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COMMENTS

PRINCIPLES FOR A META-DISCOURSE OF LIBERAL RIGHTS: THE EXAMPLE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Dr. Eric Heinze*

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INTRODUCTION

The word "right," when "taken in an *abstract* sense, means justice, ethical correctness, or consonance with the rules of law or the principles of morals."[1] When "taken in the *concrete* sense, [it denotes] a power, privilege, faculty, or demand, inherent in one person and incident upon another."[2] MacIntyre speaks of rights "which are alleged to belong to human beings as such, and which are cited as a reason for holding that people ought not to be interfered with in their pursuit of life, liberty and happiness."[3] Yet Hohfeld proposes an analysis in which "the term 'right' will be used solely in that very limited sense according to which it is the correlative of duty."[4] Indeed, for Posner, any broader concept of rights is

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* Faculty of Laws, Queen Mary and Westfield College, University of London. Maîtrise 1985, Université de Paris VIII; J.D. 1991, Harvard University; Ph.D. 1994, University of Leiden. This paper was presented in Great Britain at the 1998 Critical Legal Studies Conference, held at the University Lancaster. The author would like to thank Michael Salter for his kind efforts as organizer of the panel, as well as Bernard Jackson and Roger Cotterrell for comments on an early draft.

1. BLACK'S LAW DICTIONARY 1323 (6th ed. 1990)

2. *Id.* at 1324.

3. ALASDAIR C. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 69 (2d ed. 1985).

4. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 72 (1966).

"primitive."[5] Nevertheless, Minow captures a vision of rights which "muster people's hopes and articulate their continuing efforts to persuade."[6] One could find many more citations. Yet the point is clear. No understanding of rights is thinkable in isolation from a broader theory of law.

Why theorize about rights at all? Why not just ask what *the law itself* says about them? In fact, it says very little. Or rather, it says so many things, in so many contexts, that it shuns any unified or self-evident concept. Even the more specific field of liberal rights[7] reveals not a jurisprudence of rights *as such*, but simply a jurisprudence of this or that particular right — a jurisprudence of free expression, criminal procedure, due process, religious liberty or discrimination. Once the term "rights" has been stamped upon these disparate interests, their unity is more easily assumed than examined.

We thus face a dilemma. On the one hand, we can accept black-letter doctrine as the only reliable statement about rights. That approach, however, reduces the concept of rights to an empty shell. It provides conceptual unity only at the broadest, and commensurately trivial, level of abstraction: rights are whatever the law says they are. On the other hand, rights can be subsumed under a more substantively unified theory, but only insofar as some — invariably controversial — position is taken on the nature of law itself (such as "law is a servant of justice," "law is a by-product of political institutions," or "law is an instrument of economics").

Is there another approach? Is it possible to take Ockham's razor to rights discourse — to account only for those concepts which are necessary to the sheer intelligibility of rights discourse? Are there rules that govern the conditions for the possibility of rights discourse? Do we "instinctively" follow such rules without even knowing what they are, just as people follow rules of syntax or logic without ever having studied them in any systematic way?

It will be argued that liberal rights discourse has a structure that unites and circumscribes rights jurisprudence, precisely dictating what rights jurisprudence can and cannot assert, and that such a structure can be

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5. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 331-33 (1990).

6. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1867 (1987).

7. While traditional rights instruments such as the United States Bill of Rights limit individual rights to civil and political interests, subsequent thought, particularly in the international human rights movement, has included concepts of social, economic, cultural and collective rights. *See, e.g.*, HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT chs. 5, 14, 16 (1996). This study, however, will examine only liberal rights, meaning the civil rights and liberties now common in constitutional democracies and in international and regional rights regimes. The question whether the model proposed here, or some comparable model, would apply to other kinds of rights, is too broad to be summarily affirmed or denied, and must instead be deferred for future analysis.

elaborated through a formal, symbolic language.[8] That language will be called a *meta-discourse*[9] *of liberal rights*. The meta-discursive model proposed here will serve to develop the following theses:

1. All arguments in the adjudication of liberal rights are instances of fixed combinations of variables.[10] These combinations can be expressed as symbolic formulas. There are fourteen kinds of arguments — *meta-arguments* — that can be made in the adjudication of liberal rights. (General formulas representing the fourteen meta-arguments appear in Part 3.3, Table 2.) Any one formula can be adopted to an infinite variety of fact patterns. The fourteen meta-arguments thus represent not total determinacy, but only the limits of determinacy in liberal rights discourse.

2. All rights disputes are nothing but disputes about which formula is correct. Disputes about which formula is correct are nothing but disputes about the values to be ascribed to the constituent variables. Those values are always indeterminate; but the variables and formulas to which they are ascribed are fixed, and, in that sense only, are determinate.[11]

3. As the fourteen meta-arguments represent the conditions for the very coherence of liberal rights discourse, they apply to any system of civil rights — domestic, regional, or international.[12]

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8. For an analysis of symbolic as compared with natural language, see WILLARD VAN ORMAN QUINE, ELEMENTARY LOGIC 52-53 (1965).

9. Compare Carnap's concept of *metalanguage*: "In the investigation of languages, either historical natural ones or artificial ones, the language which is the object of study is called the *object language*. . . . The language we use in speaking *about* the object language is called the metalanguage." RUDOLF CARNAP, INTRODUCTION TO SYMBOLIC LOGIC AND ITS APPLICATIONS 78 (William H. Meyer & John Wilkinson trans., Dover Publications 1958).

10. *See also* Eric Heinze, A Meta-Discourse of Constitutional Rights (unpublished manuscript, on file with author); Eric Heinze, A Meta-Discourse of Discrimination Law (unpublished manuscript, on file with author).

11. In Wittgenstein's words, "[d]as Wesentliche am Satz ist . . . das, was allen Sätzen, welche den gleichen Sinn ausdrücken können, gemeinsam ist." Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* 3.34I, *in* 1 WERKAUSGABE 7, 24 (1984). "That which is essential to a sentence is . . . that which is common to all those sentences which can express the same meaning." (translation by author).

12. Although the concept of civil and political rights, inherent within all individuals as inalienable legal claims against the State, is largely Western European in origin, it has increasingly provided a primary component of international and regional human rights instruments, of national constitutions, and of foreign policy. *See* STEINER & ALSTON, *supra* note 7, chs. 2, 3, 7, 10, 12. *See also* Eric Heinze, *Beyond Parapraxes: Right and Wrong*

Although some of the notation to be used in this analysis is drawn from standard symbolic logic, no knowledge of formal logic is assumed. All relevant logical concepts and symbols will be explained. Those used are rudimentary and based upon familiar, intuitive processes.

This analysis does not purport to bring us any closer to solving rights disputes. It takes no position on the merit or universality of rights discourse, as opposed to other means of articulating human needs and aspirations.[13] It contains not a scintilla of substantive insight on moral, philosophical, sociological, or policy-based rights debates. It seeks only to understand how those debates can become rights discourse in the first place. After all, not all moral, philosophical, sociological, or policy debates are debates about rights. The statement "*abortions not performed by qualified professionals are harmful to women*" is not, without more, a legal one. What, then, is required to turn such statements into statements about the adjudication of rights? The aim of this study is not to resolve controversies surrounding rights jurisprudence, but only to clarify them by understanding them as products of a regular and predictable discursive structure.[14] Moreover, having banished such standard concepts as "liberty" or "reasonableness" to the land of variable contingencies, we will nevertheless see towards the end of this paper that a formal analysis allows us to re-generate natural-language[15] concepts. Such concepts, if hardly accounting for the full variety of debate proper to rights adjudication, nevertheless, to the extent of the determinacy of rights discourse, can be used with precision. Thus, the analysis will conclude by proposing formal concepts of liberalism, paternalism, communitarianism, and State sovereignty.

The corpus to be examined here will be the case law of the European Convention on Human Rights.[16] Its jurisprudence is the most extensive among international and regional human rights systems, providing one of the

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Approaches to the Universality of Human Rights Law, 12 NETH. Q. HUM. RTS. 369 (1994); LUDGER KÜHNHARDT, DIE UNIVERSALITÄT DER MENSCHENRECHTE (1987).

13. *See* STEINER & ALSTON, *supra* note 7, ch. 4; Heinze, *supra* note 12; KÜHNHARDT, *supra* note 12.

14. Compare Carnap's depiction of formal logic: "Such a system is not a theory (*i.e.* a system of assertions about objects), but a *language* (*i.e.* a system of signs and of rules for their use)." CARNAP, *supra* note 9, at 1.

15. The term *natural language* as used here simply denotes languages, such as English, colloquially spoken or written, as opposed to *artificial languages*, such as formal logic, mathematics, or computer languages, developed for limited scholarly or technical purposes. *See* JOHN LYONS, NATURAL LANGUAGE AND UNIVERSAL GRAMMAR 1-3, 50-52 (1991).

16. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 45 AM. J. INT'L L. Supp. 24 (1951) [hereinafter European Convention on Human Rights].

leading bodies of case law on civil rights and liberties.[17] The model proposed here is structured on the basis of arguments attributed to parties in dispute. These are drawn only from European Court or European Commission opinions,[18] and not from oral or written pleadings.[19] The assumption is that an opinion issued by the European Court or Commission, as a condition for its coherence, must be assumed to arbitrate between *some* two opposing positions, even if such positions are different from those of the parties' original submissions and even if the opinion does not articulate the positions it ascribes to the parties in great detail. A broader corpus embracing written or oral pleadings, decisions of domestic courts, or *travaux préparatoires* would simply provide further instances for applying the model — and may offer a worthwhile basis for future analysis — but in no way bears upon the structure of the meta-discourse as set forth here. Similarly, the fact that the parties or judges may have failed to raise arguments that might have been made in a given case is irrelevant, as the proposed model envisages possible, as well as actual, arguments.

The hypothesis is that this meta-discourse applies to any system of liberal rights. Even in legal systems that make less use of a "reasoned" ("*motivé*") style of jurisprudence, it cannot be assumed that such jurisprudence is arbitrary (or, at least, any more arbitrary than adjudication in the common-law world), but only that any requisite reasoning was done at other, presumably legislative, executive, or administrative levels, and is then accepted and incorporated by a judicial body.

Part 1 considers the failure of standard concepts to provide a discursive unity of rights jurisprudence. Part 2 proposes the components of a meta-discourse. Part 3 examines how those components combine to generate legal arguments.

1. STANDARD APPROACHES

Courts must generalize about rights. Rights jurisprudence must appear orderly rather than random, principled rather than *ad hoc*. Some degree of unity is required.

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17. For an overview of current international and regional human rights practice, see STEINER & ALSTON, *supra* note 7, chs. 6-10.

18. On Court and Commission practice generally, see D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS chs. 22-24 (1995). The institutional changes now in force under protocol 11 of the Convention will entail the replacement of the Commission's functions by a restructured Court. *See id.* ch. 26. These changes do not affect the meta-discursive model.

19. Accordingly, all citations to the European Convention on Human Rights cases refer to the Series A reporters. For records of the submissions made by the parties in each case, the corresponding Series B reporters may be consulted.

Consider some examples. In *Handyside v. United Kingdom*, the European Court upholds a government ban on a children's textbook containing explicit discussions of human sexuality.[20] In *Dudgeon v. United Kingdom*, the Court finds a Northern Irish prohibition on private, adult, consensual homosexual conduct to be in violation of the Convention's privacy right.[21] In *Mellacher v. Austria*, the Court upholds rent control legislation reducing proceeds to owners of rented property.[22] In *Tomasi v. France*,[23] the Court upholds an individual's claim of unlawful detention,[24] deprivation of a judicial hearing within a reasonable time,[25] and infliction of

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20. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976). The claim was brought under article 10, which reads in part:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas . . . .
>
> (2) The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention on Human Rights art. 10.

The United Kingdom prevailed under the "protection of . . . morals" clause. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 21, 28 (1976).

21. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981). Article 8(1) states: "[E]veryone has the right to respect for his private and family life . . . ." European Convention on Human Rights art. 8(1). Article 8(2) sets forth a limitations provision similar to that of article 10(2). *Compare* European Convention on Human Rights art. 8(2), *with* European Convention on Human Rights art. 10(2). These limitations include a "protection of health or morals" clause identical to that invoked in *Handyside*. *See* European Convention on Human Rights art. 8(2).

22. *See* Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) (1989). Article 1, Protocol 1, reads in part, "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 9 E.T.S. 41.

23. Tomasi v. France, 241 Eur. Ct. H.R. (ser. A) (1992).

24. Article 5 states: "Everyone has the right to liberty and security of person. . . . Everyone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or release pending trial." European Convention on Human Rights art. 5.

25. Article 6(1) states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time . . . ." *Id.* art. 6(1).

torture or inhuman or degrading treatment.[26] In *McCann v. United Kingdom*, the Court finds a police shooting of individuals suspected of terrorist activity to have violated the Convention.[27]

Handyside and *Dudgeon* differ insofar as *Handyside* concerns the right of free expression while *Dudgeon* concerns the privacy right. They are related, however, as they both raise questions of public morals. The Court in *Dudgeon* carefully reconciles its view of public morals to that adopted in *Handyside*.[28] *Mellacher*, *Tomasi*, and *McCann*, while not presenting "public morals" questions in the conventional sense, are nevertheless equally concerned with public welfare. How conceptually related, then, are these five cases? Are they guided by concepts that would unify all of the Convention jurisprudence, or indeed the jurisprudence of all international, regional, or domestic liberal rights regimes?

We will begin by considering two standard sets of unifying concepts: Part 1.1 examines standard "political" concepts. Part 1.2 examines standard "judicial" concepts. In both cases, we will see that standard concepts in liberal rights adjudication prove to be too ambiguous to provide a general language of rights. In Part 1.3, it is suggested that such a language can be found at a more basic level.

1.1 *Discursive Unity through Standard "Political" Concepts*

Concepts of liberty, community, dignity, democracy, autonomy, individual welfare, or public interest have long guided rights discourse. Each purports to have something to say about rights as a whole — about speech as well as privacy, due process as well as religious freedom. Can any of these concepts provide a cohesive account of *Handyside*, *Dudgeon*, *Mellacher*, *Tomasi*, and *McCann*?

"Liberty" seems like a good candidate. *Handyside* and *Mellacher*, it might be said, stand for the proposition that principles of individual liberty are not absolute. *Dudgeon*, *Tomasi*, and *McCann*, on the other hand,

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26. Article 3 provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Id.* art. 3.

27. *See* McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) (1995). Article 2 reads in part:

> Everyone's right to life shall be protected by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary — (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained . . . .

European Convention on Human Rights art. 2.

28. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 21-22 (1981).

demonstrate that principles of individual liberty must nevertheless override certain countervailing State interests. The concept of liberty would thus appear to provide a general discourse of liberal rights, able to characterize five very different disputes.

Yet the concept of liberty could just as easily have explained the opposite results in each case. Had each case been decided differently,[29] we would simply say that it is *Dudgeon, Tomasi*, and *McCann* which stand for the proposition that principles of individual liberty are not absolute, while *Handyside* and *Mellacher* demonstrate that principles of individual liberty must nevertheless override certain State interests. By explaining every possible outcome, the liberty concept explains none. Far from explaining the results of individual cases, it is only explained by them: "liberty" is only what the cases say it is. It explains liberal rights not "synthetically," but "analytically"; it does not provide conceptually distinct information about liberal rights, but is merely part of their definition.[30] It at first raises the hope of unifying liberal rights discourse by extrapolating, in some meaningful way, from specific cases to a general principle. Yet, it does just the opposite. Any attempt to clarify the general notion of liberty merely leads us back to the facts and reasoning of particular cases.

Even if we accept "liberty" as a unifying concept in these cases, further indeterminacy arises. If *Handyside* and *Mellacher* stand for the proposition that individual liberty must sometimes cede to countervailing interests, and if *Dudgeon, Tomasi*, and *McCann* demonstrate that individual liberty must sometimes override countervailing interests, then what are those countervailing interests? One might call them "democratic consensus" or

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29. As with most controversial cases, and many uncontroversial ones, opposite results in all five of these cases are by no means unthinkable. The impugned publication in *Handyside* was legal in a number of other member States. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 8, 27 (1976). In *Dudgeon*, the majority vote in favor of the applicant reversed earlier positions taken by the Commission. It was only rather recent changes of attitudes among European States that, in the Court's view, warranted a revised stance. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981). *See also* ERIC HEINZE, SEXUAL ORIENTATION: A HUMAN RIGHT 98-99 (1995). The Court in *McCann* was split by ten votes to nine. *See* McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 65 (1995) (Ryssdal, Bernhardt, Thór Vilhjálmsson, Gölcüklü, Palm, Pekkanen, Freeland, Baka and Jambrek, JJ., dissenting). The holding in *Mellacher* — hardly revolutionary, from the perspective of the contemporary, Western European welfare State — nevertheless produced five dissenting opinions. *See* Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) at 32 (1989) (Cremona, Bindschedler-Robert, Gölcüklü, Bernhardt and Spielmann, JJ., dissenting). Even the brutal treatment found in *Tomasi* did not survive Strasbourg scrutiny with full unanimity. *See* Tomasi v. France, 241 Eur. Ct. H. R. (ser. A.) at 62 (1992) (Mr. Soyer, dissenting).

30. Indeed, the article 10 right adjudicated in *Handyside* is freedom of expression, merely the Germanic form of the Latinate "liberty." Thus, the equally official French version of the Convention provides in article 10 for *liberté d'expression*. *See* European Convention on Human Rights art. 10.

"community interests." Yet, if that is the case, then "liberty" is no longer a unifying concept. Conceptual unity instead derives from some combination of liberty and democracy or liberty and community. In addition, if the *Handyside* Court is correct to note that the State's interests lie not merely with broad democratic consensus or community values, but also with protecting specific, vulnerable individuals who might be adversely affected by reading the publication,[31] then the concept of state paternalism must be injected.[32]

Of course, there is no reason why a general discourse must consist of only one concept. It may consist of a combination of concepts. But which combination? Each specific fact scenario — a restriction on expression, a restriction on privacy, a restriction on property, a restriction on the right to life, a restriction on detention procedures or practices — will require its own balance of concepts. The more we try to distill general principles from specific factual scenarios, the more those principles dissolve back into factual scenarios. Far from providing a general language of rights, combinations of standard, relevant terms simply provide different ways of restating specific legal issues and fact patterns.

These standard concepts, moreover, are irresistibly prescriptive. It is difficult to trust a concept purporting to provide a neutral account of rights jurisprudence when that same concept is used to advocate or to challenge rights. If Mr. Dudgeon asserts "liberty requires privacy," is this merely a restatement of applicable doctrine, or is it rather an expression of his own views? How would we know the difference? When the Court, in *Dudgeon*, attributes to a democratic society the "two hallmarks" of "tolerance and broadmindedness,"[33] or, in *Mellacher*, claims that "it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way[,]"[34] are these observations descriptive or prescriptive? Is the distinction even meaningful? Purportedly neutral descriptions of rights discourse all too easily blend with partisan discourse, and partisan discourse all too easily serves political ends.[35]

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31. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 14-17 (1976).

32. *See* Eric Heinze, *Victimless Crimes*, *in* 4 ENCYCLOPEDIA OF APPLIED ETHICS 464-65, 467-68 (1998).

33. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 21 (1981). *Cf.* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 29 (1976).

34. Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) at 28 (1989).

35. There is little need to belabor this point, which, like the analytical point made in *infra* Part 1.2, has become so familiar from critical legal perspectives as to require little elaboration.

1.2 *Discursive Unity through Standard "Judicial" Concepts*

Courts might purport to avoid such "political" concepts through recourse to distinctly "judicial" concepts. While periodically referring to liberty, community, dignity, democracy, autonomy, individual welfare, or public interest, the Court raises no pretense of subsuming the entirety of its jurisprudence under any one, or any combination, of these concepts. Instead, it more commonly employs concepts of "reasonableness," "proportionality," or a "margin of appreciation"[36] — concepts which, again, purport to characterize rights as such, transcending the confines of any particular right. These concepts, however, are equally indeterminate, and their apolitical nature is questionable.

The most highly elaborated of the three concepts is the margin of appreciation doctrine. According to this doctrine, some balance between individual rights and State interests is commonly required. It cannot be expected that States with different histories, cultures, and political or legal institutions will always strike these balances in the same way.[37] "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge"[38] to assess local interests. Yet, far from providing a consistent, unified rights discourse, this doctrine is thoroughly chaotic. It is ill-defined, applied only with reference to a half dozen ancillary doctrines. These ancillary doctrines are equally ill-defined as to their scope and their hierarchical relationships to one another. They stand with each other not in an orderly queue — which the Court often appears to construct by moving from step to step as if checking off entries on a shopping list — but in a vicious circle.

The Court indicates that the margin of appreciation is not "unlimited." It "goes hand in hand with a European supervision. Such supervision concerns both the aim of the [government] measure challenged and its 'necessity[.]'"[39] We suddenly have not one concept, but four: (1) the margin of appreciation, which is constrained by (2) judicial supervision, as guided by (3) the aim of government action, as well as (4) the necessity of that action. Recall the circularity inherent in this fourth concept: in cases arising under articles 8 through 11, the whole point of the margin of appreciation doctrine is to interpret the requirement that government restrictions on rights

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36. *See, e.g.*, HARRIS ET AL., *supra* note 18, at 5-19, 289-301.

37. *See id.* at 12-15, 290-301. *See also* J. G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS ch. 7 (2d ed. 1993).

38. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

39. *Id.* at 23. By "European supervision," the Court simply means judicial scrutiny under the Convention.

must be "*necessary* in a democratic society."[40] The margin of appreciation doctrine is then applied to interpret a necessity requirement, yet a necessity requirement is devised to interpret the margin of appreciation doctrine.

But there is more. How do we assess the "necessity" of government action? "[A] restriction on a Convention right cannot be regarded as 'necessary in a democratic society' . . . unless, amongst other things it is proportionate to the legitimate aim pursued."[41] What other things? Now we have two additional concepts: "proportionality," which the Court often applies regardless of whether a margin of appreciation is at issue,[42] and "legitimacy." According to which standards, however, is government action "proportionate" or "legitimate"? *Dudgeon* cites a seventh doctrine — the "evolving European consensus"[43] — in this case, favoring the legality of private, adult, consensual homosexual relations. Yet, there was also a European consensus favoring the legality of the impugned book in *Handyside*. In *Dudgeon,* the doctrines of proportionality or legitimacy accord with the doctrine of European consensus.[44] In *Handyside*, the doctrines of proportionality or legitimacy override the doctrine of European consensus.[45]

Why the conflicting results? When the judges can draw upon six ancillary doctrines, with no clear rules dictating those doctrines' meanings, scope, or hierarchy *inter se*, it matters not a whit what the judges' rationale is for reaching a decision, as one or another of these ancillary doctrines will justify any outcome.[46] Like "political" concepts, these "judicial" concepts,

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40. European Convention on Human Rights art. 10(2) (emphasis added). *Cf.* HARRIS ET AL., *supra* note 18, at 290-301.

41. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 21-22 (1981) (citations ommitted).

42. *See* HARRIS ET AL., *supra* note 18, at 11-12.

43. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981). *Cf.* HARRIS ET AL., *supra* note 18, at 7-11, 294-96.

44. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981).

45. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 27-28 (1976).

46. It is worthwhile to consider two recent books devoted entirely to the margin of appreciation doctrine, HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (International Studies in Human Rights Series No. 28, 1996), and ELIAS KASTANAS, UNITÉ ET DIVERSITÉ: NOTIONS AUTONOMES ET MARGE D'APPRÉCIATION DES ETATS DANS LA JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME (1996). The books are of interest not so much because of what the authors observe, but rather in what they fail to observe. At the very least, one would expect either that the authors would demonstrate that the doctrine is meaningless; or, if they believe the doctrine to be meaningful, that they would provide some sense of what it means — some synthesis, extrapolating from specific cases to a more general understanding. Yet they do just the opposite. The further they progress, the further they move away from any meaningful synthesis, drowning in a sea of sheer case summaries. Any conceptual synthesis remains at the broadest, and commensurately trivial, levels of abstraction. Both authors suggest that the doctrine reflects tensions between the European Convention's

which would purport to lead us from the chaos of divergent interests and fact settings to the unity of a coherent rights discourse, in fact do the opposite. The margin of appreciation doctrine amounts to nothing more than its application in any particular case. In any given case, it justifies a result in favor of State interests just as plausibly as it justifies a result in favor of individual rights. If we change the outcome in each case, and substitute the foregoing "liberty" analysis with the margin of appreciation doctrine, we are left with identical results: *Dudgeon* then stands for the proposition that the State enjoys a margin of appreciation in determining public interest, while *Handyside* or *Mellacher* stand for the proposition that the margin of appreciation is nevertheless subject to "European supervision" on the basis of legitimacy of the State action, its proportionality to the stated aim, and so forth.[47]

A compression of the margin of appreciation and its ancillary doctrines into one sentence would result in something resembling the following:

> *The State enjoys a margin of appreciation to place a restriction on the exercise of an individual right, but subject to European supervision, in light of that restriction's necessity, and of the legitimacy of its aim, and of the proportionality of the restriction to that aim, with regard to the practice of other Convention States.*

Yet these ancillary concepts of supervision, necessity, legitimacy, proportionality, and State practice are merely tests of reasonableness. The judges simply apply them to the facts of a case in order to produce a result that commonly would be regarded as reasonable. Every European Convention case that has ever been decided on the basis of the margin of

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"unity and diversity," or between European integration and subsidiarity, or between judicial activism and restraint. Yet these tensions are equally present in cases that do not invoke the margin of appreciation doctrine. They follow from the sheer existence of a regional system of liberal rights. The authors state no *specific* way in which those tensions illuminate, or are illuminated by, the margin of appreciation doctrine. Naturally, such tensions resonate most clearly in controversial cases. This is not, however, because these cases employ the margin of appreciation doctrine, but simply because they are controversial and would reflect the same tensions regardless of the judicial reasoning employed. Far from identifying any specific, non-trivial principles contained in the margin of appreciation doctrine, these works default to the tautological point that the doctrine reduces to the limitless normative and factual situations to which it can be applied. The authors fail to understand that they are not dealing with a *doctrine*, in any significant sense, at all, but only with an empty shell. The margin of appreciation doctrine accounts for everything because it means nothing. It tells us nothing about the European Convention and everything about judicial hoodwinking.

47. Although the analyses in *Tomasi* and *McCann* do not rely upon the margin of appreciation doctrine, it would be impossible to demonstrate that opinions doing so would have reached different results or would have been based on substantively different grounds.

appreciation and its arsenal of ancillary concepts could have been decided with a run-of-the-mill "reasonableness" doctrine (or "legitimacy" doctrine, or "fairness" doctrine, or "appropriateness" doctrine) without the slightest loss of difference either to the final result or to the substantive reasoning. In place of the foregoing formulation, the European Court could just as easily say the following:

> *The State may place reasonable restrictions on the exercise of individual rights.*

It could then proceed to examine the same factual evidence, reaching the same conclusions on conceptually identical grounds. Were the Court to substitute a straightforward reasonableness inquiry for the margin of appreciation inquiry, no doubt many of the factors considered would be identical. The Court surely would examine, among other things, the aims of a State action, that action's relationships to those aims, and the practices of other State parties. Thus, one can view the entire margin of appreciation doctrine not as an alternative to a straightforward reasonableness doctrine, but rather as its very articulation. If this is the case, however, then it should be frankly acknowledged that the half-a-dozen ancillary doctrines are nothing more than components of an ordinary reasonableness inquiry, with all the attendant indeterminacy.

If the Court's conceptual arsenal largely, or entirely, reduces to a discourse of reasonableness, then, strictly speaking, it tells us nothing at all. The requirement that a balance between individual rights and State restrictions must be reasonable is not "synthetically" true, but "analytically" true. It is true by definition. What else would it mean for a liberal rights jurisprudence to balance conflicting interests, if not that the balance must be "reasonable?" Moreover, even the ostensible neutrality of the standard "judicial" terms, as compared with "political" terms, does not exempt them from confusion with a partisan discourse. When the Court in *Handyside*, *Dudgeon*, or *Mellacher* asserts that a State restriction must be reasonable, legitimate, appropriate, or proportionate to a necessary aim, are these assertions descriptive or prescriptive? How would one know? And, if and when they are prescriptive, how can we know that they are, at the same time, not "political?"

1.3 *Discursive Unity and Conceptual Determinacy*

Standard "political" and "judicial" concepts, then, are indeterminate. Nevertheless, rights discourse cannot be wholly indeterminate without entailing absurdities. Consider the following utterance: *If tax deductions are allowed for out-of-pocket expenses, then government censorship of pornographic material is permissible.* The question is not whether this is a

correct statement of law, but rather whether it is coherent as rights discourse at all. If rights discourse is entirely indeterminate, then there is no reason why this utterance should be less coherent than others.

Of course, we immediately recognize this utterance as incoherent. We immediately sense the conflation of tax discourse and censorship discourse as no more coherent than, say, a conflation of physics discourse and censorship discourse: *If the mass of a decelerating particle is greater than that of a stationary particle, then government censorship of pornographic material is permissible.* We immediately distinguish certain utterances which are not rights discourse from others which are rights discourse. But how do we do this? By instinct? By habit? Do we intuitively place such utterances outside the bounds of coherent rights discourse just as we place the utterance, *Où est ma chatte?*, outside the bounds of coherent English, or the utterance, *if a cat is an animal, then it must be a Cheshire cat*, outside the bounds of coherent logical deductions?

We need not search as far as tax law or physics to concoct incoherent rights discourse. Consider the following proposition:

> *In a democratic society, the people, through their elected representatives, may legitimately restrict the individual exercise of a right, even if they agree that the exercise of that right causes no harm.*

Such propositions have long provoked well-known debates: What are the limits of individual rights? How do they balance against the wishes of the majority? The question here, however, is not whether this proposition is valid or invalid, but rather whether it is even coherent, as an assertion about rights, and, if so, what makes it so.

That proposition is in fact incoherent. It only appears coherent, if at all, because we read it as meaning something very different, namely:

> *In a democratic society, the people, through their elected representatives, may legitimately restrict the individual exercise of a right, by agreeing that the exercise of that right causes harm.*

The distinction between the two propositions would appear to lie in the old problem of defining "harm." Must harm be material? If not, what non-material effects are harms?[48] It would seem hasty to conclude that the second version of this proposition is "real," while the first is incoherent. It would seem that, whether one adopts the first proposition or the second depends on

48. *See* Heinze, *supra* note 32, *passim*.

one's definition of "harm." If one's definition is material, then the first proposition would appear entirely coherent, indeed superior to the second (its validity as a statement of substantive law being a separate issue).

If one's definition of harm is material, assuming agreement on the meaning of "material," then on what grounds are the people, in the first proposition, declining to allow individuals to exercise a right? Because they fear its effects on public morals? But why would people fear those effects, if not because they believed them to be *harmful* to public morals? And to admit that those effects are harmful to public morals is to admit a concept of non-material harm, thus contradicting the premise that the first proposition is meaningful if our definition of harm is material.[49]

Perhaps the people find the individual exercise of the right immoral "in itself," *regardless* of its effects on public morals. But what makes an act immoral "in itself"? Does the act degrade human dignity? What is "degradation" if not a kind of harm? Does it violate God's law? What is an act in "violation" of a law if it is not an act that in some sense harms the purposes or values of that code? To call something "immoral" is to assert that it harms the purposes or values of morality.

Or perhaps the people "just don't like" the act, *regardless* of its morality or immorality. But to "just not like" a thing means to not like its existence or effects. Additionally, not to like its existence or effects is to feel that a state of affairs in which it exists or exercises its effects obstructs — harms — the preservation or advent of a state of affairs in which it does not exist or exercise its effects.

At this point, one might object that, as long as we are satisfied that we "understand each other" when speaking about rights, it cannot really matter that we may not always say precisely what we mean. But *what* do we understand when we understand each other? Is there a determinacy that structures even our use of highly indeterminate concepts?

Legal adjudication requires coherent use of language at some level, even when it generates contradictions. It is not pure chaos — pure indeterminacy, sheer meaninglessness — that generates contradictions, but rather some kind of order at some level which allows that modicum of meaning which is necessary to the very determination that a contradiction has arisen. No set of utterances can be *both* mutually contradictory *and* meaningless. There is contradiction only where there is meaning, and there is meaning only where there is some level of determinacy. Legal discourse,

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49. In *Handyside* or *Dudgeon*, assuming the people's, or the majority's, wish to proscribe the impugned activity in order to preserve public morals, such a wish is asserted not *regardless* of whether the activity is in fact harmful to public morals, but *because* it is believed to be harmful to public morals. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 11-13, 14-18 (1976); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 29-31 (1981) (Zekia, J., dissenting); *id.* at 39-47 (Walsh, J., partially dissenting).

like language itself, is neither perfectly chaotic nor perfectly ordered, neither perfectly determinate nor indeterminate.

Consider the analogy to logic or linguistics. No logician asserts that all meaningful utterances are logical. The statement, "the sun is rising," is, in abstraction, neither logical nor illogical. Depending on the context in which it is uttered, it may be false; it may not be amenable to verification; it may indeed be meaningless. But it can be meaningful regardless of whether it issues from a train of reasoning that is logical. The study of logic does not reveal logical structure in all meaningful utterances, nor can it render all meaningful utterances logical. It merely seeks the conditions that must be fulfilled *if* an utterance is to be logical.[50] Similarly, the linguist does not maintain that all utterances are, or can be made, syntactical. Linguistics merely seeks the conditions that must be fulfilled *if* an utterance is to be syntactical.[51] Logic and linguistics can study whatever determinacy there is within their respective corpora without assuming those corpora to be perfectly determinate. Logic does not assume all thought, nor does linguistics assume all language, to be susceptible to immutable rules. They do not render human thought or language more logical or syntactical, but only propose rules which define what it means for thought or language to be logical or syntactical — *i.e.*, to be determinate.

The analogy to logic is particularly apt. Traditional, formal logic, like mathematics, proposes a system of tautologies, or what is sometimes referred to as "trivial truths": observations which are true not because they provide substantive information about the world, but simply because they are different ways of stating that which is true by definition. In mathematics, it might be said that the equation "2 + 2 = 4" is only tautologically, or trivially, true, insofar as "2 + 2" and "4" are simply two ways of stating the same thing, which, indeed could be stated in countless other ways — "3 + 1", "10 - 6," "4 + 0 + 0 + 0" — without ever telling us anything more about the world than we know if we understand the meaning of "4." Addition, subtraction, and other operations do not provide substantively new information about numbers. They simply provide so many illustrations of what we mean when we *call* something a number. Similarly, in logic, the conclusion which results from the deduction: *"If all judges are confused, and if Holmes is a judge, then Holmes is confused"* is *"Holmes is confused."* However, that conclusion is no more informative than were the two premises. Given the two premises *"judges are confused"* and *"Holmes is a judge,"* the conclusion that *"Holmes is confused"* is merely a restatement of what is already necessarily meant by them. In this deduction, logic, like

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50. *See, e.g.*, WILFRID HODGES, LOGIC 13-41 (1977).

51. For a classic statement, see FERDINAND DE SAUSSURE, COURS DE LINGUISTIQUE GÉNÉRALE 97-192 (Tullio de Mauro ed., 1979).

mathematics, generates not a heretofore unknown truth, but simply a more economical, more convenient, statement of a proposition that is already conceded to be true.[52]

Thus, the purpose of the present analysis is, above all, to say nothing new. Why bother? There is trivia, and there is trivia. A proposition that is trivial in the strict sense, meaning that it states only a tautology, is not necessarily trivial in the colloquial sense of being without interest or utility. New insights into mathematics or logic, however tautological, appear every day. In an age of judicial opinions running into the hundreds of pages (and treatises running into the thousands), there is nothing trivial in wondering whether there is some way of saying it all a bit more concisely, or whether law might benefit from a few tautologies, serving to organize ostensibly unrelated doctrines and themes. It may be true that a page of experience, like a page of history, is worth a volume of logic.[53] However, if volumes of experience can be summarized in a page of logic, then the two may not be at odds.

However indeterminate rights discourse may be, it must possess at least enough determinacy to be identifiable and functional as rights discourse. That which can be stated with certainty about rights discourse is determinate; that which remains subject to variation is indeterminate. The object of a meta-discourse is not to eliminate the standard "political" or "juridical" concepts. If, as suggested, these concepts are ("analytically") part of the very meaning of liberal rights, then they cannot be eliminated. Their uses and limits can, however, be clarified. The limits of determinacy define the limits of indeterminacy.

2. ELEMENTS OF THE META-DISCOURSE

We will first examine three constitutive elements of rights discourse: *actors*, *harm*, and *consent*. Part 2.1 inquires into the *actors* envisaged by rights discourse: Who is entitled to exercise rights, and in whose name may rights validly be restricted? Part 2.2 suggests that any abridgment of rights necessarily proceeds on the basis of some notion of *harm* asserted to be caused by the individual exercise of, or by State interference with, Convention rights. Part 2.3 examines the element of *consent* given or withheld by those actors to incur those harms. Of course, any formal or symbolic language can be developed only through the existing terms of a natural language. Thus, these three terms derive, themselves,

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52. For a classic exposition of the tautological character of mathematics or deductive logic, see ALFRED JULES AYER, LANGUAGE, TRUTH, AND LOGIC 74-77 (1952).

53. Justice Holmes once said: "[A] page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

from natural language — "harm" and "consent," in particular, are notoriously "loaded" terms. The conversion of these elemental terms into components of a purely formal language requires that they be reconstituted to encompass any definition that can be given to them within any possible rights dispute.

2.1 *Actors (ι)*

Innumerable actors have an interest in the adjudication of Convention rights. At first, it would appear that the actors relevant to the Convention are dictated by the Convention's bipolar standing requirements and are thus limited to: (1) individuals alleged to be victims of a violation and (2) States Parties to the Convention.[54] As in other areas of law, however, the resolution of cases between two sides of a dispute can affect a broader range of actors.

Brief examination of any Convention case makes the point. While the Court in *Handyside* expressly adjudicates only one publisher's rights and one State's powers, the outcome concerns not only the actual applicant, but also other similarly situated publishers and the media generally — not only in Britain, but also in other States Parties to the European Convention. In addition, children, not merely as an undifferentiated mass but also as individuals from different backgrounds and of different characters, have an interest in the outcome of the case, as do parents, educators, or religious or community leaders. Far from being a simple dispute between two discrete parties, *Handyside*, like *Dudgeon*, becomes the locus of a broad social debate about sexuality and morals, affecting actors at many levels of society.

The roster of actors potentially affected by the adjudication of the entire gamut of liberal rights is indeed limitless, encompassing families, neighborhoods, ethnic groups, linguistic groups, political groups, economic groups, or any number of social or public interest groups. *Mellacher* concerns all property owners and all persons in need of inexpensive housing. *McCann* concerns all persons suspected of unlawful activity, particularly in circumstances of urgency. *Tomasi* concerns the rights of all detained persons and the powers of all law-enforcement officials.

At the same time, while any given case may affect a broad number of actors, the Commission and Court are not called upon to adjudicate the interests of non-parties. While the Court's judgment in *Handyside* makes general reference to the interests of children, parents, or educators, the

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54. *See* European Convention on Human Rights arts. 25(1), 48, *amended by* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, 155 E.T.S. 1. *Cf.* HARRIS ET AL., *supra* note 18, chs. 22-26. In the case of State-initiated complaints, it is, of course, individual interests that are at issue. *See id.* at 585-88.

precise identities of these actors, and their convergent or divergent interests, are left largely undefined. Are all children, parents, or educators similarly situated? Does social or ethnic background count? The Court does not give explanation on these subjects. Similarly, the interests of religious communities or of the media generally are barely mentioned. *Dudgeon*, *Mellacher*, *McCann*, and *Tomasi* are equally vague with regard to the wider range of affected actors.

Substantively, then, the identities and interests of relevant actors in Convention cases are multifarious, but indeterminate: some affected actors receive greater attention, others receive little or no attention. *Formally*, rights discourse under the Convention "resolves" this substantive indeterminacy by pitching the interests of all actors at two generalized and opposed levels of abstraction. All relevant interests are reduced either "downwards" to the interests of individuals or "upwards" to the collective interests of society as a whole.[55] There is no intermediary level.[56] In *Handyside*, the applicant becomes a paradigmatic individual actor, asserting personal interests against the State as a whole. Formally, any interests of other publishers, however divergent or convergent with those of the applicant, become entirely assimilated to his. The moral interests of children, or the interests of parents or educators or religious authorities in children's moral welfare, become assimilated either to the applicant's interests in publishing the work or to the State's interest in suppressing it.

The actors formally recognized in liberal rights discourse are, then, on the one hand, specific individuals and, on the other hand, the State. The former will be denoted here by the upper-case Roman "variable" I ("individual actors"). The latter will be denoted with a symbol commonly used in symbolic logic called a tilde (~) (read "not")[57] preceding, and representing the opposite value of, the relevant variable, hence ~I (the "non-individual" actor, *i.e.*, the collectivity, or society as a whole, as represented by the State).[58] Where it is useful to speak of relevant actors

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55. The reduction of intermediary group interests either "downwards" to individual interests, or "upwards" to State interests is, again, specific to the more traditional, liberal rights regime embodied by the Convention. An attempt to take account of minority groups as such can be found in the International Covenant on Civil and Political Rights, art. 27, Dec., 16, 1966, 999 U.N.T.S. 171 (entered into force, Mar. 23, 1976). However, article 27 is limited in its wording to "persons belonging" to those groups. *See id.* Debate thus remains as to whether, or to what degree, article 27 departs from the liberal, individualist model. Subsequent developments have not fully resolved this question. *See* Eric Heinze, *The Construction and Contingency of the Minority Concept, in* MINORITY AND GROUP RIGHTS IN THE NEW MILLENNIUM 25 (Bill Bowring & Deirdre Fottrell eds., forthcoming 1999).

56. For further analysis of this point, see *infra* Part 2.1.2.

57. *See* QUINE, *supra* note 8, at 11-13.

58. The term "non-individual" is thus to be understood as "collective." It is not to be understood as "no one," which would yield an absurdity.

generally, without specifying them either as individual (I) or as the State (~I), the lower-case, Greek variable ι (iota) will be used. A similar scheme will be followed later in the analysis, as other elements are introduced. Upper-case Roman variables will be called "first-degree variables." Lower-case Greek variables used to represent more than one possible first-degree variable (*i.e.*, in this case, I or ~I) will be called "second-degree variables." In order to represent the set of possible values of a given variable, the "⊂" symbol will be used. Thus the *postulate* (Ps) that I and ~I are possible values of ι can be written:

Ps.1 $\iota \subset I, \sim I$

2.1.1 *Individual Actors*

Having drawn an initial distinction between individual and collective actors, we must further distinguish between two different kinds of individual actors (*see* Figure 1). Despite the polarity between the individual asserting a right and the State, liberal rights discourse recognizes another kind of individual actor. It recognizes any individual, for example, "Y," who is affected when another individual, for example, "X," exercises a right. In *Handyside*, the respondent government asserts not only a generalized interest in the morals of society, and particularly of children, as a whole (~I), but also an interest in the welfare of any individual children (I) upon whom a reading of the book might have a specific emotional or psychological effect.[59] Both interests can freely be conceded to be speculative (the whole point of the prohibition is to prevent the alleged harm from occurring in the first place) and somewhat overlapping.[60] Substantively, there is not necessarily a bright line between them. Formally, however, they remain distinct. Rights discourse always allows a legal argument to distinguish between them. Liberal rights discourse thus envisages two types of individual actors:

> 1. The first type is *any individual actor, X, seeking to exercise a right*. We will say that X is affected by the exercise of a right with *respect to X's "own person."* Assertions of interests with respect to one's "own person" will be denoted by means of the

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59. Reference to the rights of others as limits to the exercise of individual rights is common in liberal rights instruments, indeed implied by the very idea of liberal rights. In *Handyside*, this principle is directly drawn from art. 10(2). *See* discussion *supra* note 20. *Cf.* European Convention on Human Rights arts. 8(2), 9(2), 11(2). *See also id.* art. 17.

60. Often "it is somewhat artificial . . . to draw a rigid distinction between 'protection of the rights and freedoms of others' and 'protection of morals.' The latter may imply safeguarding the moral ethos or moral standards of a society . . . ." Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 20 (1981).

superscript, lower-case Roman *marker* "p" as I^{p}.[61] In *Handyside*, the applicant's interest in free publication of his ideas is an assertion of rights with respect to his "own person" (I^{p}). It is *his* freedom of expression that he seeks. The same applies to the applicants' assertions of privacy rights in *Dudgeon*, property rights in *Mellacher*, rights governing detention and treatment in *Tomasi*, or the right to life in *McCann*.

2. The second type comprises *any individual, Y, other than the individual seeking to exercise a right, X, but who is affected by that individual's (X's) exercise of that right.* Assertions regarding the effects of the exercise of individual rights upon other individuals — so to speak, not upon one's "own person," but on "the person of another" — can be denoted with the marker "$\sim$p" ($I^{\sim p}$). If, in *Handyside*, the British government had not only made an argument about public morals generally, but had also demonstrated a specific, causal relationship between some child's reading the book and some adverse effect upon that child, such an argument would be an $I^{\sim p}$ argument. By extension, even the more speculative assertion that there is a *risk* that the book *might* have such an effect, with or without empirical corroboration,[62] is still an $I^{\sim p}$ argument. In *Dudgeon*, the State adduces harm not only to public morals as a whole ($\sim$I), but also to minors or to other "vulnerable members of society" who might be specifically harmed if homosexual activity were to be legalized.[63] The harm alleged by the State to be caused by the individual applicant's exercise of his property rights ($I^{\sim p}$) in *Mellacher* can be characterized both as a harm to certain, specific, lower income persons ($I^{\sim p}$) in need of housing and as a harm to society as a whole ($\sim$I) linked to broader social problems associated with homelessness or inadequate housing.[64] $\sim$I and $I^{\sim p}$ interests are both strongly present in *Handyside*, *Dudgeon*, and *Mellacher* more as two different expressions of a common concern than as utterly distinct concerns. An individual

61. As used in this analysis, the difference between a "marker" and a "variable" is that a marker is only meaningful when attached to a variable, and thus, a marker never stands alone.

62. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 15-18 (1976).

63. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 20 (1981).

64. *See* Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) at 21-23, 26-30 (1989).

> is denied the right to shout "Fire!" falsely in a crowded theater[65] not only on the basis of harm to the specific persons ($I^{\sim p}$) present in the theater, who might, additionally, bring civil actions for physical or psychological injuries caused in the ensuing panic, or for the value of the tickets of the ruined performance, but also on the basis of harm to society as a whole ($\sim I$), which has an interest in preventing fortuitously dangerous or disruptive acts *regardless* of whether harm to specific individuals results.

I^{p} and $I^{\sim p}$, then, represent two possible values of I:

Ps.2 $\quad I \subset I^{p}, I^{\sim p}$

Wherever I is left unmarked, it signifies either I^{p} *or* $I^{\sim p}$. Ps.1 can thus be restated more accurately, to denote the set of all actors formally recognised in liberal rights discourse, by means of a *theorem* (Th) derived from Postulates Ps.1 and Ps.2:

Th.1 $\quad \iota \subset I^{p}, I^{\sim p}, \sim I$

The relationships among ι variables are illustrated in Figure 1.

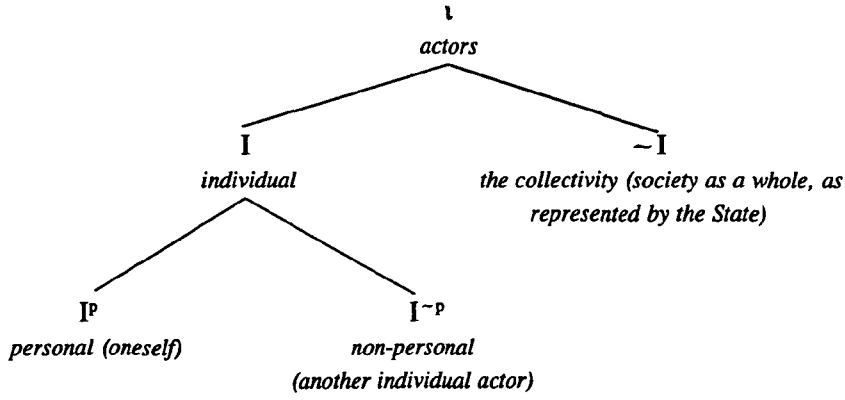

Figure 1

In the case of *Laskey v. United Kingdom*,[66] the Court finds that British laws prohibiting adult, sexual sado-masochistic acts do not violate the article 8(1) right to privacy. The sexual acts in question raise three possible issues:

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65. The example, of course, is from Justice Holmes in *Schenk v. United States*, 249 U.S. 47, 52 (1919).

66. Laskey v. United Kingdom, 1997 Eur. Ct. H.R. (ser. A) at 120.

1. the rights of individuals to have inflicted upon themselves — to submit their "own persons" to — blows administered by others (I^{p});

2. the rights of individuals to inflict blows upon other individuals — to submit other persons, not their own person — to such blows ($I^{\sim p}$); and

3. the authority of the State to determine that such acts adversely affect not only the specific individuals participating in such acts, but also the moral climate of society as a whole ($\sim I$).

Perspectives (1) and (2) represent two formally distinct characterizations of a substantively identical act. The law governing liberal rights does not assume that rights governing one's action upon one's own person are necessarily identical to rights governing the same action upon another, even with the consent of the latter. A State permitting suicide but prohibiting assisted suicide allows one to submit one's own person (I^{p}) to a homicidal act but prohibits the submission of another person ($I^{\sim p}$) to such an act, regardless of the consent of the latter.[67] Similarly, the *Laskey* judgment has no conclusive bearing on one's right to inflict blows upon oneself in purely solitary acts of sexual pleasure.

A dispute about whether an entity is a relevant actor is thus a dispute about whether its interests are attributable to some value of ι. In *Brüggemann v. Germany*, the State defends a restriction on abortion as a protection of the fetus as an individual actor ($I^{\sim p}$) from the applicant's exercise of the privacy right (I^{p}).[68] The applicant disputes the existence of any relevant $I^{\sim p}$ interest by disputing the existence of a relevant $I^{\sim p}$ actor.[69]

Note also that, in liberal rights discourse, the State always enjoys a *prima facie* presumption of representing the interests of the collectivity ($\sim I$) through its democratic political processes. Arguments to the contrary may indeed be introduced — in *Dudgeon*, the European Court considers data suggesting that the blanket prohibition of homosexual acts no longer represents the actual viewpoints of the majority.[70] In the first instance, however, collective interests are not ascertained by independent opinion surveys or empirical data. State policy is *ipso facto* presumed to represent

67. It should be noted that the European Court has not yet issued a final ruling on euthanasia.

68. *See* Brüggemann v. Germany, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100, 107 (1977).

69. *See id.* at 111. *See also infra* Part 2.2.6.

70. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 12 (1981).

the collective will or the will of the majority.[71] Thus where the State does not restrict itself to arguments about specific, individual harm ($I^{\sim p}$), but also adduces some general State policy ($\sim I$), it purports to be representing the interests of society as a whole.

2.1.2 *Intermediary Actors*

The interests of all actors relevant to European Convention jurisprudence, then, are pitched either at the lowest level of abstraction, as purely individual interests (I^p, $I^{\sim p}$), or at the highest level of abstraction, as interests of society as a whole ($\sim I$). Intermediary actors, such as familial, ethnic, religious, social, or economic groups, are recognized only to the extent that their interests can be formulated either as individual interests or as interests of society as a whole.

Rights of families, for example, are formulated, for some purposes, in terms of the rights and interests of individual family members (I^p, $I^{\sim p}$), and, for other purposes, as general public interests ($\sim I$). In a number of cases from the United Kingdom involving procedures of child welfare authorities governing the placement of children in foster care and subsequent adoption, the Court finds that denial to the natural parents of sufficient opportunities to be heard in the course of such procedures constitutes a violation of the parents' individual right (I^p) to a fair and public hearing under article 6(1).[72] In *Handyside*, parents' interests in their children's welfare are asserted by the State not only as individual interests ($I^{\sim p}$) against the applicant's exercise of rights of expression (I^p), but also as interests of society as a whole ($\sim I$). In *Kjeldsen v. Denmark*, the Court affirms the State's power to require compulsory sex education for students in State schools,[73] despite the claims of some objecting parents of a violation of the Protocol 1, article 2[74] requirement that education must conform to parents' religious and

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71. Such is presumably the meaning of the margin of appreciation doctrine. *See also* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, 9 E.T.S. 41 (providing that States parties will "hold free elections . . . under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature").

72. *See, e.g.*, O v. United Kingdom, 120 Eur. Ct. H.R. (ser. A) at 4 (1986); H v. United Kingdom, 120 Eur. Ct. H.R. (ser. A) at 45 (1987); W v. United Kingdom, 121 Eur. Ct. H.R. (ser. A) at 4 (1986); B v. United Kingdom, 121 Eur. Ct. H.R. (ser. A) at 61 (1987); R v. United Kingdom, 121 Eur. Ct. H.R. (ser. A) at 105 (1987).

73. *See* Kjeldsen v. Denmark, 23 Eur. Ct. H.R. (ser. A) (1976).

74. Article 2 of Protocol 1 states: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Mar. 20, 1952, 9 E.T.S. 41

philosophical convictions.[75] The State thus asserts a collective interest ($\sim$I) in social enlightenment on such social issues as reproduction, birth control, or sexually-transmitted disease,[76] as well as the individual ($I^{\sim p}$) interests of children who, by missing this part of their education, would be adversely affected by the parents' exercise of their rights (I^p).

Similarly, the interests of racial, ethnic, religious, or linguistic minority groups may be formulated, for some purposes, as individual rights against discrimination by, or attributable to, the State, but, for other purposes, as affirmative State interests. The *Belgian Linguistic* case[77] concerns the rights of a French-speaking minority in predominantly Flemish-speaking regions of Belgium. The French speakers bring complaints of individual discrimination (I^p) against the State, complaining of the State's failure to provide French speakers with education in their own language. Minority interests are thus advocated as aggregations of individual (I^p) interests.[78] In *Jersild v. Denmark*,[79] on the other hand, the State's censorship of a television program containing racist material derives from its assertion of a collective interest ($\sim$I) in the dignity of racial minorities, as well as the related interest in preventing offense to any specific members of such minorities ($I^{\sim p}$).

2.1.3 *Attribution*

While liberal rights discourse recognizes three kinds of actors, the interests of those actors are only asserted, in the context of adjudication, by the two disputing parties. As the analysis progresses, such assertions will include other kinds of variables conjoined to the three ι variables. It will be useful to indicate in succinct form who is asserting what about whom. Applicants bringing a claim against a State, or on whose behalf a claim is brought, will be denoted with the variable "A". A can represent any entity bringing a claim under the Convention's standing requirements,[80] such as one individual, several individuals, a group, a corporation, or some other organization, or, in the case of an inter-State complaint, the applicant State. Respondent States will be denoted by the variable "Z". Where reference

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75. To the extent that article 2 of Protocol 1 imposes a positive obligation on States, its character as a social or cultural right represents a break from the more classically liberal character of the original Convention. *See* HARRIS ET AL., *supra* note 18, at 540-44. As suggested in the *Kjeldsen* or *Belgian Linguistic* cases, however, the conformity clause has been adjudicated in largely the same terms as those of traditional liberal rights, and thus presents no particular problems in terms of positive obligations. *See id.* at 544-47.

76. *See* Kjeldsen v. Denmark, 23 Eur. Ct. H.R. (ser. A) at 10-16 (1976).

77. Case "Relating to Certain Aspects of the Laws on the Uses of Languages in Education in Belgium," 6 Eur. Ct. H.R. (ser. A) (1968).

78. *But see* discussion *supra* note 55.

79. Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) (1994).

80. *See* sources cited *supra* note 54.

need simply be made to some party without specification as to whether that party is the applicant (A) or the respondent (Z), the letter π (pi) will be used (not to be confused with the occasional use of π as denoting "plaintiff"):

Ps.3 $\pi \subset A, Z$

The term *position* will be understood as *any combination of variables adduced by or attributed to an applicant (A) in support of, or a respondent (Z) in opposition to, a liberal rights claim.* An applicant's position will be called an A position. A respondent's position will be called a Z position. A π position is either an A position or a Z position. Every π position will be denoted by a colon (:) following the variable representing the party to which the position is attributed:

π:...

A positions and Z positions will thus be written, respectively:

A:...

Z:...

2.2 *Harm (η)*

The assertion by A that a right has been violated is always opposed by Z's assertion of a countervailing State interest. It will be argued in this section that, in liberal rights discourse, a dispute between A's right and Z's countervailing interest is always a dispute about some *harm* caused either (1) through A's exercise of the right or (2) through Z's interference with the right.

Like the set of possible actors, the set of possible harms in rights discourse is substantively indeterminate. It is potentially infinite in number and quality. Disagreements about what qualifies as harm, whether it is present in a given case, how it is to be ascertained, or who is competent to do so, arise in many areas of law. Some would recognize only material injury; others would add emotional, moral, or symbolic injury. "Battles of the experts" are often disputes about whether, or what kind of, harm is present in a case. In liberal rights discourse, some notion of harm can be invoked to denote numbers of hours spent in solitary confinement, quality of food or health care available to persons in detention, or losses incurred through restrictions on private property; it can denote degrees of prurience of erotic materials, degrees of news-worthiness or vitriol in hate speech, or

degrees of "immorality" in works of art.[81] This substantive indeterminacy, however, is by no means unintelligibility. Every day, courts do in fact decide, regardless of whether they use the term "harm" or some other term, that treatment of criminal suspects, conditions of incarceration, incursion upon private property, or works of journalistic or artistic expression, do or do not reach a sufficiently harmful level to warrant a finding that State action has or has not violated an individual right.

2.2.1 *Two Harm Postulates* (HP_1, HP_2)

The formal concept of harm assumed in every substantive dispute can be stated in the form of two *harm postulates* (HP_1, HP_2), which will be explored piece by piece as the analysis progresses. HP_1, in particular, may at first appear odd, for, in its first provision, $HP_1(1)$, it attributes to individual rights seekers the argument that the exercise of their rights causes harm — just the opposite of the argument that applicants appear to make in conventional discourse. But note the use of the conjunctive *and*.

> *First Harm Postulate* (HP_1): In the adjudication of liberal rights, any claim by an individual that a right has been violated is asserted in one of two ways:
>
> 1. *Either* the individual claims that:
> a. some harm is *caused by that individual* in the exercise of that right; *and*
> b. such harm is caused to that individual, or to some other individual, or to society generally; *and*
> c. the harm is *either*
> i. *insufficient* to justify State interference with that right; *or*
> ii. *irrelevant* to the question of whether State interference with the right is justified.
> 2. *Or* the individual claims that:
> a. some harm is *caused by the State* to the individual asserting the right; *and*
> b. such harm is *sufficient* to warrant a finding that State interference with the right is unjustified.
>
> *Second Harm Postulate* (HP_2): In the adjudication of liberal rights, any assertion by an individual that a right has been violated is opposed by the State in one of two ways:

81. *See* Heinze, *supra* note 32, at 463, 465-66, 474-75.

1. *Either* the State claims that:
   a. some harm is *caused by that individual* in the exercise of that right; *and*
   b. such harm is caused to that individual, or to some other individual, or to society generally; *and*,
   c. the harm is *sufficient* to justify State interference with that right.
2. *Or* the State claims that:
   a. some harm is *caused by the State* to the individual asserting the right; *and*
   b. such harm is *either*
      i. *insufficient* to warrant a finding that State interference with the right is unjustified, *or*
      ii. *irrelevant* to the question of whether State interference with the right is justified.

2.2.2 *Sufficient and Insufficient Harm*

A concept of "sufficient harm" appears in $HP_1(2)(b)$ and $HP_2(1)(c)$. A concept of "insufficient harm" appears in $HP_1(1)(c)(i)$ and $HP_2(2)(b)(i)$. An assertion of *sufficient* harm will also be referred to, interchangeably, as *unacceptable* harm. An assertion of *insufficient* harm, will also be referred to, interchangeably, as *acceptable* harm. (Later we will be translating these terms into symbolic variables. A formal system is easier to use if its symbolic variables can be translated back into familiar, colloquial language. These alternative but synonymous terms are introduced in order to allow selection of the more congenial term in a given instance.) Regardless of the terms that lawyers or judges may happen to use, rights discourse is never concerned with whether there is *harm* or *no harm*. It is concerned only with whether there is *sufficient harm* or *insufficient harm* to justify a finding of a violation. The mere term "harm" says too little, as it leaves this question undefined. The term "no harm" says too much, for as long as there is insufficient harm to warrant a finding of a violation, it is unnecessary to determine whether there is "not enough harm" or "absolutely no harm." An assertion of "no harm" is not so much incoherent, as it is, so to speak, "hyper-coherent," overstating that which is strictly required to generate a coherent position. An assertion of "no harm" may certainly be adduced in argument but is only relevant insofar as it signifies insufficient harm.

The applicant in *Handyside* argues that any harm caused by him ($HP_1(1)(a)$), either to individual children who may read the book or to society generally ($HP_1(1)(b)$), is insufficient to justify State interference with

his rights of free expression ($HP_1(1)(c)(i)$).[82] The State rebuts that any harm caused by the applicant ($HP_2(1)(a)$) to children or to society generally ($HP_2(1)(b)$) is sufficient to justify State interference with the right ($HP_2(1)(c)$).[83] The applicant in *Dudgeon* argues that any harm caused by his homosexual acts ($HP_1(1)(a)$) to himself, to other individuals, or to society generally ($HP_1(1)(b)$) is insufficient to justify State interference ($HP_1(1)(c)(i)$).[84] The State rebuts that any harm caused ($HP_2(1)(a)$) to himself, to other individuals, or to society generally ($HP_2(1)(b)$) is sufficient to justify State interference ($HP_2(1)(c)$).[85] The applicants in *Laskey* argue that any harm caused through their acts of sexual sado-masochism ($HP_1(1)(a)$) to themselves, to other individuals, or to society generally ($HP_1(1)(b)$) is insufficient to justify State interference ($HP_1(1)(c)(i)$).[86] The State rebuts that any harm caused by the applicants ($HP_2(1)(a)$) to themselves, to other individuals, or to society generally ($HP_2(1)(b)$) through the practice of those acts is sufficient to justify State interference ($HP_2(1)(c)$).[87] The State in *Brüggemann* asserts that abortion entails a harm caused by the woman ($HP_2(1)(a)$) to a living being ($HP_2(1)(b)$), which is sufficient to justify State interference ($HP_2(1)(c)$).[88] The applicants rebut that any harm caused by them ($HP_1(1)(a)$) to such a being ($HP_1(1)(b)$) is insufficient to justify State interference ($HP_1(1)(c)(i)$): *a fortiori* as, for the applicants, there *is* no such being, hence no harm, but which simply means insufficient harm to justify State interference with the right — which is all that the Commission can meaningfully decide.[89] The applicants in *McCann*[90] and *Tomasi*[91] argue that State officials have caused harm ($HP_1(2)(a)$) at a level sufficient to warrant a finding that such action was unjustified ($HP_1(2)(b)$). The State in each case argues that any harm caused by those officials ($HP_2(2)(a)$) is insufficient to warrant such a finding ($HP_2(2)(b)(i)$).[92]

Rights discourse is always bi-polar. Arguments serve either to support

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82. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 14, 24-25 (1976).

83. *See id.* at 13-18, 24-28.

84. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 23-25 (1981).

85. *See id.* at 19-20. *See also id.* at 29-31 (Zekia, J., dissenting); *id.* at 39-47 (Walsh, J., partially dissenting).

86. *See* Laskey v. United Kingdom, 1997 Eur. Ct. H.R. (ser. A) at 124, 127-28, 131-32. *See also id.* at 138 (excerpts from the Opinion of the Commission); *id.* at 147-48 (Mr. Loucaides, dissenting).

87. *See id.* at 126-27, 128-29, 132-34.

88. *See* Brüggemann v. Germany, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100, 107 (1977).

89. *See id.* at 110-12. *See also id.* at 118-20 (Mr. Fawcett, dissenting).

90. McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 51-54 (1995).

91. Tomasi v. France, 241 Eur. Ct. H.R. (ser. A) at 34-35, 40-44 (1992).

92. *See* McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 54-56 (1995); Tomasi v. France, 241 Eur. Ct. H.R. (ser. A) at 35-38, 41-43 (1992).

or to defeat the claim that a right has been violated. A harm may thus be asserted to be insufficient merely in the sense that it is less harmful than the alternative. Aside from debates about harm to another living being, additional arguments in the abortion debate may include assertions by the State of harm ($HP_2(1)(a)$) caused by women to themselves ($HP_2(1)(b)$), and that such harm is sufficient to justify State interference ($HP_2(1)(c)$).[93] In rebuttal, pro-choice advocates may assert that if the only two available alternatives are either access or non-access to legal abortion, then the former is less harmful than the latter, as any harms caused to women by legal abortions are less than those which can be caused through illicit means;[94] thus any harm caused by women ($HP_1(1)(a)$) to themselves ($HP_1(1)(b)$) is, by comparison, insufficient to justify State interference ($HP_1(1)(c)(i)$). The State in *Mellacher* argues that the harm that would be caused by the applicants ($HP_2(1)(a)$) to low-income persons in need of rent control or to society as a whole as a result of social problems caused by inadequate housing ($HP_2(1)(b)$) is sufficient to justify State interference ($HP_2(1)(c)$).[95] The applicants' rebuttal that undue harm is caused to them through reduction in value of their property is *ipso facto* an assertion that the harm caused by exercise of their property rights ($HP_1(1)(a)$) to other individuals, or to society generally ($HP_1(1)(b)$), is, if only by comparison with the alternative, insufficient to justify the State action ($HP_1(1)(c)(i)$).[96] The State in *Kjeldsen* asserts that any harm caused ($HP_2(1)(a)$) to the children or to society generally ($HP_2(1)(b)$) through inadequate sexual education is sufficient to justify State interference ($HP_2(1)(c)$).[97] For the applicants, exemption of their children is not merely a lesser harm but an unqualified good, as they see sex education as a positive evil. They thus argue that any harm caused ($HP_1(1)(a)$) to their children or to society generally ($HP_1(1)(b)$) by seeking to exempt their children from compulsory sex education is, by comparison, insufficient to justify State interference ($HP_1(1)(c)(i)$).[98]

Some claims challenge not active State interference, but rather the omission of the State to undertake an affirmative duty. Hence a doctrine of "positive obligations," in contrast to traditional concepts of liberal rights as sheer "negative" rights.[99] The assertion by the State of an undue financial or administrative burden is nothing but a claim of unacceptable harm: cost

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93. *See* Brüggemann v. Germany, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100, 112-13, 116-18 (1977).

94. *See id.* at 111.

95. *See* Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) at 21-23, 27-30 (1989).

96. *See id.* at 9-13, 27-29.

97. *See* Kjeldsen v. Denmark, 23 Eur. Ct. H.R. (ser A.) at 10-16 (1976).

98. *See id.* at 24-28.

99. *See* HARRIS ET AL., *supra* note 18, at 19-22, 284-85; MERRILLS, *supra* note 37, at 102-06.

to the State is harm to the State. The cost to society, hence to the State, even if substantively small, is asserted by the State to be too great to be required for purposes of respecting the right. In *Rees v. United Kingdom*[100] and *Cossey v. United Kingdom*,[101] the State successfully defeats the applicant transsexuals' individual assertions of a right to obtain full recognition of their new civil status.[102] The State argues that the requisite administrative changes would create an unacceptable burden, hence unacceptable cost. Three dissenting judges in *Rees*,[103] in an opinion reiterated in *Cossey*,[104] reject this reasoning, finding that some of the measures requested would not unduly burden the government. In this case, State interference takes the form not of active intervention, but rather of omission to grant full recognition of the change in civil status. For the State, cost is nothing but a harm caused ($HP_2(1)(a)$) to society (HP_2 (1)(b)) of a level sufficient to justify State interference with the asserted privacy right ($HP_2(1)(c)$).[105] For the applicants, any harm caused ($HP_1(1)(a)$) by imposing that cost upon society ($HP_1(1)(b)$) is insufficient to justify State interference with that right ($HP_1(1)(c)(i)$).[106]

The cases on transsexualism illustrate the substantive malleability of the concept of harm. The question whether the burden on the State is too great is examined not in the abstract, but in light of the corresponding interference with the countervailing individual right. Part of the Court's reasoning in *Rees* and *Cossey* is that British practice in recording civil status does not take the form of comprehensive, unified national identity registration schemes as found in other European countries. While not allowing changes to all documents, British practice does allow changes to some.[107] The cost to the State of making the residual changes sought by the applicant is accepted by the Court as being too great, given that the applicant's change of civil status already enjoys partial recognition. In *B. v. France*,[108] the fact that the French system allows no partial changes to identify documents thus *diminishes* the government's claim of excessive administrative burden by increasing the gravity of the individual applicant's predicament, even though

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100. Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) (1986).

101. Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) (1990).

102. The Court's transsexualism cases have been decided principally with reference to article 8 of The European Convention on Human Rights.

103. Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) at 21 (1986) (Bindschedler-Robert, Russo and Gersing, JJ., dissenting).

104. Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 20 (1990) (Bindschedler-Robert and Russo, JJ., partly dissenting).

105. *See* Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) at 17 (1986).

106. *See* Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 15-16 (1990).

107. *See* Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) at 10, 16 (1986); Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 9 (1990).

108. B. v. France, 232 Eur. Ct. H.R. (ser. A) at 17 (1992).

a total change to the French system might well be more costly than a partial change to the British system. The Court thus chooses $HP_1(2)$ over $HP_2(1)$.

The different result in *B. v. France* might instead be explained not in terms of the subtlety, or ambiguity, of the Court's concept of harm, but simply in terms of a reversal in the Court's attitude towards the phenomenon of transsexualism,[109] particularly in light of what it suddenly claims to accept as new scientific evidence about the nature of transsexualism.[110] A meta-discursive model, however, need neither confirm nor deny such a suggestion. *Every* case may be decided for reasons other than those stated. The conditions for the *coherence* of a legal argument are indifferent to judges' political, psychological, or other motivations for accepting or rejecting it. More important, in terms of a meta-discursive model, is the fact that the dissenting judges in *B. v. France* must face the fact that, by itself, the cost argument of *Rees* and *Cossey* no longer persuades the majority of the Court. They now attempt to bolster the "society generally" component of $HP_2(1)(b)$ with arguments based on the "that individual" and "some other individual" components. Some attribute to the State the authority to determine that sex-change operations might cause unacceptable harm to the individuals seeking them.[111] Even arguments based on harm to others are adduced: Judge Pinheiro Farinha suggests that a child born out of wedlock and subsequently initiating paternity proceedings might suffer harm from the shock of learning of the change of sex of the natural father.[112] In a more recent case directly concerned with the rights of transsexuals to adopt children, and thus with the affects of that situation upon the children, the Court broadly accepts State assertions of sufficient harm to such children.[113]

2.2.3 *Irrelevant Harm*

A concept of "irrelevant harm" appears in $HP_1(1)(c)(ii)$ and $HP_2(2)(b)(ii)$. Some arguments neither affirm nor deny the existence, character, or level of harm. Rather, they assert that any inquiry into harm is irrelevant to the proper disposition of the dispute. They assert that the case must be resolved a certain way *regardless* of the existence, character,

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109. *See, e.g.*, HEINZE, *supra* note 29, at 99-103; G. Cohen-Jonathan, *Respet de la Vie Pivée et Familiale*, 5 JURIS CLASSEUR: TRAITÉ DE DROIT EUROPÉEN 6521, 6523, 6525 (1992).

110. *See* B. v. France, 232 Eur. Ct. H.R. (ser. A) at 48-49 (1992). This growing change in attitude is already evident in *Cossey*, which, in contrast to *Rees*, produces a sharply split Court, inspiring virulent dissenting opinions.

111. *See id.* at 59 (Matscher, Pinheiro Farinha, Pettiti, Valticos, Loizou and Morenilla, JJ., dissenting).

112. See *id.* at 61-62 (Pinheiro Farinha, J., dissenting). *Cf. id.* at 70 (Morenilla, J., dissenting).

113. *See* X, Y & Z v. United Kingdom, 1997 Eur. Ct. H.R. (ser. A) at 619.

or level of harm caused. In *Laskey*, an alternative to the applicants' $HP_1(1)(c)(i)$ argument is an argument of the form $HP_1(1)(c)(ii)$. Their $HP_1(1)(c)(i)$ argument is, after all, not without difficulties, as the selfsame acts inflicted upon non-consenting persons are easily characterized, in European jurisdictions as elsewhere, as sufficiently harmful to constitute criminal or tortious batteries.[114] It can be difficult to argue that the sheer act of consent transforms the physical characteristics of the acts. As an alternative argument, the applicants assert that as long as the participants have given valid consent, any harm caused ($HP_1(1)(a)$) to themselves, to other individuals, or to society generally ($HP_1(1)(b)$) is irrelevant to the question of whether State interference is justified ($HP_1(1)(c)(ii)$).[115] The State rebuttal, by definition, remains the same: the assertion that any harm caused by the applicants is sufficient to justify State interference ($HP_2(1)(c)$) is *ipso facto* an assertion that such harm is relevant.

As in *Laskey*, all assertions of irrelevant harm depend upon assertions of consent. For the sake of completeness, we will take note of them throughout the remainder of this discussion of harm, but will analyze them in greater detail in Part 2.3.

2.2.4 *Substantive Causation, Formal Causation and Formally Dispositive Harm*

The Harm Postulates indicate that assertions about harm refer not only to the sufficiency or relevance of harm, but also to its cause. $HP_1(1)$ and $HP_2(1)$ correspond to *individually-caused* harm, while $HP_1(2)$ and $HP_2(2)$ correspond to *state-caused* harm. The concept of causation is by no means straightforward. The Coase Theorem[116] challenges conventional assumptions about rights by reversing the link between rights and harms. It compares a regime in which harm is caused wherever a right is infringed, with a regime in which a right is infringed only where harm is caused. In the latter, infringement of a right constitutes not a sufficient cause but rather a necessary cause for a finding of harm. If rights are not presupposed by, but rather themselves presuppose, the question as to whether harm has occurred, then harm must be determined with reference to something other than rights. And, if there is disagreement about what that referent should be, then the questions whether harm has occurred and who has harmed whom remain indeterminate.

Claims based on individually-caused harm ($(HP_1(1), HP_2(1))$ as in

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114. *See, e.g.*, SIR JOHN SMITH & BRIAN HOGAN, CRIMINAL LAW 416-18 (8th ed. 1996); CLERK & LINDSELL ON TORTS 959-64 (R. W. M. Dias et al. eds., 16th ed. 1989) (showing examples in the United Kingdom).

115. *See* sources cited *supra* note 86.

116. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

Handyside, *Dudgeon*, *Mellacher*, *Brüggemann*, *Laskey*, *Kjeldsen*, or the transsexualism cases involve applicants asserting insufficient harm to themselves, to others, or to society in general in the exercise of their rights. Yet under a Coase rationale, these cases could just as plausibly be cast under $HP_1(2)$ and HP_2 (2) as complaints of unacceptable harm caused to the applicants by the State authorities in arresting, prosecuting, or fining the applicants, censoring their works, searching, seizing or devaluing their property, or otherwise regulating their conduct. Similarly, *McCann* and *Tomasi* are expressed under $((HP_1(2), HP_2(2))$ as cases of harm caused to the applicant by the State. But are the suspected terrorists in *McCann* themselves partly the cause of their killings by State officials? Can *Tomasi* just as plausibly be understood as a reaction by State officials to any harm alleged to have been caused by the applicant either through the criminal acts that led to their imprisonment or through their conduct in prison? In short: Is it the applicants, in all of these cases, who, in exercising their asserted rights, cause harm to themselves, to other individuals, or to society as a whole? Or is it, rather, the State that causes harm to the applicants by interfering with those asserted rights?

Substantively, the concept of causation is indeterminate. It is never self-evident or purely empirical, but rather presupposes some prior allocation of rights and duties. An analysis of rights discourse, however, seeks only to identify the formal concept of causation specifically presupposed by rights arguments. The substantive plausibility of that concept is no doubt an important question, but it is a distinct one, raised only by the outside observer looking in at rights discourse and never by the terms of rights discourse itself. *Formally*, the concept of causation remains entirely intact, as a condition for the coherence of rights discourse. Economic and policy-based analyses seek to understand what law is "really" doing by examining its substantive effects, regardless of what it says it is doing in terms of conventional rights and duties. Law's version of what it says it is doing is not thereby rendered irrelevant, as it must continue to deploy a discourse specific to its task of case-by-case dispute resolution. The relationship between conventional legal discourse on the one hand, and policy-based discourse on the other, is not so much a matter of replacing the former with the latter as it is a matter of translation back and forth between the two sets of discourses. Conventional legal discourse thus retains quasi-autonomy, and an understanding of what law can say is an understanding of what it cannot say.

The applicants' $HP_1(1)$ positions in *Handyside*, *Dudgeon*, *Mellacher*, *Brüggemann*, *Laskey*, *Kjeldsen*, or the transsexualism cases certainly include or presuppose claims of unacceptable harm inflicted by the State's unduly intrusive or harsh conduct. However, for the specific purpose of adjudicating liberal rights, the question whether unacceptable harm has been inflicted by the State in these cases simply begs the question as to whether

the applicants' own activities caused sufficient harm to justify the conduct of the State authorities. The dispositive question in these cases is whether it is the applicants' acts that caused sufficient or insufficient harm to justify interference with their Convention rights. For purposes of rights adjudication, it is the applicants' acts that provide the decisive cause of any relevant harm. The legitimacy — sufficiency or insufficiency — of any subsequent State-caused harm only begs the question as to the sufficiency or insufficiency of the prior individually-caused harm. Even in *Mellacher*, the question whether the State unacceptably harms the individual property owner only begs the question as to whether the individual property owner, in exercising the property right, harms the countervailing public interest. In these cases, then, the *formally dispositive harm* is individually-caused. We will simply use the term *individually-caused harm*, its formal character being assumed.

In *McCann* and *Tomasi*, the $HP_2(2)$ position presupposes the possibility of claims of unacceptable harm attributable to the applicant through a legitimate suspicion of the applicant's commission of criminal acts. The commission of criminal acts, or the suspicion thereof, does factor into the question of the sufficiency or insufficiency of State-caused harm, but it is formally distinct. If a State official kills X in order to protect Y from X's murder attempt, then any harm caused by X may be relevant to X's *murder attempt*, a formally distinct issue arising under substantive criminal law, but it is not relevant to X's *right to life*. Y is not affected by X's exercise of the right to *life*, but only by X's formally distinct act of attempted murder. For the sole purpose of adjudicating X's right to life, any question as to whether the State-caused harm was sufficient or insufficient with respect to Y is meaningful only to answer the question as to whether that harm was sufficient or insufficient with respect to X. X's attempted murder is treated the same as any other factor, such as how fast X was running, whether X was alone or accompanied, whether X was previously known by the State officials as a dangerous person, and the like. If a claim is brought on behalf of X that killing X was unnecessary under the circumstances, then the State's contrary assertion that the killing was indeed necessary to protect Y simply factors the attempted murder of Y into the assessment of the State-caused harm. The *formally dispositive harm* in such cases is State-caused. We will simply use the term *State-caused harm*, its formal character being assumed.

Although cases can be imagined which would involve both kinds of formally dispositive harms, the two can readily be distinguished. If, for example, the police in *Handyside, Dudgeon* or *Laskey* had arrested the applicants using excessive force, then the formally dispositive harm for an article 3 claim would be the harm caused to the applicants by the State agents, while the dispositive harm for the article 8 or 10 claims would be that caused by the applicants to themselves, each other, or society as a whole in practicing sado-masochism. Dispositive harms, however substantively

related in a given factual setting, always remain formally distinct.

It should not be assumed that a given Convention article can only involve one kind of harm. The question of an article 3 violation in *Tomasi* depends on the sufficiency of State-caused harm, but in *Ahmed v. Austria*[117] it depends upon the sufficiency of an individually-caused harm. *Ahmed* concerns a State decision to return a Somalian refugee, who had been convicted of attempted robbery in Austria, to Somalia. The applicant complains of an article 3 violation, claiming that he faces a risk of torture or inhuman or degrading treatment if he returns to Somalia. Unlike *Tomasi*, however, any question of harm caused by the Austrian State in this case, by exposing the applicant to that risk, only begs the question of possible harms caused by the applicant by remaining in Austria. In this case, the Court finds that the risk of recidivism posed by the applicant is not sufficiently harmful to justify interference with the applicant's article 3 right by exposing the applicant to such danger.

2.2.5 *Symbolic Translation of the Harm Postulates*

Assertions of sufficient, or unacceptable, harm will be denoted by the variable H. Assertions of insufficient, or acceptable, harm will be denoted by the variable $\sim$H. Thus, the variables H and $\sim$H must not be read as "harm" and "no harm." They must be read, respectively, as "sufficient harm" or "unacceptable harm" (H), and "insufficient harm" or "acceptable harm" ($\sim$H). Where it is useful to speak of harm generally, without specifying it either as sufficient (H) or insufficient ($\sim$H), the second-degree variable φ (phi) will be used:

Ps.4 $\quad \varphi \subset H, \sim H$

Assertions that inquiry into harm is irrelevant can be denoted by negating φ, hence the second-degree variable ($\sim\varphi$). Where it is useful merely to indicate the issue of relevance of harm, without indicating whether the issue of harm is asserted to be relevant (φ) or irrelevant ($\sim\varphi$), a "third-degree variable" η (eta) will be used. A third-degree variable is a symbol representing more than one second-degree variable:

Ps.5 $\quad \eta \subset \varphi, \sim\varphi$

Accordingly,

Th.2 $\quad \eta \subset H, \sim H, \sim\varphi$

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117. Ahmed v. Austria, 24 Eur. H.R. Rep. 278 (1996).

The relationships among η variables are illustrated in Figure 2.

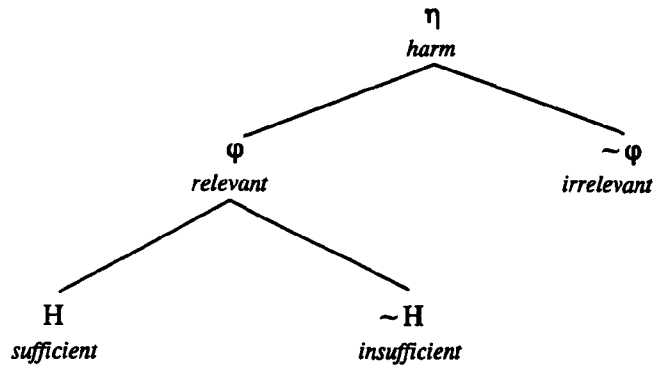

Figure 2

All arguments — that is, all π positions — in liberal rights adjudication attribute some η to some ι. All π positions thus assume what we will call a *general form* (GF):

GF.1 π: $\iota\eta$

Thus, the assertion by a State (π = Z) of sufficient harm (η = H) to another individual ($\iota = I^{\sim p}$) in the exercise of a right would take the following form (where *formulas* are used only to illustrate an argument arising in a specific case, the simple notation "F" will be used):

F.1 $Z: I^{\sim p}H$

One possible rebuttal to F.1 would be an assertion by an applicant (π = A) of insufficient harm ($\eta = \sim H$) to another individual ($\iota = I^{\sim p}$) in the exercise of a right, which would take the form:

F.2 $A: I^{\sim p}\sim H$

Another rebuttal could take the form of an assertion that consent by that individual to incur the harm renders irrelevant any inquiry into its acceptably or unacceptably harmful character ($\eta = \sim\varphi$):

F.3 $A: I^{\sim p}\sim\varphi$

$HP_1(1)$ and HP_2 (1) govern individually-caused harm and can be denoted by use of the lower-case Roman marker "i" affixed to the relevant

η variable:

Th.3 $\eta^{i} \subset \varphi^{i}, \sim\varphi^{i}$ (*cf.* Ps.5)

GF.1 allows a more precise formulation of Th.3:

Th.4 $\iota\eta^{i} \subset \iota\varphi^{i}, \iota \sim\varphi^{i}$

$HP_1(2)$ and $HP_2(2)$ govern harms asserted to be *caused by the State* in the exercise of a right and can be denoted by use of the marker "$\sim$i" affixed to the relevant η variable:

Th.5 $\eta^{\sim i} \subset \varphi^{\sim i}, \sim\varphi^{\sim i}$ (*cf.* Ps.5)

GF.1 allows a more precise formulation of Th.5:

Th.6 $\iota\eta^{\sim i} \subset \iota\varphi^{\sim i}, \iota \sim\varphi^{\sim i}$

Having thus translated all of components of the two Harm Postulates into symbolic form,[118] we can begin to examine their various features.

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118. The two Harm Postulates can thus be restated with the aid of symbolic variables corresponding to each component:

First Harm Postulate (HP_1): In the adjudication of liberal rights, any claim by an individual (π = A) that a right has been violated is asserted in one of two ways

1. *Either* the individual (A) claims that:
   a. some harm is *caused by that individual* (η^{i}) in the exercise of that right; *and*
   b. such harm is caused to that individual ($I^{P}\eta^{i}$), or to some other individual ($I^{\sim P}\eta^{i}$), or to society generally ($\sim I\eta^{i}$); *and*
   c. the harm is *either*
      i. *insufficient* ($\eta^{i} = \sim H^{i}$) to justify State interference with that right; *or*
      ii. *irrelevant* ($\eta^{i} = \sim\varphi^{i}$) to the question of whether State interference with the right is justified.
2. *Or* the individual (A) claims that:
   a. some harm is *caused by the State* to the individual asserting the right ($I^{P}\eta^{\sim i}$); *and*
   b. such harm is *sufficient* ($\eta^{\sim i} = H^{\sim i}$) to warrant a finding that State interference with the right is unjustified.

Second Harm Postulate (HP_2): In the adjudication of liberal rights, any assertion by an individual that a right has been violated is opposed by the State (π = Z) in one of two ways:

1. *Either* the State (Z) claims that:
   a. some harm is *caused by that individual* (η^{i}) in the exercise of that right; *and*
   b. such harm is caused to that individual ($I^{P}\eta^{i}$), or to some other individual ($I^{\sim P}\eta^{i}$), or to society generally ($\sim I\eta^{i}$); *and*
   c. the harm is *sufficient* ($\eta = H^{i}$) to justify State interference with that right.
2. *Or* the State (Z) claims that:

2.2.6 *Individually-Caused Harm* (π: $\iota\eta^i$)

$HP_1(1)$ and $HP_2(1)$ thus encompass π positions taking the form π: $\iota\eta^i$. As assertions that harm is irrelevant ($\eta = \sim\varphi$) are only meaningful in conjunction with assertions about the variable of *consent,* positions taking the form π: $\iota\sim\varphi^i$ will be examined in Part 2.3. For now, we will simply examine π positions taking the form π: $\iota\varphi^i$. Ps.4 defines the scope of π: $\iota\varphi^i$ positions:

Th.7 $\quad \iota\varphi^i \subset \iota H^i, \iota\sim H^i$

Note that where variables are grouped together, the tilde ($\sim$) negates not the entire combination of variables, but only the variable directly following it. For example, in the combination $\sim$IH, the tilde negates only I and not the entire combination IH.

Under $HP_1(1)$, the A positions in *Handyside, Dudgeon, Mellacher, Laskey, Brüggemann, Kjeldsen,* or the transsexualism cases take one of the following forms:

a. *Either* A claims that A's exercise of those rights would cause no unacceptable harm ($\sim H^i$) to A, as an individual seeking to exercise those rights (I^p):

F.4 $\quad A: I^p\sim H^i$

b. *Or* A claims that A's exercise of those rights would cause no unacceptable harm ($\sim H^i$) to other individuals ($I^{\sim p}$):

F.5 $\quad A: I^{\sim p}\sim H^i$

c. *Or* A claims that A's exercise of those rights would cause no unacceptable harm ($\sim H^i$) to society generally ($\sim I$):

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a. some harm is *caused by the State* to the individual asserting the right ($I^p\eta^{\sim i}$); *and*
b. such harm is *either*
   i. *insufficient* ($\eta^{\sim i} = \sim H^{\sim i}$) to warrant a finding that State interference with the right is unjustified, *or*
   ii. *irrelevant* ($\eta^{\sim i} = \sim\varphi^{\sim i}$) to the question of whether State interference with the right is justified.

F.6 A: $\sim I \sim H^i$

The corresponding Z position to each of these A positions ($HP_2(1)$), is, respectively:

a. *Either* Z claims that A's exercise of those rights would cause unacceptable harm (H^i) to A as an individual seeking to exercise those rights (I^p):

F.7 Z: I^pH^i

b. *Or* Z claims that A's exercise of those rights would cause unacceptable harm (H^i) to some other individual or individuals ($I^{\sim p}$):

F.8 Z: $I^{\sim p}H^i$

c. *Or* Z claims that A's exercise of those rights would cause unacceptable harm (H^i) to society generally ($\sim I$):

F.9 Z: $\sim IH^i$

Arguments taking the form π: $\iota\varphi^i$ encompass the following: harms asserted to be caused by individuals to themselves ($I^p\varphi^i$, hence I^pH^i or $I^p \sim H^i$); harms asserted to be caused by individuals to other individuals ($I^{\sim p}\varphi^i$, hence $I^{\sim p}H^i$ or $I^{\sim p} \sim H^i$); and harms asserted to be caused by individuals to society generally ($\sim I\varphi^i$, hence $\sim IH^i$ or $\sim I \sim H^i$). Hence,

Th.8 $\iota\varphi^i \subset I^pH^i, I^p \sim H^i, I^{\sim p}H^i, I^{\sim p} \sim H^i, \sim IH^i, \sim I \sim H^i$

In *Handyside* and *Kjeldsen*, Z asserts unacceptable harm to individual children (Z: $I^{\sim p}H^i$, F.8) and to society (Z: $\sim IH^i$, F.9). In symbolic logic, a combination of two propositions is commonly called a "conjunction." It is represented by a dot ($\cdot$), which can simply be read as "and":[119]

F.10 Z: $I^{\sim p}H^i \cdot \sim IH^i$

A rebuts with an assertion of insufficient harm to other individuals (A: $I^{\sim p} \sim H^i$, F.5) and to society as a whole (A: $\sim I \sim H^i$, F.6):

F.11 A: $I^{\sim p} \sim H^i \cdot \sim I \sim H^i$

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119. *See* VIRGINIA KLENK, UNDERSTANDING SYMBOLIC LOGIC 52-53 (1983).

In *Laskey*, the applicants assert insufficient harm to themselves (A: $I^{p} \sim H^{i}$, F.4), to other individuals (A. $I^{\sim p} \sim H^{i}$, F.5), and to society as a whole (A: $\sim I \sim H^{i}$, F.6):

F.12 A: $I^{p} \sim H^{i} \cdot I^{\sim p} \sim H^{i} \cdot \sim I \sim H^{i}$

The State claims the contrary:

F.13 Z: $I^{p}H^{i} \cdot I^{\sim p}H^{i} \cdot \sim IH^{i}$

The most dramatic example of substantive indeterminacy arises in the case of abortion. Where other liberal rights are concerned, the question is simply whether harm is being caused and, if so, to whom. In the case of abortion, the first question simply begs the second. There can only be a harm if there is a whom; there can only be a φ if there is an ι; and, again, the question whether there is an ι is a question whether there is an $I^{\sim p}$. In *Brüggemann*, Z responds in the affirmative (Z: $I^{\sim p}H^{i}$, F.8).[120] For A, there is no life to protect, thus no harm to any other person, thus no unacceptable harm to any other person, in the exercise of the right (A: $I^{\sim p} \sim H^{i}$, F.5). Other positions also arise in the abortion debate. Z may adduce moral or paternalist arguments: prohibition of abortion deters harm to public morals (Z: $\sim IH^{i}$, F.9) or protects women from making a wrong choice for themselves (Z: $I^{p}H^{i}$, F.7).[121] A positions in rebuttal deny any unacceptable harm to public morals (A: $\sim I \sim H^{i}$, F.6) or to women seeking abortions (A: $I^{p} \sim H^{i}$, F.4).[122]

In *Otto-Preminger-Institut v. Austria*, government authorities had censored a film, *Das Liebeskonzil*, disparaging of Roman Catholicism. They deemed the film unacceptably harmful — harm, here, asserted to be sheer moral or psychological offense — to society generally through the promotion of intolerance or "hate speech"[123] (Z: $\sim IH^{i}$, F.9) and to any individuals who might take personal offense[124] (Z: $I^{\sim p}H^{i}$, F.8) (hence F.10). The applicants argue that there is insufficient harm either to other individuals (A: $I^{\sim p} \sim H^{i}$, F.5) or to society as a whole (A: $\sim I \sim H^{i}$, F.6) to justify interference with their freedom of expression (hence F.11).[125] The Court accepts the State's

120. *See* Brüggemann v. Germany, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. at 100, 107 (1977).

121. *See supra* note 93 and accompanying text.

122. *See supra* note 94 and accompanying text.

123. *See* Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. (ser. A) at 20-21 (1994).

124. *See id.* at 34-36 (opinion of the Commission) (Messrs. Ermacora, Weitzel and Loucaides, partly dissenting).

125. *See id.* at 23-25 (Palm, Pekkanen and Makarczyk, JJ., dissenting). *See also id.* at 31 (opinion of the Commission).

position. Yet in *Jersild*, decided just four days later, the Court finds Denmark's ban on the television emission *Søndagsavisen* to be in violation of the Convention.[126] Arguments similar to those in *Otto-Preminger* are made on each side (F.10, F.11).[127] As in *Handyside* or *Dudgeon*, rights discourse in *Otto-Preminger* and *Jersild* presuppose potential distinctions between harm to others (π: $I^{\sim p}\varphi^i$) and harm to society as a whole (π: $\sim I\varphi^i$) without rigorously distinguishing the two.

Otto-Preminger and *Jersild* further illustrate the substantive indeterminacy of the concepts of harm that inform liberal rights discourse. Conventional casuistry would distinguish the cases by noting that the *Søndagsavisen* emission involves an attempt at the neutral and objective exposition of ideas of public concern (hence insufficient harm to $I^{\sim p}$ or $\sim I$ actors to justify interference with the right of expression, F.11),[128] while *Das Liebeskonzil* deliberately debases religion (hence sufficient harm to $I^{\sim p}$ or $\sim I$ actors to justify interference with the right, F.10).[129] Yet, as the dissenting opinions in each case argue, plausible contrary arguments can be made in both cases: *Das Liebeskonzil* can be seen as a work of iconoclastic social commentary, which had been shown only to a small, self-selecting audience within the context of an art house cinema and thus cannot be deemed unacceptably harmful to others (hence insufficient $I^{\sim p}$ or $\sim I$ harm, F.11);[130] or the *Søndagsavisen* program had failed to provide sufficiently critical context, thus conveying the racist utterances with undue prurience, amounting to racist expression (hence sufficient $I^{\sim p}$ or $\sim I$ harm, F.10).[131] Substantive disagreement about harm in these cases, far from undermining, only underscores the formal determinacy of the harm concept: either case requires ascription of *some* H^i or $\sim H^i$ value to φ^i (Th.7). Rights discourse is, so to speak, indifferent to the choice made, *i.e.*, to the comparative strengths of F.10 and F.11. It cares not about truth, but about intelligibility. It requires only that the argument take *some* value of the general formula π: $\iota\eta$ *in order to be coherent as rights discourse*. Rights discourse remains coherent even if the substantive results in *Otto-Preminger* and *Jersild* are reversed.

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126. *See supra* text accompanying note 79.

127. For Z: $I^{\sim p}H^i$ arguments, see, e.g., Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) at 29-30 (1994) (Ryssdal, Bernhardt, Spielmann and Loizou, JJ., dissenting); *id.* at 31 (Gölcüklü, Russo and Valticos, JJ., dissenting). *See also id.* at 40-42 (Mr. Gaukur Jörundsson, Sir Basil Hall and Mr. Geus, dissenting) (noting, in addition to a link to racial discrimination generally, the possibility of individual offense to members of racial minorities); *id.* at 44-45 (Mrs. Liddy, dissenting).

128. *See* Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) at 21-26 (1994).

129. *See* Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. (ser. A) at 20-21 (1994).

130. *See id.* at 23-25 (Palm, Pekkanen and Makarczyk, JJ., dissenting). *See also id.* at 31 (opinion of the Commission).

131. *See* Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) at 21-26 (1994).

In theory, all assertions about harm can be understood as assertions about cost. In practice, this would produce controversial results. In *Otto-Preminger* or *Jersild*, it would be unusual, although by no means incoherent, to argue that any unacceptable harm caused by hate speech can be rendered acceptable by making payments to persons adversely affected. The less provocative hypothesis is that, *to the extent* that harms can be understood in monetary terms, assertions about harm are assertions about cost. Assertions of sufficient and insufficient harm then become assertions about whether the harmed actors are willing, or can be expected, to absorb the costs inflicted upon them by the act in question.

The foregoing discussion of cases falling under $HP_1(1)$ and $HP_2(1)$ shows that, for every position of the form π: $\iota\varphi^i$, any dispute is about the value of φ^i. For A's exercise of a right, A asserts insufficient harm (A: $\iota \sim H^i$), while Z asserts sufficient harm (Z: ιH^i). Even *Brüggemann* inquires into the ι status of the fetus not in abstraction, but for the sole purpose of determining whether there is any harm to an $I^{\sim p}$ actor; it asks whether there is a "whom" solely to determine whether there is sufficient harm. Concepts of liberty, democracy, reasonableness, or the margin of appreciation, to the extent that they are meaningful, are simply means of attributing — ultimately indeterminate — values to $\iota\varphi^i$. They are neither more nor less persuasive, *a priori*, than other natural-language concepts that might be used.

2.2.7 *State-Caused Harm* (π: $\iota\eta^{\sim i}$)

$HP_1(2)$ and $HP_2(2)$ thus encompass π positions taking the form π: $\iota\eta^{\sim i}$. Here too, as assertions of the irrelevance of harm ($\eta = \sim\varphi$) require examination of consent, we will limit ourselves in this section to positions of the form π: $\iota\varphi^{\sim i}$. Ps.4 defines the scope of π: $\iota\varphi^{\sim i}$ positions:

Th.9 $\quad \iota\varphi^{\sim i} \subset \iota H^{\sim i}, \iota \sim H^{\sim i}$

Acts involving, for example, maltreatment of individuals by State agents, as in *McCann* or *Tomasi*, are challenged by A claiming that the harm is unacceptable, *i.e.*, sufficient to constitute a violation of the right:

F.14 $\quad A: I^p H^{\sim i}$

Z rebuts that any harm caused by the State to A is insufficient to constitute violation of the corresponding right:

F.15 $\quad Z: I^p \sim H^{\sim i}$

The scope of π: $\iota\varphi^{\sim i}$ positions is narrower than that of π: $\iota\varphi^i$ positions. In

the former, the only possible value of ι is I^P:

Th.10 $\quad \iota\varphi^{\sim i} \subset I^P\varphi^{\sim i}$

The reasons are straightforward. First, there is no argument of the form π: $\sim I\varphi^{\sim i}$. Within liberal rights discourse, there is no concept of harm caused by the State to itself. Certainly, arguments are imaginable which would assert that harms caused by the State can affect society as a whole ($\sim I\varphi^{\sim i}$): "The society which debases individuals ($I^PH^{\sim i}$) also debases itself ($\sim IH^{\sim i}$)." Judges might even take note of such an argument, either on their own initiative or because an applicant had raised it, as part of the very philosophy of human rights.[132] Nevertheless, any principle of State self-debasement can provide only a background philosophy to support an $I^PH^{\sim i}$ claim. There are no principles in liberal rights discourse which would provide for the disposition of a case on the basis of harms caused by society to itself.

Second, there is no argument of the form π: $I^{\sim P}\varphi^{\sim i}$. For any harm caused by the State to other individuals, if relevant at all, serves only to bolster a position of the form A: $I^PH^{\sim i}$. Never is harm caused to others by the State relevant as a distinct matter. If it is others' rights that are at issue in a dispute concerning State-caused harm, then such claims are coherent only as distinct claims of the form A: $I^PH^{\sim i}$ and not as $I^{\sim P}$ claims within someone else's lawsuit. Where the dispositive harm is State-caused, it can only be understood to affect the person asserting a right (I^P) against infliction of that harm. Again, if a State official kills X in order to protect Y from X's murder attempt, then Y is indeed affected by X's *murder attempt,* but

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132. For example, Judge Makarczyk's views on derogations under article 15 of the European Convention in *Brannigan v. United Kingdom* are stated as follows:

> A derogation made by any State affects not only the position of that State, but also the integrity of the Convention system of protection as a whole. It is relevant for other member States — old and new — and even for States aspiring to become Parties which are in the process of adapting their legal systems to the standards of the Convention. For the new Contracting Parties, the fact of being admitted, often after long periods of preparation and negotiation, means not only the acceptance of Convention obligations, but also recognition by the community of European States of their equal standing as regards the democratic system and the rule of law. In other words, what is considered by the old democracies as a natural state of affairs, is seen as a privilege by the newcomers which is not to be disposed of lightly.

Brannigan v. United Kingdom, 258 Eur. Ct. H.R. (ser. A) at 29, 74 (1992) (Makarczyk, J., dissenting). *See also infra* Part 3.4 (discussing derogations under article 15 of the European Convention).

not by X's *right to life*. If a claim is brought on behalf of X that killing X was unnecessary under the circumstances (A: $I^{P}H^{\sim i}$), then the State's contrary assertion that the killing was indeed necessary to protect Y simply factors the attempted murder of Y into the value it ascribes to $\varphi^{\sim i}$ ($\sim H^{\sim i}$, hence Z: $I^{P} \sim H^{\sim i}$, hence an assertion of insufficient harm caused by the State in light of the urgency of the circumstances). There is no distinct $I^{\sim P}$ interest with respect to any individual's exercise (I^{P}) of the right to life.

The formula π: $\iota\varphi^{\sim i}$ thus always reduces to π: $I^{P}\varphi^{\sim i}$ (*i.e.*, for all π: $\iota\varphi^{\sim i}$, $\iota = I^{P}$). The combination $I^{P}H^{\sim i}$ denotes an A position claiming that harm caused by the State to A is unacceptable:

F.16 A: $I^{P}H^{\sim i}$ (*cf.* F.14)

$I^{P} \sim H^{\sim i}$ denotes a Z position claiming that harm caused by the State to A is acceptable:

F.17 Z: $I^{P} \sim H^{\sim i}$ (*cf.* F.15)

Hence,

Th.11 $\iota\varphi^{\sim i} \subset I^{P}H^{\sim i}, I^{P} \sim H^{\sim i}$

In *Tomasi*, the Court finds a violation of articles 3 and 5(3). In *Tyrer v. United Kingdom*,[133] the Court finds that corporal punishment administered for juvenile criminal wrongdoing violates article 3. In *Costello-Roberts v. United Kingdom*,[134] the Court rejects a claim of article 3 violation brought on behalf of a school child subjected to a beating by a school headmaster. Dissenting opinions in *Tyrer*[135] and *Costello-Roberts*[136] again underscore the substantive indeterminacy of the concept of harm. The Court and the dissenters alike stress that the question of an article 3 violation is one of degree, their disagreements largely concerning the question whether a sufficient threshold of physiological or psychological harm has been reached. Those believing such a threshold to have been reached consider there to be sufficient individual harm (A: $I^{P}H^{\sim i}$, F.14) to warrant a finding of a violation. Those not believing the threshold to have been reached consider there to be insufficient individual harm (Z: $I^{P} \sim H^{\sim i}$, F.15) to warrant such

133. 26 Eur. Ct. H.R. (ser. A) (1978).

134. 247 Eur. Ct. H.R. (ser. A) at 47 (1993).

135. The notoriously provocative Z: $I^{P} \sim H^{\sim i}$ arguments of Judge Sir Gerald Fitzmaurice appear in *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 22 (1978) (Sir Gerald Fitzmaurice, J., dissenting).

136. Costello-Roberts v. United Kingdom, 247 Eur. Ct. H.R. (ser. A) at 47, 64 (1993) (Ryssdal, Thór Vilhjálmsson, Matscher and Wildhaber, JJ., partly dissenting).

a finding. In each case, then, the dispute is about the value of $\varphi^{\sim i}$ as attributed to I^p.

An assertion about the existence or level of harm cannot be made in abstraction. It depends upon the terms of the right to which it is applied. Individuals killed by State agents suffer, in an abstract sense, the ultimate harm. However, this does not mean that the harm will perforce be treated as unacceptable under the terms of the right. Article 2, paragraph 2 enumerates specific circumstances under which deprivation of life by State officials is justified.[137] In *McCann*, the Court rejects, only by the thinnest possible margin, the State's contention that the fatal shooting of individuals suspected of terrorist activity was necessary under the circumstances — that the level of harm inflicted was acceptable (Z: $I^p \sim H^{\sim i}$).[138] The State can often argue in such cases that it is in fact the individual's conduct that caused sufficient harm to warrant a harsh response by official agents. Again, any such individually-caused harm, if substantively crucial under a Coase rationale, is not formally dispositive. That individually-caused harm is simply factored into the determination as to the level (acceptable or unacceptable) of harm caused by the State.

Having distinguished between individually-caused and State-caused harm, it will nevertheless be economical, at times, to characterize them jointly:

Th.12 $\quad H \subset H^i, H^{\sim i}$

2.2.8 *Synthesis of* π: $\iota\eta$ *Values*

Having thus narrowed the scope of possible combinations of ι and η, we can now formulate the set of possible values for π: $\iota\eta$. Figure 3 displays all values of GF.1.

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137. *See* sources cited *supra* note 27. *Cf.* HARRIS ET AL., *supra* note 18, at 40-41, 48-54. Note, however, measures for abolition of the death penalty under protocol 6 of the Convention. *See id.* at 45, 564. *See also* Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, 114 E.T.S. 1.

138. *See* McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 65 (1995) (Ryssdal, Bernhardt, Thór Vilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek, JJ., dissenting).

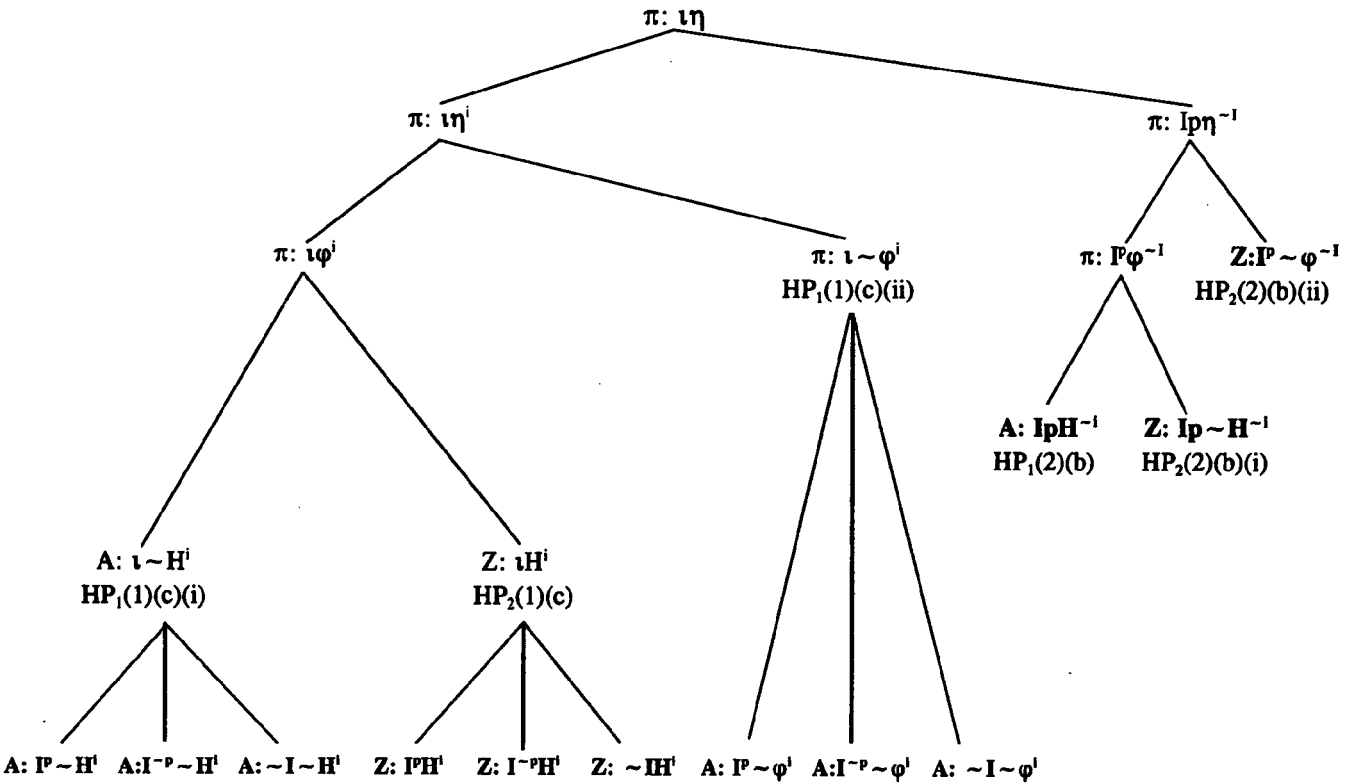

Figure 3: Possible Values of π: ιη (GF.1)

2.3 *Consent* (κ)

Wherever there is otherwise, say, sufficient individually-caused harm (ιH^i) to justify State interference with a right, or sufficient State-caused harm ($I^P H^{\sim i}$) to constitute the violation of a right, the question arises whether the harmed actors give or withhold valid consent to incur the harm so as to render State interference unjustified, notwithstanding such harm.[139] The presence of valid consent can be denoted as "C"; the absence of valid consent, as "$\sim$C". The terms "valid" or "invalid" must always accompany any construction of the variables C and $\sim$C, as a mere assertion that consent is given begs the question as to its validity. Moreover, like the assertion of "no harm," an assertion of "no consent" is meaningful only as an assertion of invalid consent. If consent is invalid, then the question whether it is in fact given, but is invalid, or is not in fact given at all, becomes irrelevant. "No consent," like "no harm," is not meaningless so much as it is "hyper-meaningful," overstating that which is strictly required to generate coherent rights discourse.

Where it is useful to speak of consent generally, without specifying it either as valid (C) or invalid ($\sim$C), the second-degree variable λ (lambda) will be used:

Ps.6 $\quad \lambda \subset C, \sim C$

Some arguments assert that consent is irrelevant. An assertion of the irrelevance of consent can be represented by negating λ, hence $\sim\lambda$. The third-degree variable κ (kappa) will thus be used to represent assertions as to the relevance of consent:

Ps.7 $\quad \kappa \subset \lambda, \sim\lambda$

Hence,

Th.13 $\quad \kappa \subset C, \sim C, \sim\lambda$

Like ι and η, the set of substantive values attributable to κ is subject to controversy and indeterminacy, not only in rights discourse but also in other areas of law. Can an experienced entrepreneur validly consent to conclude an unconscionable contract? Can a woman validly consent to be beaten by her husband?[140] Nevertheless, courts do in fact respond to these

139. *See* Heinze, *supra* note 32, at 471-72.

140. *See infra* text accompanying notes 144-47.

questions. Rights arguments always assume some sufficiently determinate value of κ. The relationships among κ variables are illustrated in Figure 4:

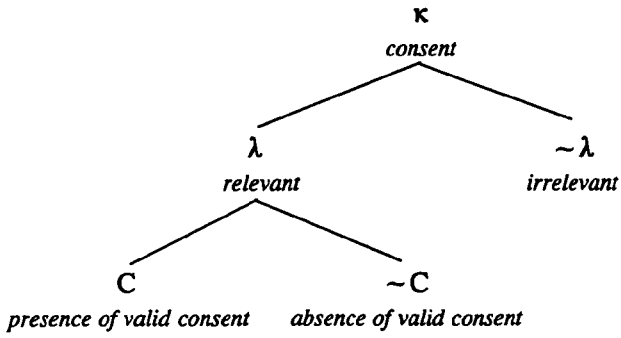

Figure 4

2.3.1 *Three Consent Postulates* (CP_1, CP_2, CP_3)

The variables ι, η, and κ represent the three core components of liberal rights arguments. The general π position in GF.1 can thus be restated more precisely:

GF.2 π: ιηκ

Before examining distinct questions raised by different kinds of actors (ι), we can first make some general observations about consent variables (κ) by considering them in combination with harm variables (η).

> *First Consent Postulate* (CP_1). An assertion of invalid consent (~C) is always an assertion of sufficient harm (H). For all π: ιηκ, if κ = ~C, then η = H:
>
> Ps.8 ιη~C = ιH~C

In some cases, this postulate follows as a matter of definition, namely, where harm is itself defined by consent. For example, in European jurisdictions, as in others, a conventional legal distinction between lawful sexual intercourse and rape depends on the presence or absence of valid consent.[141] An assertion of invalid consent is thus *ipso facto* an assertion of sufficient harm. Even where harm is not defined solely by consent, this postulate

141. See SMITH & HOGAN, *supra* note 114, at 469 (giving an example in the United Kingdom).

holds. In *Dudgeon*, the State asserts collective non-consent on the basis of sufficient harm that might be caused to public morality through the legality of homosexual acts (Z: $\sim IH^{i} \sim C$). That argument does not assume that the sufficient harm follows from the collective non-consent, but rather that the collective non-consent follows from the sufficient harm, presumably from the intrinsic evil of homosexuality.[142]

> *Second Consent Postulate* (CP_2). An assertion of valid consent (C) is always an assertion of irrelevant harm ($\sim\varphi$). For all π: $\iota\eta\kappa$, if $\kappa = C$, then $\eta = \sim\varphi$:
>
> Ps.9 $\qquad \iota\eta C = \iota \sim \varphi C$

It might at first appear to follow from CP_1 that an assertion of valid consent (C) necessarily implies an assertion of insufficient harm ($\sim$H). That deduction, however, would be incorrect. An assertion that consent is validly given is an assertion that the law must necessarily permit the consenting party to incur the harm. And if the law necessarily permits the consenting party to incur the harm, then it does so regardless of the sufficient or insufficient character of that harm. Thus, an assertion of *valid* individual consent to terminate one's life, or to engage in sexual intercourse — be it heterosexual or, as in *Dudgeon*, homosexual — is itself an assertion that there can be no meaningful inquiry into the sufficiency of harm.

> *Third Consent Postulate* (CP_3). An assertion of insufficient harm ($\sim$H) is always an assertion of irrelevant consent ($\sim\lambda$). For all π: $\iota\eta\kappa$, if $\eta = \sim H$, then $\kappa = \sim\lambda$:
>
> Ps.10 $\qquad \iota \sim H\kappa = \iota \sim H \sim \lambda$

It might equally appear to follow from CP_1 that an assertion of insufficient harm ($\sim$H) necessarily implies an assertion of valid consent (C). Yet that deduction would also be incorrect. If there is insufficient harm, then there is nothing to which one consents. If something is insufficiently harmful, then its legal consequences are identical regardless of whether consent is given. Consent given to something which, through its insufficiently harmful character, requires no consent, is not meaningful consent. The applicants' assertions that the publication in *Handyside*, or the homosexual acts in *Dudgeon*, are insufficiently harmful to society as a whole means that such acts are insufficiently harmful not *because* others give consent, as many do

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142. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 29-31 (1981) (Zekia, J., dissenting); *id.* at 39-47 (Walsh, J., partially dissenting).

not, but rather regardless of whether others give consent.

2.3.2 *Collective Consent to Individually-Caused Harm* (π: $\sim I\eta^{i}\kappa$)

The State enjoys a presumption of collective non-consent to what it determines to be unacceptable, individually-caused harm (Z: $\sim IH^{i}\sim C$, *cf.* Ps.10). In *Handyside*, *Jersild*, or *Otto-Preminger*, for example, State censorship is presumed in the first instance to represent the interests of society as a whole. Any presumption of public non-consent to the individual exercise of a right is a presumption that the public deem such exercise to be harmful. If we recall the two propositions that were compared in Part 1.3, we see that the first takes the form Z: $\sim I\sim H^{i}\sim C$, which is not strictly coherent under CP_1 and CP_3. An assertion that the public withhold consent to incur a harm means that such consent is withheld not regardless of whether it is unacceptably harmful, but rather because it is deemed unacceptably harmful, Z: $\sim IH^{i}\sim C$.

Prima facie, the position Z: $\sim IH^{i}\sim C$ can serve to justify *any* restriction of individual rights, even if such restriction is submitted, as an empirical matter, to enjoy little popular support (*i.e.*, even if the empirically accurate characterization, presumably adduced by A, would be A: $\sim I\sim\varphi^{i}C$, *cf.* Ps.9). The law in *Dudgeon* prohibiting private, consensual, adult, homosexual acts for purposes of maintaining public morals (Z: $\sim IH^{i}\sim C$), is presumed, in the first instance, to reflect the popular will. Only in the face of that presumption does A introduce an empirical claim to the contrary. In addition to such empirical claims, the applicant must make a more principled claim, namely, that any harm caused to society is insufficient to justify interference with the right *despite* society's non-consent to incur that harm.[143] There being insufficient harm, society's non-consent is irrelevant (A: $\sim I\sim H^{i}\sim\lambda$, *cf.* Ps.10).

2.3.3 *Individual Non-Consent: Volitional and Non-Volitional* (π: $IH\sim C$)

The Z position in *Jersild* and *Otto-Preminger* is that A's actions are sufficiently harmful not only to society in general, which is presumed to withhold consent to incur the harms of the alleged hate speech caused by A's journalistic or artistic works (Z: $\sim IH^{i}\sim C$, *cf.* Ps.8), but also to individual members of the concerned victim groups, who, are also presumed to withhold consent to incur such harm (Z: $I^{\sim p}H^{i}\sim C$, *cf.* Ps.8). What, however, is the nature of individual non-consent in the $I^{\sim p}$ argument? Does it consist of an empirical submission that such individuals *do not*, in fact, consent to incur the offense? Or does it consist, rather, of a government

143. *See infra* Part 3.2.3.

determination that such individuals, as a matter of law, *cannot* validly consent to such harms, even if some of them would in fact do so? Certainly, on the Voltairian maxim, some members of racial or religious groups may be willing to subordinate any personal offense to what they consider to be the higher value of free speech. By nevertheless exercising censorship, the State in each case determines that such individuals *cannot* validly consent to incur such harms, as a matter of law, even if their personal choices are otherwise.

The distinction between consent in fact and in law is not unique to the discourse of liberal rights. In many areas of the law, non-consent may be recognized only in fact for some persons or circumstances, but decreed in law for other persons or circumstances. In European jurisdictions, as in others, non-consent in fact to conclude contractual agreements is recognized for adults, while non-consent is presumed in law for children.[144] Non-consent to conclude fraudulent, coercive, or unconscionable contracts is presumed in law even for adults.[145] Similarly, non-consent in fact of the victim is, by definition, a requisite element of such crimes as larceny or rape,[146] while some persons are presumed in law to be unable to give valid consent.[147]

Formally, then, once a harm is asserted to be sufficient (unacceptable), there are two different kinds of individual non-consent to incur it: *volitional non-consent*, indicated here by suffixing a marker "w" to the variable $\sim C$ (hence, $\sim C^{w}$), meaning that an individual does not in fact consent to incur the harm (π: $IH \sim C^{w}$), and *non-volitional non-consent* ($\sim C^{\sim w}$), meaning that, as a matter of law, the individual cannot validly consent to incur the harm (π: $IH \sim C^{\sim w}$). The distinction between volition (w) and non-volition ($\sim w$) is unnecessary in cases of individual consent; valid individual consent to incur an individually-caused harm is by definition volitional. Only individual non-consent raises the question as to whether it is volitional (non-consent "in fact") or non-volitional (non-consent "in law"). There is, then, no meaningful assertion of the form π: $IHC^{\sim w}$. All meaningful assertions of the form π: $I\eta C$ necessarily presuppose the form π: $I\eta C^{w}$, and thus need not be written as such. In addition, the distinction between volitional non-consent ($\sim C^{w}$) and non-volitional non-consent ($\sim C^{\sim w}$) applies only to arguments concerning individual actors (ι = I). The *prima facie* presumption of collective non-consent in Z positions of the form Z: $\sim IH^{i} \sim C$ is only coherent insofar as it is assumed to be volitional. There is, then, no meaningful assertion of the form π: $\sim IH \sim C^{\sim w}$. All assertions

144. *See, e.g.*, LAURENCE KOFFMAN & ELIZABETH MACDONALD, THE LAW OF CONTRACT 347 (2d ed. 1995) (explaining consent within the United Kingdom).

145. *See id.* at 77-86.

146. *See* SMITH & HOGAN, *supra* note 114, at 469.

147. *See id.* at 471.

of the form π: $\sim IH \sim C$ necessarily presuppose the form π: $\sim IH \sim C^{w}$, and thus need not be written as such.

2.3.4 *Individual Consent to Individually-Caused Harm* (π: $I\eta^{i}\kappa$)

In *Jersild* and *Otto-Preminger*, Z's assertion of unacceptable harm to other individuals correlates not to an empirical survey about those actors' actual consent or non-consent, but to an assertion of State prerogative to determine as a matter of law that they cannot validly consent to incur such harm (Z: $I^{\sim p}H^{i} \sim C^{\sim w}$, *cf.* Ps.8). A rebuts by asserting insufficient harm to other individuals. The consequence of that assertion, however, is that those individuals' consent or non-consent is rendered irrelevant ($\sim\lambda$), hence A: $I^{\sim p} \sim H^{i} \sim \lambda$ (*cf.* Ps.10). In *Brüggemann*, Z's assertion that the fetus is an affected individual ($I^{\sim p}$) entails an assertion of non-voluntary invalid consent by that actor to incur an unacceptable harm (Z: $I^{\sim p}H^{i} \sim C^{\sim w}$). A's claim that there is no unacceptable harm to another individual means that there is nothing to which one can consent, thereby negating the element of consent ($\sim\lambda$), hence, A: $I^{\sim p} \sim H^{i} \sim \lambda$ (*cf.* Ps.10).

Had Z's position in *Laskey* adduced evidence of individuals who had not consented to incur the harms in question, it could then have alleged failure of valid consent in fact (Z: $I^{\sim p}H^{i} \sim C^{w}$), without having to adduce non-valid consent in law (Z: $I^{\sim p}H^{i} \sim C^{\sim w}$). That argument would have been so evident as to have A's case summarily dismissed: If Z can argue Z: $I^{\sim p}H^{i} \sim C^{w}$ with no challenge on the facts (*i.e.*, no assertion that there *was* valid individual consent), then the case simply involves a run-of-the-mill battery.[148] Once A asserts valid consent to incur any harm inflicted, the only remaining State rebuttal on point is that such consent is non-volitionally invalid:

F.18 Z: $IH^{i} \sim C^{\sim w}$ (*cf.* Ps.8)

A's argument on this point might at first seem to take the form A: $IH^{i}C$. However, an assertion of valid consent to incur a harm is by definition an assertion that the sufficiency or insufficiency of the harm is irrelevant (CP_2). If valid consent can be given to incur harm qualifying as sufficient, then it can *a fortiori* be given to incur a harm qualifying as insufficient. It is only non-consent that raises a question as to the sufficiency of harm. A's position, then, is:

F.19 A: $I \sim \varphi^{i}C$ (*cf.* Ps.9)

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148. *See id.* at 114.

The F.19 position that it makes no difference what individuals do as long as they validly consent, remains strongly libertarian regardless of how cogently linked it is to questions of being or identity. Moreover, this position can still be difficult to adduce in societies that profess paternalist principles — all societies, to a greater or lesser degree.[149] An alternative rebuttal to F.18, then, asserts insufficient harm (A: $I \sim H^i$) (*cf.* F.11), hence nothing to which one can consent. Such a position renders consent irrelevant:

F.20 $A: I \sim H^i \sim \lambda$ (*cf.* Ps.10)

Yet, the A position in *Laskey* — unlike that in *Handyside*, *Otto-Preminger,* or *Jersild* — cannot easily maintain that the sado-masochistic acts in question are harmless regardless of consent. Thus, the dispute in *Laskey* is not really about the presence or degree of harm (φ) at all. It is about the relevance of harm (η), as neither side disputes sufficient harm as to individuals not giving valid consent (F.18, F.19). Thus, *Laskey* is not about harm at all. It is about consent. Had the dissenting Commissioners understood this, they might have sent a more persuasive opinion to the Court.

One argument adduced by Z in *Dudgeon* concerns the prevention of unacceptable harm to minors or to other "vulnerable members of society"[150] (Z: $I^{\sim p}H^i \sim C^{\sim w}$). A, in no way disputing this proposition as to homosexual *or heterosexual* sex, responds that the case concerns only individuals giving valid consent. It would perhaps seem that, for A, the giving of valid consent renders any harm insufficient, A: $I^{\sim p} \sim H^iC$. However, this is not a coherent position. A's position is not that the individual participants in the act consent to incur the act's insufficient harm, but that their consent to proceed with the act renders inquiry into any such harm irrelevant (A: $I^{\sim p} \sim \varphi^iC$, *cf.* Ps.9).

While non-volitional non-consent ($\sim C^{\sim w}$) to incur individually-caused harm (H^i) can be attributed to both I actors ($IH \sim C^{\sim w} \subset I^p H^i \sim C^{\sim w}$, $I^{\sim p}H^i \sim C^{\sim w}$), volitional non-consent ($\sim C^w$) to incur such harms can be attributed only to $I^{\sim p}$ actors ($IH^i \sim C^w \subset I^{\sim p}H^i \sim C^w$). One never argues that one does not validly consent to incur a harm caused by oneself in the exercise of an individual right (A: $I^pH^i \sim C^w$). Volitional non-consent to incur an individually caused harm is attributable only to another individual (Z: $I^{\sim p}H^i \sim C^w$). Hence,

Ps.11 $IH \sim C^{\sim w} \subset I^{\sim p}H^i \sim C^w$, $IH \sim C^{\sim w}$

In conjunction with Ps.2, Ps.11 yields a correlative theorem:

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149. *See* Heinze, *supra* note 32, at 468.

150. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 20 (1981). *See also supra* text accompanying note 63.

Th.14 $IH\sim C^{\sim w} \subset I^{\sim p}H^{i}\sim C^{w}, I^{p}H\sim C^{\sim w}, I^{\sim p}H\sim C^{\sim w}$

The relationships among κ variables in Figure 4 can thus be revised as set forth in Figure 5:

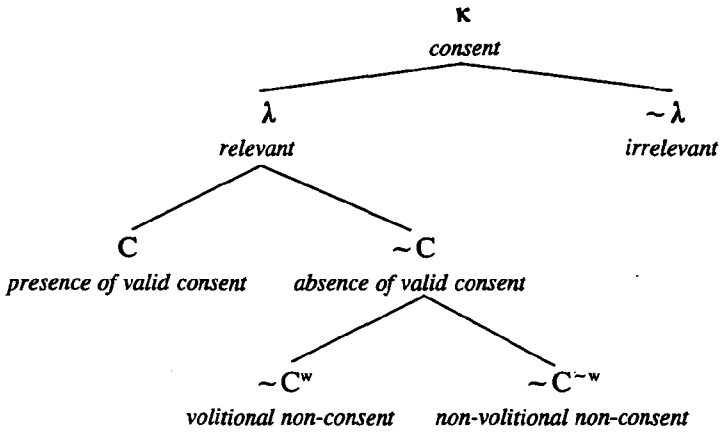

Figure 5

2.3.5 *Individual Consent to State-Caused Harm* (π: $I^{p}\eta^{\sim i}\kappa$)

The very fact of bringing a case assumes A's assertion of lack of valid consent to incur State-caused harm (A: $I^{p}H^{\sim i}\sim C$). Yet individual non-consent to State-caused harm also raises a question as to its volitional or non-volitional character. In *Tyrer*, the applicant had actually withdrawn his complaint before it reached the Court. Although the Court does not state the reasons for the complaint's withdrawal, it is useful, for argument's sake, to speculate that a change of heart might have prompted the applicant to re-consider his views on the beating, and thus, so to speak, to have given retroactive consent to incur the State-caused harm. Z might then assert the validity of such consent in order to assert non-violation of the Convention. And, if such consent is valid, the precise character of the harm is irrelevant:

F.21 $Z: I^{p}\sim\varphi^{\sim i}C$ (*cf.* Ps.9)

The Commission nevertheless decided to proceed to the Court as a matter of principle.[151] Persons might indeed give consent to forgo rights against torture or inhuman or degrading treatment, rights to a fair trial, rights of expression or privacy, or other rights in the belief that they may thereby

151. *See* Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 12-14 (1978).

procure some favor from the State, such as suspension or reduction of a prison sentence. Suspects might consent to sign confessions or to forgo legal counsel; to submit to castration, sterilization, or medical experimentation; or to be electronically tagged.[152] In *Tyrer*, however, the significance of the Commission's action, and of the Court's decision, is that any such act of volitional consent can be asserted to be non-volitionally invalid:

F.22 A: $I^{p}H^{\sim i}\sim C^{\sim w}$ (*cf.* Ps.8)

In cases concerning individually-caused harms, Z: $IH^{i}\sim C^{\sim w}$ positions attribute to the State the *prerogative* of treating individual consent as invalid. The A: $I^{p}H^{\sim i}\sim C^{\sim w}$ position attributes to the State the *obligation* to treat individual consent as invalid.[153]

Where the Z position cannot argue, or cannot argue solely, that A consented to incur a State-caused harm, its only remaining option is to argue that no unacceptable harm has been inflicted, thus rendering irrelevant the question of individual consent:

F.23 Z: $I^{p}\sim H^{\sim i}\sim \lambda$ (*cf.* Ps.10)

Where there is no question of non-volitionally invalid consent, then A's position always assumes that A resists the State action *in fact*, *i.e.*, withholds volitionally valid consent:

F.24 A: $I^{p}H^{\sim i}\sim C^{w}$ (*cf.* Ps.8)

If A gives volitionally valid consent, for example by accepting incarceration, then there is no dispute. In the many cases, like *McCann, Tomasi,* or *Costello-Roberts*, where there is no question of individual consent to incur the State-caused harm, and thus no question of the validity of such consent, the volitional withholding of valid consent is presupposed by merely bringing the claim.

2.3.6 *Synthesis of* π: ιηκ *Values*

Having considered the κ values correlative to each π position, we can now formulate the set of possible values for π: ιηκ. Figure 6 shows all values of GF.2. The fourteen general formulas GF.3 - GF.16 represent the possible bases for liberal rights arguments.

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152. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

153. *See infra* Part 3.2.5.

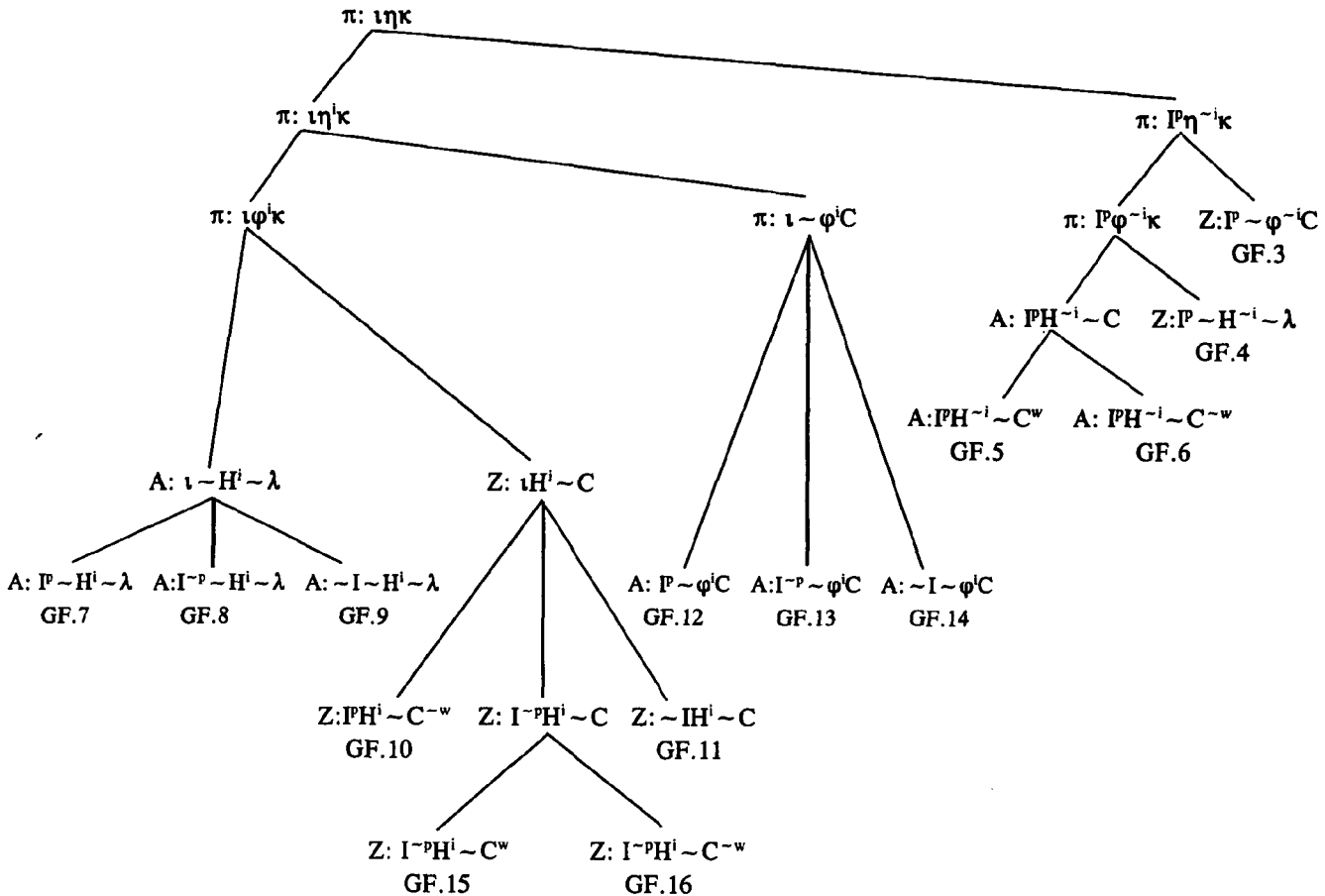

Figure 6: Possible Values of π: ιηκ

3. GENERAL FORMS OF ARGUMENT

The purpose of a π position is either to support, or to contest, the conclusion that a right was violated.[154] We will now examine how the π positions GF.3 - GF.16 form arguments as to whether rights within a corpus of positive law have been violated. Part 3.1 analyzes ιηκ combinations as antecedents to conclusions regarding the violation or non-violation of rights. Part 3.2 considers those conclusions as expressions of broader jurisprudential theories of liberalism, paternalism, communitarianism, and State sovereignty.

3.1 *Violation and Non-Violation of Rights (υ positions)*

Any one of the fourteen values of π: ιηκ serves only as a *premise* to A's *conclusion* that a right was *violated* (V) or to Z's conclusion that it was *not violated* (~V). Where it is useful to speak of a judicial finding generally, without specifying it either as a finding of violation (V) or of non-

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154. In the standard jurisprudence of the Convention, the question whether or not there is a violation always depends on two prior questions. The first is whether the claim is encompassed by some Convention right. In *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) (1986), a previously married man and a woman were living together with their child. They claimed that Ireland's divorce prohibition violated their article 12 right to marry and article 8 right to respect for privacy and family life. The Court ruled that the case in fact depended on a right to divorce, which it found to have been excluded deliberately from the drafting of the Convention, and thus to be beyond the purview of articles 8 or 12. Where the Court or Commission does find an applicable right, however, the second question is whether there is any State interference with that right. In *Glasenapp v. Federal Republic of Germany*, 104 Eur. Ct. H.R. (ser. A) (1986), the applicant had been hired as a public school teacher contingent upon her signing a standard declaration of loyalty to the constitution of the Federal Republic of Germany. When she subsequently published a statement of affiliation with and support of the German Communist Party, she was dismissed from her employment. Her application complained of a violation of her article 10 rights of free speech and expression. The Court observed that the Convention contained no right of access to civil service positions, leaving government officials broad discretion to observe their own employment criteria. The applicant remained free to associate with and publicly endorse the German Communist Party; this freedom, however, did not include any Convention right to retain a civil service position. Although the applicant's statement of support for the Communist Party fell within the purview of article 10, the government's dismissal of her was not held to constitute interference with her article 10 rights. However, if the Court or Commission find both an applicable right and State interference with that right, they then proceed to examine whether the interference was justified. It is the response to this third question which determines whether there has been a violation. If either of the two initial questions is answered in the negative, there is no further inquiry as to whether the Convention was violated, and no question as to the substantive values of π: ιηκ combinations arises. In virtually all cases that reach the Court, rather than being dismissed by the Commission, these initial questions have indeed been answered in the affirmative, and it is the question as to the existence of a violation that guides the judgment.

violation ($\sim$V), the second-degree variable υ (upsilon) will be used.

As we have seen, one of the A positions in *Laskey* is that valid individual consent is given to incur harm inflicted upon oneself or upon others (A: $I \sim \varphi^i C$) (F.19). The more precise formulation is that *if* valid consent is given to incur harm inflicted upon oneself or upon others, *then* State interference constitutes a violation (V) of the privacy right. Such a proposition states a *sufficient condition*[155] for a finding of a violation. The relationship of p as a sufficient condition for q is commonly denoted in symbolic logic with an operator known as an "arrow" ($\rightarrow$)[156] placed between the two variables, hence $p \rightarrow q$. In such a construction, terms preceding the arrow constitute an *antecedent* and terms following it constitute a *consequent*.[157] An assertion of this form is commonly read, "*If* p, *then* q." In this case, A asserts "*If* $I \sim \varphi^i C$, *then* V": the proposition's antecedent is $I \sim \varphi^i C$, and its consequent is V:

F.25 $\quad A: I \sim \varphi^i C \rightarrow V$

One Z rebuttal asserts a State prerogative to determine that the harm is sufficient and cannot validly be consented to (F.18):

F.26 $\quad Z: IH^i \sim C^{\sim w} \rightarrow \sim V$

An alternative A position avoids the issue of consent by asserting insufficient harm (F.20):

F.27 $\quad A: I \sim H^i \sim \lambda \rightarrow V$

A display of all possible π positions (GF.3 - GF.16) as antecedents to υ findings appears in Table 1. Formulas GF.3 - GF.16 all take the form of a revised general formula, which will be called an "υ position":

GF.17 $\quad \pi: \iota\eta\kappa \rightarrow \upsilon$

The correlative A and Z positions take the form:

GF.18 $\quad A: \iota\eta\kappa \rightarrow V$

GF.19 $\quad Z: \iota\eta\kappa \rightarrow \sim V$

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155. *See* KLENK, *supra* note 119, at 59.
156. *See* HODGES, *supra* note 50, at 96-98.
157. *See* KLENK, *supra* note 119, at 59.

Table of υ Positions

A (υ = V)	Z (υ = ~V)
GF.20 A: $I^{p} \sim H^{i} \sim \lambda \rightarrow V$ (*cf.* GF.7) GF.21 A: $I^{p} \sim \varphi^{i}C \rightarrow V$ (*cf.* GF.12)	GF.22 Z: $I^{p}H^{i} \sim C^{\sim w} \rightarrow \sim V$ (*cf.* GF.10)
GF.23 A: $I^{\sim p} \sim H^{i} \sim \lambda \rightarrow V$ (*cf.* GF.8) GF.24 A: $I^{\sim p} \sim \varphi^{i}C \rightarrow V$ (*cf.* GF.13)	GF.25 Z: $I^{\sim p}H^{i} \sim C^{w} \rightarrow \sim V$ (*cf.* GF.15) GF.26 Z: $I^{\sim p}H^{i} \sim C^{\sim w} \rightarrow \sim V$ (*cf.* GF.16)
GF.27 A: $\sim I \sim H^{i} \sim \lambda \rightarrow V$ (*cf.* GF.9) GF.28 A: $\sim I \sim \varphi^{i}C \rightarrow V$ (*cf.* GF.14)	GF.29 Z: $\sim IH^{i} \sim C \rightarrow \sim V$ (*cf.* GF.11)
GF.30 A: $I^{p}H^{\sim i} \sim C^{w} \rightarrow V$ (*cf.* GF.5) GF.31 A: $I^{p}H^{\sim i} \sim C^{\sim w} \rightarrow V$ (*cf.* GF.6)	GF.32 Z: $I^{p} \sim H^{\sim i} \sim \lambda \rightarrow \sim V$ (*cf.* GF.4) GF.33 Z: $I^{p} \sim \varphi^{\sim i}C \rightarrow \sim V$ (*cf.* GF.3)

Table 1

Liberal rights disputes, then, are disputes about the values of the variables constituting one of the fourteen υ positions. No lesser degree of determinacy, but also no greater degree, should be assumed for liberal rights

discourse *generally*. More specific structure is possible only with a narrowing of the corpus. In *Belgian Linguistic*,[158] Z's failure to provide French-language instruction in Flemish school districts can be defended as imposing an unwarranted burden and, in that cost-based sense, an unacceptable harm upon the State (Z: $\sim IH^{i} \sim C$); this defense is challenged in contrary terms by A: $\sim I \sim H^{i} \sim \lambda$. Although this characterization is not inaccurate, specific problems posed by discrimination rights allow for more detailed analysis on the basis of a distinct meta-discourse specific to discrimination law.[159] While other positive rights disputes raise the question whether the State must recognize a given exercise of a right at all, discrimination law does not raise the question whether a right or benefit may be enjoyed at all, but whether it may or must be enjoyed equally. A meta-discourse of discrimination law can thus supplement the general liberal rights model proposed here with respect to the narrower corpus of discrimination cases. Discrimination cases will not be further examined because only the general model is of interest at the moment.

3.2 *Legal Regimes (ρ positions)*

A "V" conclusion can be called "liberal" in the tautological sense that it finds Z obliged to respect an individual interest over a countervailing State interest. Using the letter L to characterize that purely formal, liberal position, this means that *if* there is a finding of a violation (V), *then* that result is formally liberal (L):

F.28 $\quad V \rightarrow L$

For example, in F.25 (A: $I \sim \varphi^{i}C \rightarrow V$) it is asserted that *if* it is the case that $I \sim \varphi^{i}C$, *then* it is the case that V. We thus have two propositions linked in the form of a so-called "hypothetical syllogism":[160]

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158. *See supra* text accompanying note 77.

159. *See* Heinze, A Meta-Discourse of Discrimination, *supra* note 10, *passim*.

160. *See* KLENK, *supra* note 119, at 118-19. The rule of hypothetical syllogism simply formalizes an obvious intuitive deduction. Given the following values of *p*, *q* and *r*:

p = Holmes is a judge.
q = Holmes is irrational.
r = Holmes is unreliable.

We can then reason as follows:

If Holmes is a judge, then Holmes is irrational.
If Holmes is irrational, then Holmes is unreliable.
Therefore, if Holmes is a judge, then Holmes is unreliable.

In linear form, this principle can be written: $((p \rightarrow q) \cdot (q \rightarrow r)) \rightarrow (p \rightarrow r)$.

$$p \rightarrow q$$
$$\underline{q \rightarrow r}$$
$$p \rightarrow r$$

Hence,

$$I \sim \varphi^i C \rightarrow V \qquad (F.25)$$
$$\underline{V \rightarrow L} \qquad (F.28)$$
$$I \sim \varphi^i C \rightarrow L \qquad (F.29)$$

In linear fashion, this proposition can be written as follows:[161]

F.30 $\quad A: ((I \sim \varphi^i C \rightarrow V) \cdot (V \rightarrow L)) \rightarrow (I \sim \varphi^i C \rightarrow L)$

And condensed:[162]

F.31 $\quad A: (I \sim \varphi^i C \rightarrow V) \rightarrow L$

Similarly, for F.27 (A: $I \sim H^i \sim \lambda \rightarrow V$):

F.32 $\quad A: (I \sim H^i \sim \lambda \rightarrow V) \rightarrow L$

$\sim$V conclusions, however, are not so easily classified. Not all $\sim$V conclusions can be classified as "non-liberal," as some $\sim$V results are integral to a liberal regime. For example, punishment of rape, and the $\sim$V finding that would result from any privacy claim, is quintessentially liberal. On the other hand, no political regime is purely liberal. Some $\sim$V results clearly are non-liberal. *Laskey's* $\sim$V holding that the State can prohibit persons from consensually harming themselves is standard paternalism. *Handyside's* $\sim$V holding that the State can prohibit individual expression for the sake of public morals is vintage communitarianism.

As we saw in Part 1, however, no sooner do we introduce such natural-language concepts as liberalism, paternalism, or communitariansim, then are we reminded of the ambiguities and contradictions that they entail. We are indeed barred from shouting "Fire" in a crowded theater because of the harm that can be caused to others; however, does racially or religiously inflammatory speech carry the potential for even greater — if concededly more insidious, hence less causally demonstrable — harm? If so, is the result in *Otto-Preminger* just as liberal as it is communitarian? Moreover,

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161. *See* discussion *supra* note 160.

162. This condensed form can be derived as follows: $[(p \rightarrow q) \cdot (q \rightarrow r)) \rightarrow (p \rightarrow r)] \rightarrow (p \rightarrow q) \rightarrow r$.

as already suggested, we are barred from shouting "Fire" not only in the interest of other, specific individuals, but also as a general social interest in keeping the peace — it would be punishable even if no specific individuals were harmed — and indeed in the interest of protecting *ourselves* from any resulting harm, say, from an angry mob. Is the prohibition thus liberal *and* communitarian *and* paternalist? Meanwhile, the concept of communitarianism is so vast as to encompass utterly contradictory regimes, from religious fundamentalism to Marxism to radical feminism.[163]

Given the tendency of these concepts to intersect and blur, one might wonder whether there is any point to using them at all. On the other hand, if we dispense altogether with broader conceptual schemes, we drown in a morass of de-contextualized particularism; we lose a vocabulary for characterizing rights jurisprudence in any way that is not purely fact and case-specific. Just as the substantive indeterminacy of actors, harm or consent does not preclude their formal determinacy in rights discourse, the substantive indeterminacy of theories of liberalism, communitarianism, and paternalism does not preclude the identification of a jurisprudence of formal liberalism, formal communitarianism, and formal paternalism, which would allow us to identify how rights discourse is used in adjudication, regardless of whether such use is ultimately, in a substantive context, ambiguous or indeterminate.

3.2.1 *State Liberalism* (L)

Where individual rights are restricted on the very narrow basis of unacceptable individually-caused harm to other volitionally non-consenting individual actors ($I^{\sim p}H^{i} \sim C^{w}$), that result can be defined as *formally liberal* (L): regardless of the restriction's motivation or impact, its formal rationale is the redress or prevention of *unacceptable harm to volitionally non-consenting others*. Accordingly, *if* it is the case that $I^{\sim p}H^{i} \sim C^{w}$ provides a sufficient condition of a finding of $\sim V$, *then* that result is formally liberal (L). As its formal character can be assumed, we will simply call the position *liberal*:

GF.34 $Z: (I^{\sim p}H^{i} \sim C^{w} \rightarrow \sim V) \rightarrow L$ (*cf.* GF.25)

One correlative A rebuttal is:

GF.35 $A: (I^{\sim p} \sim H^{i} \sim \lambda \rightarrow V) \rightarrow L$ (*cf.* GF.23)

Had the State in *Laskey* been able to adduce an assertion of harm to an

163. *See* Heinze, *supra* note 32, at 464-69.

unwilling participant, that assertion would have taken the form GF.34. A, assuming no challenge to volitional non-consent, would have had to rebut with GF.35. In *Ahmed,* Z's rationale for returning A to Somalia is to prevent future crimes; thus, Z's rationale seeks to prevent other individuals from harms to which they would volitionally withhold valid consent (GF.34).[164] A rebuts that any risk of recidivism is insufficiently harmful as compared with the risk facing A if deported (GF.35).

Theoretically, GF.34 could also be rebutted by A asserting C attributable to $I^{\sim p}$:

F.33 A: $(I^{\sim p} \sim \varphi^{i}C \rightarrow V) \rightarrow L$ (*cf.* GF.23)

In practice, however, such a case would never arise. If there is no dispute that $I^{\sim p}$ gives valid consent to incur any harm, then there is no dispute on point at all.

3.2.2 *State Paternalism* (T)

Where individual rights are restricted on the basis of non-volitional non-consent to unacceptable harm to ourselves ($I^{p}H^{i} \sim C^{\sim w}$) or to others ($I^{\sim p}H^{i} \sim C^{\sim w}$), that result can be defined as *formally paternalist* (T): regardless of the restriction's motivation or impact, its formal rationale is the redress or prevention of unacceptable harm to individuals despite their possible willingness to incur that harm. As its formal character can be assumed, we will simply call the position *paternalist*:

GF.36 Z: $(I^{p}H^{i} \sim C^{\sim w} \rightarrow \sim V) \rightarrow T$ (*cf.* GF.22)
GF.37 Z: $(I^{\sim p}H^{i} \sim C^{\sim w} \rightarrow \sim V) \rightarrow T$ (*cf.* GF.26)

Correlative A rebuttals in response to GF.36 would be:

GF.38 A: $(I^{p} \sim H^{i} \sim \lambda \rightarrow V) \rightarrow L$ (*cf.* GF.20)
GF.39 A: $(I^{p} \sim \varphi^{i}C \rightarrow V) \rightarrow L$ (*cf.* GF.21)

Correlative A rebuttals in response to GF.37 would be:

GF.40 A: $(I^{\sim p} \sim H^{i} \sim \lambda \rightarrow V) \rightarrow L$ (*cf.* GF.23)

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164. To be precise, by asserting an interest in preventing future crime, the State would also presumably be concerned with crimes against persons, such as children or persons otherwise incompetent to give valid consent, non-volitionally withholding valid consent (*see infra* Part 3.2.2), hence espousing a paternalist, as well as a liberal, rationale. Such a degree of precision is hardly compulsory, however, for the very simple point that the State is making.

GF.41 A: $(I^{\sim p} \sim \varphi^{i}C \rightarrow V) \rightarrow L$ (*cf.* GF.24)

One of the central disputes in *Handyside* concerns the effects of the impugned publication on individual children who might read it:

F.34 π: $I^{\sim p}\eta^{i}\kappa \rightarrow \upsilon$

The Z position is that children can be unacceptably harmed by the work and that the State therefore enjoys the prerogative to determine that children cannot give valid consent to read (GF.37). A responds that the book will not cause unacceptable harm to children; hence, no inquiry into consent is required (GF.40). In *Kjeldsen*, the parents, seeking to exercise rights over their children's education, claim that such control would cause less harm than would be caused to their children were they to be exposed to sex education (GF.38). Z's response is formally identical to that in *Handyside*: exercise of that right would unacceptably harm the children, by depriving them of knowledge about sex (GF.37).

Again, in *Dudgeon*, Z adduces paternalist concerns about unacceptable harm to individuals, such as minors or other "vulnerable members of society"[165] (GF.37). A can entirely concede this point, as these are not the actors whose interests are at issue in the case. As we have seen, the relevant actors are individuals able to give valid consent, which itself, as to the relevant sexual acts, renders the question of harm irrelevant (GF.41). Z might also have raised a second paternalist argument: homosexuality represents a harm with respect to which the State can protect individuals from themselves (GF.36).[166] This position is still common in debates on the age of consent.[167] However, given law reform based on contrary assumptions in England, Wales, and Scotland,[168] this view plays no significant role in the State's position. Here too, for A, it is one's own valid consent that renders the question of harm irrelevant (GF.39). One might query whether it is in fact the giving of valid consent which renders the question of harm irrelevant, or rather, the insufficient harm which renders the giving of valid consent irrelevant — *i.e.*, whether it is GF.39 or in fact GF.38 which properly characterizes the A position. After all, if homosexual acts are no more sick or dangerous than heterosexual acts, then what harm can come of them? Yet, even as to heterosexual acts, there is insufficient harm only insofar as valid consent is given. As suggested by the law of

165. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 20 (1981).

166. *Cf. id.* (Walsh, J., partially dissenting).

167. *See* Sutherland v. United Kingdom, App. No. 25186/94, Eur. Comm'n H.R. Dec. & Rep. (1997) (visited May 10, 1999) <http://www.dhcommhr.coe.fr/eng/25186R31.E.html>.

168. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 9-10 (1981).

rape, the acceptably or unacceptably harmful character of a sexual act is itself defined by the element of consent.[169] The selfsame act may be defined as sufficiently or insufficiently harmful solely on the basis of whether valid consent is given. For *Dudgeon* A, then, insufficient harm is itself the product of valid consent. One can synthesize a more general A position for I actors in *Dudgeon* (GF.39 · GF.41):

F.35 $A: (I \sim \varphi^{i}C \rightarrow V) \rightarrow L$

The correlative Z position would combine GF.36 and GF.37:

F.36 $A: (IH^{i} \sim C^{\sim w} \rightarrow V) \rightarrow L$

That same A position, however, is by no means successful in *Laskey*. Rightly or wrongly (if one compares the acts at issue in these cases, say, with those occurring in lawful but dangerous athletic activities)[170] positive law does not define the harm at issue in *Laskey* in purely consensual terms. We have seen that, as with euthanasia, liberal rights jurisprudence has not generally accepted the libertarian proposition that valid consent renders the question of harm irrelevant. The Court thus accepts Z's challenge to the individuals' ability to give valid consent (GF.36, GF.37).

One justification for State interference in *Otto-Preminger* and *Jersild* is the protection of individuals from the unacceptable harm of hate speech (GF.37). The Court might have contemplated that some such individuals consent to incur any ensuing harm through a belief in free speech (GF.41). However, the Court does not examine this position, which, moreover, excludes persons who would not consent. Instead, A argues that any harm caused by the works is insufficient to justify State interference, thus rendering consent irrelevant (GF.40). The Court accepts GF.40 in *Jersild* and GF.37 in *Otto-Preminger*.

F v. Switzerland[171] concerns an applicant who had been twice divorced. The third time he married a woman six weeks after meeting her and filed for divorce barely two weeks thereafter. Having found the grounds for divorce to be adultery, the divorce court, pursuant to national law, prohibited the applicant from marrying for a period of three years. The applicant asserted a violation of the right to marry,[172] winning by only a 9-8 vote. The State

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169. *See* SMITH & HOGAN, *supra* note 114, at 469.

170. *See* Laskey v. United Kingdom, 1997 Eur. Ct. H.R. (ser. A) at 147-48 (Mr. Loucaides, dissenting).

171. F v. Switzerland, 128 Eur. Ct. H.R. (ser. A) (1987).

172. Article 12 provides that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." European Convention on Human Rights art. 12.

defends its temporary prohibition as a measure intended "to protect . . . the rights of others and even the person affected by the prohibition."[173] By "the rights of others," the State means not only future spouses, but also any children who might be born of the remarriage (GF.37).[174] Z also argues that the prohibition serves A's interests by creating a temporary cooling off period "to take time for reflection . . . to protect him from himself"[175] (GF.36).

As to GF.36, A might have argued that his valid consent to remarry obviates inquiry into harm (GF.39). However, the Court, unwilling to dismiss the relevance of harm, simply deems it to be insufficient. It finds that A would cause no unacceptable harm to himself in exercising the marriage right,[176] thus obviating inquiry into the validity of A's consent (GF.38). Of course, the complaint is brought precisely because A does claim to give valid consent to exercise the right in this case. The value of κ in GF.38 ($\kappa = \sim\lambda$) does not contradict that fact, but only evinces its irrelevance to the dispute.

As to GF.37, A might have adduced a classically liberal position that it would be the responsibility of a future spouse to "know what she's getting into" before consenting to marry the applicant. Such consent would obviate any inquiry into harm (GF.41). However, this is not the Court's approach. The Court notes the measure's punitive effect upon a future spouse who might want to exercise her own right to marry and whose interests are in no way better protected during the intervening period before the applicant is again permitted to wed.[177] However great the harm caused by the applicant's exercise of the Article 12 right, it is less than the harm caused by the State's abridgment of the right, and the harm thereby becomes insufficient to justify interference with the right. Similarly, as to the interests of future children, the Court finds that the harm caused by the abridgment of the right, namely the prospect that such children might be born out of wedlock, is greater than that caused by the applicant's exercise of the marriage right.[178] The comparative harm caused by A's exercise of the marriage right is thus insufficient to justify State interference (GF.40).

The desire to anchor State interference in a discourse of specific harm to others in order to avoid a discourse of general harm to society is illustrated in *Kokkinakis v. Greece*,[179] concerning imprisonment of Jehova's Witnesses for proselytism. According to the Greek trial court, the applicants

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173. F. v. Switzerland, 128 Eur. Ct. H.R. (ser. A) at 17 (1987).
174. *See id.* at 17-18.
175. *Id.* at 18.
176. *See id.*
177. *See id.* at 17-18.
178. *See id.*
179. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) (1993).

"attempted to . . . intrude on the religious beliefs of Orthodox Christians, with the intention of undermining those beliefs, by taking advantage of their inexperience, their low intellect and their naïvety"[180] (GF.37). The Strasbourg Court, however, accepted that A's proselytism had caused insufficient harm to other individuals (GF.40).[181]

3.2.3 *State Communitarianism* (M)

Where individual rights are restricted on the basis of collective non-consent to unacceptable harm (Z: $\sim IH^i \sim C$), that result can be defined as *formally communitarian* (M): regardless of the restriction's motivation or impact, its formal rationale is the redress or prevention of unacceptable harm to society as a whole. As its formal character can be assumed, we will simply call the position "communitarian":

GF.42 Z: $(\sim IH^i \sim C \rightarrow \sim V) \rightarrow M$ (*cf.* GF.29)

Correlative A rebuttals would take the form:

GF.43 A: $(\sim I \sim H^i \sim \lambda \rightarrow V) \rightarrow L$ (*cf.* GF.27)

GF.44 A: $(\sim I \sim \varphi^i C \rightarrow V) \rightarrow L$ (*cf.* GF.28)

Z's paternalist argument in *Handyside* (GF.37) comports with a communitarian argument that the book is harmful to the morals of society as a whole (GF.42):

F.37 Z: $((I^{\sim p}H^i \sim C^{\sim w} \cdot \sim IH^i \sim C) \rightarrow \sim V) \rightarrow (T \cdot M)$

The correlative A position is that any harm caused to society by the book is insufficient to justify interference with the right (GF.43). Conjoined with GF.40, a fuller A position can thus be written:

F.38 A: $(I^{\sim p} \sim H^i \sim \lambda \cdot \sim I \sim H^i \sim \lambda \rightarrow V) \rightarrow L$

F.38 can be written more economically:

F.39 A: $(I^{\sim p} \sim I \sim H^i \sim \lambda \rightarrow V) \rightarrow L$

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180. *Id.* at 8 (quoting the Lasithi Criminal Court's judgment of March 20, 1986). *Cf. id.* at 20-21.

181. *See id.* at 20-21.

Indeed, if we wish to conjoin to F.39, the self-evident A position, that there is also no unacceptable I^p harm (A: $I^p \sim H^i \sim \lambda$), then a complete A position can be written even more simply:

F.40 A: $(\iota \sim H^i \sim \lambda \rightarrow V) \rightarrow L$

In other words: "There is no unacceptable harm to anyone." The Court, however, accepts F.37.

The same $\sim$I positions appear in *Kjeldsen*. A's belief that sex education is positively harmful to particular religious beliefs is an assertion of insufficient harm to society as a whole through exemption of the children (GF.43). The Court, however, accepts Z's assertion as to the comparatively greater risk of inadequate sex education to society as a whole. Z's assertion of risk of unacceptable harm to individual children (GF.37) is itself an assertion of unacceptable harm to society as a whole (F.37).

Z's principal argument in *Dudgeon* concerns offense to public morals (GF.42).[182] A rebuts that sheer offense to a disapproving public constitutes insufficient harm, rendering collective consent irrelevant (GF.43). A also proposes a GF.44 argument by challenging the presumption of public non-consent as represented by the State position, asserting that public attitudes have changed and no longer support the prohibition. In *Otto-Preminger* and *Jersild*, the State justifies interference with the article 10 right of expression on grounds of protection of society as a whole, as well as other individuals, from unacceptable harm (F.37). A argues that any harm is insufficient to justify State interference (F.40). *Jersild* accepts F.40. *Otto-Preminger* accepts F.37.

The Z position in *Laskey*, too, refers to unacceptable moral harm to society in general, as well as to unacceptable harm to the individual participants:

F.41 Z: $((IH^i \sim C^{\sim w} \cdot \sim IH^i \sim C) \rightarrow \sim V) \rightarrow (T \cdot M)$

However, the judgment makes little reference to harm to society as a whole. The "broader moral reasons" behind the prohibition are mentioned more with respect to the relationship between the individual participants ("the respect which human beings should confer upon each other") than with respect to the welfare of society as a whole.[183] Even if we do cite F.41 to describe the result in *Laskey*, it is clearly the paternalist element that dominates the opinion:

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182. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 19-20 (1981). *Cf. id.* at 29 (Zekia, J., dissenting); *id.* at 40-47 (Walsh, J., partially dissenting).

183. Laskey v. United Kingdom, 1997 Eur. Ct. H.R. (ser. A) at 132.

F.42 $Z: (IH^{i} \sim C^{\sim w} \rightarrow \sim V) \rightarrow T$

The emphasis on the paternalist element in *Laskey* might, of course, be purely strategic. The judges may feel that, by anchoring the judgment in a discourse of physical harm to specific individuals, they can avoid more controversial moral questions. Even if we accept that the *expressly* communitarian arguments (GF.42) in the judgment are so slight as to be non-existent,[184] one might nevertheless feel that it was, in fact, more a communitarian, moral impulse than a sheer paternalist concern with physical harm that motivated the judgment.[185] Such suspicions, however, are unverifiable.

The purely formal character of the variables L, T, and M as jurisprudential concepts becomes apparent in the cases governing positive obligations. The State's assertion of unacceptable collective harm in *Rees, Cossey,* and *F. v. Switzerland* rests solely on undue administrative burden (GF.42), which is not a communitarian rationale in any profoundly moral sense. What makes it formally communitarian, however, is the fact that the State can assert all manner of harms which, substantively, may have little in common: prohibitions of, say, treason, passport defilement, and tax evasion may all be justified as being based on the good of society as a whole, although they envisage very different kinds of harms.

The Z positions in the transsexualism cases also include paternalist concerns about promoting medical procedures without full appreciation of their consequences on the individuals or their family members (GF.36, GF.37). As in *Handyside* or *Laskey*, it is these I concerns which might be said to form the basis of more morally laden $\sim$I concerns about the effects of such "permissiveness" on society generally, although such concerns do not figure strongly in the opinions. An A position as in F.40 succeeds only in *F. v. Switzerland.* In *X, Y & Z v. United Kingdom*, Z positions as in GF.37 are more strongly emphasized.[186]

In addition to I interests, the State in *F v. Switzerland* asserts $\sim$I interests by seeking "to protect . . . the institution of marriage."[187] Z envisages society's continued approval of fault-based divorce, hence a collective rejection of the harm to society of "making a mockery of the institution of marriage."[188] (GF.42). As in *Dudgeon*, one possible rebuttal might take the form of an empirical submission that the more tolerant views

184. *See id.* at 144-45 (Mr. Bratza and Mr. Nowicki, concurring) (referring only to physical harms, and thus entirely embracing F.42).

185. *See id.* at 136 (Pettiti, J., concurring) (noting the overall dangers to society of a "laxisme effréné," *i.e.*, "unrestrained permissiveness").

186. X, Y & Z v. United Kingdom, 1997 Eur. Ct. H.R. (ser. A) at 633-35.

187. F v. Switzerland, 128 Eur. Ct. H.R. (ser. A) at 17 (1987).

188. *Id.* at 11 (citing the October 18, 1984, judgment of the Swiss Federal Court).

of society as a whole are not in fact faithfully reflected in the State's position (GF.44). Indeed, the Court notes the abolition of such waiting periods in other contracting States,[189] and its otherwise brief opinion devotes considerable attention to proposals for law reform in Switzerland.[190] Yet, ever loathe to challenge a State's claim to represent society's collective interest, the Court rejects that position.[191] Instead, by resolving the case purely on the basis of the applicant's rebuttals on the I interests (GF.38, GF.40), the rebuttal by definition defaults to GF.43. The premise A: $I \sim H^{i} \sim \lambda$ provides, itself, a sufficient basis for finding that insufficient harm to society renders collective non-consent irrelevant (A: $\sim I \sim H^{i} \sim \lambda$). Hence, A: $(\iota \sim H^{i} \sim \lambda \rightarrow V) \rightarrow L$ (*cf.* F.40).

3.2.4 *State Sovereignty (R)*

As observed in Part 2.3.5, A asserts lack of valid consent to incur State-caused harm in one of two ways.

> (1) *Either* A *in fact* withholds consent to be arrested with excessive force, detained without counsel, tortured, sterilized, and the like (A: $I^{p}H^{\sim i} \sim C^{w}$, F.24), in which case A asserts volitional withholding of valid consent to incur an unacceptable State-caused harm. Hence a liberal position:
>
> GF.45 A: $(I^{p}H^{\sim i} \sim C^{w} \rightarrow V) \rightarrow L$ (*cf.* GF.30)
>
> (2) *Or* A's consent to be arrested with excessive force, detained without counsel, tortured, sterilized, and the like is non-volitionally invalid (A: $I^{p}H^{\sim i} \sim C^{\sim w}$, F.22), in which case A's assertion of non-volitionally invalid consent to incur an unacceptable, State-caused harm attributes to the State the obligation to treat individual consent as invalid, thereby attributing to the State a paternalist obligation. As such, under this position, the State *must* treat individual consent as non-volitionally invalid:
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> GF.46 A: $(I^{p}H^{\sim i} \sim C^{\sim w} \rightarrow V) \rightarrow T$ (*cf.* GF.31)

In comparison with all foregoing A positions, all of which are liberal, GF.46

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189. *See id.* at 16-17.

190. *See id.* at 13-14.

191. *See id.* at 16-17 (noting that the mere retention by a State of an otherwise outmoded view does not perforce justify a finding of a Convention violation).

is the only paternalist V position. It is the only position in liberal rights discourse whereby A attributes to the State the obligation not to honor an act of individual liberty.

Z has two possible responses to either A position: (1) The State-caused harm is not unacceptable, rendering irrelevant the question of individual consent (F.23); or (2) A has given valid consent, rendering the question of harm irrelevant (F.21). Z's position, then, is either that the harm is acceptable regardless of consent or that the consent is valid regardless of the harm. There is thus no link between harm and consent. The State simply asserts its prerogative to exercise its police power, thereby creating what we will call a "State Sovereignty" (R) regime:

GF.47 $Z: (I^{p} \sim H^{\sim i} \sim \lambda \rightarrow \sim V) \rightarrow R$ (*cf.* GF.32)
GF.48 $Z: (I^{p} \sim \varphi^{\sim i} C \rightarrow \sim V) \rightarrow R$ (*cf.* GF.33)

To the extent that *Tyrer* presents a question of retroactive consent, it pits A's GF.46 position against Z's GF.48 position. *McCann, Tomasi,* and *Costello-Roberts* — and *Tyrer* to the extent that Z *does not* adduce an GF.48 position — present no question of non-volitional non-consent, and thus pit A's GF.45 position against Z's GF.47 position.

3.2.5 *Compulsory and Non-Compulsory Regimes* (ρ^{c}, $\rho^{\sim c}$)

Where it is useful to speak of the legal regime comported by a ν position without specifying it as liberal (L), paternalist (T), or communitarian (M), we can use the second-degree variable ρ (rho),

Ps.12 $\rho \subset L, T, M, R$

GF.36, GF.37, and GF.46 all represent paternalist regimes. Their rationales, however, are not identical. GF.36 and GF.37 assert a State prerogative to take a paternalist measure. GF.46 asserts a State obligation to do so. GF.46 asserts that the State *must* do so, attributing to the State a *compulsory* paternalism, while GF.36 and GF.37 attribute to it a discretionary, or *non-compulsory*, paternalism. Similarly, GF.34 attributes to the State the prerogative to interfere with the individual exercise of a right on grounds of unacceptable harm to another individual withholding volitionally valid consent, while F.31 attributes to the State the obligation of respecting individual exercise of the right. Thus, GF.34 attributes to the State a discretionary liberal measure, whilst F.31 requires a liberal measure. An assertion that a regime (ρ) *must* be followed as a compulsory matter can be denoted by use of the marker "c," hence ρ^{c}. An assertion that a regime (ρ) *may* be followed as a discretionary, or non-compulsory, matter can be denoted by use of the marker "$\sim$c," hence $\rho^{\sim c}$. Hence, for GF.46:

GF.49 $A: (I^{p}H^{\sim i} \sim C^{\sim w} \rightarrow V) \rightarrow T^{c}$

For GF.36 and GF.37:

GF.50 $Z: (I^{p}H^{i} \sim C^{\sim w} \rightarrow \sim V) \rightarrow T^{\sim c}$
GF.51 $Z: (I^{\sim p}H^{i} \sim C^{\sim w} \rightarrow \sim V) \rightarrow T^{\sim c}$

For F.31:

GF.52 $A: (I \sim \varphi^{i}C \rightarrow V) \rightarrow L^{c}$

For GF.34:

GF.53 $Z: (I^{\sim p}H^{i} \sim C^{w} \rightarrow \sim V) \rightarrow L^{\sim c}$

3.3 *The General Formulas*

Accordingly, arguments in liberal rights discourse are subsumed by the general formula:

GF.54 $\pi: (\iota\eta\kappa \rightarrow \upsilon) \rightarrow \rho$

As GF.54 represents the greatest degree of determinacy in liberal rights arguments as such, it will be called the *meta-formula of liberal rights*. All liberal rights arguments take some form of the meta-formula, and are expressed as general formulas in Table 2. These general formulas can also be called *meta-arguments*, or ρ positions.

The set of all possible, *i.e.*, all coherent ρ positions, is smaller than that of all conceivable values of GF.54. The following is a conceivable value, in the sense that it fulfills the GF.54 form, but is not a coherent value, as it is sheer gibberish and would never be made by any party:

$\pi: (\sim IHC \rightarrow V) \rightarrow L^{c}$

Thus, not all values that can randomly be "plugged in" to GF.54 generate coherent values. The suggestion that the ρ positions represent possible arguments in liberal rights discourse does not mean that they represent *only* liberal rights arguments. The meta-formula GF.54 states only the necessary conditions for liberal rights arguments and not the sufficient conditions. It does not state some essence of liberal rights discourse, which would distinguish it from other kinds of discourse, and does not necessarily represent a form of speech that would arise only in liberal rights discourse. It states only the conditions that must be fulfilled *if* an utterance is to be an argument about the resolution of a liberal rights dispute.

Table of Possible Arguments in Liberal Rights Discourse
(ρ Positions)

A ($\upsilon = V$)	Z ($\upsilon = \sim V$)
GF.55 A: $(I^{\rho} \sim H^{i} \sim \lambda \rightarrow V) \rightarrow L^{c}$ GF.56 A: $(I^{\rho} \sim \varphi^{i} C \rightarrow V) \rightarrow L^{c}$	GF.57 Z: $(I^{\rho} H^{i} \sim C^{\sim w} \rightarrow \sim V) \rightarrow T^{\sim c}$
GF.58 A: $(I^{\sim \rho} \sim H^{i} \sim \lambda \rightarrow V) \rightarrow L^{c}$ GF.59 A: $(I^{\sim \rho} \sim \varphi^{i} C \rightarrow V) \rightarrow L^{c}$	GF.60 Z: $(I^{\sim \rho} H^{i} \sim C^{w} \rightarrow \sim V) \rightarrow L^{\sim c}$ GF.61 Z: $(I^{\sim \rho} H^{i} \sim C^{\sim w} \rightarrow \sim V) \rightarrow T^{\sim c}$
GF.62 A: $(\sim I \sim H^{i} \sim \lambda \rightarrow V) \rightarrow L^{c}$ GF.63 A: $(\sim I \sim \varphi^{i} C \rightarrow V) \rightarrow L^{c}$	GF.64 Z: $(\sim I H^{i} \sim C \rightarrow \sim V) \rightarrow M^{\sim c}$
GF.65 A: $(I^{\rho} H^{\sim i} \sim C^{w} \rightarrow V) \rightarrow L^{c}$ GF.66 A: $(I^{\rho} H^{\sim i} \sim C^{\sim w} \rightarrow V) \rightarrow T^{c}$	GF.67 Z: $(I^{\rho} \sim H^{\sim i} \sim \lambda \rightarrow \sim V) \rightarrow R^{\sim c}$ GF.68 Z: $(I^{\rho} \sim \varphi^{\sim i} C \rightarrow \sim V) \rightarrow R^{\sim c}$

Table 2

3.4 *Institutional and Procedural Factors*

A meta-discourse applicable to liberal rights generally cannot account for many of the institutional and procedural factors which are specific to particular regimes. Although the discourse governing questions of admissible evidence, burden of proof or production, or judicial review may have their own internal discursive structure and corresponding meta-discourse, any such structure would be formally distinct from the meta-discourse of substantive liberal rights as developed here and would have to

be examined as a separate matter. What can be said, however, from the perspective of the present model, is that such institutional and procedural issues are nothing but means for deciding between an A and a Z position. A question, for example, about whether a piece of evidence is admissible is a question about whether an item serving to support a given π position should be considered. The question, in a given case, whether a court should defer to the act of a legislative body invoked to support a State interference with rights is simply a question about whether the court should accept a Z position.

Of particular interest to the European Convention is the question of derogations under article 15, which has prompted a number of controversial cases. Derogations provisions categorically differ from substantive rights provisions, as they do not invest individuals with additional rights, but, to the contrary, govern the conditions under which States may decline to observe Convention obligations. Whether the jurisprudence of derogations is subject to its own meta-discourse is a question that must be addressed some other time. From the point of view of the present analysis, however, it can be seen as a means for finding in favor of a party *despite* the merits of the opposing parties arguments. A Z position asserting that the State has complied with article 15 is an assertion supporting a finding of $\sim$V *despite* the possibly superior strength of the A position on conventional, substantive grounds.

4. CONCLUSION

Rights discourse has become a dominant international language of fundamental human interests. That observation, however, only begs the question as to whether there is in fact a unified discourse of rights as such. Standard concepts of "liberty," "democracy," or "reasonableness" purport to provide a general language of liberal rights. However, as products of natural language, their indeterminacy leaves them unable to provide such a language at any significant level of generality.

The determinate elements of liberal rights discourse can best be expressed in a symbolic language, called here a *meta-discourse of liberal rights*. A symbolic language has allowed us to identify those elements without which assertions about liberal rights would be incoherent. Such elements take the form of symbolic variables, which combine to generate a finite set of formulas representing all possible arguments in liberal rights discourse. Those formulas are specific instances of the meta-formula π: ($\iota\eta\kappa\neg$ υ) $\rightarrow$ ρ. All rights arguments are disputes about which formula — *i.e.*, which version of the meta-formula — disposes of a given dispute and are therefore also about the set of values that should be ascribed to the component variables of possible formulas. While the set of possible formulas is fixed, the set of values attributable to them is variable and

indeterminate. A meta-discourse affirms and delimits the indeterminacy of rights discourse within determinate bounds.

AN OVERVIEW OF ARGENTINE IMMIGRATION LAW

Barbara Hines*

I. INTRODUCTION

Argentina, like the United States, is a country of immigrants. Juan Bautista Alberdi, the Argentine jurist and constitutionalist, coined the well-known phrase "to govern is to populate,"[1] which formed the basis of the country's immigration and population policies for many years. Indeed, the current and previous Argentine constitutions incorporate the right to immigrate and the protection of immigrants as basic constitutional principles. The preambles to both the Constitution of 1853 and the Constitution of 1994 extend the rights of liberty, general welfare, and justice to "all men in the world who wish to dwell on Argentine soil."[2] Specific constitutional provisions allow all foreigners to enter Argentina who will work the land, improve industry, or teach the arts and sciences,[3] and also provide equal rights for all foreigners.[4] Despite Argentina's historic tradition of liberal

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* B.A. with honors, University of Texas at Austin (1969); J.D., Northeastern University School of Law (1975). Ms. Hines is Board Certified in Immigration & Nationality Law by the Texas Board of Legal Specialization. She has practiced in the field of immigration law for 24 years. Ms. Hines was awarded the 1992 American Association Immigration Lawyers Association Jack Wasserman Memorial Award for Excellence in Litigation. She is currently an adjunct faculty member, directing an immigration law clinic, at the University of Texas School of Law. The author wishes to thank the U.S. Fulbright Commission for a grant, which enabled her to conduct research in Argentina, and Katie Fleet for her research assistance and comments.

1. Juan Bautista Alberdi, *Bases y Puntos de Partida Para la Organización Política de la Republica Argentina, in* 3 OBRAS COMPLETAS DE JUAN BAUTISA ALBERDI 371, 527 (Buenos Aires, La Tribuna Nacional 1886).

2. CONSTITUTION DE LA NACION ARGENTINA [CONST. ARG.] preamble (1994), *reprinted and translated in* 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., Marcia W. Coward trans., Oceana Publications 1995); CONST. ARG. preamble (1983), *reprinted and translated in* GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES PAN AMERICAN UNION (1963).

3. *See* CONST. ARG. art. 25 (1994). "The Federal Government shall encourage European immigration; and may not restrict, limit or burden with any tax whatsoever, the entrance into Argentine territory of foreigners who arrive for the purpose of tilling the soil, improving industries, and introducing and teaching the arts and sciences." *Id.* Article 25 of the Constitution of 1853 contained identical language. *See* CONST. ARG. art. 25 (1853).

4. *See* CONST. ARG. art. 20 (1994). The 1994 Argentine Constitution states the following:

> Foreigners enjoy in the territory of the Nation all the civil rights of a citizen; they may engage in their industry, commerce or profession; own real property, purchase it and alienate it; navigate the rivers and coasts; freely practice their religion; make wills and marry in accordance with the laws. They are not obliged to assume citizenship nor to pay forced extraordinary

immigration, the Constitution also recognizes the government's right to regulate immigration.[5] The government, in turn, has conferred extensive powers to the Argentine immigration agency. Thus, although the Argentine Constitution embraces immigration and immigrants' rights, broad agency discretion has resulted in shifting, and in some instances, more restrictive immigration laws and practices, according to changing political, social, and economic realities.

While Argentina, like the United States, considers itself a country of immigrants, from the outset Argentina has unabashedly promoted European immigration.[6] Article 25 of the Constitution of 1853 states that "the Federal Government shall encourage European immigration."[7] This article was adopted without change as part of the Constitution of 1994.[8] Commentators postulate that article 25 should be interpreted as merely a preference toward European immigration because the second clause states that all foreigners coming to Argentina to carry out the goals listed in the Constitution have the right to enter the country.[9] Nevertheless, the fact that the Constitution

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> taxes. They may obtain naturalization by residing two continuous years in the Nation; but the authorities may shorten this term in favor of anyone so requesting, on asserting and proving services to the Republic.

Id. See also CONST. ARG. art. 20 (1853).

5. *See* CONST. ARG. art. 75, para. 18 (1994). "Powers of Congress . . . [t]o provide whatever is conducive to the prosperity of the country, to the progress and welfare of all the Provinces and for the advancement of . . . immigration . . . ." *Id. See also* CONST. ARG. art. 67, paras. 11, 16, 28 (1853). Law No. 22439, art. 20, Mar. 23, 1981 [1981-A] L.A. 273, the current Argentine Immigration Law, states in article 20 that the right of a foreigner to enter, reside and leave the country, a right guaranteed to all inhabitants under article 14 of the Argentine Constitution, is limited by the immigration laws. For an Argentine Supreme Court case recognizing the right of the government to regulate immigration, see "Lino Sosa," CSJN, 234 Fallos 203 (1956). One leading constitutional scholar has argued that article 20 of the Argentine Constitution, which provides equal rights for foreigners, renders deportation unconstitutional. *See* 2 GERMÁN J. BIDART CAMPOS, TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL ARGENTINO 212 (Ediar, Buenos Aires, 1989). He reasons that if citizens cannot be expelled, neither can foreigners. *See id. See also* Susana Albanese, *La Expulsion y el Amparo*, [1991-B] L.L. 456.

6. In the past, the United States has also passed restrictive legislation in order to maintain the European character of immigration. *See, e.g.*, Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (restricting Chinese immigration to the United States); Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874 (1917) (repealed 1952) (restricting all Asian immigration except Japanese); Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952) (establishing country quotas to benefit Northern European immigrants). However in 1965, the United States established an equal quota system for all countries and allowed Asian immigration as well. *See* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C.A. § 1101 (West 1999)).

7. CONST. ARG. art. 25 (1853).

8. *See supra* note 3 (stating text of article 25).

9. *See* OFELIA STAHRINGER DE CARAMUTI, LA POLÍTICA MIGRATORIA ARGENTINA 36 (1975).

specifically promotes European immigration affects the current immigration debate, given that the majority of recent immigrants are from neighboring Latin American countries.[10]

II. IMMIGRATION TRENDS

Argentina reached its highest levels of immigration during the latter half of the nineteenth century and the first decades of this century. Between 1857 and 1913, 2,711,648 persons immigrated to Argentina, of which 1,120,222 arrived between 1901 and 1910.[11] In 1914, 29.9% of the population was foreign born.[12] The immigrants came primarily from Spain and Italy.[13]

After a decrease in immigration during the two world wars, immigration again increased in Argentina after the close of the Second World War. While foreigners from Spain and Italy still comprised 61.2% of the immigrant population in 1960, 17.8% of the immigrants were from neighboring Latin American countries.[14]

By 1980, Argentina had experienced significant changes in the country of origin of its immigrants. European immigration declined and the number of immigrants from Latin American countries increased significantly. Thus, in a remarkable parallel to immigration trends in the United States,[15] recent immigrants to Argentina are no longer predominantly European. According to the 1991 census, Argentina's population totaled 32,615,528, and 1,628,210 of the total population was foreign born.[16] Of this foreign-born population, 817,144 came from Latin American countries — primarily

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10. *See generally* Enrique Otieza et al., *Política Inmigratoria: Inmigración Real y Derechos Humanos en la Argentina, in* INFORME ANUAL SOBRE LA SITUACIÓN DE LOS DERECHOS HUMANOS EN LA ARGENTINA 147 (Centro de Estudios Legales y Sociales, Buenos Aires, 1996); Sebastian Rotella, *Argentina's Frontier of Promise*, L.A. TIMES, June 8, 1996, at A1; *Putting Out the Unwelcome Mat*, ECONOMIST, Mar. 18, 1995, at 42.

11. *See* Raúl C. Rey Balmaceda, *El Pasado la Immagración en la Historia Argentina, in* 2 GEODOMOS 44 (Graciola M. de Marco et al. eds., 1994).

12. *See id.*

13. *See id.*

14. *See id.* at 52. According to the 1960 Argentine census, of the 2,604,447 foreigners in Argentina, 878,298 were Italian (33.7%) and 715,685 were Spanish (27.5%). *See id.* Latin American immigrants were recorded as follows: Paraguay, 155,269 (6%); Chile, 118,165 (4.5%); Bolivia, 89,115 (3.4%); Brazil, 48,737 (1.8%); and Uruguay, 55,934 (2.1%). *See id.* Demographers have criticized the 1960 census as underestimating the number of foreigners in the country. *See id.*

15. The majority of recent immigrants to the United States are Latin Americans and Asians. *See* MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 27 (1994).

16. *See* Otieza et al., *supra* note 10, at 148.

Paraguay, Bolivia, Brazil, Chile, and Peru.[17] Another sizable non-European immigrant population is Korean and, to a lesser degree, other Asians.[18] These census figures do not take into account those Latin Americans who subsequently obtained residence through amnesty programs in the nineties.[19]

In addition to legal immigration to Argentina, there has also been an increase in undocumented immigration, primarily of Latin Americans from nearby countries. These immigrants initially enter the country legally as tourists without a visa for a determinate period of time[20] and simply stay. The exact number of undocumented immigrants in Argentina, like in the United States, is extremely difficult to calculate due to the irregular or underground status of the population. However, approximate figures range from 50,000 to 2,500,000.[21]

III. CURRENT IMMIGRATION STATUTE

The Argentine Congress has the general power to regulate immigration.[22] Nevertheless, the current Argentine immigration law,[23] was enacted by the military dictatorship in 1981 replacing Law No. 817, the Avellaneda law of 1876, and subsequent decrees.[24] Despite the re-emergence of democracy in Argentina in 1984, the Argentine immigration law remains in effect. While the law provides the basic parameters of immigration, the executive branch has broad and virtually unfettered authority to issue decrees and administrative orders that substantively alter

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17. *See id.*

18. There are approximately 35,000 Koreans residing in Argentina. *See* Calvin Sims, *Don't Cry, the Land is Rich in Kims and Lees*, N.Y. TIMES, Nov. 15, 1995, at A3.

19. From 1992 through 1994, 209,198 people received residency through amnesty programs. *See* Katie Fleet, *Situación de Los Inmigrantes y Derechos Humanos*, *in* INFORME ANUAL SOBRE LA SITUACIÓN DE LOS DERECHOS HUMANOS EN LA ARGENTINA 261-262 (Centro de Estudios Legales y Sociales 1997). *See also* Decree No. 1906, Oct. 9, 1993, H. Camara de Diputados de la Nación, Secretaria Parlamentaria, fol. 58.

20. *See* Res. No. 189, Feb. 13, 1995, H. Camara de Diputados de la Nación, Secretaria Parlamentaria, fol. 34.

21. *See Putting Out the Unwelcome Mat*, *supra* note 10, at 42 (estimating the number at 50,000 to 500,000). *Cf.* Fleet, *supra* note 19, at 262-63 (citing estimates of 2,500,000 according to data furnished by the immigrant communities); Otieza et al., *supra* note 10, at 157 (questioning *El Clarin's*, the national newspaper, calculation of 400,000 as inflated). The wide variation in the reported estimates of the undocumented community demonstrates the lack of reliable statistical data.

22. *See supra* note 5 and accompanying text.

23. Law No. 22439, Mar. 23, 1981, [1981-A] L.A. 273.

24. *See* Decree No. 4805, [1963] A.L.J.A. 66, *ratified by* Law No. 16478, [1964] A.L.J.A. 52. *See also* Decree No. 17294, [1967-B] A.L.J.A. 1516.

immigration laws and policy.[25] The Argentine immigration law has been modified and restricted by both the governments of former President Alfonsin, the first democratically elected president after the military dictatorship, and the current administration of President Menem.

The Argentine immigration law reiterates the governmental interest in promoting immigration based on the constitutional imperative of European immigration.[26] The law, framed in general terms, establishes three classes of admission into the country: transitory residents, temporary residents, and permanent residents, while delegating wide discretion to the Executive Branch to set the conditions for admission in each category.[27] In addition, the regulations authorize the Department of Immigration, in its discretion, to admit persons not encompassed by the stated categories.[28] The Argentine Supreme Court has upheld the right of the Department of Immigration to determine admissions and concomitantly expel foreigners who do not qualify for admission.[29]

The *Dirección Nacional de Migraciones* (National Immigration Department) is part of the *Secretaria de Población y Relaciones con la Comunidad* (Secretary of Population and Community Relations) which in turn is part of the *Ministerio del Interior* (Ministry of Interior).

A. *Admission Standards*

Persons who may apply for permanent or temporary residence include: parents, spouses, and children of Argentine citizens; parents,

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25. *See* Letter to the President of the Nation presenting the Argentine Immigration Law, March 16, 1981, [1981-A] L.A. 269, 270 (deferring to the administrative authority the establishment of the conditions, requirements and costs of admission).

26. *See id.* para. 4.

27. *See* Law No. 22439, art. 12, Mar. 23, 1981, [1981-A] L.A. 273.

> Foreigners may be admitted to enter and remain in the Republic, in the following categories: permanent residents, temporary residents, or transitory residents. The National Executive Branch shall establish the conditions, requirements, and sureties which will apply to admission, entry, and stay of foreigners, as well as the subcategories and length of stay of temporary and transitory residents.

Id. Cf. Immigration and Nationality Act, 8 U.S.C.A. § 1151 (West 1999), in which the U.S. Congress, not the executive branch nor the Immigration and Naturalization Service, explicitly determines all categories of admission to the United States. The United States immigration law provides for similar categories of entrants. *See, e.g.*, Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(15)(C) (West 1999) (providing for transit visas); *id.* § 1101(a)(15)(A), (B), (D)-(S) (providing numerous non-immigrant visas, including temporary employment visas); *id.* §§ 1151-1154 (providing permanent residence visas).

28. *See* Decree No. 1023, June 29, 1994, B.O. No. 27925.

29. *See, e.g.*, "Scheimberg," CSJN, 164 Fallos 344 (1932); "Acosta," CSJN, 278 Fallos 147 (1970).

spouses, and unmarried children under the age of twenty-one; disabled children of permanent or temporary residents; and persons applying for temporary or permanent residence.[30] Those who are considered temporary residents within the definition of the law include: technicians, skilled workers, business persons or owners, scientists, educators, workers, artists, athletes, religious workers who are members of a recognized sect, students who enter to study in private or public institutions other than primary school, contract workers who have entered into a written employment contract, representatives of foreign companies, immigrants with sufficient capital to develop a productive commercial or service enterprise, retired persons or persons with independent income, and persons encompassed by other laws that establish special immigration categories.[31] The definition also includes those persons whose special recognition in cultural, social, economic, scientific or political affairs serves, in the opinion of the Ministry of Interior, the national interest; and those persons from countries which merit special treatment based on geographic, historical and/or economic conditions, in the opinion of the Ministry of Interior in consultation with the Ministry of Foreign Relations, International Commerce, and Culture.[32]

The immigration regulations which accompany the 1994 decree limit certain previously-mentioned categories to temporary status, such as: students, religious workers, contracted workers, and seasonal workers.[33] In addition, exemplifying the wide discretion of the Department of Immigration, the Department may authorize the temporary residence of any person not covered by the specific admission categories if, in the opinion of the agency,

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30. *See* Decree No. 1023, art. 2, June 29, 1994, B.O. No. 27925 (amending Decree No. 1434, art. 15(a)-(k), Sept. 17, 1987, B.O. No. 26224, *modified by* Decree No. 669, 1990, [1990-A] L.A. 240, *and* Decree No. 1013, 1992, [1992-A] L.A. 1907). As discussed previously, the substantive immigration statute, Law No. 22439, does not specify the categories of persons who qualify for permanent or temporary residence. Likewise, Decree No. 1023, art. 2, lists persons in these categories as eligible for both temporary or permanent residence. However, the annexed regulations limit permanent residence to family members of Argentine citizens. All other categories of persons must enter as temporary residents. *See* Decree No. 1023, Annex, art. 27(a), June 29, 1994, B.O. No. 27925. The immigration categories set out by decree have been held to be constitutional. *See, e.g.*, "Andrade," [1992-B] L.L. 244; "Leque," [1990-C] L.L. 495.

31. For example, Argentina has entered into bi-lateral agreements governing immigration with specific countries to facilitate immigration. *See, e.g.*, Res. No. 4612, Dec. 28, 1993, H. Camara de Diputados de la Nación, Secretaria Parlamentaria, fol. 66 (establishing special immigration standards for Japanese nationals).

32. *See, e.g.*, Res. No. 3384, Dec. 27, 1996, B.O. No. 28566 (extending immigration benefits to immigrants from Central and Eastern Europe, based on the constitutional imperative to promote European immigration).

33. *See* Decree No. 1023, Annex, art. 27(a), June 29, 1994, B.O. No. 27925.

there is justification to authorize the admission.[34] Temporary residents may only engage in authorized employment or commercial activities.[35] Those who enter to engage in the business, employment, and cultural activities described previously, including religious workers, may be admitted for renewable periods of three years; students may be admitted for renewable periods of one year; and seasonal workers may be admitted for a period of 180 days, renewable one time for ninety days.[36]

Transitory residents include the following: persons in transit; border visitors; crewmen; tourists; persons seeking medical treatment; and persons who enter for fixed periods of time to engage in artistic, religious, or cultural activities. Professionals or technicians whose services are needed by established employers, regardless of remuneration, as well as persons who enter to engage in business, investment, or market studies, are also within the framework of those who are transitory residents.[37] The regulations also provide a catch-all category that allows the Ministry of the Interior to admit a person as a transitory resident for any other satisfactory reason.[38] Most transitory residents, depending upon their subcategory of transitory residence, are admitted for a period of time ranging from ten days to three months with limited renewals.[39] Persons in the discretionary category may be admitted for six months with a one-time, three-month extension.[40]

Applicants may apply for admission at an Argentine consulate abroad, or if they have legal immigration status within the country, application is made at the Department of Immigration.[41] The applicant must present proof of eligibility for the requested visa status, a sworn declaration regarding the applicant's criminal history, police certificates from places where the applicant has resided during the last five years, and a record of a medical examination.[42] The Department of Immigration has the authority to waive the requirement of a police certificate for any applicant for temporary or permanent residence who has resided in Argentina for three years. The Department may also waive documentation for persons who have been forced to immigrate for religious, social, or political reasons.[43]

An application for temporary or permanent residence on behalf of an

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34. *See* Decree No. 1023, art. 2, June 29, 1994, B.O. No. 27925. *See also id.* Annex, art. 25.

35. *See* Law No. 22439, art. 27, Mar. 23, 1981 [1981-A] L.A. 273.

36. *See* Decree No. 1023, Annex, art. 30(a)-(d), June 29, 1994, B.O. No. 27925.

37. *See id.* art. 29. As is apparent, certain transitory categories overlap with temporary categories, although the admission period is shorter as a transitory resident.

38. *See id.* art. 2. *See also id.* Annex, art. 29(g).

39. *See id.* Annex, art. 31.

40. *See id.* art. 31(a)-(c).

41. *See id.* arts. 32-37.

42. *See id.* arts. 39, 44.

43. *See id.* art. 52 (a)-(b).

immigrant already in Argentina must be submitted by an *escribano*, the general equivalent of a notary public.[44] The purported aim of requiring notaries to prepare applications is to assure that applicants present authentic documents that can be verified by the *escribano*.[45]

B. *Inadmissibility and Waivers*

Unlike U.S. immigration law, the Argentine statute does not provide for specific grounds of inadmissibility. Instead, broad categories of inadmissibility are determined by regulation.[46] The following groups are absolutely inadmissible: (1) persons with transmittable illnesses that pose a danger to community health, or psychopathic mental conditions that may cause social or family problems; (2) persons with physical or psychological disabilities that affect the ability to work, unless the foreigner has other means of support; (3) persons who are serving or being prosecuted for crimes that, under Argentine law, carry a sentence of two years imprisonment or more; (4) current and former drug traffickers, prostitutes, and persons who have obtained financial profits from prostitution or those suspected of such activities; (5) persons who are presumed to lack employment, a profession or other means of lawful lifestyle; (6) persons who tend to engage in criminal behavior, who offend public morality or custom, or for any other reason that, in the opinion of the Ministry of the Interior, indicates the applicant's inability to integrate into society; (7) persons who have a criminal record that may jeopardize public security, order, or social peace; (8) persons whose entry into the country has been previously denied by a competent authority; (9) persons who have entered the country without inspection by immigration officials, or persons who remain in the country illegally for more than thirty days; and (10) persons who work without express permission from the Department of Immigration.[47]

In addition to the grounds of total inadmissibility, other groups are "relatively inadmissible."[48] These categories include persons who have a physical or psychological disability or chronic illness that diminishes their ability to support themselves; persons over the age of sixty-five; minors under the age of eighteen who are in the country without a parent or legal

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44. *See* Res. No. 286, Aug. 2, 1996, B.O. No. 28339.

45. *See id.* In contrast, in the United States, bar associations have objected to, and courts have prohibited the use of, notaries to prepare immigration applications as an unauthorized practice of law. *See* Unauthorized Practice Comm. v. Cortez, 692 S.W.2d 47 (Tex. 1985). *See also* Representations and Appearances, 8 C.F.R. § 292.1(a)-(e) (1999).

46. *Compare* Immigration and Nationality Act, 8 U.S.C.A. § 1182(a) (West 1999), *and* Decree No. 1023, Annex, art. 21(a)-(l), June 29, 1994, B.O. No. 27925.

47. *See* Decree No. 1023, Annex, art. 21(a)-(l), June 29, 1994, B.O. No. 27925.

48. *See id.* art. 22(a)-(c).

representative; persons who have been convicted of crimes with a maximum punishment of less than two years and those who have completed their criminal sentence or whose cases have been dismissed; drug addicts; persons, who in the opinion of the government, are without adequate housing in the country; and persons who have remained in the country illegally for more than thirty days.[49]

The grounds for relative and absolute inadmissibility relating to physical and psychological disabilities are waived for persons whose spouse, parent, child, or legal guardian is granted permanent residence. The waiver entitles disabled persons to enter Argentina in the same status as their qualifying relative.[50]

The Argentine law also provides for a waiver of the absolute inadmissibility grounds of communicable diseases, psychopathic mental conditions, and physical and psychological disabilities for spouses, parents, and unmarried children of Argentine citizens or permanent residents who have resided in the country for five years.[51] Factors to be considered in granting a waiver include the governmental interest in the activities or employment of the applicant; the applicant's ability to support himself; the physical, moral, economic, and employment abilities of the family; and any other objective considerations in support of the waiver. A waiver on any ground of relative inadmissibility is available to any permanent or temporary resident applicant. The same factors relevant to a waiver of absolute inadmissibility grounds are utilized to determine a waiver of relative inadmissibility.[52] Transitory visa applicants who are relatively inadmissible because of drug addiction may apply for a waiver to enter the country to seek treatment for such addiction.[53]

An affected party may request reconsideration within ten days of an unfavorable decision to deny admission or permanent residence, to cancel temporary or transitory residence, or to voluntarily depart the country.[54] If the Immigration Department denies the reconsideration, the party may appeal within ten days to the Ministry of Interior. [55] The law does not provide for

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49. *See id.*

50. *See* Law No. 24393, art. 1, Nov. 18, 1994, [1994-C] L.A. 3228 (modifying Law No. 22439, art. 12, Mar. 23, 1981 [1981-A] L.A. 273).

51. *See* Decree No. 1023, Annex, arts. 23, 25, June 29, 1994, B.O. No. 27925.

52. *See id.* art. 25. The immigration authorities have broad discretion to determine what quantum and type of proof is needed for a waiver. *See* Interviews with Dr. Garrido, in Buenos Aires (July 1996), and Dr. Vergara, Legal Department, National Immigration Department, in Buenos Aires (Nov. 1996) [hereinafter Interviews].

53. *See* Decree No. 1023, Annex, art. 24, June 29, 1994, B.O. No. 27925

54. *See* Law No. 22439, art. 73, Mar. 23, 1981, [1981-A] L.A. 273. *See also* Decree No. 1023, Annex, art. 126, June 29, 1994, B.O. No. 27925.

55. *See* Decree No. 22439, arts. 73-75, 80, Mar. 23, 1981, [1981-A] L.A. 273. *See also* Decree No. 1023, Annex, art. 128, June 29, 1994, B.O. No. 27925.

any direct judicial review.[56]

IV. EXPULSIONS

The Immigration Department may expel any foreigner who enters the country illegally or who violates his or her immigration status while in the country.[57] The law provides for two means of removing a foreigner from the country: an official request to depart by a certain date or a deportation order.[58] Persons who enter the country without submitting to immigration inspection may be immediately expelled from the country.[59]

In addition to illegal entry or exceeding an authorized stay, persons whose activities affect national security, social peace, or public order may be deported from the country, regardless of their immigration status.[60] Persons who are sentenced for a crime that carries a penalty of five years imprisonment may be expelled from the country.[61]

The law provides for detention pending deportation but also allows for release on bond.[62] Persons who are deported from the country may not re-enter without the express permission of the Ministry of Interior. Those who enter after an order of expulsion may be imprisoned for three months to two years.[63] Decisions to terminate permanent residence, deport, detain, or release on bond must be appealed directly to the Ministry of Interior.[64]

Relief from deportation, at least technically speaking, is available for persons convicted of criminal offenses or whose activities detrimentally

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56. *See infra* Part V (discussing the practical application of immigration procedures).

57. *See* Law No. 22439, art. 38, Mar. 23, 1981, [1981-A] L.A. 273. During the first six months of 1996, the National Immigration Department deported 1387 foreigners, gave a fixed departure date to 2129 foreigners, and rejected 1803 foreigners at the border. *See* DIRECCIÓN NACIONAL DE MIGRACIONES, REPORT OF THE MINISTERIO DEL INTERIOR (June 1996) (on file with author).

58. *See* Law No. 22439, arts. 37-38, Mar. 23, 1981, [1981-A] L.A. 273. These provisions correspond to voluntary departure, Immigration and Nationality Act, U.S.C.A. 8 U.S.C. § 1229c (West 1999), and removal (deportation), *id.* § 1229a, under U.S. statutes.

59. *See* Law No. 22439 art. 39, Mar. 23, 1981, [1981-A] L.A. 273, which is the Argentine corollary of "expedited removal" under the Immigration and Nationality Act, 8 U.S.C.A. § 1225 (West 1999).

60. *See* Law No. 22439, art. 95(b), Mar. 23, 1981, [1981-A] L.A. 273. Deportation based upon national security and public order was also part of the prior immigration Law No. 4144, Nov. 23, 1902. During the early part of this century, many labor activists were deported from Argentina. *See, e.g.*, "Scheimberg," CSJN, 164 Fallos 344 (1932); Gabriel B. Chausovsky, *El Estado y La Expulsión de Extranjeros*, REVISTA DE CIENCIAS JURÍDICAS Y SOCIALES, Nov. 1997, at 169.

61. *See* Law No. 22439, art. 95(a), Mar. 23, 1981, [1981-A] L.A. 283.

62. *See id.* arts. 40-41.

63. *See id.* arts. 44-46.

64. *See id.* art. 78. *See also* Decree No. 1023, Annex, art. 134, June 29, 1994 B.O. No. 27925.

affect national security, social peace, or public order. A foreigner, who has an Argentine parent, spouse, or child prior to the commission of the criminal offense or prohibited activities, or who has resided for ten years in the country, may apply for permission to remain in the country, despite the deportable offense.[65]

V. PRACTICAL APPLICATION OF THE IMMIGRATION PROCEDURES

A fundamental concern regarding residency, admissibility and expulsions is the lack of statutory and regulatory procedures, judicial review and institutional safeguards.[66] There are few regulations which govern the adjudication of immigration benefits, waivers, bonds or expulsion procedures. There is no formal procedure or application to request a waiver of inadmissibility or relief from deportation. Moreover, there is very little case law interpreting the grounds of inadmissibility, expulsion, discretionary relief, or procedural aspects of the immigration process.[67] Generally, grounds of inadmissibility and other problematic cases are resolved administratively, although long delays may ensue. In fact, the most common complaint of the few Argentine immigration practitioners and service providers relates to the unreasonable delays and arbitrary decisions of the Department of Immigration. More serious public accusations of corruption within the Department of Immigration have been made by a former government official and also reported by a leading human rights organization in Argentina.[68]

Expulsion proceedings, as well, provide for few regulatory or procedural safeguards. There are no regulations which govern, among other things, the initiation of expulsion proceedings, bond, burden of proof, or the conduct of the hearing. Indeed there are no immigration courts or independent judges. Thus, the majority of cases are resolved without formal hearings, bond, or appeals.[69] Generally, immigrants are unrepresented before the Immigration Department. The summary nature of the process provides the foreigner with little opportunity to contest the grounds of

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65. *See* Law No. 22439, art. 96, Mar. 23, 1981, [1981-A] L.A. 273.

66. The author bases her conclusions regarding the practical aspects of the deportation and residency processes and the availability of legal services on personal interviews. *See* Interviews with the following groups: *Comisión Argentina Para Refugiados* (CAREF), *Comisión Católica Argentina de Migraciones* (CCAM), *Iglesia Evangelica Bautista del Centro*, private attorneys, immigration officials, and immigrants at CAREF and CELS (*Centro de Estudios Legales y Sociales*), in Buenos Aires (June-Dec. 1996) [hereinafter Interviews in Argentina]. *See also* Fleet, *supra* note 19, at 266-68.

67. *See* Interviews, *supra* note 52.

68. *See Menem Descalificó a Cavallo por Hacer Acusaciones Sin Pruebas*, CLARIN, Nov. 13, 1996, at 2. *See also* Fleet, *supra* note 19, at 268-69.

69. *See* Interviews in Argentina, *supra* note 66. *See also* Interviews, *supra* note 52.

deportation.

Another serious shortcoming is the lack of direct judicial review of a negative decision. Instead, an affected party's only remedy is to proceed by means of a constitutional *amparo*,[70] or habeas corpus. The lack of a statutory judicial review has been criticized as a violation of article 20 of the Constitution of 1994, which guarantees foreigners' equal civil rights,[71] article 14, which gives all inhabitants of Argentina the right to remain in the country,[72] and the international treaties, which have been incorporated into the Argentine Constitution.[73]

In addition to the paucity of formal procedures, immigrants have few legal resources to protect their interests.[74] There is no established immigration bar and very few attorneys practice in the field of immigration law. There are few pro-bono groups available to represent immigrants and no historical tradition of public interest law.[75] Three church-based groups, the *Comisión Argentina para Refugiados* (CAREF), the *Comisión Catolíca Argentina de Migraciones* (CCAM), and the *Iglesia Evangelica Bautista*, assist refugees and immigrants. One group has no attorneys, and the others are staffed by part-time attorneys. All offer more social services than legal representation. Recently, the *Centro de Estudios Legales y Sociales* (CELS) began to address immigrants' rights. Thus, while there may be statutory or constitutional rights which apply to immigration adjudication and expulsion proceedings, in practice, it is rare that an immigrant can exercise his or her rights.

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70. Article 43 of the Argentine Constitution of 1994 provides for an *amparo* action based on a violation of the Constitution or law in situations where there is immediate danger of imminent harm. *See* CONST. ARG. art. 43 (1994). The *amparo* is similar to an action for injunctive relief under U.S. law.

71. *See supra* note 4 (stating the text of article 20 of the Argentine Constitution).

72. *See infra* text accompanying note 114 for the text of article 14 of the Argentine Constitution, which has been interpreted to protect the rights of foreigners. *See also infra* Part VIII (discussing the constitutional protections and jurisprudence).

73. *See* Chausovsky, *supra* note 60 (providing an excellent analysis and criticism of the lack of judicial review). Dr. Chausovsky argues that the Argentine Immigration Law violates the Argentine Constitution, the right to due process, and international law. *See id.* He further opines that the extraordinary remedies of *amparo* and habeas corpus do not cure the inherent unconstitutionality of expulsion proceedings without review by a federal court. *See id.* Ironically, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections at 8 U.S.C.), similarly limits direct judicial review in the United States of many immigration decisions, and it forces aliens to seek review only in habeas corpus proceedings. *See* 8 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 104.13 (1998).

74. *See* Interviews in Argentina, *supra* note 66.

75. *See* Martín F. Böhmer, *Sobre la Inexistencia del Derecho de Interés Público en Argentina*, REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO, April, 1998, at 131.

VI. AMNESTY PROVISIONS

The relative ease with which a person from a neighboring country may enter Argentina has contributed to the large undocumented population within the country. Bilateral treaties to promote tourism allow citizens of neighboring countries to enter Argentina without a visa upon presentation of an identity document.[76] Since 1948, the government has decreed amnesties six times, each time with the purpose of regularizing the status of undocumented immigrants,[77] primarily from bordering countries, and prohibiting the further entry of undocumented immigrants.[78]

The first amnesty after the fall of the military dictatorship was promulgated in 1984 by President Alfonsin.[79] The decree recognized that many foreigners who had contributed to the Argentine community, even through the "worst moments that the Republic has experienced,"[80] should be allowed to regularize their illegal status. On the other hand, the decree also stated that, henceforth, Argentina would implement immigration policies that would deter the illegal entry and residence of foreigners in the future.[81]

The 1984 amnesty benefited persons who had resided in the country

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76. *See* Decree No. 4418, art. 42, June 14, 1965, *reprinted in* 2 GEODEMOS 414 (Graciela M. de Marco et al. eds., 1994). *See also* Res. No. 189, Feb. 13, 1995, H. Camara de Diputados de la Naciön, Secretaria Parlamentaria, fol. 34.

77. The author uses the term "undocumented immigrant" for lack of a better term. However, many persons from border countries enter as tourists and overstay their authorized period of admission.

78. *See* Decree No. 15972, July 8, 1949, *reprinted in* 2 GEODEMOS 490 (Graciela M. de Marco et al. eds., 1994). *See also* Decree No. 24666, 1949, *reprinted in* 2 GEODEMOS 490 (Graciela M. de Marco et al. eds., 1994); Decree No. 3364, 1958, *reprinted in* 2 GEODEMOS 492 (Graciela M. de Marco et al. eds., 1994); Decree No. 49, Jan. 10, 1964, [1964] A.L.J.A. 96; Decree No. 11982, 1965, [1966] A.L.J.A. 56; Decree No. 87, 1974, *reprinted in* 2 GEODEMOS 498 (Graciela M. de Marco et al. eds., 1994); Decree No. 780, 1984, [1984-A] A.L.J.A. 40. The fact that Argentine amnesty programs have been implemented by decree illustrates the broad powers of the executive branch over immigration matters. In the United States, after long and heated debate, Congress, not the Immigration and Naturalization Service, passed the country's only amnesty program. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); Immigration and Nationality Act, 8 U.S.C.A. § 1255a (West 1999). An analogous provision to the U.S. registry statutes, which provides permanent residence to long-time residents of the country, was also passed by decree in Argentina. *Compare* Decree No. 1835, 1977 (providing for permanent residence for persons over the age of 66 who have resided in Argentina for 30 years), *and* Immigration and Nationality Act, 8 U.S.C.A. § 1259 (West 1999).

79. *See* Decree No. 780, 1984, *reprinted in* 2 GEODEMOS 500 (Graciela M. de Marco et al. eds., 1994). *See also* Decree No. 3627, 1984, *reprinted in* 2 GEODEMOS 501 (Graciela M. de Marco et al. eds., 1994).

80. Decree No. 780, 1984, pmbl., *reprinted in* 2 GEODEMOS 500 (Graciela M. de Marco et al. eds., 1994).

81. *See id.*

since November 30, 1983. The initial application period was 180 days from the effective date of the decree but was extended through March 29, 1985.[82] Permanent residents, diplomats, students, temporary residents in the country for medical treatment, and asylees were ineligible under the decree.[83] Applicants were required to submit an application form with no fee required, an identity document, proof of residence, a sworn declaration of the lack of a criminal record which would render the applicant ineligible for residence under existing immigration norms,[84] and a record of medical examination for applicants who had resided in the country for less than three years.[85] Approximately 156,769 persons, of which 95% were from bordering countries, obtained residence under the 1984 amnesty program.[86]

In 1987, the Immigration Department promulgated a resolution to implement yet another amnesty program. The stated purpose of the resolution was to provide relief for persons who would be penalized by stricter immigration regulations adopted simultaneously by the executive branch.[87] This resolution provided for legal residence for persons who had entered the country legally prior to September 1, 1987, persons who entered illegally but who were parents, spouses or unmarried children of Argentine citizens, or persons who had filed for residence under previous laws before September 1, 1987. The primary beneficiaries were Chileans, Paraguayans, Bolivians, and Uruguayans.[88]

Despite the government's stated goals in the previous amnesty programs of ending illegal immigration, it was obliged to pass additional amnesty measures in 1992. The 1992 decree was limited to persons from

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82. *See id.* arts. 1-2. *See also* Decree No. 3627, art. 1, 1984, *reprinted in* 2 GEODEMOS 501 (Graciela M. de Marco et al. eds., 1994).

83. *See* Decree No. 780, art. 5, 1984, *reprinted in* 2 GEODEMOS 500 (Graciela M. de Marco et al. eds., 1994).

84. Under the 1965 immigration decree, a person who had been convicted of, or who was being tried for, common crimes, which under Argentine law could be punished by incarceration, were ineligible for residence. When the criminal sentence had been served, or the prosecution completed, or if the maximum punishment was less than two years, the immigration authorities had the discretion to grant residence under certain circumstances. *See* Decree No. 4418, arts. 25, 27, June 14, 1965, *reprinted in* 2 GEODEMOS 414 (Graciela M. de Marco et al. eds., 1994).

85. *See* Decree No. 780, arts. 2-3, 11, 1984, *reprinted in* 2 GEODEMOS 500 (Graciela M. de Marco et al. eds., 1994).

86. *See* Susana M. Sassone, *Los Indocumentados y las Amnistias Migratorias, reprinted in* 2 GEODEMOS 355, 366 (Graciela M. de Marco et al. eds., 1994).

87. *See* Decree No. 1434, Aug. 31, 1987, *reprinted in* 2 GEODEMOS 464 (Graciela M. de Marco et al. eds., 1994). *See also* Res. No. 2364, Sept. 2, 1987, *reprinted in* 2 GEODEMOS 578 (Graciela M. de Marco et al. eds., 1994). As stated previously, the Department of Immigration in Argentina has the broad power to decree such amnesties.

88. *See* Res. No. 2364, 1987, arts. 1, 2, *reprinted in* 2 GEODEMOS 578 (Graciela M. de Marco et al. eds., 1994).

bordering countries — Chile, Paraguay, Brazil, Uruguay, and Bolivia — who had been in Argentina since December 31, 1996. The initial application period was from November 2, 1992, through April 3, 1993, but was then extended to January 3, 1994.[89] A total of 224,471 persons obtained temporary residence under this amnesty.[90] Bolivians, followed by Paraguayans, constituted the majority of those who regularized their status under the amnesty provisions.[91]

Like previous amnesties, the documentation needed to establish eligibility was minimal.[92] An applicant was required to submit an application, a filing fee of approximately $16.00, proof of identity, and proof of residence in the country prior to December 31, 1991. Proof of residence could be established by submission of one of the following documents: an entry stamp in a passport or other entry document; proof of temporary residence; or any other official document, such as school records, a birth certificate, or a marriage license issued in Argentina before the effective amnesty date.[93] In addition, the applicant had to sign a sworn declaration of admissibility.[94] A medical exam was not required for applicants with temporary residence or those who had resided in Argentina since November 1, 1990.[95]

Although the 1992 amnesty decree speaks of "definite residence," persons who qualified were issued temporary documents for a period of two years. At the end of this period, the applicant must present his or her *Documento Nacional de Identidad*, or D.N.I. (National Identity Document), in order to obtain permanent residence,[96] which is granted unless the Department of Immigration finds fraud in the application. Many amnesty residents still do not have permanent status. There have been many complaints regarding the implementation of the programs, including

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89. *See* Decree No. 1033, June 24, 1992, [1992-B] L.A. 1909. *See also* Decree No. 864, June 5, 1993; Decree No. 2504, Oct. 12, 1993, H. Camara de Diputados de la Nación, Secretaria Parlamenataria, fol. 61.

90. *See* DIRECCIÓN NACIONAL DE MIGRACIONES, ESTADÍSTICAS POR DECRETO 1033/92, Oct. 23, 1995. *See also* Otieza et al., *supra* note 10, at 174.

91. *See* Otieza et al., *supra* note 10, at 174.

92. The author categorizes the documentation as "minimal" in comparison with the more onerous evidentiary requirements of the legalization provisions of the Immigration Reform and Control Act of 1986. *See* Immigration and Nationality Act, 8 U.S.C.A. § 1225a (West 1999). However, many Argentine amnesty applicants lack sufficient funds to obtain necessary documents or pay for the required notary services. *See* Interviews in Argentina, *supra* note 66; Fleet, *supra* note 19, at 266.

93. *See* Decree No. 1033, June 24, 1992, [1992-B] L.A. 1909.

94. *See id.*

95. *See id.* art. 4(a)-(f).

96. *See* DIRECCIÓN NACIONAL DE MIGRACIONES, RADICACIÓN-REQUISITOS MIGRATORIOS [Residence-Immigration Requirements, National Department of Immigration] (on file with author).

accusations of irregularities within the Department of Immigration as well as by *gestores*, non-attorney "agents," who assist immigrants with their applications. A common occurrence is that more than one person obtained amnesty under the same file number. When attempting to renew their documents, immigrants, who filed for amnesty in good faith, learn that their documents actually belong to another person.[97]

In addition to specific amnesty programs, the Immigration Department has promulgated decrees which have provided Peruvians and Bolivians with "precarious" residence[98] and employment authorization for approximately sixty to ninety days.[99] "Precarious" residence may be renewed so long as the decree remains in effect. If the "precarious" resident obtains an employment contract, he or she may apply for temporary residence under the normal immigration procedures. High unemployment in Argentina makes it difficult for undocumented immigrants to obtain an employment contract as required by the immigration law in order to qualify for a more permanent status.

VII. REFUGEES

Argentina has ratified the United Nations Convention on the Status of Refugees and the Protocol on the Status of Refugees.[100] Subsequently, by decree in 1985, the government established the *Comité Para La Eligibilidad de Refugiados*, or CEPARE (Committee for the Eligibility of Refugees), within the Immigration Department.[101] The committee is comprised of the

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97. *See* Interviews in Argentina, *supra* note 66. *See also* Fleet, *supra* note 19, at 268-69.

98. *See* Res. No. 1315, July 7, 1997, A.O.N. (extending Resolution No. 3850, Oct. 10, 1994, to Peruvians). *See also* Res. No. 1178, June 19, 1997, B.O. 8 (July 27, 1997) (extending Res. No. 2912, 1996, and Res. No. 1178, 1991). The Argentine Immigration Law gives the Department of Immigration broad powers to grant "precarious" residence and to cancel such status at the agency's discretion. *See* Law No. 22439, art. 21, Mar. 23, 1981 [1981-A] L.A. 273. The most analagous provision under U.S. immigration law is the practice of granting deferred enforced departure with employment authorization to allow certain individuals or groups to remain in the United States for determinative periods of time. *See also* INS Cable, June 11, 1992, File No. CO 1810/14, *reprinted in* 69 INTERPRETER RELEASES 736 (1992).

99. *See* Interview with Violeta Correa, CAREF, in Buenos Aires (Aug. 1996).

100. *See* Law No. 15869, Dec, 11, 1961, [1961] A.L.J.A. 65; Law No. 23160, Nov. 11, 1984 [1984-B] A.L.J.A. 879. Argentina also recognizes territorial or diplomatic asylum under the Caracas Convention on Diplomatic Asylum, § 3, Mar. 28, 1954, 10th Inter-American Conf., OAS Treaty Series, No. 18, and the Caracas Convention on Territorial Asylum, § 3, Mar. 28, 1954, 10th Inter-American Conf., OAS Treaty Series, No. 19. *See also* Alejandro O. Iza, *The Asylum and Refugee Procedure in the Argentine Legal System*, 6 INT'L J. REFUGEE L. 643 (1994).

101. *See* Decree No. 464, art. 1, Mar. 11, 1985, B.O. No. 25636.

National Director of Immigration, the head of the Legal Affairs Department of the Immigration Department, the head of the Department of the Admission of Foreigners, and a representative of the Ministry of Foreign Relations and Culture.[102] In addition, a member of the United Nations High Commission for Refugees (UNHCR) may serve on the committee in an advisory capacity without voting rights.[103]

Most refugees apply for status without the assistance of an attorney and rarely present, or are rarely required to provide, the quantum of proof required in asylum cases in the United States.[104] Upon the filing of the application, the applicant is issued permission to work. Employment authorization is extended while the application is pending. There is no precise time limit for filing for refugee status, although the regulations state that an applicant "must appear before the immigration authorities upon arrival in the country or without delay."[105] However, in practice, the filing of a tardy application may be considered a negative factor by CEPARE in its determination of refugee status.[106]

The applicant is interviewed by the Immigration Department which sends a recommendation to CEPARE regarding the validity of the claim. Persons who are granted refugee status are considered permanent residents.[107] The general grounds of inadmissibility, such as physical

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102. *See id.* art. 3

103. *See id.*

104. *See Matter of S-M-J*, Interim Decision 3303 (B.I.A. 1997). The number of persons applying for refugee status in Argentina is much smaller than in the United States. In 1997, 10,400 refugees resided in Argentina. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES STATISTICAL UNIT, *Refugees and Others of Concern to UNHCR*, 1997 STATISTICAL OVERVIEW 5 (1998). Cubans, Peruvians, and Africans make up most of the refugees. In contrast, according to recent statistics, the United States received an annual total of 297,687 refugee and asylum applications and approved 52.7% of these cases. *See* IMMIGRATION & NATURALIZATION SERVICE, STATISTICS DIVISION, INS FACT BOOK: SUMMARY OF RECENT IMMIGRATION DATA 16 (Jan. 1997). This figure does not include cases that were referred by the Asylum Office to an immigration judge for decision. Conclusions regarding the informality, quantum of evidence, attorney representation, and country of origin of refugees are based on the author's interviews in Argentina. *See* Interviews with Legal Advisor, Argentine office of the UNHCR, and service providers, refugees, and refugee seekers, in Buenos Aires (Aug. 1996) [hereinafter Interviews with the UNHCR].

105. *See* Res. No. 1872, 1985. *Cf.* Immigration and Nationality Act, 8 U.S.C.A. § 1158(a)(2)(B) (West 1999). The new U.S. law requires an applicant to file for asylum status within one year of arrival in the United States unless the applicant establishes changed circumstances which materially affect eligibility or extraordinary circumstances which excuse the delay in filing. *See id.*

106. *See* Interviews with Alicia Curiel, private attorney, in Buenos Aires (Oct. 1996); Interviews with the UNHCR, *supra* note 104.

107. *See*Decree No. 1434, art. 178, Aug. 31, 1987 B.O. No. 26224. *Cf.* Immigration and Nationality Act, 8 U.S.C.A. § 1159 (West 1999) (showing a person granted asylum or refugee status in the United States must wait one year to apply for permanent resident status).

incapacity, age or criminal record, are inapplicable to refugees.[108] If CEPARE denies the claim, the applicant may request a reconsideration and, if the unfavorable decision is upheld, may appeal to the Ministry of Interior within ten days of the denial.[109] Appeals of denials are handled by the UNHCR[110] and the very limited service providers who assist refugees.[111]

VIII. CONSTITUTIONAL PROTECTIONS AND JURISPRUDENCE

The Argentine Constitution provides very specific constitutional rights for foreigners and immigrants.[112] Article 20 of the Constitution of 1994 explicitly states that foreigners enjoy the same civil rights as citizens and can exercise their profession or business, own, buy and sell property, navigate the waterways, practice their religion freely, make wills, and marry.[113] Under Article 14, "inhabitants" of Argentina, a constitutional term which has been defined to include foreigners, enjoy additional constitutional and civil rights, including the right to enter and live in Argentina.[114]

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108. *See* Decree No. 1434, art. 179, Aug. 31, 1987 B.O. No. 26224.

109. *See* Decree No. 464, arts. 7-8, Mar. 11, 1985, B.O. No. 25636.

110. The UNHCR has the right to appeal the denial of a refugee application. *See id.* art. 4.

111. As of the writing of this article, only the *Comisión Cátolica Argentina de Migraciones* (CCAM) handles appeals of the denial of refugee status.

112. Based on the author's investigations in Argentina, as previously noted, immigrants in Argentina, particularly the undocumented, are unable to exercise their constitutional rights due to factors such as the lack of an immigration and public interest bar, lack of resources, unfettered discretion of the Department of Immigration, and discrimination against immigrants. *See generally* Interviews in Argentina, *supra* note 66; Fleet, *supra* note 19.

113. *See* CONST. ARG. art 20 (1994). *See also supra* note 4 (stating the text of article 20); "Repetto," CSJN, 311 Fallos 2272 (1988) (prohibiting the state from requiring Argentine citizenship for teachers). Under U.S. precedent, the constitutional rights of immigrants have been found to be implied under more general constitutional provisions. *See, e.g.*, U.S. CONST. amends. V, XIV; Takahashi v. Fish & Game Comm'n., 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915). In addition, legal immigrants in the United States may be denied entry into certain professions and thus do not enjoy the full right to exercise their profession. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (denying employment as a state probation officer); Ambach v. Norwick, 441 U.S. 68 (1979) (denying employment as a teacher); Foley v. Connelie, 435 U.S. 291 (1978) (denying employment as a police officer). *See also* Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (restricting the rights of legal residents to public benefits, which would ostensibly be unconstitutional under the Argentine Constitution).

114. The Spanish term is *habitante*. The Constition provides:

> All inhabitants of the Nation enjoy the following rights, in accordance with the laws that regulate their exercise, namely: working in and practicing any lawful industry; of navigating and trading; of petitioning the authorities; of entering, remaining in, travelling through and leaving Argentine territory; of publishing their ideas through the press without previous censorship; of using and disposing of their property; of associating for useful purposes; of freely

A. *Case Law*

Due to the relatively limited number of contested immigration proceedings and lack of direct judicial review, there are fewer reported cases in Argentina involving the legal rights of immigrants than are reported in U.S. jurisprudence. As previously discussed, the lack of pro-bono legal resources or an organized immigration bar also restricts litigation regarding the rights of immigrants. Nevertheless, both article 20, bestowing constitutional rights on foreigners, and article 14, recognizing additional constitutional rights of "inhabitants," have been applied in immigration proceedings to challenge both expulsion and the denial of residence.[115] A discussion of the major Argentine court decisions relating to immigration matters follows.

The constitutional protections enjoyed by "inhabitants" to enter and remain in Argentine territory have been extended to undocumented immigrants and those in irregular immigration status. In *Macía y Gassol*,[116] the Argentine Supreme Court ruled that the term "inhabitant" extends to both foreigners and the native born and that the term is defined to include all persons who reside and have the intention of remaining in the territory of the Republic, even without legal domicile.[117]

The Court in *Macia y Gassol* did not consider the manner of entry in construing the term "inhabitant." However, the jurisprudence has not always been consistent.[118] In some decisions, the Court has concluded that the Constitution only protects those immigrants who entered the country legally. In other decisions, the Court has extended the definition of "inhabitant" to persons whose initial entry into Argentina was illegal.

For example, in *Coito*,[119] the Immigration Department denied residence to a Jehovah's Witness on national security and public order grounds. While recognizing the government's right to control immigration, the Court reiterated that the administrative agency's decision-making process must not violate the Constitution.[120] Although Carrizo Coito's tourist visa had expired at the time he applied for residence, the Court concluded he was an "inhabitant" who could invoke his right to religious freedom and his right to

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professing their religion; of teaching and learning.
CONST. ARG. art. 14 (1994).

115. *See, e.g.*, "Coito," CSJN, 302 Fallos 604 (1980) (denying permanent residence); "Acosta," CSJN, 278 Fallos 147 (1970) (expelling immigrant).

116. *See* "Macia," CSJN, 151 Fallos 211 (1928).

117. *See id.*

118. The Argentine legal system is based on the Napoleonic civil system, not the English system of common law and binding precedents.

119. CSJN, 302 Fallos 604 (1980).

120. *See id.* at 635, (citing "Urrutia," CSJN, 200 Fallos 99 (1944)).

remain in Argentina guaranteed under articles 14 and 20 of the Constitution.[121] The Court defined an inhabitant as a person who has not entered clandestinely and who has the intention of remaining permanently in the country.[122]

Nevertheless, in other cases the Argentine Supreme Court has broadly defined "inhabitant" to include even persons whose initial entry was illegal. For instance, in *Lino Sosa*,[123] the Court held that neither the Constitution nor the immigration laws specifically set a time frame after which an illegal entrant becomes an "inhabitant."[124] Nevertheless, the Court reasoned that Sosa's five-year residence in Argentina, his demonstrated attachment to the country, and his record of good behavior elevated him to the status of "inhabitant."[125]

Although the Court has vacillated on the relevance of the manner of entry, the primary factor in concluding that a foreigner is an inhabitant appears to be his or her ties to Argentina, length of residence, and lack of criminal record. For example, the Argentine Supreme Court overturned a decision to deny residence to a Paraguayan because of purported Communist activities ten years earlier.[126] The Court noted that it would be unreasonable to deport the applicant who had been a temporary resident of the country for a lengthy period of time and who had established family and business ties in the country.[127] The Court ruled that the administrative decision making must be reasonable and concluded that the Immigration Department's decision to expel the foreigner conflicted with the constitutional right to enter, remain, travel through, and leave the country.[128]

A similar result was reached in *Argüello*.[129] In that case, the Immigration Department denied the permanent residence application of a Nicaraguan on national security and public order grounds based on his alleged membership in left-wing political groups in Argentina and Nicaragua.[130] Relying on the applicant's ties with the country, including a previous grant of temporary residence, presence in Argentina for thirteen

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121. *See id.*

122. *See id.* at 633.

123. CSJN, 234 Fallos 203 (1956).

124. *See id.*

125. *See id.* at 209.

126. *See* Horacio N. Dassen, *Expulsion de Extranjeros*, [1955] L.L. 837. Many of the Supreme Court cases involve the denial of residence on national security and public order grounds. The reported cases interpret earlier versions of the immigration statutes which also provide for deportation and inadmisisbility based on national security and public order. *See* Chausovsky, *supra* note 60, at 169.

127. *See* Dassen, *supra* note 126, at 837.

128. *See* "Acosta," CSJN, 278 Fallos 147.

129. CSJN, 268 Fallos 393 (1967).

130. *See id.*

years, and an Argentine citizen child, the Court invoked the protections of articles 14 and 20 of the Constitution to prevent Argüello's deportation.[131]

In *Silvestre Ramón Britez*,[132] the Court again overrruled the denial of residence to a foreigner based on his union activism. Citing Britez's marriage to an Argentine citizen and his lengthy residence in the country, the Court held that the consitutional right of an inhabitant to live in Argentina prevented Britez's deportation.[133] In *Juliana B. Zlatnik*,[134] the immigrant was detained by the immigration authorities upon arrival to Argentina because of her medical condition; she was subsequently released pending resolution of her case. Focusing on Ms. Zlatnik's intent to reside in Argentina and her family ties, the Supreme Court declared that she was an inhabitant and thus entitled to admittance.[135]

Residents who travel abroad and return to Argentina do not lose their status as inhabitants and thus are not subject to expulsion.[136] Moreover, a legal resident who re-enters Argentina illegally does not lose his resident status.[137] In *Cesare*, a long-time resident departed for ten months and returned to Argentina illegally as a stowaway.[138] Characterizing the immigrant as an "inhabitant" under article 14, the Court held that Cesare could not be deported or required to reestablish his residence in Argentina.[139]

Due process rights in expulsion proceedings have also been recognized by the Argentine courts. In the seminal case of *Scheimberg*,[140] the Argentine Supreme Court set out basic constitutional guarantees that should be afforded in deportation proceedings: the rights to a fair hearing, to be heard, to

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131. *See id.*

132. CSJN, 268 Fallos 406 (1967).

133. The Supreme Court criticized the lack of evidence relating to the alleged subversive materials that Britez was accused of distributing. *See id.*

134. CSJN, 182 Fallos 39 (1938).

135. *See id.*

136. *See* "Bertone," CSJN, 164 Fallos 290 (1932). Note, however, that the current immigration law provides that a permanent resident who remains outside Argentina for more than two years without special permission from the consulate or the immigration authorities loses his residence. *See* Law No. 22439, art. 16(b), Mar. 23, 1981 [1981-A] L.A. 273. *Bertone* does not discuss the length of the immigrant's absence but notes that he departed to visit an ailing relative. *See* "Bertone," CSJN, 164 Fallos 290 (1932).

137. *See* "Cesare," 184 Fallos 101 (1939). Under U.S. law, a lawful permanent resident who enters illegally is subject to removal proceedings. *Compare* Immigration and Nationality Act, 8 U.S.C.A. § 1227(a)(1)(B) (West 1999), *and id.* § 1101(a)(13)(C)(vi).

138. *See* "Cesare," CSJN, 184 Fallos 101 (1939).

139. *See id.*

140. CSJN, 164 Fallos 344 (1932).

present a defense, and to a review by a competent court.[141] Nonetheless, in *Scheimberg* and numerous other cases, the Court upheld the right of the government to deport foreign anarchists and other activists accused of subverting public order.[142]

In *M.P., J.H.*,[143] the Immigration Department denied the residence and ordered the expulsion of an alleged Chilean transvestite because he did not have a profession, art, or science which was beneficial to the country.[144] The appellate court criticized the immigration agency for using this provision as a means of disapproval of the applicant's sexual orientation without providing the applicant a meaningful right to be heard.[145] The court's decision was strongly influenced by the fact that the twenty-nine year old applicant had lived in Argentina since the age of eleven months and that his application for permanent residence had been pending for twelve years.[146]

In contrast to the Court's seemingly generous extension of constitutional protections to those with ties to Argentina, in *Don Jose Fernandez Rodriguez*,[147] the Supreme Court affirmed the denial of residence to an arriving foreigner who was afflicted with trachoma but who had married an Argentine and had lived in the country previously. The Court reasoned that the petitioner had not adequately established that she was an "inhabitant" and thus was not entitled to constitutional protection.

In *Rial y Freire*,[148] the Court concluded that the denial of residence to two foreign crewmen who entered the country illegally did not violate article 14 of the Constitution. In the latter case, there was no discussion of any family ties or lengthy residence in the country.

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141. *See id.* While the Supreme Court has articulated these rights, there are no immigration courts and few formal procedures to resolve expulsion cases. *Scheimberg* reached the Supreme Court on habeas corpus, not by direct appellate review. *See supra* Part IV (discussing expulsions).

142. Many other foreigners were deported as threats to public order pursuant to prior Law No. 4144, Nov. 23, 1902.

143. "M.P., J.H.," CFed [1991-B] L.L. 455 (1989). The case was decided under an earlier immigration decree. *See* Decree No. 1434, 1987, art. 22(f), *reprinted in* 2 GEODEMOS 469 (Graciela M. de Marco et al. eds., 1994). Nevertheless, the language of the prior law is identical to the current decree. *See* Decree No. 1023, Annex, art. 21(g), July 5, 1994, B.O. No. 27925.

144. *See* "M.P., J.H.," CFed [1991-B] L.L. 455 (1989). *See also* Decree No. 4418, art. 25(c), June 14, 1965, [1965] A.L.J.A. 144. The current Argentine law contains a similar provision. *See* Law No. 22439, art. 21(g), Mar. 23, 1981, [1981-A] L.A. 273.

145. *See* "M.P., J.H.," CFed., [1991-B] L.L. 455 (1989).

146. *See id.*

147. CSJN, 148 Fallos 410 (1927).

148. CSJN, 205 Fallos 628 (1946).

B. *Restrictions of the Rights of the Undocumented*

While the Argentine Constitution theoretically provides for broad constitutional rights for all foreigners, the immigration laws severely restrict the rights of the undocumented population and arguably violate constitutional and international law.[149] Undocumented foreigners may not work, are restricted in commercial transactions, and are prohibited from attending secondary school. The police may search the homes of the undocumented without a warrant or probable cause. Argentine citizens are required to report undocumented foreigners to the authorities in a variety of situations. The constitutionality of these provisions has not been subject to extensive court challenge.

1. *Access to Public Education*

Article 102 of Law No. 22439 limits public education beyond the primary school level to foreigners who are permanent residents or temporary residents.[150] There have been only a few challenges[151] mounted against the constitutionality of this provision and no reported decisions on the issue, although access to secondary education is a significant problem in the undocumented community.[152]

Possible challenges to restrictions on educational access could be based on the Argentine Constitution, international law, and comparative U.S. law.[153] In addition to the general constitutional protections that foreigners

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149. Many human rights treaties, declarations and covenants have been incorporated into the Argentine Constitution and have parity with other constitutional provisions and superiority to domestic laws. *See* ARG. CONST. art. 75, para. 22 (1994). Additional ratified treaties and pacts not specifically listed in paragraph 22 supersede national law, although they do have not constitutional force. *See id.* art. 75, para. 24. Undocumented immigrants might avail themselves of the courts' broad interpretation of the term "inhabitant" to include those foreigners in irregular immigration status but who evince an intention to reside in Argentina. Litigants could argue that restricting rights of the undocumented violates the constitutional protections afforded under articles 14 and 20 of the Argentine Constitution.

150. *See* Law No. 22439, art. 102, Mar. 23, 1981, [1981-A] L.A. 273. "Institutes of middle or secondary schools, whether public or private, national, provincial or municipal, shall only admit as students those foreigners who establish for each course their duly authorized status as 'permanent residents' or 'temporary residents.'" *Id.* (translation by author).

151. CELS has successfully obtained school admission for a few individual clients through administrative channels or through the filing of an *acción de amparo*.

152. *See* Interviews in Argentina, *supra* note 66.

153. *Cf., e.g.*, Plyer v. Doe, 457 U.S. 202 (1982). Many Argentine court decisions cite U.S. precedents in support of their holdings.

enjoy,[154] the Argentine Constitution specifically provides all "inhabitants" with the "right to learn."[155] Moreover, the 1994 Argentine Constitution gives "constitutional hierarchy" to certain ratified international treaties and recognizes that these treaties take precedence over conflicting national laws.[156] Protection against discrimination, the right to equal protection, and the right to education[157] are included in many human rights treaties. Thus, the denial of secondary education may violate both Argentine and international law.[158]

2. *Employment and Property Rights*[159]

Permanent residents may engage in any employment or business endeavor.[160] Temporary and transitory residents may only work with explicit permission from the Department of Immigration.[161] Persons who have "precarious residence" are authorized to work under the terms and for the

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154. Article 20 states that foreigners have all the rights of citizens. *See supra* note 4 (stating the text of article 20). *See also supra* Part VIII-A (discussing Argentine jurisprudence).

155. "All inhabitants of the Nation enjoy the following rights, in accordance with the laws that regulate their exercise, namely . . . teaching and learning." ARG. CONST. art. 14 (1994).

156. *See* discussion *supra* note 149.

157. *See, e.g.*, Universal Declaration of Human Rights, art. 26, Dec. 10, 1948, G.A. Res. 217(A), U.N. GAOR, 3rd Sess., U.N. Doc.A/810 (1948); International Covenant of Economic, Social and Cultural Rights, art. 13, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); American Declaration of the Rights and Duties of Man, art. XIII, May 2, 1948, O.A.S. Off. Rec. OEA/Ser L/V/I.4 Rev. (1965); Convention of the Rights of the Child, art. 28, Nov. 20, 1989, G.A. Res. 44/25 (Annex.), UN GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc.A/44/49 (1990) (entered into force Sept. 2, 1990). *See also* Stephen Knight, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HASTINGS INT'L & COMP. L. Rev. 183 (1995) (providing an in-depth analysis of the right to education under international law).

158. The U.S. legal doctrine of "self-executing treaties," which serves as an obstacle to litigation based on the violation of international human rights law, is not applied in Argentine jurisprudence. *Compare* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829), *and* Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d. Cir. 1976), *with* "Ekmekdjian," [1992-III] J.A. 199 (recognizing the right of an individual litigant to raise a claim based on a violation of article 14 — the "right of reply" of the American Convention on Human Rights). *See generally* LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES, (Martin Abregú & Christian Courtis eds., Centro de Estudios Legales y Sociales, 1997).

159. This article focuses on the immigration laws affecting the undocumented and does not address the rights, or lack thereof, of the undocumented in relation to labor, criminal, or other Argentine laws.

160. *See* Law No. 22439, art. 26, Mar. 23, 1981, [1981-A] L.A. 273. As discussed previously, in addition to statutory rights, legal residents have broad constitutional rights. *See* CONST. ARG. arts. 20, 25 (1994). *See also* "Repetto," CSJN, 311 Fallos 2272 (1988) (holding that a foreigner has equal rights to employment under article 20 of the Constitution.)

161. *See* Law No. 22439, arts. 27, 28, Mar.23, 1981, [1981-A] L.A. 273.

period authorized by the Immigration Department.[162] Undocumented persons are prohibited from engaging in any type of employment or remunerative business.[163] A person or company who hires an undocumented immigrant is subject to a fine of $5000 for each violation or $200 for each violation relating to a domestic worker.[164]

The law also prevents the sale of property for value to undocumented immigrants and imposes a fine of approximately $3000 for a violation of this provision.[165] While other commercial transactions with an undocumented person are not *per se* prohibited, the law requires that the seller report the undocumented person to the immigration authorities[166] and provides for a fine of $500 for failure to do so.[167]

3. *Reporting the Undocumented*

In addition to requiring private citizens to report undocumented persons to the authorities in the course of business transactions, the immigration law also obligates notary publics who prepare documents relating to commercial transactions to do the same.[168] Likewise, officials who perform a marriage involving an undocumented person must report such person to the immigration authorities.[169] While the immigration law does not prohibit the celebration of the marriage, possible detection by immigration authorities has a chilling effect. In addition, this reporting requirement contravenes the rights to marry and to establish a family, which are protected under numerous international human rights documents,[170] as well as the right to

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162. *See id.* art. 29. *See also* sources cited *supra* note 98 (regarding "precarious" residence for Bolivians and Peruvians).

163. *See* Law No. 22439, art. 30, Mar.23, 1981, [1981-A] L.A. 273.

164. *See id.* arts. 31, 48; Law No. 24393, art. 2(a), Nov. 18, 1994 [1994-C] L.A. 3228 (modifying Law No. 22439, art. 48).

165. *See* Law No. 22439, arts. 32, 48, Mar.23, 1981, [1981-A] L.A. 273; Law No. 24393, art. 2(a), Nov. 18, 1994, [1994-C] L.A. 3228 (modifying Law No. 22439, art.48, Mar.23, 1981, [1981-A] L.A. 273).

166. *See* Law No. 22439, arts. 32, 35, Mar.23, 1981, [1981-A] L.A. 273. From a civil rights standpoint, one might question how an ordinary citizen can determine the immigration status of a foreigner. However, in Argentina, a national identity card (*Documento Nacional de Identidad* — DNI) is required for official transactions.

167. *See id.* art. 48; Law No. 24393, art. 2(b)-(c), Nov. 18, 1994, [1994-C] L.A. 3228 (modifying Law No. 22439, art. 48)

168. *See* Law No. 22439, art. 105, Mar. 23, 1981, [1981-A], L.A. 273.

169. *See id.* art. 101.

170. *See, e.g.*, Universal Declaration of Human Rights, art. 16, Dec. 10, 1948, G.A. Res. 217(A), U.N. GAOR, 3rd Sess., U.N. Doc.A/810 (1948); International Covenant of Economic, Social and Cultural Rights, art. 10, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Jan. 3, 1976); American Declaration of the Rights and Duties of Man, art. VI, May 2, 1948, O.A.S. Off. Rec. OEA/Ser L/V/I.4 Rev. (1965); American Convention on Human

privacy under article 19 of the Argentine Constitution.[171] A medical facility that treats an undocumented person must furnish her name and address to the Immigration Department within twenty-four hours.[172] The law also contains similar reporting requirements within twenty-four hours for all municipal, provincial, and federal agencies and employees.[173]

4. *Searches of the Undocumented*

The immigration law authorizes the Immigration Department or its designees to require that all foreigners prove their legal status in the country.[174] The immigration authorities are further given the power to enter commercial establishments, factories, educational facilities, hospitals, or any other place where a violation or presumption of a violation of the law has occurred.[175] None of these provisions of the law require a judicial order, probable cause, or reasonable suspicion before questioning or searching a person or entering an establishment. Thus, they may be subject to challenges under the provisions of the Argentine Constitution and international law incorporated into the Constitution.[176]

Rights, art. 17, Nov. 22, 1969, OAS Off. Rec. OEA/Ser. L/V/II.23, Doc. 21 Rev. 6 (1979), *reprinted in* 9 ILM 673 (1970); International Covenant on Civil and Political Rights, art. 23, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). These treaties are incorporated in the Argentine Constitution under article 75, paragraph 22. Challenges could also be based on the rights of equal protection and privacy encompassed by numerous human rights treaties.

171. Article 19 states:

> The private actions of men that in no way offend public order or morality nor injure a third party, are reserved only to God and are exempt from the authority of the magistrates. No inhabitant of the Nation shall be obliged to do what the law does not command nor be deprived of what it does not forbid.

CONST. ARG. art. 19 (1994).

172. *See* Law. No. 22439, art. 103, Mar. 23, 1981, [1981-A] L.A. 273. The law makes clear, however, that the medical facility may provide medical treatment, notwithstanding the immigration status of the patient.

173. *See id.* arts. 104, 106.

174. *See id.* art. 107(a).

175. *See id.* art. 107(c).

176. "The residence is inviolable, as are letters, correspondence and private papers; and a law shall determine in what cases and for what reasons their search and seizure shall be allowed." CONST. ARG. art. 18 (1994). *See also* "Solaris Transporte Internacional," 166 E.D. 176 (1995) (holding that the search of a business without a court order violates article 18); International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After* Verdugo-Urquidez, 27 VAND. J. TRANSNAT'L L. 329 (1994).

IX. CONCLUSION

While Argentina is truly a country of immigrants, its immigration system is paradoxical. The Constitution provides some of the broadest protections for immigrants and foreigners in the world. Nevertheless, the immigration laws contain provisions which openly discriminate against the undocumented. While the statute provides the broad parameters of the immigration law, substantive and procedural issues are delegated to the Immigration Department. Thus, categories of immigrants, grounds and procedures relating to deportation and expulsion, and many other matters are determined by the immigration agency, rather than by the Argentine Congress. Moreover, the statute and the regulations provide few procedural or formal processes for the resolution of disputed cases, waivers, or expulsion hearings. In practice, most cases are resolved informally by the Immigration Department. Its broad discretion and lack of formal hearing procedures provide immigrants with few protections. Finally, the lack of an established immigration bar or low-cost legal services makes legal challenges to the system extremely difficult.

FROM THE PROVIDENCE OF KINGS TO COPYRIGHTED THINGS (AND FRENCH MORAL RIGHTS)

*Calvin D. Peeler**

I. INTRODUCTION

The most unique feature of contemporary French intellectual property law is the doctrine of moral rights. France stands out not only as the world's leading proponent of moral rights,[1] which perhaps distinguishes it as the country with the most comprehensive legal protection to authors of literary and artistic works,[2] but also because its doctrine of moral rights predominates over the more traditional economic rights that are typically associated with intellectual property law.[3] The doctrine of moral rights has been incorporated into the intellectual property regimes of many countries in varying degrees,[4] including, it could be argued, into the laws of the United States where there has been significant reluctance to adopt moral rights.[5] The focus of intellectual property law in the United States has been almost exclusively on economic rights.[6] However, there is continuing interest in

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* Associate Professor of Law, Whittier Law School; B.A., University of California, Berkeley; J.D., University of California, Berkeley; J.S.M., Stanford University; Ph.D. Candidate, Stanford University.

1. *See* Karen Y. Crabbs, *The Future of Authors' and Artists' Moral Rights in America*, 26 BEVERLY HILLS B. ASS'N J. 167, 169 (1992).

2. *See* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 97-100 (1985). *See also* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 126 (1997) (indicating that France provides the most extreme protection for the inalienability of the right of integrity); Carol G. Ludolph & Gary E. Merenstein, *Authors' Moral Rights in the United States and the Berne Convention*, 19 STETSON L. REV. 201, 204 (1989) (noting that France and "other European countries influenced by natural law principles expressly recognize an artist's moral rights").

3. *See* Jill R. Applebaum, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 AM. U. J. INT'L L. & POL'Y 183, 187 (1992).

4. *See* Dane S. Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors' Moral Rights*, 69 TUL. L. REV. 935, 946-47 (1995).

5. *See* Hansmann & Santilli, *supra* note 2, at 95. *See also* Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 478 (1990) (noting that there has been some debate in this country that moral rights are already protected through other legal doctrines); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L. J. 455, 496-98 (proposing that because moral rights are inalienable, they are at odds with traditional Anglo-American notions of copyright protection).

6. *See* Jimmy A. Frazier, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L .REV. 313, 315 (1995).

moral rights in the United States, particularly among advocates who propose amending the existing laws to expand the legal protection and interests of authors and artists.[7]

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7. *See* Karen M. Corr, *Protection of Art Work Through Artists' Rights: An Analysis of State Law and Proposal for Change*, 38 AM. U. L. REV. 855, 856 (1989). *See also* Edward Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 946-47 (1990) (citing recent legislative activity in the United States directed toward addressing moral rights issues). Jaszi, *supra* note 5, at 496 (opining that by adopting these rights the United States would provide a solution to a number of legal and cultural dilemmas in copyright). *See generally* Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law — A Proposal*, 24 S. CAL. L. REV. 375 (1951) (proposing that the concept of moral rights should be incorporated into American law).

The moral rights doctrine has been inching its way into U.S. law for some time. The United States Congress enacted the Visual Artists Rights Act of 1990, embracing for the first time, and against its previous decisions, some form of moral right protection. *See* Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C.). The statute defines and limits a work of visual art to paintings, drawings, prints or sculptures. *See* 17 U.S.C.A. § 101 (West Supp. 1999). They must exist in a single copy, or in a limited edition of two hundred copies or fewer that are signed and consecutively numbered by the author, or in the case of a sculpture, in multiple cast, carved or fabricated sculptures of two hundred or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author. *See id. See also* Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPYRIGHT SOC'Y U.S.A. 109, 109-10 n.2 (1989) (noting numerous academic commentaries proposing reformtion of the Copyright Act).

Before 1990, there existed the 1988 National Film Preservation Act (NFPA). *See* Pub. L. No. 100-446, 102 Stat. 1782 (repealed 1992). The 1992 NFPA replaced the original 1988 version. *See* Copyright Amendments Act of 1992, Pub. L. No. 102-307, § 214, 106 Stat. 264 (current version at 2 U.S.C.A. § 179(l)-(w) (West Supp. 1999)). This was the first time the United States government passed legislation entailing moral rights in its history and this significant legislative enactment embraced concerns for artists' reputation and personality, bringing to mind policy considerations about the personality of the artists much like those found in the French moral rights. This Act specifically responded to artists' concerns about the coloration of famous black and white films. Among other things, it sought the protection of the reputation of the film makers by safeguarding the color integrity of their films. Prior to the act, a film maker could prevent colorization of his film only if he owned the copyright. If he had transferred his copyright interest, he retained no control over the film. Generally, the original filmmaker was not the copyright owner; his film was owned by the company that financed the film or perhaps by the producer. The U.S. Copyright Office took the position that colorized versions of films were derivative works and copyrightable themselves. If a filmmaker did not own the copyright or if the film had fallen into public domain, anyone could colorize it without their permission. The NFPA was created to protect film makers and directors against colorization of their films without their consent even when their films had fallen into public domain. *See* Elise K. Bader, *A Film of a Different Color: Copyright and the Colorization of Black and White Films*, 5 CARDOZO ARTS & ENT. L.J. 497, 499 (1986); Jon A. Baumgarten & Sally Hertzmark, *Color-Converted Motion Pictures are Registerable Derivative Works*, NAT'L L.J., JULY 27, 1987, at 28; Anne Marie Cook, Note, *The Colorization of Black and White Films: An Example of the Lack of Substantive Protection for Art in the United States*, 63 NOTRE DAME L. REV. 309, 325 (1988).

France also distinguishes itself as the country from where the individual rights that constitute the doctrine of moral rights had their legal

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These exceptions to the existing copyright law were born out of philosophical considerations about justice and morality toward film makers in much the same way that nineteenth-century French courts began to succumb to arguments about protecting the honor of authorship and artistry. The Act expired in 1991 but was shortly thereafter revised. The new version preserves a limited number of films each year arguably without responding to the substantive issues surrounding the controversies about reputation that initially prompted the original act.

In addition to recent federal legislation, individual U.S. states have also considered the possible role this doctrine might have in U.S. law. *See* Ginsburg, *supra* note 5, at 489-90. Some states have adopted moral rights by expressly granting them in some form. *See, e.g.*, CAL. CIV. CODE §§ 980-990 (West 1982 & Supp. 1999); CONN. GEN. STAT. ANN. § 42-116s to -116t (West 1992); LA. REV. STAT ANN. § 51:2151-:2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (West 1988); MASS. GEN. LAWS ANN. ch. 231, § 85s (West Supp. 1999); NEV. REV. STAT. ANN. § 597.720-.760 (Michie 1994); N.J. STAT. ANN. § 2A:24A-1 to -8 (West 1987); N.M. STAT. ANN. §13-4B-1 to -3 (Michie 1997); N.Y. ARTS & CULT. AFF. LAW §§ 11.01-14.03 (McKinney 1984 & Supp. 1999); PA. STAT. ANN. tit. 73, §§2101-2130 (West 1993); R.I. GEN. LAWS §5-62-2 to -6 (1995). *See also* Corr, *supra*, at 856-57 (noting that some states' laws have been more receptive to moral rights than federal law).

Key aspects of the doctrine are also embraced by article 6bis of the Berne Convention. *See* Berne Convention for the Protection of Literary and Artistic Property, Sept. 9, 1886, 828 U.N.T.S. 221 (last revised July 24, 1971) [hereinafter Berne Convention], to which the United States became a signatory for the first time in 1988. On October 31, 1988, President Ronald Reagan signed into law the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.). *See* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINE 935 (David L.Shapiro et al. eds., 3d ed. 1990).

In 1989, the Berne Implementation Act of 1988 went into effect. *See id.* at 935. One of the most considerable controversies resulting from the United States' adherence to the Berne Convention has centered around the question of whether the United States already complies with article 6bis of the Convention which requires some moral right protection. *See* Anne Moebes, *Negotiating International Copyright Protection: The United States and European Community Positions*, 14 LOY. L.A. INT'L & COMP. L.J. 301, 316-17 (1992). "[T]he author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." Berne Convention, art. 6bis. It has been argued that the United States complies with this requirement through the various state statutes, as well as several common law principles and unfair competition laws. *See* Damich, *supra*, at 945; Ludolph & Merenstein, *supra* note 2, at 203; Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 §§ 2(3), 3(b), 102 Stat. 2853, 2853-2854; S. REP. NO. 100-352, at 38-39 (1989). In spite of its origin in France, the doctrine is without question becoming part of American law.

origins,[8] although the underlying philosophical construction of the author's relationship that attends the individual rights is said to have evolved out of the writings of Germany's Immanuel Kant and Georg Hegel.[9] The doctrine is more an assembly of four separate rights which are encompassed by it, than it is a uniform doctrine.[10] Consequently, four rights contained therein have separate and independent histories from that of the doctrine itself.[11] The rights evolved from a societal concern about individual author's and artist's personality and reputation investments as they are exhibited through their creative work.[12] The individual rights can be traced back to their judicial beginnings through an examination of judicial opinions in nineteenth century French courts; however, the nomenclature used to identify the doctrine today does not have the same history. The doctrine of moral rights was first coined in an 1872 legislative journal,[13] but its first legal adoption in French law was not official until 1992.[14] This ratification was well over a century after the first judicial appearance of the first moral right and more than a quarter century after the French legislature officially recognized them individually, although not by that title, in a 1957 legislative amendment.[15]

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8. *See* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1026 (1976). *See also* Adolf Dietz, *ALAI Congress: Antwerp 1993 The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 201 (1995) (citing France as the "mother country" of moral rights); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968) (stating that the moral right has evolved gradually out of French court decisions "since the middle of the last century").

9. *See* Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 370-71 (1998). *See also* Ciolino, *supra* note 4, at 939 (noting that when French moral rights were finally codified into law in 1957, it was Hegel's dualist theory that was adopted, which provided authors with two distinct rights: personal and economic).

10. *See* Ciolino, *supra* note 4, at 940.

11. *See* Sarraute, *supra* note 8, at 467-83.

12. Moral rights are completely separate from the economic rights of the author or artists, and moral rights are personal to the artist. *See* Frazier, *supra* note 6, at 315.

13. *See* ANDRÉ BERTRAND, LE DROIT D'AUTEUR ET LES DROITS VOISINS 219 (1991), which states "[i]l n'apparut d'une manière structurée et sous son appellation de droit moral qu'en 1872 sous la plume d'André Morillot (Rev. crit. Lég. 1872, 29, Cf. § 1.14) avant de faire lentement son chemin dans la doctrine et la jurisprudence." (it did not appear in a structured manner under its title moral right until 1872 under the pen of André Morillot before slowly making its way into doctrine and jurisprudence) (translation by author).

14. *See* Dietz, *supra* note 8, at 201. Before the 1992 codification, the "term of droit moral . . . was not to be found in the French Copyright Act of 1957, either as a sub-title or in the very content of Article 6 of that law (now Article L. 121-1 of the Code)." *Id.* (footnote omitted).

15. *See* BERTRAND, *supra* note 13, at 220.

> But, finally, it is by article 6 of the Law of March 11, 1957 that the concept of moral right took its place in French legislation. According to that article: The author enjoys the right to respect of his name and of the quality of his work.

The four separate and independent rights as previously mentioned are (1) the French *droit de divulgation*, which is the right of the author to decide whether or not the work is to be published; (2) the *droit de retrait (ou de repentir)*, which is the author's right to withdraw the work from publication or to modify it even after it has been made public;[16] (3) the *droit a la paternite*, or the right of the author to have his name always associated with the work and to be acknowledged as its creator, as well as to disclaim authorship of works falsely attributed to him; and (4) the *droit a l'integrite*, which provides the author with the right to protect the author's work from alteration, mutilation, and excessive criticism without permission.[17]

The goal of this article is to go a step further than anyone has dared to go in the effort to trace the judicial origins of French moral rights by looking at the earliest French cases where the individual rights themselves were articulated or cases where the underlying policy of protecting more than economic rights of authors was advanced. This analysis begins by describing the French history that gave rise to France's first and modern intellectual property law, which was enacted during the eighteenth century French Revolution. It is important to note that the Revolutionary government that enacted the first law was politically motivated to reject all symbols of the centralized power and absolute control that the French monarchy had previously exercised over authors and artists. A polemic about authorship had already emerged, characterized by a tension between those who supported the traditional notions of governmental control over works of the mind and a burgeoning new and revolutionary notion about the individuality of creativity. The third part looks at some actual case reports recorded in the *Recueil Dalloz*,[18] in which some of the rights that were to become moral rights were insinuated. The fourth part focuses on the nineteenth century as a transitory period when this tension between traditional and revolutionary notions was nourished by a threat to authors' rights inherent in the changing political forms of government in France along with the possible role that prominent intellectuals and politicians played in lobbying for protection of authors' rights.

> This right is attached to his person. It is perpetual, inalienable and imprescriptible. At death it is transmitted to his heirs, and cannot not be conferred upon a third party by testamentary disposition.

Id. (translation by author).

16. This is the only right included in the doctrine that did not appear in a judicial opinion before the rights were codified. *See* Sarraute, *supra* note 8, at 476.

17. Article 6 of the Law of March 11, 1957. *See also* Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 1, 3 (1980).

18. The *Recueil Dalloz-Sirey* is the French equivalent of West Reports. *See* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1357 (1995).

II. FRANCE'S MODERN INTELLECTUAL PROPERTY LAW

Prior to the Revolution of 1789, it was the monarch who defined artistic and literary culture. The monarch had become the central figure of national identity, and as God's earthly representative, all creativity was ultimately referred back to Him.[19] The French monarchy not only defined cultural property, but the king also regulated art and culture long before the establishment of what is today intellectual property protection.[20] Prior to the French Revolution, French authors obtained a protected legal status over their works by receiving recognition of their authorship by grant of a "literary privilege" from the king. In 1777, the king issued a royal decree in favor of authors,[21] making it possible for authors to have an official privilege in their works, which until then had been a right exclusive to the booksellers and publishers.[22] The king granted these privileges selectively and generally to the author and the author's heirs for a particular work,[23] only limiting the author's privilege if the author conveyed the property to another party.[24]

France's modern law governing intellectual property, which developed during the French Revolution, ended the centralized power the king had acquired under the ancien regime.[25] During the Revolution, revolutionaries advocated the destruction of all symbols of the ancien regime, including cultural and artistic property which was not yet viewed as part of the

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19. *See* Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, *in* LAW AND THE ORDER OF CULTURE 109, 111 (Robert Post ed., 1991).

20. *See* RÉGIS MICHAUD & A. MARINONI, FRANCE: TABLEAU DE CIVILIZATION FRANÇAISE 83 (1928). Perhaps the most noteworthy example was the establishment of the French Academy by Louis XIII's minister Richelieu in Academy 1635, which marked the official regulation of the French language. *See id.*

21. The early intellectual property claims of publishers and booksellers to literary property were based on principles of ownership, not authorship, a theoretical difference not discussed in this Article.

22. The monarch in France, as well as in other European countries, had granted royal privileges to publishers, booksellers and authors from as far back as the fifteenth century. They were paid-for favors, of varying lengths of time, and often attached to the person and would apply to *any* work that the person would be the first to publish during that time instead of applying to a particular work. *See* ELIZABETH ARMSTRONG, BEFORE COPYRIGHT THE FRENCH BOOK-PRIVILEGE SYSTEM 1498 - 1526, at 118-19 (1990).

23. *See* CA Paris, 4e ch., March 29, 1878, S. Jur. II, 1878, 145.

24. *See* Cour de cassation, Cass. crim., May 28, 1875, D.P. I, 1875, 329, 329-30.

25. *See* Swack, *supra* note 9, at 370.

personality of the author.[26] However, a new national cultural policy erupted in order to stop the destruction of great works of art. This movement was initiated to preserve and protect artistic works for their value as part of the national heritage.[27] This new policy urged "a focus on the creator of art rather than on the patron, . . . bring[ing] the individual to the forefront and . . . present[ing] works of art as examples of the free spirit."[28]

The first French copyright law was enacted in 1793 and was likely modeled after England's Statute of Anne[29] and the Copyright Act of May 1790,[30] which was America's first copyright act. [31] The 1793 Decree establishing intellectual property law was the signpost to the modern history of intellectual property in France because upon its enactment, for the first time in France, literary rights were set by the democratic process.[32] The 1793 Decree marked the revolutionary rupture with the past tradition of the king's regulation of literary rights. The decree also anticipated the modern separation of the arts from cultural standards traditionally imposed by the state. As the monarchy ebbed, the classical notions that the validity of art was determined by its compliance with rigid rules governing form and content vanished.[33] Art was free to be individualized, while subjectivity began to reign over the former objective model.[34] Innovative forms of art would evolve that no longer bowed to a superior authority.

Various theories regarding the role that the new Revolutionary government should take to protect intellectual property were debated prior to the passage of the 1793 legislation.[35] This was an era in French history

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26. The response to the destruction of artistic and cultural artifacts was reminiscent of the ancien regime which had been the most centralized government in Europe. *See* Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1152-54 (1990).

27. *See id.* at 1151-52.

28. *Id.* at 1155.

29. Statute of Anne, 1710, 8 Anne, ch. 19.

30. Act of May 31, 1790, ch. 15, 1 Stat. 124.

31. *See* BERTRAND, *supra* note 13, at 24-25.

32. *See generally* ARMSTRONG, *supra* note 22 (discussing the book-privilege system in Europe and in France and detailing the scope of this system).

33. *See* ALBERT L. GUERARD, ART FOR ART'S SAKE 161 (1936).

34. Two of several important literary and artistic movements that influenced the direction of nineteenth-century art were Romanticism and a movement called Art for Art's Sake, both of which launched a refusal by artists to conform, manifested by the acknowledgment of no authority but the inspiration of the artist himself. *See id.* at 34-54. The Romantics, for example, were said to despise commissioned art and were suspicious of all authority external to themselves, a trend accentuated in the movement of *l'Art pour l'Art* (Art for Art's Sake). *See* N. H. CLEMENT, ROMANTICISM IN FRANCE 174 (Revolving Fund Series No. 9, 1939).

35. The model for the first law came from the school of thought that the role of government was to furnish a means by which to maximize the social utility of the creative process by legislating incentives for individual contributions to the social welfare. It had also

when the prevailing attitude about enlightenment was "that the essential quality of the Republic reposed in the genius of the individual citizens" through scientific and artistic achievements, and not in the sovereign.[36] As a consequence of the Revolution, there was the strong desire that artists' rights no longer be determined by the king.[37]

Early rights of authorship in France were dominated by the concern for economic protection,[38] and the forefather of the early French copyright legislation, the Marquis de Condorcet,[39] argued strongly against the privatization of intellectual property.[40] Instead, de Condorcet favored a

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been argued that a pre-existent right of property imbued in the author or creator by natural law and that positive law was the government's way to limit these rights in the interest of the public good, which was to make the products of intellectual activity available to the public after a specified time.

Others believed there were no pre-existent rights and that absent a specific statutory grant, no rights existed at all. Those who adopted this latter position were inclined to argue for a very strict interpretation of the 1793 Decree during the nineteenth century as they believed that the court's role was to rely on nothing more and nothing less than the language of the legislative decrees, consulting when necessary, historical records for legislative intent.

Proponents of the natural law theory argued that principles of ownership and possession were a natural limit to the scope of intellectual property rights for authors and artists so that those who had absolute dominion over intellectual property had the rights to do with it what they wished, whether or not they were authors or artists. *See generally* Hesse, *supra* note 19 (discussing natural law theory and the evolution of the legal identity of the author). This was certainly the prevailing position in the early case law. *See* Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851.

36. Sax, *supra* note 26, at 1156.

37. *See* Ciolino, *supra* note 4, at 938-39.

38. *See* Christine L. Chinni, *Droit D'Auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention*, 14 W. NEW ENG. L. REV. 145, 149-50 (1992). See also Cour de cassation, Jan. 10, 1826, D.P. I, 1826, 255, and CA Paris, 1re ch., June 18, 1840, D.P. II, 1840, 254, for examples of nineteenth-century cases that stood for the proposition that the 1793 Decree had as its exclusive goal to grant authors the right to sell, distribute, and convey all or part of their intellectual property.

39. *See* Hesse, *supra* note 19, at 115-30 (discussing Condorcet's role in the development of French copyright law).

40. *See id.* Denis Diderot was commissioned to write an argument favoring authors' claims to intellectual property on behalf of the Paris Publishers' and Printers' Guild whose chief, Le Breton, was responsible for Diderot's release after the latter was imprisoned because of his radical and unorthodox views. *See* THE AGE OF ENLIGHTENMENT 206-10 (Otis E. Fellows & Norman L. Torrey eds., 1942); Hesse, *supra* note 19, at 114.

Much like the English Stationers' Company had argued in the landmark English case of *Donaldson v. Becket*, 1 Eng. Rep. 837 (P.C. 1774). Diderot argued for greater authors' rights, believing it would serve the self interest of the publishers and enable them, as assignees, to argue for more rights. *See* Hesse, *supra* note 19, at 114. Just as the Stationers' Company lost its fight in *Donaldson*, Diderot's philosophies that ideas, coming directly from the individual mind, were inherently subjective and the most inviolable form of personal property did not seem to have influenced the 1793 Decree or its early interpretations. *See id.* at 114-15. *See also* Mark Rose, *The Author as Proprietor:* Donaldson v. Becket *and the*

governmental policy which provided an economic means to maximize the social utility of the creative process, thus, legislating the incentives for individual contributions to the general social welfare.[41] A revolutionary French lawmaker and politician, de Condorcet, through his proposals, shaped the first French law emulating the prevailing political philosophies articulated by American lawmakers[42] who also sought to strike a balance between private interests and the concern for the public good.[43] The philosophical and theoretical debates that can be observed in nineteenth century court decisions were a tension between these ideas and growing debates about authorship that preceded the passage of the 1793 Decree.[44] In 1799, the French Minister of Justice set the tone for the nineteenth century public debate when he addressed French magistrates regarding literary property and implored upon them to prosecute vigorously infringements upon the rights of authors.[45] He pleaded for judicial sensitivity toward authorship in the following address:

> The government, responsible for executing the law, is informed that literary properties are openly violated, that there exist associations of men without prudence, who seize the best works and take from their owners the fruit of their eves, of their travels, of the dangers they have braved, and the investments they spent on enterprises worthy of national recognition . . . . The Minister of Interior, who invites me to deal with this subject, assures me that several officers of their judicial police . . . be it by lack of care, be it by a false interpretation of the law, refused to lend their ministry to the claim of authors . . . . Literary property, should they be considered less sacred than other properties in the eyes of the republican magistrate? . . . It is to the intellectuals, to the dramatic authors, to all of the people of letters that we owe principally the uncontested superiority of the French language over all the languages of Europe. It is they

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Genealogy of Modern Authorship, 23 REPRESENTATIONS 51 (1988) (providing a detailed analysis of *Donaldson v. Becket*).

41. *See* Hesse, supra note 19, at 115-30.

42. *See generally* FRANCK ALENGRY, CONDORCET: GUIDE DE LA REVOLUTION FRANÇAISE, THEORICIEN DU DROIT CONSTITUTIONNEL ET PRECURSEUR DE LA SCIENCE SOCIALE (1903).

43. *See* W.T. SHERWIN, MEMOIRS OF THE LIFE OF THOMAS PAINE 87 (1819). American Thomas Paine, himself, refused a copyright in his own work *The Common Sense* so that the book would belong immediately to the public or be in the public domain.

44. *See generally* Hesse, *supra* note 19 (discussing these philosophical and theoretical debates). *See also* Rose, *supra* note 40, at 52-53 (tracing cases prior to *Donaldson* that had addressed commercial and legal struggles between various booksellers).

45. *See* 2 REV. INT'L DE DROIT D'AUTEUR 98-99 (1954) (citing LAMBRECHTS, LE DROIT D'AUTEUR SOUS LA PREMIER REPUBLIQUE FRANÇAISE).

> who render all nations tributaries of our art, of our tastes, of our genius, of our glory; it is by them that the principles and the rules of a wise and generous liberty penetrate beyond our borders and our sphere of activity. The government solemnly promises that it will grant the most constant protection to the properties of works of the mind . . . .[46]

Moral rights did not seem to have been in the destiny of French intellectual property law, but instead the rights resulted from practical encounters in the courts. Although the development of the rights that came to be known as moral rights occurred without fanfare, their appearance in French law does seem to be related to important inquiries about the meaning of the law raised time and again in the French courts, and it seems no understatement that there was absolutely no consensus about the exact scope[47] and meaning of the legal concept of intellectual property in the nineteenth century.[48] With nothing to guide them except the text of the 1793 Decree itself, the courts heard many versions of the underlying policies regarding the meaning of intellectual property law. The diversity of opinions about the law informed their efforts to define the rights entailed therein. Consequently, the scope of the law was interpreted, defined, and even continuously refined because of the repeated debates about what intellectual property law was supposed to accomplish and for whom it was aimed. During its evolution, the law took on new meaning, including a protection for non-economic interests of authors and artists. As reflected in the debates, there was a philosophical tug between varying theories about intellectual property in general and, in particular, about what actual rights were to be construed from the 1793 statutory decree. The debate occurred concurrently with a growing recognition of the cultural role of authors.[49] This growing adoration of creative genius impelled the judiciary to fashion principles of moral justice as an important tenet of the law of authors' rights.[50] The proclivity toward protecting more than the economic interests of authors was not born out of rigid legal considerations but from social concerns about ethics and justice. As these concerns grew, the law expanded in favor of augmenting the rights and interests of authors. The debate about literary property profoundly influenced nineteenth century jurisprudence, not by producing definitive resolutions for the conflicting categories and

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46. *Id.*

47. The courts recognized the need for judges to give meaning to the law with regard to scope (what types of works it covered) and coverage (to what extent the works were covered). *See* Cour de cassation, Cass. crim., May 16, 1862, S. Jur. I, 1862, 999.

48. *See* Cour de cassation, Cass. crim., Nov. 28, 1862, S. Jur. I, 1862, 41, 43.

49. *See* Sax, *supra* note 26, at 1152-54.

50. *See* Ciolino, *supra* note 4, at 939.

philosophical questions regarding intellectual property, but by facilitating an open discussion encompassing a very broad range of ideas and considerations about what the law should be.

III. NINETEENTH CENTURY JUDICIAL OPINIONS ON THE RIGHTS OF AUTHORS WERE EXPANDED BEYOND THE 1793 DECREE AND MORAL RIGHTS WERE INSINUATED

A. *The Method and Madness of French Case Reports*

Tracing French moral rights back to their judicial roots does present several noteworthy research and analytical challenges. First, French judicial decisions are difficult to trace and assess as they are not reported in the same detail, manner or custom as the common law system in the United States.[51] Second, the same nineteenth century French courts to which the origin of the moral rights is attributed were not empowered, theoretically at least, to amend the existing law or create new law.[52] Consequently, judicial opinions did not make explicit pronouncements in favor of changing the law, but only made interpretative analyses as the role of the French judge was expressly restricted to interpreting the Code and applying its rules,[53] which were themselves presumed to be endowed by universal principles constructed on universal values and believed to be applicable to private disputes.[54] However, there was often the need to amend the existing legislation to cover what had not been anticipated,[55] and it is arguable that in the interim French

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51. *See* RENÉ DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY 188 (Michael Kindred trans., Louisiana State Univ. Press 1972) (1960).

52. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 59 (1969). *See also* Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage Over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 94-95 (1998). "[T]he legislator is considered the exclusive law-giver in the civil law tradition." *Id.* at 97.

53. "The French civil law system is premised on a supposedly all-encompassing and all-generating legal code. French judicial opinions merely apply the Code . . . ." Lasser, *supra* note 18, at 1327.

54. *See* Cappalli, *supra* note 52, at 95. There were many different issues regarding intellectual property that were in dispute in nineteenth century French courts, but the existing legislation and Civil Code were too broad to provide specific rules to resolve some of them. "Codes . . . are based upon general and incomplete constructs of reality and must necessarily be comprised of high level abstractions . . . . [L]arge spaces exist in the civil law system between relevant statements of law and the specific facts of actual human encounters." *Id.* at 102. See also Mitchell de S.-O.-l'E. Lasser's discussion, which notes that "[i]mplicit in this official portrait is a definition of the role of the civil judge: He mechanically (and unproblematically) fits fact situations into the matrix of the Code. Thus, 'the Code is supposed to have *already* judged' . . . ." Lasser, *supra* note 18, at 1327 (emphasis added).

55. There were several legislative amendments during the nineteenth century although none of them included the moral rights. *See generally* BERTRAND, *supra* note 13.

judges simply created normative rules when the facts of a case fell within a legislative gap.[56] Therefore, it also seems important to examine some of the social norms of the period by looking at cases that expressed a strong policy toward authorship and protecting authors in ways that were not addressed by existing laws. It is also instructive to examine the prevailing philosophies regarding authorship during the nineteenth century to understand the significance of the socio-political influences on the judiciary[57] and to explore the beliefs about authorship that occurred in France as a result of the dynamic ideological revolution in the latter part of the eighteenth century and how the intellectuals of the period reacted to the limitations of the existing law. No American academic studies concerning the French doctrine of moral rights examine the origins of moral rights by analyzing actual French cases[58] or by way of looking at some of the nineteenth century cultural context that may have given rise to it as a major feature of French intellectual property law today.

The first judicial ruling espousing a moral right policy occurred in 1828 when a Paris court announced the *droit de divulgation*.[59] However, the underlying philosophy of moral rights to protect the personality and reputation of the author and artist is said to occur most noticeably in French judicial opinions in the latter part of the nineteenth century.[60] These individual rights took well over a century before they were officially incorporated into French law,[61] and today in France they are inalienable, unassignable, and perpetual, lasting even after the death of the author or artist.[62] The particular cases and events that mark their beginning remain a somewhat illusive part of nineteenth century French judicial history, and surprisingly from a U.S. perspective, they were not ushered into French law by any landmark judicial decisions. In fact, no nineteenth century legislative

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56. *See* Lasser, *supra* note 18, at 1354.

57. *See id.* at 1327.

58. The one possible exception is the 1998 article by Cheryl Swack. *See* Swack, *supra* note 9, at 374-79. Unlike Ms. Swack, this author has found cases that occurred earlier than those cited by Ms. Swack and therefore disagrees with assertions in that article about exactly when the rights of disclosure, attribution, and integrity occurred in French judicial history. This Article traces the actual earliest cases standing for the policy of those rights. *See also* BERTRAND, *supra* note 13, at 219 (indicating that the right of disclosure appears from 1828, and not as late as 1895, and that the right of integrity can be traced to an 1845 decision in contrast to the assertion that it occurred first in the twentieth century).

59. *See* BERTRAND, *supra* note 13, at 219 (indicating that a 1828 Cour de Paris case announced the *droit de divulgation.* Unlike Bertrand, this article cites an earlier case from 1826, which this author argues as the announcement of *droit de divulgation.*

60. *See id.*

61. *See id.* at 218-19.

62. *See* DaSilva, *supra* note 17, at 3-5.

declarations or decrees introduced moral rights into law either.[63] It is even surprising that moral rights insinuated themselves into French law at all because they simply were not a logical extension of the existing French law which had no underlying policies or principles advancing them.[64] France's legislation on intellectual property seemed antithetical to what had become the moral rights, as the legislation was designed to protect economic interests, promote the public good, and at the same time made neither absolute nor automatic, the basic legal rights of authorship that it announced.[65]

Some French court reports memorialized the ideological tensions about intellectual property as they were debated during the nineteenth century and thereby gave some indication and insight as to how the various private conflicts over intellectual property were litigated and resolved. The courts took great liberty in their philosophical application of the law to these conflicts, and they appeared to have been responsive to authors' and artists' rights, mirroring the same concerns reflected in nineteenth century French society.[66] The texts that record the judicial decisions are useful in order to extrapolate some of the reasons for how and why the French judiciary resolved intellectual property disputes, sometimes seeming to expand the scope of the law. Many of the issues at the center of the nineteenth century philosophical debate about authorship were argued by the litigants, scholars, and artists themselves or their heirs.[67] The particular facts of the cases do not always seem relevant to the policies that developed toward the moral rights, but the allegations supporting the complaints, the defenses, and the rationale for the courts' rulings all provide valuable information about the legal transformation.

In the text of the court decisions, the arguments of both parties were repeated, preserving the essence of the ideological debate espoused by the

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63. Although the legislature had the exclusive role to make law in the French civil system, none of the several nineteenth century legislative amendments to France's original intellectual property law addressed any of the moral rights. *See* BERTRAND, *supra* note 13, at 21.

64. *See generally* Hesse, *supra* note 19 (discussing the French law from which moral rights developed).

65. *See generally id.*

66. The French judiciary allows the introduction of socio-political theories, which in turn guide French judges in exercising their role of interpreting the law. *See* Lasser, *supra* note 18, at 1354.

67. "The teacher-scholar is the real protagonist of the civil law tradition. The civil law is a law of professors." MERRYMAN, *supra* note 52, at 59-60. Legal scholars are consistently cited in nineteenth century French judicial texts. Although they are often quoted in the body of the decision, they generally are cited in the footnotes of opinions as either proponents or opponents of a particular policy or view about the issue before the court. The judicial text then cites the scholar's treatise for further reference. Some of the most often cited nineteenth century scholars were Misters Merlin, Gastambide, and Renouard.

scholars.[68] French case reports did not typically report the salient facts of the cases, and they generally did not contain a complete factual record as is practiced in the common law system.[69] Retracing the judicial origins of the moral rights in the French civil system is therefore a difficult task because the judges re-characterized the specific case facts into general principles to make the decisions fit into the broader principles found in the Code.[70] The requirement that judges write their decisions was a product of the French Revolution,[71] but judicial decisions were written anonymously and resulted from secret deliberations.[72] Although nineteenth century judicial opinions were likely concise, they were also part of a tradition of writing opinions in a highly technical manner.[73] They typically contained only part of the actual decision, often making them difficult to read.[74]

It is noteworthy that a vastly different policy about the law could even develop in the courts. It does not appear that there was a conscious effort to change the original policies. On the contrary, the courts were neither policymakers nor entrusted with the power to make law.[75] However, while they attempted to convey (sometimes very rigidly and narrowly while at other times responding to the romantic philosophy of creative genius) the meaning of the 1793 Decree, the law on intellectual property became what it was not originally intended to be, that is, a vehicle to sanction the relationship between the artist and his creation.[76] Consequently, the courts, apparently vulnerable to the persuasive forces of contemporary intellectuals,

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68. From a review of numerous nineteenth century French judicial decisions in both the Supreme Court of Cassation and by appellate and trial courts, Professors Jane Ginsburg and Pierre Sirinelli accurately describe how the Supreme Court makes its decisions in general:

> Cour de cassation decisions, including the most important, rarely exceed one or two pages in length. A decision of reversal will cite the legal texts that the lower court will be held either to have misapplied or to have violated. Next, it will state the principle for which these texts stand or the rules that the texts enunciate. It will then — usually in a single paragraph — set forth the facts and the lower court's reasoning in a manner demonstrating the error of the decision below. The key to understanding the decision is generally the Court's statement of the meaning of the cited texts. The Court is not quoting the rule verbatim but is paraphrasing it, often in a way that tends to reshape it.

Jane C. Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy*, 15 COLUM.-VLA J.L. & ARTS 135, 142 (1991).

69. *See* Cappalli, *supra* note 52, at 103.

70. *See id.* at 104.

71. *See* DAVID, *supra* note 51, at 45.

72. *See id.* at 55.

73. *See id.* at 45.

74. *See id.* at 45-46.

75. *See* MERRYMAN, *supra* note 52, at 59.

76. *See* Hesse, *supra* note 19, at 125-31.

established new policies for the direction of the law.

B. *Nineteenth Century French Cases Regarding Intellectual Property*

1. *Property or Privilege Before 1793?*

On August 4, 1789, just short of one month after the fall of the Bastille, the same revolutionary legislature that later passed the 1793 Decree enacted a resolution to abolish all of the privileges of the Old Regime.[77] The legislature apparently did not consider the implications to the property interests of authors because it made no comment about whether the "literary privileges" previously established by the king were also abrogated,[78] and it enacted no new statutory provisions to supplant the grant of literary privileges. The absence of a statutory provision governing intellectual property between 1789 and 1793 raised the question of the origins of the rights to intellectual property.[79] In Year Two of the French Revolution,[80] the Supreme Court of France[81] reviewed this very issue in *Veuve Buffon C. Behmer*,[82] in which one of the first post-Revolution judiciary tasks was to address the ideological question about the underlying nature of literary

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77. *See* Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851. *See also* BERTRAND, *supra* note 13, at 26.

78. In the decision of Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851, the plaintiff argued that the legislators only intended to abolish feudal privileges and not rights to literary property and that the two had nothing in common. There was no explicit indication about what the 1789 legislature had in mind regarding literary privileges except that the deputies of the Third Estate responsible for passing this anti-privilege were rejecting the former powers of the king. However, it is also noted that the reformers rigorously defended private property rights. *See* PIERRE MIQUEL, HISTOIRE DE LA FRANCE 265 (1976).

79. *See* Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851.

80. The French Revolution that began in 1789 and lasted a whole decade resulted not only in a change in the form of government, but it also had as its goal the alteration of French society by destroying and erasing all the influences of and symbols related to the old traditions. *See* Sax, *supra* note 26, at 1152-54. *See also generally* ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE REVOLUTION (John Bonner trans., Harper & Brothers 1856) (describing the French Revolution). Another way the revolutionary French government sought to distance itself from its past was to establish a new calendar erasing from society all references to and celebrations of the Catholic Church. Until the practice ceased under Napoleon Bonaparte, the French began to renumber each year beginning with Year One in 1793.

81. The French Cour de cassation was originally a nonjudicial body created to assist lower courts in their interpretations of statutes. Instituted in Paris, it became the highest court of the "ordinary" court system to assist the lower courts with the interpretation and application of the Napoleonic Code, but it did not have the power to make law. *See* MERRYMAN, *supra* note 52, at 93 (discussing the division of jurisdiction in the civil law system). As a result of the Code, French law was codified for the first time. Before the Revolution, there were many independent jurisdictions throughout France, each of which applied customary law.

82. Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851.

property and the law that attended to it. The factual conflicts raising the issue were immediate because the 1789 legislature, as part of its revolutionary rupture with the ancien regime, abolished all royal privileges.[83]

In *Veuve Buffon*, the heir to a literary work sued a bookseller who had sold counterfeited copies of her husband's work.[84] The latter died prior to 1793, and so the question was whether or not his widow was intended to be covered by the 1793 Decree.[85] The importance of the notion of "property" in the concept of intellectual property was debated and contrasted to traditional notions of property.[86] Analogizing the rights contained in the 1793 Decree to the royal privileges that were part of the rejected institutions of favoritism of the pre-Revolutionary regime of royal privileges, the court found that because literary property was merely a privilege before 1793, it was still by definition nothing more, except now was granted by the 1793 Decree.[87] This question of whether literary property was another form of the traditional notions of property or a privilege of a different legal nature, was often at issue.[88] As late in the century as 1876, a debate in the Cour de Paris attempted to qualify the property rights of authors by stating that they differ from common property in principle and character. Common property was immediate, perfect, complete, absolute, and derived from natural law, whereas intellectual property was born out of "civilized" society's need for and interest in encouraging, honoring, and compensating the works of intelligence and art.[89] Literary property, it was stated, was a creation of the positive law and was solely a function of legislative enactment.[90]

The *Veuve Buffon* decision illustrates that common property rights were considered to be greater rights than intellectual property rights; and by the court's decision, the traditional right of property ownership triumphed over

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83. *See id.* at 852.

84. *See id.*

85. *See id.*

86. *See id.*

87. The *Veuve Buffon* case also states:

> Or, un droit circonscrit pour le temps et les lieux, ne saurait être un droit de propriété, car la propriété est un droit absolu; le titre en est perpétuel: l'exercice en est partout respecté . . . . Ce qu'on appelle propriété littéraire, n'est donc qu'une faveur particulière, une exception au droit commun, une limitation apposée, au profit d'un auteur, sur les facultés industrielles des imprimeurs et des libraires.

Id.

88. *See* CA Paris, 1re ch., May 19, 1876, D.P. III, 1876, 230. In this case, the issue was whether legislative amendments in 1854 and 1866, which prolonged the duration of intellectual property rights extended to assignees, applied to people who inherited literary property before these amendments were enacted. As late in the century as 1876, courts still entertained various debates about the question of what constituted intellectual property.

89. *See id.*

90. *See id.*

literary property rights as the lower court actually ruled in favor of the defendant bookseller who admittedly sold pirated copies of the work in question.[91] The favorable ruling was based on the defendant's ownership of the copies as he obtained them legally outside the jurisdiction of the French law, and, as the court recognized, through his own labor and ingenuity.[92] The defendant bookseller acquired the pirated copies prior to the annexation of his country to France. He was arrested and jailed, and all his property, including the pirated copies, was confiscated but returned to him in France where he resumed his business. The lower court opined that because he obtained and sold the copies when he lived in a foreign country, he was not bound by the laws of France. Consequently, these pirated copies constituted his property which the courts refused to deny him. Presumably, any time a work by a French author crossed the national borders, it automatically fell into this domain of free access with impunity.[93]

The lower court opinions supported the notion that literary property was a privilege, or minimally, a right of lesser importance than common property rights. On reversal, the Supreme Court of France articulated a policy very close to a theory of natural rights.[94] It held that the decree of August 1789 had nothing to do with the property right that authors acquired over their works, for it was the legitimate indemnity for their labor and naturally owed to them.[95] In Year Fourteen,[96] the Supreme Court seemed to affirm the decision in *Veuve Buffon*, but backed away from the natural rights argument it had enunciated earlier, finding instead another theory through which to achieve the result it desired. This time the Court established that the old individual privileges granted by the king were not abrogated in 1789, and it simply avoided the philosophical debate.[97] By its decision, the Court revived the old royal privileges as the legal source for those authors whose works pre-dated the 1793 Decree by limiting the scope of coverage of the 1793 Decree to those authors in possession of their works at the time of its passage.

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91. *See* Jugement du Tribunal du Departement de la Moselle, Fruct. 7, an 7; Appel 14 An 8, Jugement Confirmatif du Tribunal d'Appel at Metz, Fruct. 14, an 8, *cited in* Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851.

92. *See* Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, at 852.

93. *See id.* This issue came before the courts again in Year 14, when the Supreme Court ruled that the law was applicable to those residents of newly acquired French territory who had previously legally acquired and sold pirated copies outside the jurisdiction of France. *See* Cour de cassation, Frim. 29, an 14, S. Jur. I, an 14, 197.

94. *See* Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851, 852.

95. *See id.* at 853.

96. *See* Cour de cassation, Cass. crim., Brum. 16, an 14, S. Jur. I, an 14, 177.

97. *See id.*

2. *Property vs. Privilege for Works Published After 1793*

In 1826, the Supreme Court of France continued to seek a way to articulate a policy regarding authors' rights when it decided *Muller C. Guibal*.[98] The Supreme Court compared intellectual property to traditional property rights, but unlike in the earlier court decision, this time the analogy was used to validate the concept of property.[99] The Court found literary property to be just as important as traditional notions of property. Specifically, the Court stated that "the rights that the law grants to authors over their works were neither less sacred nor less inviolable than the rights of ordinary property."[100] The Court had begun its efforts to balance the continuing conflict between private rights of authors and a pervasive policy of public access to literary property, as it opined that the private rights of authors did, in fact, supersede public access in some situations. The case was one in which the king himself[101] had authorized the reprint of a book in the name of the state and for public purposes. However, the Court ruled that there was no legal authority, even for the state under orders from the king, to expropriate an author's rights without his consent.[102] By 1843, the Supreme Court took the position that the goal of the 1793 Decree was to confer authors' rights analogous to real property rights and to recognize authors for the fruit of their thoughts and the products of their intelligence, thereby promoting an important social policy.[103]

In 1875, an appellate court examined whether the State itself could claim a legal right to intellectual property.[104] This was an issue because the 1793 Decree set forth provisions that courts had previously interpreted by applying such provisions to authors.[105] The debate would again focus on the interpretation of the nature of intellectual property.[106] This case raised a question long debated in France — whether literary property was a real right of property (although limited for public purposes) or whether it was a privilege created by the legislature, without whose enactment it could not exist. The State's claim to literary property, according to the debate in this

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98. Cour de cassation, Cass. crim., Mar. 4, 1826, S. Jur. I, 1826, 290.

99. *See id.* at 291.

100. *Id.* at 291 (translation by author). The original text of this case reads: "Que les droits que la loi accorde aux auteurs sur leurs ouvrages ne sont ni moins sacres ni moins inviolables que les droits de propriete." *Id.*

101. By April 1814, after Napoleon Bonaparte's fall, Louis XVIII was proclaimed king of France, and the French monarchy was restored. *See* MIQUEL, *supra* note 78, at 314.

102. *See* Cour de cassation, Cass. crim., Mar. 3, 1826, S. Jur. I, 1826, 291.

103. *See* Cour de cassation, Cass. crim., Dec. 12, 1843, S. Jur. I, 1843, 814.

104. *See* CA Seine, Feb. 3, 1875, D. P. II, 1875, 148, 148 nn.2-3.

105. *See id.*

106. *See id.*

case, depended entirely upon how the court concluded this issue.[107] The argument was that if literary property was a natural right, then the State would naturally have the right to claim literary property for itself.[108] However, if literary property was not the function of a natural pre-existing right, then logically, the courts would refuse to recognize that right in the State because it could not be regulated with regard to one of the important conditions that had been fixed by the law, namely, duration.[109] In the absence of any special provision regarding state ownership, the Court held that the State had a right to claim ownership of intellectual property and resolved the question about duration by declaring the State's rights as perpetual.[110]

3. *The Meaning of the Registration Formalities*

The Supreme Court of France was not immune to the pendulum swing regarding the ideas about authorship and the rights of authors that mostly divided the lower courts. It sometimes failed to guide the lower courts persuasively or even remain consistent about which policies were to prevail in literary property law. One of the most poignant examples of the vacillating Supreme Court in the nineteenth century was how it responded to the debate surrounding article 6 of the 1793 Decree.[111] Article 6 stated that all citizens who published a work of literature, regardless of genre, would be obliged to deposit two copies of that work at the *Bibliotheque National*, at which time the citizen would receive a receipt signed by the librarian.[112] The question then became whether the failure to deposit those copies would preclude standing to prosecute infringers.[113] Based on the number of

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107. *See id.*
108. *See id.*
109. *See id.*
110. *See* Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 634.
111. *See id.*
112. *See id.*
113. Article 6 stated:

> Tout citoyen qui mettra au jour un ouvrage, soit de litterature ou de gravure, dans quelque genre que ce soit, sera obligé d'en déeposer deux exemplaires à la Bibliothèque nationale ou au cabinet des estampes de la république, dont il recevra un reçu signé par le bibliothécaire; faute de quoi il ne pourra être admis en justice pour la poursuite des contrefacteurs.

1793 Decree, art. 6, *quoted in* Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 634. Article 6 was argued to have as its goal to assure the conservation of the creative work as well as to legally determine who was its author. *Compare* GOLDSTEIN, *supra* note 7, at 544, 550 (discussing the rationale for making deposits and applying for federal copyright registration in U.S. copyright law). Although it is not a condition to copyright protection in the United States, failure to deposit copies upon demand might result in fines and extra

reported appellate and Supreme Court decisions addressing the implications of article 6, it was perhaps one of the most controversial issues in cases in the nineteenth century. Contained within the numerous discussions about this relatively simple and straightforward requirement were very important arguments about authorship. The issue was one in which the courts leaned toward fairness and justice for the author when the strict application of the law rendered results that seemed too harsh. Deciding cases on questions of moral justice, as opposed to the strict application of the established law, was a significant departure from what the courts set out to do. Although article 6 itself seems unimportant to the history of the development of moral rights, the cases that discussed the controversy surrounding it provide some of the best examples of how the social forces raised concerns that demanded more justice than was provided by the black letter law.

The courts viewed the requirements under article 6 as an affirmative obligation imposed on the author who wished to exercise for himself the rights granted in article 1.[114] That the 1793 legislature mandated the deposit requirement as a prerequisite to acquire the rights was interpreted to mean that it did not consider them either automatic or natural.[115] In 1828, an appellate court, referring to the literary rights as "privileges," enunciated the rule that if the author did not comply with the conditions set forth in article 6, he automatically surrendered his literary privilege to the benefit of the public domain.[116]

In 1832, the Supreme Court strictly applied article 6 in *Chapsal et Noel C. Simon*,[117] ruling that it required, without exception, that all authors deposit two copies of their works with the *Bibliotheque Nationale*[118] or be precluded from litigating infringement claims. The trial and appellate courts had barred the plaintiffs, Noel and Chapsal, from pursuing an action for infringement against Simon, who allegedly reprinted their work without their permission.[119] Neither Chapsal nor Noel had ever taken two copies to the *Bibliotheque Nationale*, and consequently, the success of the defense resided

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charges. *See id.* at 550. One of the policy reasons for the deposit requirement was simply to supply the Library of Congress with copies for its collection. *See id.*

114. Article 1 states that "[t]he authors of writings of all kinds, the composers of music, painters and drawers shall enjoy during their entire life, the exclusive right to sell, to have sold, to distribute their works in the territory of the Republic and to assign the property in whole or in part." *See* BERTRAND, *supra* note 13, at 27 (translation by author).

115. Cour royal et Conseil d'Etat, Nov. 26, 1828, D.P. III, 1828, 197.

116. *See id.*

117. Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 633. Several of the lower courts, including d'Aix, de Riom et de Paris, had ruled against an earlier opinion of the Supreme Court creating uncertainty about this issue. *See* Cour de cassation, Cass. crim., Mar. 1, 1834, 66, 66 n.2; Gaz. Trib. Mar. 2, 1834, at 401.

118. *Bibliotheque Nationale* is the equivalent of the Library of Congress.

119. *See* Cour de cassation, June 30, 1832, D.P. I, 1832, 633-34.

in the gratuitous public domain. The appellate court first sought to determine whether any law, focusing on a subsequent law enacted in 1810 and its 1814 revision, explicitly abrogated the deposit requirement set forth in 1793.[120] The court determined that the laws of 1810 and 1814 did not abrogate the formality requirement of the 1793 Decree.[121] At least two factors were important to the court. First, it looked at the language of each law to see at whom it had specifically targeted compliance. The 1793 Decree was distinguished from the laws of 1810 and 1814 because the former was addressed to authors, whereas the latter were specifically addressed to printers and publishers.[122] The language in the text of article 6 did not, however, specify that the *author* had to make the deposits.[123] The court also examined the title of the two laws to ascertain whether or not either title was relevant to the meaning or purpose of the laws. The most interesting point to note in this discussion was that the court found that the Law of 1814 had as a subtitle the phrase "of the police of the press," indicating a stronger connection with policies of governmental censorship than a relationship to the protection of intellectual property.[124] The Supreme

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120. *See id.* at 634. *See also* BERTRAND, *supra* note 13, at 28. The legislature had enacted yet another statute in 1810 that mandated new registration rules. The later rule was more burdensome and came as part of a very complex and confusing amendment to intellectual property rights and the law governing the liberty of the press. In addition to the deposit requirement of article 6 of the 1793 Decree, article 48 of the law of 1810 required that each publisher deposit five copies of each work published at various government offices, including one for the *Bibliotheque Imperial*. An ordinance of 1814 was a revision of this latter decree, and it had stronger language requiring that no publisher shall print a writing before declaring his intentions to do so, or to sell or publish a writing in any way before having deposited the prescribed number of copies, which was five until an ordinance of 1828 reduced the number from five to two. *See generally* BERTRAND, *supra* note 13.

121. *See* Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 634.

122. *See id.*

123. *See* Cour de cassation, Cass. crim., Mar. 1, 1834, at 66-67; Gaz. Trib. Mar. 2, 1834, at 401-02. The plaintiff argued that the language of the 1793 Decree was ambiguous. *See id.* The Law required a deposit of two copies from all *citizens* who wished to *mettre au jour* (publish) a work. *See id.* The French phrase *mettre au jour* was the point of contention in that it arguably means "to publish" or more literally "to put to the day," as in to make public or available to the public. *See id.* Therefore, as the argument went, the 1793 Decree could have been addressed to printers and publishers, who, of course, actually published most works, and if so, it would be logical that if the decrees of 1793 and 1810 both applied to printers, the deposit requirement of 1810 abrogated the deposit requirement of 1793. *See id. See also* Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 634.

124. Censorship was far from gone in nineteenth century France. In fact, during Napoleon's Empire in 1806, a decree was passed on June 8 which gave the government the right to prohibit or use the police to suspend theatrical representations. Victor Hugo's plays *Le Roi s'Amuse* and *Hernani* were both censured. *See generally* ODILE KRAKOVITCH, HUGO CENSURÉ: LA LIBERTÉ AU THÉÂTRE AU XIX SIÈCLE (1985).

In the August 7, 1814, issue of *Journal de Paris, Politique, Commercial et Litteraire*, an article appeared, memorializing an argument made by Mr. Fleury before the

Court concluded that the two laws were different enough in intent and purpose so that the latter did not abrogate the former.[125] Therefore, the consequences of non-compliance were explicit in the text of article 6, making its repercussions clear. Concurring with the court of appeals, the Supreme Court went on to say that the deposit requirement served a public purpose — that it served as notice to the public of the author's intention to safeguard his property interest in his literary work.[126] Of course, the corollary was that in the absence of the deposit, there was a presumption that the author wished for his work to be in the public domain. It was, therefore, incumbent upon any author, not the publisher or printer, to take the affirmative step to safeguard the author's property interest and to give notice to the public of that intention. Neither level of court discussed any social interest or notion of fairness. Courts simply favored a strict application of the law — a result that enriched the public domain over the individual rights of authors.[127]

Not long after the decision in *Chapsal*, the Supreme Court was in the midst of a judiciary controversy.[128] Lower courts were still split on the issue, and several courts disagreed with and refused to follow the ruling in *Chapsal*,[129] prompting an article in a prominent legal periodical on

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Chambre des Deputes, in which he spoke out against the presence of censorship. Mr. Fleury argued that there was one universal principle in all organized societies: the liberty of individuals must sometimes be subordinated to the general interests of society. Censorship was one method that the police could employ to prevent written threats to the security of the state and the individual. He also added that censorship was not incompatible with the constitutional charter and that there was no legislation that abolished it. However, in spite of the fact that it was legally permissive, and in theory served a role, he spoke out against the fears of its abuse, adding that men of letters should claim a "right" to express themselves and no longer allow that right to be confused with the word privilege. The liberty to express an opinion was not a privilege, but a right guaranteed by the constitution. It may be relevant that the 1810 Ordinance and the 1814 Decree were targeted specifically for the publishers and printers. After all, they are the source of broad dissemination of the printed word, and historically they were the group through which the monarchy had been able to control what information reached the public. *See* J. DE PARIS, POLITIQUE, COMMERCIAL ET LITTERAIRE, Aug. 7, 1814.

125. *See* Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 634.

126. *See id.*

127. Later in 1853, in *Thoisnier-Desplaces et Michaud C. Didot*, the issue of fairness was discussed with regard to outcomes in literary property cases. *See* Cour de cassation, Cass. crim., July, 16, 1853, S. Jur. I, 1853, 545. What was important to the society was not that another work fell within the cultural heritage, but rather that authors be assured of legitimate compensation for their work. *See id.* Most important to society was the protection of the rights of the individual and his personality. *See id.*

128. *See* Cour de cassation, Cass. crim., Mar. 1, 1834, D.P. I, 1834, 66; Gaz. Trib. Mar. 2, 1834, 401.

129. In fact, *Terry C. Marchant* was an appeal from a protesting appellate court opinion rendered in 1833. The Appellate Court of Paris was just one of several that refused to follow the *Chapsal* ruling. *See id.* (acknowledging a departure from *Chapsal* and suggesting that the issue remained controversial in spite of the Supreme Court's decision in *Chapsal*).

jurisprudence and judicial debates on March 2, 1834, in which the arguments of *Terry C. Marchant* were reprinted.[130] In the two years it took the Court to reconsider the issue, it had become obvious that there were tremendous stakes riding on the decision. The Supreme Court tried to construe the language and statutory history to find a more practical approach, presumably an approach that reached a more equitable outcome.[131] First, the Court looked at the deposit requirements of the 1810 Law, which mandated that five copies be deposited at various locations.[132] One of the five copies required was destined for the *Bibliotheque Royale*, which for all practical purposes was the same destination of the two copies required in the 1793 Decree.[133] Consequently, the Court determined that compliance with the latter law accomplished the goal of the former.[134] Second, and most importantly, was the Court's concern with the practical implications of *Chapsal*.[135] It had been documented that since the 1810 Law, no authors had executed any other deposit requirement except the one prescribed by the 1810 Law.[136] It was argued that if it was imperative that the deposit be made pursuant to the 1793 Decree, there would be an interval of more than 20 years during which literary property would not be preserved.[137] Therefore, this twenty-year delay would be unjust because all authors who published works between 1810 and 1834 would be barred from seeking legal redress against any infringers and pirates of their works,[138] and only the public domain would benefit from such a major disallowance of individual ownership rights while depriving authors of legal protection for their most sacred property.[139]

The attorney for the plaintiff argued that moral considerations influenced the revolutionary legislature to enact the first law protecting literary property.[140] Appealing to concerns about how the court should recognize and value authorship, he argued there was nothing in the world

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130. *See* Gaz. Trib. Mar. 2, 1834, at 401. The *Gazette des Tribunaux* was printed in Paris from 1825 to 1955.

131. *See* Cour de cassation, Cass. crim., Mar. 1, 1834, D.P. I, 66; Gaz. Trib. Mar. 2, 1834, 401. The actual requirements for official registration remained rather unclear until May 29, 1925, when the legislature abrogated the disposition of article 6 as a preliminary condition to an infringement action. *See* BERTRAND, *supra* note 13, at 29, 102.

132. *See* Cour de cassation, Cass. crim., Mar. 1, 1834, D.P. I, 66; Gaz. Trib. Mar. 2, 1834, 401.

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.*

more noble, liberal, and unselfish as talent and genius.[141] In addition, he argued that although it was pleasant to deliver these qualities to the public without any other compensation, except glory and a name to enrich the country, it was the responsibility of the courts to ensure the author's will regarding his property because any infringement of his right to his property was vile and despicable.[142] The plaintiff's attorney then argued that the plaintiff had expressed his will, not by complying with article 6 himself, but through his publisher's compliance with the requirements of the decree of 1810.[143] The defendant argued that society should presume that the benefit derived by an individual from his work was the pleasure of contributing to a greater social good. Therefore, the author presumptively had no interest in exercising a property interest in his creations unless he exhibited an intention to reserve his rights by complying with article 6.[144]

Ultimately, the Supreme Court reversed its decision in *Chapsal* by ruling in *Terry* that the Decree of 1810 and its revision in 1814 incorporated the deposit requirement of the 1793 Decree.[145] Therefore, the Court stopped numerous potential challenges to works published during the twenty-year period in question. The issue presented itself again before the Supreme Court in several different forms in the following years.[146] In 1839, the Cour Royale de Rouen opined that the deposit requirement was only a prerequisite to the right to sue and did not negate an author's inherent rights in his work because literary property was a pre-existing and natural right of the author.[147]

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141. *See id.*

142. *See id.*

143. *See id.*

144. In 1839, the Cour royale de Rouen gave a different perspective to this argument when it said the offense was not that someone reproduced the work of someone else which could be a useful and moral thing to do; instead, the offense was that someone reproduced a work determined to be the "property of someone else." *See* CA Rouen, 1er ch., Dec. 10, 1839, D.P. II, 1839, 74-75.

145. *See* Cour de cassation, Cass. crim., Mar. 1, 1834, D.P. I, 1834, 66; Gaz. Trib. Mar. 2, 1834, 401.

146. In 1852, in *Bourret et Morel C. Escriche de Ortega* the court heard arguments but did not decide the issue of whether the omission of the author's name by the printer or publisher precluded the author's right to sue under the deposit requirements of 1810 and 1814. *See* Cour de cassation, Cass. crim., Aug. 20, 1852, S. Jur. I, 1852, 234-36. Although the court conceded that compliance with the formalities of 1814 was generally enough to safeguard the literary property rights of the author, the specific issue was what happens when there is some irregularity in the act of compliance by the printer. *See id.* In 1872, the court decided *Garnier C. Levy*, a case in which the plaintiff argued that he had complied with article 6, but he did not have the receipt from the *Bibliotheque Nationale* as proof. *See* Cour de cassation, Cass. req., Nov. 6, 1872, S. Jur. I, 1872, 362-63. The court decided that it would consider a number of factors and use its own judgment to determine if sufficient proof of the deposit existed absent the formal receipt. *See id.*

147. *See* CA Rouen, 1er ch., Dec. 10, 1839, D.P. II, 1839, 74-75.

4. *The Earliest Moral Right: Right of Divulgation and the Separation of Economic and Personal Interest*

In 1828, the highest court granted the individual author a right that was clearly not part of the 1793 Decree and was to become one of the moral rights.[148] In its decision, the Court declared the right of divulgation. The case was *Widow Vergne C. Creditors of Mr. Vergne*, in which, again, an heir sued an infringer.[149] The decedent author, a reputable composer and a member of the French Conservatory of Music, entered a national competition where he performed the compositions that became the subject of this lawsuit.[150] He died shortly after performing his work but before publishing it. Although he never published the works, a creditor, being informed of their potential value, sued the composer's widow to seize the compositions as partial payment of a prior debt.[151] The Court ruled that an unpublished manuscript was not property that could be seized anterior to the publication of a creative product, even if the manuscript had obvious value; there were private interests and rights that belong exclusively to the author.[152] Therefore, the decision to publish belonged either to the composer himself or to his heir. Another issue debated by the defendant in this case was whether or not Mr. Vergne's public performance of his unpublished composition thrust his work into the public domain.[153] The Court created an absolute property right anterior to publication in the individual author, establishing new law and the first moral right.[154] The Court implied that it may have decided the case differently and settled the decedent's debt if the disputed property had been in any other form.[155] A footnote to this case reports that English judge and scholar William Blackstone (who had supported the author's common law right to literary property in England) influenced the Court's decision.[156]

In 1862, the Supreme Court decided *Betheder et Schwabe C. Mayer et Pierson*,[157] a case in which the trial court determined that the 1793 Decree had, in part, the goal of protecting not only the author, but also the work of

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148. *See* CA Paris, 1re ch., Jan. 11, 1828, S. Jur. II, 1828, 5.
149. *See id.*
150. *See id.*
151. *See id.* at 5-6 n.4.
152. *See id.*
153. *See id.*
154. *See id.*
155. *See id.*
156. *See id. See also* BERTRAND, *supra* note 13, at 219-20.
157. Cour de cassation, Cass. crim., Nov. 28, 1862, D.P. I, 1862, 40. For a discussion of Judge Blackstone's role in the English debate between individual rights and societal rights in intellectual property, see Rose, *supra* note 40, at 63-65.

art itself.[158] Stating that productions of art are the fruits of the mind, imagination, and genius, serving as an ornament for the nation which they glorified, the arguments asserted that creative products were, in some way, part of the author because he was the person to whom they most immediately belonged.[159] The Court searched for legitimate reasons to distinguish between those creative products that belonged in the category of fine arts and those that were industrial art. Photography was the medium of artistic expression at issue in this case, and the Court was deciding whether photography fell within the meaning of those products protected by the 1793 Decree. However, although photography was decidedly a production of the mind, it was important that it be a qualified product of the mind because it involved the operation of a machine. One of the criteria for distinguishing between the fine arts and industrial arts was to examine the nexus between the art and the personality of its author.[160] This connection was not so obvious in industrial art. Theorizing over the question of what is art, the Court argued that art has two distinctive meanings — one aesthetic and one legal.[161] Just as judges were said to have the authority to determine whether or not a particular kind of work fell within the definition of the 1793 Decree,[162] courts were exploring Hegel's theory of the dualistic attributes of intellectual property,[163] even though it was still argued that the law only understood the moment when the artist became a seller.[164] However, the point when the artist became a seller was argued to be when art also lost its prestige as art and faded away.[165]

5. *Early Rulings of The Rights of Integrity and Paternity*

In 1845, it was the Trial Court of Paris in *Marquam C. Lehuby*[166] that decided that an editor did not have the right to alter a work submitted for publication even when he had purchased all rights to the work.[167] Marquam was an English Protestant and the author of several children's booklets on history and geography. He sold all rights to his works to Lehuby, a bookseller who, in his efforts to obtain approval from the church to use the books in Catholic parochial schools, edited various parts of the book,

158. *See* Cour de cassation, Cass. crim., Nov. 28, 1862, D.P. I, 1862, 40.
159. *See id.* at 41.
160. *See id.*
161. *See id.* at 43.
162. *See* Cour de cassation, Cass. crim., May 16, 1862, S. Jur. I, 1862, 998, 999.
163. *See* Cour de cassation, Cass. crim., Nov. 28, 1862, S. Jur. I, 1862, 41, 43.
164. *See* Cour de cassation, Cass. ch. réuns., May 27, 1842, S. Jur. I, 1842, 385, 386.
165. *See id.* at 386.
166. Trib. de comm. de Paris, Aug. 22, 1845, S. Jur. II, 1845, 549.
167. *See id.* at 550.

deleting forty to fifty pages out of the approximately four hundred pages of text, in particular, sections pertaining to religious matters.[168] The publisher simply wanted to make the books more marketable to the targeted schools. Marquam sued to prevent the publisher from publishing the books claiming that this change offended his *reputation* as an author. He succeeded in convincing the court of the potential harm to his reputation. Thus, the decision created another moral right for authors due to the court protecting the right of the author to stop the publication of his work if, without his permission, it has been altered or mutilated.[169] On these grounds, the court ruled that the book had to be returned to its original form.[170] Similarly, the court in *Vergniaud C. Roret*, ruled that it was a legal principle that an author who sold his work, even if he sold all of his rights to it, reserved the right to demand that no modification be made without his permission.[171]

In *Masson de Puitneuf C. Musard*,[172] the defendant had purchased the right to use the plaintiff composer's music in some concerts that he directed but failed to give the composer credit, listing instead a fictitious name on the billing. The court found that the composer had the legal right to require that his name be used because, otherwise, there might be damage to his reputation.[173] Similarly, the court in *Vergniaud*[174] also decided that the law required there be no name added to or substituted for that of the authors, protecting the right of paternity.[175]

IV. NINETEENTH CENTURY SOCIO-POLITICAL TRANSITION

There were numerous changes in the form of government in France during the nineteenth century. The nineteenth century rulers found a different relationship with culture than their predecessors. The king, who had once been the representative of divine knowledge and who was empowered to dictate the path of all works of culture in both substance and form, became less omnipotent, thereby exercising less control over art. Consequently, a new alliance emerged between the state and the author. Although there continued to be various efforts to control culture, mostly through laws of censorship, no central governmental policy ever reclaimed the power of prescribing works of art as it had previously done under the ancien regime. The emergence of the notion of creative genius liberated

168. *See id.*
169. *See id.* at 549-550.
170. *See id.*
171. CA Paris, 3e ch., Jan. 12, 1848, D.P. II, 1848, 142, 142-43.
172. 1836 Recueil Dalloz-Sirey, 242-43 (Lois et decisions diverse).
173. *See id.*
174. *See* CA Paris, 3e ch., Jan. 12, 1848, D.P. II, 1848, at 142-43.
175. *See id.*

artists, and in the realm of culture, the artists crusaded for the power of the imagination as well as the merit of the individual over the necessities of the state.[176] This cultural transition provided the historical context for intellectual property law in nineteenth century France. The transition offers an important social background, wherein both significant substantive and policy changes evolved in intellectual property law, which contrasted the founding, French intellectual property law — the 1793 Decree.

The king and all of his trappings were barely gone when cultural domination returned in the nineteenth century: first with Napoleon, then with the restoration of the monarchy,[177] and lastly with Napoleon III.[178] Consequently, although the forces of tradition had begun to wane, they retired slowly, igniting and protracting, throughout much of the nineteenth century, the conflict that erupted between those who supported tradition and those in favor of artistic autonomy.

Important nineteenth century intellectuals and literary figures were actively engaged in the debate about literary property and its relation to the idea of a public good. Alphonse de Lamartine, Honore de Balzac, and Victor Hugo all made passionate appeals to the French legislature against this notion when arguing for the law to tip the scales in favor of greater legal protection for authors and their families.

On March 3, 1841, Honore de Balzac appeared before the Parliamentary Commission[179] which was reviewing what would become the 1844 Amendment to the existing copyright legislation.[180] A few days later on March 13, 1841, Lamartine, who was politically the most active writer of the romantic movement in France,[181] made a presentation before the Chamber of Deputies.[182] Dedicated to helping the poor, he became a member of the Chamber of Deputies where he warned the nation of an impending revolt by the working class. His predictions were realized when revolt broke out in the 1843 Revolution, and Lamartine later became the

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176. *See* DAVID OWEN EVANS, SOCIAL ROMANTICISM IN FRANCE, 1830-1848, at 98-99 (Octagon Books 1969) (1951).

177. This period spanned from 1814 to 1848. *See generally* MIQUEL, *supra* note 78.

178. Napolean III was a peaceful man who despised war. GUERARD, *supra* note 33, at 262. Unfortunately for Napolean III and the Second Empire, the exiled Victor Hugo scoffed the emperor and "succeeded in ruining the artistic appeal of the régime." *Id.*

179. *See Le Droit d'Auteur Selon Balzac*, 5 REV. INT'L DU DROIT D'AUTEUR 124, 124-25 (1954).

180. *See* BERTRAND, *supra* note 13, at 28.

181. The term romantic and its interpretation had profound and significant differences in England, Germany, and France. In each country, the word was endowed with special meanings not readily comprehensible to the others. *See* LILIAN R. FURST, ROMANTICISM IN PERSPECTIVE 17-22 (1969).

182. *See Le Droit d'Auteur Selon Lamartine*, 7 REV. INT'L DU DROIT D'AUTEUR 132, 132-33 (1955).

head of the provisional government. In the Chamber of Deputies, Lamartine debated the issues raised about intellectual property law, seeking to extend the private rights of authors.[183] Balzac believed the concept of the public interest was a terrible one, arguing that those who advocated for the public interest were adversaries of intellectual property.[184] Prior to the passage of the 1844 amendment, a group of heirs to several authors appeared before the legislature mocking the notion of public domain as an opportunity for theater directors to continue profiting from the work of authors long after the law ceased to protect the author or his heirs.[185]

In 1849 Victor Hugo, one of the few great French writers who was a popular icon during his own lifetime, became the first president of the International Literary and Artistic Association (ALAI). The ALAI organized the 1883 convention in Berne, Switzerland, of writers, artists and editors of various countries. This convention created the international treaty on intellectual property, currently referred to as the Berne Convention.[186] Hugo made a very forceful attack against the governmental policy regarding intellectual property. He alleged that the French government had not taken literature seriously and argued for more legislation that took into account the contributions of intelligence and creativity.[187] He expressed anger toward the fact that literary property was not given the same legal protection as other forms of property in spite of the fact that, as a creation, it was more sacred. Hugo implored the legislature to stop treating the writer as a social outcast and to reject the notion of a public domain. He considered the notion of public domain as one way the state legitimized withholding intellectual property from artists.[188] Hugo felt that the only way to reconcile the contribution of the artist with the interests of society was to ensure authors the legal protection of property interests in their creations.[189]

Lamartine, Balzac and Hugo expressed concerns about how the law balanced the conflicts between private rights and the public interest. All three believed that society should have no superior interest in creative property over the private interests of the author. Condemning those who advocated the public interest, they argued that the public domain was not only in violation of the property rights naturally due to authors as a consequence of their labor, but was also inconsistent with principles of individual liberty.

Residing in French intellectual property law, like the U.S. law, was the

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183. *See id.*

184. *See Le Droit d'Auteur Selon Balzac*, *supra* note 179, at 124-25.

185. *See* 6 REV. INT'L DU DROIT D'AUTEUR 144, 144-45 (1955).

186. Berne Convention for the Protection of Literary and Artistic Property, Sept., 9, 1886, 828 U.N.T.S. 221 (last revised July 24, 1971).

187. *See* 6 REV. INT'L DU DROIT D'AUTEUR 144, 144-45 (1955).

188. *See id.*

189. *See id.*

notion that all such property would at some point end up in the public domain — an important concept intrinsic to the founding policies underlying the laws of literary property in general. However, in France, unlike in the United States, this notion was under constant attack for being the vehicle through which the law wore away at the private interests and the rights of authors.[190] The public domain became an illusive abyss into which all intellectual and artistic property was destined to fall, and it sometimes produced legal consequences that seemed unfair to the author. Based on the idea that all people should have equal access to the nation's cultural legacies without hereditary or arbitrary class distinctions and without privileges, the public domain reflected the belief that information and facts, even as they were revealed through individual creations, belonged to everyone because the advancement of human knowledge required unconstrained access to enlightenment.[191] The commanding presence of this notion in nineteenth century legal conflicts suggests that artists constantly defended their ownership rights in their own creative products against those whose claims were based entirely upon the right of public domain. The French courts ultimately responded sympathetically to this issue in the text of a Cour de cassation decision in 1875: "In a conflict of interest between the public domain on one hand and the authors or their heirs on the other hand, we always lean in favor of the latter."[192]

V. CONCLUSION

The French doctrine of moral rights presents an important, yet often troubling, and definitely challenging, difference between the philosophies underlying French and U.S. intellectual property laws.[193] The doctrine and its application in French law are not conceptually as difficult as they may appear, although perhaps they are culturally confusing. In France, there is an attitude about protecting culture that seems to transcend plain legal logic, while sometimes challenging the U.S. perspective,[194] as French moral rights

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190. *See* Cour de cassation, Cass. crim., May 28, 1875, D.P. I, 1875, 328, 328-29 nn.1-2.

191. *See* Hesse, *supra* note 19, at 129.

192. Cour de cassation, Cass. crim., May 28, 1875, D.P. I, 1875, at 328-29 nn.1-2 (translation by author). The original language of the case reads: "Dans un conflit d'intérêt entre le domaine public d'une part, et les auteurs ou leurs ayants cause d'autre part, on incline toujours en faveur de ces derniers." *Id.*

193. *See* Sarraute, *supra* note 8, at 484-86.

194. For example, cultural differences and conflicts between the United States and France have been exemplified by recent conflicts regarding the U.S. market share of the European broadcast industry. In the past years, the entertainment industry has been the United State's second largest export earner, and one of the few areas of production for which the United States has enjoyed a trade surplus. *See* Brian L. Ross, Note, *"I Love Lucy," but the European*

seem to operate antithetically to basic tenets of protecting the liberty of free market negotiations and upholding bargained-for exchanges.[195] The salient American policy for copyright law has always been the promotion of the purported public interest. The rights granted by U.S. copyright laws were designed to serve as financial incentives for authors and artists to create literary and artistic works for public consumption.[196] Then, following a defined statutory period, these works become public property.[197] In view of the implications of moral rights to the U.S. idea of a free market of ideas, this doctrine presents some important theoretical and practical challenges.[198] Like its American counterpart, the first French law provided only for the protection of pecuniary interests, arguably emulating policies already instituted in U.S. law. Unlike the U.S. law, however, the French legislature did not derive its power to enact intellectual property statutes from a superior authority, and there was neither a stable government nor an enduring federal constitution in place at that time.[199] However, the law in France was

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Community Doesn't: Apparent Protectionism in the European Community's Broadcast Market, 16 BROOK. J. INT'L L. 529, 531, 531 n.8 (1990). However, the French, alleging cultural imperialism, have been the chief European opponents to the American television market in Europe. *See id.* at 530 n.4. They have objected to the quantity of American products in the European broadcast market in general, and on French television in particular, on the pretext of protecting their culture. *See id.* Consequently, the French, through the European Economic Community, have sought to limit American access to their broadcast market, prompting U.S. industry allegations of irrational cultural protectionism. *See generally id.*

195. In 1983, a French court reached a decision on a moral rights issue that would seriously undermine U.S. policies governing contract and property principles had it been rendered in the United States. The court ruled in favor of a sculptor who sued Renault, France's major car manufacturer, after it decided to cease construction on a huge sculpture the artist had modeled to go outside the corporate headquarters. The court directed Renault not only to continue construction but it was implied that the company would have to maintain the integrity of the sculpture at significant future costs. Although the company agreed to settle the dispute by paying the agreed upon contract price, the court ruled that the artist had a moral right to have his work published. *See* Judgment of Mar. 16, 1983, Cass. 1e civ., July 1983 R.I.D.A. 80. *See also* Andre Françon & Jane Ginsburg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM.-VLA J.L. ARTS 381, 391 (1985) (providing a discussion of the *Renault* case).

196. *See* Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1493-94 (1979).

197. *See id.* at 1493. *See also* U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

198. For additional discussion of contemporary uses of moral rights in the French system, see Ginsburg & Sirinelli, *supra* note 68, at 135.

199. Article 1, section 8, clause 8 of the United States Constitution is the source of American copyright law. *See* U.S. CONST. art. I, § 8, cl. 8. It granted to Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to the respective Writings and Discoveries." *Id.*

transformed during the nineteenth century to include the moral rights protections that characterize French law today.

French copyright laws have stood out for at least a couple of reasons. First, they became a system providing legal sanction of equal importance to economic, as well as non-economic, rights, the latter being the category of rights that separated French and American copyright law in the most profound way. Second, in direct opposition to the historical denial of non-economic rights by the United States Congress, the French have been animate advocates of moral rights. Yet, these rights of personality in works of art were not part of France's original copyright scheme, nor were they explicitly part of the pre-statute philosophical debate. Instead, the source of these rights is the nineteenth century French court decisions. The nineteenth century began with a newly-codified law[200] and legal system that engendered the modern French court system. It left a legacy of judicial interpretations of the 1793 Decree, as well as the subsequent decrees and ordinances affecting the rights of authors. The court decisions served as historical texts memorializing the continuation of theoretical debate about the relationship between authorship and knowledge, property and knowledge, and the role of the law in regulating the tension between private interests and the benefits of public domain. Whether or not courts strictly interpreted the language drafted by the legislatures or whether the issues before them required that they expand the law beyond the boundaries originally envisioned by the legislature, they usually commented on the policies, philosophies and politics espoused by the litigants, leading legal scholars, or by their own initiative.

The president of the French committee on authors' rights commented as follows:

> It is no exaggeration to say that the degree of civilization of a country is measured by the protection it gives to works of the mind. . . . [I]n this respect, it is remarkable to find the greater respect a country pays to creative thought, the more importance it attaches to the moral element of copyright.[201]

It is, therefore, not entirely surprising that the French conception of copyright law, viewed as the law that regulates the dissemination of literature and the arts within the society, has evolved to reflect the importance of these commodities in the French culture. The French see literature and art as the

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On the other hand, nineteenth century France was fraught with precarious governments characterized by the struggle between the conservative and revolutionary ideas, a conflict that sprang out of the eighteenth century revolution.

200. *See* CODE NAPOLEON (photo. reprint 1960) (1804).

201. Philippe Pares, *The French Conception of Copyright*, 2 REV. INT'L DU DROIT D'AUTEUR 2 (1954).

epitome of their society. This explains, in part, the development of the doctrine of moral rights. For the French, culture had been a national symbol of power, a weapon through which they historically exerted dominance around the world.[202] It is probably no exaggeration to say that from the French perspective in modern times, they have continued to exert a cultural domination in the arts.[203] Consequently, it is no surprise that the French conception of intellectual property embraced the concerns of artists. In the nineteenth century, the French had begun to hold artists as the individual purveyors of their nation's cultural heritage.

Recent efforts of prominent American filmmakers to secure protection for the integrity of art has raised a similar debate in the United States about the role the law should take to protect its national heritage through individual achievements. The notions of a free market may be too strongly entrenched in U.S. law to give way to an adoption of moral rights similar to the French. However, it is clear that the doctrine now has some immediate application in U.S. law.

The best way to summarize the concerns of the nineteenth century French about fairness to authors, while at the same time framing the issue within an American context, is to refer to an article by Jesse Hamlin published in the *San Francisco Chronicle*.[204] The article discusses the unauthorized use of Ruth Bernhard's 1962 photograph *In the Box — Horizontal* for the ad image for the movie release of *Boxing Helena*. Bernhard was outraged by the use of the image she created for her famous photograph,[205] but because the photograph was in the public domain, she had no legal recourse. However, she nicely summed up a concern with morality and justice that seemed to have prompted nineteenth century French society

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202. At the time of the French Revolution in 1789, the French culture commanded admiration and imitation around the world, and France was considered the leading culture in Europe, and French language had succeeded Latin as the common speech of the civilized world. Prior to the enactment of the Napoleonic Code in the early nineteenth century, France's legal system was not among its cultural treasures. However, after the country codified its law under Napoleon Bonaparte, its legal institutions took a prominent position in the world and were imitated and used as a model in many other countries.

203. One commentator noted:

> The just satisfaction granted to the interests of authors will not be foreign to the veritable glory to come of French Arts and Letters, to that glory which illustrates the attention of the whole world and which has contributed so much to increasing the powerful influence of our beautiful Motherland, making of it the center of modern Civilization.

Jean Matthyssens, *Copyright Law Schemes in France During the Last Century*, 4 REV. INT'L DU DROIT D'AUTEUR 14 (1954).

204. *See* Jesse Hamlin, *Bernhard's Ready to Box Some Ears*, S.F. CHRON., Sept. 21, 1993, at E2.

205. Bernhard stated: "I haven't seen the movie, but from what I've read it sounds ugly and not a film I would go see." *Id.*

to demand the legal protection that necessitated the embodiment of moral rights in French intellectual property law. Seemingly helpless, Bernhard complained, "My lawyers tell me there's nothing we can do. Apparently, there's no copyright. We can't sue."[206] Then she stirringly added, "But ethically, it's wrong."[207] Nearly two hundred years ago, the French apparently began to make the very same allegations of moral injustice about the legal definitions and status of their intellectual property. Occasional social outrage culminated with the policy provisions that initiated the doctrine of moral rights in France.

206. *Id.*
207. *Id.*

TROKOSI – THE PRACTICE OF SEXUAL SLAVERY IN GHANA: RELIGIOUS AND CULTURAL FREEDOM VS. HUMAN RIGHTS

I. INTRODUCTION

It is widely believed that slavery no longer exists, but surprisingly it is still very common.[1] "Contemporary forms of human bondage include such practices as forced labor, servile marriage, debt bondage, child labor, and forced prostitution."[2] Most countries have outlawed slavery, yet it continues to exist in many countries and seems to be most concentrated in the Middle East, Asia, and Africa.[3]

One example of modern slavery is found in Africa where "[tens] of thousands of pre-teen [and teenaged girls[4]] are being kept as unpaid servants and sex slaves by West African voodoo priests to pay for the sins of their families against traditional gods and spirits."[5] As many as "35,000 virgin girls as young as eight in Ghana, Benin, Togo and Nigeria have been given to 'fetish priests' who treat them like serfs and often rape them."[6] For thousands of years, the religious tradition of making offers like cattle, money, and liquor to appease angry gods has existed; however, those offerings changed relatively recently.[7] Now, young girls are given to shrine priests to make amends for family sins, which range from breaking the law

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1. *See* Charles Jacobs, *Slavery: Worldwide Evil*, WORLD & I, Apr. 1996, at 110.

2. *Id.*

3. Among other areas, slavery has been reported in: Russia and Eastern Europe, *see* Christine S.Y. Chun, Note, *The Mail-Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes*, 17 U. PA. J. INT'L ECON. L. 1155, 1173-74 (1996); China, *see* Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & LAW 83, 87-88 (1994); Mali, Niger, Sudan, Cameroon, Burundi, Rwanda, Botswana, Namibia, South Africa, Taiwan, Philippines, Nepal, Indonesia, India, Bolivia, Paraguay, Peru, *see generally* ANTI-SLAVERY INTERNATIONAL — INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, ENSLAVED PEOPLES IN THE 1990S: INDIGENOUS PEOPLES, DEBT BONDAGE AND HUMAN RIGHTS (1997); Bosnia, Algeria, Uganda, *see* Barbara Crossette, *Violation: An Old Scourge of War Becomes Its Latest Crime*, N.Y. TIMES, June 14, 1998, § 4, at 1; and the Caribbean, *see Colombia Frees Child Sex Slaves*, SUN-SENTINEL (FORT LAUDERDALE), Sept. 27, 1998, at 12A.

4. Although the practice of Trokosi enslaves females of all ages, the tradition of atonement involves offering young girls to the shrines; thus, the term "girls" will be used throughout this note for simplicity.

5. Sam Kiley, *Child Slaves Used by West Africans to Appease Spirits*, TIMES LONDON, Sept. 17, 1996, *available in* 1996 WL 6519665.

6. *Id.*

7. *See Dateline: Innocents Lost* (NBC television broadcast, Aug. 30, 1998) [hereinafter *Dateline*].

to offending the gods.[8]

The United Nations and countries around the world have adopted several initiatives to recognize and establish general human rights standards and to eliminate harmful practices like sexual slavery. Some of these initiatives include: the Universal Declaration on Human Rights;[9] the Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery;[10] and the United Nations Convention on the Rights of the Child.[11] However, despite these efforts, sexual slavery and slavery-like practices continue.

This note focuses on Trokosi, the religious and cultural practice of sexual slavery in Ghana, Africa, and the human rights violations that arise from this practice. Part II analyzes the human rights movement and the issues raised when cultural and religious rights conflict with human rights. Part III provides background information on the Trokosi practice and describes experiences of some of the Trokosi system. Part IV discusses some of the international documents that prohibit human rights violations like sexual slavery. Part V discusses Ghana's Constitution and its provisions that prohibit Trokosi. This note concludes by evaluating the Trokosi practice by balancing the costs and benefits of the practice and concludes that Trokosi is a harmful cultural and religious practice that should be eliminated.[12] Additionally, this note (1) recommends that Ghana's president sign the recently passed law that specifically outlaws customary servitude to make it effective, (2) urges the government of Ghana through the Commission on Human Rights and Administrative Justice (CHRAJ), in conjunction with Non-Governmental Organizations (NGOs), to continue the educational efforts of the local leaders to eliminate sexual slavery in Ghana, and (3) urges human rights organizations, non-governmental organizations, and the international community to assist Ghana with its educational efforts by

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8. *See id.*

9. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 III.A, U.N. GAOR, 34th Sess., Pt. I, at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 21 (3d ed. 1992).

10. Slavery Convention, Sept. 25, 1926, 60 L.N.T.S., *amended by* Protocol of 7 December 1953, Dec. 7, 1953, 212 U.N.T.S. 17 [hereinafter Convention to Suppress Slavery], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 52 (3rd ed. 1992); Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 [hereinafter Convention to Abolish Slavery], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 58 (3d ed. 1992).

11. Convention on the Rights of the Child, G.A. Res. 44/25 Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/25 (1989) [hereinafter UNCRC], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 182 (3d ed. 1992).

12. The author is not advocating the elimination of the religions that observe the Trokosi system, only the practice of offering young girls to the shrines to atone for the sins of others.

providing the funding for workshops, training, and liberation ceremonies for those involved in Trokosi.

II. BALANCING HUMAN RIGHTS AGAINST RELIGIOUS AND CULTURAL PRACTICES

A. *The Debate*

Member states of the United Nations pledge their cooperation in solving the problems facing the international community "of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[13] However, "[s]tates will often justify discrimination and noncompliance with human rights conventions on the basis of custom or cultural practices. This obstacle is particularly difficult to overcome when the customs are founded on religion."[14]

Using religion to justify practices that many believe are violations of human rights standards is not a new concept.[15] Generally, states will protect their religious practices as a significant part of their culture and will decline to reprimand or prosecute those whose practices violate human rights standards.[16] Additionally, many states do not expressly recognize such practices as "discriminatory or biased" because they have been instilled within these cultures as the "natural" order of things.[17]

Human rights and culture cannot be separated from each other.[18] "[F]actors such as race, nationality, ethnicity, etc., are integral to the human

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13. U.N. CHARTER art. 1, para. 3.

14. Elizabeth L. Larson, Comment, *United Nations Fourth World Conference on Women: Action for Equality, Development, and Peace (Beijing, China: September 1995)*, 10 EMORY INT'L L. REV. 695, 714 (1996) (examining the potential for changing the international status of women through the Beijing Conference and Platform, discussing the challenges present in human rights development, and analyzing how the Beijing Conference addresses those problems).

15. *See* Berta Esperanza Hernández-Truyol, *Women's Rights as Human Rights — Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 659 n.207 (1996) (quoting Arthur Schlesinger, Jr., *The Opening of The American Mind*, N.Y. TIMES, July 23, 1989, at 1 (book review)). In her article, Hernández-Truyol explores "the roles played by rules of law and by the conflation of economic, social, political, religious, cultural, and historic realities in the marginalization of women in the international, regional, and domestic spheres worldwide" and proposes an "analytical model [that] deconstruct[s] and reconfigur[es] the human rights framework to ensure that women's rights that exist in theory become reality." *Id.* at 606-07.

16. *See* Larson, *supra* note 14, at 714.

17. *See id.*

18. *See* Hernández-Truyol, *supra* note 15, at 666.

rights construct. However, there is a distinction to be made between considering or accommodating cultural customs and using culture as a pretext to deny the integrity and dignity of individuals on the basis of sex."[19] Culture should not be used as "a shield to protect practices that violate women's human rights," nor should human rights be used "as a sword, a weapon of subjugation, colonialism and moral imperialism, to oppress other communities and ways of life."[20]

B. *The Conflict between Religious Freedom and Women's and Children's Rights*

> Religion, spirituality and belief play a central role in the lives of millions of women and men, in the way they live and in the aspirations they have for the future. The right to freedom of thought, conscience and religion is inalienable and must be universally enjoyed. This right includes the freedom to have or to adopt the religion or belief of their choice either individually or in community with others, in public or in private, and to manifest their religion or belief in worship, observance, practice and teaching. In order to realize equality, development and peace, there is a need to respect these rights and freedoms fully. Religion, thought, conscience and belief may, and can, contribute to fulfilling women's and men's moral, ethical and spiritual needs and to realizing their full potential in society. However, it is acknowledged that any form of extremism may have a negative impact on women and can lead to violence and discrimination. [21]

1. *Women's Rights*

Women's rights is a predominant area of conflict between religious law and human rights law.[22] "Religious law may incorporate elements hostile to

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19. *Id.*

20. *Id.* at 666-67.

21. *Report of the Fourth World Conference on Women: Beijing Declaration and Draft Platform for Action*, G.A. Res. 1, U.N. GAOR, 16th plen. mtg., ch. II, ¶ 24, at 655, U.N. Doc. A/Conf.177/20 (1995), *reprinted in* 6 UNITED NATIONS, THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN, 1945-1996, at 649 (1996).

22. *See* Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487, 515 (1988).

various human rights, infringing upon those rights to differing degrees."[23] On one level are rituals or practices that arguably do not have negative or lifelong effects on women, such as ear-piercing female infants.[24] On another level are dress codes, which reinforce the inferior status of women in certain societies.[25] However, on other levels are practices that do have significant, long lasting and possibly harmful effects on women, such as female genital mutilation (FGM),[26] "female infanticide, and reproductive controls, such as forced pregnancies or forced abortions."[27] The common element among these practices is that they "interfere with women's general well-being and perpetuate women's second-class status and conditions."[28] Unfortunately, because these practices are based on gender, they seem more easily justified

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23. *Id.* at 514.

24. *See* Hernández-Truyol, *supra* note 15, at 673.

25. *See* Sullivan, *supra* note 22, at 514.

26. *See generally* Fitnat Naa-Adjeley Adjetey, *Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351, 1361-62 (1995) (examining several African customs and traditional practices that affect women's autonomy and ways that the international human rights standards may be used in response to the problems women face).

> There are three different types of FGM: clitoridectomy, excision, and infibulation or "pharaonic" circumcision. Clitoridectomy is the removal of the clitoral prepuce or tip of the clitoris. Excision is the removal of the clitoris and the inner lips of the female external genitalia or labia minora. Infibulation or "pharaonic circumcision" is the most extreme of these operations and involves the removal of the clitoris, labia minora and parts of the labia majora. The remaining skin of the labia majora is then scraped to form raw surfaces and stitched together with thorns. The wound is further kept together by binding the woman with pieces of cloth made into a rope, from thigh to ankle for several weeks to enable scar tissue to form, covering the urethra and most of the vagina. A small aperture, the size of the head of a match stick or the tip of a finger, is left open for the flow of urine and menstrual blood. Approximately eighty-five percent of all women who undergo FGM have the clitoridectomy or excision procedure and the remaining fifteen percent have undergone infibulation.

Id. An amendment to the Ghana Criminal Code makes it a second-degree felony with a minimum sentence of three years imprisonment to practice FGM. *See id.* at 1372 n.83.

27. Hernández-Truyol, *supra* note 15, at 673. Hernández-Truyol describes women's sexual health rights and freedoms as a bundle of "rights critical to women's existence, well-being and full personhood," which include "life, health, privacy, family life, economic self-determination, political participation, education, and equality." *Id.*

28. *Id.* at 637. According to Hernández-Truyol, other inflictions on women "justified or explained by culture and tradition [are]: genital mutilation, female infanticide, bride burning, foot-binding, slavery, face-hiding, wife-beating, honor-killing, forced pregnancy, forced abortion, and multiple, early and closely spaced, child-bearing and birthing, to name but a few." *Id.* at 635-37.

by society than if they were rooted in another category, such as race.[29]

2. *Female Children's Rights*

Another conflict that arises between human rights and cultural and religious rights is abuse of children — particularly affecting female children.[30] Historically, women's and children's rights have been linked together based on the presumption that they need "special protection."[31] However, the connection between women's rights and the rights of the female child has not been significantly developed, even though it is widely accepted that the female child suffers abuses based on gender.[32] "Female excision,[33] bride burning,[34] female infanticide,[35] sex slavery and

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29. *See id.* at 637. "[A]lthough until recently culture and tradition were used to justify racial discrimination, including apartheid and slavery." *Id.*

30. *See* Kirsten M. Backstrom, Note, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEO. WASH. J. INT'L L. & ECON. 541 (1996/1997) (analyzing the problems the female child experiences and examining the various international legal responses to those problems).

31. *Id.*

32. *See id.*

33. Female excision is one form of FGM. *See* Adjetey, *supra* note 26, at 1361-62.

34. Bride burning is also known as dowry murder.

> In the typical dowry dispute (in India), a groom's family will harass a woman they believe has not provided sufficient dowry. This harassment sometimes end[s] in the woman's death, which family members often try to portray as a suicide or kitchen accident. . . . Government figures show a total of 5,377 dowry deaths in 1993 . . . . Nonetheless, convictions in dowry death cases are rare . . . . [W]hen dowry is not met, if psychological and physical abuse does not drive the women to suicide, they are often victims of bride burning . . . . [I]n some parts of India the custom of *sati* still exists where a widow will be burned or buried alive along with the body of her deceased husband.

Hernández-Truyol, *supra* note 15, at 635-36 n.118 (quoting DEPARTMENT OF STATE, 103D CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, at 1230 (Comm. Print 1994)).

35. "Female infanticide is defined as the killing of a child in its infancy because of the child's gender, and includes death through neglect." Backstrom, *supra* note 30, at 544.

> [It occurs] in various rural communities where female children are drowned, abandoned, starved, or given such inadequate postnatal care that they die from disease or malnutrition. Although male children are sometimes abandoned by their families, the practice is much less common and usually occurs when the male child has a physical or mental disability. In many cases girls are not killed outright after their birth. Instead, they die more subtly during the first few years of life as a result of cultural practices that discriminate against them and increase their risk of death.

Id.

tourism,[36] and servile marriage[37] all affect the female child because she is female and a child — both positions of vulnerability in many societies."[38] As the female child matures, the state offers her less protection even though she becomes more vulnerable to human rights abuses.[39]

C. *Protections for Religious and Cultural Practices*

In 1981, the United Nations adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[40] It is "regarded throughout the world as articulating the fundamental rights of freedom of religion and belief."[41] The Declaration compels states to "prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life."[42] It also provides that "[e]veryone shall have the right to freedom of thought, conscience and religion."[43] However, these freedoms are distinguishable

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36. Sexual slavery and tourism is a booming industry. *See* Eddy Meng, *Mail-Order Brides: Gilded Prostitution and the Legal Response*, 28 U. MICH. J.L. REFORM 197, 200 (1994). "The industry is transnational, involving procurers who recruit women from developing countries and marriage agencies in industrialized countries that print catalogs to solicit potential husbands." *Id.* at 200-01. After selecting a bridal package, the "consumer-husband visits potential brides in their home countries. If a meeting goes well and the parties decide to marry, the consumer-husband will apply for a fiancée visa, which allows his bride to come to the United States but which expires in ninety days unless she marries." *Id.* at 209. "Many factors cause women in developing countries to become mail-order brides but, [sic] the foremost is poverty . . . . Economics, however, is not the only reason for becoming a mail-order bride: social and other embedded cultural practices — sometimes working in conjunction with economic factors — also encourage women to enter into the trade." *Id.* at 203. "[T]he same countries that export mail-order brides are also the prime destinations for sex tourism." *Id.* at 224.

37. The practice can be described as follows:

> Servile marriage takes place primarily in societies where women have low social status and cultural attitudes perpetuate the belief that a wife is a slave. Servile marriage includes forced marriage — where the female child has no right to refuse the proposed union — as well as the sale of women into marriage by their families.

Backstrom, *supra* note 30, at 549-50.

38. *Id.* at 541-42.

39. *See id.* at 542.

40. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Nov. 25, 1981, G.A. Res. 36/55, U.N. GAOR 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981) [hereinafter Declaration to Eliminate Religious Intolerance], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 109 (3d ed. 1992).

41. Sullivan, *supra* note 22, at 488.

42. Declaration to Eliminate Religious Intolerance, art. 4(1).

43. *Id.* art. 1(1).

from the freedom to exercise one's religion or belief, which may be limited in order to safeguard other societal interests.[44] The Declaration acknowledges restraints set forth in the law and those that are deemed necessary "to protect public safety, order, health or morals or the fundamental rights and freedoms of others."[45]

The Declaration recognizes the right of parents and legal guardians to "organize family life in accordance with their religion or belief."[46] However, this control over children is restricted where it pertains to practices that are "injurious to [their] physical or mental health or to [their] full development."[47] This prohibition reflects the concern that children's health or survival may be threatened by some of these practices.[48]

The United Nations also adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Peoples' Convention) in 1989.[49] It is considered the "most comprehensive and ambitious approach to protecting indigenous and tribal cultures."[50] While the Convention does not expressly refer to the "right of self-determination, self-government, or autonomy," it does guarantee "respect for indigenous institutions" by affirming that "indigenous peoples [have] an identity of their own" and that they are more "than groups of individuals sharing some racial or ethnic characteristic" but are "comprised [of] organized societies."[51] However, despite the broad protections offered by the Peoples Convention, these protections are limited.[52] For instance, indigenous peoples "shall have the right to retain their own customs and institutions" only as long as they "are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."[53]

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44. *See* Sullivan, *supra* note 22, at 492-93.

45. Declaration to Eliminate Religious Intolerance, art. 1(3).

46. Sullivan, *supra* note 22, at 512.

47. Declaration to Eliminate Religious Intolerance, art. 5(5)

48. *See* Sullivan, *supra* note 22, at 513.

49. *See* Roger J.R. Levesque, *Sexual Use, Abuse and Exploitation of Children: Challenges in Implementing Children's Human Rights*, 60 BROOK. L. REV. 959, 973 (1994) (referring to the International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Conference, Draft Report of the Committee on Convention No. 107, App. I, C.C. 107/D.303 (1989), *reprinted in* 28 I.L.M. 1382 [hereinafter Peoples' Convention]). In his article, Levesque describes the general failure to view children's protection from sexual maltreatment as a basic human rights issue and examines this right against international human rights law.

50. Levesque, *supra* note 49, at 973.

51. *Id.* at 974 n.77.

52. *See id.* at 974.

53. Peoples' Convention, art. 8(2).

D. *Balancing Human Rights with Religious and Cultural Practices*

Human rights documents continually recognize that culture is an area that must be protected; however, culture is not relied on as a basis to diminish these protected rights.[54] To effectively evaluate a "perceived or claimed cultural conflict between a practice and a universal human right," the practice should be considered from the perspective of the cultural advocate as well as the human rights advocate.[55] This same examination should be made in regard to the human rights standard being asserted.[56] "In this context, particular attention to cultural practices is necessary so that they may be carefully protected from the improper imposition of outsiders' ideologies."[57]

When it appears that women are disadvantaged or disproportionately burdened by a cultural practice, the benefits of the cultural practice and the harm of the human rights violation must be weighed against each other.[58] Questions to consider include: "What is the origin and value of the cultural practice?; What is its level of significance to the culture and within the community?; What is its level of intrusion on a protected individual right?; and How significant is the human rights norm to the international community?"[59] The inquiry should also consider "the nature of the practice being challenged, who is challenging the practice (i.e., an insider versus an outsider), the challengers' motives for opposing the practice, and the claimed harmful outcomes of the practice."[60]

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54. *See* Hernández-Truyol, *supra* note 15, at 662.

55. *Id.* at 672. Hernández-Truyol's article proposes and develops a theoretical and analytical model to reform the international human rights arena and increase women's roles in this debate. *See id.* at 667. The article suggests that failure to focus on questions of gender, women, and culture is significant and due largely because women have been excluded from the global communication process. *See id.* at 669. Hernández-Truyol proposes three inquires: (1) "The Gender Question — Are there any gender implications of the rules or practices that otherwise appear neutral or objective? . . . [2] The Women's Question — What will the implications of the rule or practice, as interpreted and enforced, be on the real lives of women, and how will women be disadvantaged? . . . [and 3] "The Culture Question — What are the cultural considerations driving the practices and rules?" *Id.* at 670-72.

56. *See id.* at 672.

57. *Id.*

58. *See id.*

59. *Id.*

60. *Id.* at 672-73.

III. BACKGROUND ON THE TROKOSI PRACTICE

A. *The Trokosi practice*

The girls are known as Trokosi, or "slaves of the gods."[61] "'Tro' means god and 'Kosi' can be translated as virgin, slave or wife."[62] Reports indicate that there are "at least 4,000 girls and women bound to various shrines in the Trokosi system" in Ghana.[63] Additionally, there are an estimated 16,000 children of the slaves.[64] In some places more than 2,000 girls and women are enslaved to a single shrine.[65]

Trokosi is a religious and cultural practice concentrated primarily in the Volta region of Ghana; it is found among the Ada and Ewe (pronounced

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61. Howard French, *Girls Suffer for Sins of Fathers*, GUARDIAN, Jan. 30, 1997, *available in* 1997 WL 2363683. Trokosi is also spelled "Trocosi."

62. Emma Brooker, *Slaves of the Fetish*, INDEPENDENT, June 16,1996, at 12, *available in* LEXIS, News Library, Non-US News File.

63. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997, at 141 (1998) [hereinafter GHANA COUNTRY REPORT]. "Ghana is located on West Africa's Gulf of Guinea only a few degrees north of the Equator" and "became an independent state on March 6, 1957, when the United Kingdom relinquished its control over the Colony of the Gold Coast and Ashanti, the Northern Territories Protectorate, and British Togoland" after more than 100 years. U.S. Dep't of State, *Background Notes: Ghana*, Feb. 1998 (visited Oct. 9, 1998) <http://www.state.gov./www/background_notes/ghana_0298_bgn.html> [hereinafter *Ghana Background Notes*]. "The Constitution that established the Fourth Republic" of Ghana furnishes "a basic charter for republican democratic government" based on the English and American models. *Id.* The Constitution declares Ghana to be a "unitary republic with sovereignty residing in the Ghanaian people" and "calls for a system of checks and balances, with power shared between a president, a unicameral parliament, a council of state, and an independent judiciary." *Id.* "Ghana is active in the United Nations and many of its specialized agencies (including the World Trade Organization), the Nonaligned Movement, the Organization of African Unity (OAU), and the Economic Community of West African States." *Id.* "Ghana maintains friendly relations with all states, regardless of ideology." *Id.* "The United States has enjoyed good relations with Ghana at the nonofficial, personal level since Ghana's independence. Thousands of Ghanaians have been educated in the United States. Close relations are maintained between educational and scientific institutions, and cultural links, particularly between Ghanaians and African-Americans, are strong." *Id.* "After a period of strained relations in the mid-1980s, U.S.-Ghanaian official relations are stronger than at any other time in recent memory." *Id.* Among other things, "Ghanaian parliamentarians and other government officials have . . . acquainted themselves with U.S. Congressional and state legislative practices." Also, "[t]he U.S. and Ghanaian militaries have cooperated in numerous joint training exercises," and "[t]he Office of the President of Ghana [has] worked closely with the U.S. Embassy in Accra to establish an American Chamber of Commerce to continue to develop closer economic ties in the private sector." *Id.*

64. *See* Vincent t'Sas, *Ghana's Fetish Priests Free Slaves*, REUTERS WORLD SERVICE, Apr. 1, 1997, *available in* LEXIS, News Library, Non-US News File.

65. *See Dateline*, *supra* note 7.

Evay) ethnic groups.[66] By most western standards, Trokosi "is an especially severe abuse and a flagrant violation of children's and women's rights."[67] The Trokosi shrines are usually found in "remote, inaccessible places"[68] among "the poorest and least developed parts"[69] of Ghana. The shrine priests are believed to be highly influential with the gods because they are

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66. *See* Mawusi Afele, *Fetish Priests in Ghana Under Attack for Enslaving Young Girls*, DEUTSCHE PRESSE-AGENTUR, Jan. 21, 1996, *available in* LEXIS, News Library, Non-US News File. "Ethnically, Ghana is divided into small groups speaking more than 50 languages and dialects." *Ghana Background Notes*, *supra* note 63. "Ghana's principal ethnic groups are the Akans (Twi- and Fante-speaking), the Guans, Ewes, Dagombas, Gas, Gonjas, Dagabas, Walas, and Frafras." Ghana Embassy, *Ghana: The New Gateway to Africa* (visited Sept. 4, 1998) <http://www.ghana.gov/profile/index.html>. The major tribal languages are Twi, Fante, Ga, Hausa, Dagbani, Ewe and Nzema. *See id.* In nearly all cases, a tribe and its language have the same name. *See* D.E.K. KRAMPAH, LIFE IN GHANA 1 (1977). English is Ghana's official and commercial language and is taught in all schools. *See Ghana Background Notes*, *supra* note 63. "[I]n the absence of a native lingua franca, [English] is effectively the only means of communication between educated members of the various tribes." KRAMPAH, *supra*, at 1.

67. GHANA COUNTRY REPORT, *supra* note 63, at 141.

68. Brooker, *supra* note 62. "The village [of Dofor] sits at the end of an isolated finger of land which points into Lake Volta and gets cut off for three months during the rainy season." *Id.* While Accra, Ghana's capital, is "only two hours away by road . . . . Dofor has no electricity, no running water and only one vehicle — the village tractor." *Id.*

69. *Id.* Ghana is primarily agricultural, "with a majority of its workers engaged in farming." *Ghana Background Notes*, *supra* note 63. "About 70% of Ghana's population live in the countryside and of the remainder only a fraction earn their living outside rural occupations." KRAMPAH, *supra* note 66, at 4. Two-thirds of Ghana's export revenues come from cash crops, primarily cocoa and cocoa products. *See Ghana Background Notes*, *supra* note 63. Other traditional occupations include:

> weaving, basketry . . . pottery, lumbering, gold-, silver-, and black-smithing . . . oil-making from coconut and oil-palm fruits, carving in wood and ivory, shoe-making and cobbling, hairdressing and barbering, carpentering, tailoring and dressmaking, retail-trading, hawking of finished goods, food-selling and hawking, fishing, fish-mongering, palm-wine tapping and gin-distilling, cattle-, sheep-, goat- and poultry-rearing, charcoal burning, catering . . . cloth-dyeing, hair-dyeing, tanning, leatherwork-making, fore-skin surgery and trade-vending.

KRAMPAH, *supra* note 66, at 4-5. "By West African standards, Ghana has a diverse and rich resource base." *Ghana Background Notes*, *supra* note 63. Ghana's resource base includes: minerals, "such as gold, diamonds, manganese, bauxite, iron ore and various clay an salt deposits[;] [e]xtensive, rich forests with a wide range of fine tropical hardwoods[;] [a] wide variety of agricultural products and rich fishing resources[;] [u]nique tourist attractions." Ghana Embassy, *supra* note 66. The Ghanaian government places great emphasis on tourism support and development because tourism is "one of Ghana's largest foreign income earners (ranking third in 1997)." *Ghana Background Notes*, *supra* note 63. The tourism industry has grown in recent years as Ghana has become "a popular destination for African-Americans" tracing their cultural heritage. t'Sas, *supra* note 64. Ghana "helped feed the transatlantic slave trade that uprooted millions of Africans and shipped them to the Americas." *Id.*

able to communicate with them.[70] After the current system of chieftaincy emerged,[71] some of the traditional priests' powers diminished.[72] However, the priests "remain the most revered, feared and powerful figures in many rural communities."[73]

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70. *See* Brooker, *supra* note 62. "Senior members of Ghana's armed forces, police service and a handful of government ministers are said to visit the shrines seeking promotion, protection and success in their operations." *Id.* Jerry Rawlings, Ghana's current president, himself an Ewe, "has spoken of Trokosi as an important part of Ghana's cultural heritage." *Id.* However, President Rawlings has been commended recently for his efforts in trying to abolish Trokosi. *See* Peter Bailey, *Mission Possible*, TORONTO STAR, Apr. 5, 1997, at L18, *available in* LEXIS, News Library, Non-US News File.

71. "Chieftaincy is the system of traditional rule. A chief is the embodiment of the collective aspirations of his subjects and their culture." KRAMPAH, supra note 66, at 2.

> [I]n ancient times the various ethnic, tribal or clan groups were organised each in their separate areas. Each tribe had its own chief or ruler whose power was absolute in his own domain. Under him came divisional chiefs who ruled a section of the tribal area . . . . Each division consisted of a number of towns and villages.
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> Although the tribal chief was absolute in his own area, his rule was by no means despotic, for he could not [make] any decision against the advice of his council who represented the masses of his subjects. In this way the ordinary citizen was protected against the dangers of misrule . . . .
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> . . . .
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> Chieftaincy has never been tampered with except for the statutory right of the government to gazette, or approve, the enstoolment or enskinment, and destoolment or deskinning of a chief. (The terms enstoolment, destoolment, enskinment, derive from the fact that in the central and southern areas of Ghana, chiefs sit on wooden stools, while in the northern areas the chiefs sit on animal skins) . . . .
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> . . . [M]uch has been done by successive governments since [Ghana's] independence in 1957 to safeguard and enhance chieftaincy; for example, by establishing Regional Houses of Chiefs made up of all the paramount chiefs in the region, and a National House of Chiefs, attended by elected representatives from the Regional Houses of Chiefs. A Chieftaincy Secretariat was set up to deal with matters concerning destoolment, succession, stool-lands, disputes, etc. . . . .
>
> . . . In theory, no law passed by the government or by-law passed by the local council would be obeyed if the chiefs disapproved of it. In practice this has never happened.

Id. at 3.

72. *See* Brooker, *supra* note 62.

73. *Id.* While there is no rigid class system akin to those existing in some countries of the West, Ghanaian society is not classless. *See* KRAMPAH, *supra* note 66, at 1. "Class differences in Ghana spring first from traditional status; next, from social status; and last, from wealth." *Id.* The traditional status system recognizes the king or the chief first, "then the clan or family heads, followed by the captains of the traditional militia and various civil office holders." *Id.* These positions "take precedence, in order of authority and dignity, over the general citizenry," although they are chosen by the council of elders. *Id.* These families are considered sovereign and sacrosanct. *See id.* This is by far the most exclusive class and

Trokosi is a belief[74] "that things do not happen without a cause"[75] and evolved from the same belief structure as voodoo.[76] Trokosi "is a system in which a young girl, usually under the age of 10,[77] is made a slave to a fetish

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they "enjoy the highest respect in the locality." *Id.* This exclusive class "is born of tradition; its roots lie in the inviolate past and no-one can change it." *Id.* "No effort by a single individual can alter his traditional status, neither wealth nor learning nor alliance of any kind." *Id.* Thus, every person "knows his rightful place in society and keeps to it." *Id.* The other elite classes, based on social status and wealth, are not as rigidly set as the traditional elite. "One can easily work one's way up into one or the other or even both, and one can as easily fall from them." *Id.* First, is the social elite, "made up of highly educated people like politicians, public servants, professionals and people of similar standing and calibre." *Id.* The other elite of wealth is the smallest. *See id.* at 2. "There are very few rich people in Ghana, but quite a large number of well-to-do. They are mostly big cocoa-farmers, traders and businessmen." *Id.*

74. Animism "is the belief that every object of nature, both animate and inanimate is the abode of a soul or disembodied spirit." KRAMPAH, *supra* note 66, at 24. "The traditional Ghanaian recognises a hierarchy of spirits presided over by God (Onyankopon or Onyame)." *Id.* After God comes "his wife the Earth Goddess (Asaase Efua)," then "the nature-spirits-gods (abosom) and sprites," and finally "the ancestor spirits (nananom)." *Id.* There are "600 or more lesser gods, often associated with natural phenomena like thunder, mountains, rivers and lakes." Brooker, *supra* note 62. These spirits are believed to participate directly in the affairs of humanity and mediate on humanity's behalf "giving protection, adjudicating supernaturally in criminal cases, and punishing the guilty." *Id.* The spirits are thought to be "most helpful when properly ministered to, but are very vengeful when offended." KRAMPAH, *supra* note 66, at 24. The point is that when a deity helps someone, it must be rewarded. *See* Emile F. Short, Commissioner for Human Rights and Administrative Justice in Ghana, Trokosi — Legal or Illegal, Address before Ghanaian Committee (date unknown) (on file with the author). The reward shows appreciation and gratitude for the good fortune that the god has manifested. *See id.* Thus, animal sacrifices and rewards such as cloth, drinks, and money were presented to the gods. *See id.* "The traditional Ghanaian[,] therefore, strives to do right by the hierarchy of spirits and by society." KRAMPAH, *supra* note 66, at 24. Ghanaians are "naturally moralistic" in life, their folklore consists of "stories which teach that evil follows upon evil and good comes when one does good." *Id.* Ghanaians try "to remain in harmony with all forces about [them], material and immaterial." *Id.* Therefore, every evil is "the result of disharmony," and Ghanaians strive "to restore the harmony through expiation and sacrifice." *Id.*

75. Short, *supra* note 74.

76. *See* Brooker, *supra* note 62. "Ghana is a secular state," where "a wide variety of religions are practised." *See* KRAMPAH, *supra* note 66, at 24. The three major religions are Islam, Christianity, and Animism. *See id.* An estimated 15% of Ghana's population are Islamic, 62% Christians, and the remainder (23%) hold traditional beliefs of Animism. *See* JOHN S. POBEE, RELIGION AND POLITICS IN GHANA 12 (1991).

77. Some reports state that children as young as two have been given to a shrine for crimes committed by relatives. *See* Brooker, *supra* note 62. Other reports indicate girls as young as four, five, and six have been given to a shrine. *See* Bailey, *supra* note 70; Afele, *supra* note 66; t'Sas, *supra* note 64.

shrine for offenses allegedly committed by a member of the girl's family,"[78] like stealing[79] or improper sexual relations.[80] Originally, the girls were killed as a sacrifice to appease angry gods[81] or "to ensure success in war."[82] Then, the priests agreed to keep the girls as slaves "mainly to work the shrine's land, do the priest's housekeeping and share his bed."[83]

The practice of Trokosi began as a system to "search for truth and knowledge" but now serves primarily as a device to punish wrongdoers.[84]

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78. GHANA COUNTRY REPORT, *supra* note 63, at 141. "In a majority of the tribal or ethnic groups in Ghana, the family is made up of brothers, sisters, cousins, and aunts on the maternal side together with their children." KRAMPAH, *supra* note 66, at 10. In a few areas, the basis of the family is the paternal line. *See id.* The souls of the departed, called "ancestral spirits," are also included in the family. *See id.* "The Ghanaian family is a large group of people with a common heritage, and common sentiments and aspirations. The average Ghanaian is never an isolated individual, even if he has neither wife, children nor home of his own." *Id.* The family usually lives in a neighborhood formed by a collection of their houses. *See id.* Generally, Ghanaians build their own homes by their own means. *See id.* at 12. They use inexpensive materials like swish or earth, "particularly in the rural areas where no attention is given to planning or environmental specifications." *Id.* "The typical Ghanaian house is a single storied rectangular or square building with an open central yard or compound around which all the rooms are arranged. The roof is usually a corrugated iron or aluminum sheets." *Id.* In certain areas, northern Ghana in particular, the rooms form a circle around the central yard and have thatched roofs. *See id.* Although earth is used in building the homes, the walls are usually plastered and painted, and the floors are usually cemented. *See id.* Typically, Ghanaian homes have a kitchen, bathroom, storage area, sitting room, and five to seven verandahs which are open or are enclosed by a short wall. *See id.* "The verandah is an essential part of the Ghanaian house where many household activities are carried on." *Id.* The husband and wife have separate bedrooms. *See id.* The girls live in one room until reaching puberty, when they leave the group and have their own rooms. *See id.* "The grown-up boys may each have their own room, or they may share a singe room by themselves or with the younger boys." *Id.*

79. *See* GHANA COUNTRY REPORT, *supra* note 63, at 141.

80. *See* Kiley, *supra* note 5.

81. *See* t'Sas, *supra* note 64. For instance, some of the girls were fed to crocodiles. *See id.*

82. Kiley, *supra* note 5.

83. t'Sas, *supra* note 64.

84. *See* Short, *supra* note 74.

> In the past, the essence of the deity was to protect the community. The fundamental problems and questions of everyday life are addressed to this deity . . . .
>
> . . . .
>
> . . . These days vestal virgins initiated into shrines are mostly cases where someone in the family might have committed a crime.
>
> Whenever a crime was committed, the offended party became angry and approached a priest to look for the offender or wrongdoer. This search is done through the invocation of the gods. The aggrieved person demanded of the priest that his deity should punish the offender[']s family. After some time there were alarming calamities such as large death tolls in the family of the offender.

Ghanaians believe "the practice stems from a philosophy that sees justice and punishment as communal; an individual with no connection to a crime may be punished to spare others. Similarly, when one person's offence goes unpunished, vengeance may be wreaked upon the entire community."[85] The young girls "are offered at a shrine after a run of bad luck, disease, or a series of deaths in a clan"[86] or to prevent similar events in the future.[87]

> As custom demanded, the suffering family will conduct a search to find out the cause of this family tragedy . . . . Eventually the family consulted the shrine whose god had been involved and acknowledged the offence.
>
> The priest would inform them of the necessary ritual for reparation. Central among the items demanded is a virgin girl who has not at the time menstruated to serve as a slave in the shrine. The period of servitude for the vestal virgin varies from place to place and could be from three (3) years to life.

Id.

85. French, *supra* note 61. The extended family system is the basis for a variety of features unique to the Ghanaian community, including "communal labor, collective liability to family or community commitments, [and] collective rights to opportunities or assets in the family or community." KRAMPAH, *supra* note 66, at 10. "The Ghanaian sees responsibility and rights as things that are to be collectively shared. He sacrifices personal ease and comfort to the collective wellbeing of the social unit of which he is a member, and the other man's joys and sorrows are equally his." *Id.* at 28-29.

> A very special feature of Ghanaian life, deriving from the traditionally communalist concepts of rights and responsibility, is the idea of communal labour. The chief of a town or village and his elders may, in the interest of local development, decide upon a particular project. This project may involve manual labour and/or money. Once the decision has been taken by the people through their representatives and rulers, it is assumed that acceptance is unanimous . . . .
>
> On the day chosen for work every adult citizen goes to the place and led by the chief, his elders and street or neighbourhood leaders, begins the work. Most often the work involves only the men, in which case the women are expected to provide free food . . . .
>
> . . . .
>
> If the project requires money, the sum involved is divided between men and women in the community; women pay half as much as men. The gonggong man announces the amount due and neighbourhood leaders or family heads are made responsible for collection. These are what are called in Ghanaian newspapers "voluntary contributions", and those who refuse to pay are renegades and are refused the right to share in the benefits of the completed project . . . .
>
> Communal labour has remained and will remain a way of getting things done by local resources of manpower and materials and supplementing government efforts in the rural areas.

Id. at 4.

86. Kiley, *supra* note 5.

87. *See CNN Newsroom/Worldview* (CNN television broadcast, Apr. 23, 1997) [hereinafter *CNN*].

Traditionally, the offerings took the form of cattle, money, and liquor, but over time the practice changed from offering animals to offering girls.[88] The practice changed due to the priests' belief that only virgins could appease the gods.[89] The change may also have been economically based. Long ago, families started giving their daughters to the shrines because a girl was cheaper than a cow and more likely to please the priest.[90]

The tradition requires that the girls begin their bondage as virgins.[91] Once at the shrine, the priest is the only one who can decide when the girls have atoned for the sin and free them.[92] "They are expected to stay with priests from the age of about eight up to 15 and sometimes much longer."[93] Sometimes, even lifelong servitude may not settle the debt to the gods.[94] Occasionally, the family must offer another female virgin if the Trokosi dies while at the shrine.[95] If the Trokosi is not replaced, it is alleged that the refusal "will lead to a recurrence of calamities in the family of the wrongdoer."[96] It can go on for generations.[97] Different girls pay for "the same offense, from generation to generation."[98] Today, there are some women bound to shrines who "represent the fifth successive generation to pay for a [single] crime."[99]

Most Trokosi "are condemned to a lifetime of hard labour, sexual servitude and perpetual childbearing at the service of the village priest."[100] The girls work domestically for the priest by cooking, cleaning, and working the fields.[101] The priests get all of the profits,[102] but they are not obligated to provide "food, medical care or education for the girls or for the children

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88. *See Dateline*, *supra* note 7. "Trokosi has undergone some transformation over the years and so with time reward of human beings became the norm. This reward of human beings has now become central to the Trokosi system." Short, *supra* note 74.

89. *See* Bailey, *supra* note 70.

90. *See Dateline*, *supra* note 7.

91. *See* French, *supra* note 61. The tradition of giving virgin girls to the shrine dates back at least as far as the 17th century. *See id.*

92. *See id.*

93. Kiley, *supra* note 5.

94. *See 60 Minutes: Trokosi* (CBS television broadcast, Nov. 30, 1997) [hereinafter *60 Minutes*].

95. *See* Brooker, *supra* note 62.

96. Short, *supra* note 74.

97. *See Dateline*, *supra* note 7.

98. *60 Minutes*, *supra* note 94.

99. Brooker, *supra* note 62.

100. *Id.*

101. *See Dateline*, *supra* note 7. "Some [priests] have as many as 40 . . . trokosi . . . under their control." Bailey, *supra* note 70.

102. *See* Brooker, *supra* note 62.

they bear."[103] The families of the Trokosi are expected to provide food for the girls and their children and, eventually, to pay for the Trokosi's burial.[104] "Although the girls' families must provide for their needs . . . most are unable to do so"[105] or simply ignore the obligation.[106] In theory, the Trokosi marry the gods, but because the priest stands in place of the gods, the girls are his wives.[107] Unlike other wives in Ghana, the Trokosi have no rights, no assets, and cannot leave when they choose.

Trokosi are the sexual property of the priests, so by night, they are sex slaves.[108] "When a fetish slave starts menstruating, she undergoes an initiation ceremony after which the priest, or as the custom would have it, the god through the human channel of the priest, can have sex with her whenever he wants."[109] During this initiation ceremony, "the girl is sent naked into a dark room where she is told that 'the fetish' will have sex with her and [she] should therefore not resist. . . . [She is] then sexually assaulted . . . ."[110]

The Trokosi generally have "two or three children by their priest masters,"[111] and because they usually do not have access to education, they are usually unable to support themselves or their children when released from their enslavement, which ranges between three years to life.[112] Even if released, generally in poor health, with no family ties, no education, no skills or hope of marriage, "[m]any former slaves have to remain with the priests after serving the time agreed by their families because they are cut off from any other means of survival."[113] Others remain after their release "because they can't overcome their fear of the priests who once ran their lives."[114]

If the Trokosi manage to run away, the outside world is not much better.[115] After the girls have been branded as Trokosi slaves, their families

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103. Bailey, *supra* note 70. The Trokosi are completely responsible for the children. *See* Telephone Interview with Emile Short, Commissioner of Human Rights and Administrative Justice for Ghana (Nov. 4, 1998).

104. *See* Brooker, *supra* note 62.

105. GHANA COUNTRY REPORT, *supra* note 63, at 141.

106. *See* Short, *supra* note 74.

107. *See 60 Minutes*, *supra* note 94.

108. *See Dateline*, *supra* note 7.

109. Brooker, *supra* note 62. According to Mr. Aklidopko, a Trokosi priest, "[h]aving sex with a woman depends on love and affection. If the woman is not willing, you can't force it." *60 Minutes*, *supra* note 94.

110. Afele, *supra* note 66. Older women are sometimes kicked out of the shrines once they have lost their physical appeal. *See id.*

111. Kiley, *supra* note 5.

112. *See* Short, *supra* note 74.

113. Kiley, *supra* note 5.

114. Bailey, *supra* note 70.

115. *See 60 Minutes*, *supra* note 94.

refuse to take them back, and they may become outcasts.[116] "Their families wouldn't take them back even if I begged them," says Togbe Charmla, a fetish priest.[117] "They're too afraid of angering the fetish."[118]

Gradually, Ghanaians and even some priests are realizing that the Trokosi system violates human rights.[119] Some of Ghana's "more enlightened fetish priests have agreed to try to prevent families from handing over their daughters to atone for sins they fear they may have committed" and to convince them to offer a goat instead.[120] However, not all priests are so agreeable.[121] "Despite the outcry against the dehumanising practice, some fetish priests turn a deaf ear to calls to abolish it."[122] Many others "have flatly refused to cooperate."[123] The priests view Trokosi as a beneficial practice because it "deters others from committing crimes."[124] Some priests fear that abolition of the Trokosi system would destroy their religion.[125] Other priests have warned that if they can no longer receive women and girls as offerings to the gods, they cannot be held responsible for the "dire

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116. *See id.* In addition to the social stigma, some shrines physically mark the Trokosi. *See* Brooker, *supra* note 62. However, there is some evidence that physical branding is not a widespread practice and that the Trokosi are not perceived as outcasts. *See* Telephone Interview with Emile Short, *supra* note 103.

117. Brooker, *supra* note 62. Charmla, who is also the headmaster in his village school, had a Christian upbringing, but converted to the traditional religion of the region after he began experiencing vision problems while in school to get his teaching certificate. *See id.* When the doctors told him nothing was wrong with his eyes, he realized "the fetish had entered [him] and was summoning [him] to become a priest." *Id.*

118. *Id.*

119. *See* French, *supra* note 61.

120. Kiley, *supra* note 5.

121. Pastor Mark Wisdom, a Ghanaian Baptist minister, has spent the last 15 years working to abolish Trokosi. *See* Brooker, *supra* note 62. "By 1982, [Wisdom] had persuaded all the fetish priests and shrine-owners in the region to gather for a big meeting at which they agreed the practice should be abolished." *Id.* The priests even agreed to perform a ceremony releasing the Trokosi. *See id.* However, one priest convinced the group to postpone the ceremony for two weeks. *See id.* If Wisdom was alive at the end of that time, "it would be a sign that the fetish gods were happy to let the women and girls go." *Id.* If he died, the tradition would continue. *See id.* Recalling his two week spiritual battle, Wisdom said, "The priests tried to kill me by all sorts of means. I had a boy who cooked for me. They gave him a fish hook attached to a thread and made him put it in my food. Fortunately I did not swallow it." *Id.* Every night for two weeks, Wisdom's home "reverberated with thuds and bangs." *Id.* Wisdom "wrestled with evil spirits sent by the fetish priests. 'Witches and wizards came to hypnotise and attack me,'" he said. *Id.* "They vowed to kill me at all costs." *Id.* In the end, although he survived, the priests decided to keep the Trokosi. *See id.*

122. Afele, *supra* note 66.

123. *CNN*, *supra* note 87.

124. *60 Minutes*, *supra* note 94. *See also* Afele, *supra* note 66.

125. *See* Afele, *supra* note 66. Leaders of the campaign against Trokosi, some of whom are affiliated with other religions, say their movement "is not aimed at asserting Christianity, but is rather a fight against human rights abuses." *Id.*

consequences to the community."[126] When confronted and asked what it would take to stop the enslavement of virgin girls, one priest replied that Trokosi was "the price of human sinfulness."[127] "If stealing stops, then my marrying will stop," he said, "[b]ut if the people continue to do wrong, then the women will keep coming."[128]

B. *The Trokosi*

Those who have spoken with the Trokosi report the girls ache with a desire to be free.[129] Most of the girls do not play, chat or even smile, but are somber, weary, and subdued.[130] Some speak of committing suicide by taking poison.[131]

Abla Kotor's family took her to a shrine to atone for the rape her father committed against a niece (Abla's mother) several years before.[132] Juliette,

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126. *CNN*, *supra* note 87. The fetish priests say the war gods need virgin 'brides' and that they cannot change the gods' will. Bailey, *supra* note 70. One priest stated that the young girls "'must be at the shrines because they perform certain chores which boys cannot do.'" Afele, *supra* note 66. The priests do not think force can be used to stop the practice, but some have expressed their openness to alterative approaches. *See id.* As one priest suggested, "[I]f we are educated to accept that we are wrong, we can think of a solution." *Id.*

127. *Dateline*, *supra* note 7.

128. *Id.*

129. *See id.*

130. *See* Brooker, *supra* note 62.

131. *See Dateline*, *supra* note 7.

132. *See* French, *supra* note 61.

> Aged just 12, with a shy smile, Abla Kotor has begun a life of servitude and atonement for a crime she did not commit. For now her duties mostly involve sweeping the courtyard of a local fetish priest in . . . south-east Ghana's traditional juju religion. But her responsibilities will grow to include providing sexual favours to the priest.
>
> Miss Kotor has little idea why she was sent to the shrine in Tefle by her family four months ago.
>
> "My father brought me here, but he never explained why," she said in halting English and her native Ewe. "I was told that someone had done something bad in my family, but I was not told what it was."
>
> . . . .
>
> In exchange for a bottle of schnapps, the priest Miss Kotor serves as one of seven trocosi "wives" explained that Miss Kotor has been given to him to atone for a rape.
>
> Not just any rape, he explained, with Miss Kotor listening silently, perhaps hearing the story for the first time, but the sex her father forced a young niece to engage in years ago. That act resulted in Miss Kotor's birth, the priest said.
>
> He explained it in terms of his religion. "To you this may seem like a miscarriage of justice, but the girl will have to atone. It is the spirit, our fetish, who has made things work this way, and only he can explain."

along with twenty cows and ten crates of brandy, was expected to go to a shrine to atone for her father's crime of stealing a tape recorder.[133] Ten year-old Mewornovi Kokou was given to the shrine for a crime committed so long ago that no one remembers what the crime was or who did it.[134] Julie Dorbadzi was six when her family surrendered her at a shrine to atone

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Id.

133. *See Dateline*, *supra* note 7.

> DENNIS MURPHY: [Juliette] was only days away from being turned over to a priest for a crime her father Joshua had committed years ago. He'd stolen a tape recorder, and now the shrine had set a price to appease the gods: 20 cows, 10 crates of brandy, and Juliette.
>
> KATE BLUETT: And she suffered nightmares, waking up screaming in the night begging her mother to help her out and not let her go to the shrine.
>
> MURPHY: Juliette's mother, Shee-rah, hid her daughter away in panic. Her father went to bargain for Juliette's freedom with the priest and with the village elders. . . . The priest and Juliette's father bargained and threw shells, the god's vote on what the price of sin was to be.
>
> [Joshua begged to get the price of atonement reduced.]
>
> MURPHY: For hours the negotiations droned on.
>
> . . . .
>
> MURPHY: [Soon] the filmmakers realized that Juliette wasn't even up for discussion.
>
> . . . .
>
> MURPHY: During the entire negotiation, neither the father nor the priests asked about Juliette. In the end, the father's debt . . . was reduced [to 15 cows, 2 crates of brandy and Juliette.]
>
> . . . .
>
> MURPHY: In the end, the priests reversed themselves and said the family could keep Juliette for $2,500, an impossibly high fine, more than ten years of earnings for [Joshua].
>
> . . . .
>
> STONE PHILLIPS: The filmmakers contacted a human rights organization that paid the fee for Juliette and won her freedom. Today Juliette is back in school and hopes to go to college.

Id.

134. *See* Brooker, *supra* note 62.

> Mewornovi Koku has a delicate, solemn face and an air of resignation which makes her seem more like 75 than 10.
>
> . . . .
>
> Mewornovi's family had to give a virgin daughter to the shrine to atone for an ancestral crime, as required by the traditions [of their religion]. The original offence was committed so long ago that nobody can remember what it was, let alone who did it. "Human memory may be frail but the gods do not forget," says Togbe Charmla, . . . priest of the shrine . . . where Mewornovi will remain a virtual prisoner until she dies. "The fetish demands it," he explains. "If the family withheld her they would be cursed and die."

Id.

for a theft her grandfather committed.[135] Mercy Sanahee was in servitude for seventeen years and was the second in her family to be sent into slavery because her great-grandmother stole an earring two generations ago.[136] Grace Duga Cabanu was sent to the shrine at age eighteen, "not to atone for a criminal offense but as an offering to the gods to improve the harvests, an arrangement existing in her family since the early 19th century."[137] Yotia Dorgbadzi was twelve years old when she was taken to the shrine where she served for eighteen years.[138] She was released when she was no longer "attractive."[139]

IV. INTERNATIONAL CONVENTIONS PROHIBIT TROKOSI

A. *Overview*

Protection from sexual abuse is recognized as a basic human right by the international community.[140] Several programs, conventions, and declarations have been signed, ratified and enacted that could be relied on as a foundation to eliminate the practice of Trokosi. However, none appear to have an appropriate enforcement mechanism to bring violators to justice. "While the international human rights system has given rise to an ever-increasing number of standards, supervisory organs, reporting processes, complaint procedures, and special rapporteurs, it still lacks effective

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135. *See id.*

> Julie Dorbadzi was six when her family abandoned her at . . . [a] shrine, where she grew up with five other Trokosi.
>
> Julie was paying for [a theft committed] by a great-grandfather. She was the fourth successive virgin sent by her family to atone for that crime. "By the time I was seven, the priest wanted to have sex with me, but I resisted until I was 12. I gave in because if you didn't sleep with him, the priest would beat you."
>
> . . . Now 23, she recently ran away, . . . but [the two-inch scar] on her left cheek still marks her out as a Trokosi. "People notice it and, if they're from round [sic] here, they know what it means. I can tell some of them are afraid of me."

Id.

136. *See* CNN, *supra* note 87. "The priest first forced himself on her when she was 11 years old." *60 Minutes*, *supra* note 94. After years of servitude, Mercy ran away, but found assimilation back into society very hard. *See id.* "People ran away from me. Even my relatives turned their backs." *Id.* Interestingly enough, the priest that Mercy served is a government official with the Ministry of Health. *See id.* But "[b]y night, he's a husband to 10 slaves, who've borne him 60 children." *Id.*

137. *CNN*, *supra* note 87.

138. *See* Afele, *supra* note 66.

139. *See id.*

140. *See* Levesque, *supra* note 49, at 996.

implementation and enforcement mechanisms."[141]

B. *The African Charter on the Rights and Welfare of the Child*

The African Member States of the Organization of African Unity (OAU) adopted the African Charter on the Rights and Welfare of the Child (African Children's Charter) in 1990.[142] Ghana is a member state of the OAU.[143] The purpose of the African Children's Charter is to balance human rights and culture.[144] It directs member states to eliminate customs and practices that are detrimental to children.[145] In particular, member states are to abolish "(a) those customs and practices prejudicial to the health or life of the child, and (b) those customs and practices discriminatory to the child on the grounds of *sex* or other status."[146]

The Preamble recognizes the importance of human rights and sets forth the special safeguards and care needed for African children due to unique factors of "socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger."[147] Among the rights outlined in the Charter include protection against child abuse and torture,[148] protection against harmful social and

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141. Justice Elizabeth Evatt, *Ours by Right: Women's Rights as Human Rights*, 7 HARV. HUM. RTS. J. 295, 299 (1994). Additionally, some see the system as "burdened by lack of coordination and resources, overlapping mandates, excessive use of reservations, and lengthy delays." *Id.*

142. African Charter on the Rights and Welfare of the Child, Organization of African Unity, Doc. CAB/LEG.24.9/49 (1990), *reprinted in* AFRICAN NETWORK FOR THE PREVENTION AND PROTECTION AGAINST CHILD ABUSE AND NEGLECT, CHARTER ON THE RIGHTS AND WELFARE OF THE AFRICAN CHILD 12 (1993) [hereinafter African Children's Charter].

143. *See Ghana Background Notes*, *supra* note 63.

144. *See* Hernández-Truyol, *supra* note 15, at 662.

145. *See id.*

146. *Id.*

147. African Children's Charter, pmbl.

148. *See id.* art. 16. Article 16 requires state parties to "take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse." *Id.*

cultural practices,[149] and protection against sexual exploitation.[150]

The Charter establishes the Committee on the Rights and Welfare of the Child (Children's Rights Committee)[151] whose principle mandate includes: (a) promoting and protecting the rights set forth in the Charter; (b) monitoring implementation and ensuring protection of the rights outlined in the Charter; and (c) interpreting provisions of the Charter at the request of a party.[152] State parties are required to submit reports to the Committee on the steps taken to ensure the enjoyment of these rights two years after becoming a party and every three years thereafter.[153] The Committee may also use any appropriate method of investigation on matters within the Charter's jurisdiction.[154]

Trokosi violates the Charter because it subjects children to degrading treatment and sexual abuse. Additionally, as a cultural practice, it is harmful to the welfare, dignity, and normal growth and development of the girls enslaved to the priests. Moreover, Trokosi discriminates on the basis of sex because only virgin girls are offered to appease the gods. While the declarations in the Charter are laudable, the obligations on the state parties to abide by its provisions are not binding. The Charter states that "[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged."[155] Although discouraging inconsistent practices is important, it falls far short of protecting those affected by the Trokosi system. The Charter fails to provide for an effective enforcement mechanism to ensure that the state parties give full effect to the Charter. There is no mechanism for a member state or an aggrieved individual to bring a state party before a tribunal to account for violations. Similarly, it fails to make the Charter directly enforceable in the courts of the ratifying countries, instead relying on the domestic laws of each nation to

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149. *See id.* art. 21. Article 21 of the Charter requires state parties to "take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child." *Id.* Article 21 focuses in particular on "(a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices [that are] discriminatory to the child on the grounds of sex or other status." *Id.*

150. *See id.* art. 27. Article 27 of the Charter provides that state parties "shall undertake to protect the child from all forms of sexual exploitation and sexual abuse." *Id.* In particular, state parties are to "take measures to prevent: (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; [and] (c) the use of children in pornographic activities, performances and materials." *Id.*

151. *See id.* arts. 32-41.

152. *See id.* art. 42.

153. *See id.* art. 43.

154. *See id.* art. 45.

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

enforce the provisions recognized in the Charter.

C. *United Nations Human Rights Declaration*

On December 10, 1948, the United Nations General Assembly adopted and proclaimed the Universal Declaration of Human Rights (Universal Declaration), "as a common standard of achievement for all peoples and all nations" of the rights found therein.[156] While the Universal Declaration has significantly influenced customary law, "it is not an international agreement but a declaration of basic principles approved by the General Assembly."[157] The Universal Declaration proclaims that "[a]ll human beings are born free and equal in dignity and rights."[158] It establishes that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[159] and that "[e]veryone has the right to life, liberty and security of person."[160] It further provides that "[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."[161]

The Trokosi system violates the Universal Declaration because the girls taken to the shrines are stripped of their liberty, security of person and dignity, as well as subjected to cruel, inhuman, and degrading treatment by being enslaved to other human beings against their will, having to work under the complete control of the priests, and having to satisfy the priests' sexual desires. The stories in Part III provide ample evidence of Trokosi's harmful effects.[162] While the Universal Declaration has functioned as a

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156. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 III.A, U.N. GAOR, 34d Sess., Pt. I, at pmbl., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 21 (3d ed. 1992).

157. Michelle Lewis Liebeskind, *Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights*, 63 REV. JUR. U.P.R. 645, 668 (1994) (focusing on peacetime violence against women committed by private individuals and analyzing several international documents that condemn violence against women).

158. Universal Declaration, art. 1.

159. *Id.* art. 2.

160. *Id.* art. 3.

161. *Id.* art. 5.

> Rape and abuse may be considered violations of Articles 3 and 5 of the Universal Declaration, read against the definition of torture found in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). Coupled together, these articles prevent the violations of an individual's bodily integrity, sexually or through other forms degrading or cruel acts.

Liebeskind, *supra* note 157, at 669.

162. *See supra* notes 129-39 and accompanying text.

model for over seventy human rights instruments, it is simply a statement of principles and is not legally enforceable.[163] Indeed, if it was enforceable, the subsequent conventions and declarations directed at women's and children's rights would be unnecessary.[164]

D. *The Convention to Suppress the Slave Trade and Slavery and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*

In 1926, the Convention to Suppress the Slave Trade and Slavery (Convention to Suppress Slavery) was enacted by the League of Nations.[165] The Convention to Suppress Slavery defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[166] The High Contracting Parties were charged with adopting all appropriate measures to prevent, suppress, and abolish slavery in all of its forms,[167] including compulsory and forced labor.[168]

The United Nations adopted the Convention to Suppress Slavery in 1953 to allow state parties to continue the efforts begun by the League of Nations in abolishing slavery.[169] Then in 1956, the United Nations, aware that slavery still existed, augmented the Convention of 1926 with the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Convention to Abolish Slavery).[170] Ghana ratified the Slavery Convention of 1926, as well as the Convention to Abolish Slavery.[171]

The Convention to Abolish Slavery requires state parties to take all practical and necessary measures to abolish or abandon the following

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163. *See* Backstrom, *supra* note 30, at 569 (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 463 (1962)).

164. *See* Liebeskind, *supra* note 157, at 668.

165. *See* Slavery Convention, Sept. 25, 1926, 60 L.N.T.S., *amended by* Protocol of 7 December 1953, Dec. 7, 1953, 212 U.N.T.S. 17 [hereinafter Convention to Suppress Slavery], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 52 (3rd ed. 1992).

166. *Id.* art. 1(1).

167. *See id.* art. 2.

168. *See id.* art. 5.

169. *See id.*

170. *See* Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 [hereinafter Convention to Abolish Slavery], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 58 (3d ed. 1992).

171. *See* UNITED NATIONS, HUMAN RIGHTS: INTERNATIONAL INSTRUMENTS, CHART OF RATIFICATIONS 5 (1995), U.N. Doc. ST/HR/5, U.N. Sales No. E.87.XIV.2 (1995) [hereinafter CHART OF RATIFICATIONS].

institutions and practices: (a) debt bondage;[172] (b) serfdom;[173] (c) forced marriage;[174] or (d) "any institution or practice whereby a child or young person under the age of eighteen years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour."[175] Additionally, state parties are to make the enslavement or inducement of another into slavery a criminal offense and to hold those convicted liable.[176] Notably, state parties are not permitted to make reservations to the Convention to Abolish Slavery,[177] and any disputes arising between state parties that are not settled through negotiation "shall be referred to the International Court of Justice at the request of any one of the

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172. *See* Convention to Abolish Slavery, art. 1(a). Debt bondage is defined as:

> the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Id.

173. *See id.* art. 1(b). Serfdom is "the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status." *Id.*

174. *See id.* art. 1(c). The term forced marriage refers to

> any institution or practice whereby: (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) a woman on the death of her husband is liable to be inherited by another person.

Id.

175. *Id.* art. 1(d).

176. *See id.* art. 6(1).

177. *See id.* art. 9.

> A reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Reservations are permissible unless generally or specifically prohibited by a treaty, or when "the reservation is incompatible with the object and purpose of the treaty." Other states parties are considered to have accepted a reservation unless they object to it either within twelve months of notification or "by the date on which [they express their] consent to be bound by the treaty."
>
> The effect of a reservation varies depending on the type of treaty.

Larson, *supra* note 14, at 702-03.

parties to the dispute."[178] Thus, no country may legally permit slavery or slavery-like practices within its borders.

The Trokosi system violates the Convention to Abolish Slavery because it is slavery, and it involves serfdom as well as the exploitation of children and their labor. It appears that other state parties to the Convention could, after unsuccessfully negotiating with Ghana, refer Ghana to the International Court of Justice to resolve the conflict between the application of this Convention and the existence of Trokosi. However, this has not occurred, and historically, state parties have been reluctant to intervene.[179]

E. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights[180] (ICCPR) requires states to protect against slavery and cruel, inhuman, or degrading treatment,[181] and recognizes the rights of life, liberty, security and privacy of the person.[182] The Covenant emphasizes that all of the enumerated rights are to be enjoyed without discrimination by sex, and that men and women are to be accorded equal status.[183] National emergencies which threaten the life of the nation permit derogations to liberty and security of one's person only if the temporary measures do not discriminate solely on the grounds of sex.[184]

The state parties' obligations are specified in article 2 of the ICCPR, which requires a state to: "(1) respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant;"[185] (2) take the necessary steps to adopt "legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant;"[186] and (3) "ensure that any person . . . shall have an effective remedy" and that "competent authorities shall enforce such

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178. Convention to Abolish Slavery, art. 10.

179. "[E]ven when morally unambiguous situations present themselves — when all agree that the practice should be stopped — nation states remain reluctant to intervene. Not only do they hesitate to interfere with other states, they do not even appear willing to enact responsible laws within their own countries." Levesque, *supra* note 49, at 998.

180. International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A.Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 125 (3d ed. 1992). The ICCPR became effective in 1976. *See id.*

181. *See id.* arts. 7, 8.

182. *See id.* arts. 6, 9.

183. *See id.* arts. 2, 3, 26.

184. *See id.* art. 4(1).

185. *Id.* art. 2(1).

186. *Id.* art. 2(2).

remedies when granted."[187] The Covenant also establishes the Human Rights Committee[188] and requires state parties to submit reports to that committee one year after ratification and upon the direction of the committee.[189] "Although freedom from torture is explicitly granted in the Political Covenant, it leaves torture undefined, and provides no criteria to distinguish between torture and acts of cruel or degrading treatment."[190]

The Trokosi system violates the ICCPR because it can be characterized as "torture," "cruel or degrading treatment," or both because the girls are under the complete control of the priests. The Trokosi are forced to work long hours in the fields of the shrine, without pay, and are forced to provide sexual favors to the priest and bear children for him. Additionally, Trokosi violates the ICCPR because it is slavery, degrading treatment, and discriminates on the basis of sex. Moreover it violates the liberty, security, and privacy of the enslaved girls and women. However, because Ghana has not ratified the ICCPR, Ghana is not subject to its enforcement mechanisms for noncompliance.

F. *United Nations Convention on the Rights of the Child*

The United Nations Convention on the Rights of the Child (UNCRC)[191] became effective on September 2, 1990, when over 170 countries signed it or became state parties by ratification or accession.[192] Ghana is a state party to the UNCRC.[193] There are four basic themes of children's rights incorporated in the UNCRC: "(1) emphasis on the 'best interests of the child';[194] (2) recognition of the child's 'evolving capacities';[195] (3) the principle of non-discrimination;[196] and (4) respect for the child's human

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187. *Id.* art. 2(3)(a), (c).

188. *See id.* art. 28.

189. *See id.* art. 40.

190. Liebeskind, *supra* note 157, at 672. *See also* ICCPR, art. 7.

191. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/25 (1989) [hereinafter UNCRC], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 182 (3d ed. 1992).

192. *See* Backstrom, *supra* note 30, at 566. However, the success of the UNCRC is limited by the significant number of reservations attached by the member states. *See id.*

193. *See* CHART OF RATIFICATIONS, *supra* note 171, at 4. "The first twenty-one States Parties to the Convention on the Rights of the Child were: Ghana, Viet Nam, Ecuador, the Holy See, Belize, Guatemala, Sierra Leone, Bolivia, Sweden, Mongolia, Egypt, El Salvador, Guinea, St. Kitts & Nevis, Mauritius, Kenya, Senegal, Bhutan, Sudan, Bangladesh and Togo." Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 24 n.126 (1993).

194. *See* UNCRC, arts. 3(1), 9(1), 18(1), 20(1), 21, 40(2)(b)(iii). For general discussion of the four themes, see Backstrom, *supra* note 30, at 565.

195. *See* UNCRC, arts. 5, 12(1), 14(2), 40(1), 40(2)(b)(iii).

196. *See id.* pmbl., art. 2(1).

dignity."[197]

The two basic rights identified in the UNCRC are: (1) "[p]rotection from harm;" and (2) "[s]pecial care."[198] Protection from harm includes protection from: physical, mental and sexual abuse and neglect;[199] economic, sexual and other exploitation;[200] harmful labor;[201] armed conflict;[202] torture or cruel treatment;[203] abduction, trafficking and illicit transfer abroad;[204] harmful drugs;[205] traditional practices harmful to health (such as female genital mutilation);[206] and separation from parents.[207] Special care includes the right of the child to an adequate standard of living,[208] health care;[209] nutrition[210] and education.[211]

Several provisions of the UNCRC focus on the rights and potential needs of the female child to a greater extent than any other human rights instrument.[212] Although the UNCRC directs state parties to abolish "traditional practices prejudicial to the health of children,"[213] it does not adequately address the cultural discrimination the female child encounters in daily life.[214] Therefore, the operation of the UNCRC is limited as "cultural abuses . . . do not always implicate a health risk."[215] Moreover, the female child is not adequately protected by the UNCRC from exploitations that take place within the family.[216]

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197. Backstrom, *supra* note 30, at 565. *See also* UNCRC, pmbl., arts. 23(1), 28(2), 39, 40.

198. Gerald Abraham, *Giannella Lecture: The Cry of the Children*, 41 VILL. L. REV. 1345, 1362-63 (1996) (reviewing the tragic condition of children around the world, discussing the two promises made by nations of the world to give their children a decent life, and examining the hopeful signs of these promises being implemented and conditions actually improved).

199. *See* UNCRC, art. 19.

200. *See id.* arts. 32, 34, 36.

201. *See id.* art. 32.

202. *See id.* art. 38.

203. *See id.* art. 37.

204. *See id.* arts. 11, 35.

205. *See id.* art. 33.

206. *See id.* art. 24.

207. *See id.* art. 9.

208. *See id.* art. 27.

209. *See id.* art. 24.

210. *See id.* art. 24(2)(c), (e).

211. *See id.* art. 28.

212. *See* Backstrom, *supra* note 30, at 566.

213. UNCRC, art. 24(3).

214. *See id.*

215. Backstrom, *supra* note 30, at 578.

216. *See id.*

The UNCRC emphasizes the need for the child to develop within the cultural framework and learn about community practices.[217] Additionally, the UNCRC provisions stress "the need to strengthen the family unit, perhaps even to the subordination of children's rights. Together these two factors make it practically impossible for the female child to assert human-rights abuses based on cultural tradition or bias."[218] Therefore, the UNCRC may justify cultural abuse based on gender, as well as mistreatment if it occurs within the family.[219]

While the UNCRC imposes binding obligations on all of the nations that have ratified it, it does not have an effective enforcement mechanism.[220] The UNCRC fails to establish a mechanism to permit any international tribunal to enforce decisions where a state party has violated the UNCRC, nor does it require that the UNCRC be "directly enforceable in the courts of a ratifying country."[221] Direct enforceability is left to each nation to decide.[222]

The UNCRC created the Committee on the Rights of the Child to monitor the progress of state parties, which are required to make periodic reports to the committee,[223] but it has no power to enforce its findings.[224] "It

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217. *See* UNCRC, art. 29(c).

218. Backstrom, *supra* note 30, at 578.

219. *See* UNCRC, art. 19.

220. *See* Abraham, *supra* note 198, at 1364.

221. *Id.* at 1364-65.

222. *See id.* at 1365.

223. *See* Backstrom, *supra* note 30, at 565. Ghana, in keeping with its obligations as a state party to the UNCRC, supplied lengthy written material to the Committee on its efforts to help and protect children. *See UN Committee on the Rights of the Child Concludes Fifteenth Session*, M2 PRESSWIRE, June 10, 1997, *available in* LEXIS, News Library, Non-US News File. The Committee

> urged greater efforts in Ghana to combat discriminatory attitudes against girls and disabled children, especially those living in rural areas . . . .
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> . . . .
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> Among positive developments noted in the report of Ghana, the Committee pointed to the early establishment — long before ratification of the Convention — of the Ghana National Commission on Children. Concern was cited, among other things, about the persistence of customary law which in some areas, such as marriage, could conflict with the Convention.

Id. Some recommendations made by the Committee include the following:

> that the current drafting of a comprehensive law on protection of children be modeled on the provisions and principles of the Convention; . . . that coordination be improved in carrying out programmes and policies related to children; . . .
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> . . . .
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> that programmes be developed and pursued on a priority basis to prevent harmful practices such as early marriage, female genital mutilation, and Trokosi;
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> . . . .

is not a prosecutorial or adjudicatory body; instead, it tries to obtain compliance by persuasion, suggestion and assistance,"[225] as well as by "education, facilitation, and cooperation, rather than confrontation," and "relies on domestic procedures and privatization to enforce the international rights it embodies."[226]

The Trokosi system violates the UNCRC because it separates girls and young women from their families, usually against their will;[227] subjects them to physical and mental abuse, neglect, negligent treatment, maltreatment and exploitation, including sexual abuse;[228] deprives the girls of a "standard of living adequate for the child's physical, mental, spiritual, moral and social development;"[229] deprives the girls of their right to education in many instances;[230] and economically exploits their labor to perform work that interferes with their right to education and that is harmful to their health or physical, mental, spiritual, moral or social development.[231] However, because the UNCRC has no enforcement mechanism, it cannot be used to hold Ghana, a member state, accountable for the Trokosi practice within its borders.

G. *Convention on the Elimination of All Forms of Discrimination Against Women*

The Declaration on the Elimination of Discrimination Against Women (DEDAW), adopted by the UN General Assembly in 1967,[232] and the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention), adopted unanimously by the UN General

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> [and] that legislation be reinforced to fully protect children from all forms of sexual abuse or exploitation . . . .

Id.

224. *See* Abraham, *supra* note 198, at 1366.

225. *Id.*

226. Backstrom, *supra* note 30, at 565.

227. *See* UNCRC, art. 9(1).

228. *See id.* art. 19(1).

229. *Id.* art. 27(1).

230. *See id.* art. 28.

231. *See id.* art. 32(1).

232. Declaration on the Elimination of Discrimination Against Women, Nov. 7, 1967, G.A. Res. 2263, U.N. GAOR, 22d Sess., Supp. No. 16, at X, U.N. Doc. A/6716 (1968), *reprinted in* UNIFO, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS, 1948-1982, at 103 (1983).

Assembly in 1979,[233] and subsequently ratified by Ghana,[234] were the first international instruments to independently address women's issues.[235] The Women's Convention recognizes that culture may be misused as a basis for discrimination and urges states parties "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."[236]

A broad reading of the Women's Convention defines discrimination in a manner that envelops both "public and private discrimination, [and] unintentional and intentional violations."[237] The Convention establishes a committee and requires state parties to report to that committee within one year after their ratification of the Convention and every four years thereafter or upon request of CEDAW.[238] "CEDAW considers children's rights paramount — a higher standard than that recognized in the UNCRC."[239]

While CEDAW addresses general discrimination against women, it has limited application to female children because the only pertinent provisions relate to early marriage and development of specific educational programs

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233. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. 46/A/34/46 (1980) [hereinafter CEDAW], *reprinted in* IAN BROWNLIE, Q.C., BASIC DOCUMENTS ON HUMAN RIGHTS 169 (3d ed. 1992).

234. *See* CHART OF RATIFICATIONS, *supra* note 171, at 4.

235. *See* Liebeskind, *supra* note 157, at 662.

236. CEDAW, art. 2(f).

237. Liebeskind, *supra* note 157, at 663.

> Article 1 provides that discrimination includes any distinction, exclusion or restraint made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality by men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field . . . .
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> . . . .
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> . . . Article 2 . . . requires states to pursue "by all appropriate means and without delay a policy of eliminating discrimination against women" through constitutional, legislative, administrative, and other measures. Article 2(f) requires the modification or abolition of laws, regulations, customs or practices which constitute discrimination . . . .
>
> Article 5 obligates state parties to "take all appropriate measures [inter alia] to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

Id.

238. *See* CEDAW, art. 18.

239. Backstrom, *supra* note 30, at 573. The UNCRC states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." UNCRC, art. 3(1).

for female dropouts.[240] However, blending CEDAW and the UNCRC allows the "paramount interests of the child" to become superior to the general rights of the family.[241] Therefore, when the family endangers the health of the female child, the need to respect the family unit is outweighed by her best interests.[242] Additionally, integrating these treaty concepts allows for increased "enforcement of these rights by allowing for state-to-state complaints and individual petitions."[243] Even though women's and children's rights are furthered by both the UNCRC and CEDAW, "neither instrument adequately contemplates the unique abuses — those based on age and sex — encountered by the female child."[244]

The Trokosi practice constitutes discrimination against women because only girls are sent to the shrines to redeem their families with the gods for the wrongful acts of other family members, usually males.[245] Additionally, Trokosi violates article 16 of CEDAW, which declares a woman's right to choose a spouse and consent to marriage, by forcing the girls to marry the priests.[246] The Trokosi "are not free to choose whom they want to marry . . . [but] are forced to marry the priests at a very early age and are burdened with the rearing of children."[247]

H. *International Criminal Court*

1. *Background*

On July 17, 1998, governments assembled in Rome for a diplomatic conference and enacted the Rome Statute establishing a permanent International Criminal Court (ICC).[248] These governments "agreed, by an overwhelming 120 in favor, 21 abstentions and only 7 against, to embrace this essential institution for bringing the world's worst human rights

240. *See* Backstrom, *supra* note 30, at 572.
241. *See id.* at 576.
242. *See id.*
243. *Id.*
244. *Id.* at 542.
245. *See* Short, *supra* note 74.
246. *See id.*
247. *Id.*
248. *See* Human Rights Watch, *Summary of the Key Provisions of the ICC Statute* (visited Oct. 15, 1998) <http://www.hrw.org/hrw/campaigns/icc/icc-statute.htm>. *See also* Rome Statute of the International Criminal Court, July 17, 1998 (visited Sept. 8, 1998) <http://www.un.org/icc/part1.htm> [hereinafter ICC].

criminals to justice."[249] Ghana was among the very first to sign the ICC.[250] The statute will become effective after a minimum of sixty countries ratify the treaty.[251] The treaty is perceived as a compromise because each strength of the court is qualified by a weakness.[252] While establishing the ICC is an important step in eliminating human rights abuses, the ICC will not address all human rights abuses or past violations.[253]

2. *Jurisdiction*

a. *Generally*

The jurisdiction of the court is limited to the most serious crimes facing the international community; those crimes being "genocide,"[254] "war crimes,"[255] "crimes of aggression,"[256] and "crimes against humanity."[257] The

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249. Human Rights Watch, *supra* note 248. "At the request of the United States, the Statute was adopted by a non-recorded vote." *Daily Summary* (visited Sept. 20, 1998) <http://www.un.org/icc/pressrel/summary.htm>.

250. *See International Criminal Court is Major Step Towards Universal Human Rights*, M2 PRESSWIRE, July 21, 1998, *available in* LEXIS, News Library, News Group File.

251. *See* Douglass W. Cassel, Jr., *U.S. Fears Undercut Tribunal*, CHI. DAILY L. BULL., Aug. 18, 1998, at 5, *available in* LEXIS, News Library, News Group File. Currently, the statute is supported by 51 of the required minimum 60 countries necessary to bring the court into existence. *See UN Human Rights Commissioner Against Rebel-prisoner Exchange Plan*, BRIT. BROADCASTING CORP., Oct. 30, 1998, *available in* LEXIS, News Library, News Group File.

252. *See* Cassel, *supra* note 251.

253. *See A Campaign to Establish a International Criminal Court — Factsheet* (visited Oct. 15, 1998) <http://www.hrw.org/hrw/campaigns/icc/icc-fct.htm> [hereinafter *Factsheet*].

254. *See* ICC, art. 6. Genocide is defined as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Id.

255. *See id.* "The court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes." *Id.* art. 8(1). War crimes are defined as

> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by

Court will have jurisdiction only over persons of eighteen years of age or older,[258] and will be permitted to impose only two types of penalties: imprisonment for a specified term or life imprisonment.[259] By ratifying the treaty, the state "accepts the Court's jurisdiction over all crimes within its scope."[260] A state party may not choose to have the ICC accept jurisdiction only over some crimes and not others.[261] The only exception to the automatic jurisdiction of the ICC is the opt out provision, pertaining to war crimes committed on the state's territory or by its nationals, which is available for a limited period of time.[262]

Because the ICC will only have jurisdiction where a state has ratified the treaty or accepts the Court's jurisdiction, the ICC will face a significant obstacle when the state of territory or nationality of the accused is the same as the non-party state.[263] In the absence of an independent police force, state cooperation is essential at all stages.[264] By signing the ICC and expressing the desire to eliminate Trokosi, Ghana should support the prosecution of Trokosi priests who continue to violate human rights.

b. *Prosecutorial Power*

The ICC Prosecutor may investigate allegations of crimes when referred by either the Security Council of the United Nations (UN), state parties, victims, non-governmental organizations, or any other reliable source.[265] If the Security Council refers a situation to the ICC, it has the

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> military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.

Id. art. 8(2)(a)(i)-(viii). The Court shall also have jurisdiction over "[o]ther serious violations of the laws and customs applicable in international armed conflict." *Id.* art. 8(2)(b).

256. *See id.* 5(2). A provision defining "crimes of aggression" has not yet been adopted. *See id.* The Court will assume jurisdiction "once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime." *Id.*

257. *See id.* art. 5(1)(b). See *infra* notes 272-81 and accompanying text for a definition and discussion of crimes against humanity.

258. *See* ICC, art. 26.

259. *See id.* art. 77(1). "A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons." *Id.* art. 103(a).

260. Human Rights Watch, *supra* note 248.

261. *See id.*

262. *See* ICC, art. 124.

263. *See id.*

264. *See id.*

265. *See id.* art. 15(2), (3).

"unique consequence of binding all member states of the UN, whether or not parties to the statute."[266]

If the Prosecutor decides a case should not proceed, the original source must be informed.[267] If the Prosecutor decides there is a reasonable basis to proceed with an investigation, then after receiving pre-trial approval, all states that would ordinarily exercise jurisdiction must be notified of the Prosecutor's intention to investigate.[268] "[T]he ICC will not be a substitute for national systems, but will only be able to act where national systems . . . [fail to] investigate or prosecute, or where they are 'unable' or 'unwilling' to do so genuinely."[269] A state party or non-party may block prosecution by the ICC where the state has decided not to proceed with a prosecution, unless that decision was due to inability or unwillingness of the state.[270] Parties that may challenge the admissibility of a case include: "an accused person; any state that has jurisdiction over the case because it is investigating or prosecuting the case or has investigated or prosecuted it; or the state of territory or nationality of the accused."[271]

3. *Crimes Against Humanity*

Although the ICC allows the prosecution of crimes against humanity, the practice of sexual slavery in Ghana may not qualify under the ICC's jurisdiction. The statute provides that crimes against humanity are "acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[272] It also requires that there be the "multiple commission of acts" and that they be carried out "pursuant to or in furtherance of a State or organizational policy" to bring

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266. Human Rights Watch, *supra* note 248.

267. *See id.*

268. *See id.*

269. *Id.* The Court determines "inability" by considering "whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." ICC, art. 17(3). To determine unwillingness, the Court considers:

> whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility . . . ; (b) There has been an unjustified delay in the proceedings . . . inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially.

Id. art. 17(2).

270. *See* Human Rights Watch, *supra* note 248.

271. *Id.*

272. ICC, art. 7(1).

it within the Court's jurisdiction.[273] This double criteria imposes an unprecedented threshold for crimes against humanity.[274]

The acts which constitute crimes against humanity that are applicable to Trokosi include: enslavement;[275] severe deprivation of physical liberty;[276] torture;[277] rape, sexual slavery, forced pregnancy, or any other form of sexual violence of comparable gravity;[278] and "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or . . . health."[279]

However, it is not clear whether the ICC will have jurisdiction over those involved in the practice of Trokosi. Jurisdiction depends on whether the ICC considers this practice as a "widespread or systematic attack directed against any civilian population"[280] and "pursuant to or in furtherance of a State or organizational policy."[281] The Trokosi system is not a widespread or systematic attack on the population conducted pursuant to a state or organizational policy. It is a practice focused, isolated and performed among the Ewe and Ada ethnic groups. Ghana is working to eliminate Trokosi — not sustain it. Thus, because Ghana is working to eliminate this practice, the ICC may not have jurisdiction because Ghana is investigating and has pledged to prosecute offenders.

Even if the ICC has jurisdiction, it is not likely to be effective without educating the priests and Animists that the Trokosi system violates human rights. According to Betty Akuffo-Amoageng, Executive Secretary of Ghana's National Commission on Children, "using excessive force to break the tradition would only drive it underground" and then the "parents will

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273. *Id.* art. 7(2)(a).

274. *See* Human Rights Watch, *supra* note 248.

275. *See* ICC, art. 7(1)(c). "'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." *Id.* art. 7(2)(c).

276. *See id.* art. 7(1)(e). This section is not specifically defined other than to say "[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law." *Id.*

277. *See id.* art. 7(1)(f). "Torture" is defined as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions." *Id.* art. 7(2)(e).

278. *See id.* art. 7(1)(g). Forced pregnancy is the only crime in this clause that is defined. It "means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law." *Id.* art. 7(2)(f).

279. *Id.* art. 7(1)(k). This section is not further defined. *See id.*

280. *Id.* art. 7(1).

281. *Id.* art. 7(2)(a).

simply take their children to neighbouring countries to give them to priests."[282]

V. GHANA'S CONSTITUTION PROHIBITS TROKOSI

A. *The Ghana Constitution*

1. *Generally*

The laws of Ghana are comprised of the Constitution, enactments by or under the authority of the Parliament, any orders, rules and regulations made by any person or authority given power under the Constitution, the existing law, and the common law.[283] In Ghana, the Constitution is the supreme law of the land, and any other law that cannot be reconciled with it is void to the extent of the inconsistency.[284]

2. *Fundamental Human Rights and Freedoms*

The 1992 Constitution is Ghana's "most ambitious attempt at giving meaning to human rights in all their forms — civil, economic, social[,] political and cultural."[285] The Constitution defines the fundamental human rights and freedoms that are to be respected and upheld by the government.[286] These provisions are applicable to "every person in Ghana, regardless of race, place of origin, political opinion, color, religion, creed or gender."[287] The fundamental human rights and freedoms that pertain to Trokosi include (1) respect for human dignity,[288] (2) protection from slavery

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282. Kiley, *supra* note 5.

283. *See* GHANA CONST. art. 11(1). The common law of Ghana is comprised of rules of law generally known as the common law, the doctrine of equity and the rules of customary law. *See id.* art. 11(2). Customary law means the rules of law that by custom are applicable to particular communities in Ghana. *See id.* art. 11(3).

> Custom is an established usage or practice of society having the force of law. For a custom to carry the force of law, it must satisfy the conditions of common adoption and acquiescence, longevity, and compulsion for the place and time in question. . . .
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> . . . .
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> Religious beliefs also played an important part in the development of African customary law.

Adjetey, *supra* note 26, at 1365-66.

284. *See* GHANA CONST. art. 1(2).

285. Jacob Saah, *Ghana, The Constitution of 1992 and Human Rights*, AFR. NEWS, Oct. 16, 1998, *available in* LEXIS, News Library, News Group File.

286. *See* GHANA CONST. art. 12(1).

287. Saah, *supra* note 285.

288. *See* GHANA CONST. art. 15, § 1.

and forced labor,[289] (3) cultural rights and practices,[290] and (4) children's rights.[291]

The Constitution allows any person who believes that his or her rights have been breached or are about to be breached to seek redress from the High Court, with the right to appeal to the Court of Appeal and a right of further appeal to the Supreme Court.[292]

a. *Respect for Human Dignity and Protection from Slavery and Forced Labor*

"Slavery is illegal in Ghana."[293] The Ghana Constitution explicitly outlaws slavery: "[n]o person shall be held in slavery or servitude" or be "required to perform forced labour."[294] The Trokosi are subjected to slavery, servitude, and forced labor which violates article 16(1) and (2) because they are required to fulfill the needs of the shrine and priest.[295] Additionally, article 15(1) of the Constitution provides that "[t]he dignity of all persons shall be inviolable."[296] There is no dignity for the Trokosi who must fulfill the sexual pleasures of the fetish priest.[297] "The Trokosi system pays no regard to the rights of the vestal virgins, whose rights under the Constitution are just as important as those of the fetish priests or their parents or guardians."[298] The government of Ghana concedes that the Trokosi

289. *See id.* art. 16.

290. *See id.* art. 26.

291. *See id.* art. 28.

292. *See* Saah, *supra* note 285. The Judiciary in Ghana consists of the Superior Courts of Judicature comprised of the Supreme Court, the Court of Appeal and the High Court and Regional Tribunals and any lower courts or tribunals that the Parliament establishes. *See* GHANA CONST. art 126(1). The Supreme Court consists of a Chief Justice and not less than nine other Justices and is the final court of appeal. *See id.* arts. 128(1), 129(1). The Court of Appeal consists of a Chief Justice and not less than ten justices and has jurisdiction to hear and determine appeals from a judgment, decree, or order of the High Court and Regional Tribunals. *See id.* arts. 136, 137. The High Court consists of a Chief Justice and not less than twenty justices and has jurisdiction in all civil and criminal matters and the power to enforce the fundamental human rights and freedoms guaranteed by the Constitution. *See id.* arts. 139, 140. The Regional Tribunals are established in each region of Ghana and consist of a Chief Justice, a chairperson, and members who may or may not be lawyers to sit as a panel to try offenses against the State and public interest. *See id.* arts. 142, 143.

293. *Dateline*, *supra* note 7.

294. GHANA CONST. art. 16(1), (2).

295. *See* Short, *supra* note 74.

296. GHANA CONST. art. 15(1).

297. *See* Short, *supra* note 74.

298. *Id.*

system violates the constitutional rights of children[299] but says it is tolerated out of respect for religious freedom.[300]

The Ghana Criminal Code provides that those who practice slavery are "guilty of a second degree felony as provided for in Section 314 of the [Ghana] Criminal Code."[301] However, because the Trokosi are usually coerced by their parents or relatives to serve in the shrines, it is questionable whether that criminal code section covers the customary practices.[302] Section 314 "does not apply to any such coercion 'as may lawfully be exercised by virtue of contracts of service between free persons, or by virtue of the rights of parents and other rights, not being contrary to law, arising out of family relations customarily used and observed in Ghana.'"[303] But, the freedom to practice one's religion is subject to the provisions of the Constitution.[304] Therefore, ritual slavery is banned under the Constitution,[305] even though it may not be punishable under the Criminal Code.[306]

b. *Cultural Rights and Practices*

Except as limited by other provisions of the Constitution, "[e]very person is entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion."[307] However, these customary practices are prohibited where they "dehumanise or are injurious to the physical and mental well-being of a person."[308] This limitation on religious freedom demonstrates Ghana's recognition that some cultural traditions include practices that are contrary to human rights standards. It therefore follows from this Constitutional provision "that no religion or other belief of culture can be legitimately practised in such a way as to deprive others of their rights, freedoms or to subject others to dehumanizing or degrading treatment."[309] The practice of offering the young girls to the shrines violates the Constitution by forcing them to live enslaved to the priests who subject them to dehumanizing and degrading treatment, and it deprives them of their rights and freedoms.

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299. *See* Kiley, *supra* note 5.
300. *See Dateline*, *supra* note 7.
301. Short, *supra* note 74.
302. *See id.*
303. *Id.*
304. *See id.*
305. *See id.*
306. The Criminal Code of Ghana was recodified in early 1998, providing for a criminal penalty for practices like Trokosi. *See* discussion *infra* Part V(B).
307. GHANA CONST. art. 26(1).
308. *Id.* art. 26(2).
309. Short, *supra* note 74.

c. *Children's Rights*

Parliament is charged with enacting laws to ensure that (1) "every child has the right to the same measure of special care, assistance and maintenance as is necessary for its development,"[310] (2) "children and young persons receive special protection against exposure to physical and moral hazards,"[311] (3) "[e]very child has the right to be protected from engaging in work that constitutes a threat to his health, education or development,"[312] and (4) "[a] child shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment."[313]

The practice of Trokosi violates children's rights because the girls are torn from their families, denied access to education, denied payment for their work, and denied the shrine's support for the children they bear for the priests. Moreover, when the girls are left in the complete control of the shrine priests, they are often sexually abused and exploited for their labor — exposing the girls to moral and physical hazards.

3. *Commission on Human Rights and Administrative Justice*

a. *Generally*

The Constitution establishes a Commission on Human Rights and Administrative Justice (CHRAJ)[314] whose main function is to "investigate complaints of violations of fundamental rights and freedoms."[315] The CHRAJ's primary responsibilities are: "[1] to receive and investigate complaints of human rights violations and other acts of administrative injustice, [2] to investigate allegations of corruption by public officials and [3] to educate the public on human rights issues."[316] CHRAJ is obligated to remedy, correct, and reverse these violations through negotiation, reporting, initiation of court proceedings to secure termination of the offending action or conduct,[317] and "to educate the public as to human rights and freedoms."[318] The powers of the CHRAJ include the authority to compel

310. GHANA CONST. art. 28(1)(a).
311. *Id.* art. 28(1)(d).
312. *Id.* art. 28(2).
313. *Id.* art. 28(3).
314. *See id.* art. 216.
315. *Id.* art. 218(a).
316. Saah, *supra* note 285.
317. *See* GHANA CONST. art. 218(d).
318. *Id.* art. 218(f).

witnesses, require the production of evidence, seek court enforcement of its decisions, and seek judicial remedies.[319]

These broad powers appear to make the Commission the most effective organization for dealing with Trokosi; however, no such cases have been brought before the Commission. Additionally, unless a parent is willing to come forward and testify, the priests cannot be singled out because they do not force parents to give up their children to the shrines.[320] It is a long-standing belief by the parents that they must bring a child to the shrine or face the consequences of an angry god.

b. *Educational Efforts*

In recent years, the Ghana Commission for Human Rights and Administrative Justice (CHRAJ) "has conducted an awareness campaign with traditional leaders and practitioners in an effort to bring the practice to an end."[321] The CHRAJ's efforts, in conjunction with a non-governmental organization (NGO)[322] called International Needs,[323] have "had some success in approaching village authorities and fetish priests at 10 of the 76 shrines, winning the release of 474 Trokosi slaves to date, and retraining them for new professions."[324] Including work by other organizations, 672 slaves were released by the end of 1997.[325]

The methods used by CHRAJ and various NGOs are based mainly on educating the priests and local leaders on how the Trokosi system violates fundamental freedoms and human rights provisions of the Ghana

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319. *See* Saah, *supra* note 285.

320. *See* Short, *supra* note 74.

321. GHANA COUNTRY REPORT, *supra* note 63, at 141.

322. Non-governmental organizations (NGOs) play a vital role in the examination of state reports by the Human Rights Committee of the United Nations. *See NGO Guide to the UN Human Rights Committee* (visited Oct. 14, 1998) <http://www.lchr.org/ngo/ngoguide/MoveUp/move.htm>. NGOs are relied on to highlight the "other side of the coin" to help prepare the Committee in their review of the governments. *See id.*

323. International Needs (IN) is a Christian-based organization whose mission is to promote human and community development for the relief of socio-economic, cultural, and religious injustices. *See* INTERNATIONAL NEEDS (GHANA): CORPORATE PROFILE 1 (n.d.). International Needs, headquartered in New Zealand, is spread throughout the world and found in Africa, Europe, and the Near and Far East. *See id.* at 3. In Africa, IN operates in Ghana and Uganda. *See id.* International Needs Ghana (ING) has initiated and implemented a number of projects aimed at rehabilitating and economically empowering disadvantaged people. *See id.* at 6. One of ING's main projects involves the freedom of Trokosi. *See id.* at 7. ING may be contacted by mail at International Needs Ghana, P.O. Box 690, Dansoman Estates, Accra, Ghana; by phone at (233-21) 226620; or by e-mail at intneeds@ncs.com.gh.

324. GHANA COUNTRY REPORT, *supra* note 63, at 141.

325. *See id.*

Constitution, as well as many of the human rights declarations to which Ghana has become a party.[326] The practice of Trokosi has always violated the Constitution, but until recently, no criminal sanction for the violation existed.[327] Now, the fetish priests must be educated on the criminal penalty for continuing the practice of Trokosi.[328] To do this, CHRAJ organizes workshops and seminars for the village priests and leaders to impress upon them the need to abolish the system.[329] Emile Short, Head of the Ghana Commission on Human Rights and Administrative Justice, stated that "this practice has gone on for so long, it is important to have a dialogue" with those involved to end the practice.[330] The CHRAJ plans to perform random checks at the shrines with the Ghanaian police force and to prosecute the violators.[331] Other educational methods include the performance of drama troops in the communities, school debates, and the publication of literature about human rights and the abolition of the Trokosi system in local languages.[332]

Liberation ceremonies or rituals are performed to perfect the release of the Trokosi once a priest agrees to set them free,[333] and the Trokosi are given certificates of emancipation.[334] In the past, the priests agreed to release the girls in exchange for money and cows or goats, but now they are moving away from the notion of exchange and are simply releasing the girls.[335] The

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326. *See* Telephone Interview with Kathryn Fitrell, Human Rights Officer with the United States Embassy in Accra, Ghana (Nov. 2, 1998); Telephone Interview with Emile Short, *supra* note 103.

327. *See* Telephone Interview with Emile Short, *supra* note 103. While the Ghana Constitution expressly prohibits slavery, previously there was no criminal penalty for violating that provision until the recodification of the 1960 criminal code in early 1998, which now provides for a three year term of imprisonment for those that engage in customary servitude. *See infra* Part V(B).

328. *See* Telephone Interview with Emile Short, *supra* note 103.

329. *See id.*

330. *Id.*

331. *See id.*

332. *See* Telephone Interview with Kathryn Fitrell, *supra* note 326.

333. *See id. See also* Telephone Interview with Emile Short, *supra* note 103.

334. *See* t'Sas, *supra* note 64.

335. *See* Telephone Interview with Emile Short, *supra* note 103. Successful liberation ceremonies include one coordinated by Sentinelles, a Swiss-based group, who made an agreement with two shrines to accept cows or other domestic animals and drinks instead of virgin girls. *See Swiss Buy Freedom of 40 Women Enslaved in Ghana under Folk Custom*, DEUTSCHE PRESS-AGENTUR, Oct. 25, 1996, *available in* LEXIS, News Library, Non-US News File. The 40 women freed ranged in age between 8 and 60. *See id.* "Under the agreement, Sentinelles will assist the liberated slaves to go into trading while the young girls will be encouraged to go to school or learn a vocation." *Id.* The Sentinelles paid four million cedis (about $2,300) to the shrines for the rituals to be performed to mark the freedom of the slaves. *See id.* It will also provide one commill to each shrine for the fetish priests to make a living. *See id.* Another successful liberation freed 45 slaves, including a six year-old girl.

proponents of the Trokosi system are not the only ones in need of education. After the girls are released, CHRAJ and NGOs provide funding for the Trokosi because many of them have been traumatized by the many years of bondage and servitude.[336] "They are in desperate need of counselling, financial support and rehabilitation."[337] It is also important for the girls to receive training in an occupation or be sent back to school so that they are able to support themselves.[338]

B. *1998 Update to the Ghanaian Criminal Code*

Eager to eliminate child slavery,[339] the CHRAJ sent teams of investigators to the shrines to study the practice.[340] The investigators made recommendations to Parliament for changes in the law that would help eliminate the practice of Trokosi.[341] The Ghanaian Parliament recently enacted a new provision in the recodification of the criminal code of 1960 that specifically outlaws the practice of sexual slavery.[342] The provision refers to the Trokosi system and like practices as "customary servitude" and imposes a minimum three year sentence for violators.[343]

See t'Sas, *supra* note 64. In exchange, the priest got five cows, one bull, and the equivalent of about $1,650. *See id.* Yet, another successful liberation freed 350 "voodoo slaves" with funding assistance generated in Australia by the Anti-Slavery Society and charity group International Needs. *See FED: Australians Help Free 350 Voodoo Slaves*, AAP NEWSFEED, Sept. 15, 1997, *available in* LEXIS, News Library, News Group File.

336. *See* t'Sas, *supra* note 64. *See also* Telephone Interview with Emile Short, *supra* note 103.

337. t'Sas, *supra* note 64.

338. *See* Telephone Interview with Emile Short, *supra* note 103.

339. *See* Bailey, *supra* note 70. Even though at one time President Rawlings defended Trokosi as an important part of Ghana's cultural heritage, President Rawlings has been commended for his efforts in eliminating this practice. *See id.*

340. *See* Short, *supra* note 74.

341. *See id.*

342. Criminal Code (Amendment) Act, Act 554 of 1998, § 17 (amending Criminal Code 1960 (Act 29), by inserting new section 314A). The bill was passed on August 19, 1998; however, President Rawlings has not signed the bill to effectuate its amendments. *See* Telephone Interview with Kathryn Fitrell, *supra* note 326.

343. *See* Criminal Code (Amendment) Act, Act 554 of 1998, § 17. The new law provides:

> (1) Whoever — (a) sends to or receives at any place any person; or (b) participates in or is concerned in any ritual or customary activity in respect of any person with the purpose of subjecting that person to any form of ritual or customary servitude or any form of forced labour related to a customary ritual commits an offence and shall be liable on conviction to imprisonment for a term not less than three years.
> (2) In this section "to be concerned in" means — (a) to send to, take to, consent to the taking to or receive at any place any person for the performance of the customary ritual; or (b) to enter into any agreement

While the passage of this law is significant, there is not much confidence that the practice of Trokosi will end, especially in light of the fact that the Constitutional prohibition has been in place since 1992 and has not yet eradicated the practice.[344] "The practice persists because of deeply entrenched traditional beliefs, and it is therefore unlikely that any legislative prohibition alone would eliminate the practice."[345] "Beliefs in traditional rituals and the spirit world permeate the highest levels of most West African societies, making it difficult to convince [traditional believers] to give up the [T]rokosi practice" even with the passage of this new legislation.[346]

VI. CONCLUSION

Sexual slavery violates basic human rights and fundamental freedoms expressed in the Ghana Constitution and several other human rights declarations and conventions to which Ghana is a voluntary party. Although respect for cultural and religious practices should be encouraged, the state government and international bodies should intervene when cultural or religious practices result in human rights violations and infringement of constitutionally-protected fundamental freedoms. There is no acceptable explanation, reason, or excuse for such violations of human dignity to continue.

Religious and cultural freedoms must be restricted by "the fundamental right to bodily integrity, freedom from torture and discrimination."[347] Even though this belief is not widely accepted in many third-world areas, it is readily acknowledged that religion cannot defend or pardon subjugation when dealing with well-recognized rights.[348] Slavery is an example: while virtually all traditional religions accepted slavery at one time, it has been outlawed as "one of the most serious violations of human rights."[349]

In studying this practice, even a cursory examination concludes that Trokosi violates women's and children's human rights in a variety of ways that cannot be justified on religious and cultural grounds. "Perhaps [the] most objectionable aspect of the Trokosi system has to do with sexual abuse.

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whether written or oral to subject any of the parties to the agreement or any other person to the performance of the customary ritual; or (c) to be present at any activity connected with or related to the performance of the customary ritual.

Criminal Code (Amendment) Act, Act 554 of 1998, § 17.

344. *See Dateline*, *supra* note 7.

345. GHANA COUNTRY REPORT, *supra* note 63, at 141.

346. Kiley, *supra* note 5.

347. Liebeskind, *supra* note 157, at 653.

348. *See id.*

349. *Id.* at 653-54.

. . . [T]he Trokosi must have sexual intercourse with the priest whether she likes it or not. . . . This is the undignified fate of the Trokosi until she is turned out of the shrine."[350] Advocates of the Trokosi system practice view it as beneficial because it deters wrongdoing. However, the cost to the young girls and women who are enslaved to the shrines is too high a price to pay. This is especially true considering that the girls offered to the shrine to atone for the offense are rarely the ones who commit the offenses, and many times, were not even born when the offense was originally committed. The abuses to these girls who are involuntarily taken to the shrines to atone for sins they did not commit cannot continue. These abuses result in lifelong, detrimental effects because the girls work long hours for little or no pay for priests that sexually abuse and impregnate them. It is not only those *outside* of Ghana or the Trokosi religion who are working to stop the enslavement of these girls. Many Ghanaians are actively seeking the freedom of the Trokosi as well.[351]

Any of the aforementioned international conventions, as well as the Ghana Constitution, provide an adequate basis to eliminate Trokosi. However, reliance on these documents alone has not been successful due in part to Ghana's reluctance to infringe on religious or cultural practices. With the increasing interest and demand to eliminate Trokosi, Ghana has worked to strengthen the Constitutional prohibition of slavery by providing criminal penalties for violations. The President of Ghana, Jerry John Rawlings, has not signed the new law that specifically outlaws customary servitude.[352] Even though this law by itself may not end the practice, it does

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350. Short, *supra* note 74.

351. Vivian Addy-Lampety, an Ewe woman in her early thirties who grew up in the Volta region, was appointed to negotiate with the priests. *See* Brooker, *supra* note 62.

> She has neatly braided hair, pursed lips and a sweet, almost docile expression which conveniently distracts from the glint of steely determination in her eyes. Once a week she leaves the capital, bouncing over the rutted, red-dirt country roads in a car which rings out with the clanking of half a dozen green glass bottles of schnapps, on her way to pay reluctant homage to the fetishes of the Trokosi shrines. She presents booze and cash, removes her shoes, shirt and bra at the shrine gates and wraps up in a traditional garment so that she is fit to enter the sacred inner sanctums. Still clutching her handbag, she kneels in the dirt before the fetish priests, imploring them to grant her an audience, only to be regaled with hostility and abuse. But slowly she is making progress, winning their confidence.

Id. Vivian has joined forces with Emile Short, head of Ghana's Commission for Human Rights. *See id.*

352. *See* Telephone Interview with Kathryn Fitrell, *supra* note 326.

provide victims of Trokosi a way to gain their freedom and to punish those who continue with this practice.

The International Criminal Court (ICC) represents one alternative to punish some human rights criminals and deter potential criminals. However, it remains to be seen whether the ICC will be the proper tribunal to initiate proceedings to help end the practice of sexual slavery in Ghana. The uncertainty arises because the practice of Trokosi does not appear to be a systematic attack on the population supported by a State or organizational policy[353] and also because Ghana is investigating the practice and pledges to prosecute offenders.

Additionally, Ghana, through CHRAJ, governmental agencies, and NGOs should increase the educational efforts to end this practice. "[B]y virtue of their office, the chiefs have a tremendous influence and a great power for good."[354] By educating the chiefs on the human rights violations of Trokosi and encouraging them to discourage this practice in their villages, their power to influence the priests and local leaders to stop this practice may continue to prove to be the most successful and effective means for eliminating the Trokosi practice. Finally, countries that deal with Ghana on an economic basis, like the United States,[355] should work with Ghana to help eliminate the practice of Trokosi by assisting the appropriate agencies, like

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353. Unlike the Holocaust, where the government, controlled by the Nazi's, implemented a state policy to eliminate the Jewish population (systematic attack on the population), the practice of Trokosi is not a state or organizational policy or a systematic attack on the population, but rather is concentrated in the Ewe and Ada ethnic groups.

354. KRAMPAH, *supra* note 66, at 3.

355. The United States is becoming increasingly interested in the markets of African countries. "With Africa's vast market potential largely untapped, a forward-looking trade policy is in our own national interest. It is essential that we press ahead with our ongoing efforts to accelerate Africa's full integration into the global economy . . . ." *United States and Africa: Carson Addresses US-Africa Trade Forum*, AFR. NEWS, Nov. 10, 1998, *available in* LEXIS, News Library, News Group File.

> America's commercial interests in Africa will deepen as companies begin to tap these . . . markets.
>
> . . . .
>
> [However, o]ur commercial policy is inextricably linked to our efforts to promote democracy and respect for human rights, resolve new and persisting conflicts, and to meet our second important policy goal — working with Africans to combat global threats — including terrorism.

Id.

CHRAJ, with the necessary resources and funding.

Amy Small Bilyeu[*]

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* J.D., 1999, Indiana University School of Law — Indianapolis; B.A., 1992, Indiana University — Bloomington. The author wishes to thank: Scott Goodroad and the staff of the *Indiana International & Comparative Law Review*, especially Michelle Cooper and Michael Browne for their advice, comments, and guidance; Cyndi Bauerly and Jay Clifford for their helpful suggestions; Peter Horvath and Father Michael Blume for their sources and contacts; Phil Sachtleben and Vincent Azumah for obtaining sensitive documents; Emile Short and Kathryn Fitrell for granting interviews; Professor James Bailey and the staff of the IU Law Library; my parents, Bob and Helen Small, and the rest of my family, for their love and support; and especially my husband, Ken, for his love and encouragement — I could not have made it this far without you.

HUMAN CLONING RESEARCH IN JAPAN: A STUDY IN SCIENCE, CULTURE, MORALITY, AND PATENT LAW

But only God can make a tree.[1]

I. INTRODUCTION

Movies and science fiction novels for years have depicted ancient and exotic animals resurrected from extinction by mad scientists and out-of-this-world phenomena. While in actuality we have yet to see any such resurrections, the theoretical results once thought to be science fiction fantasy have come a step closer to reality as powerful technology has been developed which allows the production of genetically identical copies of living, breathing animals through the process of cloning. Cloning technology carries moral, cultural, scientific and legal implications. Today, researchers and scientists work diligently to develop groundbreaking technology that must be protected through worldwide patenting of the fruits of their labor. Recent advances in cloning and other scientific technology have reached the point that there is "virtually no life form which does not have the potential as the subject of a patent application,"[2] including human beings. Japan has been at the forefront of the development of cloning technology. In the summer of 1998, Japanese researchers announced that they had successfully cloned a cow. This success, combined with other recent cloning developments throughout the world, immediately raised the question of whether cloning could have human applications, and ultimately whether human cloning was possible. Thus begins a debate that transcends the realms of morality, culture, ethics, and the law.

Parts II and III of this note address scientific research in Japan in general, and the science of cloning specifically. Part IV provides an overview of the patent law system of Japan, and Part V discusses religious and cultural influences on Japanese morality. The note then turns specifically to human cloning, beginning with Part VI which presents arguments both for and against human cloning. Part VII describes why human cloning is contrary to morality in Japan and asserts that there is no need for governmental regulation of human cloning research in Japan because Japan's patent law system provides both adequate regulation of the technology and the flexibility to allow potentially useful technology to emerge and to allow societal views to change.

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1. 1 Joyce Kilmer, *Trees*, *in* 1 POEMS, ESSAYS & LETTERS 180 (Robert Cortes Holliday ed., 1918).

2. Sally I. Hirst, *Biopatents: A Sense of Order*, TRENDS IN BIOTECHNOLOGY, Aug. 1992, at 63.

II. SCIENTIFIC RESEARCH IN JAPAN

Since World War II, Japan has become a global leader in technological advancements and is typically regarded as a leader in technological innovation and utilization throughout the world.[3] The science and technology industry of Japan has seen fierce competition for many years, especially in the area of research and development.[4] Since 1981, when the Japanese Ministry of International Trade and Industry (MITI) officially designated biotechnology[5] as "a key to future industrial technology,"[6] the Japanese government has played "a central role in the development, growth, and regulation of . . . [scientific] industry."[7] While a great deal of money has been spent on scientific research, Japan's Science and Technology Agency suggests that improvement is needed in life science research.[8] This need for improvement and the overall importance of life science research has prompted action by the Japanese government.

The Prime Minister of Japan recently issued recommendations for research and development of the life sciences, which are consistent with the

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3. *See* Gerald J. Mossinghoff & Vivian S. Kuo, *World Patent System Circa 20XX, A.D.*, 80 J. PAT. & TRADEMARK OFF. SOC'Y 523, 550 (1998).

4. In 1991 alone, Japanese industry spent $97 billion on scientific research. *See* Andrew H. Thorson & John A. Fortkort, *Japan's Patent System: An Analysis of Patent Protection Under Japan's First-to-File System*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 211, 221 (1995).

5. "Biotechnology" can be defined as "the scientific manipulation of organisms, particularly at the molecular genetic level, to produce useful products." THOMAS F. LEE, GENE FUTURE: THE PROMISE AND PERILS OF THE NEW BIOLOGY 17 (1993). Biotechnology, therefore, in a sense, has been around for centuries, through the use of yeasts to ferment wine and the cross-breeding of crops. *See id.* Biotechnology in the form of manipulation of life was even around in the year 100 A.D., when the Chinese used powdered chrysanthemum as an insecticide. *See Historical Events in Biotechnology* (visited Sept. 21, 1998) <http://www.ncbiotech.org/timeline.htm>.

6. Akim F. Czmus, *Biotechnology Protection in Japan, the European Community, and the United States*, 8 TEMP. INT'L & COMP. L.J. 435, 437 (1994).

7. *Id.*

8. *See generally Survey on the Present and Future of the Life Sciences* (visited Sept. 3, 1998) <http://www.sta.go.jp/life/life/e9801_5.html>. Life science research focuses on living organisms and their diversity, and employs various analytical methods in order to study the functions and structures of the basic elements of life such as DNA and proteins. *See* discussion *infra* notes 23, 122. Life science research covers everything from understanding life at the molecular level at one end of the spectrum, to studying development, illness, ecosystems, and other complex life phenomena of entire organisms at the other. *See* The Prime Minister of Japan, *Basic Plan for Research and Development on Life Science* (tentative trans., Aug. 13, 1997) (visited Sept. 3, 1998) <http://www.sta.go.jp/life/lifeplan.htm> [hereinafter Prime Minister's Report]. This research has a large number of goals in Japan, which include creating technological systems to conquer disease and understanding the interaction and meaning of life. *See id.*

government's position on the importance of biotechnology. The recommendations stress the need for research and development in the life sciences because the life sciences have "far greater potential to make a direct contribution to the improvement of the well being of people . . . than other fields of science and technology."[9] The Prime Minister also stated goals to be achieved through life science research, including caring for the people of Japan by creating "a society in which people can lead lives safe and healthy, by overcoming diseases . . . [a]nd creat[ing] a society in which people can age free from fear . . . [of] disease and isolation resulting from some age-related illnesses."[10] The Prime Minister's Plan goes on to emphasize that "[e]xpectations for basic research are very high; it is not only a basis for innovative development in science and technology, but such development in itself is valuable as intellectual property for all humans to share. Japan, especially, is highly expected to boldly challenge unknown fields in science and technology."[11]

Other factors reveal the need for improvement in life science research as well. For example, researchers in the United States, Germany, and France produce more research papers than researchers in Japan.[12] Also, less than one-third of scientific researchers in Japan are currently conducting life science research,[13] in spite of the importance of life science research in the view of the Japanese government.[14] Critics have argued that the initial cause of these shortfalls is a deficiency in college-level and graduate-level education.[15] In response, the Japanese government has attempted to

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9. Prime Minister's Report, *supra* note 8, ch. 1(1).

10. *Id.* Other goals stated by the Prime Minister for life science research included the preservation of the environment and the development of pharmaceutical and food industries through a better understanding of biology. *See id.*

11. William A. Blanpied, *Japan's Science and Technology Policy: Retooling for the Future*, NAT'L SCI. FOUND. (Mar. 1998) (last modified May 14, 1998) <http://www.nmjc.org/jiap/specrpts/reports/spl_1998.html> (quoting *Introduction* to the Science and Technology Basic Plan (1996)).

12. *See Survey on the Present and Future of the Life Sciences*, *supra* note 8. For example, the number of papers per researcher in the United States is 14.6 times higher than that of Japan, and the number of papers per unit of research expenditure is 5.4 times higher. *See id.*

13. *See id.*

14. *See supra* notes 8-9 and accompanying text.

15. For example, very high emphasis is placed on university entrance examinations through rigid preparation in elementary and secondary education in Japanese schools. Upon passing a university entrance examination, students are often assigned to a specific faculty or branch of the university, which eliminates the chance to "shop around while at the university for a field of specialization," which has already been determined. EDWIN O. REISCHAUER & MARIUS B. JANSEN, THE JAPANESE TODAY: CHANGE AND CONTINUITY 195 (enlarged ed. 1995). Also, graduate schools are often viewed as unimportant to the Japanese, in part due to the fact that the role of the university in research activities is diminishing compared to that of research in the private sector. *See id.*

restructure the research and development system of the country to place more emphasis on the life sciences and to bring life science research in line "with the Japanese economy and with Japanese society more broadly."[16]

In spite of some current shortfalls of life science research in Japan, the Japanese people are certainly aware of such research and seem very interested. In general, the Japanese have "a very high level of interest in science."[17] The Japanese Prime Minister's Office has promoted this interest even further, by calling for the "promotion of public understanding of science and the 'establishment of a national consensus on science and technology.'"[18] This high level of interest in science, however, is not accompanied by a high level of interest in the ethical side of scientific research however. Ethics in the life sciences, also known as bioethics, is a relatively new concept in Japan, and the concept has developed in a way unique to the rest of the world because of Japan's "unique cultural values and traditions."[19] "Public discussion of bioethics has only begun in the last few years."[20] Recent studies have also indicated that teachers in Japan feel

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16. Blanpied, *supra* note 11. Efforts to accomplish this task include measures to increase industry-university cooperation in research, the creation of more post-doctoral research positions, "systematic improvement in . . . [research and development] facilities at both national and private universities," and the promotion of public understanding of the life sciences. *Id.*

17. *See* Darryl R. J. Macer, *Japan: the Land of "Bio"*, ALTE ANGSTE NEUE WELT; GENTECHNOLOGIE, IM VISIER NIPPONS 46-47 (English original, Zeitthema (Aus.) 2d ed. 1993) (visited Sept. 21, 1998) <http://re-xs.ucsm.ac.uk/eubios/papers/austria.htm>. For example, surveys in Japan have revealed that 96% of the people surveyed had heard of the word "biotechnology." *See id.*

18. Blanpied, *supra* note 11 (quoting Science and Technology Basic Plan). In reality, however, the current state of affairs in Japan is that "[p]ublic opinion is seldom influential in determining public policy and there are no effective means used by the public to change policy." Darryl R. J. Macer, *Bioethics May Transform Public Policy in Japan*, 13 POL. & LIFE SCI. 89-90 (1994) (visited Sept. 21, 1998) <http://re-xs.ucsm.ac.uk/eubios/papers/plsppj.htm>. Therefore, while the public may have a high level of awareness of scientific research in general, it is unlikely that public opinions would change any policies regarding scientific research. "In Japan . . . [a] truly open national forum has yet to exist for any major policy, and the establishment of such a multi-disciplinary forum would probably represent in itself a transformation of society structure." *Id.*

19. *See Words in the News*, DAILY YOMIURI/YOMIURI SHIMBUN, Feb. 20, 1997, *available in* 1997 WL 9499757. For further information on bioethics, see TOM L. BEAUCHAMP & LEROY WALTERS, CONTEMPORARY ISSUES IN BIOETHICS (3d ed. 1989); ARTHUR CAPLAN, MORAL MATTERS: ETHICAL ISSUES IN MEDICINE AND THE LIFE SCIENCES (1995); REM B. EDWARDS & GLENN C. GRABER, BIO-ETHICS (1988).

20. Macer, *supra* note 18. While there has been past concern with issues such as environmental pollution and suspicion of the medical profession, public debate on life science issues has only recently begun. *See id.* Macer argues that this is due in part to the fact that the government of Japan is an Asian-style democracy where "[p]ublic opinion is seldom influential in determining public policy and there are no effective means used by the public to change policy." *Id.* Macer goes on to argue that the movement toward bioethics and

the need to teach bioethics in schools because of a disrespect for life that they see displayed by Japanese children.[21] Education is vital in terms of public awareness and responsibility, and is especially important in science and technology because education leads to understanding.

III. THE SCIENCE OF CLONING

Cloning is the process by which a cell, or a group of cells, are used to create an entirely new organism that is "genetically identical to the ancestral cell or organism from which it is derived."[22] Cloning has proven very useful at the molecular level for some time.[23] "Researchers have been cloning animal, plant and other organism cells and genes for over twenty years."[24] Since then, cloning research has led to tremendous breakthroughs in the development of medicines and the treatment of disease.[25]

While cellular cloning techniques have been used for over twenty

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bioethical reasoning may itself have a dramatic affect on Japanese culture. *See id.*

21. *See* Yukiko Asada et al., *High School Teaching of Bioethics in New Zealand, Australia and Japan,* J. MORAL EDUC., Dec. 1, 1996, at 92.

22. LEE M. SILVER, REMAKING EDEN: CLONING AND BEYOND IN A BRAVE NEW WORLD 94 (1997). While the term "cloning" definitely carries this connotation, geneticists also use the term to describe the production of identical copies of genes, which in laymen's terms are structures that carry all the information that is needed to direct every process in an organism. *See* discussion *infra* note 23. *See also* DAVID SUZUKI & PETER KNUDTSON, GENETHICS: THE ETHICS OF ENGINEERING LIFE 98 (rev. ed. 1990). The term "cloning" can also refer to molecular cloning (duplicating strings of DNA containing genes) and embryo twinning (splitting an embryo into two identical halves to produce twins). *See Introduction* to FLESH OF MY FLESH: THE ETHICS OF CLONING HUMANS IX (Gregory E. Pence ed., 1998) [hereinafter FLESH OF MY FLESH].

23. Cloning is a key process in the isolation of human genes for research. Genes are made up of Deoxyribonucleic Acid (DNA). Because the mechanism is beyond the scope of this paper, it suffices to say that DNA encodes all the hereditary information required to create and orchestrate every cell in the human body. If it were possible to unwind all the DNA in the human body, the DNA could "stretch to the moon and back roughly one million times." SUZUKI & KNUDTSON, *supra* note 22, at 31. For an in depth discussion of cloning at the molecular (not organism) level, see generally LEE, *supra* note 5. For a complete discussion of the workings of genes and DNA, see DAVID FREIFELDER, ESSENTIALS OF MOLECULAR BIOLOGY (George M. Malacinski ed., 2d ed. 1993); SUZUKI & KNUDTSON, *supra* note 22. For the structure and chemistry of DNA, see THEODORE L. BROWN ET AL., CHEMISTRY: THE CENTRAL SCIENCE 990-93 (5th ed. 1991).

24. William S. Feiler, *'Birth' of Dolly Raises Patent Issues on Clones*, N.Y.L.J., Mar. 9, 1998 (visited Aug. 27, 1998) <http://www.ljextra.com/patents/0309dolly.html>.

25. Such breakthroughs have included treatments for heart attack, hemophilia, anemia, cancer, hepatitis, and other diseases. It has also been suggested that cloning could be useful as a research tool in developing new therapies to treat human disease, such as growing human cells and tissues for grafts and transplantations that would not be rejected by their recipient which often occurs today. *See* ROBERT GILMORE MCKINNELL, CLONING: A BIOLOGIST REPORTS 67-71 (1979).

years, the prospect of cloning at the organism level began to gain notoriety in 1993, when a group of researchers in the United States[26] successfully took seventeen human embryos and cloned them, multiplying them into forty-eight embryos.[27] The experiment laid the groundwork for the fierce debate on human cloning which was to come, even though the research did not produce an entire organism.[28] The fire surrounding human cloning did not ignite until 1997, however, when cloning at the organism level came to the forefront of scientific research as a team of scientists in Scotland[29] announced that they had cloned a mammal and produced a viable sheep which came to be known as "Dolly."[30] Since then, the cloning of entire animals has become more and more feasible.

In the summer of 1998, scientists in New Zealand announced that they had successfully cloned the last "surviving member of a rare breed of cow."[31] Later that same summer, researchers at the University of Hawaii announced that they had cloned more than fifty female mice.[32] Researchers used a slightly different technique to clone the mice than was used to clone the sheep in Scotland, and they have indicated that "since all mammals develop in a roughly similar fashion, the new technique could be used to

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26. The research was led by Dr. Robert Stillman, George Washington University.

27. *See* Philip Elmer-DeWitt, *Cloning: Where Do We Draw The Line?*, TIME, Nov. 8, 1993, *available in* 1993 WL 2929305.

28. This research effort cloned an embryo's cells that were immature and undifferentiated. *See id.* As will be discussed, the complex cloning techniques later developed produced viable organisms from adult cells that had already undergone differentiation. *See infra* note 33.

29. The team of scientists was led by Dr. Ian Wilmut. For Dr. Wilmut's research paper unveiling his work, see Ian Wilmut et al., *Viable Offspring Derived from Fetal and Adult Mammalian Cells*, 385 NATURE 810 (1997).

30. *See* SILVER, *supra* note 22, at 91. In fact, the sheep had been born several months before the announcement, but the funding corporation that backed the research waited for approval of patents on its cloning techniques before announcing the birth of the lamb to the public. *See* FLESH OF MY FLESH, *supra* note 22, at IX. The patents on the techniques — patent numbers WO 97/070668 and WO 97/070669 — were granted by the World Intellectual Property Organization (WIPO).

31. Rick Weiss, *Last Cow of Rare Breed is Cloned in New Zealand*, WASH. POST, Aug. 20, 1998, at A02. The cow was the last female survivor of the Enderby Island breed, which lived on an island near New Zealand for over a century. *Cloning Comes to the Rescue of a Lady*, SCI. NEWS, Sept. 5, 1998, *available in* 1998 WL 14404402. Dr. David N. Wells, who led the cloning effort of the cow, stated: "With . . . [the cow's] birth, we have vastly improved the chances of saving this endangered breed." *Id.*

32. *See* Rachel K. Sobel, *Copying a Multitude of Mice*, U.S. NEWS & WORLD REP., Aug. 3, 1998 (visited Oct. 1, 1998) <http://www.usnews.com/usnews/issue/980803/3mous.htm>. More important than the fact that the mice were cloned, is the success rate that the researchers achieved. While it took researchers 277 tries to successfully clone the sheep in Scotland, researchers achieved success and produced viable mice between two and three percent of the time, indicating that cloning techniques are being improved and becoming more and more successful. *See id.*

clone larger animals and perhaps even humans."[33]

Japan has been one of the principal players in recent cloning developments. First, the technique used to clone the mice at the University of Hawaii was developed by Ryuzo Yanagimachi, a Japanese professor.[34] Also, Japanese researchers announced in July of 1997 that they had cloned twin calves using a process similar to the method used to create the sheep in Scotland.[35] Since then, Japan has received international attention for its cloning of cows and other farm animals.[36] Dr. Ian Wilmut, the researcher who led the cloning of the sheep in Scotland, acknowledged the importance of Japanese cloning efforts, stating: "If we take together our research with sheep, Japanese work with cattle and American work with mice, it clearly shows that this is a very powerful and effective technology."[37]

While appearing extremely complex, cloning is a relatively simple process. One cloning method that has met with success is called "Somatic Cell Nuclear Transplantation," which is the method that was used to clone the sheep in Scotland.[38] In this technique, the nucleus[39] of a somatic cell[40] is

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33. *Human Clones a Step Closer*, POPULAR MECHANICS, Oct. 1998, at 20. What is fascinating about this effort and other recent cloning efforts is the fact that researchers have taken cells that have already become very specialized in performing a certain task in an organism and wound the cells back, allowing them to give instructions for the complete organism. *See id.* This feat was once thought impossible in biology. *See* Sharon Begley, *Little Lamb, Who Made Thee?*, NEWSWEEK, Mar. 10, 1997, *available in* 1997 WL 9315470.

34. *See U.S., British Firms Plan to Clone Pigs*, JAPAN SCI. SCAN, July 27, 1998, *available in* 1998 WL 8029785.

35. *See infra* notes 38-50 for a discussion of the different cloning techniques.

36. *See Analysis: Cloning Reports, Reactions Ripple Back to Japan*, ASIA PULSE, Mar. 7, 1997, *available in* 1997 WL 10601695. In addition to research and development on cloning in the private sector, Japan has ongoing research in the public sector. Regional governments have programs, and both the Tokyo University of Agriculture and Kinki University have cloning programs. *See id.* One reason for the research on cows, in particular, was a nationwide goal of creating cows that would produce more milk or a higher quality of beef. *See Japan's First Cloned Calf Dies*, AP ONLINE, July 25, 1998, *available in* 1998 WL 6698471. Scientists in the United States have also succeeded in cloning a cow. *See id.*

37. *Cloning an 'Effective' Technology, Says Sheep Cloner*, JAPAN SCI. SCAN, July 27, 1998, *available in* 1998 WL 8029784. Dr. Wilmut went on to comment that while he was concerned with the possibility of human cloning, he did not oppose cloning efforts which use early human eggs for research because the eggs "cannot yet be considered to be fully human and possess awareness." *Id.*

38. *See* Feiler, *supra* note 24.

39. The nucleus is the part of a cell that contains all of the genetic material (the DNA), as well as all of the complex machinery that is required to reproduce cells and the genetic material contained in them, as well as many other vital components that are essential to life. *See* FREIFELDER, *supra* note 23, at 373-75.

40. A somatic cell is "any cell of the embryo, fetus, child or adult which contains a full complement of two sets of chromosomes." Feiler, *supra* note 24. Every cell of the human body contains 46 chromosomes. *See* SUZUKI & KNUDTSON, *supra* note 22, at 30. A chromosome is a structure that consists of a strand of DNA. *See* discussion *supra* note 23.

removed and implanted into an egg cell[41] which has had its nucleus removed.[42] This egg cell, which contains identical genetic material to the organism from which it was removed, is implanted in the womb of a surrogate mother where it divides and develops into an embryo.[43] One problem encountered with this technique, however, is that adult cell nuclei "cannot be readily reprogrammed back to an embryotic state."[44] The cells must be reprogrammed in order to make them capable of directing the development of the organism from the time that it is one cell, all the way through the life of the organism.

This problem was conquered by the researchers at the University of Hawaii.[45] As with the technique used to clone the sheep, DNA was extracted from adult cells and injected into an egg cell with the nucleus removed.[46] This time, however, the DNA was extracted from cumulus cells[47] instead of somatic cells.[48] After a few hours, the cell was placed into chemicals that prompt cell division and then was transferred to the womb of a surrogate mother, where it developed just as a normal fertilized egg cell would grow into an embryo and then into an entire organism.[49] While scientists conquered the problem of making adult cells revert back to stages where they are capable of directing development, they were unable to explain exactly why the process worked in this case.[50]

While these incredible advances in technology carry serious scientific implications, they are accompanied by legal ramifications as well. As with all areas of scientific research, cloning researchers seek patent protection for

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A chromosome carries genetic instructions for carrying on all cellular processes, and ultimately the developing and functioning of the human body. *See* SUZUKI & KNUDTSON, *supra* note 22, at 30-32.

41. Egg cells are the reproductive cells of females.

42. *See* Feiler, *supra* note 24. It must be noted that while the concept of cloning is relatively simple, the actual operation is exquisitely complex. For a further discussion of the physical operation and technique used in nuclear transfers, see MCKINNELL, *supra* note 25, at 40-47.

43. *See Tinkering with Mother Nature* (visited Sept. 21, 1998) <www.infoplease.com/ipa/A0198330.shtml>.

44. SILVER, *supra* note 22, at 96.

45. *See supra* notes 32-34 and accompanying text.

46. *See* Sobel, *supra* note 32, at 1.

47. Cumulus cells are cells that adjoin egg cells within an ovary in females. *See id.*

48. *See* Adam Rogers & Erika Check, *The Mice That Roar*, NEWSWEEK, Aug. 3, 1998, at 54. Somatic cells are "any cell of the embryo, fetus, child or adult which contains a full complement of two sets of chromosomes." Feiler, *supra* note 24.

49. *See* Sobel, *supra* note 32.

50. *See* Rogers & Check, *supra* note 48, at 54. Scientists speculate that the process works because cumulus cells rarely divide, making them good candidates for cloning. *See id.* Even though cumulus cells rarely divide, they still contain all the genetic material necessary to produce an entire organism. *See id.*

their work, and the importance of such protection is certainly recognized by the Japanese.[51]

IV. OVERVIEW OF PATENT LAW IN JAPAN

The protection of intellectual property in Japan derives from Japan's constitution.[52] Japan has protected intellectual property since the Patent Monopoly Act of April 8, 1885, was passed.[53] Since then, the explosion of technology has made the patent a valuable and controversial device. In Japan, in 1991, just over 100 years after the Patent Monopoly Act was passed, over 360,000 patent applications were published.[54] Today, patents are very important to companies in Japan, as Japanese companies "know well the values of intellectual property and technological innovation."[55] Japanese companies even provide their employees with rewards to encourage them to file patents. Patents have become very important both for the individual inventor and small business as well.[56] In order to analyze the role of the patent in Japanese scientific industry, a basic understanding of the Patent Law is necessary.

The purpose of Japan's Patent Law is to "encourage inventions by promoting the protection and utilization of inventions and thereby, to contribute to the development of industry."[57] One major area of "invention"

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51. *See* text accompanying *infra* notes 55-56.

52. While it is true that the constitution of a country will likely be the original source of patent protection, there are other sources of patent protection as well. Governments pass laws and sign international treaties which affect the scope of patent protection in their respective countries. For a discussion of many of the major international patent treaties, see generally Michael N. Meller, *Planning for a Global Patent System*, 80 J. PAT. & TRADEMARK OFF. SOC'Y 379 (1998); Mossinghoff & Kuo, *supra* note 3; Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. PA. J. INT'L ECON. L. 535 (1998).

53. *See* Thorson & Fortkort, *supra* note 4, at 214.

54. *See id.*

55. *Id.* The importance of patents can be seen from the filing of patents internationally by Japanese companies. For example, in ranking the top ten companies that filed patent applications in the United States in 1993, Japanese companies held six of the ten spots. *See* Dan Rosen & Chikako Usui, *The Social Structure of Japanese Intellectual Property Law*, 13 UCLA PAC. BASIN L.J. 32, 33 (1994). In Germany, Japanese companies also filed over twice as many patent applications than American companies in 1992. *See id.*

56. For example, financial institutions in Japan have created a system of providing loans to venture businesses by holding patent rights as collateral for the loans. *See Jottings March*, YOMIURI SHIMBUN/DAILY YOMIURI, Mar. 3, 1998, *available in* 1998 WL 6591191. This opportunity is especially valuable for small businesses and individual inventors who may not have the collateral that large corporations have to obtain credit and loans.

57. Patent Law, Law No. 121 of 1959, art. 1 (amended 1998) [hereinafter Japan Patent Law].

in Japan is biotechnology.[58] The process of patenting an invention[59] in Japan begins with the filing of an application with the Japanese Patent Office (JPO). The application must include basic information on the inventor[60] and must disclose the invention. The disclosure in the application must include a claim over the subject matter to be patented and "a detailed explanation of the invention . . . describ[ing] the invention in a manner sufficiently clear and complete for the invention to be carried out by a person having ordinary skill in the art to which the invention pertains."[61]

In Japan, the first requirement to receive a patent is that the invention be useful or industrially applicable.[62] To be industrially applicable, an invention must have some usefulness, as the "industrially applicable" requirement deals with that usefulness and the level of innovation that is required for patentability.[63] In biotechnology, inventions are useful when they can be "repeatedly exploited."[64]

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58. Biotechnology is also a major area of invention in the United States. For a listing of the requirements for the patenting of biotechnological inventions in the United States and a discussion of those requirements, see MICHAEL A. EPSTEIN, MODERN INTELLECTUAL PROPERTY ch. 11(II)(A) (2d ed. 1992).

59. An invention is a highly advanced creation of technical ideas by which a law of nature is utilized. *See* Japan Patent Law, art. 2.

60. Examples of basic inventor information that is required include the name(s) and address(es) of the inventor and applicant and the name(s) of attorneys representing the applicant. *See id.* art. 36. *See also Japanese Patent Law* § IV(D)(1) (visited Sept. 5, 1998) <http://www.shinjyu.com/patent.html> (describing information which must appear in patent applications).

61. *See id.* § IV(D)(2). Note also that this requirement represents a change to the law instituted for applications filed after July, 1995. *See id.* For applications filed before that date, the applicant only had to disclose the purpose, constitution, and the effect of his invention, but did not have to disclose how to make the invention. *See id.*

62. *See* Japan Patent Law, art. 29. The term "industrially applicable," like the term "invention," is somewhat vague and highly subjective. In Japan, only inventions that are industrially applicable are patentable. *See id.* In the United States, a patent can be obtained for the invention or discovery of "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C.A. § 101 (West 1984).

63. The industrial applicability requirement of Japan's Patent Law developed under the influence of the "nonobviousness" requirement of the United States. *See* Toshiko Takenaka, *The Substantial Identity Rule Under the Japanese Standard*, 9 UCLA PAC. BASIN L.J. 220, 224 (1991). The nonobvious standard for the United States is codified at 35 U.S.C.A. § 103 (West 1984 & Supp. 1999).

64. Alan J. Kasper, *Protection of Software Related Inventions in Japan*, 479 PLI/PAT 931, 940 (1997). While patent protection for biological products and processes is increasing in Japan, inventions in the field of therapeutic or diagnostic treatment of humans are still not "industrially applicable" because they are not considered part of "industry." *See* Miyako Okada-Tskagi, *Intellectual Property Law in Biotechnology*, 16 MED. & L. 9, 14 (1997). As far as biological inventions outside of Japan are concerned, the European Union has recently issued a directive which permits patent protection of new inventions

The second requirement for an invention to be patentable in Japan is novelty.[65] Under the novelty requirement, a person may not obtain a patent on any invention already existing in what is known as "prior art."[66] Prior art consists of any invention that was publicly known, publicly worked on, or publicly used in Japan prior to the filing of the patent application, or any invention that was described in a publication distributed in Japan or anywhere else in the world prior to the filing of the patent application.[67]

The third requirement for patentability in Japan is an inventive step. A person may not obtain a patent for inventions which could easily have been made by a person with ordinary skill in the art to which the invention pertains prior to the filing of the patent application.[68] The most important

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> which involve an inventive step and which are susceptible of industrial application . . . even if they concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used. . . . Biological material may be the subject of an invention even if it has previously occurred in nature.

John R. Schmertz & Mike Meier, *EU Issues Directive to Member States to Coordinate Domestic Law on Scope of Patent Protection for Biotech Products*, 4 Int'l L. Update 96 (1998). Such action by the European Union has made the legal scene more "biotech-friendly." *See Gist-Brocades: Strasburg Approves Move on Biotech Patent Rules*, CHEMICAL BUS. NEWSBASE, Sept. 1, 1998, *available in* 1998 WL 14756548.

65. *See* Japan Patent Law, art. 29(1)-(3). For a further discussion of the novelty requirement in Japan, see ROBERT W. RUSSEL, PATENTS AND TRADEMARKS IN JAPAN (A HANDY BOOK) 279-80 (3d ed. 1974). Novelty is also a requirement for patents in the United States. *See* 35 U.S.C.A. § 101 (West 1984).

66. *See* Japan Patent Law, art. 29; *Japanese Patent Law*, *supra* note 60, § IV(D)(2), § V(C)(2).

67. *See* RUSSEL, *supra* note 65, at 314-15. Prior art determines novelty in the United States as well. For a discussion of the concept of "prior art" in the United States and the rest of the world, see generally Kate H. Murashige, *The Hilmer Doctrine, Self-Collision, Novelty and the Definition of Prior Art*, 26 J. MARSHALL L. REV. 549 (1993).

68. This inventive step requirement is similar to the standard of unobviousness in the United States. A certain level of innovation is required in order to make an invention patentable. *See* WILLIAM H. FRANCIS & ROBERT C. COLLINS, CASES AND MATERIALS ON PATENT LAW 315 (1995). This requirement is mandated in part by public policy considerations, and the "need to balance public interest considerations against the grant of a patent monopoly." Takenaka, *supra* note 63, at 225 (footnote omitted). The powerful and lucrative grant of a patent monopoly "is not justified [simply] by [a] trivial change or modification" on an existing invention. *Id.* Rather than stimulating inventiveness, granting patents for such trivial changes would obstruct inventiveness. *See id.* Since the purpose of Japan's Patent Law is to promote invention and the development of industry (*see* discussion, *supra* note 57 and accompanying text), "allowing a monopoly on existing technology would debilitate industry and forestall progress by preventing people from freely using technology." *Id.* at 223. To determine whether the inventive step in Japan has been met:

1. identify the claimed invention and review the teachings of the prior art;
2. select the most suitable prior art for comparison with the invention;
3. compare the claimed invention with the selected prior art;
4. recognize the common and different features between the two without

exception to the general rule of patentability of inventions in Japan for purposes of this note,[69] however, is the statutory requirement that inventions which contravene public order, morality, or public health cannot be patented.[70]

In Japan, the first inventor to file a patent application with the Japanese Patent Office owns the rights to the invention, assuming that the other requirements are met.[71] This first-to-file system has also been proposed as the international standard for the grant of patents.[72] When a patent application is filed, it is automatically published[73] "eighteen months from the earlier of the Japanese filing date or the foreign convention priority date,"[74]

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considering effects;

5. establish a logical argument as to whether or not a person of ordinary skill in the art could have made the claimed invention at the time of filing on the basis of the features previously identified in the cited prior art and the invention;

6. judge whether sufficient motivation exists in the cited prior art to arrive at the claimed invention; and

7. if sufficient motivation exists, the application lacks an inventive step.

David J. Abraham, *Shinpo-Sei: Japanese Inventive Step Meets U.S. Non-Obviousness*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 528, 529-30 (1995). This inventive step requirement and inquiry is similar to the non-obviousness standard set forth in 35 U.S.C.A. § 102 (West 1984). For an excellent comparison of the two standards, see generally Abraham, *supra.*

69. Ultimately, for reasons set forth later in this note, human cloning is contrary to morality in Japan, and therefore, a human clone or a process to clone humans cannot be patented in Japan. *See infra* Part V.

70. *See* Japan Patent Law, art. 32(2).

71. *See id.* art. 39. This creates the possibility that the first person to actually invent may not receive a patent if they neglect to file for a patent and someone later creates the same invention but files for a patent first. The Japanese "first-to-file" system, which is the system used by the majority of the world, is in contrast to the United States' "first-to-invent" system, and it should be noted that the United States' system has been criticized in recent years. *See generally* Vito J. DeBari, *International Harmonization of Patent Law: A Proposed Solution to the United States' First-to-File Debate*, 16 FORDHAM INT'L L.J. 687 (1993) (discussing the United States' first-to-invent system). Currently, only the United States, Jordan, and the Philippines utilize the first-to-invent system. *See id.* at n.7. For an in-depth discussion of the differences between the two systems and the debate over whether to adopt the first-to-file system in the United States, see generally *id. See also* John C. Lindgren & Craig J. Yudell, *Protecting American Intellectual Property in Japan*, 10 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 18 (1994) (describing the first-to-invent debate).

72. *See* DeBari, *supra* note 71, at 688. For a comparison of Japanese Patent Law to WIPO standards, see generally Mark S. Cohen, *Japanese Patent Law and the WIPO Patent Law Harmonization Treaty: A Comparative Analysis*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 847 (1994).

73. This publication is called a *Kokai*, which translated literally to English means "laid open to the public." RUSSEL, *supra* note 65, at 237.

74. Lindgren & Yudell, *supra* note 71, at 18-19.

so that the general public may inspect the application.[75] For the patent application to be examined by the Japanese Patent Office, a request for examination must be filed within seven years of filing the patent application.[76] If the subject matter of the patent application meets all of the requirements, a patent is issued that will protect the invention for the shorter of: (1) fifteen years from the date of publication for opposition, or (2) twenty years from the date the application was filed.[77]

The value of a Japanese patent in protecting an invention has met some criticism around the world, however. One objection is that Japanese patent protection has a very narrow scope,[78] which has caused inventors to flood the patent office with applications,[79] inevitably creating long delays for examination and the issuance of patents. Also, the Japanese Patent Office has long been criticized as being protective toward Japanese inventors and companies as compared to their foreign counterparts, even though

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75. *See id.* at 19. Prior to 1995, the pending patent application was inspected by examiners and then published in a *Kokoku*. *See id.* This publication basically provided competitors with the subject matter of the application the opportunity to try and undermine the validity of the patent, which forced foreign applicants to face opposition that they may not encounter in their home country. *See id.* At the time, this system was in stark contrast to that of the United States, where only patent examiners at the Patent & Trademark Office would examine the patent application in total secrecy. *See id.* This practice was ended under an accord between the United States and Japan in 1995, making it easier for inventors in the United States to obtain patents in Japan. *See generally* Stephen Lesavich, *The New Japan-U.S. Patent Agreements: Will They Really Protect U.S. Patent Interests in Japan?*, 14 WIS. INT'L L.J. 155 (1995). In Japan today, a patent is granted by an examiner, and then is published for opposition. *See Japanese Patent Law*, *supra* note 60, § VII. Anyone who opposes the patent then has six months from the publication date to file an opposition with the Japan Patent Office (JPO). *See id.* Any oppositions are judged by a three to five member group of patent examiners. *See id.*

76. *See* Lindgren & Yudell, *supra* note 71, at 19. If the request for examination is not filed within this time, the application is deemed withdrawn. *See id.* This is another example of contrast to the United States' system, where every patent application is automatically examined. Lindgren suggests that the "deferred examination" process in Japan may be better than the American system because of the pace of technological growth in the world today, because an applicant would have seven years to see if his invention is in use before going through the expensive process of prosecuting a patent on the invention. *See id.*

77. *See* Japan Patent Law, art. 67.

78. *See* Jeffrey A Wolfson, *Patent Flooding in the Japanese Patent Office: Methods for Reducing Patent Flooding and Obtaining Effective Patent Protection*, 27 GEO. WASH. J. INT'L L. & ECON. 531, 541 (1994).

79. *See id.* There are other reasons for the flood of patent applications in Japan. For example, the Japanese can obtain status by the number of patents that they hold. *See id.* Also, the number of applications may be reflective of a mentality in Japan that litigation is disfavored. Rather than risk litigation, it may be better to apply for patents and let the JPO determine whether to allow the patent or to reject it. *See* Lindgren & Yudell, *supra* note 71, at 25. Otherwise, by litigating matters which could not be settled amicably, both parties are shamed and dishonored. *See id.* Therefore, litigation is seen as an extreme measure. *See id.*

improvements have been made in recent years.[80]

V. RELIGIOUS AND CULTURAL INFLUENCES ON JAPANESE MORALITY

Determining what dictates morality in Japan is no easy task. Religion is one prominent influence on morality in Japan. While most Japanese tend to consider themselves non-religious, because Japan is home to virtually all of the world's major religions, religion has undoubtedly affected Japanese thought and culture.[81] This effect of religion on Japanese thought and culture is not the result of the differing individual religious traditions, but it is instead the product of the combinations of these traditions which has created certain persistent themes in Japanese society. These themes include "the closeness of man, 'gods' . . . , and nature;"[82] the significance of the family, both living and dead;[83] the intimate relationship between religious practice

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80. *See* Lindgren & Yudell, *supra* note 71, at 6. A prime example of protectionism is the Kilby patent. Jack St. Clair Kilby invented the integrated circuit in 1958, which was one of the more important technological innovations of this century. *See id.* at 7. Kilby applied for a patent in the United States in 1959, and received a patent in 1964. *See id.* Kilby also applied for a patent in Japan in 1960, but the patent was not granted until 1989, arguably because of the protectionist policies of the Japanese Patent Office. *See id.* The patent expires in 2001, which is 15 years from the date it was published in Japan for opposition. *See id.* at 7-9. Recent developments have suggested that Japan may be moving away from its protectionist policies of the past. In 1994, the United States and Japan signed "The New Patent Accord," which was intended to resolve some of the disputes between the United States and Japan concerning patent protection. *See* Lesavich, *supra* note 75, at 174-80. The agreement made accommodations to correct errors in translation from English to Japanese, because U.S. companies have in the past lost or received worthless patents because of translation errors for which the Japanese Patent Office would not allow the correction. *See id.* at 174. The JPO also agreed to allow accelerated examination of patent applications for applications that have also been filed in other countries, which likely will eliminate results such as the Kilby case. *See id.* at 175-76. Protectionism in the JPO has also been seen in the area of importation of patented inventions into Japan, but this protectionism was reduced to some extent in 1997, by the landmark decision in *BBS Kraftfahrzeugtechnik AG v. Racimex Japan Corp.*, H-7 (o) No. 1988 (Sup. Ct., July 1, 1997) (Japan). For an in-depth discussion of the case, see John A. Tessensohn & Shusaku Yamamoto, *The BBS Supreme Court Case*, 79 J. PAT. & TRADEMARK OFF. SOC'Y. 721 (1997).

81. *See* G. Cameron Hurst III, *The Enigmatic Japanese Spirit*, ORBIS, Mar. 22, 1998, *available in* 1998 WL 12909529. In the early 1980s, one survey reported that over 65% of Japanese people surveyed said that they had no personal religious faith, and yet visits and donations to temples and shrines are high and religious festivals flourish. *See id.*

82. *See* H. BYRON EARHART, THE NEW RELIGIONS OF JAPAN: A BIBLIOGRAPHY OF WESTERN-LANGUAGE MATERIALS 2 (1970).

83. *See id.* Reverence for and even the worship of ancestors in Japan is viewed as very important in Japanese society. As one commentator stated, "[t]he mere fact that they were predecessors is sufficient to command respect and attention from their descendants of the family." ROBERT J. SMITH, ANCESTOR WORSHIP IN CONTEMPORARY JAPAN 115 (1974). The dead are revered for the contribution that they have made to the family in the past, but some

and daily life; and "the natural bond between Japanese religion and the Japanese nation."[84]

Because of such pervasive themes in Japanese religion and the presence of a variety of religious traditions, the Japanese approach to religion has been described as "fundamentally tolerant and eclectic."[85] While Japan has historically tolerated various religions,[86] much of today's influence on morality comes from two religious schools of thought: Shinto and Buddhism.

Shinto,[87] the indigenous religion of Japan, stresses a belief that human beings are in communion with the living forces in the world, which forms a communal cult where "gods or spirits, animals and trees, even rocks and streams . . . [are] believed to be living in communion with men."[88] The Japanese believe all forces and objects of nature have a spiritual essence[89] and that these forces are to be given proper respect.[90] Persons and objects whose spiritual essences come to be revered are called *Kami*.[91] In each family, there are persons who are *Kami*, and Shinto makes it clear through the concept of *Kami* that there is no distinction between human beings and

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of this veneration is generated by a fear "that a slighted or neglected spirit of the dead might return to harm the living." *Id.*

84. *See* EARHART, *supra* note 82, at 2.

85. JACK SEWARD, THE JAPANESE 188 (1995).

86. The Constitution of Japan declares that "[f]reedom of religion is guaranteed to all." JAPAN CONST. art. 20, *reprinted in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flantz eds., Oceana Publications 1990). Seward refers to Japan as a "'museum of religions,' . . . [holding] its doors open to all religions that care to test their demotic appeal in the arena of their archipelago." SEWARD, *supra* note 85, at 188. For a discussion of religion and the law in Japan, see Kawawata Yuiken, *Religious Organizations in Japanese Law*, *in* RELIGION IN JAPANESE CULTURE 199 (Noriyoshi Tamaru & David Reid eds., 1996).

87. The word "Shinto," translated into English, means "way of the *kami* (gods)." JOSEPH M. KITAGAWA, ON UNDERSTANDING JAPANESE RELIGION 139 (1987).

88. MASAHARU ANESAKI, HISTORY OF JAPANESE RELIGION 22 (1963).

89. *See* SEWARD, *supra* note 85, at 192.

90. *See* ANESAKI, *supra* note 88, at 21.

91. *See* SEWARD, *supra* note 85, at 192. The meaning of the word "*Kami*" is difficult to translate and understand. Seward indicates that the term means "above" or "superior." *Id.* Anesaki suggests the term carries the meanings of "superior," "sacred," or "miraculous." ANESAKI, *supra* note 88, at 21. Another useful interpretation is:

> [*Kami*] signifies the deities of heaven and earth that appear in the ancient records and also the spirits of the shrines where they are worshipped. Needless to say it includes human beings, and such objects as birds, beasts, trees, plants, seas, mountains, and so forth. In ancient usage anything which was outside the ordinary, possessed superior power or was awe-inspiring was called *kami* . . . [including e]vil and mysterious things . . . . [In each] family there are human beings who are *kami* . . . .

William Theodore De Bary, *Japanese Religion*, *in* AN INTRODUCTION TO JAPANESE CIVILIZATION 309, 312 (Arthur E. Tiedemann ed., 1989).

divinity.[92]

The human being as an individual in Shinto is far less important than the community as a whole.[93] While vague, it is conceded that each human being possesses what has come to be conceptualized in the notion of the "soul."[94] All living things have such a spirit, and "when a living thing dies, its spirit leaves the body and exists in Heaven until its eventual return to this world."[95] In general, "[a] reverence for life and creativity . . . abhorrence of death and defilement[,] . . . [a]n appreciation of the beauty and awesomeness of nature or divine creativity, . . . [and] an acknowledgment of one's dependence on some . . . higher being"[96] have gained acceptance and expression in Shinto worship. This appreciation of nature, through ideas that not only is nature sacred, but also that human beings and nature are on equal levels, is discernable from an examination of Buddhism as well.[97]

Buddhism is the predominant religion in Japan today.[98] Buddhism stresses the unity of all beings through the goal of realization that there is a "spiritual communion pervading the whole universe" and a basic unity of existence in life and spirit.[99] The model for achieving spiritual enlightenment is the Buddha, who taught "all-oneness" and "all-embracing charity."[100] In contrast to Shinto, Buddhism stresses that pain, suffering and death are important and essential in life.[101] Suffering and death are accepted and not

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92. *See* SEWARD, *supra* note 85, at 193-94.

93. *See* ANESAKI, *supra* note 88, at 36.

94. *See id.* at 39. In Shinto, the soul is composed of two parts, one mild (*nigi-mitama*) and one rough (*ara-mitama*). *See id.* at 40. The mild part of the soul cares for the person's health and prosperity, while the rough part of the soul performs adventurous tasks or even bad deeds. *See id.*

95. Takeshi Umehara, *Shinto and Buddhism in Japanense Culture*, JAPAN FOUND. NEWSL., 1987, at 15.

96. De Bary, *supra* note 91, at 315.

97. *See* Lucille Craft, *Monkey Culture*, WASH. POST, Dec. 10, 1997, *available in* 1997 WL 16223097.

98. *See* THE INTERNATIONAL SOCIETY FOR EDUCATIONAL INFORMATION, THE JAPAN OF TODAY 113 (1996) [hereinafter INTERNATIONAL SOCIETY]. As of 1994, Buddhism in Japan had a total following of 90 million people. *See id.* The population of Japan was approximately 125 million in 1995. *See id.* at 77.

99. ANESAKI, *supra* note 88, at 53. Such realization results in spiritual enlightenment, or *Bodhi*. *See id.*

100. *Id.* at 53-54.

101. *See* De Bary, *supra* note 91, at 316. The importance of suffering can be seen from the essential teachings of Buddhism, the "Four Noble Truths," which state in part:

> 1. The truth of suffering — that suffering is inherent in life. Buddhism is deeply conscious of the finite character of human life. Joy and sorrow, pleasure and pain, health and sickness are inextricably bound up with one another. The more we seek of one, the more exposed we are to the other. . . .
>
> 2. That suffering is caused by desire or selfish craving. It is the desiring of things for oneself that brings pain. . . .

feared by Buddhists.

The human being in Buddhism is one component that makes up the "fundamental oneness of all beings."[102] The world is made up of innumerable beings who act as individuals, but in reality these things make up one family.[103] The life of a human being is the "moral causation of the continuity of existence through successive births and deaths," or *Karma*.[104] Ultimately, the quality of life that a person experiences is determined by the merit of his past and present deeds, and therefore, illness and disease are not resisted because they are an "irresistible consequence of one's own *Karma*."[105]

It must be noted that there is no clear line distinguishing followers of Shinto and followers of Buddhism in Japan. In fact, many Japanese consider themselves adherents to both religions.[106] Nevertheless, as a result of the influence of Shinto, Buddhism, and other religions,[107] the Japanese appear to be willing to accept sickness, disease, and ultimately death. In addition,

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3. Desire, and consequently suffering, can be eliminated.

Id.

102. ANESAKI, *supra* note 88, at 66.

103. *See id.*

104. *Id.* at 70.

105. *Id.* at 73.

106. For example, in 1986, 93% of Japan's population considered themselves to be adherents to Shinto, and 74% of the population considered themselves Buddhists as well. *See* Thomas P. Kasulis, *Intimacy: A General Orientation in Japanese Religious Values*, 40 PHIL. E. & W. 433, 440 (1990).

107. In addition to followers of Shinto and Buddhism in Japan, Christianity had a following of about 1.5 million in Japan as of 1994. *See* INTERNATIONAL SOCIETY, *supra* note 98, at 113. This includes about 1 million Protestants and about 440,000 Catholics. *See id.* at 115. Also Confucianism has influenced thought and behavior in Japan as more of a "code of moral precepts rather than a religion," even though its influence has declined since World War II. *Id.* Confucianism has three elements which have had a special influence on the Japanese. These elements are ethical humanism (emphasis on human loyalties to other humans and personal relationships), rationalism (emphasis on objective reason in human affairs), and historical mindedness (emphasis on the importance of history). *See* De Bary, *supra* note 91, at 322-24. The teaching of these elements stresses discipline and creates a method of instruction for morality and ethics by stressing an indebtedness to parents and teachers, which leads to the practice of "good-will in human relationships." ANESAKI, *supra* note 88, at 271. Confucianism also recognizes that a person owes "loyalty to the family and obedience to the state" at the same time, which often results in a difficult conflict in terms of values and morality. *See* Amartya Sen, *Human Rights and Asian Values: What Lee Kuan Yew and Le Peng Don't Understand About Asia*, NEW REPUBLIC, July 14, 1997, *available in* 1997 WL 9026115. Confucianism also recognizes the virtue of harmony in society, and virtues of "justice" and "humanity" at the individual level. *See* Yutaka Yamamoto, *A Morality Based on Trust: Some Reflections on Japanese Morality*, 4 PHIL. E. & W. 451, 453 (1990). Even though Confucianism has not played a central role in Japan's religious tradition, it has clearly been a central aspect of the Japanese philosophical tradition. *See* Kasulis, *supra* note 106, at 440.

the Japanese revere both the living and the dead. With regard to the role of human beings in the overall order of life, religious influences in Japan have created the idea that human beings are interdependent with nature, "without nature belonging to humankind or humankind belonging to nature."[108]

In Japan today, numerous "modern religions"[109] have emerged, which differ from the traditional religions of Japan in ways that range from the very subtle to the very broad.[110] In contrast to the acceptance of sickness and disease found in the traditional religions, the modern religions of Japan "recognize to some extent the legitimate role of medicine in the cure of certain illnesses."[111] Rather than focus on the end results of sickness and disease as the traditional religions do, the modern religions of Japan tend to focus on identifying the underlying causes of the sickness and disease.[112]

In addition to religion, there are many other cultural ideas that influence Japanese thought which play an important role in their perceptions of life and the role of the human being. For example, Japanese education encourages learning through "repetition and emulation."[113] Educational training both at home and in school encourages conformity both to one's own group and to Japanese society as a whole.[114] In general, there is a powerful societal emphasis on staying within the group.[115] At the same time, Japanese teaching emphasizes intangibles such as the spirit, mind, and emotions, which arguably have played a major role in the industrialization of Japan as well as playing a prominent role in science and technology.[116]

In terms of intangibles, such as the spirit, the Japanese view many

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108. Kasulis, *supra* note 106, at 445.

109. There are over 170 "New Religions" that have appeared in Japan's history. SEWARD, *supra* note 85, at 201. For an annotated bibliography of the New Religions of Japan, see generally EARHART, *supra* note 82.

110. *See supra* notes 87-108 and accompanying text.

111. CLARK B. OFFNER & HENRY VAN STRAELEN, MODERN JAPANESE RELIGIONS 183 (1963). Such an idea could have an impact in shifting Japanese thought and cultural norms because, even as of the mid-1960s, these modern religions had an estimated following of approximately 15% of the Japanese population. *See id.* at 27.

112. *See id.* at 183.

113. BERNICE Z. GOLDSTEIN & KYOKO TAMURA, JAPAN AND AMERICA: A COMPARATIVE STUDY IN LANGUAGE AND CULTURE 150 (1975).

114. *See id.* at 151. Therefore, the Japanese are unlikely "to single out exceptional individuals for praise" and "encourage display of excellence in front of others." *Id.* This system is in contrast to the educational system of the United States, where parents and teachers encourage students to stand out as individuals and to focus on their individual attributes and abilities. The Japanese encourage repetition, memorization, and habit formation. *See id.* at 150-52.

115. *See Japanese and American Crime and Culture Compared*, NAT'L. PUB. RADIO, Aug. 18, 1994, *available in* 1994 WL 8679379.

116. *See* ROSS MOUER &YOSHIO SUGIMOTO, IMAGES OF JAPANESE SOCIETY: A STUDY IN THE STRUCTURE OF SOCIAL REALITY 41-42 (1986).

areas of life as "regulated by a variety of dualistic principles."[117] Human beings are accorded special respect because they are "endowed with the capacity for sophisticated spiritual activities."[118] This special respect does not suggest that human life and its preservation is a top priority for the Japanese.[119] It has long been debated in Japan how much "cultural intervention, in the form of medical tinkering," is acceptable in the process of dying.[120] Further reasons for the resistance to medical intervention come from the importance of a bond with nature that the Japanese revere and the desire to let nature exist as it is and let things be themselves.[121]

VI. HUMAN CLONING

Research and development in biotechnology today is often conducted with applications to human beings in mind. For example, while researchers may be studying gene expression[122] in mice, it is likely that they hope to use

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117. S. N. EISENSTADT, JAPANESE CIVILIZATION: A COMPARATIVE VIEW 322 (1996). Examples of such dualistic principles include purity and pollution, good and evil, inner feeling and formal pretense, insider and outsider. *See id.* at 322-23.

118. Prime Minister's Report, *supra* note 8, ch. 1(3)(b).

119. An example demonstrating that the preservation of human life is not a top priority for the Japanese is the Japanese attitude toward suicide. There are several situations when suicide is accepted and not frowned upon. *See* EISENSTADT, *supra* note 117, at 325. Suicide in "service of the collectivity" (altruistic suicide) is fully accepted, and so are some types of non-altruistic suicide. *See id.* A person may commit suicide as a means of protest or as a means "of resolving . . . the dilemmas and contradictions [in which] one is caught." *See id.* Suicide is an honorable way out of these situations, and is also an honorable way out of contradictions between "intense internal feelings and social and group pressure." *Id.* In such cases, suicide is "a very legitimate culmination of one's life." *Id.* Further evidence of the unique view of human life held by the Japanese can be seen in medical treatments. In the United States, there were nearly 2,000 heart transplants in 1990. *See* Margaret Lock, *The Unnatural as Ideology: Contesting Brain Death in Japan*, *in* JAPANESE IMAGES OF NATURE: CULTURAL PERSPECTIVES 121, 123 (Pamela J. Asquith & Arne Kalland eds., 1997). In Japan that same year, there were none. *See id.* This difference is not the result of a lack of skill or technology on the part of the Japanese, but is the result of cultural differences toward human life. *See id.*

120. *Id.*

121. *See* Kasulis, *supra* note 106, at 449.

122. A gene is a piece of a chromosome "that codes for a functional product." JAMES D. WATSON, MOLECULAR BIOLOGY OF THE GENE 702 (3d ed. 1976) A chromosome is a structure that organizes Deoxyribonucleic Acid (DNA). *See id.* at 697. DNA is basic genetic material of human beings and all other organisms and is organized on chromosomes in genes. *See id.* at 699. The bottom line is that genes contain the genetic instructions to make everything that an organism needs to live and grow. *See id.* at 697, 699-700, 702-03. For a more detailed explanation of the role of genes and their structure and function, see CURT STERN, PRINCIPLES OF HUMAN GENETICS (3d ed. 1973); JOHN PHILIP TRINKAUS, CELLS INTO ORGANS: THE FORCES THAT SHAPE THE EMBRYO (2d ed. 1984); WILLIAM WU, METHODS IN GENE BIOTECHNOLOGY (1997).

their findings to better understand gene expression in human beings.[123] Therefore, it is not surprising that when cloning technology became available and exhibited success in other species, the possibility of cloning human beings became a topic of immediate debate.[124] While some companies do not see the potential for business in the human cloning arena,[125] there are inevitably going to be companies that do, and "the potent comb[ination] of strong demand and scientific progress means attempts to copy people are inevitable — and imminent."[126]

Initial response to the concept of human cloning was negative, and people did not take the possibility of human cloning very seriously.[127] Early perceptions emerged straight from the realm of science fiction, through phrases such as "the genetic resurrection of dead people, the mass-production of dangerous superhumans and the pursuit of immortality by transplanting our brains in specifically-bred replacement bodies."[128] Along similar lines, arguments arose about the possibility of creating "'scientific' categories of superior and inferior people"[129] through a new eugenics[130] movement.[131]

Several positive uses of human cloning have been advanced, however, which have intensified the debate over human cloning. The most frequently cited use for human cloning is that it may be offered as a solution to fertility problems. While this idea seems outlandish at first, it is important to note

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123. Another example of the importance of animal studies is cancer research. Researchers throughout the world are studying cancerous cells in various animals, with the hope of applying their discoveries to treating cancer in human beings.

124. As one commentator put it, the cloning of the sheep in Scotland raised the possibility of human cloning in the future, and called "the sacredness of human life . . . into question." *Moments '97: From Clones to Martians*, U.S. NEWS & WORLD REP., Dec. 29, 1997, at 112.

125. ProBio America is one company that does not see business potential in human cloning. ProBio America is the company that owns the rights to the mouse cloning method. *See* discussion *supra* notes 45-50. Laith Reynolds, chief executive officer of ProBio America, has stated publicly that his company has no current interest in applying cloning technology to human beings. *See* John Carey, *Human Clones: It's Decision Time*, BUS. WK., Aug. 10, 1998, at 32.

126. *See* Carey, *supra* note 125, at 32. As Princeton University biologist Lee M. Silver stated, "I don't see how we can stop it from happening." *Id.*

127. For example, in 1997, 87% of Americans surveyed said they were opposed to human cloning. *See U.S. News in Brief*, U.S. NEWS & WORLD REP., Mar. 17, 1997, *available in* 1997 WL 8331732.

128. *Asian Editorial Excerpts*, JAPAN ECON. NEWSWIRE, Jan. 16, 1998, *available in* WL JAPANNEWS Database.

129. Peter N. Spotts & Robert Marquand, *A Lamb Ignites Debate on the Ethics of Cloning*, CHRISTIAN SCI. MONITOR, Feb. 26, 1997, at 3.

130. "Eugenics" is defined as "the science that deals with the improvement of races and breeds, especially the human race, through the control of hereditary fators." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 629 (deluxe 2d ed. 1983).

131. *See* Spotts & Marquand, *supra* note 129, at 3.

that the techniques of in vitro fertilization, surrogate embryo transfer, and sex preselection were once thought to be radical techniques, but are now commonplace in treating infertility.[132] A human embryo could be cloned into several embryos, one of which would be implanted into an infertile woman's uterus, allowing an otherwise infertile woman to give birth to a child.[133] This procedure has met with serious opposition, however, because of ethical issues surrounding the initial embryo which is to be cloned.

An ethical argument has been raised that the embryo will be conceived just to produce embryos for infertile couples, which may be unacceptable.[134] Proponents of cloning as a solution to infertility argue, however, that cloning is "essentially a way of creating a delayed identical twin,"[135] except the cloned twins would be different from each other because they would grow up at different times, in different environments, and with different generational experiences.[136]

Another potential use for human cloning has been offered in the area of behavioral research. Psychologists and behavioral scientists would be able to use cloned humans to study the effects of "genetic inheritance versus environment in determining personality and behavior."[137] Behavioral scientists would be able to study the classic behavioral debate of nature versus nurture and could benefit by understanding the relative influences of each.

Another use for human cloning, though somewhat more controversial, has been for research and treatment of the human body. For example, human cloning has been advanced as a way of creating organs for transplants.[138] In fact, in November, 1998, it was announced in the United

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132. *See* Jean Bethke Elshtain, *Our Bodies, Our Clones*, NEW REPUBLIC, Aug. 4, 1997, at 25. Dr. Mark Sauer, an infertility expert at Columbia Presbyterian Medical Center in New York, noted that he "dreams of offering his patients a type of cloning some day." *Id.*

133. *See id.*

134. *See* Herbert F. Krimmel, *The Case Against Surrogate Parenting, in* TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL BIO-ETHICAL ISSUES 51, 52 (Carol Levine ed., 1984). Much of the ethical concern over this process centers around the motives underlying conception of the initial embryo. *See id.* Krimmel argues that the problem lies with the fact that the "child is conceived not because he is wanted by his biological mother, but because he can be useful to someone else." *Id.* In fact, this raises an argument not only against cloning embryos to solve infertility problems, but also with surrogate motherhood in general. *See generally id.*

135. Allison M. Mays, *Cloning: Now That We've Got It, What Do We Do With It?*, 22 LAW & PSYCHOL. REV. 287, 299 (1998).

136. *See id.*

137. Katheryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction*, 8 ALB. L.J. SCI. & TECH. 1, 12 (1997).

138. *See* Krimmel, *supra* note 134, at 53. *See also* Alexander M. Peters, *The Brave New World: Can the Law Bring Order Within Traditional Concepts of Due Process?*, 4 SUFFOLK U. L. REV. 894 (1970); Roderic Gorney, *The New Biology and the Future of Man*, 15 UCLA

States that cloning technology had seen some success in developing human organs to be used in transplants.[139] It is still the case, however, that negative applications of human cloning seem to dominate discussion of the subject.

Proponents of human cloning note, among other things, that while clones have identical genetic material to their twin, they are physically different organisms.[140] The developmental process of the clone and the environment inside the uterus of the surrogate mother are different from that of the original mother, so the body of the clone will be different from its genetic twin.[141] This is precisely why some Japanese researchers have indicated that there is no need to fear human cloning technology.[142] While the technology to clone a human being may not be perfected today, because of potentially positive uses and applications, some fertility clinics in the United States have begun conducting experiments with human eggs which

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L. REV. 273 (1968); J.G.Castel, *Legal Implications of Biomedical Science and Technology in the Twenty-First Century*, 51 CAN. BAR REV. 119 (1973). In addition to solving infertility and providing behavioral research tools, one scientist has suggested that human embryos could be grown for organs in a manner that would bypass legal and ethical concerns. *See* Steve Connor & Deborah Cadbury, *Headless Frog Opens Way For Human Organ Factory*, LONDON SUNDAY TIMES, Oct. 19, 1997 (visited Sept. 21, 1998) <http://www.purefood.org/Patent/headless.html>. Dr. Jonathan Slack, a professor of developmental biology at Bath University, has developed a technique to suppress the development of the head of a tadpole, which could ultimately lead to a headless frog with fully developed organs. *See id.* Dr. Slack suggests that this technique could be used not to create and clone headless human embryos, but to "genetically reprogramme the embryo to suppress growth in all the parts of the body except the bits you want, plus a heart and blood circulation," which would produce the desired organs for transplant. *Id.* This theory has met some harsh criticism, however, concerning the exploitation of animals. *See id.*

139. "Researchers have isolated and cloned human . . . [stem] cells in a laboratory." *See* Paul Recer, *Human Stem Cells Grown in Laboratory*, INDIANAPOLIS STAR, Nov. 6, 1998, at A05. Stem cells produce the cells which ultimately differentiate to become the various organs of the body during embryonic development. *See id.* Stem cell research has been slowed in recent years by the controversy surrounding human embryonic research, but researchers are hopeful that this research could someday produce hearts, kidneys, and tissue to replace diseased parts of the body. *See id.*

140. *See* Masahiro Morioka, *Some Ethical Issues of Cloning*, 7 EUBIOS J. ASIAN & INT'L BIOETHICS 67, 68 (1997).

141. *See id.* In addition, should the technology be someday perfected to clone and produce a viable human being, that individual will also be different for several other reasons. For example, 1) the cloned individual will be born years later than its twin, and 2) the cloned individual will be exposed to completely different experiences and environments. This seems to suggest that while the clone had identical genetic material to another person, it is likely that the two people would be very different. One expert has suggested that "people are influenced by a range of relationships and environmental factors 'that help determine who and what we are, . . . [so m]aking a genetic copy of a person is not making the same person." Spotts & Marquand, *supra* note 129, at 3 (quoting Dr.Thomas Murray, Director of the Center for Biomedical Ethics at Case Western Reserve University).

142. *See* Morioka, *supra* note 140, at 67-68.

"lay the groundwork for cloning."[143]

Environmental and developmental differences do not change the fact that the genetic constitution of a cloned individual is the same as its twin. It has been argued that this genetic similarity can diminish genetic diversity, having very serious implications for the future of humanity.[144] The argument has also been raised that, while individual clones will be different in personality and behavior, they will have their physical traits preplanned, which "turns creation of children into something akin to manufacturing."[145] Opponents of cloning also argue that the long-term effects of cloning are unknown,[146] and there could be a high likelihood of death of cloned embryos because the technology is imperfect.[147]

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143. Gina Kolata, *Human Cloning: Yesterday's Never Is Today's Why Not?*, PEOPLE'S TRIB. (ONLINE EDITION), Apr. 1997 (visited Sept. 21, 1998) <http://www.purefood.org/Patent/humanClone.html>.

144. Critics argue that cloning simply produces copies of the same basic genetic constitution. Cloning has met with opposition because it not only contradicts the basic human instinct to breed sexually, but it also "subverts the evolutionary process." *World Is Not Yet Ready for Human Clones*, NATION, Jan. 15, 1998, *available in* 1998 WL 5445791. Evolution refers to the sequence of life forms that have emerged over time and the "causal mechanisms that produce such changes in forms." A. Terry Rambo, *The Study of Cultural Evolution*, *in* PROFILES IN CULTURAL EVOLUTION 26 (A. Terry Rambo & Kathleen Gillogy eds., 1991). Sexual reproduction is important not only for humans, but for all species because it recombines genetic material. The recombination of the genetic material of two individuals leads to new combinations, which produces variation and different characteristics in offspring. These new characteristics can include things such as resistance to disease, stronger physical features, and enhanced mental abilities. Cloning "sidesteps the reshuffling and screening inherent in the genetic process and strips evolution of the main source of the variation that drives it." *World Is Not Yet Ready for Human Clones*, *supra*. In fact, in perhaps the most famous work on the process of evolution, Charles Darwin partially based his theory of the development of different species on the recombination of genetic material, although the structure and function of such material had not been identified at the time of his work. *See generally* CHARLES DARWIN, ORIGIN OF SPECIES (1859). *See also* GERHARD WICHLER, CHARLES DARWIN: THE FOUNDER OF THE THEORY OF EVOLUTION AND NATURAL SELECTION (1961). For a comprehensive discussion of the role of genetic material in human diversity, see DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA (1995).

145. Carey, *supra* note 125, at 32.

146. Scientists are unsure whether cloned organisms will develop problems related to their cloning, and have no way of predicting whether this will occur because the technology is so new. In fact, the researchers in Scotland that cloned "Dolly" have expressed some concern that the cloned sheep may age prematurely or have a shorter lifespan than a sexually conceived sheep. Mays, *supra* note 135, at 294. Scientists have further indicated that cloning could damage DNA, potentially subjecting the animal to numerous diseases later in life. *See id.* Also, the cell used for cloning may contain mutations during cell divisions, which could "predispos[e] the cloned animal to cancer and age-linked diseases." *Id.*

147. Cloning technology, which is relatively new and unrefined, has generated concern which stems from the statistical probability of producing a viable clone. For example, researchers that cloned the sheep in Scotland had to use 277 sheep embryos to produce the one viable clone. *See* Rick Weiss, *Panel Backs Some Human Clone Work, Board Would Ban*

Opponents of human cloning raise other issues that are very difficult to deal with when one considers the value of human life and the unique identity of each human being which the Japanese revere. For example, the argument has been raised that it is not the place of human beings to tinker with life through any sort of genetic engineering, including human cloning. Opponents of human cloning also raise a deontological argument that cloning is inherently wrong because it threatens the value of human life and the integrity of the species.[148] This argument is based on evolutionary theory, and emphasizes that life "evolved on this planet into a delicately balanced, intricate, [and] self-sustaining network[, and] [m]aintaining this network involves many interactions and equilibria that we understand only dimly."[149] The argument stresses that the precise and delicate balance of nature must be more thoroughly understood before we should allow genetic engineering to alter the earth's ecosystems, or humans could "inadvertently collapse the ecological system in which we have found our niche."[150]

Opponents of human cloning are concerned with the issue of the actual emotional development of a cloned child as well. For example, a child that was cloned could eventually face the reality of having another child in the family with the same genetic makeup as herself. Commentators argue that, while the clone will be different because of differing environmental influences which affect the cloned child and her twin, when the child learns of the genetic sameness she will think, "or unconsciously sense," that she is being replaced by the new cloned child because she is inadequate.[151] The clone could also experience difficulties growing up through feelings that she is not truly a unique and separate individual, and may feel the need to simply behave as the older sibling to attain parental approval.[152] As University of Chicago professor Leon R. Kass stated, human cloning would be "a major step toward regarding our children as acceptable only if they conform to the

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Implanting Embryos, WASH. POST, June 4, 1997, at A01. In addition, there has been concern raised about danger to the surrogate mother of the cloned organism because the surrogate mother of the cloned calves in Japan died. *See* Jonathan Watts, *Japan Proposes Ban on Human Cloning*, LANCET, Aug. 8, 1998, at 465.

148. *See* Rebecca Dresser, *Ethical and Legal Issues in Patenting New Animal Life*, 29 JURIMETRICS J. 399, 410 (1988).

149. Robert L. Sinsheimer, *Genetic Engineering: Life as a Plaything*, *in* THE CULTURE OF SCIENCE 63, 65 (John Hatton & Paul B. Plouffe eds., 1993).

150. *Id.*

151. *See* Stephen A. Newman, *Human Cloning and the Family: Reflections on Cloning Existing Children*, 13 N.Y.L. SCH. J. HUM. RTS. 523, 526-27 (1997). Newman argues this possibility could be highly detrimental when combined with the fact that the newborn will get more attention, which inevitably happens when a new sibling is born. *See id.* at 526. This could create jealousy and resentment on the part of the older child. *See id.*

152. *See id.* at 527.

choices of our will."[153]

While the ethical side of creating a human clone is debated, the issue of whether there is a fundamental right to clone one's self requires some consideration. This issue has not yet been addressed by the Supreme Court of Japan. It could be argued by the proponents of human cloning that they have a fundamental right to their genetic identity and therefore have the right to copy it if they choose, while opponents of human cloning could counter-argue that the clone ultimately has the fundamental right to have her own unique identity and genetic makeup.[154]

While the debate over human cloning seemed very theoretical until the past few years, as cloning technology has improved, the possibility of human cloning has become less remote. As may have been expected, a plan to actually clone a human being became reality in early 1998. A scientist in the United States, Dr. Richard Seed, announced that he has assembled a team of doctors that are prepared to attempt to clone a human being.[155] Dr. Seed claims to have several people willing to be cloned, and while some commentators doubt that he would follow through with his plan to clone a human being, they believe that he has the technical and entrepreneurial expertise, as well as the "philosophical commitment to radical science," to accomplish his goal.[156] Dr. Seed theorizes that cloning clinics could be set up worldwide to produce some 200,000 babies a year.[157] It is debatable whether such a daunting task as cloning a human being could be successful today, but Dr. Seed's claims make it clear that there are some scientists that are willing (and possibly able) to push cloning technology to the ultimate level of the human being. However, as Mark Sauer, chief of reproductive endocrinology at Columbia-Presbyterian Medical Center in New York stated: "There's little question that [human cloning] can be done. The question is should it be done."[158]

The Japanese government has acted in response to human cloning issues. An advisory panel to Japan's Education Minister recently proposed "that Japan ban studies that may lead to human cloning, with a condition to revise the position within three years."[159] Some fear has emerged that a ban on human cloning will cause the technology to "simply be driven

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153. Carey, *supra* note 125, at 32.

154. *See* Spotts & Marquand, *supra* note 129, at 3.

155. *See* Rick Weiss, *Scientist Plans to Clone Humans*, WASH. POST, Jan. 7, 1998, at A03. Dr. Richard Seed is a scientist from Chicago, Illinois, who has been active in various kinds of fertility research. *See id.*

156. *Id.*

157. *See Ethics*, TIMARU HERALD, Sept. 14, 1998, *available in* 1998 WL 8248492.

158. Weiss, *supra* note 155, at A03.

159. *Ministry Panel Urges Ban on Cloning of Human Beings*, JAPAN SCI. SCAN, Aug. 3, 1998, *available in* 1998 WL 8029788. The current Education Minister of Japan is Nobutaka Machimura. *See id.*

underground, where the possibility of unsafe, unregulated, and exploitive misuse is far more likely."[160] Critics of the proposed ban postulate that "[t]he great falsehood here is that research will go away."[161] In addition, in an interim report released in June of 1998, Japan's Science and Technology Council called for the strict regulation of human cloning, but at the same time supported the advancement of cloning technology in general.[162] In spite of criticism and alternative proposals, in August of 1998, the Science Council of the Japanese Education Ministry "drafted the government's official guidelines that ban research into human cloning."[163]

VII. HUMAN CLONING WILL NOT BE ALLOWED IN JAPAN AS IT IS CONTRARY TO JAPANESE MORALITY

The official position of the Japanese government is that human cloning is unacceptable for moral and ethical reasons.[164] However, determining why human cloning is contrary to morality in Japan is no easy task.

Cloning is not contrary to morality in Japan because the thought of a human clone living in society is contrary to Japanese morality in and of itself. Genetically identical individuals already exist in society in the form of identical twins.[165] Identical twins ultimately end up somewhat different from each other,[166] and a human clone would develop differently than its "twin," ending up far more different from its twin than an identical twin

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160. Carey, *supra* note 125, at 32 (quoting Rabbi Barry Freundel).

161. *U.S. News in Brief*, *supra* note 127 (quoting David Adamson, the Society for Assisted Reproductive Technology).

162. *See* Asako Saegusa, *Japanese Fear That New Publicity Rules Could Hinder Their Research*, NATURE JAPAN, July 30, 1998 (visited Oct. 1, 1998) <http://www.naturejpn.com/newnature/news/news300798a.html>.

163. *See* Watts, *supra* note 147, at 465. The Japanese ban on human cloning goes beyond the strict regulation of cloning suggested by the Science and Technology Council by banning any transplantation of fertilized human embryos. *See id.*

164. *See id.*

165. Identical or monozygotic (one-egg) twins are genetically identical because they are initially created from one fertilized egg which splits, giving each twin the same genetic material.

166. While they may have the same genetic material, even monozygotic twins will ultimately have physical and emotional differences. Development of individual organs in each twin while in the womb of the mother will be slightly different as well. *See* George Johnson, *Don't Worry: A Brain Still Can't Be Cloned*, *in* FLESH OF MY FLESH: THE ETHICS OF CLONING HUMANS 9, 10 (Gregory E. Pence ed., 1998). Such differences are very subtle — subtle enough to make the organs interchangeable between the twins with no noticeable effect. *See id.* at 10. Personality and emotional differences stem from the fact that the brain of each twin will develop with incredibly slight differences. *See id.* at 10-11. These tremendously slight differences, such as the pattern in which brain cells are arranged, can make one twin ultimately interested in different stimuli than the other. *See id.*

born at the same time would from its twin.[167] Furthermore, the fact that identical twins have the same genetic constitution does not prevent the twins from developing their own individual identities, in spite of the fact that the twins grow up in very similar environments.[168] As one commentator noted: "To be human is not the simple summation of genetic, biochemical or physiological processes. Consciousness and knowledge do not exist in our genes; they emerge out of the interaction between individuals and human society."[169] It logically follows that a clone has the same chance to develop its own individual identity, and "its genetic constitution does not predestine it to the limited status of a 'copy.'"[170] Genetically identical twins are not discriminated against or viewed as un-human, suggesting that having genetically identical human beings is not per se unethical.[171]

The violation of morality stems from deeply-rooted tradition and cultural and religious factors. Perhaps human cloning is contrary to Japanese morality because of the concept of the "soul." Shinto provides at least a vague notion of the "soul" to its followers in Japan.[172] Buddhism recognizes an inner soul that is both unique to the individual and universal at the same time, where one can find "an ultimate reality which transcends all individual differences."[173] Within the realm of science, "[e]ven a hard-core materialist might agree that, in . . . [a] sense, everyone has a soul."[174] Apprehension toward human cloning may stem from the notion that a human being created by cloning either does not have a soul or has a soul that is less unique than a human being conceived sexually because of the genetic sameness. The concept of "soul" does not provide the answer however.

Once again drawing the comparison to identical twins born at the same time, commentators have argued that a human clone would have no less of a soul than a human who develops as a result of a sexual act because it would be absurd to argue that an identical twin has less soul than its

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167. A cloned individual could end up far different from its twin because of the potential for lapse of time between their births and the differences in environmental and parental influences. *See supra* note 141 and accompanying text. *See also* KURT BAYERTZ, GENETHICS: TECHNOLOGICAL INTERVENTION IN HUMAN REPRODUCTION AS A PHILOSOPHICAL PROBLEM 146 (Sarah L. Kirkby trans., 1994) (arguing additional differences between clones and their twins stem from differing embryotic development and environmental factors both inside and outside of the womb).

168. *See* Johnson, *supra* note 166, at 11.

169. Jonathan King, *Cloning Sheep: Converting Life Forms Into Corporate Property* (visited Sept. 21, 1998) <http://www.purefood.org/patprop.html>.

170. BAYERTZ, *supra* note 167, at 146.

171. *See Ethical Aspects of Cloning Techniques*, 23 J. MED. ETHICS 349 (1997).

172. *See supra* notes 94-95 and accompanying text.

173. ANESAKI, *supra* note 88, at 209.

174. Johnson, *supra* note 166, at 11.

sibling.[175] Also, Shinto and Buddhism both carry notions that human beings and the rest of nature are interwoven and that nature deserves a certain level of reverence and respect just like human beings.[176] This proposition raises the question of why human cloning and the patents involved are contrary to morality in Japan, while cloning of other animals and the related patents are not.

The answer could lie in the fundamental differences that the Japanese perceive as setting human beings apart from the rest of the animal world. Human beings have the capacity for self-consciousness. Self-consciousness "permits a being to reflect on itself from an external vantage point,"[177] which ultimately allows humans to think of themselves as part of a larger whole.[178] Recognizing one's self as part of this larger whole allows humans to view the interacting forces that exist in the world and to use these forces to their benefit.[179] The Japanese are also very cognizant of the fact that human beings have the intellectual capacity for religion, which plays an important role in determining the "'essence' of human nature."[180] While this explains why animal cloning patents are allowed in Japan but human cloning patents would not be, it does not completely address why human cloning is contrary to Japanese morality.

The most likely answer to why human cloning is contrary to morality in Japan comes from the deeply rooted reverence for human life that the Japanese exhibit. One historical source of this reverence is religion. Shinto stresses a reverence for life and an appreciation of the beauty and awesomeness of nature.[181] Buddhism teaches of a world made of unique individuals which ultimately make up one family.[182] Other religious influences[183] contribute to overall reverence for the human being in Japan as well.[184] The combination of these approaches creates the sense that a cloned human being crosses the line and steps outside of the beauty, individuality,

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175. *See* MCKINNEL, *supra* note 25, at 112-13.

176. *See* Kasulis, *supra* note 106 and accompanying text.

177. Matthew Hallinan, *Biological Evolution and the Emergence of a Cultural Being*, *in* CULTURAL PERSPECTIVES ON BIOLOGICAL KNOWLEDGE 63, 86 (Troy Duster & Karen Garrett eds., 1984).

178. *See id.*

179. *See id.*

180. WINSTON DAVIS, JAPANESE RELIGION AND SOCIETY 229-30 (1992).

181. *See supra* notes 87-90 and accompanying text.

182. *See supra* notes 99-100 and accompanying text.

183. *See supra* note 107 and accompanying text.

184. The Catholic Church, for example, contributes to this reverence. In fact, the Catholic Church, which has a following of about 500,000 in Japan, has issued a statement on human cloning, which takes the position that the creation of human beings belongs to God, and is not the right of human beings themselves. *See* Statement of the Standing Committee of the Catholic Bishops' Conference of Japan, *Concerning Research on Human Cloning* (visited Oct. 1, 1998) <http://www02.so-net.or.jp/~catholic/ EDOC/ CLONING.htm>.

and sense of worth and dignity that is unique to human beings, suggesting that human life should not be tampered with in such a way.

Another factor to be considered is the position of the government. The Japanese government plays a prominent role in determining moral norms in Japan. This premise stems in part from the fact that Japan is an Asian-style democracy, and thus, public opinion is rarely an influential determinant of public policy.[185] The Prime Minister of Japan has emphasized the need for respect of human life and dignity, especially in human scientific research.[186] In addition, Japan's Science and Technology Council has stated that human cloning is contrary to a common view of human life held by the Japanese because it uses human beings as tools to achieve research objectives.[187] Whatever the reason that human cloning is contrary to morality in Japan, this broad assertion carries very serious consequences in the scientific community.

The June 1998 report of Japan's Science and Technology Council requires "information about all mammalian cloning research to be made public before the animal is born."[188] Researchers in Japan are opposed to legal regulations on experimentation, fearing that this requirement could "jeopardize the international impact of their work."[189] Such disclosure may have an impact on the patentability of their work as well, which could drive private industry away from cloning research. Companies will not spend vast amounts of time and money on research which cannot provide the protection and financial benefits of a patent.

A better solution to requiring disclosure of mammalian cloning or an outright ban on human cloning would be to use the patent law to regulate the research. The Japanese patent law system already provides an effective mechanism to regulate human cloning research. Because of the value of patents in Japan, research efforts into human cloning or any other type of cloning for that matter will likely be abandoned if they cannot produce patentable inventions.[190] Patents are extremely valuable in both the private and corporate structures of Japan.[191] Patents will not be issued in Japan for inventions that are contrary to morality.[192] Since religious, cultural, and governmental influences have made human cloning contrary to morality in Japan, the patent law can effectively regulate human cloning by itself. If the

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185. *See* Macer, *supra* note 18, at 89.

186. *See* Prime Minister's Report, *supra* note 8, ch. 1(3)(b).

187. *See Government Panel Urges Controls on Cloning of Human Beings*, JAPAN SCI. SCAN, June 22, 1998, *available in* 1998 WL 8029773.

188. Saegusa, *supra* note 162.

189. *Id.*

190. *See supra* notes 55-57 and accompanying text.

191. *See supra* notes 54-56 and accompanying text.

192. *See* Japan Patent Law, art. 32(2). *See also supra* note 70 and accompanying text.

Japanese view on the morality of human cloning should change, the use of the patent law system to regulate cloning research will mean that no governmental action or reform will be necessary, which would not be the case if governmental bans or restrictions are imposed today.

An outright ban on human cloning research will preclude any technological advances in the field that may someday prove to have serious significance to the human race. One criticism of cloning at the organism level is that it has not yet been proven safe, but there is no way to prove a technology safe or unsafe if it is banned outright. Also, some individuals have argued that to clone one's self is a fundamental right.[193] While outside the scope of the morality argument of this note, the fundamental right argument certainly deserves attention and could become central as cloning technology improves. At a minimum, from a legal standpoint it seems clear that "human cloning should be governed by the same laws that now protect human rights[, because a] world not safe for cloned humans would be a world not safe for the rest of us."[194] For now, the best alternative is to allow the patent law system to regulate and control this technology because of the importance of the patent to researchers in Japan.

VIII. CONCLUSION

For millions of years, species have been coming and going from the Earth. There is an evolutionary reason why human beings inhabit the planet today, but we there is also an evolutionary reason why the vast majority of the species that have ever inhabited the earth are no longer here. While cloning technology may be viewed by some as a way of achieving species immortality in a sense, nature still has and always will have the ultimate say in what species survive. Human destiny is ultimately in the hands of a power which is far beyond the reach of human control.

It is no longer the case that only God can make a tree. Human beings can now make just about anything using modern scientific techniques and may soon be able to even make a human being who is the identical genetic copy of another. As the bounds of science are nearly limitless, we can assume that someday this technology may be perfected. For now, we must seriously consider the ramifications of such technology and address the difficult issue of whether human beings should pursue human cloning technology. Perhaps there is no explanation as to why human cloning should

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193. *See supra* note 154 and accompanying text. *See also* Elshtain, *supra* note 132, at 25.

194. Ruth Macklin, *Human Cloning? Don't Just Say No. Sure, It's a New Technology. But There's No Evidence Yet That It's Harmful*, U.S. NEWS & WORLD REP., Mar. 10, 1997, *available in* 1997 WL 8331694.

not be allowed. Perhaps human cloning just crosses a line which will never be crossed. Such lines were crossed when atomic bombs were dropped and when man walked on the moon. It is entirely possible that the barriers preventing human cloning may soon be crossed. While we may have the relatively easy task of debating human cloning issues at the theoretical level today, human cloning will become more of an issue as cloning technology evolves, and it may be a reality in many of our lifetimes.

Craig M. Borowski[*]

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* J.D. Candidate, 2000, Indiana University School of Law — Indianapolis; B.S., 1995, Indiana University — Bloomington. The author wishes to dedicate this note to his parents, David and Karen Borowski, in gratitude for their constant love, support, and encouragement. The author would also like to thank his wife, Angie, for her unconditional love, support, and patience.

AUSTRALIA'S OPPOSITION TO THE BASEL BAN AMENDMENT ON THE EXPORT OF HAZARDOUS WASTES: WHEN WILL AUSTRALIA STOP STALLING AND RATIFY THE AMENDMENT?

I. INTRODUCTION

Krishnaswamy, a thirteen-year-old Indian boy, innocently stirs a hot pan of molten lead left over from a used car battery imported from the west.[1] Like most workers engaged in the hazardous waste recycling industries in many developing Asian countries, he is economically dependent upon the potentially deadly practice.[2] While industrial world leaders influence powerful industrialized nations like Australia, Canada,[3] and the United States[4] to continue dumping their waste cheaply in India and other developing nations, the ratification of the Basel Ban[5] remains uncertain.[6] Australia, although a ratifying member of the Basel Convention,[7] has refused to ratify the recent Ban Amendment to the Convention on the Transboundary Movement of Hazardous Waste[8] and attempts to continue its waste trade with

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1. *See* Subhadra Menon & Smruti Koppikar, *The Poisoning of India. Hazardous Wastes: Toxic Terror*, INDIA TODAY, July 14, 1997, at 76, *available in* 1997 WL 9848337.

2. *See id.* In the nearby town of Majiwada, 600 citizens displayed symptoms of lead poisoning in 1996. *See id.* The air over the suburb has lead concentrations 11 times above regional standards. *See id.*

3. Canada stands together with Australia in stalling its ratification of the Basel Ban. *See* Statement Made by Canada Following the Adoption of the Amendment Decision by Consensus, Sept. 22, 1995, *in* SECRETARIAT BASEL CONVENTION, DECISIONS AND REPORT ADOPTED BY THE THIRD MEETING OF THE CONFERENCE TO THE PARTIES, at 99-100, SBC No. 95/003 (1995).

4. The United States has not ratified the Basel Convention, an international treaty regulating the transboundary movement and disposal of hazardous waste, let alone the Ban Amendment forbidding movement from industrialized countries to developing countries. *See* Martin Khor, *Environment: U.S. Accused of Trying to Reverse Toxic Waste Ban*, INTER PRESS SERV., Apr. 10, 1995, *available in* 1995 WL 2260324.

5. *See* Decision III/1, Amemdment to the Basel Convention, *in* SECRETARIAT BASEL CONVENTION, DECISIONS AND REPORT ADOPTED BY THE THIRD MEETING OF THE CONFERENCE TO THE PARTIES, at 1-2, SBC No. 95/003 (1995) [hereinafter Decision III/1, Amendment to the Basel Convention].

6. A spokesman for Greenpeace stated that OECD nations were attempting to stall ban implementation in order to "keep the option of dumping on the non-OECD countries open." *Ignore OECD Members' Call to Dump in Developing Countries, Says NGOs*, BERNAMA, MALAYSIAN NEWS AGENCY, Feb. 27, 1998, *available in* 1998 WL 6594534.

7. *See infra* Part II.A for further background on the Basel Convention.

8. The Ban Amendment became effective at the beginning of January of 1998. *See* Jim Puckett & Cathy Fogel, *A Victory for Environment and Justice: The Basel Ban and How it Happened* (visited Sept. 8, 1998) <http://www.greenpeace.org/~comms/97/toxic/basban.html>.

developing nations.[9]

The Basel Convention controls and regulates the international movement of hazardous waste, aiming to minimize trade and encourage domestic disposal.[10] In recognizing that developing nations remain acutely vulnerable to hazardous waste exports, the Ban Amendment instituted a no-exceptions ban on the export of hazardous waste from industrialized members of the Organization for Economic Cooperation and Development (OECD)[11] to developing nations beginning January 1, 1998.[12] In opposition

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9. *See Greenpeace Accuses 'Waste-Trade Zealots' of Undermining Global Ban*, AGENCE FRANCE-PRESSE, Feb. 22, 1998, *available in* 1998 WL 2227972 [hereinafter *Waste-Trade Zealots*]. These other nations include the United States, New Zealand, Canada, the Netherlands, Germany, and South Korea. *See id. See also India-Environment: India Denies Waste Import Deal with Australia*, INTER PRESS SERV., Oct. 20, 1994, *available in* 1994 WL 2722979 (describing the Indian government's refutation of the notion that Australia is pressuring it to accept Australia's toxic waste); *Ignore OECD Members' Call to Dump in Developing Countries, supra* note 6 (discussing the negative implications of Australia's attempts to "delay and dilute the ratification and implementation of the Basel ban."); Pratap Chatterjee, *Environment: Australia to Discuss Waste Dumping in Asia*, INTER PRESS SERV., Sept. 22, 1994, *available in* 1994 WL 2707666 (noting that Australia and the 12 countries of the European Union actively attempt to avoid the ban); Greenpeace Australia, *Australia Attempts to Break Waste Trade Ban* (visited Sept. 21, 1998) <http://www.greenpeace .org.au/Releases/93.html>.

10. *See* Dr. I. Rummel-Bulska, *Introduction* to The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *in* SECRETARIAT BASEL CONVENTION, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, 1989 AND DECISIONS ADOPTED BY THE FIRST (1992) AND THE SECOND (1994) MEETINGS OF THE CONFERENCE OF THE PARTIES, at 1-2, S.B.C. No. 94/008 (1994). *See generally* Basel Coonvention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989 (entered into force May 5, 1992) [hereinafter Basel Convention 1989], *in* SECRETARIAT BASEL CONVENTION, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, 1989 AND DECISIONS ADOPTED BY THE FIRST (1992) AND THE SECOND (1994) MEETINGS OF THE CONFERENCE OF THE PARTIES, at 3, S.B.C. No. 94/008 (1994).

11. The OECD is made up of primarily industrialized nations, including Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *See* Jason L. Gudofsky, *Transboundary Shipments of Hazardous Waste for Recycling and Recovery Operations*, 34 STAN. J. INT'L L. 219, 237 n.86 (1998).

12. Decision III/1, Amendment to the Basel Convention.

> 1. Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to States not listed in Annex VII.
>
> 2. Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1([1])(a) of the Convention which are destined for operations according to Annex IV B to States not listed in Annex VII. Such

to the ban, Australia attempts to invoke article 11 of the Convention, which permits the use of multilateral, bilateral, and regional waste trade agreements to export hazardous waste between OECD and non-OECD nations.[13] Australia and others opposed to the ban currently assert that article 11 agreements, made either before or after the ban took effect, continue to allow the export of hazardous wastes from OECD nations to non-OECD nations.[14] The Conference of the Parties has not yet decided what will be the fate of the agreements between OECD and non-OECD nations once the ban is ratified.[15]

Australia has also encouraged the expansion of Annex VII[16] status required by non-parties in order to accept waste from other OECD nations at lower costs, sometimes regardless of adequate domestic treatment and reclamation facilities.[17] Arguably, these efforts to circumvent the effect of

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> transboundary movement shall not be prohibited unless the wastes in question are characterised as hazardous under the Convention.

Id.

Included within Annex VII are "Parties and other States which are members of OECD, EC [European Community], [and] Liechtenstein." *Id.* Annex IV(A) governs "disposal operations" which "do not lead to the possibility of resource recovery, recycling, reclamation, direct re-use or alternative uses." Basel Convention 1989, Annex IV(A). Annex IV(B) are "operations which may lead to resource recovery, recycling reclamation, direct re-use or alternative uses." *Id.* Annex IV(B). Article 1(1)(a) defines hazardous waste as those materials designated in Annex I (a list of categories of wastes to be controlled). *See* Basel Convention 1989, art. 1(1)(a).

13. *See* Basel Convention 1989, art. 11. This article contains the restriction that "[s]uch agreements or arrangements . . . [must not] derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention . . . . in particular taking into account the interests of developing countries." *Id.*

14. *See* Statement Made by Canada Following the Adoption of the Amendment Decision by Consensus, *supra* note 3, at 99; Statement Made by Australia Following the Adoption of the Amendment Decision by Consensus, Sept. 22, 1995, *in* SECRETARIAT BASEL CONVENTION, DECISIONS AND REPORT ADOPTED BY THE THIRD MEETING OF THE CONFERENCE TO THE PARTIES, at 100-01, SBC No. 95/003 (1995).

15. *See* JAMES CRAWFORD & PHILIPPE SANDS, THE AVAILABILITY OF ARTICLE 11 AGREEMENTS IN THE CONTEXT OF THE BASEL CONVENTION'S EXPORT BAN ON RECYCLABLES: A DISCUSSION PAPER 20 (1997). Decision III/1, the ban decision, did not specifically discuss the availability of article 11 agreements after the ratification of the Ban Amendment. *See id.* Thus, the use of article 11 agreements by parties to circumvent the ban was also left unaddressed. *See id.*

16. Annex VII to the Basel Convention specifies those countries prohibited from sending Basel-designated hazardous wastes to nations not listed in the annex. *See* Cheryl Hogue, *Basel Convention Parties to Discuss Possible Exceptions to Waste Trade Ban*, Int'l Env't Daily (BNA) (Jan. 22, 1998). Annex VII is currently composed of OECD member nations, members of the European Union and Liechtenstein. *See id. See also* Decision III/1, Amendment to the Basel Convention.

17. *See* Esther Tan, *Loopholes in Basel Treaty Remain*, NEW STRAITS TIMES (MALAYSIA), Mar. 22, 1998, at 9. Environmentalists characterized the push of developed countries to expand Annex VII nations as a "ploy to delay implementation of the ban." *Id.*

the Ban Amendment undermine the spirit of the Basel Convention. Greenpeace International[18] alleges continued hazardous waste exportation in contravention of the ban.[19] Australia, among the worst offenders and most vocal opponents of the ban decision, demonstrates why the Ban Amendment is a necessary and integral part of the Basel Convention and why an international convention that purports to control hazardous waste transportation, disposal, and reclamation without the ban would fail to accomplish its original goals.

Part II of this note outlines the Basel Convention of 1989, highlighting its key provisions to explain how each works toward the Convention's overall purpose. Part II also discusses the Basel Ban Amendment in the context of the Convention and explains its inception, necessity, and relevance given hazardous waste trade realities. Part III chronicles Australia's efforts and the efforts of other OECD nations to use article 11 and the expansion of Annex VII to circumvent the Ban Amendment restrictions on free trade in hazardous waste. Part III also raises and counters industry arguments criticizing the ban as a violation of international free trade provisions, emphasizing Australia's particular responsibilities as a Convention member in view of the vulnerabilities of developing countries. Part IV describes the enforcement and liability scheme and adjudication process under the Convention, comparing it to the Australian liability scheme and suggesting solutions to the inherent difficulties of policing an international ban on the movement of hazardous wastes. This note concludes that the Ban Amendment is a necessary addition to the Basel Convention, deserving of enforcement, and neither amenable to circumvention through the use of article 11 agreements nor subject to compelling criticism from a free trade perspective.

II. BACKGROUND OF THE BASEL CONVENTION

A. *1989 Basel Convention*

The Basel Convention was first conceived in 1989 and entered into force in 1992 to regulate the transboundary movement of hazardous wastes

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18. Greenpeace was "vital in assisting the Group of 77 states (G-77) [i.e., states favoring the Ban Amendment] in writing proposals to be included in the ban decision amendment." Patricia M. Wolff, Uncovering Determinants of International Environmental Cooperation: The Disjuncture Between Treaty Signing and Treaty Ratification 38 (1996) (unpublished M.A. Thesis, University of Oregon) (on file with the University of Oregon Library). Greenpeace also assisted in developing Basel Convention negotiation strategy and in providing information regarding the extent of the hazardous waste trade problem. *See id.*

19. *See generally Waste-Trade Zealots, supra* note 9.

from and between the now 121[20] member nations.[21] The Convention responded to the effect of tightening industrial waste laws that prompted industrialized nations to engage in the international hazardous waste trade.[22] Prior to the Basel Convention's development, the OECD played a significant role in developing legal requirements governing the hazardous waste trade.[23] The Basel Convention now defines which materials constitute hazardous waste and establishes rules for transporting and recycling those materials.[24] The Convention also seeks to establish each specific nation's responsibility for its own import and export of hazardous materials by restricting the transnational flow of hazardous material and by creating incentives to control the creation of hazardous waste.[25]

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20. Those countries that have either ratified, acceded, accepted or approved the Basel Convention include Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Botswana, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Comoros, Costa Rica, Cote D'ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominica, Ecuador, Egypt, El Savador, Estonia, Finland, France, Gambia, Germany, Greece, Guatemala, Guinea, Honduras, Hungary, Iceland, India, Indonesia, Islamic Republic of Iran, Ireland, Israel, Italy, Japan, Jordan, Kuwait, Kyrgyzstan, Latvia, Lebanon, Liechtenstein, Luxembourg, Malawi, Malaysia, Maldives, Mauritania, Maritius, Mexico, Micronesia, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saint Kits and Nevis, Saint Lucia, Saint Vincent and Granadines, Saudi Arabia, Senegal, Seychelles, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, The Former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, United Arab Emirates, United Kingdom, United Republic of Tanzania, Uruguay, Uzbekistan, Venezuela, Vietnam, Republic of Yemen, Zaire, and Zambia. *See* Basel Action Network, *Country Status — Waste Trade Ban Agreements* (visited Sept. 17, 1998) <http://www.ban.org/country_status/country_ status .html> [hereinafter Basel Action Network]; *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (visited Nov. 18, 1998) <http://www.unep.ch/basel/sbc/ratif.html>. As of June 17, 1998, there are 121 parties to the Basel Convention. *See* United Nations Environment Program, *Ratifications* (visited Nov. 18, 1998) <http://www.unep.ch/basel/sbc/ratif.html>.

21. *See* Rummel-Bulska, *supra* note 10, at 1-2.

22. *See* Khor, *supra* note 4.

23. *See* D. KOFI ASANTE-DUAH & IMRE V. NAGY, INTERNATIONAL TRADE IN HAZARDOUS WASTE 94-95 (1998). Australia became a member of the OECD in June of 1971. *See id.* at 21. Even before the entry into force of the Basel Convention, the OECD, seeing the necessity for such regulations, developed specific, legally-binding obligations that applied to the export of hazardous wastes from OECD nations to developing nations. *See id.* at 95.

24. *See generally* Basel Convention 1989. Article 1 of the Basel Convention defines what is considered hazardous waste under the Convention. *See id.* art. 1(1)(a)-(b).

25. *See* ELLI LOUKA, OVERCOMING NATIONAL BARRIERS TO INTERNATIONAL WASTE TRADE: A NEW PERSPECTIVE ON THE TRANSNATIONAL MOVEMENTS OF HAZARDOUS AND RADIOACTIVE WASTES 46, 49 (International Envtl. Law & Policy Series No. 22, 1994). "The

The Convention accomplishes its goals through two key provisions. Article 4 outlines Convention members' obligations in general. Article 4 requires an exporting state to notify a prospective importing state of any transboundary movement of hazardous waste.[26] The information must be "sufficiently detailed" to allow the importing state to make a proper risk assessment.[27] Because the Convention allows parties to pass national legislation banning all hazardous waste imports, parties to the Convention may not export their hazardous waste to nations choosing to institute such bans.[28] Parties must also forbid export to an importing nation if it has reason to believe that the importer will not manage the waste "in an environmentally sound manner."[29] In addition, article 4 insulates parties from receiving hazardous waste from non-parties and prevents parties from exporting to non-parties.[30] Other general obligations include requiring: (1) the exporting nation to ensure that it minimizes its hazardous and other waste generation;[31] (2) the importing nation to possess "environmentally sound" disposal or recycling facilities and to exercise the same such management practices;[32] and (3) the cooperation and sharing of information regarding "the transboundary movement of hazardous wastes . . . in order to improve the environmentally sound management of such wastes and to achieve the prevention of illegal traffic."[33] Article 4(10) further prevents the exporting

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purpose of the Basel Convention is to establish state responsibility for hazardous waste transfers." *Id.* at 49. "The Convention attempts to regulate waste movements by imposing restrictions because, as emphasized in the preamble, restrictions reduce transfrontier movements, and provide incentives for sound waste management." *Id.* at 46. Iwona Rummell-Bulska, acting Basel Secretariat, characterized the goals of the Basel Convention as being: "to prevent to the extent possible and minimize the generation of hazardous wastes; treat and dispose of such wastes in such a way that they do not cause harm to health and the environment; and eliminate or reduce transboundary movements of hazardous wastes to a minimum." Wolff, *supra* note 18, at 30.

26. *See* Basel Convention 1989, art. 4(2)(f).

27. *See* KATHARINA KUMMER, INTERNATIONAL MANAGEMENT OF HAZARDOUS WASTES: THE BASEL CONVENTION AND RELATED LEGAL RULES 66 (1995). Annex VA to the Convention specifies what information is required. *See id.* Some examples include "the reason for the export; [the identity of] the exporter and the generator; the site and process of generation; the nature of the wastes and their packaging; the intended itinerary; [and] the site of disposal and the disposer." *Id.* Note that under article 6(6)-(8), the exporting state may obtain approval from the importing state to specify a general notification for wastes of the same nature for up to 12 months. *See id. See also* Basel Convention 1989, art. 6.

28. *See* Basel Convention 1989, art. 4(2)(e).

29. *Id.*

30. *See id.* art. 4(5). However, Parties may allow their waste to pass *through* the non-Party states as long as the procedures of article 6(2), governing prior informed consent, are adhered to pursuant to article 7. *See id.* art. 7.

31. *See id.* art. 4(2)(a).

32. *Id.* art. 4(2)(b).

33. *Id.* art. 4(2)(h).

state from shirking its obligations under other provisions of the Convention by improperly imposing its obligations upon the importing state.[34]

Article 6 of the Basel Convention governs the movement of hazardous waste between parties. Its prior informed consent provision requires the exporting state to notify the importing state in writing of the hazardous qualities of the materials to be shipped.[35] A contract between the two must be formed "specifying environmentally sound management" of the hazardous wastes.[36] If any of the Basel Convention's notification and consent provisions are not followed, if the documents provided to the importing state misrepresent actual waste contents, or if the disposal is conducted by either the exporting or importing nation, or both, in violation of the Convention or other international law, such activities are deemed "illegal traffic" and are subject to criminal penalties developed nationally by each ratifying party.[37]

Australia signed the Basel Convention in 1989 and passed enabling legislation entitled the Hazardous Waste (Regulation of Exports and Imports) Act soon thereafter.[38] Australia later ratified the Convention in 1992. [39] Because of the government's belief that the Hazardous Waste Act proved deficient when compared with the "mainstream of international opinion,"[40] the Act was amended in 1996 to widen its scope to regulate hazardous waste intended for recycling or recovery and to impose greater penalties upon individuals and corporations engaging in illegal hazardous waste trade.[41]

The Act's objectives appear to be in accord with the Basel

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34. *See id.* art. 4(10).

35. *See id.* art. 6(1).

36. *Id.* art. 6(3)(b).

37. *See id.* art. 9(1)(a)-(e). In addition, the state of export is responsible for taking the waste back or, if that is impracticable, to ensure proper disposal in compliance with the Convention. *See id.* art. 9(2)(a)-(b). The liability and dispute resolution provisions of articles 12 and 19 will be discussed in greater depth in Part IV of this note.

38. *See Australia and the Basel Convention, Hazardous Waste Act* (visited Oct. 1, 1998) <http://www.environment.gov.au/epg/hwa/basel.html>. *See also* The Honorable Ian Campbell, *Keynote Address to the Third National Hazardous and Solid Waste Convention*, May 27, 1996 (visited Oct. 5, 1998) <http://environment.gov.au> [hereinafter Campbell Remarks] (discussing Australia's enabling legislation).

39. *See* Campbell Remarks, *supra* note 38.

40. *Id.*

41. *See Hazardous Waste (Regulation of Exports and Imports) Act 1989* (visited Mar. 4, 1999) <http://www.austlii.edu.au/cgi-bin/download.cgi/download/au/legis/cth/consol_act/hwoeaia1989548.txt> [hereinafter Hazardous Waste Act 1989]. *See also* Matt Brown, *Hazardous Waste Controls Come into Force* (last modified Feb. 14, 1997) <http://www.environment.gov.au/portfolio/minister/env/96/mr13dec.html>. The Senate Minister for the Environment, the Honorable Robert Hill, stated that "[p]rior to these amendments, Australia's legislation did not fully implement our obligation under the Basel Convention. . . . These amendments ensure that Australia is now fully meeting its international obligations." *Id.*

Convention[42] but lend greater emphasis to the continued existence of article 11 agreements. The amended Act attempts "to give effect to the Basel Convention . . . and . . . to give effect to agreements and arrangements of the kind mentioned in Article 11 of the Convention."[43] The Australian law also codifies the Basel Convention's prior informed consent provision.[44] Australia's Environment Minister generally acts as gatekeeper to the granting of export or import permits to individuals or corporations.[45] For example, the Minister may consider an applicant's financial viability, his previous environmental record, and "any other relevant matters."[46] The Minister must also be satisfied that the proposal is "consistent with the environmentally sound management of the hazardous waste,"[47] that prior informed consent was given,[48] and that the applicant has adequate insurance.[49] However, even if the above conditions are satisfied, the Minister may still refuse to grant the permit if doing so would be "in the public interest,"[50] or if there is another way of handling the waste that does not "pose a significant risk of injury or damage to human beings or the environment"[51] and doing so domestically would be safe, efficient and "consistent with the environmentally sound management of the waste."[52] The Act discourages exports intended for final disposal by requiring that permits for these exports only be granted in "exceptional circumstances."[53]

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42. Section 3(1) of the Amendment states:

> The object of this Act is to regulate the export, import and transit of hazardous waste to ensure that exported, imported or transited waste is managed in an environmentally sound manner so that human beings and the environment, both within and outside Australia, are protected from the harmful effects of the waste.

Hazardous Waste Act 1989, § 3(1).

43. *Id.* § 3(2)(a)-(b).

44. *See id.* § 17(1)(b)(i)-(iii). *See also* Basel Convention 1989, art. 6.

45. *See id.* § 13. A Basel Export Permit must include, but is not limited to, the following information: (1) the kind and quantity of the hazardous waste to be exported; (2) the method, time and place of transport; (3) the method of dealing with the waste to be used after export; and (4) the facility used in disposal and process after export. *See* Hazardous Waste Act 1989, § 21(1)(a)-(g).

46. *Id.* § 17(1)(c)(iii).

47. *Id.* § 17(1)(a).

48. *See id.* § 17(1)(b)(i).

49. *See id.* § 17(1)(d).

50. *Id.* § 17(3).

51. *Id.* § 17(4)(a)-(b).

52. *Id.* § 17(5)(a)-(aa).

53. *Id.* § 18A(2)(b). A determination of exceptional circumstances requires that the Minister consider "whether there will be a significant risk of injury or damage to human beings or the environment if the Minister decides not to grant the permit; [and] . . . whether the waste is needed for research into improving the management of hazardous waste." *Id.* § 18A(4)(a)-(b).

Thus, the Australian Hazardous Waste Act appears to codify and strengthen the purposes of the Basel Convention *prior* to the Ban Amendment. However, nowhere does the Act state that Australia must manage its hazardous waste with an eye toward minimizing or prohibiting movement to developing countries because of the risks that such activities pose to developing countries. The Ban Amendment, if ratified, would require Australia and every other Convention member to implement this prohibition into national legislation.[54]

B. *The Ban Amendment*

The need for the ban on waste exported from OECD to non-OECD nations grew evident because developing nations with nonexistent or less stringent hazardous waste laws were being inundated with waste from OECD member nations.[55] Accordingly, the Third Conference of the Parties, in its decision and amendment, "[r]ecogniz[ed] that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention."[56] The Ban Amendment to the Basel Convention was first agreed to by Convention consensus on March 25, 1994.[57] Effective January 1, 1998, the amendment imposed a further ban on hazardous waste exports from OECD to non-OECD nations, making it more difficult for industrialized nations to ignore their obligations to dispose of or recycle their waste responsibly.[58]

A coalition of developing countries first proposed the ban at the First Conference of the Parties.[59] The coalition pushed for a consensus to institute the ban at the Second Conference, and Denmark joined the developing countries in moving to implement the ban decision into the Convention by

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54. *See* Decision III/1, Amendment to the Basel Convention.

55. *See* ASANTE-DUAH & NAGY, *supra* note 23, at 88. Most developing nations wanted an "absolute ban . . . [because] all such trade is exploitative." *Id.* at 99. According to the United Nations Environment Program (UNEP), 98% of the 400 million tons of waste produced annually comes from OECD countries, of which more than 10% is dumped in developing countries. *See* Khor, *supra* note 4.

56. Decision III/1, Amendment to the Basel Convention, § 3.

57. *See* Puckett & Fogel, *supra* note 8. An OECD nation disposes of its waste responsibly by first attempting to do so domestically by either minimizing its production at the source or developing proper recycling and disposal technology. *See* Basel Convention 1989, art. 4(2)(a)-(c). If it proves impossible to manage the waste domestically, an OECD nation may export its wastes to another OECD nation that engages in environmentally sound management practices. *See id.*

58. *See id.*

59. *See id.* at 76; Puckett & Fogel, *supra* note 8.

amendment at the Third Conference.[60] The Head of the Indian Delegation to the Basel Convention, A. Bhattacharja, best expressed the prevailing feelings of developing nations at the First Conference of the Parties: "You industrialized countries have been asking us to do many things for the global good [such as] stop cutting down our forests, stop using your CFCs. Now we are asking you to do something for the global good: keep your own waste."[61]

Economically, the ban decision shifts the burden of enforcement from developing countries (which previously were able to initiate unilateral bans on waste imports under the Convention) to wealthy OECD nations where the waste originates.[62] The ban further closes "the recycling loophole" through which ninety percent of the hazardous waste trade schemes fell by encompassing not only goods destined for final disposal, but also goods labeled for recycling or reclamation.[63]

By the end of 1994, one hundred three developing countries had instituted prohibitions upon hazardous waste imports whether destined for "recycling" or "final disposal."[64] However, Asian countries lagged behind, becoming even more desirable targets for OECD nations' disposal and recycling business.[65] In response to the growing concern for the uniquely

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60. *See* KUMMER, *supra* note 27, at 46-47; Puckett & Fogel, *supra* note 8. By refusing to "bow down to a morally bankrupt European Union," Denmark convinced the remaining Nordic nations and, eventually, the EU nations to support the ban decision at the Third Conference of the Parties. Puckett & Fogel, *supra* note 8. Denmark supported the G-77 developing nations in calling for a total ban. *See id.*

61. Greenpeace Australia, *Toxic Trade Reports: Heavy Burden. A Case Study on the Lead Waste Imports Into India — March 1997* (visited Sept. 21, 1998) <http://www.greenpeace.org.au/Toxics/49.137.html>.

62. *See The Basel Ban — The Pride of the Basel Convention: An Update on Implementation and Amendment — September 1995* (visited Sept. 8, 1998) <http://www.greenpeace.org/~comms/97/toxic/bbp.html> [hereinafter *Pride*].

63. *See id.* The Second Meeting of the Conference of the Parties in Geneva, Decision II/12 (2) declared: "Decides also to phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD States . . . ." Decision II/12, Mar. 25, 1994, *in* SECRETARIAT BASEL CONVENTION, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, 1989 AND DECISIONS ADOPTED BY THE FIRST (1992) AND THE SECOND (1994) MEETINGS OF THE CONFERENCE OF THE PARTIES, at 77, S.B.C. No. 94/008 (1994).

64. Praful Bidwai, *India-Environment: India Turning Into a Toxic Dump*, INTER PRESS SERV., Nov. 3, 1994, *available in* 1994 WL 2750201. However, India, Bangladesh, Nepal and other south asian countries had not yet imposed similar bans. *See id.* As a result, India imported more than five million kilograms of metal processing waste and 2.85 million kilograms of scrap metal from Australia between January and June of 1994. *See id.* The Supreme Court of India later instituted a ban against hazardous waste imports in May of 1997. *See* Menon & Koppikar, *supra* note 1.

65. *See* Greenpeace Australia, *supra* note 61.

vulnerable Asian economies and ecosystems, a group of seventy-seven Asian and non-Asian developing nations stood in strong support and solidarity for the ban on exports, even if such exports were destined for recycling.[66] The developing nations believed that such activities "exploit[] their inability to assess or process much of the toxic material destined for recycling."[67] The group, dubbed "G-77," decided by consensus that they desired a non-negotiable, "no-exceptions" ban and threatened to call for a vote on the matter if the OECD nations failed to join their position.[68] Because each country has an equal vote under the Convention,[69] "the Sinister Seven"[70] OECD nations in opposition were clearly outnumbered.[71] As a result, all parties present agreed by consensus at the Third Meeting of the Parties to adopt the Ban Amendment.[72] In support of the consensus decision, Advisor to the Malaysian Environmental Protection Society, Gurmit Singh, commented that "[i]t is not worth [it] to risk the environment and health of millions of people at the cost of promoting a few dirty industries."[73]

Ratification by sixty-two (three-fourths) of the parties present and voting for the amendment is now required to create enforceable law.[74] However, despite its adoption[75] by all eighty-two of the parties present and

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66. *See* Pratap Chatterjee, *Environment: Wealthy Nations Feel Pressure to Ban Toxic Shipments*, INTER PRESS SERV. GLOBAL INFO. NETWORK, Mar. 24, 1994, *available in* 1994 WL 2583836. Australia, Canada and the United States tried to "water down" their position in private meetings. *See id.*

67. *Id.*

68. *See* Puckett & Fogel, *supra* note 8.

69. *See* Basel Convention 1989, art. 24.

70. The "Sinister Seven" consists of Australia, Canada, Germany, Japan, the Netherlands, the United Kingdom and the United States. *See* Puckett & Fogel, *supra* note 8.

71. *See id.*

72. *See* ASANTE-DUAH & NAGY, *supra* note 23, at 107.

73. Eileen Ng, *Toxic Waste Ban a Blow to Asia's Ailing Economies*, AGENCE FRANCE-PRESSE, Feb. 27, 1998, *available in* 1998 WL 2231559. At the Fourth Conference of the Parties, Singh also stated, "[T]he most important step now is for countries, including Malaysia, to ratify the amendments so that the ban could come into force. There is no excuse for developing countries not to do so." Esther Tan, *Representatives Unanimously Close Annex VII Membership*, NEW STRAITS TIMES, Feb. 28, 1998, at 7, *available in* 1998 WL 3970612.

74. *See* Basel Convention 1989, art. 17(3). *See also How to Identify the Attempts to Undermine the Ban — A Quick Guide* (visited Sept. 9, 1998) <http://www.greenpeace.org.>.

75. Ratification entails depositing formal instruments indicating acceptance of the provisions with the Depositary. *See* Basel Convention 1989, art. 22(3). Australia adopted the Ban Amendment subject to the contingency that it would not ratify it until the definition of hazardous waste under the Convention was clarified. *See* Statement Made by Australia Following the Adoption of the Amendment Decision by Consensus, Sept. 22, 1995, *in* SECRETARIAT BASEL CONVENTION, DECISIONS AND REPORT ADOPTED BY THE THIRD MEETING OF THE CONFERENCE TO THE PARTIES, at 100, SBC No. 95/003 (1995) [hereinafter Statement Made by Australia].

voting at the Third Conference,[76] only seventeen countries[77] had ratified the ban as of February 1998.[78] Part of this failure to ratify may be attributed to confusion sparked by Australian and Canadian demands for clarification of the types of hazardous waste included in the Convention and, therefore, excluded from export by the ban.[79] In response, at the Fourth Conference of the Parties, the Technical Working Group adopted two separate lists of wastes in order to clarify what wastes were considered hazardous under the Basel Convention for the purposes of the ban.[80] Australia responded to the concerns of Greenpeace at a national Policy Reference Group meeting by stating that regardless of the clarification of what materials would be considered hazardous wastes, Australia had merely promised to "consider" whether or not to ratify the amendment once the hazardous waste issue was resolved.[81] Moreover, Australian officials further stalled ratification by

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76. *See* Basel Action Network, *supra* note 20.

77. The seventeen countries that ratified and implemented the ban into national or European Union legislation are Austria, Belgium, Denmark, Ecuador, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. *See id. See also* United Nations Environment Program, *List of Ratification of the Amendment to the Basel Convention* (visited Nov. 18, 1998) <http://www.unep.ch/basel/sbc/ratif-am.html>. Note, however, that only fifteen of these seventeen countries are members of the European Union. Ecuador and Norway are not members of the European Union. *See US to Exclude Basel Ban From Treaty Ratification?*, HAZNEWS, June 1, 1998, *available in* 1998 WL 9399342.

78. *See How to Identify Attempts to Undermine the Ban — A Quick Guide, supra* note 74.

79. *See* Statement Made by Australia, supra note 75, at 100. In a statement by Australia following the adoption of the Ban Amendment, the Australian delegate stated that, "Australia . . . will only consider ratifying the amendment when the work on the definition of hazardous characteristics is completed to our satisfaction." *Id.*

80. *See Trade Measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Joint Session of Trade and Environment Experts, OECD Working Papers, at 19-20 (1998). The materials on list A are hazardous wastes covered by article 1(1)(a) of the Basel Convention, and materials on list B are wastes not considered hazardous for the purposes of the Convention with limited exceptions. *See* Decision IV/6, Outcome of the Work of the Technical Working Group on Lists of Wastes and the Applicable Procedure for Their Review or Adjustment, Mar. 18, 1998, UNEP/CHW.4/35, *in Trade Measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Joint Session of Trade and Environment Experts, OECD Working Papers (1998). Annex VIII to the Fourth Conference lists A wastes, and Annex IX lists B wastes. *See id.* at 48-62. Many of the scrap metals were included on list B. *See id.* at 54-62.

81. *See Hazardous Waste Act Policy Reference Group, Nineteenth Meeting, February 4, 1998*, ¶ 23 (visited Oct. 27, 1998) <http://www.environment.gov.au/epg/hwa/prg19.pdf>. The Hazardous Waste Act Policy Reference Group is a "consultative forum for major stakeholders including up to thirty representatives of industry, trade unions, environment groups and overseas development groups." *Hazardous Waste Policy Reference Group* (visited Apr. 15, 1999) <http://www.environment.gov.au/epg/hwa/prg.html>.

citing the need to perform an economic assessment of the ban decision with regard to the new hazardous waste classification system.[82] Another explanation for some countries' failure to ratify the ban may reside in the United States' lack of support as evidenced by its failure to either sign or ratify the Convention.[83]

In addition, because of many economic and social incentives to maintain a hazardous waste export relationship between OECD and non-OECD members, and because of pressure from the International Chamber of Commerce,[84] compliance with the terms of the Convention ban is, and will continue to become, a major international policing issue. Specifically, the scrap metal industry opposes the ban and continues to lobby non-OECD nations to break from the non-OECD alliance that supports the ban.[85] Further, ban opponents[86] continue to assert pressure upon G-77 developing nations to withdraw their support of the ban, pressure other countries to withdraw, or to enter into bilateral hazardous waste trade agreements, or all

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82. *See Hazardous Waste Act Policy Reference Group, Nineteenth Meeting, February 4, 1998*, *supra* note 81, ¶ 27.

83. *See generally Pride*, *supra* note 62; Kenneth D. Hirschi, Note, *Possibilities for a Unified International Convention on the Transboundary Shipments of Hazardous Wastes*, 10 GEO. INT'L ENVTL. L. REV. 169, 189-191 (1997). Greenpeace sees the United States's continued failure to ratify the Ban Amendment as a "blackmail" attempt. *See Pride*, *supra* note 62. In failing to ratify the Convention, industrial nations like the United States also fail to contribute economically to the Basel Convention's efforts. *See* William Schneider, Note, *The Basel Convention Ban on Hazardous Waste Exports: Paradigm of Efficacy or Exercise in Futility?*, 20 SUFFOLK TRANSNAT'L L. REV. 247, 280 (1996).

84. *See 27,000 Tons of Toxic Waste Dumped in India: Greenpeace*, DEUTSCHE PRESSE-AGENTUR, Apr. 17, 1997, at 08:01:00.

85. *See* Martyn Chase, *Harvey Alter: Basel Flawed, But Goals are Worthy*, AM. METAL MARKET, May 26, 1997, *available in* 1997 WL 8676213.

86. These ban opponents include Australia, the United States, Canada, New Zealand, South Korea, Japan, the International Chamber of Commerce (ICC), and the Bureau of International Recycling. *See* Greenpeace Australia, *Australia's Attempts to Break Waste Trade Ban* (visited Sept. 21, 1998) <http://www.greenpeace.org.au/Releases/93.html>; *Environment: Green Light for Export Ban on all Hazardous Waste*, EUR. INFO. SERV., Oct. 7, 1995 (showing South Korea argued for an amendment retaining the right to recycle with developing nations); Pratap Chatterjee, *Environment: Ban on Toxic Exports to Poor Countries Challenged*, INTER PRESS SERV., Mar. 14, 1995, *available in* 1995 WL 2259654 (citing Australia, Canada, France, the United States and the ICC); Khor, *supra* note 4 (citing a United States State Department statement to the European Union governments that "the U.S. opposes the OECD to non-OECD ban and would not support this amendment"); Alan Samson, *Waste Stance Could Leave NZ on Outer*, DOMINION, Mar. 2, 1998, *available in* 1998 WL 7977908 (citing New Zealand); *Pride*, *supra* note 62 (citing Australia, the United States, the ICC, and the Bureau of International Recycling). Greenpeace identified the "sinister seven" key opponents of the Basel Ban as Australia, Canada, Germany, Japan, the Netherlands, the United Kingdom, and the United States. *See* Puckett & Fogel, *supra* note 8.

three.[87] In order to accomplish their objectives, nations opposed to the Ban Amendment employ a variety of tactics.

III. EFFORTS TO UNDERMINE THE BAN AMENDMENT

A. *Australian Resistance*

Industrialized nations such as the United States, Australia, and Canada are pushing vigorously to undermine the ban.[88] Many waste schemes involving developing countries existed before the ban came into effect and may not magically dissipate without fear of reprisal. Australia, in particular, continues exporting hazardous waste to developing countries who are more than willing to accept the waste at costs far lower than Australia's domestic disposal or recycling operations cost.[89] Australia's actions illustrate that industrial nations who are opposed to the ban can continue to find ways to export waste to Third World countries through legal loopholes in the Convention. To further complicate matters, a few non-OECD nations want to either accept the waste or be included in Annex VII despite their lack of adequate treatment facilities.[90] Seeking to take advantage of political and economic vulnerability, Australia and other ban opponents organized a meeting with developing countries in March of 1995, in Dakar, Senegal.[91] Greenpeace characterized the meeting as a "disguised attempt by some rich countries to destroy the ban [amendment]."[92]

Evidence that Australia may not be taking the ban seriously is illustrated by a statement in October of 1994 made by Chris Lamb, legal advisor to the Australian Department of Foreign Affairs and Trade. He argued that, although the Convention possesses moral and political significance, it does not create a binding legal obligation upon Australia.[93]

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87. *See* Chatterjee, *supra* note 86; Chatterjee, *supra* note 9. A "confidential report" from the Australian delegation indicated its purpose in meeting with South Africa was to gain South African support to "weaken" the ban. Eddie Koch, *South Africa — Environment: Scandal Over Toxic Waste Ban*, INTER PRESS SERV., Aug. 29, 1995, *available in* 1995 WL 10133936. *See also* Chatterjee, *supra* note 86 (citing future trips to India and the Philippines by the Australian government for the purpose of getting these countries to accept waste imports).

88. *See generally* sources cited *supra* note 9 (citing various news sources providing evidence of ban resistence).

89. *See infra* notes 99-102 and accompanying text.

90. *See* Tan, *supra* note 17.

91. *See* Chatterjee, *supra* note 86. The meeting was organized by Australia, Canada, France, the United States, and the International Chamber of Commerce. *See id.*

92. *Id.*

93. *See* Kalinga Seneviratne, *Australia-Environment: An Export Nobody Wants*, INTER PRESS SERV., Oct. 21, 1994, *available in* 1994 WL 2722935. However, upon a three-fourths vote of the Parties present and voting at the Conference adopting the Ban Amendment, it is

Following the ban's adoption, Australia instituted an international campaign to convince developing nations to sign waste trade agreements in order to rally and defeat ratification of the ban. In October of 1994, five months after the ban decision was originally made,[94] Australian government officials held meetings with the Indian, Malaysian, and Indonesian governments to ask that they accept toxic waste from Australian companies.[95] Australian officials also approached the South African government in 1995,[96] before the Basel Ban came into effect, to encourage it to reconsider its support for the proposed ban.[97]

Along with these attempts to thwart Ban Amendment ratification, Australian industrial hazardous waste exporters have continued dumping hazardous waste in the world's poorer nations under the guise of "recycling," a practice previously permitted under the Convention. Although the ban on exportation came into effect in January of 1998, reports from Greenpeace allege that Australia, Canada, the United States, and other OECD countries continue exporting their waste to non-OECD nations in order to save money. Greenpeace specifically cited waste "schemes" involving the United States, Canada, Australia, the Netherlands, and Germany and the export of hazardous waste to India, Brazil, Bangladesh, the Philippines, and China.[98]

Presently, Greenpeace accuses Australia of hazardous waste trading with various developing countries not equipped to handle the waste without endangering the health and environment of their citizens.[99] These allegations include: (1) twenty tons of zinc ash and residues shipped without a permit to

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submitted to the Depositary and to the parties for ratification. *See* Basel Convention 1989, art. 17(5). As to the overall force of the Basel Convention, article 25 specifies that "[f]or each state . . . which ratifies, accepts, approves or formally confirms this Convention . . . it shall enter into force." Basel Convention 1989, art. 25(2).

94. The decision to ban export of hazardous wastes from OECD to non-OECD states was originally adopted pending implementation by Decision II/12 of the Second Meeting of the Conference of the Parties in Geneva, Switzerland, on March 25, 1994. *See* Decision II/12, Mar. 25, 1994, *in* SECRETARIAT BASEL CONVENTION, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, 1989 AND DECISIONS ADOPTED BY THE FIRST (1992) AND THE SECOND (1994) MEETINGS OF THE CONFERENCE OF THE PARTIES, at 77, S.B.C. No. 94/008 (1994).

95. *See* Chatterjee, *supra* note 9.

96. South Africa was the only member of the African continent refusing to ratify the Bamako Convention prohibiting hazardous waste imports to Africa. *See* Hirschi, *supra* note 83, at 175.

97. *See* Koch, *supra* note 87.

98. *See Waste-Trade Zealots*, *supra* note 9.

99. *See Waste Dumpers Named,* NEW STRAIT TIMES, Mar. 22, 1998 (visited Feb. 2, 1999) <http://www.ban.org/ban_news/dumpers_named.html>. *See also* LOUKA, *supra* note 25, at 99-102 (discussing waste management in developing nations).

Bombay in January of 1997;[100] (2) a hazardous mixture of lead, cadmium and mercury sent to Hong Kong was ordered to be returned to Australia in October of 1997;[101] (3) exportation of at least 8569 tons of hazardous waste to non-OECD countries in 1996; and (4) between January of 1994 and June of 1996, Australia shipped 11,328 tons of battery scrap to the Philippines.[102] Regardless of whether hazardous waste trading between Australia and some poorer Asian countries continues, Australia employs stalling tactics and legal maneuvers to ignore its obligation to respect the ban. One legal manuever is claiming the continued validity of article 11 agreements under the Convention following the Ban Amendment.

B. *Article 11 Agreements*

Prior to the Ban Amendment, article 11 of the Basel Convention clearly allowed bilateral and multilateral export agreements between OECD and non-OECD nations as long as the importing country observed "environmentally sound" management practices.[103] However, Greenpeace urges that the hazardous waste ban should not be circumvented using article 11 agreements.[104] Many OECD countries, including the United States[105] and

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100. *See Waste Dumpers Named*, *supra* note 99.

101. *See id.*

102. *See id.* Australia has been classified as one of the top three scrap lead battery exporters to the Philippines. *See id. See generally* Greenpeace Australia, *Australian Waste Trader Convicted in Hong Kong*, March 25, 1998 (visited Sept. 21, 1998) <http://www.greenpeace.org.au/Releases/103.html>; *Australia: Greens Stop Used Battery Export*, INTER PRESS SERV. GLOBAL INFO. NETWORK, Mar. 14, 1994, *available in* 1994 WL 2584169. Because Australia can only domestically recycle one-fourth of the 15 million car batteries it discards annually, most of the residual is exported for recycling and disposal in developing Asian countries. *See id.* Last year, "India . . . received more than 40 ton[s] of battery scrap and lead ash." *Call for Nations to Ignore New OECD Hazardous Waste Bid*, ASIA PULSE, Feb. 27, 1998, *available in* 1998 WL 2950761; *Ignore OECD Members' Call to Dump in Developing Countries, Says NGOs*, MALAYSIAN NAT'L NEWS AGENCY (BERNAMA), Feb. 27, 1998, *available in* 1998 WL 6594534. In addition, at least 27,000 tons of toxic waste were dumped in India during a ten-month period from April 1996 to January 1997." *27,000 Tons of Toxic Waste Dumped in India: Greenpeace*, *supra* note 84.

103. *See* Basel Convention 1989, art. 11.

104. *See U.S. Chamber Reconsidering Opposition to Basel Pact in Wake of Recent Changes*, [Mar.] Int'l Env't Daily (BNA) (Mar. 10, 1998), *available in* LEXIS, BNA Library, BNAIED File.

105. The United States also has bilateral hazardous waste trade agreements with Canada, Mexico (both formed in 1986) and, most recently, Malaysia. *See* Agreement Between the Government of Canada and the United States of America Concerning the Transboundary Movement of Hazardous Wastes, Oct. 28, 1996, *in* SECRETARIAT BASEL CONVENTION, TEXTS ON THE BILATERAL, MULTILATERAL AND REGIONAL AGREEMENTS OR ARRANGEMENTS REGARDING TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND OTHER WASTES, at 123, SBC No. 94/009 (1994); Annex III to the Agreement Between the United States of

Australia,[106] rushed to enter into article 11 agreements before the ban on exportation went into effect, thereby nullifying the intent of the ban to prevent recycling and reclamation operations in nations ill-equipped to handle hazardous material.[107]

Additional efforts to avoid the ban are seen in Germany's[108] and Australia's assertions that any bilateral agreement entered into before January of 1998 remains effective after that date.[109] A Convention delegate

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America and the United Mexican States on Cooperation for the Protection and Imprisonment of the Environment in the Border Area, Nov. 12, 1986, *in* SECRETARIAT BASEL CONVENTION, TEXTS ON THE BILATERAL, MULTILATERAL AND REGIONAL AGREEMENTS OR ARRANGEMENTS REGARDING TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND OTHER WASTES, at 157, SBC No. 94/009 (1994); Hogue, *supra* note 16.

106. *See generally India-Environment: India Denies Waste Import Deal with Australia*, INTER PRESS SERV., Oct. 20, 1994, *available in* 1994 WL 2722979. While denying that it made a deal with Australia to import hazardous waste, the Indian government confirmed that Australia sought such agreements in the wake of the Ban Amendment. *See id. See also The Waigani Convention* (last modified Aug. 31, 1998) <http://www.environment.gov.au/epg/hwa/waigani.html> (describing the Waigani Convention and Australia's responsibilities under it). The Waigani Convention is a multilateral agreement pursuant to article 11 of the Basel Convention which bans the transboundary movement of hazardous and radioactive wastes to the South Pacific Forum Island Countries but allows Australia to receive such shipments. *See id.* Australia signed the Waigani Convention on September 16, 1996, and ratified it on August 17, 1998. *See id.* However, in order to enter into force the Convention must be ratified by two-thirds of the South Pacific Forum countries, which is expected to be completed in the year 2000. *See id.* Australian industry representatives at the Eighteenth Hazardous Waste Act Policy Reference Group Meeting were unconcerned about the Waigani ban because Australia does not engage in hazardous waste export with South Pacific island countries. *See Hazardous Waste Act Policy Reference Group Eighteenth Meeting Minutes, Sept. 8, 1997* (last modified Aug. 30, 1998) <http://www.environment.gov.au/epg/hwa/prg18.pdf>.

107. *See* Dean M. Poulakidas, *Waste Trade and Disposal in the Americas: The Need for and Benefits of a Regional Response*, 21 VT. L. REV. 873, 900-01 (1997).

108. *But see infra* notes 109 and 111 (regarding Germany's current position as a member of the European Union).

109. *See* Poulakidas, *supra* note 107, at 901. Note, however, that Germany is bound by the European Union's decision to ban the continued use or formation of such agreements as of January 1, 1998. *See* discussion *infra* note 111. However, Basel Convention parties must not only refrain from entering into any post-Basel Convention agreements incompatible with the aims of the Convention, but the Basel Convention also prevails over incompatible agreements between Convention parties concluded pre-Basel. *See* KUMMER, *supra* note 27, at 97. This conclusion is based upon the principle, found in article 30(3) of the Vienna Convention, that current laws supersede old laws. *See id.* By extension, and based upon the same principles governing treaties, article 11 agreements concluded before the Ban Amendment between two parties to the Convention are subject to the ban limitations that bind them. *See id.* However, agreements between parties and non-parties (even those incompatible with the Convention) concluded pre-Basel take precedence over the Convention based upon the rule *pacta tertiis nec nocent nec prosunt* "agreements neither harm nor benefit third parties." *Id.* Conversely, agreements between parties or between parties and non-parties to the Convention are rendered in violation of their international obligations imposed by the

from Australia made the following statement following adoption of the Ban Amendment: "Australia considers Article 11 to be an important provision of this Convention. . . . We do not consider that the text we have just adopted removes th[e] right [to form bilateral and multilateral agreements with non-OECD countries]."[110] However, the Directorate-General for the European Commission on the Environment, Ludwig Kramer, stated that article 11 no longer applies to the new article 4A (Ban Amendment) and that any multilateral, bilateral, or regional agreement (past or present) would violate "the spirit and provisions of the Convention."[111] Mr. Kramer reaffirmed his position in a statement to the Bureau of National Affairs that, "If you are going to have a ban, you cannot have bilateral agreements."[112]

It is important to emphasize the situations in which article 11 agreements to trade in hazardous waste still apply following the adoption of the Ban Amendment. First, between states that have not ratified the Ban Amendment, or between those states and non-parties to the Convention, an article 11 agreement still operates.[113] Second, imports to Annex VII states from non-Annex VII states or non-parties are also covered by article 11 agreements.[114] Third, Annex VII states may freely trade hazardous wastes

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Convention if found to be "incompatible with the Convention" and made post-Convention. *Id.* at 97-98.

110. Statement Made by Australia, *supra* note 75, at 101. In addition, the Australian Hazardous Waste Act specifies one of its "aims" as giving "effect to agreements and arrangements of the kind mentioned in Article 11 of [the Basel Convention]." Hazardous Waste Act 1989, § 3(2)(b).

111. Letter from Ludwig Kramer, Head of the Waste Management Policy Unit in the Environment, Nuclear Safety and Civil Protection Division of the European Commission, to Dr. I. Rummel-Bulska, Executive Secretary, United Nations Environment Policy/ Programme/Protection, Secretariat of the Basel Convention, *Bulska Letter* (visited Sept. 21, 1998) <http://www.ban.org/issues_for_cop4/bulska_letter.html>.

> [I]t is clear that bilateral, multilateral, or regional agreements or arrangements between Parties listed in Annex VII and Parties or other States not listed in Annex VII, when allowing for hazardous waste to be exported from the first to the latter, would circumvent the legal requirement of Article 4A in a way which is not foreseen by the Convention and are therefore not acceptable from a legal point of view.

Id.

In addition, the European Union adopted European Council Regulation No. 120/97 (an amendment to No. 259/93) to fully implement the Ban Amendment. *See* Basel Action Network, *supra* note 20. The regulation specified that article 11 agreements would only remain valid until January 1, 1998. *See id.* The fifteen members of the European Union are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. *See id.*

112. Joe Kirwin, *European Commission, Recycling Industry Still Up in Arms Over Expanding Basel List*, [Mar.] Int'l Env't Daily (BNA) (Mar. 10, 1998), *available in* LEXIS, BNA Library, BNAIED File.

113. *See* CRAWFORD & SANDS, *supra* note 15, at 18-19.

114. *See id.* at 19.

with other Annex VII states without the use of article 11.[115] Similarly, non-Annex VII states may also trade hazardous wastes with other non-Annex VII states without article 11.[116]

However, trade from an Annex VII state that adopted the Ban Amendment to a non-Annex VII state that adopted the amendment is clearly prohibited because both have agreed, by the terms of the Basel Convention as amended, that trade between them would "'not derogate from the environmentally sound management of hazardous wastes"[117] in violation of article 11 of the Basel Convention. Australia is an Annex VII state that has not ratified the Ban Amendment and wishes to engage in hazardous waste trade with developing countries that have or may ratify the Ban Amendment. In this scenario, although Australia is not officially bound by the Ban Amendment, it is constrained by other language in the Basel Convention,[118] and non-Annex VII states that ratify the Ban Amendment would be placed in the awkward position of enforcing the intent of the Basel Convention in any negotiation with Australia.[119] This is because the law of treaties would impose the obligations of the unamended Basel Convention upon both of the parties, and because the Basel Convention imposes the responsibility to prohibit Annex VII to non-Annex VII trade squarely upon Annex VII states rather than sharing it with non-Annex VII receiving states.[120] Thus, by failing to ratify the Ban Amendment, and given the weak economic and political position of non-Annex VII countries, Australia will likely experience little resistence in continuing its hazardous waste trade with developing countries while it awaits the results of its economic studies.

Even assuming article 11 still applied, the original Convention specifies that agreements between OECD and non-OECD countries "shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests

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115. *See id.* at 20.

116. *See id.* at 19.

117. Basel Convention 1989, art. 11. Crawford and Sands believe that article 58 of the Vienna Convention allows these countries to "suspend" the Basel Convention in special cases where there is environmentally sound management of hazardous waste for a specified period. *See* CRAWFORD & SANDS, *supra* note 15, at 23.

118. Regarding the Basel Convention's language, particularly constraining is the requirement to exercise environmentally sound management practices. *See* Hazardous Waste Act 1989, § 3(1).

119. *See* CRAWFORD & SANDS, *supra* note 15, at 23-24.

120. *See id.* at 19-20; Basel Convention 1989, art. 4(5). Article 30(4) of the Vienna Convention "gives priority to the treaty to which both states are parties." CRAWFORD & SANDS, *supra* note 15, at 18. Crawford and Sands conclude that article 11 agreements would not be available in practice between Annex VII states ratifying the Ban Amendment and developing non-Parties to the Basel Convention and would be severely scrutinized as between Annex VII states ratifying the Ban and developing states not ratifying the Ban. *See id.* at 25-26.

of developing countries."[121] In addition, the agreements must receive the Basel Convention Secretariat's approval as being "compatible with the environmentally sound management of hazardous wastes and other wastes as required by th[e] Convention."[122] To control the apparent looseness of an "environmentally sound" standard, article 11 should be subject to the same standards governing the Convention as a whole.[123] This would ensure that the agreement is not "incompatible with the spirit of the Basel Convention."[124]

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121. Basel Convention 1989, art. 11(1). "Environmentally sound management" is defined as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes." *Id.* art. 2(8). The Australian Hazardous Waste Act allows the Environment Minister to issue a written certificate specifying what conduct as applied to what hazardous waste is, or is not, environmentally sound management after consultation with the Hazardous Waste Technical Group. *See* Hazardous Waste Act 1989, § 58 C(1)-(2).

122. Basel Convention 1989, art. 11(2). To further that end, the Ad Hoc Committee on Implementation drew up a list of questions to be posited to parties to a potential article 11 agreement:

> (1) Does the agreement address the control of the transboundary movement of hazardous wastes and other wastes subject to the Basel Convention?
> (2) Taking all practicable steps, will the management of hazardous wastes under the agreement or arrangement be such that it will protect human health and the environment against adverse effects?
> (3) How does the agreement or arrangement take into account the interests of developing countries?
> (4) Does the agreement or arrangement require prior notification?
> (5) Does the agreement or arrangement require prior consent?
> (6) Does the agreement or arrangement provide for the tracking of the wastes?
> (7) Does the agreement or arrangement provide for alternative measures for wastes which cannot be managed as planned?
> (8) Does the agreement or arrangement provide for the identification of authorities responsible for the implementation of such agreement?
> (9) Are the obligations of the Article 11 agreement or arrangement consistent with the control measures related to transboundary movements of hazardous wastes as provided for by the Basel Convention?
> (10) Are the wastes covered by the Article 11 agreement or arrangement consistent with the scope of the Basel Convention?

Decisions Adopted by the Second Meeting of the Conference of the Parties in Geneva, Switzerland on 25 March 1994, Decision II/10, Annex, *in* SECRETARIAT BASEL CONVENTION, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, 1989 AND DECISIONS ADOPTED BY THE FIRST (1992) AND THE SECOND (1994) MEETINGS OF THE CONFERENCE OF THE PARTIES, at 63, S.B.C. No. 94/008 (1994).

123. *See* KUMMER, *supra* note 27, at 90-91.

124. *Id.* at 91. In other words, article 11 agreements are subject to the same scrutiny implied by the institution of the Basel Ban on hazardous waste exports from OECD to non-OECD nations. If the ban, directed at prohibiting such activity, is interpreted in accordance

The "large gap" that exists in environmental technology for disposal and recycling operations between industrialized and developing nations precludes effective regulation of hazardous waste export to the latter from the former.[125] Developing nations lack the technology to adequately control or monitor hazardous waste imports.[126] Many of the same arguments and statistics advanced above in support of the Ban Amendment may also justify the invalidation of article 11 agreements, which ignore the dangers attendant with trade between rich and poor countries. Therefore, in light of waste trade realities, any agreement between an OECD and non-OECD country allowing hazardous waste exports to the latter may constitute too great a risk to the developing nation even when subject to article 11 guidelines. However, the continued use of article 11 agreements between OECD and non-OECD nations allowing hazardous waste export to the latter is not the only argument forwarded by OECD nations eager to continue their profitable trade relationships.

C. *Annex VII Expansion*[127]

Another effort to circumvent the ban includes statements that a non-OECD country, in order to accept hazardous waste from an OECD member, need only declare that it has "environmentally sound recycling facilities."[128] However, this criterion not only applies to the accepting nation's treatment of an exporting nation's waste, but it also imposes a "general obligation" on all parties to the Convention to dispose of waste using "environmentally sound management."[129] Basel Action Network (BAN), a United States-based non-governmental organization that attended the Convention, stated that, "if non-OECD countries were allowed to join Annex VII, the ban would no

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with the "spirit" of the Convention as a whole, then article 11 agreements permitting the same activity would undermine the spirit of the Convention. *See id.*

125. *See* Pawel Kazmierczyk, International Trade in Hazardous Waste: Overview of Approaches to Creating an Effective Legal Order, at 19 (1995) (unpublished M.A. Thesis, University of South Carolina) (on file with the Thomas Cooper Library, University of South Carolina).

126. *See id.*

127. Annex VII is the list of OECD nations, the European Union, and Liechtenstein that are prohibited from exporting their waste to developing countries by the Ban Amendment. *See* discussion *supra* note 12.

128. *See supra* note 121 (defining "environmentally sound").

129. *See* Basel Convention 1989, art. 4(8). Note that this obligation "may not under any circumstances be transferred to the States of import or transit." *Id.* art. 4(10). *See also* KUMMER, *supra* note 27, at 56-57 (discussing "[e]nvironmentally sound management of hazardous wastes and the principle of non-discrimination").

longer be a ban, but an open ended, largely voluntary agreement."[130] Environmentalists characterized the push by developed countries to expand "Annex VII as a ploy to delay implementation of the ban."[131] Australia is one of the nations "strongly in favour of opening Annex VII in order to leave the ban more 'flexible.'"[132] Environmentalists counter these arguments by asserting that countries should be subject to the OECD membership process before addition to Annex VII.[133]

On February 23, 1998, Convention delegates met in Kuching, Malaysia, to discuss conferring Annex VII status upon requesting non-OECD countries.[134] Application for OECD status is conditioned upon criteria such as the applying country's economic situation and not upon its capacity to properly treat hazardous waste because economically disadvantaged countries that claim proper capacity may nonetheless be operating under economic pressure exerted by richer OECD nations.[135] Two countries, Israel and Monaco, requested admission to Annex VII at the Fourth Conference of the Parties in February of 1998.[136] Ban opponents like Australia and the United States have interpreted these requests as opportunities to encourage the development of criteria for evaluating Annex VII membership in order to expand it.[137] According to BAN, any criteria would prove just as inadequate at promoting the goals of the Convention as prior informed consent[138]

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130. Basel Action Network, *Basel Ban Victory at COP4: A Report on the Negotiations and Results of the Fourth Conference of Parties to the Basel Convention Held in Kuching, Malaysia 23-27 February 1998* (visited Sept. 17, 1998) <http://www.ban.org/issues_for_cop4/what_happened.html>. Australia joined the United States, and Canada, among others, in pushing for the development of criteria to decide which countries could be placed on Annex VII. *See id.* However, that effort proved unsuccessful at the Fourth Conference of the Parties, and the parties deferred the Annex VII criteria development to the Fifth Conference of the Parties. *See id.*

131. Tan, *supra* note 17.

132. Basel Action Network, *supra* note 130. The United States also insists that allowing countries to voluntarily join Annex VII would best avoid conflicts with GATT. *See* Hogue, *supra* note 16.

133. *See Annex VII "Criteria" — Last Attempt to Undermine the Ban?*, 1 BASEL ACTION NEWS (visited Sept. 21, 1998) <http://www.ban.org/ban_news/last_effort.html> [hereinafter *Last Attempt*].

134. *See* Hogue, *supra* note 16.

135. *See Last Attempt, supra* note 133. The OECD/non-OECD distinction remains important because OECD countries are a "legally bound, closed set of nations" which undergo a "rigorous process" to acquire membership based on economic, and not just technological, capacity criteria (the latter of which proponents of Annex VII expansion argue justifies admission to the Annex). *Id.*

136. *See* Hogue, *supra* note 16; *Last Attempt, supra* note 133.

137. *See Last Attempt, supra* note 133.

138. *See id.* Prior informed consent requires a Basel Convention member to obtain the express informed consent of all potentially affected states and to supply detailed information to those states before the exporting member can ship hazardous wastes. *See* Basel Convention

because of the possibility of economic pressure to accept hazardous waste pushed by OECD nations upon developing nations.[139] BAN further argues that, because the development of such criteria would inspire much disagreement and enforcement difficulties, the activity would only serve to stall implementation and ratification of the ban.[140] However, this issue, along with the effect of article 11 following the Ban Amendment, remains open for debate at the Fifth Conference of the Parties in 2000.[141] Beyond article 11 and Annex VII expansion arguments is the contention of many industries, and the countries they support, that the Ban Amendment violates international free trade provisions.

D. *Criticism of the Ban from a Free Trade Perspective*

Many industrial leaders and interest groups assert that the Basel Convention itself may violate the General Agreement on Tariffs and Trade (GATT).[142] Industry groups especially emphasize the need to exclude hazardous waste destined for recycling or recovery operations. However, the Basel Secretariat, Dr. Rummel-Bulska, stresses that the Basel Convention "was negotiated not to impose trade sanctions, but to minimize the generation and movement of hazardous waste."[143] However in 1995, a confidential report issued by the Australian delegation stated that there was no understanding that in signing the Convention Australia agreed to waive its free trade rights.[144]

The issues are GATT's most-favored-nation (MFN) rule in article I[145]

1989, art. 6(1). KUMMER, *supra* note 27, at 24. The information required to obtain consent includes the nature of the waste, the names of involved states and waste generators, and all other information specified in Annex VA to the Basel Convention. *See* Basel Convention 1989, Annex VA.

139. *See Last Attempt, supra* note 133.

140. *See id.*

141. *See* Decision IV/8, Decision Regarding Annex VII, *in Trade Measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Joint Session of Trade and Environment Experts, OECD Working Papers, at 46 (1998).

142. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

143. Hirschi, *supra* note 83, at 187 (footnote omitted).

144. *See* Koch, *supra* note 87.

145. Article I of GATT 1947 provides that "a nation extending a trade advantage to another nation must immediately and unconditionally extend that advantage to all other member nations." Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea (UNCLOS): Justice in Trade and Environment Disputes*, 25 ECOLOGY L.Q. 189, 217 (1998). "There is no reason to assume, a priori, that the most favoured nation rule is part of the solution [to the international waste trade issue]." Steve Charnovitz, *Living in an Ecolonomy: Environmental Cooperation and the GATT* (visited Oct. 5, 1998) <http://www

and GATT's article XI.[146] Whether the Basel Ban, in particular, violates these provisions requires further inquiry. First, if viewed as a usable good for recovery and reuse, hazardous waste and a ban on its trade would constitute a non-tariff barrier imposed by OECD nations to bar the access of "emerging economies" to a new commodity — waste.[147] Second, a requirement that hazardous wastes be imported exclusively to other OECD nations may violate GATT's article I MFN obligation by discriminating against non-OECD convention members.[148] It is argued that the Ban Amendment arbitrarily and unjustifiably discriminates between OECD/Annex VII and non-OECD/non-Annex VII countries where the same conditions may exist and where a less trade-restrictive solution[149] can be substituted.[150]

Obvious inconsistencies exist between free trade interests and placing limits on international hazardous waste trading. Both GATT and the North American Free Trade Agreement (NAFTA) contain provisions that, in theory, resolve such inconsistencies with deference to international environmental obligations.[151] Article 20 of GATT provides an exception for "national measures that are, inter alia, necessary to protect human, animal, or plant life and health."[152] However, there is no clear test under article 20 specifying the kinds of health or environmental measures that justify yielding free trade interests for environmental concerns.[153] GATT arbitration panels

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.ap.harvard.edu/papers/T&E/Charnovitz/Charnovitz.html>.

146. *See* Charnovitz, *supra* note 145. Article XI of GATT forbids "prohibitions or restrictions" on the trade of "any product" as an import or export to a GATT member. CRAWFORD & SANDS, *supra* note 15, at 29, 31.

147. *See* ASANTE-DUAH & NAGY, *supra* note 23, at 103. In fact, both exporting and importing countries in this scenario would violate article XI of GATT if they prohibit waste trade just "because the importing country cannot manage the waste in an environmentally sound manner." *Id.*

148. *See id.*

149. An example of a less trade-restrictive solution is establishing criteria for Annex VII admission based on technical capacity rather than on OECD membership. *See* CRAWFORD & SANDS, *supra* note 15, at 38.

150. *See id.* at 37-38. Crawford and Sands note that the Ban Amendment is less likely to be arbitrary if ratification is gained by three-fourths of the Convention parties. *See id.* at 17.

151. *See* Hirschi, *supra* note 83, at 187. "[B]oth GATT and NAFTA have provisions stating that when there is such inconsistency, the international environmental obligations will pre-empt the trade obligations." *Id.* (footnote omitted).

152. Mike Meier, Note, *GATT, WTO, and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 241, 242 (1997).

153. *See id.* at 243. Article 20 provides:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised

have relaxed their position on whether the exemptions apply, suggesting that cooperative multilateral environmental agreements will more likely qualifiy for those exemptions.[154] The World Trade Organization (WTO) Panel further clarified "necessary" to mean "if there were no alternative measures consistent with . . . [GATT], which [the party] could reasonably be expected to employ to achieve its . . . objectives."[155]

Industrial groups accuse the European Commission (EC) of "economic imperialism" for the EC's clear support and ratification of the Basel Ban.[156] However, unlike the Basel Amendment, the EC has extended the ban to additional materials not characterized as hazardous under the Convention.[157] The Australian industrial lobby asserted pressure on its government to invest in exploring ways to weaken or revoke the Ban Amendment.[158] Australian scrap metals processor Peter Netchaef similarly characterized the Basel Convention as "eco-imperialism" because he believes it creates a scarcity of raw materials in developing countries while simultaneously creating an excess in developed nations, resulting in inflated prices for developing nations that "runs counter to what we are trying to do with the WTO and limits markets."[159]

> restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health
>
> . . . .

General Agreement on Tariffs and Trade, art. 20, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. GATT arbitration panels have applied the following test to decide if article 20(b) can be used to allow the environmental measure to restrict trade:

> (1) whether the national measure serves to protect human, animal, or plant life or health;
> (2) whether the measure for which the exception is invoked is necessary to protect human, animal, or plant life or health;
> (3) whether the measure is applied consistently with the requirements in the introductory clause to Article 20 (namely, that the measure not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or that would constitute a disguised restriction on international trade); and
> (4) whether alternative GATT-consistent measures are reasonably available to further the same policy objectives.

Meier, *supra* note 152, at 280.

154. *See* CRAWFORD & SANDS, *supra* note 15, at 33.

155. *Id.*

156. *See* Kirwin, *supra* note 112.

157. *See id.*

158. *See Pride, supra* note 62. United States industry has asserted similar pressure upon the United States Department of State to oppose the Ban Amendment. *Id. See also supra* Part III(A).

159. Christiaan Virant, *Global Business Group Opposes UN Waste Ban*, J. COM., Apr. 11, 1997, at 11B.

Globally, industry, with the aid of the International Chamber of Commerce (ICC), is trying to "kill the Basel Ban" by arguing that anything "recyclable" should not be regulated under the Convention.[160] Exporting industries support this argument by contending that a rejection of certain recycling practices will cause manufacturing processes, now dependent upon receiving raw materials from abroad, to resort to increased use and exploitation of virgin resources.[161] Admittedly, other bilateral or multilateral treaties governing the international movement of hazardous wastes exclude materials intended for recycling or recovery from the definition of a hazardous waste even though they have different definitions of what constitutes a hazardous waste and different allowances for movement intended for recycling.[162] However, this argument and the others advanced in support of allowing continued hazardous waste trade recycling agreements between OECD and non-OECD nations ignore the reality that the act of recycling hazardous wastes itself poses grave health risks.[163] Further, if the recycling loophole remained, industries could justify exportation by fabricating a future use for any waste regardless of its volatility.[164]

From a world trade perspective, the ICC stated that "the Basel Convention . . . contravenes the spirit of the World Trade Organization . . . [because] "it will lead to significant economic losses for many developing Asian nations."[165] The ICC cites the inability of developing nations like China to import secondary raw materials for copper extraction and the harmful effect of zinc ash limits on Indian wheat output, which is dependent

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160. *See Pride, supra* note 62.

161. *See* Armando Roggio, *Environmental Watchdogs Putting Bite on Recyclers (International Metals Recycling: Import Bans Stacking Odds Against Scrap)*, AM. METAL MARKET, May 26, 1997, *available in* 1997 WL 8676209. In particular, the scrap metal industry wants ferrous scrap recognized as a product rather than a waste (hazardous or otherwise) to alleviate anticipated worldwide shortages of iron ore and steel. *See* Hirschi, *supra* note 83, at 190.

162. *See* Hirschi, *supra* note 83, at 188. One insider characterized the U.S. position on restrictions placed upon movement of hazardous waste intended for recycling by stating that, "legitimate trade in recyclable materials must be properly considered and protected before [the United States] will ratify the treaty." *Id.* at 189 (quoting *Conference Participants Debate Trade Aspects of Basel Convention*, Int'l Env't L. Rep. (BNA) No. 50 (Jan. 24, 1996)). It is further recognized that, without U.S. support for the Basel Convention or the Ban Amendment, the ban will not likely gain the support necessary for ratification. *See id.* at 191. However, if all other parties to the Convention refuse to trade with the United States, the United States will be forced to abide by international rules instead of economically and politically pressuring other Parties to abide by the status quo they currently support.

163. *See Pride, supra* note 62.

164. *See id.*

165. Virant, *supra* note 159. The United States Chamber of Commerce contends that the Basel Ban will severely stifle the $2.2 billion in U.S. earnings from the recycling trade. *See* Khor, *supra* note 4.

upon zinc-enriched fertilizers.[166] Although the Philippines, Malaysia, India, South Korea, and Brazil eventually voiced support for the ban, most of these countries expressed fears that the Ban Amendment would threaten their sources of revenue and raw materials.[167] Ban opponents also pointed out that most of the Convention delegates primarily have environmental or political backgrounds and lack the technical knowledge of metals or recycling necessary to properly evaluate the ramifications of their decisions regarding the ban.[168] However, industrial proponents appear to ignore the negative realities that continue to exist in developing nations vulnerable to OECD hazardous waste exports.

E. *Need for the Ban Amendment*

The most startling example of the dangers of continued tolerance for hazardous waste trade between OECD and non-OECD nations, premised on ban opponents' arguments for the need to recover raw materials, exists in India.[169] Although Bharat Zinc's executive director lauds the environmentally sound hazardous waste recycling and disposal processes of Bharat Zinc,[170]

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166. *See* Virant, *supra* note 159. There is currently an emerging black market in copper in China. *See id.* Also, because of the Basel Ban, many secondary smelter operations throughout the Philippines, deprived of their supply sources, were forced to shut down operations. *See* Roggio, *supra* note 161. Battery recycling operations have come to a standstill, resulting in a dangerous pile-up of discarded battery waste. *See id.* This forced manufacturers to look for virgin materials, increasing costs for consumers. *See id.*

167. *See Environment: Green Light for Export Ban on all Hazardous Waste*, *supra* note 86. Initially, South Korea won a compromise that shipments between OECD and non-OECD nations destined for recycling would be allowed provided that the materials were "watertight" and "not for re-export." *Id.*

168. *See* Chase, *supra* note 85.

169. Shristi, an India-based environmental group, reported that between 1994 and 1996, India imported over 66 cubic tons of zinc and lead from 49 countries with about half originating from Australia, Canada and the United States. *See* Robin Ajello Arjuna Ranawana, *The West's Toxic Trade with Asia (India's Recycling of Toxic Metal Waste from Western Countries)*, WORLD PRESS REV., Dec. 1, 1996, at 31. The Indian Supreme Court banned hazardous wastes imports to India in May of 1997. *See* R. Dev Raj, *Environment-India: Green Groups to Resist Toxic Dumping*, INTER PRESS SERV., Jan. 22, 1998, *available in* 1998 WL 5985444. However, "unscrupulous Indian businessmen" continue to import zinc ash and lead battery scrap from the United States and Germany. *See id.*

170. *See* Ranawana, *supra* note 169. Bharat Zinc, based in Bhopal, India, imports zinc ash from industrialized countries and extracts the metal. *See id.* According to Basel Action Network Secretariat, Jim Puckett, "Bharat Zinc is an example of exactly why the Basel Waste Trade Ban must not be overturned." Ann Leonard & Jan Rispens, *Exposing the Recycling Hoax: Bharat Zinc and the Politics of the International Waste Trade*, MULTINATIONAL MONITOR, Jan. 1, 1996, at 30. Jan Rispens, of Greenpeace Germany, characterized Bharat Zinc as an "'environmental disaster'" that would have never been allowed in Germany or Holland. *See* Mahesh Uniyal, *Environment-India: India Breaks Ranks on Basel Ban*, INTER

observations made by witnesses in July and September of 1995 indicate otherwise.[171] First, witnesses noticed that in every room of the factory, workers handled the lead-containing hazardous waste without gloves or protective masks.[172] Second, despite the executive director's claims that the lead content of the zinc being recycled is too small to warrant concern, shipping documents from the origin state (Germany) indicated that the actual lead concentrations are one hundred times higher than the executive's claims.[173] Third, a factory worker specifically acknowledged the failure of management to warn any of the workers of possible health hazards.[174] Finally, local activists report that city officials tested the nearby Betwa River, a drinking source for 200,000 people and found that it was contaminated with lead and cadmium.[175]

Although Australia has instituted fervent efforts to stall ban ratification based in part upon its industrial trade concerns, the effects upon Australia's overall export trade remain negligible. Australia's self-reported trade statistics indicate that only .00038 percent of the country's total annual export trade is affected by the export ban.[176] Thus, arguments against the Ban Amendment in the name of free trade lack the same urgency advanced by environmentalists and developing nations in support of the ban. Given the inherent dangers to non-OECD nations from either disposing of hazardous wastes *or* recycling hazardous wastes and given the environmental benefits of encouraging domestic waste disposal, hazardous waste minimization, and

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PRESS SERV., Sept. 8, 1995, *available in* 1995 WL 10134161.

171. *See* Leonard & Rispens, *supra* note 170.

172. *See id.* This is despite the fact that the plant manager and the visitors were all provided with protective masks, indicating an awareness of the danger of inhaling waste dust. *See id.* In addition, workers outside the plant carried residual waste in baskets through open dumping areas without protective clothing, and, in some cases, wearing only shorts and a t-shirt. *See id.* About 450 tons of lead are dumped there annually according to European shipping documents and laboratory tests of samples from the plant conducted by Greenpeace. *See* Uniyal, *supra* note 170.

173. *See* Leonard & Rispens, supra note 170. The residual waste was found to contain two percent lead which, as a material not recycled, either contaminates the water in run-off or enters the lungs of workers. *See id.*

174. *See id.* The worker stated: "They don't say anything. They just give us a cloth for our mouths and a hat, but they tell us nothing." *Id.*

175. *See* Ranawana, *supra* note 169.

176. *See Pride, supra* note 62. This figure was calculated accepting that Australia currently exports approximately 22 million Australian dollars worth of hazardous wastes to non-OECD nations annually, compared to the 56.58 billion Australian dollars (1994) in total export trade it made in 1994. *See id.* Even more striking are Germany's costs to export trade as the result of the ban — .000062 percent of its total annual export trade. *See id. See also* Peter Christoff, *Letter to the Editor*, AUSTL. FIN. REV., May 13, 1996, at 18, *available in* 1996 WL 16880352 (stating that the Convention does not harm Australia's hazardous waste trade interests because "trade affected by potential prohibitions under the revised act constitutes some 0.2 per cent of total annual trade by value").

recycling, the Basel ban survives both economic and environmental scrutiny.

F. *Moral and Political Responsibility of Australia as a Convention Member*

In Australia's statement following the adoption of the Ban Amendment at the Third Conference of the Parties, Australia specifically conveyed its desire to strengthen the purposes of the Convention, especially with regard to safeguarding countries "vulnerable" to unwanted hazardous waste (presumably, developing nations).[177] The Australian representative concluded her statement by commanding those who supported the adoption of the ban decision to "contribute to the realization of its true objectives," declaring that Australia would certainly not "shirk that responsibility" in that regard.[178] Although the representative's sentiment appeared well-meaning, Australia's continued failure to affirm its commitment to protect vulnerable developing countries by ratifying the Ban Amendment is more significant.[179]

Signing an international treaty or convention like the Basel Convention "displays a willingness to cooperate at a very low price."[180] Ratification of a treaty or convention, on the other hand, requires enacting national legislation that "constrain[s] the activities of certain industries in the economy."[181] In addition, some countries take advantage of the time between signing and ratification to continue undesirable behavior and to attempt to forestall cooperative efforts.[182] As such, Australia may currently be taking advantage of the time period between agreeing to the consensus decision to the Ban Amendment and ratifying that amendment. Australia has signed and ratified the Basel Convention, but it is now stalling the consensus decision to ratify the Ban Amendment despite the amendment's furtherance of previously agreed upon Convention goals.[183] Specifically, Australia has requested

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177. *See* Statement Made by Australia, *supra* note 75, at 100. "Australia's essential position ever since negotiation began on . . . [the ban decision] has been to strengthen the Convention and its processes to provide greater protection to those countries vulnerable to unwanted hazardous wastes." *Id.*

178. *Id.* at 101.

179. An example of Australia's stalling tactics is found at *supra* note 75 and accompanying text (referring to hazardous waste list clarification request).

180. Wolff, *supra* note 18, at 103.

181. *Id.*

182. *See id.* at 110.

183. It is important to note that the preamble to the Basel Convention specifically acknowledges an "increasing desire for the prohibition of transboundary movements of hazardous wastes and their disposal in other states, especially developing countries." KUMMER, *supra* note 27, at 63. In addition, article 15(7) of the Convention specifies the need for the Conference of the Parties to examine the Convention's effectiveness "periodically" with an eye toward adopting "a complete or partial ban on transboundary movements of hazardous wastes and other wastes in light of the latest scientific, environmental, technical and

specification of what constitutes hazardous waste,[184] insisted that article 11 agreements between OECD and non-OECD nations remain valid, and attempted to establish criteria beyond OECD status that would allow additions to Annex VII.

When a state ratifies a treaty or convention, that state becomes bound by its obligations to other parties to the agreement which restrict its ability to ignore future amendments consistent with the agreement's goals. When a state ratifies a treaty, it restrains its international behavior in order to similarly restrict another state's international behavior.[185] If a state chooses to forego the burdens while receiving the benefits of such an arrangement (adherence by other states), then that state is considered a "free-rider."[186] Because Australia has already ratified the Convention, certain international obligations already bind and restrict its ability to ignore future amendments to the Convention. Specifically, Australia receives the benefits of regulations forbidding the export of hazardous wastes without its consent while refusing to accept the burdens of foregoing trade in exports with developing nations.

In addition to the "free rider" problem, "a state that agrees to a treaty must execute it in good faith.[187] In order to execute a treaty in good faith, a ratifying state must affirmatively work to advance the spirit of the treaty.[188] By stalling ratification of the Ban Amendment, a necessary and integral part of the Basel Convention, Australia is violating its duty of good faith by failing to join in the effort to advance the Convention's purpose of restricting hazardous waste trade to countries unable to safely treat or dispose of it.

Article 9 of the Basel Convention, which classifies conduct amounting to illegal traffic under the Convention, may contain a legal argument defeating the continued practice of OECD to non-OECD hazardous waste trafficking. Article 9 defines the illegal traffic of hazardous waste as "any transboundary movement of hazardous wastes or other wastes: . . . (e) that

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economic information." Basel Convention 1989, art. 15(7).

184. According to Greenpeace, any moves to stall or confuse the amendment process by arguing definitional weaknesses would "undermine the very basis of the Convention itself." *Pride, supra* note 62. In other words, countries had to know what was included in the definition of hazardous waste in order to implement the Convention into their national law in the first place. *See id.*

185. *See* Hao-Nhien Q. Vu, *The Law of Treaties and the Export of Hazardous Waste*, 12 UCLA J. ENVTL. L. & POL'Y 389 (1994). The principle of *pacta sunt servanda* binds a ratifying state to the treaty obligations. *See id.*

186. *See id.*

187. *See id.* (footnote omitted). "[G]ood faith requires that the parties refrain from fraud, adhere to the purpose of the treaty, and affirmatively work to advance its spirit." *Id.* (footnote omitted). Article 26 of the Vienna Convention "obliges states to fulfil[l] international obligations in good faith." *Id.* This approach espouses the rule of *pacta sunt servanda* that "agreements must be adhered to." KUMMER, *supra* note 27, at 98.

188. *See* Vu, *supra* note 185.

results in deliberate disposal (e.g.[,] dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law."[189] Because the export of hazardous wastes from OECD to non-OECD countries is now prohibited by article 4A (the Ban Amendment), such movements, whether based on article 11 agreements or not, could be characterized as illegal traffic, punishable by the domestic legislation of either the exporting or importing country.[190] However, as discussed below, enforcement and policing of this solution may pose additional problems.[191]

IV. ENFORCEMENT AND LIABILITY SCHEME LIMITATIONS

A. *Enforcement and Development of Liability Protocol*

Unfortunately, no matter how worthy the goals of a total ban on hazardous waste exports to developing nations, enforcement remains difficult. Often, as is the case with India, corrupt government and local officials exploit industrialized countries' pre-existing economic incentives in order to ignore waste trade restrictions.[192] The twin temptation exists for developing countries to earn a quick and much-needed buck, providing immediate benefits without comprehending the long-term health and environmental risks.[193]

The original Convention recognized these warring motives and incentives and responded by requiring each Party to develop domestic measures "to prevent and punish conduct in contravention of the Convention."[194] Like most treaties of its kind, the Basel Convention relies primarily upon "self-policing" and political pressures to discourage

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189. Basel Convention 1989, art. 9(1)(e).

190. Article 9(5) of the Basel Convention specifies that "[e]ach Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic. The Parties shall co-operate with a view to achieving the objects of this Article." *Id.* art. 9(5). Note that because of economic and political pressures, lack of resources, etc., in developing nations, upon whom responsibility to police international activity will inevitably reside, the strict enforcement of an export ban upon those nations choosing to engage in such profitable illegal traffic in hazardous wastes will not likely result. *See* ASANTE-DUAH & NAGY, *supra* note 23, at 109-110.

191. It is contended that in order to successfully enforce the Ban Amendment, there must be sufficient and effective "infrastructure" in place to prevent unauthorized shipments; otherwise, greedy nations will resort to illegal trade in hazardous waste. *See* KUMMER, *supra* note 27, at 81. However, this may not be a weakness of the Convention itself, but a fact of life reflecting that "persons who stand to make millions of dollars through illegal traffic will not be easily deterred." *Id.* at 82 (footnote omitted).

192. *See* ASANTE-DUAH & NAGY, *supra* note 23, at 110.

193. *See id.*

194. Basel Convention 1989, art. 4(4).

breaches.[195] It also left open the stratifying concept of liability by allowing the Protocol Working Group (PWG) to specify the "appropriate rules and procedures"[196] with a view to adopting "as soon as practicable."[197] The PWG met several times to discuss the appropriate scope of liability, and the form and mode of compensation under the Convention.[198] At the first meeting of the ad hoc group, it set out four broad goals for liability protocol development:

> [(1)] The victim should be protected; [(2)] The person who created the risk should, in all fairness, be held liable for the consequences of that risk; [(3)] A good liability regime should in general provide an incentive to prevent waste generation; and Last, but not least, [(4)] such a regime would enable industry to know where it stood.[199]

Katharina Kummer criticizes the current Basel Convention liability scheme as failing to capture the concept of environmental reparation.[200] She outlines three aspects for ensuring compliance with international hazardous waste trade measures: (1) International guidelines, with an eye towards prevention, must "facilitate and support compliance" by providing a means of monitoring and verifying state and individual conduct;[201] (2) the guidelines should seek reparation of damage — *i.e.*, restoration of the environment and compensation to victims;[202] and (3) costs should be borne by the person or

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195. *See* Vu, *supra* note 185.

196. Basel Convention 1989, art. 12.

197. *Id. See also* Muthu S. Sundram, *Basel Convention on Transboundary Movement of Hazardous Wastes: Total Ban Amendment*, 9 PACE INT'L L. REV. 1 (1997) (discussing the development of liability protocol).

198. *See generally* SECRETARIAT BASEL CONVENTION, DOCUMENTATION AND REPORTS ON THE DEVELOPMENT OF PROTOCOL ON LIABILITY AND COMPENSATION FOR DAMAGE RESULTING FROM THE TRANSBOUNDARY MOVEMENT AND DISPOSAL OF HAZARDOUS WASTES, SBC No. 97-003 (1997).

199. *Final Report of Ad Hoc Working Group of Legal and Technical Experts*, July 6, 1990, UNEP/CHW/WG.1/3, *in* DOCUMENTATION AND REPORTS ON THE DEVELOPMENT OF THE PROTOCOL ON LIABILITY AND COMPENSATION FOR DAMAGE RESULTING FROM THE TRANSBOUNDARY MOVEMENT AND DISPOSAL OF HAZARDOUS WASTES, SBC No. 97/003 (1997).

200. *See* KUMMER, *supra* note 27, at 222. The draft liability protocol imposes strict liability for environmental damage, holding all those participating in the trade export transaction jointly and severally liable. *See id.* at 244-45. The Basel Convention further imposes the duty to re-import hazardous wastes that cannot be disposed of properly and safely under the Convention upon the exporting state. *See* Basel Convention 1989, art. 8.

201. *See* KUMMER, *supra* note 27, at 212.

202. *Id.* at 212-13.

state controlling and benefitting economically from the hazardous wastes.[203]

Efforts to stop illegal toxic waste trade in Australia are currently stifled by enforcement and monitoring difficulties contained within Australian law.[204] In addition, Helen Blain of Australia's Environment Protection Group identified problems within the Australian Customs Service and international customs codes that create a discrepancy between Basel Convention waste descriptions and the codes.[205]

Depite these difficulties, the Hazardous Waste Act subjects a person or a corporate body to punishment if they "knowingly, recklessly or negligently" export or import hazardous wastes without the relevant permit or in breach of permit conditions.[206] This offense is punishable by a fine of up to one million dollars against a corporate body or by imprisonment of up to five years for an individual.[207] If a person knowingly or recklessly makes a false or misleading statement in relation to prior informed consent or an article 11 agreement and its terms, he incurs a penalty of six thousand dollars.[208] For continued noncompliance, the Minister can apply to the court for an injunction.[209]

Article 16 of the Basel Convention creates and specifies the functions of the Basel Convention Secretariat. Many of these functions are merely supervisory rather than regulatory in nature.[210] For example, she assists the parties to the Convention in identifying illegal traffic and circulates information among the parties that may result in the assertion of moral and political pressure upon them to discontinue and punish such activities.[211] In addition, because the Secretariat already possesses expertise as the monitor of global waste movements, she should also be empowered to adjudicate disputes between member nations under the Convention and to adapt the

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203. *Id.* at 213. Note, this may also justify imposing the responsibility to prohibit OECD to non-OECD trade in hazardous wastes solely upon OECD nations.

204. *See* Ilana Eldridge, *Environment: Toxic Waste Shipment a Test Case for Australia,* INTER PRESS SERV., Nov. 20, 1997, *available in* 1997 WL 13257735.

205. *See Hazardous Waste Act Policy Reference Group Nineteenth Meeting, February 4, 1998*, *supra* note 81, at 5.

206. Hazardous Waste Act 1989, § 40(3).

207. *See* Brown, *supra* note 41.

208. *See* Hazardous Waste Act 1989, § 55(1).

209. *See id.* § 41.

210. *See* Basel Convention 1989, art. 16(1)(a)-(j). For example, some of her functions include preparing and disseminating progress reports provided by each member state, coordinating with other international authorities, gathering together information regarding available disposal and reclamation sites, conveying technical assistance to requesting parties, identifying and circulating information of illegal traffic, and aiding in an emergency. *See id.* art. 16(b)-(j). Additional functions may be added by the Conference of the Parties pursuant to article 16(1)(k).

211. *See* KUMMER, *supra* note 27, at 71.

Convention to technological changes.[212] She should assert the same type of pressure upon Parties refusing to ratify the Convention or the Ban Amendment.

Non-governmental organizations (NGOs) should also aid in enforcing Convention provisions or in encouraging ratification. Certainly, NGOs such as the Basel Action Network, Greenpeace and the ICC have significantly contributed to the dialogue during the Convention's evolution. However, without a corresponding increase in their legal capacity in the international judicial system, their enforcement power will remain limited.[213] Thus, because the nature of international environmental agreements requires a unique system of enforcement and liability, preventative national legislation providing environmental reparation and just compensation from the perpetrator should be specified through the work of the Ad Hoc Group of Legal and Technical Experts to the Basel Convention. Parties to the Convention need guidance in developing liability and compensation systems, which are not only specific to their needs, but also conscious of an effective international environmental enforcement scheme. However, before the fine is levied or the individual imprisoned, an impartial third party must evaluate the charges.

B. *Adjudication and Settlement of Disputes*

Once an allegation of illegal trafficking in hazardous waste is made or when a Convention breach occurs and is not immediately corrected, the complaining Party has a variety of options with which to seek settlement of the dispute. When one Party to the Convention has reason to believe that another Party has breached any of the Convention provisions, the complaining Party may so inform the Secretariat, and, if the Secretariat is informed, the complaining party "shall simultaneously and immediately inform" the accused Party of the allegations.[214] The wronged Party then has the option under article 20 of negotiation, or, failing that, either arbitration or submission to the International Court of Justice (ICJ), subject to agreement by both parties.[215]

The possibility of an offending Party's refusal to submit to ICJ jurisdiction, coupled with the ICJ's inexperience adjudicating environmental disputes, creates further difficulties in cases where peaceful negotiation

212. *See* Vu, *supra* note 185.

213. *See* Schneider, *supra* note 83, at 281.

214. *See* Basel Convention 1989, art. 19.

215. *See id.* art. 20(1)-(2). *See also* Vu, *supra* note 185 (describing ICJ jurisdiction and authority in these disputes).

proves insufficient.[216] It is unjust for a court that has never adjudicated a conflict between environmental and trade regulations, and that is only familiar with the latter, to handle conflicts with trade and environmental laws because these laws are aimed at different and contradictory purposes.[217] To further complicate matters, in order to assert standing to bring suit before the ICJ, the dispute must involve a "legally protected interest."[218] As a result, some nations may be unable to bring offenders of the ban before the court because they are unable to prove that the right to be free from unwanted hazardous waste trade constitutes a legally protected interest.[219] Instead, the Basel Convention must impose an "affirmative obligation" upon the Parties to submit to ICJ jurisdiction and an increase in ICJ jurisdictional authority.[220] Without these safeguards, together with enforcement efforts, those that enjoy the benefits and protections of the Basel Convention may impose unfair burdens upon other Convention members through their perpetuation of the illegal hazardous waste trade for profit.

V. CONCLUSION & PROPOSAL

Australia should ratify the Ban Amendment immediately, implement internal legislation that complies with the article 4A Ban Amendment and refrain from forming or attempting to enforce conflicting bilateral or multilateral treaties allowing hazardous waste export to non-OECD countries. Australia cannot legitimately claim to support and uphold the principles of the Convention while refusing to ratify the Ban Amendment. In addition, to prevent resistance to ratification and promote ban enforcement, whether through the use of article 11 agreements between OECD and non-OECD nations or through other trade practices in derogation of Convention purposes, the power of the Secretariat should be increased where financially feasible. Also, the possibility of ICJ jurisdiction should be added to the Convention as an affirmative command. Further, NGOs such as Greenpeace, Basel Action Network, and even foes of the Ban Amendment such as the International Chamber of Commerce, should enjoy increased international legal discretion and influence. They can aid in enforcing and policing the ban by ensuring the proper scope of hazardous material coverage. Wealthy

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216. *See* Schneider, *supra* note 83, at 282. *See also id.* at 273 (discussing the Basel Convention's inability to hold violators financially accountable).

217. *See* Guruswamy, *supra* note 145, at 226. Free trade regulations principally ignore environmental impacts and emphasize economic maximization, while environmental regulations prostrate economic concerns for the health of living things. *See generally id.* at 190-94.

218. *See* Schneider, *supra* note 83, at 282.

219. *See id.*

220. *See id.*

industrialized nations like Australia and Canada should not be permitted to enjoy the benefits of Convention membership while avoiding the costs of disposing of or recycling wastes responsibly.

Accordingly, the Fifth Conference should reinforce Convention objectives by refusing to tolerate Australia's and other Convention delegates' attempts to stall ban ratification, especially given the recent clarification of hazardous materials covered at the Fourth Conference. The Fifth Conference should also require that any existing multilateral or bilateral treaty between an OECD and non-OECD nation, once valid under article 11, be revoked immediately as a violation of the Basel Ban. The added benefit of having the United States lend its support to the Basel Convention and ban decision by ratifying the Convention would certainly prove valuable, but more importantly, current Convention members should not allow the United States' continued abstention to influence their resolve to limit irresponsible transboundary movement of hazardous wastes. Members of the original consensus decision which instituted the ban should work together to remedy alleged confusions and differences, and they should ratify the ban to derive the three-fourths vote necessary to create enforceable international law. This will not only provide the majority required, but it will also prevent opportunistic waste trade zealots like Australia from taking advantage of the international confusion over the Ban Amendment.

*Kimberly A. Breitmeyer**

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* J.D. candidate, 2000, Indiana University School of Law — Indianapolis; B.S., Environmental and Natural Resource Policy Studies, 1997, Michigan State University. The author hopes to alert the international community to the variety of concerns posed by the transboundary disposal and treatment of hazardous waste in developing countries.

ARE UNITED STATES AIRLINES PREPARED TO HANDLE IN-FLIGHT MEDICAL EMERGENCIES?

I. INTRODUCTION

Soaring over the Atlantic Ocean at 40,000 feet, you suddenly find yourself having trouble breathing and you feel a tightness in your chest. You know these are symptoms of a heart attack. You think to yourself, this cannot be happening to me, especially here, on an airplane and so far from a hospital. You hope that if your condition is serious that the airline is equipped to handle a life-threatening situation. However, as your family soon discovers, it is not.

This situation does happen and could happen to you. "Each year, an unknown number of U.S. airline passengers dies not as the result of a crash or a fire, but because the medicines and equipment that might have saved their lives were not on board the plane."[1] "Roughly one out of every 10,000 airline passengers will experience an in-flight medical emergency."[2] In 1996, 10,471 in-flight medical emergencies were reported in the United States alone, which is an average of twenty-nine emergencies per day.[3] However, accurate statistics on in-flight medical emergencies and deaths do not exist because airlines are not required to report them.[4] The Federal Aviation Administration[5] (FAA) only requires air carriers to report in-flight

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1. John Crewdson, *Cardiac Arrest at 37,000 Feet*, CHI. TRIB., June 30, 1996, § 2, at 1.

2. Douglas W. Nelms, *One in a Million: As the Number of Medically At-Risk Passengers Continues to Increase, so Do the Odds of Having an In-flight Medical Emergency*, AIR TRANSPORT WORLD, Oct. 1, 1997, at 82. This statistic is based on a Lufthansa report and is considered the industry's "best guess" figure. *See id.*

3. *See* Susan Okie, *Cardiac Arrest in the Air—Without the Tools to Cope*, WASH. POST, Jan. 15, 1998, A01, A6. Heart disease accounted for 1,020 of the emergencies reported. *See id.* From 1994-1996:

> American Airlines recorded some 4,800 in-flight medical emergencies of all types, including those not attended by physicians. If American's experience is similar to other airlines, there could have been more than 12,000 such emergencies aboard U.S. commercial airlines last year [1995]—an average of 32 a day, or more than 10 times the estimate produced by the FAA's 1986-1988 study.

John Crewdson, *How Many People Die on Airplanes? We're Interested in Aircraft Accidents, Not Heart Attacks, an FAA Official Says. Airline, FAA Data Woefully Incomplete*, CHI. TRIB., June 30, 1996, § 2, at 9.

4. *See* Judy Foreman, *If You Get Sick In-flight, Friendly Skies Can Turn Ugly: Flight Crews Aren't Trained to Deal with Medical Emergencies*, BOSTON GLOBE, Dec. 22, 1997 (visited Sept. 18, 1998) <http://www.tdo.com/features/health/stories/1222/index.htm>.

5. One of the responsibilities of the FAA is to improve and maintain safety standards for airlines, which includes safety rulemaking. *See generally* 14 C.F.R. § 121 (1998).

medical emergencies whenever a death occurs,[6] an aircraft is diverted, or when the onboard medical kit is used.[7] It is shocking to report that "[i]n an era when airline computers keep track of passengers' meal and seating preferences and the number of miles they fly, neither the Federal Aviation Administration nor the airlines can say how many people get sick on this country's airplanes or even how many die."[8]

There is disagreement among experts as to the scope of in-flight medical emergencies. Some experts believe that the number of emergencies is relatively small, while others believe that the number of people who die on flights each year is much greater than the number that die in airline crashes.[9] Regardless of which statistic is accurate, in-flight medical emergencies, including deaths, are a significant problem and are frequently overshadowed by spectacular airline crashes.[10]

As air travel becomes less expensive and more accessible, the number of people expected to fly will increase; therefore, the problem of in-flight medical emergencies will likely increase as well. Boeing, a major aircraft manufacturer, estimates that air travel will rise seventy-five percent by 2006.[11] If more people are flying in general, more "medically at-risk" passengers will also fly.[12] In addition, more "at-risk" passengers will be

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6. "[M]any airlines discourage an official declaration of death until after a passenger's body has been taken from the plane." Crewdson, *supra* note 3, § 2, at 9. With larger aircraft having several flight attendants available, CPR can be performed until the plane lands and a medical official can pronounce the passenger dead, and the airline will not have to record the death onboard. *See* Okie, *supra* note 3, at A6. Also, airlines do not have to provide any follow-up information on medical emergencies. *See id.*

7. *See* Linda L. Martin, *The Shock that Revives*, BUS. & COM. AVIATION, June 1, 1997, *available in* 1997 WL 10773863.

8. Crewdson, *supra* note 3, § 2, at 9.

9. *See* Tamar Nordenberg, *Air Aid: Medical Kits Reach New Heights* (visited Sept. 28, 1998) <http://www.fda.gov/fdac/features/1998/198_air.html>. "Published news reports . . . suggest that as many as 350 people a year die from in-flight medical problems . . . [which is] a lot more than the number of deaths from plane crashes, which range from a handful per year to more than 250, according to the National Transportation Safety Board." Foreman, *supra* note 4. "What the industry does not say is that commercial aviation is so safe that more passengers may die, on average, from in-flight medical emergencies than in aircraft accidents." Crewdson, *supra* note 3, § 2, at 9. "[A]ir travel in the U.S. is so safe that passengers are now more likely to die of an acute midair illness than in a crash." Crewdson, *supra* note 1, § 2, at 1.

10. *See* John Crewdson, *Ill in the Air? Don't Count on Fast Landing*, CHI. TRIB., Aug. 4, 1996, § 1, 1 at 15. Hundreds of U.S. airline passengers die every year because life-saving drugs and medical equipment were not onboard the plane. *See id.* In some cases, passengers die because the planes carrying these sick passengers do not land immediately. *See id.*

11. *See* Nelms, *supra* note 2, at 82.

12. *See id.*

flying as a result of the Americans with Disabilities Act.[13] Certain aspects in the nature of flying can create problems that may not exist on the ground, especially for people who already suffer from an illness.[14]

An awareness of the extent of emergencies in-flight could help airlines make a cost-benefit analysis when determining what equipment to carry in preparing for these situations.[15] Some experts believe airlines "should be better equipped for in-flight treatment because it's not always possible to land quickly where good medical care is available."[16] From an economic viewpoint, diverting an aircraft is costly and can cause scheduling difficulties for other passengers onboard.[17] Due to both the passengers' health and

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13. *See id.* "The Americans with Disabilities Act states that anyone who wants to fly on an airline can, regardless of his/her physical condition." Nelms, *supra* note 2, at 82. The Americans with Disabilities Act in 1990 stated that "no person could be denied full access to public transportation because of a disability." *Airlines Adding Defibrillators* (visited Sept. 28, 1998) <http://www.hookman.com/hc9802.htm>. Moreover, the Air Carrier Access Act guarantees that people with disabilities will receive nondiscriminatory treatment when traveling by air. *See* 49 U.S.C.A. § 41705 (West 1997). *See also The Air Carrier Access Act—Make it Work for You* (visited Nov. 13, 1998) <http://www.pva.org/access/aircarr/tacaa01.htm>. In 1990, the Department of Transportation (DOT) required some airlines to design more accessible aircraft and required airlines to modify their practices to ensure that passengers with disabilities do not encounter discrimination. *See id.*

14. The May Clinic has stated:

> Decreased cabin air pressure at high altitudes can cause chest pain for people with severe coronary artery disease and shortness of breath for people with lung disease. Sitting for a long time in a fixed, upright position may cause blood pooling and clotting in the veins of your legs. Time zone changes may disrupt medication schedules. Variable cabin temperatures, humidity and noise or vibration levels may cause discomfort.

Mayo Clinic, *Staying Well Aloft: Avoiding In-Flight Medical Emergencies*, HEALTH OASIS (Feb. 21, 1996) <http://www.mayohealth.org/mayo/9602/htm/in-fli2.htm>. *See also* Farrol Kahn, *Beware of Low Flow on Aircraft*, FIN. TIMES, Mar. 23, 1998, at 19, *available in* 1998 WL 3541879 (stating air travel is a significant factor in causing blood clots).

> While many fliers have the same heart attacks, strokes or other emergencies that they might have on the ground, there is also an increased risk in flight because the reduced air pressure in the cabin — often equivalent to being at about 8,000 feet altitude — means less oxygen gets into the bloodstream than at sea level. This poses a particular problem for anyone with anemia, or cardiac and respiratory problems.

Foreman, *supra* note 4.

15. *See* Joan Sullivan Garrett, *Preparing Non-Medical Personnel to Save Lives with AEDs: Corporate Aviation is in a Position to Lead the Way* (visited Sept. 28, 1998) <http://www.medaire.com//wpflsafe.htm>.

16. Kathryn Ericson, *Lawsuits Blame Airlines' Response to Medical Emergencies*, WEST'S LEGAL NEWS, Oct. 28, 1996, at 11440, *available in* 1996 WL 615194.

17. *See id.*

additional expenses incurred in an emergency landing,[18] airlines are looking for more ways to handle in-flight medical emergencies.[19]

The concern of in-flight medical emergencies has prompted the U.S. government to take steps to address the issue.[20] The federal government has realized that its more than decade-old regulations regarding airline preparation for in-flight medical emergencies are inadequate.[21] On April 24, 1998, President Clinton signed into law the Aviation Medical Assistance Act.[22] This Act directs the FAA to review its existing regulations regarding the required equipment to be carried in emergency medical kits on commercial aircraft and the training requirements of flight attendants who use the equipment.[23] The Act requires the FAA to begin a rulemaking process to modify the existing regulations as a result of the reevaluation.[24] It also requires the FAA to make a determination whether to mandate defibrillators as part of the emergency medical equipment on airplanes and in airports throughout the country.[25] The Act also requires the airlines to make a good faith effort to report emergencies and deaths so that the FAA can get a more accurate idea of the scope of the problem.[26]

Some issues involved in deciding what equipment and medication to carry on commercial airlines are: (1) the cost of advanced medical equipment on each plane; (2) whether the patient should be treated during flight or on the ground; and (3) the liability to the airlines and safety of the passengers on the aircraft if sharp medical instruments and drugs get into the wrong hands.[27] Some medical groups have warned the FAA that certain drugs and devices, if misused, "could do more damage than good."[28] The FAA must also take into consideration electronic interference when deciding

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18. Airlines can incur costs of hundreds of thousands of dollars if a plane must make an emergency landing. *See* Foreman, *supra* note 4. The pilot may have to dump fuel to avoid the dangers of landing the plane with full tanks. *See id.* Also, the airline may have to put delayed passengers in hotels or on other airlines to get them to their final destinations. *See id.*

19. *See id.*

20. *See generally* Bryon L. Dorgan, *President Signs Dorgan-Frist Defibrillator Bill: FAA Will Reevaluate the Need for Life Saving Medical Equipment Aboard Commercial Aircraft*, GOV'T. PRESS RELEASES, Apr. 28, 1998, *available in* 1998 WL 7323216.

21. *See id.*

22. Aviation Medical Assistance Act of 1998, Pub. L. No. 105-170, 112 Stat. 47 (to be codified at 49 U.S.C. § 44701).

23. *See id.* § 2.

24. *See* Dorgan, *supra* note 20.

25. *See id.*

26. *See* Aviation Medical Assistance Act of 1998, Pub. L. No. 105-170, § 3, 112 STAT. 47, 47-48 (to be codified at 49 U.S.C. § 44701).

27. *See* Ericson, *supra* note 16.

28. Okie, *supra* note 3, at A6.

what type of medical equipment to require onboard commercial aircrafts.[29] "Any electronic medical equipment carried onboard an aircraft must be certified free from any potential for electronic interference with flight instruments or aircraft controls."[30]

The purpose of this note is to evaluate the current FAA regulations on in-flight medical emergencies for U.S. carriers and compare these regulations to those of the European Union according to several standards such as: (1) the minimum emergency medical equipment required onboard; (2) the minimum training requirements for flight attendants; and (3) the extent of liability of the airline, crewmembers, and any medically-trained passenger who assist during an in-flight medical emergency. Part II will give a brief background of commercial aviation in the United States and how it has evolved into the mega industry it is today. Part III sets forth the current U.S. regulations promulgated by the FAA. Part IV explains how commercial aviation in the European Union is regulated and sets forth the laws that currently govern the European Union. Part V compares U.S. and European Union regulations. Part VI provides several recommendations to the FAA for upgrading the medical equipment required on all U.S. commercial airlines and the training given to flight attendants to deal with these problems. Also, Part VI offers a recommendation for the type of action needed to allow a crewmember or other passenger to aid a sick passenger without having to worry about a lawsuit for misdiagnosing or treating the passenger while in the air.

II. BACKGROUND

Regularly-scheduled passenger and express carriers began operating in the mid-1920s.[31] "The premier carrier to offer sustained service was Western Air Express, which began its Salk [sic] Lake City-to-Los Angeles route on May 23, 1926."[32] In 1926, little thought was given to in-flight medical emergencies. Flying was basically for the wealthy and adventurous and was mainly domestic in nature.

> Between 1926 . . . and 1993 the industry grew from 6,000 passengers flying 1 million passenger miles a year—and paying a dollar a mile (in 1993 dollars) for the speedy but cramped new service—to nearly half a billion passengers flying nearly a half

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29. *See In-Flight Medical Kits, 1997: Hearing Before the Subcomm. on Aviation of the House Comm. on Transp. and Infrastructure*, 105th Cong. 146 (1997) (statement of the Air Line Pilots Association) [hereinafter *In-Flight Medical Kits*].

30. *Id.*

31. *See* 1 MYRON J. SMITH, JR., THE AIRLINE BIBLIOGRAPHY: THE SALEM COLLEGE GUIDE TO SOURCES ON COMMERCIAL AVIATION 13 (1986).

32. *Id.*

trillion passenger miles for thirteen cents a mile.[33]

In the early years, flight attendants were men — stewards[34] — but this practice quickly changed in the 1930s.[35] Airlines hired only women, whom they called stewardesses, from the 1930s to the 1970s.[36] On May 15, 1930, Ellen Church, a previously-trained nurse, became the premier stewardess by making her first flight for Boeing Air Transport[37] between San Francisco and Cheyenne.[38] Although passenger health was not necessarily an issue, Ellen Church, as a nurse and a stewardess, started the chapter in aviation history of flight attendants being recognized as safety professionals.[39] In the early years, stewardesses were role models for young women; however, they were also subjected to many sexual advances by pilots, passengers, and their companies.[40] Unfair weight and marriage stipulations were endured by female stewardesses in order to continue employment.[41] For many years, flight attendants fought to be treated with more respect and to have their profession taken seriously.[42]

Today, flight attendants are both male and female and their duties are primarily focused on safety.[43] Flight attendants are trained by their employers, and each training program lasts between three to seven weeks, depending on the airline.[44] Training includes classroom and in-flight simulated experiences.[45] Although a flight attendant's job consists mainly of customer service, the primary role of flight attendants is one of safety.[46] Without the proper training and equipment, flight attendants have a difficult time performing this important job.[47]

In 1983, the Court of Appeals, District of Columbia Circuit, held in

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33. STEVEN A. MORRISON & CLIFFORD WINSTON, THE EVOLUTION OF THE AIRLINE INDUSTRY 6 (1995).

34. *See* SMITH, *supra* note 31, at 89.

35. *See id.*

36. *See id.*

37. Boeing Air Transport was a predecessor of United Airlines. *See* SMITH, *supra* note 31, at 205.

38. *See id.* at 89.

39. *See Requirements for Medical Equipment on Airlines, 1997: Hearing Before the Subcomm. on Aviation of the House Comm. on Transp. and Infrastructure*, 105th Cong. 93 (1997) (testimony of Denise C. Hedges, President, Association of Professional Flight Attendants) [hereinafter *Requirements for Medical Equipment on Airliners*].

40. *See* SMITH, *supra* note 31, at 89.

41. *See id.*

42. *See id.*

43. *See id. See also Requirements for Medical Equipment on Airliners*, *supra* note 39, at 93.

44. *See* SMITH, *supra* note 31, at 89.

45. *See id.*

46. *See Requirements for Medical Equipment on Airliners*, *supra* note 39, at 93.

47. *See id.*

Bargmann v. Helms that the Federal Aviation Administration had authority to institute rulemaking pursuant to its statutory mandate of regulating "safety."[48] The issue in *Bargmann* was whether the FAA possessed the statutory authority to institute rulemaking to upgrade the quality of first-aid kits currently carried onboard commercial aircraft.[49] The FAA said it lacked the "power, under its mandate to regulate 'safety' in the Federal Aviation Act of 1958, to require commercial aircraft to carry medical equipment designed to treat health problems that 'occur' in flight but are not 'caused by' flight."[50] The court disagreed, holding that "the FAA has the statutory authority to proceed with a rulemaking on the subject should it deem such action advisable on the merits."[51] The court emphasized that the FAA does not have to require such equipment, simply that the FAA has the authority to do so.[52] *Bargmann* demonstrates that the FAA does have the authority to require airlines to carry equipment necessary to handle in-flight medical emergencies.

After *Bargmann* was decided, the FAA set out requirements for large commercial aircraft to carry emergency medical kits.[53] Besides setting minimum standards for safety equipment required onboard the aircraft, the FAA promulgates regulations for airlines to follow when training flight attendants on safety-related issues.[54] However, the question still remains whether or not those regulations and standards are enough to meet today's in-flight medical needs.[55]

Some U.S. airlines have taken action beyond the FAA's minimum standards in order to make flying a safer experience for their passengers.[56] In November 1996, the FAA approved the use of biphasic external defibrillators[57] (devices to treat sudden cardiac arrest), and that same month, American Airlines became the first U.S. carrier to install defibrillators, which it placed only on its international aircraft.[58] In 1998, shortly after

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48. *See* Bargmann v. Helms, 715 F.2d 638 (D.C. Cir. 1983). *See also* Ericson, *supra* note 16.

49. *See* Bargmann, 715 F.2d at 638.

50. *Id.* at 638-39.

51. *Id.* at 639.

52. *See id.*

53. *See* 14 C.F.R. § 121.309(7)(d)(ii) (1998).

54. *See generally* 14 C.F.R. § 121.417 (1998).

55. *See generally* Nelms, *supra* note 2.

56. *See id. See also Airlines Adding Defibrillators*, *supra* note 13.

57. *See* Aaron Howard, RN, *Heart Attack at 30,000 Feet*, NURSEWEEK/HEALTHWEEK, Apr. 3, 1998 (visited Nov. 21, 1998) <http://www.nurseweek.com/features/98-4/rescue.html>.

58. *See* Nelms, *supra* note 2, at 84.

placing defibrillators on only its international aircraft,[59] American Airlines equipped all its aircraft with defibrillators.[60] They also enhanced the on-board medical kit by adding more prescription medicines to treat cardiac arrest, epileptic seizures, asthma, bronchitis, psychosis, anxiety, nausea, vomiting, motion sickness, and postpartum bleeding.[61]

Although the FAA has not updated commercial airline regulations for in-flight medical equipment for twelve years, many airlines, such as American, are initiating the much-needed changes.[62] Shortly after American Airlines upgraded their equipment, Delta, United and Alaska Airlines followed suit.[63] Regardless of the FAA ruling, in the near future, many U.S. carriers are expected to do the same.[64] Other carriers across the globe have carried defibrillators and enhanced emergency medical kits for years, setting a high standard in the industry.[65] Virgin Atlantic Airways and Qantas, the Australian airlines, have carried defibrillators for the last three years.[66] Cathay Pacific Airways based in Hong Kong and Air Zimbabwe also carry

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59. In June 1997, American Airlines added defibrillators to its overwater fleet to help treat sudden cardiac arrest. *See American Airlines' Purchase of Heart Defibrillators Justified on Safety Alone but Could Also Limit Liability*, WORLD AIRLINE NEWS, Apr. 4, 1997, *available in* 1997 WL 8541644 [hereinafter *American Airlines' Purchase of Heart Defibrillators*]. *See also American Airlines: American Airlines Equips International Fleet with Defibrillators*, M2 PRESSWIRE, July 2, 1997, *available in* 1997 WL 11937470 [hereinafter *American Airlines: American Airlines Equips*]. On May 1, 1998, American started adding automatic external defibrillators and enhanced medical kits on its domestic flights. *See American Adds Defibrillators, Enhanced Medical Kits to Domestic Fleet*, AVIATION DAILY, May 1, 1998, at 193 [hereinafter *American Adds Defibrillators*]. *See also* John Crewdson, *Medical Gear Upgrade Lets American Airlines Keep Pace Defibrillators, Drug Kits Will Be Added to its Domestic Flights*, CHI. TRIB., Jan. 14, 1998, § 1, at 3 [hereinafter Crewdson, *Medical Gear Upgrade*]. During an American Airlines flight from Texas to Mexico, passenger Robert Giggey became the first person to be successfully saved from cardiac arrest with the use of a defibrillator onboard the airline. *See* John Crewdson, *Defibrillator Aboard Jet Saves Cardiac Victim*, PITT. POST-GAZETTE, Feb. 22, 1998, at A3, *available in* 1998 WL 5235033 [hereinafter Crewdson, *Defibrillator Aboard Jet*].

60. *See American Adds Defibrillators*, *supra* note 59, at 193.

61. *See* Crewdson, *Medical Gear Upgrade*, *supra* note 59, § 1, at 3. *See also American Airlines: American Airlines Equips*, *supra* note 59; *American Adds Defibrillators*, *supra* note 59.

62. *See* Crewdson, *Defibrillator Aboard Jet*, *supra* note 59, at A3.

63. *See* CNN Financial Network, *Fly the Healthy Skies* (Aug. 3, 1998) <http://europe.cnnfn.com.fntraveler/9808/03/biztravel>. *See also Delta Equipping Fleet with Defibrillators*, AVIATION DAILY, Jan. 15, 1998, at 84. *See also* Crewdson, *Defibrillator Aboard Jet*, *supra* note 59, at A3. *See also Renewed Interest for Defibrillators Aboard Aircraft*, AIR SAFETY WEEK, Mar. 9, 1998, *available in* 1998 WL 7199991 [hereinafter *Renewed Interest*].

64. *See Defibrillator Aboard Jet*, *supra* note 59, at A3.

65. *See id.*

66. *See* John Crewdson, *Hong Kong Carrier is Latest to Add In-flight Defibrillators*, CHI. TRIB., Feb. 28, 1997, § 1, at 3.

defibrillators on their aircraft.[67] The increasing concern for upgraded medical equipment is evident by the actions of these airlines.

III. Current U.S. Law: FAA Standards

The FAA has required large U.S. passenger-carrying aircraft to carry emergency medical kits since 1986.[68] However, these rules have not been revised since they were initiated.[69] Airlines must also carry basic first-aid kits on their aircraft that are readily accessible to the cabin flight attendants.[70] Approved first-aid kits must be dust-free and moisture proof, contain only approved materials and be distributed evenly throughout the aircraft.[71] The minimum number of first-aid kits depends on the number of passenger seats on the aircraft, ranging anywhere from one to four kits.[72] One approved emergency medical kit must be onboard each aircraft and be readily accessible to crewmembers.[73] Doctors or other health professionals are the only persons authorized to open the emergency medical kits.[74]

Not only does the FAA regulate the contents of the first-aid kits and the emergency medical kit, but it also sets the training requirements for flight attendants.[75] Proper training of crewmembers, especially flight attendants, is essential for any in-flight medical emergency.[76] It is important for airlines

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67. *See id.*

68. *See Requirements for Medical Equipment on Airlines 1997: Hearing Before the Subcomm. on Aviation of the House Comm. on Transp. and Infrastructure*, 105th Cong. 96 (1997) (statement of Dr. Jon L. Jordan, Fed. Air Surgeon). *See also What Aircraft Medical Kits Must Include*, GANNETT NEWS SERVICE, May 21, 1997, *available in* 1997 WL 8828363.

69. *See* Okie, *supra* note 3, at A6.

70. *See* 14 C.F.R. § 121, app. A (1998).

71. *See* 14 C.F.R. § 121, app. A (1998). With few exceptions, each first-aid kit must contain the following approved contents: sixteen one-inch adhesive bandage compresses; twenty antiseptic swabs; ten ammonia inhalants; eight four-inch bandage compresses; five forty-inch triangular bandage compresses; one noninflatable arm splint; one noninflatable leg splint; four four-inch roller bandages; two one-inch standard rolls of adhesive tape; and one pair of bandage scissors. *See id.* Arm and leg splints that do not fit in the first-aid kit may be stowed in a readily accessible location as close as possible to the kit. *See id.*

72. *See id.*

73. *See id.* The emergency medical kit must contain a blood pressure cuff and a stethoscope, both of which, according to Dr. Andrew Horne, a retired FAA official, were included primarily for effect. *See* John Crewdson, *A Question of Philosophy: First Aid vs. Emergency Medicine*, CHI. TRIB., June 30, 1996, § 2, at 6.

74. *See* Foreman, *supra* note 4.

75. *See generally* 14 C.F.R. §§ 121.400-121.429 (1998).

76. *See In-Flight Medical Kits, supra* note 29, at 146.

> With only two pilots in the flightdeck, it is not possible in many instances for a pilot to assist a flight attendant in handling a medical emergency. In that case, the flight attendant must be able to handle the emergency, interact with the flight crew, and communicate with medical personnel, either on board the

to develop clear and comprehensive procedures to cover in-flight medical emergencies.[77]

"Some flight attendants have first aid training. However, they are neither legally obligated nor licensed to handle passengers' medical needs."[78] During a flight attendant's initial training, the FAA requires "[e]ach training program . . . [to] provide . . . emergency training . . . with respect to each airplane type, model, and configuration, each required crewmember, and each kind of operation conducted, insofar as appropriate for each crewmember and the certificate holder."[79] Emergency training must provide, among other things, an orientation to "[f]irst aid equipment and its proper use . . . [and] [i]llness, injury, or other abnormal situations involving passengers or crewmembers to include familiarization with the emergency medical kit."[80] Each crewmember must demonstrate the use of each type of emergency oxygen system on the aircraft[81] and must receive instruction in respiration and hypoxia.[82] The majority of time during flight attendant training is spent on emergency evacuation drills.[83] Although flight attendants are well trained to handle an evacuation, they usually are given only minimal instruction to handle a heart attack, an epileptic seizure, or any other illness or injury that may arise unexpectedly during flight.[84] The reason they are not given extensive training on medical emergencies could be because they are not required to perform emergency care on their passengers.

United States commercial airlines are classified as "common carriers"

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airplane or on the ground.

Id.

77. *See id.*

78. Mayo Clinic, *supra* note 14. The FAA does not require crews to learn CPR, but some carriers still provide CPR and other medical training. *See* Foreman, *supra* note 4.

79. 14 C.F.R. § 121.417(a) (1998).

80. 14 C.F.R. § 121.417(b)(2)(ii), (b)(3)(iv) (1998).

81. *See* 14 C.F.R. § 121.417(c)(2)(i)(C) (1998).

82. *See* 14 C.F.R. § 121.417(e)(1), (2) (1998). Hypoxia is the lack of oxygen to the brain or a "[d]eficiency in the amount of oxygen reaching bodily tissues." THE AMERICAN HERITAGE DICTIONARY 634 (2d College ed. 1985). Hypoxia occurs during decompression of the aircraft and must be treated immediately with oxygen. *See* AMERICAN TRANS AIR, INC., FLIGHT ATTENDANT INFLIGHT MANUAL, ch. 5, at 9 (Mar. 30, 1997). The "time of useful consciousness" is the duration from the start of hypoxia until the decline of a person's constructive performance. *See id.* The approximate time of "useful consciousness" is 45 seconds at 30,000 feet and 18 seconds at 40,000 feet. *See id.*

83. *See generally* 14 C.F.R. § 121.417 (1998). Emergency evacuation training consists of knowing the location, function, and operation of emergency equipment. *See id.* § 121.417(b)(2)(i)-(iv). Flight attendants are trained to operate emergency exits in order to evacuate an aircraft during an emergency landing on land, as well as deploy rafts and evacuate during a water ditching. *See id.* § 121.417(b)(2)(i), (iv). They are trained to put out fires onboard the aircraft and handle hijacking, bomb threats, and other unusual situations. *See id.* § 121.417(b)(3)(ii), (v).

84. *See id.* § 121.417(a)(3)(iv).

and are not required to provide emergency care for their passengers. Consequently, when a medical emergency occurs on board an aircraft, flight attendants, who are in immediate charge of the safety and welfare of the passengers, have several options. They can deal with the problem themselves, they can ask for the assistance of any medically trained passengers on board, or they can "radio patch" to medical personnel on the ground. In addition, they can recommend to the pilot, who always has final responsibility,[85] that the aircraft land at the nearest airport, or they may request that emergency medical personnel meet the aircraft on arrival.[86] In light of these options, a flight attendant should have enough training and equipment to feel confident in handling an in-flight medical emergency.

IV. EUROPEAN UNION LAW: JAA STANDARDS

In Europe, the fifteen members of the European Union belonging to the Joint Aviation Authorities[87] (JAA) enacted, in April 1998, requirements regarding medical emergencies on airplanes which are similar to the requirements the FAA is seeking to implement in 1999.[88] Recent deregulation has created a need to harmonize civil aviation among the European communities.[89] Before deregulation, each community acted under

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85. Although the captain of an aircraft is in complete command of her plane, the reality is, a decision to land for medical reasons involves so many extra costs to the airline that the dispatchers and its medical department are usually a part of the decision-making process. *See* Crewdson, *supra* note 10, § 1, at 14. Extra costs include dumping fuel in order to avoid damage to the landing gear, paying extra landing and servicing fees, overtime for flight crews and rescheduling passengers' flights. *See id.* "United's pilot handbook contains the admonition that any captain considering an emergency medical landing is 'strongly advised' to contact both United's dispatchers and the airline's medical department 'before dumping fuel, diverting or otherwise compromising available options.'" *Id.* Part 121 of the Federal Aviation Regulations contains emergency provisions which state that "[i]n an emergency situation . . . [requiring] immediate decision and action[,] the pilot in command may take any action that he considers necessary under the circumstances." 14 C.F.R. § 121.557(a) (1998). For information relating to emergencies on supplemental air carriers and commercial operations, see 14 C.F.R. § 121.559 (1998).

86. *See* Richard O. Cummins & Jessica A. Schubach, *Frequency and Types of Medical Emergencies Among Commercial Air Travelers*, 261 JAMA 1295 (Mar. 3, 1989).

87. The 15 members of the European Union that are part of the Joint Aviation Authorities are Austria, Finland, Sweden, Spain, Portugal, Germany, Italy, United Kingdom, France, Netherlands, Greece, Belgium, Denmark, Ireland, and Luxembourg. *See The 15 Member States* (visited May 11, 1999) <http://ue.eu.int/en/info/15states.htm>.

88. *See* Barry James, *In Europe, Crews Trained to Cope with Trouble*, INT'L. HERALD TRIB., Jan. 16, 1998, at 4. "National governments are responsible for airline safety in Europe, and they approve and monitor aircraft or equipment." *Id.*

89. *See* 1998 O.J. (C 214) 37, arts. 1.2-1.3. *See also Europe Opens Up the Skies to Competition*, EUROWATCH, Apr. 18, 1997, *available in* LEXIS, EURCOM Library, EURWCH File. On April 1, 1997, the European airline industry completed its final stages

its own regulations, making for an inefficient society.[90] "The governments [of the member states] set up the Joint Aviation Authorities to oversee rule-making so that airlines operate under a common set of standards."[91]

The Joint Aviation Authorities, like the FAA in the United States, has developed technical requirements known as JAR-OPS, which are common air safety regulations that JAA members must follow.[92] The JAR-OPS requirements were adopted on March 28, 1995, and could be transposed into Community law in order to conform such requirements throughout the European Community.[93] The JAR-OPS requirements include training standards for cabin crews on commercial airlines.[94] They also make airlines ensure that cabin crews are capable of performing certain safety-related functions, including emergency procedures for an accident, a fire onboard an aircraft, depressurization of the cabin, and treating medical disorders among passengers.[95] Furthermore, they provide that the cabin crew should undergo certain medical examinations to ensure their fitness to carry out their duties.[96]

The members of the European Union have developed these common standards but currently leave it to each Member State to decide its own system of implementation.[97] The Joint Aviation Authorities operate informally, and all of their decisions require unanimity among the fifteen members.[98] However, the European Union transport ministers agreed to establish a European Aviation Safety Agency (EASA) in 1999, which will operate formally "to certify compliance of aircraft, equipment and procedures with international safety standards and make sure the standards are applied uniformly by all 15 EU members."[99] The idea behind establishing a common set of standards is to reinforce the global authority of the European aviation institution.[100]

The common safety training standards set out in JAR-OPS are similar

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of deregulation, much like the United States did back in the 1970s. *See id.* Airlines in Europe were once restricted to flying within their home country and two other countries. *See id.* Now they are able to book flights that depart and terminate anywhere in Europe. *See id.*

90. *See* John Balfour, *European Aviation Safety Regulation,* AIR & SPACE LAW., Summer 1996, at 10.

91. James, *supra* note 88, at 4.

92. *See* 1998 O.J. (C 214) 37, art. 1.3.

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.* art. 1.4.

98. *European Aviation Safety Agency to Take Place of National Authorities,* AEROSPACE DAILY, June 22, 1998, at 460, *available in* 1998 WL 9027804.

99. *See id.*

100. *See id.*

to the internationally recommended standards[101] and the superior training practices of the industry.[102] EU sources contend that the JAR-OPS standards are sufficient to ensure a high level of safety in the industry.[103] Under JAR-OPS standards, "[a]n operator shall ensure that medical and first aid training includes: (1) [i]nstruction on first aid and the use of first-aid kits; (2) [f]irst aid associated with survival training and appropriate hygiene; and (3) [t]he physiological effects of flying and with particular emphasis on hypoxia."[104] Regarding safety equipment, the JAR-OPS states that an airline "shall ensure that each cabin crew member is given realistic training on, and demonstration of, the location and use of safety equipment including . . . [f]irst-aid kits, their contents and emergency medical equipment."[105] Airlines must also ensure that recurrent training, which occurs every twelve months, includes a section on "[f]irst aid and the contents of the first-aid kits."[106]

One of the differences between the Federal Aviation Regulations (FARs) and the Joint Aviation Regulations (JARs) is that additional crewmembers are assigned to specialist duties under the JARs.[107] In the European Union, airlines can utilize additional crewmembers who are solely assigned to specialist duties[108] to which other requirements of the JAR-OPS are not applicable.[109] One of the specialist duties listed in the JAR-OPS is medical personnel.[110] In the United States, each crewmember must meet the requirements of the FARs, regardless of whether they have a specialized duty.[111]

In the European Union, cabin crews are given advanced first aid training. This training is an orientation to the physiology of flights including an emphasis on hypoxia.[112] European Union cabin crews are also trained to handle other medical emergencies, including choking, stress reactions, allergic reactions, hyperventilation, gastro-intestinal disturbance, air sickness, epilepsy, heart attacks, strokes, shock, diabetes, emergency

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101. The Convention on International Civil Aviation "provides for implementation of the measures necessary to ensure the safe operation of aircraft[s]." 1991 O.J. (L 373) 4. This Convention was signed in Chicago on December 7, 1944. *See id.*

102. *See* 1998 O.J. (C 214) 37, art. 2.2.

103. *See* 1991 O.J. (L 373) 4.

104. JAR-OPS 1 Subpt. O, § 1, App. 1 to JAR-OPS 1.1005, ¶ 1.1005(e).

105. JAR-OPS 1 Subpt. O, § 1, App. 1 to JAR-OPS 1.1010, ¶ 1.1010 (h)(12).

106. JAR-OPS 1 Subpt. O, § 1, App. 1 to JAR-OPS 1.1015, ¶ 1.1015(b)(5).

107. *See* JAR-OPS 1 Subpt. O, § 2, IEM OPS 1.988.

108. "The additional crew members solely assigned to specialist duties to whom the requirements of Subpart O are not applicable include the following: i) Child minders/escorts; ii) Entertainers; iii) Ground engineers; iv) Interpreters; v) Medical personnel; vi) Secretaries; and vii) Security staff." JAR-OPS 1 Subpt. O, § 2, IEM OPS 1.988, ¶¶ 1.988(i)-(vii).

109. *See id.*

110. *See id.* ¶ 1.988(v).

111. *See* 14 C.F.R. § 121.417(a) (1998).

112. *See* JAR-OPS 1 Subpt. O, § 1, App. 1 to JAR-OPS 1.1005, ¶ 1.1005(e)(3).

childbirth and asthma.[113] Cabin crews are given basic first aid and survival training which includes care of the unconscious, burns, wounds and fractures, and soft tissue injuries.[114] First-aid training must also include practical cardio-pulmonary resuscitation (CPR) by each cabin crewmember in the airplane environment on a specifically designed dummy.[115] Contrary to the JAA, the FAA does not mandate CPR by crewmembers.[116]

To maintain high safety standards, the training programs, facilities, and training organization must be duly approved by the Member State and the JAA.[117] They must also be given formal recognition.[118] However, the process for approval and recognition is left to the Member States themselves.[119]

Another mandatory standard in the European Union that is not a regulation in the United States is medical examinations of cabin crewmembers.[120] Each cabin crewmember receives an initial medical examination or assessment and periodic re-assessments.[121] These examinations are to be conducted by, or under the supervision of, a medical practitioner acceptable to the Joint Aviation Authority.[122] The Authority mandates that the operators maintain a medical record for each cabin crewmember.[123] Each crewmember must be in good health, free from any physical or mental illness which might lead to incapacitation or the inability to perform cabin crew duties, have normal cardiorespiratory function, a normal central nervous system, adequate visual acuity with or without visual correction, adequate hearing, and normal function of the ears, nose, and throat.[124] Keeping crewmembers healthy is important in ensuring that they have the strength and ability to perform all of their necessary duties, including assisting sick passengers.

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113. *See* JAR-OPS 1 Subpt. O, § 2, IEM to App. 1 to JAR-OPS 1.1005, 1.1015 & 1.1020, ¶ 1(b)(i)-(xii). *See also* James, *supra* note 88, at 4.

114. *See* JAR-OPS 1 Subpt. O, § 2, IEM to App. 1 to JAR-OPS 1.1005, 1.1015 & 1.1020, ¶ 1(c)(i)-(iv).

115. *See id.* ¶ (d).

116. *See* Okie, *supra* note 3, at A6.

117. *See* 1998 O.J. (C 214) 37, art. 2.2.

118. *See id.*

119. *See id.*

120. *See* JAR-OPS 1 Subpt. O, § 1, JAR-OPS 1.995, ¶ 1.995(a)(2). *See also* 1998 O.J. (C 214) 37, art. 2.1.

121. *See* JAR-OPS 1 Subpt. O, § 1, JAR-OPS 1.995, ¶ 1.995(a)(2), (3).

122. *See* JAR-OPS 1 Subpt. O, § 2, AMC OPS 1.995(a)(2), ¶ 1.

123. *See id.* ¶ 2.

124. *See id.* ¶ 3(a)-(g).

V. COMPARISON OF FAA REGULATIONS AND JAA REGULATIONS

The FAA and the JAA are similar organizations. The FAA establishes the safety guidelines that airlines in the United States must follow.[125] The JAA oversees the rulemaking for safety requirements in the European Union.[126] Both organizations are responsible for mandating the type and amount of medical equipment and medication that airlines must carry and the training necessary for cabin crews.[127] Although the JAA has common standards for the members of the European Union, the system of implementation is left to the Member States,[128] whereas the FAA is the final authority in the United States.[129]

Many of the standards between the two organizations are similar because they must meet international safety standards.[130] However, the European Union is more advanced than the United States in its ability to care for a sick passenger onboard an airplane. "Many foreign airlines provide more extensive medical kits than U.S. carriers, and several . . . carry defibrillators."[131] Many medical kits carried by international air carriers focus on stabilizing a situation and serve as excellent models for U.S. carriers.[132] The medication and equipment carried are based on the medical problems most commonly seen on the aircraft and are not necessarily aimed at curing or alleviating the passengers' problem.[133] Instead, the medicine and equipment are aimed at stabilizing ill passengers to prevent further deterioration or decline in their health.[134] Although all the U.S. carriers meet FAA requirements, Dr. Ian W. Cummings, a practicing emergency care physician and President of the Association of Emergency Physicians, stated that "the medical care offered by the domestic airlines [is] 'woefully inadequate and inconsistent[,]'" which is a feeling shared by many medical professionals.[135]

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125. *See* 14 C.F.R. § 121.1 (1998).

126. *See* JAR-OPS 1 Subpt. O, § 1, JAR-OPS 1.988.

127. *See generally* 14 C.F.R. §121 (1998); JAR-OPS 1 Subpt. O, § 1.

128. *See* 1998 O.J. (C 214) 37, art. 1.4.

129. *See generally* 14 C.F.R. § 121 (1998).

130. "[T]he 1944 Chicago Convention . . . provides for a set of universally applicable standards, compliance with which should be accepted by all parties to the Convention." Balfour, *supra* note 90, at 1 & 10.

131. Okie, *supra* note 3, at A6.

132. *See Medical Kits on Commercial Aircraft, 1997: Hearing Before the Subcomm. on Aviation of the House Comm. on Transp. and Infrastructure*, 105th Cong. 69, 74 (1997) (statement of Joan Sullivan Garrett, President, MedAire, Inc.) [hereinafter *Medical Kits on Commercial Aircraft*].

133. *See id.* at 74.

134. *See id.*

135. CNN Financial Network, *supra* note 63.

While the United States is just beginning to adopt standards to safeguard the in-flight health of passengers on U.S. airlines, one European carrier is looking for ways to become the industry leader in caring for sick passengers.[136]

> In an era when foreign [outside Europe] airlines are searching for ways to improve their in-flight medical care — British Airways is developing a system that will transmit electrocardiograms via satellite to emergency physicians on the ground — U.S. airlines are not required to carry even a thermometer or a bottle of aspirin.[137]

British Airways, Lufthansa, Air France, Qantas and Alitalia, like most airlines in Europe, carry medical kits no bigger than an ordinary suitcase.[138] These kits are stocked with most of the same cardiac drugs found in hospital emergency rooms and include medications for seizures, pain relief, narcotic overdoses, psychotic behavior and drugs to stop postpartum hemorrhaging.[139] Many of those kits also contain extraordinary medical equipment such as umbilical cord clamps for use during childbirth.[140] By contrast, in 1994, Trans World Airlines (TWA) flight attendants who assisted in a birth during flight used shoelaces to tie the mother's umbilical cord because an umbilical cord clamp was not available.[141]

Most foreign airlines are better equipped to safeguard the health of their passengers than U.S. carriers.[142] For example, "British Airways' medical kit contains nearly 90 items, including 30 drugs—10 of which, among them a narcotic painkiller, can be administered by flight attendants if there is no physician aboard."[143] In addition, many foreign airlines carry endotracheal tubes and bag-valve-masks (used to assist respiration).[144] Air Canada follows the European philosophy for safeguarding the health of its air travelers and carries most of the same drugs and devices as the European carriers.[145] Considering these higher standards, it is not surprising that nearly all major foreign airlines disagree with the FAA's approach of limiting the ability of commercial airlines to handle medical situations that

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136. *See* Crewdson, *supra* note 73, § 2, at 6.
137. *Id.*
138. *See id.*
139. *See id.*
140. *See id.*
141. *See id.*
142. *See generally id.*
143. *Id.* § 2, at 6.
144. *See* Crewdson, *supra* note 1, § 2, at 2.
145. *See* Crewdson, *supra* note 73, § 2, at 6.

arise during flight.[146]

The United States, unlike Canada, has not followed the European carriers and fails to carry advanced medical kits onboard their aircraft to assist in saving lives.[147] Currently, the FAA must determine whether the United States will carry advanced medical equipment and medication like European carriers or stand by the outdated philosophy that, when safeguarding the health of passengers, "less is more."[148]

Legislation is necessary to provide airlines, crewmembers and medical volunteers immunity from prosecution for attempting to save a person's life during flight.[149] "So-called 'good Samaritan' laws, which give legal protection to health professionals who offer emergency assistance on the ground, do not apply in the air, a potential disincentive for going to the aid of a fellow passenger."[150]

Good Samaritan statutes have been in existence for nearly fifty years.[151] These laws resulted from perceptions that potential rescuers would ignore highway accident victims due to the fear of liability.[152] The legislators envisioned a simple answer to the problem when they enacted statutes "creating immunity from civil liability for those who volunteered in medical emergencies."[153]

However, modern emergency medical systems did not exist during the 1950s and 1960s when most of these laws were passed.[154] Before advanced emergency medicine existed, society greatly relied upon individuals to provide care to injured persons in accident situations.[155]

Today, each state and the District of Columbia have Good Samaritan laws.[156] The majority view is to provide immunity for Good Samaritans assisting an injured person regardless of his or her medical background, while the minority of states only extend immunity to individuals with medical training.[157] The two purposes of Good Samaritan laws are (1) "encouraging

146. *See id.*
147. *See id.*
148. *See id.*
149. *See In-Flight Medical Kits*, *supra* note 29, at 147.
150. Foreman, *supra* note 4.
151. *See* Bridget A. Burke, Note, *Using Good Samaritan Acts to Provide Access to Health Care for the Poor: A Modest Proposal*, 1 ANNALS HEALTH L. 139, 140 (1992).
152. *See id.*
153. *Id.*
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*

emergency volunteerism," and (2) "providing immunity for such action."[158] However, these state laws do not apply in the air.[159] United States commercial airlines and their passengers would benefit from federal legislation encouraging volunteerism and providing immunity for those who assist in an in-flight medical emergency.[160] Unless the FAA acts to limit legal liability to airlines, cabin crews, and volunteers, it seems useless to spend time worrying about equipment, or medical training for flight attendants because so many people are apprehensive of being sued for using their knowledge and training.[161]

The legal liability to the airlines, medical volunteers, and cabin crews who assist during an in-flight medical emergency is startling.[162] Joan Sullivan Garrett, President of MedAire, Inc., in her testimony before the House Aviation Subcommittee, noted, "[t]oday, we're finding that in nearly 80 percent of our [MedLink] calls, a medical professiona — a physician, nurse or emergency medical technician — has volunteered their [sic] services."[163] However, in many cases, medical personnel are reluctant to respond to a crewmember's request for assistance or give concrete opinions or recommendations because of their fear of liability.[164] Good Samaritan legislation is essential to alleviate these concerns, or the eagerness of people to assist will drastically decline.[165] Having a federal law that protects health care workers who in good faith render emergency medical care during flight is necessary legislation.[166]

VI. A RECOMMENDATION TO THE FEDERAL AVIATION ADMINISTRATION

An airplane is not a place to have open-heart surgery. With the right equipment and trained personnel, however, it is a place wherein passengers can feel comfortable knowing that the chances of surviving a heart attack or any other medical emergency is as good in the air as being on the ground. An airline crew should have equipment to save lives and be prepared to treat in-flight medical emergencies. Just because a person has an emergency at 40,000 feet does not mean the condition is not treatable or that a life cannot

158. *Id.* at 141.

159. *See Medical Kits on Commercial Aircraft*, *supra* note 132, at 75. *See also* Foreman, *supra* note 4.

160. *See generally Medical Kits on Commercial Aircraft*, *supra* note 132, at 75. *See also* William S. Broomfield, Letter to the Editor, *In-Flight Emergencies: Doc Riders in the Sky*, 263 JAMA 233, 234 (1990).

161. *See Medical Kits on Commercial Aircraft*, *supra* note 132, at 75.

162. *See id.*

163. *Id.*

164. *See id.*

165. *See id.*

166. *See generally id.*

be saved. Advanced emergency medical kits and first aid training for flight attendants are even more essential for an airline than carrying a raft and training flight attendants on water-ditching procedures,[167] which all U.S. carriers are required to do.[168]

A. *Mandatory Reporting of In-Flight Medical Emergencies is Needed to Show the Scope of the Problem*

Because airlines are not required to report in-flight medical emergencies, it is difficult to fully understand the problem. It is important to analyze what problems U.S. carriers face and to then make recommendations accordingly. Although the European Union and Australia have upgraded their medical equipment onboard aircraft, what is good for other countries is not always good for the United States. It is also important to learn from other countries and not just follow in their footsteps. By defining an in-flight medical emergency and then requiring U.S. airlines to report these emergencies to the FAA, the FAA can determine what emergencies occur most frequently without having to merely speculate. This mandatory process of reporting in-flight medical emergencies would allow the FAA to obtain concrete information before making drastic changes that could cost airlines millions of dollars. Once the types of medical emergencies that are most likely to occur onboard are determined, the FAA can plan its attack accordingly. The situation should be evaluated continually and changes made over time.

It is important to understand that just because British Airways carries certain medical equipment does not mean the same equipment is important for a U.S. carrier to have onboard. Different countries have different lifestyles, diets, and habits, and therefore, they also have different medical problems. Once it is known from which medical ailments Americans truly suffer, U.S. airlines can predict what conditions to treat during flight and carry the necessary equipment.

B. *Requiring Passengers to Disclose Potentially Life-threatening Illnesses Prior to the Day of Departure*

Besides requiring airlines to report in-flight medical emergencies, the FAA should require passengers to report potentially life-threatening illnesses to the airline before the day of departure, possibly even when they purchase

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167. A water-ditch is an emergency landing made in the water. Flight attendants are required to learn the equipment and procedures for ditching. *See* 14 C.F.R. § 121.417 (b)(3)(iii) (1998).

168. *See id.* § 121.417(b)(2)(i).

their ticket.[169] This would allow the airlines to make special provisions for that passenger's care if an emergency arises.[170] "Passengers with diabetes mellitus, coronary artery disease, a history of recent surgery, asthma, emphysema, seizure disorders, and sickle cell disease would be most likely to be affected by air travel and, thus, a mechanism for notification of the airline should be instituted for people with such illnesses."[171]

C. *Emergency Physicians' First Aid Kit Wish List*

MedAire,[172] which provides an emergency medical hotline for airlines that subscribe to their services, has developed an emergency physicians' first aid kit wish list.[173] This list includes items that would assist in identifying the immediate threat to the patient's health and stabilizing the patient's condition until proper emergency medical care is available.[174] The items on the wish list include an automated blood pressure cuff and stethoscope, which are

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169. *See* Burton J. Glass, Letter to the Editor, *In-flight Emergencies: Doc Riders in the Sky*, 263 JAMA 233, 234 (1990).

170. *See id.*

171. *Id.*

172. "MedAire was founded in 1986 with the mission of providing immediate expert medical support to people facing medical emergencies in remote locations — whether they were on land, in the air or at sea." *Medical Kits on Commercial Aircraft*, *supra* note 132, at 69. MedAire's clients are located in more than 36 countries, with British Airways announcing recently that they will become the newest airline to use MedLink's services. *See id. See also British Airways Looks to MedAire for Support in Managing In-Flight Medical Emergencies*, BUS. WIRE, April 22, 1998, *available in* WL EURONEWS Database. In the aviation industry, MedAire's most well known service is its 24-hour emergency medical hotline service called MedLink. *See Medical Kits on Commercial Aircraft*, *supra* note 132, at 70.

> Anytime a client has a medical situation on board their aircraft, no matter where in the world they are flying, they can contact, via satellite or standard air-to-ground voice/data communication services, the MedLink Communications Center and talk directly and immediately to one of [MedLink's] 16 board certified emergency physicians.
>
> . . . .
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> MedLink is based within the emergency department of Good Samaritan Regional Medical Center, Phoenix, Arizona, a Level I Trauma Center, which gives . . . emergency physicians additional access to specialists in more than 45 fields of medicine as well as a certified regional poison control center.

Medical Kits on Commercial Aircraft, *supra* note 132, at 70. The physicians who answer these calls assist non-medical personnel in collecting data, helping the victim and stabilizing crisis situations. *See id.* Because of MedLink, many airlines reduced their number of diversions for in-flight medical emergencies by more than 90% within the first year of service with MedLink. *See id.* Currently, MedLink takes approximately 150 calls a month. *See id.* at 71.

173. *See Medical Kits on Commercial Aircraft*, *supra* note 132, at 72-74.

174. *See id.* at 72.

used to obtain heart rate and blood pressure.[175] Also on the wish list is a self-injectable syringe of epinephrine, which allows a patient to self-administer a standard dose of synthetic adrenaline in the case of severe allergic reaction.[176] Diphenhydramine (Benadryl) may also be used to treat allergic reactions, but this medicine can be administered orally and is available in liquid form for children.[177] Also available is an albuterol metered dose inhaler, which provides quick relief in the event of an asthma attack and is handy if a person forgets his inhaler.[178] Finally, one of the most desired pieces of equipment is an automated external defibrillator (AED), which can be used by nonmedical personnel to deliver an electric shock to passengers who are experiencing specific cardiac arrhythmias, namely ventricular fibrillation or ventricular tachycardia.[179]

D. *AEDs Onboard Planes will Save Lives*

Although it is important for the FAA to understand the emergencies faced on U.S. carriers before making decisions regarding what additional equipment and medications to require on airlines, an AED and cardiac-related drugs should be required on U.S. commercial aircraft immediately, as is evident by the growing number of U.S. carriers taking the initiative to carry them now.[180] As stated earlier, the FAA does not have accurate statistics on in-flight medical emergencies; however, according to a 1996 Air Transport Association (ATA) study, sudden cardiac arrest accounted for nearly one-third of the industry's emergency landings.[181] In 1996, the ATA recorded more than 183 in-flight cardiovascular emergencies, resulting in forty-two fatalities.[182] Joan Sullivan Garrett, president of MedAire, Inc., stated that "[o]f all the first aid tools available to the flight crew, the AED is without question one that can make a real difference between life and

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175. *See id.*

176. *See id.* at 73.

177. *See id.*

178. *See id.*

179. *See id.* at 73-74.

180. *See id.* at 72-74. *See also American Airlines' Purchase of Heart Defibrillators*, *supra* note 59. *See also Airlines Adding Defibrillators*, *supra* note 13. *See also Delta Equipping Fleet with Defibrillators*, *supra* note 63, at 84.

181. *See* CNN Financial Network, *supra* note 63. *See also Airlines Adding Defibrillators*, *supra* note 13 (stating that cardiac problems are the major cause of diversion and that neurological and respiratory problems are the second and third causes). Another report, however, shows OB/GYN-related situations third instead of respiratory problems. *MedAire President and In-Flight Medical Emergencies Become Focus of 45th International Congress of Aviation and Space Medicine in Oslo Norway* (Aug. 15, 1997) <http://www.medaire.com/nricasm.htm>.

182. *See* Howard, *supra* note 57.

death."[183] With the use of an AED, followed by prompt medical attention, the survival rate for a victim of cardiac arrest during a flight increases to a level similar to all cardiac arrest cases.[184] In addition, using AEDs on airplanes improves the overall safety of the flight by decreasing the number of medical-related diversions.[185] AEDs weigh less than ten pounds, are smaller than a laptop computer, and cost less than $4,000.[186] For example, "Heartstream's ForeRunner, based on proprietary technology, is small, lightweight, durable and easy to use and maintain. It is battery operated and requires no outside electrical power source."[187] The growing number of airlines in the United States and Europe using defibrillators[188] indicates that the benefits of these small and relatively inexpensive machines outweigh the costs.

Early defibrillation is endorsed by both the American Heart Association (AHA) and the European Resuscitation Committee (ERC).[189] Defibrillation, both in and out of the hospital, is considered a basic life support skill for rescuers.[190] Time is critical when dealing with sudden cardiac arrest.[191] The ability to successfully resuscitate a person decreases by about ten percent with each passing minute before defibrillation is performed.[192] "With both the AHA and the ERC backing the concept of early defibrillation as the standard of care, it follows that flight crews should be trained to use and have access to AEDs."[193]

"The American Heart Association estimates that 100,000 lives a year could be saved if AEDs were broadly deployed in areas where large groups of people gather, such as on aircraft, in sports arenas and office buildings."[194]

> [T]he presence of an AED and trained crew members can mean the difference between life and death. With an AED, treatment [on an airplane] can begin within those crucial first 10 minutes when the patient has the best chance of survival, thereby avoiding the 30-or-more-minute wait until diversion takes place

183. Garrett, *supra* note 15.
184. *See id.*
185. *See id.*
186. *See* Martin, *supra* note 7.
187. *American Airlines: American Airlines Equips*, *supra* note 59.
188. *See supra* notes 56-67 and accompanying text.
189. *See* Garrett, *supra* note 15.
190. *See id.*
191. *See* CNN Financial Network, *supra* note 63.
192. *See id.*
193. Garrett, *supra* note 15.
194. *American Airlines: American Airlines Equips*, *supra* note 59.

and EMS arrives.[195]

The goal of the American Heart Association is to make AEDs accessible to the public and "make the device as common, useful and accessible as fire extinguishers while supporting training and preventing misuse."[196] When a passenger is suffering from cardiac arrest, diverting the plane to the nearest airport is too slow.[197]

> While the shock from the AED may bring the person back from the brink of death . . . the battle for survival has really just begun. [After a successful defibrillation,] [t]he focus must [next] be on stabilizing the patient and providing expert care until [the pilot can get the plane on the ground] . . . whether at the scheduled destination or a closer airport to which the aircraft has been diverted.[198]

With favorable statistics from foreign airlines and encouragement from the American Heart Association, the FAA should mandate the use of AEDs by all commercial U.S. airlines.

E. *Cardiac Life-support Drugs Can Supplement AED Revival*

Since cardiac arrest is the most common cause of medical diversions in the aviation industry,[199] in addition to carrying defibrillators, it is only logical for airlines to carry medicine to help treat sudden cardiac arrest. Like the medications carried on many European carriers, the medicines chosen by the FAA to be carried on commercial airlines should focus on stabilizing the patient.[200] Aircraft medical kits should have advanced cardiac life-support drugs in order to treat a patient after AED revival.[201] The only drug currently required by the FAA in the emergency medical kit that is carried specifically for heart patients is nitroglycerine.[202] When deciding

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195. Garrett, *supra* note 15. *See also* John Crewdson, *Defibrillator Saves 1st Life Aboard a U.S. Plane*, CHI. TRIB., Feb. 20, 1998, § 1, 1 at 13.

196. *Requirements for Medical Equipment on Airliners*, *supra* note 39, at 93.

197. *See Airlines Adding Defibrillators*, *supra* note 13. "You die in four to eight minutes if your heart action is not restored . . . [and t]here's not an airline in the world that can get a plane down and an E.M.S. team aboard that quickly." *Id.*

198. Garrett, *supra* note 15.

199. *See* Okie, *supra* note 3, at A6.

200. *See supra* notes 130-135 and accompanying text.

201. *See* CNN Financial Network, *supra* note 63.

202. *See Airlines Adding Defibrillators*, *supra* note 13. Epinephrine is also carried in the emergency medical kit for heart patients; however the amount carried in the kit is inadequate to treat a heart patient. *See* 14 C.F.R. § 121 app. A (1998). *See also* Crewdson, *supra* note 73, § 2, at 6.

what medications to place in the emergency medical kit, the FAA must take into consideration the danger of the drugs if they get into the wrong hands.[203]

Flight attendants must exercise care when allowing access to medical kits by medical passengers volunteering in an emergency.[204] Not all trained medical professionals are qualified to give all the medications that would be carried in the emergency medical kit.[205] A ground-based physician would speak with the medical volunteer on the aircraft to determine if the person is qualified to administer the necessary medication.[206]

F. *Regulation of AEDs*

The Food and Drug Administration (FDA) regulates AEDs.[207] A doctor must prescribe an AED; therefore, the prescribing physician is responsible for whoever is using the AED on the cardiac victim.[208] In the corporate world, where AEDs are currently being utilized, the company's medical director or a contracted emergency physician can fill the role of "medical control."[209] The physician's approval of the use of the AED alleviates the liability of the company's flight department.[210]

G. *Training for Effective Response*

Initial training on the AED is typically only four to six hours and varies depending on the number of students in the class.[211] Because of the AED's importance as a life-saving device, AED training should be a priority during a flight attendant's initial training program and given as much time and consideration as training for emergency procedures and evacuations.[212] The goal of AED training is for the flight attendants to become comfortable using the machine, so that, in the event they need to use the AED during a flight, they will know what to expect from the machine and feel confident using it.[213] Currently, flight attendants for American Airlines are given three hours of classroom training, along with self-guided videotapes and manuals.[214] Company flight departments can train the crews themselves if they are

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203. *See* Okie, *supra* note 3, at A6.
204. *See Medical Kits on Commercial Aircraft*, *supra* note 132, at 74.
205. *See id.*
206. *See id.*
207. *See* Martin, *supra* note 7.
208. *See id.*
209. *See id.*
210. *See id.*
211. *See* Garrett, *supra* note 15.
212. *See id.*
213. *See id.*
214. *See Renewed Interest*, *supra* note 63.

properly equipped to do so, or they can hire an outside company, such as MedAire, to train the crews.[215]

The simplicity of AED operation is a compelling reason for installing AEDs on commercial aircraft. An AED provides a visual display of the heart rhythm to assist the rescuer in assessing the cardiac victim's condition.[216] The chance of survival during cardiac arrest decreases by about ten percent each minute.[217] "Unless defibrillation occurs within the first 10 minutes, it is not likely to be successful."[218]

Before using an AED, a flight attendant or volunteer medical assistant must first check the victim for breathing and a pulse.[219] The AED is only used when the cardiac victim is not breathing, has no pulse and is unconscious.[220] The AED will not shock unless it is necessary. [221] The machine is also used in conjunction with CPR.[222] To use an AED, the person operating the machine connects two adhesive pads with cables to the patient.[223] These pads record the heart rhythm and, if necessary, deliver the electric shock.[224] If the airplane is equipped with a totally automated defibrillator, the rescuer turns on the device, and the machine analyzes the heart rhythm and determines whether to send a shock.[225] If the airline chooses a semi-automatic defibrillator, the rescuer sets up the machine the same as the automated defibrillator, but the rescuer must respond to the machine's voice prompts.[226]

On an aircraft, the semi-automatic defibrillator is probably safer than the automatic defibrillator.[227] The automatic defibrillator will send the shock if needed, regardless of the surrounding circumstances.[228] In contrast, the semi-automatic version gives the rescuers more control over when to send

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215. *See* Martin, *supra* note 7.

216. *See Delta Equipping Fleet with Defibrillators*, *supra* note 63, at 84.

217. *See* Crewdson, *supra* note 195, § 1, at 13.

218. *Id.*

219. *See* Martin, *supra* note 7.

220. *See id.*

221. *See id.*

222. *See id.*

223. *See id.*

224. *See id.*

225. *See id.* The machine has a voice synthesizer that gives a warning to all bystanders to "stand clear" and then it delivers the shock. *See id.*

226. *See id.* The semi-automatic defibrillator has "a 'press to analyze' button to start rhythm analysis and a 'press to shock' button to deliver the shock if the device identifies a shockable rhythm." *Id.* The AED determines itself if more shocks are needed after it analyzes the victims heart rhythm. *See id.* The voice prompt coaches the rescuer by explaining each step. *See id.* Once the machine is set-up, it virtually does all the work. *See id.*

227. *See id.*

228. *See id.*

the shock, thereby allowing a rescuer who is flying in turbulent conditions to avoid sending hazardous stray voltage.[229]

H. *U.S. Airlines will Experience a Cost-savings From Having Defibrillators Onboard*

Qantas Airlines has stated that besides saving lives, it is also saving money on expensive diversions by having defibrillators onboard.[230] From September 1991 to August 1996, all Qantas B747 and B767 international aircraft have carried defibrillators and have trained cabin crews to handle cardiac arrest with medical volunteers and radio advice from Qantas physicians in Sydney.[231] During a five-year period of time, defibrillators were used eighty-seven times, including forty-seven times for monitoring seriously ill passengers and forty times for treating cardiac arrest.[232] The realistic goal of equipping aircraft with defibrillators is not necessarily to save every victim, but rather to give each one as fair a chance of survival as possible.[233]

I. *Flight Attendant Training Requirements for All In-flight Medical Emergencies*

Besides training to handle sudden cardiac arrest, flight attendants should have additional training for other medical situations commonly occurring on airplanes.

> [B]asic first aid training provides a good foundation of information and skills to flight crews. However, . . . consideration should be given to placing more time and emphasis in training on knowledge and skills that are important in managing the types of situations that make up 80 percent of the onboard medical situations — and less of an emphasis on first aid situations that are rarely if ever seen on board.[234]

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229. *See id.*

230. *See American Airlines' Purchase of Heart Defibrillators*, *supra* note 59. *See also* Nelms, *supra* note 2, at 84.

231. *See* Garrett, *supra* note 15.

232. *See id.*

233. *See id.*

234. *See Medical Kits on Commercial Aircraft*, *supra* note 132, at 74. MedLink reports that 80% of its calls fall into one of five categories: (1) neurological; (2) cardiac; (3) respiratory; (4) gastrointestinal; and (5) endocrine. *See id.* at 71. However, 44% of medical-related diversions were cardiac related; 30% neurological; and 7% gastrointestinal. *See id.* at 72.

Greater emphasis should be placed on assessment and early recognition skills, the ability to obtain a pulse and respiratory rate, the ability to gather proper information on the victim's medical history, emergency airway management, the use of personal protection equipment, and learning more about the risks of bloodborne pathogens.[235] With all this information, a flight attendant can feel more confident in assessing the condition of an ill passenger during the course of the flight.

J. *A Federal Good Samaritan Law Would Relieve Crewmembers and Volunteers of the Fear of Liability*

Before the FAA mandates any emergency medical training or equipment, Congress should protect airlines, crewmembers and volunteer medical professionals through limited liability when assisting with in-flight medical emergencies. According to Joan Sullivan Garrett, President of MedAire, Inc., "unless action is taken to appropriately limit liability to airlines, flight crews and medical professional volunteers . . . there is little value in spending time worrying about equipment, or worrying about training when everyone is fearful, and rightly so, of being sued for using what they know."[236]

"[M]edical professionals are becoming scared, and even refusing to get involved in offering medical help for fear of legal liability. The legal liability to volunteers, to the airlines and to their flight crews is staggering."[237] Good Samaritan legislation is critical in order to reduce these concerns.[238]

Edward A. Mertis, Air Transport Association Senior Vice President, expressed during his testimony before the House Aviation subcommittee that there is a need for protection against the "litigious environment."[239] Mertis informed the subcommittee that "[o]ur medical consultants have told us of instances in which trained medical personnel traveling as passengers would not offer concrete opinions and recommendations as a result of their fear of liability. Moreover, carriers and in-flight personnel share that concern."[240] These concerns are reasonable due to the insufficient legal protection for these medical consultants. Although every state and the District of Columbia have some form of Good Samaritan law to protect a person who assists during an emergency, there is no similar federal statute.[241]

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235. *See id.* at 74-75.
236. *Id.* at 75.
237. *Id.*
238. *See id.*
239. Nelms, *supra* note 2, at 85.
240. *Id.*
241. *See id.*

"[A] federal 'good samaritan' law could very well be the start of positive malpractice reform."[242] "Our laws must take into account the immediacy of an in-flight emergency and give trained physicians the room to act to save lives."[243] A medical professional who volunteers assistance during an in-flight medical emergency should not have to run the risk of being sued for any adverse outcome. To encourage off-duty medical personnel to render medical care, the law should fully protect the person responding to the emergency from legal liability. The medical personnel should only be held liable if the care given is grossly negligent, similar to the majority of state Good Samaritan laws.[244]

The Indiana Good Samaritan law, which protects volunteer caregivers on the ground, is an example of the type of legislation that the FAA should adopt to protect airline employees who provide medical assistance during an in-flight emergency.[245] The Indiana statute provides protection for "[a]ny person, who in good faith gratuitously renders emergency care at the scene of an accident."[246] The caregiver shall not be held civilly liable for any personal injury damages as a result of any act or omission in giving the emergency care, "or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the injured person."[247] This protection does not apply to acts or omissions amounting to gross negligence or willful or wanton misconduct.[248]

"Emergency" characterizes the nature of the care given in the particular situation, while the word "accident" defines the circumstance that causes the need for emergency care.[249] In order to utilize the Good Samaritan defense, the care must be emergency in nature and must be essential as a result of an "accident."[250] An "accident" in its common meaning, "may be deemed to be 'any mishap or untoward event not expected or designed.'"[251]

A federal law protecting volunteer caregivers who assist during an in-

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242. Broomfield, *supra* note 160, at 234.

243. *Id.*

244. Rolanda Moore Haycox, Note, *Changes in Health Care Law in 1993 Bring New Challenges for Providers*, 27 IND. L. REV. 1119, 1124 (1994).

245. *See* IND. CODE ANN. §§ 34-30-12-1 to -2 (1998). *See also* Haycox, *supra* note 244, at 1124.

246. Haycox, *supra* note 244, at 1124. *See also* IND. CODE ANN. § 34-30-12-1 (1998).

247. Haycox, *supra* note 244, at 1124. *See also* IND. CODE ANN. §34-30-12-1 (1998).

248. *See* IND. CODE ANN. §§ 34-30-12-1 to -2 (1998). *See also* Haycox, *supra* note 244, at 1124.

249. *See* Haycox, *supra* note 244, at 1126.

250. See id. *See also* IND. CODE ANN. § 34-30-12-1 (1998).

251. Haycox, *supra* note 244, at 1126.

flight medical emergency would be welcome legislation.[252] Before the FAA can require airlines to adopt new standards for training and equipping their crews to deal with in-flight medical emergencies, Congress must pass legislation creating limited liability for airline personnel and passengers who assist during medical emergencies.[253]

K. *Summary of Recommendations*

The FAA should update its decade-old regulations which currently result in needless deaths and inefficient, unscheduled landings. The changes in its regulations should include requiring AEDs and other medical equipment on commercial aircraft. Necessarily, regulations should require proper training for airline personnel. These improvements will provide passengers on U.S. airlines with the same chance of life as passengers on foreign airlines.

Dr. Andrew Horne, a retired FAA official, said "[o]ur thing in the FAA . . . has always been that the best thing for the patient is [to] get them on the ground as soon as you can. We've never wanted to encourage physicians to play God while they're flying on an airplane."[254] Dr. Jon Jordan, the chief medical officer of the FAA, testified to Congress "that arguments had been advanced that planes should not be flying hospitals, and that too much equipment might discourage pursuit of the 'proper course of action,' namely, getting the plane down and the passenger to a hospital."[255]

However, over ten years ago when the current regulations were implemented, the majority of routes flown by U.S. carriers originated and terminated in the United States.[256] Since that time, the number of international flights has dramatically increased.[257] When flying over the ocean, it is not realistic to rely on the ability of the pilot to find a quick place to land the aircraft to find medical help. Thus, there is ample justification for changing the out-dated, decade-old regulations, which turn otherwise treatable conditions into lethal situations.

VII. CONCLUSION

The United States has always been a leader in the aviation industry. However, when dealing with in-flight medical emergencies, the United States

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252. *See* Broomfield, *supra* note 160, at 234.

253. *See Medical Kits on Commercial Aircraft*, *supra* note 132, at 75.

254. Crewdson, *supra* note 73, § 2, at 6. Dr. Andrew Horne wrote a regulation in 1986 "telling U.S. airlines what medical supplies they must have on board." *Id.*

255. *Airlines Adding Defibrillators*, *supra* note 13.

256. *See* Crewdson, *supra* note 73, § 2, at 6.

257. *See id.*

has taken a different path than most other countries in the world. It is time for the United States to look at the success of the European Union and other countries in carrying advanced medical equipment onboard their aircraft and providing exceptional training for flight attendants. It would be a tragedy for this country to follow an out-dated philosophy of "less is more" when it comes to safeguarding the health of passengers. Indeed, statistics show that precisely the opposite is true.

Most people will go through their lives without facing an in-flight medical emergency. However, just because this risk is small does not mean it should be overlooked.[258] There are many instances when society protects itself against small risks.[259] For example, most people do not have a problem paying taxes to support their community's ambulance and fire services, even though the chance is small that they will ever have to use these services.[260] Lifeguards are found at community pools and country clubs, but they rarely have to rescue anyone from drowning.[261]

"It is beyond dispute that the vast majority of airline passengers will never become seriously ill in the air, much less die on an airplane."[262] Whether it is worth spending millions of dollars to save a somewhat small number of lives depends on the value of those lives in the eyes of our government and the airlines.[263] When society deems a hazard to an innocent life as identifiable and immediate, it will likely acknowledge that saving that particular life is worth whatever it costs.[264] The outlook changes when it involves saving a hypothetical life which is not yet in danger and which may never be in danger if proper action is taken.[265] That is the situation we are currently facing. As 10,471 medical emergencies were reported in 1996,[266] it is evident that the problem is too big to ignore. In order to give American passengers a chance at survival, the FAA should upgrade its decade-old

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258. *See* John Crewdson, *Facing the Issue of Extra Costs: Expense of Better Kits and Equipment Would be Justified by Saving Just 3 Lives Per Year. Society will Pay to Protect Against Risks Small and Large*, CHI. TRIB., June 30, 1996, § 2, at 10.

259. *See id.*

260. *See id.*

261. *See id.*

262. *Id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. *See* Okie, *supra* note 3, at A6.

medical emergency standards to comply with the needs of passengers in the new millennium.

Karla Cameron[*]

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* J.D. candidate, 2000, Indiana University School of Law — Indianapolis; B.A., Journalism, 1991, Morehead State University — Morehead, Kentucky. The author was employed as a flight attendant/check flight attendant for American Trans Air for five years. The author would like to thank her husband, Jay, and her parents for their patience, support and encouragement; the law review staff for its hard work; and Brian Hunt of American Trans Air for his help in selecting this topic.