Act provides for complaints and remedies.[258] Under the Canadian Act an individual may file a complaint with

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(a) Cooperation. The Secretary will, to the extent practicable, seek the cooperation of covered entities in obtaining compliance with the applicable requirements of this part 160 and the applicable standards, requirements, and implementation specifications of subpart E of part 164 of this subchapter. b) Assistance. The Secretary may provide technical assistance to covered entities to help them comply voluntarily with the applicable requirements of this part 160 or the applicable standards, requirements, and implementation specifications of subpart E of part 164 of this subchapter.

Id.

252. 45 C.F.R. § 160.306. There are guidelines for how the complaint is to be filed. (b) Requirements for filing complaints. Complaints under this section must meet the following requirements: (1) A complaint must be filed in writing, either on paper or electronically. (2) A complaint must name the entity that is the subject of the complaint and describe the acts or omissions believed to be in violation of the applicable requirements of this part 160 or the applicable standards, requirements, and implementation specifications of subpart E of part 164 of this subchapter. (3) A complaint must be filed within 180 days of when the complainant knew or should have known that the act or omission complained of occurred, unless this time limit is waived by the Secretary for good cause shown. (4) The Secretary may prescribe additional procedures for the filing of complaints, as well as the place and manner of filing, by notice in the Federal Register.

Id.

253. *Id.*

254. *See* 45 C.F.R. § 160.308.

255. 45 C.F.R. § 160.310. Covered entities are required to keep and provide records and compliance reports, cooperate with investigations and compliance reviews, and permit access to the information for investigation. *Id.*

256. 45 C.F.R. § 160.506 (2003). "The penalty imposed under §160.506 must be in accordance with 42 U.S.C. 1320d-5 [sic] and the applicable provisions of this part." 45 C.F.R. § 160.508 (2003).

257. 45 C.F.R. § 160.510 (2003). The exclusive authority is granted to the Secretary without or without the consent of the ALJ. 45 C.F.R. § 160.536 (2003).

258. Personal Information Protection and Electronic Document Act, R.S.C. ch. 5, at pt. 1,

the Commissioner regarding a violation of the provisions.[259] The Commissioner then determines whether "there are reasonable grounds to investigate" and subsequently "may initiate a complaint in respect of the matter."[260] Additionally, the Commissioner is required to notify the organization that there has been a complaint filed.[261] The Commissioner has the power to summon appearances, administer oaths, receive evidence, enter the dwelling of the organization at anytime, and examine and copy records in order to investigate the complaint.[262]

Following the investigation, the Commissioner has one year to make a report that includes: findings and recommendations, settlement by the parties, any request made by the organization, and any possible recourse.[263] The Commissioner's report is unnecessary in cases where the Commissioner finds that the complaint did not exhaust other reasonably available "grievance or review procedures," the complaint could be dealt with more appropriately by other laws of Canada, the elapsed time is "such that a report would not serve a useful purpose," or the complaint was "trivial, frivolous, or vexatious or is made in bad faith."[264] After the report is made, the complainant can request a hearing.[265] The available remedies include: an order to comply, an order for the organization "to publish a notice of any action taken or proposed to be taken to correct its practices," and "award damages to the complainant, including damages for any humiliation that the complainant has suffered."[266]

In addition, in order to ensure compliance, the Commissioner has the power to conduct audits if he reasonably believes there is a violation.[267] If the Commissioner finds it necessary, he may make public the personal information management practices.[268] The Canadian Act encourages witnesses to come forward with information by protecting their identity and prohibiting retribution against employees who come forward.[269] Individuals who intentionally violate the provisions are subject to fines up to $100,000.[270]

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div. 2, § 11.

259. *Id.* at pt. 1, div. 2, § 11(1).
260. *Id.* at pt. 1, div. 2, § 11(2).
261. *Id.* at pt. 1, div. 2, § 11(4).
262. *Id.* at pt. 1, div. 2, § 12(1).
263. *Id.* at pt. 1, div. 2, § 13.
264. *Id.* at pt. 1, div. 2, § 13(2).
265. *Id.* at pt. 1, div. 2, § 14(1).
266. *Id.* at pt. 1, div. 2, § 16.
267. *Id.* at pt. 1, div. 3, § 18(1).
268. *Id.* at pt. 1, div. 3, § 20(2).
269. *See id.* at pt. 1, div. 4, § 27.
270. *See id.* at pt. 1, div. 4, § 28. The penalties range from "(a) an offence punishable on summary conviction and liable to a fine not exceeding $10,000; or (b) an indictable offence and liable to a fine not exceeding $100,000." *Id.*

C. *United Kingdom*

The focus of the European model is enforceability.[271] "The E.U. is concerned that data subjects have rights that are enshrined in explicit rules, and that data subjects can go to a person or an authority that can act on their behalf."[272] The Directive also requires information transferred out of Europe to be protected by similar laws, which has pressured other countries into developing laws to protect data.[273]

Council Directive 95/46/EC provides for the confidentiality of processing: "Any person acting under the authority of the controller or of the processor, including the processor himself, who has access to personal data must not process them except on the instructions from the controller, unless he is required to do so by law."[274] It gives guidelines for the processing of data.[275]

> Member States shall provide that the controller must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data protected.[276]

In instances where the data controller is not doing the actual processing of the data, he is required to "choose a processor providing sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out, and must ensure compliance with

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271. *See* Banisar, *supra* note 2, at 12. "The key concept in the European model is 'enforceability.'" *Id.*

272. *Id.*

273. *See id.* at 12-13.

> This requirement has resulted in growing pressure outside Europe for the passage of privacy laws. Those countries that refuse to adopt meaningful privacy law may find themselves unable to conduct transactions involving certain types of information flows with Europe, particularly if the transactions involve sensitive data.

Id. See also Council Directive 97/66/EC, art. 25.

274. Council Directive 95/46/EC, at § VIII, art 16.

275. *See id.* at art. 17.

276. *Id.* at art. 17, pt. 1.

those measures."[277] The Directive requires that the actions of the processor be governed by a contract.[278]

VII. PROBLEMS WITH PRIVACY AND SECURITY

A. *United States*

Despite all of the laws and regulations, many issues relating to the privacy and security of personal information in the United States continue.[279] It is difficult for the laws to keep up with technology.[280] When the laws are insufficient, enforcement remains at issue, and in some places the exemptions to the laws that are carved out for government agencies further decrease the protection.[281]

One growing problem is the amount of work involving electronic data that is done outside the United States.[282] For example, in the U.S. the "medical transcription industry is a $15 billion to $20 billion market."[283] There have been estimates that between four and ten percent of that work is subcontracted outside the United States to countries like Pakistan, India, China, and South Africa.[284] The problem arises out of the fact that HIPAA only applies to covered entities, so these subcontractors do not fall within the Act. Therefore, the Department of Health and Human Services cannot take action against these foreign entities.[285] Many of the hospitals do not even know the work is being done overseas until there is a problem.[286] This business practice threatens privacy.[287]

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277. *Id.* at art. 17, pt. 2.

278. *Id.* at art. 17, pt. 3.

279. *See generally,* American Hospital Association, *Promises Under Pressure: HIPAA - Ensuring Privacy, Security & Administrative Simplification,* (2003 AHA Annual Membership Meeting paper), *available at* http://www.hospitalconnect.com (on file with author).

280. *Id.*

281. *See* Banisar, *supra* note 2, at 15.

282. *See* Tyler Chin, *Doctors Also Ship Work Overseas (But They Don't Always Know It) Offshore Outsourcing Can Save Physicians Money, But Can Also Present Potential HIPAA Problems,* http://www.ama-assn.org/amednews/2003/11/10/bisb1110.htm (Nov. 10, 2003) (last visited Oct. 11, 2004).

283. *Id.* This is according to the president of the American Association for Medical Transcription. *Id.*

284. *Id.* This outsourcing has been attributed to cost and the unavailability of qualified workers in the United States. *Id.*

285. *See id.* HIPAA does apply to the entities that hire the foreign contractors; however, there is no direct applicability to foreign companies. *Id.*

286. *See id.* Recently, a transcriptionist in Pakistan "threatened to post patient files on the Internet unless the University of California, San Francisco, Medical Center paid her money she claimed a third party owed her. . . . The women had been hired, through a series of subcontractors, to transcribe them." *Id.*

287. *See id.*

Legislation in the United States does not give specific guidelines for technical security.[288] "Generally speaking, the final security rules offer less detail and more generic guidance [than the proposed guidelines], in the sense of high-level direction, about how covered entities and their business associates should go about implementing security."[289] Therefore, the rules are principle-based rather than "checklists."[290] This means less of a risk for entities to comply with specifics; however, the rules could lead to more liability because they require entities to continuously monitor their security systems.[291]

Hospitals continue to take advantage of new technology by providing wireless internet for staff and patients, for example.[292] One survey found most are using some type of wireless technology.[293] However, wireless networks are notoriously insecure.[294] Although there are different systems for home and business wireless systems, a study found that many of the business systems were insecure, while some systems were not being used to their full security potentials.[295] This demonstrated that there is the need for a "wake up call to corporate IT departments" and "that the enterprise needs to be taking a more activist approach to wireless LAN security."[296]

Another major issue related to the use of wireless data deals with the laptops and handheld tools that hospital employees use to access wireless data.[297] When these devices are lost or stolen there is the potential for the finder to gain access to the information stored on them.[298] "Until such remote

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288. *See* 45 C.F.R. § 164.304.

289. Richard D. Marks et al., *DWT Releases Analysis & Comments On HHS's Just-Released HIPPA Security Rules,* Davis Wright Tremaine LLP, Health Law Group Advisory Bulletin (Feb. 2003), http://www.dwt.com/practc/hc/_ecom/bulletins/02-03_HIPAASec Rules.htm [hereinafter *Analysis & Comments*].

290. *Id.*

291. *See id.*

292. *See* Bob Brewin, *Hospitalized? You Can Still Use Wi-Fi to Surf at Scripps Health,* Computerworld. *at* http://www.computerworld.com/industrytopics/healthcare/story/0,10801, 86167,00.html (Oct. 17, 2003) (last visited Nov. 19, 2003). Scripps Health claims to be using a system that allows them to "segment public traffic from the operational network" *Id.*

293. *See* Randy Gainer et. al., *No Rest for the Wary, at* http://www.dwt.com/ practc/hc_eecom/bulletins/05-03_BNAarticle.htm (n.d.) (last visited Nov. 19, 2003); *see also* The Healthcare Information and Management Systems Society (HIMSS), *Leadership Survey* (Feb. 23, 2004), http://www.himss.org/2003survey/ASP/healthcarecio_home.asp (last visited Nov. 19, 2003).

294. *See* Bob Brewin, *Worldwide 'War Drive' Exposes Insecure Wireless LANs,* Computerworld, *at* http://www.computerworld.com/mobiletopics/mobile/story/0,10801, 74103,00.html (Sept. 9, 2002) (last visited Nov. 23, 2003) [hereinafter *Worldwide War Drive*]. One of the inherent flaws in wireless internet technology is the fact that data is transmitted via radio waves which are emitted outside of buildings allowing outsiders to catch the signals. *See* Gainer, *supra* note 293. Additionally, that data is typically not well protected so hackers are able to access it. *See id.*

295. *See Worldwide War Drive, supra* note 294.

296. *Id.*

297. *See* Gainer, *supra* note 293.

298. *See id.*

destruction of data moves from 'Mission Impossible' fiction to become commercially available on laptops and PDAs, IT administrators and privacy officers need to plan how they will minimize access to protected health information on lost and stolen portable wireless devices." [299] Hospitals may consider following the Department of Defense, which banned the use of wireless communications due to poor security.[300]

Additionally, the financial impact of the regulations will be significant.[301] The cost to become HIPAA compliant has been estimated to be greater than three billion dollars nationwide.[302] This will have an impact on state and local governments as well as private industry.[303] The Final Rule provides more flexibility by recognizing the significant costs of the regulations.[304] The healthcare industry in the United States is a 1.3 trillion dollar industry; thus, regulations will have a significant impact on the industry.[305] However, some of the regulations requiring electronic claim submissions could potentially save money.[306]

One attorney predicts that the litigation could be "as lucrative as asbestos and breast implant litigation combined."[307] The way the statutes are worded the encryption of data is addressable, not required, and provisions like this could

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299. *Id.*

300. *See id. See also* Ellen Messmer, *Pentagon Prohibits Wireless, Citing Security Reasons,* Network World Fusion (Sept. 27, 2002), http://www.nwfusion.com/news/2002/0927pgon.html (last visited Nov. 19, 2003). "Given the exploitable vulnerabilities inherent in current wireless products and technologies and the interdependence of Defense and Pentagon networks, it is essential and expected that all tenants will strictly adhere to this policy." Memorandum from Howard G. Becker, Acting Director, Admission & Management, & John P. Stenbit, Assistant Secretary of Defense/DoD Chief Information Officer, to Secretaries of Military Departments, Pentagon Area Common Information Technology (IT) Wireless Security Policy (Sept. 25, 2002).

301. *See* Bob Berwin, *New HIPAA Security Rules Could Open Door to Litigation,* Computerworld, *at* http://www.computerworld.com/securitytopics/security/story/0,10801,78684,00.html (Feb. 20, 2003) (last visited Nov. 23, 2003) [hereinafter *Door to Litigation*].

302. Dibya Sarkar, *HIPAA Could Mean Big Business,* Federal Computer Week, *at* http://www.fcw.com/geb/articles/2002/0715/web-hipaa-07-19-02.asp (July 19, 2002) (last visited Oct. 11, 2004).

303. *See id.* "[S]tate and local governments and other groups have complained that the deadlines are too stringent and the issue too complex. Many want more time and guidance from the federal government. The federal government has offered some extensions." *Id.*

304. *See Analysis & Comments, supra* note 289. This provides a substantial benefit to small and rural providers. *See id.* Nevertheless it does not mean they do not need to comply with the regulations. *See id.*

305. *Door to Litigation, supra* note 301.

306. Richard D. Marks, *Surviving Standard Transactions: A HIPAA Roadmap,* 8 BNA'S ELECTRONIC COMMERCE & L.R. 22 (June 4, 2003), http://www.dwt.com/practc/hc_ecom/publications/06-03_BNA.htm [hereinafter *HIPAA Roadmap*]. For example, electronic claims submission costs anywhere between twenty-five and seventy-five cents, where the traditional paper filing costs between $2 and $12 per claim. *Id.*

307. *Door to Litigation, supra* note 301.

leave some information unprotected.[308] The interpretation and "risk analysis" will have a huge impact on the efficacy of the security rule.[309]

B. Canada

The New Canadian regulations got off to a rough start when the Information Commissioner resigned in 2003.[310] The timing of the resignation may have had a detrimental effect because it is said to have "created uncertainty at a time when, more than ever, new federal rules on privacy protection need to be promoted, interpreted and enforced."[311] One of the key problems that resulted from the change in the Commissioner is the uncertainty and the immediate need for interpretation.[312]

A major criticism of the Canadian Act is that the codes are vague due to their "multi-sectoral" nature.[313] The generality may cause difficulties when it comes to enforcement of the legislation.[314] This generality leads to a certain degree of uncertainty when it comes to what organizations are required to do and what is actually protected.[315]

One major issue is whether there is an objective standard. "For example, an organization is required to make a 'reasonable effort to ensure that the individual is advised of the purposes for which the information will be used.'"[316] This may not be possible if the information is being collected online because of the various ways to access web pages, and it has not yet been determined whether posting the purpose for which the information will be used on a web page would be considered a "reasonable effort."[317] The Act has also been criticized because, while the legislation refers to the "reasonable individual," there is no clear definition of what the "reasonable individual" is, and consumers and businesses would view the standard differently. As such, it is unclear and ambiguous.[318]

Another criticism of the Canadian Act is that it does not specifically define which information is sensitive.[319] The Act states that, "in determining the form of consent to use, organizations shall take into account the sensitivity

308. *See id.*
309. *See id.*
310. *See* Tyler Hamilton, *Radwanski's Departure Comes at a Critical Stage*, TORONTO STAR, June 25, 2003.
311. *Id.*
312. *See id.*
313. *See* Teressa Scassa, *Making Sense of Canada's New Personal Information Protection Legislation*, 32 OTTAWA L. REV. 1, 3 (2000/2001).
314. *See id.*
315. *See id.*
316. *Id.* at 10.
317. *See id.*
318. *See id.* at 11.
319. *See id.* at 12-13.

of the information."[320] This could lead to high levels of privacy invasion when it comes to information that is considered less sensitive.[321] When compared to the European Directive 95/46/EC, the Canadian Act gives little guidance as to what information is highly sensitive, whereas the European Directive spells out what information cannot be processed.[322]

Another complaint of the Canadian Act is the lack of a provision for input from the public.[323] The role of the Privacy Commissioner is to disseminate information to the public but there is no outlet for public complaints about the regulations.[324] The majority of information available does not reflect the views of the people in relation to the privacy of their health information.[325] Most of the information available on the "ethics, management, and legality of sharing personal information is written from the perspective of health professionals legal experts and social service workers."[326] This problem of "lack of understanding of the 'popular will' in relation to the interprofessional exchange of personal health information lies in the conduct of properly formulated research on the issue."[327]

As the Canadian Act continues to come into effect there are a number of likely issues that will arise.[328] The role of the Privacy Commissioner will have a significant impact on how the legislation plays out and the development of the reasonable individual standard will determine what is actually protected.[329]

C. United Kingdom

There has also been much discussion about the Data Protection Act. In a compliance report regarding websites, it was noted that smaller institutions have more difficulty understanding the Data Protection Act as well as complying with it.[330] This may be due to the fact that the larger organizations can communicate directly with the Information Commissioner[331] where the smaller organizations cannot.[332] Additionally, the smaller organizations cannot

320. Personal Information Protection and Electronic Documents Act, R.S.C. ch. 5, at pt. 4.3.2.

321. Scassa, *supra* note 313, at 12.

322. *See id.* at 13.

323. *See id.* at 19-20.

324. *See id.*

325. Weitz et al., *supra* note 32.

326. *Id.*

327. *Id.*

328. *Id.*

329. *See id.*

330. *See* UMIST AND THE OFFICE OF THE INFORMATION COMMISSIONER, STUDY OF COMPLIANCE WITH THE DATA PROTECTION ACT 1998 BY UK BASED WEBSITES 24 (2002) [hereinafter STUDY OF COMPLIANCE].

331. *See id.*

332. *See id.*

afford the legal advice.[333] The larger corporations have noted that it is taking increased time to communicate with the Commissioners office.[334] The smaller companies are also concerned with poor communication and the fear that they will not be made aware of changes to the Act.[335]

In addition to the need for additional communication, there is a need for education of smaller companies.[336] Currently, some concerns with education are the costs and the lack of "Frameworks for Compliance."[337] For example, "if you are a small shop who collects credit card information for your own purposes you should comply in the following way . . . if you are a travel agent . . . who passes the information to others[,] e.g.[,] to an airline or hotel[,] then you should comply in the following way."[338]

This lack of clear definitions was apparent in the 2000 Source Informatics[339] case where the court determined that Directive 95/46/EC did not prevent the anonymisation of personal data that could then be disclosed and the court did not analyze how the process would have been interpreted under the Data Protection Act.[340] Critics of the decisions argue that there was "no basis for this assumption: it was merely asserted that 'common sense and justice' leads to the conclusion."[341] This demonstrates that although the Data Protection Act was effective at the time of the Source Informatics decision, the court did not look to its provisions.[342] However, a strict reading of the principles could lead to a stifling of legitimate research based on the fear of legal consequences.[343]

There is also a lack of certification process.[344] There are different claims of certification being used on websites in the United Kingdom, but there is no certification process that determines whether a site is "data protection compliant."[345] Moreover, the Information Commission has reported that there are "bogus agencies" claiming to be the Information Commission and falsely notifying businesses of violations.[346] The Commission recommends not immediately sending money and confirming that the correspondence is truly

333. *See id.* at 24-25.
334. *See id.* at 25.
335. *See id.* at 25.
336. *See id.*
337. *Id.*
338. *Id.*
339. *See* R. v. Department of Health, ex parte Source Informatics, 1 All E.R. 786 (2000).
340. *United Kingdom – R. v. Department of Health Ex Parte Source Informatics*, 8 MED. L. REV. 115 (Mar. 2000).
341. *Id.*
342. *See id.*
343. *See* Ian Walden, *Anonymising Personal Data,* 10 INT'L J. L. & IT 224 (2000).
344. *See* STUDY OF COMPLIANCE, *supra* note 330.
345. *See id.*
346. *See* Information Commissioner's Office, *Bogus Agencies, at* http://www.informationcommissioner.gov.uk/eventual.aspx?id=3677 (n.d.) (last visited Oct. 30, 2004).

from the Office of the Information Commissioner before responding.[347]

Lastly, there has been criticism that the EU Directive will make it difficult to do business with other countries.[348] On July 27, 2003, the European Commission "adopted a 'Decision' approving the US [sic] 'safe harbor' arrangement."[349] This is set up to give U.S. organizations standards to comply with in order to do business with E.U. members.[350]

VIII. CONCLUSION

In general, the problem of the privacy of personal medical information is worldwide.[351] Countries around the world are attempting to create legislation that will find a balance between efficient and effective health care systems and maintaining patient privacy.[352] There are different ways to attack the problem including comprehensive and sectoral laws and combinations of the systems.[353]

One of the common underlying problems with the privacy regulations in the United States, Canada, and the United Kingdom is the lack of technological specifications, which allows for a high degree of ambiguity within the regulations. Additionally, there appears to be a common concern regarding the amount of money that will be needed to comply with the regulations. Nevertheless, across the board, there is a serious effort to ensure the privacy of public health data.[354]

The United States, Canada, and the United Kingdom all address differently which information is included.[355] The sectoral laws in the United States include specifically what information is covered;[356] the comprehensive laws in the United Kingdom also explicitly state the categories of information that deserve special attention.[357] However the comprehensive laws in Canada do not define what information is "sensitive," leaving more ambiguity than in

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347. *See id.*

348. *See* Banisir, *supra* note 2, at 12-13. *See also* text accompanying note 273.

349. *See* Information Commisioner's Office, *US Safe Harbour, at* http://www.informationcommissioner.gov.uk (n.d.) (last visited Oct. 30, 2004) [herinafter *US Safe Harbour*]; *see also* U.S. Department of Commerce, *Safe Harbour, at* http://www.export.gov/safeharbor/ (last updated June 29, 2004).

350. *US Safe Harbour,.supra* note 349.

> The scheme will involve organizations in the States committing themselves to comply with a set of data protection principles backed up by guidance provided through a number of 'frequently asked questions.' Commitment to 'safe harbours' will provide an adequate level of protection for transfers of personal data to the US from EU Member States.

Id.

351. *See supra* Part II.

352. *See supra* Part IV.

353. *See id.*

354. *See id.*

355. *See generally, supra* Part V.

356. *See generally, supra* Part VI.

357. *See id.*

the other regulations.[358] Only time will truly tell which regulations are effective, and what needs to change. Nevertheless, this will continue to be an important area to watch internationally.

358. *See id.*

> Since consent is supposed to be given for particular uses, the degree of consent required should not be tied specifically to the nature of the information. This is certainly the approach in the Quebec legislation which requires 'manifest, free and enlightened' consent regardless of the circumstances. The linking of the form of consent to the nature of the information in *PIPA* is a further indication of the weakness and ambiguity of the consent principle. Needless to say, it also gives rise to further problems of interpretation.

Scassa, *supra* note 313, at 12.

"NEW THINKING ABOUT AN OLD ISSUE:"[1] THE ABORTION CONTROVERSY CONTINUES IN RUSSIA AND IRELAND – COULD *ROE V. WADE* HAVE BEEN THE BETTER SOLUTION?

Kelley J. Johnson*

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[2]

I. INTRODUCTION

Abortion is defined as "[t]he spontaneous or artificially induced expulsion of an embryo or fetus."[3] However, human abortion has long been understood to mean "an intentionally-induced miscarriage" rather than a miscarriage "resulting naturally or by accident."[4] In the United States, abortion has always been an emotive issue, and it continues to ignite passions in those who support and oppose the procedure.[5] The same passions that arose in the United States after *Roe v. Wade*[6] continue to rise in Ireland[7] and Russia.[8]

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* J.D. Candidate, 2005, Indiana University School of Law – Indianapolis *(expected)*; Bachelor of Science, Purdue University, 1992. The author wishes to thank her husband, Chad, and her family for their continued patience, support and understanding throughout law school.

1. Roe v. Wade, 410 U.S. 113, 116 (1973) (quoting Justice Blackmun).
2. *Id.*
3. BLACK'S LAW DICTIONARY 6 (8th ed. 2004).
4. *Id.* at 6 (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 186-87 (3d ed. 1982)).

"There has been some tendency to use the word to mean a criminal miscarriage, . . . but there are so many references to lawful abortion . . . that it is necessary to speak of 'criminal abortion' or the 'crime of abortion' to emphasize the element of culpability." *Id.*

5. *See* DONALD P. JUDGES, HARD CHOICES, LOST VOICES: HOW THE ABORTION CONFLICT HAS DIVIDED AMERICA, DISTORTED CONSTITUTIONAL RIGHTS, AND DAMAGED THE COURTS 4-5 (1993).
6. 410 U.S. 113.
7. *See* Kitty Holland, *Twenty Years of Antenatal Politics, The 20th Anniversary of Ireland's First Abortion Referendum Looms, but the Issue Remains as Emotive as Ever*, IRISH

This Note will explore three countries, each with very different abortion laws: the United States, Ireland and Russia. The United States, where abortion became legal with guidelines following the fairly recent decision in 1973 of *Roe v. Wade*,[9] will be compared to Ireland, where abortion has been illegal since 1861 with very few exceptions.[10] In contrast to both the United States and Ireland, abortion in Russia has been legal with little restriction since 1920.[11] Each country has a different solution to abortion.[12] The pendulum swings from the lenient laws in Russia[13] to the stringent laws in Ireland.[14] Although the abortion laws in Ireland and Russia are opposite, both have led to devastating effects on pregnant women obtaining abortions.[15] Could the judicial decision in *Roe* have been the better solution?

Part II of this Note will look at the United States; Part III will examine Ireland; and Part IV will examine Russia. Section A of each Part will focus on the history of abortion in each country, examining the changing views and practices of abortion and the implementation and modification of abortion legislation and case law. Section B will discuss the consequences that the legislation and case law had on the citizens and on the country itself. Section B will also study the effect that legalizing or restricting abortion has had on women seeking an abortion in each country. Section C of each part will explore where the abortion controversy stands today, what laws are in effect at this time, and how each country is responding to those laws. Finally, Section D will look at where abortion laws might be headed in the future and why each country is headed in that direction.

In conclusion, Part V will contemplate the question: Is the United States' *Roe v. Wade* the better solution to abortion for Ireland and Russia? The analysis supplies the conclusion that although *Roe v. Wade* might be a middle-ground solution between the two extremes, the better answer for the future of Ireland and Russia is to focus on education and advances in technology of birth control. Regardless, as shown from the United States' history before *Roe* and the current situation in Ireland, a country cannot force acceptance of an unpopular law and should look for other solutions to remedy its problem.

TIMES, Sept. 3, 2003, at 13 [hereinafter *20th Anniversary*].

8. *See* Associated Press, *Russian Abortion Debate Grows*, *at* http://www.forerunner.com/predvestnik/X0059_Russias_abortion_pol.html (n.d.) (last visited Sept. 25, 2004) [hereinafter *Russian Abortion Debate*].

9. *See infra* Part II.A.

10. *See infra* Part III.A.

11. *See infra* Part IV.A.

12. *See infra* Parts II.A, III.A, IV.A.

13. *See infra* Part IV.A.

14. *See infra* Part III.A.

15. *See infra* Part III.B, IV.B.

II. ABORTION IN THE UNITED STATES

A. Historical Aspect

During the 1700s, abortion was not uncommon in colonial America.[16] Midwives routinely provided women with herbal abortifacients.[17] There was an "absence of legal condemnation" of abortion even though families and society valued both children and population growth in times of vast unsettled lands and high infant mortality.[18] If abortion was chastised at all, it was the violation of sexual norms, not the practice itself that was condemned.[19] In the late 1700s, the restrictive views on sexual behavior "loosened considerably."[20] Despite the relaxation of sexual standards, the drafters of the United States Constitution did not mention abortion within its four corners.[21] There is no mention of abortion by name or by inference in the original articles, the Bill of Rights, or in any subsequent amendments.[22]

Through the nineteenth century, abortion remained widely accepted.[23] Women used abortion as "conscious fertility control" because of economic pressures and the redefining role of motherhood.[24] During this time, the most common methods of abortion involved the use of herbs and devices women purchased from local pharmacists; however, abortion practitioners soon became prevalent.[25] By 1840, abortion developed into a business with some practitioners going so far as making abortion their "chief livelihood."[26] Ironically, during the same time that practitioners began to benefit from performing abortions as a business, physicians also became the principal proponents of laws to restrict abortion.[27]

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16. EVA RUBIN, THE ABORTION CONTROVERSY: A DOCUMENTARY HISTORY 11 (1994).

17. *Id.* "Abortifacients" are things that cause abortions. *Id.* Recipes for the herbal potions were found in cookbooks and diaries of women from that era. *Id.*

18. *Id.* For the aforementioned reasons, abortions were most common among single women in colonial times. *Id.* It is also unusual that abortion was not legally condemned in the tight-knit religious New England communities. *Id.*

19. *Id.*

20. *Id.* at 16. During the late 1700s it was estimated that "one third of all New England brides were pregnant at the time of marriage, compared to less than 10% in the seventeenth century." *Id.*

21. *See* JOHN T. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 5 (1979).

22. *Id.*

23. RUBIN, *supra* note 16, at 12.

24. *Id.* "The good bourgeois wife was to limit her fertility, symbolize her husband's affluence, and do good within the world." *Id.*

25. *Id.* at 12-13.

26. *Id.* at 13.

27. RUBIN, *supra* note 16, at 13-14. Between 1850 and 1880, the newly formed American Medical Association became the "single most important factor in altering the legal policies toward abortion . . . ." *Id.* at 13. Physicians wanted to restrict abortion over concerns of maternal health, consumer protection, the discriminatory idea of the subordination of women,

The first anti-abortion laws were "anti-poisoning" statutes rather than prohibitions on all abortions.[28] Because the herbal abortifacients could be fatal to the woman if taken in excessive quantities, it became a crime to "administer" the poisons.[29] These laws were drafted to protect women. As such, women who obtained an abortion were not punished if they received but did not administer the poisons.[30] Even though these early anti-abortion laws were in effect, they were not enforced.[31] Because abortion was still prevalent, the "openly tolerated practice suggests that many Americans did not perceive abortion as morally wrong."[32]

At the turn of the century, abortion rates still remained high.[33] State statutory restrictions on abortion remained basically unchanged until the 1960s.[34] Physicians were allowed to perform abortions "only to preserve the mother's life;" therefore, most abortions were performed illegally.[35] This led to injury and death of many women who went to these illegal, unqualified abortionists.[36] The medical practitioners, who had previously lobbied for strict abortion laws, became receptive to the idea that abortions should be performed legally in hospitals to prevent additional deaths.[37]

The problems of illegal abortion and the emergence of the women's movement led to the Abortion Reform Movement from 1960 to 1972.[38] Reacting to changing public opinion, the American Law Institute[39] drafted the Model Penal Code's[40] proposed revisions to state abortion laws.[41] After 1966,

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and "nativist fears," because elite Protestant women often sought abortions. *Id.* These views have now been found to be parochial and have been rejected by today's organized medicine. *Id.*

28. *Id.* at 15. In 1830, Connecticut became the first state to punish abortion after quickening. RUBIN, *supra* note 16, at 13. Quickening is the "first motion felt in the womb by the mother of the fetus." BLACK'S LAW DICTIONARY, *supra* note 3, at 1282.

29. RUBIN, *supra* note 16, at 15.

30. *Id.* at 14.

31. *Id.*

32. *Id.*

33. *Id.* at 18. The abortion rate ranged from "one pregnancy in seven . . . to one in three in 1936." *Id.*

34. *Id.* However, in the 1940s, discussions about abortion began to take place. *Id.* at 36. Articles were written on the subject in medical and law journals, and conferences were held to discuss "[t]he [a]bortion [p]roblem." *Id.* at 36-37.

35. *Id.* at 18. Legal restrictions only made abortions "furtive, humiliating, and dangerous." *Id.*

36. *Id.* at 45.

37. *Id.*

38. *See id.* Abortion rights became one of the issues over which feminists of the women's movement rallied. *Id.* Feminists argued that it was a woman's right to exercise control over her body, not the government's right. *Id.*

39. The American Law Institute (ALI) is an organization of legal scholars that studies state laws and proposes changes. *Id.* at 79.

40. The Model Penal Code is a "proposed criminal code . . . used as the basis for criminal-law revision by many states." BLACK'S LAW DICTIONARY, *supra* note 3, at 1025.

41. *See* JUDGES, *supra* note 5, at 107-08.

> The code proposed to legalize abortion in certain circumstances: if continuing the pregnancy would gravely impair the pregnant women's mental or physical health; if the child would be born with a grave physical or mental defect; or if the

a number of states began liberalizing their abortion laws.[42] By 1971, fourteen states had revised their abortion laws to permit abortions under certain circumstances.[43] However, in the majority of states, abortion remained a crime.[44]

In 1973, abortion laws in the United States dramatically changed with the Supreme Court's decision in *Roe v. Wade*.[45] In *Roe*, the Court held that a "state criminal abortion statute . . . that excepts from criminality only a life-saving procedure on behalf of the mother . . . is violative of the Due Process Clause of the Fourteenth Amendment."[46] The Court then defined the stages where abortion can be regulated.[47] The Court made abortion legal when obtained prior to the end of the first trimester, leaving the decision to the medical judgment of the pregnant woman's attending physician.[48] The Court allowed the state, in promoting its interest in the health of the mother, to reasonably regulate the abortion procedure subsequent to the end of the first trimester.[49] For the stage subsequent to viability, the Court authorized states to regulate and even prohibit abortion.[50]

In 1989, the Supreme Court decided *Webster v. Reproductive Health Services*.[51] For the first time since *Roe*, the Court allowed the state to regulate

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pregnancy resulted from rape, incest, or illicit intercourse with a girl under the age of sixteen.

Id. These proposals had a major influence on legislation in reforming states. *Id.*

42. *Id.* A number of reformed states regarded the Model Penal Code as a blueprint for their own legislation. RUBIN, *supra* note 16, at 79.

43. RUBIN, *supra* note 16, at 117. The circumstances that the states allowed for abortion include the following: avoiding harm to the woman's physical or mental health, allowing abortion if the fetus would have been born with serious mental or physical handicap, and allowing abortion for rape or incest cases. *See* JUDGES, *supra* note 5, at 108.

44. RUBIN, *supra* note 16, at 117.

45. Jane Roe, an unmarried pregnant woman, wished to terminate her pregnancy by an abortion performed by a "competent, licensed physician, under safe, clinical conditions." *Roe*, 410 U.S. at 120. Roe was unable to get an abortion in Texas because her life was not threatened by the continuation of her pregnancy, and because she was unable to afford to travel to another state where abortion was legal. *Id.* Roe claimed the Texas statutes were unconstitutionally vague and restricted her right to privacy. *Id.*

46. *Id.* at 164. The Due Process Clause is "[t]he constitutional provision that prohibits the government from unfairly or arbitrarily depriving a person of life, liberty, or property." BLACK'S LAW DICTIONARY, *supra* note 3, at 539; *see* U.S. Const. Amend XIV § 1. Roe established "a federal constitutional right to abortion, and thus made every state law on abortion subject to federal judicial review for compliance with the standards . . . ." JUDGES, *supra* note 5, at 109. Since the 1973 decision, federal courts have been at the center of the abortion controversy. *Id.*

47. *Roe*, 410 U.S. at 164-65.

48. *Id.* at 164; *see also* JUDGES, *supra* note 5, at 145.

49. *Roe*, 410 U.S. at 164; *see also* JUDGES, *supra* note 5, at 145.

50. *Roe*, 410 U.S. at 164-65; *see also* JUDGES, *supra* note 5, at 145. A viable fetus is a fetus that is capable of living outside the womb. BLACK'S LAW DICTIONARY, *supra* note 3, at 1597.

51. 492 U.S. 490 (1989). State-employed health care professionals and nonprofit corporations offering abortion counseling and services brought this class action challenging the constitutionality of a statute that regulated the performance of abortions. *Id.* at 500-01.

abortion in the second trimester to protect fetal life rather than maternal health.[52] Although the Court in *Webster* clearly changed direction on abortion rights, none of the five opinions in *Webster* had the binding force of precedent.[53] Even so, this was the first time a majority of the justices upheld a statute that interferes with the doctor-patient relationship during the second trimester for reasons unrelated to maternal health.[54] This decision is plainly contrary to the trimester framework that the Court established in *Roe*.[55] Therefore, although not precedent, the law obviously changed when *Webster* was decided.[56]

In 1992, the Supreme Court decided *Planned Parenthood Southeastern Pennsylvania v. Casey*.[57] The Court in *Casey* did not expressly overrule *Roe*.[58] Instead, the justices redefined *Roe* and "tried to articulate a new constitutional standard for abortion rights."[59] The Court created a new standard in testing the constitutionality of state abortion restrictions.[60] The Court held that the undue burden test, rather than the trimester framework, should be used in evaluating state's abortion restrictions before viability.[61] The Court's decision in *Casey* gave abortion rights a "much smaller scope" than abortion rights in *Roe*.[62] The undue burden test invited states to impose various measures to restrict abortions, provided that the measures do not "act directly, openly, and straightforwardly to protect previability fetal life."[63] Therefore, Pennsylvania's

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52. *Id.* at 519-20. There were seventy-eight amicus briefs in the *Webster* case. RUBIN, *supra* note 16, at 10. Of those seventy-eight, forty-five briefs supported an anti-abortion position. *Id.*

53. *See* JUDGES, *supra* note 5, at 212. It takes five justices to join an opinion that binds the Court in later cases; therefore, the Court did not expressly overrule *Roe v. Wade*, including its trimester framework. *Id.*

54. *Id.* The statute specified that before performing an abortion on any woman in her second trimester (twenty or more weeks pregnant), the physician must ascertain whether the fetus is viable. *Webster*, 492 U.S. at 500.

55. JUDGES, *supra* note 5, at 212.

56. *Id.*

57. 505 U.S. 833 (1992). Five abortion clinics and one physician brought this suit, claiming provisions of a Pennsylvania statute were unconstitutional. *Id.* at 844-45. The statute required *informed* consent of the woman seeking the abortion, and required that she be provided with certain information at least twenty-four hours before the abortion. *Id.* at 844 (emphasis added). The statute also required informed consent of one parent when seeking an abortion for a minor and required a married woman to notify her husband before an abortion would be performed. *Id.*

58. JUDGES, *supra* note 5, at 221. The Court upheld *Roe's* essential holding, under the doctrine of stare decisis, recognizing a woman's right to choose an abortion before viability without undue interference from the State. *Casey*, 505 U.S. at 845-46.

59. JUDGES, *supra* note 5, at 221.

60. *Id.* at 224.

61. *Casey*, 505 U.S. at 873-78; *see also* JUDGES, *supra* note 5, at 224. "Undue burden" is defined as "ha[ving] the effect of placing a substantial obstacle in the path of a woman's choice." *Casey*, 505 U.S. at 877; *accord* JUDGES, *supra* note 5, at 224.

62. JUDGES, *supra* note 5, at 224.

63. *See id.* at 226.

informed consent requirements, the twenty-four hour waiting period, and the parental consent of a minor did not impose an undue burden.[64] However, spousal notification did impose an undue burden.[65]

In 2000, the Court again considered the right to an abortion in *Stenberg v. Carhart.*[66] In *Carhart,* the Court held that a Nebraska statute violated the Constitution for two independent reasons.[67] First, the statute lacked any exception for the preservation of the health of the mother.[68] Second, the statute imposed an undue burden on the woman's ability to choose one type of partial birth abortion, thereby unduly burdening the right to choose abortion itself.[69]

B. The Consequences of Those Laws on the Citizens and the United States

The rate of legal abortions practically doubled after the Supreme Court's decision in *Roe.*[70] In 1992, according to the Alan Guttmacher Institute,[71] there were over 1,500,000 abortions performed in the United States.[72] After *Roe,* the majority of those abortions were performed early in pregnancy – during the first

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64. *Casey,* 505 U.S. at 881-87.

65. *Id.* at 887-98.

66. 530 U.S. 914 (2000). A physician who performed abortions brought suit, challenging the constitutionality of a Nebraska statute banning partial birth abortion. *Id.* at 921-22.

67. *Id.* at 930.

68. *Id.*

69. *Id.* There are two types of partial birth abortion: D and E, and D and X. Jan Crawford Greenberg, *Online NewsHour: A Summary of Partial-Birth Arguments Before the High Court* (transcript of PBS television broadcast, April 25, 2000), *at* http://www.pbs.org/newshour/bb/law/jan-june00/scotus_4-25.html (last visited Oct. 13, 2004). "In 'D and E,' you are classically breaking up the fetus within the uterus and taking out one piece at a time. With a 'D and X,' you are trying to remove the fetus intact, or at least as intact as possible . . . ." *Id.* (quoting Dr. Leroy Carhart). The Court held that the statute applied to both procedures. *Carhart,* 520 U.S. at 938. Because D and E is commonly used, it places a substantial obstacle in the path of a woman seeking an abortion before viability. *Id.*

70. JUDGES, *supra* note 5, at 30. It is estimated that approximately one million legal abortions were performed in 1975. *Id.* Between 1973 and 2002, it is estimated that 43,358,592 abortions were performed in the United States. Minnesota Citizens Concerned for Life, *Abortion Facts – U.S. Statistics and Information, at* http://www.mccl.org/abortion_facts.htm (n.d.) (on file with author) [hereinafter *Abortion Facts*].

71. The Alan Guttmacher Institute is a special research affiliate to Planned Parenthood. *Abortion Facts, supra* note 70.

72. *Id.* The Centers for Disease Control (CDC) reports that approximately 1,300,000 abortions were performed in 1992. *Id.* The Guttmacher Institute reports higher numbers than the CDC because Guttmacher actively collects the abortion data directly from providers, such as Planned Parenthood. *Id.* The CDC, on the other hand, relies on figures gained from voluntary reporting by abortion providers relayed to the CDC from state health agencies. *Id.* The CDC's statistics are also low because they stopped including statistics from four states including California, Alaska, New Hampshire and Oklahoma. *Abortion Facts, supra* note 70; *see also* CDC's Reproductive Health Information Source, *Surveillance and Research, Fact Sheet, Abortion Surveillance 1999, at* http://www.cdc.gov/nccdphp/drh/surv_abort99.htm (last modified May 22, 2003) (last visited Sept. 25, 2004) [hereinafter *Surveillance*]. In 1997, California accounted for twenty-three percent of the nation's abortions. *Abortion Facts, supra* note 70.

twelve weeks of pregnancy.[73] Since 1973, the trend has been toward a larger percentage of abortions being performed earlier in pregnancy.[74]

Before *Roe*, forty-four percent of women went out of state to have their abortions and most of those abortions were performed in hospitals.[75] By 1985, ninety-two percent of women who had abortions obtained them within their own state of residence, and eighty-three percent of abortions were performed in a clinical setting.[76]

The legalization of abortion in *Roe* led to a dramatic decline in back-alley, illegal abortions.[77] It is estimated that before 1973, 1.2 million women had illegal abortions each year.[78] The Guttmacher Institute reports that complications from abortions occur in less than one percent of cases, and a woman is "statistically less likely to experience complications from an abortion than from a penicillin shot."[79]

In the 1940s, the Centers for Disease Control (CDC) estimated there were 1,000 abortion-related deaths per year.[80] From 1979 to 1985, the rate of deaths related to legal abortions was less than one death per 100,000 abortions.[81] In 1998, the CDC reported nine maternal deaths related to legally induced abortion.[82]

The decision-making process for women in the United States who choose to have an abortion is not black and white. One study found that, for many women, the decision to have an abortion is complex and involves many factors.[83] The factors most frequently mentioned are: concern that having a baby will change the woman's life; inability to afford a child at that time; problems in the relationship with the father; not wanting to be a single parent; not ready for the responsibility of parenthood; not wanting others to know that the woman was pregnant or sexually active; and not being psychologically mature or chronologically old enough for a child.[84] Women in the study indicated the two most important reasons that led to the ultimate decision of having an abortion were not being able to afford a child and not being ready to

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73. JUDGES, *supra* note 5, at 33. In 1973, 85.4% of abortions were performed in the first trimester. *Id.*

74. *Id.* In 1999, eighty-eight percent of abortions were performed in the first twelve weeks of pregnancy. *Surveillance, supra* note 72.

75. ABORTION AND THE STATES: POLITICAL CHANGE AND FUTURE REGULATION 84 (Jane B. Wishner ed., 1993) [hereinafter POLITICAL CHANGE].

76. *Id.*

77. *See* Feminist Majority, Feminist Court Watch, *Roe v. Wade: Legalizing Abortion, at* http://www.feminist.org/courts/roe.asp (n.d.) (last visited Sept. 25, 2004).

78. *Id.*

79. *Id.*

80. POLITICAL CHANGE, *supra* note 75, at 109.

81. *Id.* at 87.

82. *Surveillance, supra* note 72.

83. JUDGES, *supra* note 5, at 37. This Alan Guttmacher Institute study examined data from 1,900 abortion patients. *Id.*

84. *Id.* at 37-38.

have a child.[85] A Guttmacher study in 2000 reported that seventy-five percent of women had an abortion because having a baby would interfere with their work, school, or other responsibilities.[86] Less than two percent of women have abortions because they were raped or because of incest.[87]

Studies have shown that women in the United States are subsequently affected by their abortions. A 1985 study researched "long-term manifestations of abortion" and found that eighty-one percent of women who had abortions reported "preoccupation with their aborted child."[88] The study also reported: "54% had nightmares; 35% had hallucinations of visitations with their child; and 96% felt their abortion had taken a human life."[89] A 1998 Wirthlin Poll found that seventy-eight percent of Americans agree that women who have abortions experience emotional trauma, such as grief and regret.[90]

C. The Abortion Laws Today

Today, the topic of debate is the banishment of partial birth abortion.[91] On June 4, 2003, the House of Representatives[92] overwhelmingly approved legislation to outlaw partial birth abortion.[93] The Senate[94] voted to approve the bill on October 21, 2003.[95] On November 5, 2003, President George W. Bush signed into law the first federal restriction on abortion in thirty years.[96] Less than an hour later, a federal judge in Nebraska partially blocked the implementation of the law.[97] The next day federal judges in New York and

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85. *Id.* at 38.

86. *Abortion Facts, supra* note 70.

87. *Id.*

88. Roe v. Wade 27 Years of Life Denied, *Abortion's Consequences, at* http://www.roevwade.org/consequences.html (n.d.) (last visited Oct, 14, 2004). This study was performed by Dr. Anne Speckhard at the University of Minnesota in 1985. *Id.*

89. *Id.*

90. *Abortion Facts, supra* note 70.

91. Robin Toner, *Measure Banning Abortion Method Wins House Vote,* N.Y. TIMES, June 5, 2003, at A1. Partial birth abortion is a type of abortion used in the second and third trimester. *Id.* The procedure involves "delivering the lower part of the fetus's body, puncturing and collapsing its head while still inside the women's body, and the delivery of a dead, but largely intact fetus." *Id.*

92. The House of Representatives is "[t]he lower chamber of the U.S. Congress, composed of 435 members – apportioned among the states on the basis of population – who are elected to two-year terms." BLACK'S LAW DICTIONARY, *supra* note 3, at 757.

93. Toner, *supra* note 91. The vote was 282-to-139. *Id.* In the last eight years, Congress had twice passed similar bills, but President Clinton vetoed both of them. *Id.*

94. The Senate is "[t]he upper house of the U.S. Congress, composed of 100 members – two from each state – who are elected to six-year terms." BLACK'S LAW DICTIONARY, *supra* note 3, at 1392.

95. Jim Abrams, *Senate Approves Ban on Abortion Procedure,* N.Y. SUN, Oct. 22, 2003, at 4. The vote was sixty-four to thirty-four. *Id.*

96. Ron Hutcheson, *Abortion Restriction Signed into Law; Legal Challenges Already Under Way,* KNIGHT RIDDER WASH. BUREAU, Nov. 6, 2003.

97. *Id.* In Lincoln, Nebraska, U.S. District Judge Richard Kopf issued a temporary

California also blocked the law.[98] All three rulings prevent enforcement of the ban until a challenge to the law's constitutionality can be heard.[99] The U.S. Department of Justice is now reviewing the block in New York.[100] The Justice Department requested an evidentiary hearing to justify the earlier findings of Congress, which stated that partial birth abortions are not medically necessary and are inhumane.[101]

Supporters of this bill call the partial birth procedure "barbaric."[102] On the other hand, opponents of the bill argue that the partial birth procedure is so broad that the bill could end up criminalizing many types of abortions that are medically necessary.[103] The two sides differ widely on the frequency of partial birth abortions and on the definition of partial birth abortion, which is not a medical term.[104] Under the bill, physicians who perform partial birth abortions are subject to fines and up to two years of imprisonment.[105] Women who undergo the procedure are not subject to prosecution, but their husbands or their parents, in cases involving minors, could sue the doctor for damages.[106] The American Civil Liberties Union[107] has announced its plans to legally challenge the ban to protect women and doctors.[108]

Another historic turn of events happened on June 17, 2003, when Norma McCorvey, also known as "Roe," filed a motion to re-open her case, *Roe v. Wade*, and requested that it be overturned.[109] McCorvey petitioned the court to

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restraining order, citing concerns that the law lacked any health exception. Terence Hunt, *Bush Signs Partial-Abortion Bill*, THE BARRE MONTPILLIER TIMES ARGUS, Nov. 5, 2003, http://www.timesargus.com/apps/pbcs.dll/article?AID=/20031105/NEWS/311050345&SearchID=731830206765.html (last visited Oct. 13, 2004).

98. *Judges in 2 More States Block New Abortion Law*, INDIANAPOLIS STAR, Nov. 7, 2003, *at* Nation/World, News in Brief, http://www.indystar.com/articles/5/090515-8405-010.html (last visited Oct. 13, 2004). Manhattan U.S. District Judge Richard Casey's ruling affects a majority of the abortion providers in the United States. *Id.* The ruling in San Francisco affects doctors who work at 900 Planned Parenthood clinics nationwide. *Id.*

99. *Id.*

100. *U.S. Justice Department Wants Block on Partial-Abortion Ban Reviewed*, Channel News Asia, Nov. 11, 2003, http://www.channelnewsasia.com/stories/health/view/56671/1/html (on file with author).

101. *Id.*

102. Toner, *supra* note 91.

103. *See id.* Senator Barbara Boxer (D-Cal.) stated that "[t]his is indeed a historic day, because for the first time in history Congress is banning a medical procedure that is considered medically necessary by physicians." Abrams, *supra* note 95.

104. Abrams, *supra* note 95.

105. *Id.*

106. Hutcheson, *supra* note 96.

107. The American Civil Liberties Union is a nonprofit, nonpartisan organization that "defend[s] and preserve[s] the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States." American Civil Liberties Union, *About Us, at* http://www.aclu.org/about/aboutmain.cfm (n.d.) (last visited Sept. 25, 2004).

108. American Civil Liberties Union, *Federal Ban on Safe Abortion Procedures Deceptive and Dangerous, ACLU Promise Lawsuit to Protect Women and Doctors, at* http://www.aclu.org/news/NewsPrint.cfm?ID=13656&c=148 (Sept. 17, 2003) (last visited Oct. 13, 2004).

109. LifeSite Daily News, *'Roe' of 'Roe vs. Wade' Files Motion to Re-Open Landmark Abortion Case, at* http://www.lifesite.net/ldn/2003/jun/030617a.html (June 17, 2003) (last

re-open her original case based on changes in factual conditions and changes in the law.[110]

The controversial issue of abortion brings other cases to the courts, cases that do not focus on the woman's right to an abortion. Two recent U.S. Supreme Court cases involve the right for anti-abortionists to protest outside health facilities that perform abortions.[111] Other controversial cases involve the prosecution of the killing of abortion doctors and the bombing of abortion clinics.[112] Needless to say, abortion centered case law continues to test the limits of the judicially mandated abortion rights.

D. The Possibility of Abortion Laws in the Future

The future of abortion in the United States will continue to be a controversial issue. "Although polls show that across America people are generally opposed to abortion, they do not believe that legislation should be introduced to make it illegal."[113] A 1999 Gallup Poll found that sixteen percent of Americans believe abortion should be legal for any reason at any time during a woman's pregnancy and fifty-five percent believe abortion should be legal only to save the life of the mother or in cases of rape or incest.[114] A 2003 Gallup Poll reports that eighty-eight percent of Americans favor a law requiring physicians to inform abortion patients about alternatives to abortion.[115]

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visited Oct. 13, 2004).

110. *Id.*

> Using Rule 60 [of the Federal Rules of Civil Procedure], there are three major arguments to re-open and overturn the case on the basis of changed facts and law: 1. Norma McCorvey, and more than 1,000 women who have actually had abortions, have signed affidavits that attest to the devastating emotional, physical, and psychological trauma of abortion. These affidavits are the largest body of sworn evidence in the world on the negative effects of abortion on women. It is more than a thousand times more evidence from women than the Court heard in Roe. 2. The unanswered question in Roe's former case, "when does life begin?" was treated by the Court as a philosophical question when the case was first heard in 1973. Since then, an explosion of scientific evidence on human life conclusively answers the question that life begins at conception. 3. The state of Texas in 1999 enacted a law in which it agreed to provide for any woman's unwanted child from the child's birth to 18 years of age with no questions asked. Legally, because the state has agreed to take responsibility for all unwanted children, women should no longer be forced to dispose of "unwanted" children by ending a human life. Forty states have similar Baby Moses laws.

Id.

111. Cloer v. Gynecology Clinic, Inc., 528 U.S. 1099 (2000); Hill v. Colorado, 530 U.S. 703 (2000).

112. United States v. Waagner, 319 F.3d. 962 (7th Cir. 2003); United States v. Marra, 165 F. Supp. 2d. 478 (W.D.N.Y. 2001).

113. Tim Reid, *Where a Woman's Rights Confront Religious Might,* TIMES (London), Sept. 4, 2003, at 3.

114. Women's Issues, *Abortion Statistics, at* http://womensissues.about.com/cs/abortion stats/a/aaabortionstats_p.htm (n.d.) (last visited Sept. 25, 2004).

115. *Abortion Facts, supra* note 70.

Given its divisive nature, abortion has always been and will always be a political issue.[116] Although President Bush opposes abortion and supports legislation ending partial birth abortion, the President has backed away from opposing *Roe v. Wade*.[117] However, opponents of the partial birth abortion ban warn that the approval of the bill was the "first step toward overturning the 1973 Court ruling."[118] There is also a possibility of a shift in balance in the Supreme Court, which could tip the Court against *Roe v. Wade*.[119]

III. ABORTION IN IRELAND

A. *Historical Aspect*

In Ireland, abortion has been illegal since 1861.[120] Articles 58 and 59 of the Offenses Against The Person Act made abortion a criminal offense.[121] Under the 1861 Act, the woman who has the abortion and anyone who helps her have that abortion are both liable for severe penalties.[122] This Act could be amended at any time, and there is nothing in Ireland's Constitution to prevent

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116. *See* Reid, *supra* note 113.

117. *See supra* note 96 and accompanying text; *see also* Reid, *supra* note 113.

118. Abrams, *supra* note 95 (quoting Senator Tom Harkin (D-Iowa)).

119. Reid, *supra* note 113. "At least two retirements are expected in two years, setting up a bitterly contested appointments battle if Mr[.] Bush achieves a second term and seeks conservative replacements." *Id.*

120. Irish Family Planning Association, *Abortion Law in Ireland – A Brief Summary*, *at* http://www.ifpa.ie/campaigns/abortion/hist.html (n.d.) (last visited Sept. 26, 2004) [hereinafter *Abortion Law in Ireland*].

121. *Id.* Article 58 states:

> Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . .

Art. 58, Offenses Against the Person Act, 1861, http://members.aol.com/abtrbng/oatpa61.htm (last visited Sept. 26, 2004); *see also Abortion Law in Ireland, supra* note 120.

Article 59 states:

> Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude.

Art. 59, Offenses Against the Person Act, 1861, http://members.aol.com/abtrbng/oatpa61.htm (last visited Sept. 26, 2004); *see also Abortion Law in Ireland, supra* note 120.

122. TOM HESKETH, THE SECOND PARTITIONING OF IRELAND? THE ABORTION REFERENDUM OF 1983, 2 (1990).

such an amendment.[123] Nevertheless, this restrictive abortion legislation has remained virtually unchallenged for over one hundred years.[124]

In 1979, these provisions were confirmed by the Health (Family Planning) Act in Section 10.[125] This Act made provisions to ensure contraceptives were available only for the purpose of family planning or for medical reasons.[126] The Act also regulated the sale, importation, manufacturing, advertising, and displaying of contraceptives.[127] Until 1979, artificial contraception was illegal.[128] It was not possible to obtain a license to manufacture or sell contraception.[129] Until the 1960s, it was common practice in Ireland for single women who became pregnant to be confined to convents where they did hard, household labor for the duration of their pregnancy and beyond.[130] These women were obligated to give up their children for adoption.[131]

After the U.S. Supreme Court's decision in *Roe v. Wade*, anti-abortion activists feared the possibility that Irish courts would judicially create or recognize the right to abortion.[132] The pro-life activists set up a pressure group, the "Pro-Life Amendment Campaign" (PLAC), to lobby for constitutional change.[133] In opposition to the amendment, the "Women's Right to Choose Campaign" (WRCC) was formally launched in August, 1980.[134] After much controversial debate[135] on September 7, 1983, the people of Ireland voted to insert the Eighth Amendment into the Constitution, which became Article 40.3.3 (known as the 1983 Referendum).[136] Prior to the entry of this amendment, the Irish Constitution did not contain any specific provision on

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123. *See id.*

124. *Id.* at 1.

125. JAMES KINGSTON & ANTHONY WHELAN, ABORTION AND THE LAW 53 (1997); *see also* Health (Family Planning) Act, 1979 section 10, http://www.irishstatutebook.ie/ZZA20Y1979S10.html (last visited Sept. 25, 2004).

126. Health (Family Planning) Act, 1979 section 4, http://www.irishstatutebook.ie/ZZA20Y1979S4.html (last visited Oct. 13, 2004).

127. *Id.*

128. Ellie Lee et al., *Ireland and Abortion: Abortion Law and Politics Today,* Pro+Choice Forum, *at* http://www.prochoiceforum.org.uk/ireland2.asp (n.d.) (last visited Oct. 13, 2004).

129. *Id.*

130. THE ABORTION PAPERS, IRELAND 21 (Ailbhe Smyth ed., 1992) [hereinafter ABORTION PAPERS].

131. *Id.*

132. KINGSTON & WHELAN, *supra* note 125, at 4.

133. *Id.*

134. *See* HESKETH, *supra* note 122, at 72.

135. *See generally id.* The debate reached unprecedented heights of controversy for Ireland when the PLAC headquarters was damaged in a fire. *Id.* at 364.

136. Art. 40.3.3, Constitution of Ireland amend. VIII, 1983; *see also* KINGSTON & WHELAN, *supra* note 125, at 5. Article 40.3.3 of the Constitution was amended to read as follows: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." *Abortion Law in Ireland, supra* note 120.

abortion.[137] Before 1983, no Irish court was ever asked to decide whether the Constitution either required the State to prohibit abortion or allowed women to obtain abortions; however, in dicta, individual members of the Supreme Court indicated that abortion was constitutionally prohibited and that any right to privacy protected by the Constitution did not encompass a general right to abortion.[138] The intention of the 1983 Referendum was to "introduce an absolute ban on abortion into the constitution with the aim of preventing the legislature or the courts from ever liberalizing abortion on the grounds of personal privacy or the repeal of the 1861 Offenses Against the Person Act."[139] The amendment was voted in by 66.45%.[140] Since its introduction to Ireland's constitution, it has been used to attack the civil and legal rights of women in Ireland.[141]

Following the insertion of the Eighth Amendment into Ireland's Constitution, a number of cases came before the Irish courts concerning its interpretation;[142] however none directly raised the issue of the lawfulness of abortion under the amendment until 1992.[143] That year the abortion issue in Ireland became "humanized" with the case, *Attorney General v. X.*[144] In the *X* case, the High Court granted an injunction, preventing a pregnant fourteen-year-old rape victim from leaving Ireland to have an abortion in England.[145] The defendant appealed, claiming she was suicidal at the thought of carrying her pregnancy to term.[146] The Supreme Court reversed, holding that there was

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137. KINGSTON & WHELAN, *supra* note 125, at 2.

138. *Id.*

139. Dublin Abortion Rights Group, *Consequences of the 1983 anti-abortion referendum in Ireland, at* http://struggle.ws/darg/pr/conseq1983.html (n.d.) (last visited Oct. 13, 2004) [hereinafter *Consequences*]. The words were framed in December of 1982 by Dr. Michael Woods, Minister for Health. *20th Anniversary, supra* note 7.

140. *20th Anniversary, supra* note 7. The amendment was passed by a two to one majority. HESKETH, *supra* note 122, at 364.

141. *Consequences, supra* note 139; *see also infra* pp. 21-22 and notes 167-75.

142. *See* Attorney Gen. v. Open Door Counselling Ltd. & Dublin Well-woman Ctr. Ltd., [1988] I.R. 593 (Ir. H. Ct.); Soc'y for the Prot. of Unborn Children (Ire.) Ltd. v. Coogan [1989] I.R. 734 (Ir. H. Ct.); Soc'y for the Prot. of Unborn Children (Ire.) Ltd. v. Grogan [1989] I.R. 753 (Ir. H. Ct.).

143. KINGSTON & WHELAN, *supra* note 125, at 6.

144. *20th Anniversary, supra* note 7. After the High Court made its decision, thousands of protestors poured into the streets. *Id.* This case was one of the most important constitutional cases to come before the Irish court, and it has remained one of the most widely publicly debated and analyzed cases in Ireland's legal history. KINGSTON & WHELAN, *supra* note 125, at 6. Sinead O'Connor traveled home to Ireland to lead students in a protest march, chanting "[k]eep your rosaries off our ovaries" on national television. CLEMENT LOSCHER, THE X CASE: HOW ABORTION WAS BROUGHT INTO IRELAND 81 (1992).

145. Attorney Gen. v. X [1992] 1 I.R. 1 (Ir. S.C.); *see also Abortion Law in Ireland, supra* note 120. The offense was committed by a forty-one-year-old man, who was a family friend. KINGSTON & WHELAN, *supra* note 125, at 6.

146. X [1992] 1 I.R. 1 (Ir. S.C.); *see also 20th Anniversary, supra* note 7. Prior to going to England, the defendant stated that she "wish[ed] it were all over. Sometimes I feel like throwing myself downstairs." KINGSTON & WHELAN, *supra* note 125, at 7.

a "real and substantial risk" of suicide if the pregnancy continued; therefore, the abortion was permissible, even in Ireland.[147] However, the Court also held that where no such risk existed, both information and possibly travel could be prevented in the interest of safeguarding the right to life of the "unborn."[148] A clinical psychologist was of the opinion that the "psychological damage that would be suffered by X if she continued her pregnancy would be 'considerable' and that the damage to her mental health would be 'devastating.'"[149]

Although the proponents of the Eighth Amendment may have believed that inserting the amendment into the Constitution would prevent the judiciary or the legislature or both from legalizing abortion, the decision in the *X* case created a new meaning for Article 40.3.3.[150] The Court broadened the interpretation when it held that abortion is not only permitted by the Constitution in certain circumstances, but also that women are constitutionally entitled to have an abortion when it is necessary to protect their own right to life.[151] Shortly after the *X* case, two referenda were passed, amending Article 40.3.3 to safeguard the rights to travel and to acquire information.[152] A third referendum was rejected that would have limited the effect of the *X* case, by restricting the "real and substantial risk" test to cases where the risk to the pregnant woman's life was due to an illness or disorder and not to a risk of suicide.[153]

At the United Nations International Conference on Population and Development, in 1994, Ireland became one of 179 nations that affirmed "the basic right of all individuals to decide freely and responsibly the number and spacing of their children, including the right to make decisions concerning reproduction free of discrimination, coercion and violence."[154] Despite commitments such as these,[155] the Irish government still prohibited abortion, except where the life of the mother is at risk.[156]

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147. X [1992] 1 I.R. 1 (Ir. S.C.); *see also Abortion Law in Ireland, supra* note 120.

148. X [1992] 1 I.R. 1 (Ir. S.C.); *see also Abortion Law in Ireland, supra* note 120. This decision was surprising because it came through a judiciary that had "previously rendered conservative judgments in this area." LOSCHER, *supra* note 144, at 3.

149. KINGSTON & WHELAN, *supra* note 125, at 8. The psychologist determined that there was a "risk" to the life of the defendant by suicide on the basis of a short examination – approximately one hour. LOSCHER, *supra* note 144, at 21.

150. KINGSTON & WHELAN, *supra* note 125, at 34.

151. *See id.* at 35.

152. *Abortion Law in Ireland, supra* note 120. The travel referendum stated, "Subsection 3 of this section [Article 40.3.3] shall not limit freedom to travel between the State and another state." *Id.* The information referendum further stated that "Subsection 3 shall not limit freedom to obtain or make available . . . information relating to services lawfully available in another state." *Id.*

153. *Id.*

154. Katherine Hall Martinez & Christina Zampas, *Ship Highlights Desire for Abortion Rights,* NEWSDAY, July 23, 2001, http://www.crlp.org/tools/print_page.jsp.

155. This basic right was also affirmed by Ireland in 1986 when it became a party to the Convention on the Elimination of All Forms of Discrimination Against Women. *Id.*

156. *Id.*

In 1998, the High Court was forced to look at the interpretation of the *X* case in a similar situation known as the *C* case.[157] In the *C* case, a thirteen-year-old rape victim remained in the care of the Eastern Health Board, which allowed her to receive free medical care including an abortion.[158] C sought permission in the courts to leave the jurisdiction to obtain a lawful abortion in England.[159] The High Court ruled that C was entitled to leave the country to have an abortion because she was likely to take her own life if forced to continue with the pregnancy.[160] This case demonstrated that the failure of the government to enact legislation following the *X* case led to another young victim of rape having to go through the court process.[161]

In March 2002, by a very close margin, voters rejected a governmental plan to amend Ireland's abortion laws.[162] For the referendum, a blanket "yes or no" vote was required for a number of separate issues.[163] Two of the important issues on the abortion bill were: (1) "Should suicide be ruled out as grounds for allowing abortion?" and (2) "Should pregnant women whose health is threatened by their pregnancy be allowed to have an abortion in Ireland?"[164] If not defeated, the referendum would have overturned the landmark decision in the *X* case.[165] Instead, the rejected referendum left the judgment in 1992 in "legal limbo."[166]

B. The Consequences of Those Laws on the Citizens and Ireland

Once the 1983 Amendment was added to the Constitution, it was used to restrict other women's rights, besides restricting abortion, due to the lack of legislation clarifying its legal meaning.[167] For example, ethics committees in some hospitals refused to provide pre-natal testing due to the ban on abortion

157. *See* A. & B. v. E. Health Bd. [1998] 1 I.R. 464 (Ir. H. Ct.); *see also Abortion Law in Ireland, supra* note 120.

158. A. & B. [1998] 1 I.R. 464 (Ir. H. Ct.); *see also Abortion Law in Ireland, supra* note 120.

159. *Abortion Law in Ireland, supra* note 120. *C*'s father, who originally was supportive of *C*'s decision to have an abortion, opposed the decision after speaking to the media and becoming influenced by extreme anti-abortion groups. *Id.*

160. A. & B. [1998] 1 I.R. 464 (Ir. H. Ct.); *see also Abortion Law in Ireland, supra* note 120.

161. *Abortion Law in Ireland, supra* note 120.

162. Shawn Pogatchnik, *Voters Defeat Ireland Abortion Bill*, Associated Press, *at* http://www.nownj.org/njNews/2000-2002/Voters%20Defeat%20Ireland%20Abortion%20Bill.htm (Mar. 7, 2002) (last visited Oct. 13, 2004). The margin was 49.58% in favor and 50.42% against. Louise Williams, *No Change to Abortion Laws*, RADIO NETH. WERELDOMROEP, *at* http://www.rnw.nl/society/html/abortion020308.html (Mar. 8, 2002) (last visited Oct. 13, 2004).

163. Williams, *supra* note 162.

164. *Id.*

165. Pogatchnik, *supra* note 162.

166. *Id.*

167. *See Consequences, supra* note 139.

because nothing could be done about any fetal abnormality discovered by the testing.[168] Counseling services that gave information about abortion were closed down.[169] Injunctions were brought against student unions that handed out information about abortion.[170] In 1991, basic women's health books were removed from public libraries in Dublin because the books contained medical information about abortion.[171] Advertisements for pregnancy-related services in British magazines were censored before the magazines went on sale in Ireland.[172] "From 1983 onwards, every avenue of assistance through which women could travel to get abortion was systematically closed down."[173]

The 1983 Amendment also resulted in more battles through the courts on women's rights.[174] The right to abortion information, the right to travel, and the right to crisis pregnancy counseling paid for by the state have all flowed from the 1983 referendum.[175]

After the *X* case made abortion illegal, except in circumstances where the life of the mother was at risk, thousands of women sought abortions abroad, primarily in England.[176] It is estimated that at least 6,000 women per year travel to Britain to obtain abortion services.[177] This number does not include the women who cannot afford to travel abroad, who must seek abortions underground in unsanitary and unsafe conditions.[178]

The illegal status of abortion discouraged doctors from learning the abortion procedure.[179] Physicians were further placed in a difficult position after the decision in the *X* case.[180] Because a pregnant woman had a constitutional right to an abortion if her life was at risk, a doctor would be legally required to perform the procedure.[181] If a physician refuses to perform an abortion under such circumstances, he or she could face a civil suit on the

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168. *Id.*

169. Lee, O'Brien & Simpson, *supra* note 128.

170. *Id.*

171. *Consequences, supra* note 139.

172. *Id.*

173. Lee, O'Brien & Simpson, *supra* note 128.

174. *20th Anniversary, supra* note 7.

175. *Id. See also* Open Door Counseling Ltd. & Dublin Well-woman Ctr. Ltd., [1988] I.R. 593 (Ir. H. Ct.); Coogan [1989] I.R. 734 (Ir. H. Ct.); Grogan [1989] I.R. 753 (Ir. H. Ct.).

176. Sarah Stephen, *Ireland: Abortion ship offers women choice at* http://www.greenleft.org.au/back/2001/452/452p25b.htm (2001) (last visited Oct. 13, 2004).

177. *Women on Waves, at* http://www.womenonwaves.net/ireland/news/about.html (n.d.) (last visited Sept. 26, 2004) [hereinafter *Women on Waves*]. The number is believed to be an underestimate because many women give English addresses to hide the fact that they are from Ireland. *See* THE ABORTION PAPERS, *supra* note 130, at 51.

178. *Women on Waves, supra* note 177. "Every year 20 million abortions worldwide are performed under illegal and unsafe conditions, resulting in the deaths of an estimated 70,000 women annually." *Id.* Unsafe methods lead to complications in about 40% of illegal abortion cases. Stephen, *supra* note 176.

179. Martinez & Zampas, *supra* note 154.

180. *See* KINGSTON & WHELAN, *supra* note 125, at 24.

181. *Id.*

ground of infringing a pregnant woman's constitutional right to life.[182] If the woman died as a result of lack of treatment, the doctor could possibly face criminal prosecution.[183]

C. The Abortion Laws Today

Performing an abortion in Ireland remains illegal except in very limited circumstances; however, abortion information may be distributed in certain circumstances.[184] Area health boards in Ireland have a duty to ensure that comprehensive family planning services are available, fulfilling this obligation in health centers through public health nurses, family doctors, and family planning organizations.[185] In practice, advice and prescriptions for contraception are provided by family doctors, voluntary organizations, and private family planning clinics, even though such organizations are not required to do so.[186]

Furthermore, there remains an exception to the illegality of abortion where there is a real and substantial risk to the life of the mother, including a risk arising from a threat of suicide.[187] However, the Medical Council ethical guidelines to doctors, while they recognize that a pregnancy may be terminated where there is a real and substantial risk to mother's life, do not accept that a threat of suicide presents such a risk.[188] Therefore, in practice, pregnancies are terminated in hospitals where there is a substantial medical risk to the life of the mother, but are not terminated in cases of threat of suicide.[189]

Today, the number of women seeking pre-abortion counseling increases every year.[190] In 2001, the abortion ratio, calculated as the number of abortions per one thousand live births, was 115.[191] It was estimated that 6,673 Irish women traveled abroad to obtain abortions.[192] Of these women, approximately 940 were under the age of twenty, 4,900 were between the ages of twenty and thirty-four, and 760 were over the age of thirty-five.[193]

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182. *Id.*

183. *Id.*

184. Oasis, Information on Public Services – an Irish Government resource, *Family Planning Services in Ireland, at* http://www.oasis.gov.ie/health/womens_health/family_planning_services.html (n.d.) (last visited Sept. 26, 2004) [hereinafter *Family Planning Services*].

185. *Id.* Guidelines from the Department of Health and Children state that each health board should provide a leaflet that outlines the type and range of family services available in its area. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *20th Anniversary, supra* note 7.

191. William Robert Johnston, *Historical abortion statistics, Ireland, at* http://johnstonsarchive.net/policy/abortion/ab-ireland.html (n.d.) (last visited Sept. 26, 2004).

192. *Id.*

193. Irish Family Planning Association, *Irish Abortion Statistics, at* http://www.ifpa.ie/

In response to illegal and unsafe abortions worldwide, the Women on Waves Foundation[194] developed a reproductive health clinic on board a Dutch ship.[195] The ship is fully equipped to offer contraceptives, information, training, workshops, and safe and legal abortions outside territorial waters in countries where abortion is illegal, such as Ireland.[196] When Women on Waves announced that its first voyage would be to Ireland in June 2001, nearly two hundred women made appointments to obtain abortions in only four days.[197] The overwhelming response revealed that women who are physically and financially able to travel overseas to obtain abortions represent a small fraction of women who would use abortion services if they were legal.[198] Licensing problems prevented the ship's staff from providing any abortions to Irish women; however, the media coverage of the floating clinic informed the world that Irish women want access to safe, legal abortions.[199]

In 2003, twenty asylum-seeking women were granted temporary exit and re-entry visas to travel to Britain for abortions.[200] These temporary visas were granted only as an "extremely exceptional" measure.[201] Many women who were in the asylum process and who had a crisis pregnancy risked their applications by "sneak[ing] out of the country and back again to have abortions."[202]

D. The Possibility of Abortion Laws in the Future

It is still not clear whether the defeat of the 2002 referendum means that abortion in some circumstances is acceptable to the majority.[203] Pro-choice

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abortion/iabst.html (n.d.) (last visited Sept. 26, 2004). These statistics are based on official British statistics compiled by the UK Office for National Statistics. *Id.* These numbers do not include Irish women who did not give an address. *Id.*

194. Women on Waves is a non-profit organization based in the Netherlands. *Women on Waves, supra* note 177. The group is committed to assisting women with unwanted pregnancies who live in countries where abortions are illegal. *Id.*

195. *Id.*

196. *Id.* The abortions on the ship are legal because the ship's doctors are acting under Dutch law, which allows abortion. Stephen, *supra* note 176. "The Netherlands has a very liberal abortion law, yet it has one of the lowest reported abortion rates in the world." Martinez & Zampas, *supra* note 154. "This is due to a comprehensive reproductive-health program that includes universal sex education in schools and easily accessible family-planning services, including emergency contraception." *Id.*

197. Martinez & Zampas, *supra* note 154.

198. *Id.*

199. *Id.* Because the necessary Dutch medical license was not obtained, the crew could have faced up to four and a half years in jail and a large fine. Karen Birchard, *Abortion Boat Faces Legal Complications*, 357 THE LANCET 9273, (2001), http://www.thelancet.com/journal/vol357/iss9273/full/llan.357.9273.news.16710.5 (last visited Oct. 13, 2004).

200. Kitty Holland, *Asylum-seekers granted visas for UK abortions*, IRISH TIMES, Aug. 30, 2003, at 4. The Department of Justice indicates that this is twice as many as last year. *Id.* Eight were granted in 2001, and two were granted in 2000. *Id.*

201. *Id.*

202. *Id.*

203. *See 20th Anniversary, supra* note 7.

lobbyists favor this view.[204] Whereas, the pro-life view believes that the referendum was defeated by "some small element of people against abortion."[205] The latter view believes that the pro-life sentiment is stronger among the people of Ireland.[206] Because of this unsolved issue, there will probably be a sixth abortion referendum.[207] This referendum should clarify the discrepancy between the *X* case and Article 40.3.3.[208] Alternatively, pro-choice groups seek legislation in line with the 1992 Supreme Court or seek the deletion of Article 40.3.3.[209]

The reasons women face crisis pregnancies need to be addressed.[210] The Irish Family Planning Act and the Well Woman Centre both describe as "frightening" the numbers of well-educated women who do not know the basics about their own reproductive cycles and how to use contraception.[211] Sex education in schools is also inadequate.[212] In Ireland, too many pregnancies are regarded as "crisis pregnancies" because support for women facing "the prospect of unplanned motherhood is inadequate, if there at all."[213]

IV. ABORTION IN RUSSIA

A. Historical Aspect

In contrast to both the United States and Ireland, abortion has been legal in Russia since 1920.[214] In fact, the former Soviet Union was the first government in history to make abortion legal.[215] This legalization gave a pregnant Russian woman the option to terminate her pregnancy at state hospitals without cost.[216] In 1936, Joseph Stalin, the dictator of the former Soviet Union,[217] criminalized abortion for the purpose of raising the birthrate to

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204. *Id.*

205. *Id.* This "small element" is the Mother and Child Campaign, led by Justin Barrett. *Id.*

206. *Id.*

207. *Id.*

208. *See id.*

209. *Id.* Catherine Heaney of the Irish Family Planning Association says that Article 40.3.3 "needs to be deleted" because it does not "deal with the reality of abortion in Ireland." *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. GENDER POLITICS AND POST-COMMUNISM, REFLECTIONS FROM EASTERN EUROPE AND THE FORMER SOVIET UNION 310 (Nanette Funk & Magda Mueller eds., 1993) [hereinafter GENDER POLITICS]; *see also* Julia O. Kotlyar & Margaret P. Battin, *Abortion in Russia*, 7 U. UTAH J. UNDERGRADUATE RES. 1, 11 (1999), http://www.lib.utah.edu/epubs/undergrad/vol7/kotlyar.html (last visited Oct. 13, 2004).

215. GENDER POLITICS, *supra* note 214, at 310.

216. Kotlyar & Battin, *supra* note 214, at 11.

217. Sergei Blagov, *Population Decline, Economic Realities See Abortion Restricted in Russia*, The Cybercast News Service, *at* http://www.cnsnews.com/ViewForeignBureaus.asp?

create more workers and soldiers.[218] During this time, illegal abortions escalated while Stalin's attempt to raise the birthrate failed.[219] Russian women were not properly educated about contraception and family planning; therefore, pregnant women continued to rely on the familiar method of abortion.[220] Because illegal abortions led to increases in infant and maternal mortality rates,[221] abortion was "reliberalized" in 1955.[222]

Russia's abortion regulations have remained some of the most permissive in the world.[223] In certain circumstances, there are no limits on abortions during the first twelve weeks of pregnancy.[224] The Fundamentals of the Legislation on Public Health Care[225] is the main law regulating a Russian woman's right to abortion.[226] The Ministry of Health[227] classifies abortion into three categories: abortion upon request, abortion for medical reasons, and abortion for social reasons.[228] There are thirteen special circumstances called "social indicators" that allow women to obtain an abortion between the twelfth and twenty-second week of pregnancy.[229] The Ministry of Health has defined those social reasons as follows:

> the illness of the husband; the death of the husband; imprisonment of either wife or husband; unemployment of wife or husband; loss or restriction of parental rights due to court order; the woman's marital status; criminal origin of the pregnancy; inadequacy of living space; woman's status as

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Page=\ForeignBureaus\archive\200308\FOR20030828b.html (Aug. 28, 2003); *see also* Kotlyar & Battin, *supra* note 214, at 11.

218. Kotlyar & Battin, *supra* note 214, at 11. "Stalin made it clear that Soviet couples should produce workers and soldiers as vigorously as new Soviet industries were turning out trucks and steel beams." *Birth Control in Russia*, INT'L HERALD TRIB., Sept. 3, 2003, at 8 [hereinafter *Birth Control*].

219. Kotlyar & Battin, *supra* note 214, at 11.

220. *Id.*

221. *Id.*

222. GENDER POLITICS, *supra* note 214, at 311. It was reasoned that legalizing abortion was a "necessary evil to prevent the carnage of illegal abortions and to help keep women in the labor force." Kotlyar & Battin, *supra* note 214, at 11. The ban was also lifted when Stalin died in 1953. *See* Blagov, *supra* note 217.

223. *See* Steven Lee Myers, *Russia Retreats from 50 Years of Permissive Law; Abortion on Demand/Once a Favored Birth Control Method*, INT'L HERALD TRIB., Aug. 26, 2003, at 2.

224. *Id.*

225. Russia's legislature passed the Fundamentals of Legislation on Public Health Care in 1993 in an effort to realize its commitment to public health. WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES 156 (The Center for Reproductive Law and Policy ed., 2000) [hereinafter LAWS AND POLICIES]. The objective of the "Fundamentals" is to "guarantee the right to healthcare, to public health, and to medical and social assistance." *Id.*

226. *Id.* at 160.

227. The Ministry of Health is the principal implementing agency of Russia's health care system. *Id.* at 156. The Ministry of Health has the duty of supervising and implementing national health programs. *Id.*

228. *Id.* at 157.

229. Myers, *supra* note 223, at 2.

> migrant or forced migrant; existence of three or more children; disability of a child; or income below the regional poverty line.[230]

Pregnancies can be terminated at any point for medical reasons, including severe disabilities of the fetus or threat to the mother's life.[231]

The punishment for performing an illegal abortion is regulated by the Criminal Code of the Russian Federation.[232] An unauthorized individual without any medical education who performs an abortion is subject to a fine and mandatory community work of 100 to 240 hours.[233] Repeat offenders can face imprisonment up to two years.[234] If an illegal abortion results in the harm or loss of life of the woman, the general Criminal Code provisions for assault and murder would apply.[235] Additionally, a licensed physician who performs an illegal abortion that leads to serious harm or death of the woman can be suspended from the medical practice for up to three years.[236]

Abortion information is unregulated in Russia.[237] Advertisements for private and commercial clinics can be found in newspapers and magazines.[238] Adolescents over fifteen years of age have the right to give their informed consent for abortion.[239] Those under fifteen years of age must have parental consent before obtaining an abortion.[240]

Although Russia's Constitution[241] guarantees free health care,[242] state support for abortion has been significantly reduced.[243] In 1997, the Communist-controlled Russian parliament cut off financing to family planning clinics, leaving some 400 clinics to subsist on local subsidies.[244] Basic medical insurance also does not fully cover expenses for abortion upon request.[245]

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230. LAWS AND POLICIES, *supra* note 225, at 160.

231. Myers, *supra* note 223, at 2; *see also* LAWS AND POLICIES, *supra* note 225, at 160.

232. LAWS AND POLICIES, *supra* note 225, at 160.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 160.

238. *Id.*

239. *Id.* at 167.

240. *Id.*

241. The Constitution of the Russian Federation was adopted by referendum on December 12, 1993. LAWS AND POLICIES, *supra* note 225, at 153.

242. Art. 41 § 1 KONST. RF (1993), http://www.constitution.ru/en/10003000-01.htm (last visited Sept. 27, 2004). In 1993, the government funded family planning clinics, which distributed free contraceptives and provided medical care. Sharon LaFraniere, *Russians Feel Abortion's Complications,* WASHINGTON POST FOREIGN SERVICE, Feb. 22, 2003, at A16. On the average, Russian women bear just more than one child. *Id.*

243. LAWS AND POLICIES, *supra* note 225, at 157.

244. LaFraniere, *supra* note 242. Lawmakers at that time said a nation with a falling birth rate did not need to promote birth control. *Id.*

245. LAWS AND POLICIES, *supra* note 225, at 160.

Abortion is free in state-funded facilities, but women still must pay for anesthesia.[246] Most women choose to have abortions at private clinics because the standards of hygiene and care are higher; however women must pay for these expensive services on their own.[247]

B. The Consequences of Those Laws on the Citizens and Russia

The permissive abortion laws have made abortion in Russia a common and widely accepted means of birth control.[248] About sixty percent of all pregnancies in Russia end in abortion.[249] This gives Russia one of the highest abortion rates in the world.[250]

During the Soviet Union era, women had limited options for avoiding pregnancy.[251] On August 1, 1971, a Health Ministry's order permitted birth control pills for medical use, such as the treatment of endometriosis or hormonal disorders. However, its use was limited to medical use because of its alleged carcinogenic side effects.[252] Contraceptives were so scarce and of such poor quality that "the dangers of crude, assembly-line abortions seemed the safer bet."[253] The Health Ministry discredited new contraceptive methods and prevented their introduction into the country.[254] In 1990, 56.8% of Soviet women had never used contraceptives and only 21.8% had used them regularly.[255] Most Russian women relied on unreliable methods, such as rhythm, withdrawal, and vaginal douches.[256]

Since the Soviet state needed women in the workforce, few women had the time, money or living space to have another child.[257] An increased desire for smaller families, in part due to growing urbanization, also raised the abortion rate.[258] Soviet medical professionals have faced incentives that

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246. *Id.*

247. *Id.* The average cost for an abortion in Russia is $230. *Id.*

248. *See* Myers, *supra* note 223.

249. *Six out of 10 Pregnancies end in abortion in Russia* LifeSite Daily News, *at* http://www.lifesite.net/ldn/2002/oct/02102206.html (Oct. 22, 2002) (last visited Oct. 13, 2004) [hereinafter *Six out of Ten*]. This percentage is estimated by Vladimir Kulakov, head of Russia's Scientific Centre for Obstetrics and Gynecology. *Id.*

250. Myers, *supra* note 223. Only Romania has more abortions per capita. *Six out of Ten, supra* note 249.

251. Reuters, *Russian Abortion Rate Declines in Russia*, Associated Press, July 28, 2003, http://asia.news.yahoo.com/030728/ap/d7sigfvg0.html (on file with author) [hereinafter *Rate Declines*]. Soviet men did not like to use Soviet-produced condoms because they regarded them as uncomfortable and unreliable. *Id.*

252. Kotlyar & Battin, *supra* note 214, at 14. Even Soviet doctors were leery of prescribing oral contraceptives. *Rate Declines, supra* note 251.

253. *Russian Abortion Debate, supra* note 8.

254. Kotlyar & Battin, *supra* note 214, at 14.

255. *Id.* at 13.

256. *Id.* at 14.

257. *Russian Abortion Debate, supra* note 8.

258. Population Matters, *Improvements in Contraception are Reducing Historically High*

likewise kept the abortion rate high.[259] As recently as the late 1980s, obtaining a legal abortion required a subsequent three-day hospital stay; thus, benefiting Soviet hospitals, which are financed by their number of occupied beds.[260]

After the collapse of the Soviet Union[261] abortions "skyrocketed in the chaos" when jobs and the "social net of communism evaporated overnight."[262] In 1988, there were 4.6 million abortions.[263] In 1992, there were an estimated 224.6 abortions for every 100 live births.[264] In 2002, there were 1.7 million abortions.[265] Although the abortion rate in Russia has lowered significantly, even today, for every ten births there are about thirteen abortions, compared with approximately three in the United States.[266]

One might assume because of the liberal abortion laws, illegal abortions are rare. However, for every two to seven legal terminations there is one illegal abortion.[267] Russian women resort to illegal abortions because of the length of hospital waiting lists[268] and the poor quality of care in state hospitals.[269] Hospitals have a shortage of anesthetics, a "conveyor belt" approach, and a health service staff that is indifferent and sometimes callous.[270] "Another deterrent is the patient's inability to keep her hospital visit confidential."[271] Because doctors are required to record "abortion" on the certificate of temporary incapacity from work as the reason for a woman's absence from work, co-workers may learn about another co-worker's abortion.[272]

About six million Russian women are infertile, and medical authorities consider abortion to be the "major cause" of that infertility.[273] About thirteen

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Abortion Rates in Russia, Rand Corporation Publication, *at* http://www.rand.org/publications/RB/RB5055 (2001) (last visited Oct. 14, 2004).

259. *Id.*

260. *Id.*

261. In 1989, the Berlin Wall collapsed and the dissolution of the Soviet Union followed on August 24, 1991. *See Six out of Ten*, *supra* note 249; *see also* LAWS AND POLICIES, *supra* note 225, at 153.

262. *Rate Declines*, *supra* note 251. The first official abortion statistics emerged only in September 1988. Kotlyar & Battin, *supra* note 214, at 11.

263. Myers, *supra* note 223.

264. Kotlyar & Battin, *supra* note 214, at 12. The official abortion statistics show 3.5 million abortions in 1992. *Id.* at 11. However, this number is low due to the introduction of "mini-abortions, performed by vacuum aspiration or extraction." *Id.* at 12. Both of these methods were not regularly registered as abortions. *Id.*

265. Myers, *supra* note 223, at 2.

266. *Rate Declines*, *supra* note 251; *see also* Myers, *supra* note 223.

267. Kotlyar & Battin, *supra* note 214, at 12. "In 1990, there were 172 persons convicted of performing illegal abortions; 91 of them repeated the offense and had caused serious consequences for the patient." *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Six out of Ten*, *supra* note 249. This figure is out of thirty-eight million females who are of childbearing age. *Id.* Russian's fertility rate is now the sixth-lowest in the world. LaFraniere, *supra* note 242.

percent of Russian married couples are infertile, and in nearly three out of four cases, the infertility is attributed to the woman because of complications from one or more abortions.[274] The number of infertile women is predicted to increase because at least one out of ten abortions in Russia is performed on a teenage girl.[275] The average Russian woman has had six to eight abortions in her lifetime, and it was not unheard of to have as many as eighteen.[276]

The rate of post-abortion complications is very high in Russia.[277] In 1920, after abortion was legalized, the risk of dying from infection as a result of the abortion was 60 to 120 times higher than the risk of death while giving birth.[278] In 1988, it was estimated that seventy percent of Russian women suffer from health complications after their abortion.[279] In Russia, first abortions[280] have been known to hinder a normal delivery and lead to future problems, including future infertility.[281] Moreover, abortions are the cause of death for one third of all mothers.[282]

As few as one in four Russian babies are born healthy, and around three-quarters of women suffer some sort of illness during their pregnancies.[283] A common problem experienced by pregnant women is anemia, which can increase the chances for premature birth.[284] Another common problem is pre-eclampsia or toxemia, which can appear late in the pregnancy and is potentially fatal for both mother and child.[285] The high rate of abortions affects the ability of women to have healthy, wanted pregnancies.[286] Furthermore, the complications after the abortions are attributable to infections, disruptions of the menstrual cycle, and disruptions of the ability to conceive.[287]

Russia is also facing a population crisis as young people are moving away. Those who stay are having fewer children, and the life expectancy of men is falling.[288] Russian health and demographics experts say the trend of

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274. LaFraniere, *supra* note 242.

275. *Six out of Ten, supra* note 249.

276. GENDER POLITICS, *supra* note 214, at 311.

277. Interfax Russian News Agency, *Russian Abortion Rate One of the Highest – Health Ministry*, Nov. 29, 1988 [hereinafter *Russian Abortion Rate*].

278. Kotlyar & Battin, *supra* note 214, at 16.

279. *Russian Abortion Rate, supra* note 277.

280. First abortions are abortions in the case of a first pregnancy. *See* Kotlyar & Battin, *supra* note 214, at 16.

281. *Id.*

282. *Russian Abortion Rate, supra* note 277.

283. Kathleen Knox, *Unhealthy Mothers in Russia Get Babies Off to a Poor Start*, Radio Free Europe Radio Liberty, *at* http://www.rferl.org/nca/features/2002/03/22032002125533.asp (n.d.) (last visited Sept. 27, 2004). Only twenty-eight to thirty percent of newborn babies in Russia fit the definition of healthy, which means suffering from no complications in the birth process. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Birth Control*, supra, note 218.

infertility caused by frequent abortions contribute to the low birthrate.[289] The low birth rate, coupled with the high mortality rate, has fueled the population decline.[290] "Russia's population, of 145 million, is shrinking by almost 700,000 annually."[291]

C. *The Abortion Laws Today*

On August 11, 2003, for the first time in nearly half a century, Russia increased its restrictions on abortion.[292] The Ministry of Health reduced the number of special circumstances that allow for obtaining an abortion between the twelfth week and twenty-second week of pregnancy from thirteen to four: "rape, imprisonment, the death or severe disability of the husband, or a court ruling stripping a woman of her parental rights."[293] The new rules are not intended to force women to "continue with unwanted pregnancies," but rather to encourage use of contraception and traditional family planning measures.[294]

The Russian government cited economic reasons as a factor for imposing the restrictions.[295] Russia's health ministry has been spending five percent of its annual budget on funding free abortions.[296] The health ministry's move is also viewed as part of a campaign to reverse the country's demographic decline under pressure from conservative lawmakers and the Orthodox Church.[297] However, the new restrictions will not greatly affect a woman's access to abortion because more than ninety-three percent of all abortions are performed before the twelfth week.[298]

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289. LaFraniere, *supra* note 242.

290. Blagov, *supra* note 217. In 2002, the State Statistics Committee's census department announced that Russia's population has fallen by 2.2 million people since a census in 1989. *Id.* There are roughly 1.6 deaths for every birth. *Id.*

291. *Birth Control*, supra, note 218. The rapidly declining population is a predicament that President Vladimir Putin has called a "creeping catastrophe." *Id.* United Nations population experts predict that in fifty years Russia will be the world's seventeenth most populous country, whereas today it is the sixth. LaFraniere, *supra* note 242.

292. Myers, *supra* note 223. This resolution went virtually unnoticed in the country's media. Robert Greenall, *Russia turns spotlight on abortion*, BBC News Online *at* http://news.bbc.co.uk/2/hi/europe/3093152.stm (Sept. 16, 2003) (last visited Oct. 14, 2004).

293. Myers, *supra* note 223.

294. Henry J. Kaiser Family Foundation, *Daily Reports, New York Times Examines New Abortion Restrictions in Russia*, http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=19524 (Aug. 25, 2003) (quoting Anatoly Korsunsky, the health ministry's chief of maternity and childhood health) [hereinafter *New Abortion Restrictions*].

295. Blagov, *supra* note 217.

296. *Id.* According to Lyudmila Pospelova, the head of the ministry's gynecology department, the health ministry had to take measures to limit the number of abortions. *Id.*

297. *Id.*

298. Kim Murphy, *Russia is moving to restrict abortions, Agency eliminates many social conditions that allow procedure after the 12th week*, L.A. TIMES, Sept. 21, 2003, http://www.indystar.com/print/articles/6/076491-8446-010.html (on file with author); *see also New Abortion Restrictions, supra* note 294.

Today, contraceptives are becoming increasingly obtainable[299] and more popular.[300] The free market of capitalism finished off the production of "Soviet-era condoms of thick, dark latex and diaphragms manufactured in only one size," which were replaced by European imports.[301] Intrauterine devices have been gaining popularity since they were introduced to Russia in 1971.[302] Even though western oral contraceptives are now available, Russian women have hostile attitudes towards the birth control pill.[303] Also contributing to the low use of birth control are local gynecologists who offer contraceptive consultations without knowledge of how to use them.[304]

Russia is poor[305] and economic despair makes having a baby for Russian women a luxury.[306] Women not only work in Russia's lowest paying jobs but also account for most of the unemployed.[307] Furthermore, state subsidies to mothers are "miniscule," between 30,000 and 50,000 rubles a month per child, which is roughly $6 to $11.[308] Public spending on Russia's overwhelmed, out-of-date, and decaying health care system shrank by about one-third in the 1990s.[309] Russia ranks 130th in the world for overall health system performance.[310]

D. The Possibility of Abortion Laws in the Future

Abortion is so ingrained in Russian life that Russia is said to have an "abortion culture."[311] According to Dr. Vladimir Serov, the chief gynecologist at the Health Ministry, abortion in Russia has been called a "habit," or a "tradition."[312] Dr. Serov also claims the trend is the result of Russia's "low level of medical culture."[313] It is evident that Russia must break its "habit," but how? Whatever route Russia takes, reducing abortions will take time.[314] Family planning groups, such as the Open Dialogue on Reproductive Rights,

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299. Kotlyar & Battin, *supra* note 214, at 14.

300. *See* LaFraniere, *supra* note 242. According to the Rand Corporation, the number of women who use contraceptives has doubled since 1988. *Id.*

301. *Id.*

302. Kotlyar & Battin, *supra* note 214, at 14.

303. *See id.* Birth control pills made their Russia debut in too high a dosage, which scared off some Russian women. LaFraniere, *supra* note 242.

304. *See* Kotlyar & Battin, *supra* note 214, at 14.

305. Knox, *supra* note 283.

306. *Russian Abortion Debate, supra* note 8.

307. *Id.*

308. *Id.*

309. Knox, *supra* note 283.

310. *Id.* The World Organization estimates that Russia now spends $251 per person per year on health care, compared with $1,700 per person per year in the European Union. *Id.*

311. *See Russian Abortion Debate, supra* note 8.

312. LaFraniere, *supra* note 242.

313. *Id.*

314. *See id.*

cite some success in lowering the abortion rate through public information campaigns and contraceptives, but changing social attitudes takes time.[315]

Dr. Serov argues that Russia's government must take better care of women's reproductive health by promoting contraceptives instead of abortions.[316] According to the Health Ministry, the government hopes to set the course with a new program in 2004.[317] However, with Russia's health care in a state of collapse, it is unknown how this program will be funded.[318]

In the meantime, Russia's parliament is considering proposals for even wider restrictions that would require "psychological counseling and would limit abortions past twelve weeks to cases of rape and unfit parents, including conditions of alcoholism and child abuse."[319] This proposal is much stricter than the abortion laws in the United States.[320] Aleksandr Chuyev, a member of the lower house of parliament, intends to sponsor a bill that will grant a fetus the same rights as a child.[321] This bill could possibly turn Russia's abortion laws from some of the most permissive to some of the most *restrictive* abortion laws in the world.[322]

On the other hand, abortion activists are helping draft a proposed law that would guarantee the right to affordable abortion.[323] After the government restrictions were implemented, pro-choice campaigners saw the restrictions as "the first step towards an attack on the rights of women."[324]

No matter where legislation will be in the future, both sides agree on the need for some form of education for young women.[325] There is no substantial program for sex education in schools, even though government has discussed having one for ten years.[326] However, there are worldwide, not-for-profit organizations that are focusing on improving the problem in Russia. The Sexuality Information and Education Council of the United States (SIECUS)[327] has collaborated with representatives from over twenty Russian organizations to learn more about the current status of sexuality education in Russia and to

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315. *Id.*

316. *Id.* Dr. Servov also argues that the government should fight the spread of sexually transmitted diseases, which he claims is the second-leading cause of infertility after abortions. *Id.*

317. LaFraniere, *supra* note 242.

318. *See id.*

319. Murphy, *supra* note 298.

320. *Id.*

321. *New Abortion Restrictions, supra* note 294.

322. *See id.*

323. *Russian Abortion Debate, supra* note 8.

324. Greenall, *supra* note 292.

325. *Id.*

326. *Id.* Dr. Grebesheva, the director of the Russian Family Planning Association says that "[a] fourteen year old receives no sex education but he can already be convicted for the crime of rape." *Id.*

327. SIECUS is a national, nonprofit organization that promotes education about sexuality and advocates the right of individuals to make responsible sexual choices. SIECUS, *About SIECUS, at* http://www.siecus.org/about/abou0000.html (n.d.) (last visited Sept. 27, 2004).

explore the development of Russian guidelines for sexuality education.[328] Together, they developed a Framework for Sexuality Education for Russian Youth, which includes information about the life behaviors of a sexually healthy Russian adult, the values needed for a sexuality education program, and the key topics and concepts to address to Russian children and youth.[329] EngenderHealth[330] has been working to improve women's health in Russia and to reduce the number of abortions by increasing contraceptive acceptance and use.[331] EngenderHealth also provides training to local health care facilities through comprehensive post-abortion care services and by improving the quality of family planning and other reproductive health services.[332]

V. CONCLUSION

Is *Roe v. Wade* the better solution for Ireland or Russia? To help answer that question, the first step is to look at what would happen in the United States if there was a shift in balance in the Supreme Court which would tip the Court against *Roe*.[333] If *Roe* is overturned, then the United States would be in political turmoil.[334] But the real focus of overturning *Roe* should be on the pregnant woman seeking an abortion.[335] If abortion became illegal again, a pregnant woman would have two choices: she could either have the baby or seek an illegal abortion. Since the number of abortions doubled after *Roe*,[336] it is possible that the abortion rate would drop just as much if abortion became illegal. Furthermore, birth control and contraception in the twenty-first century is so advanced, there is no need abortions except for the circumstances of rape, incest, or to save the life of the mother. However, this may be a "rose-colored" view of abortion, because the reality of overturning *Roe* is that women would simply seek illegal abortions, risking criminal prosecution or even death.[337]

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328. SIECUS, *Country Specific Guidelines: Russia, at* http://www.siecus.org/inter/russia/index.html (n.d.) (last visited Sept. 27, 2004).

329. *Id.*

330. EngenderHealth is a nonprofit organization that works internationally to support and strengthen reproductive health services worldwide. EngenderHealth, *About EngenderHealth, at* http://www.engenderhealth.org/about/index.html (n.d.) (last visited Sept. 27, 2004).

331. Engender Health, *Country by Country: Russia, at* http://www.engenderhealth.org/ia/cbc/russia.html (n.d.) (last visited Sept. 27, 2004).

332. *Id.*

333. *See supra* note 119 and accompanying text.

334. *See supra* Part II.C-D.

335. *See supra* Part II.B.

336. *See supra* note 70 and accompanying text.

337. This very issue was discussed in the recent U.S. Supreme Court case of *Lawrence v. Texas*. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2491 (2003). *Lawrence* involved the constitutionality of a Texas statute that made engaging in homosexual conduct illegal. *Id.* at 2475. In her concurring opinion, Justice O'Connor stated that overruling *Roe* would not create a massive disruption of the current social order. *Id.* at 2491. Overruling *Roe* would simply restore the "the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State." *Id.* The consequence

The reality is that the United States cannot force acceptance of an unpopular law.

If Ireland adopted *Roe v. Wade*, the number of women who travel to Britain to obtain abortions would certainly decrease.[338] If the same statistics in the United States after the decision in *Roe*[339] hold true in Ireland, the number of abortions will certainly increase. In any event, adopting *Roe v. Wade* may not even be an option because a Catholic-dominated country would not likely allow for the legalization of abortion.[340]

If Russia had adopted *Roe v. Wade*, its abortion rate might still be one of the highest in the world since more than ninety-three percent of all abortions in Russia are performed before the twelfth week.[341] Therefore, more restrictive case law or legislation would probably not change the rate in Russia without first implementing a program to educate Russian women about reproductive health.[342]

Therefore, although *Roe v. Wade* might be a middle-ground solution between the two extremes, the better answer for the future of Ireland and Russia is to focus on education and advances in the technology of birth control. The answer to the abortion problems in Ireland and Russia is to educate young women about birth control and the effects abortion may have on them before they become sexually active. The abortion problems of the two countries appear to be so deep that merely establishing new law would not be an appropriate answer.

Regardless, each country can continue to learn from each other for the future of its abortion laws. The United States can learn from Ireland that a woman who is determined to have an abortion will go to great lengths to have that abortion, even if it means breaking the law or even risking her life.[343] As the current abortion statistics show, the United States can also benefit from educating a young woman about contraception and her own reproductive cycle.[344]

Ireland can learn from the United States that it should work to resolve the ambiguities between Article 40.3.3 and the judicial decision in the *X* case.[345] Ireland's Supreme Court can resolve this by clarifying the uncertainties that its decision created.[346] However, Ireland's Supreme Court could learn from the

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of overruling *Roe* would not make abortion unlawful; it would only permit the States to make abortion unlawful. *Id.* Many states would not prohibit abortion. *Lawrence*, 123 S. Ct. at 2491. Even for persons who live in states that would prohibit abortion, "the choice would not have been between abortion and childbirth, but between abortion and abortion in a neighboring State." *Id.*

338. *See supra* notes 176-78 and accompanying text.
339. *See supra* note 70 and accompanying text.
340. *See* HESKETH, *supra* note 122, at 38-53.
341. *See supra* note 298.
342. *See supra* Part IV.D.
343. *See supra* Part IV.B.
344. *See supra* Part IV.D.
345. *See supra* Part III.A; *see also* notes 150-51.
346. *See id.*

U.S. Supreme Court that no matter how clear the decision appears to be, there will always be questions (and therefore future cases) on such a controversial issue.[347] Even if Ireland has not gained anything from the United States, it still seems Ireland has followed in the footsteps of the United States and has turned abortion into a highly controversial and emotional issue.[348]

The United States can learn from Russia that legalizing abortion with almost no restrictions is not the best solution.[349] Russia has proven this with the high rate of infertility, post-abortion complications, and the high number of illegal abortions.[350] This should prove to the United States the importance of teaching its younger generation about sexuality and contraception.[351]

Hopefully Russia will learn not only from the United States,[352] but also from Ireland,[353] that extremely restricting abortion regulations is not the best solution.[354] However, abortion is different in Russia than in the previous two countries because most Russians view abortion as a medical issue rather than a moral issue.[355] Because abortion laws in Russia have been so liberal for over fifty years,[356] affecting at least three generations of Russian women, the solution for Russia is patience and education.[357]

Because of the continuing devastating effects on pregnant women obtaining abortions, Ireland and Russia will have to find some middle-ground to their extreme situations; however, a judicial decision such as *Roe v. Wade* might not be the best solution. Although not an instant fix, the best long-term solution for the future of Ireland and Russia is to focus on educating young women about reproductive health.

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347. *See supra* Part II.A, Part II.C.
348. *See supra* Part III.
349. *See supra* Part IV.B.
350. *See supra* Part IV.B.
351. *See supra* Part IV.D.
352. *See supra* Part II.
353. *See supra* Part III.
354. *See supra* Part II-III.
355. *See* Kotlyar & Battin, *supra* note 214, at 16.
356. *See supra* Part IV.A.
357. *See supra* Part IV.D.

NORTH AND SOUTH: THE DISPARATE LEGAL APPROACHES TO HOMOSEXUAL ACTIVITY IN THE UNITED STATES AND NICARAGUA

Bethany Williams*

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.[1]

> The legislation of our country cannot be made for the pleasure or satisfaction of a small group of ideologues or practitioners of sodomy. The Commission of this Assembly that reported out the proposed law to reform the penal code consulted the most diverse sectors of Nicaraguan society, and their general opinion was to condemn and penalize the *scandalous practice* and the *propaganda of unnatural sexual conduct.*[2]

I. INTRODUCTION

The topic of homosexual activity, specifically the right to participate in sodomy, is one of the most hotly debated topics both in the United States and abroad. Vastly disparate approaches to this topic have been taken in the United States and in Nicaragua.

The United States' approach toward homosexual activity has become increasingly liberal.[3] In the past ten years, even the nine states steadfastly maintaining statutes that criminalize homosexual activity, specifically sodomy, have begun to repeal the statutes in landmark decisions.[4] These decisions culminated in the *Lawrence v. Texas* decision on June 26, 2003.[5] The decisions

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* J.D. Indiana University School of Law – Indianapolis, 2005 *(expected)*; B.A. Indiana University, 1997. The author would like to thank Rochelle who has always acted as her compass and never steered her wrong.

1. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
2. Martha I. Morgan, *The Bitter and the Sweet: Feminist Efforts to Reform Nicaraguan Rape and Sodomy Laws*, 26 U. MIAMI INTER-AM. L. REV. 439, 468 (1995) (quoting Alfredo Cesar, President of the Nicaraguan National Assembly).
3. *See infra* Part II.D.
4. *See infra* Part II.E.
5. Lawrence v. Texas, 539 U.S. 558 (2003). This case overturned *Bowers v. Hardwick*,

in the United States have predominantly focused on the right to privacy in sexual activities.[6] In deciding *Lawrence*, the Court stated, "Our obligation is to define the liberty of all, not to mandate our own moral code."[7]

In contrast to this broadening of legally acceptable homosexual activities in the United States, Nicaragua has been moving in the opposite direction.[8] In 1992, a proposal was made during a session of the Nicaraguan Assembly that Article 205 of the 1974 Penal Code, which prohibited practicing homosexual activity in a "scandalous manner," be deleted.[9] Instead, Article 205 was actually broadened to include not just the practice of homosexual behavior, but "inducing, promoting or propagandizing" homosexual behavior.[10] A challenge was raised to this broadening of the penal code, but it was cursorily denied and the Nicaraguan court ruled that the "sin is the scandal."[11]

Both the United States and Nicaragua make a connection between privacy and the practice of homosexual activities. The United States' repeal of statutes precluding homosexual activity is based upon Fourth and Fourteenth Amendment rights to privacy.[12] Nicaragua, in broadening its penal code, continues to focus on the "publicity" or "scandalous nature" of homosexual activity.[13] Despite the interest in both privacy and publicity, the two countries come to very different conclusions. These diametric positions are interesting in and of themselves and, given the latest decision in *Lawrence*, as well as the growing Nicaraguan population in the United States, germane and topical.[14]

Part II of this Note will discuss the evolution of the right to privacy in the United States as it relates to all sexual matters – not just the practice of homosexual activity. It will examine the gradual movement and evolution of the right to privacy in sexual matters and its abrupt halt with the *Bowers v. Hardwick* decision, which relates specifically to homosexual activity.[15] Part II

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478 U.S. 186 (1986). *See infra* Part II.C. Bowers held that there was no constitutional right for adult homosexuals to commit consensual sodomy, even in the privacy of their own homes. *See infra* Part II.B.

6. *See infra* Part II.E-F.

7. *Lawrence*, 539 U.S. at 571 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

8. *See infra* Part III.

9. Morgan, *supra* note 2, at 446.

10. *Id.* at 447.

11. *Id.* at 468.

12. *See infra* Part II.E-F.

13. Morgan, *supra* note 2, at 468-69.

14. ProNicaragua (untitled document), *at* http://anitec.net/pronica2.htm (n.d.) (last visited Aug. 6, 2004). "Nicaraguans in the United States have reached substantial numbers in most urban areas . . . ." *Id.* "Since the 1970s, several civil wars, along with economic turmoil in Latin American countries brought substantial numbers of immigrants . . . to the United States. This includes 800,000 Nicaraguans . . . ." Commission on Professionals in Science and Technology, *Limited Progress: The Status of Hispanic Americans in Science, Engineering, at* http://www.cpst.org/web/site/pages/pubs/Hispanics/hispanics.htm (n.d.) (last visited Oct. 21, 2004).

15. *See* Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

will then explore the statutes in various states criminalizing homosexual activity and their purported purposes, briefly discuss the general bias against homosexuals in the United States, and ways in which the United States has attempted to "legislate morality." Finally, Part II will trace the repeals of statutes criminalizing homosexual activity in various states, culminating in the most recent decision in *Lawrence v Texas* in June, 2003.[16]

Part III of this Note will address the existence of a right to privacy and the "moral majority" in Nicaragua. The intended purpose of the original 1974 Penal Code in Nicaragua, specifically Article 205, will be examined, as well as the broadening of the Article during the 1992 Assembly Session and the ways in which the expansion may touch the lives of homosexuals and others in Nicaragua. Consideration will be given to several influential traditions and trends in Nicaragua, reflected in the broadening of the penal code. Part III will also examine the adjudication of morality in Nicaragua and how that adjudication led to the failure of the challenge to the broadening of the penal code.

Part IV of this Note will provide some brief reflections on the international arena and will endeavor to present some examples of the various ways that other countries are dealing with the issue of legalizing (or not legalizing) homosexual activity. This section of the Note is intended to present some brief examples of the assorted methods by which members of the international community address the treatment of homosexual activities.

In conclusion, Part V will offer some general observations on the policies in effect in both the United States and Nicaragua. Concerns and questions regarding the future of this issue in each country will be considered. Finally, a brief mention will be made of the ironically similar results.

II. THE EVOLUTION OF THE RIGHT TO PRIVACY IN THE UNITED STATES

A. *The Evolution of the Right to Privacy Relating to Sexual Matters Not Encompassing Homosexual Activity*

Although the Constitution "does not explicitly mention any right of privacy . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[17] This right can be found in the "penumbras of the Bill of Rights, . . . in the Ninth Amendment, . . . or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment."[18]

In *Griswold v. Connecticut*,[19] Griswold appealed his conviction under a statute providing for fines and/or imprisonment of individuals dispensing "any

16. *See Lawrence*, 539 U.S. 558 (2003).
17. Roe v. Wade, 410 U.S. 113, 152 (1973).
18. *Id.*
19. Griswold v. Connecticut, 381 U.S. 479 (1965).

drug, medicinal article or instrument for the purpose of preventing conception."[20] The appellant had advised married individuals in the use of contraceptive devices.[21] The *Griswold* Court stated that the Fourth Amendment "affirms the 'right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.'"[22] The Court further found that the Fifth Amendment "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment."[23]

The *Griswold* Court held that the marital relationship lies "within the zone of privacy created by several fundamental constitutional guarantees."[24] The Court further found that marriage was a "right of privacy older than the Bill of Rights" and responded to the question of whether the Court would "allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives" with the answer that "[t]he very idea is repulsive."[25]

In making this decision, the Court referred to precedent establishing a certain level of liberty within the "private realm of family life[,]"[26] such as was established in *Pierce v. Society of Sisters*[27] and *Meyer v. Nebraska*.[28] Having established this level of privacy in the realm of family life, the Court stated that it was "difficult to imagine what is more private or more intimate than a husband and wife's marital relations."[29]

The Court reminded the parties that it was well established that a state could make a significant encroachment upon personal liberty only when the state could "show[] a subordinating interest which is compelling."[30] The *Griswold* Court refused to accept the State's argument that the statute would help "prevent the indulgence by some in . . . extra-marital relations."[31] Having declared the statute to be an unacceptable way for the State to express its interest in safeguarding fidelity and having determined that the statute infringed upon the privacy of the marital relationship, the statute was found unconstitutional and in violation of the Fourth Amendment.[32]

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20. CONN. GEN. STAT. § 53-32 (1958).
21. *Griswold*, 381 U.S. at 480.
22. *Id.* at 484 (citing U.S. CONST. amend. IV).
23. *Id.* at 480.
24. *Id.* at 485.
25. *Id.* at 485-86.
26. *Id.* at 495 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
27. 268 U.S. 510 (1925). The Court found an Oregon Act forbidding parents to send their children to private schools to "unreasonably [interfere] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.
28. 262 U.S. 390 (1923). The Court found that the right "to marry, establish a home and bring up children" was guaranteed under the Fourteenth Amendment. *Id.* at 399.
29. *Griswold*, 381 U.S. at 495.
30. *Id.* at 497 (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)).
31. *Id.* at 498.
32. *Id.* at 485-86.

The Court's decision in *Griswold* helped pave the way for acknowledgment of a sphere of privacy surrounding sexual matters. While *Griswold* only applied to the use of contraceptive devices by married couples, less than ten years later the Court enlarged that sphere of privacy and the conception of the right to privacy.[33]

Eisenstadt v. Baird expanded the right to use contraceptive devices to unmarried people.[34] The appellant was convicted of providing vaginal foam to an unmarried woman at the end of a lecture.[35] The distribution of the contraceptive foam was in violation of Massachusetts law[36], which forbade the distribution of contraceptive devices to anyone not acting in accordance with the terms of Massachusetts General Law.[37]

The *Eisenstadt* Court found that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[38] The Court further agreed with the

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33. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

34. *Id.*

35. *Id.* at 440.

36. MASS. GEN. LAWS ANN. ch. 272 § 21 (West 1966) provided in full:
Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of no less than one hundred not more than one thousand dollars.

37. MASS GEN. LAW ANN. ch. 272 § 21(a) (1966) provided in full:
A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device.

38. *Eisenstadt*, 405 U.S. at 453.

appellate court's assessment that such a legislative plan "conflicts with fundamental human rights." [39]

Like the *Griswold* Court, the *Eisenstadt* Court considered whether or not the State had the requisite compelling interest to allow intervention in such private matters.[40] The Court noted that the "legislative purposes that the statute is meant to serve are not altogether clear."[41] However, the Court looked at previous cases and determined that the State of Massachusetts intended to prevent the distribution of contraceptive devices that might be dangerous as well as "protect morals through 'regulating the private sexual lives of single persons.'"[42] The Court determined that the statute's purpose could not be reasonably regarded as the deterrence of premarital sex.[43] Neither could the statute be reasonably regarded as a health measure.[44]

Eisenstadt further expanded the sphere of privacy in sexual relations by acknowledging that not only married individuals, but also unmarried individuals, had a right to privacy in their sexual relations.[45] *Roe v. Wade* expanded the right to privacy even further with its decision legalizing abortion in 1973.[46]

The "principle thrust" of the attack on the statute preventing legal access to an abortion was appellant's contention that the statute violated "the concept of personal 'liberty' embodied in the Fourteenth Amendment[] . . . in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras . . . ."[47] The Court determined that the statute, which made no exception for incidents where the mother's life was at stake, swept "too broadly" and could not "survive the constitutional attack . . . upon it . . . ."[48]

Who is entitled to privacy in their sexual relations was further expanded in *Carey v. Population Services Int'l.*[49] This case challenged the constitutionality of a New York law prohibiting, in part, the sale of contraceptives to minors.[50] In deciding *Carey*, the Court reiterated that "[a]lthough '[t]he Constitution does not explicitly mention any right of

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39. *Id.* at 453.
40. *Id.* at 448.
41. *Id.* at 442.
42. *Id.* (quoting Sturgis v Attorney General, 260 N.E.2d 687, 690 (1970)).
43. *Id.* at 448.
44. *Id.* at 452.
45. *Id.* at 454.
46. Roe v. Wade, 410 U.S. 113, 164-65 (1973).
47. *Id.* at 129.
48. *Id.* at 164.
49. Carey v. Population Serv. Int'l, Inc., 431 U.S. 678 (1977).
50. N.Y. EDUC. LAW § 6811(8) (1972), makes it a class A misdemeanor for:

> Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited.

privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.'"[51] The Court then recounted the numerous previous decisions giving individuals the "interest in independence in making certain kinds of important decisions,"[52] including "marriage, . . . procreation, . . . contraception, . . . [and] family relationships."[53] Finally, the Court held that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."[54]

Carey demonstrated the Court's increased willingness to expand the sphere of privacy found around the sexual relations of individuals and further restricted attempts of the State to "legislate morality." By acknowledging minors' rights to privacy in sexual matters, the Court created the impression that the right to privacy in sexual matters was for everyone, until its decision in *Bowers v. Hardwick*.[55]

B. Drawing the Line: The Bowers v. Hardwick Decision

After the *Griswold*, *Eisenstadt*, *Roe*, and *Carey* decisions, the Court seemed to have successfully "delinked" the constitutional protection of privacy in sexual matters from procreation.[56] The Court's previous decisions created a sliding scale of protection for various sexual activities.[57] By the time of the *Bowers* decision, the Court had granted its protection to "nonprocreative contraceptive marital intercourse; nonprocreative contraceptive nonmarital intercourse; abortion; and non-nuclear family living arrangements."[58] The Court had refused to protect incest, commercial sex, intergenerational sex and forcible sex.[59]

In reviewing this laundry list of sexual rights, it would seem that homosexual activity would fall closer to the protected categories of non-nuclear family living arrangements and non-procreative, non-marital intercourse than to commercial sex or forcible sex. However, *Bowers* dispelled any illusion held

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51. *Carey*, 431 U.S. at 684 (quoting Roe v. Wade, 410 U.S. 113, 152 (1973)).

52. *Id.* at 684 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).

53. *Id.* at 685.

54. *Id.* at 693.

55. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that homosexuals had no constitutional right to practice sodomy); *see also infra* Part II.B.

56. William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 638 (1999).

57. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that married heterosexuals had a constitutional right to the use of contraceptive devices); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that unmarried heterosexuals had a constitutional right to use contraceptive devices); Roe v. Wade, 410 U.S. 113 (1973) (holding that a woman has a constitutional right to terminate a pregnancy through abortion); *Carey*, 431 U.S. 678 (holding that minors have a constitutional right to access contraceptive devices).

58. Eskridge, *supra* note 56, at 640.

59. *Id.* at 640-41.

by the gay community in the United States that they too were moving toward a greater equality.[60] *Bowers* made it very clear that the Court had finally found a clear line to delineate between "acceptable" and "unacceptable" sexual activities, and that homosexual activity would not fall into a protected sphere of privacy.[61] In rendering the decision in *Bowers*, Justice White referred to Hardwick's fundamental rights claim as "at best, facetious"[62] and found that there was a basis in a "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[63]

In *Bowers*, "Bowers . . . and . . . Hardwick . . . were forever joined as a couple" when Hardwick challenged the constitutionality of Georgia's application of its criminal sodomy law to consensual oral sex between two adult men.[64] Hardwick was charged with violating the Georgia statute[65] criminalizing sodomy by engaging in what the Court referred to as "that activity" in his own bedroom.[66] Hardwick sued in federal court, challenging the constitutionality of the statute.[67] Hardwick "asserted that he was a practicing homosexual" and that the statute, "as administered by the defendants, placed him in imminent danger of arrest, and that the statute . . . violate[d] the Federal Constitution."[68]

The court of appeals reversed the district court and held that the statute "violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment."[69] The Supreme Court reversed the court of appeals' decision.[70]

The Court narrowed the issue in *Bowers* to the question of whether the Constitution created a "fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[71] If one merely examined how the Court framed the issue, it would be entirely possible, without

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60. *See Bowers*, 478 U.S. 186 (1986).
61. *See generally id.*
62. *Id.* at 194.
63. *Id.* at 196.
64. Eskridge, *supra* note 56, at 632.
65. GA. CODE ANN. § 16-6-2 (1984) provided in pertinent part:

> A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . .

A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 [sic] years . . . .
This was held to be unconstitutional in 1998 by *Powell v. State*, 510 S.E.2d (Ga. 1998).
66. *Bowers*, 478 U.S. at 187-88.
67. *Id.* at 188.
68. *Id.*
69. *Id.* at 189.
70. *Id.*
71. *Id.* at 190.

reading the remainder of the opinion, to accurately imagine the Court's final ruling in this matter.[72]

The Court immediately discarded the idea that any of the cases establishing an area of privacy in sexual matters were related to this matter.[73] The Court stated there was "[n]o connection between family, marriage, or procreation . . . and homosexual activity . . . ."[74] The Court went on to say that "any claim that these cases . . . stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[75] In making its decision, the Court relied heavily upon the idea that there are "ancient roots" to proscriptions against homosexual conduct.[76] The Court then proceeded through a heavily biased, and arguably revisionist, history of the United States' laws against homosexual conduct.[77]

The Court disposed of the respondent's claim that consensual homosexual activity, even if not condoned by law, should not be prosecuted when it occurred in the privacy of one's home with the assertion that "[v]ictimless crimes . . . do not escape the law where they are committed at home."[78] The Court then proceeded to compare this consensual sexual activity to such "victimless crimes" as the use of illegal drugs.[79] In an astounding leap, the Court also compared consensual homosexual activity between adults to other reviled and criminal sexual acts committed in the home such as incest.[80]

Finally, in determining whether or not there was a rational basis for such a law in Georgia, the Court returned to its perch on the moral high ground and proselytized that the law was based upon the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[81]

C. *Legalized Discrimination: State Statutes Criminalizing Consensual Homosexual Activity*

After the *Bowers* decision, three states made consensual sodomy a crime only for same-sex partners, adding their numbers to the seven states with such laws already on their books.[82] Montana's statute was instituted in 1973, prior to

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72. Eskridge, *supra* note 56, at 683. "There are some ways of framing the question that are less neutral than others, however. The exemplar of non-neutrality is the way Justice White set the originalist inquiry . . . ." *Id.*

73. *Bowers*, 478 U.S. at 190.

74. *Id.* at 191.

75. *Id.*

76. *Id.* at 192.

77. *See generally* Eskridge, *supra* note 56.

78. *Bowers*, 478 U.S. at 195.

79. *Id.*

80. *Id.* at 196.

81. *Id.*

82. Eskridge, *supra* note 56, at 633. Prior to the *Bowers v. Hardwick* decision, seven states had statutes making homosexual activity a crime. Those seven states were Arkansas

the *Bowers* decision, as part of a revision of criminal law.[83] Prior to the revision, the statute had proscribed "crimes against nature" with persons or animals, rather than specifying activity between individuals of the same sex.[84] The revised statute, under Section 45-5-505(1), provided that a "person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct."[85] The term "deviate sexual relations" is defined as "sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal."[86]

Kentucky instituted its statute barring homosexual conduct in 1974. this statute, Section 510.100, prohibited "deviate sexual intercourse with another person of the same sex" and specified that the "consent of the other person shall not be a defense."[87]

Arkansas' statute prohibiting sodomy specifically between persons of the same sex was instituted in 1977 under Section 5-14-122 and stated as follows:

> (a) A person commits sodomy if such person performs any act of sexual gratification involving:
>
> (1) The penetration, however slight, of the anus or mouth of an animal or a person by the penis of a person of the same sex or an animal; or

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(1977), Kansas (1969), Kentucky (1974), Missouri (1977), Montana (1973), Nevada (1977), and Texas (1973). The three states that instituted new statutes after the decision were Okalahoma (judicial decision, 1986), Tennessee (1989), and Maryland (judicial decision, 1990). Courts in Kentucky, Montana, Tennessee, and Arkansas later struck down the laws because the statutes were determined to violate privacy rights granted by the States' constitutions. For the purposes of this Note, the decisions in Tennessee, Arkansas, Kentucky, and Montana will be discussed. A subsequent repeal in Nevada will not be discussed. The prohibitive statute in Texas was struck in federal court and will be discussed separately from the state court rulings in Arkansas, Montana, Tennessee, and Kentucky. *Id.*

83. Gryczan v. State, 942 P.2d 112, 116 (Mont. 1997).

84. *Id.*

85. MONT. CODE ANN. § 45-5-505(1) (1973).

86. "Sexual contact" is defined by MONT. CODE ANN. § 45-2-101(65) (1973) as: "[A]ny touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party." Sexual intercourse" is defined by MONT. CODE ANN. § 45-2-101(66) as:

> [P]enetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by any body member of another person, or penetration of the vulva or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient.

Id.

87. KY. REV. STAT. ANN. § 510.100 (Michie 1974).

(2) The penetration, however slight, of the vagina or anus of an animal or a person by any body member of a person of the same sex or an animal.

(b) Sodomy is a Class A misdemeanor.[88]

Finally, in 1989, Tennessee criminalized homosexual practices in its pointedly named Homosexual Practices Act found in the Tennessee Code at Section 39-13-510.[89] The Act made it a Class C misdemeanor for a person to engage in consensual penetration, as defined by Section 39-13-501(7), with a person of the same sex.[90] The statute section in question defined sexual penetration as:

> [S]exual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's or any other person's body, but emission of semen is not required.[91]

The common thread among all of these statutes is, of course, not just the specific prohibition of sodomy, as might have been common in the earlier half of the century, but sodomy as practiced between two persons *of the same sex.*[92]

D. *A Brief Overview of General Bias Against Homosexuality in the United States: Its Presence in the Courts and in the Population*

Between the time of the United States' independence and 1830, all thirteen of the original states adopted laws making sodomy a serious offense.[93] After 1900, sodomy, which had traditionally been considered "a crime only men could commit," began to be prosecuted as a crime when committed by women as well as men.[94] After World War I there was a distinct shift in the understanding of sodomy explicitly associating its performance with homosexuality.[95] Additionally, both sodomy and homosexuality began to be

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88. ARK. CODE ANN. § 5-14-122 (Michie 1977).

89. TENN. CODE ANN. § 39-13-510 (1989).

90. *Id.*

91. TENN. CODE ANN. § 39-13-501(7) (1989).

92. MONT. CODE ANN. § 45-5-505(1) (1973) defines "deviant sexual conduct" as "sexual contact or sexual intercourse between two persons of the same sex . . . ." KY. REV. STAT. § 510.100 (Michie 1974) prohibits "deviate sexual intercourse with another person of the same sex." ARK. CODE ANN. § 5-14-122 (Michie 1977) prohibits "(1) penetration . . . by the penis of a person of the same sex . . . (2) penetration . . . by the penis of a person of the same sex by any body member of a person of the same sex." TENN. CODE ANN. § 39-13-510 (1989) was entitled the Homosexual Practices Act.

93. Eskridge, *supra* note 56, at 645.

94. *Id.* at 655.

95. *Id.* at 659.

associated with child molestation and "sexual psychopathy."[96] The 1930s saw a "boom" in the arrests of homosexuals for public activities such as "kissing, groping, fondling and even hand holding in public or semipublic places."[97]

Sodomy law enforcement became even more prevalent with the advent of the concept of homosexual men as "'sexual psychopath[s]' – the aggressive male who could not control his impulses and threatened children."[98] In response to this new vision of the homosexual male, many states instituted "sexual psychopath" laws permitting states to "incarcerate offenders for indeterminate periods of time."[99] These laws likely did indeed punish some "sexual psychopaths," but also incarcerated homosexual men indulging in consensual homosexual activities with other adult men.[100]

During the McCarthy Era (approximately 1947-1957) there were "unprecedented numbers of arrests for consensual oral sex between adults, because local vice squads invested substantial resources in detection of private and semipublic activities."[101] In 1949, New York City police arrested 112 men for committing the crime of sodomy and 931 individuals for violating disorderly conduct laws governing "degenerate" acts.[102]

The social arguments against the homosexual community are legion. Some of the most common arguments are: "homosexuality is unnatural;" it "attacks the family;" the "Bible condemns homosexuality;" and "homosexuals recruit young people."[103] Reflections of these arguments can be seen in public opinion polls taken over the last thirty years. For example, in 1973, between 35 and 45% of the population expressed a distinct bias against homosexuals, including 35% that believed homosexuals should not be "allowed to speak."[104] A telephone survey of a random sampling of U.S. adults revealed that 64% of those polled believed homosexuality to be "just plain wrong" and 50% expressed that "male homosexuals are disgusting."[105]

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96. *Id.*
97. *Id.* at 660.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 661.
102. *Id.* at 660.
103. ReligiousTolerance.org, *About Homophobia: Anti-gay laws, studies of homophobia;[sic] public opinion ... [sic], at* http://www.religioustolerance.org/hom_fuel2.htm (n.d.) (last visited Oct. 21, 2004) [hereinafter *About Homophobia*].
104. National Opinion Research Center Data, *cited in* Gregory Hereck, *Sexual Prejudice,* Sexual Orientation: Science, Education, and Policy, *at* http://psychology.ucdavis.edu/rainbow/html/gss1.html (n.d.) (last visited Oct. 21, 2004). In this survey, forty-five percent of those polled believed that homosexuals should not be allowed to teach in a college or university and forty-five percent believed that books about homosexuality should be removed from libraries. *Id.*
105. *About Homophobia, supra* note 103. Unfortunately, this poll does not tell when it was taken. Other information available at this website indicates that it may have been taken in 1994. *See id.*

The homophobic feelings in the United States are reflected in every aspect of life in the United States. For example, in 1993, 85% of teachers opposed integrating gay, lesbian and bisexual themes into their curricula; and in San Francisco, California, in 1994, a poll revealed that "18% would fire, 27% would refuse to hire, and 26% would refuse to promote a person they perceived to be lesbian, gay, or bisexual."[106]

States continue to perpetuate discrimination against gay and lesbian individuals. A gay columnist noted in her online column that, in Florida, "[y]ou can do 60 days in . . . jail and be fined $500 for breaking the legal prohibition on cunnilingus, fellatio or anal coitus, pardon my Latin."[107]

Finally, the FBI reported in its annual statistics on hate crimes that, in the year 2002, 16.6% (1,244) of the victims were targeted "because of their actual or perceived sexual orientation."[108] "Sexual orientation represents the third largest hate-motivation tracked by the FBI and [homosexual] victims represent the third largest group of victims . . . ."[109]

Despite these statistics, bias against the homosexual community is actually decreasing in the United States. While 16.6% of hate-crime victims in the year 2002 were members of the homosexual community or perceived to be members of the homosexual community, this is an 11% decrease from the year 2001.[110] In contrast to the statistics of the 1973 poll mentioned above, in the year 2000, 70 to 90% of the U.S. population had more positive views of homosexuality.[111]

Perhaps most encouragingly, even the definition of homophobia in the United States is changing.[112] When heterosexual psychologist George Weinberg coined the term "homophobia" in the late 1960s, it was used "to label heterosexuals' dread of being in close quarters with homosexuals as well as homosexuals' self loathing."[113] In 1992, the *American Heritage Dictionary*

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106. National Organization for Women, *Come Out Against Homophobia! Did You Know?, at* http://www.now.org/issue/lgbi/stats.html (n.d.) (last visited Oct. 21, 2004).

107. Sally Sheklow, *Funny Old Broads, at* http://www.outsmartmagazine.com/issue/i06-03/o-2-OutLoud.php (n.d.) (on file with the author).

108. Media Release, New York City Gay and Lesbian Anti-Violence Project, FBI Releases Annual Statistics on Hate Crimes Report's Deficiencies Underscore Continuing Need for Improved Federal Hate Crimes Tracking, (Oct. 28, 2003), http://www.avp.org/publications/media/2003-10-28%20NCAVP%20FBI%20UR.htm (last visited Oct. 21, 2004).

109. *Id.*

110. *Id.*

111. National Opinion Research Data, *supra* note 104. The poll showed that 90% of those polled now believe that homosexuals have a "right to speak" and 70% believed that books about homosexuality should not be removed from libraries. *Id.*

112. Gregory Hereck, *Sexual Prejudice,* Sexual Orientation: Science, Education, and Policy, *Definitions: Homophobia, Heterosexism, and Sexual Prejudice, at*http://psychology.ucdavis.edu/rainbow/html/prej_defn.html (n.d.) (last visited Oct. 21, 2004).

113. *Id.*

defined homophobia as "an aversion to gay or homosexual people or their lifestyle or culture" and some definitions of homophobia even define it as an "*irrational* fear of homosexuality."[114]

E. *A River of Change: Overturning State Statutes Criminalizing Homosexual Activity*

The States reflected the population's changing attitude toward homosexuality when they began overturning the statutes criminalizing homosexual activity. The first state to overturn its statute was Kentucky in 1992, followed by Tennessee in 1996, Montana in 1997, and Arkansas in 2002. This culminated in the *Lawrence v. Texas* decision in June, 2003, which not only invalidated the statute in Texas, but, as a case brought in federal court, overturned the precedent set in *Bowers v. Hardwick* in 1986.

In *Commonwealth of Kentucky v. Wasson,* the court ruled that the statute criminalizing homosexual activity in Kentucky was in violation of the state's constitutionally granted rights to privacy.[115] The defendant had been arrested and charged after he allegedly solicited an undercover policeman to engage in deviate sexual intercourse in violation of Section 506.030.[116] The activity would have occurred between consenting adults and with no offer of financial gain for participating in the activity.[117] Wasson moved to dismiss the charges on the grounds that a statute, which criminalizes sexual behavior between consenting adults even if the act takes place in the privacy of a home, violates the Kentucky Constitution as "(1) an invasion of a constitutionally protected right of privacy; and (2) invidious discrimination in violation of constitutionally protected rights to equal treatment."[118]

The district court held that the statute violated Wasson's right to privacy and dismissed the charge.[119] The appellate court affirmed and added that the statute "infringed upon equal protection guarantees found in the Kentucky Constitution."[120] The Kentucky Supreme Court recognized that the decision had been made by the lower courts solely based upon state constitutional issues and, therefore, confined its decision to the same.[121]

The Commonwealth's position was based purely upon the argument that homosexual activity is "immoral," arguing that "the majority . . . has the right to criminalize sexual activity it deems immoral."[122] The Commonwealth went on

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114. *Id.*

115. KY. STAT. ANN. §510.100 (Michie 1974). This statute prohibits "deviate sexual intercourse with another person of the same sex." *Id.*

116. Commonwealth of Kentucky v. Wasson, 842 S.W.2d 487, 488 (Ky. 1992).

117. *Id.* at 489.

118. *Id.* at 488.

119. *Id.*

120. *Id.* at 489.

121. *Id.*

122. *Id.* at 490.

to say that the State may criminalize "immoral" behavior that is not harmful in and of itself "where there is a Biblical and historical tradition supporting it."[123]

The Court reminded the Commonwealth that it is the job of the court to interpret the state constitution separately from the federal constitution and not to "march in lock step with the United States Supreme Court."[124] The Court looked to the State's Bill of Rights and specifically cited Section 1, granting the citizens of Kentucky "[t]he right of enjoying and defending their lives and liberties" and "[t]he right of seeking and pursuing their safety and happiness."[125] The court looked also to Section 2 of the State's Bill of Rights which states "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."[126]

The court looked to *Commonwealth v. Campbell* and concluded that the Kentucky Bill of Rights defined a right to privacy.[127] The Court pointed out that the theory of the moral majority had changed on previous occasions. It looked to *Loving v. Virginia* as an example of such an evolution.[128] The court further noted that two states had previously held such statutes unconstitutional for similar reasons.[129] Therefore, this court, in making the decision that the statute unconstitutionally restricts the state's citizens' right to privacy "rather than being the leading edge of change, [was] but a part of the moving stream."[130]

The State of Tennessee stepped into that moving stream in 1996 when its statute prohibiting sodomy between consenting adults of the same sex was found unconstitutional in *Campbell v. Sundquist*.[131] The Plaintiffs in this matter filed a petition for declaratory and injunctive relief alleging that the statute, the Homosexual Practices Act violated their right to privacy and their right to equal protection under Article 1 of the state constitution.[132] Article 1, Section 8, of the Tennessee Constitution states:

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123. *Id.*

124. *Id.* at 492.

125. *Id.* at 494.

126. *Id.*

127. *Id.* at 495 (quoting Campbell v. Commonwealth 117 S.W. 383, 386 (Ky. 1909)). "Let a man therefore be everso abandoned in his principles, . . . provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws." *Id.*

128. *Id.* at 497 (quoting Loving v. Virginia, 388 U.S. 1, 87 (1967)). "[The Court] recognized that a contemporary, enlightened interpretation of the liberty interest involved in the sexual act made its punishment constitutionally impermissible." *Id. Loving* removed the criminalization of miscegenation (marriage or intercourse between the races), which, the court points out here, had "ancient roots" similar to those "ancient roots" referred to in *Bowers*. *Id.*

129. *Id.* at 498 (citing People v. Onofre, 51 N.Y.2d 947 (N.Y. 1980) and Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980)).

130. *Id.*.

131. Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996).

132. *Id.* at 253.

> No man to be disturbed but by law. That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

The Plaintiffs asserted that since this provision has always been "substantially identical" with the Fifth and Fourteenth Amendments of the U.S. Constitution, the right to privacy in Tennessee should only protect those rights protected by the federal right to privacy – marriage, procreation, and child rearing.[133]

The court reminded the parties it was not bound by *Bowers*.[134] The court further stated that while the drafters of Tennessee's constitution could not have envisioned every scenario that would arise over the centuries, it was certain that they "foresaw the need to protect individuals from unwarranted governmental intrusion . . . involving intimate questions of personal . . . concern."[135]

The court looked briefly at the State's argument for a compelling state interest in prohibiting homosexual sodomy. The State alleged five state interests that were advanced by the Homosexual Practices Act, including that (1)the Act was intended to discourage activities that did not lead to procreation; (2) the choice of a "socially stigmatized" lifestyle led to drug and alcohol abuse and suicide; (3) the Act discouraged homosexual relationships because they are "short lived, shallow and initiated for the purpose of sexual gratification;" (4) "the Act prevents the spread of infectious disease;" and finally, (5) the Act promoted the "moral values" of the citizens of Tennessee.[136]

The court quickly dispensed with the State's allegedly "compelling interests" by reminding the State that citizens had the right to procreate or not, at their discretion.[137] The court found that the "State's attempt to rescue homosexuals from a socially unpopular lifestyle does not provide a compelling reason . . . for infringement of the fundamental right of adults to engage in private, noncommercial, consensual sex."[138] The Court found no evidence that the Homosexual Practices Act discourages drug and alcohol abuse and suicide and no evidence that homosexual relationships are "short lived" and "weaken the 'fabric' of the community."[139] The court held that the statute was "actually counterproductive to public health goals" since it caused people to fear treatment for infectious disease.[140] Finally, the court found that:

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133. *Id.* at 259.
134. *Id.*
135. *Id.* at 260 (quoting Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992)).
136. *Id.* at 262.
137. *Id.* at 263.
138. *Id.*
139. *Id.*
140. *Id.* at 264.

> Even if we assume that the Homosexual Practices Act represents a moral choice of the people of this State, we are unconvinced that the advancement of this moral choice is so compelling as to justify the regulation of private noncommercial, sexual choices between consenting adults simply because those adults happen to be of the same gender.[141]

In short, the Tennessee Court of Appeals entered the stream of change by holding:

> [A]n adult's right to engage in consensual and noncommercial sexual activities in the privacy of that adult's home is a matter of intimate, personal concern which is at the heart of Tennessee's protection of the right to privacy and that this right should not be diminished or afforded less constitutional protection when the adults engaging in that private activity are of the same gender.[142]

Montana instituted its ban on sodomy between members of the same sex in 1973.[143] In 1997, in *Gryczan v. State*, Montana entered what can no longer be described as a stream, but rather a river of states decriminalizing homosexual activity.[144] Citizens of the State of Montana filed a declaratory judgment action challenging the constitutionality of the statute under the Montana Constitution and the Fourteenth Amendment to the U.S. Constitution.[145]

The Plaintiffs contended that the statute violated Article II, Section 10, of the Montana Constitution, which provides that "the right of individual privacy is essential to the well being of a free society and shall not be infringed without the showing of a compelling state interest."[146] As in other cases of this nature, the State contended that the U.S. Supreme Court in *Bowers* had already resolved the issue, and that there was no right to privacy in existence for homosexual activity.[147]

The Montana Supreme Court, like the courts in both Kentucky and Tennessee, reminded the State that regardless of whether or not *Bowers* was decided correctly, the Montana courts have "long held that Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution."[148] The Montana Supreme Court agreed with the

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141. *Id.* at 265.
142. *Id.* at 262.
143. MONT. CODE ANN. § 45-5-505 (1973).
144. Gryczan v. State, 942 P.2d 112 (Mont. 1997).
145. *Id.* at 115.
146. *Id.* at 121.
147. *Id.*
148. *Id.*

district court's finding in the case that "while many Montanans do not approve of homosexual activity, that is not to say that society is unwilling to recognize as reasonable an expectation of privacy as to consensual, adult, private same-gender sexual conduct."[149]

Regarding the State's allegedly "compelling interest" in protecting the public morality of the State of Montana, the court looked to *Campbell v. Sundquist* in which the Tennessee Court of Appeals stated:

> With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others . . . . Indeed, what is considered to be "moral" changes with the times and is dependent upon societal background. Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals.[150]

The Montana Court held that the State had no compelling interest for "such an intrusion" into the private lives of its citizens.[151]

The Montana court, in line with previous decisions in Kentucky and Tennessee, found that the Montana Constitution created a right to privacy which did not allow the State's intrusion into the private sexual lives of its homosexual citizens and stated that "there are certain rights so fundamental that they will not be denied to a minority no matter how despised by society. In Montana, the right of privacy is such a right."[152]

In 2002, the State of Arkansas, with a statute criminalizing homosexual activity on its books since 1977, waded into the river of change with its landmark case *Jegley v. Picado*.[153] Citizens of Arkansas brought a suit for declaratory judgment and an injunction against the enforcement of Arkansas Code Section 5-14-122, which criminalized sodomy between individuals of the same sex.[154] Plaintiffs alleged that they were harmed as the statute criminalized their intimate conduct and violated their privacy.[155] The citizens contended that the Arkansas Constitution provided an inherent right to privacy, the existence of which made the statute in question unenforceable.[156] Again, the State argued that the U.S. Constitution did not include a fundamental right to commit

149. *Id.* at 122.

150. *Id.* at 125 (quoting Campbell v. Sundquist, 926 S.W.2d 250, 265-66 (Tenn. Ct. App. 1996) (quoting Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47, 50 (Pa. 1980))).

151. *Id.* at 126.

152. *Id.* at 125.

153. Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002).

154. *Id.* at 334.

155. *Id.* at 335.

156. *Id.* at 344.

homosexual sodomy and that the need to protect the morality of the state provided a rational basis for the sodomy statute in question.[157]

The Arkansas Court acknowledged that there was no federally protected right to commit homosexual sodomy, but, as other states had before it, determined that it was possible that the Arkansas Constitution contained a right to privacy "more protective than the federal right."[158] The court noted the similarity between the Arkansas and Kentucky Constitutions regarding the right to privacy.[159]

In examining the state constitution, the court looked first to Article 2, Section 29, which provides that the rights granted by the constitution "must not be construed . . . to deny . . . other rights retained by the people."[160] Having made this determination, the court advanced to an exploration of Article 2, Section 2, which provided in pertinent part that "all men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; . . . and of pursuing their own happiness."[161] The court also looked to Article 2, Section 15, of the Arkansas Constitution, which guaranteed citizens the right "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."[162]

The court further noted that Article 2, Section 18, of the Arkansas Constitution required that privileges or immunities not be granted to any citizen or class of citizens "which upon the same terms shall not equally belong to all citizens."[163] After considering the constitution along with other statutes, rules, and case law, the Arkansas Supreme Court concluded that the State had a "rich and compelling tradition of protecting individual privacy and that a fundamental right to privacy is implicit in the Arkansas Constitution."[164]

The court also considered whether the State's interest in protecting public morality was sufficiently compelling to allow the statute to stand and concluded that it was not.[165] The court ruled that the State had not shown that the legislation bore a "real or substantial relationship to the protection of public health, safety and welfare" to justify "the prohibition of consensual, private intimate behavior between persons of the same sex."[166]

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157. *Id.* at 335.
158. *Id.* at 346.
159. *Id.* (citing Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992)).
160. *Id.* at 346-47.
161. *Id.* at 347.
162. *Id.*
163. *Id.*
164. *Id.* at 349-50.
165. *Id.* at 353.
166. *Id.*

In conclusion, the Arkansas Court held that:

> The fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults. Because [the statute] burdens certain sexual conduct between members of the same sex, we find that it infringes upon the fundamental right to privacy guaranteed to the citizens of Arkansas.[167]

F. *The Crest of the River: Overturning Bowers in the Lawrence Decision.*

While the states of the Union were chipping away at the criminalization of homosexual activity, the U.S. Supreme Court's decision in *Bowers* remained in place. *Bowers v. Hardwick*, complete with its commentary identifying homosexual activity as "an offense of 'deeper malignity' than rape," stood in the river like a steadfast boulder while change flowed around it.[168] However, on June 26, 2003, the boulder of *Bowers* crumbled, and the federal courts joined the river with the Supreme Court's decision in *Lawrence v. Texas*.[169]

In *Lawrence*, Houston, Texas, police officers responded to a reported weapons disturbance at the private residence of petitioner, John Lawrence, where the officers observed Lawrence and another man engaged in a prohibited sexual act.[170] The violation occurred under Texas Penal Code Section 21.06(a), which makes it a criminal offense to "[engage] in deviate sexual intercourse with another individual of the same sex."[171] Lawrence and his partner, Tyron Garner, were arrested, held overnight in custody, and charged and convicted.[172]

Lawrence and Garner alleged a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, and a similar provision in the Texas Constitution.[173] Both contentions were rejected and the gentlemen were fined and assessed court costs.[174] The petitioners appealed and, in a divided en banc opinion, the court of appeals affirmed the convictions, citing *Bowers* as controlling.[175]

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167. *Id.* at 350.

168. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, J., concurring) (citing 4 W. BLACKSTONE COMMENTARIES 215).

169. Lawrence v. Texas, 539 U.S. 558 (2003).

170. *Id.* at 563.

171. The statute defined "[d]eviate sexual intercourse" as follows:

(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(B) the penetration of the genitals or the anus of another person with an object.

TEX. PENAL CODE § 21.06(a) (Vernon 2003).

172. *Lawrence*, 538 U.S. at 563.

173. *Id.*

174. *Id.*

175. *Id.*

The Supreme Court granted certiorari to consider whether the statute violated the Equal Protection Clause, the right to privacy protected in the Due Process Clause, and, finally, whether it was time to overturn *Bowers*.[176]

The Court disagreed with the way the *Bowers* Court had framed the issue. The *Bowers* Court identified the issue as being whether the U.S. Constitution granted homosexuals a fundamental right to commit sodomy and, therefore, invalidated the laws of many states making such conduct illegal as they had for "a very long time."[177] The *Lawrence* Court stated that the *Bowers* Court failed to "appreciate the extent of the liberty at stake" and that to say the issue in *Bowers* was merely the right to engage in particular sexual conduct "demean[ed] the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[178]

The *Lawrence* Court went further and said that the statute touches upon the "most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[179] This should, the Court ruled, "counsel against attempts by the State, or a court, to define the meaning of the relationship . . . absent injury to a person or abuse of an institution the law protects."[180] "The liberty protected by the Constitution allows homosexual persons the right to make this choice."[181]

The *Lawrence* Court then addressed the contention by the *Bowers* Court that the proscription against homosexual conduct has "ancient roots."[182] The Court essentially held that the historical perspective adopted in *Bowers* was incorrect and that there "is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[183] Rather, early proscriptions against sodomy were directed against both same-sex and heterosexual couples in an attempt to limit non-procreative sexual activities in a more general sense.[184] The Court further noted that it was not possible for legal proscriptions against sodomy as it applies to homosexuals to have "ancient roots" as the "concept of the homosexual as a distinct category of person did not emerge until the late 19th century."[185] In short, the Court concluded that the historical premise relied upon in *Bowers* was "not without doubt and, at the very least, are overstated."[186]

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176. *Id.* at 574.
177. *Bowers*, 478 U.S. at 190.
178. *Lawrence*, 539 U.S. at 567.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Bowers*, 478 U.S. at 192.
183. *Lawrence*, 539 U.S. at 568.
184. *Id.*
185. *Id.*
186. *Id.* at 571.

Lawrence also addressed the *Bowers* argument that homosexuality had historically been condemned not only in the legal arena, but also by "Judeo-Christian moral and ethical standards."[187] The Court acknowledged the importance that such ethics and ideals hold in the lives of many, but determined that the history of this "moral condemnation" is open to a variety of interpretations and that, in any event, "the laws and traditions in the past half century are of the most relevance here."[188] The Court determined that the issue before the Court was "whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[189]

Lawrence looked at *Bowers* as an anomaly during an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[190] The Court was surprised that the *Bowers* Court did not recognize that emerging trend, as it "should have been apparent."[191]

In making its decision, the Court looked to two cases decided after *Bowers*: *Planned Parenthood of Southeastern Pa. v. Casey*[192] and *Romer v. Evans*.[193] The Court reiterated the *Casey* decision granting constitutional protection to personal decisions, noting:[194]

> These matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of

187. *Id.*

188. *Id.* at 571-72.

189. *Id.* at 571 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

190. *Id.* at 572.

191. *Id.*

192. *Id.* at 571 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)). "[C]onstitutional protection [of] personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id.*

193. *Lawrence*, 539 U.S. at 574 (citing Romer v. Evans, 517 U.S. 620 (1996)). In *Romer*, the "Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause." *Id.* The legislation named homosexuals, lesbians and bisexuals as a class and "deprived them of protection under state antidiscrimination laws." *Id.* (quoting *Romer*, 517 U.S. at 624).

194. *Id.*

> personhood were they formed under compulsion of the State.[195]

In light of the *Casey* decision, the *Lawrence* Court determined that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[196]

In considering the national trend in the legal system toward the decriminalization of homosexual activity, the Court also turned to cases discussed earlier in this Note, where states found statutes criminalizing homosexual activity to violate their state constitutions.[197] Moreover, the Court found that there was no state interest sufficient to "justify [the statute's] intrusion into the personal and private life of the individual," nor was there sufficient individual or societal reliance on *Bowers* that "could counsel against overturning its holding."[198]

The Court concluded its decision by stating:

> [This] case . . . involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. [199]

In short, the Court determined that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[200]

In looking at a recent legal history defining the right to privacy in relation to sexual matters, it is clear that the trend in the past fifty years has been to broaden the penumbra of rights included in the right to privacy.[201] One of the

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195. *Id.* (quoting *Planned Parenthood of Southeastern Pa.*, 505 U.S. at 851).

196. *Id.*

197. *Id.* (citing Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002); Powell v. State, 510 S.E.2d 18 (Ga. 1998), Gryczan v. State, 942 P.2d. 112 (Mont. 1997); Campbell v. Sundquist 926 S.W.2d 250 (Tenn. Ct. App. 1996); and Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992)). (These cases struck statutes criminalizing homosexual activity in, respectively, Arkansas, Georgia, Montana, Tennessee and Kentucky.)

198. *Id.* at 578.

199. *Id.*

200. *Id.*

201. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that married couples had a constitutional right to use contraceptive devices); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that unmarried individuals had a constitutional right to use contraceptive devices); Roe v. Wade, 410 U.S. 113 (1973) (holding that a woman had a constitutional right to

earlier decisions in this area, *Griswold*, prohibited the State from interfering with the reproductive decisions of married, heterosexual couples.[202] This was followed by *Eisenstadt* which granted unmarried individuals the right to make decisions about birth control without interference from the State.[203] *Roe v. Wade* enforced a sphere of privacy encircling reproductive choices when it prohibited the State from interfering in a woman's right to choose to have an abortion.[204] *Carey v. Population Services* made it clear that everyone, regardless of marital status or age, had the right to prevent conception through the use of contraceptives.[205] However, as the heterosexual population was enjoying an expansion of its rights to keep sexual matters private, the homosexual community was experiencing the opposite as states instituted legislation banning homosexuals from performing acts of sexual intimacy solely because those acts took place between people of the same sex.[206]

Bowers solidified the line between the right to privacy in the heterosexual community and the right to privacy in the homosexual community, making it clear that the lesbian and gay community was still considered a separate community with different, and fewer, rights to privacy in their intimate lives. However, the revolution in the right to privacy did arrive at the homosexual community's doorstep as states began failing to actively enforce statutes prohibiting homosexual activity, and then striking the statutes as violating the state, if not the federal, constitution.[207] This culminated in the *Lawrence* decision, granting homosexual citizens the right, for the first time, to have matters of sexual intimacy kept private.[208] For the first time, the gay and lesbian community could engage in sexual intimacy in the privacy of their own homes, and expect it to remain private and free from State interference.[209]

III. THE TREATMENT OF SODOMY AND THE HOMOSEXUAL COMMUNITY IN NICARAGUA

In order to look at the treatment of sodomy in Nicaragua, it is important to understand the differences in the development of the Nicaraguan Constitution and Nicaraguan law as compared to the United States. Nicaragua has a unique combination of circumstances in that modern Nicaragua was without a constitution from the time of the overthrow of the Somoza dictatorship in 1974 until the new legislators took their seats in the National Assembly in 1985[210]

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terminate a pregnancy through abortion); Carey v. Population Services Int'l, Inc., 431 U.S. 678 (1977) (holding that minors had a constitutional right to access contraceptive devices).

202. 381 U.S. 479 (1965).

203. 405 U.S. 438 (1972).

204. 410 U.S. 113 (1973).

205. 431 U.S. 678 (1977).

206. Bowers v. Hardwick, 478 U.S. 186 (1986).

207. *See supra* Part II.E.

208. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

209. *Id.*

210. Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1, 20 (1990). The Sandinista National Liberation

and promulgated a Constitution in 1987.[211] Residents of the United States often forget, or simply do not know, that "more than half the world's written national constitutions have been drafted since 1974."[212] The 1987 Constitution was the ninth constitution in Nicaraguan history.[213]

In contrast to the new constitution in Nicaragua is the Nicaraguan Penal Code. In 1974, the Penal Code was little different from the code originally promulgated in 1879, and strongly reflected the influence of the Napoleonic Code.[214] For example, the 1974 Code still reflected the traditions of the Napoleonic Code by considering married women as people without rights under the law, along with minors, criminals, and the mentally handicapped.[215]

A. Constraining Traditions in Nicaragua: Machismo, the Roman Catholic Church, and Perceptions of the Court System.

Nicaragua is also constrained by three other long-lasting traditions: *machismo*, the influence of the Roman Catholic Church, and perceptions of the Nicaraguan court system. Nicaragua has a long-standing tradition of *machismo*.[216] The late Carlos Nunez, former President of the Nicaraguan National Assembly, described the concept of *machismo* as follows:

> To me, *machismo* is a particular form of manifestation of the oppression by the male of the female that not only carries with it discriminatory attitudes, but since the disappearance of matriarchy and the imposition of patriarchy, has meant reducing the female to the condition of object, with the male acting as head of the family, and thus demanding, ordering , and imposing, without taking into account what I would call the exercise of democracy inside the house and outside of it.[217]

This constant presence of *machismo* in Nicaraguan society might seem to affect only women, but it has a direct effect upon the homosexual community as well.[218] While the terms "homosexual" and "gay" are being used more frequently in Nicaraguan society, the derogatory term, *cochon*, is still often used.[219] The term refers to the "passive" partner in a male homosexual

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Front (FSLN) defeated the Somoza regime in a military battle and forced its leaders and many followers into exile. U. S. Dep't of State, Bureau of Democracy, Human Rights and Labor, Nicaragua – Profile of Asylum Claims and Country Conditions (Mar. 1997).

211. *Id.* at 26.

212. Morgan, *supra* note 210, at 3.

213. Nicaragua - Constitutional Background, AllRefer.com Reference, http://reference.allrefer.com/country-guide-study/nicaragua/nicaragua87.htm (n.d.) (last visited Oct. 21, 2000)).

214. Morgan, *supra* note 2, at 449.

215. *Id.*

216. *Id.* at 440.

217. *Id.* at n.3.

218. *Id.* at 460.

219. *Id.*

relationship.[220] In Nicaragua, as in many Latin American countries, the "passive" male partner is the person most frequently stigmatized while the "perpetrator's" actions are seen as consistent with the "norms of masculinity in a culture of *machismo*."[221]

This culture of *machismo* has contributed to the homophobia that is still rampant in Nicaragua today.[222] In 1992, Luis Sanchez Sancho, the acting President of the National Assembly, stated during an interview that he "would rather have a daughter who is a prostitute than a son who is a *cochon*."[223]

With homophobia so accepted among the highest government officials, it is perhaps not surprising that there are a limited number of Nicaraguans willing to discuss their sexual orientation.[224] When writing an article about the Nicaraguan Constitution in 1995, Martha Morgan noted that "by late 1994, only about a dozen gay and lesbian individuals in Nicaragua were fully *out of the closet* and willing to speak publicly about their sexual orientation."[225]

The government continues to perpetuate a bias against homosexuals in Nicaragua. A gay citizen of Nicaragua, and a member of an LGBT[226] organization, *Puntos de Encuentro*, notes that while such organizations are permitted to function, "the National Assembly has never approved a specific legal status that would allow [them] to exist as such."[227] The same individual noted that the general situation for members of the gay community in Nicaragua is "very difficult, as a daily struggle to convince the family, friends and work or study colleagues that we are equal . . . ."[228]

In Nicaragua, the Roman Catholic Church continues to have a heavy influence in the lives and views of its citizens.[229] The Roman Catholic Church was first established in Nicaragua in 1524.[230] Roman Catholicism remained the official established faith in Nicaragua until 1939.[231] "When Nicaraguans speak of 'the church' they mean the Roman Catholic Church."[232]

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220. *Id.*

221. *Id.* at 469.

222. *Id.*

223. *Id.* at n.96.

224. *See id.* at n.92.

225. *Id.* at n.92.

226. "LGBT" is a standard acronym, which stands for "lesbian, gay, bisexual and transsexual."

227. Politics, Survey regarding LGBTs in Costa Rica and Nicaragua, *at* http://www.dreamwater.com/women/theresles/politics.html (2002) (last visited Sept. 26, 2004) [hereinafter Survey].

228. *Id.*

229. Morgan, *supra* note 210, at 37. Morgan describes Nicaragua as a "heavily Catholic" country. *Id.*

230. Project Nicaragua, *Spirituality, at* http://www.settlement.org/cp/english/nicaragua/spirit.html (n.d.) (last visited Oct. 21, 2004) [hereinafter *Spirituality*].

231. *Global Missions Fellowship, at* http://www.gmfdallas.org/shorttermissions/calendarbycountry.asp?Country=Nicaragua (on file with author).

232. *Id.*

Although the Nicaraguan constitutions since 1939 have included provisions for a secular state and have guaranteed freedom of religion, the Church continues to have a "special status" in Nicaraguan society.[233] Indeed, the Roman Catholic Church took part in drafting the Constitution.[234] "Its leadership, represented by the Nicaraguan Conference of Bishops, issued a pastoral letter following publication of the first constitutional draft in which it stressed its opposition to military conscription and family planning."[235] Bishops of the Church continue to lend their authority to state occasions and "their pronouncements on national issues are closely followed."[236] Representatives of the Church acknowledge its role in politics only in a "broad sense as [it] look[s] for the common well being of the nation."[237] However, some religious leaders hold "important" offices in the Nicaraguan government.[238] The influence of the Church continues to be so strong in Nicaragua that, some say it "constitutes (unofficially) another state power."[239]

During the 1980s, the leaders of the Church were often opposed to governmental policies.[240] In contrast, the 1990s ushered in a time of closer ties between the Nicaraguan government and the Nicaraguan Roman Catholic Church.[241] The present government has close ties to the Vatican and has given its support to the Church.[242] As a result, the Church often plays a variety of roles in Nicaraguan society and government.[243] Overall, "[g]overnments since

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233. *Id.*

234. Andrew Reding, *Nicaragua's New Constitution*, 4 WORLD POL. J. 2 (1987), *available at* http://worldpolicy.org/globalrights/nicaragua/1987-spring-WPJ-Nicaragua.html (last visited Oct. 31, 2004).

235. *Id.*

236. *Global Missions Fellowship, supra* note 231.

237. *Interview with His Excellency Miguel Obando Y Bravo, Cardinal of the Catholic Church in Nicaragua, at* http://www.library.thinkquest.org/17749/lchurchintsr.html (on file with author) [hereinafter *Interview*].

238. *Spirituality, supra* note 230.

239. Survey, *supra* note 227. The individual quoted made this comment specifically about Nicaragua. *Id.*

240. *Spirituality, supra* note 230. The Roman Catholic Church was often opposed to the Sandinista government's social and economic policies. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* For example, the Church was involved in negotiations when commandos held Nicaraguan officials hostage. Later, the Church was also involved in mediations with Sandanistan warriors. *Interview, supra* note 237. Additionally, "a large part of the education systems, in particular the private institutions that serve most upper-and middle-class students, is controlled by Roman Catholic bodies." *Id. See also Global Missions Fellowship, supra* note 231. "There are allegations that state funds have been used to support church-related activities that are purely religious in nature." U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *Nicaragua – International Religious Freedom Report 2002, at* http://www.state.gov/g/drl/rls/irf/202/14052.htm (Oct. 7, 2002) (last visited Oct. 21, 2004). There have also been allegations from other religious bodies that they experience bureaucratic delay in obtaining exoneration from custom duties for donated goods intended for humanitarian aid. *Id.* Religious organizations not tied to the Catholic Church have suggested that the "Catholic Church received preferential treatment in this regard and in practice did not face the

1990 have tended to uphold traditional Roman Catholic values."[244]

"[T]he current official position of most organized religions . . . remains unabashedly heterosexist [and] the historical and current official beliefs, as well as the routine practices, of the Roman Catholic Church continue to be stridently homophobic and sexphobic."[245] "[A]lthough Nicaragua is a secular state, there is still a strong influence of the Catholic Church, which continues imposing in [the Nicaraguan] culture the idea of sin if anyone chooses a non-heterosexual preference."[246] The Roman Catholic Church continues to be a "great influence on the current government and it is a major obstacle for the recognition of LGBT citizens's [sic] rights. Its position is to try to eliminate any formal expression of the reality that we [homosexuals] live in, work in and contribute to the development of Nicaragua."[247] In response to protests against a new provision of the Nicaraguan Penal Code criminalizing sodomy between members of the same sex, the President of the National Assembly stated "[f]or Christians, which the immense majority of we Nicaraguans are, sodomy is contrary to natural law and Divine Law and its propagation in the society merits the biblical punishment that fell on the city of Sodom."[248]

Given the continued hold of both the Roman Catholic Church and the culture of *machismo* in Nicaragua, the Nicaraguan attitude toward homosexuality and homosexual practices is not surprising. In contrast to the United States, which is reducing its legal bias against homosexual activity, Nicaragua is broadening its discrimination against homosexual activity.

The final stumbling block in Nicaraguan society is one that might seem rather odd to a citizen of the United States. Simply stated, the courts are not seen as effective agents of change in Nicaragua.[249] Some of this attitude may relate simply to the nature of the courts in Nicaragua's civil law system.[250] "[C]ivil law systems traditionally [limit] the role of the courts more sharply than the common law systems."[251] A civil law system usually relies on written codes

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same bureaucratic requirements applied to other religious and humanitarian organizations." *Id.* After these allegations were made, Catholic organizations reported that they had difficulties similar to non-Catholic organizations. *Id.* Although the government addressed the problem by publishing additional guidelines in 1999, "the issue remained controversial during the period covered by this report." *Id.*

244. *Global Missions Fellowship, supra* note 231. "For example, the government has made attempts to restrict women's roles in the workplace and to focus on their roles as housewives and mothers." *Id.*

245. Elizabeth M. Iglesias & Francisco Valdes, *Afterword: Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of Latcrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 548 (1998).

246. Survey, *supra* note 227. The individual quoted made this comment specifically about Nicaragua. *Id.*

247. *Id.*

248. Morgan, *supra* note 2, at 468.

249. *Id.* at 481.

250. *Id.* at 482.

251. *Id.*

or statutes "as sources of law to a much greater extent than do common-law systems."[252]

The courts are allowed only to interpret and apply law, not change it and the laws they are charged with enforcing are often "antiquated codes."[253] In fact, Nicaragua has "changed its constitution more frequently than it has changed its codes."[254] Complicating the issue, the "codes, as well as their even older procedural counterparts . . . , contain archaic provisions that flagrantly contradict the guarantees of the new constitution."[255] Even more curious to individuals used to the methods of the United States, the Nicaraguan courts generally apply judicial decisions only to the case at hand, and there is "no binding precedential value even for lower courts."[256]

Nicaragua is not the only Latin American country with such a problem.[257] In Columbia, the citizens often refer to their judiciary branch as "Cindarella-[sic]."[258] However, these problems are noted to be particularly acute in Nicaragua.[259] Rodrigo Reyes Portecarrero, former President of the Nicaraguan Supreme Court, summarized the problem succinctly:

> It would not occur to anyone here to use the legal system as an instrument of power to change things. It would not occur to anyone. Here, they would think of taking to the streets, or of going on strike, or of making a scandal, or of making barricades, or of complaining to the National Assembly, but we Nicaraguans are not accustomed to using the mechanism of law as an instrument to obtain justice . . . . We don't believe in the law. It is a cultural problem of ours.[260]

B. Broadening the Nicaraguan Penal Code and the Role of the Constitution

The 1974 Penal Code addressed the issue of sodomy. Under Article 205, the Penal Code provided:

> Concubinage between persons of the same sex or against nature constitutes sodomy and those who practice it in a manner that is scandalous or outraging modesty or public morality will suffer the penalty of one to three years in prison;

252. Morgan, *supra* note 210, at 27.
253. Morgan, *supra* note 2, at 482.
254. Morgan, *supra* note 210, at 27.
255. *Id.*
256. Morgan, *supra* note 2, at 482.
257. *Id.*
258. *Id.* at 483.
259. *Id.*
260. *Id.*

> but if one of those who practices it, even in private, had over the other disciplinary or control, as superior, guard, teacher, boss, guardian or in whatever other form that implies influence or authority or moral direction, the penalty shall be for him, from two to four years, the same as when it is practiced with one less than 15 years old or with force or intimidation.[261]

When preparing the new constitution, the initial reform proposal simply deleted this provision as a response to "growing concern about the penal code's outmoded treatment of sodomy."[262] However it soon became clear that the 1979 revolution had not changed society's negative attitudes towards the gay and lesbian community.[263]

Initially, perhaps no one noticed the deletion of the sodomy provision, but, eventually, the assembly committees did, indeed, notice the deletion.[264] While it is still not known who proposed the new language of the sodomy law, by the time the reform bill reached the full assembly, not only had sodomy been revived as a crime, but the definition had been broadened to include "inducing, promoting and propagandizing."[265] The addition of this new language provoked such heated debate that a vote was taken twice, but ultimately the new language was preserved.[266] The article, approved as Article 204 of the penal code, now states as follows:

> He commits the crime of sodomy who induces, promotes, propagandizes or practices in a scandalous manner concubinage between two persons of the same sex. He will suffer the penalty one to three years in prison. When one of those who practices this, even in private, has over the other disciplinary power or control, as superior, guard, teacher, boss, guardian or in whatever manner that involves influence or authority or moral direction, the penalty for illegitimate seduction will apply to him as the only responsible party.[267]

The language of this article is ambiguous in some senses and extremely clear in others.[268] The law clearly distinguishes between heterosexual and homosexuals in two ways. First, the change of language in this provision is

261. COD. PEN art. 205 (1974) (Nicar.).
262. Morgan, *supra* note 2, at 460.
263. *Id.*
264. *Id.*
265. *Id.* at 461.
266. *Id.*
267. COD. PEN art. 204 (NEED YEAR) (Nicar.).
268. Morgan, *supra* note 2, at 461.

clearly intended to decriminalize heterosexual sodomy.[269] The original provision as Section 205, identified as a crime concubinage between persons of the same sex or against nature, while the revised Article specifies that, in order to be criminal, sodomy must take place between persons of the same sex.[270] In many ways, this removal of sodomy between heterosexuals from the prohibition and the clear specification of the crime as requiring two members of the same sex mirrors the United States' initial criminalization of sodomy through state statutes enacted in the early 1970s.[271] The new Code further discriminates against homosexuals by deleting Article 206 of the 1974 Penal Code, which required that all individuals behave in a manner not offensive to "modesty or good customs by seriously scandalous acts not otherwise expressly penalized" or be subject to a sentence of up to two years imprisonment.[272]

The biggest and most noticeable change in the provision is clearly the addition of the language prohibiting the "inducing, promoting or propagandizing" of such behavior.[273] Considering the highly "closeted" (referring to gay and lesbian individuals not open with the identification of their sexual orientation) nature of Nicaraguan society, the response to this portion of Article 204 was impressive.[274] Over four thousand signatures were gathered petitioning President Chamorro to veto this section of the bill.[275] Although counsel for the President, Antonia Lacayo, assured the community that "nobody wants a [witch hunt]," the provision was approved in its entirety.[276]

Curiously, the periodical publishing the new law was dated September 9, 1992, but it was not issued until late October, 1992.[277] The late publication "appeared perilously close to the end of the sixty day period for filing constitutional challenges to new legislation by way of *recurso por inconstitucionalidad.*"[278] Nonetheless, a challenge to the provision was filed with the Nicaraguan Supreme Court on November 9, 1992.[279]

The *recurso* challenged the provision on the grounds that it was unconstitutional.[280] In doing so, it put forth that the provision violated various sections of the Constitution which allowed for individual liberty, respect for the private lives of individuals and their families, and for their honor and reputation, contained in Article 25, Section 1, and Article 26, Sections 1 and 3, respectively.[281] The *recurso* also looked to Article 46 of the Constitution,

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269. *Id.* at 462.
270. *Id.* at 463.
271. *See generally* Part II.
272. Morgan, *supra* note 2, at 463.
273. *Id.* at 462.
274. *Id.* at n.92.
275. *Id.* at 464.
276. *Id.* at 464-65.
277. *Id.* at 465.
278. Review for unconstitutionality. *Id.*
279. *Id.* at 466.
280. *Id.*
281. *Id.* The *recurso* also looked to sections of the Constitution guaranteeing equality

which "expressly incorporates and protects international human rights as established in [a variety of Declarations of Human Rights]."[282]

Prior to deciding the *recurso*, the Nicaraguan Supreme Court asked for commentary and guidance from President Chamorro.[283] She indicated that it was the Court's responsibility to resolve any legal problems once the law was promulgated.[284] Others were not as reluctant to comment on the law.[285] Alfredo Caesar, President of the National Assembly, requested that the challenge be rejected for failure to comply with the requirement that the challengers describe the prejudice, either direct or indirect, caused by the law.[286] He went on to state that the law did not prohibit sodomy, but rather its "inducement, promotion, propagandizing or practice *in a scandalous manner*" and that the "sin is the scandal."[287] Regarding the *recurso's* reference to international human rights declarations incorporated in the Constitution, Cesar

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before the law, the legality of crimes and punishments, respect for the physical, psychological and moral integrity of persons, the prohibition of torture and cruel, inhumane, or degrading proceedings, punishment or treatment and freedom of expression and information under Articles 4, 27, 48; Article 34(10); Article 36; and Articles 30, 66, 67 and 68. *Id.*

282. *Id.*

> The *Universal Declaration of Human Rights* provides for: a right to liberty; right to the security of a person; equality before the law; the principle of legality of crimes and punishments; respect for the private life of persons and their family, and for their honor and reputation; liberty of thought; liberty of expression. It prohibits torture, cruel, inhuman or degrading punishment or treatment.
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> The *American Declaration of Rights and Duties of Man* provides for: the right to the liberty and security of the person; equality before the law; liberty of opinion, expression and diffusion of thought, protection of the private and family life of persons and their honor and reputation.
>
> The *International Covenant on Civil and Political Rights* provides for: Respect and guarantee of the rights recognized in this Covenant for all persons, without any distinction; right to liberty; right to personal security; the principle of legality of crimes and punishment; respect for the private life of persons and their family, and for their honor and reputation; liberty of thought; liberty of expression; and equality before the law. The Covenant prohibits torture and cruel, inhuman or degrading punishments and treatments.
>
> The *American Convention on Human Rights* (San Jose Pact) provides for: respect for the rights and liberties recognized in this Pact for all persons without any discrimination; right to respect for the physical, psychological and moral integrity of persons; right of liberty and personal security; the principle of legality of crimes and punishments; right to respect for the private life of persons and their family, and for their honor and reputation; right to liberty of thought and expression; and equality before the law.

Id. (citing *Recurso Por Inconstitucionalidad, La Ley No. 143, "Ley de Alimentos,"* May 22, 1992, at 28-29).

283. *Id.* at 467.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at 467-68.

stated that "these are not on point because they are inspired by different moral conceptions than those that dominate our society." [288]

The Procurado General de Justicia, Guillermo Vargas Sandino, also commented upon the challenge as well, pointing out that adults freely practicing "their sexual activity" (presumably homosexual relations) do not violate the Penal Code however "immoral and . . . repugnant" such activity might be.[289] Vargas also cited the Constitution in order to defend the sodomy law, citing Article 24, which provides that "the rights of each person are limited by the rights of others, for the security of all and for the just exigencies of the common good."[290]

During the debates over the sodomy provision, the leader of the Revolutionary Unity Movement, Moises Hassan, described homosexual conduct practiced in a "scandalous manner" as:

> [W]hen, in the streets of New York or of whatever North American city, hundreds of homosexuals march claiming "gay power". . . . How can this be permissible? Here we must have a law that prevents that any day one hundred of these people who have the right to be what they are, but do not have the right to make this ostentatious. This is what is immoral, to make it ostentatious, a hundred people that march in the streets in front of your house, in front of mine, in front of a school saying "*poder de los maricas*" [gay power] . . . ! That is scandalous in the society, that is an example of scandal.[291]

Ultimately, the Supreme Court rejected all challenges to the law on March 7, 1994.[292] The Court addressed the challenger's arguments in only the most "cursory" of responses and denied that any of the constitutional provisions cited in the *recurso* were relevant to the case at hand.[293] The Court stressed that the provision did not discriminate against the liberty of expression since the phrase "in a scandalous form" limits the sodomy provision.[294] The Court then turned to a long defense of the institution of the family and stated in its opinion:

> To authorize the functioning and liberty of sodomy would be a legal attack against the growth of the Nicaraguan population, a move backwards in its political, economic, and social advances, due to the lack of men and women to push ahead

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288. *Id.* at 468.
289. *Id.* at 469.
290. *Id.*
291. *Id.* at n.96 (citing *Aprueban caceria a homosexuales,* BARRICADA INTERNACIONAL, June 12, 1992, at 1).
292. *Id.* at n.122.
293. *Id.* at 469.
294. *Id.* at 470.

> the progress of Nicaragua .... To accept the arguments of the challengers would be equivalent to authorizing the practice of sodomy and as a consequence destroying the noble purposes of marriage.[295]

The Court further stated that "[t]o authorize the performance and freedom of sodomy would be a legal attack against the increase of the Nicaraguan population, a step back for its political economic and social advancement, due to the lack of men and women to push Nicaragua's progress forward."[296] The Court concluded with the comment that "rather than protecting sodomy, ways should be found to limit it."[297]

Upholding Article 204 had two effects, one expected and one likely not.[298] Rather than immediately chilling the gay population of Nicaragua, the passing of the law brought the gay community "out of the closet and into the public spotlight to an unprecedented degree" and began the shaping of the gay population of Nicaragua into a more organized political movement, the effect of which has yet to be seen.[299] However, for some members of the gay community who were less willing to be open about their sexual orientation, the "law and the publicity surrounding it clearly had an intimidating effect." [300]

The initial effect of the new law was as expected, an increase in the stigmatization toward Nicaraguan gays and lesbians.[301] For example, one young homosexual man, after being attacked by an assailant, stated:

> We do not know where to turn, if we go to the police, instead, we could be taken prisoner for being what we are .... The law does not protect us, it is as if we were [sic] not human beings now that they have denied us our rights."[302]

In a succinct commentary, journalist Sofia Montenegro described the failures of the effort to reform the penal code with respect to the rape laws and the sodomy laws, by saying simply

> The two faces of patriarchal reaction, misogyny . . . and homophobia . . . have conspired within the deputies, independent of their sex, sexual orientation, or party, to

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295. *Id.* at 469-70.

296. The International Lesbian and Gay Association, *World Legal Survey - Nicaragua, at* http://www.ilga.info/Information/Legal_survey/americas/nicaragua.html (last updated Jul. 31, 2000) (last visited Oct. 21, 2004).

297. *Id.*

298. Morgan, *supra* note 2, at 476.

299. *Id.* at 477.

300. *Id.* at 480.

301. *Id.* at 478.

302. *Id.*

> produce this juridical-penal perversion that violates the rights of citizens. With a parliament like this, who needs legislators?[303]

It is too soon at this juncture to evaluate the effect that the sodomy laws will have on the gay and lesbian population of Nicaragua. Some believe that there is no intention to actually *enforce* the sodomy provision of the law, but that it is merely intended to remind the gay community that it does not have the moral approval of the majority of the Nicaraguan population.[304] On the other hand, the provision may only further imbed the traditional heterosexist values propagandized by a culture dominated by Roman Catholicism and *machismo.*

IV. TREATMENT OF HOMOSEXUALS AND HOMOSEXUAL ACTIVITY IN THE INTERNATIONAL ARENA: A FEW COMPARISONS

In considering the similarities and differences between the policies of the United States and Nicaragua it is helpful to consider the attitudes of various countries in the international arena. There are a variety of methods that countries of the world are using to address the treatment of homosexual activities in their homelands. Policies toward the homosexual community cover a broad spectrum.

A. The Extreme End of the Spectrum: Iran and Saudi Arabia.

Iran and Saudi Arabia operate at an extreme end of the spectrum. Both countries still execute individuals for engaging in homosexual activity.[305] In 1987, the Iranian Embassy wrote in The Hague that "homosexuality in Iran . . . is a sin in the eyes of God and a crime for society. In Islam generally homosexuality is among the worst possible sins you can imagine."[306] Iran allows a religious judge to sentence a gay man to death for one act of sodomy.[307] Lesbians receive treatment that is slightly less harsh.[308] They are punished with one hundred lashes for the first three offenses and, after the fourth offense, are subject to death by stoning.[309] Amnesty International reported that in January, 1990, three gay men and two lesbians were publicly

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303. *Id.* at 477.

304. *Id.* at 480.

305. John A. Russ, IV, *The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards*, 4 U.C. DAVIS J. INT'L L. & POL'Y 29, 35 (1998).

306. The International Gay and Lesbian Association, *World Legal Survey - Iran, at* http://www.ilga.info/Information/Legal_survey/middle%20east/iran.htm (last updated Jul. 31, 2000) (last visited Oct. 21, 2000) [hereinafter *Survey – Iran*].

307. Russ, *supra* note 305, at 35.

308. *Id.*

309. *Id.*

beheaded as a result of the government's anti-homosexual policy.[310] On November 12, 1995, another man was condemned to death for "the obscene act of sodomy" and was executed by stoning.[311]

The policy in Saudi Arabia is similar to that in Iran.[312] Again, homosexual acts are illegal and are subject to the death penalty.[313] A married man must be stoned to death, while a "free bachelor" is subject to one hundred lashes and banishment for a year.[314] While there is no specific discussion of treatment of lesbians under Saudi Arabian law, Islamic law considers sexual activity between women as adultery, administering the death penalty by stoning for married women and one hundred lashes to unmarried women.[315] In 1997, the religious police "frequently" arrested men for participating in homosexual activity.[316]

B. Technically Legal, but Still Punished: China and Brazil

With the advent of the "open door" policy in China in 1980, the "taboo" on homosexuality in China became less prevalent.[317] Both the legal system and society as a whole in China have become more accepting of homosexuality in the past decade.[318] However, at the 1995 International Gay and Lesbian Association's Annual Conference in New York City, a gay man from China shared that if a homosexual is "found out" in his country there is much to fear.[319] For example, in China, it is still considered acceptable to use not only herbal treatments, but also electrodes, to "cure" homosexuals.[320] Homosexuality in China may also still be punished under the term "hooliganism."[321] "A 'hooliganism' conviction commonly leads to jail time and 're-education' for gay men and lesbians."[322]

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310. *Survey - Iran, supra* note 306.

311. *Id.*

312. Russ, *supra* note 305, at 35.

313. The International Lesbian and Gay Association, *World Legal Survey – Saudi Arabia, at* http://www.ilga.info/Information/Legal_survey/middle%20east/Saudi_Arabia.htm (last updated Jul. 31, 2000) (last visited Sept. 6, 2004).

314. *Id.*

315. *Id.*

316. *Id.*

317. The International Lesbian and Gay Association, *World Legal Survey-China, at* http://www.ilga.Info/Information/Legal_survey/Asia_Pacific/china.htm (last updated Jul. 31, 2000) (last visited Sept. 27, 2004) (citing excerpts from a speech by HIV activist Wan Yan Hai at the People's Summit, Vancouver, Nov. 1997) [hereinafter *Survey – China*].

318. *Id.* "[T]he nineties has become the 'coming-out' time for gays and lesbians in China. At the same time the government and the society have also become more tolerant for sexual minorities." *Id.*

319. Kevin Reuther, *Queer Rights are Human Rights: Thoughts from the Back of a Cab*, 8 HARV. HUM. RTS. J. 265, 267 (1995).

320. Russ, *supra* note 305, at 39.

321. *Survey – China, supra* note 318.

322. Reuther, *supra* note 320 at 267. In response to the audience's questions about

Despite some advances in China in the past two decades, homophobia and discrimination against homosexuals continue to be prevalent.[323] Although it is no longer illegal to represent homosexuality in the media, it is often discouraged.[324] During 1996, the Ministry of Propaganda refused to publish articles and books about homosexuality on more than one occasion, and in 1997, the Chinese government refused to allow movie director, Zhang Yuan, to accompany his film about homosexuals to the Cannes Film Festival.[325]

Brazil decriminalized most homosexual activity in 1823.[326] Yet homosexuality is still considered illegal in the Armed Forces of Brazil.[327] However, the "police use the pretext of 'safeguarding morality and public decency' and 'preventing outrageous behavior' to stop, arrest, and bring gays to trial."[328] While Brazil removed homosexuality from the list of "psychological disturbances" in 1985, parents can still take their children to medical providers for "behavior-modifying" treatments without any legal recourse.[329]

C. Improving, with More Room for Improvement: The Gay Community in Russia

Russia has created a roller coaster ride for its gay community. From the period of 1917 to 1933, homosexuality was decriminalized, but in 1934 was "recriminalized" and "severely dealt with by persecution, discrimination and silence."[330] Russia officially decriminalized sodomy in 1993, but prior to 1993, as many as 600 to1,200 homosexual men were sent to prison each year in the Soviet Union as a result of homosexual activity.[331] Homosexual activity was punishable under Article 121.1 of the criminal code by imprisonment of up to five years.[332]

With the repeal of Article 121.1, those held in prison under the Article should have been released immediately.[333] However, "[d]ue to the chaotic

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whether or not the young man feared the cameras and videotapes at the conference, he declared "I am not afraid" and the audience responded with "applause and then fell anxiously silent." *Id.*

323. *Survey – China, supra* note 317.

324. *Id.*

325. *Id.*

326. The International Lesbian and Gay Association, *World Legal Survey-Brazil, at* http://www.ilga.info/Information/Legal_survey/americas/brazil.htm (last updated Jul. 31, 2000) (last visited Sept. 27, 2004).

327. *Id.*

328. *Id.*

329. Russ, *supra* note 305, at 40.

330. The International Lesbian and Gay Association, *World Legal Survey-Russia, at* http://www.ilga.info/Information/Legal_survey/europ/russia.htm (last visited Sept. 27, 2004).

331. Russ, *supra* note 305, at 43.

332. The International Lesbian and Gay Association, *World Legal Survey-Russia, at* http://www.ilga.info/Information/Legal_survey/europ/russia.htm (last updated Jul. 31, 2001) (last visited Oct. 21, 2004) [hereinafter Survey – Russia].

333. International Gay and Lesbian Human Rights Commission, *Russia's Anti Sodomy Law Repealed, at* http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=357 (Aug. 1993) (last visited Sept. 27, 2004).

prison system in Russia, it isn't clear that the government will know who or where these hundreds, perhaps thousands, of prisoners are."[334] When a human rights delegation attempted to speed the release of prisoners held under Article 121.1, "many officials were unwilling to help," with one official quoted as saying, "I don't care what has been repealed. They're still in there and they will stay in there."[335]

A poll of the Soviet Union's population taken in 1990 "showed that a third of the population . . . believed that homosexuals should be exterminated, a third believed [they] should be isolated from society and only 10 percent believed [they] should be left alone."[336] However, there has been progress towards acceptance of the homosexual community in Russia since the decriminalization of homosexual activity in 1993.[337] During a government-sponsored conference in Moscow entitled "The Family on the Eve of the Third Millennium," a discussion regarding same-sex marriage was held and the "recommendation to legalize such unions was taken without contradiction."[338] A greater indication of progress occurred during a 1994 survey similar to the one taken in 1990, in which the Russian population reported that only 18% wished to "liquidate" homosexuals, while the percentage of those wishing to "leave them by themselves" rose from 12% to 29%.[339]

D. Countries that Embrace Their Gay Communities: Denmark, the Netherlands, South Africa, and Canada.

Other countries in the international community have been much less reluctant to embrace their homosexual communities. In Europe as a whole, it has been noted that:

> There is now a better understanding, and in consequence an increased tolerance, of homosexual behavior to the extent that in the great majority of the member-States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind in question as in themselves a matter to which the sanctions of the criminal law should be applied.[340]

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334. *Id.*

335. Igor Kon, *Moonlight Love: Problems and Prospects,* Russian National GLBT, *at* http://www.gay.ru/english/history/kon/prosp.htm (1998) (last visited Oct. 21, 2004) [hereinafter *Moonlight Love*].

336. Ryan Goodman, *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Intervention.* 105 YALE L.J. 255, 277 (1995).

337. *Moonlight Love, supra* note 335.

338. *Id.*

339. *Id.*

340. Larry Cata Backer, *Inscribing Judicial Preferences Into Our Fundamental Law: On*

Denmark and the Netherlands may be the European counties best known for embracing their gay communities. Denmark enlarged its law to forbid discrimination on the basis of sexual orientation in 1987.[341] The law provides that any person discriminating on the basis of sexual orientation is subject to punishment by "fines, short-term detention or imprisonment for up to six month[s]."[342] In 1996, this law was expanded to include the private labor market.[343] Additionally, Denmark expanded its "anti-vilification" law in 1987 to provide that "[p]ersons who publicly or deliberately disseminate statements or other reports by which any group of people are threatened, ridiculed or degraded on account of their . . . sexual orientation, are liable to fines, short-term detention or imprisonment for up to two years."[344]

What Denmark may be best known for is its pioneering in the matter of same-sex unions.[345] In 1989 Denmark became the first country in the international community to introduce a law on registered partnerships for same-sex couples.[346] The couples are granted the same rights as married heterosexuals with a few exceptions.[347] The same divorce laws that apply to heterosexual couple also apply to partners in a registered partnership.[348]

The Netherlands is also a positive environment for its homosexual community. Dutch criminal law no longer contains any provisions outlawing homosexual activity.[349] While the Dutch Constitution does not specifically name homosexuals as a protected class, "discrimination against homosexuals is forbidden by the Constitution owing to parliamentary documents and legal precedent which place sexual orientation under the protection of the first article of the Constitution."[350] In 1992, the terms "homosexual and heterosexual orientation" were added to the articles providing criminal protection from discrimination.[351] Finally, in 1994, the General Equal Treatment Act was passed prohibiting discrimination in the fields of housing, medical care, labor,

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the European Principle of Margins of Appreciation as Constitutional Jurisprudence in the U.S., 7 TULSA J. COMP. INT'L L. 327, 357 (2000).

341. The International Lesbian and Gay Association, *World Legal Survey-Denmark, at* http://www.ilga.info/Information/Legal_survey/europe/denmark.htm (last updated Jul. 31, 2000) (last visited Sept. 27, 2004).

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* The exceptions for a registered couple are that they are unable to adopt children from a foreign country although they can adopt children of their partners. They are unable to be wed "officially" in a church and either one of the partners must be a registered citizen of Denmark or both members of the partnership must have stayed in Denmark for two years. *Id.*

348. *Id.*

349. The International Lesbian and Gay Association, *World Legal Survey-The Netherlands, at* http://www.ilga.info/Information/Legal_survey/europe/netherlands.htm (last updated Jul. 31, 2000) (last visited Sept. 27, 2004).

350. *Id.* (emphasis omitted).

351. *Id.*

and access to goods and services on the grounds of, among other things, an individual's sexual orientation.[352]

South Africa became the first country in the world to "enshrine lesbian and gay rights in its Constitution" under Clause 9(3) which reads: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . sexual orientation . . . ."[353] In October, 1998, the Constitutional Court confirmed that laws prohibiting sexual activity between two men were unconstitutional.[354] In December, 1999, the High Court confirmed a previous ruling that the Aliens Control Act discriminated unfairly against lesbian and gay couples by denying them rights available to married heterosexuals and stated, "[g]ays and lesbians in same-sex life partnerships are as capable as heterosexual couples of expressing . . . love in its manifold forms . . . they are capable of constituting a family . . . ."[355]

Finally, in 2003, Canada, the country geographically closest to the United States to do so, legalized same-sex marriage in the Canadian province of Ontario. The Ontario Court of Appeals upheld an earlier ruling establishing the right to marriage for homosexuals and "ordered same-sex marriage legalized in the province immediately."[356] In its opinion, the Court of Appeals "unanimously dismissed the idea that procreation and rearing children mandate the exclusion of gay and lesbian couples from the institution of marriage" as the "ability to 'naturally' procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples."[357]

V. CONCLUSION

It is apparent that the United States and Nicaragua have vastly differing approaches to the treatment of homosexual activity practiced by consenting adults. Both countries are willing to allow certain homosexual sexual practices to occur as long as they are done in private. However, the reasoning behind this conclusion that such activity is permissible in private is extremely different.

The United States has based its decision not to prosecute sodomy upon the idea that there is a sphere of privacy surrounding the bedroom, which cannot be intruded upon by the State.[358] The United States concludes that to violate that sphere of privacy only in the instance of homosexual citizens would

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352. *Id.*

353. The International Lesbian and Gay Association, *World Legal Survey-South Africa, at* http://www.ilga.info/Information/Legal_survey/Africa/southafrica.htm (last updated Jul. 31, 2000) (last visited Oct. 21, 2004). This amendment to the Constitution was included on May 8, 1996. *Id.*

354. *Id.*

355. *Id.* The Alien Control Act monitors immigration to South Africa. *Id.*

356. Ann Rostow, *Toronto declares gay marriage legal*, PlanetOut News & Politics, *at* http://www.planetout.com/news/article.html?2003/06/10/1 (Jun. 10, 2003).

357. *Id.*

358. Lawrence v. Texas, 539 U.S. 558 (2003).

be to deny citizens a right without a sufficiently compelling interest of the State.[359]

The United States remains, however, only willing to grant homosexual citizens rights pertaining to their exercise of sexuality within the bedroom. As of yet, the United States has refused to allow other rights enjoyed by heterosexual couples to extend to homosexuals. The most obvious example of this is the United States' refusal to sanction gay marriage.[360]

Nicaragua, by contrast, is also willing to permit homosexual conduct to take place in private, as long as such conduct does not create a scandal.[361] However, Nicaragua's reasoning behind this continues to be a desire to keep homosexual citizens out of the eyes of the populace in order to prevent offense to the majority of the citizens of the country.[362] Rather than seeking to protect the rights of homosexuals, Nicaragua is more concerned with limiting them as much as reasonably possible without making the existence of homosexuality itself illegal.[363]

The irony is, of course, that the legal outcome of these two approaches, despite the different reasoning behind them, is not terribly different. While homosexual citizens of the United States can certainly be more relaxed while exercising their right to seek liberty and sex, as they desire, they, like homosexual citizens of Nicaragua, are forced to endure the knowledge that the majority of the population and the legal system would prefer to hear no more about it than necessary.

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359. *See supra* Part II.E.

360. *See* Singer v. Hara, 522 P.2d. 1187 (Wash. Ct. App. 1974); Standhardt v. Superior Court of Ariz., 77 P.3d. 451 (Ariz. Ct. App. 2003). Both courts held that it was not unconstitutional to deny same-sex couples the right to marry.

361. Morgan, *supra* note 2, at 468.

362. *Id.*

363. *See id.* at 470.