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REVIEW ESSAY: TOWARDS A TRANSNATIONAL CONCEPTION OF THE ANTIPHONAL GROUP RIGHTS WRANGLE

PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE, THOMAS SOWELL, (WILLIAM MORROW, NEW YORK, 1990).

Harry Hutchison[*]

> Such, unfortunately, is the nature of contemporary . . . American circumstances, for real examination has taken a back seat to the placation of the ignorant and those lacking enough courage to state the hard facts.[1]
>
> —Stanley Crouch

> When we finally achieve the right of full participation in American life, what we make of it will depend upon our sense of cultural values, and our creative use of freedom, not upon our racial identification.[2]
>
> —Ralph Ellison

I. INTRODUCTION

> The language of rights has formed part of our moral, legal and political vocabulary for many centuries. The history of that language has not been one of unimpeded growth but it is probably true that it has achieved a wider currency in our own age than at any previous time. Rights are now claimed to more things and for a wider range of beings than ever before.[3]

These desiderata called rights, and especially statutory and judicially created civil rights, as compassionate remedies for the effects of prejudice,[4]

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1. STANLEY CROUCH, NOTES OF A HANGING JUDGE xv (1990).

2. RALPH ELLISON, SHADOW AND ACT 271 (1964).

3. PETER JONES, RIGHTS 1 (1994).

4. For an explication of the distinction we make between discrimination that is wrongful and discrimination that is not, see Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV.

have metamorphosed into ethnic preferences, affirmative actions, and calls for diversity.[5] In the United States, there is an impending sense that affirmative action and group preferences may be "abruptly terminated."[6] For some commentators, such a termination would amount to a confirmation of America's ineradicable "racism"; for other observers, termination would amount to a reconfirmation of America's "sense of fairness, its belief in racial integration and a presumption that a civically activist polity will voluntarily (if slowly) make positive social change."[7] Importantly, some of the contentiousness surrounding affirmative action seems to stem from the arbitrary nature by which ethnic groups are included. For example, "[p]ersons with roots in northern Spain [are eligible for preferences while] those who are descended from persons living a few miles away, in southern France, [are] not. This is strange, if not bizarre."[8]

In its recent decisions in *Adarand Constructors, Inc. v. Pena*,[9] *Miller v. Johnson*,[10] *Bush v. Vera*,[11] and *Shaw v. Hunt*,[12] the United States Supreme Court, America's leading commentator on rights, firmly reasserts its role as the guardian of the limits to be placed on an elusive component of the rights debate: affirmative action.[13] In *Adarand*, Adarand Constructors, Inc., which

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149 (1992). For a perspective on discrimination, see George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117 (1995) (suggesting inherent limits to the concept of discrimination).

5. Charles Krauthammer, *Diversity: The Degeneration of an Idea*, DET. NEWS, Sept. 5, 1995, at F5 (claiming that affirmative action, which was initially aimed at redressing the plight of African-Americans, has been transmuted beyond recognition into diversity for a wide range of groups, including immigrants).

6. Constance Horner, *What Should We Do After Affirmative Action?*, BROOKINGS REV., Summer 1995, at 7-8. Moreover, it is important to note that in California, voters were asked to decide on November 5, 1996, whether preferences are to remain legal when they voted on the California Civil Rights Initiative. *See* John Leo, *Finally, the People Vote on a Taboo*, U.S. NEWS & WORLD REP., Mar. 4, 1996, at 26.

7. Horner, *supra* note 6, at 7-8.

8. JAMES S. ROBB, AFFIRMATIVE ACTION FOR IMMIGRANTS: THE ENTITLEMENT NOBODY WANTED 117 (1995).

9. 115 S. Ct. 2097 (1995).

10. 115 S. Ct. 2475 (1995). *See also* Missouri v. Jenkins, 115 S. Ct. 2038 (1995).

11. 116 S. Ct. 1941 (1996) (deploying the doctrine of strict scrutiny to invalidate race-conscious redistricting scheme).

12. 116 S. Ct. 1894 (1996) (deploying the doctrine of strict scrutiny to invalidate race-conscious redistricting scheme).

13. What affirmative action is, and who should be included in an affirmative action program, are the subject of some debate, as "[a]ffirmative action was initially conceived as a remedy to benefit African Americans. Although many affirmative action programs include the members of other racial and ethnic groups, little attention has been paid to the criteria for inclusion." Paul Brest & Miranda Oshige, *Race and Remedy in a Multicultural Society: Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 855 (1995). *See also* Roy L. Brooks, *Race as an Under-Inclusive and Over-Inclusive Concept*, 1 AFRICAN-AMERICAN L. & POL. REP. 9 (UC Berkeley 1994).

was not a certified disadvantaged business, submitted the low bid on a subcontract as part of a federally funded highway construction contract. After losing the bid, Adarand Constructors filed suit against the federal government, claiming that the race-based presumptions used in subcontractor compensation clauses violated the equal protection component of the Fifth Amendment's Due Process Clause. Reversing the lower court's decision, the United States Supreme Court held that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed under the doctrine of strict scrutiny.[14] In essence, the Court applied strict scrutiny as a barrier to further expansions of the federal preferences, just as it had earlier limited state-sponsored preferences in state contracting cases.[15]

Similarly, in *Miller v. Johnson,* the United States Supreme Court, animated by equal protection principles, limited the ability of state governments to construct bizarrely shaped districts to guarantee group rights where the controlling rationale was race. The Court said:

> Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.[16]

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14. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (citing Justice Powell in Fullilove v. Klutznick, 448 U.S. 448, 496 (1980)). The Court also cited earlier decisions in Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (The Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986) (Any preference based on racial or ethnic criteria must necessarily receive a most searching examination.).

15. *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

16. Miller v. Johnson, 115 S. Ct. 2475, 2485 (1995) (citing Shaw v. Reno, 509 U.S. 630, 657 (1993)). The Voting Rights Act was premised on the desire to ensure the right of constitutionally protected minorities to have a voice in government.

> Congress enacted it to abolish both overt restraints on voting and registration and more subtle impediments caused by districting schemes that dilute minority electoral strength. To remedy a dilutive scheme that violates the Voting Rights Act, legislators commonly create single-member districts in which the minority has a majority of the electorate sufficient to elect a candidate of the minority's choice.

Comment, *Equal Electoral Opportunity: The Supreme Court Reevaluates the Use of Race in Redistricting in* Johnson v. De Grandy, 3 J.L. & POL'Y 497, 497 (1995). *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)). For an example of arguable logical inconsistency, see *Miller*, 115 S. Ct. at 2506 (Ginsburg, J., dissenting) (arguing for single race maximization of Black voters

Whether the United States polity desires, or should desire, a color-blind political or economic system can assuredly be debated. What is not subject to debate is that the United States Supreme Court, in *Adarand v. Pena*, *Miller v. Johnson*, and other recent cases,[17] deploys the doctrine of strict scrutiny to infarct federally sponsored and state-created race-based preference schemes. Accordingly, claims of race-based group rights in both the political and the economic spheres must today stride a higher hurdle.[18]

Given that this is an American era increasingly marked by cynical and rancorous discussions concerning preferential rights based on race and national origin,[19] it is a propitious time to revisit a book that provides empirical, analytical, and international perspectives to this ineluctably expansive debate. While Thomas Sowell's *Preferential Policies*[20] lacks the overwhelmingly canonical appeal of Shelby Steele's *Content of Our Character*,[21] the fire-next-time urgency of Cornel West's *Race Matters*,[22] or

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in a voting district); *see also* Missouri v. Jenkins, 115 S. Ct. 2038, 2091 (1995) (Ginsburg, J., dissenting) (arguing for additional non-minority students to reduce concentration of Black students).

17. *See* Missouri v. Jenkins, 115 S. Ct. 2038 (1995); Bush v. Vera, 116 S. Ct. 1941 (1996); Shaw v. Hunt, 116 S. Ct. 1894 (1996).

18. Professor Dellinger of Duke University "acknowledged that the *Adarand* decision changed the rules not only for minority contracting provisions but for affirmative action programs in health, education, hiring, and other areas as well." Kenneth Jost, *After Adarand*, A.B.A. J., Sept. 1995, at 71.

19. For an excellent example of cynical protuberance, consider Peter Wilson, governor of California, who had been accused of, among other things, being an individual in need of a "blame strategy" to kick-start his presidential campaign. As one observer points out, Mr. Wilson, while flip-flopping on his original support of affirmative action, can be characterized in his approach as classically simple and nasty. He is distinguished as a politician who "seeks to turn a majority against the minorities which it believes threatens its dominance." Mark Lawson, *Commentary: The New Baddies Are too Close to Home for Major*, GUARDIAN, June 5, 1995, at 13. *See also* Gerald F. Seib, *Is It a Flip-Flop or an Evolution? Voters Will Say*, WALL ST. J., Aug. 30, 1995, at A12.

For a somewhat more irenic if no less disingenuous approach, consider President William Clinton, who recently

> unveiled his new guidelines for federal programs, saying his goal for affirmative action was "mend it, but don't end it." Programs must be restructured or done away with if they reward unqualified people, create quotas or reverse discrimination, or continue after their equal opportunity purposes have been achieved. He also recommended a new set-aside program to benefit businesses located in economically distressed areas.

Jost, *supra* note 18, at 72. *See also* Stuart Taylor, Jr., *Flunking The Honesty Test on Preferences*, LEGAL TIMES, July 24, 1995, at 27 (noting that President Clinton engages in Orwellian semantic dodges of the truth).

20. THOMAS SOWELL, PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE (1990).

21. SHELBY STEELE, THE CONTENT OF OUR CHARACTER (1991).

22. CORNEL WEST, RACE MATTERS (1993).

the appealing balance of Glenn Loury's *One By One From the Inside Out*,[23] its dispassionate and empirically exhaustive international focus on the economic effects of group preferences informs and ultimately deracinates the less than irenic claims and counterclaims that seem to mark the preference/rights wrangle in the United States.[24]

From an international vantage point, groups that receive preferential treatment are as disparate as can be imagined—from untouchables in India to Afrikaners in South Africa; yet, common patterns in preference programs for extraordinarily different people in wholly different circumstances, living in countries separated by vast distances, emerge.[25] To demonstrate this, Sowell develops a tripartite analytical construct. First, he empirically analyzes the reasons that animate the imprecatory demand for, and the results of, preferential policies in a wide variety of settings and in a number of disparate countries. Second, he explicates "The Illusions of Preferential Policies."[26] Third, he draws compelling, coherent, yet paradoxical conclusions that establish a substantive counterweight to the deformed group-rights debate.

II. EMPIRICAL ANALYSIS

The book's empirical focus is broken down into three substantive categories: (1) majority preferences in majority economies (usually the same dominant group controls both the economic system and the political system and in addition votes itself official preferences)—the "Jim Crow" era in the United States and the apartheid era in South Africa, for example; (2) preference regimes where economic dominance by one group and political dominance by another exist—Sri Lanka, Malaysia, and Nigeria exemplify this condition; and (3) economic and political dominance by one group and preferences for the economically and politically weak minority group(s)—the

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23. GLENN C. LOURY, ONE BY ONE FROM THE INSIDE OUT (1995). Mr. Loury's book makes a powerful argument for Black conservatism that refreshingly is often equally as critical of White conservatives as it is of liberals. *See also* Claude R. Marx, *Taking Responsibility for Your Actions*, DET. NEWS, Aug. 23, 1995, at A13.

24. While Mr. Sowell's empirical analysis is primarily focused on racial and ethnic group preferences, the author indicates that empirical analysis can be extended to gender preferences and gender rights to dispel some claims of gender disparity as well. *See* SOWELL, *supra* note 20, at 17. For instance, in Canada, never-married women earn 99% of the income of never-married men. *Id. See also* Walter Block, *Economic Intervention, Discrimination, and Unforeseen Consequences*, *in* DISCRIMINATION, AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY 103, 111 (W.E. Block & M.A. Walker eds., 1982). Similarly, American women who remained single and worked continuously into their thirties earned more than 100% of the income of single men—even before preferential policies for women were instituted. Sowell, *supra* note 20, at 17 (footnote omitted).

25. SOWELL, *supra* note 20, at 6.

26. *Id.* at 117. For this discussion, see *id.* at 119-86.

United States, India, and Canada exemplify this category. Viewed together, the effects of these different preference regimes give rise to very similar consequences and conclusions.

A. *Majority Preferences in Majority Economies*

"Where the same dominant group has complete control of both the economy and the political system," racial preferences are not necessarily obvious as a way of discriminating against the disfavored group.[27] If the dominant group wishes to discriminate, there is scant need for laws to force racists to practice racism.[28] On the other hand, as Sowell cogently illustrates, because discrimination in a free market economic system imposes a cost on the dominant group that discriminates, these costs inevitably provide incentives that encourage some members of the dominant group to try to escape higher costs. For example, despite government-organized boycotts of businesses owned by Jews in Nazi Germany, "even generals in uniform made purchases in Jewish shops."[29] Importantly, the entire "history of middleman minorities, such as the Jews in Europe, the overseas Chinese in Southeast Asia, and the Indians in East Africa, is a history of their achieving a level of prosperity which would have been impossible without the economic patronage of majority populations hostile to them."[30] While it is easy to denounce middlemen from disfavored minority groups, it is costly to pass up bargains in their shops.[31]

Similarly, in the United States, despite the possible impression left by the civil rights struggle of the 1950s, integrated public transportation was not an anomaly in the South after the Civil War. To the contrary, separation of the races in passenger transportation required the passage of statutes during the early 20th century over the objections of the streetcar owners, many of whom refused to comply. There is no reason to think that the Whites who owned and operated these for-profit streetcar companies were less racist than those Whites who sought segregation; to be sure, the opposition of White streetcar owners to segregated seating was economic rather than ideological.[32] Racial separation simply represented additional cost without additional revenue.[33] In fact, due to organized boycotts of streetcars by Blacks in response to the creation of "Jim Crow" laws, segregated seating became an obvious threat to profits.

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27. *Id.* at 19.
28. *Id.*
29. *Id.* at 23.
30. *Id.*
31. *Id.*
32. *Id.* at 20-24.
33. *Id.* at 21-22.

Additionally, pre-Mandela South Africa, with its politically dominant White groups, found that racial prejudice was opposed (if incompletely) by market forces. Although the Whites in South Africa have almost always been a demographic minority, they have at the same time almost always been a political majority as well as the dominant group in the operation of the economy.[34] Since an ounce of gold is worth the same price in the international marketplace, no matter where, or by whom, it is produced, special costs imposed by South African racial policies could not be passed on to the customers in the form of higher prices. Since Black mine workers were paid less under the existing racial policies, mining companies had an ever-present temptation to evade the discriminatory policies imposed by politicians who did not have to pay the price.[35] Among other efforts to exclude Blacks from the mining industry, the South African government imposed a minimum wage law for the express purpose of "keeping black workers from undercutting the wages of white workers and taking their jobs."[36] In Canada, at about the same time, a minimum wage law was passed in order to preclude displacement of White workers by Japanese immigrants.[37]

As these and other cases[38] make clear, racism has an economic cost; such costs and price differentials act as lubricants that vitiate the effects of racism even where the majority enacts preferential policies designed to enforce discrimination. This conclusion applies not only to countries and situations in which majority preferences exist in an economy controlled by majorities, but also to other situations as well.[39] In the absence of laws or government policies that fortify prejudice, disparities in representation and income likely reflect the neutral judgements of the market itself in valuing the talents, skills, and/or character possessed by members of a particular group.[40]

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34. *Id.* at 24.

35. *Id.* at 25. *See also* GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY 212 (1981) (noting that while capitalists in general desire the cheapest possible labor, workers from the dominant ethnic group resist lower wage competition and as such are the principal agents for the regularized pattern of racial discrimination in the industrial sphere).

36. SOWELL, *supra* note 20, at 28. For an accessible introduction to the debilitating effects of minimum wages on low wage, low skilled individuals, see FINIS WELCH, MINIMUM WAGES: ISSUES AND EVIDENCE (1978). For a critical race reformist perspective on minimum wages, see Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93 (1997).

37. SOWELL, *supra* note 20, at 28.

38. *Id.* at 41-116. *See infra* notes 47-52 and accompanying text.

39. *See infra* notes 58-74 and accompanying text.

40. Importantly, what causes skill differentials remains an unsettled issue. For example:

> In Russia under the czars, the German minority—about one percent of the population—constituted about 40 percent of the Russian army's high command in the 1880s, just as German generals had been prominent in the high command

Accordingly, race-preference laws in majority-dominated economies can be seen as a government effort to obstruct market forces that might undermine the prejudices of the majority. This conclusion, *a fortiori*, dispels the illusion that the market alone encourages discrimination.

On the other hand, where there is no organized private market, where the sector operates on a non-profit basis or in a government regulated arena, or where labor unions possess monopoly power limiting employment of individuals, discrimination seems more likely to thrive. For example, universities and public utilities in the United States were among the leading practitioners of employment discrimination against Blacks during the 1930s;[41] employment of Blacks in the North (like employment of Blacks in South Africa) was inhibited by labor unions and the enactment of minimum wage laws.[42] This compelling contrast between free markets on one hand and regulated, non-profit markets and union-dominated markets on the other underscores the distinction between racism and discrimination.[43] In free markets, incentives to employ members of disfavored groups arise (*certeris*

> of the Roman legions, and generals of German ancestry led the American armies in both World Wars of the twentieth century, as well as in the Persian Gulf war of 1991.

THOMAS SOWELL, RACE AND CULTURE 3 (1994) (footnotes omitted).

41. As government policies changed in the 1960s in favor of a more diverse workforce, not surprisingly, universities and public utilities became leading practitioners of preferential employment policies favoring Blacks. *See* SOWELL, *supra* note 20, at 36.

42. *Id. See generally id.* at 24-31.

43. Discrimination in this context refers to the translation of racist impulses into conduct. Elementary economic theory suggests that if a firm receives the same output from a worker at lower wages (this will be the initial result, *certeris paribus*, of racial discrimination), this provides a market incentive (if it is assumed that the owner of the firm is a profit-maximizer) to employ the low-wage members of the disfavored group. As additional firms attempt this strategy, the wages of the disfavored group will rise, thus reducing the wage differential and thus reducing the economic impact of attempted discrimination. For an introduction to economic theory, see JOSEF HADAR, ELEMENTARY THEORY OF ECONOMIC BEHAVIOR (1966).

Discrimination imposes a cost in competitive labor markets. This cost can trump racism and give rise to otherwise puzzling results. For instance: (a) Jewish artisans were once more prevalent in eastern Poland, where anti-Semitism was greatest, and (b) Black artisans thrived in the American South, where racism was most blatant. In each case, there was a lack of certain types of market interference (guilds in Poland and labor unions in the United States) in comparison with less racist areas of each nation. In other words, there was more prejudice than usual in these sections of these countries but less discrimination because the costs of discrimination (in these particular occupations) were higher in competitive markets than in the controlled markets in other regions. Precisely because the market seems to work, incentives arise to preclude disfavored minorities from otherwise achieving success. Accordingly, it should not be surprising to see "Jim Crow" laws instituted in the American South or apartheid to be created in South Africa in order to "protect" the dominant groups from the "disfavored" minorities. *See* SOWELL, *supra* note 20, at 31. *See also* FREDRICKSON, *supra* note 35 at 212-13.

paribus), despite the existence of prejudice.

Therefore, societies that are seriously committed to vitiating discrimination should focus primarily on (1) the extirpation of statutes and policies which preclude the market from operating neutrally;[44] and (2) ensuring that complementary inputs are available to the group (in some cases the dominant but disadvantaged majority), in order to reduce income disparity between groups.[45] The judgment of the market powerfully underscores the relative improvements in economic status of Black Americans (a disfavored group) prior to 1964 (before the creation of preferential policies),[46] despite the economic and political dominance of White Americans.

B. *Majority Preferences in Minority Economies*

As Sowell powerfully illuminates, "[t]he widely known and emotionally powerful history of Blacks in the United States has led many other groups [in many other countries] to analogize their situation to that of blacks, as a politically effective way of seeking preferential treatment."[47] On the other hand, "[w]here the group seeking [group rights] is indigenous—as in Burma, Fiji, Malaysia, Sri Lanka, New Zealand, or in India's states of Punjab, Bihar, or Assam—they have analogized themselves to the American Indians."[48] Such analogies to American Indians and to African-Americans are deficient, however, in that the claims to preference are brought by ethnic groups which comprise a majority of the populace but claim to be disadvantaged by the success of ethnic minorities from the same or from other countries.[49]

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44. *See* RICHARD K. VEDDER & LOWELL GALLAWAY, OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA (1993). They cite the following statutes as causal factors in the widening of the Nonwhite-White unemployment differential: the Fair Labor Standards Act of 1938, the Davis-Bacon Act of 1931, and state legislation that led to the creation of state versions of the Davis-Bacon Act. *Id.* at 278. Accordingly, the urgent elimination of these laws that preclude the market from operating neutrally would be a positive step in improving the economic status of Nonwhites in the United States. *See also* CLINT BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY (1990) (developing a comprehensive strategy for extirpating laws and regulations that inhibit the market place advancement of minorities).

45. For example, preferential policies favoring Afrikaners were arguably ineffective unless accompanied by massive transfers of complementary resources including Afrikaner agricultural programs, education, and subsidized jobs. *See* SOWELL, *supra* note 20, at 38.

46. That is, prior to the passage of the 1964 Civil Rights Act.

47. SOWELL, *supra* note 20, at 41.

48. *Id.*

49. *Id.* at 42 (citing DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 153 (1985)). Examples of groups migrating from less fertile regions of the same country to other regions and becoming more prosperous than groups indigenous to the more fertile or more attractive regions are the Ibos in Nigeria, and the Toba Batak in Indonesia. DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 153 (1985). Examples of ethnic groups from one country

In many cases, the ethnic majority was initially the advantaged group but saw its advantages erode because of the aggressiveness, greater education, or greater competitiveness of the minority group.[50] Consider Sri Lanka. The so-called "Ceylon Tamils," an ethnic minority within the island country of Sri Lanka, lived in an arid, less fertile, and less developed area of the country (formerly known as Ceylon). Accordingly, when English-language schools were established in their part of the country, they saw education as one of their best chances for improvement. By contrast, the Sinhalese majority lived in richer agricultural areas with ample rainfall, and thus they had options other than jobs in the government and the educated professions. By 1948, despite comprising less than thirteen percent of the population, the Ceylon Tamils accounted for thirty-two percent of the government-provided doctors, forty percent of its engineers, and forty-six percent of its accountants. As the economic and professional gains of the Ceylon Tamils continued, the demands for preferences, quotas, and "standardization" emerged among the Sinhalese. For example, in the early 1970s, district quotas were instituted, thereby restricting the admission of Tamil science students to the university. Additionally, entrance exam scores of Tamil students were arbitrarily downgraded to enable more Sinhalese students to gain university admission.[51]

Eventually, the government expanded its policies preferring Sinhalese. These policies worked. The Sinhalese majority once again saw its income exceed that of the Ceylon Tamils. Predictably, and tragically, violence ensued.[52] As Sowell points out, Sri Lanka "has become almost a textbook example of how even unusually amicable relations between two groups can, within one generation, be turned into implacable hostility, violence, and ultimately civil war, simply by the politicization of race and ethnicity."[53]

Importantly, Sowell demonstrates that in many countries when disfavored minorities have been allowed to compete, they, over time, have often excelled beyond the level of the dominant majority in the contest for the patronage of majority clientele,[54] thus reducing or eliminating the majority's dominance in the market-place. This success is commonplace, not only when the minority had a head start over the majority[55] but also when the minority

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emigrating to another country where the native ethnic groups then claim to be disadvantaged by immigrants include the Chinese in Siam and Malaya, and the Indians in Fiji and East Africa. THOMAS SOWELL, ETHNIC AMERICA 123 (1981).

50. *See generally* SOWELL, *supra* note 20, at 41-87.

51. *Id.* at 85.

52. *Id.* at 85-86.

53. *Id.* at 87.

54. *Id.*

55. *See id.* at 88-89. Sowell identifies "Indian dentists and Chinese businessmen in Malaysia, Lebanese middlemen and exporters in Sierra Leone, German piano-makers from Australia, to America and Russia." *Id.* at 89.

arrived as immigrants and displaced existing classes of people.[56] This internationally verifiable economic achievement by disfavored minority groups confirms the results discussed in the prior subsection. Such results once again eviscerate the assertion that group preferences are warranted on the grounds that large disparities in representation are solely due to discrimination. To the contrary, majority group under-representation must be explicated by factors beyond discrimination, as the dominant majority "either controls the institutions in which the disparities occur or forms the bulk of the clientele on whose patronage the minority depends."[57] Assuredly, where a disfavored minority group starts out as the economically and politically disadvantaged group and later acquires dominance in the market, it is foolhardy to attribute their subsequent accomplishment to racial discrimination against the majority.

C. *Minority Preferences in Majority Economies*

Recent government-sponsored preferential policies include those for minority groups in economies dominated by majority individuals and groups. Examples include the Sephardim in Israel, the untouchables in India, the Maoris in New Zealand, and Blacks in the United States.[58] To be sure, in a self-interested world,[59] minority preferences in majority-dominated economies—which must originate outside the beneficiary group—would seem anomalous. Consider India's untouchables. Historically, severe restrictions against touching caste Hindus (the preferred group) were placed on the untouchables. In its most severe form, this caste system precludes the shadow of an untouchable from falling upon a caste Hindu.[60] To counter these morally indefensible policies, India instituted, among other things, quota programs to increase the proportion of untouchables in various professions.[61] Despite these programs, India soon had to face the problems of under-

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56. *Id.* Examples of such displacement include Jewish businessmen in Argentina, Japanese fishermen in Canada, and Irish politicians in America. *Id.*

57. *Id.*

58. *Id.* at 90.

59. *See* ADAM SMITH, WEALTH OF NATIONS (1937).

60. SOWELL, *supra* note 20, at 91. In India:

> There is not a uniform national pattern, either in behavior or in the definition of an untouchable. Moreover, untouchables are by no means a single homogeneous group, any more than the other castes are. In India, there are literally thousands of local castes, of whom more than 1,000 were placed on the schedule or list of untouchables drawn up by the colonial government for purposes of ameliorative policies. Some groups are considered untouchable in some parts of the country but not in others and some groups of untouchables observe untouchability toward other groups of untouchables.

Id. at 92-93 (citing Barbara R. Joshi, *Ex-Untouchable: Problems, Progress, and Policies in Indian Social Change*, PAC. AFF., Summer 1980, at 196-97).

61. SOWELL, *supra* note 20, at 96-101.

utilization. In survey after survey of medical and engineering schools, most Indian universities were not able to fill their quotas, despite the lowering of entrance standards.[62] Similarly, government jobs reserved for untouchables were not taken due to the "lack of qualified candidates."[63]

In his observations on the failures of the Indian quota regime, Sowell shines as he demonstrates that "these facts all reflect the same need for complementary inputs—whether money or education performance or job skills—as a prerequisite for taking advantage of the benefits reserved for particular groups."[64] This wrenching "need for complementary resources is demonstrated by the fact that, among those who do use the quotas, the more prosperous of the scheduled castes [untouchables] use a disproportionate share."[65]

In the United States, since President Lyndon Johnson's Executive Order in 1965 establishing the Office of Federal Contract Compliance, which first created "guidelines,"[66] the federal role in ensuring diversity in the workplace and in educational institutions has metastasized to permeate virtually every arena of American life. While the impact of such remedial policies has not always been clear, some analysis seems warranted. First, Sowell demon-

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62. *Id.* at 97.

63. *Id.*

64. *Id.*

65. *Id.* at 98. Also note that in the United States:

> [T]here are dozens of American colleges and universities in which the median combined verbal SAT score and mathematics SAT score total 1200 or above. As of 1983, there were fewer than 600 black students in the entire United States with combined SAT scores of 1200. This meant that, despite widespread attempts to [ensure black] "representation" [that was] comparable to the black percentage of the population (about 11 percent), there were not enough black students in the entire country for the Ivy League alone to have such a "representation" *without going beyond this pool*—even if the entire pool went to the 8 Ivy League colleges.

Id. at 108. Given the number of "top-tier institutions across the country competing for these and other black students, there was no realistic hope [in the near term] of approaching a proportionate 'representation'" of such students without widespread lowering of admissions standards for such students. *Id.* This pattern, of course, echoes the facts concerning the Sinhalese in Sri Lanka. *See id.* at 108.

More recently, average scores on the SAT and on the ACT have indicated that most minorities continue to lag behind the average scores achieved on such aptitude tests. CHRON. HIGHER EDUC., ALMANAC ISSUE, Sept. 1, 1995, at 12.

For an incisive and captivating argument in favor of complementary resources, see LOURY, *supra* note 23, at 107. While simultaneously opposing (1) a return to a so-called color-blind approach to the disparity between races and (2) affirmative action, Loury states "that direct and large-scale intervention aimed at breaking the cycle of deprivation and the limited development of human potential among the black poor is the only serious method of addressing the racial inequality problem in the long run." *Id.*

66. SOWELL, *supra* note 20, at 103-04.

strates that, contrary to the conventional view, the migration of Blacks from the South to the other parts of the United States, and the input of more and better education, largely explain the relative improvement of African-American incomes during the period between 1940 and 1970. Furthermore, the upward trend in African-American wages relative to those of Whites preceded the passage of the Civil Rights Act of 1964.[67] Additionally, while the numbers of Blacks in professional and other high level occupations rose significantly after the passage of the Civil Rights Act of 1964, "the number of blacks in such occupations increased even more rapidly in the years *preceding* passage of the Civil Rights Act of 1964."[68] Interestingly, "[t]he largest gains in black wages relative to those of whites between 1960 and 1970 occurred in private sector industries *less* regulated by government and *less* likely to be government contractors."[69] In addition, Black males with more education and more job experience have advanced in income, both absolutely and relative to Whites, while Black males with less education and less job experience have retrogressed relative to Whites over the same span of years.[70] Consistent with the effects of preferential policies elsewhere, such as those in Sri Lanka, India, and Nigeria, one should expect that the more fortunate members of the preferred group will gain and that the less fortunate members of favored groups will lose; and thus, income disparity should be exacerbated by the creation of preferential group rights.[71]

Indeed, less fortunate but preferred *groups* lose in competition with more fortunate groups in terms of skills, education, and cultural attitudes. For instance, both Puerto Rican and African-American groups have fallen further behind the average for all Americans in terms of relative economic advancement during the era of preferential policies, while women, especially White women (the most fortunate preferred group), have progressed substantially.

Using the examples of India, the United States, and other countries that enact preferential policies favoring minorities, Sowell exposes the deficiencies of these policies:[72] (1) the beneficiaries of such policies are unlikely to be the most needy members of preferred groups or members of the most needy group; (2) in order for group preferences to work in terms of improving the economic status of under-represented groups, additional, effective, comple-

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67. *Id.* at 113. *See also* Chinhui Juhn et al., *Accounting for the Slowdown in Black-White Wage Convergence*, *in* WORKERS AND THEIR WAGES: CHANGING PATTERNS IN THE UNITED STATES 107 (Marvin H. Kosters ed., 1991).

68. SOWELL, *supra* note 20, at 113.

69. *Id.*

70. *Id.*

71. *See id.* at 113-14. This pattern of retrogression by the less fortunate members of preferred groups is consistent with the experience of untouchables in India, the Maoris in New Zealand, and the Malays in Malaysia. *Id.* at 114.

72. *Id.* at 103-12.

mentary resource deployment is a prerequisite; (3) preferential policies, even when defined as temporary, tend not only to persist but also to expand in scope—embracing more groups, increasing group polarization, and leading to fraudulent claims of group membership as standards are lowered in order to increase the statistical representation of groups;[73] and (4) consistent with the evidence from prior subsections touching on preferences for majorities, racism alone fails to explain disparities in income for minority groups.[74]

III. IMPLICATIONS AND ILLUSIONS OF PREFERENTIAL POLICIES

Beyond the largely empirical discussions of majority preferences in majority dominated nations, of majority preferences in minority dominated countries, and of minority preferences in majority dominated societies, Sowell explicates how preferential programs, which seemingly are animated by dispassionate consideration of outcomes, are instead propelled by illusions. He briefly examines widely held myths concerning knowledge, control, morality, and compensation.

Sowell first considers the illusion that societies possess "far more control of complex social interactions than anyone or any institution has been capable of exercising."[75] Explicit evidence of the vitality of this illusion is proffered by referring to Pakistani preferences that were proposed to "ameliorate socioeconomic differences between East Pakistan and West Pakistan."[76] Preferential policies advanced as a vehicle to improve the statistical representation of East Pakistanis in employment and school admissions were advocated in 1949 as a temporary measure to be phased out over a five- to ten-year period. These measures were instead extended in 1984 to 1994, despite the fact that East Pakistan broke away in 1971 to form the independent nation of Bangladesh.[77]

This illusion of control, exemplified by the failure of the Pakistani

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73. *See generally id.* at 90-116. Two-thirds of Americans qualify for preferences. *Id.* at 122.

74. Alternative explanations of income disparity abound. For instance, one observer of the United States economy states that "[t]o the extent that unions are successful, they redistribute income toward their members, who are predominantly white, male, and well paid, at the expense of consumers as a whole, taxpayers, nonunion workers, the poor, and the unemployed." MORGAN O. REYNOLDS, MAKING AMERICA POORER: THE COST OF LABOR LAW 29 (1987).

75. SOWELL, *supra* note 20, at 119. Because the United States government lacks sufficient knowledge about morally unwarranted discrimination, some observers have proposed, and some courts have accepted, the view that any action by a decision maker having a disparate impact on a group is illegal in the absence of compelling justification. For a commentary on this perspective, see Alexander, *supra* note 4, at 212-16.

76. SOWELL, *supra* note 20, at 121.

77. *Id.*

program, is premised on the illusion that societies possess "far more knowledge than anyone possesses."[78] Most advocates of preference programs fail to understand that the establishment of preferences also creates disincentives. For instance, proponents of preferences justify such policies on the ground that prior discrimination warrants preferences to increase opportunities for "qualified" individuals to acquire skills, while ignoring the fact that the existence of preferences creates disincentives which may limit the acquisition of skills and increase a sense of entitlement. Consider this query by a member of a preferred group in the Indian city of Hyderabad: "Are we not entitled to jobs just because we are not as qualified?"[79] In addition, as one observer points out, the most virulent White supporters of early racial preferential policies in South African mines were those who had trouble becoming qualified for promotions, and "who therefore relied on being White instead."[80]

Other illusions concern morality and compensation. For instance, preference programs have been sustained on the basis of the morality of protecting a group's innate superiority. Such claims have been maintained in disparate settings, such as the "Jim Crow" American South, Nazi Germany, and pre-Mandela South Africa. In these cases, such arguments were animated by the need "to evoke a sense of solidarity within a group already possessed of the political power needed to give themselves special benefits."[81] Assuredly, programs maintained on the basis of group solidarity run the very real risk of eroding a sense of national solidarity and cohesion.

While Sowell's discussion of illusory compensation claims should be amplified, the author skillfully depicts the experience of the Japanese in the United States and Canada and compares African-Americans to Puerto Ricans in the United States. These discussions severely undercut the notion that preferences are warranted on the ground that contemporary descendants suffer the effects of past wrongs and such wrongs must, accordingly, be offset by compensatory preferences.[82] The fallacy of this viewpoint is its implicit failure to comprehend that the contemporary socioeconomic position of groups in a given society often bears no relationship to the historic wrongs suffered.[83] For example, despite severe anti-Japanese discrimination, Japanese family income in both Canada and the United States exceeds the

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78. *Id.* at 119. *See also* F. HAYEK, 2 LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE (1976).

79. SOWELL, *supra* note 20, at 68 (quoting MYRON WEINER, SONS OF THE SOIL 229 (1978)).

80. *Id.* at 123.

81. *Id.* at 145. For an article that seeks to illuminate the economic power of claims of group superiority, see Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1005 (1995).

82. SOWELL, *supra* note 20, at 149.

83. *Id.*

income of the descendants of the perpetrators of discrimination.[84] Moreover, African-American income exceeds Puerto Rican income in the United States, despite the fact that the historic wrongs suffered by African-Americans exceed that of Puerto Ricans.[85] Paradoxically, under the United States' present preference regime, recent immigrants from identifiable ethnic minority groups qualify for affirmative action, despite the impossibility that these groups can make plausible claims for remediation.[86]

As one commentator illumined:

> For a long while, economists, like specialists in other fields, often took it for granted that groups of individuals with common interests tended to act to further those common interests . . . .
>
> More recently, the explicit analysis of the logic of individual optimization in groups with common interests has led to a dramatically different view of collective action.[87]

If the interest is really common, "the furtherance of that common interest will automatically benefit each individual in the group, whether or not he has borne any of the costs of collective action to further the common interest."[88] On the one hand, the most highly educated and the most highly skilled members of preferred groups demand more preferences while concurrently garnering disproportionate shares of the benefits; on the other hand, less educated or less skilled members of the preferred group incur disproportionate shares of the cost while the preferred group as a whole, at least in some cases, falls further behind the average in terms of relative income. This situation should be surprising only to the most naive among us. Economists and public choice scholars have known of this situation for some time.[89] What is apparently new is that Sowell has verified these facts empirically. Given, then, the accuracy of Sowell's empirical analysis, one important conclusion

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84. *Id.*

85. *Id.*

86. Krauthammer, *supra* note 5, at F5. Since minorities comprise up to 75% of recent immigrants to the United States, a large portion of the benefits of racial preference programs designed to remedy past discrimination inevitably flow to recent immigrants. Indeed, by law, immigrants can not be excluded from preference regimes. *See* ROBB, *supra* note 8, at 5-120.

87. Mancur Olson, *Collective Action, in* THE INVISIBLE HAND 61 (John Eatwell et al. eds., 1989).

88. *Id.*

89. *See* Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 472-73 (1988) (arguing that an important goal of a legal system that desires to promote social stability and social welfare is to increase the transaction costs facing parties who seek enactment of legislation that employs the machinery of the state to effect coercive wealth transfers from one group to another).

emerges: if group-oriented policies are to be morally justifiable, the benefits of such remedial programs must be made to predominately flow to the less skilled, the less educated, and the less fortunate among us.

Attaining this objective will be difficult. Again, Sowell points the way by stating that, while the American public seems to express disapproval of outright "set-asides," it accepts "resource transfers designed to enable disadvantaged groups to meet standards . . . while attempts to bring the standards down . . . are overwhelmingly rejected."[90] Despite preferential policies having been repeatedly rejected in public opinion polls, most Americans have strongly supported "special educational or vocational courses, free of charge, to enable members of minority groups to do better on tests."[91] Such an approach is not necessarily color blind nor race conscious. Instead making complementary resources available demonstrates a salutary movement toward the extirpation of income disparity that can be labeled *disparity conscious*. The necessity of complementary inputs is poignantly illustrated by the phenomenon that, despite preferential policies, Black American income has fallen relative to the average during the period following the exhilaration of the civil rights movement.[92] Additionally, as the experience of the Ceylon Tamils illustrates, components of success include competitiveness, aggressiveness, and a cultural appreciation for competition.

IV. CONCLUSIONS

Readers who revisit this important book will be rewarded by the author's international focus and willingness to state the hard facts. Both of these perspectives seem absent in the current debate over group rights. By relentlessly focusing on outcomes rather than justifications, by steadfastly examining incentives rather than hopes, Sowell compels readers to take the problems of group rights seriously. Dispensing with illusions, Mr. Sowell imperils the vitality of recreant and protuberant arguments emanating from all sides of the group rights chasm. Sowell examines the paradox of policies designed to reduce inequality, which, under certain circumstances, increase disparity even for members of the less-fortunate but preferred groups, as well as the irony of policies initially animated by a desire to reduce inter-group friction, but which over time increase it. While explicitly illustrating lacunae in our knowledge, and while cogently demonstrating that free markets, contrary to the prevailing hegemony, do not preclude the advancement of disadvantaged groups, Sowell provides results that depend less on which

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90. SOWELL, *supra* note 20, at 165.

91. *Id.*

92. *See generally* Juhn et al., *supra* note 67, at 107-43. Black male wages have actually declined relative to White males during the 1980-1987 period, which followed a period of dramatic decreases in wage disparity from 1963-1980. *Id.*

group dominates or on which group suffers from disparity, than on the inherent shortcomings of group rights.

Given that "[t]he powerful moral vision that generated America's civil rights movement is on the brink of disintegration,"[93] given "that civic harmony among racial and ethnic groups is among the most salient global challenges of the next half-century,"[94] and given the vituperative claims by observers currently echoing from all sides of the group rights divide, it is chimerical to believe that the truths illumined by Sowell alone will free either America or the rest of the globe. It is, however, important to realize that, whilst many commentators rail for or against affirmative action, racial preferences can have very minimal impact in terms of income distribution *unless* constituent members of preferred groups possess skills that are valued in the marketplace. In many cases, group preferences can be seen as a form of regressive income redistribution that not only redistributes income from the least fortunate to the most fortunate members of the preferred groups, but also effectively redistributes income from the less skilled groups to the more skilled groups.[95] Such a redistribution is "in effect . . . a redistribution of power from the individual to the State."[96]

Since preferences reward those with marketable skills, the prime beneficiaries of redistributional preferences are individuals and groups that possess such skills. Accordingly, one of the poignant ironies of the American preference wrangle concerns the frequent invocation of the term "racial preference" by group rights opponents who fail to recognize that the prime beneficiaries of redistributional preferences are likely to be members of their

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93. Horner, *supra* note 6, at 7.

94. *Id.*

95. This paradoxical result can be expressed through an example. As the competition for minority students heated up during the recent decades in the United States, many Black students who scored above average on the SAT were recruited by top-notch universities and colleges. These minority students had the capability of doing very well at good, but less demanding, schools. Instead, they were placed in the most demanding environment. Unfortunately, in more than one case, after five years of schooling, 70% of these students failed to graduate. Assuredly, a graduate of a good university is likely to be more valuable in a market economy than a drop-out from a demanding one. Accordingly, it is possible to argue that one of the unintended results of preferential admissions is that fewer Black students attain a college degree. Since education is one of the factors that affects economic success in the United States and most other market-oriented countries, affirmative action may have the paradoxical and undesired effect of reducing the number of skilled members of the preferred group and hence lowering the average income of the preferred group relative to the average of nonpreferred groups. *See supra* note 65 and accompanying text. *See also* SOWELL, *supra* note 20, at 109. For a recent judicial opinion that concurrently restricts the availability of preferences in an academic setting, and declines to move in the direction of compensatory resource deployment, see Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

96. BERTRAND DE JOUVENEL, THE ETHICS OF REDISTRIBUTION 72 (1990).

own racial class.[97] Honest observers of the group rights debate must conclude that this invocation should not be taken seriously unless coupled with implacable opposition to all forms of invidious discrimination as well as support for policies which go to the heart of economic disparity among groups and individuals. Opponents of group preferences must champion policies (including non-governmental and non-coercive ones) that increase the complementary inputs available for the most needy among us, which extirpate laws that inhibit the marketplace advancement of minorities, and which raise the standards and the academic readiness of disadvantaged groups and individuals.[98] Otherwise, their moral qualms concerning group rights will, deservedly, inherit the wind.

On the other hand, group rights proponents, blinded by the myth that the market is antithetical to minority advancement and impelled by the unshakable dream of ever-expanding group rights, refuse to confront inefficacious programs and paradoxical policies. Accordingly, effective and honest discourse—characterized by a willingness to state the hard facts about the causes and cures of income disparity among individuals and racial groups[99] and about proposals, including the creative use of freedom,[100] which have the capacity to reduce such disparity—become evanescent in the thicket called "racism." Meanwhile, truly disadvantaged individuals and groups fall further behind as group preference programs redistribute income from the less fortunate to the more fortunate among us. Moreover, group rights advocates must come to understand this conclusion born of an examination of international and American evidence: government cannot necessarily make us equal;

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97. For example, as preferences expanded to include women in the United States, racial minorities, especially Black Americans, were relatively disadvantaged, since women (especially White women) possessed, on average, more initial skills and more initial education than many members of disadvantaged racial minorities. In addition, many group rights opponents underestimate the extent that past racial preference regimes, such as "Jim Crow" and segregated schooling, constitute massive complementary resource transfers to White Americans, thus especially raising the average income of some Whites in the United States. By way of analogy, see SOWELL, *supra* note 20, at 39 (discussing preferences coupled with massive transfers of resources favoring Afrikaners that improved the relative incomes of Afrikaners).

98. *See generally* BOLICK, *supra* note 44, at 47-86.

99. *See generally* SOWELL, *supra* note 40, at 81-116. *See also* Glenn Loury, *Individualism Before Multiculturalism*, 121 PUB. INTEREST 92 (Fall 1995) (arguing, among other things, that character counts).

100. Among the proposals to improve the academic preparedness of minorities include the creation and expansion of school voucher programs. For at least one view, see Harry Hutchison, *Private Schools: Let Competition Heat Up*, *in* EDUCATIONAL CHOICE FOR MICHIGAN 47 (Lawrence Reed & Harry Hutchison eds., 1991) (available at The Mackinac Center for Public Policy, 119 Ashman Street, Midland, Michigan 48640).

it can only recognize, respect, and protect us as equal before the law.[101]

While affirmative action, group rights, and other preferential approaches based largely on ethnicity may be morally and empirically problematic, they were animated (at least initially) by compassion.[102] Compassion, however, cannot irretrievably cloud truth, nor should truth eviscerate compassion. What is urgently required, given the current exponential expansion of the minority "underclass"[103] in the United States, is the recognition that our compassion, as informed by the verifiable effects demonstrated by Thomas Sowell, can lead America to a more coherent conception of the group rights wrangle, to an awareness of the pitfalls of group rights policies, and to more effective and less divisive remedies for income disparity. Otherwise, the antiphonal chasm that separates group rights proponents and opponents—the abyss that ineffably divides White, Black, Asian, Hispanic, and other Americans—will accrete until this fragmented country, like many others in the global village, becomes inexorably drawn to the fragrant aroma of the conflagration next time, as America unifies only in the scent of its self-immolation.

Hopefully, an internationally grounded perspective will prevent the United States and other countries from treading down the path that leads to Bosnia. In any case, history will give an authoritative assessment of whether the United States and the world are capable of learning from the past.

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101. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring).

102. *See* SOWELL, *supra* note 20, at 90-91.

103. For example, the percentage of Black children in poverty rose from 39% to 46% during the period from 1974 to 1993. The percentage of the Black population living in so-called "underclass" areas has nearly doubled during the period from 1970 to 1990. HERBERT STEIN & MURRAY FOSS, THE NEW ILLUSTRATED GUIDE TO THE AMERICAN ECONOMY 134-37 (2d ed. 1995).

INTERNATIONAL DETERMINANTS OF HUMAN RIGHTS AND WELFARE: LAW, WEALTH OR CULTURE

*Frank B. Cross**

I. INTRODUCTION

The relative protection of fundamental human rights varies considerably among nations, as does the social welfare of individuals. If the sources of this variance can be identified, we may better be able to define and implement policies to advance human rights and welfare across the globe. This article represents a first step toward ascertaining the determinants of national levels of rights and well-being. I examine three potential factors influencing levels of rights and welfare—the prominence of the rule of law, relative wealth, and cultural difference. Various studies have considered these factors and sought to measure their effect, but these studies have considered the factors individually rather than jointly.

For purposes of this article, human rights are defined as the type of individualist negative rights found in the Bill of Rights and the U.S. Constitution. This definition includes such rights as the right to vote in democratic elections, freedom of speech and belief, freedom from imprisonment without due process of law, and analogous rights. I define human welfare as a measure of material well-being sometimes called positive economic rights, either for the average citizen or for the poorest segment of society. Additional detail about these definitions is provided below in my discussion of methodology.

One potential source of human rights and welfare is the prominence of the rule of law. The potential significance of law is most apparent with respect to the classical negative human rights, because such rights are legally defined and legally enforced against an infringing government. Presumably, a nation that constitutionally guarantees basic rights (such as freedom of speech or freedom from unreasonable searches and seizures) would maintain higher levels of such rights.[1] Other legal factors also may influence the measure of negative human rights throughout the world. Gerald Scully has found an association between common law nations and higher levels of freedom.[2] Law and independent courts may be considered central to the

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1. Of course, constitutional guarantees are not self-enforcing. Nor are such guarantees exogenous. The content of a constitution is surely affected by a nation's culture, its well-being, and its legal structure. Consequently, my study focuses not so much on the written content of the guarantee as on the mechanisms through which such rights may be advanced.

2. GERALD W. SCULLY, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH 148-65 (1992). Scully cites a number of features of the English common law system that promote human rights, including the "[e]qual protection and equal status of the litigants and

creation and protection of rights.[3] In addition to the substantive content of law, procedural features, such as the position of lawyers, may also influence the protection of human rights. Terence Halliday reports considerable anecdotal evidence of lawyers advancing human rights in different international regimes.[4] One might, therefore, expect a large number of lawyers to enhance the advancement of such rights, as some existing research has found.[5]

Law may also advance material human welfare insofar as it provides a counterweight to the power of the wealthiest societal group. While most economic systems enable the wealthy or otherwise empowered to have their way, legal systems may provide a brake that limits the exercise of this power. In the United States, one cannot purchase an actual slave, regardless of one's wealth and inclinations. Law may also have a broader influence. For example, lawyers can play a significant role in defining society's values.[6] This connection seems weaker, though, than the likely association of law and negative human rights. Katarina Tomaševski suggests that the rule of law can contribute more to the protection of human rights than to overall material welfare.[7] Some suggest that the law's devotion to the protection of negative human rights might actually undermine human welfare.[8]

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strict judicial independence [to] circumscribe the coercive power of government." *Id.* at 151. His cross-national empirical analysis indeed found that freedom was greater in common law countries and that the differences were "relatively large and are statistically significant at well above the 1 percent level." *Id.* at 161.

3. *See, e.g.*, Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470 (1995). Tamanaha notes that the law can be used as a "means of social engineering" for achieving "development objectives." *Id.* at 473. He further observes that when courts are "weak or irrelevant[,]" elites can exercise power more arbitrarily. *Id.* at 474. He concludes that law may be helpful or even necessary to economic and political development, but that legal development is not itself sufficient to achieve these ends. *Id.* at 483-84.

4. Terence C. Halliday, *Legal Professions and the State: Neocorporatist Variations on the Pluralist Theme of Liberal Democracies*, *in* 3 LAWYERS IN SOCIETY: COMPARATIVE THEORIES 375 (R.L. Abel & P.S.C. Lewis eds., 1989). Halliday's examples include the resistance to Franco's fascism on the part of Spanish lawyers, the fight of Argentine lawyers against military dictatorship, and other cases. *Id.* at 404-05.

5. Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 676-78 (1992). The study found a statistically significant association between lawyer numbers and both civil liberties and democracy, though lawyers did not explain a high percentage of the variance in these features. *Id.* at 678.

6. *See* Philip S. Stamatakos, *The Bar in America: The Role of Elitism in a Liberal Democracy*, 26 U. MICH. J.L. REF. 853 (1993).

7. Katarina Tomaševski, *Monitoring Human Rights Aspects of Sustainable Development*, 8 AM. U. J. INT'L L. & POL'Y 77, 85 (1992).

8. *See, e.g.*, ZEHRA F. ARAT, DEMOCRACY AND HUMAN RIGHTS IN DEVELOPING COUNTRIES (1991). Arat observes that "socioeconomic rights are often considered as group rights that can be maintained only at the expense of individual rights (civil-political rights), or vice versa." *Id.* at 3-4. He observes that communitarians believe that negative rights interfere

Another potential source of human rights and welfare is the level of national wealth. The richer a nation, the greater its mean level of material well-being, which may produce a higher level of welfare for the median and poorest groups as well, either through a trickle down of free market benefits or via greater government transfer payments and other public welfare expenditures. Wealth may also contribute to human rights, in that wealthier societies with relatively less concern for material necessities might place greater value on individual rights. Lee Kuan Yew, Singapore's former Prime Minister declared that: "When you are hungry, when you lack basic services, freedom, human rights and democracy do not add up to much."[9] In a Maslovian hierarchy of needs, pursuit of some minimal level of wealth would precede the quest for protection of human rights.[10] One review suggests that civil and political rights have generally expanded in parallel with the expansion of national wealth.[11] The association of wealth and human rights has been empirically suggested in prior research.[12] Some suggest that the positive social rights are an essential prerequisite to individual rights.[13]

Yet another influence on human rights and welfare is local culture. Indeed, some maintain that there are no universal rights and that all concepts of rights are culture-based.[14] A variety of authors have claimed that

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with positive rights, while classical liberals reject positive rights as requiring a compromise of negative rights. *Id.* at 4. While Arat believes that the two categories of rights are in some tension, he does not find the conflict ineluctable. Rather, he calls for a balanced promotion of both sets of rights. *Id.* at 8.

9. Philip Shenon, *Singapore, the Tiger Whose Teeth Are Not Universally Scorned*, N.Y. TIMES, Apr. 10, 1994, at 5. Adamantia Pollis makes the very broad claim that "[a]ll third world countries espouse the priority of economic and social rights over civil and political rights." Adamantia Pollis, *Liberal, Socialist, and Third World Perspectives of Human Rights*, *in* TOWARD A HUMAN RIGHTS FRAMEWORK 20 (Peter Schwab & Adamantia Pollis eds., 1982).

10. *See* ABRAHAM H. MASLOW, MOTIVATION AND PERSONALITY 35-46 (2d ed. 1970) (suggesting that primary needs are physiological).

11. Ronald St. J. MacDonald, Book Review, 86 AM. J. INT'L L. 192 (1992) (reviewing CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990)). He cites one commentator who notes Africa as an example of a region where "pressing economic and social development needs support economic-based rights over civil and political freedoms." *Id.* at 195.

12. *See* R.D. McKinlay & A.S. Cohan, *A Comparative Analysis of the Political and Economic Performance of Military and Civilian Regimes*, 8 COMP. POL. 1 (1975); Partha Dasgupta & Martin Weale, *On Measuring the Quality of Life*, 20 WORLD DEV. 119 (1992); Neil J. Mitchell & James M. McCormick, *Economic and Political Explanations of Human Rights Violations*, 40 WORLD POL. 476 (1988).

13. *See* ARAT, *supra* note 8, at 4.

14. This thesis is reviewed by numerous articles in ABDULLAHI AHMED AN-NA'IM, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (1992). *See also* HUMAN RIGHTS IN THE AMERICAS: THE STRUGGLE FOR CONSENSUS (Alfred T. Hennelly & John Langan eds., 1982) (presenting perspectives on human rights from various traditions, both religious and secular philosophical); ASIAN PERSPECTIVES ON HUMAN RIGHTS (Claude E. Welch, Jr. & Virginia A. Leary eds., 1990) (discussing human rights concepts from the

democracy is contingent upon cultural conditions to a considerable degree.[15] Other individualist human rights are also affected by cultural traditions.[16] Without entering that debate over the ethnocentrism of specific rights, this study investigates whether the actual protection of traditional Western individual rights is, in fact, culture-based as so often assumed. One can discern the extent to which protection of these rights is culturally based and then draw one's own conclusions regarding the value of the rights.

Culture may also influence human welfare, as some cultures presumably are more altruistic and egalitarian rather than individualist. Mark Casson has observed that culture may influence human welfare, as Eastern economies function differently from those of the West, a feature that may influence overall economic growth, distribution of income, or the level of government transfer payments.[17] One must take care to escape the temptation of sociologically ascribing any and all differences to culture, however. One author found that cultural factors had less effect on welfare than did the country's political and economic institutions.[18] Culture may be a product, rather than the cause, of a nation's law and wealth.

Given the theoretical basis for expecting law, wealth, or culture to affect human rights and welfare, investigation of the empirics is in order. Which factors matter and how much do they matter? While these variables have interrelationships among themselves, the multiple regression format is designed to isolate independent effects of each variable. The following study uses this approach to search for an association between measures of law,

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Asian philosophical tradition); ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM (1990) (suggesting that there is no philosophical basis for universal notions of human rights). The culture-dependence of human rights also has been challenged from a philosophical perspective. *See* Raimundo Panikkar, *Is the Notion of Human Rights a Western Concept?*, 120 DIOGENES 75 (1982) (suggesting that human rights are fundamental to human life itself). Adamantia Pollis begins her essay on human rights by stating that "[h]uman rights, both their philosophic and/or theoretical formulation and their practice, are rooted in the specifics of particular societies and civilizations." Pollis, *supra* note 9, at 1.

15. *See* THE CIVIC CULTURE REVISITED (Gabriel A. Almond & Sidney Verba eds., 1980) (suggesting that certain attributes called civic culture are central to democracy); MARTIN C. NEEDLER, THE PROBLEM OF DEMOCRACY IN LATIN AMERICA (1987) (suggesting that traditional Latin American culture is inconsistent in some respects with democracy); CLAUDIO VÉLIZ, THE CENTRALIST TRADITION OF LATIN AMERICA (1980) (contending that traditional Latin American culture conflicts with democratic approaches).

16. *See, e.g.*, Abdul Aziz Said, *Human Rights in Islamic Perspectives*, *in* HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 86 (Adamantia Pollis & Peter Schwab eds., 1979) (suggesting that individualistic negative rights are inconsistent with Islamic culture).

17. Mark Casson, *Cultural Determinants of Economic Performance*, 17 J. COMP. ECON. 418 (1993).

18. *See* MARC M. LINDENBERG, THE HUMAN DEVELOPMENT RACE: IMPROVING THE QUALITY OF LIFE IN DEVELOPING COUNTRIES (1993).

wealth, and culture and a variety of established indices of human freedom and welfare.[19]

II. METHODOLOGY

Empirical investigation of the above associations requires a closer definition of terms. For wealth, gross national product is an accepted measure, and this study uses for its independent variable of wealth the per capita gross domestic product of the nation in 1985 (GDP85). For law, no such accepted proxy is available. Rather than attempt somehow to measure the substantive content of the law, this study uses the number of lawyers per capita as the proxy for the prominence of law in a nation (LAWPOP). The substantive content of the law may be relatively meaningless without the resources and procedures to enforce its terms, and lawyers are the primary resource. Culture also lacks a convenient proxy. While cultural effects might be modeled in different ways, this study divides the world into six cultural zones: East Asia, South Asia, Middle East, Africa, Latin America, and Europe. Nations are assigned to these groups geographically, with an eye to historic culture (e.g., the United States and Canada are assigned to the Europe category).[20]

For the dependent variables of human rights and social welfare, the study uses a variety of secondary sources that have sought to quantify these variables across nations. The human rights proxies include the following:

- POLRIGHT, a private organization's measure of such rights as democratic elections and the right to vote;[21]
- CIVLIB, a private organization's measure of civil liberties, such as freedom of speech and religion;[22]
- HUMANA, a different private organization's measure of human rights, focusing on individual freedom but also including some positive rights of

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19. There are inherent limitations to any quantitative analysis of human rights, not the least of which is variable measurement. *See, e.g.*, Robert Justin Goldstein, *The Limitations of Using Quantitative Data in Studying Human Rights Abuses*, 8 HUM. RTS. Q. 607 (1986). Yet even Goldstein recognizes the value of quantitative approaches but merely cautions against allowing quantitation to supplant any qualitative analysis.

20. This geographic proxy for culture could be criticized, but many of the discussions of cultural influence on rights are explicitly geographic in their categorization (e.g., suggesting that Latin American or Middle Eastern culture may control negative human rights allowed). *See supra* notes 15-16. I would emphasize that my geographic breakdown does not imply any inherent cultural attributes of peoples. For example, one author suggests that traditional African cultures were respectful of human rights but that this tradition was destroyed by colonialism. Dunstan M. Wai, *Human Rights in Sub-Saharan Africa*, *in* HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 115 (Adamantia Pollis & Peter Schwab eds., 1979).

21. Data for this variable are taken from RAYMOND D. GASTIL, FREEDOM AROUND THE WORLD: FREEDOM AT ISSUE (1990).

22. *Id.*

material welfare;[23]

- HUMFREED, the United Nations ranking of human rights, including primarily individual freedom and equality of rights;[24] and
- DUEPROC, a private organization's rating of judicial rights, especially for criminal defendants.[25]

Some of these rankings have suffered criticism for bias, either ethnocentric or ideological.[26] This article does not enter that debate but rather considers the conventionally established standards of individual liberty, which doubtless carry some value to many individuals. The proxies used to measure material social welfare including the following:

- HUMDEVI, the United Nations human development index intended to measure overall human welfare, including such factors as GDP, life expectancy, and literacy;[27]
- SOCWELF, the proportion of government revenues dedicated to social welfare expenditures;[28]
- QLIFERAN, a private organization's rating of overall quality of life, considering health, freedom, economics, and other factors;[29]
- PQLI, a private measure of quality of life intended to focus on the status of the poorest citizens, including factors such as literacy and infant mortality;[30] and
- ECOSOC, a private organization's rating of overall median human welfare.[31]

The different sources have varying definitions of material well-being, but together they should capture the comparative material quality of life.

To identify any effects of GDP85, LAWPOP, or geographic culture on the dependent variables of human rights or social welfare, a regression model is fit as follows. For example, the equation for democratic rights is:

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23. Data for this variable are taken from CHARLES HUMANA, WORLD HUMAN RIGHTS GUIDE (1992).

24. Data for this variable are taken from UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT (1991).

25. Data for this variable are taken from MICHAEL J. SULLIVAN, MEASURING GLOBAL VALUES (1991).

26. *See, e.g.*, Lisa J. Bernt, Note, *Measuring Freedom? The UNDP Human Freedom Index*, 13 MICH. J. INT'L L. 720 (1992). For example, these traditional conceptions of rights are individualistic and do not admit of group rights, which have recently received considerable attention. *See, e.g.*, Pollis, *supra* note 9, at 7.

27. Data for this variable are taken from UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT (1990).

28. Data for this variable are taken from source cited *supra* note 25.

29. Data for this variable are taken from AGORA, INC., THE WORLD'S BEST (1986).

30. Data for this variable are taken from M.D. MORRIS, MEASURING THE CONDITION OF THE WORLD'S POOR: THE PHYSICAL QUALITY OF LIFE INDEX (1979).

31. Data for this variable are taken from source cited *supra* note 25.

$$POLRIGHT = B_1 LAWPOP + B_2 GDP85 + B_3 DEASIA + B_4 DSASIA + B_5 DLAMER + B_6 DAFRICA + B_7 DMEAST + B_8 DEUROPE$$

DEASIA, for example, is a dummy variable, coded as 1 if the culture is East Asian and 0 if not. B_3 is the estimated level of political rights in East Asia if the number of lawyers and amount of wealth were zero. The same equation is employed for each dependent variable in turn.

III. RESULTS

The first test involved the human rights variables. For three of these variables (POLRIGHT, CIVLIB, and DUEPROC), a lower score or negative correlation coefficient is "better" (reflecting a higher level of the freedom measured). The results of this test are displayed in Table 1. Significance levels are shown in parentheses below the coefficients.

Table 1
Determinants of Human Freedom

	POLRIGHT	CIVLIB	HUMANA	HUM-FREED	DUEPROC
N	65	65	59	54	55
R^2	.677	.673	.765	.792	.655
LAWPOP	-.437 (**.045**)	-.206 (.211)	1.936 (.331)	.218 (.842)	-.793 (.380)
GDP85	-.112 (.165)	-.135 (**.030**)	1.128 (.123)	.941 (**.021**)	-.578 (.070)
East Asia	4.42 (**.000**)	4.01 (**.000**)	57.73 (**.000**)	9.54 (**.000**)	24.06 (**.000**)
South Asia	2.95 (**.000**)	3.57 (**.000**)	56.75 (**.000**)	9.96 (**.000**)	22.98 (**.000**)
Latin America	3.50 (**.000**)	3.61 (**.000**)	66.90 (**.000**)	15.67 (**.000**)	19.69 (**.000**)
Africa	5.84 (**.000**)	4.62 (**.000**)	53.76 (**.000**)	9.58 (**.000**)	22.67 (**.000**)
Mid East	5.26 (**.000**)	4.50 (**.000**)	42.63 (**.000**)	7.26 (**.000**)	20.67 (**.000**)
Europe	2.51 (**.000**)	2.55 (**.000**)	81.90 (**.000**)	24.81 (**.000**)	14.53 (**.000**)

The geographic definition of culture plainly has an overpowering effect on the level of human rights across nations. Europe consistently scores higher levels of measured rights in every scale. Differences among other regions are significant but vary by scale. Table 2 contains exemplary pairwise comparisons of various cultures for the variable POLRIGHT, with law and wealth held constant. The table provides P-Values for each pair of cultures with "<" or ">" signs to show the direction of a statistically significant difference. Thus, the "<" sign below indicates that the Middle East has a lower level of political rights than South Asia, holding the other variables constant.

Table 2
Political Rights by Culture

	East Asia	South Asia	Latin America	Africa	Mid East	Europe
East Asia		.1075	.2365	.1036	.3131	**.0072>**
South Asia			.3583	**.0001<**	**.0022<**	.5906
Latin America				**.0001<**	**.0031<**	.1163
Africa					.3976	**.0001>**
Mid East						**.0002>**
Europe						

Law has a statistically significant positive effect on political rights but no other individual rights variable, once the cultural variables are entered. This result is contrary to expectations, as one might have expected a stronger effect on due process and other individual rights that generally require legal assistance for vindication. In all cases, the direction of the coefficient for law was associated with higher levels of freedom, which may suggest some positive effect.

Wealth has a statistically significant positive effect on civil liberties and the United Nations human rights ranking, but not on other variables. However, wealth has a positive association for all variables (negative coefficients are for variables for which lower numbers mean more liberty) and approaches statistical significance for all. This encouraging result suggests that individual rights gain greater respect as a nation grows economically. It seems to suggest that greater wealth and more lawyers consistently tend to promote greater respect for freedom.

The same methodology was used to test relative levels of human welfare, and results are reported in Table 2. One variable (ECOSOC) has an inverse direction between score and level of welfare such that smaller numbers reflect higher levels of welfare.

Table 3
Determinants of Human Welfare

	SOCWELF	HUMDEVI	QLIFERAN	PQLI	ECOSOC
N	57	63	64	63	64
R^2	.796	.763	.913	.810	.881
LAWPOP	.050 **(.045)**	.046 (.070)	2.21 **(.032)**	3.39 (.088)	-3.06 (.230)
GDP85	.037 **(.000)**	.038 **(.000)**	2.54 **(.000)**	2.92 **(.000)**	-6.51 **(.000)**
East Asia	.590 **(.000)**	.561 **(.000)**	20.79 **(.000)**	61.14 **(.000)**	82.29 **(.000)**
South Asia	.525 **(.000)**	.487 **(.000)**	21.27 **(.000)**	56.69 **(.000)**	100.9 **(.000)**
Latin America	.579 **(.000)**	.557 **(.000)**	20.71 **(.000)**	59.13 **(.000)**	86.26 **(.000)**
Africa	.349 **(.000)**	.337 **(.000)**	14.28 **(.000)**	32.78 **(.000)**	103.7 **(.000)**
Mid East	.490 **(.000)**	.499 **(.000)**	12.74 **(.000)**	45.04 **(.000)**	85.51 **(.000)**
Europe	.596 **(.000)**	.567 **(.000)**	31.42 **(.000)**	62.93 **(.000)**	76.46 **(.000)**

As in the case of human rights, regional culture has a strong effect on material well-being. Europe consistently has higher levels of welfare for these dependent variables, even independent of the measured effects of wealth and law. The difference seen here between Europe, East Asia, and the other regions is much smaller, though, than in the freedom measures. Table 4 contains the significance levels for pairwise comparisons of the variable PQLI among the cultures. Statistically significant differences were found only for Africa or the Middle East as compared with other regions. Thus, although the nations of Africa are generally poor, these countries are not providing well for their poorest people, even accounting for their resource constraints. There are no significant differences among the cultures of East Asia, South Asia, Latin America, and Europe on this scale.

Table 4
Physical Quality of Life Index by Culture

	East Asia	South Asia	Latin America	Africa	Mid East	Europe
East Asia		.5579	.7591	**.0003<**	**.0255<**	.7600
South Asia			.6249	**.0001<**	**.0599<**	.3669
Latin America				**.0001<**	**.0050<**	.4673
Africa					**.0391<**	**.0001>**
Mid East						**.0014>**
Europe						

Somewhat surprisingly, the rule of law has a pronounced association with material well-being. The number of lawyers correlated significantly with SOCWELF and QLIFERAN and was significant at the .10 level for HUMDEVI and PQLI. The correlation is consistently positive. Contrary to expectation, the measured positive effect of lawyers on material welfare appears even greater than the measured effect on freedom.

Less surprisingly, national wealth also has a strong positive correlation with each material welfare variable. This is not simply a tautological finding, however. While average wealth is a component in some indices of well-being, the PQLI and HUMDEVI indices consider the welfare of poorer groups. Thus, this finding suggests that increasing overall GDP will incidentally benefit the middle class and poorer societal groups as well. This result fundamentally confirms that of others who reached this result with different scales to measure well-being.[32]

32. *See* LINDENBERG, *supra* note 18; N. Kakwani, *Performance in Living Standards: An International Comparison*, 41 J. DEV. ECON. 307 (1993).

IV. CONCLUSIONS

The results suggest that law, wealth, and culture all play a material role in protecting global individual freedoms and promoting material welfare. Culture, presumably, provides a basic level of rights and welfare that plainly differs across the world. European culture is associated with higher levels of individual freedoms. One might suspect this was attributable to Europe's higher level of wealth or rule of law, but the level of freedom is greater than in other regions, even holding those variables constant. The results should not be too unexpected, as individual freedom is in large part a Western construct[33] and may be ecdemic for other regional cultures. It is perhaps more noteworthy that European nations also have higher levels of material welfare for poorer inhabitants, even holding wealth constant. Several authors suggest that the Western emphasis on individual rights could actually undermine the ability of society communally to provide for its least advantaged,[34] but that does not appear to be the case in practice. European nations score the same or better on all scales of material well-being.

The results for the effect of law are less clear. Why would lawyers advance political rights much more than civil liberties? Why would lawyers promote overall welfare more than the sort of individual rights that presumably require judicial vindication? Study on the functioning and effects of lawyers in society is plainly inadequate.[35] Further research on the role of law is needed.

National wealth has a positive effect on both freedom and welfare. A variety of authors have criticized the economists' traditional reliance on GDP as a measure of a nation's well-being, because GDP ignores many important nonmonetized social goods, including liberty.[36] While this criticism is facially accurate and fair, GDP may incidentally contribute to the growth of such nonmonetized goods and thus be a more adequate measure of welfare than the critics concede. This study suggests that greater levels of national wealth are associated with higher levels of individual freedom and overall human welfare, notwithstanding distributional and other problems of the monetized scale. However, GDP does not exclusively drive freedom and welfare variables, and law and culture remain important.

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33. *See* Bernt, *supra* note 26. Arat refers to the individualistic negative rights as the "Western model." ARAT, *supra* note 8, at 8.

34. *See* sources cited *supra* notes 9, 16.

35. *See, e.g.*, Ronald J. Gilson, *How Many Lawyers Does It Take to Change an Economy?*, 17 L. & SOC. INQUIRY 635 (1992) (lamenting the paucity of rigorous scholarship upon the role of law and lawyers in society).

36. *See, e.g.*, Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815 (1990); Jandhyala Tilak, *From Economic Growth to Human Development: A Commentary on Recent Indexes of Development*, 19 INT'L J. SOC. ECON. 31 (1992).

One other important conclusion may be reached, at least tentatively. The purported conflict between negative and positive human rights does not appear. To the contrary, the two types of rights appear associated once one controls for law and wealth. Tables 2 and 4 show that the nations of certain regions are "underachievers" with respect to both positive and negative human rights. Plainly, eschewing individualist negative rights is not necessarily the way to advance positive rights of human welfare.

Finally, an important caveat is in order. This study treats law, wealth, and culture as exogenous factors that determine a society's levels of freedom and welfare. While this seems a reasonably necessary simplifying assumption, reality is somewhat more complex. There undoubtedly exist complex feedback loops through which, for example, greater freedom might increase national wealth or produce a greater role for law. Indeed, the causality might be entirely reversed. Rather than lawyers enhancing material welfare, it is possible that nations with higher levels of material welfare and freedom simply demand more lawyers. Barbara Newman and Randall Thomson suggest such reverse causality between PQLI and GDP,[37] though Enrico Colombatto challenges this suggestion.[38] In any event, there remains an important association that suggests the presence of substantial positive externality values of wealth and also suggests the presence of those same values for law and lawyers. Recognition of these values should assist human rights planning and provide additional policy tools for promotion of such rights.

37. Barbara A. Newman & Randall J. Thomson, *Economic Growth and Social Development: A Longitudinal Analysis of Causal Priority*, 17 WORLD DEV. 461 (1989).

38. Enrico Colombatto, *A Comment on Economic Growth and Social Development*, 19 WORLD DEV. 1441 (1991).

A PRIMER ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS: FROM THE PERSPECTIVE OF THE UNIFORM COMMERCIAL CODE

*Henry D. Gabriel**

I. INTRODUCTION

This article compares the major provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] with the sale of goods sections under Article II of the Uniform Commercial Code (UCC).[2] The following major areas are discussed: contract formation; warranties; inspection of goods; delivery; payment; seller's right to cure; breach and remedies; damages; and risk of loss.

II. SCOPE

The United Nations Convention for the International Sale of Goods applies to contracts for the sale of goods between parties whose places of business are in different States [countries] and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State.

Under the CISG, contracts of sale are distinguished from contracts for services.[3] A contract for the supply of manufactured goods is a sale unless the ordering party supplies a substantial amount of the materials necessary for the manufacture of the goods.[4] In that instance, the CISG would not apply.

The following types of sales are excluded from the CISG: (1) sales in which goods are bought for personal, family, or household use; (2) sales by auction, on execution, or otherwise by law; (3) sales involving stocks, investment securities, ships, aircraft, or electricity. In most States, these sales are governed by special rules reflecting the esoteric nature of the goods.[5]

Article II of the UCC applies to "transactions in goods."[6] As with the CISG, a scope problem in the UCC arises when contracts involve both goods and services.

Article II does not apply to several types of transactions, such as

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1. *United Nations Convention on Contracts for the International Sale of Goods, Final Act*, U.N. Doc. A/CONF. 97/18 (1980), *reprinted in* S. Treaty Doc. No. 9, 98th Cong., 1st Sess., *and in* 19 INT'L LEGAL MATERIALS. 668 (1980) [hereinafter C.I.S.G.].

2. U.C.C. art. II (1996).

3. C.I.S.G. art. 3.

4. *Id.* art. 3(1).

5. *Id.* art. 2.

6. U.C.C. § 2-102.

transactions involving real estate.[7] Also, as with the CISG, Article II does not apply to construction contracts, service contracts, or employment contracts.[8] Furthermore, it does not apply to corporate stocks and bonds, or to leases.[9]

III. FORMATION OF THE CONTRACT

Both the CISG and the UCC are based on the premise of freedom of contract, and both presume that a party's intent should determine the enforceability of the contract.

Like the UCC, Article 14(2) of the CISG indicates that an offer need not specifically set forth all the terms, and that the primary determination of an offer's sufficiency and validity will be the offeror's intent.[10] However, Article 14(1) differs from the UCC by proposing a test to determine whether an offer is sufficiently definite enough to be valid. While § 2-204(3) of the UCC does not specify which open terms will affect the sufficiency of an offer, Article 14(1) requires that an offer "indicate[] the goods and expressly or implicitly fix[] or make[] provision for determining the quantity and the price."[11] Conversely, the UCC test is not certain as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough, of itself, to defeat an otherwise adequate agreement if the parties intend to enter into a binding agreement. UCC § 2-204 recognizes that an agreement is valid, despite missing terms, if there is any reasonably certain basis for granting a remedy.[12]

Although the CISG Article 14(1) requires greater specificity than the UCC, the practical effect of this requirement is minimal because of Article 14(2)'s exception to the specificity requirement, which allows a general proposal to constitute a valid offer if the proposal so intends.[13] To meet Article 14(1)'s specificity requirement, the offer must identify the goods and the quantity of the goods to be sold.[14] However, this provision requires little more than a mere indication, by either buyer or seller, of which goods are being offered.

The CISG requires greater specificity of an offer than the UCC because the Convention provides greater protection to the offeree once an offeror extends a valid offer. Article 14's specificity requirement serves as evidence of the offeror's intent to be bound, thus enabling the offeree's response to

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7. *Id.*
8. *Id.*
9. *Id.*
10. C.I.S.G. art. 14(2).
11. *Id.* art. 14(1).
12. U.C.C. § 2-204(3).
13. C.I.S.G. art. 14(2).
14. *Id.* art. 14(1).

conform to the terms of the offer. Definiteness and conformity of terms are essential in contract formation, for under the CISG, an offeree's acceptance must match the original offer to be enforceable.[15] In other words, the CISG follows the "mirror image" rule of the pre-UCC common law. If new or different terms are added, the offer is rejected and the power of acceptance is terminated. The new terms constitute a counter-offer, not an enforceable contract, unless the offeror assents to the new bargain. Adopting the common law mirror image rule, the CISG's approach to contract formation, unlike that of the UCC, allows the offeror to be master of the offer.

A. *Statute of Frauds*

The counterpart to UCC § 2-201 is the CISG Article 11. UCC § 2-201 requires that all contracts for the sale of goods in excess of $500 be written.[16] Article 11 eliminates the requirement of a writing to evidence the agreement, specifically noting that "[a] Contract of sale need not be concluded in or evidenced by writing."[17] Article 11 also eliminates any mandatory requirement for enforcement based on any domestic form requirement.[18] However, Article 11 does not prevent the parties from imposing their own contractual requirements.[19] Article 29 provides that parties, by a contract in writing, may require any modifications or termination by agreement to be in writing.[20] Thus, Article 11 must be read in conjunction with Article 29.

Article 12 allows Contracting States to opt out of Article 11, thereby requiring a writing to evidence the agreement.[21] Article 11 would not apply where any party has his place of business in a state that has decided, under Article 12, to require a writing as a necessary element of a valid contract.[22]

B. *Parol or Extrinsic Evidence*

Article 8 is the general CISG provision that governs the interpretation of the statements and conduct of the parties. Under the CISG, both the subjective and objective intent of the parties are relevant for questions of interpretation.[23] Subjective intent is given primary consideration, and objective intent governs only if the subjective intent of a party is not

15. *Id.* art. 14.
16. U.C.C. § 2-201(1).
17. C.I.S.G. art. 11.
18. *Id.*
19. *Id.*
20. *Id.* art. 29(2).
21. *Id.* art. 12.
22. *Id.* art. 11.
23. *Id.* art. 8.

discernable.[24] In addition, this article allows open-ended reliance on parol evidence, as well as subsequent behavior. For example, one may consider "all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."[25] Article 8 does not relate to questions of whether the terms contradict a written agreement or whether the agreement between the parties is intended to be the final complete statement of the parties. Rather, Article 8 deals with interpreting statements and conduct, not contract formation.[26]

The UCC adopts a more structured hierarchy to determine the intent of the parties. The UCC § 1-205 provides that express terms of the agreement shall control course of performance and that course of performance shall control both course of dealing and usage of trade.[27] Under the UCC § 1-205, as with the CISG, the express words of the contract trump all other interpretations. Furthermore, under the UCC, course of performance, course of dealing, and usage of trade are only relevant for interpretation when the express language of the agreement does not indicate the parties' intent.[28]

The UCC limits the use of parol evidence to a greater extent than the CISG. When the parties have a written final agreement, that agreement may not be contradicted by parol evidence.[29] However, the parties may seek to explain or supplement the terms of their agreement by parol evidence concerning course of dealing, usage of trade, or course of performance.[30] In general, the approach of the UCC § 2-202 is much less receptive to this type of evidence than is the Convention's "all relevant circumstances" approach.[31]

As with the UCC, the CISG provides that the parties' behavior may serve as a guide to contract interpretation. The CISG Article 9, which is the counterpart to the UCC §§ 1-205 and 2-208, sets out the role of usages and practices and their effect in interpreting contracts.[32]

Under the CISG, parties are bound by the present course of performance and prior course of dealing if they are relevant to interpreting the present contract; the parties are also bound by any practices which they have established between themselves.[33] Additionally, the parties are bound by relevant trade usage.[34]

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24. *Id.*
25. *Id.* art. 8(3).
26. *Id.*
27. U.C.C. §§ 1-205(4), 2-208(2).
28. *Id.*
29. *Id.* § 2-202.
30. *Id.* § 2-202(a).
31. C.I.S.G. art. 8(3).
32. *Id.* art. 9.
33. *Id.*
34. *Id.*

As with the Convention, the UCC allows for usage of trade, present course of performance, and past course of dealing to help interpret expectations and the intent of the parties.[35] However, Article 9 and the UCC § 2-208 vary in that Article 9 does not set out a hierarchical structure for interpretation as does the UCC.[36] The UCC § 2-208(2) provides that "when . . . construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade."[37]

C. *Battle of the Forms*

The CISG adopts the traditional common law rule that an acceptance must be a "mirror image" of an offer.[38] The Convention presumes that any material variance in an offeree's acceptance constitutes a rejection of the offer and is a counter-offer. The Convention, however, provides for an exception to this general principle where additions or modifications to the offer do not "materially alter" the terms of the offer.[39] Article 19(2) contemplates that a varying response can form a contract if the varying response lacks material alteration.[40] However, this exception to the non-formation counter-offer principle of 19(1) is narrow and is practically useless because Article 19(3)'s list of material alterations includes those elements most typically found in sale of goods contracts.[41] Thus, almost any alteration is material. Conversely, the UCC rejected the common law "mirror image" rule and adopted the "battle of the forms" provision.[42]

Under the UCC § 2-207, a varying response will not prevent contract formation where there is otherwise demonstrated an intent to deal.[43] The UCC § 2-207(1) provides that an acceptance or confirmation that contains additional or different terms operates as a valid acceptance, unless acceptance is expressly made conditional on assent to the additional or different terms.[44] Once a valid acceptance under § 2-207(1) exists, § 2-207(2) operates to determine the exact terms of the bargain, given the disparity in the documents involved.[45] The UCC § 2-207(2) provides the offeree a limited power to unilaterally alter the terms of an agreement or a proposed bargain when the

35. U.C.C. § 2-208.
36. C.I.S.G. art. 9; U.C.C. § 2-208.
37. U.C.C. § 2-208(2).
38. C.I.S.G. art. 19(1).
39. *Id.* art. 19(2).
40. *Id.*
41. *Id.* art. 19(3).
42. U.C.C. § 2-207.
43. *Id.*
44. *Id.* § 2-207(1).
45. *Id.* § 2-207(2).

parties are merchants.[46] Where the offeree's proposed alterations are "material" (a term not precisely defined in § 2-207), yet the responsive document constitutes the requisite "definite and seasonable expression of acceptance[,]" a contract is formed on the offeror's terms.[47]

Theoretically, the CISG and the UCC take opposite stances on what constitutes acceptance. The UCC's theory is that business people rarely read the "boilerplate" language on purchase forms and that both parties are relying on the existence of a contract despite their clashing forms. As a result, the UCC allows contract formation unless the responding offeree specifically states that there will be no contract unless the original offeror expressly accepts the second set of terms.[48] If the offeree specifically limits the contract to these new terms, the response is treated as merely a counter-offer.[49] If no such limitation exists, a contract is created by the nonmatching response, even though it contains new or different terms.[50] For merchants, these new or different terms become part of the contract unless the offeror objects within a reasonable time after notice of them is received, or unless the new or different terms materially alter the original terms.[51] When material alterations exist, the alterations are excluded from the contract, and the remaining terms create a valid contract.[52]

Furthermore, § 2-207(3) enforces an agreement where the writings of the parties do not create a contract, but the parties nevertheless act as though one exists.[53] In this case, the UCC looks to the writings and supplements the missing terms.[54]

The central difference between the UCC and the CISG emerges when an offeror objects to the variant term or when the variant term constitutes a material alteration. In such cases, the UCC preserves the contract and omits the offensive term.[55] Conversely, the CISG strikes the contract and recognizes the alteration as a counter-offer.[56] Additionally, the CISG appears to allow offerors to prevent contract formation by objecting to even non-material discrepancies.[57] The CISG's theory is that most of the terms and conditions on the backs of the forms are important; therefore, no contract exists unless both parties agree to the same terms.

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46. *Id.*
47. *Id.*
48. *Id.* § 2-207(1).
49. *Id.* § 2-207(2).
50. *Id.* § 2-207(3).
51. *Id.* § 2-207(2).
52. *Id.* § 2-207(1).
53. *Id.* § 2-207(3).
54. *Id.*
55. *Id.* § 2-207(2).
56. C.I.S.G. art. 19(1).
57. *Id.* art. 19(2).

The theoretical differences between the CISG and the UCC may have little practical effect because both the UCC and CISG have provisions that make a contract enforceable after delivery and acceptance. Also, the majority of disputes arise after the goods have been delivered and are found to be defective or not what the buyer wanted.

IV. WARRANTIES

A. *Warranty of Title*

The CISG Article 41 sets forth the seller's duty to deliver to the buyer goods that are free from any third-party right or claim.[58] The time contemplated by Article 41 is the time of delivery rather than the time of contract formation.[59] Also, Article 41 works in conjunction with Article 43(1), which requires the buyer to notify the seller of such a claim within a reasonable time.[60]

As with the UCC § 2-312, which requires that goods be delivered free from any security interest or other lien or encumbrance, the purpose of Article 41 is to protect the buyer from a potential third-party lawsuit. The seller is obligated to reimburse the buyer for any expense or loss resulting from the third-party claim.[61] As with the CISG, the UCC also requires the buyer to notify the seller of a breach of title within a reasonable time.[62]

In addition, one should look to Article 42 when analyzing the warranty of title. Article 42 sets out the seller's obligations for third-party claims based on industrial or intellectual property, such as infringement of a copyright, a trademark, or a patent.[63] Article 42 limits the seller's responsibilities for third-party claims against the buyer to certain specified places: (1) in the state where the goods will be resold or used if the parties contemplated use or resale in that state or (2) in the state of the buyer's place of business.[64]

The second paragraph of Article 42 limits the seller's obligations for third-party claims or rights in two situations: (1) where the buyer had actual or constructive knowledge of the third-party claims at the conclusion of the contract; and (2) where the claim arises because the seller followed the buyer's specifications for design, drawings, or formulae.[65] Article 42, like Article 41, protects the buyer from having to litigate third-party claims.

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58. *Id.* art. 41.
59. *Id.*
60. *Id.* art. 43(1).
61. *Id.* art. 41.
62. U.C.C. § 2-312 cmt. 2.
63. C.I.S.G. art. 42.
64. *Id.* art. 42(1)(a)-(b).
65. *Id.* art. 42(2)(a)-(b).

While the UCC has no perfectly analogous provision to Article 42 of the CISG, § 2-312 is similar because it embodies the concept of infringement and it relieves the merchant seller of liability for infringement when the seller followed the buyer's specifications.[66] In addition, UCC § 2-312(2) is similar to Article 42(2)(a) because it excludes or modifies the warranty if the buyer has reason to know "that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have."[67]

B. *Express and Implied Warranties*

The warranty provisions found in the UCC § 2-313 (express warranties), § 2-314 (implied warranties of merchantability), § 2-315 (implied warranties of fitness for a particular purpose), and § 2-316 (disclaimer and modification of warranties) are combined into two articles in the CISG—Articles 35 and 36. The requirements of the warranty provisions under the CISG will be familiar to any American commercial lawyer familiar with the UCC provisions.

Article 35 of the CISG covers the seller's obligation to deliver goods that are of a specified quality. Under paragraph (1) of Article 35, goods must conform to the contract with respect to quantity, quality, description, and packaging.[68] Paragraph (2) of Article 35 describes the ways in which goods "conform" to the contract, and Article 35(3) relieves the seller of liability under paragraph (2) if the buyer knew of the nonconformity at the time the contract was concluded.[69]

Under the UCC, the provisions on the quality of the goods are embodied in the sections on warranties: § 2-313 (express warranties), § 2-314 (implied warranty of merchantable quality), and § 2-315 (implied warranty of fitness for a particular purpose).[70]

Paragraph (1) of the CISG Article 35 reinforces the principle that the parties must comply with the terms of the contract.[71] Concomitantly, the UCC § 2-313 requires the goods to conform to any contract description.[72]

Paragraph (2)(a) of Article 35 and UCC § 2-314(2) both require that goods be fit for the ordinary purposes for which such goods are used.[73] However, the § UCC 2-314 (implied warranty of merchantability) also

66. U.C.C. § 2-312(3).
67. *Id.* § 2-312(2).
68. C.I.S.G. art. 35(1).
69. *Id.* arts. 35(2), 35(3).
70. U.C.C. §§ 2-313, 2-314, 2-315.
71. C.I.S.G. art. 35(1).
72. U.C.C. § 2-313(1)(b).
73. C.I.S.G. art. 35(2)(a); U.C.C. § 2-314(2)(c).

imposes the additional requirement that the goods be merchantable.[74]

Paragraph 2(b) of Article 35 deals with the seller's express obligation to deliver goods that are fit for a particular purpose.[75] However, the seller's obligation under this provision is limited to instances where the buyer actually relied on the seller's skill and judgment to provide goods for a particular purpose.[76] Under the UCC § 2-315, an implied warranty of fitness for a particular purpose arises when the seller has reason to know at the time of contracting that the buyer "is relying on the seller's skill or judgment to select or furnish suitable goods."[77]

As with the UCC § 2-313(c), the CISG Article 35(2)(c) requires that the goods possess the same qualities as goods in the sample or model that were held out to the buyer.[78] Paragraph (2)(d) of CISG Article 35 requires the goods to be packaged in an appropriate manner.[79] In this regard, it mirrors the UCC § 2-314(2)(e), which requires that goods be "adequately contained, packaged, and labeled as the agreement may require" to be merchantable.[80]

As to knowledge of defects as a basis for excluding warranties, the CISG and the UCC differ. While the UCC § 2-316(3)(b) provides that "there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to [the buyer,]" Article 35 of the CISG only holds the buyer to defects of which the buyer "could not have been unaware."[81] In other words, the CISG does not impose upon the buyer a duty to investigate.

In contrast, the UCC imposes a greater duty upon the buyer to examine the goods for defects than does the CISG. The UCC excludes an implied warranty when the buyer refuses to examine the goods before entering into the contract.[82] The UCC also excludes an implied warranty when the buyer did investigate the goods but failed to discover a defect which the buyer ought to have discovered.[83] However, the Official Comment to § 2-316 maintains that, for the implied warranty not to apply to the buyer who has refused to examine goods, the goods must have been available for examination, and the seller also must have requested the buyer to examine the goods.[84]

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74. U.C.C. § 2-314.
75. C.I.S.G. art. 35(2).
76. *Id.*
77. U.C.C. § 2-315.
78. C.I.S.G. art. 35(2)(c).
79. *Id.* art. 35(2)(d).
80. U.C.C. § 2-314(2)(e).
81. *Id.* § 2-316(3)(b); C.I.S.G. art. 35(3).
82. U.C.C. § 2-316(3)(b).
83. *Id.*
84. *Id.* § 2-316 cmt. 8.

V. RIGHT TO INSPECT

The CISG Article 58 gives the buyer a right to inspect the goods before payment.[85] The buyer need not pay for the goods until he has had an opportunity to inspect them, unless the procedures for payment or delivery are inconsistent with such an opportunity.[86]

Similarly, the UCC gives the buyer the same right to inspect. The UCC § 2-310 states that in a shipment under reservation, "the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract."[87] The comments to this section recognize that the buyer has no obligation to pay prior to inspection unless otherwise agreed.[88] Thus, under both the UCC and the Convention, the parties should contractually indicate the time for payment to avoid the assumption of unintended risks.

VI. DELIVERY

A. *Early Delivery*

Article 52 gives the buyer the option of either taking goods early or refusing delivery if the seller delivers the goods before the date specified in the contract.[89] The buyer's option to refuse only applies if the date of delivery is inconsistent with the contract.[90] If the seller delivers more goods than the contract calls for, the buyer may either accept or reject the excess goods; however, if the buyer accepts the extra goods, then the buyer must pay for them at the contract rate.[91]

The UCC has no perfectly comparable provision to Article 52. However, the UCC § 2-607(1) requires the buyer to pay at the contract rate for any goods accepted.[92] While it is unclear whether this provision also applies to excess goods that the buyer chooses to accept, a literal reading of the statute would indicate that it does. The concept of early delivery, though not specifically mentioned in the UCC, is embedded within § 2-508(1), which allows the seller to remedy any defect in goods already delivered up until the delivery date specified in the contract.[93]

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85. C.I.S.G. art. 58(3).
86. *Id.*
87. U.C.C. § 2-310(b).
88. *See id.* § 2-310 cmt. 1.
89. C.I.S.G. art. 52(1).
90. *Id.*
91. *Id.* art. 52(2).
92. U.C.C. § 2-607(1).
93. *Id.* § 2-508(1).

B. *Partial Delivery*

Article 51 of the CISG applies when only a portion of the goods are delivered or only a portion of them conforms to the contract. In this situation, paragraph (1) of Article 51 makes available to the buyer a whole range of remedies. These remedies allow the buyer to: (1) require the seller to deliver substitute goods or repair defective goods; (2) avoid the contract for the defective goods; (3) reduce the price of defective goods; or (4) claim damages.[94] The buyer may also avoid the entire contract if the non-delivery or nonconformity as to part of the goods results in a fundamental breach of the whole contract.[95]

The UCC § 2-601 allows the buyer to reject any nonconforming commercial unit or units.[96] If the buyer makes a rightful rejection under § 2-601, then he may also take advantage of the other remedies available under the UCC, including "cover," recovery of goods and damages, specific performance, and replevin.[97]

Paragraph (2) of Article 51, which allows the buyer to declare the entire contract avoided if the breach amounts to a fundamental breach, is similar to the UCC § 2-608, which allows the buyer to revoke acceptance of a commercial unit whose nonconformity substantially impairs its value.[98] The UCC § 2-612 on installment contracts also parallels the CISG Article 51(2). This provision allows the buyer to reject any nonconforming installment "if the non-conformity substantially impairs the value of that installment and cannot be cured."[99] If a nonconforming installment substantially impairs the value of the whole contract, then a breach of the entire contract results.[100]

C. *Improper Delivery*

Article 49 of the CISG addresses the buyer's rights on improper delivery, allowing the buyer to avoid the contract in two situations: (1) when the seller's failure to perform any of his obligations results in a fundamental breach as defined by Article 25 or (2) when the seller fails or refuses to deliver the goods in the additional period of time allowed by the buyer in conjunction with Article 47(1).[101]

The buyer must avoid the contract within a reasonable time after late

94. C.I.S.G. art. 51(1).
95. *Id.* art. 51(2).
96. U.C.C. § 2-601.
97. *Id.* § 2-711.
98. C.I.S.G. art. 51(2); U.C.C. § 2-608(1).
99. U.C.C. § 2-612(2).
100. *Id.* § 2-612(3).
101. C.I.S.G. art. 49(1).

delivery or, in the case of non-conforming goods, within a reasonable time after learning of the breach by either actual or constructive knowledge.[102] In other cases, the buyer must also avoid the contract within a reasonable time.[103]

Under the Convention, a breach is fundamental if it "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract . . . ."[104] The concept of fundamental breach in the Convention is probably most similar to the term "substantial impairment" as used in various UCC Article II provisions.

The UCC § 2-601 sets forth the basic principle that the buyer may reject the goods if they "fail in any respect to conform to the contract."[105] Thus, unlike the CISG requirement of a "fundamental breach" as a basis for contract avoidance, under the UCC, the buyer may reject the contract if the goods or tender of the goods fail to conform to the contract in any respect.

However, as with the CISG, under the UCC, if the buyer rejects goods, he must do so within a reasonable time after their delivery or tender, and he must also seasonably notify the seller of the rejection.[106] The "reasonable time" requirement of the UCC is similar to the Convention's requirement of proper avoidance under Article 49.

Furthermore, the UCC requires the buyer to particularize the defect that is the cause of the rejection.[107] If the buyer fails to particularize, the buyer will be unable to rely on the defect to establish breach or to justify rejection.[108] The CISG differs from the UCC in that the former does not require the particularization of defects.[109]

Under domestic law, a buyer is deemed to have accepted goods if the buyer has failed to make an effective rejection under § 2-602 or has accepted goods despite their nonconformity.[110] If the buyer accepts the goods, the buyer must notify the seller within a reasonable time after the buyer discovers or should have discovered any breach or he is barred from any remedy.[111] The requirements of UCC § 2-602(1) are similar to the notice requirements imposed on the buyer by Article 49(2) of the Convention.

Once the buyer accepts goods under the UCC § 2-606, the buyer may then revoke acceptance only if the nonconformity substantially impairs the value of the goods to the buyer.[112] The requirement of "substantial

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102. *Id.* art. 49(2)(a).
103. *Id.* art. 49(2)(b).
104. *Id.* art. 25.
105. U.C.C. § 2-601.
106. *Id.* § 2-602(1).
107. *Id.* § 2-605(1).
108. *Id.*
109. C.I.S.G. art. 49.
110. U.C.C. § 2-606(1)(a)-(b).
111. *Id.* § 2-607(3)(a).
112. *Id.* § 2-608(1).

impairment" is also present in § 2-612(2) on installment contracts.[113] The "substantial impairment" standard of §§ 2-608 and 612 is similar to the requirement of Article 49(1) in that the buyer may only avoid the contract if the breach is "fundamental." Revocation of acceptance in the UCC must also occur within a reasonable time after the buyer discovers or should have discovered any breach.[114] This requirement is similar to the restrictions imposed by Articles 49(2)(a) and 49(2)(b)(i) of the CISG.[115]

D. *Non-Conforming Goods*

Article 50 applies when the goods delivered do not conform to the contract. Under this Article, the buyer may reduce the price in proportion to the value of the goods actually delivered over the value that conforming goods would have had at that time.[116] However, if the seller has remedied any defective goods that were delivered before the delivery date specified in the contract, the buyer may not reduce the price.[117]

The scope of Article 50 is narrow: it usually applies only when the buyer accepts and keeps defective goods and the seller is not liable for damages. If the price of the goods rises, the buyer will probably choose not to reduce the price in accordance with Article 50, but rather will choose to claim damages under Article 74.

While § 2-714 of the UCC sets forth the buyer's damages for accepted goods, this section does not use the proportion method of the Convention.[118] Under the UCC § 2-714, if the buyer has accepted non-conforming goods and has given notice to the seller of the nonconformity, he may recover damages for breach of warranty.[119] The measure of damages under this section is the difference between the value of the goods accepted and the value the goods would have had if they had been as warranted.[120]

113. *Id.* § 2-612(2).
114. *Id.* § 2-608(2).
115. C.I.S.G. arts. 49(2)(a), 49(2)(b)(i).
116. *Id.* art. 50.
117. *Id.*
118. U.C.C. § 2-714.
119. *Id.* § 2-714(1).
120. *Id.* § 2-714(2).

VII. PAYMENT

A. *Open Price Terms*

Article 55 is a gap-filling provision for an omitted or indefinite price term. Under Article 55, where a valid contract exists, and the contracting parties have made no provision for determining the price, the parties are presumed to have agreed to the price generally charged at the time the contract is concluded.[121]

Article 55 presupposes a validly concluded contract, and therefore the Article only applies after the contracting parties establish the existence of a valid contract. Article 14 defines when a proposal is sufficient to become an offer.[122] Article 55 describes the method for determining price when the price has been omitted from a validly concluded contract.[123] If the lack of a price brings into question the existence of a contract, Article 14 applies, and the contract may be invalidated for indefiniteness or for lack of clear intent to be bound.[124]

The UCC has a similar approach to open price terms. Like the Convention, the UCC distinguishes between the validity of an open price contract and the method for determining price if an open price contract is valid. An open price contract is provided for in § 2-305(1): "The parties . . . can conclude a contract for sale even though the price is not settled."[125]

Similar to the Convention, the UCC takes an objective approach to filling missing price terms. The UCC § 2-305(1) provides that when the parties intend to have an enforceable contract but omit the price, "the price is a reasonable price at the time for delivery."[126] This is probably indistinguishable from the meaning of the "price generally charged" in Article 55.

B. *Location of Payment*

Article 57 designates the location for payment when the parties fail to do so in the contract. This section only applies when the contract neither explicitly nor implicitly designates a place for delivery. However, when the contract does not designate a place of payment, paragraph (1) selects as the default location for payment either the seller's place of business or the place where the transfer of the documents or goods occurs.[127]

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121. C.I.S.G. art. 55.
122. *Id.* art. 14(1).
123. *Id.* art. 55.
124. *Id.* art. 14.
125. U.C.C. § 2-305(1).
126. *Id.*
127. C.I.S.G. art. 57(1)(a)-(b).

Paragraph (2) of Article 57 sets out the seller's obligation to pay incidental expenses caused by a change in his place of business after the conclusion of the contract but before payment.[128]

Section 2-308 of the UCC is almost identical to CISG Article 57. Section 2-308(a) provides that "the place for delivery of goods is the seller's place of business."[129] Like Article 57, § 2-308 applies only in the absence of an agreement between the parties.[130] The UCC § 2-310(c) provides that "if delivery is authorized and made by way of documents of title . . . then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received."[131] Thus, if read together, UCC §§ 2-308(c) and 2-310(c) yield the same result as CISG Article 57(1)(b).

Although the UCC does not have a provision equivalent to Article 57(2), any increases in cost based upon the seller's abrupt change in his place of business would likely be recoverable under § 2-715(1).

C. *Time of Payment*

Paragraph (1) of Article 58 sets out two principles: (1) that the buyer need not pay until the seller places the goods (or documents representing the goods) in the buyer's control and (2) that the seller need not hand over the goods until the buyer pays the price.[132] The result under the UCC is the same as under the CISG. The UCC § 2-310(a) provides that "payment is due at the time and place at which the buyer is to receive the goods."[133] However, the buyer may condition his payment on the seller's tender of delivery of the goods under UCC § 2-507.[134] Thus, under the UCC, as well as under the Convention, the responsibility for payment is based on receipt of the goods (or the equivalent).

Paragraph (2) of CISG Article 58 imposes a payment term when the goods are to be shipped by carrier. As with paragraph (1), a concurrent exchange of the goods for the price is required. When the contract authorizes or requires the seller to ship the goods, the seller may require that the goods, or the documents representing the goods, not be handed over to the buyer except against payment of the price.[135]

UCC § 2-310, like Article 58(2) of the Convention, permits shipment by

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128. *Id.* art. 57(2).
129. U.C.C. § 2-308(a).
130. C.I.S.G. art. 57; U.C.C. § 2-308.
131. U.C.C. § 2-310(c).
132. C.I.S.G. art. 58(1).
133. U.C.C. § 2-310(a).
134. *Id.* § 2-507.
135. C.I.S.G. art. 58(2).

the seller under reservation of payment. The UCC § 2-310 provides that, unless the parties otherwise agree, "if the seller is authorized to send the goods he may ship them under reservation."[136] The comments to UCC § 2-310 state that the seller need not give up possession of the goods until he has received payment.[137] The buyer's responsibility for payment does not arise until the seller has "tendered" the goods. Thus, the Convention and the UCC have similar protections for both the seller's and buyer's interests.

VIII. SELLER'S RIGHT TO CURE

A. *Prior to Date of Delivery*

Article 37 sets forth the principle that the seller may cure any nonconformities in goods already delivered up to the delivery date provided in the contract.[138] The only caveat is that the exercise of this right by the seller must not cause the buyer any "unreasonable inconvenience or unreasonable expense."[139] This Article applies to various nonconformities such as missing or defective goods or parts and allows the seller to cure by either repair or replacement. Implied in this section is the seller's obligation to bear the cost of replacement.

The CISG Article 37 is both different from and similar to the U.C.C. § 2-508(1). Like the CISG Article 37, the UCC § 2-508(1) allows the seller to cure up to the time for performance; however, § 2-508(1) differs from Article 37 in that it requires the seller to notify the buyer of her or his intention to cure.[140] Although Article 37 does not require notice of intention to cure, failure to do so may implicate Article 37 as it may "cause the buyer unreasonable inconvenience or unreasonable expense."[141]

B. *After Time of Delivery*

Article 48 allows the seller to remedy any defective goods or documents that have already been delivered. The seller may remedy either by repair, replacement, or substitution.[142] Under paragraph (2), the seller may request that the buyer inform him if the buyer will accept his remedy.[143] If the buyer fails to provide an answer, the seller may perform within the time indicated

136. U.C.C. § 2-310(b).
137. *See id.* § 2-310 cmt. 2.
138. C.I.S.G. art. 37.
139. *Id.*
140. U.C.C. § 2-508(1).
141. C.I.S.G. art. 37.
142. *Id.* art. 48.
143. *Id.* art. 48(2).

in the request, and the buyer may not invoke a remedy which is inconsistent with the seller's performance (such as avoidance of the contract) during this time.[144] The risk of loss of giving notice under paragraphs (2) or (3) of Article 48 is on the seller, because the seller is the one who has not performed his obligations.

The UCC allows the seller the right to substitute a conforming tender for a nonconforming tender.[145] To do so, the seller must have reasonable grounds to believe that the first delivery would be acceptable to the buyer.[146] Like CISG Article 48, the UCC § 2-508(2) requires the seller to give the buyer seasonable notice of his intention to substitute.[147] In addition, this section also refers to tender of documents, as does CISG Article 48.[148] Both the CISG and the UCC protect the seller's right to cure from surprise rejection by the buyer. However, in domestic law, either a prior course of dealing or an express provision in the contract may strictly preclude the seller from replacement.[149]

IX. CONCEPT OF FUNDAMENTAL BREACH

Under the CISG, a breach is fundamental if it "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract . . . ."[150] The Article 25 definition of a fundamental breach also includes the principle that parties cannot be deprived of their expectations under the contract.[151] For a breach to be fundamental, the consequences of the breach must be foreseeable to the breaching party.[152] However, Article 25 does not specify whether foreseeability should be measured at the time of contract formation or at the time of the breach. The concept of fundamental breach in the Convention is probably most similar to the term "substantial impairment" as used in various UCC Article II provisions.

Article 25 defines "fundamental breach" in general terms and applies to both buyer and seller.[153] The most significant remedies for a "fundamental breach" occur in Articles 49(1)(a) (the buyer's right to avoid the contract) and 64(1)(a) (the seller's right to avoid the contract).[154] If one party to the contract commits a fundamental breach, the other party may "avoid" the contract and

144. *Id.*
145. U.C.C. § 2-508(2).
146. *Id.*
147. *Id.*
148. *Id.*
149. U.C.C. § 2-508 cmt. 2.
150. C.I.S.G. art. 25.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* arts. 49(1)(a), 64(1)(a).

be released from any further contractual obligations.[155]

X. SELLER'S REMEDIES

Article 61 summarizes the remedies available to an aggrieved seller upon the buyer's breach of contract. Under this Article, the seller may select any of the following options: (1) require the buyer to pay the price; (2) fix an additional time for the buyer's performance; (3) avoid the contract; (4) select the measurement or form of the goods (if it is the buyer's duty to so select); or (5) claim damages.[156] The seller's selection of one remedy under this section does not exclude application of any other remedies.

Article 61 provides a blueprint of remedies available to a seller upon the buyer's breach of contract. The seller has three main remedies under this section. If the buyer fails to take delivery of the goods, the seller may require him to do so, declare the contract avoided, and claim damages.[157] The seller also has the option of setting a future time for performance by the buyer and selecting a form or measurement of the goods if such a selection is necessary.[158] The remedial scheme of the Convention strikes a balance between avoidance and non-avoidance of the contract. Under Article 64, if the buyer has committed a fundamental breach, a seller may avoid the contract, and may then pursue damages under the CISG Articles 74-77.[159]

Alternatively, the seller may attempt to enforce the contract under the CISG Article 62.[160] In this case, "the Convention contemplates that the basic exchange of goods and price will be completed despite a breach, with damages or other remedies to compensate for defects in the exchange."[161] Thus, under both alternatives, the seller is made whole by a combination of available remedies.

The UCC approaches remedies in a narrower fashion. Like the Convention, the UCC focuses on two distinct situations: (1) when the buyer has accepted the goods but has breached the contract and (2) when the exchange has not yet been completed. In the first case, the UCC normally completes the transaction, despite the breach, based upon the buyer's acceptance.[162] The seller still has available remedies for the incidental

155. *Id.*
156. *Id.* art. 61.
157. *Id.*
158. *Id.* art. 63.
159. *Id.* art. 64.
160. *Id.* art. 62.
161. Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53, 56 (1988).
162. U.C.C. § 2-607(2).

damages arising from the buyer's breach.[163]

Alternatively, when the buyer does not accept the goods, or when he has rejected or revoked them, the general remedy is either resale damages or market price differential damages.[164] Thus, monetary damages are the usual compensation when the exchange has not yet been completed. Both the Convention and the UCC have cumulative remedy provisions that allow the aggrieved seller to select the most beneficial result.[165]

Article 64 provides the seller with the possibility of avoiding the contract upon the buyer's breach.[166] Paragraph (1) considers the two general methods for avoidance when the buyer breaches the contract: (1) if the buyer's breach is fundamental, then the seller may exercise this remedy or (2) if the seller has provided additional time for the buyer to pay or take delivery under Article 63 and the buyer did not do so within that extra period, or if the buyer otherwise notifies the seller of his intention not to comply, then the seller may avoid the contract.[167]

The second paragraph of Article 64 gives the grounds for avoidance after the buyer has paid.[168] First, if the buyer is late in taking delivery or in taking steps necessary to enable delivery, the seller may avoid the contract if the seller does so before he becomes aware that the late performance has been rendered.[169] Second, in all other circumstances other than the buyer's failure to take delivery, the seller may avoid the contract within a reasonable time (a) after the seller knew or should have known of the breach or (b) after the expiration or rejection of any additional period granted to the seller under the CISG Article 63.[170]

Avoidance of the contract is one of the most powerful remedies available under the Convention. However, because this is a drastic remedy, the Convention has placed limitations on its usage.[171] Paragraph (1) of Article 64 gives the two grounds for the seller's avoidance.[172] First, if a breach is fundamental, then the seller may avoid the transaction even though the buyer may or may not have possession of the goods.[173] Second, if the buyer fails to pay the price or take delivery of the goods within an additional period set by the seller under Article 63, the contract may be avoided.[174] Article 64(1)(b)

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163. *Id.* § 2-710.
164. *Id.* §§ 2-708(1), 2-710.
165. *Id.* § 2-703; C.I.S.G. art. 61.
166. C.I.S.G. art. 64.
167. *Id.* art. 64(1)(a)-(b).
168. *Id.* art. 64(2).
169. *Id.* art. 64(2)(a).
170. *Id.* art. 64(2)(b)(i)-(ii).
171. *Id.* art. 64.
172. *Id.* art. 64(1).
173. *Id.* art. 64(1)(a).
174. *Id.* art. 64(1)(b).

only applies when the notice under Article 63 calls for performance of the buyer's basic obligations to pay the price or to take delivery of the goods.[175] Thus, any buyer's obligations outside of the limited definition will not support avoidance under this paragraph.

Paragraph (1) of Article 64 has no time limitations.[176] This provision allows a seller to delay making a decision to avoid a contract or wait for performance. If a seller is unsure whether the buyer's delay in payment or refusal to take the goods is a "fundamental breach," the situation can be clarified by sending a Nachfrist notice to the buyer. The seller's right to reclaim the goods in such in instance would be determined by the law of the forum.

Paragraph (2) of this article allows the seller to avoid the contract in two circumstances after the buyer has paid the price: (1) late performance by the buyer and (2) any other breach within a reasonable time.[177] First, when the buyer has paid the price, the seller may avoid the contract based on the buyer's delay in taking delivery of the goods.[178] This remedy is limited by the requirement that the seller must avoid the contract before he becomes aware that performance has been rendered by the overdue buyer.[179]

The second possibility for avoidance after the seller has received payment involves any of the buyer's duties other than taking delivery of the goods. Under this paragraph, the seller may avoid the contract within a reasonable time after the seller knew or should have known of the breach, or after the applicable time periods for a Nachfrist notice have passed or have been repudiated by the buyer.[180] If the seller is unsure whether the breach is fundamental, the seller may send a Nachfrist notice to the buyer setting a final date for performance of the contractual duty. Under the second section of this paragraph, the seller may avoid the contract after the expiration of this additional period or after the buyer declares that he will not perform within the period.[181] Thus, paragraph (2) provides a focused limitation on the usage of avoidance after the seller has received payment.

175. *Id.* art. 64(1)(b).
176. *Id.* art. 64(1).
177. *Id.* art. 64(2).
178. *Id.* art. 64(2)(a).
179. *Id.*
180. *Id.* art. 64(2)(b)(i)-(ii).
181. *Id.* art. 64(2)(b)(ii).

XI. BUYER'S REMEDIES

A. *Fundamental Breach*

Under Article 70, if the seller commits a fundamental breach, the buyer retains all rights to which the buyer is entitled, irrespective of the fact that the risk of loss may have passed to the buyer.[182] The specific rights preserved by the buyer consist of the right to elect to avoid the contract under Article 49(1), or the right to require the seller to deliver substitute goods under Article 46(2).[183] By exercising either of these options, the buyer places the risk of loss on the seller because of the buyer's right to avoid the contract. If shipment of the goods constitutes a fundamental breach of the contract as a whole, the buyer's right to avoid or compel substitute delivery is not lost because the goods were damaged in transit. In addition, the Convention allows avoidance where the goods have perished or deteriorated as a result of the examination and where the goods have been sold or consumed in the normal course of business before discovery of the lack of conformity.[184] Although the Convention gives the buyer the right to avoid the contract even where the goods have been sold or consumed in the normal course of business, the buyer will be required to "account to the seller for all benefits which he has derived from the goods."[185]

B. *Anticipatory Breach*

Articles 71 and 72 provide the general provisions on anticipatory breach. Article 71 permits the aggrieved party to "suspend the performance of his obligations."[186] The aggrieved party is completely relieved of his obligations to perform or to accept performance only by avoiding the contract under Articles 49, 64, or 72. Paragraph (1) of Article 71 applies to non-performance by either party; paragraph (2) applies specifically to the threat of non-payment that becomes apparent to the seller while the goods are in transit to the buyer.[187] Paragraph (3) requires the suspending party to "continue with performance if the other party provides adequate assurance of his performance."[188]

Like Article 71, Article 72 addresses the situations when breach is threatened prior to the date for performance. Under Article 72, the aggrieved

182. *Id.* art. 70.
183. *Id.*
184. *Id.* art. 82.
185. *Id.* art. 84.
186. *Id.* art. 71(1).
187. *Id.* art. 71(1)-(2).
188. *Id.* art. 71(3).

party may avoid the contract when "it is clear" that the other party "will commit a fundamental breach."[189] Advance notice of avoidance must be given "[i]f time allows."[190]

The standards for avoidance under Article 72 are more rigorous than the standards for suspension under Article 71 because of the difference in severity. Article 72 authorizes a party to avoid a contract prior to the date of performance only when "it is clear" that the other party "will commit a fundamental breach."[191] Paragraph (3) limits this restriction when the other party has declared that he will not perform his obligations.[192] In that case, the aggrieved party may proceed without regard to the limits of Article 72.

Articles 71 and 72 parallel the UCC § 2-609 (the right to suspend performance if reasonable grounds for insecurity arise with respect to the other party's performance and the right to treat a failure to provide adequate assurances as a repudiation of the contract) and § 2-610 (options and remedies upon anticipatory repudiation) respectively.[193] Article 72 combines the functions of UCC § 2-609(4), which treats a failure to meet a justified demand for adequate assurances as a repudiation of the contract, and of § 2-610, which specifies the aggrieved party's rights where there has been a repudiation of the contract.[194]

Section 2-609 of the UCC requires that when "reasonable grounds for insecurity arise with respect to the performance . . . [the aggrieved party] may in writing demand adequate assurance of the performance and until he receives such assurance may if commercially reasonable suspend any performance . . . ."[195] The CISG provides that "[i]f time allows, [the aggrieved party] must give reasonable notice" in order to provide "adequate assurance of his performance."[196] Although the actual wording of the CISG and the UCC differs slightly, the result is quite similar, as both require the aggrieved party to affirmatively act to initiate the right of avoidance. The UCC § 2-610 on anticipatory repudiation is operative if a party repudiates prior to the date for performance and the loss "will substantially impair the value of the contract to the other [party]."[197] In that case, the aggrieved party may (1) await performance for a commercially reasonable time or (2) resort to any remedy for breach and suspend his own performance.[198] The effect of this

189. *Id.* art. 72(1).
190. *Id.* art. 72(2).
191. *Id.* art. 72(1).
192. *Id.* art. 72(3).
193. *Id.* arts. 71-72.
194. *Id.* art. 72.
195. U.C.C. § 2-609(1).
196. C.I.S.G. art. 72(2).
197. U.C.C. § 2-610.
198. *Id.* § 2-610(a)-(b).

provision is similar to the CISG. The phrase of UCC § 2-610—repudiation "which will substantially impair"—encompasses the same principle of a "fundamental breach" under the CISG.

XII. DAMAGES

Article 74 provides the general rule for calculation of damages. The basic premise of the damages provisions of the CISG is to put the injured party in the same position he would have been in if the contract had been performed; that is, to give the injured party the "benefit of the bargain," as measured by expectation interests as well as reliance expenditures. This principle is embedded in Article 74 by the language "[d]amages . . . consist of a sum equal to the loss, including loss of profit, suffered . . . as a consequence of the breach."[199]

Article 74 does not specify the time or place for measuring the loss.[200] This lack of specificity is important in transactions involving goods which fluctuate significantly in price. The 1978 Commentary on Article 70 offers some explanation: "[T]he place for measurement should be where the seller delivered the goods," and suggests that the time chosen should be an appropriate one; for example, when the goods were delivered, or when the buyer learned that the nonconformity would not be remedied by the seller under any other articles of this Convention.[201] A clause that specifies the time and place for measuring damages would resolve this problem.

Damages are limited by foreseeability. This limitation is similar to the common law requirement of foreseeability derived from the old English case of *Hadley v. Baxendale*.[202] The "only significant difference" between the UCC view of foreseeability and the view of CISG Article 74 is that the Convention includes a subjective as well as an objective test of foreseeability. The language of UCC § 2-715(2)(a) is stated only in objective terms—referring to a seller who "at the time of contracting had reason to know"—as is the language of the Restatement, allowing recoveries for injuries that the defendant had "reason to foresee as a probable result of the breach when the contract was made."[203]

Article 74, on the other hand, provides an objective and subjective foreseeability test: "[D]amages may not exceed the loss which the party in breach foresaw or ought to have foreseen."[204]

Article 5 imposes a limitation of damages which excludes claims

199. C.I.S.G. art. 74.
200. *Id.*
201. *Id.* art. 70 (official commentary).
202. 156 Eng. Rep. 145 (1854).
203. RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (1981).
204. C.I.S.G. art. 74.

concerning the "liability of the seller for death or personal injury caused by the goods to any person."[205] Only commercial measures of damages are authorized by Article 74.[206] Unlike the Convention, the UCC authorizes personal injury awards in breach of warranty actions.[207]

Articles 75 and 76 give two alternative approaches for measuring damages when the contract is avoided due to a fundamental breach of the contract.[208] Both articles represent a specific application of Article 74 and should be read in conjunction with it.[209] Article 74 embodies the general rule for the measurement of damages whenever and to the extent that Articles 75 and 76 do not apply.

Article 75 establishes the measure for damages based on a substitute transaction.[210] If the contract is avoided in a reasonable manner and within a reasonable time after avoidance, and the buyer has bought goods in replacement or the seller has resold the goods, the party claiming the damages may recover the difference between the contract price and the price in the substitute transaction, as well as any further damages recoverable under the article.[211] The advantage of Article 75 is that resale by an aggrieved seller and repurchase by an aggrieved buyer establishes damages, and the aggrieved party need not prove the current or market price for the goods. The substitute transaction must be made in a "reasonable manner and within a reasonable time."[212] If it is not, the injured party must resort to Article 76, which provides the rule for measuring damages based on the current or market price.[213]

Article 76 sets the measure of damages on the price differential of a substitute transaction which is based on the current or market price for the goods at the time of avoidance.[214] If the aggrieved party does not set the damages under Article 75, then the party is limited under Article 76 to the measure of damages which is based on the current market price.[215] The current market price is determined "at the time of avoidance,"[216] and the price prevailing is determined "at the place where delivery of the goods should have been made."[217]

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205. *Id.* art. 5.
206. *Id.* art. 74.
207. U.C.C. § 2-715(2)(b).
208. C.I.S.G. arts. 75, 76.
209. *Id.*
210. *Id.* art. 75.
211. *Id.*
212. *Id.*
213. *Id.* art. 76.
214. *Id.* art. 76(1).
215. *Id.*
216. *Id.*
217. *Id.* art. 76(2).

Article 76 applies when resale or repurchase is not reasonable under Article 75, when no resale or repurchase occurs, or when it is impossible to determine the resale or repurchase contract in replacement.[218] The UCC equivalents to Article 75 are the UCC §§ 2-706 and 2-712. The UCC equivalents to Article 76 are the UCC §§ 2-708(1) and 2-713.

XIII. RISK OF LOSS

Article 66 sets up the basic rule that once the risk passes to the buyer, he is obligated to pay the price.[219] The seller is liable for any lack of conformity—caused by a breach of the seller's obligations—that occurs before or after risk passes.

The most similar provision in the UCC is § 2-709(1)(a). This article gives the aggrieved seller the right to recover the price (and incidental costs) of "conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer . . . ."[220] Thus, under the Code, the risk of loss for wrongfully rejected goods falls initially on the buyer, but only for a reasonable time. After that, the risk of loss reverts to the seller.

Paragraph (1) of Article 67 governs several types of contracts. The first sentence sets out the risk of loss in shipment contracts.[221] The second sentence sets out the risk of loss in contracts that require the seller to hand the goods over to a carrier at a particular place other than the seller's place of business, such as at an intermediary port.[222] Risk passes differently in each case.

A. *Article 67(1)—First Sentence*

Under the Convention, in shipment contracts, risk of loss passes when the goods are handed over to the "first carrier."[223] Like the Convention, the UCC provides that goods transported by the seller travel at the seller's risk.[224] Risk passes in shipment contracts when conforming goods are "duly delivered" to the carrier. Three conditions must be satisfied in order for the goods in a shipment contract to be duly delivered: (1) the seller must put the goods in the possession of the carrier and make a reasonable contract for carriage; (2) the seller must deliver any documents necessary for the buyer to obtain possession; and (3) the seller must promptly notify the buyer of the

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218. *Id.* art. 76.
219. *Id.* art. 66.
220. U.C.C. § 2-709(1)(a).
221. C.I.S.G. art. 67(1).
222. *Id.*
223. *Id.*
224. U.C.C. § 2-320(2).

shipment.[225]

Unlike the Convention, the UCC requires the seller to notify the buyer of the shipment in all cases.[226] However, the seller's failure to notify the buyer, or his failure to make a proper contract, are grounds for rejection only if material delay or loss ensues.[227]

B. *Article 67(1)—Second Sentence*

The second sentence of Article 67(1) governs contracts that require the seller to hand the goods over to a carrier at a particular place other than at the seller's place of business.[228] If the sales contract requires the seller to hand the goods over to a subsequent carrier at an intermediary port, the risk passes when and where the goods are handed over to that carrier.[229] This provision relieves the buyer from liability during the initial leg of the voyage.

The UCC does not have a special section dealing with the passage of risk at an intermediary port. But, the risk of loss in this situation would pass in accordance with § 2-509(b), which also governs risk of loss in destination contracts.[230]

C. *Article 67(1)—Third Sentence*

The third sentence of Article 67(1) recognizes that in sales involving documentary exchange, the buyer may receive the documents before or after he receives the goods. This section makes clear that control of the shipping documents does not affect passage of the risk.[231] In a shipment contract, the risk passes when the seller hands over the goods to the first carrier, even if the seller retains control of the goods by holding a bill of lading naming himself as consignee.[232]

This provision effectuates the Convention's underlying rule that the risk should be on the party who controls the goods. It recognizes that documentary exchanges are intended to be a means of payment rather than a means of shifting risk.

The UCC effectuates the same policy in § 2-509(1). Under subsection (a), risk of loss in shipment contracts is not affected by the seller's decision

225. *Id.* § 2-504(a)-(c).
226. *Id.* § 2-504 cmt. 5.
227. *Id.*
228. C.I.S.G. art. 67(1).
229. *Id.*
230. U.C.C. § 2-509(b).
231. C.I.S.G. art. 67(1).
232. *Id.*

to retain a security interest in the goods.[233] Risk of loss passes as if the seller had not retained a security interest. However, both the CISG and the UCC require the seller to tender any documents of title necessary to enable the buyer to take delivery.[234] Under the Convention, the seller's failure to tender documents of title gives the buyer the right to exercise rights provided in Articles 46 to 52 and to claim damages as provided in Articles 74-77.[235] The buyer can reject the goods only if the improper tender results in a fundamental breach under Article 25.[236] Under the UCC, the seller's failure to tender documents of title entitles the buyer to reject the goods or to pursue remedies under § 2-508.[237]

Paragraph (2) of Article 67 ensures that the risk of loss will not pass to the buyer unless the goods are clearly identified to the contract. The goods must be sufficiently linked to the buyer.[238] The identification requirement prevents an unscrupulous seller from falsely claiming that the goods were damaged after they were purchased by the buyer. The rule lists three ways in which the goods can be identified. First, the seller can identify the goods to the buyer by marking them.[239] Second, the seller can identify the goods to the buyer through the shipping documents.[240] In a typical sale involving carriage of goods, a bill of lading naming the buyer as consignee will identify the goods to the buyer. However, if the seller names himself as consignee in order to maintain control over the goods upon arrival, the bill of lading will probably not sufficiently link the goods to the buyer. Nonetheless, in that case, the invoice or other correspondence will probably suffice. Third, the seller can identify the goods by notifying the buyer that the goods have been dispatched to the carrier, as provided in Article 32(1).[241]

Under the UCC, the identification of goods serves a more limited role. The primary significance is that identification gives the buyer and seller remedies not otherwise available. If goods identified to the contract suffer casualty without the fault of either party, and the casualty occurs before the risk of loss passes, then the contract is avoided.[242] If the loss is partial, the buyer may treat the contract as avoided or accept the goods with due allowance for the non-conformity.[243] Furthermore, if the buyer refuses to pay for goods already identified to the contract, the seller has an action for the

233. U.C.C. § 2-509(1)(a).
234. C.I.S.G. art. 30; U.C.C. § 2-503(3).
235. C.I.S.G. art. 45.
236. *Id.* art. 49.
237. U.C.C. §§ 2-601, 2-508.
238. C.I.S.G. art. 67(2).
239. *Id.*
240. *Id.*
241. *Id.*
242. U.C.C. § 2-613(a).
243. *Id.* § 2-613(b).

price of the goods that he is unable to resell.[244] Similarly, both the buyer's right to recover goods on the seller's insolvency, and his right to replevin, depend on the goods being identified to the contract.[245] However, the buyer's right to specific performance is not limited to goods that have been identified to the contract.[246] For example, a buyer can demand specific performance under an output contract even though the goods have not been produced.

Like the Convention, the UCC provides numerous means by which the goods can be identified to the contract. These are essentially the same means as provided in the Convention. If the contract relates to goods already identified, identification occurs when the contract is made.[247] If the contract relates to future goods, identification occurs "when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers."[248] In addition, § 2-501 provides that identification may occur by explicit agreement of the parties.[249]

Article 68 provides for risk of loss for goods sold in transit.[250] This provision applies primarily where a middleman arranges for shipment of the goods and resells the goods while they are in transit.[251]

The basic rule for goods sold in transit is that risk passes from the time when the contract is concluded.[252] In cases where the goods are destroyed by a single, identifiable event, such as fire, collision, or explosion, the rule allowing for risk to pass would be relatively simple to administer. However, to allow the risk to pass mid-shipment can lead to practical difficulties if the damage is caused by a less identifiable event. To avoid this difficulty, Article 68 provides that "if the circumstances so indicate," the buyer assumes the risk retroactively, i.e., from the time when the goods were handed over to the first carrier.[253] The UCC does not provide a separate rule for goods sold in transit.

Article 69(1) applies if the contract requires the buyer to pick up the goods at the seller's place of business.[254] The risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal.[255]

Under the UCC, contracts that require the buyer to pick up the goods are governed by § 2-509(3). This subsection also governs the risk of loss where

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244. *Id.* § 2-706.
245. *Id.* §§ 2-502(2), 2-716(3).
246. *Id.* § 2-716.
247. *Id.* § 2-501(1)(a).
248. *Id.* § 2-501(1)(b).
249. *Id.* § 2-501(1).
250. C.I.S.G. art. 68.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* art. 69(1).
255. *Id.*

the seller transports the goods.[256] In either case, passage of risk depends on whether or not the seller is a merchant.[257] If the seller is a merchant, the risk of loss passes when the buyer receives the goods.[258] If the seller is a not a merchant, the risk passes on tender of delivery.[259] The seller must put, and hold, conforming goods at the buyer's disposal and give the buyer any notice reasonably necessary to enable him to take delivery.[260]

Under Article 70, if the seller commits a fundamental breach, the buyer retains all rights to which the buyer is entitled, irrespective of the fact that the risk of loss may have passed to the buyer under Articles 67, 68, or 69.[261] The specific rights preserved by the buyer are the election to avoid the contract under Article 49(1) or to require the seller to deliver substitute goods under Article 46(2).[262] By exercising either of these options, the buyer places the risk of loss on the seller because of the buyer's right to avoid the contract. If shipment of the goods constitutes a fundamental breach of the contract as a whole, the buyer's right to avoid or compel substitute delivery is not lost because the goods were damaged in transit.

Under the UCC, the buyer also retains rights accrued by the seller's breach; however, under the UCC, the breach shifts the risk of loss back to the seller.[263] In this way, the UCC is unlike the CISG, where the shifting back of the risk is a necessary result of the buyer's right to avoid the contract. However, unlike the requirement of a fundamental breach in the CISG, the UCC allows the buyer to shift the risk back to the seller based on any breach, regardless of its extent.[264]

XIV. IMPOSSIBILITY AND FRUSTRATION OF PURPOSE

Article 79 embodies the CISG's provisions for frustration of purpose and impossibility.[265] There are three factors which must be proven by a non-performing party who seeks to establish that he is not "liable for a failure to perform": (1) the failure was "due to an impediment beyond his control"; (2) at the time of the contract "he could not reasonably be expected to have taken the impediment into account"; and (3) following the contract, he could not reasonably be expected "to have avoided or overcome [the impediment to

256. U.C.C. § 2-509(3).
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* § 2-503(1).
261. C.I.S.G. art. 70.
262. *Id.* arts. 49(1), 46(2).
263. U.C.C. § 2-510(1).
264. *Id.*
265. C.I.S.G. art. 79.

performance] or its consequences."[266]

The second paragraph of Article 79 narrows the grounds for exemption of a seller by treating the failure by the third person as if it were the failure by the seller. The seller will be exempt only if the third party would be exempt under the general standards of paragraph (1).[267]

Paragraph (3) acknowledges that impediments may only be temporary and that the Convention may not allow a total exemption if the condition is temporary.[268]

Paragraph (4) provides the requirement that notice be given by the non-performing party within a reasonable time. Without this notice, the non-performing party is liable for the damages resulting from the breach and has no right to claim immunity from liability under the provisions of this or other articles.[269]

Paragraph (5) provides that "[n]othing in this article prevents either party from exercising any right other than to claim damages."[270] This section emphasizes the fact that this exemption provision does not negate the adverse party's right to avoid the contract.

The UCC differs from the CISG in that the CISG is much closer to the Civilian approach to frustration of purpose, and is more permissive than the common law. For example, the UCC only provides the defense for the seller, and then only with respect to two aspects of performance—"delay in delivery" and "non-delivery."[271] Article 79 of the Convention follows the approach of most civil law systems in extending the rules on excuse to all aspects of a party's performance. Either party may be excused from liability "for a failure to perform any of his obligations."[272]

The differences are not as great as a literal reading of the two codes would suggest. The buyer would probably be able to claim frustration of purpose in most American courts, and both the first and second Restatement of Contracts adopt this broader view.

XV. PRESERVATION AND RESALE OF REJECTED GOODS

Article 86(1) imposes a duty on the buyer to preserve goods when the buyer is in possession of the goods and intends to reject them.[273] The buyer essentially has a lien on the goods against the seller for reimbursement of the

266. *Id.* art. 79(1).
267. *Id.* art. 79(2).
268. *Id.* art. 79(3).
269. *Id.* art. 79(4).
270. *Id.* art. 79(5).
271. U.C.C. § 2-615(a).
272. C.I.S.G. art. 79(1).
273. *Id.* art. 86(1).

cost of storage. If goods are dispatched to the buyer and the buyer intends to reject them, Article 86(2) imposes a duty on the buyer to take possession of the goods.[274] Thus, the rejecting buyer cannot avoid the obligation to preserve the goods by not taking possession of the goods. The obligation can be avoided if the seller or the seller's agent is able to take possession of the goods at their destination.[275] The buyer need not care for the goods indefinitely.[276] If the delay by the other party becomes unreasonable, then the preserving party may sell the goods under Article 88.[277]

For rightfully rejected goods in the possession of the buyer, the UCC imposes a duty on the merchant buyer "to follow any reasonable instructions received from the seller."[278] If the seller does not provide such instructions, then the buyer may sell the goods if they are perishable or if the value of the goods threatens to decline.[279] The UCC provides other options for non-perishable, rightfully rejected goods that may be exercised by merchants and non-merchants. The buyer may store the goods for the seller's account,[280] reship the goods to the seller, or sell the goods for the seller's account and deduct expenses.[281] If the buyer uses the goods after rejecting them, then the buyer will have to account to the seller for such use.[282] The non-merchant buyer has a duty not to convert the goods and to hold them for a reasonable time until the seller may remove them.[283]

Under Article 88(1), the buyer in possession of goods for which there is a duty of preservation may sell the goods in two circumstances.[284] First, he may sell the goods if the seller delays unreasonably in taking possession of, or taking back, the goods.[285] Second, if it appears that the buyer would be left with storage costs, the buyer may seek to offset the costs by selling the goods.[286] In either event, the buyer seeking to sell the goods must give the seller notice of the intention to sell.[287] Article 88(2) deals with the sale of perishables or goods for which storage would be financially impractical. In both situations the preserving party must sell the goods and a good faith effort

274. *Id.* art. 86(2).
275. *Id.*
276. *Id.*
277. *Id.* art. 88.
278. U.C.C. § 2-603(1).
279. *Id.*
280. *Id.* § 2-604.
281. *Id.*
282. *Id.* § 2-606(1)(c).
283. *Id.* § 2-604.
284. C.I.S.G. art. 88(1).
285. *Id.*
286. *Id.*
287. *Id.*

at notice would still be required.[288]

Under the Convention, resale is allowed "if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation."[289] Article 88(1) states only that a sale may be made by "appropriate means."[290]

The Convention does not limit the duty to deal with perishables to merchants, as does the UCC; but since the Convention itself will not apply to sales "of goods bought for personal, family or household use," the parties to a Convention transaction will most likely be of a "merchant" character. The parties required to make the "salvage sale" will be similar under both the UCC and the Convention. The UCC requires the buyer to follow reasonable instructions before making a salvage sale.[291] Although the Convention does not have a "reasonable instructions" provision, it adds the requirement of notice "[t]o the extent possible" of the intention to sell.[292]

288. *Id.* art. 88(2).
289. *Id.* art. 88(1).
290. *Id.*
291. U.C.C. § 2-604.
292. C.I.S.G. art. 88(2).

ARE THERE ANY LIMITS TO JUSTICIABILITY?

THE JURISPRUDENTIAL AND CONSTITUTIONAL CONTROVERSY IN LIGHT OF THE ISRAELI AND AMERICAN EXPERIENCE

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I. INTRODUCTION

Justiciability deals with the boundaries of law and adjudication. Its concern is with the question of which issues are susceptible to being the subject of legal norms or of adjudication by a court of law. Justiciability is distinct from the issue of judicial activism, which relates to the role of the courts in developing and changing the law and with the readiness of the courts to intervene in the decisions of other public authorities and to grant relief against those decisions.[1] The concern of justiciability is with the province within which the law and the courts properly function, irrespective of whether the courts take an activist approach within this province or not.

In the United States, the issue of justiciability is dealt with primarily within the context of the "political question" doctrine, which focuses on the limitations upon adjudication by the courts of matters generally within the area of responsibility of other governmental authorities—in particular, matters of foreign relations and national security. According to this doctrine, as articulated by Justice Brennan, the Court will not undertake to adjudicate an issue where there exists:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[2]

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1. *See* AHARON BARAK, JUDICIAL DISCRETION 147-48 (1989). And compare to the broader definition of Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 385 (Stephan C. Halpern & Charles Lamb eds., 1982). In the United States, the term "justiciability" is often used to refer to the doctrines determining at what stage, and by whom, disputes may be brought for resolution before the courts—standing, ripeness, and mootness. *See, e.g.*, Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 605-06 (1992). In this article, however, I will utilize the term in its other sense, as referring to the question of which issues (from the standpoint of their content and not the manner in which they were brought up for judicial resolution) are susceptible to being the subject of legal norms or being adjudicated by a court of law.

2. Baker v. Carr, 369 U.S. 186, 217 (1962). In Goldwater v. Carter, 444 U.S. 996, 998 (1979), Justice Powell broke down the doctrine to a tri-partite examination, on the basis of which it could be decided if a question was political and, consequently, not justiciable:

(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government?

(ii) Would resolution of the question demand that a court move beyond areas of judicial expertise?

Nowak and Rotunda note that it would be better to term this doctrine the doctrine of non-justiciability.[3] This notwithstanding, it must be noted that the political question doctrine does not contain within it any general theory regarding the limits of the law or of the adjudicatory process; rather, it deals with "political" questions in the traditional and narrow sense of the word. According to this doctrine, certain sets of issues categorized as political questions, including issues that in their essence are legal, are considered to be external to the judiciary; their resolution is given over to other branches of government, i.e., the legislature or the executive branch. The political question doctrine thus focuses on the limits of adjudication by the courts. It deals hardly at all, however, with that aspect of justiciability that directs itself to the question of the limits of the law itself, as opposed simply to the limits of adjudication.

In Israel, since the 1980s—perhaps as a result of the recognition of broad and well-nigh unlimited entitlement for most claimants to standing before the courts in cases of constitutional and administrative law[4]—justiciability, in all its central aspects, has become the subject of fundamental debate among Supreme Court Justices and commentators.[5] The debate in Israel, in essence, is over whether there can be an answer to every legal question; whether it is appropriate for the judicial branch to apply itself to every legal question; and whether there is a meaningful distinction to be drawn between the first question and the second. This being said, a general consensus exists in Israel, at least rhetorically, that the courts will adjudicate only legal disputes and will decide those disputes solely on the basis of legal standards and criteria.

(iii) Do prudential considerations counsel against judicial intervention?

For summaries of the doctrine, see JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 47-53 (2d ed. 1991); Robert J. Pushaw Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 498-99 (1996).

3. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 104 (4th ed. 1991); *but see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 96 (2d ed. 1987).

4. *See* ZE'EV SEGAL, STANDING BEFORE THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE 235-39 (2d ed. 1993) (Hebrew).

5. *See, e.g.*, H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 449-72, 509-12, 514; H.C. 90/1635, Gerjevski v. Prime Minister, 45(1) P.D. 749, 765-76, 818, 843-44, 855-57; *see also* Menachem Elon, *The Basic Laws: Their Enactment, Interpretation, and Expectations*, 12 BAR-ILAN L. STUD. 253, 298-306 (1995) (Hebrew); Aharon Barak, *On the World View Regarding Law, Adjudication and Judicial Activism*, 17 TEL AVIV U. L. REV. 475, 477 et seq. (1992) (Hebrew); Ariel Rozen-Zvi, *The Culture of the Law—On Judicial Intervention, Enforcement of the Law, Judicial Activism and Assimilation of Values*, 17 TEL AVIV U. L. REV. 689 (1992) (Hebrew).

This article seeks to use the tools of critical comparative law to present and discuss a number of jurisprudential and constitutional aspects central to the issue of justiciability, an issue which, in any system of law, constitutes a fundamental and crucial topic. For, along with its theoretical character, the issue of justiciability carries with it significant practical consequences—both legal and political. Against a background which sets forth the discussion in the Israeli sources and compares them with the American sources,[6] I will offer several theses in the area of jurisprudential and constitutional law and, *inter alia*, suggest an approach to the issue in accordance with which the courts—in the context of their constitutional function in a system of checks and balances—may be required to adjudicate questions as to which the law itself, at least at this time, does not provide sufficient tools to determine.

II. ON JUSTICIABILITY

A. *The Meaning of the Term Justiciability: Normative and Institutional Justiciability*

The term justiciability is not unambiguous. It is possible that a significant part of the difficulties and dispute surrounding the jurisprudence—and, more specifically, the understanding—of justiciability derive from the ambiguity of the word justiciability itself.[7] This ambiguity imbues the very subject matter of the dispute, and the various contending views and positions, with a lack of essential clarity. Indeed, there have been those who have seen in justiciability, by reason of its very nature, "a concept of uncertain meaning and scope."[8]

Yet it would seem that the necessary condition for a serious and fruitful consideration of a theory of justiciability is a definition of the meaning—more

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6. The Israeli legal literature, which is largely in Hebrew, will be less well known to the typical readers of this journal than the corresponding American legal literature. Consequently, in this article, the review, description, and quotation of the Israeli sources will be broader than the review, description, and quotation of the American sources.

7. *See* Geofrey Marshall, *Justiciability*, *in* OXFORD ESSAYS IN JURISPRUDENCE 265 (Anthony G. Guest ed., 1961). *See also Ressler*, 42(2) P.D. at 474 (comments of Barak, J.).

8. Flast v. Cohen, 392 U.S. 83, 95 (1968) (Warren, C.J.); Similarly: "Justiciability is, of course, not a legal concept with fixed content or susceptible of scientific verification." Poe v. Ullman, 367 U.S. 497, 508 (1961) (Frankfurter, J.). Under Israeli law: "I would be astounded if a sage would ever arise who was able to precisely define the meaning of this term . . . I will admit without shame that I myself have never grasped the nature of this monstrous creation . . . . No exact legal analysis can be found to comprehend its content." H.C. 295/65, Oppenheimer v. Minister of Interior and Health, 20(1) P.D. 309, 328 (Zilberg, acting C.J.); "The doctrine of non-justiciability is in its essence a doctrine whose foundations cannot be defined in a precise manner." H.C. 85/73, "Kach" Movement v. Chairman of the Knesset, 39(3) P.D. 141, 161 (Barak, J.).

specifically, the meaningfulness—of the term "justiciability." The achievement of such a definition, vital for conducting any meaningful discussion or debate, is not beyond our grasp.

Justiciability focuses on two problems, or, in other words, it is comprised of two fundamental aspects.[9] It is possible that the use of a single term to embody both these aspects at once has contributed to the obscuring of the differences between them.

One of these aspects, which bears a plainly jurisprudential character (and which, as with many other significant jurisprudential issues, in no way detracts from its practical significance), is the consideration of whether there exists a legal answer for every legal question (i.e., for every question as to the existence or non-existence of a person's rights or obligations, as these are understood under Hohfeld's classic categorization[10]). This aspect of justiciability has been termed by the current Chief Justice of the Israeli Supreme Court, Aharon Barak, as "normative justiciability." According to his definition, "normative justiciability comes to answer the question whether there exist legal criteria sufficient to determine a dispute presented before the Court."[11] It should be carefully noted, however, that in considering this question, normative justiciability does not intrude into the famous argument between Hart and Dworkin as to whether for every legal question there exists only one lawful answer or a number of equally lawful alternative resolutions.[12] Normative justiciability deals with the question of whether for every legal question there exists any (i.e., at *least* one) legal answer. This notwithstanding, it would seem that an approach which asserts that there are questions that are not normatively justiciable would not be compatible with either of the aforesaid approaches. For each carries the assumption that every legal question has an answer (or answers) at which the jurist can arrive.

Alongside the aspect of normative justiciability, there exists the aspect that has been termed by Justice Barak as "institutional justiciability." According to his definition, "institutional justiciability comes to answer the question of whether the court is the appropriate authority to determine a particular dispute, or whether it is more appropriate that the dispute be

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9. From a terminological point of view, it would seem that the first aspect may be termed "law-ability," as opposed to the second aspect, which may be termed "litigatibility."

10. WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1923). Hohfeld categorizes the various rights into four categories: (1) right (in the sense of claim or demand) and duty; (2) privilege (in the more modern term—liberty) and no-right; (3) power and liability; and (4) immunity and disability.

11. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 474.

12. For Dworkin's view, that to every legal question there is only one lawful answer, see, for example, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (2d ed. 1978); Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978). For Hart's view, that a legal question may have several lawful answers, see, for example, HERBERT L. A. HART, THE CONCEPT OF LAW 121 (2d ed. 1994).

determined by another institution, such as the legislative or the executive authority."[13] Institutional justiciability itself bears two aspects: a material aspect and an organic aspect.[14] The material aspect is concerned with the question of whether it is appropriate for the court to adjudicate the subject matter of the dispute before it. The organic aspect, which is particularly relevant with respect to petitions brought against the legislative branch, is concerned with whether it is appropriate for the court to adjudicate the legality of the actions of the organ of the state against whom the legal petition has been brought.

There were those in Israel who disputed this distinction between the normative aspect of justiciability and its institutional aspect. When Justice Barak expressed the view that "these two meanings of justiciability are different and it is proper that they not be confused[,]"[15] there were other justices—such as the former Deputy Chief Justice of the Supreme Court, Menachem Elon—who believed that the distinction was not viable, and, in any case, was pointless and impractical.[16] A similar view was taken by the former Chief Justice of the Supreme Court, Moshe Landau, who wrote in an article:

> I do not see that there is any practical advantage or even analytical justification in the distinction between normative justiciability and institutional justiciability. The very term justiciability is at its core bound up with adjudication by a court as an institution; that is to say: whether there exists any norm that would prevent a *court* from applying itself to a particular legal petition. Therefore, I see no point, for example, in categorizing questions that touch on the adjudication of the policy of the Government in its capacity as the authority over the State's foreign relations in the category of normative justiciability, as opposed to questions touching upon the separation of powers, that ostensibly would fall in the category of institutional rather than normative justiciability. The question is always the same: Should the court apply itself to the petition, or should it refrain from considering it.[17]

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13. *Ressler*, 42(2) P.D. at 474. *Cf.* Samuel Issacharoo, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1686-88 (1993).

14. Ariel Bendor, *Justiciability in the High Court of Justice*, 17 MISHPATIM 592, 594 (1987-1988) (Hebrew).

15. *Ressler*, 42(2) P.D. at 474.

16. H.C. 90/1635, Gerjevski v. Prime Minister, 45(1) P.D. 749, 773. For a discussion of Justice Elon's position on this issue, see Ariel Bendor & Shulamit Almog, *Judicial Review According to Justice Menachem Elon*, 25 MISHPATIM 481, 484-86 (1995).

17. Moshe Landau, *On Justiciability and Reasonableness in Administrative Law*, 14 TEL AVIV U. L. REV. 5, 10 (1989) (Hebrew).

It would appear that the position taken by Elon and Landau is inextricably bound up with their opinion that the *law*, as such, does not take any position on certain questions, such as certain categories of questions within the realm of politics or ethics, and that these questions are simply not justiciable. Thus, from their point of view, there is no practical point in the distinction between normative non-justiciability and institutional non-justiciability, for, at any rate, the courts will never deal with or determine such questions.

Nevertheless, according to the view that rejects a congruence between questions whose non-justiciability is normative (assuming such questions exist) and questions whose non-justiciability is institutional (again, assuming such questions even exist), the distinction is, obviously, a necessary one. According to the view of Justice Barak, as detailed hereafter,[18] while all legal questions may be justiciable from a normative standpoint, there are legal questions that are not institutionally justiciable. Consequently there is meaning and significance to the distinction. In my own viewpoint,[19] according to which there can be, *in a certain sense*, legal questions that are not normatively justiciable, there is still a need for the distinction between the two forms of justiciability. This is because, with respect to legal questions that are normatively non-justiciable and those that are institutionally non-justiciable (to the extent such questions exist at all), there is no congruence between the two.

B. *Justiciability and Jurisdiction*

A distinction must be drawn further between the jurisdiction over a certain matter that is conferred upon a court by law, and justiciability, whose concern is with how appropriate it is that the matter be determined judicially. The fact is that there is a great tendency to confuse these two categories. This lack of clarity derives primarily from the tendency to use the term "jurisdiction" to connote the readiness of a court to hear cases in situations where the law has granted the court discretion as to whether it will hear the case or not. A good example of this in Israeli law is the text of Paragraph 15(c) of the Basic Law: The Judicature, which deals with the jurisdiction of the Supreme Court in its capacity as High Court of Justice (in which capacity it primarily deals with matters of constitutional and administrative law). As stated there:

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18. *See infra* text accompanying notes 36-38 and 100-02.

19. *See infra* Section III.

> The Supreme Court will sit also as the High Court of Justice; in this capacity it will determine matters where it sees fit to grant relief for justice's sake and which are not in the jurisdiction of another court or a tribunal.[20]

This paragraph, which appears to define the extent of the High Court of Justice's jurisdiction, establishes that it is to judge "in matters *where it sees fit* to provide relief for justice's sake."[21] That is to say, the paragraph gives discretion to the court as to what claims it will hear. It is thus possible to understand why many justices and learned jurists, sometimes intentionally and sometimes, perhaps, from mere inattention, considered the High Court of Justice's decision to decline the hearing of a case to be a matter of jurisdiction. For example, the Israeli Supreme Court, on the grounds that this was not a matter given to judicial determination, decided early on that it was not competent to hear a claim that would have required the President of Israel to act in a particular manner regarding the way he delegated the function of forming a government.[22]

It would seem appropriate then to distinguish between jurisdiction and the manner of the exercise of that jurisdiction. For it is not reasonable that a court's jurisdiction should be dependent on its own discretion as to whether or not it will hear a dispute. But the distinction between the jurisdiction over a particular dispute and that dispute's justiciability may be dependent on one's substantive position regarding the justiciability (and, more particularly, the normative justiciability) of the dispute. It may be contended that where the dispute is not justiciable from a normative standpoint, the court lacks jurisdiction to decide the case (irrespective of the wording of the statutory section from which the court would purportedly draw such jurisdiction).[23] This position would maintain that a basic prerequisite to a court's hearing of a dispute is that the dispute revolve around a legal issue, i.e., one that the law is given to dealing with. Courts, by their essential nature, are empowered to deal only with legal disputes (i.e., issues that are normatively justiciable). The presumption by a court to decide a dispute that is not a legal one would be, under this view, a trespass over the bounds of its proper jurisdiction. That is to say, under this view, normative non-justiciability implies a lack of jurisdiction.

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20. Basic Law: The Judicature, S.H. 78 (1984).

21. *Id.* (emphasis added).

22. H.C. 65/51, Jabotinski v. President of the State of Israel, 4 P.D. 801. Yet, in a subsequent decision, this distinction was overruled. *See, e.g.*, H.C. 802/79, Samara v. Commander of the Judea and Samaria Region, 34(4) P.D. 5.

23. *See* David Kretzmer, *Judicial Review of Knesset Decisions*, 8 TEL-AVIV U. STUD. L. 95, 105, 149 (1988) [hereinafter Kretzmer, *Judicial Review*]; David Kretzmer, *Forty Years of Public Law*, 24 ISR. L. REV. 341, 352 (1990) [hereinafter Kretzmer, *Forty Years*].

Similarly, in the United States, the distinction between the question of jurisdiction and that of justiciability is not clear-cut. For many of the categories falling within the definition of a non-justiciable "political question"—for example, "a textually demonstrable constitutional commitment of the issue to a coordinate political department"[24]—fall, to a large extent, within the boundary between the jurisdiction of the court and the jurisdiction of other governmental authorities, as established in the articles of the U.S. Constitution.

As I will elaborate in the ensuing discussion,[25] it is my view that full normative justiciability is not a necessary pre-condition for institutional justiciability, i.e., for the appropriateness of a matter being subject to a court's determination. Sometimes, the court will be required to issue rulings on grounds other than those of authentic legal norms. In any case, under this view, a distinction must still be drawn between a court's jurisdiction, determined from the statute on the basis of which it acts, and the justiciability (normative and institutional) of the dispute brought before it for adjudication.

C. *Justiciability and Substantive Law*

In general, it is a mistake to identify the laws dealing with the exercise of the discretion of the court in hearing a dispute and in granting relief in the dispute (within the limits of that discretion), including the laws governing justiciability (at least from the institutional aspect), as being simply procedural laws. For often, the concern of those laws is with the question of whether the petitioner has a right to a hearing of his position and to relief upon it, and not simply with the mode of the judicial procedure for the enforcement of the rights embodied in the substantive law.[26]

We must, however, continue to draw a distinction between the question of the willingness of the court to adjudicate a dispute and to grant relief therein and the substantive law upon which the rights of the disputants are determined. The substantive law operates outside the courtroom walls as well, and it is expected of all citizens and institutions that they will conform their behavior to the dictates of that law, wholly aside from the judicial enforcement of the law. Of course, there are few today who would dispute that the courts bear a distinct influence on the determination of the content of the substantive law.[27] Yet, this is not sufficient to allow us to dispense with

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24. *See* Baker v. Carr, 369 U.S. 186, 217 (1962). For the difficulties in providing a literal interpretation for the criteria set forth in *Baker*, see Pushaw, *supra* note 2, at 500-01.

25. *See infra* Part III.

26. *See, e.g.*, BLACK'S LAW DICTIONARY 1203-04 (6th ed. 1990).

27. *See generally* BARAK, *supra* note 1. There is also the view of Dworkin and of those who join in his position, that there is only one lawful answer for every legal question. Thus, Dworkin recognizes legal precedents as sources of the law and even contends that special rules

the distinction between the judicial discretion in the interpretation and development of the substantive law, and the judicial discretion as to the court's willingness to hear and adjudicate a dispute in the first place, including through the criteria of institutional justiciability.

This distinction is not purely "semantic."[28] The need for such a distinction and its significance derives—beyond the value of terminological precision—from the fact that the law, and adherence thereto, must exist outside the courtroom walls as well. For example, in the realm of the public law, constitutional and administrative, the substantive rights of the individual against the governmental authorities exist and apply even when separated from the issue of the court's willingness to rule in a dispute involving those rights. Governmental authorities must operate in accordance with the law and must respect individual rights even if, for whatever reason—including reasons related to institutional justiciability—the court may decline to intervene and enforce the governmental authorities' obligations to act in accordance with the law.

Of course, the court wields wide influence upon the law. This alone, however, is an insufficient basis to assert a wholesale identity between the two. The law and the court each have their separate existence. It is, consequently, of great importance that the court make clear in its rulings, most essentially to the more political branches of government, the bases upon which the ruling has been granted. The governmental authorities must be aware whether a dispute was dismissed because the government acted properly, or because of reasons of non-justiciability, whether in the normative or in the institutional sense. The civic responsibility of governmental authorities, and of the citizenry as individuals, to act in accordance with the law is not dependent on the power (and some would say the duty) of the court to dismiss non-justiciable petitions. Public authorities must be aware of the substantive law and its boundaries (to the extent such boundaries exist).

The substantive law must not be obscured by confusion between it and the rules of justiciability. If the dismissal of a petition against a governmental authority is based on substantive law, it connotes that the authority acted legally and, thereby, any restraint on its acting similarly in the future is removed. On the other hand, dismissal of a similar petition on grounds of non-justiciability means that the court has taken *no* position with respect to the question of the legality of the authority's conduct. Furthermore, it is precisely where the courts are seen as not possessing a monopoly on the

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of interpretation apply to them, which differ from those that apply to the interpretation of statutes. *See, e.g.*, DWORKIN, *supra* note 12, at 116.

28. Yaakov Zemach, *The Non-Justiciability of Military Measures*, 9 ISR. L. REV. 128, 133 (1974).

binding interpretation of the law, as is maintained in the United States,[29] that the other governmental authorities are not freed from the need to interpret and to act in adherence with the law, as it appears to them, and may not deliberately violate it.

Yet in the decisional law in Israel, and at times in the United States, this significant distinction is not always given expression. In many cases, it is not clear if a petition has been dismissed due to non-justiciability or whether the dismissal is based on the substantive law. Sometimes, particularly in matters of foreign relations and national security, despite the court's usage of the term justiciability, what the court was actually referring to was the substantive law regarding the lawful extent of the authority's jurisdiction. The substantive law generally provides that in the administration of foreign affairs and national security, the empowered authorities are granted a particularly wide scope of discretion.[30]

For example, the Supreme Court of Israel held in one case that "the matter is not justiciable . . . because if a military-security operation . . . is anchored in the law and if we are satisfied that the motives were security-based—the court has no place to second-guess it."[31] This statement could, apparently, be reformulated as follows: "There is no basis for the petitioners' claims because a military-security operation is proper from a legal standpoint if it is anchored in the law and if its motives were security-based." Proof of the difficulty courts have in recognizing this distinction may be found in the fact that it is rare that a court will dismiss a petition on the sole basis of the non-justiciability of the subject matter it deals with while believing, at the same time, that the substantive law favors the petitioners.[32]

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29. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defence Council, Inc., 467 U.S. 837 (1984); *see also* Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175 (1990); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) and the commentaries cited there at note 19; Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996). *See also infra* notes 78-80 and accompanying text.

30. *See* Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976).

31. H.C. 302, 306/72, Hilo v. State of Israel, 27(2) P.D. 169, 181.

32. Compare H.C. 5364/94, Velner v. Chairman of the Labor Party of Israel, 49(1) P.D. 758, 808-11, where Justice Goldberg asserted that, despite the fact that the coalition agreement, with respect to which the petitions were directed, was illegal, the Court should still not involve itself because the agreement related to the position of the judiciary itself. This viewpoint received criticism from the other Justices and was not accepted. Yet it would seem possible to categorize Justice Goldberg's position as relating to organic non-justiciability, where the Court's abstention from intervening, despite the unlawfulness of the decision involved, would be more acceptable than from the standpoint of material justiciability. *See infra* notes 115-27 and accompanying text.

D. *Justiciability and the Policies of Public Agencies*

What is the demarcation between non-justiciable issues and matters regarding "governmental policy" where the legitimate involvement of the courts is restricted? In my opinion, there is no coherence between the two categories. Not all matters of policy are non-justiciable and not all non-justiciable questions revolve around policy. Each of these doctrines deals with its own particular province: While the non-justiciability doctrine relates to the subject matter of the actions being adjudicated, the policy doctrine relates to the measure of the generality of the issue under dispute.[33] The doctrine of non-justiciability establishes, *inter alia*, that questions relating to a certain subject matter, in particular "political" matters (including foreign relations and national security matters), are not justiciable. Not only general policy decisions but also a decision on a specific matter which, however, relates to non-justiciable subject-matter, is viewed as not being subject to judicial review. On the other hand, under the policy doctrine, judicial criticism on general operations of governmental authorities, whether or not the subject matter is "political," is restricted.

Another less sharp divide between the non-justiciability doctrine and the policy doctrine is that, while justiciability is a prerequisite for the court's involving itself in the case, the policy doctrine is a part of the substantive law relating to the discretion of public authorities.[34] The obscuring of this division derives from the fact that, generally, the policy doctrine is articulated in a realistic form. For example, "the limitations on the involvement of the High Court of Justice in Policy . . . are . . . narrow."[35] There is nothing here which clarifies whether the doctrine deals with the prerequisites to adjudication or with the substantive law itself.

E. *On Normative Justiciability*

1. The Universality of Law: The Law Takes a Position Regarding All Human Actions

The concern of normative justiciability is, as previously noted, the problem of whether each legal question—a question dealing with the rights or obligations of a person according to the norms recognized in the particular

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33. *See* Marshall, *supra* note 7, at 279-80. The second meaning ascribed by this writer to the term "political" is "discretion[al]." Yet, neither in the United States, nor in Israel, does the political question doctrine apply to all actions given over to the discretion of public authorities.

34. *See* Aharon Barak, *The Duty to Regulate General Norms*, 22 HAPRAKLIT 292, 296 (1966) (Hebrew).

35. H.C. 49/83, United Dairyman Ltd. v. Milk Branch Council, 37(4) P.D. 516, 523.

system of law—possesses an answer. Logic would seem to require that there must be an answer to all legal questions defined as such. For it is not logical that any human action should be simultaneously lawful and unlawful, permissible and prohibited. The law, by its very nature, cannot be indifferent to any human action. Every such action is either lawful or unlawful, permissible or prohibited.[36] In the words of Justice Barak:

> The law is omnipresent. There exists no 'legal vacuum'. If a lacuna should come to exist, the law finds a way to fill it. I am permitted to think and move as I will because the law recognizes my freedom in these respects. This recognition doesn't arise because the law does not prohibit these actions by me but because it does not recognize the right of others to prevent me from so acting. My freedom is the restriction of another's right . . . . Indeed, if these relations were considered to exist in a legal vacuum, what would prevent me from preventing my fellow from thinking or eating as he wishes?[37]

> The world is filled by the law. All human behavior is the subject of a legal norm. Even where a particular class of actions—such as relations of friendship or subjective thought—are controlled by the autonomy of the individual will, this autonomy exists because it is recognized by the law. Absent this recognition, freedom would be given to all to invade this sphere of autonomy.[38]

It is clear that statutes or decisional law do not deal expressly with each and every human action, permitting or prohibiting them. The doctrine of the universality of the law is tied to two general fundamental legal principles. According to the first principle, the individual is granted the freedom to act as he wills unless a specific legal provision rules otherwise (The Principle of Individual Freedom); according to the second, a public governing authority lacks any powers save those delegated to it by the law (The Principle of The Legality of Governance).

Against this approach, Shulamit Almog and Avinoam Ben-Ze'ev contend that it is proper—and that it could not be otherwise—that certain human actions operate in a "legal vacuum."[39] According to their approach,

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36. Bendor, *supra* note 14, at 622.

37. H.C. 90/1635, Gerjevski v. Prime Minister, 45(1) P.D. 749, 855.

38. Barak, *supra* note 5, at 447.

39. Shulamit Almog & Avinoam Ben-Ze'ev, *Legal Reality—On Justiciability and the Limits of the Law*, 12 BAR-ILAN L. STUD. 369 (1996) (Hebrew). This source is also reprinted in chapter one of SHULAMIT ALMOG & AVINOAM BEN-ZE'EV, THE LAW OF HUMANITY (1996) (Hebrew).

human actions upon which the law (the legal norms and the courts) cannot exercise any influence, such as thoughts, dreams and feelings, exist in "a reserved area of total freedom,"[40] outside the concern of the law. In these matters there is no practical meaning in any legal permissibility or impermissibility, and any legal provision regarding them would be irrelevant (in the best case) or even harmful (in the worst case). The authors add that this "reserved area of total freedom" in these areas properly exists:

> Not simply because there is no way to place restrictions on its being there but because the individual is deserving of this protective reserve. In a certain sense, man cultivates the meaning of his life within this reserve. There he learns to be himself, there he learns his own significance, as well as the great goodness in freedom . . . . Accordingly, if we were to follow in the footsteps of imaginative fiction, we would define as tyrannical a society that was able, through advanced technology, to enter into the world of dreams and thoughts. In this sense, and still within the bounds of the imaginary, individual autonomy is a signpost of our values. Its boundaries are the boundaries of democratic society.[41]

I agree that a legal norm relating to an action that is impossible to control or to influence by means of the norms and the agencies of legal enforcement would be insignificant. At the same time, where the legal norm is incapable of exercising influence, the concern of the authors as to an infringement upon individual autonomy is not understandable. In any case, it would seem that the assumption that thoughts, dreams, and feelings are not susceptible to the influence of legal norms—and that there is, therefore, no point in permitting or prohibiting them—is not a universal truth. Take for example an imaginary society, like that mentioned by the authors, "capable, through advanced technology, of entering into the world of dreams and thoughts."[42] In such a society, the legal norms regulating the use of such technology would bear a practical significance of the highest degree. The level of tyranny or democracy in a society are not determined solely by the technological capacity of the society, but, among other things, by the content of the norms regulating the usage of the various technologies. These norms, prohibitory or permissive, would have to exist both as a concept and as a matter of practicality. Moreover, in an age of "virtual reality," it is doubtful if it is still possible to say confidently that control over the thoughts of

40. Almog & Ben-Ze'ev, *supra* note 39, at 381.
41. *Id.*
42. *Id.*

another, or certainly influence not reaching to the level of control, is a matter of science-fiction. The right of a person not to be exposed to the media of virtual reality without his consent derives from the legal norm of freedom of thought, which is the lack of right or freedom of another to prevent someone from thinking as he or she wishes. It is well to remember that the very question of whether any particular action is subject to outside control, to the extent where there is reason to regulate it under the law, is at times far from simple. A blatant example of this can be seen in various problems of criminal law, such as the laws regarding willfulness, and the serious debates concerning these matters. There are even areas, at the head of which could be placed the modern technologies, such as computers, or in earlier periods even television, radio, telephone, and electricity, which in the past were "fantastical," and which even today may not exist in certain areas of the world. Does the non-existence—plainly temporary—of these technologies and of others turn them into non-justiciable subjects as a matter of fundamental principle (as distinguished from the insignificance or impracticability of having norms to deal with them)?

The former Deputy Chief Justice of the Israeli Supreme Court, Justice Menachem Elon, in his debate against the notion of the universality of legal thought, held that:

> You do not say that the law 'permits' one to eat, to talk on the telephone, to take a stroll, to run or to dance because it does not 'prohibit' these activities. You also cannot say that the law 'permits' one to do kindness or walk humbly, because it does not 'prohibit' these activities. The legal system does not relate itself at all to all these above-mentioned actions, it ignores them, for they are outside its area of concern. With respect to all these activities there exists a 'legal vacuum'.[43]

Yet most, if not all, of the examples raised by Justice Elon are plain examples of activities regulated in detail—and not simply regulated under general principles of individual freedom or legality of governance—by at least some of the legal systems existing today. For example, "the freedom to eat" is far from being self-evident. Its legal regulation and limitation for reasons such as health, environmental concern, and, in many states (including Israel), religious practice, is not rare. The right of a person to talk on the telephone, whether relating to its technical aspects or to aspects of constitutional human rights (including freedom of expression and the right to privacy), is also a right which the law in many states regulates extensively. The "right to take a stroll" outside the boundaries of the State and even within them is also

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43. *Gerjevski*, 45(1) P.D. at 767.

regulated and limited by intricate legal norms, including constitutional norms that balance the freedom of movement on the one hand, and public and property rights on the other. The list of examples is endless.

It is possible that what Justice Elon meant is that the above-mentioned rights are "natural rights," which means that their source does not lie simply in the fact that the law does not prohibit them and, consequently, grants them. Yet even if we are speaking of a "natural rights" approach, of rights whose source is ostensibly in nature itself,[44] it is still the case that such natural rights depend no less than "artificial rights" (i.e., those created by the legal system) on the protection of the legal norms for their enjoyment. The absence of the right or freedom to interfere with the exercise of the natural rights, and the right not to be interfered with in the exercise of these rights, are positive legal norms (even if their justification derives from "nature"). As long as there is no attempt to violate these natural rights, they will, like other rights, appear to be self-evident. From here there may be only a short road to Justice Elon's above-quoted conclusion that "the law does not relate itself at all" to these rights; "it ignores them, for they are outside its area of concern. With respect to all these activities there exists a 'legal vacuum'."[45] Yet this "legal vacuum" does not exist. Legal regulation of a right comes to be necessary in a place where there is an attempt to derogate from that right. Is it reasonable that if someone were denied his right to eat what he wished, or to speak on the telephone, or to take a stroll, that he would be unable to find relief within the legal system because the legal system "does not relate itself" to these matters? And if this were the case, could you not say, then, that the legal system was relating itself to those rights insofar as it was permitting the power or, at least, the freedom to interfere with those rights, thereby limiting them? These are, of course, simply rhetorical questions. Nevertheless, they make clear that neither the "triviality" of a human activity nor its "naturalness" are sufficient to take them outside the ambit of the concern of the law.

It may be noted that Justice Elon, who is an Orthodox Jew and whose life's work has been the incorporation of the principles and concepts of religious Jewish Law (the *Mishpat Ivri*) within general Israeli law, does not base his position regarding justiciability on any texts or references from Jewish law. On this matter, he would maintain a clear opposition between the world of secular law and that of the religious law (the *halacha*). According to his view, the law, by its very nature, exists within defined and narrow boundaries; the *halacha*, by *its* very nature, extends into every human concern

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44. For the weaknesses in the natural rights doctrine, see, for example, MARGARET MACDONALD, NATURAL RIGHTS IN THEORIES OF RIGHTS 21 (Jeremy Waldron ed., 1984); Philip A. Hamburger, *Natural Rights, Natural Law and American Constitutions*, 102 YALE L.J. 907 (1993).

45. *Gerjevski*, 45(1) P.D. at 767.

with the *Mishpat Ivri* being one portion of it.[46] Indeed, many of the commandments of Jewish Law deal with the area of human feelings. For example, the Tenth Commandment teaches: "Do not covet your neighbor's house, do not covet your neighbor's wife or his slave or his maidservant or his ox or his donkey or anything that belongs to your neighbor."[47] Yet, if these type of norms are possible in the *halacha*, it should be possible for them to extend into the area of the secular law. It should be noted that the foregoing does not support the notion that the law should place any prohibitions or restrictions on emotions. Rather, the meaning is that the absence of any such prohibitions or restrictions is itself anchored in the law and does not find its place outside of it.

The commentators Almog and Ben-Ze'ev[48] maintain—and it is possible that Justice Elon[49] was hinting at a similar position—that the intrusion of the law into certain human activities which occupy the field of free feeling and will (or, in the language of Almog and Ben-Zev, "the reserve of total freedom"), such as love, mercy, and the practice of charity and righteousness, would deprive them of their savor and their value. For love which is mandated by law and which is engaged in to comply with that mandate is not love; legally stipulated mercy is not mercy, and so forth. To this quaint argument it is possible to reply (1) that we should certainly not reject any legal norms that serve to protect our "reserve of total freedom" by prohibiting interference with the desires and feelings that dwell there, and (2) that many, perhaps most, legal norms are based on ethical norms. This does not detract from the moral significance of acts on the basis of an authentic moral outlook, if such action (or omission) comports with what is set forth in the law or even mandated by it. The same would apply to an action undertaken from emotional imperatives. To the extent that the dictates of the emotions coincide with the dictates of the law, there is nothing there to detract from the substance of the emotion or its meaningfulness. Finally, with respect to the theoretical case of the person who loves or shows mercy because the law so directs, it is indeed true that his love is not love nor his mercy, mercy. These laws carry with them their own failure (though the same is not the case with laws that prohibit these and other emotions, such as the Tenth Commandment mentioned above: "Thou shalt not covet"). Yet simply because this or that norm commands the impossible is no reason to place the subject matter of that norm outside the bounds of justiciability. Certainly, there are innumerable activities that are either entirely, or at times impossible, to execute (or not to

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46. *Id.*

47. *Exodus* 20:13.

48. Almog & Ben-Ze'ev, *supra* note 39, at 32. *But cf.* Peter Goodrich, *Law in the Courts of Love: Andreas Capellanus and the Judgments of Love*, 48 STAN. L. REV. 633 (1996).

49. *See Gerjevski*, 45(1) P.D. at 766-67.

execute), both in the area of emotions and in other areas as well. Norms which purport to mandate or prohibit such activities will be totally ineffectual and, therefore, also inappropriate. Yet this provides no basis to say that the subject matter with which those norms deal is therefore non-justiciable.

A distinct category of issues that are traditionally claimed to be outside the competency of the law are "political questions" which generally refer to questions of foreign policy and national security.[50] Even though the bases for considering these questions as non-justiciable generally focus more on the institutional aspect of non-justiciability (particularly considerations relating to the separation of powers),[51] still, the relevant factors may have a normative aspect in the sense of the impossibility (rather than simply the non-desirability) of dealing with political questions in a purely legal manner.[52] Thus, Justice Elon—who negated the very distinction between normative justiciability and institutional justiciability and therefore intermixed in his exposition normative and institutional terminology—wrote in his rebuttal of Justice Barak's approach regarding the imposition of a reasonableness requirement on the political activities of the government:

> How is the court to assess that the weight given by the government to the relevant considerations, and the balancing that it performed between them, was improper or unreasonable? Does it have in its hands the professional tools needed to weigh the reasonableness or unreasonableness of that balance? What point or use is there in our terming this an examination of the legality of how it ran a briefing on preparations for battle? And is our nomenclature and terminology determinative? Are these not matters that from their very nature and essence can only be examined by other more appropriate and proficient bodies, such as a governmental Committee of Inquiry composed, in addition to a judge, of professionals and experts in the matter. We, the judges, howsoever wise and farsighted we may be, what do we have to do with the considerations that go into the waging of war or the initiation of diplomacy? . . . In my view, what is unreasonable is to reasonably expect that a *court of law* should examine the reasonableness of such matters.[53]

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50. In the United States, the foundation for the notion of the immunity of foreign relations from judicial review is Justice Marshall's comment in Marbury v. Madison, 5 U.S. 137, 176-78 (1803). *See* T.M. FRANCK, POLITICAL QUESTION JUDICIAL ANSWERS 3 (1992).

51. As such, they are the political questions deemed non-justiciable under Baker v. Carr, 369 U.S. 186 (1962).

52. *See, e.g.*, Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 142 (1962) (White, J.). For the interpretation of Tribe, see TRIBE, *supra* note 3, at 98.

53. *Gerjevski*, 45(1) P.D. at 771.

Despite his "institutional" formulations, the factors causing Justice Elon to consider the reasonableness of the above-mentioned political actions to be non-justiciable consist not simply in the notion that it is undesirable for a court to apply itself to the question, but also that the court is not equipped to do so because the law does not supply the court with the tools to assess the reasonableness of political actions.

Though I believe this view contains a certain nucleus of truth, which I will deal with further on,[54] it suffers from two fundamental deficiencies. First, it greatly confuses the highly significant distinction between justiciability and substantive law. It is not clear if Elon's meaning is that the political activities are not subject to a *legal* requirement of reasonableness, or whether they are subject to such a requirement, but the court is not the appropriate body to determine if it has been fulfilled. If the intent is that the governmental authorities are not subject to a legal requirement of reasonableness in the exercise of their political activities, then the court's avoidance of examining the reasonableness of these actions does not occur because of the ostensible non-justiciability of the unreasonableness claim, but rather because unreasonable political acts are legal. Just as the court dealing with criminal matters will not rely on non-justiciability when it acquits one accused of an offense not recognized as such by the substantive law (e.g., negligence not resulting in bodily harm), so there is no reason to have recourse to this factor in dismissing a petition based on the claim—in our case, the unreasonableness of a political action—that at face value reveals no legal defect. On the other hand, if the meaning here is that the *legal* obligation of reasonableness applies to political acts, but that the court is not the proper body to oversee the compliance with that obligation, then we are indeed speaking of a contention of non-justiciability, if only in its institutional aspect. In this case, the question arises as to whether or not it is then appropriate to establish an alternative *legal* institution that will be authorized to determine disputes revolving around the reasonableness of political decisions. There are a number of courts in which, due to the subject matter with which they deal, other experts or public representatives participate alongside the professional judges. Examples of this include the Israeli Labor Courts, where employer and labor representatives participate alongside the professional judges; the American criminal courts, where a significant adjudicatory role is delegated to the jury; and the Constitutional Courts in countries like France[55] and Germany.[56] Yet, I am doubtful that this is what Justice Elon, and those who hold similar views, intend. The Commissions of Inquiry referred to by Justice

54. *See infra* text accompanying notes 142-60.

55. *See* CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 111-13 (2d ed. 1996).

56. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 27-30 (1994).

Elon, which are formed infrequently and on the initiative of the ruling authorities themselves, are no substitute for an on-going judicial review of the reasonableness of political actions of the governing authorities. The impression, then, is that the remarks of Justice Elon do not relate to justiciability, and certainly not to normative justiciability, at their core, but rather to the proper content of the substantive law.

Second, the contention that judges are unable to assess the reasonableness of political governmental actions would seem to be equally valid as to their ability to assess the reasonableness of any action, whether political or non-political, whether committed by a governmental body or by an individual. It is well known that the substantive law depends heavily on various categories containing a reasonableness requirement. The terms "reasonable man," "reasonable amount of time," "reasonable manner," and the like, appear in the penal law, the law of contracts, tort law, family law, property law, the law of adjudication and evidence, administrative law, constitutional law, and so on. Not simply the decisional common law, but the statutes themselves, include norms whose core standard is reasonableness and its near relatives: justice, fairness, customary practice, good faith (in its objective meaning), and the like. How is the ability of judges to determine the reasonableness of the variety of actions in all these areas any greater than their ability to determine the reasonability of political actions? Justice Elon's words to the effect that "we, the judges, howsoever wise and farsighted we may be, what do we have to do with the considerations that go into waging war or entering into diplomacy?",[57] and that it is "wholly unreasonable to reasonably expect that a *court* will examine the reasonableness of all these varied matters[,]"[58] are equally valid to the vast majority, if not all, of the subjects where the court applies the norm of reasonableness. Yet no one would maintain that these various norms, without which it would be difficult to envisage a system of law and adjudication, are not justiciable—either normatively or institutionally. Indeed, as noted, it is valid to consider whether it is really appropriate to apply a requirement of reasonableness as a legal requirement in this or that area of the substantive law. Yet, the fact that the judges are not experts in the fields where they are required to rule on reasonability is not sufficient to turn reasonableness into something non-justiciable. On the other hand, as discussed, *infra*,[59] it is possible that in administrative law, in light of particular difficulties raised therein, reasonableness should not be classified as part of the substantive law, but as a basis to allow for judicial examination. This means that institutional justiciability will exist even in the absence of normative justiciability.

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57. *Gerjevski*, 45(1) P.D. at 771.
58. *Id.*
59. *See infra* Part III.

A fairly common claim, similar to a certain extent to the contention that political questions are normatively non-justiciable, is that there are problems that, by their essential nature, are not within the province of the law, and that the law and the courts are constrained to deal with and determine them almost against their own will. A typical example of this kind of problem is the determination as to whether to permit controversial forms of medical treatment, whether voluntarily or involuntarily imposed, such as: whether to force a youth, ill with cancer, to undertake a painful treatment to which he vigorously objects;[60] whether it is permissible to remove the kidney of a retarded youth, who is incapable of expressing his informed consent, in order to save the life of the father who cares for him;[61] whether it is permissible to plant a "surrogate" ovum in a woman's womb, when that ovum has been fertilized by the sperm of a man who has withdrawn his consent to the use of his sperm;[62] or whether it is permissible to deny a respirator to a child in a coma afflicted with an incurable illness.[63] The problem in determining these issues—it is claimed—is that they are tied into complex questions outside of the law—such as philosophy (including ethics), religion, sociology, economics, psychology, and medicine. In one of the Israeli decisions previously mentioned, Deputy Chief Justice Elon wrote:

> We sit 'against our will' to consider the issue before us. The Angel of Law stands over us and tells us 'Decide!' Even with differing opinions such as are here present, the judge is commanded to judge, so that the patient may know what is his right and what he is obligated to do or request, so that the physician may know what is forbidden, what is permissible and what is required of him in the practice of his craft, and so those who care for the ill may know what they are permitted—and what they are required—to know.
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> . . . .
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> . . . 'Against our will' we rule on all these matters, for we are far from certain that we are sufficiently versed in these worldwide problems, or that we have in our hands all the data and information needed to determine our issue.
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> . . . .
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> . . . Nevertheless, we are not freed from fulfilling our judicial duty, and we are commanded to examine, consider and

60. *See* H.C. 2098/91, John Doe v. Zik, 45(3) P.D. 217.

61. *See* R.I. 698/86, Attorney General v. Doe, 42(2) P.D. 661.

62. *See* C.A. 5587/93, D. Nahmani v. R. Nahmani, 49(1) P.D. 485; A.H. 2401/95, R. Nahmani v. D. Nahmani (not yet published).

63. *See* 506/88, Sheffer v. State of Israel, 48(1) P.D. 87.

to express our conclusion.[64]

Yet, is it in fact possible to distinguish between questions that, in their essence, are not legal (which the law, and the courts, must deal with, if at all, against their will) and plainly legal questions which the law and the courts deal with willingly? What is the difference between those non-justiciable questions—such as political questions which the law (and the courts) do not deal with (and where it is claimed to be inappropriate for them to deal with such questions)—and questions which the law (and the courts) do deal with, albeit unwillingly?

Why is the determination of granting capital punishment in a criminal case considered an obviously legal and judicial matter, whereas the decision regarding euthanasia is considered to be something that the court rules upon under force of circumstances despite the fact that inherently it is not a legal question? Why is a question regarding the danger to the life of soldiers who are sent into battle considered a non-justiciable matter for which the courts are not equipped and, hence, not even permitted to deal with? What is the standard of measure for normative justiciability?

In cases[65] and legal literature,[66] there is reference to "the expert feel of the lawyer" according to which he determines if such questions and others are justiciable or not. Yet it is clear that all the talk about a mysterious "expert feel" is no substitute for a rational, analytical examination of the subject, particularly since it is clear that this "expert feel" does not operate equally and in the same manner for everybody. It is my guess—and it is no more than a guess—that the aforesaid "expert feel" is influenced heavily by the accepted custom and tradition regarding the ambit of the law and of adjudication. For example, since the determination of criminal matters is a clearly traditional function of the law and of the courts, the question of the reasonableness of the conduct of a person who unintentionally caused another's death, and who is accused of the crime of negligent homicide, is viewed, in the professional sense of the jurist, as a clearly justiciable question. The same applies to the issue of the reasonableness of conduct which caused damage, with respect to which there has been asserted a tort suit on the basis of negligence. The medical issues referred to above have not, due to their very novelty, been commonly presented for legal or judicial determination; and therefore, especially in light of the difficult ethical uncertainties with which they are bound up, they have been viewed as issues less legal in nature. Similarly,

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64. *Id.* at 97.

65. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 151 (1951); H.C. 1/81, Shiran v. Broadcasting Authority, 35(3) P.D. 365, 371; H.C. 246, 260/81, Agudart Derekh Eretz v. Broadcasting Authority, 35(4) P.D. 1, 15-16.

66. *See, e.g.*, Menachem Flon, *Values of a Jewish and Democratic State in the Light of Basic Law: Human Dignity and Freedom*, 17 TEL AVIV U. L. REV. 662 (1993) (Hebrew).

clearly political questions have been traditionally viewed as delegated to the sphere of autonomy of the governing authorities—i.e., the legislative and executive authorities. Consequently, the "expert feel of the lawyer" recoils from seeking to bind them within the law's—and certainly the judiciary's—Procrustean bed, particularly with respect to any requirement of reasonableness. Until a few years ago, the professional instinct of the typical Israeli lawyer viewed the examination of the reasonableness of an administrative act—even one not considered particularly political—as non-justiciable. With the years, and with the assimilation of the reasonableness doctrine into Israeli administrative law, the professional instinct has leaned toward accepting justiciability of this doctrine. The situation certainly differs in those countries, including the United States, where judicial review of the reasonableness of administrative decisions is less common.

As we know,[67] legal norms are themselves expressions of values and interests whose source lies outside the law itself. The legal discipline, rather than existing in a splendid, self-enclosed isolation, is a vehicle for the realization and enforcement of values and interests of concern to society (or, at least, to the influential segments of society). In this sense, all legal norms are political, and all reflect and give expression to a variety of other disciplines (including ethics, religion, economics, sociology, psychology, medicine, management, and many more). Thus, those questions termed "political," which the "professional instinct of the jurist" recoils from adjudicating, are not (essentially) more political than other questions regulated by law and brought for adjudication to the courts. The dichotomy between political and legal questions, based upon a view that regards them as if they were two distinct and self-exclusive categories, is, in fact, without foundation. The law is always the expression of political, value-laden, and interest-ridden considerations.

Indeed, even with respect to the more common understanding of political questions, which identifies them with questions relating to the areas of foreign policy and national security, to the internal relations of governmental institutions, and sometimes also to questions of macro-economics, there is no basis to viewing a dichotomy between such political questions and legal questions. So maintained Justice Barak:

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67. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 9-116 (1985); Uriel Procaccia, *Law Bubbles*, 20 MISHPATIM 9 (1990) (Hebrew). Understandably, the Economic Analysis of Law and the Critical Legal Studies Movement are clear examples that are helpful for understanding the law against the background of its underlying values and interests.

> Every action—be it ever so political or policy-related—is encompassed within the universe of the law and there exists with respect to it a legal norm holding whether that action is permitted or prohibited. The claim that 'the matter is not a legal matter but a clearly political matter', confuses wholly different entities. That a matter is 'clearly political' is not enough to remove it from being also a 'legal matter'. . . . The political domain and the legal domain are two different domains. They neither exclude one another nor render the other superfluous. They operate in different spheres. The same action that can be encompassed by the one can be encompassed by the other as well. The political nature of an action does not negate its legal aspect, and its legal aspect does not negate its political aspect.[68]

Even a military action, or an action within the sphere of foreign affairs, or similar political actions, in the common meaning of the term, carries a legal aspect to which the law is not indifferent. For, as in the case of every other human action, so also actions from these categories cannot be at the same time both lawful and unlawful, both permissible and forbidden, both not-permissible and not prohibited.

2. Still, the Law Has Limits

The things of which I have written thus far are fully consistent with the doctrine of the universality of legal significance—i.e., the doctrine that maintains that the law is "concerned" with every human action—and supports that doctrine. Yet, even under this doctrine, it is not assured that the existing and accepted legal norms will lead to a result in each and every case. In this sense there may be legal questions that are normatively non-justiciable.

I am not referring to cases where a dispute has arisen as to the interpretation of certain rules of law—i.e., where the dispute is over which of the suggested interpretations is correct or proper. In this article my focus is not on the issue of whether there may be more than one lawful answer to a legal question; rather, it is on whether every legal question has, at the very least, one answer.

Normative non-justiciability, in the sense I am referring to, may arise from one of these three factors: (1) inherent limitations in human understanding; (2) a failure to solve a legal question (where such failure does not arise due to the aforesaid inherent limitations); and (3) an internal contradiction within a legal norm or between several norms which cannot be resolved on the basis of the rules of interpretation followed in the legal system. I will briefly

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68. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 547.

deal with these three categories in their proper order.

Even putting aside the skepticist approach in its broadest sense, which casts doubt on every answer or conclusion, the human intellect, by its very nature, is limited. There are questions that the mind of mankind is not capable of resolving. This was noted by Immanuel Kant in his antinomies.[69] It is not impossible that included among the class of legal questions are some questions that cannot be answered.[70] I myself, however, am doubtful that it is possible to positively identify questions of this class, or to distinguish between these questions and those belonging to the second category, i.e., questions that can be answered, but whose answers have not yet been discovered.

In every area of science there are unresolved questions. This is the case in mathematics, physics, chemistry, biology, medicine, psychology, sociology, economics, philosophy, and so forth. Those who work in these areas sometimes think that such questions are in fact unanswerable. These are questions that resemble those categories of legal questions I have just dealt with. Yet, in many—and perhaps in most—cases, researchers assume that there are answers for these questions, answers that have not yet been discovered. But they still strive to uncover these answers. The searches may last many years, sometimes decades. Sometimes the researcher may despair of his research and halt it. Even here, he would not necessarily claim that the reason he stopped his research lies in the inability of the human mind to find the answer; he might rather simply assert an individual's failure to do so.

As a student and as a law professor, I have found that students of law, particularly at the beginning of their studies, will encounter difficulty in resolving the problems given to them as assignments. At times it will occur that a student will despair of answering a particular question and will claim—with total honesty—that he or she is incapable of solving the problem. Yet, rather than suggesting that the problem itself is insoluble or non-justiciable, the student generally will say only that he himself cannot succeed in solving it. But this confession of failing to solve a legal question does not become part of the legacy that he takes with him after he finishes his studies and goes on to be an attorney, a law professor, or, most particularly, a judge. These professionals, out of a need to provide some sort of answer to the dispute or problem before them,[71] prefer to take a stand and to reach a relatively rapid determination with respect to every legal question presented

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69. *See* IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS 86-95 (Dr. Paul Carus ed., Open Court Pub. Co. 1902).

70. *See* Almog & Ben-Ze'ev, *supra* note 39, at 386-88.

71. *See infra* text accompanying note 172. With respect to the ethical problems in giving legal advice concerning questions whose answers are uncertain, see Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyers*, 104 YALE L.J. 1545 (1995).

to them. They will never say that they themselves are incapable of solving the question. At most, they will claim that the question is itself non-justiciable, i.e., that the question is not within the boundaries of the field of activity of the law and the law courts; that the question does not have, and could not have, a legal solution.

Yet it is possible that, as in other disciplines, there are questions whose answers are, in principle, within the grasp of the human intellect but whose answers have simply not been discovered yet. It is possible that one example of such a question is that which I will expand on further in this article[72] and which relates—in the framework of assessing the reasonability of a public authority's decisions—to the balance between obligatory considerations and permissive considerations (and, in particular, considerations focusing on the political benefit to the maker of the decision).

It is possible to offer as another example of this, the issue of defining the term justiciability (or non-justiciability) itself. In the past, this question was addressed by the acting Chief Justice of the Israeli Supreme Court, Justice Zilberg; he wrote:

> I am doubtful that we shall ever discover in the world a sage who shall be able to precisely define the meaning of this term. . . . I can confess, without shame, that even I have not ever grasped the nature of this monstrous creation. . . . A precise legal analysis cannot be found that will allow us to grasp the content of this concept.[73]

Subsequently, the term was defined by Justice Barak in the *Ressler* decision[74]—though in the present context we need not consider the substance of that definition.

As previously noted, the third category of legal questions whose answers are not known includes cases of internal contradictions within a legal norm, or between such norms, which cannot be resolved through the interpretive rules and principles operating in that legal system. A good example of a norm within the Israeli legal system which falls into this category is Section 4 of the Local Authorities (Elections) Act, 5725-1965. This section provides, *inter alia*, that elections for the local authorities shall take place every five years on a set date. The Section thus points to two periods when elections for the local authorities are to take place: (1) every five years and (2) on a specified date.[75] Generally, there will be a coincidence

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72. *See infra* text accompanying notes 145-59.
73. H.C. 295/65, Oppenheimer v. Minister of Interior and Health, 20(1) P.D. 309, 328.
74. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 474.
75. Local Authorities (Elections) Act, 5725-1965.

between these two dates and there will be no difficulty in knowing when the elections are to take place. Yet, circumstances can arise where, with respect to a particular local authority, there is no overlap between the two stipulated times. For example, consider a case where, on the date specified for the election of all the local authorities, less than five years have passed since the last elections for that particular local authority (where, for one reason or another, the previous election for that local authority had been postponed). In these cases, the above section simply cannot be complied with due to an internal contradiction: If the elections take place five years after the last elections, they will not occur at the specified date; and if they are held on the specified date, they will not take place five years after the previous elections. This contradiction, it appears, cannot be resolved; and it therefore seems that we are dealing with a case of normative non-justiciability in the sense that, despite the existence of a norm regarding the scheduling of the elections, we cannot know, purely on the basis of that norm, when they will take place.[76]

Are the jurist and, most significantly, the court, which is confronted with a legal question falling into one of these three categories of normative non-justiciability, to refrain from rendering a decision? Do they have any other option? These questions fall within the area of institutional justiciability, to which I will now turn my attention.

F. *Concerning Institutional Justiciability*

Institutional Justiciability deals with the question of whether the court is the appropriate institution to provide a final binding answer to legal questions.

In Israeli law, there is a presumption that the court—whose expertise and whose function, in a system of the separation of powers, is directed to the adjudication of disputes involving rights and obligations, i.e., to giving final and binding answers to legal questions[77]—is in fact the appropriate party for doing so. In other words, it is presumed that every legal question is justiciable from an institutional standpoint, which means that a law court is the appropriate forum in which to determine all legal issues.

Nevertheless, to those who subscribe to the theory of institutional justiciability, this presumption is not irrebuttable. Under the doctrine of

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76. It may be noted that when this question reached the Israel Supreme Court, it held that the relevant minister could choose—according to his discretion—between the two dates provided under the statute. *See* H.C. 3791/93, Mishlab v. Minister of the Interior, 47(4) P.D. 126. With respect to this decision, see Ariel Bendor, *Defects in the Enactment of Basic Laws*, 2 MISHPAT UMIMSHAL—LAW AND GOVERNMENT IN ISRAEL, 443, 454 (1994). With respect to the adjudication of questions that are not fully normatively justiciable, see *infra* Part III.

77. *See, e.g.*, H.C. 306/81, Platto-Sharon v. Knesset Comm., 35(4) P.D. 118, 141; H.C. 73/85, "Kach" Movement v. Chairman of the Knesset, 39(3) P.D. 141, 152-54.

institutional justiciability, two factors must be examined. The first examination is whether it is appropriate that a court adjudicate the subject matter of the dispute (material institutional justiciability). Then it must be determined if it is appropriate that the court rule upon the legality of actions taken by the body against whom the petition has been brought (organic institutional justiciability).

In the United States, the problem is more complex not only as a result of the tendency not to sharply demarcate between legal questions and political questions, but also because of the reluctance there to grant to the courts a monopoly on the making of binding determinations on legal questions, particularly questions that approach the political domain. Thus in *Luther v. Borden*,[78] the Supreme Court refused to enforce Article IV, Section 4 of the Federal Constitution, in which it is provided that:

> The United States shall guarantee to every State in this Union, a Republican Form of Government, and shall protect each of them against Invasion; and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.[79]

The Supreme Court held that the determination of what form of government would govern under this section was a matter given to Congress and the President and not to the courts.

Nevertheless, even in the United States, it is accepted as a principle that, subject to the political question doctrine, legal questions are justiciable from an institutional point of view, i.e., that the court—the judicial branch—is the institution vested with the function of determining such questions.[80]

In this article, I shall focus on material institutional justiciability, i.e.,

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78. 48 U.S. 1 (1849) (citing U.S. CONST. art. IV, § 4).

79. U.S. CONST. art. IV, § 4.

80. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 549 (1969); United States v. Nixon, 418 U.S. 683, 703 (1974). *Cf.* FRANK M. COLEMAN, POLITICS, POLICY, AND THE CONSTITUTION 19-20 (1982). This approach expresses the traditional federalist position. *See* Pushaw *supra* note 2, at 503-04. This view was questioned to a certain extent in *Chevron*. For criticism of this decision, see Cynthia F. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989), *reprinted in* FOUNDATIONS OF ADMINISTRATIVE LAW 193 (Peter H. Schuck ed., 1994); Bernard Schwartz, *"Apotheosis of Mediocrity"? The Rehnquist Court and Administrative Law*, 46 ADMIN. L. REV. 141, 172-78 (1994); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). *See also* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995). *But see* articles cited *supra* note 29.

the suitability of the courts to adjudicate the variety of questions that come before them. The issue of organic institutional justiciability, dealing with the suitability of the courts in adjudicating claims against various governmental organs and, in particular, the Legislature, is itself bound up, to a very large extent, with material institutional justiciability. In any case, it is a less complicated issue than material justiciability, and I will deal with it below only briefly.

1. Material Institutional Justiciability

In light of the presumption already mentioned—that the courts are the institution best-suited and appropriate to deliver final and binding resolutions to legal questions, i.e., that legal questions are per se justiciable from an institutional point of view—we must examine then what the possible justifications for restricting material institutional justiciability in various types of situations are.

The most acceptable justification in the decisional law and in the legal literature for the restricting of institutional justiciability is to prevent the impermissible infringement upon the separation of powers and democratic governance that is caused when a law court involves itself in a question whose determination has been committed to another authority. It is contended that the most clear-cut instance of questions with respect to which the courts are not the appropriate institution to render determinations, because they have been committed for final determination to another branch, are "political questions"—questions committed for resolution to "political" bodies.

This claim is only a variation of a claim that I have already considered, whereby political questions were ostensibly non-justiciable from a normative standpoint.[81] As previously emphasized, the law takes a stand even with respect to political acts. As long as the question presented to the court for determination is a legal question—dealing with the legality of a political act—there is no basis upon which to negate its institutional justiciability. The clearest function of the courts in a democratic system is to determine the lawfulness of the acts of other actors in the society, including the other governing authorities. It is precisely the presumptuous conduct of another authority, in rendering a final binding determination as to the legality of its own or another body's actions, that negatively impacts the democratic system and the principle of the separation of powers—even if the action adjudicated was a political one. On this basis, there is no justification for the court's abstention on grounds of institutional justiciability—provided, of course, that the court concentrates only on the question of the legality of the political action at issue.

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81. *See supra* text accompanying notes 36-76.

It is true, however, that the distinction necessitated by this approach between the legal aspect of the political question and its political aspects is less accepted by the legal ethos and judicial rhetoric in the United States than is the case in Israel. It is precisely this ethos and rhetoric that has enabled the courts in the United States to achieve public legitimacy in providing judicial review of statutes that interfere with human rights than is the case in Israel, where the courts have only recently undertaken this task. It is noteworthy that in Israel, where it is still contended that judicial review of interference with human rights is unacceptable because it causes the courts to slip into the determination of value-laden political questions, the judicial adjudication of questions related to the structure of the government and to the relationships between its various branches arouses less opposition because of the more technical/legal appearance of those issues. Former Chief Justice of the Israeli Supreme Court, Moshe Landau, who opposes judicial review of human rights legislation, took up this point:

> There are two main issues adjudicated on a regular basis with respect to legislation: first, the structure of the governmental authorities: the manner of their formation and the relations between them; and, second, the delineation of basic social concepts including human rights upon which the governing system in the state is founded. . . . Laws in the first category determine the framework of governance and the manner of its operation—matters of form that are not meant to define the substantive content of the government's actions with respect to its various arms. The second category, however, relates directly to matters of substance. . . . With respect to the norms establishing the structure of government. . . . I see much to commend the notion that they should take on somewhat the status of a higher law.[82]
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> . . . You cannot place the issue of the conformity of the Knesset's ordinary legislation with the ideological principles of the State under the rod of reexamination by the courts or any other body, . . . and the same applies to judicial oversight of the preservation of the constitutional norms regarding civil freedoms.[83]

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82. Moshe Landau, *A Constitution as the Supreme Law of the State of Israel*, 17 HAPEAKLIT 30, 32 (1961) (Hebrew).

83. Moshe Landau, *The Supreme Court as Constitution Maker for Israel*, 3 MISHPAT UMIMSHAL—LAW AND GOVERNMENT IN ISRAEL 697, 711 (1995-1996). *See also* Landau, *supra* note 82, at 35 et seq.

In the United States, by contrast, the cases in which petitions have been dismissed because they were non-justiciable on political question grounds have been precisely those cases where the dispute revolved around the relationships between the various branches of government, particularly the President and Congress, and not disputes regarding the rights of individuals against the government.[84]

Another justification for limiting institutional justiciability was articulated by the former Chief Justice of the Israeli Supreme Court, Meir Shamgar. In his opinion, the courts should adjudicate only in cases where the legal component of the case is dominant in order to avoid "question begging." He writes:

> There are circumstances where the adjudication of a particular case on the basis of legal standards will miss the point, for the purely legal solution may obscure the true inherent nature of the problem being adjudicated. Not infrequently, it is not the legal norms that cause the problem to arise, and a purely legal determination will have no decisive significance as to the political decision being reviewed itself. Yet when the judicial decision has been rendered, and it has been determined, after passing through the process of judicial review, that the political decision at issue had, in fact, been taken by one authorized to take it, in good faith and in a non-discriminatory manner, and that the decision was within the zone of reasonableness, the conclusion may form that everything is fine—when the substance of the political decision itself may be far from that: Does consideration of the decision to manufacture an airplane or questions related to foreign affairs reach its end point when it successfully answers the questions posed under a purely legal examination according to the above criteria? The answer is no. Yet, that could be the mistaken conclusion that could arise from judicial review of an issue whose foundations may be far removed from the legal tests applied by the court; . . . Although, as a formal matter, legal standards can [always] be applied, these standards cannot be seen, in many areas, as answering the ultimate issue. This is because, by the substance, nature, and content of the issue, *additional* answers will have to be given—from fields that the law court does not turn to.[85]

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84. *See, e.g.*, Luther v. Borden, 48 U.S. 1 (1849); Coleman v. Miller, 307 U.S. 433 (1939); Goldwater v. Carter, 444 U.S. 996 (1979); Nixon v. United States, 506 U.S. 224 (1993).

85. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 520. Compare the warning of Professor Bickel that "the Supreme Court may see it as its function, not merely to let an apportionment be, but to legitimate it." ALEXANDER M. BICKEL, THE LEAST

This approach will apply more strongly when the relevant legal norm is the requirement of reasonableness, for, in many cases—for instance in political matters—it is not appropriate that the court review the reasonableness of a decision by a state authority.[86] I disagree, however, with Justice Shamgar's approach for two principal and cumulative reasons.

First, it is the function and the obligation of the courts to rule in the legal disputes that are brought to them. This is the fundamental function and obligation of the courts as a branch of government. This function and obligation is in no way dependent on the extent to which the legal questions posed are dominant with respect to the underlying dispute. That the court rule on the legal aspects of the disputes properly brought before it for adjudication, irrespective of whether or not these legal aspects are "dominant," is the right of the citizen and the obligation of the court. As a general rule, the legal system must give its consideration to claimed legal violations, even when they may seem to be of little weight compared to the broader context of the issue involved. The proper body to rule in a binding manner on a legal claim—whether the claim is "dominant" or not—is always the court. This is so, just as, conversely, in a case where the legal aspects of a dispute *are* dominant, the court must take care not to arrogate unto itself, in an ancillary manner, the power to rule, as well, on the non-legal aspects of the case. Rather it must relegate the final decision on these non-dominant, non-legal issues to those authorities empowered to determine them.[87] Let us take for example the case of a decision by the police not to allow a demonstration to take place due to the fear that a hostile crowd will threaten the safety of the demonstrators and, thereby, threaten the public order in general. It is clear that the dominant issues in a lawsuit brought by the would-be demonstrators to allow their demonstration to go forward are legal ones.[88] Yet, does it follow that the court—if it decides the legal-statutory issues in favor of permitting the

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DANGEROUS BRANCH 197 (2d ed. 1986). On the other hand, see the warning of Professors Champlin and Schwarz that "if the political question dismissal is a *de facto* merit determination . . . then the doctrine's use results in a merit determination without any consideration of the merits, greatly increasing the risk of a wrong decision." Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 256 (1985).

86. With respect to this issue, see the expanded discussion *infra* Part III.

87. This subject is judicial review of the reasonableness of decisions of governmental authorities, which will be exercised with extreme restraint in order to prevent an "absolute" discretion. *See infra* Part III.

88. Even according to the view of Justice Shamgar, "[t]he issue of justiciability need never arise . . . wherever the issue in dispute relates to the protection of rights, whether political or otherwise." *Ressler*, 42(2) P.D. at 519. This approach is common in the United States as well. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Davis v. Bandemer, 478 U.S. 109 (1985); Fritz W. Scharpf, *Judicial Review and the Political Questions: A Functional Analysis*, 75 YALE L.J. 517 (1966).

demonstration to proceed under police protection—should then go on and dictate to the police precisely which measures and actions they should take (e.g., how many police should be assigned to control the situation), simply because these non-dominant operative details arise in the general context of the legal dispute? It is clear that this question must be answered negatively. Each public body is bound to deal with such aspects of a dispute as fall within the scope of its authority and responsibilities. No branch of government may take unto itself the authority to deal with and determine issues that do not fall within the scope of its proper function simply because the principal aspects of the broader issue and subject matter involved are within its area of responsibility. In a parallel fashion, no branch of government is deprived of its authority, or its obligation, to reach determinations regarding matters entrusted to its charge merely because the dominant issues of the matter in dispute are within the scope of responsibilities of another branch. The doctrine of "ancillary jurisdiction," which sometimes grants a court the authority to decide on issues within the jurisdiction of another court, where the determination of those ancillary issues is necessary for the determination of the broader issues that are within the first court's jurisdiction, does not apply to the relationships between the courts and non-judicial governmental authorities.

As noted previously, Justice Shamgar has indicated that his approach would apply more strongly where the action at issue has come before the court upon a claim of unreasonableness (within the legal meaning of that term, to which the court's jurisdiction is limited). According to his argument, where the issue presented is the substantive reasonableness of a political decision, the legal aspects of the issue are extremely circumscribed (or, in other words, the parameters of what is reasonable are quite wide) to the extent that there is no point to the legal proceedings at all. These proceedings are calculated to only permit "one who so wishes to avoid and to hide from the substantive consideration of the issue which is the subject of the legal petition."[89] The rebuttal to this contention is that in any situation where, as a matter of substantive law, the action—political or otherwise—is subject to a legal requirement of reasonableness, a court must, in the framework of its duties to the rule of law, fulfill its delegated function and review the action under the standard of reasonableness to which it is legally subject. As I shall explain, *infra*,[90] it is my view that there are many cases where "reasonableness" under administrative law is not a substantive rule of conduct but rather is, at its essence, a ground for judicial review that does not reflect such a rule. As such, the exercise of this review can be conducted by the court in accordance with a wide spectrum of political and practical considerations to the extent

89. *Ressler*, 42(2) P.D. at 520.
90. *See infra* Part III.

that the court can enter, in a substantial manner, into the roots of the context and situation in which the action, whose reasonableness it is assessing, was taken.

There have been those who have cited certain types of disputes as clearly "legal" in nature and, therefore, always justiciable. For example, one of the former Chief Justices of the Israeli Supreme Court, Moshe Landau, noted in an article that "the claim that the subject of a legal petition 'is a matter of public dispute and that the court should therefore abstain from the issue as one the political authorities must determine . . .' is one that must be rejected at the outset, because the subject of the petition is regulated by an explicit statute."[91] Yet, does the fact that a subject is regulated by an explicit statute transform it into a matter whose dominant aspects—according to the theory that hangs justiciability upon such dominance—are justiciable? Take, for example, the law in Israel. Section 51 of Basic Law: The Government provides, *inter alia*, that:

> (a) The State shall not go to war save on the basis of a decision by the Government.
> (b) Nothing in this section shall prevent military actions necessary for the purpose of the defense of the State and the public security.[92]

It should appear, according to the above-cited theory of Justice Landau, that the issue of whether certain military operations are "necessary for the purpose of protecting the State and the public security" should be patently justiciable because its criteria are anchored in an explicit Basic Law. Yet this question is clearly one whose dominant aspects—under the dominance approach—are not legal and, therefore, not justiciable. The legal system in Israel, like most of the legal systems in the United States, including the federal law, are "mixed" systems,[93] where along side explicit written norms (the Constitution, the Basic Laws, statutes and regulations) are common legal norms that derive from the decisional law. Subject to the fact that the legislative authority—though not usually the promulgator of regulations!—is authorized to abolish or alter, through legislation, norms established under the decisional law, the strength of these common law norms and their binding legal status are no less than that of the explicit written norms. A norm anchored in a statute is in no way more "legal" in nature than a norm anchored in the case law. Consequently, the legal aspects of an issue regulated by an explicit statute are no more dominant—merely by virtue of their statutory

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91. Landau, *supra* note 17, at 7.
92. Basic Law: The Government, S.H. 214 (1992).
93. *See* MARTIN WEINSTEIN, SUMMARY OF AMERICAN LAW 98-99 (1988).

source—than the legal aspects of an issue regulated by the common law.

Many of the advocates of the restriction of institutional justiciability believe that the courts should concentrate their activities on matters involving individual rights since these disputes are by their very nature, legal.[94] Even Chief Justice Shamgar noted that "no issue as to justiciability should arise at all . . . whenever the issue in dispute relates to the guaranteeing of rights, either political or otherwise."[95] This is also the common approach in the United States, where the courts deal with many clearly political cases (as opposed to political questions) when these touch upon the rights of the individual.[96] Yet, it appears as though it is precisely in those situations touching on the individual's rights vis-à-vis the government, that the most sensitive political issues are involved. In his observations as to why the question of establishing diplomatic relations with Germany was not institutionally justiciable, Chief Justice Shamgar wrote that "the question . . . is appropriate for a political, historical, philosophical and even emotional discussion, yet the criteria that are at the disposal of the court are wholly lacking in anything that would allow it to embrace these multifarious facets or to involve itself in them."[97] Yet, do not questions that relate to individual rights, such as the claim that abridgment of a civil liberty is required to protect the national security or public morality, often involve just such a panoply of multifarious, non-legal considerations? What makes these questions patently justiciable, in the sense that their dominant aspects are seen as legal, while other questions (such as the German relations issue) are considered non-justiciable? As noted earlier,[98] relative categorization of normative questions as more or less "legal" is heavily influenced by historical factors. For example, these questions are influenced by whether legal tradition and custom, which inform the professional instinct of the jurist, have already come to accept such matters as within the proper ambit of authority of the law and the courts. This categorization lacks, however, any persuasive objective foundation.

Second, it is true, at least in Israel, that after the Court rules in a particular matter, both the public and the relevant public authorities have a

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94. *See, e.g.*, Kretzmer, *Judicial Review*, *supra* note 23, at 106, 150; Kretzmer, *Forty Years*, *supra* note 23, at 354.

95. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 519.

96. *See, e.g.*, Dep't of Commerce v. Montana, 503 U.S. 442 (1992). See also the observations of Professor Fisher that "[i]n many instances the judiciary concludes that Congress is a more appropriate forum for reconciling conflicts between individual rights and governmental action." LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 5 (1991). As for the contention that disputes between governmental branches are not justiciable if they relate to individual rights, see JESSE H. CHOPPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 296 (1980).

97. *Ressler*, 42(2) P.D. at 521.

98. *See supra* text accompanying notes 65-68.

general tendency to ignore the reasoning of the judges and relate only to the "bottom line"—i.e., to whether the petition at issue was dismissed or granted and, if granted, what form of relief was provided. Consequently, the dismissal of a petition against the act of some public authority will be viewed as an approval of the propriety of the authority's actions. This is true even though the reasoning in the decision contains clear criticism of those actions and even though it is clearly explained that the dismissal of the petition derived only from the fact that the defects in the actions taken by the authority failed to rise to the level of legal defects that would render the authority's action illegal. Similarly, the granting of a petition as a result of purely formal legal defects in an authority's actions will be taken as a negative determination with respect to the substantive merits of the action itself. Against this background, it is possible to understand the outlook of Chief Justice Shamgar who indicates that a judicial consideration of issues whose substantive legal aspects are marginal is inappropriate when such issues are considered on the basis of purely legal criteria, for such a consideration will amount to nothing more than "question begging." In his own words: "It is appropriate to draw the boundaries so that the court will not find itself granting, unwittingly, a general seal of approval to a political act, as a result of its need to consider only the legal aspects of the act."[99]

Yet the truth is that neither the public nor governmental agencies meaningfully distinguish between the dismissal of a petition on substantive grounds, i.e., on the grounds that the actions attacked in the petition were legal and even justified, and a dismissal of the same petition on grounds of non-justiciability (whether normative or institutional). The very dismissal of the petition is seen as the court's determination of the substance of the matter and as an approval—legal and substantive—of the action attacked. Therefore, the concern inherent in Chief Justice Shamgar's position—that judicial and legal consideration of an action that, at its foundation, relates to non-legal issues will divert the attention of the public, as well as the authorities concerned, from the dominant aspects of the matter to its marginal legal facets (and that these last will be confused as representing the entire broader issue)—will be present even if, as Chief Justice Shamgar advocates, the court were to abstain from adjudicating the matter. For the only way the court can abstain from adjudicating a petition brought before it is by dismissal, and a dismissal on institutional non-justiability grounds will be subject to misinterpretation as an expression by the court as to its views on the substantive merits of the entire underlying matter, no less than would be a dismissal on substantive law grounds. If, by dismissal on institutional non-justiciability grounds, the court cannot avoid the "question begging" of which Chief Justice Shamgar warned, then it would seem preferable that the court adjudicate the legal issues

99. *Ressler*, 42(2) P.D. at 524.

contained in the case and thereby avoid the troublesome consequences for the rule of law that arise when the court dismisses a petition on institutional non-justiciability grounds.

A third justification for circumscribing institutional justiciability was put forward in Israel by Chief Justice Barak. It is Justice Barak's general belief that it is inappropriate for a court to refrain, on the basis of the subject matter of a case, from fulfilling its function to decide the disputes brought before it because "the absence of institutional justiciability causes damage to the rule of law."[100] Nevertheless, in Barak's opinion, such avoidance is legitimate "in special circumstances, where the concern as to damage to the public's trust in judges will overweigh the concern as to damage in the public's trust in the law."[101] As he states:

> It is difficult to ignore the fact that the public tends not to distinguish between judicial review and political review, and will often identify judicial review of a political matter as a review as to the matter itself; it is apt to identify a judicial determination that a governmental action is lawful as a judicial position that the governmental action is desirable; it may read a judicial decision that an action is not legal as equivalent to a negative judicial position as to the merits of the act itself; it may read a judicial determination that a certain governmental action is reasonable as equivalent to a judicial determination that the action was desirable; it may identify a legal determination with a political stance.[102]

According to Justice Barak, in exceptional circumstances, where the above dangers are particularly severe, and outweigh in their seriousness the harm to the rule of law if the court declined in such an instance to fulfill its judicial function, it is permissible for the court to abstain from ruling upon the substance of a petition and to dismiss it as institutionally non-justiciable.

Yet, as already noted, the governmental authorities, general public, and, truth be known, many practitioners of the law generally do not distinguish

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100. H.C. 1635/90, Gerjevski v. Prime Minister, 45(1) P.D. 749, 856. Professor Henkin wrote along these lines that: "I see the political question doctrine as being at odds with our commitment to constitutionalism and limited government, to the rule of law monitored and enforced by judicial review." Louis Henkin, *Lexical Priority or 'Political Question': A Response,* 101 HARV. L. REV. 524, 529 (1987).

101. *Ressler*, 42(2) P.D. at 496. For similar claims in the United States, see, for example, Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344-45 (1924). For a rejection of these claims, see BICKEL, *supra* note 85, at 184; Martin H. Redish, *Judicial Review and the 'Political Question,'* 79 NW. U. L. REV. 1031, 1053-55 (1984).

102. *Ressler*, 42(2) P.D. at 495.

between dismissal of a petition on grounds of institutional non-justiciability (or normative non-justiciability, for that matter) and a dismissal for reasons founded in the substantive law. A court cannot avoid the dangers pointed out by Justice Barak by dismissing petitions on the ground of non-justiciability. In that case, is it not preferable that the court rule upon the petitions themselves on the basis of the relevant substantive legal norms? In my opinion, the answer to this question should be in the affirmative, for even in such a case, the court will be exposed to the dangers which Justice Barak indicated. Yet it would be so exposed in any case, even if it were to dismiss the petitions on the grounds of institutional non-justiciability.

In truth, it appears that a central consideration at the root of arguments to limit institutional justiciability, and perhaps the consideration standing behind Justice Barak's position as well, is the concern that too broad an extension of the involvement of the courts in the workings of other governmental authorities—legislative and executive—will cause those authorities to circumscribe the jurisdiction of the courts in order to limit the power of judicial oversight. In Israel, this concern is not without basis. To a large extent, the jurisdiction of the law courts in Israel does not currently enjoy any constitutional protection. The jurisdiction of the courts is largely founded on ordinary statutory legislation, which may be altered or even eliminated through a simple majority of Israel's parliamentary body, the Knesset. Even the jurisdiction of the Israeli Supreme Court, sitting as the High Court of Justice, which constitutes the central constitutional and administrative law court in Israel, is subject to legislative alteration without overwhelming difficulty, notwithstanding its being anchored in a Basic Law (i.e., Basic Law: The Judicature). Indeed, of late, owing to a number of controversial Israeli Supreme Court decisions, there have been increasing calls to limit the Court's jurisdiction. Although these voices have not enjoyed meaningful public support, and an intrusion on the Court's jurisdiction does not appear on the visible horizon, the very ease with which the other governmental branches could act to limit the Court's jurisdiction operates, to a certain extent, as an inherent threat upon the Court. In countries like the United States, where the jurisdiction of the judicial branch is rigidly anchored within the Constitution—whose amendment to restrict such jurisdiction would be well-nigh impossible as a practical matter—it would appear that a concern of this sort does not exist. Nevertheless, even in the United States, there does exist the concern, voiced by Justice Barak, of an erosion of the public's trust in the judges and the courts, which could lead to an erosion in the faithful adherence to the decisions and pronouncement of the courts.

What is the import of this concern? In truth, it would seem to contain within it an inherent absurdity. In Woody Allen's "Take the Money and Run," there is a scene in which the protagonist of the film smashes his own eyeglasses in order to thwart the threat of a gang of bullies who themselves threatened to smash the spectacles. Is not the avoidance by the courts of

involvement in certain classes of cases, in order to avoid a possible restriction on their jurisdiction to rule in precisely those type of cases, behavior equivalent to that of the film's comic hero? What point is there in possessing a jurisdiction which is never exercised? If the court is prepared in any event to refrain from making use of one jurisdiction or another, what great concern can there be in preventing the elimination of such not-to-be-used jurisdiction? But there are less absurd explications of the aforesaid concern. First, the concern may be that any legislated restriction of the court's jurisdiction may be sweeping in nature and would extend even to cases in which justiciability is currently unquestioned. Second, the concern may be that the explosive growth of the court's involvement in political cases may result in a curtailment of its jurisdiction, whereas the guarded use of that jurisdiction in a smaller number of cases, in which such involvement is of particular importance, may not provide the other powers with an excuse to curtail the court's activities.

Nevertheless, not only are these concerns wholly speculative, and not only is there little chance that these worst-case scenarios will come to pass, but the considerations raised are foreign to our notions of proper governance. For the import of these concerns is that the court should desert its duty to rule in accordance with the law in order to avoid the possibility that authorized bodies may alter the extent of the court's authority. Yet, judges are always on warning not to allow such considerations to affect their rulings.[103] The concern of future legislation by the authorized legislative powers, and

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103. The only apparent exception to this caution in Israel is to be found in the opinion of Justice Goldberg in the *Velner* case. In that case, the Supreme Court dealt with the legality of a paragraph in a coalition agreement between two parties in which an "automatic" procedure was established for the altering, by means of legislation, of any court holding which would violate the prevailing status quo in religious matters. Justice Goldberg reached the conclusion that this paragraph was invalid because it contradicted the public good in a substantive manner. Nevertheless, he concurred in the dismissal of the petition for the reason that, in accepting a petition protesting against an infringement upon the status of the court, "the court might appear to be crossing the red line of involving itself in a political agreement, simply because it was implicated, through none of its own doing, in the agreement itself." H.C. 5364/94, Velner v. Chairman of the Labor Party of Israel, 49(1) P.D. 758, 809. According to Justice Goldberg's view, "only by not involving ourselves in such an agreement, do we transmit the clear and unambiguous message that this Court has no interest in any 'war of supremacy,' but only in the overiding supremacy of the law." *Id.* at 809-10. The position of Justice Goldberg, however, did not win the acceptance of his colleagues. Justice Or, among the others, criticized the ruling, noting that:

> [T]he jurisdiction granted to the High Court of Justice is granted to it so that it will exercise measures necessary to fulfill the duties accompanying that jurisdiction . . . . The concern as to any particular reponse on the part of any of the public ought not restrain the Court from fulfilling its duty and determining the matter before it according to the principles and standards of the law.

Id. at 814-15.

certainly of legislation relating to the courts and the judges themselves, cannot be of legitimate interest to a judgment adjudicating the legal rights of litigants. It is precisely reliance upon such considerations by the courts that would be calculated to harm the public stature of the courts and the ethos of judicial independence that, in Israel, is given formal expression in the Basic Law: The Judicature, in which it is provided that "[a] person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law."[104]

Nevertheless, it may be questioned, how should the judge act when the court sees no possibility to consider a petition that it might honestly be willing to grant on substantive merits due to serious concerns as to harm to the position of the court, non-obedience to its judgments, a cutback in its jurisdiction, or some other substantial injury to the interests of the State?

Professor Kremnitzer[105] expressed the opinion that in such a circumstance—where the court sees no way out but to dismiss the petition, however strongly it may be grounded in the substantive law—it is preferable that the court base its dismissal on grounds of non-justiciability. This will avoid a distortion of the substantive law undertaken in order to reach a desired result; it will prevent injury to the system of law in its entirety with respect to the creation of incorrect and possibly injurious law that could serve in the future as a mistaken precedent in other, even routine, cases, and with respect to injury to the integrity of the judicial branch.

It must be emphasized that the cases which Kremnitzer writes about are cases that, according to all customary approaches, would be considered plainly justiciable, such as cases involving a violation of an individual's basic civil rights. Indeed, the particular decision to which Kremnitzer was referring when he expressed these views was the Israeli Supreme Court decision dismissing a petition against the expulsion to Lebanon of approximately 400 Hamas activists.[106] In Kremnitzer's view, this decision was a distortion of the relevant substantive law. If, however, the Supreme Court felt it had no choice but to dismiss the petition—in order to avoid serious damage to the international standing of the State of Israel or to the public image of the court itself (as a result of charges that the court had caused serious injury to the security of the nation by ordering the return to its borders of dangerous terrorists), or for some similar reason—it would have been better for the court to have based

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104. Basic Law: The Judicature, S.H. 78 (1984). Another question is whether this consideration is also foreign to the matter of bases for judicial review that do not, in my view, express rules of substantive law? *See infra* Part III.

105. Mordechai Kremnitzer, *Let Expulsion Be Expelled—Some Comments on the Holding in the "Expulsion," the High Court of Justice, Law, Politics, and Ethics*, 4 PLILLIM—ISR. L.J. CRIM. JUST. 17, 29 (1994) (Hebrew).

106. H.C. 5973, 5990/92, Association of Civil Rights v. Minister Of Defense, 47(1) P.D. 267.

its holdings on a decision that the issue was non-justiciable.[107]

It is open to debate whether the damage occasioned by an incorrectly decided judgment is greater than that caused by the refusal of the court to perform its designated function and duties. In either case, it seems that the question at issue here is neither more nor less than whether the "rule of law" and the "principle of lawful governance" are absolute values, to which all, especially the courts, must defer absolutely, or whether there are possible situations where it would be permissible, if not obligatory, for the court to subordinate these values to other even more important values, such as human life or the very existence of the nation or of society. This fundamental issue is beyond the scope of this article and has been dealt with in a voluminous amount of literature.[108] I will note only that, even if the rule of law and the principle of Lawful Governance are not absolute values, they are part of the very fabric of the democratic state. The judicial authority, which, of the three branches of government, is vested with the special responsibility of guarding these values, is permitted, if at all, to veer from them under only the rarest and most exceptional of circumstances. Mere difficulty or unpleasantness, or a mere fear that has not coalesced into a palpable and immediate threat to essential values, cannot justify the court in disregarding its duty to render decisions according to, and only according to, the law. Only a clear and present danger to human life or to the very existence of the democratic state (including an independent judiciary) can, if at all, justify a court in refraining from deciding a case in accordance with the substantive law by a finding of institutional non-justiciability. Even in these exceptional circumstances, it is doubtful to what extent it is legitimate for the court to disguise the true reasons for its decision. It is true, as Professor Kremnitzer opines, that, when faced with a situation where no other option is available, it is better to dismiss a petition on non-justiciability grounds than to dismiss it on distorted substantive law grounds. Nevertheless, it would seem that a more far reaching case could be made for the fact that the judicial authority is bound to determine the substance of all disputes properly brought before it, no matter how many difficulties such a determination may entail.[109]

At the same time, and as discussed, *infra*,[110] it is possible to claim that, at times, the rules upon which basis the court renders its decision do not represent the substantive law, which determines that the substantive rights and obligations of the public and of the governmental authorities, are simply "grounds for judicial review," principally calculated to grant rights of judicial

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107. *See* Kremnitzer, *supra* note 105, at 29. *Cf.* Peter Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511 (1987).

108. *See, e.g.*, THE RULE OF LAW (Ian Shapiro ed., 1994).

109. *See* Bendor, *supra* note 14, at 622.

110. *See infra* Part III.

oversight and review to the courts. Where the exercise of these rules is at issue, the court's avoidance of rendering a judgment, arguably, should not be considered an infringement upon the basic principles of the rule of law and of lawful governance. In such circumstances, the court's discretion in considering the effect of its judgment on the position of the judiciary might be broader.

In the United States, under the influence of English law,[111] and in the framework of the political question doctrine, arose another central basis for restricting material institutional justiciability. This ground, relevant to the issue of the limitations on the justiciability of issues dealing with the state's foreign affairs, relates to the interest of the state in speaking in the foreign relations area with "one voice"[112]—generally the voice of the executive branch and its head—the President.[113]

I join with those who maintain that this consideration cannot outweigh the fundamental values of the rule of law and the principal of lawful governance.[114] The voice of the state—whether on domestic or foreign affairs—should be heard in accordance with the law. Matters of foreign relations, like all other state activities, must be conducted by those authorities whom the Constitution and other laws have invested with such responsibilities, and should be conducted in conformance with the rules established in those laws. The fact that the judiciary, vested with the function of ensuring legality, fulfills that function, subject to the laws of standing, even within the area of foreign affairs, cannot be seen as harming the interests of the nation. For the legal rules of the state relating to foreign affairs, like all the other legal

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111. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831).

112. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). For partial support for this reasoning, see Scharpf, *supra* note 88, at 573-77. For a similar line of thought in a different context, see Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995). For the traditional reasons for non-justiciability of foreign affairs, see Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 107-08 (Louis Henkin et al. eds., 1990). For the particular restraint of the American courts in matters of foreign affairs, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 208-16 (1972); Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L. L. 912, 952-55 (1985). One scholar has indicated that the reason for the non-justiciability of the war powers is precisely because "the Constitution has vested Congress with the sole judicial power to decide whether the United States is at war." John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 288 (1996).

113. *See, e.g.*, FRANCK, *supra* note 50, at 5-9.

114. Compare the words of Chief Justice Rehnquist that discretion which is assesed in such a case is "drawn in such broad terms that in a given case there is no law to apply," Webster v. Doe, 486 U.S. 592, 599-600 (1988) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (citing S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945))), and the court "would have no meaningful standard against which to judge the agency's exercise of discretion." *Webster*, 486 U.S. at 600 (citing Heckler v. Chaney, 470 U.S. 821, 830 (1985)).

rules, are intended to benefit and further the interests of the nation and its citizens. How then can the protection of those legal rules, and the judicial review conducted by the courts to maintain those rules (in accordance with its delegated governmental function), possibly harm the interests of the nation? Other nations who enter into relations with the State must be aware that its authorities operate in accordance with the law and are bound and limited by that law.

The above considerations do not, of course, operate to prevent the court from considering the circumstances present in every case brought before it when it determines the proper relief to be provided in the case. Thus, there may be cases where an illegal action that has occurred is irreversible, or where such reversal would result in harm greater than that occasioned by the illegality itself. Yet such cases may, and do, arise in all areas of law, and not exclusively in the area of foreign affairs. The existence of such circumstances is an insufficient basis for drawing a line of "non-justiciability" around the area of foreign affairs. Furthermore, it would appear that in the area of foreign relations (as in the case of national security, macro-economics and other especially "political" issues) the law grants the relevant authorities a particularly wide scope of discretion. This narrows the possibility that any decision of such authorities will be found unlawful and will be overturned on that basis by a court of law. Yet, this factor arises from the area of the substantive law and does not relate to the issue of justiciability.[115]

2. Organic Institutional Justiciability

Organic institutional justiciability deals with the willingness of the court to adjudicate petitions brought against one or another public authority, most particularly against the legislative branch, the parliament. I am not referring here to judicial review over the laws passed by that legislature. Petitions attacking legislation not usually asserted directly against the parliamentary bodies themselves, and issues of justiciability regarding legal attacks on legislation will raise, at most, issues of material institutional justiciability. What I am referring to here is judicial review over parliamentary decisions that are not legislative, such as matters relating to the procedural work rules of the parliament (including those in the framework of legislative procedure) or procedures bearing a quasi-judicial character.

Concerning the issue of organic institutional justiciability, there are three primary approaches that have been taken. The first approach, which

115. Indeed, there is no democratic state worthy of the name that would bar a court from adjudicating a petition asserted against an organ of the Executive Branch or which would dismiss such a petition simply because of the identity of the respondent (rather than because of the subject matter of the petition, something which, as noted, falls under material institutional justiciability).

prevails in England,[116] rejects any intrusion by the judiciary into the decisions of the legislature. According to this approach, judicial review of parliamentary decisions infringes upon parliamentary sovereignty and is, in fact, beyond the jurisdiction of the courts. The second approach, followed in Germany,[117] recognizes no distinction between the scope of judicial review regarding parliamentary decisions and the scope of review regarding the decisions of other bodies. In the United States and in Israel, a third approach prevails. This is a "middle" approach wherein the court is by no means barred from review of parliamentary decisions, yet neither is such review a matter of routine, as is the case of its review of executive branch actions. Only in specific cases where a special justification exists will such review apply. In those jurisdictions where the third approach holds sway, the connection between organic institutional justiciability and material institutional justiciability is pronounced. Under this approach, the court, in attempting to determine whether it will even hear the petition, must consider the substantive content of the decision under attack; mere identification of the body against whom the petition has been directed is insufficient to determine the issue of justiciability.

Although both the United States and Israel, in general, adopt this middle path regarding the justiciability of parliamentary decisions, there are, in fact, significant differences between the two countries in this area. These differences, it seems, rather than reflecting any divergence on the formal legal norms, instead reflect a difference in the political and social cultures of the two nations. In Israel, adjudications respecting the decisions of the legislative body—including decisions relating to its working procedures and the relationships between its members—are a widespread phenomenon. Recourse to the courts to decide this type of dispute is a commonplace device, often utilized by members of the parliamentary opposition. The courts not only rule in this kind of case on the merits but they will even, on occasion, deal with the decisions attacked before them.

In the United States, on the other hand, petitions to the courts in a matter relating to the working procedures of Congress are extremely rare, and even more exceptional is any willingness by the courts to intervene. I will not expand in this article on the reasons—which I have indicated are cultural—for greater dependence in Israel upon the courts to resolve disputes within other political authorities, an issue of relevance to the subject of material justiciabil-

116. The foundation for the English view is the rule established in the opinion in Bradlaugh v. Gossett, 12 Q.B. 271 (1884). *See, e.g.*, H.W.R. WADE, CONSTITUTIONAL FUNDAMENTALS 30-35 (1980).

117. *See* CURRIE, *supra* note 56, at 170.

ity as well.[118] It will suffice to mention that the non-legal norm of "fair play" is not always common, for the court is viewed at times as a "fortress of justice" (not necessarily in its narrow legal sense), and is trusted to succeed in resolving, in a fair and objective fashion, disputes between (or internal to) political bodies.

In Israel, with respect to justiciability of parliamentary decisions, there is a test followed by the court in adjudicating the issue and, if necessary, in granting relief. The Court considers "the extent of the damage claimed to the framework of parliamentary life, and the level of the effect of the infringement at the foundations of the structure . . . of democratic governance."[119] This means that the Court will adjudicate petitions brought against a parliamentary authority if they arise in the context of issues of fundamental constitutional principle, as opposed to simple procedural issues.[120] On the basis of this test, some sub-rules have developed. For instance, a court will always adjudicate petitions relating to attempts to remove the immunity of members of the Knesset or to suspend them,[121] this in light of the effect such issues have upon the fundamental rights of the parliamentarians and the voters which elected them. Yet, the court will not rule on the petitions regarding the processes of legislation in a case where those processes have not been completed at the time the petition is brought before the court[122] or regarding the times established for the sessions of parliament.[123] There will also be cases where the court will hear the petition and make its views known, but will not offer relief.[124] In all cases, the court will avoid granting relief against Knesset authorities in the form of a positive or negative injunction, casting its

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118. In Israel, the phenomenon has received great attention in the literature. *See, e.g.*, AMNON RUBINSTEIN, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 28-35 (Amnon Rubinstein & Barak Medina eds., 5th ed. 1996) (Hebrew); Rozen-Zvi, *supra* note 5.

119. H.C. 652/81, Sarid v. Chairman of the Knesset, 36(2) P.D. 197, 200. *See also, e.g.*, H.C. 742/84, Kahane v. Chairman of the Knesset, 39(4) P.D. 85, 96; H.C. 1956/91, Shamai v. Chairman of the Knesset, 45(4) P.D. 313, 317. Nevertheless, there are judges who are dissatisfied with this criterion. *See* H.C. 669/85, 24/86, Kahane v. Chairman of the Knesset, 40(4) P.D. 393, 409 (Elon, J.). *Cf.* H.C. 2136/95, Guttman v. Chairman of the Knesset, 49(4) P.D. 845, 852 (Dorner & Bach, JJ.). For detailed discussion of the issue under Israeli law, see Kretzmer, *Judicial Review, supra* note 23; Bendor, *supra* note 14, at 604-20.

120. *See, e.g.*, H.C. 6124/95, Ze'evi v. Chairman of the Knesset (unpublished).

121. *See, e.g.*, H.C. 306/81, Platto-Sharon v. Knesset Comm., 35(4) P.D. 118; H.C. 670/85, Miari v. Chairman of the Knesset, 41(4) P.D. 169; H.C. 1843/93, Pinchasi v. Knesset of Israel, 48(4) P.D. 492. Notwithstanding, the Court has refrained from adjudicating a petition to *require* the Knesset to remove the immunity of one of its members. *See* H.C. 4281, 4282/93, Movement for Change in the System of Gov't in Israel v. Knesset of Israel (unpublished).

122. *See, e.g.*, H.C. 761/85, Miari v. Chairman of the Knesset, 42(4) P.D. 868.

123. *See, e.g.*, H.C. 652/81, Sarid v. Chairman of the Knesset, 36(2) P.D. 197; H.C. 6124/95, Ze'evi v. Chairman of the Knesset (unpublished).

124. *See, e.g.*, H.C. 482/88, Reiser v. Chairman of the Knesset, 42(3) P.D. 142.

holding instead as declaratory.[125]

In the United States, this issue is adjudicated in terms of the political question doctrine.[126] Thus, the court will hear and rule on cases where the petitions have allegedly raised issues dealing with the legal rights of the complainants and where the determination regarding such issue was not committed to the conclusive determination of the political branches.[127] This means that, in practice, the scope of petitions against parliamentary decisions is manifestly narrower in the United States relative to Israel, and the willingness of the courts to involve themselves in reviewing such decisions is narrower still.

III. INSTITUTIONAL JUSTICIABILITY IN THE ABSENCE OF NORMATIVE JUSTICIABILITY

A. *General Discussion*

In the previous portion of this article, I discussed the distinction, as well as the interdependence, between the two fundamental aspects of justiciability—normative justiciability and institutional justiciability—as well as the necessary criteria for the existence of each. In this portion of the article, I will attempt to show that, although it would seem that normative justiciability is a prerequisite for institutional justiciability, there are, in fact, circumstances where institutional justiciability will exist, or at least should exist, even when, in a certain sense, normative justiciability is absent. In these cases, however, the criteria necessary for the existence of institutional justiciability will be different than would be in circumstances where full normative justiciability existed.

A clear example of a situation where institutional justiciability will exist, even in the absence of full normative justiciability, is when a court wants to invalidate the decision of a public agency on the grounds that the decision was unreasonable to an extreme extent or was clearly erroneous. Through the use of this example, I will attempt to advance the thesis I am proposing here regarding institutional justiciability. Nevertheless, the reasonableness rule in administrative law is only an example. Other situations will exist where normative justiciability is incomplete, but where institutional justiciability may still be present. Such situations may, for example, present questions of when to permit physicians (or to require them) to detach a patient

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125. For complications that have arisen as a result of the granting of declaratory judgments against the Knesset authorities, see H.C. 306/85, Kahane v. Chairman of the Knesset, 39(4) P.D. 85; H.C. 5711/91, Poraz v. Chairman of the Knesset, 44(1) P.D. 299.

126. For a summary of the political question doctrine, see *supra* notes 2-3 and accompanying text.

127. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969).

from an artificial respirator, or to refrain from attaching a patient to such a device.

B. *Normative and Institutional Justiciability of the Rule of Reasonableness in Administrative Law*

1. The Rule of Reasonableness in Administrative Law

A central concept in both Israeli and United States law is the concept of reasonableness. This concept is utilized, *inter alia*, in determining the standards of responsibility for negligence in tort law,[128] for criminal negligence in penal law,[129] and in determining the obligations of administrative agencies in exercising their discretional authority—a matter I will discuss below.

Despite its central position in the law, reasonableness is an opaque and open-textured concept and has remained so, at least in the administrative law, despite all attempts to imbue it with some tangible content. It is for this reason that the requirement of reasonableness in the administrative law has been hard put to fulfill its basic function as a norm for directing conduct.

Only in a few exceptional circumstances have the courts managed to provide the concept of reasonability with concrete meaning. For example, the courts in Israel accept the rule which allows for retrospective effect to be given to regulation when the retroactivity is reasonable, both in light of the substance of the matter involved and the amount of time with respect to which such retrospective effect is given. In the context of that rule, the courts have determined that the retrospective effect of tax regulation is substantively reasonable but that such retrospectivity can only apply to the particular tax year in which the law was promulgated.[130] This concrete construction of reasonableness is, as noted, the exception rather than the rule, and it is, at best, a matter of debate whether it would be appropriate for the judicial authority to generally establish such concrete and inflexible rules, or not.[131]

The theory of administrative reasonableness—in its Israeli version and, to a certain extent, in its American version—is based on the following

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128. *See, e.g.*, J.C. SMITH, LIABILITY IN NEGLIGENCE 5 (1984); FRANCESCO PARISI, LIABILITY FOR NEGLIGENCE AND JUDICIAL DISCRETION 213 (1992).

129. *See, e.g.*, WAYNE R. LAFAVE & AUSTINE W. SCOTT, JR., CRIMINAL LAW 233 (2d ed. 1986).

130. *See* H.C. 21/51, Binenbaum v. Municipality of Tel Aviv, 6 P.D. 375; C.A. 10/55, "El Al" Airways to Israel, Inc. v. Mayor of Tel Aviv-Jaffa, 10 P.D. 1586; 1 BARUCH BRACHA, ADMINISTRATIVE LAW 270-83 (1987) (Hebrew).

131. BARAK, *supra* note 1, at 172-89.

principle of administrative discretion:[132] In making a decision within the scope of its discretion, the public agency has the power to choose from among a number of possible choices. This choice must be made on the basis of the agency's consideration of the relevant factors—of *all* the relevant factors and of *no* non-relevant factors.

In Israel, the Supreme Court has ruled—in a somewhat tautological manner—that an administrative decision is reasonable if, in reaching that decision, relative weight was reasonably given to each of the relevant considerations.[133] Under this doctrine of administrative reasonableness, where discretion has been given to an administrative agency, there can be several reasonable ways of balancing the relevant considerations. Each of these reasonable balancings will lead to a decision that is within the "zone of reasonableness." A decision located within this zone of reasonableness is considered to be lawful and the court will not interfere with it even if, in the opinion of the judges, a better or more effective decision could have been made. However, a decision falling outside the zone of reasonableness—i.e., a decision based on an extremely unreasonable balancing of the various considerations—is not lawful and may be invalidated by a court.

In the United States, the principle of a "zone of reasonableness" has also been accepted. Nonetheless, the scope of judicial review on the basis of this principle is generally narrower than that in Israel. Under federal law, the Administrative Procedure Act provides, *inter alia*, that:

> [T]he reviewing court shall . . . .
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .[134]

Indeed, in the United States, for a decision to be considered as beyond the zone of reasonableness, constituting thereby an illegitimate exercise of discretion, the decision must generally be found to have been arbitrary and

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132. *See, e.g.*, H.C. 156/75, Daka v. Minister of Transportation, 30(2) P.D. 95, 105; A.H. 3299/93, Wechselbaum v. Minister of Defense, 49(2) P.D. 195, 209-10. The doctrine of reasonableness within administrative law has been developed by jurists, primarily judges, without familiarity with the work and thought of researchers in the field of public administration, one of the sub-branches of political science. It is possible that this has been the cause of some of the weaknesses of the doctrine, only a few of which I will deal with in this article. *See* Ariel Bendor, *Administrative Law as a Theory of Administration*, 1 MISHPAT UMIMSHAL—LAW AND GOVERNMENT IN ISRAEL 45, 63 (1992-1993) (Hebrew).

133. *See, e.g.*, H.C. 389/80, Gold Pages, Inc. v. Broadcasting Authority, 35(1) P.D. 421, 445.

134. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1996).

capricious.[135] This is quite a narrow standard and, generally, the court will not substitute its judgment for that of the agency if its decision was based on the relevant factors (and on them only),[136] and if the agency's action does not involve violation of constitutional rights[137] or of rights established under the legislation through which the agency purports to act.[138]

Yet, the court may invalidate a decision defective by reason of a "clear error in judgment."[139] Additionally, under the "substantial evidence rule," a factual determination of an agency may be overturned if it is unreasonable in view of the evidence presented before it.[140] As a general rule, a court will refrain from overturning an administrative decision, unless it possesses meaningful standards upon which it can rely.[141]

2. On Normative and Institutional Justiciability of the Rule of Reasonableness in the Administrative Law

There are many who dispute the legitimacy of judicial review of discretionary administrative decisions—particularly judicial review of the reasonableness of those decisions—on the basis of claims regarding the jurisdiction of the courts and the constitutionality of such judicial review on the one hand, and on considerations of institutional justiciability on the other.

Yet the most basic problem with such review relates to the normative justiciability of the rules of administrative discretion in general and of the law of reasonability in particular. I will illustrate this problem through an example taken from recent Israeli case law.

In two cases decided at the same time by the Israeli Supreme Court in

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135. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 654 (1991). Nevertheless, it has been held that the Administrative Procedure Act and the bases established therein for judicial review do not apply to the President of the United States, unless the matter is set forth in the specific statute upon whose power he operates. *See* Franklin v. Massachusetts, 505 U.S. 788 (1992). For criticism of this decision, see Schwartz, *supra* note 80, at 170-72.

136. *See, e.g.*, Exxon Corp. v. Federal Energy Admin., 398 F. Supp. 865 (D.D.C. 1975); Citizens Comm. Against Interstate Route 675 v. Lewis, 542 F. Supp. 496 (S.D. Ohio, W.D. 1982); Soler v. G. & U., Inc., 833 F.2d 1104 (2d Cir. 1987).

137. Administrative Procedure Act, 5 U.S.C. § 706(2)(B) (1996).

138. *Id.* § 706(2)(C).

139. *See, e.g.*, Delpro Co. v. Brotherhood Ry. Carmen of U.S. and Canada, 519 F. Supp. 842 (D. Del. 1981); Martin Oil Service, Inc. v. Koch Refining Co., 582 F. Supp 1061 (N.D. Ill., E.D. 1984).

140. SCHWARTZ, *supra* note 135, at 640-42. *See also* WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 293-99 (1992).

141. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985). For criticism of this decision, in which it is maintained that "reasonableness" on its own is a "meaningful standard" for judicial review, see Kenneth C. Davis, '*No Law to Apply*,' 25 SAN DIEGO L. REV. 1 (1988).

1993,[142] the petitioners had raised claims against the refusal of then-Prime Minister Yitzhak Rabin to remove from office (respectively, a cabinet minister and a deputy minister) representatives of one of the parties making up the Prime Minister's coalition government on the ground that indictments had been filed against each of the two on charges of corruption. Petitioners contended that, under these circumstances, the Prime Minister was obligated to exercise his discretionary authority to dismiss the minister and deputy minister from their positions.[143]

The Israeli Supreme Court heard the two petitions in its capacity as the High Court of Justice and granted relief with respect to both of the petitions, directing that the two officials be dismissed. The Court did so based upon its holding that refraining from such dismissals was unreasonable to an extreme degree and that the exercise of the Prime Minister's authority to dismiss the officials was the only lawful option available at his discretion. The essential reasoning of the Court was that the continued incumbency of the minister and deputy minister, in the face of the corruption indictments filed against them, would result in severe deterioration in the public's faith in governmental authorities and their ethical standards. The Court held that this was a relevant consideration of significant importance and, under the circumstances of the situation, should have tipped the balance, mandating the dismissals. It is clear under this reasoning that the Court would have reached a similar result had the issue before it been the Prime Minister's discretion in appointing the members of his Cabinet. Just as it was held to have been unreasonable not to fire the indicted minister and deputy-minister, so also it would be unreasonable to have appointed such indicted officials in the first place.

I will not deal at length in this article with the troubling question of whether the explicit discretionary authority of the Prime Minister, under the Basic Law, to appoint and dismiss ministers and their deputies possesses any real meaning if he can be "obligated" to dismiss them (i.e., under certain circumstances, the Prime Minister will not be choosing among several lawful options, but, instead, the Supreme Court will dictate to him which decision he must make in the scope of his "discretion").[144]

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142. H.C. 3094, 4319, 4478/93, Association for Quality in Gov't v. Government of Israel, 47(5) P.D. 404; H.C. 4267, 4287, 4364/93, Amitai—Citizens for Improvement of Administration and Purity of Ethics v. Prime Minister, 47(5) P.D. 441.

143. The authority for this claim may be found in Articles 35(b) and 38(3) of the Basic Law: The Government, S.H. 214 (1992).

144. It should be noted that in most of the cases in which the Court has thus far involved itself in the decisions of a governmental agency on reasonableness grounds, two alternative decisions were involved which represented two contrasting principal considerations. In these cases, the meaning of the court's invalidation of the agency's decision was that the agency was required to make some specified decision, i.e., in practical terms, there was an elimination of the discretion which the law had accorded to the agency. *See, e.g.*, H.C. 581, 832, 849/87, Zucker v. Minister of Interior, 42(4) P.D. 529; H.C. 223/88, Sheftel v. Attorney General,

The two rulings raise an even more troubling issue. Among the public respondents who sought to be heard in the proceedings, and who were permitted to appear under the Supreme Court's extremely liberal rules of standing respecting both petitioners and respondents,[145] was Ze'ev Trainin, a member of the Prime Minister's political party. Trainin's contention, as summarized by Chief Justice Shamgar in the decision in the matter involving Minister Deri, was that "it was incumbent upon the Court to consider the political-partisan consequences of its decision in ordering the dismissal of the Minister from his post."[146] In their reasoning in ordering this dismissal, neither Chief Justice Shamgar, nor any of the other Justices, related at all to this contention. Yet, undoubtedly included among the relevant considerations related to the appointment—and the dismissal—of government ministers would be political considerations of the sort cited by Trainin. Indeed, the essential purpose of those amendments to the Basic Law, which operated to endow the Prime Minister with the authority to dismiss ministers from their positions in the government, was precisely to increase the Prime Minister's political power. It was intended that, in exercising this authority—as is the case in his authority with respect to appointing the members of his government—the Prime Minister would be able to take political considerations into account, foremost among which are the establishment and continued existence of his government, and its ability to realize its policies by means of the construction of as broad and stable a governing coalition as possible.

Even the Supreme Court could not have disputed the Prime Minister's authority to consider these political factors in appointing and dismissing the members of his government.[147] Here, then, arises the question: How could the Court rule that the Prime Minister's failure to dismiss the aforesaid governmental officers was unreasonable—i.e., the result of an unreasonable weighing of the various relevant considerations—if the Court failed to assess the "political" considerations involved, the balance between those factors, and the countervailing considerations regarding public faith in the government and in governmental ethics?

Indeed, the legal "professional instinct" of even the most activist of Israel's Supreme Court Justices would certainly reject the court's considering—let alone deciding—the question of whether the incumbency of a government advocating one particular policy or another contributes to the welfare of the state or causes severe injury to it. The same would apply to the question of to what extent dismissal (or appointment) of one or another

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43(4) P.D. 356; H.C. 935, 940, 943/89, Ganor v. Attorney General, 42(2) P.D. 485; *Association for Quality*, 47(5) P.D. 404; *Amitai*, 47(5) P.D. 441.

145. *See supra* note 4.

146. *Association for Quality*, 47(5) P.D. at 415.

147. *See Association for Quality*, 47(5) P.D. at 421; *Amitai*, 47(5) P.D. at 463.

minister or deputy minister would endanger the stability of the governing coalition. Yet, under the general doctrine of administrative discretion, consideration and ruling with respect to just these questions would have been a prerequisite to any ultimate ruling on the reasonableness of the decisions that were the subject of the two aforesaid Supreme Court rulings. Absent the Court's consideration and ruling on these questions, the determinations of the Supreme Court in these cases possess a not-negligible element of arbitrariness.

Of course, it could be asserted that the two rulings may be interpreted as holding that no political consideration, whatsoever, could have justified the continued incumbency of government officials who had been indicted on charges of corruption. In other words, the harm to the trust of the people in the ethical purity of the government, which would have eventuated from the continued service in government of these allegedly corrupt officials, was so strong that *no* political objective to be achieved from their remaining in office—including the continued existence of the government, and, perhaps, those interests related to the continued existence of the State that, at least from the government's point of view, might be contingent thereto—could have served as a sufficient basis to justify the continued presence in the government of these two indicted individuals. Yet, this contention is not ultimately persuasive. The trust of the people in the incorruptibility of their government, with all its vast importance, is not a value so supreme that for its realization we are required to sacrifice other interests essential (in the view of a majority of the citizens' representatives) to the continued existence of the State.

Moreover, the above contention does not even succeed in successfully responding to the essential issue we have raised. Let us assume, for example, that the charges against the aforesaid members of the Government were of lesser severity. Would there then be required—under the doctrine of reasonability—some balance between the political considerations at stake and the considerations related to public trust in government institutions?

What are the roots of the difficulties that prevent (in these cases) the normal application of the law of reasonableness? The law, as expressed in the decisions of the courts, tends to ignore the fact that many times the decisions of governmental agencies are influenced by political and coalition considerations, which are expressed in coercions and compromises that attack the very power and ability of the political authorities to maintain office and to realize their central policy goals. Take, for example, the situation of the President of the United States, who, as a practical matter, is required to enter into compromises—if not into active collaboration—in many areas with Congress. Or, even more clearly, of the Prime Minister in Israel who requires the support of the Knesset for the very existence of his Government. When they operate in the sphere of their various authorities, they must, in order to garner the necessary political support, or in order to form the necessary political coalition, make decisions that they might not have made had they not been

subject to the above political necessities. In similar fashion, they may for the same reason refrain from making decisions that they might otherwise have made. Yet, when such a decision comes before the Court for judicial review, the examination will generally be conducted on the artificial assumption that the considerations upon which the decision was based were the considerations of the political group or individual who demanded that decision of the authorized authority, and not the political-coalition considerations that actually motivated that authority.

For example, in Israel, where there is no total separation of church and state, "Religious Councils" operate, under the law,[148] in every locality possessing a majority of Jewish inhabitants, with the task of providing various religious services and functions for those Jewish inhabitants.[149] Forty-five percent of the members of these religious councils are elected by the Local Councils, which are themselves elected by the residents and are composed of representatives of the various political parties. According to a decision of the Israeli Supreme Court, the composition of the representatives of the Local Council on the Religious Councils must reflect, as far as is possible, the relative party distribution in the Local Councils themselves.[150] This means that even minority parties must be assured representation in the Religious Councils. In practice, under this system, each party offers its candidates and the Local Council votes on the matter of the suitability of each candidate. The Israeli Supreme Court has ruled that, on such vote, the Local Council could not disqualify a candidate for membership on the Religious Council simply because he belongs to the Reform or Conservative movements of Judaism, which form minorities in Israel (most practicing religious Jews identifying themselves with the Orthodox branch).[151] In *Naot*,[152] a suspicion had arisen that certain candidates for the Religious Councils who had been offered by opposition factions had been disqualified by the majority for reasons relating to their adherence to the Reform and Conservative movements. The Supreme Court, consequently, annuled their disqualification. Yet it is possible—and the matter was even raised by one of the judges[153]—that some of the Local Council members who had supported disqualification of the Reform and Conservative candidates did not do so out of hostility to these religious movements, but out of coalition considerations, i.e., to avoid violating the

148. Jewish Religious Services (Consolidated Version) Act, 5731-1971.

149. Under other statutes, there exist religious councils to provide religious services to Israel's non-Jewish citizens.

150. *See, e.g.*, H.C. 121/86, Shas Movement, Union of Sephardic Torah Observers v. Minister of Religion, 40(3) P.D. 462, 466.

151. *See, e.g.*, H.C. 699/89, Hoffman v. Jerusalem Municipal Council, 48(1) P.D. 678, 693.

152. H.C. 4733, 6028, 7105/94, Naot v. Hai'fa Municipal Council, 49(5) P.D. 111.

153. *See id.* at 131-32 (Tal, J.).

collaboration between themselves and the members of those parties opposed to the Reform and Conservative movements. Yet, as noted, under its customary approach, the Court will ignore the fact that the considerations in reaching the decision were political and coalition related, and will relate to the decision under review as if it arose solely from those specific considerations of the body or individuals who demanded that the decision be made (in the above case, the anti-Reform and anti-Conservative religious parties).

It does not seem sensible to say—certainly not in a broad, sweeping fashion—that consideration of political-coalition factors of the sort referred to are forbidden. On the other hand, it is certainly possible that public agencies exist, such as judicial or professional authorities which, in the exercise of their decision-making authority, should not take any account whatsoever of political-coalition considerations. Yet, in general, the very placement of authority into a political entity—one which requires the support of various institutions, including other political bodies, and which must collaborate with these same in order to stay in power and fulfill policy objectives—can be considered to reasonably carry the implication that this political entity may permissibly weigh political-coalition factors in reaching its decisions. This is so even if the result involves compromises of one sort or another, from the decision-maker's point of view, in the exercise of its authority.

According to what is routinely stated in the case law,[154] in exercising its discretion, a public authority must consider all the relevant considerations and is forbidden from considering considerations that are not relevant. But the uniqueness of the political-coalition considerations of the sort described above are such that, while it is clear that the law does not place an obligation upon the authorities to consider these factors, they are not forbidden to consider them. Yet in the common description of the law of administrative discretion, there is no mention of factors whose consideration is permitted but not required. This description clearly does not encompass political-coalition considerations. On the one hand, as noted, the political authorities are generally not to be prevented from weighing such considerations which are, after all, integral to their very nature, manner, and needs. On the other hand, there is no reason to require the political authorities to take account of political-coalition considerations. The opposite is true: an altruistic willingness on the part of the authority to disregard its partisan political interests and focus its decision solely "on the matter itself" would be viewed as praiseworthy.

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154. For the United States, see cases cited *supra* note 136. For Israel, see, for example, H.C. 727/88, Awad v. Minister of Religion, 42(4) P.D. 487, 491; H.C. 869/92, Zvili v. Chairman of Central Elections Comm., 46(2) P.D. 692, 714; A.H. 3299/93, Wechselbaum v. Minister of Defense, 49(2) P.D. 195, 209-10.

How does the case law bridge this lack or correspondence between its own stated rule, that every consideration is one that either must or must not be evaluated, and the existence of political-coalition factors, factors that generally may be considered, but do not have to be considered? This bridge is accomplished through the phenomenon mentioned earlier—according to which an administrative decision influenced by political-coalition factors will generally be reviewed by a court of law as if the considerations which form its basis were those considerations of the party which sought the decision from the authority—and not the political-coalition considerations which motivated the authority itself. In other words, the court will just ignore the fact that the decision was influenced by political-coalition considerations.

This is exactly what the Supreme Court did in two decisions involving Minister Deri[155] and Deputy Minister Pinchasi.[156] Yet, why did the refusal of the Court to take notice of the political-coalition considerations in the two matters not succeed? Because in these cases, it was impossible to support the decisions under review by any other than political-coalition considerations. For the very purpose of the provisions of the Basic Law involved was to grant political, coalition-building powers to the Prime Minister. In these cases, the political-coalition considerations were themselves the considerations relating "to the very matter itself" in the full sense of the term. The Court was not dealing, as in the *Naot* case,[157] with a situation where considerations relating "to the matter itself" were able to act as a veil to the political-coalition considerations. For this reason, and because the Court was unable to apply itself here to the political-coalition factors and to weigh those factors against the interest in preserving public trust in government, these two decisions appear arbitrary in their reasoning.

The difficulties that arise from the above discussion are not limited to purely political-coalition considerations such as those that were involved in the cases of the dismissal of the minister and deputy minister. In fact, it is actually a fiction that we can disregard political-coalition factors in those cases where it *is* possible to "exchange" consideration of those factors for consideration of factors purportedly going "to the matter itself." Why is this so?

First, cases of the latter category are much more prevalent than cases of "pure" political-coalition situations. A significant portion of the governmental authorities are vested in the hands of public agencies, such as government ministers and local governing councils, that often attempt to include, within the corpus of factors that they consider, political-coalition considerations which are then wholly disregarded by the courts reviewing the decisions.

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155. *See supra* note 142.
156. *Id.*
157. *Naot*, 49(5) P.D. 111.

Second, its disregard of the political-coalition considerations actually weighed by the governmental authorities prevents the court from being able to review the exercise of discretion as it actually operates. An evaluation of fictitious considerations, and, in any case, a disregard of factors actually considered, cannot be a review of discretion in any meaningful sense.

The conclusion is that, in a wide series of cases, judicial review of the discretion of governmental agencies is distorted in the sense that it is based on a fictitious presentation of the factors which the agency supposedly considered.

Is there any way of escaping this fictitious play-acting and establishing legal principles upon which a meaningful judicial review can take place—one which will take account of the fact that governmental authorities are often political entities which are not to be prevented (yet neither are they to be obligated) from considering, in the exercise of many of their authorities, political and coalition-related factors? It is obvious that through explicit statutes we could establish hard and fast mandatory rules that would constrain discretion by an authority to set a framework for balancing, on an "ad hoc" basis, between considerations related to the "matter itself" and to the political-coalition factors.

Our present concern is not with authorities so-constrained but with authorities possessing discretion. To allow for a balance, by such an authority, between competing considerations, a "common denominator" between the considerations is necessary. A balance between considerations totally foreign to one another constitutes nothing more than an empty metaphor. In the matters with which the two decisions concerning Minister Deri and Deputy Minister Pinhasi dealt, it is possible—though subject to some doubt—that one could balance, by a normative assignment of relative weight, political factors of one sort or another whose common concern is establishing and preserving the government. It is even possible that a balance could be made between the wish to further the trust of the public in the rectitude of the government, on the one hand, and the desire to make the government more efficient, on the other. Yet, here the question is with respect to the Prime Minister's authority to appoint and dismiss members of government: Is there a real—and not a purely metaphoric—possibility of balancing, in a normative manner, between the Prime Minister's determination to maintain his government in existence and the public's general interest in preserving public trust in government?

At present, I see no satisfactory answer to this last question. The difficulty arises not simply from the different conceptual levels to which each of these competing considerations relate, or simply from the fact that some of these considerations are mandatory considerations while others are only permissible. It also arises from the vast number of considerations involved and from the complex interplay between them. To the extent that the number of factors increases, and they become more complex, so also does it become

increasingly difficult to establish a mandatory "zone of reasonableness," as required by the legal doctrine regarding the discretion of public agencies.[158] The difficulty does not exist to the extent that we can say it is proven that the question cannot possibly, by reason of its very nature, be resolved.[159] For it is possible that someday, with the development of thought and theory, a solution will be found. However, at present there is no known solution, and the issue is not justiciable from a normative standpoint.

Some indication, even if not conclusive,[160] that at present the rule of reasonability cannot operate as fully justiciable, substantive legal doctrine—at least insofar as this concerns the balancing between considerations related "to the matter itself" and the political-coalition considerations—lies in the fact that this doctrine has been unable to effectively govern the conduct of the public authorities. By this I mean that a public authority, wholeheartedly desirous in reaching a decision in the proper, lawful manner, while, at the same time, not waiving its right to take into account political-coalition considerations essential to its survival and its ability to govern, will in many cases (absent an on-all-fours judicial precedent) not be able to know beforehand if any particular decision it may make will withstand legal review as to its reasonability. This applies to the authority, as well as to its legal advisors, be they ever so eminent and capable. The difficulty faced by the authorities does not derive only from the general difficulty of predicting what a court will do, should the matter come to it for determination. After all, there are many issues of interpretation that practically—if not in theory—relate to "hard cases," where the answer is not clear or where there are a number of possible answers.[161] The particular difficulty here derives from the lack of consistency and the internal contradictions in the doctrine of administrative discretion, several of which have been presented above.

Does it follow from this that it would be appropriate to eliminate the rule of reasonableness from the area of administrative law, at least insofar as the corpus of legitimate considerations includes political-coalition considerations? The answer that I would suggest is that the rule should not be thus limited. To my mind, even if this doctrine, or certain aspects of it, are in a certain sense non-justiciable from a normative standpoint, it still may be proper to find them institutionally justiciable. Thus, even in the absence of standards that can be expressed as consistent legal rules, i.e., establishing

158. See, for example, with respect to oversight of military matters, H.C. 561/75, Ashkenazi v. Minister of Defense, 30(3) P.D. 309, 318-20.

159. *See supra* text accompanying notes 71-76.

160. *See infra* text accompanying notes 161-69.

161. As noted, I have not dealt in this article with the question of whether, both theoretically and practically, there may be legal questions with more than one lawful answer. In any case, I maintain that not all legal questions have even one known answer. *See supra* note 12 and accompanying text.

rights and obligations regarding the authorities and the public (and wholly aside from the enforcement of these rights and obligations by the courts), it still may be appropriate at times that the judicial branch place, under the rod of its review, the decisions of bodies of the executive branch, even when these comport with the defined requirements of the law, and even if their unreasonableness cannot be proven by traditional legal means.

In my view, normative justiciability would not be a prerequisite for institutional justiciability. Institutional justiciability could exist—and, in practice, does exist—even in the absence of complete normative justiciability.

3. The Normative Non-Justiciability of the Reasonableness Rule in Administrative Law—What Is Meant?

The claim that the requirement of reasonableness in the administrative law is not justiciable from a normative standpoint, in the sense that it fails to define to the administrative agencies their legal obligations, raises difficulty. Do not, as already stated,[162] norms which demand reasonability stand at the very center of many branches of the law, and not merely the administrative law? For instance, could it be said that tortious negligence or criminal negligence are not normatively justiciable because they incorporate a reasonableness requirement? Moreover, modern laws generally include many abstract norms, and it is possible to say that every generalized norm, by virtue of its very generality, is abstract to one degree or another. Do all these abstract norms—and, as indicated, perhaps all norms—lack normative justiciability?

It seems that the key to the resolution of these questions does not lie solely in the extent of the abstractness of the norm or in the extent that it is able to provide guidance to the public, but in the inner consistency of the norm on the one hand and in the purpose of the norm's existence on the other. By this last factor, I am referring to the extent to which the norm enjoys a "life of its own" as opposed to serving only as a basis for the exercise of judicial review.

On the one hand, the norm must be examined in order to determine—however abstract it may be or whatever discretion, mental or substantive,[163] it calls for—whether it permits the ascertainment of the legal status (i.e., the

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162. According to Professor Redish: "Courts are often called upon to apply generalized and ambiguous abstract principles to specific factual situations, even when the application of those principles is unclear." MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 125 (1991). *See also, supra* notes 128-29 and accompanying text.

163. Even according to those who negate a situation in which there exists substantive discretion as to the meaning of the norm, there exists a mental state of doubt as to its meaning. This is discretion in its weak sense. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 12, at 31-32.

rights and obligations, in the broad sense) of every situation to which it would purport to apply. A norm that cannot meet this requirement—as I have tried to demonstrate, *supra*, is the case with the reasonableness rule in the administrative law, and, to a certain extent, the entire legal doctrine of administrative discretion in general—is not normatively justiciable, or, at least, its normative justiciability is seriously defective to an extent proportional with the defects in the consistency of the norm.

On the other hand, we must also examine to what extent we are speaking of a norm whose essence is to grant power and quasi-administrative jurisdiction to the *courts* and to subordinate the authorities and the public to this power and jurisdiction, as opposed to a norm that directs itself to the authorities and the public and seeks to instruct them as to how to behave, or not to behave, with the court being charged only with the interpretation, application, and enforcement of the norm.

According to my thesis, the doctrine of reasonableness in the administrative law is not normatively justiciable in the sense that, as a practical matter, its actual content is not: "administrative agencies must operate in a reasonable manner" (or at least not in an extremely unreasonable manner). Rather, its content at present is: "The court has the discretion to provide relief against the action of an administrative agency that it finds to be unreasonable to an extreme degree."

In this manner, reasonability in the administrative law resembles many rules in the law of procedure which grant to the court discretionary authority with respect to matters of procedure, such as the granting of temporary relief and the setting of attorneys fees and costs. This quasi-administrative discretion is rarely subject to interference by appellate courts, in contradistinction to a ruling on the substantive law where normative justiciability is total, and where the scope of judicial review by the appellate courts is similarly full. With respect to the discretion granted to the lower court as to the setting of the sum for a bond in a civil case, Chief Justice Shamgar had this to say:

> The setting of the sum of the bond is not among the matters in which the appeals process involves itself unless there exist special and exceptional circumstances. *In principle, the matter is left to quasi-administrative discretion.*[164]

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164. B.S. 5205, 5238/93, Eisenman v. Kimron (unpublished) (emphasis added). *See also, e.g.*, R.A. 450/94, Efrat Works Shares, Inc. v. Marek (unpublished) (setting the level of costs and attorneys fees in a civil case); Cr.A. 7/96, Or-Ner v. Israel (unpublished) (setting fees of an appointed attorney in a criminal case); R.A. 1166/93, Moreshet Israel, Inc. v. New Age Film and Television Producers, Inc. (unpublished) (bond in a civil case); B.S. 2841/91, Taib v. Keren L.B.I. (unpublished) (joinder of respondents to civil appeal).

It should be noted that in the exercise of their discretion in matters related to judicial procedure, just as in the exercise of their discretion in assessing the decisions of administrative agencies on unreasonability grounds, the courts are not exercising administrative authority. These authorities are essentially judicial in nature, not simply from the standpoint of the branch exercising them, i.e., the judiciary, but also by virtue of their content—determination of a dispute between parties. Yet, like the discretion exercised by administrative authorities, the courts possess significant, albeit not total, discretion with respect to the content of their decisions.

It is questionable if this approach wholly comports with any one of the common approaches to the question of whether for each legal question there exists only one legal answer or several.[165] This notwithstanding, it should be understood that my claim is that certain determinations made by the courts in the exercise of judicial review, as in other matters, do not even purport to provide answers to legal questions, i.e., to decide on the constellation of rights and duties that *the Law* gives to each of the sides involved in the dispute. Rather, like the public agency exercising its discretionary authority, and, similarly, like a parliament in legislating, the court *creates* through its holdings—and not in the framework of mere interpretation of the law—this constellation of rights and duties. Just as an administrative agency is not bound to take one or another particular decision, but rather may choose from among a number of alternatives, so is the court in a similar position when exercising discretion of the sort described.

As has been claimed, judicial discretion of this sort is not total, and, like administrative discretion, is subject to the various laws relating to such discretion. With the passage of time, new rules will develop as to the exercise of this discretion, which will then establish a substantive law of adjudication from a normative standpoint. Thus, for example, it was ruled in Israel—upon the basis of the constitutional principle of free expression—that in a civil case there can be no temporary relief granted forbidding publication of a book or a newspaper column, nor may there be required any disclosure to the complainant of the book or the article prior to its publication.[166]

As noted, even the law of reasonableness in the administrative law will become the foundation for other norms whose normative justiciability is more plainly evident, such as the now clear norm barring the continued service in office of a minister or a deputy minister against whom indictments have been filed on corruption charges,[167] or the bar on the enactment of a retroactive tax which levies a tax on transactions carried out prior to the start of the tax-year

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165. *See supra* text accompanying note 12.

166. *See* C.A. 214/89, Avneri v. Shapira, 43(3) P.D. 840. For criticism of this decision, see Ariel Bendor, *Freedom of Defamation*, 20 MISHPATIM 561 (1991) (Hebrew).

167. *See* cases cited *supra* note 142.

with respect to which the new amendment was added.[168]

That the rule of reasonableness constitutes a law-creating power and jurisdiction for the court to which the agencies and the public are subject, and *not* a substantive law establishing rights and duties, can be gathered from the fact that, to invalidate the decision of a administrative agency, it is insufficient that it be "simply" unreasonable. Rather, what is required, even in Israel, is "extreme" unreasonability, while in the United States, the requirement is for unreasonability expressed through an exercise of discretion that is nothing less than "*arbitrary and capricious*."[169] Does it seem logical that a substantive law would permit the validity of merely unreasonable administrative actions? It seems then that we are not talking about a substantive law but about a level of discretion granted to the courts in the context of their *judicial review* of the decisions of administrative agencies.[170] Indeed, it may be noted that in other areas of the law where the requirement of reasonableness is part of the substantive law, such as negligence in tort law or criminal negligence in the penal law, the prohibitions on conduct are not generally applicable only to "extremely" unreasonable behavior or "arbitrary and capricious" conduct; rather, the legal prohibition relates to every deviation from the substantive standard of reasonability.[171]

4. In Favor of Institutional Justiciability of Judicial Review Under the Rule of Reasonableness

Indeed, the approach offered above would appear to undermine, to a degree, the accepted outlook in Israel which is founded on a dichotomy and separation between law (and judges) and policy, in general, and politics (and politicians) in particular. This outlook has accorded the judiciary a monopoly in determining questions of law, while, at the same time, denying it all jurisdiction or legitimacy for dealing (save through the application of substantive legal norms) in non-legal questions and, most especially, in political questions and policy issues. The result of this viewpoint in Israel has been that the courts have devised legal norms whose basic purpose has been to provide a foundation for judicial review in areas where the courts have

168. *See* sources cited *supra* note 130.

169. *See supra* notes 135-41 and accompanying text.

170. Indeed, as noted, in the U.S. Administrative Procedure Act, the rules relating to administrative discretion are anchored in a section entitled "Scope of Review," which includes all the bases for judicial review. Administrative Procedure Act, 5 U.S.C. § 706 (1996). Some of these bases, such as infringement of a constitutional right, reflect the substantive law relating to the agency. Nevertheless, it would seem possible to interpret the basis relating to arbitrary and capricious actions—the American analogue of Israel's extreme unreasonableness standard—as a basis for review that does not reflect the substantive law. *See also infra* text accompanying notes 172-84.

171. *See* H.C. 389/80, Gold Pages, Inc. v. Broadcasting Authority, 35(1) P.D. 421, 445.

considered such judicial review to be necessary. Thus, the judicial review is not the result of the need to enforce substantive legal norms; rather, the norms have themselves been created by the courts as a result of the perceived need for judicial review. The goal of these norms—first and foremost of which is the rule of reasonableness—is not to guide the behavior of the public agencies or to provide direction to the courts. Their failure to do so effectively should not, therefore, be seen as impacting negatively on their true task—to constitute a mechanism which provides a basis, and legitimacy, for judicial review.

Consequently, the fact that claims as to the unreasonability of administrative decisions may not be wholly justiciable from a normative standpoint should not then lead to the conclusion that they are not institutionally justiciable. The substantive doctrine of the separation of powers focuses on the need for reciprocal review and oversight between the various branches of government. In this sense, alongside the particular functions of the individual branches of government, there is also to be oversight and review with respect to the exercise of most of these functions.[172] According to this view, the task of the judiciary in providing oversight over the other branches of government—and, in particular, for our purposes, the executive authorities—is necessary in a system of government of separation of powers because it prevents unfettered discretion, including the *consciousness* of unfettered discretion, and the threat to individual rights that could derive therefrom.[173]

Furthermore, it is the obligation of the courts to fulfill their institutional function of deciding disputes even when this confronts the courts with problems in the area of normative justiciability. True, the courts are able to travel the royal road when they are capable of basing their adjudications, and their judicial review of other branches of government, on substantive laws which place clear obligations upon these other authorities. Yet the courts cannot shirk their constitutional function whenever such a substantive law does not exist or cannot be applied, i.e., where the controversy involved is not normatively justiciable. The mere fact that the court lacks the normative tools to decide the controversy does not justify its declaring "*quia timet.*" Indeed, in many cases, the Court itself may be able to fashion the tools it lacks through the process of interpretation, in the manner long accepted in the common law as a source of law and the development of the law.[174] Yet, even

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172. *See also supra* text accompanying note 81.

173. In the famous words of Justice Douglas: "Absolute discretion, like corruption, marks the beginning of the end of liberty." New York v. United States, 342 U.S. 882, 884 (1951). See also, for example, the Israeli articulation of the same spirit in the words of Justice Barak in H.C. 4267, 4287, 4364/93, Amitai—Citizens for Improvement of Administration and Purity of Ethics v. Prime Minister, 47(5) P.D. 441, 462-63.

174. *See, e.g.*, Aharon Barak, *Judicial Creativity: Interpretation, the Filling of Gaps (Lacunae) and the Development of Law*, 39 HAPRAKLIT 267 (1990) (Hebrew).

in cases of normative non-justiciability, where the court cannot rule on the basis of legal missing norms, it should still, generally, decide the matter before it.

As already noted, in cases where normative justiciability is lacking from the outset and where the court is adjudicating the matter solely in the context of its institutional function, norms may be created through the theory of binding precedent. For example, even if the matter of the dismissals of Minister Deri and Deputy Minister Pinhasi, discussed earlier,[175] had not originally been normatively justiciable, the rulings in their cases by the Supreme Court have now established a new norm, to the effect that a government generally cannot include individuals against whom there have been asserted indictments on crimes of corruption. From now on, situations of this sort will be adjudicated on the basis of this new norm and the courts no longer will have to struggle—at least in such circumstances—with the lack of normative justiciability of the rule of reasonableness in the administrative law.

The significance of institutional justiciability even, in the absence of normative justiciability, is well illustrated in the context of judicial review of decisions delegated to the discretion of authorized agencies, especially judicial review exercised on the basis of the law of reasonableness. The discretion of governmental authorities is subject to little practical, meaningful limitation under any substantive norms.[176] Indeed, in most circumstances, we do not possess, at least at the present time, any realistic means of applying substantive legal parameters limiting such discretion. If the judicial review were to proceed solely in accordance with a precise application of existing substantive legal norms, the inevitable result would be an even greater expansion of the discretion of the agencies of the government—expansion, at times, to the point where this discretion would become absolute. Worse still, these authorities would no longer be concerned with the need to explain their decisions before a court (which in Israel, in many cases, is the Supreme Court).

Such a result would be quite difficult to accept. Many—perhaps most—of the authorities delegated to the agencies of the government are discretionary authorities. To render that discretion virtually absolute, with no effective review over the manner of exercise and with no consciousness on the part of the agencies that any such oversight even exists, would be wrong and runs contrary to the entire notion of checks and balances between the branches of government.

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175. *See supra* text accompanying notes 142-47 and 155-56.

176. While the obligations to consider all relevant factors, to not consider irrelevant factors, and to not practice discrimination may be categorized as requirements of the substantive law, they only slightly restrict the agency's discretion. Moreover, proof of a failure to abide by the first two criteria is hard to accomplish. I have already expatiated on the difficulties in categorizing the rule of reasonableness as a rule of substantive law.

This notwithstanding, where normative justiciability is lacking, judicial review must operate with special restraint and circumspection. It is one thing for a court to intervene in the case of a clearly unlawful decision.[177] It is quite another for it to intervene—on the basis of the court's own discretion—in a decision whose unlawfulness is not subject to determination. Only in exceptional cases, if at all, would it be legitimate for a court to refuse to grant relief against an illegal decision, however "political" that decision may be. Where, however, normative justiciability is absent and judicial review bases itself solely on the institutional function of the judicial branch, that the court believes or feels that the decision is wrong does not constitute sufficient basis for granting relief against an administrative decision. Rather, it must be persuaded that the decision is extremely harmful and illegitimate, and that the intervention of the court is essential.

In such a context, the Court may, to the extent it is able and on the basis of the evidence before it, investigate in depth the factors relevant to the matter and, on that basis, reach a determination as to the matter itself. The claim regarding the difficulty in determining factual findings as to policy matters[178] cannot serve as a basis for the court to refrain from fulfilling its role to fully determine a question that is before it from a normative standpoint. This concern, however, can influence a determination as to the extent of institutional justiciability with regard to a dispute where normative justiciability is lacking.

The level of restraint a court will exercise in these circumstances depends on the political and social culture within which the court is operating. It is possible that the difference between the preeminent restraint which the United States courts practice in utilizing reasonableness as a foundation for judicial review, and the more limited restraint exhibited by the courts in Israel, may be best understood against the background of the cultural differences between the two countries.[179]

Furthermore, it is not necessary that review which is not normative be carried out only by the judicial branch. Where legal norms cannot be applied,

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177. Yet, even with respect to the matter of unconstitutional decisions, the court enjoys a general discretion in the granting of relief. *See, e.g.*, H.C. 2918, 4235/93, Kiryat Gat Municipality v. Israel, 7(5) P.D. 833, 848-50. *Cf. id.* at 845-47 (minority opinion of Justice Mazah). On such discretion and on the relationship between it and abstention from judicial review on "political question" grounds, see, for example, Scharpf, *supra* note 88, at 549-50; Redish, *supra* note 101, at 1055-57; Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 321-23 (1990). *See* Bendor, *supra* note 14, at 620-22.

178. *See, e.g.*, Scharpf, *supra* note 88, at 567. For a rejection of this contention, see Redish, *supra* note 101, at 1051-52.

179. Compare text accompanying notes 61-64 and 92. *Cf. also* Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L.J. 19 (1996).

the intervention of the courts is essential only where no other powers fulfill this essential function. Nonetheless, in practice, due to the structure of government in Israel, the parliament (the Knesset) is generally not an effective address to direct claims to that the executive authority has made an invalid decision. There was once an attempt in Israel to refer complaints against certain administrative decisions from the court to the care of the ombudsman who, in some cases, possessed investigative capabilities superior to those of the courts.[180] This experiment, however, did not prove satisfactory.[181] It is possible, however, that with the strengthening of the position of the State Comptroller, who also acts in an ombudsman capacity,[182] it may prove proper to consider referring to official non-normative objections to the actions of public administrative agencies. It may be that such referral to bodies whose statutory mandate provides for their operations to be conducted in accordance with standards that are not solely legal in nature[183] may be considered more legitimate than the handling of such matters by the courts. At the same time, however, unlike the courts, the State Comptroller and the Ombudsman lack virtually any authority to issue binding decisions and, to date, there has not developed a strong custom of obedience to their recommendations. The conclusion, consequently, is that, in the existing situation, the judiciary must, even in the absence of normative justiciability, take up its part, institutionally, in providing review and oversight for the acts and decisions of the executive branch.

This approach comports to some extent with the view followed in the United States, which does not draw an explicit distinction between law, policy, and politics. Indeed, the American legal philosophy, expressed in the political question doctrine, does not grant to the judiciary a monopoly in the determination of questions of law. In this regard, it differs, to a certain extent, with the approach proposed in this article. For under my approach, no political authority—neither the executive nor the legislative—should ever have the last word with respect to the legality of its own actions or those of other political branches. The determination of legal questions must in principle be concentrated in the hands of the judiciary, subject, perhaps, to the option that, in certain situations, the court will delegate this determination to

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180. *See* H.C. 384/71, Dudai v. Harel, 25(2) P.D. 554.

181. *See* H.C. 453/84, Iturit Media Services, Inc. v. Minister of Communication, 38(4) P.D. 617.

182. *See* Section 4 of the Basic Law: State Comptroller, S.H. 30 (1988).

183. In the State Comptroller (Consolidated Version) Act, 5718-1958, it is set forth, *inter alia*, that the State Comptroller is authorized to examine "if the investigated bodies . . . behaved prudently and efficiently and with pure ethics[,]" *id.* § 10(2), as well as "every matter that she sees a need to do so." *Id.* § 10(3). In serving as ombudsman the Comptroller is permitted, *inter alia*, to deal with complaints relating to "action . . . opposed to proper administration, or which is unduly harsh or blatantly unjust." *Id.* § 37(2).

other non-political agencies, such as the State Comptroller or Ombudsman. This assumes, of course, that the determination of these agencies will be given the binding force of judgments granted by the courts themselves.

While the American system denies the courts a monopoly over legal questions, it also recognizes that the courts will sometimes reach determinations on policy questions, and this not necessarily upon the basis of substantive legal norms. In this respect, the American system comes closer to the approach advocated in this article.

Are there questions that, even in the absence of any explicit restraint or limitation in the Constitution, are not to be determined by the law courts? Under the theory of the political question doctrine, as well as from its practical application by the courts, there arise no clear-cut or definite answers to this issue. Still, as noted, it seems that the measure of judicial restraint exercised in this area in the United States is greater than that in Israel.[184] It would seem that, along with the different cultural contexts in the two countries, the difference in the levels of judicial restraint in the two countries is also contributed to by the different rhetoric applying to each. Thus, in Israel, the judiciary's monopoly on the determination of legal questions, accompanied by its *obligation* to determine these questions and coupled with the expansion of the range of questions classified as legal questions, has resulted in a relatively large level of involvement by the Israeli courts in issues of policy and, to an extent, in political matters as well. In the United States, on the other hand, the combination between the recognition of the fact that the law does not possess an answer to every question that appears to be legal, and the recognition that the judiciary does not possess a monopoly on the determination of even legal issues, has resulted in a relatively narrower degree of involvement by the courts in questions of politics, and even policy.

IV. CONCLUSION

From the thesis I have advocated in this article, no hardfast or universal viewpoint arises with respect to the appropriate level of involvement by the courts in questions where, according to the view I have presented, there is a lack of normative justiciability. That level of involvement—namely, institutional justiciability—will depend on the political and judicial culture of the society, on the relative position of the judicial branch, and on the existence of effective non-judicial alternatives capable of reviewing and overseeing the actions of the governmental authorities.

One must distinguish between the normative justiciability of a legal question and its institutional justiciability. Similarly, a distinction must be drawn between material institutional justiciability and organic institutional

184. *See supra* text accompanying notes 118, 135-37 and 165.

justiciability.

In general, legal questions will be justiciable from a normative standpoint. A question that is justiciable from a normative standpoint ought also—save in, perhaps, the most exceptional circumstances—be institutionally justiciable (both in the material and organic sense). From this standpoint, doctrines in the United States and Israel relating to political questions or judicial review of parliamentary matters are problematic to the extent that they limit the institutional justiciability of questions that, normatively, are fully justiciable.

The normative justiciability of a question is not, however, a precondition to its being institutionally justiciable. There can be questions whose normative justiciability is deficient but which will still be institutionally justiciable. Yet, the criteria for finding institutional justiciability with respect to questions which are not normatively justiciable will not be the same as those applicable to questions that are. The institutional justiciability of questions whose normative justiciability is deficient will be narrower than the institutional justiciability of questions with full normative justiciability. This suggested approach comports to a greater extent with the prevailing legal outlook in the United States, but it could be made compatible with the law in Israel as well.

SEARCH AND SEIZURE IN SCHOOLS: A COMPARISON OF HISTORICAL JEWISH LEGAL SOURCES AND CONTEMPORARY UNITED STATES LAW

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It is inconceivable that a thousand years ago a rabbi teaching his students in Europe would need to search a student for contraband. Today, American schools are frequently called "battle zones," with metal detectors reinforcing this epithet. This article contrasts searches of students and confiscation of their property from a historical Jewish legal (i.e., halachic) perspective and a contemporary United States legal perspective.

The need to create a safe and secure school is a prerequisite not easily attained. To what lengths may school officials go to achieve a favorable learning environment without sacrificing the legal rights of the very students being taught? What are the boundaries of school authorities and students' rights? The answers are found by juxtaposing complex and theoretical halachic decisions with American court decisions spawned by students carrying drugs and weapons to school.

It is not uncommon for teachers to confiscate items belonging to students. At times, this is done simply because the school has banned the item from its premises and mere possession is *ipso facto* a breach of school policy. The most obvious example is the policy of many schools with regard to weapons and drugs. At other times, the item may be confiscated as a disciplinary measure because the student has used it in an inappropriate manner, e.g., a student has used a ruler to slap another student, or simply because the student's preoccupation with the object causes the student to be inattentive.

Often, the confiscation is temporary and the item is returned when behavior improves, when the item will no longer cause disruption, or simply because temporary confiscation is deemed to be a sufficient punishment. Sometimes, seizure is designed to serve as punishment or deterrent and is permanent. In an educational setting, such acts are presumably designed for the benefit of the particular student or for students as a whole.

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I. JEWISH HISTORICAL SOURCES

Jewish legal sources analyze various aspects of this issue. Writing in the Israeli annual *Tehumin*, VIII (1987), Rabbi Yehudah Herzl Henkin notes that the Gemara, *Baba Metsi'a* 61b, declares that the prohibition against theft applies even "*al menat le-meikat*," which Rashi, *ad locum*, defines as "*le-tsayer*," i.e., theft for the purpose of inflicting anguish or discomfort upon the victim. The Gemara declares that this prohibition applies even when the theft is committed "*al menat le-shalem tashlumei kefel*," i.e., the thief wishes to benefit the victim by becoming liable for a fine to be paid to the victim. In such cases, the thief intends no harm; on the contrary, he is motivated by a desire to enrich his "victim." In establishing a blanket prohibition, the Talmud clearly bans theft even when the theft redounds to the benefit of the victim. These provisions of Jewish law are recorded in *Shulhan Arukh, Hoshen Mishpat* 348:1.

The definition of "*al menat le-meikat*" (for the purpose of inflicting anguish) is a matter of dispute among early-day authorities. A collection of medieval talmudic commentaries, *Shitah Mekubetset, Baba Metsi'a* 61b, notes that some interpret "*al menat le-meikat*" as including the notion that the individual has no intention of retaining the object permanently, but intends only to deny the rightful owner use of his property for a limited period of time in order to cause him distress. However, *Shitah Mekubetset*, in rejecting that definition, apparently maintains that theft with intent to restore the stolen item to its rightful owner does not constitute a violation of the prohibition against theft and interprets "*al menat le-meikat*" as referring to theft of an object without intent to return. Theft "*al menat le-meikat*," according to *Shitah Mekubetset*, differs from ordinary theft only in motivation; the item is taken solely in order to cause pain to the victim and not because the thief desires any benefit from, or contemplates any use of, the stolen object. Two other early day commentators, *Tosafot Rabbenu Perets* and *Ritva ha-Hadashim, Baba Metsi'a* 61b, also cite the latter interpretation of "*al menat le-meikat*" in the name of *Rabbenu Tam*. According to those authorities, there is no question that a school official might deprive a student of an object on a temporary basis without incurring a transgression.

A prominent nineteenth-century work, *Ketsot ha-Hoshen* 348:1 cites the comments of Maimonides in his *Sefer ha-Mitsvot*, negative commandments, no. 244, and notes that Maimonides maintains that it is forbidden to steal even with intention to restore the property to the rightful owner. That is also the position of *Sefer ha-Hinnukh, mitsvah* 224. *Ketsot ha-Hoshen* concludes that although *Shitah Mekubetset* remarks that theft of objects on an interim basis is a common and, indeed, a daily occurrence, nevertheless, in light of Maimonides' restrictive position, it is appropriate to be careful not to seize another person's property even temporarily. Similarly, Rabbi Naftali Zevi Yehudah Berlin, *Emek ha-She'elah, she'ilta* 4, no. 6, maintains that the

She'iltot prohibits even temporary appropriation of an object belonging to another person.

Rabbi Henkin asserts that even those who maintain that one may steal an object temporarily permit such an act only if the object is retained for but a very brief period of time. Rabbi Henkin notes that *Rabbenu Perets* employs language stating that such an act is permitted only if the object is to be retained for only a "brief period" (i.e., *le-sha'ah*). Accordingly, Rabbi Henkin argues that if the teacher plans to return the object, but only after an indefinite period, the act is forbidden even according to *Rabbenu Tam.*

Rabbi Henkin further asserts that the connotation of "*le-sha'ah*" is that the object must be returned in a matter of hours, possibly on the same day. Hence, argues Rabbi Henkin, if a teacher confiscates an item with the intention of returning it to the student the next day, all authorities would agree such an act is prohibited. Against that conclusion it may be argued that the term "*le-sha'ah*," employed by *Rabbenu Perets*, is idiomatic and is used in contrast to language signifying permanent retention of the stolen property but is not designed to establish an exclusion limited to custody of the object for merely a matter of hours. Thus, "*le-sha'ah*" may be understood as connoting simply a temporary, rather than an indeterminately long, period of time. Furthermore, neither *Ritva ha-Hadashim* nor *Shitah Mekubetset* incorporates the phrase "*le-sha'ah*" in his comments. Moreover, it appears that both *Ketsot ha-Hoshen* and *Torah Temimah*, Leviticus 19:11, no. 60, understand *Shita Mekubetset*'s position to be that taking possession of an object for even an indefinite period is permissible so long as there is no intent to retain the object permanently.

Rabbi Henkin does not note this, although *Ketsot ha-Hoshen* states that "it is proper to be watchful with regard to the matter" but does not pronounce an unequivocal ban. It is, nevertheless, the consensus of other latter-day authorities that the practice is prohibited. The *Shulhan Arukh ha-Rav, Hilkhot Gezeilah u-Geneivah*, no. 3, *Kitsur Shulhan Arukh* 182:3, and *Arukh ha-Shulhan, Hoshen Mishpat* 348:3, as well as *Torah Temimah*, Leviticus 19:11, no. 60, all rule that it is prohibited to appropriate an object for even a brief period.[1]

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1. Liability for loss or damage of the object appropriated under such circumstances is also the subject of considerable discussion. An ordinary thief is responsible for all damages, including those suffered as a result of force majeure. *Ketsot ha-Hoshen* 348:1 expresses doubt with regard to whether or not there is an obligation to make restitution in the event that the object is damaged as a result of circumstances beyond the control of the "thief" (i.e., *ones*). *See also Minhat Hinnukh*, no. 224. Compare, however, *Ketsot ha-Hoshen* 291:2 where, citing *Shitah Mekubetset, Baba Metsi'a* 41a, *Ketsot* apparently maintains that a thief who steals *al menat le-meikat* is exempt from liability in cases of *ones*. *Arukh ha-Shulhan* 348:3 maintains that a person who steals *al menat le-meikat* is not liable for *ones* but must make restitution if the object is lost or stolen. On the other hand, *Hazon Ish, Baba Kamma* 20:5 and *Torah Temimah*, Leviticus 19:11, no. 60, maintain that liability is absolute. See also Rabbi Moshe

Rabbi Henkin further suggests that there may be grounds to permit confiscation as a disciplinary measure in an educational setting since the intent of the teacher is not to inflict pain or distress upon the student but is rather intended for the student's benefit. In support of that distinction, he cites the comments of the early-day authority, *Ritva*, *Baba Batra* 5a. *Ritva* notes that the Gemara relates that a certain man named Runia owned a plot of land surrounded on all four sides by property belonging to Ravina. Ravina constructed a fence to separate his property from Runia's and demanded that Runia share in the expenses incurred in erecting the fence. Runia refused. Eventually, Ravina directed his servant to seize some of Runia's produce as compensation for labor and materials. *Ritva* questions the legitimacy of that action on the grounds that theft is prohibited even "*al menat le-meikat*" (i.e., for the purpose of inflicting pain). *Ritva* responds that seizure of someone else's property, not for the purpose of inflicting pain, but in order to satisfy an outstanding claim, is permissible. On that basis, Rabbi Henkin argues that the prohibition of theft "*al menat le-meikat*" is limited to theft with the specific intent to inflict pain; theft of a temporary nature that is motivated by other concerns is permissible.

It seems that *Ritva*'s comments reflect an entirely different principle. Many authorities regard self-help as legitimate and appropriate in situations in which other forms of redress are not available.[2] *Ritva* stresses that Ravina adopted this procedure "to execute his judgment."[3] Moreover, as noted by Rabbi Henkin, on the basis of the comments of *She'iltot*, *She'ilta* 4, it is clear that *She'iltot* maintains that, with regard to theft "*al menat le-meikat*," intent to cause distress is not a necessary condition, and the act is prohibited so long as the individual whose property is being seized experiences pain and distress.

Maimonides, *Hilkhot Geneivah* 1:2, unequivocally declares that all acts of theft are banned lest a person become habituated to such conduct:

> It is biblically prohibited to steal even a minute amount. It is prohibited to steal in jest or to steal in order to return the object or in order to make restitution. Everything is prohibited so that a person not accustom himself with regard to this.

Aryeh Leib Shapiro, *Tabe'ot Zahav* 348:1 (2d ed., Jerusalem 1987) (a commentary on *Ketsot ha-Hoshen*), who argues against liability in case of *ones*. For a further discussion of this issue, see IV *Pithei Hoshen* 24, n.17.

2. *See Hoshen Mishpat* 4:1.

3. Compare, however, the comments of *Sefer Hasidim* no. 585 (Reuben Margulies ed., Jerusalem 1960), who apparently maintains that one may seize an object for a temporary period in order to benefit the person from whom the object is taken. *See also Sedei Hemed, Pe'at ha-Sadeh, ma'arekhet ha-gimel*, no. 5.

Thus, Maimonides rules that all acts of theft are proscribed and allows no exception for salutary intent.

Nevertheless, one latter-day authority, *Teshuvot Oneg Yom Tov*, no. 48, permits theft with intent to restore the stolen object when such theft is undertaken for purposes of performing a *mitsvah*. A contemporary writer, Rabbi Ya'akov Yeshaya Blau, *Pithei Hoshen*, IV, 24, n.17, argues that, since a teacher's confiscation of a student's property for a disciplinary purpose is integral to the *mitsvah* of *hinnukh* (i.e., "teaching"), it is permissible for the teacher to act in that manner. Relying upon a combination of the view of *Oneg Yom Tov* and the earlier cited view of *Shitah Mekubetset* to the effect that theft with intent to return is not prohibited, Rabbi Blau concludes that a student's property may be confiscated even for an indefinite period, provided that the teacher plans to return the object at some future time. Although Rabbi Blau cites *Oneg Yom Tov*'s ruling as authoritative, the writers are unaware of other authorities who accept this view. It is apparently the consensus of the previously cited authorities, including *Shulhan Arukh ha-Rav*, *Arukh ha-Shulhan*, and *Kitsur Shulhan Arukh*, that all forms of theft are prohibited, even if the theft is temporary in nature and even if committed for meritorious purposes.

A. *Rights and Obligations of Teachers*

Rabbi Henkin also advances an entirely different argument in justifying confiscation of students' property as a disciplinary measure. The Mishnah, *Makkot* 7b, rules that a father who unintentionally causes the death of a son, a teacher who causes the death of a student in the course of administering corporal punishment, and a court official who causes death in the course of administering lashes to a convicted transgressor are exempt from the penalty of exile since the death occurred in the course of performing a *mitsvah* (i.e., in the case of the father or teacher, the requirement of training children in the performance of the commandments). Rabbi Henkin cites scholars who argue that since a teacher is permitted to strike a student, he must similarly be permitted to appropriate his property. It should be noted that the editor of *Tehumin* quotes Rabbi Yehudah Shaviv as advancing precisely this argument, that just as a teacher is permitted to violate the prohibition of striking another person—as expressed in Deuteronomy 25:3—by striking a student, he is similarly permitted to violate other interpersonal prohibitions, and, hence, he may confiscate a student's property for pedagogical purposes.

As further noted by the editor of *Tehumin*, Rabbi Shlomo Min-Hahar, writing in *Shm'attin* nos. 46-47 (Tammuz 1976), has similarly argued that if a teacher is justified in inflicting corporal punishment and causing physical pain, it stands to reason that he may impose a temporary pecuniary burden

upon a student in confiscating his property for an indefinite period of time.[4]

Rabbi Henkin, however, argues that although a teacher has the right to administer corporal punishment, a teacher has no authority to impose monetary penalties. He argues, in effect, that prohibitions are not suspended even in order to achieve laudable goals and that chastisement of a child or student is not at all encompassed within the ambit of the prohibition against striking one's fellow because that prohibition is limited to such conduct undertaken in the form of assault.

Rabbi Henkin fails to note that a similar point has been made by the twentieth-century scholar, Rabbi Elchanan Wasserman, in his *Kovets He'arot*, no. 70. Rabbi Wasserman cites the comments of Maimonides, *Hilkhot Hovel u-Mazik* 5:1, indicating that the prohibition against striking one's fellow is limited to striking him *derekh nitsayon*, i.e., in the nature of an assault.[5] Indeed, Rabbi Wasserman points to a father's license to strike a son and a teacher's right to chastise a student as Rambam's source for this statement.[6]

Accordingly, Rabbi Henkin forcefully and convincingly concludes that it is prohibited for a teacher to confiscate property. However, he rules that it is permissible for a teacher to deprive the child of the use of an object by taking the object and placing it on the teacher's desk while indicating that the student may reclaim the object at the end of the class or at the end of the day. Rabbi Henkin does not present a clear explanation for this leniency. Presumably, he reasons that Jewish law stipulates that, in order to be guilty of an act of theft, one must make a "*kinyan geneivah*," i.e., perform an act of "acquisition." Such a *kinyan* entails unlawfully removing an object from the owner's domain. Rabbi Henkin apparently reasons that placing and retaining the object on the teacher's desk does constitute an act of "acquisition" with regard to the object and that no act of theft has taken place because the item

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4. Surprisingly, Rabbi Min-Hahar maintains that confiscation of a student's property is permitted but that fining a student for inappropriate behavior is prohibited as an act of extortion or "theft." Rabbi Min-Hahar cites no sources to buttress his contention that temporary theft is not an act of theft; as demonstrated earlier, the consensus of halachic scholars is the reverse. It may be noted that Rabbi Min-Hahar's article is entirely polemical in nature and cites absolutely no primary or secondary sources that address the issue directly. It is rather surprising that the editor of *Tehumin* cites this article as carrying halachic weight. The concluding sentence of Rabbi Henkin's rebuttal to the editor, stating that the article in *Shm'attin* does not add or detract from the discussion and is thus irrelevant, is entirely on the mark.

5. *See also* XII *Encyclopedia Talmudit*, *Hovel* 683 n.64. *Cf. id.* n.68. *See also* Rabbi Moses Feinstein, II *Iggerot Mosheh*, *Hoshen Mishpat*, no. 66.

6. It should also be noted that even if it might be demonstrated that a teacher has a right to confiscate property as a disciplinary measure, the authority to do so is certainly limited in nature. Rabbi Moshe Feinstein, II *Iggerot Mosheh*, *Yoreh De'ah*, no. 103, cogently argues that for a teacher to administer any form of discipline, it is not sufficient merely to have grounds for suspecting the student of a misdeed; rather, the teacher must have actual knowledge that the student has committed the misdeed for which he or she is being punished.

in question remains in an area accessible to the student and in an area in which the student's proprietary rights are equal to those of the teacher.

B. *Dangerous Objects*

Confiscation of an object that poses a potential danger to its owner or to others is an entirely different matter. The Code of Jewish Law, *Shulhan Arukh, Hoshen Mishpat* 426:8, rules that failure to remove a dangerous object constitutes a violation of the commandments "[t]ake heed to yourself and guard your life diligently" (Deuteronomy 4:9) and "you shall not bring blood upon your house" (Deuteronomy 22:8). A contemporary compendia, *Pithei Hoshen*, V, 37, n.12, indicates that quite apart from the need to train children in the obligations established by those commandments, the language employed by *Shulhan Arukh* suggests that the obligation to remove a dangerous object devolves not only upon the owner of the object but also upon the bystander. *Shulhan Arukh* 382:1 depicts the bystander who eliminates the danger as a person who "seizes a *mitsvah*" that is the prerogative of another. The clear implication is that, if it is clear that the owner has no intention of fulfilling the obligation, others are certainly at least permitted, and possibly obligated, to do so. The proper course of action for a teacher responsible for the safety of his or her charges is self-evident.

II. CONTEMPORARY AMERICAN LAW

In American law, temporary seizure of a student's property is rarely a criminal act. The law in New York, for example, is quite clear in its refusal to recognize temporary deprivation of use of property as an act of larceny. The Penal Law of New York defines larceny as theft "with intent to deprive another of property or to appropriate the same to himself or a third person."[7]

In *People v. Hoyt*,[8] the court held that to warrant a larceny conviction there must be intent to permanently deprive the owner of property. Temporary withholding of property, by itself, would not constitute larcenous intent.[9] In *People v. Ward*,[10] the court held that, at minimum, there must be intent to permanently deprive another person of property or to deprive the person of it "for so extended a period of time that a major portion of its economic value is lost." American courts have, however, dealt extensively with another form of discipline employed in public schools. These cases involve a single primary source of American law—the Fourth Amendment.

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7. N.Y. PENAL LAW § 155.05 (McKinney 1996).
8. 92 A.D.2d 1079 (N.Y. App. Div. 1983).
9. People v. Guzman, 68 A.D.2d 58, 62 (N.Y. App. Div. 1979).
10. 120 A.D.2d 758 (N.Y. App. Div. 1986).

The leading United States Supreme Court precedent, *New Jersey v. T.L.O.*,[11] amplifies an exception to the probable cause and warrant requirement for searches done by public school officials. In *T.L.O.*, a teacher discovered fourteen-year-old T.L.O. smoking in the school bathroom. When T.L.O. was questioned by the vice-principal, T.L.O. said she did not smoke. The vice-principal demanded to search her purse. Discovered inside were rolling papers used to make marijuana cigarettes, marijuana, a pipe, a wad of one-dollar bills, a list containing names of students who may have owed her money, and two letters implicating her in dealing marijuana. The Supreme Court eventually upheld the reasonableness of the search. The Court held that "[t]he determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'"[12]

The Supreme Court sets out a two-prong test to establish whether a public school official has "reasonable suspicion" to conduct a search:

> [F]irst, one must consider "whether the . . . action was justified at its inception," . . . second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place[.]" Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[13]

The Court balances "the substantial need of teachers and administrators for freedom to maintain order in the schools"[14] against the privacy interests of students. While acknowledging that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights[,]"[15] it is "equally well settled that the fourth amendment's protection, which only applies to governmental action, applies to searches conducted by public school officials

11. 469 U.S. 325 (1985).
12. *Id.* at 337 (citing Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)).
13. *Id.* at 341-42 (footnotes omitted) (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).
14. *Id.* at 341.
15. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976).

who act as representatives of the state."[16]

Vigilance by school officials to create a safe school environment is complicated by the uncertain application of *DeShaney v. Winnebago County Dep't of Soc. Services*.[17] Is there a "special relationship" between students and school officials such that harm to a student by a fellow student may create school liability? The courts are of a mixed opinion.[18] Ironically, the finding of a "special relationship" may prompt school officials to engage in questionable searches of individual students in the interest of maintaining security for the greater student body.

The burgeoning problem of weapons and drugs has recently been confronted by American courts.[19] One California Court of Appeal notes that the "gravity of the danger posed by possession of a firearm . . . was great compared to the relatively minor intrusion involved in investigating the veracity of the unidentified student's accusation."[20] But, *T.L.O.* and its progeny should not be read too broadly. There are limits to the right to search. In *People v. Dilworth*,[21] a full-time police officer assigned to a school improperly seized a flashlight containing cocaine from a student simply because the student was associating with another student reputedly involved in drug dealing. A suspicion based on a mere "hunch" cannot be equivalent to "reasonable suspicion." The fact that the official conducting the search was a police officer rather than a school official was critical. Law enforcement officers cannot arbitrarily invade the privacy rights of individuals. However, a security officer who heard a metallic sound when a student tossed his bookbag on a metal shelf was permitted to feel the outside of the bag, discern the shape of a gun, and open the bag to discover a handgun inside.[22] There was no premonition of a gun inside the bag. Rather, there was some reasonable suspicion based on concrete evidence:

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16. *In re* Doe, 887 P.2d 645, 649 (Haw. 1994) (citing New Jersey v. T.L.O., 469 U.S. 325, 336 (1985)).

17. 489 U.S. 189 (1989).

18. *See* D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1079 (1993); J.O. v. Alton Community Unit School District 11, 909 F.2d 267 (7th Cir. 1990); Pagano v. Massapequa Public Schools, 714 F. Supp. 641 (E.D.N.Y. 1989).

19. *See In re* Joseph G., 38 Cal. Rptr. 2d 902 (Cal. Ct. App. 1995); S.D. v. State of Florida, 650 So.2d 198 (Fla. Dist. Ct. App. 1995); Wilcher v. State, 876 S.W.2d 466 (Tex. App. 1994); *ex rel.* Doe, 887 P.2d 645 (Haw. 1994).

20. *In re* Alexander B., 220 Cal. App. 3d 1572, 1577 (Cal. Ct. App. 1990).

21. 640 N.E.2d 1009 (Ill. App. Ct. 1994).

22. *In re* Gregory M., 82 N.Y.2d 588 (1993).

> Because appellant's diminished expectation of privacy was so clearly outweighed by the governmental interest in interdicting the infusion of weapons . . . we think the "unusual" metallic thud . . . was sufficient justification for the investigative touching of the outside of the bag . . . .[23]

The court noted, too, that the search was conducted for the purpose of school security, not for a criminal investigation. However, even in a criminal investigation situation, a protective pat-down exception to the warrant requirement may authorize a limited search to determine whether a weapon is present.

The possible possession and use of a weapon by a student is an excellent example of exigent circumstances sufficient to necessitate an immediate search. "Probable cause exists where 'the facts and circumstances within [the officials'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[24] When a school principal strip-searched a student in order to determine whether the student had stolen money from a teacher, this was excessively intrusive, even though, when the principal looked into the underpants of the student, the missing $100 was there.[25] The court ruled that the invasion of personal privacy, even with individualized suspicion, is not equatable with searching a student's locker or personal possessions. It added:

> [E]valuating the nature of the suspected infraction strictly in terms of the danger it presents to other students, it does not begin to approach the threat posed by the possession of weapons or drugs.[26]

Based on reasonable suspicion, it is valid to search a particular student's jacket,[27] or a particular student's purse,[28] for drugs. But search warrants "are ordinarily required . . . where intrusions into the human body are concerned."[29]

"Confiscation" can be used in its literal sense, i.e., taking an object from a person. At issue is also the concern about "taking" someone's dignity and self-respect. Therefore, when doing a strip search of a student to determine

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23. *Id.* at 593-94.
24. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).
25. State *ex rel.* Galford v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993).
26. *Id.* at 49.
27. *In re* Ronnie H., 603 N.Y.S.2d 579 (App. Div. 1993).
28. *In re* Doe, 887 P.2d 645 (Haw. 1994).
29. Schmerber v. California, 384 U.S. 757, 770 (1966).

whether weapons, drugs, or other contraband is being concealed, a school official needs to take into account the severity of humiliation as compared to the likelihood of finding contraband: "Subjecting a student to a nude search is more than just the mild inconvenience of a pocket search . . . ."[30] The trauma associated with a strip search is well recognized. "Therefore, as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search."[31]

III. CONCLUSION

Interestingly, search of a student's person or possessions does not pose a problem in Jewish Law. Although a student would be fully entitled to refuse to submit to such a search, the procedure itself does not violate any particular law. Jewish law does indeed recognize a number of particular rights of privacy, e.g., the right to be free of even innocent voyeurism, respect of confidences, and the privacy of correspondence. Jewish Law does not posit a global right of privacy *per se*, nor does it define unwanted tactile contact as a battery. Hence, despite the fact that, in the absence of a pedagogic need, such practices are certainly not in conformity with the spirit of Jewish teaching, within an educational framework, justified searches may readily be carried out without incurring any technical violation.

There are strong halachic grounds to prohibit confiscation of a student's property as a general disciplinary measure. Nevertheless, there is some halachic support for such action. Apart from halachic considerations, such policies are contraindicated on pedagogical grounds firmly rooted in Jewish teaching. Maimonides, *Hilkhot Geneivah* 1:2, notes that the rationale underlying the prohibition against stealing in jest or with the intent to return the object is a need to prevent habituation to acts of theft.[32] Teachers serve as role models for students. Confiscation of property by a teacher or an authority figure conveys a strong message; it diminishes respect for the property rights of others and teaches that appropriating someone else's property is not always wrong. Youngsters often do not fully comprehend nuances of the exceptions that prove the rule. The student may readily become "accustomed," or

30. Doe v. Renfrow, 475 F. Supp. 1012, 1024 (N.D. Ind. 1979).

31. Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316, 1321 (7th Cir. 1993).

32. See also the comments of *Minhat Hinnukh*, no. 224, stressing that theft *al menat le-meikat* (for the purpose of inflicting anguish) is prohibited primarily because of its insidious effect upon the perpetrator.

desensitized, to the severity of the prohibition against theft.[33]

It is evident that, while traditional halachic sources focus on confiscation of student property for mild disciplinary purposes, contemporary American courts are confronted with serious security concerns. The respective judicial discussions indicate the stark contrast in school environments faced by teachers in historical time and today. The distinction between government and private oversight is also apparent. Rabbis were not representatives of the State. Rather, they were legitimate parental surrogates who could, for all practical purposes and if need be, claim a healthy dose of immunity. The balancing of interests in the form of "rights" that exists today in American law is absent in Jewish law.

Finally, an important distinction to make is the weight and legitimacy of the primary sources themselves: the United States Constitution and the Bible. "'We must never forget, that it is a *constitution* we are expounding', 'a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs'."[34] As highly regarded as is the U.S. Constitution (which can be amended), how much more so the Bible which allows for no amendment and whose source is divine rather than human!

33. A similar point in a somewhat different context is made by *Iggerot Mosheh, Yoreh De'ah*, II, no. 103.

34. Hirabayashi v. United States, 320 U.S. 81, 100-01 (1943) (emphasis added) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819)).

LEARNING FROM OUR MISTAKES: THE AFTERMATH OF THE AMERICAN DIVORCE REVOLUTION AS A LESSON IN LAW TO THE REPUBLIC OF IRELAND

> This process of learning from each other is at least as old as our nations, and its role in our development as nations has been incalculably beneficial. I would say that this process of learning from each other, far from being over, is as vital now as it has been at any point in the past.[1]

INTRODUCTION

On November 24, 1995, the people of the Republic of Ireland voted in favor of ending a fifty-eight-year-old constitutional ban on divorce.[2] The vote to amend the nation's 1937 constitution in order to allow divorce was secured by the narrowest margin in any Irish referendum.[3] Of the 1.6 million Irish citizens who voted on the referendum, 50.3% voted to allow divorce, while 49.7% voted against lifting the prohibition then in place.[4] As a result of the vote, Ireland will amend its constitution near the end of 1996, and the Irish Parliament will enact a formal divorce bill alongside the amendment.[5]

Ireland's new divorce laws "will be the most conservative in Europe."[6] The Fifteenth Amendment to the Irish Constitution will do more than simply remove the constitutional ban on divorce: it will provide "the actual ground rules for divorce in Ireland."[7] Specifically, before granting a divorce, an

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1. Mary Robinson, *Constitutional Shifts in Europe and the United States: Learning from Each Other*, 32 STAN. J. INT'L L. 1, 5 (1996). Mary Robinson is the President of the Republic of Ireland.

2. Christine M. Goldbeck, *"For Better or for Worse" No More*, AN SCATHAN (Dec. 1995) <http://www.underbridge.com/anscathan/issues/decemb~1/divorce.htm>. Article 41.3.2 of the Irish Constitution states, "No law shall be enacted providing for the grant of a dissolution of marriage." IR. CONST. art. 41.3.2.

3. Golbeck, *supra* note 2. The vote was so close that an unprecedented recount was ordered. The "Yes" vote in favor of dropping the divorce ban had won by 7520 votes. After the recount, the margin increased to 9163 votes. *Court Challenge to Vote for Divorce*, NEWS OF IRELAND (visited Sept. 25, 1996) <http://www.iol.ie/resource/ip/noi/ nov29-95/divorce.htm>.

4. Goldbeck, *supra* note 2.

5. *Id.* The presentation of the divorce referendum to the Irish electorate in November 1995 represented the first time in the history of the Republic that "a full draft [b]ill was published alongside the wording of a constitutional amendment." Maol M. Tynan, *First Divorces Expected Late Next Year*, THE IRISH TIMES, June 20, 1996, at 6.

6. Goldbeck, *supra* note 2.

7. Anna Margaret McDonough, *When Irish Eyes Aren't Smiling—Legalizing Divorce in Ireland*, 14 DICK. J. INT'L L. 647, 656 (1996).

Irish court will have to be satisfied that at the time proceedings are initiated the spouses have lived apart for at least four of the previous five years, and that there is no reasonable prospect of reconciliation.[8] The Amendment also will require that proper provisions be made for the spouses and their children.[9] Furthermore, the Amendment will permit additional conditions as set out by law.[10] Such additional conditions will be set forth in the Family Law (Divorce) Bill, which will address "various aspects of divorce in Ireland."[11] On June 27, 1996, the Bill passed its second stage in Ireland's House of Representatives (the "Dail"[12]) after a day of debates.[13] The following month the Bill passed through the Dail's committee stage, in which

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8. Geraldine Kennedy, *Spring Hopes for Substantial Majority in Poll*, THE IRISH TIMES, Sept. 14, 1995, at 6. According to Ireland's Minister for Equality and Law Reform, Mervyn Taylor, there will be "no quickie divorce" under the Fifteenth Amendment, nor will there be a "divorce culture," as there has been in foreign jurisdictions where the waiting periods for divorce are much shorter. *Id.*

9. *Id.*

10. *Id.* The Fifteenth Amendment of the Constitution Act, 1995, provides as follows:

> A court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that—
>
> i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period or periods amounting to, at least four years during the previous five
>
> ii. there is no reasonable prospect of reconciliation between the spouses
>
> iii. such provisions as the court considers proper having regard to the circumstances exist or will be made for the spouses, and children of both of them and any other person proscribed [sic] by law
>
> iv. any further conditions proscribed [sic] by law are complied with.

McDonough, *supra* note 7, at 656 n.60 (quoting Fifteenth Amendment of the Constitution Act (1995) (Ir.)).

11. McDonough, *supra* note 7, at 656. The Bill, for example, will prescribe conditions on a court's jurisdiction in divorce proceedings. Kennedy, *supra* note 8, at 6. In general, the Family Law (Divorce) Bill, 1995, consists of the following parts:

> Part I. Planning and General
>
> Part II. The Obtaining of a Decree of Divorce
>
> Part III. Preliminary and Ancillary Orders in or After the Proceedings for a divorce [sic]
>
> Part IV. Income Tax, Capital Acquisition Tax, Capital Gains Tax, Probate Tax, and Stamp Duty

McDonough, *supra* note 7, at 656 n.61.

12. The Irish Parliament is called the "Oireachtas" and consists of two houses, the Senate (*Seanad Eireann*) and the House of Representatives (*Dail Eireann*). *Ireland* (visited Sept. 26, 1996) <http://www.odci.gov/cia/publications/95fact/ei.html>.

13. *Divorce Bill Passes Second Stage*, THE IRISH TIMES, June 28, 1996, at 11.

it was amended.[14] In October 1996, debate on the Bill was opened in Ireland's Senate (the "Seanad"), where it awaits passage.[15] "The first [divorce] applications can be made three months after the Bill is signed into law," and the first divorce settlements are likely to be decreed by the end of 1997.[16]

Although Ireland is just now making divorce available to its citizens, the ability to divorce one's spouse has existed in the United States since the colonial period.[17] From before the Revolutionary War through the first half of the twentieth century, the grounds for obtaining a divorce in the various states were fairly limited, with all states requiring a showing of some form of marital offense on the part of one of the spouses.[18] The typical statutes authorized divorce for adultery, desertion, and sometimes cruelty and other offenses.[19] After World War II, however, in response to the nation's growing dissatisfaction with the existing "fault-based" divorce laws, courts in some states began to relax the statutory requirements for divorce.[20] By 1969, California had enacted a statute allowing divorce without a showing of marital fault.[21] Other states soon followed its lead, sparking a widespread liberalization of divorce laws in the United States.[22] Although American divorce laws are statutory and vary from state to state, most states today have adopted some type of "no-fault" divorce law, in which the "irretrievable breakdown" of a marriage or "irreconcilable differences" between spouses

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14. Dermot Kelly, *TDs Told VAT on Divorce Fees Cannot Be Waived*, THE IRISH TIMES, July 18, 1996, at 2. Various amendments to the Divorce Bill were proposed and voted on during the committee stage in the Dail. One proposed amendment, for example, "sought to require spouses to show that they had attempted reconciliation and to produce a certificate to [that] effect before a court [would grant] a divorce decree." Dermot Kelly, *'Grey Area' Surrounds Marriages—Shatter*, THE IRISH TIMES, July 17, 1996, at 5 [hereinafter *Grey Area*]. Because the Bill envisaged that counseling would be entered into on a voluntary basis, and because the amendment would add another layer of bureaucracy to divorce proceedings, the amendment was defeated by an eleven-to-nine vote. *Id.*

15. *Counseling Urgently Needed in Cases of Marital Breakdown—Neville*, THE IRISH TIMES, Oct. 11, 1996, at 6.

16. Tynan, *supra* note 5.

17. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 11, at 283 (1968).

18. *Id.*

19. *Id.*

20. Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing With Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 77 (1993). After World War II, fault-based divorce laws increasingly were viewed as "annoying anachronisms" that frequently prevented divorce even when both spouses wanted one. *Id.*

21. *Id.*

22. *Id.*

serves as either the sole or one of several grounds for dissolving a marriage.[23]

As divorce has become easier to obtain, divorce rates in the United States have skyrocketed, and a "divorce revolution" has ensued.[24] Today, two people exchanging vows for the first time have only a fifty-fifty chance of staying married.[25] If either of them has been married previously, the odds for divorce increase.[26] Furthermore, although no-fault divorce laws were designed in part to encourage the equitable division of marital property upon divorce,[27] such laws frequently have had adverse economic consequences for financially dependent spouses, most of whom are women.[28] Where courts have taken a no-fault approach to asset distribution and spousal support payments, the results have been especially inequitable. First, although no-fault laws seek to effect a "clean break" between spouses by encouraging a one-time division of marital property, in many cases an award of a portion (usually half) of the marital property often does not offset the future hardships associated with low income potential for women or other "displaced homemakers."[29] Second, no-fault laws are based on the theory that any maintenance, or alimony, awarded should be temporary and only for

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23. IRA M. ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 177 (2d ed. 1991).

24. Thomas M. Mulroy, *No-Fault Divorce: Are Women Losing the Battle?*, 75-NOV. A.B.A. J. 76, 76 (1989). "Except for a brief period after World War II, the divorce rate in the United States increased only gradually from 1860 to the early 1960's." LENORE J. WEITZMAN, THE DIVORCE REVOLUTION xvii n.* (1985). Then, "[i]n the twelve years between 1963 and 1975 the divorce rate increased 100 percent, and in each successive year until 1981 the divorce rate surpassed all previous records for this country. The actual number of annual divorces climbed to a record high of 1.21 million in 1981." *Id.*

25. Mulroy, *supra* note 24, at 76.

26. *Id.*

27. The elimination of both allegations of misconduct and "wrangling about guilt" from divorce proceedings was a principal aim of the no-fault laws. Such an aim "found expression not only in the substitution of the objective ground of breakdown for the former misconduct grounds, but also in . . . the elimination of guilt as a determinant in the decision about property settlement, alimony, and child custody." MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW 379 (1972).

28. Most of the dependent spouses in American marriages are women, because more women than men have stayed out of the labor force. The Bureau of Labor Statistics reported that in 1991, a total of 41.8 million women stayed out of the work force for various reasons. Approximately 22.7 million of them did not want jobs because they were "keeping house." Another 1.2 million wanted jobs but did not look for them due to home responsibilities. By contrast, only 415,000 men stayed out of the work force to "keep house," and only a "small number" did not look for work because of home responsibilities. Starnes, *supra* note 20, at 69 n.3 (citing BUREAU OF LABOR STATISTICS, UNITED STATES DEPT. OF LABOR, 39 EMPLOYMENT AND EARNINGS No. 1, at 204, Table 35 (1992)).

29. *Id.* at 85. "A displaced homemaker is [usually] a woman whose principal job has been homemaking and who has lost her main source of income because of divorce, separation, widowhood, [etc.] . . . . If she is employed at all, she works part-time or part of the year." *Id.* at 79 n.46.

the purpose of enabling a disadvantaged spouse to obtain suitable employment.[30] Such a theory of "rehabilitative" maintenance has proven to be overly optimistic about the opportunities available to dependent spouses, because it overlooks the reality of gender-based divisions of labor within the home and the costs of those divisions to dependent spouses who must enter the work force.[31]

These adverse consequences of American no-fault laws have not gone unnoticed in Ireland. In Ireland, divorce opponents and supporters alike have recognized the risks that attend liberal divorce policies like those in place in the United States and other Western nations. Aware of the economic consequences of "easy" divorce and seeking to avoid a "divorce revolution" in their own country, Irish lawmakers have adopted a rather conservative approach in formulating the nation's new divorce legislation. Although the form of divorce proposed in Ireland is not fault-based, it is relatively restrictive in its other conditions.[32] By American standards, Ireland's imposition of a four-year-separation requirement seems especially limiting, "given that most states in the U.S. either prohibit judicial discretion to deny a divorce, or, in the case of a contested unilateral no-fault divorce, require a period of one year or less of separation."[33] While Irish legislators understandably have tried to avoid some of the problems reported in the United States and other countries where divorce is readily available, the conservative approach these lawmakers have taken may prevent divorce from becoming a workable option for ending broken marriages in Ireland. If certain court reforms are not put into place by the end of 1996, when the proposed legislation is expected to become effective, couples could "experience delays of two to three years in obtaining divorce decrees following the commencement of divorce proceedings."[34]

Ireland thus faces the challenge of striking a balance between making divorce a viable option for ending a marriage and enacting a divorce law that does not produce the economic inequities that are common in the United States and other liberal no-fault jurisdictions. As Ireland tackles this challenge, it should not hesitate to look to the United States as a model of both what to do and what not to do in the area of divorce law. Because

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30. *Id.* at 85.

31. *Id.* at 97, 105.

32. MICHELE DILLON, DEBATING DIVORCE: MORAL CONFLICT IN IRELAND 1 (1993).

33. *Id.* By European standards, however, Ireland's four-year separation requirement appears less strict. "With the exception of Sweden and the Netherlands, which come closest to granting divorce on demand, other European societies take a much stricter view of marriage and its dissolution than does the United States. *Id.* at 1-2. For example, in the case of unilateral divorces, France requires a six-year separation. Additionally, France's dissolution statute has a "hardship" clause which permits a court to dismiss a divorce petition if divorce would cause excessive hardship to one or both of the parties. *Id.* at 176 n.2.

34. Tynan, *supra* note 5, at 6 (quoting Alan Shatter).

support for divorce itself is far from overwhelming in Ireland, and because of a strong tide of conservatism running through Irish society, Irish lawmakers may rightly regard the American no-fault laws as being too liberal for their nation. Furthermore, conservative and liberal nations alike should seek to avoid the economic hardships that accompany the no-fault approach to property distribution and spousal support payments. Nevertheless, Ireland should remember that despite the many defects of American divorce law, such law has served as a workable option for ending broken marriages by not being too restrictive in its requirements.

This note considers both the recent referendum to legalize divorce in Ireland and the history and consequences of the divorce revolution in the United States. Part I begins by examining key legislation enacted by the Irish legislature between 1986, when voters rejected divorce in a similar referendum, and 1995, when a narrow majority voted in favor of divorce. This section then considers the lack of unified support for divorce in Ireland, insofar as it reflects an underlying societal conflict between the desire to guarantee individual rights and the need to protect the common good. Part II draws a parallel between Ireland's difficulty in reconciling its Catholic values with the more secular views of the European Union and the sociopolitical tensions surrounding federalism in the United States. After a discussion of the sociopolitical conflicts that are common to both nations, the section suggests that the United States may serve as a useful model to Ireland, as the latter struggles both to find its place in the modern world and to adopt divorce laws compatible with its own social values. Next, Part III explores both the history and aftermath of the divorce revolution in the United States while focusing on the adverse consequences of the no-fault approach to property distribution and maintenance. The focus then shifts back to Ireland, as Part IV begins by pointing to Ireland's awareness of the economic consequences of liberal divorce laws. This section then suggests that in order to make divorce a real option for ending broken marriages, Ireland should preserve the opportunity to alter its divorce laws in the future by not writing them into the constitution. Furthermore, in order to protect the economic interests of women, Ireland should adopt legislation that allows a no-fault *ground* for divorce while permitting considerations of fault to affect property distribution and maintenance awards. Finally, Part V concludes with some concerns about both the possible ramifications of legalized divorce in Ireland and the existing social schism which the result of the referendum has highlighted.

I. THE CONFLICT BEHIND THE REFERENDUM: INDIVIDUAL RIGHTS V. THE COMMON GOOD

A. *The Road to the Referendum: Changes in Irish Family Law from 1986 to 1995*

The first attempt to amend the Irish Constitution to allow divorce occurred in 1986,[35] when a legislative coalition, led by the Fine Gael political party, introduced a proposal to eliminate the prohibition on divorce contained in Article 41.[36] After the government announced that its proposal would be presented to the Irish electorate in a national referendum, a national opinion poll indicated that sixty-one percent of Irish voters intended to vote in favor of the amendment.[37] As the referendum approached, however, later polls revealed that the level of support for the introduction of divorce was dropping. After nine weeks of intense campaigning by both pro- and anti-divorce factions, voters rejected the referendum by nearly two to one.[38] Although some supporters of the referendum blamed the reversal of public opinion on the Catholic hierarchy, which allegedly had used "scare tactics" to pressure citizens to vote against the referendum,[39] others attributed

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35. Although the government did not introduce a formal proposal to allow divorce until 1986, prior to that time surveys had been conducted to measure the public's attitude toward the removal of the divorce ban. In 1971, when opinion polls first posed the question, 21% of those surveyed were in favor of removing the ban. The number in favor of divorce reached a "peak of 53 percent in 1983, with 77 percent expressing support for the introduction of divorce in certain circumstances." DILLON, *supra* note 32, at 2.

36. Carol Coulter, *Ten Year [sic] Wait is Finally Over for Those Who Campaigned for Divorce*, THE IRISH TIMES, June 13, 1996, at 7. The amendment proposed in 1986 contained essentially the same provisions as those appearing in the Fifteenth Amendment of the Constitution Act, 1995. (See *supra* note 10 for text of the 1995 amendment.) However, the 1986 amendment required a five-year, rather than a four-year, separation period. DILLON, *supra* note 32, at 1.

37. DILLON, *supra* note 32, at 2.

38. *Id.*

39. McDonough, *supra* note 7, at 651-52. Although the hierarchy had issued a collective statement recognizing the right of Catholics to vote in good conscience in favor of divorce, several bishops individually offered their own guidance on how Catholics should vote. For example, Bishop Dominic Conway of the Elphin diocese warned people not to interpret the hierarchy's statement "too loosely." He cautioned that Catholics could not vote as they wished, but because they faced a "serious conscientious decision," they had to vote "in accordance with the law of God." DILLON, *supra* note 32, at 97 (quoting Bishop Conway). Such warnings and "scare tactics" by the clergy resurfaced prior to the 1995 referendum. One senior bishop claimed that divorcees were more likely to die from smoking or alcoholism and were more apt to commit suicide. John M. Brown, *Ireland Readies for Battle on Divorce*, FIN. TIMES, Sept. 2, 1995, at 2. Another bishop predicted that if the referendum passed, there would be a right-wing backlash "akin to the fanaticism of the Michigan Militia in the U.S." *Id.*

the result to the amendment's silence on the issue of property distribution.[40]

Whatever the reason for the referendum's defeat, the government soon began introducing legislation designed to reform existing marriage laws, the defects of which had been highlighted during the campaign.[41] In the nine years between the defeat of the 1986 referendum and the approval of the 1995 referendum, the Irish parliament passed several key pieces of legislation addressing both property distribution and foreign divorce recognition.[42] During the campaign before the 1995 referendum, divorce supporters, in their attempts to persuade citizens that Irish society was ready for change, often referred to the passage of such legislation. Even the President of Ireland, Mary Robinson, recognized the importance of those reforms: "What has happened since the issue (of divorce) was last before the people is a whole structure of reform of our marriage law, of various protections, of access to court remedies—a very thoughtful infrastructure has been developed."[43]

It is worth noting, however, that even before the legislature enacted such reforms, Ireland did provide some limited remedies for the problem of marital breakdown. For example, although the Irish Constitution prohibited divorce *a vinculo matrimonii*,[44] which effects a complete dissolution of the marriage contract, a court could issue a decree of a divorce *a menso et thoro*,[45] which results in a separation of the parties by law.[46] A court could grant such a decree only on three bases: cruelty, adultery, or unnatural practices.[47] If one of the parties could establish any of these wrongdoings on the part of the other spouse, the court then had the power both to determine a husband's liability to pay alimony to his wife, and to declare the "guilty"

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40. McDonough, *supra* note 7, at 652.

41. Coulter, *supra* note 36, at 7.

42. McDonough, *supra* note 7, at 652.

43. Department of Pol. Sci., Trinity College Dublin, *The Irish Divorce Referendum 1995*, at 2-3 (1995) <http://www.bess.tcd.ie/polsdept/divorce.htm> (quoting Mary Robinson).

44. *A vinculo matrimonii* is a Latin phrase meaning "[f]rom the bond of matrimony." BLACK'S LAW DICTIONARY 136 (6th ed. 1990).

45. *A mensa et thoro* is a Latin phrase commonly translated to mean "from bed and board." *Id.* at 81.

46. ALAN J. SHATTER, SHATTER'S FAMILY LAW IN THE REPUBLIC OF IRELAND 217 (3d ed. 1986). The remedy of divorce *a mensa et thoro* is misleadingly named "in that it does not amount to a divorce in the popular meaning of the term but only to a judicial separation of the spouses." *Id.* The courts' authority to grant a decree of divorce *a mensa et thoro* derives from two pieces of legislation. Under Section 13 of the Matrimonial Causes Act, 1870, the High Court inherited jurisdiction over such decrees from the Ecclesiastical Courts. The Courts Act, 1981, conferred a concurrent jurisdiction on the Circuit Court to determine these judicial separation proceedings. *Id.*

47. McDonough, *supra* note 7, at 649.

spouse unfit to have custody of any children of the marriage.[48] In addition to granting decrees of divorce *a mensa et thoro*, the Irish courts recognized foreign divorces in certain circumstances.[49] Before they would recognize a foreign divorce, Irish courts required both parties, at the time proceedings were initiated, to have been domiciled in the jurisdiction granting the divorce.[50] Such a requirement was sexist in its application, however, because the Irish common law considered a wife's domicile to be that of her husband.[51] "[T]hus a husband could leave his wife in Ireland, move to England, and obtain a divorce which would be recognized as valid in Ireland. The husband would then be free to marry again."[52] A wife, however, could not do the same, because her domicile would remain that of the husband she left behind in Ireland.[53]

Because the 1986 referendum highlighted these and other shortcomings of the courts' efforts to address marital breakdown, the Irish legislature sought to broaden and improve the remedies already existing. The legislature's first reform effort was to pass the Domicile and Recognition of Foreign Divorces Act of 1986, which replaced the common-domicile requirement with a policy requiring courts to recognize a foreign divorce if either spouse were domiciled in the foreign jurisdiction.[54] The Act further abolished the common law rule that a wife's domicile depended upon her husband's.[55] Although such measures would be expected to expand divorce recognition in Ireland, other provisions of the Act, along with the actual judicial implementation of the Act, prevented such broadened recognition from occurring. First, the Act itself limited the jurisdictions from which the courts had authority to recognize divorces.[56] Second, "[t]he courts place[d] a heavy burden on [those] seeking foreign divorce recognition" by requiring that a party, in order to establish a new domicile, show an intention to abandon a previous domicile, along with an intent to live indefinitely in the

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48. SHATTER, *supra* note 46, at 227.

49. Article 41.3.3 of the Irish Constitution addresses Irish recognition of foreign divorces:

> No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

IR. CONST. art. 41.3.3.

50. SHATTER, *supra* note 46, at 255.

51. McDonough, *supra* note 7, at 650.

52. *Id.*

53. *Id.*

54. *Id.* at 652.

55. *Id.*

56. *Id.* The Act allowed courts to recognize divorces obtained in England, Wales, Northern Ireland, the Isle of Man, and the Channel Islands. *Id.* at 652 n.35.

foreign state.[57] Irish courts did not recognize foreign divorces when there was a failure to meet the domicile requirement.[58] Thus, because of the courts' "narrow interpretation of domicile," many people who relied on foreign divorces and subsequently remarried had their second marriages declared invalid in Ireland.[59]

After reforming the law with respect to the recognition of foreign divorces, the legislature adopted the substance of a bill proposed by Alan Shatter of the Fine Gael party.[60] Designed to "streamline[] the proceedings for judicial separation,"[61] the Judicial Separation and Family Reform Act of 1989 established six grounds for granting divorce *a mensa et thoro*.[62] The Act provided for a no-fault basis for judicial separation, along with other grounds based on a marital offense.[63] The legislation also allowed all other matters, such as maintenance and custody, to be determined at the same time a decree was granted.[64]

Although the Act provided a number of grounds for separation, the granting of a decree was not guaranteed upon application. The passage of the Act increased the number of applications for judicial separation without significantly affecting the acceptance rate; for example, couples filed 2718

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57. *Id.* at 653.

58. *Id.*

59. *Id.*

60. Coulter, *supra* note 36, at 7.

61. *Id.*

62. McDonough, *supra* note 7, at 653. The Judicial Separation and Family Law Reform Act provides that:

> An application for a decree of separation may be made if:
>
> (1) the Respondent has committed adultery;
>
> (2) the Respondent has behaved in such a way that the Applicant cannot reasonably be expected to live with Respondent;
>
> (3) there has been desertion by the Respondent of the Applicant for a continuous period of at least one year immediately preceding the date of application;
>
> (4) the spouses have lived apart for a continuous period of at least one year immediately preceding the date of application and that the Respondent consents to a decree being granted;
>
> (5) the spouses have lived apart for a continuous period of at least three years preceding the date of application; or
>
> (6) the marriage has broken down to the extent that the Court is satisfied in all circumstances that a normal marital relationship has not existed between the spouses for a period of at least one year immediately preceding the date of the application.

Id. at 653 n.44 (quoting JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT § 2(1) (1989)).

63. Coulter, *supra* note 36, at 7.

64. *Id.*

petitions in 1992, but only 1015 were granted.[65] Furthermore, even when a court did grant a decree, such decree did not dissolve the marriage, and the parties thus were prohibited from remarrying.[66]

Perhaps the most disturbing aspect of the Act, however, was the uninhibited discretion that it permitted the judiciary. The Act provided no clear standards for judges to use in determining whether an applicant had satisfied one of the six grounds for separation.[67] For example, in the case of *V.S. v. R.S.*, the court considered what constituted behavior with which one could not "reasonably be expected to live."[68] The judge in that case found that although the defendant-husband had physically abused the plaintiff-wife, the plaintiff had failed to show that the defendant had behaved in such a way that she could not reasonably be expected to live with him.[69] Nevertheless, the judge did grant a decree of judicial separation, on the ground that a normal marital relationship had not existed.[70] The judge based this determination partly on the fact that the couple no longer had sexual relations.[71] Thus, a lack of sexual activity within a marriage justified separation, while physical abuse did not.[72] With physical abuse not constituting a ground for separation, the usefulness of the Act seemed questionable. Because the Act gave vast discretion to judges, the results of individual cases were "inconsistent and at times appear[ed] entirely arbitrary."[73]

The new laws addressing foreign divorces and judicial separation represented attempts by the legislature to expand the available remedies for marital breakdown. Although the new legislation failed to bring about significant improvements in Irish marriage law, it nonetheless opened the door for future reform. The changes in the law that occurred after 1986 formed the basis for the constitutional amendment that was approved in the 1995 referendum.[74]

B. *A Nation Divided*

Although there will no longer be an outright ban on divorce once the Fifteenth Amendment and the Divorce Bill become part of Ireland's laws, the

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65. McDonough, *supra* note 7, at 654.
66. *Id.* at 653-54.
67. *Id.* at 655.
68. *Id.* (citing V.S. v. R.S., 1990 48 CA (Transcript) (Ir. H. Ct. 1990)).
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. Coulter, *supra* note 36, at 7.

1995 referendum result in no way signifies the instant liberalization of a society long characterized by its conservatism and its strict adherence to the traditions of the Roman Catholic Church.[75] Although the approval of the referendum undoubtedly represents a shift in public opinion since the referendum of 1986, it is by no means evidence of a nation unified in its support for divorce. Indeed, the fact that the 1995 referendum passed by only a 0.6% majority suggests that Ireland is a nation "divided between those who wish to cling to [the] traditional Catholic Ireland, and those who wish to join the modern trend by focusing upon the rights of the individual."[76] Furthermore, no bright line seems to separate the two groups. Even those who have advocated change have not urged radical reforms. For example, during the debate over the referendum, Bertie Ahern, the leader of the Fianna Fail political party, prophetically claimed that "a referendum allowing remarriage will only gain the necessary support if Irish people are

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75. Ireland's Catholic identity is rooted in the nation's history. Catholicism arrived on the island with the British missionary, Patrick, in the fifth century. DILLON, *supra* note 32, at 11. Centuries later, in the face of the Protestant Reformation in Europe, Ireland remained loyal to Catholicism, while England became Protestant. *Id.* at 12. When England began colonizing Ireland in the sixteenth century, Ireland struggled to maintain an independent identity. *Id.* Throughout the next four centuries of colonial domination, the Irish "appropriated Catholicism as a symbolic force against British Protestant oppression." *Id.* at 14. Ireland's Catholic tradition continued even after the nation achieved independence in 1922, and today Catholicism still "acts as a central cohesive force for the Irish, providing them with a sense of community and unity." *Id.* at 14, 20. Today 93% of Irish citizens are Catholic. *Ireland, supra* note 12.

76. McDonough, *supra* note 7, at 672. The referendum's narrow victory led Des Hanafin, an anti-divorce leader and former senator, to bring a court case challenging the referendum result on the grounds that the government wrongly spent public funds in its efforts to secure a "Yes" vote. *Hanafin Can Appeal to Supreme Court*, THE IRISH TIMES, Mar. 2, 1996, at 4. When, prior to the referendum, the government had allocated £500,000 for an "information" campaign which advocated a "Yes" vote, Patricia McKenna challenged the expenditure and won. A week before the vote, the Supreme Court of Ireland held that the expenditure of public funds in seeking a particular result to a referendum was unconstitutional, and it ordered the government to cancel the remainder of its advertising campaign. When the vote was returned in favor of divorce, however, Hanafin claimed that the unconstitutional expenditure had interfered with the conduct of the referendum, contrary to the Referendum Act of 1924, and had influenced the outcome. After the High Court found against him on both counts, Hanafin appealed to the Supreme Court. Although the Supreme Court found that the government's expenditure did indeed interfere with the referendum, the Court concluded that Hanafin had failed to prove that such interference had *materially* affected the outcome of the vote. Coulter, *supra* note 36, at 7.

Hanafin and McKenna have not been the only ones to challenge the way in which the referendum was conducted. In October 1996, *The Irish Times* reported that Fionnuala Sherwin, a worker on the "No" campaign during the referendum, had brought an action against the government challenging the constitutionality of the monitoring of votes in referenda. Unlike Hanafin's suit, though, Sherwin's suit has not challenged the outcome of the referendum. *Vote Monitoring Challenged*, THE IRISH TIMES, Oct. 15, 1996, at 4.

satisfied about the safeguards [that the amendment would provide]."[77] He also stated the position of his party that "[t]he right to remarriage should never be an easy option."[78] Similarly, Des O'Malley, former leader of the Progressive Democrats, warned that the proposed amendment would directly conflict with provisions of the Irish Constitution guaranteeing protection for the family.[79] During the Divorce Bill's committee stage in the Dail, Eamon O'Cuiv of Fianna Fail suggested that the referendum proposal put before the people in November 1995 had envisaged "divorce as a last resort."[80] He further expressed his concern that the Bill which was taking shape was dismantling that proposal.[81] Even the executive branch took a cautious stance: Prime Minister John Bruton urged lawmakers to reflect on why so many citizens voted against the referendum.[82]

Because a conservative approach is being taken in the formulation of the new divorce law, it is far from certain that divorce will become a workable option for ending a broken marriage in Ireland. Despite the vein of conservatism running through the discourse on divorce, Irish legislators nevertheless seem to appreciate the suffering endured by the 75,000 individuals who are trapped in broken marriages in Ireland.[83] According to the Minister for Equality and Law Reform, Mervyn Taylor, the Divorce Bill is meant to address the welfare of those citizens whose lives have been devastated by marital breakdown, but who have remained married in "the insistent eye of the law."[84] Similarly, Alan Shatter of the Fine Gael party has expressed hope that the Bill will offer the promise of a better future to the thousands of people whose marriages had in reality ended years ago.[85] Furthermore, legislators see the right to divorce and remarry as a solution to the growing problem of illegitimacy which has resulted from the government's refusal to recognize relationships formed after the breakdown of a marriage. More than one-fifth of Irish children are now born out of

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77. Mary Cummins, *Ahern Calls for Separation Period of at Least Five Years Before Divorce*, THE IRISH TIMES, May 15, 1995, at 4 (quoting Bertie Ahern).

78. *Id.* (quoting Bertie Ahern).

79. Dermot Kelly & Michael O'Regan, *O'Malley Warns Proposed Amendment Could Be Contested and Lead to Situation of No Divorce*, THE IRISH TIMES, Sept. 29, 1995, at 6. Article 41.1.1 of the Irish Constitution provides: "The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." IR. CONST. art. 41.1.1. Article 41.1.2 states: "The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State." IR. CONST. art. 41.1.2.

80. *Grey Area, supra* note 14, at 5.

81. *Id.*

82. McDonough, *supra* note 7, at 672.

83. Kennedy, *supra* note 8, at 6.

84. *Divorce Bill Passes Second Stage, supra* note 13, at 11 (quoting Mervyn Taylor).

85. Tynan, *supra* note 5, at 6.

wedlock.[86] Because many lawmakers believe that the illegitimacy of the new family negatively impacts both the parents and the children of subsequent unions, the real thrust of Fifteenth Amendment is arguably to legalize remarriage.[87]

Accompanying the legislators' sensitivity to the reality of marital breakdown in Ireland,[88] is an awareness of the need for the State to provide support systems, along with legislation, to ensure that divorce will actually be available to those couples whose suffering the State seeks to alleviate. Dr. Michael Woods, Fianna Fail's spokesman on equality and law reform, has indicated that his party will insist on the establishment of an "action programme that must go hand in hand with the Bill" to provide counseling and mediation services and to ensure the expansion of the Family Court system.[89] Alan Shatter also has warned that, in conjunction with the Divorce Bill's enactment, significant reform of the court structure will be required to enable the system to cope with the anticipated demand for divorce, so that divorces can be obtained within a reasonable period.[90] Currently, courts take eighteen months just to decide separation cases.[91] According to Shatter, if the needed court reforms are not put into place, "couples may experience delays of two to three years in obtaining divorce decrees following the commencement of divorce proceedings."[92] Helen Keogh, spokeswoman on equality and law reform for the Progressive Democrats, has acknowledged that once divorce is formally introduced in Ireland, "[the legislature] must ensure that the reality of marriage breakdown is dealt with in a caring, professional and effective manner."[93]

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86. Brown, *supra* note 39, at 2.

87. *Id.*

88. According to Mervyn Taylor, "No right to remarry has not meant no [marital] breakdown" in Ireland. Kennedy, *supra* note 8, at 6 (quoting Mervyn Taylor). At the time of the referendum, "there was approximately one application for judicial separation for every six marriages." *Id.* Furthermore, the incidence of marriage itself has decreased. In 1986, there were 18,573 marriages. *Divorce Bill Passes Second Stage, supra* note 13, at 11. By 1994, the number had decreased to 16,297, with 2806 applications for judicial separation in the same period. Brown, *supra* note 39, at 2.

89. Tynan, *supra* note 5, at 6 (quoting Dr. Michael Woods).

90. *Id.*

91. *Id.*

92. *Id.* (quoting Alan Shatter). The delay of two to three years would be in addition to the four years of separation required before divorce proceedings can even be initiated. Thus, from the time that marital breakdown occurs, a couple may have to wait up to seven years to get a divorce.

93. *Id.* (quoting Helen Keogh).

C. *The New Discourse on Rights*

Ireland faces the challenge of striking a balance between making divorce a viable option for ending a marriage and establishing a divorce law that does not depart too radically from the conservative referendum supported by a narrow majority of voters.[94] As conservatives struggle to protect the family as the "fundamental unit group of Society,"[95] and modernists fight for changes in the law for the welfare of individuals trapped in bad marriages, the effects of these competing values on Irish society remain to be seen.[96] What is clear, however, is that the challenge that Ireland faces with regard to the divorce issue stems from a basic societal conflict that is not unique to Ireland alone. Every democratic society faces the challenge of protecting individual rights and, at the same time, safeguarding the common good.[97] In Ireland, supporters of divorce have argued that individuals who have endured miserable marriages ought to be given a chance to make a fresh start.[98] Those opposed to divorce have focused on the negative consequences that divorce can have on both families and society as a whole.[99] The two viewpoints "represent an inherent societal conflict: to what extent may one retain individual freedoms without creating a non-functioning individualistic society?"[100]

Traditionally, the Catholic Church in Ireland has taught not only that divorce is morally wrong,[101] but also that a society which exalts individual

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94. The Divorce Bill introduced in the Dail in June 1996 was almost identical to the legislation announced before the referendum in November 1995. Changes to the Bill from the legislation published before the referendum were of a technical nature. Those changes related to pension adjustment orders, the pursuit of spouses who fail to honor maintenance orders, and certain provisions of the Family Law Act. *Id.* It remains to be seen what additional changes to the law will occur after the Bill passes through the Seanad.

95. IR. CONST. art. 41.1.1.

96. Some citizens view the results of the referendum as "Ireland's wake-up call to join the rest of the modern world." McDonough, *supra* note 7, at 647. Yet for others, joining the modern world "means sharing in its misfortunes." *Id.* To Irish conservatives, becoming a modern nation will cost "far more than they believe Irish society ought to pay." *Id.* at 648.

97. The Preamble to the Irish Constitution sets out the dual goals of promoting the common welfare and ensuring individual rights. The language employed suggests that individual rights are made possible through the protection of the common good. For instance, the Preamble states that in adopting the Constitution, the "people of Éire [Ireland]" sought "to promote the common good . . . so that the dignity and freedom of the individual may be assured." IR. CONST. preamble.

98. McDonough, *supra* note 7, at 661-62.

99. *Id.* at 662.

100. *Id.*

101. The Catholic Church maintains that marriage is "permanent and indissoluble." *Id.* at 650-51. In 1985, the Irish hierarchy issued a definitive pastoral letter on marriage and the family, entitled *Love Is for Life*. DILLON, *supra* note 32, at 95. That letter in part stated, "the compassion of Jesus cannot be invoked as a reason for departing from his teaching on divorce

rights at the expense of the common good will suffer.[102] Members of the Irish hierarchy have warned that the "cult of excessive individualism," which puts the individual man or woman at the center of things, interferes with the establishment of a community in the "true sense."[103] Largely because of the influence of the Catholic Church, the Irish people lack even the basic vocabulary that would allow a discourse on individual rights.[104] Thus, unlike in the United States "where it is commonplace for people to freely use a language that talks about their individual rights, the use of a 'rights' discourse in Irish society is uncommon."[105] The passage of the divorce referendum, however, has ushered in some discussion of individual rights. For example, in urging Catholics to adopt a more compassionate view of divorce, the Reverend John Marsden of the Church of Ireland Theological College declared that "all the Christian churches still have much to learn from liberalism's regard for the human individual."[106] According to Marsden, the individual rights tradition serves as "an important counterweight to too great a reliance on arguments based on conceptions of the common good."[107] Claiming that concern for the human individual should be a central tenet of Christian ethics, Marsden has criticized the Catholic bishops' pre-referendum statement praising abandoned spouses who had given "an authentic witness of fidelity" by not entering a new relationship.[108] To Marsden, asking people to stay in bad marriages places additional burdens on those who are already victims.[109]

II. THE UNITED STATES AS A NATURAL MODEL

Accompanying the recent discussion of individual rights in Ireland has been the recognition that the country in fact no longer stands alone in rugged isolation from the rest of the world.[110] Since becoming a member of the

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. . . . The bond uniting married couples is a sacramental bond, coming from God alone . . . no human authority, no State or civil court can put this bond asunder." *Id.* at 98.

102. McDonough, *supra* note 7, at 666.

103. *Id.* (quoting Christine Newman, *Cult of Excessive Individualism Leads to False Idea of Freedom*, THE IRISH TIMES, Oct. 3, 1995, at 4 (referring to Bishop Lee's homily on the then upcoming referendum)).

104. DILLON, *supra* note 32, at 15.

105. *Id.*

106. Andy Pollak, *Compassionate View of Divorce Urged*, THE IRISH TIMES, Sept. 4, 1996 (quoting the Reverend John Marsden).

107. *Id.* (quoting the Reverend John Marsden).

108. *Id.* (quoting the Catholic bishops' pre-referendum statement).

109. *Id.*

110. Historically, the Irish people have valued and protected their isolation from the rest of the modern world. After winning independence from Britain in 1922, Ireland embarked on a "project of establishing a truly sovereign country that was independent not just politically but economically and culturally." DILLON, *supra* note 32, at 21. Thus, while other Western

European Economic Community (now the European Union) in 1973,[111] Ireland has become increasingly connected to the rest of the Western world. As Ireland has established its place in the European family, it has re-experienced, this time in a global context, the familiar conflict between individual rights and the common good. In the context of the European Union, the conflict involves the rights of the member states to retain their sovereignty versus the need for international laws and standards designed for the good of the Union. In becoming part of the Union, the member states must necessarily surrender certain national rights. In 1963, the European Court of Justice[112] declared the European Union to be "a new legal order of international law *for the benefit of which the States have limited their sovereign rights.*"[113] Like many other member nations, Ireland has been hesitant to surrender certain of its national interests for the sake of European integration.[114] Thus, concerned about the extent to which European law could intrude on Irish social values, Ireland recently negotiated a special protocol to protect its constitutional provision protecting the right to life of the unborn.[115] Similarly, Denmark secured protection for its law prohibiting nationals of other member states from acquiring second homes in its territory, and Britain obtained the right to "opt out" of a timetable for the

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nations "were becoming more interconnected and interdependent, insular self-sufficiency became the dominant objective in Ireland." *Id.* at 22. However, when the Irish government began to change its economic policy in the late 1950's to focus on industrial development, Ireland could no longer remain a lonely agrarian island. Rapid industrial growth "marked this period as the watershed in Ireland's modernization" and began to erode the country's tradition of cultural protectionism. *Id.* at 25.

111. *Id.* at 26.

112. As one of four governmental branches of the European Union, the European Court of Justice "adjudicates Community law both among the governmental branches of the Community and between the Community and its Member States." Paul W. Butler & David L. Gregory, *A Not So Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community*, 25 VAND. J. TRANSNAT'L L. 429, 439 (1992).

113. Robinson, *supra* note 1, at 8 (emphasis added).

114. In asserting the supremacy of European law, the European Court of Justice has "frequently operated against the grain of the [member] nations which—not unnaturally—have sought to limit the implications of the voluntary delimitation of their own sovereign power." *Id.*

115. *Id.* at 9. Fearing that Irish courts might overturn Section 42 of the Offenses Against the Person Act of 1861, which criminalized abortion in Ireland, pro-life groups successfully fought for a constitutional referendum to protect the rights of the unborn. In 1982, the Eighth Amendment Bill to the Irish Constitution passed by a two-to-one margin. Butler & Gregory, *supra* note 112, at 458. Codified as Article 40.3.3 of the Irish Constitution, the Amendment states, "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." IR. CONST. art. 40.3.3.

move to a single European currency.[116] As Ireland's President Mary Robinson[117] has noted, "[t]here is a perception . . . held by a substantial number of European opinion formers—that the European ideal threatens local interests, local culture, local heritage, and local values."[118]

Just as Ireland is not alone in confronting the internal challenge of balancing individual rights and the common welfare within its democratic society, it is not alone in facing its global challenge of protecting its own sovereign needs while contributing to the needs of the greater European Union. In many respects, there is a parallel between Ireland's difficulty in reconciling its Catholic values with the more secular views of the European Union, and the political and social tensions surrounding the concept of federalism in the United States.[119] The courts of the United States, the Republic of Ireland, and the European Union all have grappled with issues involving "[p]rivacy, personal individual dignity, and the most intimate and fundamental human rights."[120] The United States, despite the conflicts that constantly arise within its federal system of government, nevertheless has existed as a union of self-governing, yet interdependent, states for more than 200 years. Because the United States has survived, and indeed flourished, as such a union, the Irish people may rightly look to America's social and political history for guidance, as their nation struggles to define its own place within the European Union and the Western world in general. Recognizing the United States as a natural role model for her country, Ireland's President Robinson observed that at the time the United States was founded, "the very notion of such a Union was as daring and as far-fetched as some would say the notion of a European Union is today."[121] In constructing its own social policies, Ireland in the past has looked to the example provided by the United States. According to President Robinson, "[i]t was to the pioneering creativity of the Warren Court of the late 1950's and early 1960's that [Ireland's] own Supreme Court in Dublin looked when it began in the mid 1960's to fashion [Ireland's] 1937 Constitution into the modern rights-based document that it is today."[122] As Ireland faces the global challenge of federalism within the European Union and the internal challenge of balancing

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116. Robinson, *supra* note 1, at 9.

117. Mary Robinson became the first woman President of Ireland on December 3, 1990. In her inaugural speech, President Robinson announced, "the stage is set for a new common European home based on respect for human rights, pluralism, tolerance, and openness to new ideas." *Id.* at 1 (quoting the inaugural speech of President Mary Robinson).

118. *Id.* at 10.

119. Butler & Gregory, *supra* note 112, at 429. The "tensions between the sovereign prerogative of the Republic of Ireland and the role of federalism in the European Community are broadly analogous to themes of federalism in the United States." *Id.* at 430.

120. *Id.* at 430.

121. Robinson, *supra* note 1, at 6.

122. *Id.* at 5.

individual rights and the common good, it should continue to look to the United States for guidance. Furthermore, the United States may serve as an especially useful model to Ireland as the latter tackles the challenges surrounding its new divorce laws. Because divorce, in one form or another, has been available in America since the colonial period,[123] the United States has more than two centuries of experience in an area of law that Ireland is just now adopting.

III. THE HISTORY AND AFTERMATH OF THE AMERICAN DIVORCE REVOLUTION

A. *From Fault to No-Fault: A Brief History of American Divorce Law*

From its beginning, American law allowed divorce more freely than did British law due to a strong Protestant tradition in the colonies.[124] In colonial New England,[125] statutes authorized divorce for adultery, desertion, and sometimes cruelty and other offenses.[126] After the Revolutionary War and through the nineteenth century, the divorce laws of the various states were characterized by great diversity and were subject to frequent change.[127] Nevertheless, through the first half of the twentieth century, all states required that all divorce cases be brought within one or another category of marital offense,[128] the broadest (and hence often the most useful) of these

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123. CLARK, *supra* note 17, at 283.

124. In England, ecclesiastical courts had exclusive jurisdiction over cases of marital breakdown until 1857, when jurisdiction was transferred to the civil court system and divorces were authorized in cases of adultery. *Id.* at 282. Until that time, the Church of England, through the ecclesiastical courts, had refused to grant divorce for any reason, although it did permit judicial separation, without a right of remarriage, on the grounds of cruelty and adultery. *Id.* at 281. The Matrimonial Causes Act of 1937 added desertion, cruelty, and some other offenses as grounds for divorce. *Id.* at 282. Today divorce is available on no-fault grounds in England, but the time requirements for obtaining a divorce on such grounds are quite restrictive. A mutual consent divorce is available only after a two-year separation, and a unilateral divorce is available only after a five-year separation. DILLON, *supra* note 32, at 176 n.2.

125. While the courts and legislatures in New England occasionally granted divorces during colonial times, the South generally followed the English tradition during this period. Absolute divorces were unknown, and judicial separations were rare. ELLMAN ET AL., *supra* note 23, at 162.

126. CLARK, *supra* note 17, at 283.

127. *Id.*

128. The offense necessary to support a divorce decree depended on the statutory language of the particular state. All states acknowledged adultery as a ground for divorce, and, until 1937, it was the only ground for divorce in New York. Desertion was also recognized almost universally as a sufficient ground. In order to establish desertion, plaintiffs in most states had to prove that the defendant had abandoned all marital duties, and that for a minimum period of time, often prescribed by statute, the parties had not lived together.

categories being "cruelty"[129] or "indignities"[130] or some equivalent.[131]

After World War II, a new spirit of individualism sparked questions about the legitimacy of these "fault-based" divorce laws, which were increasingly viewed as anachronistic and inconvenient.[132] After the 1950's, the virtues of the family were no longer so openly celebrated.[133] A new cultural emphasis on individual fulfillment was reflected in the emerging women's movement, the increasing number of women entering the work force, and the declining birth rate.[134] The new focus on self, rather than family, generated increased dissatisfaction with the fault-based divorce laws, which were viewed as imposing constraints on individual freedom. The dissatisfaction with fault-based divorce laws led many people to try to circumvent the restrictions those laws imposed. For example, because "[t]he national law of divorce was a hodgepodge," with some states having relatively strict divorce laws and others having more liberal ones, the practice of "migratory divorce" developed.[135] In order to avoid the strict divorce laws of one jurisdiction, people with money and the desire to travel would relocate to another state that had liberal divorce laws and a short residency requirement.[136] Moreover, even in states that had "stringent law[s] strutting proudly on the books," the enforcement of those laws was often lax.[137] Indeed, by the middle of the twentieth century, divorce law in the United States had become one of the most unsettled and heterogeneous areas of law in the nation:

Cruelty was a third common ground allowed under the divorce laws of most states. While many states required the plaintiff to show bodily harm as a result of the defendant's actions, some states allowed proof of mental suffering as well. ELLMAN ET AL., *supra* note 23, at 165-66.

129. Especially in states that had relatively restrictive grounds for divorce, "the official divorce law of the books bore no relation to the law in practice." *Id.* at 167. In jurisdictions that allowed "cruelty" as a ground for divorce, the law was particularly subject to expansion in individual cases. *Id.* at 167. As noted by Professor Homer Clark in the 1968 edition of his text, "In many states, especially in the West, a divorce for cruelty may be had for the asking, providing it is uncontested. . . . It is the means by which divorce has become easy in most of the United States without the necessity for enlarging the statutory grounds." CLARK, *supra* note 17, at 341.

130. Wyoming, for example, allowed divorce on the ground of "indignities" that made the marriage "intolerable." ELLMAN ET AL., *supra* note 23, at 165.

131. CLARK, *supra* note 17, at 283.

132. Starnes, *supra* note 20, at 77.

133. *Id.* at 76.

134. *Id.* at 77.

135. ELLMAN ET AL., *supra* note 23, at 165.

136. *Id.* Before the 1870's, Indiana was one state that attracted the "tourist trade" for divorces. However, after moralists in that state campaigned vigorously for stricter divorce laws, the legislature enacted a new statute that effectively "shut the divorce mill down." *Id.*

137. *Id.*

> Divorce law stood as an egregious example of a branch of law tortured by contradictions in public opinion, trapped between contending forces of perhaps roughly equal size; trapped, too, in a federal system with freedom of movement back and forth, and beyond the power and grasp of any single state . . . .[138]

In response to the growing dissatisfaction with the existing divorce laws, courts in strict jurisdictions began to relax the statutory requirements for divorce and, in some cases, to allow fabricated stories of adultery and other marital wrongs to pass as evidence of fault.[139] Such judicial intervention eventually prompted legislatures to take action. By 1969, California had enacted a statute allowing divorce without a showing of marital fault.[140] California's new law permitted divorce upon one party's assertion that "irreconcilable differences have caused the irremediable breakdown of the marriage."[141] One year later, the National Conference of Commissioners on Uniform State Laws approved the Uniform Marriage and Divorce Act (UMDA), which allowed divorce in the case of an "irretrievably broken" marriage without the requirement of fault.[142] Other states soon followed California's lead and adopted statutes similar to the UMDA.[143] The new "no-fault" laws, which are still in place today,[144]

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138. *Id.*

139. Starnes, *supra* note 20, at 77. In states with more restrictive divorce grounds, the number of fabrications was perhaps greater. The need to prove specific behavior demonstrating one spouse's faults often led to "an unpleasant and embarrassing public exposure of the parties' marital difficulties." ELLMAN ET AL., *supra* note 23, at 168. Furthermore, "where the spouses were agreed upon divorce, but had not in fact engaged in conduct recognized as grounds under their state's divorce law, there was temptation to invent the necessary offenses." *Id.* While "[c]ollusion and connivance were recognized grounds for denying a divorce," they were rarely invoked. *Id.*

140. Starnes, *supra* note 20, at 77. California's statute was "the first law in the Western world to abolish completely any requirement of fault as the basis for marital dissolution." WEITZMAN, *supra* note 24, at 15.

141. WEITZMAN, *supra* note 24, at 15 (quoting CAL. CIV. CODE § 4508 (West 1983)). In enacting the new statute, California's legislature meant to "eliminate the adversarial nature of divorce and thereby to reduce the hostility, acrimony, and trauma characteristic of fault-oriented divorce." *Id.*

142. Starnes, *supra* note 20, at 77.

143. *Id.*

144. A 1987 survey indicated that 15 states have "pure no-fault laws" in which marital breakdown is the only ground for divorce, all fault-based grounds having been abolished. ELLMAN ET AL., *supra* note 23, at 177 (citing Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 5-6 (1987)). Among these states are Arizona, California, Colorado, Florida, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Montana, Nebraska, Oregon, Washington, Wisconsin, and Wyoming. *Id.* Twenty-one other states have achieved the same result by merely adding a modern no-fault ground, such as "breakdown," to traditional fault-based grounds, in effect allowing parties to

evolved from a partnership theory of marriage. Under this theory, a marriage is a partnership of individuals "who may dissolve their relationship at will, compel the liquidation and distribution of their property, and upon winding up their affairs, leave the relationship with no further obligations to one another."[145]

Not surprisingly, as divorce became easier to obtain, divorce rates in the United States skyrocketed and a "divorce revolution" ensued.[146] The divorce rate rose sharply throughout the 1970's and then reached a plateau in the early 1980's, when it achieved a level where one in two recent marriages could be expected to end in divorce.[147] In 1981, the actual number of annual divorces reached a record high of 1.21 million.[148] Today, there are still more than one million divorces each year in the United States.[149] While the increased divorce rate and the no-fault reforms occurred at roughly the same time, it is not clear that the enactment of no-fault divorce laws was itself responsible for the increased incidence of divorce in the United States. As advocates of no-fault divorce correctly have noted, the passage of the no-fault laws was the outgrowth of American society's changing views of

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choose between a fault or no-fault divorce. *Id.* Among these 21 states, Ohio is unique in that it has "both a divorce law based on fault and a procedure for dissolution of marriage based on an agreement of the spouses without any statutory specification of a breakdown standard." Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 6 (1987). The 14 remaining states and the District of Columbia are also considered no-fault jurisdictions, because they include, among their fault-based grounds, an incompatibility or separation standard that effectively permits parties to obtain a divorce without proving fault. ELLMAN ET AL., *supra* note 23, at 177.

145. Starnes, *supra* note 20, at 78. The partnership theory of marriage, also referred to as the "marital-sharing" theory, has been stated and characterized in various ways. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 465 (1991). Under one view, the theory is portrayed as "an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike." *Id.* (quoting MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 131 (1989)). Such an approach regards the economic rights of each spouse as "deriving from an unspoken or imputed marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage." *Id.* Under another view, the theory is cast in restitutionary terms and embraces a "return-of-contribution" notion. Under this approach, the law entitles each spouse to compensation for non-monetary contributions to the marriage, as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost." *Id.* (quoting GLENDON, *supra* note 145, at 131). However it is conceived, the partnership theory of marriage has had important implications with respect to the distribution of marital property under the no-fault system of divorce. *See infra* text accompanying notes 169-90.

146. Mulroy, *supra* note 24, at 76.

147. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 303 (1990).

148. WEITZMAN, *supra* note 24, at xvii n.*.

149. *Id.* at xvii.

marriage and divorce.[150] It seems likely that a number of different social factors combined to contribute to the divorce "boom."[151] Nevertheless, there is evidence to indicate that, at least in some states, the adoption of no-fault divorce was a significant factor contributing to the increase in divorce rates.[152] For example, one study which examined thirty-five states adopting new no-fault laws before 1980 found that twenty-five of them experienced higher than average increases in divorce rates when the new laws went into effect.[153] In eleven of those states, the increase in the divorce rate was more than twice the previous rate of increase.[154] The study's researcher concluded that "[n]o-fault laws, operationalized as a single variable, had a significant impact on divorce rates, with the major thrust delayed for a year."[155]

B. *The Aftermath of the Divorce Revolution: Economic Hardship for Dependent Spouses*

While the increased divorce rates were perhaps not surprising given the greater facility of divorce following the no-fault reforms, less expected were the economic inequities that the new laws would engender in many instances.[156] Although no-fault divorce laws were designed partly to encourage the equitable treatment of men and women upon divorce, such laws frequently have had adverse economic consequences for women.[157] For example, Lenore Weitzman's ten-year study of the California no-fault system found that women and the minor children in their households experienced a seventy-three percent decline in their standard of living within the first year following a divorce.[158] Men, on the other hand, experienced a forty-two percent rise in their standard of living within the same time period.[159]

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150. Mulroy, *supra* note 24, at 76. In the 1960's and early 1970's there was marked departure from traditional notions of marriage. "The feminist movement had a significant impact on traditional thinking as women sought the sexual freedom which they perceived men enjoyed. Pressure built to liberalize divorce laws and make them more equitable." *Id.*

151. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 119 (1991).

152. *Id.*

153. *Id.* at 117.

154. *Id.* at 117-18.

155. *Id.* at 118 (quoting Marvel, *Divorce Rates and the Fault Requirement*, 23 L. & SOC'Y REV. 543, 563 (1989)).

156. Starnes, *supra* note 20, at 78.

157. Mulroy, *supra* note 24, at 77.

158. WEITZMAN, *supra* note 24, at 36.

159. *Id.* The significant discrepancy in living standard between former husbands and wives is partly due to the fact that men are not typically ordered to pay alimony and are responsible only for what are often meager child support payments. Because men do not have to share their incomes with their former wives and children after divorce, they are left with more money to spend on themselves. On the other hand, women typically earn much less

Ironically, such inequities have resulted from the avowed purpose of the no-fault laws to treat the sexes equally at the time of divorce. In reality, the no-fault laws have treated men and women "*as if they were equal* . . . at the point of divorce."[160] In so doing, the laws have ignored the structural inequality between men and women in the larger society.[161] Spurred to action by demands for fair and efficient divorce laws, state legislatures adopted no-fault laws without accounting for the unfortunate reality that within American society most women are not on equal economic footing with men.[162] In fact, "[d]ivorced women and divorced men do not have the same opportunities: the women are more likely to face job and salary discrimination and [are] more likely to be restricted by custodial responsibilities."[163] Furthermore, in treating men and women "equally" at the time of divorce, no-fault laws also have ignored the economic inequalities that marriage itself produces.[164] Traditionally, marriage has economically disadvantaged women rather than men.[165] Most married women have given priority to their families, while most married men have given priority to their careers.[166] Even when both husband and wife are in the work force, it is more likely that the woman will forego further education and training, while the man acquires additional education and work experience.[167] Because a woman's earning capacity is often impaired during marriage, while a man's is often enhanced, "marriage itself can be partly responsible for the dramatically different prospects that men and women face after divorce."[168] Such a discrepancy in the financial prospects of men and women frequently results when courts apply no-fault principles in distributing marital property and awarding maintenance.

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money and often have custody of their children, whom they must support with little financial assistance from their ex-husbands. *Id.*

160. *Id.* at 35.

161. *Id.*

162. Mulroy, *supra* note 24, at 77. Studies confirm that women earn less than their male counterparts in the workplace. Wages of white women have been reported to be 63% of white men's wages. Starnes, *supra* note 20, at 139 n.25 (citing NATIONAL COMM. ON PAY EQUITY, PAY EQUITY: AN ISSUE OF RACE, ETHNICITY, AND SEX 1 (1987)). Presumably the percentages are even lower for women of color.

163. WEITZMAN, *supra* note 24, at 35.

164. *Id.* at xi.

165. *Id.* at 36.

166. *Id.* at xii.

167. *Id.*

168. *Id.* at 36.

1. *The "Clean Break" Theory of Property Distribution*

Because they are designed to effectuate a "clean break"[169] upon divorce, no-fault laws promote a final settlement of the parties' mutual obligations through a one-time division of marital property.[170] However, the presumption that such a division equitably settles the parties' rights and responsibilities "has proved to be wishful thinking."[171] The typically insubstantial amount of tangible marital property, together with the broad discretion which judges have in dividing that property, often make the distribution of property "both insignificant and unpredictable."[172] First, when a minimal amount of tangible assets are available at the time of divorce, which is often the case,[173] an award of a portion (usually half[174]) of the marital property will not offset the future hardships of parties with low income potential, such as women or "displaced homemakers."[175] For example, when a couple's only important asset is equity in a marital residence, such equity can only be divided upon sale of the home.[176] Since courts often do order a sale of the marital home, a displaced homemaker, or

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169. The notion of a "clean break" at divorce derives from the partnership model of marriage embraced by no-fault theory. "At the core of this partnership model are two simple concepts: divorce should be available at will; and divorce should terminate the parties' mutual responsibilities, thus affording each party an emotional and financial clean break." Starnes, *supra* note 20, at 108.

170. *Id.* at 85.

171. *Id.*

172. *Id.*

173. Research has revealed that "the average divorcing couple has relatively few assets, and those assets are typically of relatively low value." WEITZMAN, *supra* note 24, at 55. For example, a 1977 random sampling of Los Angeles divorce decrees revealed that less than half of divorcing couples had *any* major assets, such as a house, business, or pension. *Id.*

174. Only nine states require an *equal* (fifty-fifty) division of marital assets between the two spouses: Arizona, Arkansas, California, Idaho, Louisiana, Nevada, North Carolina, New Mexico, and Wisconsin. Most states have *equitable* distribution standards by which courts have the discretion to divide assets "as justice requires." There is usually more variation in awards under equitable distribution standards, since such laws give judges considerable latitude. (However, many equitable jurisdiction states follow the common law tradition of awarding one-third of the property to the wife and two-thirds to the husband.) Because of widespread dissatisfaction with the uncertainty of awards occasioned by equitable distribution, equal division rules are likely to become more common in the future. Already there is a tendency for judges in some equitable distribution states, such as Hawaii, to begin with the presumption that a fifty-fifty division is "equitable." In such states, the burden of proof shifts to the judge to justify an unequal award. *Id.* at 47-48.

175. Starnes, *supra* note 20, at 85. For a definition of a "displaced homemaker," see *supra* note 29. The phenomenon of the displaced homemaker is far from rare in the United States. The Census Bureau counted 15,600,000 displaced homemakers in 1989, an increase of 12% over the figures for 1980. Most middle-aged and younger homemakers were displaced by divorce or separation. *Id.* at 79.

176. *Id.* at 86.

otherwise disadvantaged spouse, "may thus leave the marriage with limited income potential, few if any assets, and no home."[177] Second, because trial judges have virtually unfettered discretion in dividing assets, the financial fate of the economically disadvantaged party often depends on the goodwill or prejudice of a particular judge.[178] Most states have adopted equitable distribution statutes,[179] which give trial courts the discretion to divide property in a just or reasonable manner, with the only constraint often being that a judge "consider" certain factors.[180] Given such broad discretion, judges may base their decisions on any of the statutory factors which they personally deem important.[181] Furthermore, they may give a single factor, such as one spouse's greater financial contribution to the marriage, "disproportionate and dispositive weight."[182] Recent studies have suggested that the significant latitude given to trial judges in divorce cases has been subject to abuse. At least thirty states have established task forces to investigate the extent of gender bias in their courts.[183] Of the nine states that have reported their findings, each one concluded that "gender bias

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177. *Id.* at 86-87. Concerned by the possibility of such hardships in cases involving limited assets, some courts have attempted to expand the definition of marital property in order to increase the assets available for distribution. For example, a court might include within the pool of marital property such nontraditional assets as pensions, goodwill in a business, and professional degrees or licenses. *Id.* at 87. However, while most states now regard pensions and retirement benefits as marital assets, only a few consider a professional degree, goodwill, insurance benefits, and other career assets to be marital property. WEITZMAN, *supra* note 24, at 47. In one case, a court refused to classify a husband's business degree as a marital asset on the ground that such a degree "is simply an intellectual achievement," which has "none of the attributes of property in the usual sense of that term." Starnes, *supra* note 20, at 89 (quoting *In re* Marriage of Graham, 574 P.2d 75, 76 (Colo. 1978)). Moreover, even those courts which do treat professional degrees as marital property afford no help to the more typical homemaker whose spouse has not earned such a degree. Starnes, *supra* note 20, at 91.

178. Starnes, *supra* note 20, at 92.

179. *See supra* note 174.

180. Starnes, *supra* note 20, at 92. Under UMDA § 307, judges are directed to consider the following factors in deciding how to divide marital property:

> the duration of the marriage, and prior marriage of either party[;] antenuptial agreement of the parties[;] the age, health, station, occupation, amount and source of income, vocational skills, employability, estate, liabilities, and needs of each of the parties[;] custodial provisions[;] whether the apportionment is in lieu of or in addition to maintenance[;] and the opportunity of each for future acquisition of capital assets and income.

Id. at 139 n.111 (quoting UMDA § 307, 9A ULA 238 (West 1987) (Alternative A)). While UMDA § 307 lists certain factors that judges should consider in distributing marital property, it does not expressly prohibit a judge from considering any other factor, except marital misconduct. Furthermore, § 307 does not specify the weight to be given to each factor. *Id.*

181. *Id.* at 93.

182. *Id.*

183. *Id.*

detrimental to women permeates every aspect of marital dissolution and child support."[184]

Even when substantial marital assets are available and judicial bias is absent, no-fault laws still have the potential to produce inequities, because they reduce the bargaining power of women and dependent spouses in certain situations. Before the no-fault reforms, the "status of women in divorce was a mixed blessing."[185] If women had no *titled* interest in property acquired during marriage, they stood to receive nothing at the time of divorce.[186] A woman who wanted a divorce and who was not financially independent often had to choose between losing all her assets in a divorce or

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184. *Id.* (quoting Lynn H. Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 187 (1990)). A study in Michigan found that the "resolution of economic issues is often premised on misconceptions about the economic consequences of divorce for women," and that "[s]ome judges and attorneys fail to recognize a spouse's loss of career or career potential as a meaningful contribution to the economic partnership of the marriage." *Id.* at 93-94 (quoting MICHIGAN SUP. CT. TASK FORCE ON GENDER ISSUES IN THE COURTS, CONCLUSIONS AND RECOMMENDATIONS 8 (1990)).

185. Mulroy, *supra* note 24, at 76.

186. *Id.* Today, the majority of states have "separate-property"systems of ownership for marital property. In a separate-property system, the husband and wife are separate owners of the assets that each acquires after marriage (except for property that they have agreed to hold jointly). By contrast, nine states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin) have "community-property" systems, under which husband and wife own all assets acquired by either of them during marriage in equal, undivided shares. WAGGONER ET AL., *supra* note 145, at 466-67. Prior to the no-fault reforms, in the separate-property states, "title" to the property controlled upon divorce, and courts had no jurisdiction over property that was held in the name of one spouse. For example, if the marital home was titled in the name of the husband, it belonged to him alone and could not be divided by a court at the time of divorce. WEITZMAN, *supra* note 24, at 46-47. After no-fault laws were enacted, however, most of the separate-property states adopted "equitable distribution upon divorce statutes," which approximate the rules in community-property systems by implementing a partnership theory of marriage. WAGGONER ET AL., *supra* note 145, at 471-72. Under these statutes, courts have broad discretion to "assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse . . . to the acquisition of that property." *Id.* (quoting J. GREGORY, THE LAW OF EQUITABLE DISTRIBUTION § 1.03, at 1-6 (1989)).

A key difference between equitable-distribution and community-property regimes, however, is that equitable-distribution statutes allow for a considerable degree of judicial discretion in the distribution of property (*See supra* text accompanying notes 178-84), while community-property regimes automatically grant each spouse a one-half interest in the earnings of the other immediately upon acquisition. *Id.* Furthermore, among equitable-distribution states, there are considerable differences in the statutes concerning what property is subject to distribution. *Id.* at 472. In 15 states, a court may consider *all* property owned by either spouse as potentially available for distribution upon divorce. In another 27 states, a court may divide only that property acquired during the marriage. WEITZMAN, *supra* note 24, at 46-47.

staying in an unhappy marriage.[187] However, because it required the consent of both spouses or a showing of fault, a divorce was not easily obtained.[188] Thus, in cases where the husband wanted a divorce, women had a distinct advantage: "If a man wanted his freedom, he would have to pay for it. Where the law failed to give women explicit property rights, it allowed them to extract economic security through bargaining. A divorce decree was often an expensive commodity."[189] Thus, while the no-fault principle of equitable distribution has given women certain assets to which they had no previous claim, it has taken away from them the power to refuse consent to a divorce until their demands for economic security are met.[190]

2. *The Theory of Rehabilitative Maintenance*

No-fault laws are based on the theory that any award of maintenance, or "alimony" in the language of the prior fault-based laws,[191] should be temporary and for the purpose of rehabilitating a disadvantaged spouse.[192] First, in accordance with no-fault's goal of making dependent spouses self-sufficient after divorce, "there has been a shift from permanent awards based on the premise of the wife's continued dependency, to time-limited transitional awards."[193] In theory, transitional awards are to continue long enough for the recipient to attain the education or training needed for suitable employment;[194] i.e., maintenance should last for the period of time needed to "rehabilitate" the dependent spouse.[195] In practice, however, courts have

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187. Mulroy, *supra* note 24, at 77.

188. *Id.*

189. *Id.*

190. *Id.* at 80.

191. In distinguishing between "alimony" under the prior fault-based law, and "maintenance" under no-fault law, a Colorado court explained in a 1983 decision that "maintenance, unlike its predecessor, alimony, is primarily concerned with insuring that, after dissolution, the basic [economic] needs of a disadvantaged spouse are met." WEITZMAN, *supra* note 24, at 45 (quoting *In re* Marriage of Mirise, 673 P.2d 803 (Colo. Ct. App. 1983)). Such a distinction has proved to be significant, as states increasingly have redefined alimony as maintenance and have made awards dependent upon the recipient's earning potential and economic need. *Id.*

192. Starnes, *supra* note 20, at 85.

193. WEITZMAN, *supra* note 24, at 32. Between 1968 and 1972, permanent maintenance (i.e., maintenance continuing until death or remarriage) dropped from 62% to 32% of all maintenance awarded in Los Angeles County. By 1972, two-thirds of the maintenance awards were transitional awards for a limited duration. The median duration of these transitional awards was 25 months. *Id.* at 32-33.

194. *Id.* at 45-46.

195. Arguably, the term "rehabilitative maintenance" has pejorative connotations when applied to the case of a displaced homemaker, since it "suggests that the homemaker has not been engaged in productive or socially useful work during marriage." *Id.* at 46.

limited maintenance awards to a few years at most.[196] Second, since the no-fault reforms, a new "economic" focus has driven the courts' decisions regarding spousal support payments.[197] Focusing less on the standard of living during marriage, courts have paid more attention to each spouse's earning capacity and to the dependent spouse's ability to become self-supporting.[198] While courts still consider factors such as the recipient's age and the length of the marriage, they have placed greater importance on strictly economic criteria, such as a dependent spouse's occupation and pre-divorce income.[199] However, in applying the new criteria, courts have denied maintenance both to spouses with low pre-divorce incomes and to spouses with "limited and marginal employment histories," apparently on the belief that such spouses are capable of supporting themselves.[200]

The result of the "economic" approach to maintenance has been that the "vast majority of divorced women, roughly five out of six divorced, are not awarded [maintenance]."[201] According to the Census Bureau, during the last 100 years, the percentage of divorced women awarded maintenance actually has decreased from sixteen percent to fifteen percent.[202] Furthermore, the average maintenance award in 1989 was approximately $4000 per year, and "one-fourth of those women awarded [maintenance were] unable to collect because of non-compliance and poor enforcement."[203] Perhaps in response to such outcomes, some courts have relaxed the standards they apply in determining maintenance awards. Many states have come to realize that permanent support may be necessary in some cases.[204] New York has a statute that shifts a court's attention from a "needs" analysis back to a focus on the marital standard of living.[205] In recent years, some appellate courts have overturned trial courts awarding only meager payments to older wives who could not easily become self-supporting.[206] Nevertheless,

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196. *Id.* Several states now have fixed time limits on all maintenance awards. New Hampshire limits awards to three years (provided there are no minor children), Delaware to two years, and Kansas to one year. Although New Hampshire and Kansas do allow the time periods to be extended in certain cases, the burden of proof falls on the recipient to show that an extension is necessary. *Id.*

197. *Id.* at 45.

198. *Id.*

199. *Id.* at 33.

200. *Id.* In *Otis v. Otis*, the court upheld an award of only four years of support payments to a 45-year-old homemaker of 24 years, even though she had not worked since the birth of the parties' child 23 years earlier. 299 N.W.2d 114, 117 (Minn. 1980), *cited in* Starnes, *supra* note 20, at 103.

201. WEITZMAN, *supra* note 24, at 33.

202. Mulroy, *supra* note 24, at 80.

203. *Id.*

204. *Id.*

205. *Id.*

206. WEITZMAN, *supra* note 24, at 46.

"[i]f there is a trend developing for the benefit of women, it is not yet statistically significant."[207] Because the no-fault laws have grown out of the presumption that dependent spouses *will* become self-sufficient after divorce,[208] the majority of disadvantaged spouses are either being denied maintenance altogether, or are awarded small amounts for short periods of time to "ease the transition" to independence.[209]

IV. CONFRONTING THE CHALLENGE: STRIKING A BALANCE BETWEEN NO-FAULT AND FAULT IN THE REPUBLIC OF IRELAND

A. *A Recognition of the Risks*

As courts in the United States have continued to divide marital property and to award support payments in accordance with "equitable" principles, and as American homemakers have continued to suffer losses, the citizens of Ireland have taken note. In Ireland, divorce opponents and supporters alike have recognized the risks which attend liberal divorce policies like those in place in the United States and other Western nations. In the campaigns leading up to the 1995 referendum, those opposed to divorce argued that the availability of divorce would both increase the rate of marital breakdown and impoverish women and children.[210] Divorce opponents pointed to studies conducted in other countries for results showing a surge of divorces when they first became available there and a steady increase in divorce rates thereafter.[211] Even outsiders warned of the downside to divorce. For example, Leo Cash, an English family lawyer, advised the Irish people to look at the situation in England before voting to legalize divorce.[212] He warned that in his country the living standard of a divorcing couple plummets, forcing England to spend 180 million pounds each year on legal aid services.[213]

There was a similar awareness of the adverse consequences of divorce before the referendum in 1986. Prior to that referendum, the Anti-Divorce Campaign ("ADC") emphasized economic issues in its campaign for a "No" vote, with the impoverishment of women as one of the central themes of its

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207. Mulroy, *supra* note 24, at 80.

208. The theory of rehabilitative maintenance has proven to be overly optimistic about the possibilities for "rehabilitation" of the dependent spouse, because it overlooks the reality of gender-based divisions of labor within the home and the costs of those divisions to dependent spouses who must enter the work force. Starnes, *supra* note 20, at 97, 105.

209. WEITZMAN, *supra* note 24, at 33.

210. McDonough, *supra* note 7, at 665-66.

211. *Id.* at 665.

212. *Id.* at 664.

213. *Id.* at 664-65.

discourse.[214] For example, the ADC's Bernadette Bonar argued that, unlike in Ireland where there are welfare benefits designated specifically for deserted women, in other countries where divorce is available, filing for divorce is the only way in which deserted women can hope to get financial support.[215] To this observation, Bonar added a warning: "But don't forget that men just don't pay maintenance to their wives. [Sixty percent] of [divorced women] in England go straight onto social welfare. *And in America, 85% of men, even after a court order, refuse to pay maintenance to their wives.*"[216] William Binchy, a law professor and the ADC's primary spokesman, argued that the introduction of divorce would result in hardships both for older women, who had sacrificed careers by raising families, and for younger women, who had children at home.[217] According to Binchy, "[t]hese two categories, studies throughout the world have shown again and again, are the categories that have been hit hardest by the introduction of divorce based on failure of a marriage."[218]

On the other side of the debates in both 1986 and 1995, proponents of divorce also recognized the economic hardships that divorce had wrought in other countries. Nevertheless, they maintained that divorce was necessary to end the suffering which accompanies marital breakdown, and that carefully designed legislation would prevent some of the problems reported in other nations. While the Minister for Social Welfare, Proinsias De Rossa, acknowledged shortly before the 1995 referendum that divorce resulted in a loss of income for the family, he noted that such loss was often willingly endured: "It is women, overwhelmingly, who initiate divorce. In every study of divorced women, they say yes, they regret the loss of income, and yes, despite that, they prefer to be divorced rather than endure the continuing

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214. DILLON, *supra* note 32, at 74. The ADC accentuated this theme throughout the debate with posters stating, "This amendment will impoverish women: Vote NO!" *Id.* (quoting the Anti-Divorce Campaign). In short, the ADC argued that divorce was not a workable option for addressing marital breakdown because it would force women and children into poverty. The ADC supported this claim by pointing to statistics from other countries; for example: "in Britain 60% of women who get a divorce go straight on to social welfare .... [Eighty-eight percent] of low income parents are women. [Sixty-three percent] of that 88% of low income parents are divorced women." *Id.* at 75 (quoting Bernadette Bonar, "Today Tonight," Apr. 24, 1986).

215. *Id.* at 75.

216. *Id.* (emphasis added) (quoting Bernadette Bonar, "Today Tonight," June 19, 1986).

217. *Id.* at 76.

218. *Id.* (quoting William Binchy, "Today Tonight," June 19, 1986). The ADC argued that because sex discrimination is a reality in Irish society, the state's legal protection of marriage as a lifelong commitment represented the best way to compensate women for the discrimination they faced. *Id.* However, the ADC did *not* suggest that anything be done to address the problem of sex discrimination itself.

emotional stress of a bad marriage."[219] Accusing Catholic bishops of spreading lies about the effects of divorce on society, De Rossa called on the bishops to consider the actual consequences of divorce in Northern Ireland by examining "two towns in the same diocese, Strabane in Northern Ireland and Lifford in the Republic."[220] De Rossa pointed out that although divorce had been available for more than seventeen years in Strabane and could be obtained there within a six-month period, it had not caused family life and society there to collapse.[221] He questioned how the introduction of divorce into Lifford, only 100 yards away in the neighboring Republic, where divorce laws would require a four-year separation period, could possibly destroy the community.[222] Furthermore, De Rossa and other divorce supporters rejected their opponents' arguments that approval of the referendum would usher in a new "divorce culture." De Rossa asserted that the government's proposed legislation would in no way allow "Hollywood style divorce" to become the practice in Ireland.[223] Similarly, Mary O'Rourke, the deputy leader of Fianna Fail, expressly rejected the notion that "having a provision to allow people to remarry [would] usher [Ireland] into a glitzy world of glamour and of temporary relationships."[224]

B. *The Need for Balance*

Meanwhile, across the Atlantic and not far from divorce-ridden Hollywood itself, Dr. Julia Wallerstein, founder of the Center for the Family in Transition in San Francisco, had reason to comment on the debates in Ireland. As the author of a number of studies on divorce and the family, Dr. Wallerstein had been "widely cited by opponents of divorce in the [1995] referendum campaign."[225] In an interview published in *The Irish Times*, Dr. Wallerstein stated that she fundamentally disagreed with how the anti-divorce campaigners had used her research.[226] While she agreed that her studies and those of other researchers have shown that divorce is a "serious issue for the family," she emphasized that no study ever has suggested that divorce itself should be abolished.[227] According to Dr. Wallerstein, no one in the United

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219. Carol Coulter, *De Rossa Says Bishops Are Telling Lies About Divorce*, THE IRISH TIMES, Nov. 21, 1995, at 6 (quoting Proinsias De Rossa).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* (quoting Proinsias De Rossa).

224. Kelly & O'Regan, *supra* note 79 (quoting Mary O'Rourke).

225. Carol Coulter, *Allowing Divorce Is Necessary for a "Just Society,"* THE IRISH TIMES, Nov. 2, 1995, at 7.

226. *Id.*

227. *Id.* (quoting Dr. Julia Wallerstein).

States has argued "from the standpoint that there should be no divorce,"[228] as had been the argument in Ireland. Furthermore, she even suggested that divorce is *necessary* for a just society: "Divorce says you don't have to stay with the mistakes of your youth all your life, nor live alone and in misery. That is the way of a compassionate and just society."[229] As Ireland's President Mary Robinson would later do,[230] Dr. Wallerstein urged Ireland to look to the United States as a model. Unlike President Robinson, however, Dr. Wallerstein pointed to the United States as a model for Ireland of what *not* to do as the country formulates its divorce laws: "People are quoting me on the mistakes we [the United States] made. You can learn a great deal from our mistakes. We have a lot to teach. . . . It would be foolish not to use our experience. But no one is saying to go back to having no divorce."[231]

Thus, while Ireland is justified in trying to avoid the problems experienced in liberal divorce jurisdictions like the United States, it should remember that divorce does provide a valuable remedy to the problem of marital breakdown. As Irish lawmakers fashion a new area of law for their country, they will have to balance the interests of the nation's more than 75,000 separated couples, who need a way of ending their broken marriages, against the interests of dependent spouses,[232] who will need protection against financial hardships in the event of divorce.

C. *Finding a Middle Ground*

The need to enact a divorce law which will enable the efficient dissolution of broken marriages and, at the same time, safeguard against economic hardship, presents a daunting challenge to the Republic of Ireland. Nevertheless, by looking to the laws of the United States, Ireland may be able to glean possible solutions to this challenge.

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228. *Id.* (quoting Dr. Julia Wallerstein).

229. *Id.* (quoting Dr. Julia Wallerstein).

230. In a speech addressed to the Stanford University Law School on October 18, 1995, President Robinson recognized that the United States would serve as a valuable role model for Ireland as the latter attempts to establish its place within the European Union and the modern world in general. *See supra* notes 121-22 and accompanying text.

231. Coulter, *supra* note 225 (quoting Dr. Julia Wallerstein). When asked whether she thought the availability of divorce had adverse consequences for the institution of marriage, Dr. Wallerstein replied, "The laws to change marriage reflect society, not the other way around." *Id.*

232. The needs of dependent spouses for financial protection *compete with, but are not necessarily distinct from*, the needs of separated couples for marital dissolution. For example, a wife who is separated from her husband, but who still depends on him for support, may have an interest in both ending her marriage and safeguarding her financial position.

1. *Step One: Enabling the Dissolution of Broken Marriages*

The constitutional ban on divorce has not prevented marital breakdown from occurring in Ireland.[233] Despite its Catholic tradition[234] and its avowed reverence for the family,[235] Ireland has a real need for divorce due to a large number of broken marriages,[236] an increasing demand for judicial separations,[237] and a growing problem of illegitimacy.[238] Because divorce is generally easier to obtain when there is no requirement that one spouse prove marital misconduct on the part of the other, Ireland should adopt a no-fault ground for divorce. Such a ground could require either the physical separation of the spouses for a prescribed time period or a finding that the marriage has broken down irretrievably.[239] Indeed, based on the proposed legislation and recent debates on the issue, Ireland does seem prepared to incorporate no-fault principles in establishing the grounds for divorce. For example, as it now stands, the Fifteenth Amendment will allow divorce after a separation period of four years and upon a determination that there "is no reasonable prospect of reconciliation between the spouses."[240] (Note, however, that the proposed requirements mandate that there be both a separation period of four years *and* a showing that reconciliation is not likely.)

Although the form of divorce proposed in Ireland is non-fault based, the proposed legislation is relatively restrictive in other respects.[241] First, the

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233. *See supra* note 88.

234. *See supra* note 75.

235. *See supra* note 79.

236. *See supra* text accompanying note 83.

237. *See supra* note 88.

238. *See supra* text accompanying notes 86-87.

239. *See supra* notes 140-45 and accompanying text.

240. Fifteenth Amendment of the Constitution Act (1995) (Ir.), *cited in* McDonough, *supra* note 7, at 656 n.60. For full text of the Amendment, see *supra* note 10.

241. Before the 1995 referendum, the Divorce Action Group ("DAG") was concerned that future divorce legislation would impose strict requirements that would effectively restrict access to divorce. The DAG expressed its concern in a submission to the Government:

> To impose either fault-based legislation or over-long waiting periods is to intrude into the private lives of separated persons. While there are emotional aspects to marital breakdown, the Government must not lose sight of the fact that it is the dissolution of the civil contract that is of importance to them as legislators.
>
> Divorce is a civil right. Any attempt to impose a strict regime is a clear signal to [] separated people that they are being judged as irresponsible, immature or at fault. Punishment has no place in civil legislation relating to marital breakdown.

Mary Cummins, *DAG Seeks Simple Divorce Referendum*, THE IRISH TIMES, June 28, 1993, at 4 (quoting the Divorce Action Group). In light of the Fifteenth Amendment's requirement

requirement that "at the date of the *institution of the proceedings*"[242] spouses have lived apart "at least four years during the previous five"[243] will restrict the number of couples who will have standing even to *initiate* divorce proceedings. Spouses who already have lived apart for a year[244] will have to wait three more years just to file for divorce. Furthermore, the requirement seems to discriminate "against those living under the same roof and in conflictual relationships, as well as those who cannot afford to move apart."[245] While Mervyn Taylor, the Minister for Equality and Law Reform, has indicated that courts could construe "living apart" to include situations in which both spouses were living under "one roof but . . . in different households,"[246] there is always danger in giving such broad discretion to the judiciary, as demonstrated by the unjust outcomes that occurred under the Judicial Separation Act of 1989.[247] Second, the Amendment's requirement that there be "no reasonable prospect of reconciliation" requires broad judicial discretion as well. Because "[n]o guidelines identify the evidence that will establish that reconciliation is unlikely," the requirement "lends itself to extensive legal battles with . . . results dependent upon the subjective opinion of the judiciary."[248]

In Professor Anna McDonough's view, Irish lawmakers could avoid the "unfair and inflexible approach to divorce" embodied in the proposed Fifteenth Amendment[249] by simply declining to write any divorce requirements into the constitution.[250] According to McDonough, "[t]he rigid approach of placing the standards for divorce into the constitution . . . means

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of a four-year separation period, it seems that the DAG's fears of restrictive legislation may become a reality if the proposed Amendment becomes law.

242. Fifteenth Amendment of the Constitution Act, *supra* note 240 (emphasis added).

243. *Id.*

244. In the United States, most states require a separation period of one year or less "in the case of a *contested*, unilateral no-fault divorce." DILLON, *supra* note 32, at 1 (emphasis added). In comparison, Ireland's requirement of a four-year separation for even an *uncontested* no-fault divorce seems especially strict.

245. McDonough, *supra* note 7, at 660. The four-year requirement will also cause hardship for those in abusive or dangerous relationships. "Indeed, the physical or emotional force of some spouses may make living apart impossible for those in such relationships." *Id.* at 661.

246. Kennedy, *supra* note 8 (quoting Mervyn Taylor).

247. McDonough, *supra* note 7, at 661. See *supra* text accompanying notes 67-73 for a discussion of judicial discretion and the unjust results of such discretion under the Judicial Separation Act of 1989.

248. *Id.*

249. Before the referendum, Progressive Democrat leader Mary Harney claimed that the proposed amendment "offered voters a false choice between two wrongs: one, vote against the [r]eferendum and leave the constitutional ban on divorce in tact, or two, vote for the [r]eferendum, and an unfair and inflexible approach to divorce becomes part of the constitution." *Id.* at 660.

250. *Id.*

Ireland may only change the requirements by yet another referendum."[251] A "more flexible approach" would be to delete the current ban on divorce[252] and "enumerate the requirements [for divorce] in subsequent legislation."[253] Because it would allow the legislature to periodically revise the divorce requirements, an approach like McDonough's may offer a viable course of action for Ireland to take in formulating a completely new area of law. Not only would such an approach allow for the easy elimination of inflexible standards such as the four-year separation requirement, it also would prevent abuse of judicial discretion by allowing the legislature to add further guidelines for judges to consider in making such determinations as when reconciliation is unlikely. Thus, even if Irish lawmakers determine that a four-year separation requirement is in the nation's best interest at this point in time, they at least could keep open the possibility of changing such a requirement in the future by not writing it into the constitution now. If lawmakers truly want to make divorce a viable option for ending a broken marriage in Ireland, they must either change the restrictive provisions of the proposed Fifteenth Amendment now or preserve the opportunity for changing equivalent legislation in the future.

2. *Step Two: Preventing Economic Hardship*

Given the demographics of Irish society, it is not surprising that divorce supporters and opponents alike have expressed concern about the effects of divorce on women. The post-divorce economic hardships experienced by many women in the United States would seem even more likely to occur in Ireland, "where the disempowerment of women and their economic dependence is far greater than in the United States."[254] In Ireland, where "the vast majority of married women are dependent economically on their husbands," only twenty-one percent of such women "are engaged in the labor force, compared to [fifty-six] percent of married women in the United States."[255] The economic dependence of Irish women stems from the fact that within Irish society a "woman's status [is] dependent on her role as wife

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251. *Id.*

252. Prior to the referendum, the Divorce Action Group took the position that the referendum "should pose only a simple question to voters asking if they are in favour or not of having the ban [on divorce] removed from the Constitution." Cummins, *supra* note 241. Mags O'Brien, chairperson of DAG, stressed that a simple deletion of the ban from the constitution was the only acceptable approach. According to O'Brien, it would be "nonsense" for lawmakers to write "complex family legislation" into the constitution. *Id.*

253. McDonough, *supra* note 7, at 660.

254. DILLON, *supra* note 32, at 80.

255. *Id.* "[T]he life chances of the majority of Irish women revolve around marriage and domesticity, an arrangement that is the expressed preference of a majority of Irish married men." *Id.*

and homemaker and [is] not related to engagement in the public sphere."[256] Indeed, until it was repealed in the mid 1970's, a legislative ban prohibited women from working outside the home after marriage.[257] Thus, because they depend on marriage for financial security, Irish women would be especially vulnerable to economic hardship at the time of divorce. In order to protect the economic interests of women upon divorce, Irish lawmakers must give careful thought to the standards they design to regulate property distribution and spousal support payments. One way for Ireland to safeguard such interests may be to allow courts to consider fault in making decisions regarding property allocation or maintenance awards, while still preserving a no-fault *ground* for divorce.

First, it should be noted that although fault-based theory "has been under attack for many years" in the United States, it remains important there "in many contexts and in complex ways."[258] While fault-based theory is typically dismissed as being contrary to the modern trend, half of all states now make use of fault-based doctrines in one way or another.[259] Significantly, many fault-based laws regarding property distribution and maintenance represent recent reforms of earlier statutes enacted during the no-fault revolution.[260] Thus, in many states, "even when the divorce is obtained on no-fault grounds, fault may be a factor in awarding post divorce support or in allocating property."[261] Such states, which recognize fault in certain contexts, have been deemed "fault-regarding" jurisdictions and occupy a "middle ground" between "fault-blind" jurisdictions, which consider merit and blame within marriage to be irrelevant to divorce, and "fault-driven" jurisdictions, which consider conduct such as adultery and abandonment to be "not only relevant but dispositive of spousal rights and

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256. *Id.* at 78. The Irish Constitution itself relegates women to the domestic sphere:

> In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
>
> The State shall, therefore, endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

IR. CONST. art. 41.2.1-2.

257. DILLON, *supra* note 32, at 23-24. Because of this ban, in 1961 only "[five] percent of married women participated in the labor force." *Id.* at 24.

258. Barbara B. Woodhouse & Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2531 (1994).

259. *Id.*

260. *Id.*

261. *Id.* at 2532.

obligations."[262] While fault-regarding states still "weigh issues of merit and blame," they focus on such issues within "the wider context of the couple's particular marriage, general situation, and shared social norms."[263]

With respect to property distribution, "the states are almost evenly divided between the fault-blind and limited fault-regarding approaches," with a substantial minority using a fault-driven approach.[264] Those states applying the "limited" fault-regarding approach give weight to a form of misconduct different from the traditional forms of marital misconduct such as adultery or cruelty. The misconduct with which such states are concerned has been termed "economic fault" and occurs whenever there is misuse, waste, or dissipation of assets during a marriage.[265] With respect to maintenance, fault traditionally has played a significant role in the determination of awards.[266] Fault may determine one spouse's eligibility to receive maintenance, the other's obligation to pay it, and the amount of the award.[267] In each of these determinations, as in determinations involving property distribution, "fault can either play a dispositive role, figure as one of many factors, or be excluded as irrelevant."[268] Furthermore, as in the property allocation context, *economic* fault often factors into a court's decision on how much support to award.[269]

Because its proposed divorce legislation is already relatively restrictive, Ireland should not make fault a requirement for obtaining divorce. Nevertheless, by allowing judges to consider fault, whether in the form of marital or economic misconduct, when dividing marital property or awarding

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262. *Id.* at 2532-33.

263. *Id.* at 2533.

264. *Id.* at 2535.

265. *Id.* at 2533-34. UMDA § 307, which specifies certain factors for judges to consider in deciding how to divide marital property, directs courts to look at "the contribution or *dissipation* of each party in the acquisition, preservation, *depreciation*, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit." Starnes, *supra* note 20, at 92 n.111 (emphasis added) (quoting UMDA § 307, 9A ULA 238 (West 1987) (Alternative A)). Thus, in jurisdictions adopting similar statutes, economic fault on the part of either spouse may affect how a judge decides to divide the marital property.

266. Woodhouse & Bartlett, *supra* note 258, at 2536. The concept of maintenance itself originates from fault-based theory. Under the common law, alimony "originated as the continuing right of an innocent wife—one who had been abandoned or had justifiably left her husband—to support [from her husband]." *Id.* at 2535. Thus, alimony "was predicated not on a division of income-providing assets already accumulated, but instead on punishing misconduct." *Id.* at 2536.

267. *Id.* at 2536.

268. *Id.*

269. *Id.* at 2538. Jurisdictions that consider economic fault in determining support payments often look for evidence of the "depreciation or dissipation of marital property" by one of the spouses. *Id.*

maintenance, Ireland may be able to alleviate some of the economic hardships that would otherwise be experienced by women upon divorce. For example, in a case where the husband abandons the wife during the course of the marriage, the judge could acknowledge the husband's misconduct and either award the wife a greater portion of the marital property or order the husband to pay support to her. Because courts will lack the guidance of legal precedence when divorce first becomes available in Ireland, they should apply a fault-regarding approach in their decisions, since such a method will enable them to consider fault in the "wider context of the couple's particular marriage."[270] The flexibility of a fault-regarding approach also will allow judges to take into account the disadvantaged position that women occupy within Irish society. Thus, in a case where the wife commits adultery during the course of the marriage, the judge would still have the latitude to give her an equal share of the property or a fair maintenance award, if her economic situation so necessitated. By giving courts discretion where discretion is needed (i.e., in determining the economic entitlements and obligations of the parties), and by denying courts discretion where such discretion could produce uncertain or unjust results (i.e., in determining whether the grounds for divorce have been met), legislation with a no-fault ground for divorce and a fault-based distributive scheme would enable Ireland both to provide divorce as a remedy for marital breakdown and to safeguard the economic interests of women upon divorce.

V. CONCLUSION

No matter what course of action Irish lawmakers take in formulating a new area of law for their country, the legalization of divorce is bound to have a profound impact on Irish society. Even with the granting of the first divorces, dramatic changes will occur in the structure of Irish society. Children who are the product of second relationships will no longer be shunned as "illegitimate."[271] On the other hand, children of a marriage which ends in divorce may have to adjust to a living arrangement in which their parents share custody of them.[272] Couples who have suffered for years in broken marriages will be free to end their troubled relationships and begin their lives anew. However, for some financially dependent spouses, the price of a fresh start may be a decreased standard of living or other economic hardship. Just as divorce has altered the fabric of American society during the latter part of the twentieth century, the introduction of

270. *Id.* at 2533.
271. McDonough, *supra* note 7, at 672.
272. *Id.*

divorce may have serious ramifications on Irish society within the near future.

Whatever problems may result from divorce in the future, "a divided Irish society poses a problem for the nation today."[273] The impassioned campaigns preceding the 1995 referendum, along with the narrow majority by which the referendum passed, highlighted a deep division within Irish society. While the Catholic Church has molded the nation of Ireland,[274] and many of Ireland's laws have been based on traditional Christian morality, the nation is now divided between those who wish to preserve Catholic traditions and those who view the secularization of Ireland as an opportunity for the nation to join the modern world.[275] With just 50.3% of the electorate voting to allow divorce, it is clear that the 1995 referendum did not mend the division in Irish society; indeed, the narrow passage of the referendum, after months of emotional campaigning by both sides, may have intensified the schism.[276] While "traditionalists grapple for the past and modernists fight for future change," what will happen to Irish society remains uncertain.[277]

While it would be dangerous for legislators, in planning for Ireland's future, to ignore the major social schism dividing the nation,[278] the fact remains that "the divorce referendum marked a crucial stage in [Ireland's] political development."[279] The 1995 referendum presented voters "with a

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273. *Id.*

274. *See supra* note 75 and accompanying text.

275. McDonough, *supra* note 7, at 672. Although the Catholic Church has long existed as a moral stronghold in the Republic of Ireland, a recent poll conducted by *The Irish Times* suggests that the Church's moral authority is declining. Andy Pollak, *Poll Shows Church's Moral Authority in Decline*, THE IRISH TIMES, Dec. 16, 1996, at 5. The poll reported that only 21% of Catholics surveyed said that they followed the teachings of the Church when making "serious moral decisions," compared to 78% who said they followed their own conscience. *Id.* (quoting the poll's language). Such figures suggest that "Ireland is moving towards the European cultural mainstream in its religious attitudes." *Id.* The poll further found that only 27% of those questioned believed that "the great majority of people in Ireland will still practice Catholicism in 20 years time." *Id.* Sixty-nine percent believed that "in 20 years time Ireland will be Catholic in name, but only a minority will be practising their Catholicism." *Id.* As additional evidence of the declining influence of the Church, Mass attendance has been falling. When asked how often they attended Mass ten years ago, 85% of those polled said once a week. When asked how frequently they went five years ago, 79% said once a week. "Now only 66 per cent [sic]of those polled say they attend Mass at least once a week." *Id.*

276. McDonough, *supra* note 7, at 672.

277. *Id.*

278. In planning for the future, Irish lawmakers "must realize that the nation is sharply divided" over certain matters of social policy. *Id.* The fact that 49.7% of the population did not support the introduction of divorce suggests that "[t]he nation will divide even more should the government make rash movements toward modernization." *Id.*

279. Mary Holland, *Lectures on "Welfare Fraud" Ring Very Hollow*, THE IRISH TIMES, Dec. 5, 1996, at 16.

clear but difficult choice between sincerely held, traditional beliefs that were very precious to many people, and an alternative which would have a dramatic impact on Irish society, not necessarily for the better."[280] In light of the difficult choice that voters faced, it took a significant amount of courage for them to "face up to the fact that Ireland had to deal with the problem of marital breakdown in an honest and clearsighted way and to vote accordingly."[281] If nothing else, the divorce referendum may have "put an end . . . to the notion of an Irish solution to an Irish problem."[282] Indeed, in recent years, Ireland seems to have recognized that its sociopolitical problems are not unique, and that it can no longer isolate itself from the rest of the world.[283] Even if Ireland has entered the modern world with half of its population dragging its feet, it nevertheless has arrived in a new place. As Irish lawmakers navigate this new territory on behalf of their nation, they would be well-advised to study the paths taken by previous explorers. Having entered the realms of both fault-based and no-fault divorce, the United States is one explorer whose successes and failures may serve as lessons in law to Ireland.

*Sarah E. Fette**

280. *Id.*
281. *Id.*
282. *Id.*
283. *See supra* notes 110-11 and accompanying text.

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PROTECTING THE RIGHT TO LIVE: INTERNATIONAL COMPARISON OF PHYSICIAN-ASSISTED SUICIDE SYSTEMS

> Creating a new 'right' . . . will endanger society and send a false signal that a less than 'perfect' life is not worth living.[1]

The "right to die" movement is not bounded by sovereign borders normally thought to define the unique culture of a people.[2] The impact of improved medical technology on the quality of life has precipitated an international quest for patient autonomy in health care decision-making. The right to die movement promotes a continuum of choice in patient autonomy that extends from palliative care[3] and withdrawal of treatment[4] to physician-assisted suicide.[5] This desire to provide the full continuum of choice has fueled an international movement to recognize the greatest level of patient

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1. *Bernadin's Plea Against Assisted Suicide*, USA TODAY, Nov. 14, 1996, at 3A. Cardinal Joseph Bernadin, near death at the time, wrote a letter to the Supreme Court, urging the Court not to recognize a right to physician assisted-suicide in two cases pending before the Court. *Id.*

2. A search on the world wide web produces information from national and international societies who support the "right to die" movement. *See generally Welcome to the Scottish Voluntary Euthanasia Society* (visited Jan. 5, 1997) <http://www.netlink.co.uk/users/vess/vess.html> (advocating the right of every human to choose his or her own death and the manner of death and to have the option of legalized voluntary euthanasia available); *Voluntary Euthanasia Society of Victoria* (visited Jan. 5, 1997) <http:///www.vicnet.net.au/~vse/v1a.htm#legal> (describing the role of the society in Victoria, Australia, as one of the thirty member societies of the World Federation Right to Die Societies, in providing information to the public and in lobbying the legislature for legal reform that would allow medically assisted suicide to be provided to requesting, competent, and incurably ill adults); *The Hemlock Society USA* (visited Jan. 5, 1997) <http://www.irsociety.com/hemlock.htm> (describing the Hemlock Society's belief in the right of terminally ill people to "self-determination for all end-of-life decisions," including physician-assisted suicide).

3. JAMES M. HOEFLER, DEATHRIGHT: CULTURE, MEDICINE, POLITICS, AND THE RIGHT TO DIE 136-37 (1994). Palliative care provides terminal care focusing on the individuality of the dying person, as opposed to the nature, development, or progression of the person's illness. Care is normally provided in the comfort of home and with the support of family and friends. The treatment philosophy emphasizes "caring rather than curing[;]" medical support focuses on symptom management and pain relief. *Id.*

4. The principle of patient self-determination to refuse medical treatment was acknowledged in the United States as early as 1914 when Judge Cardozo explicitly ruled that medical procedures require patient consent. ROBERT M. VEATCH, DEATH, DYING, AND THE BIOLOGICAL REVOLUTION: OUR LAST QUEST FOR RESPONSIBILITY 91 (1989). However, there is no consensus that a physician or guardian has the right to refuse medical treatment for an incompetent patient who lacks legal capacity to refuse treatment. The role of surrogate decision-making is less clear, due in part to the different types of incompetent patients and surrogate decision-makers. *Id.* at 107.

5. *See* sources cited *supra* note 2.

autonomy - the right to make an affirmative decision to terminate one's own life.

The right to die, however, should not demean the coexisting right to choose life. Given the option of physician-assisted suicide, few people would choose the right to die over the right to live.[6] Many competing interests challenge the right to die.[7] However, protecting the right to live while granting the right to die is the greatest challenge in developing a system that permits physician-assisted suicide. Right to die proponents fear a difficult death; right to life proponents fear the inability to choose life in the face of death. Although history has yet to prove definitively that both fears can be balanced to provide autonomy and protection of rights for each group, the right to die movement continues to realize victories in the international legal arena.[8]

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6. As the first country to legalize euthanasia, the Netherlands experienced a 1990 physician-assisted death rate of less than one percent of the population. *See* Richard Fenigsen, *Physician-Assisted Death in the Netherlands: Impact on Long-Term Care*, 11 ISSUES L. & MED. 283, 284-85 (1995). In 1990, the Netherlands, a country of 15 million people, experienced as many as 11,800 reported cases of medical assistance to end a patient's life. The total of 11,800 includes reported cases defined as "physician-assisted suicide," "active euthanasia," and "morphine overdose intended to terminate life." *See also* Julia Belian, Comment, *Deference to Doctors in Dutch Euthanasia Law*, 10 EMORY INT'L L. REV. 255, 288 (1996) (Dr. Fenigsen "has remained an outspoken critic of Dutch euthanasia practices" following his resignation from the Royal Dutch Medical Society after the Society's release of euthanasia guidelines for the prosecution and punishment of doctors who assist in euthanasia.). In contrast, Australian legislators believe that their system of a narrower scope will substantially limit the number of patients who die with the assistance of a physician. *See* 2 THE RIGHT OF THE INDIVIDUAL OR THE COMMON GOOD: REPORT OF THE INQUIRY BY THE SELECT COMMITTEE ON EUTHANASIA, TRANSCRIPTS OF ORAL EVIDENCE, LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY GOVERNMENT (July 1995) (visited Sept. 17, 1996) <http://www.nt.gov.au/lant/rotti/vol2.shtml> [hereinafter COMMITTEE REPORT, VOLUME 2]. Committee Report statements by Ms. Cracknell indicate that "[t]he extent of utilisation of the Act . . . would be very, very low . . . . [W]e are looking at 6 to a dozen [people per year and] . . . at those people who comply with the conditions of the Act . . . and have reached that point where palliative care is no longer adequate to them." *Id.*

7. *See* Catherine L. Bjorck, *Physician-Assisted Suicide: Whose Life Is It Anyway?*, 47 SMU L. REV. 371 (1994) (discussing questions of ethics and law); ERICH H. LOEWY, TEXTBOOK OF HEALTHCARE ETHICS 185-87 (1996) (discussing questions of health care ethics); Kenneth L. Vaux, *The Theologic Ethics of Euthanasia*, 19 HASTINGS CENTER REP. 19 (Special Supp., Jan.-Feb. 1989) (discussing questions of religion and ethics as they relate to euthanasia); Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 HASTINGS CONST. L.Q. 799 (1994) (discussing questions of the constitutionality of assisted suicide).

8. *See infra* Introduction.

INTRODUCTION

The international right to die movement recently celebrated two victories. On July 1, 1996, the Northern Territory of Australia enacted the Rights of the Terminally Ill Act (Act),[9] marking the world's first legislation legalizing physician-assisted suicide.[10] Although a permanent injunction has prevented Ballot Measure 16, an instance of legislation by referendum, from being enacted,[11] Oregon voters narrowly approved in November 1994 what would have been the world's first legislation to decriminalize physician-assisted suicide.[12] Prior to passage of the Oregon referendum and the Northern Territory legislation, the Netherlands had been the only country to create a defense for euthanasia.[13] The Dutch Supreme Court has recognized that a physician who terminates life at the express wish of a patient may, under certain conditions, invoke the criminal defense of *force majeure*.[14]

This note compares the three systems that have been approved.[15] The development of each system provides the best background to date for comparing the scope, criteria, and enforcement protocols of systems that permit voluntary euthanasia.[16] Part I compares the Dutch judicial system

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9. RIGHTS OF TERMINALLY ILL ACT (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

10. *Euthanasia Law Upheld*, ROCHESTER SENTINEL (IND.), July 24, 1996, at 4.

11. Lee v. Oregon, 891 F. Supp. 1429 (D. Or. 1995). The court held that the Act violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. All defendants were permanently enjoined from recognizing the Act. *Id.* at 1437.

12. Edward R. Grant & Paul B. Linton, *Relief or Reproach?: Euthanasia Rights in the Wake of Measure 16*, 74 OR. L. REV. 449, 449 (1995).

13. BARRY R. FURROW ET AL., HEALTH LAW § 17-70 (1995).

14. Office of Health & Env't, Royal Neth. Embassy, Washington, D.C., *The Termination of Life by a Doctor in the Netherlands* (1995) [hereinafter *Termination of Life*] (on file with the *Indiana International & Comparative Law Review*). *Force majeure* is a form of duress which "constitutes generally recognised grounds for immunity from criminal liability." Article 40 of the Dutch Criminal Code generally states that "[a]ny person who was compelled by *force majeure* to commit an offence shall not be criminally liable." Duress associated with euthanasia, assisted suicide, or the termination of life without a request applies when a physician is faced with a conflict of duty; the conflict is between a duty to preserve life and a duty to relieve unbearable suffering when the patient has no prospect for improvement. To successfully raise a defense of *force majeure* that allows an immunity from prosecution, the physician must fulfill specified criteria. *Id.*

15. The term "system" is used to denote the purpose, scope, criteria, and enforcement criteria of a policy that permits voluntary euthanasia. Note that all systems are not currently in force. *See supra* text accompanying notes 9-14.

16. Each system uses different terminology for an act commonly discussed in the United States as physician-assisted suicide. Although some of the definitional and reporting differences are discussed in Parts I and II, the term "euthanasia" will be consistently used to refer to the act permitted and defined by the system being discussed.

with the Australian legislative system. The discussion focuses on the differences of the systems, including criteria to limit usage and minimize abuse, as well as on the intent of Northern Territory legislators to distinguish the Australian system from the Dutch system. Upon its enactment in 1996, the Rights of the Terminally Ill Act reflected this intent by including more detail and express safeguards to protect the system's limited purpose than appeared in the Dutch system which has developed through nonstatutory case precedent since 1973.

Part II addresses the distinctive criteria of the American referendum system. The discussion focuses on criteria unique to the Oregon Ballot Measure 16 referendum, as well as on the inherent weaknesses in the application and interpretation of this type of statute. Although Oregon's Ballot Measure 16 incorporated criteria not found in either the Dutch or Australian system, the legislation lacked protective criteria found only in the Australian system. Additionally, the interpretive difficulties resulting from referendum legislation's lack of legislative history weaken Oregon's protective criteria. Because the improved criteria of the Australian system were not incorporated cumulatively into the American criteria improvements, the American system lacks the maximum available statutory safeguards to protect the right to live.

Part III discusses a concern prevalent in all three countries, namely, the need to ensure that euthanasia is available as a choice on a continuum of patient autonomy. Although both the Netherlands and Australia have national health care systems providing full access to health care, the United States does not offer full opportunity for health care to all citizens. Furthermore, although the option of euthanasia is available to all criteria-qualified citizens, the option of palliative care is not fully accessible to all citizens in each of these three countries. Euthanasia is not available as a true choice if a patient cannot first be assured access to health care and palliative care.

Even though statutory criteria can limit a system's scope, safeguard the system's purpose, and improve the balance of the right to die with the right to live, a system has yet to emerge that proportionately balances the risk of abuse of either right. If a country is to err in balancing life and death, it is best to err on the side of life.

I. COMPARISON OF A JUDICIAL AND LEGISLATIVE SYSTEM: THE NETHERLANDS AND AUSTRALIA

A. *The Comparative Definition of Euthanasia*

Definition is a basic issue in any discussion of euthanasia.[17] The Greek roots of "euthanasia" mean "good death."[18] Although vague, "good death" continues to be closest to a conclusive definition.[19] Testimony at public committee meetings held prior to passage of the Rights of the Terminally Ill Act reflected a concern for the definition; the expressed concern was to distinguish the meaning of the Australian legislative term from that perceived to be commonly used in the Netherlands.[20] The perceived distinction is between the physician's stated intent as opposed to the physician's motive.[21] A physician's intent rests with an agreement on the purpose and scope of a system that permits euthanasia. The defined scope of a system should effectively convey the system's purpose.[22] If the purpose of a system is to limit the option of euthanasia to a small category of patients, narrowing the scope of a system's permitted assistance effects such a purpose.

Australian legislators chose to define euthanasia as the right of a patient to request his or her physician to assist in terminating life when, "[i]n the course of a terminal illness, [he or she] is experiencing pain, suffering and/or distress to an extent unacceptable [to him or her]."[23] The definition

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17. *But see* GEORGE P. SMITH, II, FINAL CHOICES: AUTONOMY IN HEALTH CARE DECISIONS 92 (1989) (illustrating that blurred definitions have minimized the importance of terminology debates).

18. CARLOS F. GOMEZ, M.D., REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS 22 (1991). "Euthanasia" represents a "compound of two Greek words . . . *eu* meaning 'well' or 'good,' and *thanatos* meaning 'death.'" *Id.*

19. *Id.* (discussing the interchangeability of words used in the Netherlands).

20. COMMITTEE REPORT, VOLUME 2, *supra* note 6 (statement of Dr. John Fleming, Director of Southern Cross Bioethics Institute).

21. *Id.* Dr. Fleming defined "intention" as "an act which brings about a result" and distinguished between acts which look similar but which actually differ because of a difference in intent. In contrast, in the context of a doctor who administers euthanasia, his or her "motivation" would be to relieve suffering. *Id.*

22. 1 THE RIGHT OF THE INDIVIDUAL OR THE COMMON GOOD: REPORT OF THE INQUIRY BY THE SELECT COMMITTEE ON EUTHANASIA, LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY GOVERNMENT § 2 (May 1995) (visited Jan. 5, 1997) <http://www.nla.gov.au/nt/rotti/vol1a.html#preface> [hereinafter COMMITTEE REPORT, VOLUME 1]. The full range of definitions, including the express distinctions between "active and passive" and "voluntary and involuntary" euthanasia, were not included in the final Rights of Terminally Ill Act. The Select Committee on Euthanasia in its report to the Northern Territory legislator addressed the concern for consistency in terminology. The Committee's report defined the terminology accepted by the Committee. *See* RIGHTS OF TERMINALLY ILL ACT, § 3 (Austl.) (visited Jan. 5, 1997) <http:// www.nt.gov.au/lant/rotti/>.

23. RIGHTS OF TERMINALLY ILL ACT, § 4 (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

encompasses a full range of assistance: a physician may "assist" by prescribing, preparing, giving, or administering the medication to the patient.[24]

In contrast, the Dutch acknowledge a full range of assistance within different narrow categories of assistance: "the termination of life at the request of the patient (euthanasia); assisted suicide: the doctor supplies a drug which the patient administers himself or herself; and the termination of life without a request from the patient [manslaughter or murder]."[25] Under Dutch law, a physician who has terminated a patient's life at the patient's request may plead the defense of *force majeure*.[26] Motive is important in the wide range of permitted assistance that a physician can provide because the motive determines the enforcement of the criminal law, including prosecution.[27] Therefore, even though the Australian and Dutch systems define euthanasia differently, both recognize a full range of physician assistance.

In developing the Australian system, the Australian legislators also criticized the Netherlands' timing in developing its system. The Dutch Supreme Court recognized the physician defense of *force majeure* for euthanasia in 1984 even though the Dutch had been actively involved in euthanasia since the early 1970's.[28] Furthermore, three Dutch attempts to enact euthanasia legislation have failed and few physicians have been prosecuted under the current judicial criteria.[29] Dutch legislation in 1994 established a reporting requirement but did not change the criminal status of euthanasia.[30] The Australian Committee referred to the Dutch enforcement system as "[t]he abnormal position which the Supreme Court decision created."[31] Thus, the Australian legislature was concerned with implementing a system that permitted physicians to assist their patients in suicide with defined criteria, enforcement, and reporting standards to minimize abuse.[32]

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24. These terms comprise Australia's definition of "assist." *Id.* § 3.

25. *Termination of Life*, *supra* note 14.

26. *See supra* note 14 and accompanying text.

27. *See supra* note 14 and accompanying text.

28. COMMITTEE REPORT, VOLUME I, *supra* note 22, § 4.1.

29. *Id.* Bills introduced in 1986, 1987, and 1993 failed to pass. Thus, euthanasia remains technically illegal by statute. There have been only two prosecutions, with the most recent in 1995 for the death of an infant. *Id. But see Termination of Life*, *supra* note 14 (Since the November 1990 establishment of a voluntary notification procedure, a total of 26 cases have been prosecuted in the years 1991 through 1994. The voluntary notification procedure became a statutory requirement effective June 1, 1994.).

30. COMMITTEE REPORT, VOLUME I, *supra* note 22, § 4.1.

31. *Id.*

32. GOMEZ, *supra* note 18, at 25-39 (discussing the chronological events of Dutch case history).

A similar concern with the timing of judicial and legislative interaction has been discussed in the Netherlands.[33] Dutch tradition is that the legislature "*makes the law*" by promulgating general rules and that the judiciary merely "*find[s] the law*" by applying legislative rules to specific disputes.[34] However, a shift in law-making responsibility from the legislature to the judiciary has resulted in issues, such as euthanasia, being submitted to the courts prior to any legislative action; the courts thus have recently rendered many decisions that form the only legal statement in a given field of law.[35]

The Australian legislation represents an extreme contrast in timing and manner of development. The Rights of the Terminally Ill Bill of 1995 was introduced into the Legislative Assembly of the Northern Territory on February 22, 1995.[36] Although debate on the bill was adjourned until May, the Assembly established by resolution a Select Committee on Euthanasia to receive and examine evidence and report to the Assembly by May 16, 1995.[37] The Committee called witnesses, advertised for written and oral submissions, distributed information about the Bill, and held two weeks of hearings.[38] The Legislative Assembly passed the Rights of the Terminally Ill Bill on May 25, 1995; an amendment, the Rights of the Terminally Ill Amendment Act of 1996, passed on February 20, 1996.[39] The amended Act was enacted on July 1, 1996.[40]

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33. Jimmy M. Polak & Maurice V. Polak, *Faux Pas Ou Pas De Deux? Recent Developments in the Relationship Between the Legislature and the Judiciary in the Netherlands*, 33 NETH. INT'L L. REV. 371 (1986). The Board of Editors of Netherlands International Law Review asked the authors to write an article addressing developments in the relationship between the Dutch legislature and judiciary. The interest was inspired by a few cases "in which the Supreme Court of the Netherlands (*Hoge Raad*) seemed to act as an 'assistant-legislator' rather than as a '*bouche de la loi*' [*mouth of the law*]. The four cases involved "transsexuals and the civil registry," "pension rights and divorce," "euthanasia," and "family plot: parents and children" (concerning the personal and property relationships between parents and children). *Id.* at 384-404.

34. *Id.* at 372.

35. *Id.* at 384. The authors noted that "[t]he attempts undertaken by the legislature to bring about clarification and legal certainty in this field have affected Dutch society . . . for a number of years, and will certainly continue to do so in the near future." *Id.* at 394. Interestingly, the "near future" referred to in 1986 has extended into current times. *See supra* note 29 and accompanying text.

36. COMMITTEE REPORT, VOLUME 1, *supra* note 22, § 1.1.

37. *Id.* §§ 1.3-1.4. A total of 104 people appeared before the Committee, and 1126 written submissions were received; all but four submissions were from Australia. (Two submissions each were from the United Kingdom and the United States.). *Id.* § 3.10.

38. *Id.* § 1.3.

39. RIGHTS OF THE TERMINALLY ILL AMENDMENT ACT 1996 (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/amend.shtml>.

40. *Id.*

Unlike the Dutch system that today represents a system developed primarily from twenty-three years of case precedent, the Australian system includes specific statutory criteria that developed over a year of inquiry, debate, and amendment. The development of the Australian system permitted the system's current well-defined scope, the first level of safeguard for the right to live, to be defined and enforceable from the day of enactment.

B. *The Comparative Regulation of Euthanasia*

1. *Assessment Criteria*

Assessment criteria, which define the scope of the system, narrow the circumstances where an individual may elect euthanasia as an option. Effectively conveyed criteria further establish a second level of safeguard for the system's scope. Thus, both a limited scope and well-defined criteria create obstacles to unintended use that would represent an abuse of the intended purpose of the system. For purposes of comparative analysis, assessment criteria are generally grouped into categories representing system goals: medical condition, medical consultation, voluntary request, and quality of decision.

An inherent distinction between the Dutch and Australian criteria is the manner in which the two sets of criteria have developed.[41] Australian Northern Territory legislators were expressly concerned with developing a distinction in the development, establishment, and application of criteria because they wanted to minimize potential abuse of the system's scope.[42] Their legislative efforts succeeded in establishing a system of specific criteria for a euthanasia system which responded to the swell of public opinion favoring voluntary euthanasia.[43]

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41. *See* discussion *supra* Part I.A.

42. *See* EXTRACTS FROM THE PARLIAMENTARY RECORD OF THE DEBATES OF THE LEGISLATIVE ASSEMBLY ON THE RIGHTS OF THE TERMINALLY ILL BILL, Legislative Assembly of the Northern Territory, May 24 - 25 A.M. (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/euthanas.shtml> [hereinafter PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES (This was discussed in a debate between Mr. Hatton and Mr. Stirling. Mr. Hatton asked the question: "Is it better to let the common law evolve before you pass a statute or is it better to pass a statute in advance of the common law?" Mr. Stirling replied that legislation will already be broadened beyond its original scope through pressure to amend legislation to include groups excluded by the criteria and through the natural functioning of the legal system: "Safeguards are lowered in practice and the process of desensitisation to the practice of euthanasia will mean that the net will grow ever wider.").

43. Of the 1126 submissions reported in the Inquiry by the Select Committee on Euthanasia, 72% of the submissions favored euthanasia or the right of an individual choice, though only 23% of the submissions were received from Northern Territory residents. Of the

a. *Medical Condition*

The Dutch neither expressly[44] nor in application view terminal illness as a requisite medical condition for permitting euthanasia.[45] The required medical condition is defined as "unacceptable and hopeless suffering."[46] The stipulated test is an assessment of whether the attending physician can reasonably conclude "that the patient was suffering unbearably."[47] However, the basic criterion for qualification, the level of suffering, has been acknowledged as difficult to apply.[48]

A second level of assessment requires the physician to determine the patient's suffering is "without prospect of improvement."[49] The objective test for hopelessness of suffering requires that "[p]rofessional medical judgment must have established beyond doubt that the patient's situation is beyond improvement, which is the case when there is no realistic therapeutic perspective."[50] However, if a review of the physician's assistance determines that a patient made a free choice, the physician can invoke a presumption that the standard for level of suffering likewise was met. The Court attempts to narrow assistance to "extremely strict conditions" by

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255 submissions from territory residents, only 48% (122) favored euthanasia. COMMITTEE REPORT, VOLUME 1, *supra* note 22, § 3.10.

44. Robert J.M. Dillmann & Johan Legemaate, *Euthanasia in the Netherlands: The State of the Legal Debate*, 1 EUR. J. HEALTH L. 81, 83-84 (1994).

45. Office of Health & Env't, Royal Neth. Embassy, Washington, D.C., Memo from the Ministerie van Justitie, Directie Voorlichting, *Consequences of Supreme Council Decree for Prosecution Policy in Relation to Euthanasia and Assisted Suicide* [hereinafter *Consequences of Prosecution Policy*] (on file with the *Indiana International & Comparative Law Review*). "In principle[,] the cause of the suffering and the circumstance of the terminal phase are deemed irrelevant. According to both ministers [i.e., the Ministers of Justice and Public Health], the basic consideration must be the unbearable suffering of the patient concerned without any prospect of improvement." *Id.* *See also* GOMEZ, *supra* note 18, at 39. This concept was reinforced in a 1986 court decision that dismissed charges against a physician who had assisted in the death of a patient who was not terminally ill.

46. Dillmann & Legemaate, *supra* note 44, at 84. The requirement was defined by the General Board of the Royal Dutch Medical Association (RMDA) in 1984 and has "been confirmed in court decisions." *Id.*

47. *Consequences of Prosecution Policy*, *supra* note 45.

48. *Id.*

49. *Termination of Life*, *supra* note 14. *See also Consequences of Prosecution Policy*, *supra* note 45.

50. *Consequences of Prosecution Policy*, *supra* note 45. A perspective is defined as realistic if "a. current medical practice considers a prospect of improvement to exist[,] provided [that] adequate treatment is administered, b. this can be achieved within a reasonable term[,] and c. a reasonable balance is deemed to exist between the expected results and the burden placed on the patient while undergoing treatment." *Id.*

requiring that there is "no possibility of any form of treatment whatsoever being effective."[51]

The Dutch Supreme Court has further recognized psychological suffering as a permissible condition for physician assistance.[52] A physician must determine that the patient's request has been carefully considered and was made "when the patient was fully mentally competent" and that "no further treatment could be effective."[53] However, the Supreme Court has also acknowledged that with a case of psychological suffering, unlike physical suffering, it is almost impossible to objectively establish whether there is an opportunity for improvement.[54]

In an attempt to ensure an objective evaluation, the Dutch prosecution policy instructs the physician to take greater care in assessing whether the psychological suffering is unbearable.[55] In addition, as the suffering becomes proportionately more psychological, greater care in assessment must be taken.[56] One measure of the physician's level of care in assessment is the length of time taken in making the decision.[57]

The Australian intent to implement specific measurable criteria is distinguished by a focus on the narrower medical condition of terminal illness. A patient who is terminally ill must be experiencing "severe pain or suffering."[58] Although a terminal illness is defined as "an illness that will, in the normal course and without application of extraordinary measures, result in the death of the patient,"[59] the legislators did not define a terminal condition by a specific period of limited life expectancy.[60] Legislative

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51. *Termination of Life*, *supra* note 14. If a psychiatric patient does not desire further treatment, a physician cannot provide assistance and receive immunity under the defense of *force majeure*. *Id.*

52. *Id.* A 1994 Dutch Supreme Court case did not permit the physician to invoke the defense of *force majeure* and found the physician guilty of assisting the patient to commit suicide. However, the Court did not impose a penalty. *Id.* Although the court did not permit that physician to invoke the defense, the court did establish a standard that if met would permit a physician to raise the defense. *See infra* text accompanying notes 52-56.

53. *Termination of Life*, *supra* note 14..

54. *Id.*

55. *Id.*

56. *Consequences of Prosecution Policy*, *supra* note 45.

57. *Id.*

58. RIGHTS OF TERMINALLY ILL ACT, § 7(1)(d) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

59. *Id.* § 7(1)(b)(i).

60. PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (The debate relays a discussion between Dr. Lim, Mr. Bell, and Mrs. Braham. Dr. Lim was concerned that deletion of a 12-month life expectancy requirement in the definition of terminal illness would permit a greater range of patients to qualify, including those with an illness that would likely not result in death for 20 years. Mr. Bell was opposed to a terminal illness definition that did not include a 12-month life expectancy and argued that 12 of the 25 members who voted against the bill at the second-reading stage presumably also found the definition

concern echoed a concern common in bioethic discussions: a physician cannot guarantee a diagnosis of limited life expectancy nor the length of life remaining.[61] However, by excluding a time frame for life expectancy, the legislators have widened the scope of the system and increased potential abuse of the right to live.

Is the system intended more for use in a particular phase of terminal illness: at the time of diagnosis when the length of life expectancy is the greatest or in the final stages of illness when the length of life expectancy is the least?[62] While the patient's medical condition is described as terminal, the patient is required to be experiencing unacceptable "pain, suffering and/or distress."[63] If the legislators intended to create a primary threshold at the patient's level of discomfort, it is questionable why they were not more concerned with expressing an intent that the euthanasia option only be available into the extension of an illness. At the time of diagnosis, there is less known about the diagnosis, progression and effects of illness, as well as the ability to provide comfort measures. By omitting a time frame for life expectancy, the Australian legislators have enlarged the scope of the system, foregone an opportunity to provide a more objective expression of the intended scope, and created vagueness in the intended application.

b. *Medical Consultation*

There is little detail in the Dutch system relative to a consultation requirement. Simply stated, the attending physician must consult with "at least one other physician with an independent viewpoint who must have read the medical records and seen the patient."[64] The general purpose for consultation is to verify that the request is genuine and appropriate.[65] While the Dutch courts have not discussed the requirement of secondary medical

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unacceptable. Mrs. Braham recommended the insertion of the terminal illness definition without a 12-month life expectancy requirement, so that the legislation was consistent with existing statutory language.).

61. *Id.* (relaying debate between Mr. Perron and Mr. Stirling).

62. Legislators could not agree at what stage in a terminal illness the system was intended as an option. Statement of a 12-month time frame for life expectancy was deleted in final amendments to the Rights of Terminally Ill Act. *Id.*

63. RIGHTS OF TERMINALLY ILL ACT, § 7(1)(d) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

64. *Termination of Life*, *supra* note 14. *See also* Dillmann & Legemaate, *supra* note 44, at 84 (stating that of the five cumulative requirements for physician assistance, one is "e. consultation of another physician").

65. Maurice A.M. de Wachter, *Euthanasia in the Netherlands*, 22 HASTINGS CENTER REP. 23, 23 (Mar.-Apr. 1992).

consultations,[66] more emphasis is placed on the patient and physician together reaching the decision that the patient's circumstances qualify for euthanasia.[67]

In contrast, the Australian system includes more consultation requirements and a higher level of specificity in the consultation criteria. The attending physician's assessment must include a consultation with "[t]wo other persons, neither of whom is a relative of or employee of, or a member of the same medical practice as, the first medical practitioner or with each other."[68] Furthermore, one physician must be "experienced in the treatment of a terminal illness from which the patient is suffering;" one physician must be a qualified psychiatrist.[69] This safeguard prevents a physician from making an arrangement with either another physician in his or her own practice or a relative of another physician in his or her own practice and ensures that a physician with specialized knowledge and experience is involved in a patient's physical and psychological assessment.[70]

In addition to requirements ensuring the professional competency of the attending and consulting physicians,[71] the Australian legislators also outlined the level of consultation among the practitioners.[72] The qualified psychiatrist must examine the patient and determine "that the patient is not suffering

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66. *See generally* GOMEZ, *supra* note 18, at 25-39 (discussing court cases, holdings, and implications on the formal limits of Dutch euthanasia).

67. *Id.* at 39 (discussing the last reviewed decision cited as *The Hague, 1986*).

68. RIGHTS OF TERMINALLY ILL ACT, § 7(1)(c) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

69. *Id.* § 7(1)(c)(i)(ii).

70. PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting the discussion by Mr. Ede).

71. RIGHTS OF TERMINALLY ILL ACT, § 3 (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>. All physicians must be "entitled to practice as a medical practitioner (however described) in a State or Territory of the Commonwealth for a continuous period of not less than 5 years and who is resident in, and entitled under the Medical Act to practise medicine in, the Territory." A qualified psychiatrist must be:

> (a) person entitled under a law of a State or Territory of the Commonwealth to practise as a specialist in the medical specialty of psychiatry;
> (b) a specialist whose qualifications are recognised by the Royal Australian and New Zealand College of Psychiatrists as entitling the person to fellowship of that College;
> (c) a person employed by the Commonwealth or a State or Territory of the Commonwealth, or an Agency or authority of the Commonwealth or a State or Territory, as a specialist or consultant in the medical specialty of psychiatry.

Id. See also PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting discussion of Dr. Lim). Although legislators debated inclusion of a 10-year requirement instead of the five-year requirement, the intent was to ensure that an assisting physician has adequate clinical experience. *Id.*

72. RIGHTS OF TERMINALLY ILL ACT, § 7(1)(c) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

from a treatable clinical depression."[73] The second consulting physician must examine the patient and concur with the original opinion regarding the existence and seriousness of the illness, the likelihood of the patient's death as a result of the illness, and the prognosis.[74] The consultation requirement provides greater assurance that a medical assessment is made on a valid long-term physical and psychological prognosis.[75] Thus, while both the Dutch and Australian systems include a medical consultation requirement, the Australian system better protects the neutrality and effectiveness of the physical and psychological assessment that qualifies a patient for life-terminating assistance.

c. *Voluntary Request*

Several concerns generally relate to an accurate assessment of the voluntariness of the patient's request: the physician's knowledge of the patient, the manner in which the patient makes the request, and the durable nature of the consent. The Dutch courts have generally emphasized the importance of the attending physician's relationship with the patient.[76] "The attending physician must know the patient well enough to assess whether the request is indeed voluntary . . . ."[77] However, problems can arise when an assisting physician does not know the patient well because the patient is a referral from another physician who, due to religious or moral reasons, has declined to provide assistance.[78]

The manner in which the patient makes the request for assistance is further evidence of the voluntariness of the decision. The Dutch courts require that the patient's request to his or her physician be made persistently[79] and very emphatically[80] and be "durable."[81] A 1973 court

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73. *Id.* § 7(1)(c)(iv).

74. *Id.* § 7(1)(c)(iii).

75. *See* PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting discussion of Mr. Ede).

76. *See supra* note 67 and accompanying text.

77. *Termination of Life*, *supra* note 14.

78. *See* GOMEZ, *supra* note 18, at 43. The acknowledgment that an assisting physician may not meet the emphasized importance of knowing the patient well is the only discussion of the court's general preference. No specific standards or requirements have been expressed. A physician that declines to provide a requesting patient with euthanasia assistance due to religious or moral concerns (not strictly medical reasons) is "bound to refer the patient to another physician who feels no such scruples." *Id.* The Royal Dutch Society for the Promotion of Medicine (KNMG) guidelines require that if a physician excuses himself or herself from assisting a patient, the physician "cannot be further involved in the decisionmaking process because there can be no question of an objective participation in the decision for euthanasia." *Id.* at 42-43.

79. *Termination of Life*, *supra* note 14. *See also* de Wachter, *supra* note 65, at 24 (listing the requirements for "voluntariness" to include that "[t]he patient's request must be

decision further held it to be a "generally established and acceptable medical practice" to provide euthanasia assistance when "[t]he patient has indicated in writing . . . that he desires to terminate his life."[82] However, no later court has discussed a requirement of writing, nor included the writing requirement in its list of criteria for permitting the *force majeure* defense.[83] The requirement of a written request also is not listed in the guidelines for the attending physician's mandatory report to the municipal pathologist.[84]

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persistent.").

80. Office of Health & Env't, Royal Neth. Embassy, Washington, D.C., Memo from the Ministerie van Justitie, Directie Voorlichting, *Compulsory Euthanasia Notification Procedure Comes into Force on 1 June* [hereinafter *Compulsory Notification Procedure Press Release*] (Press Release dated May 11, 1994) (on file with the *Indiana International & Comparative Law Review*).

81. Dillmann & Legemaate, *supra* note 44, at 84. A list of requirements published in 1984 by the General Board of the Royal Dutch Medical Association and confirmed in court decisions lists five cumulative requirements; one requirement is a "voluntary and durable request." *Id.*

82. GOMEZ, *supra* note 18, at 30. The 1973 *Leeuwarden* court reviewed the first case of a physician charged for providing assistance. The physician was charged with killing her 78-year-old mother who had been a resident in a nursing home for two months. The physician asserted she injected her mother with 200 milligrams of morphine with an intent to end her mother's life in response to her mother's request for assistance. Although the court found criminal fault with the physician because her intent was to kill her mother rather than alleviate pain, the court did not pass the statutory sentence and instead suspended a one-year prison sentence on the condition that the physician not be found guilty of another punishable act within the one-year period. In its opinion, the court recognized that a patient's life may not be continued when the following four conditions, in the medical opinion of the physician, are present:

> A. When it concerns a patient who is incurable because of illness or accident—which may or may not coupled with shorter or longer periods of improvement or decline—or who must be regarded as incurably ill from a medical standpoint.
>
> B. Subjectively, his physical or spiritual suffering is unbearable and serious to the patient.
>
> C. The patient has indicated in writing, it could even be beforehand, that he desires to terminate his life, in any case that he wants to be delivered from his suffering. . . .
>
> E. Action is taken by the doctor, that is, the attending physician or medical specialist or in consultation with that physician.

Id. at 28-31. The court found this assessment to be "generally established and acceptable medical practice." *Id.* at 30. Note should be made that the court did not accept a fifth condition that the dying phase has begun for the patient or is indicated. *Id.*

83. *See generally* GOMEZ, *supra* note 18, at 25-39 (discussing court cases, holdings, and implications of the formal limits on Dutch euthanasia).

84. Office of Health & Env't, Royal Neth. Embassy, Washington, D.C., Fax from the the Ministerie van Justitie, Directie Voorlichting, *Guidelines for the Attending Physician in Reporting Euthanasia to the Municipal Pathologist* [hereinafter *Reporting Guidelines*] (Fax dated Feb. 15, 1996) (on file with the *Indiana International & Comparative Law Review*). The guidelines only ask if there was a living will and request that a copy of any existing living will

Thus, while the Dutch criteria require that a patient's consent be emphatic, persistent, and durable, neither case precedent nor statutory reporting guidelines provide specific objective requirements to minimize potential abuse of voluntary consent.

Unlike the Dutch requirement, the Australian system does not address the type of relationship required by the attending physician. The legislators viewed the decision to assist as less of a one-on-one decision and more of a decision representing a range of medical expertise.[85] Section 6 of the Act imposes a penalty to protect the patient from a variety of potentially interested third parties: from a family member acting as the primary caregiver to a party possessing a financial interest in the premature death of the patient.[86] This provision represents a legislative concern with protecting the patient from the influence of third parties and from conditions extraneous to the patient's self-determination.

Additionally, the Australian system provides a physician with a series of specific and objective requirements to ensure a voluntary and durable request. The series of expressions of consent and required timing of conduct include: express request by patient to end his or her life;[87] signature of the patient, or of the person acting on his or her behalf, on a certificate of request a minimum of seven days following the initial request;[88] and lapse of a minimum of forty-eight hours from the signing of the certificate to the act of assistance.[89] In addition, a physician providing assistance must not have had any indication prior to the act of assistance that the patient no longer wished to end his or her life.[90] If an indication is made, the physician is required to, as soon as possible, "destroy the certificate of request and note . . . that fact on the patient's medical record."[91]

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be forwarded to the municipal pathologist. *See generally Compulsory Notification Procedure Press Release*, *supra* note 80 (presenting text of section 10(1) of the Act on the Disposal of the Dead). The Act on the Disposal of the Dead established a statutorily-mandated requirement to report acts of assistance to the Public Prosecutor. The press release indicates an additional question of why there was not a living will. However, there is not further clarification in the press release that indicates a change of criteria requires that a patient's voluntary consent be expressed in writing. *Id.*

85. *See supra* Part I. B.1.b.

86. RIGHTS OF TERMINALLY ILL ACT, § 6(1) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>. The Act imposes a penalty upon a person improperly influencing a physician "to assist or refuse to assist" a patient who has requested assistance. *Id.* The assessed penalty for such an action is $10,000. No penalty is assessed to a person who accepts an inducement; however the person does not possess a "legal right to receive or retain the reward." *Id.* § 6(2).

87. *Id.* § 7(1)(f).

88. *Id.* § 7(1)(i).

89. *Id.* § 7(1)(n).

90. *Id.* § 7(1)(o).

91. *Id.* § 10(2).

Therefore, the series of three steps requires an Australian patient to request assistance a minimum of three times during passage of a minimum of nine days from the initial request to the act terminating life. The legislators also included a requirement of two "cooling off" periods over a passage of nine days so that the patient has time to consider the decision and to discuss the decision with his or her family.[92] The specific criteria provide an objective measure to assure that the patient has expressed a durable request for assistance.

While the Australian legislature sought to provide safeguards for a voluntary durable request free from third-party interests, the legislature also sought to ensure assistance when the patient met the statutory criteria. The system permits a patient who is unable to sign the required certificate of request to request a third party to sign the certificate on his or her behalf.[93] The requirement limits the use of a substitute signature to the occasion when a patient cannot personally sign the certificate but can request a third-party signature.[94] The risk of third-party abuse is further limited by a requirement that the third-party must not be one of the physicians involved "or a person likely to receive a financial benefit directly or indirectly as a result of the death of the patient."[95] A third-party who signs for the patient automatically forfeits any benefit, financial or otherwise, that the person would ordinarily obtain upon the death of the patient.[96] Thus, the Australian system provides specific, objective steps to assure opportunity for assistance through a durable request.

While the Northern Territory legislature sought to provide safeguards for a voluntary durable request, the legislature fell short of providing the maximum level of safeguard. The legislature did not expressly adopt a

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92. PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting debate among Mr. Perron, Mr. Hatton, Mr. Ede, Mr. Manzie, Mr. Stirling, and Mr. Bailey). The required passage of time is also intended to encourage patients to request assistance earlier than may be requested without a waiting period. Prior to a compromise among the legislators, including discussion of the timing requirements included in Oregon's Ballot Measure 16, the act had included a minimum passage of 14 days. *Id.* Mr. Bailey argued the point that a shortened time frame was less an issue because the required decline in medical condition had already heightened the threshold for permitted assistance. He referred to the need for a patient to "reach the stage where the pain and suffering is no longer bearable and palliative care is no longer working." *Id.* He compared the substitution as one that increased the "slope" of decline in medical condition required to qualify for assistance. He argued that once the patient reached that sharp slope, there need not be an extended waiting period. *Id.* (Note that this argument is only upheld when the threshold for the slope is well-defined, measurable, and protected from abuse.).

93. RIGHTS OF TERMINALLY ILL ACT, § 7(1)(I) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

94. *Id.*

95. *Id.* § 9(1).

96. *Id.* § 9(2).

policy requiring that a patient's completed series of requests be invalid if he or she is not competent to express at the time of assistance any change in his or her mind.[97] Omission of the policy was based on the security that other safeguards had been included to ensure patient self-determination free of abuse.[98] The additional safeguard was believed to potentially hinder patient self-determination when the patient's health deterioration from the time of initial request to the time of act prevented him or her from expressing a last assurance of consent at the time of assistance.[99] However, the omission of the requirement, regardless of the numerous other safeguards, presents a true opportunity for abuse of the patient's voluntary request for assistance.[100]

d. *Quality Decision*

Two considerations generally relate to the quality of a patient's decision: the patient's competency to make a decision and knowledge of the alternatives. While the Dutch require that the patient's request be carefully considered, there is no express requirement addressing a patient's competency in making a decision.[101] There is little case law, and there are no medical professional guidelines addressing the issue of competency.[102] Similar to the Australian omission of a requirement of contemporaneous consent,[103] euthanasia can be performed on an incompetent patient if the patient provided written consent prior to loss of competency.[104] Evidence of

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97. PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting debate between Mr. Lim and Mr. Perron). Mr. Lim argued that once the patient is no longer able to communicate [and has met all requirements of consent], the doctor must assume that the prior request remains the patient's current request. He raised the issue that the patient may express that he or she would no longer request assistance if he or she had the ability to communicate. The issue is raised that the legislation permits a physician to provide assistance to a patient, absent the patient's ability to communicate at the time of assistance. *Id.*

98. *Id.*

99. *Id.*

100. *See supra* note 97 and accompanying text.

101. *Termination of Life*, *supra* note 14. *See also* Dillmann & Legemaate, *supra* note 44, at 84 (A list of requirements published in 1984 by the General Board of the Royal Dutch Medical Association and confirmed in court decisions lists five cumulative requirements; none of the requirements addresses competency of the patient.).

102. *Termination of Life*, *supra* note 14. *See also* de Wachter, *supra* note 65, at 24. The Dutch refer to mental competency as the ability to request termination of life. This definition does not, however, explain the wide range of incompetent patients who have received euthanasia assistance: severely defective newborn babies, persons who are irreversibly comatose, and patients who are severely mentally handicapped.

103. *See supra* notes 97-99 and accompanying text.

104. *See* de Wachter, *supra* note 65, at 24.

the validity of a request is greater when the request has been written or re-signed within the five years preceding the act of euthanasia."[105]

While prior written consent is generally required in order to provide assistance to an incompetent patient, a similar requirement is not extended to severely handicapped newborn infants who survive the withdrawal of treatment.[106] "At least three of the eight [Dutch] centers of neonatology surveyed . . . in 1989 permitted[,] . . . in exceptional cases, . . . actively terminating the life of a severely handicapped infant as soon as it is born when its defects are so extreme that bringing about a speedy death seems the most merciful treatment."[107] Thus, the lack of a Dutch general competency requirement results in an increase in the type and number of patients who qualify for euthanasia; evidence of this result is that patients who have never expressed a request and who can no longer revoke a prior written request can receive life-terminating assistance from a physician. This movement erodes the basic requirement that a patient voluntarily request assistance to terminate his or her life.

Dutch assessment criteria do require that "the doctor and the patient must have considered and discussed alternatives to euthanasia."[108] The requirement was indirectly addressed in 1984 when the Dutch Supreme Court overturned a lower court decision "because the latter had decided the matter from too limited a perspective."[109] In its criticism of the lower court's decision, the Court questioned if there had been other ways to alleviate the patient's suffering.[110] In remanding this case, the Court instructed that there be an overall consideration whether the act of euthanasia was justified.[111] The court held that a condition of "psychic suffering" or "potential disfigurement of personality" created an acceptable standard for requesting

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105. *Id.*

106. *Id.*

107. *Termination of Life*, *supra* note 14. In this circumstance, the defense of *force majeure* permits a physician's immunity only in exceptional circumstances. Criminal proceedings have been instituted in two cases when the lives of "barely viable newborn babies were terminated after a doctor had ascertained that from a medical point of view there was no point in continuing treatment." *Id.* Although in one case the court permitted a defense of *force majeure*, the Minister of Justice continues to desire that the instructions to prosecute will prompt "case law from which criteria can be derived to apply to similar cases." *Id.*

108. *Termination of Life*, *supra* note 14. *See also* GOMEZ, *supra* note 18, at 30-32 (discussing that a 1981 district court added this requirement to the original four requirements outlined by a 1973 court). *See also* Dillmann & Legemaate, *supra* note 44, at 84 (The "full information" requirement was included in guidelines published in 1984 by the General Board of the Royal Dutch Medical Association and have been upheld in court decisions.).

109. GOMEZ, *supra* note 18, at 36.

110. *Id.*

111. *Id.* at 38-39. However, the court dismissed charges filed against the physician who had assisted his patient in terminating his life; the patient was not terminally ill nor in acute physical pain. *Id.*

euthanasia.[112] Because the court requires that the physician discuss the full range of options with the patient, the court's decision would suggest that the range of alternatives required for discussion would also include psychiatric assistance. However, this requirement neither appears in criteria[113] nor is held to be required by the court.[114] Thus, while the Dutch courts require that a physician discuss and consider alternatives with the patient, no decision has expressly identified the range of alternatives which must be discussed.

In contrast, the Australian system expressly establishes two requirements of competency: a patient minimum age of eighteen years[115] and physician satisfaction that the patient is of sound mind.[116] The legislators intended that the sound mind requirement be interpreted in coordination with the requirement of a qualified psychiatrist's exam[117] and confirmation "that the patient is not suffering from a treatable clinical depression."[118] A patient who is suffering from or being treated for a treatable clinical depression is considered incompetent and unable to qualify for physician assistance in terminating his or her life until the condition has been successfully treated.[119]

Similarly, the Australian system expressly requires that a physician provide a patient with a minimum identified range of medical treatment options. "[P]alliative care, counselling[,] . . . psychiatric support and extraordinary measures" available to sustain the patient's life, must be discussed with the patient.[120] Information on availability of palliative care must be provided by a practitioner who possesses "special qualifications in the field of palliative care."[121] To ensure an informed decision, the Act requires that the patient, prior to making a final request,[122] be informed of the nature of his or her illness and its likely course.[123]

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112. *Id.*

113. Dillmann & Legemaate, *supra* note 44, at 84.

114. GOMEZ, *supra* note 18, at 36-39.

115. RIGHTS OF TERMINALLY ILL ACT, § 7(1)(a) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

116. *Id.* § 7(1)(h).

117. *See* PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting debate between Mr. Hatton, Mr. Bailey, Mr. Burke, and Mr. Ede).

118. RIGHTS OF TERMINALLY ILL ACT, § 7(1)(c)(iv) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

119. *See* PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting debate between Mr. Hatton, Mr. Bailey, Mr. Burke, and Mr. Ede).

120. RIGHTS OF TERMINALLY ILL ACT, § 7(1)(e) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

121. *Id.* § 7(3). The Act requires that if the physician who has received a request for assistance does not have "special qualifications in the field of palliative care," the practitioner must involve the required consulting practitioner (not the required consulting psychiatrist) or any other physician who has the required special qualifications. *Id.*

122. *Id.* § 7(1)(f).

123. "'Illness' includes injury or degeneration of mental or physical faculties . . . ." *Id.* § 3.

The Australian system further requires a patient to seek alternative options prior to permitting a physician to provide life-terminating assistance.[124] The physician cannot assist the patient if, "in his or her opinion and after considering the advice of . . . [a physician specialized in palliative care], there are palliative care options reasonably available to alleviate the patient's pain and suffering to levels acceptable to the patient."[125] If the patient, subsequent to a request for life-terminating assistance, receives palliative care "that brings about the remission of the patient's pain or suffering," the physician cannot act upon the patient's original request for assistance.[126] However, if at some point the palliative care ceases to provide the patient with an acceptable level of alleviation from pain and suffering, the patient can receive life-terminating assistance but must, in order to revitalize the original request, first express a new request to the physician.[127] Thus, the Act has delineated multi-level safeguards in ensuring that a patient requesting life-terminating assistance has knowledge of and is required to try available palliative care options.

A similar delineation of safeguards requires a patient needing psychiatric care to be informed of and receive psychiatric services.[128] A physician cannot provide assistance to a patient who, after a required examination by a qualified psychiatrist, has been diagnosed as suffering from treatable clinical depression.[129] However, the legislators failed to expressly include the comparable requirement that a physician, prior to providing assistance to a patient who has received psychiatric care for clinical depression, receive a renewed request for life-terminating assistance.[130] Since the legislation has been recently enacted, the breadth of interpretation of the legislature's omission upon prosecutorial or judicial review and the potential abuse to the voluntary choice requirement is unknown.

2. *Enforcement-Reporting Procedures*

Assessment criteria protect the purpose and scope of the system while enforcement protocol protect the assessment criteria. Reporting procedures are necessary to an ongoing review of actual acts of assistance, identification of abuses to the system, prosecution of abusive conduct, and identification of changes necessary to protect the system's purpose. Enforcement criteria generally require documentation of assistance provided by a physician,

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124. *Id.* § 8(1).
125. *Id.*
126. *Id.* § 8(2).
127. *Id.*
128. *Id.* §§ 7(1)-7(1)(c)(iv).
129. *Id.*
130. *Id.*

investigation of reported assistance, and prosecution of physicians providing assistance outside the required guidelines.

a. *Dutch Reporting Procedures*

The first Dutch reporting procedure for physician-provided euthanasia assistance was adopted November 1, 1990.[131] The two-step voluntary reporting procedure required the assisting physician to forward a completed questionnaire to the local medical examiner.[132] The medical examiner then reported the assistance to the district attorney who decided if the physician complied with the criteria[133] and if charges should be filed against the physician.[134] Upon the 1991 recommendation of the government-appointed Remmelink Committee, the voluntary reporting procedure became a statutory requirement with the July 1, 1994, enactment of section 10(1) of the Act on the Disposal of the Dead (Disposal Act).[135] The Disposal Act provides a model reporting form of over fifty-five questions that address case history, the request to terminate life, active termination of life without express consent, consultation of other physicians, and termination of life.[136]

b. *Effectiveness of Dutch Reporting Procedures*

The Dutch statutory reporting procedure will increase the amount of information gathered,[137] as well as the number of cases reviewed for abuse.[138] However, the proven uncertainty of the Dutch euthanasia guidelines and review criteria fail to present incentive to report acts of assistance. Unpredictable guidelines increase the uncertainty of a physician's ability to raise the *force majeure* defense. Furthermore, the statutory reporting requirement does not change the manner in which the criteria and their application will evolve.[139] Uncertainty of prosecutorial criteria have further

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131. *Termination of Life*, *supra* note 14 (discussing that the notification procedure was voluntary). *See also* Dillmann & Legemaate, *supra* note 44, at 84.

132. Dillmann & Legemaate, *supra* note 44, at 84.

133. *See supra* Part I.B.1.

134. Dillmann & Legemaate, *supra* note 44, at 84.

135. *Compulsory Notification Procedure Press Release*, *supra* note 84.

136. *Id.*

137. *Id.* In the first year of the voluntary reporting procedure, the number of reports increased. Cases reported for the years 1991, 1992, and 1993 were 591, 1323, and 1318, respectively. *Id.*

138. *Id.*

139. *Consequences of Prosecution Policy*, *supra* note 45. A memorandum from the Ministerie van Justitie has stated that "[t]he prosecution policy is, and *will continue* to be, anchored in Dutch legislation and the jurisprudential interpretation thereof." *Id.* (emphasis added).

increased with the inclusion of information on the reporting form that has not yet been required or discussed by the courts.[140] Several questions arise: Will prior notification be provided when additional prosecutorial elements are added? Will judicial review respond to elements in the same manner as prosecutorial review? Will future courts continue to create new criteria as they find physicians guilty of criminal acts?

A physician does not have a general incentive to report life-terminating assistance. The reporting statute does not stipulate a penalty for providing assistance without prior or subsequent reporting of the assistance.[141] Therefore, if a physician provides assistance that may not meet the criteria and permit raising a defense of *force majeure* when prosecuted for manslaughter or murder, would a physician be compelled by force of a reporting statute to file a report of assistance when that report will automatically trigger review of the potentially indefensible act? In contrast, will a physician be more compelled to chance non-discovery of an act and the result of a review if discovered or report the act which will trigger an automatic review?

The Dutch physician's incentive to report assistance is central to safeguarding the defined limits to permitted euthanasia. Reports of assistance trigger prosecutorial review; prosecution triggers judicial review. Judicial review is mandatory to establish the precedent of guidelines that will provide clearer criteria for physicians, limit assistance to that approved by public policy, and prosecute abuse of the system. The lack of physician incentive to report assistance for review is unsettling.

c. *Australian Reporting Procedures*

In contrast, the Australian system's two-step reporting procedure does not involve completion of a lengthy report; rather, it involves submitting original documentation of assistance and a certificate of death.[142] The physician's report of assistance to the coroner must include: original documentation of two patient requests, medical opinions of the three physicians involved in the assistance, certification of involvement of independent consultants, obedience of the required steps, and prescribed

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140. *See Compulsory Notification Procedure Press Release*, *supra* note 84. The Ministerie van Justitie has indicated that the reporting procedure includes some new elements relating to the Dutch prosecution policy. Examples of items required to report, but not yet required by the courts, include: consultation with the patient's next-of-kin, supplementary considerations that determined the medical decision-making and the time at which action was taken, and notification of the management of the institution where the patient was staying. *Id.*

141. *Id.*

142. RIGHTS OF TERMINALLY ILL ACT, §§ 12-13 (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

assistance resulting in death.[143] The coroner is required to report annually to the Attorney General on the number of patients who received assistance and may report to the legislature as he or she thinks appropriate.[144] Upon his or her discretion, the coroner may at any time report to the Attorney General on any matter involving the operation of the Act.[145] In response, the Attorney General must, within three sitting days of the legislature after receiving the report, present a copy of the report to the legislature.[146]

d. *Effectiveness of Australian Reporting Procedures*

While the Australian two-step reporting procedure is comparable to the Dutch two-step reporting procedure, the Australian system is distinguished by the physician's incentive to report. Unlike an act of assistance by a Dutch physician, an Australian physician's act of assistance is not presumed to be an illegal criminal act,[147] is not reviewable by the district attorney,[148] and is not punishable as manslaughter or murder.[149] An Australian physician is not "subject to civil or criminal or professional disciplinary action for anything done in good faith and without negligence in compliance with this Act."[150] Thus, absent an inability to meet the tests of "good faith," "without negligence," and in compliance with the Act, an Australian physician can provide assistance to patients without concern of civil, criminal, or professional repercussions.

Lack of experience with this system precludes an opportunity to evaluate the effectiveness of the reporting procedure.[151] However, prior to passage of the Act, the legislature debated the coroner's role in investigation and reporting.[152] A minority of Australian legislators would have required the coroner to review documentation prior to assistance - as an additional

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143. *Id.* §§ 12-14.

144. *Id.* § 14(2).

145. *Id.* § 15.

146. *Id.*

147. *Supra* note 14 and accompanying text.

148. *Supra* note 133 and accompanying text.

149. *Supra* note 23 and accompanying text.

150. RIGHTS OF TERMINALLY ILL ACT, § 20(1) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

151. *But see Right-To-Die Cases Stir Profound Ethics Controversy*, MED. & HEALTH, Oct. 21, 1996, *available in* WESTLAW, MEDHLTH. Review of the legislation's ability to protect the permitted scope of euthanasia can soon begin. On September 22, 1996, Bob Dent, an Australian with prostate cancer, became the first person to die under the Northern Territory Rights of the Terminally Ill Act. Mr. Dent's physician was in attendance when he self-administered a lethal injection via a machine connected to a laptop computer.

152. *See* PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting debate among Mr. Bailey, Mr. Perron, and Mr. Manzie).

safeguard to abuse.[153] However, a majority of legislators determined the coroner's role to be investigation of death, not investigation of the preliminary circumstances of death.[154] If the coroner reports to the Attorney General only as required annually, the effectiveness of the enforcement protocol will rely heavily on the coroner's investigation. However, the likely effectiveness of the Australian local investigation will overcome the Dutch system's weakness in reliance on a more removed district attorney investigation of the medical examiner's report from the physician.

Vote on the final form of the Act without additional safeguards was proffered on a belief that the variety of safeguards already expressly required in the system were sufficient.[155] In balancing potential safeguards to abuse, the Australian legislators chose to substitute more intensive scrutiny of acts of assistance for an addition of detailed criteria. If the goal of a system is to permit euthanasia with safeguards against abuse, why substitute one deterrence option for another when including both deterrence options will increase the safeguard against abuse? A combination of the two deterrence options—criteria and stringent reporting procedures—would provide enforcement of the system's permitted scope both prior to and after assistance.

II. THE AMERICAN REFERENDUM SYSTEM DISTINGUISHED

A review of the additional safeguards included in the American referendum system as defined by the Oregon Death with Dignity Act, but not found in either the Dutch or Australian system, provides an extension to the list of potential system requirements to safeguard the system's intended scope of assistance.[156] While the American system surpasses some of the statutory protective elements of the Australian system, it does not include all the statutory safeguards of the Australian system. Thus, the American referendum system does not represent a culmination of the statutory safeguards of both systems.[157]

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153. *Id.*

154. *Id.* A coronial test is based upon the coroner's statutory role: a decision for coronial inquiry is based upon a lack of satisfaction with the details of death presented in the required report. The coroner's role further requires providing feedback if the standards should be revised to be further limiting. *Id.*

155. *Id.*

156. A comprehensive comparison of the American referendum system, as defined in Oregon's Death with Dignity Act, with the Dutch and Australian systems is beyond the scope of this note.

157. The Oregon Death with Dignity Act, ch. 127, OR. REV. STAT. §§ 127.800-.897 (Supp. II 1996). Examples of some of the elements included in the Rights of the Terminally Ill Act but not included in the Death with Dignity Act include the following requirements: psychiatric consultation for all patients seeking assistance, a second physician consultant to be

A. *Medical Condition*

The Death with Dignity Act (Oregon Act) incorporates two additional factors to limit the purpose of euthanasia and the number of people who generally qualify for assistance: terminal diagnosis with six-month life expectancy and state residency.[158] Since the Oregon Act was enacted as a public referendum ballot measure, there is no act-specific legislative history to assist in defining the residency requirement.[159] However, the residency requirement does limit the group of patients who qualify for assistance.

Furthermore, the Oregon Act defines terminal disease more narrowly than the Australian Act. The Australian Act does not establish a life expectancy time period;[160] in contrast, the Oregon Act limits the scope of assistance to patients who have been diagnosed with a medically confirmed disease that is incurable, irreversible, and will, "within reasonable medical judgment, produce death within six . . . months."[161] While a life expectancy time frame creates a specific, narrow category for permitted assistance, the inherent uncertainty of medical prognosis could create difficulty for physician assessment. However, an application of assessment protocol for terminal illness, already used by palliative care physicians, would assist physicians.[162] The Oregon Act communicates the drafter's intent to deter the option of euthanasia until the last stages of a terminal illness; the Oregon Act effectively narrows the scope of assistance permitted.

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trained in treatment of the patient's terminal illness, a consulting physician to be neither a relative nor employee of or member of the assisting physician's medical practice, and information on palliative care to be provided by a physician with special qualifications in palliative care. *See* RIGHTS OF THE TERMINALLY ILL ACT, (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

158. The Oregon Death with Dignity Act § 2.01.

159. *Id.* The Oregon Death with Dignity Act, as Ballot Measure 16, "was proposed by initiative petition and was enacted by a vote of 627,980 to 596,018 at the regular general election on November 8, 1994. By proclamation of the Governor dated December 7, 1994, the Act was declared to . . . be in full force and effect." *Id.*

160. *See supra* note 60 and accompanying text. *See also* PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting debate among Mr. Perron, Mr. Bell, Dr. Lim, and Mrs. Braham). Australian legislators understood that the omission of a time period widened the scope of the act's application but elected to maintain definitional consistency with other statutes. *Id.*

161. The Oregon Death with Dignity Act § 1.01(12).

162. *See* NATIONAL HOSPICE ORGANIZATION, HOSPICE FACT SHEET (1996) (on file with the *Indiana International & Comparative Law Review*). Hospice care is provided to a patient with a limited life expectancy of six months or less. *Id.*

B. *Voluntary Request*

The Oregon Act incorporates two additional safeguard elements to ensure that the patient's request is voluntary: the requirement of a witness to verify the patient's signature on the written request[163] and an expressly defined requirement of competency.[164] Although both the Australian[165] and Oregon Acts require a written request by the patient, only the Oregon Act requires a witness to the signature in addition to that of the physician.[166] The Oregon Act requires the safeguard of two witnesses to the patient's signature on the written request, one of whom is not "[a] relative of the patient by blood, marriage, or adoption; . . . entitled to . . . the estate of the . . . patient upon death under any will or by operation of law; or . . . [affiliated with a] health care facility where the . . . patient is receiving [care]."[167] This requirement increases the assurance that the patient's request is voluntary and that the patient has not been influenced by third parties.

While the Australian Act requires that a patient requesting assistance be of "sound mind," the Act does not provide a definition for this mental state.[168] In contrast, the Oregon Act requires a patient to be "capable."[169] The Act defines "capable" as having "the ability to . . . communicate health care decisions to health care providers, including communication through persons familiar with the patient's manner of communicating if those persons are available."[170] Furthermore, the statute provides that a patient's capability is determined by either a court or the physician.[171] Thus, the Oregon Act's statutory definition provides an applicable definition to safeguard the scope of the act, as well as a method to determine a patient's competency when there is a disagreement.

C. *Quality Decisions*

The Oregon Act incorporates three additional safeguards to ensure that a patient's decision is well-informed, fully considered, and durable: counseling of potential risks of medication,[172] passage of a minimum of fifteen days from initial to final request,[173] and an offer made to the patient

163. The Oregon Death with Dignity Act § 2.02(1).
164. *Id.* §§ 2.01, 1.01(6).
165. *See supra* note 89 and accompanying text.
166. The Oregon Death with Dignity Act § 2.02.
167. *Id.* § 2.02(2).
168. *See supra* notes 116-119.
169. The Oregon Death with Dignity Act § 2.01.
170. *Id.* § 1.01(6).
171. *Id.*
172. *Id.* § 1.01(7).
173. *Id.* § 3.08.

at the end of the fifteen-day waiting period of "an opportunity to rescind the request."[174] The Oregon Act requires the physician to inform the patient about the potential risks of taking the prescribed medication.[175] This requirement informs the patient of a concern that arises in euthanasia discussions—when medication does not work as quickly or in the manner desired. Use of the appropriate type and amount of medication to precipitate the type of death anticipated by the patient is not a science, and it can vary with the physician's knowledge of and experience in use of the medication.[176] If a patient elects prescription of medication to terminate life, he or she should be informed of the possible consequences. This notice ensures that the patient has made an informed decision.

The Oregon Act, requiring a minimum passage of fifteen days from the time of the request to assistance in death,[177] represents an increase of the seven-day period required by the Australian Act.[178] The Australian legislators adopted the lesser seven-day period even though some legislators believed that the Oregon Act's longer time period addressed a concern that patients who are suffering from treatable depression will need more time for treatment of and improvement in their mental state.[179] By lengthening the mandatory time period between an initial request and assistance, there is more time for diagnosis of clinical depression and provision of palliative care treatment to ensure a well-considered decision.[180]

In addition to the fifteen-day waiting period, the Oregon Act incorporates a requirement for the physician to solicit an indication of a change in request prior to life-terminating assistance.[181] A similar provision was discussed by the Australian legislatures but not included in the Act.[182] Discussion of the issue focused on the question of competency of the patient at the time of assistance.[183] The provision could be viewed as stating that any act less than a positive indication that the patient has changed his or her mind does not require the physician to discontinue life-terminating assistance.[184] In contrast, the provision could be viewed as requiring that a physician must discontinue assistance absent a positive indication that the patient has not

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174. *Id.* § 3.07.

175. *Id.* § 1.01(7)(c).

176. *See Pain*, MED. & HEALTH, Oct. 21, 1996, *available in* 1996 WL 7993641.

177. The Oregon Death with Dignity Act § 3.08.

178. RIGHTS OF TERMINALLY ILL ACT, § 7(1)(i) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

179. *See* PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting debate among Mr. Ede, Dr. Lim, Mr. Hatton, and Mr. Bailey).

180. *See supra* note 92. *See also Pain*, *supra* note 176.

181. The Oregon Death with Dignity Act § 3.04.

182. *See supra* notes 97-99 and accompanying text.

183. *Id.*

184. *Id.*

changed his mind.[185] In view of the lack of definitiveness of the provision and a desire to ensure that a patient who has lost competency since the initial request be able to receive assistance, the Australian legislature failed to include this additional safeguard to ensure a durable and voluntary request.[186] Absent any legislative history, the Oregon provision retains the same issues expressed by the Australian legislatures. The ambiguity could be resolved with further clarification. Absent clarification, the requirement of voluntariness is not safeguarded from abuse.

III. AVAILABILITY OF HEALTH CARE ALTERNATIVES

Each of the three systems incorporates the safeguard requirement that a physician prior to providing life-terminating assistance inform the patient of the availability of health care alternatives. Both the Australian and American systems also require that a patient receive psychiatric care, when found necessary, prior to qualification for euthanasia assistance.[187] However, only the Australian system requires that a patient receive palliative care prior to receiving euthanasia assistance when the physician believes "there are palliative care options reasonably available to the patient to alleviate the patient's pain and suffering to levels acceptable to the patient."[188] Although all three systems—Dutch, Australian, and American—express concern that the patient be informed of the availability of health care options and some of the systems require utilization of some alternative health care services, no system coordinates a guarantee that information on availability of other health care alternatives ensures geographic and financial access to health care alternatives.

A. *Access to Health Care*

While the health care systems in the Netherlands, Australia, and United States vary, both the Netherlands and Australia have universal access to health care.[189] In contrast, the United States is one of the few remaining industrialized countries without universal access to health care.[190] Universal

185. *Id.*

186. *Id.*

187. *See e.g., supra* notes 73, 108 and accompanying text; The Oregon Death with Dignity Act, § 3.01(4).

188. RIGHTS OF TERMINALLY ILL ACT, § 8(1) (Austl.) (visited Jan. 5, 1997) <http://www.nt.gov.au/lant/rotti/>.

189. EDWARD M. MENDOZA & BRYN J. HENDERSON, INTERNATIONAL HEALTH CARE: A FRAMEWORK FOR COMPARING NATIONAL HEALTH CARE SYSTEMS 3-6 (1995).

190. *Id.* at 7-8.

coverage does not guarantee immediate access but does guarantee eventual access.[191]

By contrast, the United States can generally guarantee immediate access only for emergency care and only limited access for uninsured routine care when the patient lacks the resources to pay.[192] When access is gained, the uninsured are likely to receive a lower level of health care services.[193] Furthermore, uninsured patients have less access to preventative and nonemergency care that can often eliminate or shorten periods of pain and illness.[194] With increasing financial pressure being placed on hospitals and physicians, access and level of health care service for the uninsured face increasing compromise.[195]

When the scope of a system permitting euthanasia requires that the physician inform the patient of other health care alternatives, of what benefit is the information if access to the other alternatives is not available? In the United States, an estimated thirty-seven million people are uninsured.[196] "Although those greater than 65 years of age and the very poor have access to good coverage, there are increasing numbers of working poor without coverage. Access difficulty is increasing for poor, black, Hispanic, or underinsured citizens."[197]

B. *Access to Palliative Care*

Palliative care, as a health care alternative, is experiencing increased success in alleviating pain and providing comfort to patients with a limited life expectancy diagnosis.[198] A 1986 national hospice study of home-care, hospital-based hospices, and conventional care revealed that a respective ten, four, and eighteen percent of patients experienced persistent pain.[199] In contrast, a 1973 report had indicated that seventy-three percent of patients experienced persistent pain.[200] Although palliative care is improving, there are several barriers to its increasing overall access: fifty countries do not have access to medicinal morphine, few medical schools offer palliative care

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191. *Id.* at 8.

192. *Id.* at 8-9.

193. Tom Stacy, *The Courts, The Constitution, and a Just Distribution of Health Care*, 3-WTR KAN. J.L. & PUB. POL'Y 77, 79 (1994).

194. *Id.*

195. *Id.*

196. THOMAS S. BODENHEIMER & KEVIN GRUMBACH, UNDERSTANDING HEALTH POLICY: A CLINICAL APPROACH 19 (1995).

197. MENDOZA & HENDERSON, *supra* note 189, at 8.

198. Warren L. Wheeler, *Hospice Philosophy: An Alternative to Assisted Suicide*, 20 OHIO N.U. L. REV. 755, 757 (1994).

199. *Id.*

200. *Id.*

in the curriculum, and physicians fear the legal ramifications of medicating for pain.[201]

Without guaranteed access to medical treatment to alleviate pain, information about palliative care as a health care alternative is of little use to a patient who is enduring a painful illness. The Dutch have established palliative care as a component of their national health care system.[202] A national center coordinates the activity of 135 voluntary organizations that provide care and support to the terminally ill patients in a home setting.[203] Furthermore, hospitals, nursing facilities, and pain control centers provide advanced clinical care to terminally ill patients.[204] Although the Dutch have devoted increased medical training and research resources to palliative care,[205] their health care system has been criticized for having only formally introduced hospice in 1993.[206]

Australian concern about access to palliative care is consistent with general concerns. If access to quality palliative care treatment is available, can all pain be controlled?[207] Access is a concern because there are few physicians with palliative care training.[208] Access to palliative care is further limited in areas outside the major cities of Australia.[209] Even when patients have access to morphine, the full complement of hospice care—psychological, spiritual, and emotional support—is often not available.[210] The Australian legislators discussed the cost effectiveness and necessity of providing palliative care but did not incorporate a guarantee of access to palliative care in the statutory requirements.

Similarly, the American system does not guarantee access to palliative care. Palliative care is not new to the health care continuum in the United States; the National Hospice Organization has advocated the needs of the terminally ill since 1978.[211] "In the 1990s, annual growth in the number of

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201. *Id.* at 757-58.

202. *Termination of Life*, *supra* note 14.

203. *Id.*

204. *Id.* "Four teaching hospitals have been designated as pain control centres . . . . The medical profession draws up treatment protocols on the basis of the latest medical research in the fields of general . . . and anaesthesiological pain relief." *Id.*

205. *Id.*

206. Wheeler, *supra* note 198, at 760. Warren Wheeler, author of the article, spoke to Dr. Peter Admiraal, a trained anesthiologist from Delft, Netherlands, at Dr. Balfour Mount's International Congress on the "Care of the Terminally Ill." Dr. Admiraal conveyed that the first hospice in the Netherlands was opened in 1993. *Id.*

207. *See* COMMITTEE REPORT, VOLUME 1, *supra* note 22, § 3.7.

208. *Id.*

209. *See* PARLIAMENTARY RECORD OF LEGISLATIVE DEBATES, *supra* note 42 (reflecting discussion of Mr. Setter).

210. *Id.*

211. *See* NATIONAL HOSPICE ORGANIZATION, *supra* note 162.

hospice patients nationwide has averaged 13 percent."[212] However, Medicare and Medicaid public assistance programs, available only to select portions of the population, continue to pay for over seventy-five percent of all hospice care provided.[213] Access is further limited when a patient is a member of a minority race,[214] does not have a primary caregiver,[215] or requires "high tech" therapies.[216]

If the overriding purpose of a system of euthanasia is to provide the final alternative on a continuum of patient autonomy, how can a system fulfill its purpose without providing access to other health care alternatives? How can information about alternative services provide comfort and dignity to a patient when those services are not available? Information alone does not permit a patient to effectively choose between enduring a deteriorating, painful, and perhaps slow death and a quick death that at a minimum ensures an end to an unknown future. A system that permits voluntary euthanasia cannot equally guarantee the right to live and the right to die without a guarantee of alternative health care.

IV. CONCLUSION

At the time of this writing, society awaits the outcome of another victory for the international right to die movement. The United States Supreme Court has given physician-assisted suicide a legal spotlight on the national stage by agreeing to review Ninth and Second Circuit Appellate Court decisions that ruled against Washington and New York state bans of assisted-suicide.[217] The Court began to hear arguments in January, 1997;[218]

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212. *Id.*

213. *Id.* "Sources of payment for hospice services are as follows: Medicare, 66.8%; private insurance, 14.6%; Medicaid, 9.1%; indigent (nonreimbursed) care, 6.3%; other, 3.2%." *Id.*

214. *Id.* "Consistent with other health care census statistics, 85% of hospice patients were white; 9% were African American; 3% were Hispanic; and 3% were identified as 'other.'" *Id.*

215. *Id.* "Forty-five percent of hospices admit patients without primary caregivers; another 31% admit patients without caregivers on a case-by-case basis." *Id.*

216. *Id.* "Fifty-one percent of hospices admit individuals requiring 'high-tech' therapies; an additional 42% admit patients needing 'high-tech' services on a case-by-case basis." *Id.*

217. Edward Felsenthal & Paul M. Barrett, *Supreme Court Agrees to Rule on Laws Banning Assisted Suicide*, WALL ST. J., Oct. 2, 1996, at B9 *available in* 1996 WL-WSJ 11800742. The Court will rule on lower court decisions striking down a Washington state law and a New York state ban on assisted suicide. The Court will decide: "Does the Constitution implicitly give people a right to privacy in making decisions about the most personal aspects of their lives, from child-rearing and marriage to contraception and abortion?" *Id. See also American Suicide Foundation Submits Opinion to Supreme Court Opposing Legalization of Assisted Suicide* [hereinafter *American Suicide Foundation*], PR NEWSWIRE, Nov. 12, 1996. "In both cases the courts ruled that there is a constitutional right to suicide for competent

a decision is expected in June.[219] "If the Supreme Court agrees with the federal appellate courts . . . the decision will allow terminally ill citizens throughout the country to hasten death 'without undue interference from the state' . . . ."[220]

"In anticipation of the possibility that the Supreme Court will rule in favor of physician-assisted suicide, several . . . organizations are drafting their own guidelines for the procedure . . . ."[221] These organizations follow the path of other individuals and groups that have formulated protocol.[222] As authors hurriedly work toward the approaching deadline of the Court's decision, they most surely are reviewing what systems are available and asking: What systems have been tried? What concerns still remain?

Over twenty-three years of Dutch experience in permitting voluntary euthanasia can provide history with the lessons from which society seeks to learn. Australian legislators derived comfort in legislating a euthanasia system by safeguarding against the weaknesses of the Dutch judicial system. They responded to a public concern for increased patient autonomy in end-of-life decisions by enacting a system with a more specific set of objective assessment and reporting safeguards than society had yet seen.

As the world prepares for another outcome in the battle between the right to live and the right to die, one must be careful in drawing specific lessons from one experience, culture, and people for application in another setting.[223] Beyond cultural specifics lie similarities in issues inherent to any policy permitting one individual to assist in the death of another.[224] However, a difference in cultural values, as evidenced in the comparison of Dutch and Australian systems, will affect the application of criteria to another culture.

If a state, territory, or country makes a public policy decision to permit a system of voluntary euthanasia—and a right to die—to operate within its

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terminally ill patients and that laws in both states banning assisted suicide are invalid." *Id.*

218. *'The Way We Are,'* WALL ST. J., Jan. 10, 1997 *available in* 1997 WL-WSJ2405269.

219. *American Suicide Foundation, supra* note 217.

220. *Guidelines*, MED. & HEALTH, Oct. 21, 1996, *available in* 1996 WL 7993640.

221. *Id.* Organizations preparing for legalization of assisted-suicide include the Washington State Medical Association and San Francisco Medical Society. *Id.*

222. *See, e.g.*, Charles H. Baron et al, *A Model State Act to Authorize and Regulate Physician-Assisted Suicide*, 33 HARV. J. ON LEGIS. 1 (1996) (representing a collaborative effort of attorneys and law school professors); Craig A. Brandt et al., *Model Aid-in-Dying Act*, 75 IOWA L. REV. 125 (1989) (reporting on a collaborative student effort of a year-long seminar); Paul A. Drey & James J. Giszczak, Note, *May I Author My Final Chapter? Assisted Suicide and Guidelines to Prevent Abuse*, 18 J. LEGIS. 331 (1992) (representing a student written work); JACK KEVORKIAN, PRESCRIPTION: MEDICIDE: THE GOODNESS OF PLANNED DEATH (1991) (representing his personal beliefs).

223. Alexander M. Capron, *Euthanasia in the Netherlands: American Observations*, 22 HASTINGS CENTER REP. 30 (Mar.-Apr. 1992).

224. *Id.*

society, they can enact several measures to limit abuse of the system. The measures of development—judicial, legislative, and public referendum—will possess inherent weaknesses specific to the manner of development. However, the society can further limit the scope of the system to narrow the category and type of patients that will qualify. Specific, objective assessment criteria and a reporting and prosecutorial system will limit abuse of the defined scope of the system.

However, a focal point of potential abuse, lack of health care alternatives, will destroy prior safeguards if the society cannot guarantee geographic and financial access to other health care alternatives. This guarantee of health care requires a financial commitment during a time of prevailing concern for health care cost-containment. In a quest for cost efficiency, how high will society rank the need to safeguard the right to live? Will society continue to ensure a right to medical assistance in death before ensuring a right to medical assistance in life?

> The law exists to protect life. When it begins to legitimate the taking of life, . . . one has a right to ask what lies ahead for our life as a society.[225]

Traci R. Little[*]

225. USA TODAY, *supra* note 1, at 3A.

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A CHALLENGE TO THE LEGALITY OF TITLE III OF LIBERTAD AND AN INTERNATIONAL RESPONSE

INTRODUCTION

On February 24, 1996, two unarmed United States (U.S.) civilian aircraft were tragically shot down by the Cuban military in international airspace with no jurisdictional justification for the outrageous act.[1] Prior to this incident, President Clinton opposed the proposed Helms-Burton Act[2] which among other things, contained a provision giving U.S. nationals the right to sue foreigners who "traffic" in property confiscated by the Cuban government on or after January 1, 1959, for monetary damages.[3] However, in response to the tragedy, President Clinton signed into law on March 6, 1996, the legislation creating harsh sanctions on those not conforming to U.S. policy against Cuba.[4] As a result, the United States currently stands in the face of worldwide criticism on the grounds that the Helms-Burton Act is a violation of international law and oversteps U.S. jurisdictional boundaries.[5]

Proponents of the Helms-Burton legislation support its legality and jurisdictional basis on the grounds that U.S. properties were illegally expropriated by the Cuban government and, thereafter, U.S. nationals were never fairly compensated for their property interests. As a result, the United States recognizes $15 billion dollars in outstanding claims, including compounded interest.[6] According to the United States, the effects of these property claims that U.S. nationals hold against the Cuban government permit jurisdiction under Title III; therefore, justifying its international legality.[7] If however;

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1. Peter Tarnoff, Transcript of White House Briefing on ICAO Report, (June 20, 1996), *reprinted in* U.S. NEWSWIRE, June 21, 1996.

2. *See* Steven Greenhouse, *Bill to Tighten Economic Embargo on Cuba is Passed with Strong Support on the House*, N.Y. TIMES, Sept. 22, 1995, at A8 (Secretary of State Warren Christopher indicating that President Clinton would veto the legislation).

3. Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C.A. § 6021-6091 (West Supp. 1997) [hereinafter LIBERTAD].

4. *Background on the Helms-Burton Bill* (visited Sept. 28, 1996) <http://www.usis-canada.usia. gov/helms.htm>.

5. Teresa Gutierrez, *U.S. v. Cuba, Helms Burton Act Arouses Worldwide Anger* (visited Sept. 28, 1996) <http://www.workers.org/cuba/helms.html>; *See also U.S. Allies Give Good Advice on Cuba,* CHI. TRIB., June 10, 1996, at 14; *Europeans Try to Unify Against U.S. Actions,* THE COM. APPEAL, Sept. 10, 1996, at 8B.

6. *Quid Pro Quo*, THE ECONOMIST, Nov. 16, 1996, at 8. [hereinafter Quid Pro].

7. Monroe Leigh, Prepared Statement Before the Senate Foreign Relations Western Hemisphere Subcommittee, (July 30, 1996) *reprinted in* FED. NEWS SERVICE, July 30, 1996.

> the United States truly endorses its own logic [in justifying these claims under Title III], it has no excuse but to allow a claim against itself for the properties seized during and after its own revolutionary war. Some 50,000-60,000 British loyalists fled the 13 states for Canada, leaving behind property . . . compound[ing] this at a modest 8% and the United States owes $6.3 trillion. [Thus] maybe Canada and Britain should endorse Helms-Burton, let the Americans make sweeping, legal pontifications supporting it and then hold them to their word, agreeing to pay their claim when they pay ours.[8]

This note discusses the legality of Title III under the recently enacted Cuban Liberty and Democratic Solidarity Act (LIBERTAD), otherwise referred to as the Helms-Burton Act, giving U.S. nationals the right to sue foreigners who traffic in property confiscated from them by the Cuban government. First, a brief history leading up to the enactment of LIBERTAD including a synopsis of the relations between the United States and Cuba will be presented. However, the main focus of the note will be directed at the legality of Title III of the Act in the international scheme. Specifically, it will be suggested that Title III is inconsistent with international law, constitutionally unsound, and not in furtherance of U.S. policy.

Because no jurisdictional grounds exist for U.S. courts to adjudicate claims against Cuba for activities taking place in Cuba by the Cuban government, Title III is a violation of international law. In addition, the Act of State Doctrine precludes U.S. courts from sitting in judgment on the activities of the Cuban government conducted within its own territory. Moreover, Title III violates the U.S. Constitution by its provision barring U.S. courts from applying the Act of State Doctrine because of the constitutional encroachment of power into the Executive and Legislative branches of government resulting from the Judicial branch deciding issues of foreign affairs.

Furthermore, even if it is possible that the United States has not encroached upon international law, policy reasons suggest that enforcement of the Act is not in the interest of the United States. This is because the actual effects of Title III operate to create a loophole for the U.S. Trade Embargo with Cuba for certain U.S. claimants. In addition, the original purpose of the Act, to promote political reforms in Cuba, will not be accomplished by Title III. Finally, negative policy implications of Title III are apparent through proposed counter-measures the U.S.'s major allies are in the process of instituting.

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8. *Quid Pro Quo*, *supra* note 6, at 8.

I. DESCRIPTION OF TITLE III

Title III of LIBERTAD provides a cause of action for U.S. nationals whose property was confiscated in Cuba by the Cuban government. The law states that "any person that, after the end of the 3-month period beginning on the effective date of this title, traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any U.S. national who owns the claim to such property for money damages."[9] As well as attempting to protect U.S. nationals' property rights wrongly taken by the Cuban government, the law extends to protect property rights of American nationals who were Cuban nationals *at the time* their property was confiscated.[10]

LIBERTAD was enacted primarily to promote the transition from a communistic Cuba to a democratic regime.[11] Accordingly, Title III furthers

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9. 22 U.S.C.A. § 6082(1)(A) (West Supp. 1997). 22 U.S.C.A. § 6023(12)(A) & (B) (West Supp. 1997) define property as:

> any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest . . . . [T]he term 'property' does not include real property for residential purposes unless, as of the date of the enactment of this Act . . . (i) the claim to the property is held by a United States national and the claim has been certified under Title V of the International Claims Settlement Act of 1949; or (ii) the property is occupied by an official of the Cuban Government or the ruling political party in Cuba.

A person "traffics" in confiscated property if:

> that person knowingly and intentionally-- (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property, (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

22 U.S.C.A. § 6023(13)(A) (West Supp. 1997). See 22 U.S.C.A. § 6023(B) (West Supp. 1997) for a description of activities that do not constitute trafficking.

10. 22 U.S.C.A. § 1643l (West Supp. 1997) provides that in interpreting Title III of the Act, a U.S. District Court may determine a claim resulting from the confiscation of property by the Cuban government "whether or not the U.S. national qualified as a national of the United States . . . at the time of the action by the Government of Cuba."

11. H.R. REP. NO. 104-468, sec. 3, at 3 (1996). In addition, the congressional record indicates that the purposes of LIBERTAD include:

> [1] to assist the Cuban people in regaining their freedom and prosperity . . . in joining the community of democratic countries . . . ; [2] to strengthen international sanctions against the Castro government; [3] to provide for the

this objective by isolating foreign investment in Cuba and, thereby, applying economic pressure on the country. Thus, by creating the opportunity for property claimants to sue in U.S. courts under Title III, the United States accomplishes two objectives. First, it provides an opportunity for restitution to U.S. nationals whose property was "wrongly" confiscated. But more importantly, by doing so it also provides a jurisdictional means to impose a secondary boycott on foreign countries, forcing them to partake in U.S. isolationist foreign policy regarding Cuba or face U.S. sanctions.

II. HISTORY OF POLITICAL RELATIONS BETWEEN THE UNITED STATES AND CUBA

The beginning of unstable U.S. relations with Cuba surfaced following Castro's rise to power in 1959 after the fall of the Batista regime.[12] With Castro's rise to power came a shift from a capitalist regime to one of communism resulting in a decrease in U.S. involvement with Cuba in the years to follow.[13] As part of the restructuring of the Cuban government after Castro took power, the Fundamental Law of the Republic was adopted providing a legal basis for Cuban confiscatory decrees.[14] Subsequently, the Agrarian Reform Law was passed affecting foreign property owners by a redistribution of land ownership in Cuba which provided compensation for victimized land owners but was found compensatorily insufficient by the United States.[15] Additionally, in 1959 a mineral law requiring the re-registration of mining claims and a petroleum law were adopted in Cuba.[16] These enactments along with the increased trading relations between Cuba

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> continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government . . . ; [4] to encourage the holding of free and fair democratic elections in Cuba . . . ; [5] to provide a framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and [6] to protect the Untied States nationals against confiscatory takings . . . [of] property . . . by the Castro regime.

Id.

12. ROBERT QUIRK, FIDEL CASTRO 209 (1993).

13. LOUIS PEREZ, JR., CUBA AND THE UNITED STATES: TIES OF SINGULAR INTIMACY 239-40 (1990). A reduction in U.S. imports occurred from $543 million in 1959 to $224 million in 1960. *Id.* at 240 (citing SUSAN SCHROEDER, CUBA: A HANDBOOK OF HISTORICAL STATISTICS 433 (1982)).

14. Jonathon R. Ratchik, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343, 344 (1996).

15. *Id.* at 344-45.

16. *Id.* at 345

and the Soviet Union led to increased tensions between Cuba and the United States.[17]

In response to these rising tensions, the United States began reducing its sugar quota from Cuba, and finally in 1960, Congress passed the American Sugar Bill which totally eliminated the U.S. sugar quota.[18] Subsequently, the beginning of Cuban confiscation of U.S property began, and Congress responded with the Foreign Assistance Act of 1961 which authorized the President of the United States to impose an economic embargo against Cuba.[19] Thereafter, in 1962 President Kennedy, acting in accord with the Foreign Assistance Act and the Trading with the Enemy Act,[20] instituted a complete trade embargo against Cuba.[21]

In order to validate and certify property claims held by U.S. nationals whose property had been wrongly confiscated by the Castro regime, the United States amended the International Claims Settlement Act of 1948 to provide a mechanism for U.S. nationals to file claims against the Cuban government.[22] Despite this measure by the United States, Cuba failed to satisfy any of these claims.[23]

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17. *Id.* *See also* QUIRK, *supra* note 12, at 316-19 (The Soviet Union was providing many economic benefits to Cuba.).

18. QUIRK, *supra* note 12, at 319.

19. Foreign Assistance Act of 1961, 22 U.S.C.A. § 2370(a)(1) (West Supp. 1997).

20. Jerry W. Cain, Jr., *Extraterritorial Application of the United States' Trade Embargo Against Cuba: The United Nations General Assembly's Call for an End to the U.S. Trade Embargo*, 24 GA. J. INT'L & COMP. L. 379, 381 (1994). The Trading with the Enemy Act authorizes the President of the United States to impose sanctions against any country in time of crisis. President Truman in 1950, pursuant to the Trading with the Enemy Act, "declared a national emergency caused by what he perceived as a growing Communist threat." *Id.* Then following the Foreign Assistance Act, President Kennedy in 1962 passed the economic embargo with Cuba based on "the Truman proclamation of a national emergency." *Id.*

21. Proclamation [No.] 3447, 27 Fed. Reg. 1,085 (1962), *reprinted in* 31 C.F.R. § 515 (1996).

22. 22 U.S.C.A. § 1643 (West Supp. 1997). The statute defines U.S. nationals as "any United States citizen; or (B) any other legal entity which is organized under the laws of the United States . . . ." 22 U.S.C.A. § 6023(15)(A) & (B) (West Supp. 1997). However, under Title III U.S. nationals, who at the time of confiscations of their properties were not U.S. nationals are entitled to bring suit. 22 U.S.C.A. § 6083(c)(1) (West Supp. 1997).

23. *Supporting Democracy in Cuba: Hearings on S. 381 and H.R. 927 before the Senate Comm. on Foreign Relations*, 104th Cong. (1995) (statement of Ignacio E. Sanchez, Atty., Kelley Drye & Warren) *available in* WESTLAW, 1995 WL 357720 [hereinafter Sanchez]. Total number of Cuban claims validated was 5911 at a total of 1.8 billion dollars. MICHAEL W. GORDON, THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY 153 (1976).

III. ANALYSIS OF TITLE III AND ITS LEGALITY

A. *Jurisdiction under Title III*

International challenge to the legality of Title III (Act) has been primarily based upon the theory that the United States does not have the jurisdictional authority to prescribe law to those outside its borders.[24] Title III's paramount problem with respect to international law is that there are no grounds for the U.S. courts to assert jurisdiction over U.S. nationals' claims to expropriated property by the Cuban government with respect to the statute. It is accepted doctrine that:

> a state has jurisdiction to prescribe law with respect to:
> (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
> (b) the status of persons, or interests in things, present within its territory ["territoriality principle"];
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory ["effects doctrine"];
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory ["passive personality doctrine"]; and
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests ["protective principle"].[25]

Since expropriation of property within Cuba clearly does not take place in the United States, there can be no basis for jurisdiction under subsection (1)(a) or (b). While the majority of those who support the Act assert the existence of jurisdiction under subsection (c), the effects doctrine, it will be suggested that even though effects within the United States may exist, those

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24. David Fox, *Washington Faces Renewed EU Attack Over Cuba,* REUTERS FIN. SERVICES, May 30, 1996. *See also*, Ratchik, *supra* note 14, at 364 n.119 (citing Letter from Wendy R. Sherman, Assistant Secretary of Legislative Affairs to Benjamin A. Gilman Chairman, House Comm. on Int'l Relations (Apr. 28, 1995) *reprinted in* CUBA POLICY OR CUBA FOLLY?: FACTS ABOUT THE HELMS-BURTON LEGISLATION TO TIGHTEN THE EMBARGO AGAINST CUBA 5 (United States-Cuba Foundation & Cuban Committee for Democracy ed., 1995) stating "LIBERTAD'S extraterritorial application would be difficult because it transcends accepted international procedures and would be difficult to defend under international law."

25. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987) [hereinafter RESTATEMENT].

effects are not reasonable, as required by internationally accepted doctrine in order to prescribe jurisdiction. Furthermore, it will also be shown that the doctrines of passive personality and protective principle are also inappropriate means for asserting jurisdiction under Title III.

While it is accepted international doctrine that a state has jurisdiction to prescribe law with respect to conduct or activities that have a substantial effect within its territory,[26] that effect must be reasonable.[27] However, even when it may be reasonable for a state to exercise jurisdiction over a person or activity "but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction."[28] If the other state's interest is greater than the state considering exercising jurisdiction, then it should defer to that state.[29]

Some proponents of the Act claim that Title III's exercise of jurisdiction does not violate international law because "the actual implementation of the Act operates within the territorial boundaries of the United States . . . . That is, Title III of the Act allows lawsuits only against those traffickers who enter or operate within the U.S. . . . ."[30] A careful reading of the Act prescribes no such restrictions. Lawsuits are permitted against "any person that . . . traffics in property which was confiscated by the Cuban Government."[31] No language within the Act states that lawsuits

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26. *Id.*

27. Reasonableness is defined by evaluating the following relevant factors:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between the state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state . . . and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Id. § 403(2).

28. *Id.* § 403(3)

29. *Id.*

30. Leigh, *supra* note 7.

31. 22 U.S.C.A. § 6082(1)(A) (West Supp. 1997).

are allowed only against traffickers who enter or operate within the United States.[32] The Act states that U.S. courts have jurisdiction to preside over U.S. nationals who have causes of action against any foreigners who are trafficking in confiscated U.S. property, regardless of whether those alleged traffickers are entering or operating within the United States.[33]

The other justification for jurisdiction over U.S. nationals' causes of action under the Act is that the acts of foreigners trafficking in the confiscated property have "substantial effects" within the United States.[34] These effects within the United States include economic effects from the U.S. citizens injured as a result of the Cuban takings and subsequent trafficking of taken property, the complication of potential future return of these properties, and the undermining of U.S. foreign policy relating to free commerce.[35] While admittedly, there may be effects within the United States from Cuban confiscation of U.S. citizens' property, this admission does not automatically provide the United States with jurisdiction to intervene in settling disputes with U.S. nationals and foreigners who are "trafficking" in such property. The exercise of jurisdiction must additionally be reasonable and if conflicting interests exist between the two states, the state with the least interest should defer to the other state.[36]

Because exercise of jurisdiction by the United States is not reasonable, the United States should not review property claims in Cuba against foreigners trafficking in such properties. First, such jurisdiction is not reasonable because it prescribes law to territories outside its borders. The "trafficking" by foreign nationals referred to in Title III occurs entirely outside the borders of the United States. Secondly, such jurisdiction prevents Cuba from developing and providing its own definition of property.[37] While the United States claims that it has a reasonable interest in exercising jurisdiction in order to provide remedies to its nationals who have been damaged by the trafficking,[38] the purposes of the Act suggest that

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32. *Id.*

33. See Pascal Fletcher, *Sherrit Snubs US and Sends its Men to Havana*, FIN. TIMES, Sept. 12, 1996, at 28 for an example of a Canadian mining group who has over 200m (1128.2m) dollars invested in Cuba in mining, oil, exploration, agriculture, and tourism and has become the target of U.S. sanctions under the Act with no reference to whether the Canadian company enters or operates within the United States.

34. *See* RESTATEMENT § 402(1)(c).

35. Leigh, *supra* note 7. *See also* Brice M.Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434, 435-38 (1996).

36. RESTATEMENT § 403(3).

37. Ratchik, *supra* note 14, at 363. The Cuban Constitution provides that all property belongs to the state. Sanchez, *supra* note 23 (citing ALBERT P. BLAUSTEIN & GISBERT H. FRANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CUBA 9 (Pamela S. Falk ed. & trans., 1993)).

38. *See generally* 22 U.S.C.A. § 6022(6) (West Supp. 1997).

the real goal of the passage of the Act was to deprive the Cuban government of foreign investment in an effort to force Cuba to return to a democratic regime[39] while incidentally providing relief to property claimants. This is further evidenced by the fact that the law contains a provision to nullify all U.S. claims in the event that Cuba begins actions to reverse its governmental structure to a democracy.[40] Congress, in offering the bill to the President to sign, even acknowledged that jurisdiction under Title III was controversial with respect to whether valid jurisdictional grounds existed and as a result, offered the President discretion with regard to the implementation of its provisions.[41] President Clinton has in fact delayed the implementation of Title III for six months and is likely to make further delays.[42] Furthermore, exercise of jurisdiction is not reasonable when taken in connection with foreign allies who have an economic and trade interest in Cuba. Because of Title III's passage, worldwide criticism has evolved, and some of our closest allies have even adopted counter-measures to rebut Title III's effect while others continue to enact similar counter-measures believing that the legislation is a violation of international law.[43] Thus, it is not reasonable for the United States to risk its foreign trade and economic relations with its closest allies over a property issue unsettled as to its legality.

Additionally, the United Nations Charter suggests that it would be unreasonable for the United States to exercise jurisdiction under Title III by its firm position on abstaining from an activity that may have the effect of impinging upon another state's sovereignty. For example article 1, paragraph 2 of the United Nations Charter asserts that signatory nations are held to "principles of non-intervention and both expressly and implicitly forbid extraterritorial application of laws which would thereby violate another country's sovereignty."[44] Furthermore, the United Nations Charter commands that all members respect the sovereignty of all other signatory nations.[45] Such a strong position by the United Nations demonstrates, in an international sense, that any overstepping of territorial jurisdiction will not be tolerated.

While arguably the effects felt within the United States of Cuban expropriation claims are to some degree existent, justification that an

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39. 22 U.S.C.A. § 6022 (West Supp. 1997).

40. 22 U.S.C.A. § 6082(h)(1)(B) (West Supp. 1997).

41. *European Commission President Jacques Santer Underlines EU's Deep Concern with Helms-Burton Legislation to President Bill Clinton*, EUR. UNION NEWS (visited July 12, 1996) <http://www.eurunion.org/eu/news/press/pr41-96.htm>.

42. Jonathan Freedland, *Clinton Likely to Hold Fire on Cuba*, THE GUARDIAN, Nov. 12, 1996, at 12.

43. *See Antidote Law Introduced to Combat Anti-Cuban Legislation*, NEWS WAVES, (visited Sept. 28, 1996) <http://www.southam.com/nmc/waves/depth/trade/cubamenu.html>.

44. Cain, *supra* note 20, at 386.

45. U.N. CHARTER art. 2, para 1.

assertion of jurisdiction by the United States is reasonable is not strong enough. A balancing test may be performed to weigh which sovereign may more reasonably assert jurisdiction. In a narrow view, it may seem logical that the reasonableness for asserting jurisdiction based on legitimate property interests favor the United States;[46] but, viewed in a broader international scheme, that evaluation fails. It fails not only based upon the application of strict adherence to the international view against extraterritorial jurisdiction, but more importantly because of policy interests of both the United States and third countries. The United States assertion of jurisdiction under Title III affects worldwide trading partners with the United States as well as Cuba. The position that Title III claims impose upon countries, especially those who rely heavily on trade with Cuba, is unreasonable. These countries are effectively being forced to not invest in Cuba or face sanctions imposed by U.S. suits under Title III. Third countries that trade with Cuba are put in a position of uncertainty and hesitation when considering purchasing Cuban assets because the wrong purchase may subject them to a Title III suit.[47] More importantly, however, is the position in which the United States puts itself while allowing such claims to proceed. No major ally of the United States supports such action under Title III and furthermore, they vehemently object to it.[48] Not only is this opposition voiced by countries worldwide, but some have instituted counter-measures to rebut the effect of Title III on their respective nationals who stand to suffer under the legislation.[49] These countries assert that along with the exercise of extraterritorial jurisdiction, Title III is also a restraint on free trade. These Title III effects on U.S. relations with its major allies provide the strongest support that such an assertion of jurisdiction by the United States under Title III is unreasonable.

Finally, U.S. Title III jurisdiction cannot be justified either under the "passive personality" or "protective" principles. First, the passive personality principle for asserting jurisdiction provides that "a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national."[50] Because this principle for jurisdiction has been increasingly

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46. Clagett, *supra* note 35, at 436 (asserting that the balancing test results favor the United States' assertion of jurisdiction over such claims).

47. ROBERT C. HELANDER, CREDITOR'S RIGHT: CLAIMS AGAINST CUBAN CONFISCATED ASSETS IN INVESTING IN CUBA: PROBLEMS AND PROSPECTS 37, 42 (1994).

48. *See* Maria Sanz, *U.S. Increasingly Isolated Over Cuba Policy,* AGENCE FRANCE PRESSE, Nov. 13, 1996; David Fox, *Washington Faces Renewed EU Attack Over Cuba,* REUTERS FIN. SERVICE, May 30, 1996.

49. *See* Teresa Gutierrez, *U.S. v. Cuba, Helms-Burton Act Arouses Worldwide Anger* (reprinted from July 25, 1996) <http://www.workers.org/cuba/helms.html>; *Euro MPs Call for Retaliatory Measures on Helms-Burton and Iran-Libya Sanctions,* PR NEWSWIRE, July 10, 1996.

50. RESTATEMENT § 402 cmt. g.

recognized in cases of terrorism and other types of organized attacks but not in ordinary torts or crimes,[51] it is not applicable for justifying jurisdiction for property claims of U.S. nationals.

Secondly, the protective principle is also an inapplicable basis of jurisdiction under Title III. Under this principle of jurisdiction, the United States can assert jurisdiction over those who are not its nationals but commit offenses outside its territory when the offenses are "directed against the security of the state" or threaten "the integrity of governmental functions that are generally recognized as crimes by developed legal systems."[52] Proponents of Title III argue that "Cuba—as a potential nuclear platform, a source of terrorism and illegal immigration, and a scene of human rights abuses" is a security threat to the United States.[53] If the cause of action under Title III was directed at specifically punishing activities by the Cuban government relating to potential nuclear activities or acts of terrorism that had occurred, jurisdiction may be justified. Title III, however, merely provides a cause of action for U.S. nationals who were wronged by the Cuban government through the confiscation of their property in Cuba. Expropriating U.S. property in Cuba, while seemingly a wrong act, does not directly threaten the security of the United States as would an act of terrorism or potential nuclear activity. Note that the actual offense under Title III is wrongfully expropriating U.S. property by the Cuban government. The protective principle has traditionally been aimed at offenses such as "espionage" that *directly* threaten U.S. security.[54] Thus, Cuba's nationalization of property does not rise to the level of an offense that could create a national security threat to the United States necessary to invoke the protective principle of jurisdiction.

Because none of the internationally recognized bases of jurisdiction exist for adjudicating claims under Title III, application of the legislation is a violation of international law. The only theory that arguably could apply for justifying jurisdiction under Title III would be that the confiscation of U.S. property had "effects" within the United States. However, these effects are not substantial. More importantly, even though effects exist, assertion of jurisdiction would not be reasonable primarily because of the aforementioned policy reasons. Therefore, there is no jurisdictional grounds for Title III, and thus, Title III constitutes a violation of international law on the grounds of its extraterritorial application.

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51. *Id.* Section 1202 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 18 U.S.C. § 2231 (1994) illustrates how the United States has applied this jurisdictional doctrine in the severe circumstances of terrorism. This particular Act makes it a crime to kill, or attempt to conspire to kill a national of the United States outside U.S. territory.

52. RESTATEMENT § 402 cmt. f.

53. Leigh, *supra* note 7.

54. RESTATEMENT § 402 cmt. f.

B. *Act of State Doctrine and Constitutionality of Title III*

In addition to the lack of a jurisdictional basis for adjudicating claims, Title III is in direct conflict with the Act of State Doctrine which requires every state to respect the independence of every other sovereign state.[55] While proponents of the statute rely on the Hickenlooper Amendment[56] to demonstrate the inapplicability of the Act of State Doctrine in respect to U.S. nationals' claims against the Cuban government for expropriated property, questions remain unanswered as to how narrowly the Hickenlooper Amendment was intended to be construed. Regardless, even if the Hickenlooper Amendment does require holding the Act of State Doctrine inapplicable to the claims addressed by Title III, the statute remains unconstitutional due to the provision that *mandates* the Act of State Doctrine to be inapplicable. This is because such provisions encroach upon authority of the Executive and Legislative branches in foreign affairs.[57] Thus, it will be suggested that Title III is inconsistent with the Act of State Doctrine as well as the subject of "constitutional underpinnings."

The Act of State Doctrine (Doctrine) is a federal choice of law rule that has the effect of precluding the application of U.S. law in favor of the foreign law.[58] While the Doctrine has been recognized as early as 1674 in England,[59] the major modern U.S. case ruling upon the effect of the Doctrine was *Banco Nacional de Cuba v. Sabbatino*.[60] In *Sabbatino*, the Cuban government, acting pursuant to Cuban Law 851 in issuing Executive Power Resolution No. 1, expropriated all "property and enterprises, and . . . rights and interests arising therefrom, of certain listed companies," including a company (C.A.V.) organized under Cuban law whose capital stock was

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55. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

56. 22 U.S.C.A. § 2370(e) (West Supp. 1997).

57. *See* U.S. CONST. art. II, § 1; U.S. CONST. art II, § 2

58. Frederic L. Kirgis Jr., *Understanding the Act of State Doctrine's Effect*, 82 AM. J. INT'L L. 58, 58 (1988) (citing Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967)). *See also Sabbatino*, 376 U.S at 418 (citing Oetjen v. Central Leather Co., 246 U.S. 297, 309 (1918))(stating the Act of State Doctrine:

> does not deprive the courts of jurisdiction once acquired over a case. It requires only that when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts . . . . To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.).

59. Donald T. Kramer, LL.B., Annotation, *Modern State of the Act of State Doctrine*, 12 A.L.R. FED. 707, 715 (citing Blad v. Bamfield (1674) 3 Swanst. 604, 36 Eng. Reprint 992).

60. *Sabbatino*, 376 U.S. at 398.

owned principally by U.S. residents.[61] C.A.V. was in the process of shipping an order of sugar, placed by a U.S. broker, Farr Whitlock & Co. (Farr), in the United States. The expropriation of the ship and its contents occurred prior to its sailing from Cuba. After the expropriation the Cuban government insisted that Farr re-contract with it for the sale of the sugar. Following the sale of the sugar by the Cuban Government to Farr, C.A.V., the original owner, contacted Farr claiming it was entitled to the proceeds. C.A.V. then proposed a deal whereby Farr would turn over the proceeds from the sale to the rightful recipient, and in turn C.A.V. would reimburse Farr for any expense as well as provide them with ten percent of the proceeds as a bonus for cooperating. After refusing to turn over the proceeds of the sale to the Cuban bank, a lawsuit in U.S. district court was filed against Farr for return of the proceeds.

The district court, although recognizing the continuing vitality of the Act of State Doctrine, found it inapplicable in the instant case because it dealt with an alleged violation of international law.[62] Subsequently, the Court of Appeals for the Second Circuit affirmed the district court's ruling.[63] Additionally, it held that the Bernstein exception, which provides for the inapplicability of the Act of State Doctrine in instances where the Executive branch clearly indicates that it does not object to a court's review of the validity of a foreign state's act, was applicable.[64] The Court cited two state department letters that demonstrated the U.S. government had no objection to the U.S. courts deciding the effectiveness of the Cuban expropriation decrees. After reversing the decision of the court of appeals, the Supreme Court applied the Act of State Doctrine and held that the validity of the expropriation decrees could not be challenged by U.S. courts and must be presumed valid.[65] In holding the Act of State Doctrine controlling, the Court stated the famous words iterated in *Underhill v. Hernandez* that:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will

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61. *Id.* at 400-03. Because the Cuban government found the passing of the American Sugar Act of 1948 which allowed the President of the United States to direct a reduction in the sugar quota to be an act of aggression, the Cuban government adopted Law No. 851 that authorized the Cuban President and Prime Minister to take counter-measures against the United States. Pursuant to such authority, Executive Power Resolution No.1 was issued providing for the compulsory expropriation of certain U.S. property interests. *Id.* at 403 n.3.

62. *Id.* at 406.

63. *Id.* at 407.

64. *Id.* Bernstein letters are letters from the Department of State stating that a judicial review of a foreign state's act would not disrupt foreign affairs or relations of the country. The Bernstein Exception to the Act of state doctrine was first recognized in *Bernstein v. Van Heyghen Frerer*, 163 F.2d 246, *cert. den.*, 332 U.S. 772 (1947).

65. *Sabbatino*, 376 U.S. at 428.

> not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[66]

The Court further explained that the underlying purpose of the Doctrine is to avoid possible danger of destroying amicable relations and peace between nations by disallowing one sovereign state to review and perhaps condemn the actions of another state.[67] In addition, the court recognized that the Act of State Doctrine, while not required by international law, does not forbid application of the Doctrine where the act in question violated international law.[68]

Finally, it was acknowledged that while the Act of State Doctrine is not required by the Constitution of the United States, it does have "constitutional underpinnings."[69] These constitutional underpinnings arise from the federal separation of powers issue inherent in the nonapplication of the Doctrine and the danger of different branches of government making decisions regarding foreign affairs.[70] Historically, the Doctrine has expressed the "strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole."[71] Thus, it would be dangerous for the Judicial branch to make decisions regarding the actions of other sovereign states since such decisions may impede upon the power of the Executive branch in conducting foreign affairs. For example, decisions made by the Judiciary could "interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached."[72]

Although the Supreme Court's holding in *Sabbatino* contradicts the effects of Title III, advocates of the law find support for its legality in the

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66. *Id.* at 416 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).
67. *Id.* at 417-18 (citing *Oetjen*, 246 U.S. at 303-04).
68. *Id.* at 422.
69. *Id.*
70. *Id.*
71. *Id.* at 423.
72. *Id.* at 432. Such danger of interfering with the powers of the Executive branch could arise where

> the Executive branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.

Id.

Hickenlooper Amendment passed shortly after the decision in *Sabbatino*.[73] The Hickenlooper Amendment to the Foreign Assistance Act of 1964 (Amendment) provides that:

> no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state based upon a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law . . . .[74]

In addition, the Amendment also provides that these provisions for barring the Act of State Doctrine, however, are not applicable in any case where the "President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf . . . with the court."[75] Thus, the Hickenlooper Amendment essentially only codified the Bernstein exception to the Act of State Doctrine.

Despite the Hickenlooper Amendment, Title III is still in conflict with the Act of State Doctrine and contains constitutional problems. It is noteworthy that the purpose of the Hickenlooper Amendment was to "reverse in part the recent decision of the Supreme Court in *Banco de National de Cuba v. Sabbatino*."[76] Thus, as a result, the Amendment was intended to carry with it specific limitations. For example, the Amendment is inapplicable where there is no violation of international law or where the President declares his objection to its application in the interest of foreign affairs.[77]

First, Title III grants U.S. nationals who were Cuban nationals at the time of the confiscation standing to bring suit as a U.S. citizen injured by the Cuban expropriations.[78] This provision in Title III, however, makes the Hickenlooper Amendment inapplicable to these claims because Castro's expropriations of Cuban nationals' property would not constitute a violation of international law. It is an accepted doctrine that any acts of a sovereign state "against its own nationals do not give rise to . . . [violations] of

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73. Leigh, *supra* note 7.
74. 22 U.S.C.A. § 2370(e)(2) (West Supp. 1997).
75. *Id.*
76. S. REP. (Foreign Relations Committee) No. 1188 (1964).
77. 22 U.S.C.A. § 2370(e)(2) (West Supp. 1997).
78. 22 U.S.C.A. § 16431 (West Supp. 1997).

international law."[79] Thus, the Hickenlooper Amendment would be inapplicable in such circumstances[80] and the Act of State Doctrine would remain in full effect. Therefore, U. S. courts adjudicating these specific types of claims under Title III would do so contrary to the *Sabbatino* decision reached by the Supreme Court.

Secondly, while the Hickenlooper Amendment seems to overcome the effect of the Act of State Doctrine, and thus quash arguments that U.S. courts should decline to review actions based upon U.S. nationals' losses from Cuban expropriated property, some authority suggests that the effect of the Hickenlooper Amendment was intended to be much narrower.[81] Specifically, it has been asserted that the Amendment (in reversing the decision in *Sabbatino*) was limited to claims of title to American-owned the property nationalized by foreign governments in violation of international law when property or its proceeds are subsequently *located in the United States*. For example, in *Compania de Gas De Nuevo Laredo v. Entrex Inc.*, the court held that "the Hickenlooper Amendment is inapplicable because neither the nationalized property nor its proceeds are located in the United States."[82] This holding directly supports the proposition that the Hickenlooper Amendment was intended solely to reverse *Sabbatino* because *Sabbatino* specifically dealt with proceeds from a sugar sale that *were in the United States*. Thus, authority supports the narrower interpretation of the Hickenlooper Amendment. Because Title III claims do not require the property or proceeds of the Cuban expropriations to be *in the United States,*

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79. F. Palicio y Compania, S. A. v. Brush, 256 F. Supp. 481, 487 (S.D.N.Y. 1966); *see also* Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 861 (2d Cir. 1962) (stating that "[a]cts of a state directed against its own nationals do not give rise to questions of international law."); United States v. Belmont, 301 U.S. 324, 332; Pons v. Republic of Cuba, 294 F.2d 925 (1961), *cert. den.*, 368 U.S. 960 (1962). As a sovereign state, a government has a right to appropriate private property for public property uses when there is a need for the public welfare. The Navemar, 90 F.2d 673 (1937).

80. *See* 22 U.S.C.A. § 2370(e)(2) (West Supp. 1997).

81. *See supra* text accompanying note 82. *See also* Occidental v. Buttes Gas & Oil Co., 331 F. Supp. 92, 112, *aff'd*, 461 F.2d 1261 (stating that the Act of State Doctrine exception is "by its terms extremely narrow, and in all other cases the act of state doctrine remains the law of the land").

82. 686 F.2d 322, 327 (5th Cir. 1982). The court in that case, analyzing the history of the Hickenlooper Amendment, recalled the decision in *Banco de National de Cuba v. First National City Bank of New York*, 431 F.2d 394, 399-402 (2d Cir. 1970), when Chief Judge Lumbard, commenting on the legislative history of the Amendment, stated that "Congress intended it to be limited to cases involving claims of title with respect to American owned property nationalized by a foreign government in violation of international law, when the property or its assets were subsequently located in the *United States*." *Id.* at 327 (emphasis added). *See also* Menendez v. Saks and Co., 485 F.2d 1355, 1372 (2d Cir. 1973), *rev'd on other grounds sub nom.*; United Mexican States Relator v. Ashley, 556 S.W.2d 784 (Tex. 1977).

the applicability of the Act of State Doctrine as enumerated by the Supreme Court in *Sabbatino* is warranted; thereby, U.S. courts are barred from judging the validity of such Cuban expropriation decrees.

Thirdly, and most importantly, the major issue confronting the validity of Title III in relation to the Act of State Doctrine is its "constitutional underpinnings." Because Title III *mandates* the inapplicability of the Act of State Doctrine, it is unconstitutional due to conflicts with the separation of powers of the U.S. federal government as proscribed in the U.S. Constitution. Title III states that "[n]o court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action."[83] This provision is in direct conflict with the Constitution of the United States because it puts the Judicial branch in a position to directly encroach upon the Executive's constitutional power to conduct foreign affairs.[84]

The Supreme Court in *Sabbatino* found the Act of State Doctrine to provide protection from the threat of "constitutional underpinnings" that could arise between branches of government in a system of separation of powers.[85] The Supreme Court stated that "the President alone has the power to speak or listen as a representative of the nation."[86] This power reserved to the President allows for one voice to represent the nation on the issue of foreign affairs in an effort to provide a more effective and efficient method for dealing with foreign states.[87] The Court in *Sabbatino* was concerned about the affect of dissimilar institutions [making and implementing] particular kinds of decisions in the area of international relations. Specifically, the concern lies in the Judicial branch passing upon decisions of foreign acts that may "hinder rather than further this country's pursuit of goals both for itself and for the community of nations"[88] The passing of judgment on the acts of foreign states might interfere or worse yet embarrass the President in his conducting of foreign affairs. Such a judgment by the judiciary might occur when "such an impact would be contrary to our national interest."[89] For example, the President in negotiating for reform of

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83. 22 U.S.C.A. § 6082(a)(6) (West Supp. 1997).

84. *See* U.S. CONST. art. II.

85. *Sabbatino*, 376 U.S. at 423.

86. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). *See also* Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (stating that the "foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry."); Banco de Cuba v. Farr, 243 F. Supp. 957, 997 (S.D.N.Y. 1965) (referring to the Constitution's entrustment of foreign affairs to the executive and legislative branches).

87. *See Curtiss-Wright Export Corp.*, 299 U.S. at 319.

88. *Sabbatino*, 376 U.S. at 423.

89. *Id.* at 432

the Cuban government may decide to suspend all existing claims.[90] Clearly, a judicial decision during such time would be contradictory to the exercise of Executive authority in suspending such claims as well as serving as an embarrassment and a possibly offensive act towards the expropriating country.

The concern of Judicial encroachment upon the Executive branch is also apparent in the Hickenlooper Amendment. At the same time the Hickenlooper Amendment provided for the inapplicability of the Act of State Doctrine, it also provided for an exception to this inapplicability by giving the President final say in whether the courts would apply the Act of State Doctrine in a given situation.[91] This fallout provision provided a safeguard to constitutional concerns of the judicial branch deciding on activities related to foreign affairs by allowing the Executive to intervene and require the Judicial branch to apply the Act of State Doctrine in times where there could be national embarrassment because of dual policy. The problem with LIBERTAD is that it does not provide such a fallout provision to ensure the Executive has the final say as to foreign affairs decisions. Thus Title III, by totally barring the application of the Act of State Doctrine could be characterized as an unconstitutional prohibition upon the courts because it violates the separation of powers doctrine.[92]

IV. PRACTICAL AND POLICY EFFECTS OF TITLE III

While Part II of this note suggests that no internationally recognized grounds exist to assert jurisdiction under Title III, that the Act of State Doctrine precludes adjudicating such claims, and that Title III is in violation of the U.S Constitution, additional grounds dictate against implementation of the Act. These grounds include the practical effects resulting from Title III's implementation, including a loophole in the current trade embargo with Cuba for certain claimants as well as promoting our own policy interests in leading Cuba to a democratic political system. Additionally, policy concerns exist regarding our relations with our major allies such as the European Union, Canada, and Mexico.

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90. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981), where President Carter, as part of the settlement of the hostage situation in Iran, took a number of actions affecting the claims of American creditors against Iran including suspending all contractual claims pending in American courts. The Supreme Court in that case held that the suspension of claims was within the President's constitutional authority. *Id.*

91. 22 U.S.C.A. § 2370(e)(2) (West Supp. 1997) states that the Act of State Doctrine would be applicable when the "President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States."

92. Banco National de Cuba v. Farr, 383 F.2d 166, 181(2d Cir. 1967).

A. *Creation of a Loophole to U.S. Trade Embargo with Cuba*

LIBTERTAD is not the appropriate mechanism for promoting a democratic regime in Cuba. Proponents of the law stand firm on the theory that tough sanctions imposed on foreigners trafficking in Cuba will serve as a deterrent for international investment in Cuba, thereby isolating Cuba and creating economic pressures.[93] Such isolation and economic pressures, proponents maintain, will further push Cuba towards a democratic government.[94] However, Title III will far from have this effect and will instead only play into the hands of Castro "by creating an expansive loophole for property claimants, especially wealthy Cuban Americans, to circumvent the embargo."[95]

First, it is noteworthy to recognize that certain attorneys who represent U.S. companies with major claims under Title III, such as the attorneys for both the National Association of Sugar Mill Owners of Cuba, the Cuban Association for the Tobacco Industry, and Bacardi rum company, were instrumental in advising the drafters of LIBERTAD.[96] These advising attorneys, whose present clients were victims of the Cuban government's confiscation of U.S. nationals' property, intend to assert claims against their respective traffickers.[97] While under Title III these attorneys are able to file suit in US. district court on behalf of their clients against their foreign traffickers, it is more likely that these parties will reach out-of-court settlements.[98] The advantages of these settlements would include the

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93. Clagett, *supra* note 35, at 435-36.

94. H.R. CONF. REP. NO. 104-142, at E308-309 (1996) (statement of the Honorable Jack Reed of Rhode Island in the House of Representatives) [hereinafter Reed Statement]. The purpose of the legislation has been described as an effort to "discourage foreign business investment in Cuba, thus undermining the island's financial recovery which, the bill's supporters naively hope, will result in a collapse of the Castro regime." *Id.* at E309 (quoting Louis F. Desloge, *The Great Cuban Embargo Scam- A Little- Known Loophole Will Allow the Richest Exiles to Cash In,* WASH. POST, Mar. 3, 1996, at N07).

95. H.R. CONF. REP. NO. 104-142, at E271-72 (1996) (statement of the Honorable Doug Bereuter of Nebraska in the House of Representatives) [hereinafter Bereuter Statement] (quoting Desloge, *supra* note 94, at N07).

96. *Id.* at E272.

97. *Id.* Gutierrez, one of the representative attorneys, had been quoted as saying that he and his clients "are eyeing a Kentucky subsidiary of British-American Tobacco (B.A.T.) that produces Lucky Strike cigarettes. B.A.T. has a Cuban joint venture with the Brazilian firm Souza Cruz to produce tobacco on land confiscated from his clients." *Id.* In addition, "Bacardi would be able to sue Pernod Ricard, the French spirits distributor, currently marketing Havana Club rum worldwide. Bacardi claims that Pernod Ricard's rum is being produced in the old Bacardi distillery in the city of Santiago de Cuba." *Id.*

98. The Act permits settlements without the approval from the Unites States by providing that "an action . . . may be brought and may be settled . . . without obtaining any license or other permission from an agency of the United States." H.R. 927 § 302(a)(7). Thus, "[t]hese agreements do not need the blessing of the U.S. government. This is the

opportunity for both parties to avoid prolonged litigation time and cost. However, a likely result of these settlements would be to provide a profit sharing agreement whereby the U.S. national would take a percentage of the profits produced from the foreign national doing business in Cuba.[99] Therefore, the U.S. trade embargo would be circumvented by these "certain" claimants that choose to take a portion of the profits of these trafficking foreign investors rather than pursue full-scale litigation against them in U.S. district court. Thus, a loophole to the U.S. trade embargo against Cuba is created in Title III.[100] In addition, the legislation could

> encourage a massive *influx* of new *foreign investment in* Cuba. Armed with the extortionist powers conferred by the legislation, former property holders could shop around the world for prospective investors in Cuba and offer them a full release on their property claim in exchange for a 'sweetheart' lawsuit settlement entitling them to a piece of the economic action. Thus, the embargo is legally bypassed and everyone laughs all the way to the bank.[101]

B. *Not in Furtherance of Policy of the Embargo*

Aside from the practical effects of creating a loophole for avoiding the trade embargo with Cuba, Title III does not further the policy articulated in LIBERTAD of leading Cuba to a democratic regime.[102] As stated in the congressional record, the purpose of the act is to "take proactive steps to encourage an early end to the Castro regime."[103] The President's support for LIBERTAD has been practically non-existent, until the unarmed civilian aircraft was shot down.[104] However in response to such a tragedy in an election year, the President was persuaded to sign into law the Act which includes, among other things, authorizing lawsuits against foreigners

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million dollar loophole in Helms-Burton." Bereuter Statement, *supra* note 95, at E272.

99. Bereuter Statement, *supra* note 95, at E271-72.

100. *Id.*

> The bottom line is that Clinton, in the name of getting tough with Castro, has endorsed a bill that allows the embargo to be evaded and protects Cuban Americans who want to legally cut deals to exploit their former properties in Cuba while the rest of the American business community must watch from the sidelines.

Id. at E272.

101. Reed Statement, *supra* note 94, at E309 (emphasis added).

102. H.R. REP. NO. 104-202, at 22 (1995).

103. *Id.*

104. Greenhouse, *supra* note 2, at A8.

investing within Cuba.[105] As a result, "[t]he President has properly sought and won international condemnation for an act that flouts international law and norms,"[106] thus strengthening his political support by those Americans enraged by the hostile act as well as those Cuban Americans standing to vote in the United States.[107]

Defenders of Title III look towards the protection of property interests of U.S. nationals; however, a realistic look at the legislative intent of LIBERTAD and the timing of its signing by the President suggest that the real goal of Title III was not only to provide relief to property claimants injured by the confiscation of their property in Cuba, but primarily to institute an affirmative measure to economically isolate Cuba in pursuit of leading it to a democratic system.[108] Such policy, however, does not justify the United States' acquisition of jurisdiction over Title III claims illegally or creation of an economic boycott restricting investment by foreigners in Cuba. Proponents of Title III intend to accomplish their objective of leading Cuba out of its communist regime and restoring fundamental human rights to its people by economically isolating Cuba from its trading partners that replaced the economic support the Soviet Union left behind when it overthew the communish government. After articulating the effect property confiscation had on its victims, Brice Clagett, a specialist in international law, articulates the real motive of Title III:

> [B]ecause of the proximity of Cuba to the United States and the history of relations between the two countries, Cuba's persistence in suppressing democracy, violating human rights and refusing to satisfy international law claims against it has substantial impact on the United States in a variety of ways . . . . It [the United States] has reasonably concluded that discouraging foreign investment in tainted Cuban property is an appropriate and proportionate means toward that goal.[109]

To the contrary, evidence suggests that the effects of this isolation will not have the intended effect and not further the legislative intent of the

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105. David Fox, *EU Counters Helms-Burton Act,* REUTERS WORLD SERVICE, Oct. 28, 1996 (EU diplomats believe that Clinton signed the bill in order to retain the Presidency in an election year and that it was a good probability that he will further suspend theAct in the new year.).

106. H.R. REP. NO. 104-142, at H1298 (1996) (statement of Mr. Skaggs—*Illegal Cuban Shootdown Warrants Punishment of Castro, But Not Despite Long-Term United States Interests).*

107. *EU/US: EU Hopes Clinton Re-Election Will Smooth Relations,* EUR. REPORT, Nov. 9, 1996.

108. Clagett, *supra* note 35, at 435-36.

109. *Id.*

Act.[110] For example, Congressman Joe Moakley visited Cuba before the enactment of LIBERTAD for the purpose of: (l) trying to find ways to improve relations between the U.S. and Cuba; and (2) trying to seek out ways to help and support the Cuban people and promote human rights.[111] After meeting with a variety of people in Cuba, including Castro, top government officials, church leaders, dissidents, foreign diplomats, U.S. officials, and ordinary Cuban citizens, Moakley reported that "[t]he bill [LIBERTAD] will not help Cuba's transition to a market economy and could only retard the very forces of freedom and openness the United States wishes to encourage"[112]

Furthermore, none of the U.S.'s major trading partners share the view that "strangling the Cuban economy is the best way to promote democracy" in
Cuba.[113] The general view among countries is that the effects of Title III actually do not lead Cuba to democratic and economic reforms, but rather, have an opposite effect by a "prompted wave of sympathy for Havana."[114] The true consequences of Title III are to make "the Cuban dictator such [a] welcome guest (around the world) [by] the US policy of blackballing him."[115] In addition, Pope John Paul II, who helped defeat communism in his native Poland and who has made efforts to help facilitate reforms in the Cuban regime by increased dialogues, has publicly attacked Title III as a means of thwarting these desired results.[116] Specifically, Pope John Paul II is "convinced that a safe political climate must be created to ensure a peaceful power transition to democracy in Havana, whenever it occurs, applying the same successful philosophy and diplomacy he used with Moscow and Eastern

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110. S. REP. NO. 104-142, at S3408-3409 (1996) (statement of Mr. Simon).

111. H.R. REP. NO. 104-142, at H877 (1996) (statement by Congressman Joe Moakley) [hereinafter Moakley Statement].

112. *Id.* at H878.

113. *EU Plans to Hit Back at US Over Cuba Laws on Point of Collapse,* AGENCE FRANCE PRESSE, Oct. 28, 1996. *See also* Marjorie Olster, *U.S. and Spain Air Differences on Cuba,* THE REUTER EUR. BUS. REPORT, Nov. 17, 1996 (Spain, vehemently rejecting Title III sanctions, also does not believe economic trade embargo and isolationist policies are way to achieve political reform goals.).

114. Sanz, *supra* note 48; *"We Exhort the Government of the United States of America to Reconsider the Application of the Law,"* AGENCE FRANCE PRESSE, Nov. 12, 1996 (Spanish Prime Minister, Jose Maria Aznar, stating his belief that the actual effect of Title III will be the opposite of the effect the U.S. intends).

115. Sanz, *supra* note 48.

116. *CNN World Today* (CABLE NEWS NETWORK BROADCAST, Nov. 16, 1996). *See also Italy Says Castro is "Open to Dialogue" on Reforms,* REUTERS FIN. SERVICES, Nov. 18, 1996 (Italian Foreign Minster Lamberto Dini also has been cited as saying that he has found Castro open to dialogue regarding political reforms and human rights.).

Europe."[117] The only real effect of Title III will be to anger our closest allies to the point that they institute countermeasures to rebut the effects of the legislation and in the long run hurt U.S. interests.[118]

As the situation stands now, the restrictive policies against Cuba leave the U.S. completely out of the picture as far as getting "serious about improving relations [with Cuba]."[119] Long-term economic opening and continued engagement with Cuba by countries such as Canada and those in the European Union and Latin America have led to positive political developments such as: (1) "authorization of free trade zones" (allowing some firms to contract their own labor rather than relying on the Cuban government to supply it); (2) "the loss of full state control over the economy and flourishing illegal markets;" and (3) "the government's authorization of some self-employment and farmers' markets."[120] These advancements evidence Castro's desire to "allow an economic policy shift despite his distaste for capitalism."[121] Thus, tightened economic policies may reverse and certainly will not encourage any advancement on the part of the Cuban government towards positive political developments.

In addition, the legislation has provided Castro with a tool to "rally nationalist support," even from Cubans who otherwise oppose the government's policies. More importantly, LIBERTAD has essentially sent

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117. Tad Szulc, *Clinton's Cuba Problem*, INT'L HERALD TRIB., Nov. 12, 1996. Pope John Paul II has begun an increased dialogue with Castro and strongly believes that the Catholic Church is achieving more success towards political reform in Cuba than the U. S. through all its economic sanctions. *Id.*

118. H.R. REP. NO. 104-142, at E1247 (1996) (statement of the Honorable Lee Hamilton of Indiana in the House of Representatives) [hereinafter Hamilton Statement]. Title III has enraged the EU and major trading partners of the United States. In the United Nations Assembly on Nov. 12, 1996, an overwhelming majority of countries present (137 countries) voted against the 30-year economic embargo against Cuba and called for its lifting while only three countries, including the United States, voted for the resolution. The results evidence the strong opposition to isolationists polices against Cuba. *UN General Assembly Condemns US. Embargo Against Cuba*, DEUTSCHE PRESSE-AGENTUR, Nov. 12, 1996.

119. Moakley Statement, *supra* note 111, at H878. Moakley even commented on how the dissident groups in Cuba oppose LIBERTAD and stressed that the difficulties in Cuba run much deeper than economic hardships. *Id.*

120. Hamilton Statement, *supra* note 118, at E1248.

121. *Id.* For example, see the Moakley Statement, *supra* note 111, at H877, noting observations from his trip to Cuba that an explosion of independent enterprenuerships has occurred in Cuba with roughly 208,000 independent family businesses operating in Cuba. Thus, encouraging isolation not only from the United States but from other countries around the world clearly could not be in the best interests of promoting the success of these newly started independent businesses. Implication of such new entruenpenerships is clear because people who are no longer dependent on the government for their jobs are free from economic coercion. Moakley stated he sensed that the Cuban government recognizes that these small businesses are necessary for the country's economic viability and are accepting the political space they create. *Id.*

the message to Cuba's government that "it could repress as it pleased because there is no chance left of improving its relations with the United States."[122] As a result, the Cuban government has no incentive to stop any repressive treatment of its citizens that preceded the enactment of LIBERTAD.[123] Therefore, the targeted economic effects of isolation that the United States hoped to achieve in Cuba by imposing the threat of Title III lawsuits on foreign companies will not be a catalyst to democracy. Rather, results of Title III will be felt in the United States by an increased number of lawsuits flooding our court system.[124]

More important than not satisfying the policy goals of the Act, LIBERTAD is "viewed by every major country as detrimental to its relations with the United States."[125] Implementation of Title III will severely penalize foreign companies for commercial conduct geared toward a third country and in the process, will provoke trade conflicts with U.S. allies as well as mandate secondary boycotts on other nations in violation of U.S. legislation and policy.[126] Additionally, as will be discussed in the final section of this note, Title III has led to the implementation of countermeasures by our closest allies in an effort to reduce the effects of Title III lawsuits on their nationals.[127]

Despite U.S. efforts to economically isolate Cuba in passing LIBERTAD, interest in Cuban investment and trade is on the rise.[128] Practically speaking, Title III will result in more harm than good to the United States. As Foreign Investment Minister Ibrahim Ferradaz commented, "US businessmen are the ones who are the first victims of the law which stops them from investing in Cuba. They are the ones who have to stand by and watch as others come in and do business, gain market shares and go home with profits."[129] Furthermore, LIBERTAD separates firms that will engage in trade with Cuba by their size. "Large international

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122. Hamilton Statement, *supra* note 118, at E1248.

123. *Id.* "Within ten days of President Clinton signing the Helms-Burton Act, General Raul Castro launched attacks on various Cuban academic institutions and intellectuals, further chilling public expression and curtailing academic freedom." *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at E1247-48.

127. Richard W. Stevenson, *Canada, Backed by Mexico, Protests to US. On Cuba Sanctions*, N.Y. TIMES SERVICE (visited Sept. 28, 1996) <http://www.latinolink.com/news/0313cuba.html>.

128. *Cuba Thumbs Nose at US Sanctions with Bustling International Trade Fair*, AGENCE FRANCE PRESSE, Nov. 4, 1996. The Hectare-plus Havana International Trade Fair with Castro and 336 Cuban companies at hand had around 1500 international companies open booths at a trade fair in Cuba. By investing heavily in Cuba and taking an economic stake in the country, foreign nations believe, "they have more of a chance to influence Castro on change." *Id.*

129. *Id.*

firms—because they are likely to do business with the United States—[may be] discouraged from trading or investing in Cuba. But [the] smaller firms that do not operate in the U.S. market are not exposed to Helms-Burton retaliation."[130] Thus, these smaller firms will find investment in Cuba extremely attractive.

Supporting the proposition that Title III is contrary to U.S. policy interests is strongly evidenced by a July, 1, 1996, letter written by the U.S. Council for International Business[131] to the President of the United States urging him to suspend the provision.[132] The letter articulates the view of a broad cross section of the business community including companies who stand to acquire the legal right to sue under Title III. In expressing opposition to Title III, the group addresses its position to the President by stating:

> Many of our member companies had property in Cuba that was expropriated by the Castro regime. Yet, many of these companies, constituting some of the largest certified claimants, do not believe that Title III brings them closer to a resolution of these claims. To the contrary, Title III complicates the prospect of recovery and threatens to deluge the federal judiciary with hundreds of thousands of lawsuit. These companies, Title III's intended beneficiaries, support our view that Title III should be suspended . . . . Finally, we believe that if Title III were to become effective, it would drive a wedge between the United States and our democratic allies that would significantly hinder any future multilateral efforts to encourage democracy in Cuba . . . .[133]

It is evident that the U.S. business community condemns Title III due to concerns that the provision will "poison" the United States' trading relations around the world.[134] Likewise, the U.S. Chamber of Commerce has sharply criticized the use of trade sanctions to achieve foreign policy objectives and believes the primary focus should be determining the cost to

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130. Hamilton Statement, *supra* note 118, at E1248.

131. Others behind the letter include the National Foreign Trade Council, Organization for International Investment, U.S. Chamber of Commerce, and the European-American Chamber of Commerce. Hamilton Statement, *supra* note 118, at E1247-48.

132. H.R. REP. NO. 142, at E1247-48 (1996) (The National Foreign Trade Council letter).

133. *Id.* at E1248.

134. *EU/US: Businessmen Forge Breakthrough on Testing*, EUR. REP., Nov. 13, 1996.

the U.S. economy.[135] Thus, U.S. policy interests with respect to protection of property claims cannot be justified if beneficiaries of the legislation denounce the legal measure intended to protect their interests. Aside from certain claimants that have intentions of avoiding the trade embargo and benefiting from settlement agreements with foreign nationals in Cuba discussed later, support by potential claimants under Title III has not been substantial as demonstrated by the U.S. Council for International Business letter cited above. Thus, this letter suggest that U.S. nationals with property claims in Cuba large enough to sue under Title III (greater than $75,0000 to satisfy traditional federal diversity jurisdiction), do not maintain the belief that threatening their foreign business partners with lawsuits is worth destroying business relations with them in the long run. This letter, combined with the legislative intent, provide support that U.S. policy interest in compensating victims of Cuban property confiscations is secondary to the U.S. policy interest of forcing Cuba to reform its government. Additionally, "secondary boycotts to enforce policy goals . . . [through] unilateral extraterritorial legislation does not promote international cooperation"[136] or satisfy international legal principles. Solutions are only possible when international legal principles are upheld.[137] Thus, policy interests, if entirely based on Title III as a measure to lead Cuba to a democratic regime, certainly do not justify jurisdictional and legal grounds for authorizing such suits under Title III.

B. *International Reaction to Title III and Prospective Enactment of Countermeasures*

While the U.S. supporters of LIBERTAD have attempted to defend the legislation as not violative of international law,[138] allies of the United States continue to protest the enactment of the law. Three major protesters of LIBERTAD that vehemently assert opposition are Mexico, Canada, and the European Union. The view taken by all those opposing the legislation is well-represented by a statement from the European Union alleging that enactment of the U.S. legislation would "represent the extraterritorial application of U.S. jurisdiction and would restrict EU [European Union] trade in goods and services with Cuba."[139]

Since President Clinton signed LIBERTAD, anticipation has mounted as to whether U.S. allies would officially enact counter-measures to combat

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135. *US Sanctions Laws Condemned,* FIN. TIMES, Nov. 14, 1996.
136. *European Business Concerned Over Helms-Burton Row,* EUR. REP., Nov. 1, 1996.
137. *Id.*
138. *See, e.g.*, Clagett, *supra* note 35, at 438.
139. Stevenson, *supra* note 127.

Title III lawsuits against their nationals.[140] Despite President Clinton's six-month delay in instituting Title III lawsuits against foreign investors in Cuba in order to persuade them to side with U.S. law, Canada has announced a retaliatory measure to combat the effects of Title III. After announcing that "the Helms-Burton law flies in the face of international legal principles," Art Eggleton, the Canadian Minister of International Trade avowed to institute an amendment to Canada's Foreign Extraterritorial Measures Act (FEMA) to counter the effects of the Helms-Burton on Canadian companies.[141] The amendment would in essence provide Canadian companies with more legal authority to combat U. S. claims against it for its investment relations with Cuba.

Specifically, the amendments to FEMA would give "Canada's Attorney General the authority to forbid compliance in Canada with extraterritorial measures that, in his view, infringe Canadian sovereignty."[142] Thus, the Canadian Attorney General could declare a judgment in a U.S. court against a Canadian company as void and refuse to enforce the U.S. judgment. In addition, the Canadian company who has a judgment and award rendered against it in a U.S. court would also have a retaliatory action to recover its loss from that award in the U.S. as well as court costs.[143] Lastly, FEMA penalties provided for in the amendment will also serve as a deterrent for Canadian countries to abide by such foreign legislation as Title III of LIBERTAD.

Other than government propositions to combat the causes of action created under Title III, Canada is taking additional boycott measures against the United States by discouraging holidays in Florida, a major revenue-

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140. *Europeans Try To Unify Against U.S. Actions*, THE COM. APPEAL, Sept. 10, 1996, at 8B.

141. FEMA was originally enacted in 1985 to protect Canadian interests against extraterritorial measures. *Canada Announces Measures to Combat Helms-Burton Act*, LATIN AM. LAW AND BUS. REP., July 31, 1996.

142. *Id.*

143. Hypothetically, the following is how the counterclaims would be instituted by Canadian companies who have judgments rendered against them in U.S. courts:

> (1) U.S. national X might win a suit against a Canadian, Y, in a U.S. court under the Helms-Burton act.
>
> (2) If the Canadian has no assets in the United States, the U.S. national would have to ask a Canadian court to enforce the judgment. The Attorney General of Canada could issue an order blocking this process.
>
> The Canadian, Y, could choose to sue X in Canadian courts to recoup the full amount of the award that X had won in the foreign court. This amount plus courts costs in both countries would be applied against X's assets in Canada. Thus, the Canadian proposed countermeasures would only be effective as a remedy if the U.S. claimant has assets in Canada.

Id.

producing industry in the United States.[144] Thus, Canada is so enraged over Title III that it is pursing any means necessary to send a signal to the United States that it will not remain silent and tolerate what it considers a flagrant extraterritorial assertion of jurisdiction by the United States. Recognizing the harm imposed by Title III of LIBERTAD on its nationals, Canada's response to the legislation has resulted in proactive measures against it.

European reaction to Title III, like Canada, has not been supportive. The European Union, like the United States, maintains policy to promote democracy and human rights in Cuba; however, it does not believe that suits under the U.S. legislation will further that policy. Rather, the European Union feels LIBERTAD will only have the effect of hurting European businesses.[145] Based on its belief that suits under Title III are in violation of international law as well as the interests of its businesses, the European Union on October 28, 1996, reached political agreement on a draft of legislation to "make it illegal for Europeans to obey Washington's anti-Cuban Helms-Burton Act."[146] The Trade Commissioner for the European Union, Sir Leon Brittan, declared that the decision was "an historic breakthrough which shows we have the will and capacity to defend our interests."[147] The agreement was solidified after much negotiation with Denmark, who originally opposed it, but finally came to agreement when convinced the counter-measures did not compromise national sovereignty.[148]

The agreed upon legislation in the European Union has been characterized as a "defensive law" rather than an "offensive law"[149] which seeks to block the statute and protect against the "effects of application of the extraterritorial legislation adopted by a third country."[150] The legislation offers European firms or individuals the opportunity to go in front of

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144. David Ott, *Flexing the Muscle to Defend a Stake in Treasure Island,* THE SCOTSMAN, July 16, 1996, at 12.

145. *European Commission President Jacques Santer Underlines EU 's Deep Concern With Helms-Burton Legislation to President Bill Clinton,* EUR. UNION NEWS, (visited July 12, 1996) <http://www.eurunion.org/eu/news/press/pr4l-96.htm>.

146. Fox, *supra* note 105. The European Union has also filed a complaint as of October 29, 1996, with the World Trade Organizations, and an arbitration panel is scheduled to convene on the matter on November 20, 1996. *EU Response to US. Anti-Cuba Law,* XINHUA NEWS AGENCY, Oct. 29, 1996.

147. Fox, *supra* note 105. Note that in response to the EU's actions, the United States has commented that the "Europeans should pay more attention to human rights in Cuba rather than taking retaliatory measures against the Helms-Burton Law." *EU/US: Overcomes Danish Reserve to Agree Cuba Retaliatory Measures,* EUR. REP., Oct. 30, 1996.

148. *EU Agrees Law to Counter U.S. Anti-Cuba Moves,* THE REUTER EUR. BUS. REP., Oct. 28, 1996.

149. *EU Response to Helms Burton Called "Defensive,"* THE REUTER EUR. BUS. REP., Oct. 29, 1996.

150. *Conclusions of Oct. 28-29 General Affairs Council,* THE REUTER EUR. COMMUNITY REP., Oct. 30, 1996.

European Union courts and make complaints against U.S. nationals who have sued them over Cuban property claims. Such an opportunity provides a means for the European companies to recoup the damages that U.S. companies inflicted upon them acting pursuant to Title III.[151] In addition, the European Union regulation allows for European companies to "launch 'clawback' counter-suits against the European subsidiaries of any companies which seek to make use of the Act."[152] Furthermore, the legislation forbids cooperation by European companies with any court proceedings with regard to Title III.[153]

Although the European Union and Canada have led the race among other nations and have begun drafting legislation to combat the effects of Title III, other nations are sure to follow due to their strong opposition to the legislation and their support of those who have already begun instituting such measures.

V. CONCLUSION

While the destruction of two U.S. unarmed civilian aircraft in an international fly zone was an inexcusable act of the Cuban government, such an act should not be the motive for enacting legislation that hurts major U.S. allies and trading partners. Title III of LIBERTAD is a violation of international law and, in light of policy considerations, is not in the interest of the United States. First, there are no legal grounds for asserting jurisdiction under the law: none of the internationally recognized forms of asserting jurisdiction over territorial borders is applicable under Title III. Doing so is a violation of extraterritorial jurisdiction as pronounced by our closest allies. While the confiscation of U.S. property in Cuba may arguably have some "effects" within the United States territory, those effects do not rise to the level of reasonableness to justify asserting jurisdiction. Secondly, the Act of State Doctrine, promulgated by the United States Supreme Court forbids U.S. district courts from sitting in judgment on activities committed by sovereign states. Even though the passage of the Hickenlooper Amendment shortly after the decision in *Sabbatino* provided that U.S. courts could hear property claims of U.S. citizens whose property was confiscated by the Cuban government, some authority suggests that the Amendment was to be interpreted narrowly. Thus, the Amendment was intended solely to reverse the decision in *Sabbatino* where proceeds from the Cuban confiscation were brought *into* the United States.

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151. *EU Response to Helms-Burton Called "Defensive", supra* note 149.

152. *US Hits back at Opposition to Anti-Castro Legislation,* AGENCE FRANCE PRESSE, Oct. 29, 1996.

153. *Id.*

Regardless, Title III still presents constitutional problems since it expressly requires U.S. courts to disregard the Act of State Doctrine. Such a provision runs in the face of the U.S. Constitution's framework regarding separation of powers and the power of the Executive and Legislative branch to have final say regarding foreign affairs.

Aside from the blatant illegality of Title III, it does not achieve its practical and policy objectives. By enabling claimants to settle with foreign traffickers without a license from the U.S. government, a loophole is created for certain property claimants to avoid the over three decade long U.S. trade embargo imposed on Cuba. In addition, Title III will not achieve its policy objectives of returning Cuba to a democratic regime. Economically isolating Cuba, while angering U.S. allies and trading partners in the process, will not promote human rights or further relations with our allies. Furthermore, such policy objectives do not justify asserting extraterritorial jurisdiction on third country defendants and placing a secondary boycott on our allies in order to force U.S. policy on them.

By maintaining such a tough position against its allies as a result of the legislation, the United States must now prepare to deal with anti-boycott and counter-measure legislation from allied countries in opposition to Title III who say it is a flagrant violation of international law. The United States will also find itself defending its legislation in front of the World Trade Organization pursuant to claims that have been filed against it for violation of trade agreements.

Moreover, even if the United States can defend Title III, politically it is not worth angering our closest trading partners to the extent that they go to such extremes to implement measures to counter the effects of Title III suits. The real issue that should be brought to bear upon Title III of LIBERTAD is how it is affecting the United States' long-term relations with important trading partners and world allies as well as the internal economic ramifications that may result from Title III claims. Then the United States must ask itself whether Cuba is really worth the inevitable political ramifications that will erupt as a consequence of permitting Title III suits to commence. Furthermore, history has indicated that thirty-nine years of trade embargo and isolationist policy in Cuba has failed to produce the political reforms sought. Aside from risking worldwide political condemnation for implementation of Title III, the United States is unlikely to meet its objective of political reform in Cuba by further isolationist policies.

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