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TABLE OF CONTENTS

THE EVOLUTION IN AND INTERNATIONAL CONVERGENCE OF THE DOCTRINE OF SPECIFIC PERFORMANCE IN THREE TYPES OF STATES

Robert Bejesky*

I. INTRODUCTION

Pacta sunt servanda is the universally accepted notion[1] that contract promises must be kept and that affirmative actions to ensure satisfactory completion of obligations occurs.[2] Even though every legal system emphasizes that breaching a freely negotiated contract is dishonorable[3] and requires a remedy, the degree that law insures strict adherence to the precise definition of a contract's original terms has varied across countries.[4] This article historically evaluates the relative degree of government interest[5] in ensuring that contractual relations among independent economic actors maintain integrity by examining both government ideology toward the private sector and the derivative authority of the judiciary as an independent actor that

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* J.D. Thomas M. Cooley Law School, LL.M. Georgetown University Law Center, MAE Michigan, Ph.D. Candidate Political Science, University of Michigan. Professor Bejesky currently teaches International and Comparative Law at the Cooley Law School and is an Adjunct Professor of Political Science at Alma College. He previously worked for the Inter-American Development Bank in Washington D.C.. Professor Bejesky publishes on the area of international economic integration and its impact on comparative law.

1. This is expressed at the international level. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27, at 289 (1969), 1155 U.N.T.S. 331, art. 26. Customary international law is formed "as evidence of a general practice accepted as law." Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, T.S. No. 993, art. 38(b). For establishing customary international law, see generally DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS, 14-24 (2001).

2. *See* Walter Neitzel, *Specific Performance, Injunctions, and Damages in the German Law*, 22 HARV L. REV. 161, 165 (1909).

3. *See generally* CHARLES FRIED, CONTRACT AS PROMISES: A THEORY OF CONTRACTUAL OBLIGATIONS (1981); *see* JOHN RAWLS, A THEORY OF JUSTICE 344-50 (1971).

4. This difference was said to be an "abyss" between Continental and Anglo-American legal systems. *See generally* Ernst Rabel, *A Draft of an International Law of Sales*, 5 U. CHI. L. REV. 559 (1938). *See also* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 274-77 (1991).

5. While the theme of this work is historical and evolutionary in nature, both current governments and the private sector have keen interests in this issue since stable contractual relations are vital to a healthy economy and the political self-interest of those in power, while private sector businesses utilize contracts to lessen risks and increase their ability to make foresighted business projections since the expectation that effectual remedial measures will be dispensed can impel the bargaining and contract consummation process. *See* HENRY SIDGWICK, ELEMENTS OF POLITICS 78 (1891). At extremes, complete trust may exist between parties or promises could be perceived by the parties as "empty shams." *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 90 (H. Paton trans., 1964).

can be summoned to resolve contract disputes. Influencing the persona of this doctrine are key moments in a country's history that have circumscribed the acceptable legal nexus between government and the private sector, but government institutions and concomitant ideology have evolved and/or taken abrupt deviations because of internal and external political and economic dynamics. The judiciary's role as a private sector dispute settler emanates from and is philosophically consistent with this ideological framework.

The article is broken down into five substantive sections that consider the legal dynamics of six countries divided into three categories: the United States and Britain (reactive states); France and Germany (semi-active states); and Russia and China (activist states). The second and third sections respectively establish the theoretical framework and rationale for country choices, and describe the long-lived specific performance rules in these countries. The fourth part characterizes the historical ideology of the surveyed states and the derivative role of the judiciary in granting coercive relief, while the fifth section considers how internal and external economic and social dynamics have induced changes in government ideology and deviations in the historical specific performance rule frameworks.

II. THEORETICAL FRAMEWORK

A. Dispute Settlement in an Archaic Society

Without the existence of a government in a territory, there would be no formal dispute settlement mechanism to adjudicate rights. Instead, dispute resolution would be predicated on either, self-help, informal mediation forms, or both.[6] Assume there are two people who consummate an oral contract to trade potatoes for a chicken, but the owner of the chicken later decides to not provide it to the potato farmer. The potato farmer certainly does not have to confer his potatoes unless he receives the chicken, but what if the potato farmer was veritably dependent on the trade? Should he have a right to attain the chicken against the will of its current owner? If the inhabitants of this society live in peace and harmony, they would presumably have informal and respected community-wide dispute settlement norms.[7] Accepted community remedial norms might permit one to unilaterally take the locus of the agreement without the authorization or coercive power of a governance authority, which would be a form of "self-help." However, even before self-help is exercised, a mutually respected and independent mediator[8] might

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6. This would normally consist of both parties agreeing upon permitting one or more respected individuals, probably elders, that are perceived as being independent of the interests of either party, to act in the capacity of what today is considered a mediator or arbitrator.

7. This assumes that there are no codified norms established by a governance unit.

8. *See generally* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

become involved to "buy off a feud" to maintain peace and harmony in society[9] by structuring a remedial decision within the parameters of community norms. This would be a primitive form of adjudication employed to "define the limits of self-help[10] and to validate legitimate community conduct under the facts of the dispute.

When government does exist and law is established, a position is taken on contractual relations establishing norms on how disputes should be resolved so that actions relating to contract performance can more easily be deemed appropriate or inappropriate. If there is a deviation from those contractual norms, the executive and police force can enforce rules and protect the contractual expectations of parties to a contract, but normally only after legitimate rights and breach of obligations have been validated by the judiciary.

B. Emergence of Institutionalized Law Premised on Governance Ideology

The assumption implicit in this article relating to the evolution of government institutions is that when institutions of law are established, they will reflect state ideology and relationships in society.[11] "Law reflects to a large degree the civilization [sic] of those that live under it," its development is often based on "the outlook of the age,"[12] and the "structure of the law is that we can trace every legal provision right back to its ideological and economic roots."[13] There is consistency between ideological movements and current code provisions[14] and a nexus between legal proceedings and "dominant views on the role of government in society."[15] If "[l]aw is inseparable with the theory of the state"[16] and reflects the way of life of people in a society, there will be consistency between positive legal institutions[17] and culture,[18] and in terms of contractual relations, the judiciary and its mandate

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9. *See* John P. Dawson, *Specific Relief in France and Germany*, 57 MICH. L. REV. 495, 497 (1959).

10. *See id.* This would particularly be the case when complete transparency in acceptable disputes settlement norms does not exist.

11. *See* HANS KELSEN, THE COMMUNIST THEORY OF LAW 10 (1955); *see generally* MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986).

12. HAROLD POTTER, HISTORICAL INTRODUCTION TO ENGLISH LAW 6 (2nd ed. 1943).

13. *See* Bernhard Grossfeld, *Money Sanctions for Breach of Contract in a Communist Economy*, 72 YALE L.J. 1326, 1345 (1963).

14. *See* SCHLESINGER ET AL., COMPARATIVE LAW CASES: TEXT MATERIALS 731 (6th ed. 1998).

15. DAMASKA, *supra* note 11, at 10.

16. KELSEN, *supra* note 11, at 1.

17. "Positive legal institutions" refers to progressive government norms of acceptable societal conduct.

18. While this article is not concerned with cultural attributes of legal evolution, this too could be another factor for analysis since institutions can affect culture and culture can affect the adoption of new legal institutions. *See generally* RONALD INGLEHART, MODERNIZATION

to grant remedial relief should derive from and be consistent with this structure.

The framework of this contention is premised on a work by Mirjan R. Damaska[19] that characterized judicial systems and law not according to historical distinctions of civil law, common law, and socialist law, but according to the degree that government involved itself in the inner-workings of society and the economy as balanced against the rights of the individual.[20] At one extreme, a *reactive* government aspires only to "maintain the social equilibrium and merely provide a framework for social self-management and individual self-definition," while the other extreme, an *active* government, seeks to "manage the lives of people and steer society"[21] and promote the "moral betterment of its citizens."[22] The six countries chosen for analysis[23]-the United States and Britain (reactive states),[24] France and Germany (semi-active states),[25] and the former Soviet Union and China (active states)[26]—can be located along a continuum that contemplates the degree of individualism versus government authority within the context of property rights and freedom of contract.

At the essence of enduring and fervent altercations involving the posture that government should champion with regard to contract and property rights

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AND POSTMODERNIZATION: CULTURAL ECONOMIC AND POLITICAL CHANGE IN 43 COUNTRIES (1997). A consistency between cultural norms and societal acceptance of coercive remedial relief should eventually exist over time. *See* PITMAN B. POTTER, THE ECONOMIC CONTRACT LAW OF CHINA: LEGITIMATION AND CONTRACT AUTONOMY IN THE PRC 8 (1992). Culture has been defined as "collective programming of the mind." GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES 13 (1980). Culture assumes that there is a consistent way of thinking and feeling in a society. Empirical studies have been conducted on the extent to which individual or collective values are held and the degree to which society is acceptant of being directed by government authority. In one study, cultural attributes of the United States, Britain, France, and Germany, were consistent with philosophical premises on which these countries were primarily formed. *See id.* at 104, 165, & 222; *see also infra* section III; Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1, 2 (1997); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 855 (1985).

19. *See generally* DAMASKA, *supra* note 11.

20. *See id.*

21. *See id.* at 11.

22. *See id.* at 80.

23. What is also unique about the chosen countries is that they are the leading precedential sources that other countries have looked to for legal transplants.

24. *See* DAMASKA, *supra* note 11, at 90.

25. The categorization of semi-active state is not a term that Damaska employed, but is something that the author of this article finds a logical extension of Damaska's framework. Both France and Germany are civil law countries. While contemporary civil law legal systems have been said to have derived from two primary families or branches of law, the Romanic and Germanic branches these two classifications have been fundamentally merged into a single *Romano-Germanic* civil law model. *See* KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW (1977); RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (1978).

26. *See* DAMASKA, *supra* note 11, at 12.

protections[27] is the notion that vigorous protection of economic rights supports enhanced individualism and a free market economy,[28] while heightened government control of society and the economy inhibits freedom of contract and mounts barriers to the unabridged protection of property rights.[29] The historical evolution of the philosophical framework that can be said to most fully sustain economic individualism dawned in England and was transported to the United States. Axioms specified that political affairs generally would succumb to the interests of the private sector,[30] that personal liberty and protection of property was the primary function of public law,[31] and that liberty of contract "be held sacred."[32] This can be distinguished from semi-active states that assuredly condone a right to freely dispose of property,[33] but that right is balanced with the public good[34] curbing transactional freedom.[35] Additionally, this can be starkly contrasted with the activist states, the former Soviet Union and China, where there was public ownership of all productive resources,[36] generally no protection of property or economic rights,[37] and a system of contract that was a public function of the state.[38] The higher the degree of contractual freedoms and property rights protections institutionally respected in a country, the more difficult it becomes for government actions to deprive holders of those rights from their legal interests.

C. Derivative Role of the Judiciary

From these property and contract right conceptions, judicial systems will normally be established in or evolve toward a posture logically supporting the

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27. *See* James Gordley, *Contract, Property, and the Will The Civil Law and Common Law Tradition*, *in* THE STATE AND FREEDOM OF CONTRACT 66 (Harry N. Scheiber ed. 1998).

28. *See* RICHARD ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 53 (1914). The term "market economy" assumes that individual economic actors are permitted to engage in transactions that promote their self-interest in a manner relatively undefiled by government intervention so that forces of supply and demand can establish prices for goods and services in the economy. *See id.*

29. *See* DAMASKA, *supra* note 11, at 81. The goals of an activist state could be undermined if individuals could personally profit at the expense of government goals. *See id.*

30. *See* Henry Horowitz & James Oldham, *John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century*, 36 HISTORICAL J. 137 (1993).

31. *See* David Lieberman, *Contract Before "Freedom of Contract" in* THE STATE AND FREEDOM OF CONTRACT, *supra* note 27, at 106.

32. Printing and Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462 (1875), *quoted in* Lieberman, *supra* note 31, at 112.

33. *See* R. Pothier, *Traité du droit de domaine de propriété*, *in* "Oeuveres de Pothier," *cited in* James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459, 462 (1994).

34. *See id.* at 463.

35. *See* SCHLESINGER ET AL., *supra* note 14, at 734.

36. *See* WILLIAM G. FRENKEL, COMMERCIAL LAW OF RUSSIA II.A(1) (1995).

37. *See* George Brunner, *The Function of Communist Constitutions: An Analysis of Recent Constitutional Developments*, 3 REV. OF SOCIALIST L. 121 (1977).

38. *See* G.T. Hsiao, *The Role of Economic Contracts in Communist China*, 53 CAL. L. REV. 1029 (1965).

predominant ideology of the founding preceptors of the respective countries[39] and their definition of the apropos relationship between government and citizens, between and among individuals in society. At extremes, judiciaries may remedy ensuing disputes involving legal transgressions in a fashion that is thoroughly encompassing and become enmeshed in the dispute and be influenced by political and ideological forces, or may resolve disputes in a manner that is distant, uninvolved, and not at all impacted by political and ideological pressure. The political and judicial relationship can be situated along a spectrum that ranges from a completely independent judiciary to one that is absolutely subservient to the predilection of political forces.[40] In the active states, judiciaries have been required to devote weighty deference to state validated prerogatives since court decisions could be monitored and controlled by those with political power[41] even though judicial independence was commonly alleged.[42] On the other hand, political fidelity has not been required of judiciaries in reactive states since directing otherwise would question the impartiality of the law and independence and integrity of the judiciary as an institution of government that should have an unbiased decision-making process. Likewise, in the activist states, the judiciary was often employed to preemptively obviate societal disputes from manifesting, while in the reactive states, the judiciary was to provide a remedy "after the fact"[43] and only to become involved to the extent needed to satisfy the immediate private sector dispute.[44]

Even if a state grants significant power to the judiciary as an independent organ of government and separates policy agendas from the judiciary, it may still substantially restrict its ability to freely rectify disputes in a manner that might diverge with other societal norms. For instance, countries that acclaim property rights and have powerful judiciaries may restrict coercive government

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39. This assumes that adequate resources are provided to the judiciary to properly perform the role with which it was endowed. Many developing countries have established certain norms and roles for their judicial branches but because a choice must be made about allocating limited resources, sometimes functions bestowed cannot be discharged. Another issue is that political change in government could also have an important impact on the evolution of the judiciary, although the theme of this work is that the degree of political shift can be somewhat restricted by long-lived and foundational legal sources in a country. For example, individual property rights in the United States Constitution are hailed, while they have been essentially non-existent in China. If later legislation derives from these foundational sources, the legislation cannot egregiously depart from what exists in the foundational source of law, regardless of short-term political shifts.

40. *See* Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 HARV. L. REV. 967, 972 (1969).

41. *See* DAMASKA, *supra* note 11, at 17.

42. *See* HAROLD JOSEPH BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE 102 (1966).

43. *See* DAMASKA, *supra* note 11, at 73.

44. *See id.* at 88.

authority[45] and impede any intricate government involvement in the private sector. Reciprocally, if a court system is weak and subordinate to the executive, it may still be endowed with much authority to utilize coercive relief as the remedy of choice, give the non-breaching party exactly what was bargained for in the original contract, and leave damages as a secondary remedy even if a substitutional remedy would objectively and fairly compensate the wronged party.[46] A weak and less independent judicial branch may be accorded with an authority to manage contract performance because the state regards remedial measures as a social institution that endeavors to effectuate moral behavior as a public interest consequence. The type and amount of remedy can punish a wrongdoer[47] and establish precedent for prospective contractual relations where risk of breach may otherwise be high, and incubate a policy agenda to instill morality in commercial relations. This is not to say that even in countries that traditionally have not been interested in punishing promisors for reneging on contractual obligations[48] have not done so on occasion for malicious and deliberate breaches,[49] but this is the anomaly.[50] Normally only countries that have favored specific performance have also commonly penalized for non-performance.[51]

While the two state extremes discussed above do not exist today, largely because of conflicting forces of market economics and government expansion, examining their historical archetypes and evolutions can portray the coherence between ideologies underlying state formation movements and legal doctrines designed to abet a particular economic ordering. In this economic ordering, there is a theoretical trade-off between control-based/paternalistic government norms and those that promote economic individualism. Principles, norms, and regulations governing contract law are at the essence of societal ordering in any country and the ideology behind that law can generally be traced back to influential and often revolutionary periods over a century ago. The ideology of leaders during influential periods have drastically impacted long-lived and

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45. For instance, in the United States, courts are hesitant to employ a court enforced contempt power to coerce actions on defendants. *See* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 698 (1990). Giving a court significant coercive power could be inconsistent with a culture that is hesitant to accept government impediments on individual actions.

46. *See* Arthur Leff, *Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970).

47. There are also various types of substitutional relief that may have the effect of punishing for breach of contract. Expectation, restitution, and reliance are all damage categorizations. Having rules that favor substitutional relief over specific performance and favor damages that do not require a wrongdoer to forsake ill-gotten gains might even promote breach. *See generally* RESTATEMENT (SECOND) OF CONTRACTS, ch. 16 (1981).

48. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

49. *See* Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM L. REV. 1365, 1409 (1982).

50. *See* Laurence P. Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284 (1959).

51. *See* Grossfeld, *supra* note 13, at 1332.

integral contract law principles and remedial norms for their respective countries.[52]

Having established the theoretical framework of the article in relation to contract and property rights comparisons and the association of the state to the judiciary, a discussion of the historical distinctions in remedial relief follows.

III. SPECIFIC PERFORMANCE RULES

A contract is an agreement whereby parties establish, vary, or terminate relationships and obligations in a manner that did not exist before the contractual relationship was instituted. The parties may have the ability to freely contract in a manner that fully fosters their self-interests, to some degree be restricted by government regulation, or be required to consummate certain terms in their contractual relations. Once the contractual relationship is established and rights and obligations are ascertained, if the contract is irreconcilably breached, the non-breaching (or injured party) has a legal right to enforce that contract or to obtain a substitutional remedial measure in a court system. Inherent in the power of contract is the right to have legal sanctions available that are "adequate to protect reliance on the promise, to prevent gain by default and to effectuate expectations where there may be hidden or unprovable reliance."[53]

With specific performance, a court requires that the exact contractual obligation(s) be executed with less ability for the defecting party to maneuver its actions. With substitutional relief, or damages, a contractual obligation is not being coerced, but a court is replacing the original obligation with a substitutional responsibility to pay money. The historical rules concerning which form of relief is favored conspicuously differ across countries.

Revolutionary movements have been the events that have typically induced abrupt alterations in rule/legal frameworks so that there is a "fresh start" regarding legitimate actions of individuals in society, otherwise legal change will normally be more gradual and subject to political transitions and power struggles. Of the states surveyed, it was in the active states (the former Soviet Union and China) where the movement to drastically redefine acceptable societal conduct were most rash, while the semi-active states (France and Germany) incorporated codes to structure future lawful societal behavior in a moderately progressive fashion. The reactive states did not have revolutionary movements beckoning for a more active role for government in society and the economy. In the United States and England, government was

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52. The six countries discussed can be seen as precedential and leaders in legal innovation. In many other countries, similar movements have occurred but legal change and the adoption of new norms and codified sources often can be seen as being influenced in some way by these sources (*i.e.* "legal transplants").

53. *See* Ian R. MacNeil, *Power of Contract and Agreed Remedies*, 47 CORNELL L. Q. 495, 497 (1962).

to promote market transactions, individual rights, and property rights, and norms and rules regarding remedial relief are consistent with these agendas.

A. England and the United States

1. Relevant Legal History

In early England, cultural dominance of localized behavior in unstructured "popular courts"[54] eclipsed attempts to unify the law. A central government and more uniform justice system were eventually forthcoming, but there was never a revolutionary movement in England to call for a more progressive administrative government. In fact, England was not seen as a "modern state" in terms of having institutionally progressive and systematic legislation[55] since it acclaimed court-made law[56] and preserved rules of appropriate societal and economic behavior that were most consistent with the current structure and lives of local people.[57]

While some resistance existed to adopting the English common law in the United States,[58] it was eventually embraced by most American states as their official legal system shortly after the American Revolution, despite an ostensibly ardent intention to disjoin from the British crown and everything associated with it. States and the federal government were hesitant to establish their own codes and/or legislative sources because the predominant American value was that people were to choose their own independent path of social choice and that progressive legislation could hinder that choice. "Government itself was widely viewed as no more than a necessary evil."[59] Both England and the United States affirmed that society and the economy were too complex for government to direct and control[60] and that government's role should be to encourage "individual creative energy."[61]

The judiciary institutionally reflected a "hands off" approach to dispute settlement since only Courts of Equity, administered by the Chancery, could

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54. *See* WILLIAM F. WALSH, OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW (1926).

55. *See* DAMASKA, *supra* note 11, at 43.

56. This has been the case even though there were futile attempts to replace the common law. *See generally* FREDERIC WILLIAM MAITLAND, ENGLISH LAW AND THE RENAISSANCE (1901). Likewise, legislation has operated alongside the common law for centuries. *See* POTTER, *supra* note 12, at 23.

57. *See* Nicholas L. Georgakopoulos, *Predictability and Legal Evolution*, 17 INT'L REV. L. & ECON. 475, 478 (1997).

58. *See* WILLIAM F. WALSH, HISTORY OF ANGLO-AMERICAN LAW 93 (2nd ed. 1932); Van Ness v. Pacard, 2 Pet., 27 U.S. 137, 7 L. ed. 374 (1829).

59. *See* DAMASKA, *supra* note 11, at 44.

60. *See* John V. Orth, *Contract and the Common Law*, *in* THE STATE AND FREEDOM OF CONTRACT, *supra* note 27, at 62.

61. *See* WILLARD J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 7 (1956).

compel personal conduct,[62] but courts of general jurisdiction could not.[63] This jurisdictional archaism was eliminated,[64] but the rules restricting coercive relief over the actions of individuals sojourned in both countries. The historical institutional bifurcation may be a reason specific performance has remained the secondary remedy,[65] even though courts today have more procedural flexibility to fashion remedial decrees.[66] Others have claimed that this historical distinction is a "scant justification" for the endurance of such a system.[67]

2. *Specific Performance Rules in England & the United States*

In the United States "the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise."[68] "Reasonable expectations" means that at the time of bargaining, the parties knew that an appropriate remedy would be provided by a court in the event of breach[69] but it did not necessarily mean that the original promises would be compelled.[70] The historical institutional limitation was that "courts of equity were without jurisdiction [over a contract dispute] unless the remedy at law was inadequate,"[71] making specific performance the exceptional relief in

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62. *See* Sir James O'Connor, *Thoughts about the Common Law*, 3 CAMB. L.J. 161, 164 (1928); HAROLD D. HAZELTINE, EARLY ENGLISH EQUITY, ESSAYS 261 (1913).

63. *See* POTTER, *supra* note 12, at 497.

64. Jurisdictional rules between common law and equity became more uniform. *See* HENRY LACEY MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 125-27 (2d ed. 1948). The jurisdictional distinction between these two institutions is only of historical import today since courts of equity were abolished first in the United States in New York in 1848 through the enactment of the Code of Procedure (§ 69) and in England in 1873 with the first Judicature Act (§ 3).

65. *See* E. Allen Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1143, 1151-56 (1970).

66. *See* Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 345, 347 (1981).

67. *See* E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS, Vol. 3, at 163.

68. *See* ARTHUR L. CORBIN, CONTRACTS § 2 (1952).

69. *See generally* FRIED, *supra* note 3.

70. There is an often quoted phrase by Justice Holmes that reads:

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it and nothing else. . . [S]uch a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.

Holmes, *supra* note 48, at 462.

71. *See* Harold Greenberg, *Specific Performance Under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style,"* 17 NEW ENG. L. REV. 321, 323 (1982).

England and the United States.[72] If there was an "adequate remedy at law,"[73] coercive relief would be barred and a sum of money would be assessed against the breaching party.[74] Pleadings would need to exhibit that "reason and conscience" evinced that there were inadequacies in the remedy at law[75] and that substitutional relief would be exceedingly unfair in lieu of the original performance.[76]

Breach of contract claims can normally be divided into *in personam* and *in rem*, whereby, in remedial terms, the former refers to coercing actions of a person and the latter to transferring title to property.[77] For contracts requiring action by the parties, e.g. service contracts, damages have generally been the expected and only remedy.[78] When property was the locus of the contract, damages would be inadequate if the plaintiff could not "use them to replace the specific thing he has lost."[79] For real property, it was assumed that because every parcel of land in the world is unique,[80] specific performance of a land sale contract was required.[81] It would be challenging to find that substitutional relief could not adequately compensate the aggrieved party in the case of personal property since money damages could permit one to purchase comparable goods in the market. However, if a market substitute does not exist,[82] meaning that the good is unique,[83] specific relief could be granted.

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72. *See* G.H. Treitel, *Remedies for Breach of Contract*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 16 § 9 (1976).

73. *See* SIR WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW, Vol. 1, 457 (7th ed. 1956).

74. *See* George T. Washington, *Damages in Contract at Common Law*, 47 L. Q. REV. 345 (1931).

75. *See* WILLIAM F. WALSH, WALSH ON EQUITY 43 (1930).

76. *See* I.C.F. SPRY, THE PRINCIPLES OF EQUITABLE REMEDIES: INJUNCTIONS, SPECIFIC PERFORMANCE, AND EQUITABLE DAMAGES (2nd ed. 1980).

77. *See* CHARLES ANDREW HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY 74 (1915).

78. *See* SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, Vol. 11 § 1423 (1968); *see* Sampson v. Murray, 415 U.S. 61 (1974). Courts would be more apt to *prevent* the performance of a contract with an injunction. However, there have been situations where courts have enforced affirmative obligations to act, such as with a construction contract, particularly when a high level of supervision is not required by the court. *See* Tucker v. Warfield, 119 F.2d 12 (D.C. Cir. 1941). M.T. Van Hecke; *Changing Emphases in Specific Performance*, 40 N.C. L. REV. 1, 13-16 (1961).

79. *See* Laycock, *supra* note 45, at 703.

80. *See* Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 423 (Iowa 1977).

81. *See* Adderly v. Dixon, 1 Sim. & Stu. 607, 57 Eng. Rep. 239 (1824); Gethsemane Lutheran Church v. Zacho, 104 N.W.2d 645, 648 (1960); SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 141, 8A (3d ed. 1968).

82. *See* WALSH, *supra* note 75, at 301.

83. Economists have defined "uniqueness" in terms of whether there is a "substitutable good" in the eyes of consumer preferences. *See* Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 359 (1978). Some examples where this was found include cases involving family jewels (*See* Duff v. Fisher, 15 Cal. 375 (1860)), customized products (*See* Cumbest v. Harris, 363 So. 2d 294 (Miss. 1978)), special business interests (*See* Triple-A Baseball Club Ass'n v. Northeastern Baseball Inc., 832 F. 2d 214 (1st Cir.1987)), and patent

Even in those circumstances where the locus of the contract would ordinarily imply a need for coercive relief, it could be denied if contract performance would be impossible, unreasonably burdensome, unlawful, or when court orders could be "frustrated by the defendant through exercise of a power of termination or otherwise."[84]

All of these situations are premised on court interpretations of the "adequacy of remedy rule" at the *reactive* common law. The common law rule has been somewhat modified in the case of the sale of goods in both the United States and Britain with the adoption of commercial codes, although Britain seems to have stricter standards.[85] In the United States, the general policy for the sale of goods is that American courts can order specific performance when it is commercially necessary.[86] The buyer can obtain specific performance or replevin when the goods are "unique,"[87] which is the case when there in an "inability to cover," when substitutional damages cannot provide adequate relief, or a similar circumstance.[88] A seller can require specific performance of payment of the price when "resale of the goods is impracticable."[89] By comparison, under the British Sale of Goods Act, it has been said that the decision to grant specific performance is entirely within the discretion of the court but that it should not be granted when damages would be adequate.[90] "Only in rare cases do English courts exercise this discretion."[91] Because enacting these codes was a departure from the common law, their application will be discussed in section V(B).

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rights (*See* Corbin v. Tracey, 34 Conn. 325 (1867)). However, even though uniqueness may require coercive relief because of some subjective value, if substitutional relief is granted, there need not be compensation for sentimental or subjective values. *See* Charles Goertz & Robert Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM L. REV. 554, 568-77 (1977).

84. *See* FARNSWORTH, *supra* note 67, at 163-64.

85. *See* U.C.C. § 2-716; British Sale of Goods Act, 1979, § 52 (Eng.); Jianming Shen, *The Remedy for Requiring Performance Under the CISG and the Relevance of Domestic* Rules, 13 ARIZ. J. INT'L & COMP. L. 253, 279-80 (1996).

86. *See* KENNETH YORK ET. AL., REMEDIES 815 (1985).

87. *See* U.C.C. § 2-716. However, even if this is met, specific performance could be denied if performance were deemed impossible or impracticable (*See id.* § 2-615), if a contract defense were available (*See* Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH L. REV. 341, 396 (1984)), or when parties negotiated out of any right to specific performance (See E. ALLEN FARNSWORTH, CONTRACTS 832 (1982)).

88. *See* U.C.C. § 2-716, cmt. 2; *see* Madariaga v. Morris, 639 S.W.2d 709 (1982).

89. *See* U.C.C. § 2-709.

90. *See* British Sale of Goods Act, *supra* note 85, § 52; *see* P.S. ATIYAH, THE SALE OF GOODS 552-53 (1990).

91. Shen, *supra* note 85, at 279-80.

B. France & Germany

1. Relevant Legal History

Throughout the sixteenth century, European rulers governed much like their reactive state counterparts in that their primary role was that of societal "dispute settler" rather than that of a legislator that framed progressive and objective standards on societal behavior, which was what their role was to become.[92] It was with revolutionary movements and the adoption of codified law that converted this ideology toward that of a progressive state[93] that has lasted to this day.[94]

In France, for those living in the generation preceding the 1789 French Revolution, it was a time of economic scarcity for most and a time of opulence for a few. The vast majority of French citizens judged the government to be autocratic, suppressive, corrupt,[95] a monopolizer of wealth, and endower of special privileges to the allegiant;[96] while the judiciary was perceived as an inequitable institution that favored property holders and those loyal to the king.[97] It was this corruption and oppression that drove the French populace into a *coup d'état* that overthrew the regime. However, unlike the American Revolution, which sought to preserve individual rights against the emergence of a powerful and potentially suppressive government, the French Revolution was aimed at the King and property holders.

Shortly after the Revolution, France began to unify its legal and economic systems in a way that served the needs of the general populace by incorporating public law, granting democratic and individual rights in the 1791 Constitution,[98] abolishing the ancient system of privileges,[99] and forming a democratic bond between government and the common person. The fundamental institutional transformation occurred with the 1804 enactment of the French (or Napoléonic) Civil Code, which sought to harmonize law with

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92. *See* QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT, Vol. 2, 289 (1978).

93. *See* H.C. GUTTERIDGE, COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH 77-78 (2d ed. 1949).

94. The initial reason for this move may have been a pragmatic desire to hedge against territorial battles and border shifts on the continent since government consolidation and nationalistic movements might more fully unify the country, but the derivative result was progressive government.

95. *See* ALBERT GUÉRARD, FRANCE: A MODERN HISTORY 233 (1959).

96. *See* J. Q. C. MACKRELL, THE ATTACK ON 'FEUDALISM' IN EIGHTEENTH CENTURY FRANCE 82 (1973).

97. *See id.* at 53.

98. These were largely perceived as *natural rights*. *See* CHARLOTTE C. WELLS, LAW AND CITIZENSHIP IN THE EARLY MODERN FRANCE 140 (1995).

99. *See* Francis Deák & Max Rheinstein, *The Development of French and German Law*, 24 GEO. L.J. 551, 555 (1936).

the new societal philosophy[100] by abolishing feudal hierarchies and property restrictions and sculpting a culture of Frenchmen dedicated to their nation through progressive government statism.[101] Some have said that this resulted in a culture dedicated to a French way of life and the nation, rather than to a commitment to the private sector, capitalism, and money, which was the case in England and the United States.[102]

Germany undertook a similar approach by employing government progressiveness in the economy and instilling cultural acceptance of those institutions. A national identity movement materialized in Germany by the time the German Reich emerged in 1871 and several new codes were adopted in the next two decades,[103] but it was the German Civil Code of 1896 that replaced all local laws with a uniform legal system that began to consolidate the country much like that which occurred in France, but without notable violence.[104] However, unlike France, which had a fairly solid democratic system after its codification period, Germany faced harsh durations of authoritarianism and revolutionary fervor.[105] From 1933 to 1945, the centralization and monopolization of authority[106] dethroned traditional relationships among government, society, and the private sector, so to attune relationships to an authoritarian statist government that planned economic development.[107] While most private sector enterprises remained legally private in Germany during this period, the government undertook an economic development strategy that was staunchly nationalistic and control-based that dominated interests outside of government.[108] This persisted after World War II in East Germany, which followed a statist form of rule with a communist/activist legal system like that of the Soviet Union and China, but with the collapse of the Berlin Wall and East Germany's reunification with the corporatist and civil law West Germany in 1989, it then adopted legal, administrative, and political institutions consistent with semi-active state traditions.

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100. *See* Gordley, *supra* note 33, at 483.

101. *See id.* at 461.

102. *See* GUÉRARD, *supra* note 95, at 457.

103. Some of the codifications include the 1871 Penal Law, the 1877 Civil Procedure Code, the 1896 Private Law, and an 1897 Uniform Commercial Code. *See* Erhard Blankenburg, *Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany*, 46 AM. J. COMP. L. 1, 2 (1998). Prior to this period, there were various influences on German law, including the Saxon Civil Code of 1863, the Napoleonic Code, and the Roman Common Law. *See* Deák & Rheinstein, *supra* note 99, at 568-69.

104. *See id.* at 574.

105. The type of revolutionary movement had the semblance of that which occurred in the Soviet Union.

106. *See* REINER POMMERIN, CULTURE IN THE FEDERAL REPUBLIC OF GERMANY 5 (1995).

107. *See* MARSHALL DILL, GERMANY: A MODERN HISTORY 358-64 (1961).

108. Laws were enacted that said there could be no "unearned incomes" and that there would be "limitations of profits from wholesale operations, land reform, nationalization of all trusts, communalization of all big department stores, and no land speculation." *Id.* at 299.

2. *Specific Performance Rules in France and Germany*

In most civil law systems, the right to demand contract performance has been said to be an established principle[109] and an "absolute right."[110] This is generally the case in France[111] and Germany,[112] although German courts have even less discretion to refuse coercive relief than do French courts.[113] "[T]he sanctity of contract is regarded as implying. . . the claim for performance."[114] Unlike the reactive states, which diluted a court's coercive authority by maintaining non-codified authority restrictions, progressive codified sources in France and Germany presumed that such relief would be granted by a court unless the disadvantages of the remedy outweighed the advantages of granting the relief.[115]

The French Civil Code (FCC) states that contracts have the force of law and must be performed in good faith,[116] but the innocent party has the ability to choose between specific performance and rescission with substitutional relief.[117] The choice between remedial measures often favors the one that is most pragmatic for the particular circumstance,[118] as selected by the innocent

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109. *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 227 (1987). This has *generally* been the case with all civil law countries influenced by the French and German codes, but with distinctions. *See* Treitel, *supra* note 72, § 12. For instance, under the Netherlands and Danish law, specific performance is the common remedy (*See* MICHAEL H. WHINCUP, CONTRACT LAW AND PRACTICE 253-54 (1990)), but there is more of a choice between specific and substitutional relief in Spain. *See* Civil Code of Spain, art. 1124. The Roman law influenced all legal systems on the European continent in many important ways. *See* SCHLESINGER ET AL., *supra* note 14, at 221; SYBILLE BEDFORD, THE FACES OF JUSTICE: A TRAVELER'S REPORT 152 (1961). Germany was particularly influenced by the Roman law during the eighteenth and nineteenth centuries. *See* Dawson, *supra* note 9, at 525. However, specific performance is a principle on which France and Germany departed since the Roman law favored substitutional relief. *See* Neitzel, *supra* note 2, at 161; SCHLESINGER ET AL., *supra* note 14, at 219; Dawson, *supra* note 9, at 496.

110. *See* Charles Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208, 231 (1955).

111. *See* FRENCH CIVIL CODE (J.H. Crabb & F.B. Rothman, trans.), art. 1184 [hereinafter FCC].

112. *See* GERMAN CIVIL CODE (Forrester, Goren, and Ilgen, trans. of the 1976 Code) [hereinafter BGB]. Provided in Appendix in B.S. MARKESINIS ET AL., THE GERMAN LAW OF OBLIGATIONS: VOLUME I: THE LAW OF CONTRACTS AND RESTITUTION § 241 (1997).

113. *See* Szladits, *supra* note 110, at 227.

114. *See* Ulrich Drobnig, *General Principles of European Contract Law*, *in* INTERNATIONAL SALE OF GOODS 305 (1986).

115. *See* Dawson, *supra* note 9, at 530.

116. *See* FCC, *supra* note 111, art. 434.

117. *See id.* arts. 1243 & 1184(2).

118. *See* Dennis Tallon, *French Report*, *in* CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS 283 (Donald Harris & Denis Tallon eds., 1989).

party or determined by the judge,[119] but the substitutional remedy can be the only one available if it is the only one still possible.[120] What is important for comparative purposes is that in France the innocent party has the *opportunity* and *ability* to request and attain coercive relief while Britain and the United States have had strict impediments on that remedial choice.

Similarly in England and the United States, it is more difficult to attain a court order compelling a party to do something than to give something[121] and the FCC similarly demarcates[122] between obligations *to do or abstain from doing something*[123] and *obligations to give item(s).*[124] France favors coercive relief for obligations to convey[125] and to some degree for obligations to do[126] even though the general rule code provision, FCC Article 1142, provides that every obligation to do or not to do resolves itself in damages in case of nonperformance.[127] The codified preference for damages is often discounted and averted because of other provisions and judicial decisions[128] that do favor coercive relief for personal obligations,[129] particularly since the intention of this provision was to prohibit excessive coercion on an individual but not to consecrate substitutional relief over specific performance.[130] Another commentator has stated that an Article 1142 obligation *to do* should give rise to substitutional relief only when "direct compulsion of the debtor is physically or morally impossible, and there are circumstances where such compulsion would be impracticable or odious."[131]

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119. *See* Szladits, *supra* note 110, at 216. French courts will normally grant specific performance whenever requested by the innocent party unless "costs would be disproportionately high with regard to the damage caused, or where the promisee can have no real interest in receiving specific performance, or the latter would disturb intervening rights of third parties." FCC, *supra* note 111, art. 1184.

120. *See* FCC, *supra* note 111, art. 1184. Courts have leniently interpreted this provision in favor of compelling performance as long as it is still remotely possible. *See* P.D.V. MARSH, COMPARATIVE CONTRACT LAW: ENGLAND, FRANCE, GERMANY 320 (1994).

121. *See* G.H. TREITEL, REMEDIES FOR THE BREACH OF CONTRACT 53 (1988).

122. *See* FCC, *supra* note 111, art. 1126. A contract to build a boat would be a contract "to do," while a contract to sell an already constructed boat would be a contract "to give." *Id.*

123. *See id.* arts. 1142-45.

124. *See id.* arts. 1136-41.

125. *See* Dawson, *supra* note 9, at 524. The legal fiction is that an obligation to convey creates a property right in the transferee at the moment the contract was consummated (*See* FCC, *supra* note 111, art. 1138) so for "an obligation to convey," the law attaches, as between the parties, the full and immediate effect of a conveyance. The innocent party has the right to have a bailiff seize the item. *See* French Code of Civil Procedure, art. 156 [hereinafter FCCP].

126. *See* MARSH, *supra* note 120, at 320. A commentator at the turn of the century said the "effect of an obligation to do or to abstain from doing is on the other hand in principle restricted to the creation of a right to damages for non-performance." M. Sheldon Amos, *Specific Performance in French Law*, 17 L.Q. REV. 372, 372 (1901).

127. *See* FCC, *supra* note 111, art. 1142.

128. *See* Tallon, *supra* note 118, at 284.

129. *See* FCC, *supra* note 111, art. 1143.

130. *See* James Beardsley, *Compelling Contract Performance in France*, 1 HAST. INT'L & COMP. L. REV. 93, 93 (1977).

131. *See* Tallon, *supra* note 118, at 285.

Germany's test for granting coercive relief is rather akin to that of France, but the substantive provisions and powerful German judiciary makes all countries discussed thus far pale in comparison. A patronage for specific performance was clearly foreordained[132] by the drafters of the carefully thought through and tightly organized[133] German Civil Code (BGB). The BGB provides that a court can order performance of the original contract terms[134] as long as performance of the original contractual obligation is not *impossible*[135] or would not otherwise require unreasonable expense or effort.[136] "[I]n principle, at least, as long as specific performance enforcement is possible, no damages may be demanded by the promisee for nonperformance of the contract."[137] While German courts do have discretion in deciding upon remedial relief, they generally do not refuse specific performance when it is requested.[138]

The BGB specifies that an obligee is entitled to claim performance from the obligor[139] and that the obligor must "restore the situation which would have existed if the circumstances rendering him liable to make compensation has not occurred,"[140] meaning that legal responsibility requires "undoing" the breach. One can request substitutional relief but only after it is pled that specific performance is impossible and a formal demand was made on the obligor to perform according to the original contract terms.[141] While general provisions strictly favor coercive remedial relief, substitutional relief may be granted even though breach occurred and performance is still possible. For instance, substitutional relief may be granted when performance would now insufficiently compensate the creditor,[142] if an expected breach is preempted and it is claimed that damages would be the desired remedy when performance does not occur within a reasonable time,[143] or if specific performance would require a disproportionate expenditure by the obligor to fulfill the originally

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132. *See* Neitzel, *supra* note 2, at 162. "[E]very right may be enforced by the courts" and "the purpose of the lawsuit is to create a situation or condition which would exist if no violation or infringement of a right has arisen at all." *Id.*

133. *See* Dawson, *supra* note 9, at 525.

134. *See generally* B. S. MARKESINIS ET. AL., *supra* note 112.

135. This form of "impossibility" differs from the case where the obligor should not reasonably be held responsible. *See* BGB, *supra* note 112, § 275(1). It is when the obligor can be said to be at least partially responsible for the impossibility that caused the breach (*See id.*§ 280), that the obligor has no reasonable excuse for nonperformance. *See* TREITEL, *supra* note 121 at 52-53.

136. *See* TREITEL, *supra* note 121, at 53.

137. Szladits, *supra* note 110, at 221.

138. *See* Dawson, *supra* note 9, at 530.

139. *See* BGB, *supra* note 112, at § 241

140. *Id.* § 249.

141. *See* ERNST JOSEPH COHN, MANUAL OF GERMAN LAW 105 (1968).

142. *See* BGB, *supra* note 112, at § 251 Nr. 1

143. *See id.*§§ 250, 283 & 326. The facial rigidity of the rules favoring coercive relief can be pacified when it is clear that damages would be the more efficient and less intrusive remedy. *See* MARKESINIS ET AL., *supra* note 134, at 618.

contracted obligation.[144] While the BGB is very particular in favoring coercive remedial relief, the German Code of Civil Procedure (ZPO) also has rules that consider distinctive types of contracts.

When goods, assets, land, or other fungible property rights are at issue, specific performance is always available and a court judgment can give the automatic transfer of that property.[145] While the countries discussed thus far have been more hesitant to grant specific performance for personal performance contracts, in Germany, it is the normal remedy,[146] particularly when the public interest is involved.[147] This does not mean that the aggrieved party cannot attain a substitutional remedy when fundamentally necessary,[148] perhaps by having a third party render performance at the expense of the breaching party[149] when personal competence is not at issue.[150]

C. *The Soviet Union & China*

1. Relevant History

The period prior to the Russian Revolution of 1917 was an era of tempered private sector, market, and property right freedoms. As the government progressively resorted to direct interference in the economy, such as with "price controls, requisitions, state monopolies, and bans on certain commercial operations," the economy collapsed[151] and provoked the Russian Revolution,[152] the abolition of all Czarist laws in 1918,[153] and statist rule over the private sector.[154] This system embraced the antithesis of reactive state property ownership norms in the reactive states, since the goal was the gradual[155] "abolition of capitalist ownership and the establishment of public ownership of the basic means of production. . . [and] planned development of

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144. *See* BGB, *supra* note 112, § 251(2).

145. §§ 894-96 ZivilproBordnung [German Code of Civil Procedure Statute] [hereinafter ZPO]. The bailiff or police authority can confiscate the goods subject to the court order (*See id.* §§ 883, 884), or evict the breaching party if land is the locus of the contract right (*See id.* § 885).

146. *See id.* § 888. This includes orders that prevent action. *See id.* § 890.

147. *See* MARKESINIS ET AL., *supra* note 112, at 622.

148. *See* BGB, *supra* note 112, at § 251 Nr. 2.

149. *See* ZPO, *supra* note 145, at § 888.

150. *See id.* § 887.

151. FRENKEL, *supra* note 36, at I.A.(13).

152. *See* KAZIMIERZ GRZYBOWSKI, SOVIET LEGAL INSTITUTIONS: DOCTRINES AND SOCIAL FUNCTIONS 28 (1962). The Russian Revolution was said to embrace "the legal ideology of the French Revolution" but it went well beyond ideological change. *See id.*

153. *See generally* John N. Hazard, *The Future of Codification in the U.S.S.R.*, 29 TUL. L. REV. 241 (1955).

154. *See* Dietrich A. Loeber, *Plan and Contract Performance in Soviet Law*, *in* LAW IN THE SOVIET SOCIETY 128 (Wayne R. LaFave ed., 1965).

155. *See* JOHN N. HAZARD, COMMUNISTS AND THEIR LAW: A SEARCH FOR THE COMMON CORE OF THE LEGAL SYSTEMS OF THE MARXIAN SOCIALIST STATES 173-74 (1969).

the national economy aimed at building socialism and communism."[156] Monetary exchange was eliminated, as were contract[157] and property rights. Nationalizations and expropriations infested the economy. There was a unification between the public and private sectors[158] and ultimatums initiated in The Five Year Plan to develop the economy. Central planning required state and socialist enterprises to operate economically and according to administrative directives deriving from the central plan and to structure contractual relations consonantly with the plan. "The Soviet state, or more precisely, the Communist Party, maintained a tight economic and political grip on all productive and creative activity through its plenary political powers, and the Soviet law merely acted as a conduit of that political power in replacing market mechanisms with ethereal 'socialist economic relations.'"[159] The regulatory role of the state over production became complete, unquestioned, and unrelenting,[160] and was premised on the philosophical collectivist assumption that it was best for the state to define societal interests. This also meant that the judiciary and legal institutions had to be decimated to instill the "socialist concept of justice."[161]

China, arguably the world's most ancient civilization, traversed five stages of socio-economic and political organization,[162] but maintained a relatively high degree of social harmony throughout its history chiefly because of paternalistic cultural norms.[163] Like the Soviet Union, China, starting in 1904, was also pursuing Western norms of private sector, capitalist, and market order prior to its revolutionary period, including by promulgating new

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156. *Id.* at 6.

157. *See* V.I. LENIN, SELECTED WORKS Vol. 9, 288-89 (1937). While contract law principles were initially abolished, even Lenin later realized that the economy could not function without such principles. *See id.*

158. *See* HAZARD, *supra* note 155, at 77.

159. FRENKEL, *supra* note 36, at I.A(16).

160. *See id.* This was the result even though the initial goal was to reach a stage where no laws or coercion would be necessary. *See id.* The underlying connection between Marxism and law was that differing economic statuses, particularly between the proletariat and bourgeois, formed a need for law to maintain control over society, but if a classless society existed, formal rigid law would not be needed. *See id.* It was the "oppression of one class by another" that caused the need for law. *See* KELSEN, *supra* note 11, at 52-54. *See generally* MAUREEN CAIN & ALAN HUNT, MARX AND ENGELS ON LAW (1979); *see also* J. W. HARRIS, LEGAL PHILOSOPHIES 251-53; KATHERINE NEWMAN, LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PRE-INDUSTRIAL SOCIETIES 17-25 (1983).

161. Leaders later realized that more stability and predictability in law was needed. *See* Joseph Stalin, *On the Draft Constitution of the U.S.S.R., 1936, in* LENINISM: SELECTED WRITINGS (1942).

162. *See* ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 6-7 (1992).

163. *See* Fu-mei Chang Chen, *On Law in Imperial China*, 29 HARV. J. OF ASIATIC STUDIES 274, 275 (1969).

commercial codes,[164] but pursuits toward economic Westernization abruptly halted when the Communists[165] defeated the Nationalists (Kuomingtang) in 1949 in a long and bloody civil war. The Communists abrogated all Kuomingtang laws[166] and institutions so that political preferences could flexibly direct societal governance in a custom consistent with long-lived paternalist cultural notions.[167] Expectantly, this also meant severely suppressing property rights and belittling any private sector actions that could oppress the common person or undermine the state's goals. The new Chinese system of governance was based on teachings of Mao and Marx and brought forth an activist and planned economy,[168] with contractual relations deriving from collectivist planning and policy-making.

2. *Specific Performance Rules in the Soviet Union and China*

The basic rules for specific performance preceding the formation of the Soviet Union were comparable to those in European civil law systems since availability of a "fair substitute" for the locus of a breached contract could sanction the grant of a substitutional remedy. This abruptly changed with the new economic order since decreed planning directives imposed that contracts be executed in a "manner most economical for the socialist economy."[169] Since no leniency was procurable in avoiding contractual obligations that derived from a state plan, any discussion of specific performance rules in the former Soviet Union and China must be preceded by a discourse on state planning ultimatums because of the intricate nexus between contract consummation and remedial measures.

Economic actors were required to consummate contracts to fulfill obligations to society in two ways the "administrative legal obligation vis-à-vis the state. . . and a civil law obligation between supplier and consumer."[170] Administrative planning restrained the free will of economic actors by mounting parameters for societal action as defined by the *will of the government* rather than by the *will of the individual*, which is contrary to the bedrock themes of all countries addressed thus far. This prerogative to control

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164. *See* BEDFORD, *supra* note 109, at 153. While this was certainly a significant departure from the past for China, these codes were said to not live up to Western expectations. *See* Roscoe Pound, *The Chinese Civil Code in Action*, 29 TUL. L. REV. 277, 279 (1955).

165. *See generally* THE LEGAL SYSTEM OF THE CHINESE SOVIET REPUBLIC 1931-1934 (W.E. Butler, ed., 1983). The Communist Party of China was founded in 1921 and was ideologically modeled after that of the Soviet Union. *See id.*

166. *See* FATHER ANDRE BONNICHON, LAW IN COMMUNIST CHINA 4 (1956).

167. This approach departed from that of the Soviet Union since the Soviets relied more on rigid legalities to nurture its economic modernization program.

168. *See generally* WILLIAM HENRY CHAMBERLIN, THE SOVIET PLANNED ECONOMIC ORDER (1931).

169. Russian Soviet Federated Socialist Republic, art. 168, *in* SOVIET CIVIL LEGISLATION (Whitmore Gray & Raymond Stults eds., 1964) [hereinafter R.S.F.S.R. Civil Code].

170. Loeber, *supra* note 154, at 140.

economic and societal relations was codified and required that the essence of a contract between economic actors be "concluded on the basis of a planned task," "must conform to this task," and that contracts violating economic planning, laws, or "socialist state and society"[171] were null and void.[172] Despite a gradual abatement in the number of production areas and pervasiveness in the economic plans in different periods of communist rule, contracts descending from the plan had to be consummated and exigent obligations of those contracts had to be carried out, making specific performance mandatory, unless there was something that made performance impossible.[173] Unilateral refusals to perform were not permitted[174] and creditors could readily demand that debtors transfer specific items that were the subject of a contract.[175]

There were circumstances where attaining an order of specific performance would be less likely. If a contract was consummated and obligations were inconsistent with a planning act[176] or if a planning act was later altered, then contractual obligations could be expunged. Also, akin to the other legal systems discussed thus far, the probability that performance of personal service contracts would be ordered was lower than in the case of production or sales contracts and could revert to damages,[177] but because obligations to perform for society prevailed over individual deference and liberties, even personal service contracts could be compelled if needed to accommodate the planning mandate.[178]

China's system of planned economy was premised on the Soviet model and became the foundation and framework by which all in society had to adhere,[179] which also meant that contracts had to be performed. "As a general rule in Chinese law, the tradition has been to compel the parties to perform their contractual obligations, making the right to specific performance often the primary remedy for breach of contract. Specific performance is even considered a fundamental principle of Chinese contract law."[180] However, given endemic breaching,[181] ensuring performance of contracts proved more difficult than expected.[182] The government met recalcitrance to perform on

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171. R.S.F.S.R. Civil Code, *supra* note 169, art. 49.

172. Principles of Civil Legislation of the Union of the SSR and the Union Republic (1961), *in* LAW IN EASTERN EUROPE, Vol. 7, 263-98, (1963) [hereinafter PCL].

173. *See* HAZARD, *supra* note 155, at 339.

174. *See* R.S.F.S.R. Civil Code, *supra* note 169, art. 169.

175. *See id.* art. 217.

176. *See* PCL, *supra* note 172, arts. 33 & 34.

177. *See* R.S.F.S.R. Civil Code, *supra* note 169, art. 218.

178. *See* HAZARD, *supra* note 155, at 321.

179. *See* Zhonghue Renmin Gonghego Xianfa art. 15 (1962) [Constitution of the People's Republic of China (1962), art. 15, (XIANFA), *in* ALBERT P. BLAUSTEIN, FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST [hereinafter PRC Const.].

180. Shen, *supra* note 85, at 282.

181. *See* Hsiao, *supra* note 38, at 1056.

182. *See* POTTER, *supra* note 18, at 24-25.

contracts with new penalties and strict fiats about fulfilling economic contract obligations,[183] pre-emptive measures that established supervisory administrative organs and/or required cadre supervision over contract performance,[184] and alleged brutalization and reprisals.[185]

While this leads to a very abysmal picture in both the Soviet Union and China, it should be noted that a distinction can be drawn between economic contracts that were derived from the state plan, and civil contracts consummated between private parties that were not so tangentially related to the economic plan. Certainly, the state's interest in permitting coercive relief was highest when the plan was involved, but there was still a tangential effect in civil contracts. Civil contracts did permit more leniency for parties to establish contract terms, but state interest in coercing relief derived more from themes about communal and societal morality than out of pragmatism, which resulted in readily granting specific performance also when there was less state interest involved in the contract at issue.

The unique rules depicted herein, in all three types of states, have since evolved from their historical archetypes. For the most part, only negligible adjustments have occurred in France and Germany, although France did need to produce consistency between the remedial role with which its courts were endowed and their institutional ability to penalize. The next section will philosophically describe why the rules were established as they were, while the section thereafter will explain why seeming shifts have occurred in the interpretation of the rules in Britain and the United States, and why there were drastic overhauls in the Russian and Chinese codified sources covering remedial rules. These rule transitions will be discussed in section V.

IV. HISTORICAL IDEOLOGICAL RATIONALE FOR SPECIFIC PERFORMANCE RULE DISTINCTIONS

At the essence of irreconcilable distinctions in substantive rules to grant specific performance was the foundational ideology on which each state was constituted. Ideological cornerstones ensconced morality norms concerning relations between government and individuals and between economic actors. From this descended the authority of the judiciary and the practical economic manifestation of principles that justified a rule's particular disposition.

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183. Circular Concerning the Strict Enforcement of Basic Construction Procedures and the Strict Fulfillment of Economic Contracts (Chinese Central Committee and State Council issued in Dec. 1962) *cited in* POTTER, *supra* note 18, at 25-26. The guidelines were designed to penalize and coerce rather than compensate an aggrieved party for losses. *See id.*

184. *See* Hsiao, *supra* note 38, at 1047, 1058.

185. *See generally* FOX BUTTERFIELD, CHINA: ALIVE IN THE BITTER SEA (1982).

A. *Defining Morality in Contractual Relations*

There is a stark contrast between how reactive and active states defined morality in contractual relations involving economic actors[186] and how scholars constituted legal fictions about rights and obligations originating from legally consummated contracts. In the common law states, "rights to remedial relief" are granted to the creditor, while civil law countries perceive the result of contractual relations in terms of obligations owed by a debtor,[187] and communist systems focused on obligations owed to society.[188] The differences in these contract law fictions are telling for purposes of portraying how law endows individual right protections versus government[189] and other individuals, as well as the degree of freedom from government authority provided to the private sector. Practically speaking, any effective remedial system can bestow a self-interest in parties to fulfill contractual obligations since personal morals or fear of disrepute in one's business reputation[190] alone can succor a self-enforcing mechanism that can curb habitual breaching even when anxiety over legal or government reprisal[191] does not exist, but it may still be in a government's interest to codify principles that transparently specify a position on contractual morality.[192]

Reactive approaches to law have sought to dispense justice apart from policy agendas of the state. The judiciary is a "promoter and enforcer" of individual rights and liberties,[193] including against government and majoritarian voices,[194] connoting that interests of the majority or collective

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186. Some scholars have criticized both societal extremes. *See generally* I. KAWASAKI, JAPAN UNMASKED (1969); ARTHUR BRITTAN, THE PRIVATIZED WORLD (1977).

187. *See* John Fitzgerald, *Recent Developments Relating to CISG: CISG, Specific Performance, and the Civil Law of Louisiana and Quebec*, 16 J. L. & COM. 291, 302 (1997).

188. *See* Shen, *supra* note 85, at 256. "Chinese law often emphasizes the [assurance] of performance and addresses remedial issues in terms of the *liabilities* and *obligations* of the party in breach rather than strait-forwardly in terms on the remedies and rights of the non-breaching party." *Id.*

189. *See* GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1988).

190. *See generally* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 68 AM. SOCIOL. REV. 55 (1963). The argument is that if one is not concerned about the ethics of fulfilling contractual obligations, one might rationally consider future losses that might be incurred from a smirched business reputation;, as weighed against the benefits that might be provided by a current decision to breach a contract. *See generally* ANDREW M. SPENCE, MARKET SIGNALING (1974). This can be perceived as a self-regulatory process or delegation of morality punishable by the market, rather than by government ultimatums of right and wrong. *See id.*

191. *See* John H. Wigmore, *The Scope of the Contract Concept*, 43 COLUM. L. REV. 569, 569-70 (1943).

192. *See* J. L. MACKIE, ETHICS 116-18 (1977).

193. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976).

194. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

society can succumb to individual rights[195] and buttressing the notion that the state should not intricately be involved in the economy or frustrate transactions involving property, contracts, and market competition among private sector actors. Adam Smith wrote that the role of government in the market should be limited and that a natural liberty emerges when man "is left perfectly free to pursue his own interest in his own way,"[196] which is a theme espousing that property rights and contractual freedoms should be held inviolable and sacred toward the rest of the world.[197] This conception of the public good[198] was translated into and has now evolved into the capitalist structure of social and economic relations[199] and is the prototype of the reactive government. This form of government that converted "law into rights personal to citizens"[200] for contract and property, originated in and became accepted conceptually and culturally[201] in England,[202] and became the most bedrock legal source in the United States.[203]

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195. For a good synopsis of this individual rights/collectivist interest distinction, see generally Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN. J. INT'L L. 359 (1995). The ideological struggle endows rights to the side that provides the highest utility. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30 (1974).

196. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSE OF THE WEALTH OF NATIONS (R.H. Campbell, et al., 1976) (1776).

197. *See* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2:2 (1979); *see* also Printing and Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462 (1875).

198. *See* A.W.B. Simpson, *Land Ownership and Economic Freedom*, *in* THE STATES AND FREEDOM OF CONTRACT 25 (1998). This definition of "public good" runs contrary to what has become the generally accepted, commonplace, and denotative meaning of this term today. *See id.* Probably the best area in which to ponder this distinction can be found in the conflict between public environmental protections and real property rights. *See* NICHOLAS MERCURO ET AL., ECOLOGY, LAW AND ECONOMICS: THE SIMPLE ANALYTICS OF NATURAL RESOURCES AND ENVIRONMENTAL ECONOMICS 80 (1994); Nancie G. Marzulla, *The Property Rights Movement: How it Began and Where it is Headed*, *in* LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION 24 (Bruce Handle ed., 1995); Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 527. For a general description of rights classifications along a private-public continuum, see Robert Bejesky, *An Analytical Appraisal of Public Choice Value Shifts for Environmental Protection in the United States & Mexico*, 11 IND. INT'L & COMP. L. REV. 251, 259-60 (2001).

199. *See* Harry N. Scheiber, STATE AND FREEDOM OF CONTRACT, *supra* note 27, at 129-30.

200. DAMASKA, *supra* note 11, at 99.

201. *See generally* SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY (1981). Samuel Huntington's *American Creed* incorporates the ideal of the high value of every individual and that each person has the opportunity and ability to raise himself/herself up to the fullest extent through self-interested individual action, and that government should not interfere, restrain or inhibit individual action. *See* Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 38 (1997).

202. *See* Mark M. Baker, *Integration in the Americas: A Latin Renaissance or a Prescription for Disaster*, 11 TEMP. INT'L. & COMP. L.J. 309 (1997).

203. *See* Scheiber, *supra* note 199, at 2. Not only did this become the "touchstone doctrine by which the constitutionality of various types of social and regulatory legislation was judged," but in economics it meant that the private sector should be free from unreasonable regulation. *Id.*

In England and the United States, since the jurisprudential goal of contract law was to satisfy the will[204] of the individual parties and their right to create a binding legal obligation,[205] the judiciary was not to employ contract law in a manner that punished breaching parties or instilled moral behavior into the private sector. "The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform on his promise but compensation of the promisee for the loss resulting from breach."[206] The remedy should only compensate for the injury suffered[207] and should not overcompensate the plaintiff.[208] Obversely, a government favoring compulsive relief assumes institutions must undertake a more profound role in assessing and enforcing contractual fairness because the government has an intricate interest in the private sector.

When a government undertakes a penetrating role in dispute resolution and instills moral norms by assuming the posture that contracts should not be breached, the private sector dispute resolution process is more clearly perceived as a public law function, so not only does breach violate an obligee's rights endowed by an obligor's contractual promises, but there is a perceived spill-over effect on society. This means that individual rights must be more scrupulously balanced against the interests of the general welfare,[209] which condones relatively more progressive government action in the private sector. This is the position of the semi-active states, and it emerged from a mid-eighteenth century movement in Europe termed the period of enlightenment and the "age of philosophy."[210] This philosophy not only influenced[211] but has even been said to be directly linked as a cause of the [French] Revolution[212] and has been claimed to permeate French political thought even to this day.[213]

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204. This has been deemed "will theory" and it incorporates the "idea of individual choice and self-determination." Lieberman, *supra* note 31, at 94.

205. *See* P.S. ATIYAH, RISE AND FALL OF FREEDOM OF CONTRACT 399-00 (1979).

206. RESTATEMENT (SECOND), *supra* note 47, at ch. 16. Remedies are "aimed at relief to promisees to redress breach." Farnsworth, *supra* note 65, at 1147. "Perhaps it is more seemly for a system of free enterprise to promote the use of contract by encouraging promisees to rely on the promises of others, rather than compelling promisors to perform their promises out of fear that the law will punish their breaches." *Id.*

207. *See* Illinois Central Rail Co. v. Crail, 281 U.S. 57, 63 (1930); this is known as expectation damages. *See* RESTATEMENT (SECOND), *supra* note 47, § 347 cmt. a. While other damage awards could grant more to the plaintiff, expectation damages are the normal award and has been said to be the award that promotes "efficient breach." *See generally* Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980).

208. *See* L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182 (2d Cir. 1950).

209. *See* CHARLES HUNTER VANDUZER, CONTRIBUTION OF THE IDEOLOGUES TO FRENCH REVOLUTIONARY THOUGHT 49 (1935).

210. *See* ERNST CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT 3 (C.A. Koelln Fritz et al., trans., 1951).

211. *See* VANDUZER, *supra* note 209, at 11.

212. *See* ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE REVOLUTION 96 (Alan S. Kahan, trans, 1998).

213. *See* Rogoff, *supra* note 201, at 68.

Natural law theory was the dominant jurisprudential influence on contract and property law doctrines. It professed that government is all powerful and is able to instill social authority and equality for people,[214] but it also curbed government authority to the degree necessary to ensure that political liberty ultimately resided in the people.[215] The French Revolution sought to subdue both economic and government oppression, but differed from the American Revolution, which was aimed only at perceived abuses of government authority.[216] Since the state received power from a collective society and pursued a common endeavor, it had a mandate to progressively act on behalf of the nation to establish parameters in law for moral societal action. Law acquired a public persona[217] and heartened egalitarian standards in legal doctrines[218] to undercut hierarchical social structures.[219] This ideal was codified in the 1791 French Constitution, whereby, a strong republican form of government was incorporated and endowed with power from the collective populace.

The philosophy assisted cooperative vertical relations in terms of establishing a "social contract" between the community and government that permitted the latter to morally guide the people.[220] A balance was struck between collectivism and individualism[221] that would more aptly favor social rights when a conflict between the two would arise,[222] than in the more reactive forms of government. Everyone "places his person and all his power in common under the supreme direction of the general will; and as one we receive each member as an individual part of the whole."[223] A reciprocal commitment between public and private rights[224] tempered individualism[225] and provided a social covenant of citizen unity in the populace[226] to inculcate

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214. *See* TOCQUEVILLE, *supra* note 212, at 96-99.

215. *See* CHARLES DE SECONDAT, BARDON DE L'ESPIRIT DES LOIS (1748), *translated in* THE SPIRIT OF THE LAWS (1823). Not surprisingly, there were often clashes between contract and property law code provisions and new forms of social regulation. *See* Gordley, *supra* note 27, at 84.

216. *See* Rogoff, *supra* note 201, at 23.

217. *See* OTTO GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 1500-1800 36 (Ernest Barker trans., 1957).

218. *See generally* MICHAEL E. TIGAR & MADELINE R. LEVY, LAW AND THE RISE OF CAPITALISM (1977).

219. *See generally* D. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC. REV. 529 (1977).

220. *See* GEIRKE, *supra* note 217, at 46-50.

221. "Man is born into this world; he neither creates it nor shapes it," and while adaptation to the ideals of the state is expected, some individualism should be asserted as "passive acceptance and obedience have their limits." CASSIRER, *supra* note 210, at 18.

222. *See generally* Rogoff, *supra* note 201.

223. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 24-25 (Donald A. Cress ed. & trans., 1983).

224. *See id.*

225. *See* DAMASKA, *supra* note 11, at 210.

226. *See* CASSIRER, *supra* note 210, at 256.

confidence in progressive government action. A social contract between government and the people gave rise to a similar principle for horizontal contractual relations[227] in the private sector.[228]

Natural law theory supplanted rival philosophical contract law traditions of the day,[229] including some versions of "will theory" that sanctified unfettered potential in property holders to do what they wanted with their property[230] and to freely consummate contracts that would promote this right.[231] However, when "will theory" was combined with natural law, it was assumed that government intervention was necessary in the private sector to ensure that contracts were fair and not overbearing[232] on one of the parties[233] so that individual rights[234] were protected and property rights institutions served the *common good*.[235]

Hugo Grotius, the founding father of Dutch law and the most important thinker of the humanist movement, had a conception of a natural law of contracts that said: "promises must be kept, whether [or not] they have been couched in specific form. . . . Even God would be acting against his nature [if he] were to not keep his word."[236] By comparison, the common law reactive states "approached contract law in terms of the mechanisms for acquiring property title and not in terms of promise-keeping," explained "the rules of contract in terms of the need to secure expectations," and "[repudiated] rival natural law treatments which supposed that 'the contract' required some

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227. "Horizontal contractual relations" refer to contracts among economic actors or individuals outside of government. *See id.*

228. In terms of more fully granting specific performance under natural law and the balance between individual and social rights, a rationale is that because the power to compel performance rests with the judiciary, but rules were established by the legislature and in codes, the judiciary is acting in subordinate to and on behalf of the legislature. *See id* The power to compel performance of private sector actors is coming from the people. *See id.* In fact, in Germany, while not adopted in the German Civil Code, there was a proposal to permit courts to adapt the obligations of a private contract "to the requirements of public utility and in accordance with the commands of morals." GRZYBOWSKI, *supra* note 152, at 39. Even though this was not adopted, it is telling that such a proposal was made based on philosophical thought and that such a proposal would be inconceivable in Britain or the United States. *See id.*

229. *See* Gordley, *supra* note 27, at 69-70. Natural law departed from earlier philosophical axioms, particularly those based on teachings of Aristotle and Thomas Aquinas. *See id.* The connection between natural law and a progressive order of the state occurs because "law is [not seen as] simply the sum total of that which has been decreed and enacted; it is that which originally arranges things. It is 'ordering order', not 'ordered order.'" *See* CASSIRER, *supra* note 210, at 240.

230. *See* Christopher C. Langdell, *Classification of Rights and Wrongs*, 19 HARV. L. REV. 537, 537-38 (1900); Gordley, *supra* note 27, at 72-76.

231. *See id.* at 84.

232. Unfairness could result if there were large deviations in consideration. *See* Gordley, *supra* note 34, at 470.

233. *See generally* RICHARD ELY, STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY (1903); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

234. *See* GRZYBOWSKI, *supra* note 152, at 29.

235. *See* Gordley, *supra* note 33, at 463.

236. SCHLESINGER ET AL., *supra* note 14, at 219.

'original independent reason' for its enforcement other than the general utilitarian justification of private property law."[237] The distinction is also one of judicial pragmatism versus theory since "French judges apply a conception of public policy susceptible to philosophic justification . . . whereas . . . English analysts believe that refusal to enforce a contract for public policy reasons is to some extent in conflict with the law rather than in integral union with it."[238]

The communist principle of morality inaugurated a system that strictly limited individualism so that the interests of the collective society could be elevated. Both the Soviet Union and China believed they could constitute a harmonious society if the state instilled a moral code[239] and conducted citizens toward determinations of right and wrong.[240] "The truly activist state tries to seduce citizens away from private concerns and to mobilize them in pursuit of governmental goals."[241] Economic law supported this orientation. Since government owned nearly all property, it had the substructure to control or compel what one could do with that property. Even property with scintillas of private ownership were held under the guise that it belonged to the "individual on the strength of the fact that he belongs to the human society. . . [and that property] constitutes a part of the patrimony of all."[242] An individual could not use property rights in a way that would harm the community or the socialized economy.[243] Underlying this theme was that party equality was essential in contractual relations, that market transactions and individual rights[244] would degenerate law and society,[245] and that state economic agendas could assure fairness between parties in transactions.[246] If government guided society, more opportunities and equality would be available to the individual[247] and rigid legalities protecting "individual rights" would not be necessary. However, both systems out of necessity did incorporate rigid legalities and penalize for societal transgressions, such as breach of contract.

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237. JEREMY BENTHAM, THE THEORY OF LEGISLATION 194 (1931), *cited in* David Lieberman, *Contract Before "Freedom of Contract," in* THE STATE AND FREEDOM OF CONTRACT, *supra* note 27, at 102.

238. *See* HAZARD, *supra* note 155, at 325-26.

239. *See* J. TRISKA, SOVIET COMMUNISM PROGRAMS AND RULES 112 (1962).

240. *See* MAO TSE-TUNG, ON THE CORRECT HANDLING OF CONTRADICTIONS AMONG THE PEOPLE 42 (Eng. trans., 1964).

241. *See* DAMASKA, *supra* note 11, at 153.

242. GRZYBOWSKI, *supra* note 152, at 34.

243. *See* HAZARD, *supra* note 155, at 85.

244. *See* KELSEN, *supra* note 11, at 52-54. The morality was said to foster freedom from legalities that suppressed the individual since the ultimate goal was to eventually create a classless society that did not require formal law to ensure societal stability. *See id.*

245. *See* HAROLD JOSEPH BERMAN, JUSTICE IN RUSSIA: AN INTERPRETATION OF SOVIET LAW 45 (1950).

246. *See* GRZYBOWSKI, *supra* note 152, at 89.

247. *See* RAYMOND AUGUSTINE BAUER, THE NEW MAN IN SOVIET PSYCHOLOGY 2-24 (1952).

Penalizing for breach, or for any other societal transgression, in the Soviet Union was not intended to be a long-run need, but was conceived to assimilate a culture of people who would devote respect and obedience to the government, legal and social institutions, and the concept of *homo sovieticus*[248] through education and reform.[249] Because economic individualism was nonexistent in the Soviet Union and China, practical problems emerged since economic accountability seemed imperative[250] as an adjunct to advancing broader collectivist goals and spontaneous business transactions to stimulate the economy. Penalization for nonperformance became regular and severe,[251] particularly in the Soviet Union, since aims of criminal and civil justice converged.[252] While even German courts would regularly assess the willfulness of a breach of contract and punish when breach was more willful and less so when breach was evidently out of the obligor's control,[253] the level of penalization cannot be compared to that of the Soviet Union and China since assessing fault for determining penalties was regular and more rigid. For instance, if it could be shown that a breaching party "maliciously" broke a contract and that this breach impaired the national economic program, penalties would be more severe and criminalized.[254] This was the case with the crime of "economic counterrevolution"[255] which even led to the execution of a large number of individuals.[256] Non-fault based breaches were not so harshly penalized.[257] In the Soviet Union, negligently violating a planning provision could subject "the enterprise to civil suit for damages,"[258] while China did not normally criminalize breach of contract but instead subjected those responsible to societal criticism and condemnation[259] for disrupting the social order.[260] China did seemingly have a more paternalistic culture that supported societal

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248. This means a new Soviet man. *See* FRENKEL, *supra* note 36, at I.A(14). The ideal was similar to that which sought to instill French citizenship after the French Revolution, but was premised on an ideology that completely abolished individual rights. *See id.* at I.A.(14-15).

249. *See* Grossfeld, *supra* note 13, at 1332; T. SZABO, THE UNIFICATION AND DIFFERENTIATION IN SOCIALIST CRIMINAL JUSTICE 13 (1978).

250. *See* Loeber, *supra* note 154, at 165.

251. *See id.* at 164.

252. *See* JOHN N. HAZARD, SETTLING DISPUTES IN SOVIET SOCIETY 401-05 (1966).

253. *See* Dawson, *supra* note 9, at 528.

254. *See* BERMAN, *supra* note 42, at 146. To make this even more severe, these cases were treated as criminal cases that placed the initial burden of proof on the breaching party to show he was not at fault. *See* HAZARD, *supra* note 155, at 322.

255. *See id.* at 72.

256. *See id.* at 347.

257. *See* GROSSFELD, *supra* note 13, at 1333.

258. *See* HAZARD, *supra* note 155, at 346.

259. *See* Hsiao, *supra* note 38, at 1049.

260. Societal condemnation could be more harsh than pecuniary or criminal penalties. This is probably because there was less of a need to indoctrinate a paternalistic culture because China had a long-lived culture more consistent with the new society the communists sought to attain.

obedience,[261] which is perhaps why Mao's managerial socialism reached one of the most activist government extremes in the world.[262]

In fact, China can be differentiated from all of the states discussed thus far in that it did not historically have *law* in the Western sense of the word, or a legal and juridical order codified through intricate textual sources,[263] as such sources have been few and even non-existent.[264] Instead, parameters for acceptable societal conduct were premised on cultural norms consistent with deference to government authority.[265] Moral and cultural norms were "enforced by society instead of government"[266] and were in harmony with Confucian philosophy and begot a natural collective identity.[267] In this order, *li* and *fa* were two terms that depicted the struggle between written legal norms *(fa)* and "moral rules of correct conduct and good manners" as taught by Confucius *(li)*.[268] Relying on *li*, Mao wielded shame as punishment for disrupting the good working order of society, employed Confucian principles of truthfulness and a communal desire for individuals to fulfill obligations to society,[269] and assigned selfish personal interests in a low priority.[270] For most of Chinese history, it has not been the dread of judicial coercion or legal punishment that has provided rudimentary favoritism for specific performance as a remedial measure or otherwise stymied breaches from occurring, but societal and cultural norms that made one who disturbed harmony subject to "criticism, self-criticism, demotion, and dismissal."[271] Self-interest in China was defined by broader obligations owed to family, friends, and alternative relationships in the collective social order than by individualist notions like

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261. *See* EUGENE EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 373 (1936).

262. *See generally* P. HENG-CHAO-CH'EN, CHINESE LEGAL TRADITION UNDER THE MONGOLS (1979).

263. *See* Luke T. Lee, *Chinese Communist Law: Its Background and Development*, 60 MICH. L. REV. 439, 439 (1962).

264. *See* BONNICHON, *supra* note 166, at 3.

265. *See* Chen, *supra* note 163, at 275.

266. *See* Lee, *supra* note 263, at 442.

267. *See* HOFSTEDE, *supra* note 18, at 215.

268. *See* Chang Chin-tsen, *Li and Law*, 2 CHINESE CULTURE 4, 4 (1960).

269. *See* RALPH HAUGHWOUT ET AL., LAW AND POLITICS OF THE PEOPLE'S REPUBLIC OF CHINA 335 (1992).

270. *See* D. Y. F. Ho, *The Concept of Man in Mao-Tse-Tung's Thought*, 41 PSYCHIATRY 391, 395 (1978).

271. *See* Hsiao, *supra* note 38, at 1049. If a cultural foundation exists that is consistent with the state's activist role, one can perceive why excessive legal coercion would not be utilized and would actually be counterproductive since framing societal parameters for right and wrong must be based on societal acceptance. *See generally* B. I. Schwartz, *On Attitudes Toward Law in China*, *in* GOVERNMENT UNDER LAW AND THE INDIVIDUAL (M. Katz ed., 1957). If there is societal acceptance of such norms and they actually cause one to perform on a contract, it would be seen as moral to fulfill one's contractual obligations and understood that harm caused by breach of contract is an abuse on the good-working order of the collective society and not because there is a fear of punishment. *See id.* Societal shame could provide a greater threat to individual interest than the threat of punishment, legal sanction, or penalty. *See id.*

rights,[272] and it was this self-interest that naturally ensured performance and discouraged breach.[273]

B. Interest of Judiciary

In dispensing with the obvious interest of the judiciary first prior to examining relative separation of powers attributes, practical judicial concerns endure for remedial relief in every legal system since there is a trade-off between efficiency and exceptional stringency in case supervision. First, emphasis might be placed on efficiency, making a substitutional remedy preferred so that public resources are not expended in monitoring a party's performance. Here, the burden of attaining a satisfactory remedy in terms of the original contract is placed on the non-breaching party. If coercing performance would take much time, energy, and resources away from the court system, or would require tailoring ambiguous contract provisions, then such relief would be less likely,[274] but would obligatorily still be evaluated within the parameters of each country's remedial relief tests. Second, if coercive relief is freely accorded but mechanisms do not exist to ensure compliance with a coercive court order, e.g. the availability of contempt of court sanctions,[275] then the integrity of the judiciary as an institution is undermined if orders for specific performance are frequently ignored. In fact, if a judiciary is endowed with notable discretion to decide upon the type of remedial relief, the probability that performance of a court order will be executed by the breaching party might necessarily be pondered by the judge when making the remedial decision. However, even these apparently independent judicial interests are partially derived from the peculiar ideology of the state and the degree that the state has an interest in the affairs of economic actors and in how private sector disputes should be resolved.

Regarding the nexus between the judiciary and the executive, if government empowers the rights of the individual, the judiciary will likely be made a potent[276] and politically-independent[277] source to authority[278] that retains law somewhat more in the sphere of private interests and outside the purview of public interests. The consistency between an institutionally empowered judiciary but one that has restricted remedial authority is clear and can be premised on historical ideals. To permit an institution of government,

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272. *See generally* Ning Fu, *Remedies under Chinese Contract Law*, 2 INT'L LEG. PERSP. (1990).

273. *See* Shen, *supra* note 85, at 256.

274. *See* RESTATEMENT (SECOND), *supra* note 47, § 366; Yonan v. Oak Park Federal Savings and Loan Association, 326 N.E..2d 773 (Ill. App. 3rd 1975).

275. *See* TREITEL, *supra* note 121, at 54.

276. *See* JOHN P. DAWSON, THE ORACLES OF THE LAW 80 (1968).

277. *See generally* RICHARD L. ABEL, AMERICAN LAWYERS (1989).

278. *See* Alexis de Tocqueville, *De La Démocractie en Amérique, in* POLITICAL JUSTICE (O. Kirchheimer trans., 1961).

i.e. the judiciary, to act in a manner that undermines individual free will would be anathema to the detached approach of a state that strives to increase individual rights and ensure against any pretense of government condoned involuntary servitude,[279] as well as subvert the integrity of an independent judicial branch that is normally respected and hailed for being separate from the branch of government that can most easily suppress individual rights, i.e. the executive. Thus, coercive relief would logically not be the favored remedy in countries with the most respected separation of powers division between the executive and the judiciary,[280] and in those scenarios where it is granted, harsh penalties to ensure compliance of that award would be unlikely[281] for the same reasons.

The British and American common law judiciaries have been powerful and respected institutions that reconcile contract contentions without considering particular public policy notions of government, but the "adequacy of damages" remedial test has restrained the authoritative power of the judiciary so that individual rights are not offended and individual court efficiency interests can be encouraged. In these systems, a judge pondering the most appropriate remedial relief will weigh individual rights and whether an order compelling action would unduly encroach on either party's rights or the court's resources and authority, with this decision being very much weighted in favor of substitutional relief because of the "adequacy of damages" screening test. A paradox emerges, since it can logically be contended that discretionary rules permitting more court leniency to determine when specific performance is the more appropriate remedy is a mark of a stronger institution, which has not been the case in Britain and the United States, but this must necessarily be balanced against the elevated nexus between the judiciary and policy-making institutions of government and concomitant subordination to substantive policies that periodically manifest. France and Germany endowed their judiciaries with authority that not only maintains a functional order in the private sector but also with an authority that should promote the public good.[282] Promoting the public good[283] meant that

279. *See* Robert S. Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L. Q. 235, 244-50 (1921).

280. *See* part III A.

281. *See* F. LAWSON, REMEDIES OF ENGLISH LAW 9 (2nd ed. 1980).

282. *See* ARTHUR ENGLEMAN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 587-15 (1927). Prior to the French Revolution, dispute settlement was designed primarily to serve private rights. *See id.*

283. Many areas can be comparatively telling as to whether the judiciary promotes the public good and the agenda of the institution. For instance, civil law countries have more fully been concerned with truth-finding in the judicial process (*See* DAMASKA, *supra* note 11, at 123) and have been less concerned about expending public resources on the dispute settlement process. *See* BEDFORD, *supra* note 109, at 159.

judiciaries had to be subordinate to codified sources of law[284] and the central government[285] since powerful independent judiciaries could otherwise obstruct state reforms or policy measures,[286] which could be particularly undesirable and undermine the distinct philosophy of the state when policies and laws were democratically made.[287] France provides a telling example since there was a long-term inconsistency between the judiciary's ability to exercise discretion in employing coercive relief and the fact that it was intentionally made institutionally impotent.

French courts have had substantive authority to grant specific performance, but they were not endowed with any authority to collateralize and ensure that performance would actually occur since empowering the judiciary would subvert the essential theme of the French Revolution.[288] The court system eventually and independently conceived an invention called *astreinte* that assessed a monetary penalty on a party for not performing.[289] However, because the French judiciary was intentionally made weak and subordinate to the state, it could not, by its endowed authority, penalize a party. Thus, *astreinte* had to be reduced to the "actual loss suffered in consequence of the nonperformance"[290] and so once performance occurred, there was no *real* penalty for non-compliance with a specific performance court order.[291] The use of this measure and the discrepancy in a substantive codified law that preferred contractual morality but kept the judiciary institutionally weak lasted for nearly two centuries, and it was not until 1972 that French courts were legislatively empowered with an authority to collateralize orders of specific performance[292] and to penalize for non-performance. Unlike France, German courts never encountered legal or institutional obstacles in authorizing the use of penalties, such as by using

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284. *See* SCHLESINGER ET AL., *supra* note 14, at 261. A principle concern of the French Revolution was to usurp the power of the judiciary so that the law would be made "judge-proof." *See* John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 109 (1996).

285. *See* DAMASKA, *supra* note 11, at 36.

286. *See* Stefan Riesenfeld, *The French System of Administrative Justice*, 18 B.U. L. REV. 48, 56 (1938); *see* WILLIAM ALEXANDER ROBSON, JUSTICE AND ADMINISTRATIVE LAW: A STUDY OF THE BRITISH CONSTITUTION 229 (2nd ed. 1947).

287. If the law is the will of the people and the will of the people is always correct, then individual judges should not be able to question law that is infallible. *See* ROUSSEAU, *supra* note 223, at 24.

288. *See* Rogoff, *supra* note 201, at 23.

289. The counterpart of astreinte is found in most legal systems and is commonly known as a contempt of court order.

290. *See* Szladits, *supra* note 110, at 218-20. The astreinte had to be reduced because it could not legally exceed actual damages since French courts did not have a power to penalize. *See* Beardsley, *supra* note 130, at 96.

291. *See* Dawson, *supra* note 9, at 515.

292. Law No. 72-676 of July 5, 1972, France.

contempt of court fines or even incarceration[293] to more fully ensure that performance would occur.[294]

Activist state judiciaries were given a mandate to embrace the ideology of the state,[295] which meant that relatively more coercive relief was justified[296] to heighten the state ideology[297] and ensure that the public good was served by adherence to the state plan.[298] The judiciary had little to no independence as a fortified branch of government, but was instead subordinate to the state policy-making apparatus.[299] In the Soviet Union, the state employed the justice system as a tool for policy implementation so that transgressors of the law could be taught lessons[300] and society at large could be "educated to habits of compliance with the law."[301] In China, judges were historically seen as agents of the emperor[302] and their authority was severely limited.[303] Having a judiciary, as an independent institution of government from a Western connotation appears inconsequential since its role in the more reactive types of state is to represent perceived neutrality and to balance individual rights, but individual rights are instead superceded by the interest of the state and the collective in the activist forms of state.[304] Both the Soviet Union and China supervised and condoned administrative review of court decisions,[305] injected state policy into particular disputes,[306] and usurped jurisdiction in administrative tribunals whenever the government so desired.[307] Likewise,

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293. *See* MARSH, *supra* note 120, at 337.

294. *See* ZPO, *supra* note 145, § 899.

295. *See* HAZARD, *supra* note 155, at 71. In the Soviet Union, the People's Court Act of 1918 directed judges to ignore the former "imperial law" and decide cases based on their "socialist concept of justice." *Id.*

296. *See* GRZYBOWSKI, *supra* note 152, at 39.

297. The Communist Party in China "supplanted the judiciary as an instrument of law." F. SHURMANN, IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA 180 (1966).

298. In the Soviet Union, a contract dispute between state-run firms fell within the jurisdiction of the Arbitrazh, a special tribunal designed to hear economic cases. *See* O. S. IOFFE & P. B. MAGGS, SOVIET LAW IN THEORY AND PRACTICE 306 (1983).

299. For example, courts were completely subordinate to administrative agencies. *See* Donald C. Clarke, *What's Law Got to do with it? Legal Institutions and Economic Reform in China*, 10 PAC. BASIN L.J. 1, 66 (1991).

300. This role for the judicial system has been described by Professor Llewellyn as a "parental system." *See* BERMAN, *supra* note 245, at 307.

301. DAMASKA, *supra* note 11, at 202.

302. *See* Cohen, *supra* note 40, at 968.

303. *See* Clarke, *supra* note 299, at 57.

304. *See* Lee, *supra* note 263, at 449. "Independence" means that "courts must follow the national policy, must be controlled and supervised by the people, and must be in harmony with local government activities." *Id.*

305. *See* SHAPIRO, *supra* note 8, at 180.

306. *See* DAMASKA, *supra* note 11, at 196-97. This political interference was even greater in China than it was in the Soviet system since the CCP regularly interfered with on-going court decisions. *See id.* at 198-99.

307. *See* Loeber, *supra* note 154, at 131-33. These tribunals were to render justice by considering "community interests, ethical and political interest, and the demands of social justice." *See* GRZYBOWSKI, *supra* note 152, at 84.

these judiciaries could guarantee orders for performance,[308] but given the nexus with the executive, this is not surprising and such authority should not be viewed as an independent source of power apart from the executive.

C. The Practical Economic Consequence of How Morality is Defined

In the historical reactive states, the assumption was that expanding availability of coercive remedies might result in a slippery slope whereby individual liberty interests could conceivably be compromised and that such a risk was unnecessary if substitutional relief could provide certainty to the contractual bargaining process and sustain a functional market order. The nexus between economics and the common law was what Max Weber deemed a "rational legal system" composed of comprehensive and consistent rules detached from religion, politics, and personal mores,[309] which by default became driven by private sector pragmatism and economics, rather than by a systematization of law in accordance with a formal or philosophical methodology.[310] With a limited cultural and institutional acceptance of government jurisdiction over the economy and an inexplicable commitment to protecting property rights,[311] the government's primary roles were to ensure private sector transactional freedom and bolster self-interested actions of independent economic entities.[312] Remedies for contract breach became less consequential since the market, based on production from derivative consumer demand, could produce goods with a definite and calculable value[313] and those fungible goods and services could replace the locus of a breached contract and make substitutional relief substantially equivalent to coercive relief.[314] The reactive state contract law ideology is sustained by the principles of the modern day law and economics jurisprudential movement,[315] so it is not surprising that the law and economics influence reemerged in the early 1970s to counter those who advocated injecting morality into the law and those who

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308. *See* Shen, *supra* note 85, at 292. Chinese courts had a weak mandate to penalize. *See* Clarke, *supra* note 299, at 66. It was often the executive that had to independently support court decisions. *See id.*

309. *See generally* Trubek, *supra* note 219, at 720.

310. *See* DENNIS LLOYD, PUBLIC POLICY: A COMPARATIVE STUDY IN ENGLISH AND FRENCH LAW 147-49 (1953).

311. *See* Robert A. Dahl, *The American Oppositions: Affirmation and Denial*, *in* POLITICAL OPPOSITION IN WESTERN DEMOCRACIES 35-41 (Robert A. Dahl ed., 1966)

312. This is at the essence of capitalism and market ordering.

313. *See* HUSTON, *supra* note 77, at 74.

314. *See* Laycock, *supra* note 45, at 691.

315. *See generally* T. ANTHONY KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW (1979).

saw courts imprudently granting coercive relief more often than was necessary.[316]

In the law and economics jurisprudence, punishing for breaching contracts could "stifle the evolution of rules of risk allocation designed to enhance the efficiency of the contract process."[317] Because enhancing allocative efficiency to promote the highest aggregate productivity is the ambition of market ordering,[318] law should remain neutral so that parties can negotiate and settle disputes in the most efficient manner[319] without being impeded by legal remedial predispositions or by assigning the burden of assessing the parties' subjective value for the locus of the contract on a dispute settler. If a court becomes more intricately involved and endorses a particular remedial relief, then the personal valuation and the private sector bargaining process can be impaired and increase public expenditures because monitoring costs for the court system can be high[320] and not achieve the best result from the subjective positions of the parties. If law in the reactive state is intended to support private ends, then minimizing public expenditures by reducing judicial resources and maximizing aggregate production flows is desirable, which can be accomplished by more regularly denying coercive relief as long as the innocent party's rights are protected in any particular individual dispute.[321] Private sector expectations in the aggregate are still protected. The traditional law and economics contention is that to grant specific performance, "the marginal benefit to the promisee must be sufficiently great that it outweighs the marginal cost imposed on the promisor and on the legal system."[322] The "adequacy of damages" rule ostensibly screens cases to promote this outcome.

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316. *See* Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970). Those advocating a more liberal use of coercive relief argued that it would be more efficient than substitutional relief. *See* Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); *see* Ian R. MacNeil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); *see generally* Ulen, *supra* note 87. There are also articles refuting these arguments. *See* Yorio, *supra* note 49.

317. Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 114 (1977).

318. *See generally* KRONMAN & POSNER, *supra* note 315.

319. This is called the "Coase Theorem." *See* Schwartz, *supra* note 316, at 277.

320. This should occur if a market economy provides relatively free access to the exchange of goods and services with small friction costs to adequately replace a breached contract and courts do not have to expend public monies to remedy private sector disputes.

321. If no one is harmed and an efficient allocation of resources occurs, then it is said that a Pareto optimal result occurs. *See* Robert L. Birmingham, *Damage Measures and Economic Rationality: The Geometry of Contract Law*, DUKE L.J. 49, 55 (1969). However, harm could be forthcoming when significant costs would be necessary to search for a good in the market. *See* G. STIGLER, THE ORGANIZATION OF INDUSTRY 171-90 (1968).

322. EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 2.5 (1989); *see* David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 636-70 (1988).

Since France and Germany were more fully incorporated into their economies and have had public and private sectors that have been relatively more closely connected,[323] self-interest in individual property rights were balanced against preeminent social concerns and gave way to a political-economy structure. There was minimal concern for justifying specific performance rules with economic analysis before the codes were drafted. Since government was expected to act in the economy because of social reliance on such actions, economic efficiency arguments never sallied forth to challenge underlying morality principles of private sector contract performance or to question the government's predominant position when it was a contracting party.[324]

In the activist states, with planned development, contract and property law principles had to be consistent with the state's need to *control* society and prevent economic actors from engaging in freely negotiated transactions[325] that might undermine government ultimatums.[326] Economic plans, which were treated as law, framed parameters[327] and conditions on which the economy would develop from the top down[328] and productive sectors at all levels of

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323. One of the best examples of this distinction can be found in modern comparative economic thought. American economics has typically employed demand-side economic models, while their Western European counterparts employed supply-side economic models. The former assumes private sector dominance of the economy, while the latter assumes a more intricate government involvement to stabilize the economy. However, the level of integration in both of these categorizations is completely overshadowed by the dominance of the economy and unification between productivity and government and planning approach to development in the former communist countries.

324. An example of how there was relatively more public dominance over the private sector can be illustrated by rules concerning a contract between a private sector entity and a French government agency. If there is a breach of contract, there is a substantial power inequality that favors the French government. *See* Tallon, *supra* note 118, at 278-79, 282. Coercive remedies are available to the private sector actor on the government institution pursuant to the civil law, while the government agency has coercive authority over the private sector entity pursuant to the administrative law, which has more lenient specific performance rules. *See id.* France has never been a "free country" like Britain or the United States when it comes to the ability to challenge government authority. *See id.*

325. *See generally* C. HOWE, CHINA'S ECONOMY (1978).

326. *See* DAMASKA, *supra* note 11, at 204. Where the economy is organized by an encompassing plan and the firms are owned by the state, disputes among economic agents cannot be considered in isolation from the overall functioning of the state economy. *See id.* If problems arise in the preparation and execution of contract among state firms, as administrative perspective on these problems necessarily prevails. *See id.*

327. *See* POTTER, *supra* note 18, at 3-4. The more specific the plan for the economy, the more narrow would be the purview of action available to economic actors and the more expansive would be the limitations on independent initiative. *See id.* Certain periods of communist rule had stricter and more expansive state plans than did others. *See id.*

328. Production agendas were established at the top and lower levels had to implement the plans by consummating specific contract terms. *See id.*

industry had to adhere to those parameters.[329] This pragmatically justified the use of specific performance since denying such relief could beget a rippling effect throughout the economy.[330] Each economic actor in an industrial chain was dependent on all others[331] to produce for the good of society,[332] rather than for a profit motive. Money damages could never be an adequate remedy for breach when there was no buyer's market[333] with available substitutes or pricing mechanisms.[334] The rules for specific performance, as well as their underlying justifications, were primarily the same in both the Soviet Union and China that economic actors and individuals must perform according to their contractual obligations (and especially when the state economic plan was at issue). The design of the rules sought to engage the people in the beneficent role that the state would nourish by controlling economic relations.

V. RISE OF THE ADMINISTRATIVE STATE AND ECONOMIC LIBERALIZATION

While everything to this point reveals how highly disparate were the historical legal frameworks for coercive relief in the event of contract breach, there have been drastic changes in the rules in the former Soviet Union and China and seemingly identifiable deviations in the interpretation of the traditional rule frameworks in Britain and the United States. The position is that the rise of the administrative state in the reactive states and influence of international market economics on the active states pressured remedial rule frameworks and fostered consistency with economic ordering and institutional realities. Of course, other reasons can also partially account for influencing

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329. *See* Elton H. Reiley & Run-Fu Hu, *Doing Business in China After Tiananmen Square: The Impact of Chinese Contract Law and the U.N. Convention on Sale of Goods on Sino-American Business Transactions*, 24 U.S.F. L. REV. 25, 67 (1989). "[T]he question of concluding a contract is not a private business of the two managers of the socialist enterprises; concluding such a contract is a function of government." BRATUS GENKIN ET AL., SOVETSKOE GRAZHDANSKOE PROVO 397 (1956), *cited in* GRZYBOWSKI, *supra* note 152, at 87.

330. *See* HAUGHWOUT ET AL., *supra* note 269, at 346.

331. *See* Grossfeld, *supra* note 13, at 1330.

> The damage to the society as a whole, for example, cannot be compensated, for every breach of contract disturbs a certain established pattern and demands an increased effort to overcome its consequences and re-create order. . . Moreover, the goods which could not be produced as a result of the breach of contract are missing in the final balance of the plan, or can be produced only at the expense of other goods.

Id.

332. This was particularly the case when there was only one monopolistic producer of goods.

333. *See* MICHAEL GAMARNIKOV, ECONOMIC REFORMS IN EASTERN EUROPE 12 (1968). It was believed by some that the practical reason for requiring specific performance would become less imperative as markets expanded. *See* Loeber, *supra* note 154, at 175. However, chronic shortages remained a problem in China during many periods. *See* Neil Boyden Tanner, *The Yin and Yang of Economic Contract Law in the People's Republic of China B A Legalistic and Realistic Perspective*, 16 J. L. & COM. 155, 155 (1996).

334. *See* HAUGHWOUT AL., *supra* note 269, at 341.

shifts in judicial authority. While cultural norms beget new ideals about politics and economics and the "globalization of the judiciary" has dispensed more policy-making authority to courts because of the fortification of individual rights and trait sharing between the civil and common law,[335] ideological country categorizations and motivations that prefer particular specific performance rules have merged and/or become quite congruent[336] with these alternative explanations of legal evolution.

A. Rise of Administrative State

The notion of a more assertive and activist state only gradually took hold in the United States and Britain over the past several decades. More progressive government agendas have seemingly modified how courts have interpreted rule frameworks, even though the same legal tests and standards have lingered. Relatively weak government structures existed at the common law and coercive relief was severely restricted, but this evolved incrementally at the same time there was an emergence of more fortified government institutions with progressive proclivities. Government became more involved in the lives of private citizens, which somewhat downplayed notions that completely extolled freedom of contract and secured private property at all costs so to incorporate more public concerns in institutional and policy agendas. The same rationale that sanctioned public utility to supercede individual action can be employed to reveal why courts may have become more apt to render decisions in a manner that previously might have been regarded as undermining individual liberties.[337]

The gradual rise of the administrative state[338] in Britain and the United States[339] illustrates a trend moving away from touting individual economic interests at all costs and toward maintaining more parity between state policy-making and individual freedoms.[340] Not surprisingly, since this rise alleges a separation of powers struggle and departure from long-lived legal principles,

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335. *See generally* THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

336. *See* Ole Lando, *Article 28 Commentary*, *in* COMMENTARY ON THE INTERNATIONAL SALE LAW: THE VIENNA SALES CONVENTION 233-34 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987).

337. *See* RICHARD ELY, STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY 400-10 (1903). Similarly, the reactive states became more progressive in protecting weaker parties in a contractual relationship with the emergence of the administrative state. *See id.* This was not a new theme to United States scholars as many articulated nearly a century ago that inequality in bargaining power was the greatest threat to individual liberties. *See id. See generally* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

338. For example, government expansion in the United States primarily took place during the Progressive (1870s), New Deal (1930s), and the Rights Revolution (1960s) eras.

339. *See* DAMASKA, *supra* note 11, at 231-32.

340. *See* Dawson, *supra* note 9, at 534.

activist state agendas were met with judicial hesitance in both Britain[341] and the United States.[342] New regulatory regimes "came increasingly to be regarded as an instrument for instituting social reform or for challenging existing institutional practices,"[343] and provoked jurisdictional overlaps between administrative tribunals and courts that made their interests adapt to each other, including in the interpretation and enforcement of private contracts.[344] Once institutional and cultural legal norms ensconced the government itineraries to adopt new legal frameworks or for judges to interpret lingering legal frameworks in a posture that was more acceptant of government initiative in transactions, then perceptions about the acceptability of more involved remedial measures too should also evolve in a direction that is consistent with new progressive institutional or cultural norms.

B. Specific Performance Rule Shifts in Britain and the United States

Even though common law courts have been said to be more reluctant than their civil law counterparts to "exert pressure directly on the defendant to compel him to perform"[345] and to attach property for nonperformance of a specific performance decree,[346] it appears that the evolution in and application of the British and American specific performance frameworks has made the practical result similar to that of their civil law counterparts[347] because of efficiency and pragmatism.[348] It is only what the remedial law and norms express that is a reflection of government ideology regarding private sector relations and whether there is a right to demand coercive relief, even if it is not granted given particular facts,[349] but it is an aspect of legal culture influencing judicial discretion that may make the outcome of the aggregate of remedial decisions evolve.

Over the past few decades there has not only been advocacy for change[350] to make coercive remedial relief more readily available than at the common law, but there is evidentiary support that is often given, both because

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341. *See* DAMASKA, *supra* note 11, at 43.

342. *See* Lochner v. New York, 198 U.S. 45 (1905). The trend for the judiciary to start upholding legislation that interfered with private sector contract rights began two years later (*See* Muller v. Oregon, 208 U.S. 412 (1907)), and was common by 1937. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

343. DAMASKA, *supra* note 11, at 133.

344. *See* Scheiber, *supra* note 199, at 148.

345. Farnsworth, *supra* note 65, at 1152; *see generally* SCHLESINGER ET AL., *supra* note 14, at 739-40.

346. *See* Szladits, *supra* note 110, at 228. Likewise, an executive official should only execute on a court order to sell the defendant's property as necessary to satisfy the monetary judgment. *See* HUSTON, *supra* note 77, at 7.

347. *See* Fitzgerald, *supra* note 187, at 302.

348. *See* HONNOLD, *supra* note 4, at 277.

349. *See* Shen, *supra* note 85, at 268.

350. *See* RESTATEMENT (SECOND), *supra* note 47, § 359 cmt. a.

of a codified source and evolutionary interpretation of the common law. Commercial codes governing the sale of goods have supplanted long-lived cultural and reflective processes typical of the common law.[351] In Britain, the adoption of the English Sale of Goods Act endowed courts with elevated discretion in granting specific performance,[352] making coercive relief in sale of goods contracts more available than at the common law.[353] Likewise, in the United States, with the adoption of the Uniform Commercial Code (UCC), "specific performance may be decreed where the goods are unique" or "in other proper circumstances."[354] "In other proper circumstances" broadens the common law remedial discretion of courts[355] and was specifically intended by the UCC drafters to further liberalize the ability of courts to grant specific performance.[356] It is believed that American courts are more apt to grant specific performance than are English courts[357] in sale of good cases because the English sales statutes were enacted in the 1890s, while the UCC was codified in the 1950s,[358] making any gradual institutional and progressive trends over time naturally solidified by the ideology at the time of promulgation.[359]

Likewise, even though the institutional demarcation between equity and law has long been eliminated, the test separating the two "adequacy of damages" has remained but has seemingly undergone an interpretive shift. Despite recent holdings by the U.S. Supreme Court that equitable relief is still the extreme case,[360] trends have been noticed,[361] and an exhaustive study

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351. An important characteristic of the theoretical activist state is that a codified source of law is progressive and structural in nature while the common law is a reflection of the past.

352. *See* BRITISH SALE OF GOODS ACT, *supra* note 85, § 52.

353. *See* G.H. TREITEL, THE LAW OF CONTRACT 906 (8th ed. 1991).

354. *See* U.C.C. § 2-716(1). The definition of when specific performance can be ordered has ostensibly been broadened, from "unique good", to include situations when there is an ambiguous market price. *See id.* comments 2 and 3.

355. *See* Stephen Walt, *For Specific Performance Under the United Nations Sales Convention*, 26 TEX. INT'L L.J. 211, 225 (1991); *see* U.C.C. § 2-716(1), cmt. 1. Guiding principles in deciding on the type of relief includes: whether the locus of the contract is irreplaceable (*see* Walt, at 227-28), if damages can be measured with precision, and whether the cost of performance is too high in relation to the plaintiff's benefit. *See* TREITEL, *supra* note 121, at 66.

356. *See* John M. Catalano, *More Fiction than Fact: The Perceived Differences in the Application of Specific Performance Under the United Nations Convention on Contracts for the International Sale of Goods*, 71 TUL. L. REV. 1807, 1818 (1997).

357. *See* Szladits, *supra* note 110, at 232.

358. *See* William Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEGAL STUD. 299, 309 (1985).

359. This assumes that legal codifications in any given period in history acts like a "snapshot" of the political and ideological forces of the day. Culture and other facets may later evolve and place pressures on that "snapshot," perhaps enough so that a new codification must then occur.

360. *See* Bowen v. Massachusetts, 108 S. Ct. 2722, 2748 (1988) (Justice Scalia stating that the use of equitable relief is reserved for the most extreme cases).

361. *See generally* Van Hecke, *supra* note 78.

recently undertaken that question this premise.[362] It has been claimed that today the expectations of the parties have a greater impact on *what* remedial relief is granted than the "adequacy of damages" test[363] and that courts have been inclined to interpret the test more flexibly to achieve functional results,[364] rather than by deciding cases on historical limitations that sought to restrict coercive relief because of potential infringements on individual liberties.

C. International Economic Integration

While it was a long-term internal and gradual institutional trend that seemingly paved the way for rule shifts in coercive remedial relief in Britain and the United States, in Russia and China, changes eventuated when these countries recognized that they needed to open their economies to the rest of the world[365] and were impacted by the effect of globalization. Globalization is caused by catalysts like increases in communication,[366] technology sharing,[367] cultural transmissions,[368] and economic integration. Certainly, a perfect causal relationship between globalization and legal reform cannot be ascribed,[369] but

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362. *See* Laycock, *supra* note 45, at 687-88. In studying 1400 cases, Professor Laycock concludes that the "adequacy of damages" rule is dead and that plaintiffs get the remedy they choose. *See id.* In other words, exceptions have "eaten away" at the rigidity of the rule. *See id.* This is not entirely the case since there are selection effects in choosing only a population of cases that are published since appealed cases are the ones that are most apt to create exceptions from the norm. This does not mean in general that trial courts have discarded the general and long-lived rule. However, Professor Laycock's study is ambitious and may just reflect a temporal trend.

363. *See* FARNSWORTH, *supra* note 67, at 163, 168.

364. *See* Laycock, *supra* note 45, at 693.

365. *See* JOHN RAPLEY, UNDERSTANDING DEVELOPMENT: THEORY AND PRACTICE IN THE THIRD WORLD 28-29 (1996). For the West, an unprecedented economic integration effort commenced with the Bretton Woods cooperation framework, signed shortly after World War II, and today functions as the bedrock structure for today's nearly universal acceptance of the superiority of freedom of trade, business relations, and financial transactions and is the backdrop that has persuaded governments from remaining self-sufficient and to liberalize their economies. *See id.* For several decades, the Soviet Union and China provided the antithesis of this theme to the rest of the world. *See id.* Many Latin American countries also followed an approach of import substitution industrialization policies, that espoused internal production and domestic population needs so to remain free of economic shocks that internationally dependent development could breed. *See id.* It was with the economic liberalization successes of the Asian Tigers, and the collapse of the Soviet Union's system of central planning at the end of the 1980s, that the model of closed and government controlled economic development lost credence and support. *See id.* at 27-50.

366. *See* Jay R. Mandle & Louis Ferleger, *Preface: Globalization in Southeast Asia*, 570 ANNALS OF THE AMER. ACAD. OF POL. & SOC. SCIENCE 8 (2000).

367. *See* OFFICE OF TECHNOLOGY ASSESSMENT, MULTINATIONALS AND THE NATIONAL INTEREST: PLAYING BY DIFFERENT RULES 38 (1993).

368. *See* Gary Minda, *Book Review: Globalization of Culture*, 71 U. COLO. L. REV. 589, 593 (2000).

369. *See* Henry Laurence, *Symposium, The Rule of Law in the Era of Globalization: Spawning the SEC*, 6 IND. J. GLOBAL LEGAL STUD. 647, 648 (1999).

logic does more than allude that trends in economic globalization can occasion modifications in private sector law, such as with contract law reforms.[370] Economic integration includes increasing freedom of exchange of currencies,[371] promoting the benefits of trade,[372] begetting comparative advantage,[373] and production efficiencies from that trade[374] via the General Agreement on Tariff and Trade framework,[375] and stimulating international investment flows,[376] including by consummating international agreements on foreign investment.[377] The obverse result of international market integration is that the role of government in the economy eventually decreases,[378] an attribute more consistent with the reactive state and shifting power to the private sector.[379] This shift assumes that government must protect private

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370. *See* Stephen J. Canner, *Exceptions and Conditions: The Multilateral Agreement on Investment,* 31 CORNELL INT'L L.J. 657, 659 (1998). In 1991, thirty-five countries made eighty-two changes to investment rules, with eighty being liberalizing rules; in 1995 almost "twice as many countries introduced 112 changes in their investment regimes," with 106 of those rules favoring investment liberalization. *See id.*

371. Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, 2 U.N.T.S. 39 (adopted at Bretton Woods, New Hampshire, July 22, 1944 and entered into force Dec. 20, 1945).

372. What began as an initial step to liberalize trade in goods with the General Agreement on Tariff and Trade, over eight rounds of negotiations has evolved into liberalization in new concerns, such as for trade in services and intellectual property protections, and has provided a more institutionalized dispute settlement forum with the World Trade Organization. *See* JAGDISH BHAGWAIT, A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION AND DEMOCRACY 271 (1998). This framework has led to incredible increases in trade. *See* Mandle & Ferleger, *supra* note 366, at 11.

373. *See* Helen V. Milner & David B. Yoffie, *Between Free Trade and Protectionism: Strategic Trade Policy and a Theory of Corporate Trade Demands,* 43(2) INT'L. ORG. 239 (1989), *available at* http://www.jstor.org/fcgi-bin/jstor/viewitem/fes/00208183/dm980266/98p02157/0?current res.

374. *See* RAPLEY, *supra* note 365, at 39-40.

375. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, *available at* 1948 WL 6858.

376. Foreign direct investment has increased dramatically over the years. *See* United Nations Conference on Trade and Development, World Investment Report, Annex I, II, U.N. Sales No. 97.II.D.13 (1997); *see Multinationals,* THE ECONOMIST, Mar. 27, 1993, at 5.

377. Over 160 countries have consummated bilateral investment treaties and in 1998 there were more than 1300 agreements ratified globally. *See* Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties,* 36 COLUM. J. TRANSNAT'L L. 501, 503 (1998). This is up from only 435 bilateral investment treaties in 1990. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT OF INVESTMENT DISPUTES, BILATERAL INVESTMENT TREATIES 1959-1996, 1-96 (1997). Over thirty countries have signed the Multilateral Agreement on Investment. *See* Canner, *supra* note 370, at 659. These agreements do not provide a complete open door policy to investment in host countries as significant limitations still exist (*see* RICHARD E. CAVES, MULTINATIONAL ENTERPRISE AND ECONOMIC ANALYSIS 222 (1996)), and in some cases "relatively few obligations [are agreed upon by] a host state." Vandevelde, at 522.

378. This does not mean that government intervention in the economy does not occur in the West, as it does, but such intervention is designed to stabilize rather than to control. *See* Minda, *supra* note 368, at 598-99.

379. *See id.* at 596.

property and contract rights, permit the market to allocate resources, and only intervene in the economy to correct market failures.[380] Cooperative initiatives by governments[381] and assent to international market principles require domestic contract law regimes to accommodate the many business forms resulting from transnational business operations.[382] If greater certainty in "global contracting" is to be had, then new remedial rules must be promulgated that are more supportive of norms that sustain individual rights and markets. This is what happened in Russia and China.

D. Specific Performance Rule Re-Codifications in Russia and China

Russia somewhat abruptly transformed and China has been gradually modifying domestic legal rules and judicial authority to more fully comport with economic and political realities. At the behest of President Gorbachev's commercial, political, and legal reforms, more of the economy began to operate apart from government authority and law become fairly Westernized.[383] Since state interest in contractual relations fell with communism and individual rights and markets became a counteracting force, substantive contract law remedial rules and the role of the judiciary needed to be altered.

The Civil Code of the Russian Federation (CCRF) became effective in 1995[384] and new rules were adopted for specific performance that are similar to those of civil law countries. Now, if a party does not give a legally recognized excuse for nonperformance of a contract, then the obligee is entitled to a remedy, with specific performance being the preferred remedy[385] and there are prohibitions preventing unilateral refusals to perform;[386] however, there is no state interest in making performance an ultimatum or in severely punishing a breaching party as has previously been the case.

China's gradual release of its economy and opening it up to international market forces over the last two decades and implementation of multiple code

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380. *See* Vandevelde, *supra* note 377, at 504-05. The move was a product of the collapse of communism and a shift in economic ideals somewhat away from Kenesian welfare economics to free market principles. *See* DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD 13, 15 (1998).

381. *See* Paul B. Stephan, *Relationship of the United States to International Institutions: The New International Law B Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 COLO. L. REV. 1555, 1556-57 (1999).

382. *See* Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563, 575 (1999).

383. *See* FRENKEL, *supra* note 36, at I.A(25).

384. *See* Civil Code of the Russian Federation (ACCRF), adopted by the State Duma at the Third Reading on Oct. 21, 1994, effective Jan. 1, 1995, *translated in* WILLIAM G. FRENKEL, COMMERCIAL LAW OF RUSSIA (1997).

385. *See id.* ch. 25 & art. 309.

386. *See id.* art. 310.

sources governing contract law transactions Economic Contract Law (ECL) in 1982,[387] Foreign Economic Contract Law (FECL) in 1985,[388] General Principles of Civil Law (GPCL) in 1987,[389] and Technology Contract Law (TCL) in 1987[390] confirms how different principles for coercive relief were available depending on the importance of the contractual relationship to government planning and the degree of deference provided to the international system. In 1982, the ECL was adopted to incite a commercial culture that augmented autonomy in economic relations[391] in what was still to officially remain a collectivist and guided system[392] with government entities monitoring, approving, and remaining ultimately responsible for contracts[393] to protect public interest.[394] Economic actors remained under an ultimate mandate to implement the economic plan by consummating and fulfilling contract obligations.[395] Freedom of contract was restricted by extensive state policy, social morality, public interests, and the economic plan.[396]

All of these codes, except for the FECL, had provisions reflecting the duty to perform in accordance with contract terms,[397] and is consistent with culture and ideology: "Breach of contract is viewed as a breach of legal duty and is very much discouraged by Chinese law"[398] and endows an obligee with the right to demand performance.[399] The "Chinese principle [is that] specific performance can by no means be replaced by the payment of 'breach of contract' damages."[400] Not having this remedy specifically listed in the FECL

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387. *See* Economic Contract Law of the People's Republic of China, adopted Dec. 13, 1981 and amended on Sept. 2, 1993, *translated in* CCH AUSTRALIA LTD., CHINA LAWS FOR FOREIGN BUSINESS (1993) [hereinafter ECL].

388. *See* Foreign Economic Contract Law of the People's Republic of China, Adopted Mar. 21, 1985, *translated in* CCH AUSTRALIA LTD., *supra* note 387 [hereinafter FECL].

389. *See* General Principles of Civil Law of the People Republic of China, adopted Apr. 12, 1986, by the 4th Sess. Of the 6th National People's Congress, *effective* Jan. 1, 1987, *translated in* CCH AUSTRALIA LTD., *supra* note 387 [hereinafter GPCL].

390. *See* Technology Contract Law of the People's Republic of China. adopted June 23, 1987, *translated in* CCH AUSTRALIA LTD., *supra* note 387 [hereinafter TCL].

391. *See* POTTER, *supra* note 18, at 30.

392. *See* ECL, *supra* note 387, art. 1.

393. *See id.* art. 44.

394. *See* CCH INTERNATIONAL, CHINA LAW FOR FOREIGN BUSINESS, Rep. No. 6, Feb. 28, 1994.

395. *See* ECL, *supra* note 387, art. 11; *see also* Shen, *supra* note 85, at 296-97.

396. *See* ECL, *supra* note 387, art. 1; *see* GPCL, *supra* note 389, arts. 6, 7 & 58; *see* FECL, *supra* note 388, art. 4.

397. *See* GPCL, *supra* note 389, art. 88; *see* ECL, *supra* note 387, art. 6; *see* TCL, *supra* note 390, art. 16.

398. Zhao Yuhong, *Contract Law*, *in* WANG SHENG, INTRODUCTION TO CHINESE LAW 240 (1997).

399. *See* GPCL, *supra* note 389, art. 111; *see* ECL, *supra* note 387, art. 31; *see* Zhao, *supra* note 398, at 269. There were also limits to specific performance in Chinese law, including when it would be futile to force an economic actor to perform on a contract (*see* WILLIAM C. JONES, BASIC PRINCIPLES OF CIVIL LAW IN CHINA 160 (1989)), or when it becomes "impossible" to fulfill the economic contract. *See* ECL, *supra* note 387, art. 27).

400. *See* Shen, *supra* note 85, at 288.

characterizes a first and intended distinction between domestic-based contract sources that sought to preserve internal remedial principles and elevated deference to the international system.[401]

With drastic economic reforms in China over the last two decades, all three of the contract law codes were superceded by the Uniform Contract Law in 1999,[402] which consolidated previous code sources and fostered consistency and greater transparency to China's burgeoning market economy. Increased deference is imparted to international rules and norms of contract law,[403] but there is still government supervision and approval of contracts[404] and policies to ensure that China's socialist economic order is maintained, thus abridging free market contracting.[405] Similarly, there is still emphasis on performance of obligations[406] and compensation for breach is required,[407] but there is an ostensible step away from the general policy mandating specific performance since more parameters and limitations on this relief have been ordained. To attain specific performance, coercive relief must be able to be carried out in law and in fact, the object of the debt must be suitable for enforcement, expenses of enforcement must not be too high, and the obligee must have requested that specific performance be ordered within a reasonable time.[408]

E. International Contract Law Negotiations and Specific Performance (UNCISG)

Because private sector actors desire enhanced certainty in transnational business dealings[409] and governments want to foster economic development, an international treaty designed to create more uniformity in contract law was concluded to nourish these aspirations. The Convention on the International Sale of Goods (UNCISG), which now applies automatically to sales contracts consummated between economic actors from two different signatory countries or when it is specifically implicated,[410] was consummated in 1980 and went

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401. The FECL only had provisions that stated that parties should refrain from terminating or altering contractual obligations. *See* FECL, *supra* note 368, art. 16. Specific performance could have been permitted as another "reasonable remedy" under the FECL (*See* FECL, *supra* note 388, art. 18) since good faith in performance was a guiding principle in the FECL (Zhang Yuqing & James S. McLean, *China's Foreign Economic Contract Law: Its Significance and Analysis*, 8 NW. J. INT'L L. & BUS. 120, 142 (1987).

402. *See* Uniform Contract Law of the People's Republic of China, *available at* http://www.cclaw.net [hereinafter UCL].

403. *See id.* art. 435.

404. *See id.* art. 432.

405. *See id.* arts. 1, 3, & 7.

406. *See id.* art. 8.

407. *See id.* art. 113.

408. *See* UCL, *supra* note 402, art. 116.

409. *See* Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 TUL. J. INT'L & COMP. L. 99, 100-01 (1995).

410. *See* United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf.97/18 Annex 1 art. 1(1) (1980) [hereinafter UNCISG].

into effect in 1988.[411] The negotiations during the Convention depict how very divergent contract law regimes aligned to form a compromise at the international level[412] even though negotiated positions adamantly espoused domestic rules. This divergence was particularly the case for rules governing when specific performance should be available.[413] The position of civil law countries primarily prevailed in the text of the Convention,[414] presumably because of the sheer number of states following this approach. The United States and United Kingdom argued unsuccessfully that specific performance is an inefficient and burdensome remedy,[415] while the opposition contended that a non-breaching party should not be required to accept anything less than full performance.[416] However, the ultimate outcome on this issue does permit flexibility and deference in the domestic interpretation of contract breach remedies governed by the Convention because of significant differences in economic, cultural, and legal norms of countries.[417]

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411. *See id.* The Convention went into effect on January 1, 1988, when it was ratified by eleven nations by December 11, 1986 as required by Art. 99. The first eight countries to ratify were Argentina, Egypt, France, Hungary, Lesotho, Syria, Yugoslavia, and Zambia. *See* Status of Conventions: Note by the Secretariat 4, U.N. Doc. A/CN.9/271 (1985). On December 11, 1986, China, Italy, and the United States ratified the Convention. *See* U.N. Dept. of Public Information, Press Release I/T/3849, Dec. 11, 1986.

412. *See* Amy H. Kastely, *Reflections on the International Unification of Sales Law: Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 J. INT'L L. BUS. 574, 576-77 (1988).

> [T]he Convention [was to attempt] to *unify* the law governing international commerce, [and seek] to substitute one law for the many legal systems that now govern this area" and to unify "the law among nations means to subject people around the world to a single set of rules and principles and to have them understand and conform to these rules and principles as they would to the law of their own communities.

Id.

413. Delegates "struggled to overcome the conceptual barriers of their various national legal backgrounds." *See* Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 608-10 (1988).

414. *See* Olga M. Gonzalez, *Remedies Under the U.N. Convention for the International Sale of Goods*, 2 INT'L TAX & BUS. L. 79, 96 (1984).

415. *See* Kastely, *supra* note 412, at n. 176. Professor Farnsworth, as a delegate for the United States, argued that specific performance was "too harsh a remedy for breach of an international sales contract." *See* Kastely, *supra* note 413, at 628. In an attempt to scratch away at a broad rule that sanctified coercive relief as the remedy of choice, the United States tried to place time limits on both the buyer's and seller's right to demand performance, but this was not accepted by the Committee. *See* United Nations Conference on Contracts for the International Sale of Goods, Official Records , U.N. Doc. A/Conf./97/19, U.N. Sales No. E.81.IV.3, at 555-56, 864 (1981) [hereinafter UNCISG Official Records]. Another proposal that was also rejected was to limit the buyer's right to require performance if substitute goods could be obtained "without substantial expense or inconvenience" to the innocent buyer. *See id.* at. 78, 111.

416. *See id.* at 328.

417. *See* Susanne V. Cook, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197, 217 (1988).

In the Convention, specific performance is the remedy of choice[418] and provisions endow the buyer[419] and seller[420] with a right to require a breaching party to perform according to voluntarily undertaken contractual obligations.[421] However, the broad right to attain coercive relief is limited by practical exceptions typical in domestic legal systems[422] to preserve sovereignty.[423] The common law countries specifically requested[424] that domestic tribunals be permitted to employ the remedial rules of their own jurisdiction even when the Convention was at issue. Pursuant to Article 28, domestic courts would only be obliged to provide the relief favored in the Convention if they were otherwise required to dispense it under their particular domestic remedial rules,[425] while the broader scope favoring specific performance in the Convention *could* still be applied by a court when it would not normally be available under the same circumstance if domestic law was solely at issue.

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418. *See* Kastely, *supra* note 413, at 614. The integrity of the contract should be protected, innocent parties should not be expected to accept something less than full performance, damage determinations would require unnecessary litigation, and obtaining "cover" requires unnecessary costs and delay. *See id.*

419. "[T]he buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement." UNCISG, *supra* note 410, art. 46.

420. "[T]he seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy that is inconsistent with this requirement." *Id.* art. 62.

421. Interestingly, the earlier equivalent of the UNCISG, the Uniform Law on the International Sale of Goods, had a broader limit on a buyer's right to demand specific performance, which said:

> The buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. In this case the contract shall be *ipso facto* avoided as from the time when such purchase should be affected.

Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S., art. 25. The difference between the two Conventions may be reflective of how comparative remedial rules have relatively changed in the fifteen years between the adoption of this agreement and the UNCISG, or that the bargaining power and/or number of common law countries involved may have been relatively greater in the earlier convention.

422. A party need not perform if failure to perform was caused by an act or omission of the other party (*see* UNCISG, *supra* note 410, art. 80) or by something outside a party's control (*See id.* art. 79), when a contract is claimed to be void (*see id.* art. 49), or if denying specific performance is necessary "to prevent punitive and bad faith demands" for coercive relief. *Id.* art. 7; *see* Fitzgerald, *supra* note 187, at 303.

423. *See* Jacob S. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 9-1 (N. Gaston & H. Smith eds., 1984).

424. *See* Gonzalez, *supra* note 414, at 96.

425. "[A] party is entitled to require performance of any obligation by the other party," but "a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts." UNCISG, *supra* note 410, art. 28. The exact meaning of this exception is debatable given that the statement "its own law" could refer to a state's substantive law and/or the state's entire legal system. *See* Catalano, *supra* note 356, at 1818.

Article 28 reflects a "compromise between civil law countries, which tend to grant specific performance more routinely, and common law countries, which. . . view specific performance as an extraordinary remedy."[426] Even though this exception to the remedial framework was said to be "disruptive [to] the Convention's underlying goal of uniformity,"[427] "threatens extreme uncertainty regarding the right to specific performance,"[428] and even undermines the primary goals of the Convention, the importance of this remedial issue to the negotiating countries was so clear that a flexible ultimate outcome was necessary to maintain legal system sovereignty.

VI. CONCLUSION

This article provided a historical journey through the evolutionary components that have influenced the legal foundation of specific performance, one of the most engrossing concepts in contract law and a remedial issue that is at the essence of judicial authority and government-private sector relations. In a very early form of society where no government existed and dispute settlement incorporated ad hoc mediation methods, a village elder would normally evaluate whether an individual would have a right to the locus of a contract and thus whether that individual would be entitled to exercise self-help to attain the item from the current possessor. Practical considerations, such as the inability of the aggrieved individual to cover the loss of contractual expectations, would have logically had to predominate the decision-making process of the dispute settler. Times have changed since economies lacked substitutability for goods and practical concerns no longer mandate the use of specific performance as the only mode of protecting the legitimate expectations of the parties. As Martinus, one of the Four Doctors of Bologna, stated: "if you have sold bread, have not delivered it, and I have died of hunger, will a money judgment suffice."[429] The existence of markets makes such a concern currently moot.

With the emergence of fortified government institutions and economic exchange, those structuring governance authority will take a position on its role in private sector dispute settlement and the authority that it wants to endow to the judiciary to resolve such disputes. Reactive states, Britain and the United States, structured their economies and societies in a manner that thoroughly promoted individual rights and contractual freedoms. The judiciary is the mainstay of these rights and protects individuals from excessive government intrusions, which has included ensuring that individuals are not subjected to non-essential coercive remedial relief orders for breach of

426. *See* Walt, *supra* note 355, at 219.

427. *See* Gonzalez, *supra* note 414, at 98.

428. *See* Kastely, *supra* note 413, at 627.

429. HAENEL, DISSENSRONES DOMINORUM 46-48, 93-94, and 597 (1834), *cited in* Dawson, *supra* note 9, at 503.

contract claims. Government institutions have been relatively detached from any intricate involvement in the private sector. However, this remedial system has seemingly gravitated towards more flexible use of specific performance in sale of goods cases with the adoption of the U.C.C., and generally in other types of contract cases at the common law likely because of the foundational expansion of government activity and societal acceptance of that expansion brought about by the piecemeal enlargement of the administrative state.

The semi-active states, France and Germany, had nationalistic and revolutionary movements that resulted in government becoming more involved in the economy and society. Since one can perceive progressive government action and protection of individual conduct on a spectrum, both of these countries cultivated a fairly equal balance between the collective good and individual rights. Likewise, code provisions that sought to fashion societal conduct and thwart disputes from occurring supported this philosophical equilibrium between the collective and the individual. These states had a more pronounced interest in ensuring that morality in contract law abided and functioned for the good of society. This meant that specific performance would be the remedy of choice and that courts should favor compelling performance. Except for the inconsistency between sanctifying coercive relief and the authority of courts in France, this remedial framework has survived with few modifications for nearly two hundred years in France and over a hundred years in Germany. If one rationally assumes that legal evolution occurs because of political and economic change, it is also sensible to conclude that a well-chosen and balanced framework between individual rights and government action would also survive the test of time because it was indicative of what the global system and economies of the world were to become.

The activist states, the former U.S.S.R. and China, underwent abrupt revolutionary movements and adopted an extreme model of government action in the economy and society. Government planning and control over productive entities structured contracts and the law. Since it was imperative that contracts be performed, since not doing so could result in economic production bottlenecks, specific performance became the remedy of necessity. Likewise, the judiciaries in these countries were intentionally made impotent and were agents of the executive branch, primarily so that the collective would not need to succumb to individual rights protections that could disrupt government agendas for the collective. Moral overtones required that one perform on contractual obligations for the good of society. However, because both countries realized that international economic interdependence was essential to long-term development and quality of life, Russia drastically overhauled its economic system and commercial codes, and China has undertaken comparable reforms in a piece-meal fashion. Specific performance rules and norms have also been changed in a manner that is consistent with the struggle between globalization and protecting one's domestic legal sovereignty.

In short, specific performance remedial rule frameworks and interpretive norms have converged, much like other similar rule frameworks,[430] as a result of conflicting forces of sovereignty and international integration. Today's multifaceted and economically-integrated world dictates that specific performance be granted when "practically" necessary.[431] Since a higher percentage of business transactions are of an international nature, countries must be more accommodating when legal system norms depart from those that are more generally accepted in the international system. Legal systems may flexibly adapt to a midpoint location to facilitate elevated ease in international

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430. Another area of contract law that depicts consistencies between ideological realities and rule frameworks across countries is that of liquidated damage clauses. In the United States and England, parties are generally free to specify damage amounts to be granted upon a breach of contract (*see* Anthony Ogus, *Remedies: 1. English Report, in* CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS (Donald Harris & Dennis Tallon eds., 1989)), but the legitimacy of such a contract clause depends on whether it was a reasonable pre-estimate of the loss that would be suffered in the event of breach. *See* Dunlop Pneumatic Tyre Co. v. New Garage, AC 79 (1915). *See* SCHLESINGER ET AL., *supra* note 14, at 753. Thus, freedom of contract in predetermining damages is supported unless there are extortionate demands that are reasonable in light of actual loss as a result of the breach. *See* Paul H. Rubin, *Unenforceable Contracts: Penalty Clauses and Specific Performance*, 10 J. LEG. STUD. 237 (1981); *see* MacNeil, *supra* note 53, at 501-09.

In France, historically, liquidated damage clauses were given full effect regardless of the extremity of the damages mandated by the clause if a breach were to occur. *See* FCC, *supra* note 111, arts. 1226 & 1152; *see* Beardsley, *supra* note 130, at 103. However, in 1975, this was changed and permitted courts to increase liquidated damage clauses that were ridiculously small or decrease liquidated damage clauses when they were manifestly excessive. *See* FCC, *supra* note 111, 1975 Amend. to art. 1152. These changes occurred shortly after the *astreinte* debates in France. In Germany, liquidated damage clauses are payable upon breach (*see* BGB, *supra* note 112, § 339), but courts can increase or decrease amounts that are "disproportionately high." *See id.* § 340. There is no such discretion to reduce the amount when merchants are involved. *See id.* § 348.

In the former Soviet Union, penalty clauses in contracts were not only upheld, but paying them also did not always relinquish contractual obligations. *See* R.S.F.S.R. Civil Code, *supra* note 169, arts. 187 & 191. When the Soviet Union fell and the CCRF was eventually enacted, penalty clauses could still be applied, but could be reduced if "clearly disproportionate" to the consequences of a violation of an obligation. *See* CCRF, *supra* note 384, arts. 330-330. Likewise, legislated penalty clauses were no longer mandated but have been left to the discretion of the contracting parties.

In China, penalty clauses have not only been sustained in favor of the non-breaching party via the contract, but are often prescribed by law. *See* ECL, *supra* note 387, art. 31; *see* FECL, *supra* note 388, art. 20. The obligation to perform could even continue after paying a penalty (*see* Shen, *supra* note 85, at 289; *see* POTTER, *supra* note 18, at 33) and there are circumstances where both damages and specific performance have been given. *See* Shen, *supra* note 85, at 286-87; *see* GPCL, *supra* note 389, art. 34. With the enactment of the new UCL, breaches can be penalized, but China's rules have become more similar to that of Western countries: "[I]f the amount agreed as the costs of the breach greatly exceeds or is much less than the damage that is produced, a party can request the People's Court or an arbitration organization to make an appropriate reduction or increase in the cost." UCL, *supra* note 402, art. 118. There are exceptions to this rule on matters in which China seemingly has a more distinctive interest. *See id.* arts. 355, 356, 362 & 365.

431. *See* Kastely, *supra* note 413, at 640.

contracting. Providing more flexibility to and even revamping rule frameworks has been common since the world has become more interrelated and based on capitalist ideology and market forces. Countries with legal system characteristics that have been furthest from those that have been accepted by the median country have been the ones that have more fully compromised their historical legal frameworks. Legal reforms that amplify predictability have and will continue to materialize and will impact the fate of long-lived legal doctrines, such as that of specific performance. Over time, if economic principles drive legal change, even seminal and enduring legal system characteristics will evolve from various directions to inject or remove underlying themes such as morality or efficiency, and judicial system institutional attributes can evolve to undertake new authorities consistent with evolutionary transformations.[432]

432. *See generally* THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 335.

THE SWEDISH LEGAL SYSTEM: AN INTRODUCTION

Bernard Michael Ortwein II*

I. INTRODUCTION

Culturally, the Swedish people are less inclined than U.S. citizens to resort to outside sources for help in solving their legal problems. In addition, when they do seek outside assistance they have a history of utilizing arbitration rather than litigation as their primary dispute resolution method.[1] One Swedish commentator reports that, in the private law area, only "[a]bout 20,000 to 25,000 ordinary civil cases, 15,000 small claims cases and 30,000 family law cases are dealt with by the courts each year."[2] Litigation is more the exception than the rule and, in many ways, is considered the true alternative method of resolving disputes in Sweden.[3] Generally, the Swedish people do not automatically think of seeking legal advice as problems arise.[4] This attitude is fostered to some extent by the way the legal system is designed in Sweden as much as the cultural nature of the population.[5]

It has been stated that if one were to ask the average Swedish citizen what the "third branch of power" in their government might be, they would most likely reply "the press, the media. No one would think of the Courts."[6]

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* Professor of Law and Director of Foreign Programs, Suffolk University Law School. The author wishes to thank Deborah Starkman for her valuable assistance.

1. *See* Ulfe Franke, *Arbitration, in* SWEDISH LAW IN THE NEW MILLENNIUM 510, 510 (Michael Bogdan ed., 2000). One commentator has suggested that Swedish legislation contained arbitration provisions as early as the Fourteenth Century. *See* Ulfe Franke, *Arbitration, in* SWEDISH LAW A SURVEY 532, 534 (Hugo Tiberg et al. eds., 1994). Arbitration is particularly prevalent in the context of commercial matters, although "any question in the nature of a civil matter which may be compromised by agreement" is subject to arbitration by agreement of the parties. *See id.* In 1929, the *Arbitration Act* and the *Act on Foreign Arbitration Agreements and Awards* were enacted to help facilitate and encourage arbitration as the prime method of dispute resolution. *See id.* at 533.

2. Per Henrik Lindblom, *Civil and Criminal Procedure, in* SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 1, at 201, 217.

3. *See* Per Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805, 815 (1997). "[C]ivil courts are so seldom used that it sometimes seems more appropriate to regard the use of courts themselves as ADR." *Id.*

4. *See id.*

5. *See id.*

6. Lindblom, *supra* note 2, at 201. Obviously, the answer to this question would be different in America. Alexis de Tocqueville's comments in his seminal work, Democracy in America, that there are very few issues arising in the United States that do not sooner or later result in a judicial question, are perhaps more true today than they were when originally made. *See* HENRY J. ABRAHAM, THE JUDICIAL PROCESS 19 (1998).

This attitude is not unusual in countries with a strong civil law tradition.[7] Typically, in civil law countries, the Judiciary is not on equal footing with the Legislative (Parliamentary) Branch in affecting the law. This may be changing in Sweden. At least one commentator has predicted that the role of the court will expand in the coming years.[8] One question raised by this anticipated change is whether lawyers will be prepared to assume a larger and more influential role within the Swedish legal system as they become more involved in deciding the issues affecting the social, economic, and political life of Swedish citizens.[9]

Sweden, a Scandinavian country located in Northern Europe, approximates the State of California in size with a landmass of approximately 174,000 square miles.[10] However, apart from its geographical area, Sweden is comparatively, sparsely populated with 8.8 million inhabitants or 52 inhabitants per square mile to California's approximately 217 inhabitants per square mile.[11] This ratio is somewhat deceptive in that approximately one-half

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7. The term civil law tradition or system is really a shorthand method of identifying a system of law that consists primarily of legislative or administrative enactments reduced to writing in codes as the supreme law of the country for all to see. There are a variety of terms that have been used interchangeably to identify this type of legal system, including statutory law system, code system, Roman system etc. Although there are some substantive and historical distinctions among these various terms they all have the same common theme. For purposes of this article, the shorthand term "civil law system" will be used throughout to identify those countries that have a strong legal "code" as their basis in contrast to the type of "common law" system in effect in America.

8. *See* Lindblom, *supra* note 2, at 202.

9. Kjell A. Modeer, *The Ongoing Dream: Legal and Political Culture in Postwar Sweden, in* ZWEDEN EN DE EUROPESE CULTUUR, 2001, ACTA VAN HET COLLOQUIUM GEOORGNISEERED IN SAMENWEKING MET DE KUNGLGIA VETENSKAPSAKADEMIEN (Royal Swedish Academy of Sciences) 37, 52 (M. Sohlman et al. eds., 1999). Professor Kjell A. Modeer of the University of Lund Law Faculty in Sweden believes that Sweden is being transformed from a national culture to a more international culture. *See id.* It is his position that lawyers more than judges are at the forefront of this transformation. *See id.* The Swedish legal profession is being "Americanized" as more law school graduates are seeking and finding positions in the private sector as Advokats so that they might better take advantage of the international opportunities presented. *See id.* One could argue that this phenomenon will empower the legal profession and energize it to become more active within its internal court system. *See id.*

10. *See Introduction: Sweden, Basic Facts, at* http://www.lysator.liu.se/nordic/scn/faq71.html (last visited Jan. 25, 2003) [hereinafter *Sweden Basic Facts*]. California actually has a land mass of approximately 158,706 square miles. *See* Encyclopedia Britannica, *available at* http://www.Britannica.com/search?query=California&ct=&fuzzy=N (last visited Jan. 25, 2003).

11. *See Sweden, Basic Facts, supra* note 10. These figures are based on estimated census compilations as of 2000 when California had a population of 33,871,648. However, that number has since been estimated at 34,501,130 as of 2001. *See State and County QuickFacts,* U.S. Census Bureau, *available at* http://quickfacts.census.gov/qfd/ states/06000.html (last visited Jan. 25, 2003); *see also* http://www.50states.com/californ.htm (last visited Jan. 25, 2003).

of Sweden's land mass is covered by forest and is uninhabitable.[12] Much of northern Sweden is on or above the Arctic Circle and sparsely populated while the south has farms and beaches and enjoys a rather mild climate and large population.[13] Sweden is relatively homogeneous with approximately ten percent of the population born abroad.[14] Although Sweden has recently experienced a growth in cultural diversity as a direct result of increased immigration trends and participation as an active member of the European Union, conformity and uniformity continue to be hallmark characteristics of the Swedish people.[15]

The general objective of this article is to provide a broad outline of the fundamental structure of the Swedish Legal System, to identify the current role of the legal profession in that system, and to make some general observations related to future development. The specific approach is: first, to present a broad overview of the Swedish System of Government, the Legal System and the Court System; second, to outline the Procedural Law that pervades the Swedish civil and criminal justice systems; third, to discuss the Swedish legal profession generally and its role within the legal system; and finally, to make suggestions for changes that might help the legal profession better prepare for a more active role in the legal system of the 21st Century.

II. SWEDISH SYSTEM OF GOVERNMENT

Sweden's governmental structure is in many ways typical of other modern Western European representative Democracies.[16]

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12. *See* Fredrik Sterzel, *Public Administration, in* SWEDISH LAW A SURVEY, *supra* note 1, at 72, 72. Sweden's land mass is 50% greater than Italy's, which has seven times as many inhabitants and 30% greater than Germany's, which has ten times as many inhabitants. *See id.*

13. *See Sweden, Basic Facts, supra* note 10. Approximately one-third of the entire population and most business and farming activity are concentrated in or near one of three southern urban areas: Stockholm metropolitan area (1,686,000), Goteborg (450,000), and Malmo (240,000). *See id.*

14. *See* Marianne Eliason, *Citizens and Immigrants, in* SWEDISH LAW A SURVEY, *supra* note 1, at 93, 98. According to one source, approximately 870,000 of the 8.5 million Swedish population was born abroad and only about fifty percent of that figure is not naturalized. *See id.* "Sweden has increasingly been transformed from a heterogeneous country with a substantial number of immigrants from several ethnic minorities . . . Since January 1, 1995, Sweden is also a member of the European Union. The monolithic culture has become pluralistic." Modeer, *supra* note 9, at 37. Prior to the advent of the European Union, the individual legal and political cultures of the Nordic Countries of Denmark, Finland, Norway and Sweden were loosely harmonized. *See id.* That local harmonization faded and an international harmonization emerged when Finland and Sweden joined Denmark as members of the Union in 1995. *See id.*

15. *See* Stig Stromholm, *General Features of Swedish Law, in* SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 2, at 31, 37.

16. *See generally* Par Cronhult, *Introduction, in* SWEDISH LAW A SURVEY, *supra* note 1, at 30-40. Presenting an historical perspective of the Swedish governmental structure.

Sweden has a constitutional[17] parliamentary democracy with a "weak" monarch as the representative head of state.[18] Sweden has a long and colorful

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17. For an English translation of the Swedish Constitution, see Sveriges Riksdag, The Swedish Parliament, *at* http://www.riksdagen.se/english/work/constitution.asp (last visited Jan. 25, 2003) [hereinafter Riksdag]. Swedish constitutional history is rather complicated. Unlike that of the U.S., the Swedish Constitution has changed dramatically at various times over the years and, in fact, was completely reformed in 1974. *See generally* Fredrik Sterzel, *The Constitution, in* SWEDISH LAW A SURVEY, *supra* note 1, at 43, 44.

The Swedish Constitution actually consists of four separate Basic or Fundamental Laws, each of which has the status of a Constitutional Law. *See id.* at 43. The four basic laws are: "The Instrument of Government Act; the Act on Succession; the Freedom of the Press Act; and, the Freedom of Expression Act." *Id.* It is important to understand the distinction between Fundamental or Constitutional Acts and other levels of governmental laws. There are four levels of governmental laws in the Swedish system in the following hierarchy of importance: (1) Constitutional Acts; (2) Ordinary Acts enacted by Parliamentary vote; (3) Ordinances enacted by the Government; and (4) Statutory Instruments enacted by administrative agencies and local authorities. *See* Hans-Heinrich Vogel, *Sources of Swedish Law, in* SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 1, at 48, 48. Constitutional Acts are considered first among all other acts or laws primarily because of the more complicated procedure that must be followed for them to be enacted. *See id.* For example, while Ordinary Acts require one affirmative vote of Parliament, Constitutional Acts must be voted favorably twice with a general election between the two Parliamentary votes. *See id.* The word "Constitution" when related to Sweden is used collectively herein and includes all four acts unless otherwise specified.

It should also be noted that Sweden is party to a substantial number of international agreements and conventions. *See id.* at 55. These are not considered as a part of the internal hierarchy of Swedish laws unless and until they are incorporated into national Swedish law. *See id.* They become internal laws through a two-step process. First, they must be approved by the Swedish Parliament, and second, they must be added to Swedish law either by adding an explicit provision to an existing Act or Ordinance, including the new law, or by enacting the law as a new Act or Ordinance. *See* Hans-Heinrich Vogel, *Sources of Swedish Law, in* SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 1, at 48, 48. This process is referred to as "transformation." *See id.* Once "transformed," these laws enjoy the same status as other Ordinary Acts of Parliament. *See id.*

Two very important international agreements that have been "transformed" into Swedish law are: The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and the law of the European Union. *See id.*

The European Convention was not only transformed into Swedish law by an Act of Parliament (SFS 1994:1219), but it was added to the Swedish Constitution in the Instrument of Government (c.2, §23) with the following proviso: "no law or other regulation may be promulgated which contravenes Sweden's undertakings under the Convention." *Id.* Thus, the European Convention has the equivalency of a Constitutional Act in the Swedish hierarchy of laws. *See id.*

The entire body of laws of the European Union were transformed into Swedish Law in a Parliamentary Act entitled Sweden's Accession to the European Union (1994:1500). *See* Hans-Heinrich Vogel, *Sources of Swedish Law, in* SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 1, at 48, 56. In essence this Act transforms all treaties, acts, and other decisions of the European Union that occurred before Sweden's accession to the Union into law with binding prospective effect in Sweden. *See id.*

18. *See* Sterzel, *supra* note 17, at 43. The Instrument of Government Act of the Swedish Constitution sets forth the basic framework of the system of government. *See id.* at 46. Sweden's system of government is a prototypical Parliamentarian form. *See id.* at 52. The hierarchy of the power structure is Parliament, as the most prominent power responsible for enacting laws; Government (Prime Minister and Cabinet etc.), next most powerful with a mandate to rule the Realm as well as issue ordinances (regulations); and finally, Public

political history that is beyond the scope of this article. However, some historical generalizations may be in order for a more complete perspective.

The basis of Sweden's modern governmental structure can be traced to the turn of the 18th Century when King Gustav IV Adolf, was forced to abdicate and leave the country.[19] At that time, Parliament created a Constitutional Committee that produced a new Instrument of Government Act (Constitution).[20] Although there was some thought that this Constitution would divide the powers more equally among the various branches, in reality, it had the opposite effect.[21] The King and Royal Council were granted Executive power.[22] Legislative power was placed jointly with the King, Council, and Parliament.[23] A separate Judicial Branch and Ombudsman was created but delegated little power in relation to the other branches.[24] The monarchy continued to be extremely powerful until sometime after World War II when, without any change to the Constitution itself, the King began to lose power to a stronger and more aggressive Parliament.[25] Finally, in 1974, the Constitution was changed to reflect Parliament's assumption of a greater portion of power, a reality that had slowly insinuated itself into the governmental structure. This new Constitution specifically created a one-chamber, more powerful Parliament which exists to this day.[26]

Authorities existing on both a national and local (Municipal) level with power to issue regulations. *See id.* As mentioned earlier, the Judiciary, while a part of the Swedish system, plays a less predominant role in the power structure. *See id.* The Instrument of Government also sets out the rights and responsibilities of the Monarch. *See* Sterzel, *supra* note 17, at 52.

19. *See* Cronhult, *supra* note 16, at 32-33.

20. *See id.* at 33-34. This Act had the status of a Fundamental or Constitutional Law. *See id.*

21. *See id.* at 34.

22. *See id.*

23. *See id.*

24. *See* Cronhult, *supra* note 16, at 34. The Ombudsman concept originated in Sweden introduced in an 1809 revision of the Instrument of Government. *See id.* In addition to providing a buffer between the citizens and the Swedish bureaucracy, the Ombudsman acted as a check on the power of the judiciary. *See* Modeer, *supra* note 9, at 47.

25. *See* Joakim Nergelius, *Constitutional Law, in* SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 1, at 65, 66. It seems that during this period a variety of political changes occurred without regard to the language of the Constitution. *See id.*

26. *See* Cronhult, *supra* note 16, at 37. In effect, the Instrument of Government was changed, strengthening the power of Parliament such that even the Government, the branch that is responsible for the day-to-day operation of the country, became responsible to it. *See id.* This new structure is consistent with and emphasizes the importance placed on the principle that Parliament is the vehicle that best represents the will of the people. *See id.* The 1974 version of the Instrument of Government opens with the following section, "All public power in Sweden proceeds from the people. The people's rule of Sweden builds upon the free formation of opinions and a universal and equal suffrage and is reali[z]ed through a representative and parliamentary Constitution and a communal autonomy. All public power must be exercised under the law." *Id.*

Under the 1974 Constitution, Parliament is the most prominent power responsible for enacting Laws; Government (Prime Minister and Cabinet etc.) is next in power with a mandate to rule the Realm as well as issue ordinances (regulations); and finally, Public Authorities,

Today, Sweden's King, Carl XVI Gustaf, although the titular head of state, serves only ceremonial functions.[27] While the King does have a limited role in appointing a new government and selecting the chief executive,[28] this chief executive nevertheless emerges from, and is totally dependant on and responsible to, the legislative or Parliamentary authority.[29] Parliament thus assumes the most predominant role in the Swedish governmental structure.[30]

Parliament, the legislative arm of Swedish government, consists of a body of 349 freely and directly elected members who sit in a single chamber called the "Riksdag."[31] Any member of the Government or Parliament can submit a proposal for enactment.[32] The general rule is that only a majority of the Members of Parliament present and voting must vote in favor of a proposal in order for it to become a law.[33] There are some exceptions specifically identified in the Constitution, however, when a qualified majority is required for enactment.[34] The Prime Minister, who must be approved by vote of Parliament, is the leader of the Government.[35] A new Prime Minister, when proposed by the Speaker of Parliament, will be approved unless a majority of the Members vote against him or her.[36] The Prime Minister selects the other members of his or her government without the need for Parliamentary approval.[37] However, with a majority of its Members voting in support, Parliament may at any time declare that either the Prime Minister or an individual minister of his or her government does not have their confidence.[38]

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which exist on both a state and municipal level, have power in that they may also issue regulations. *See* Sterzel, *supra* note 17, at 52. As mentioned *supra*, the role of the judiciary is a much less important role under the terms of this document. *See id.*

27. *See* SWED. CONST. cl.1, § 5 (specifies that the King (or Queen) is the Head of State). The document, however, confers no powers on the Monarch except to provide that he or she "be kept informed on affairs of the Realm" and that, as necessary, he or she serve as Chair of the Government in Council. *See* Sterzel, *supra* note 17, at 46.

28. *See* SWED. CONST. cl.1, § 5. Of course, as in any Parliamentary system, there are even limitations on this power in that the Monarch must select someone whom a majority of Parliament would then be willing to approve by vote. *See* Sterzel, *supra* note 17, a 47.

29. *See* Sterzel, *supra* note 17, at 44.

30. *See id.* at 46-61.

31. *See* Riksdag, *supra* note 17. Every Swedish citizen who is at least eighteen years of age is entitled to vote as long as they at one time resided in Sweden. *See* Sterzel, *supra* note 17, at 47. The Country of Sweden (Realm) is divided into twenty-eight regions or political constituencies. *See id.* Three hundred ten of the 349 Parliamentary seats are spread proportionately among the constituencies based upon voting population. *See id.* Given the demographics of the country as mentioned *supra*, the largest number of seats, and thus political power, is located in the southern part of the country. *See id.*

32. *See* Nergelius, *supra* note 25, at 72.

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See* Nergelius, *supra* note 25, at 73.

Such a vote would require the Government or the individual involved to resign.[39]

Since neither the Monarch nor the Court has the power to review acts of Parliament for conformity with laws of the Realm, including the Constitution, its power becomes absolute.

III. SWEDISH LEGAL NORMS

As mentioned previously, Sweden has a strong civil law tradition. For purposes of this article, that means, *inter alia*, Sweden's system of legal norms or laws consists primarily of legislative or parliamentary enactments reduced to writing and contained in a book entitled a "Code." Obviously, this is an overly simplistic explanation of a rather complicated and complex topic, but some perspective is in order.

The Swedish code was developed in 1734.[40] It consisted of all legal norms and customs that were in existence at that time.[41] The norms themselves had evolved over a period of time in a variety of ways, including through principles developed and applied by a rather primitive judicial system.[42] This system was comprised of judges that were basically educated in Continental European Universities teaching a system based upon influences generated by German-Roman law.[43] Unlike the comprehensive Napoleonic Codes of 1804-1811, the 1734 Swedish Code was no more than a simple compilation of existing norms and customs. They were prepared with no pretense of reflecting a comprehensive legal structure permeated by a reasoned philosophical or enlightened approach to societal development. As Swedish legal and political culture developed, reflecting a cohesive and more enlightened pattern of thought, the Code became obsolete.[44] It no longer met the needs of a changing society.[45]

There have been numerous unsuccessful attempts at re-codification over the years. For a variety of political and other reasons, a more philosophically reflective and complete Code remains elusive. Instead, the Swedish Parliament has continually added to and modified this original 1734 document in a piecemeal fashion.[46] These changes reflect a variety of jurisprudential influences that have been in vogue over the years from sources of French and German origin as well as the social welfare philosophy of the internal Swedish

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39. *See id.* at 72. The Prime Minister can avoid having his government replaced by calling a special election within one week of the vote of no confidence. *See id.*

40. *See* Cronhult, *supra* note 16, at 37.

41. *See id.*

42. *See id.*

43. *See id.* Thus, aspects of the so-called Roman tradition found their way indirectly into the Swedish legal system.

44. *See* Modeer, *supra* note 9, at 48.

45. *See id.*

46. *See id.*

political power structure.[47] Today the only part of the original 1734 Code that remains in existence is the cover and title page of the document.[48]

IV. SWEDISH LEGAL SYSTEM

A. General

A strongly independent Parliament and existence of a comprehensive civil code place Sweden in line with most civil law systems. However, while there are certain characteristics and attributes that compare favorably, the Swedish legal system cannot be compared in all respects to other continental civil law systems. The Swedish system is unique in that while it has its roots in the Romano/German civil law tradition, it also has some influences from aspects of the common law tradition interspersed throughout.[49]

B. Constitutional Review

Sweden has had a Constitution of one type or another for almost as long as the United States.[50] In fact, one of the four parts of the Swedish Constitution, the "Instrument of Government," dates from 1809.[51] Although the Constitution sets forth the political organization of the Swedish Realm, specifying its powers and establishing some procedural and substantive

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47. *See id.* at 49.

48. *See id.* Interestingly, the Swedish civil code is less like a traditional comprehensive civil code such as exists in France and Germany and more like the kind of legislatively created interconnected but independent codes existing in the United States.

49. *See* Lindblom, *supra* note 3, at 812. The uniqueness referred to seems to be true for all Scandinavian countries in the area of private law. As Lindblom states, "Scandinavian private law constitutes a legal family of its own with five independent and sometimes co-operating siblings, with no forefathers or foremothers alive, and with some rather distant relatives on the continent." *Id.* Perhaps Sweden's form of civil law as a system of law is best described as follows:

> The Nordic legal systems, though touched by the Roman law revival and affected in important ways by their proximity to the modern civil law systems, are generally thought of as *sui generis*, set apart by several unique features both from the common law and the mainstream of the civil law.

MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 60 (1984).

50. *See* Sterzel, *supra* note 17, at 43.

51. *See* Cronhult, *supra* note 16, at 33. It is also interesting to note that Sweden lays claim to the first "Freedom of the Press Act," which has existed as a Fundamental Law in Sweden since 1766. *See id.* Professor Modeer maintains that the 1809 Instrument of Government was strongly influenced by Montesquieu's theory of Separation of Powers. *See* Modeer, *supra* note 9, at 47. This philosophy resulted in an Act subordinating the role of the king and elevating that of the judiciary within the Swedish political structure. *See id.* During the period roughly up to the outbreak of World War I, the judiciary enjoyed a time of independence and power. *See id.* In fact, in the Instrument of Government of 1809, Parliament delegated power of "judicial preview" to the Swedish High Court obliging the government to submit all bills of reform to the Court for constitutional pre-review *before* they could be considered by Parliament. *See id.*

limitations on the exercise of those powers, it has in the past played a much less influential role than other Ordinary Acts of Parliament on the everyday life of Her citizens and in the general development of Swedish law.[52] This is true in spite of the fact, as mentioned above, that constitutional acts by the nature of their mode of enactment are considered first in the hierarchy of importance among laws in Sweden.[53] It is only recently that the Swedish Constitution has truly become a part of the legal system, recognized by government, courts and the people in general as "a living element of social life."[54] One familiar with the American political model realizes that constitutionalism and federalism are the centerpieces, and judicial review is considered the norm. The United States Constitution stands as a bulwark against legislative and executive infringement of the fundamental rule of law.[55] Constitutionalism, as developed in the United States, demands a vehicle free of political power and influence to assure the permanency and superiority of the document and its basic human rights protections.[56] Of course, early on it was the Supreme Court in this country that assumed the power of constitutional interpretation.[57] Today, when appropriately raised, it is the duty of any court in the American legal system to make a decision as to the

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52. *See* Nergelius, *supra* note 25, at 68. The Instrument of Government is a rather complete document setting forth not only the framework of the branches of government but also limited provisions relating to Human Rights protections for Her citizens. *See id.* On the question of Human Rights, it should be noted that Sweden has also accepted as Swedish Law the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See id.* Similar to the U.S. Constitutional protections, the protections afforded human rights in Sweden extend to governmental infringements but not to those occurring at the hand of private parties. *See id.*

53. *See* Stromholm, *supra* note 15, at 37. "[C]onstitutional acts and ordinary acts stand out as the most important legal sources because of their very special role as instruments to express the people's will during the struggle for democracy and parliamentarism in the 19th and early 20th centuries." Vogel, *supra* note 17, at 48.

54. Sterzel, *supra* note 17, at 61.

> Constitutional questions rarely appeared in the Swedish courts but are not unusual nowadays. Constitutional viewpoint has become a natural part of both the legal and the political basis for argument. Constitutional law, which just 20 years ago was almost considered to be a historical curiosity in the study of law is now gaining terrain as a complete part of the positive law.

Id.

55. *See* Mauro Cappelletti, *The "Mighty Problem" of Judicial Review and The Contribution Of Comparative Analysis*, 53 S. CAL. L. REV. 409, 430 (1980).

56. *See id.*

57. *See* Marbury v. Madison, 1 Cranch 137 (1803). In 1803, United States Supreme Court Chief Justice John Marshall enunciated the doctrine of judicial review as follows:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . A law repugnant to the Constitution is void; . . . courts as well as other departments are bound by that instrument.

Id. Interestingly, between the *Marbury* case and the case of Dred Scott v. Sandford, 19 Howard 393 (1897), no other federal law or portion of it was declared unconstitutional by the Supreme Court. *See* ABRAHAM, *supra* note 6, at 346.

Constitution's applicability to a situation. No court in Sweden has this power.[58] However, since the 1970s subtle changes have occurred allowing Swedish courts to take a more active role in the interpretation and application of the Constitution to the lawmaking process.[59]

In 1980, Parliament passed legislation specifically conferring a very limited power of judicial review upon courts in Sweden authorizing them to set aside Parliamentary Acts that might conflict with the Constitution or some other higher authority.[60] It seems this power of judicial review, such that it is, is available at all levels of courts, administrative and general, and to public authorities as well.[61] However, the judicial review that is authorized in this provision is less than complete. For example, constitutional decisions of the Supreme Court, or other higher courts, have no binding effect on lower courts.[62] Further, while judicial review of an Act of Parliament or other government ordinance is authorized, it is nevertheless limited to only those instances where the law in question is "manifestly" incompatible with the Constitution or some other superior provision of law.[63] Finally, as mentioned

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58. *See* Vogel, *supra* note 17, at 58. Of course, the awesomely broad power of judicial review established by Chief Justice Marshall in *Marbury* and its progeny will not be found in any other system to the extent it exists in the United States. *See id.* As mentioned previously, while historically the Supreme Court in Sweden has not had a role in directly reviewing legislation vis-a-vis the Constitution, there is, nevertheless, a system in place that is designed to accomplish a similar purpose in Sweden. *See generally* Sterzel, *supra* note 17, at 43. From 1809 to 1909 this power of constitutional pre-review was delegated to the Swedish High Court. *See id.* at 44. Since 1909, no legislation can be finally promulgated until it undergoes a rather extensive pre-enactment approval process by a group called the Council on Legislation. *See id.* This body is composed of justices of both the Supreme (General) Court and the Supreme Administrative Court. *See id.* The main purpose of this review of all legislative proposals is to consider the way in which the legislation "relates to the fundamental laws and the legal system in general and what problems are likely to arise in applying the law." Vogel, *supra* note 15, at 58. If this body finds major problems with the proposal and renders a negative opinion, the proposal does not usually become enacted by the Riksdag. *See id.*

59. *See* Sterzel, *supra* note 17, at 45. Following World War II, many civil law countries have moved toward a more active constitutional control over legislative and executive power. In many cases the courts have been taking on the responsibility. In others, the view is that judicial review is anti-democratic. The theory is that it is more appropriate for decision of conformity with the constitution to be made by the elected majority in the legislature rather than the less democratically selected judiciary.

60. *See id.* at 59. *See also* Nergelius, *supra* note 25, at 78.

61. *See* Sterzel, *supra* note 17, at 59.

62. *See* Ulla Jacobsson, *General Procedural Law, in* SWEDISH LAW A SURVEY, *supra* note 1, at 489, 489. It does seem that the court decisions play a major role in establishing precedent for practitioners as they prepare their cases or advise clients especially on procedural matters that have no statutory basis. *See id.*

63. *See* Sterzel, *supra* note 17, at 60. In 1980, c.11, §14 of the Instrument of Government was changed as follows:

> If a court or other public authority finds that a provision conflicts with a provision of the fundamental laws or other enactment of higher dignity or that a legislative provision has in important respects been disregarded when it was made, the provision may not be applied. If the Parliament or the Government

above, the judicial review power specified in the Instrument of Government (Chapter 11, Article 14) is not solely within the province of the courts but also extends to public authorities.[64] All of these factors seem to have the effect of minimizing and diluting the overall effect of the review power.[65]

In addition, Sweden has created a Council on Legislation to serve as an alternative method to use of courts for legislative oversight. [66] Theoretically, this entity is authorized, when requested by the Parliament or Government, to review legislative proposals, *inter alia*, for their conformity with the Constitution.[67] It is not mandatory to request review and the opinion of the Council is not officially binding.[68] Nevertheless, it seems when the Council actually is asked and renders an opinion on a matter it is given appropriate deference.[69]

C. Courts

Swedish courts have not played a particularly active role in the interpretation of legislation vis-a-vis the Constitution over the years. Nevertheless, they have been available as a method for resolving disputes between private parties and, of course, as the primary vehicle in the criminal justice system.[70]

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have decided the provision, its application must however only be avoided if the error is manifest.

Id.

64. *See id.*

65. *See* Nergelius, *supra* note 25, at 79.

66. *See id.* at 80. It has been suggested that there are two general models for judicial review; one is the American model and one is referred to as the Austrian model. *See* J.A. Jolowicz, *Summary of the 1984 Scientific Colloquium of the International Association of Legal Science on "Judicial Review and its Legitimacy," in* COMPARATIVE LEGAL TRADITIONS, *supra* note 49, at 75. Under the Austrian model, questions of the constitutionality of legislation are decided by a separate special constitutional court. *See id.* The procedure for bringing the question to the constitutional court will vary depending upon the model followed. *See id.* For example, in 1958 France enacted a system of constitutional review of Parliamentary Acts by creating a governmental entity called *Conseil Constitutionnel (Constitutional Court). See* Marcel Waline, *The Constitutional Council of the French Republic,* AM. J. COMP. L. 483 (1963). The court was empowered to review the constitutionality of laws only upon the request of the executive and only before they were promulgated. *See id.*

67. *See* Nergelius, *supra* note 25, at 80.

68. *See* Louis Favoreu, *The Constitutional Council and Parliament in France," From Constitutional Review and Legislation: An International Comparison, in* COMPARATIVE LEGAL TRADITIONS, *supra* note 49, at 80.

69. *See* Nergelius, *supra* note 25, at 80.

70. *See* Lindblom, *supra* note 2, at 239. However, use of courts to resolve civil disputes in Sweden is the exception rather than the rule and cannot be compared to the use of courts in the United States. *See id.*

The general structure and power of the courts in Sweden is found in Chapter 11 of the Instrument of Government.[71] This Instrument states that "the Supreme Court is the highest court of general jurisdiction and the Supreme Administrative Court is the highest administrative court."[72]

Included in the Instrument of Government is a provision specifying that no authority, including Parliament, may determine how a court should adjudicate a particular matter.[73] This provision prohibits outside powers from imposing any influence on how a court (administrative or general) decides a case. The Constitution also requires legislative enactments to establish fundamental procedures for the operation of the courts.[74] While it has not always been the case, a fair reading of these relatively recent Constitutional provisions would support a conclusion that Parliament intends the Judiciary to be independent and free from outside influences in its decision-making, thus assuming a more proactive role in the legal system.[75]

A more detailed description of the Swedish Court System including, *inter alia*, organization, procedures, and other related matters is contained in the Swedish Code of Judicial Procedure.[76]

Courts and administrative authorities share responsibility in the Swedish legal system for enforcing the legal rules as developed by Parliament. Sweden is similar to other civil law countries in that there is a demarcation of jurisdiction between courts and these administrative authorities.[77] This distribution of power is set forth generally in the Swedish Constitution (Instrument of Government) and more specifically in subsequent legislation.[78]

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71. *See* Rune Lavin, *Administrative Law and Procedure, in* SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 1, at 89, 90. Courts are divided into two categories, Administrative and General. *See id.* In addition to these two general categories of courts, there are some highly specialized courts in Sweden. *See id.* For example, beginning with the enactment of an Environmental Code in 1998, a system of environmental courts was established, including a Supreme Environmental Court. *See id.* These specialized courts serve the exclusive function of dealing with appeals from decisions of administrative authorities in environmental cases. *See id.* Other examples of specialized courts include the Labour Court, Maritime Courts, Real Property Courts, and Water Rights Courts. *See* Jacobsson, *supra* note 62, at 496.

72. Nergelius, *supra* note 25, at 78.

73. *See* Sterzel, *supra* note 17, at 59.

74. *See id.*

75. *See id.* Other provisions in the Instrument of Government relating to the judiciary include provisions establishing the tenure of judges and legal review of closed cases. *Id.*

76. The Swedish Code of Judicial Procedure (SCJP) was promulgated in 1942 and first published in English as Volume fifteen in the American Series of Foreign Penal Codes. SCJP citations in this article refer to the most recent English translation published by the Swedish Ministry of Justice, Regeringskansliet – Justitiedepartmentet (Norstedts Tryckerie AB, Stockholm 1998) [hereinafter SCJP].

77. *See* Sterzel, *supra* note 12, at 77. The Instrument of Government provides that "for the administration of justice there are courts of law and for the public administration there are state and municipal administrative authorities." *Id.*

78. *See generally* Hugo Tiberg, *Introduction to Private Law, in* SWEDISH LAW A SURVEY, *supra* note 1, at 117, 118. Typically a civil law system divides disputes into either a private or public law category. *See id.* Generally, private law governs matters that would be considered

This division of power is particularly important and necessary in a country like Sweden, which fashions itself as a democratic state governed by law, including a substantial public welfare and social service structure in place for its people.[79] In essence, either Parliament enacts laws or the Government issues instructions that affect the various administrative authorities and agencies.[80] These, in turn, promulgate regulations on matters within their purview.[81] As would be expected, a large administrative bureaucracy is necessary to manage a system such as this in a socialistic style country like Sweden.[82] There are three different levels of local government administration in Sweden: central, regional, and local/municipal.[83] Administrative agencies and authorities exist at each of these levels. In order to assure Her citizens of effective protection in this administrative hierarchy, an elaborate specialized administrative court structure was established to handle public law disputes.[84] These administrative courts are separate from the general court structure that is designed to accommodate matters of a criminal and private law nature.[85]

Following is a brief overview of the organization of the two primary court systems in the Swedish judicial structure, the administrative and the general courts. [86]

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civil law in the United States and would be initiated between private parties, e.g. property, tort, contract etc., as well as criminal law. These matters are within the jurisdiction of the general courts. *See id.* Public law refers to those matters where an administrative decision making authority is a party and would include e.g. welfare and tax matters among many issues. *See id.* These matters would be within the Administrative Court's jurisdiction. *See id.*

79. *See* Sterzel, *supra* note 12, at 72. Sweden has an extensive "cradle to grave" social welfare structure that is uniquely Swedish/Scandinavian. *See* Xan Smiley, *The Five Nordic Countries Remain Defiantly Different from the Rest of Europe . . . and from Each Other,* THE ECONOMIST, Jan. 23, 1999, at 3. The Swedish legal historian, Kjell A. Modeer, characterizes the political period from 1976 to present as the Party-related Period. *See* Modeer, *supra* note 9, at 41. He maintains that the political culture can be divided into two factions, one more nationally oriented and the other more internationally oriented. *See id.* The nationally oriented faction maintains the more traditional social welfare principles and is comprised of the Social-democratic, Left (Communist), Green and Center (Farmer) parties. *See id.* The internationally oriented faction leans toward the European Union and maintains a philosophy supportive of separation of powers with a strong court system including power of judicial review. *See id.* This faction is represented in the Conservative, Christian Democrat and Liberal parties. *See id.*

80. *See* Sterzel, *supra* note 12, at 73.

81. *See id.*

82. *See id.*

83. *See id.* The information contained herein is at best a simplistic explanation of the Swedish Public Law System. For an excellent in depth discussion in English see *id.*

84. *See id.*

85. *See* Sterzel, *supra* note 12, at 73. Public Administrative Authorities are not considered an official part of the Swedish Government although they can only receive directives from the Government. *See id.* at 74. In addition, general courts have no jurisdiction or power of review over decisions made by Public Authorities. *See id.*

86. *See* Lindblom, *supra* note 2, at 207. Administrative responsibility for all of Sweden's courts is centralized within the purview of the National Court Administration headed by a Director-General. *See id.*

1. Administrative Court System

Administrative law in Sweden has both a procedural and a substantive aspect.[87] For example, a sophisticated set of formal procedural rules for administrative matters has been developed to assure an equitable system for citizens to deal with issues arising in the public law context.[88] The centerpiece of administrative procedure is the administrative court system. Substantive administrative law is extremely broad and includes, *inter alia*, matters relating to environmental law, social services, ecclesiastical law, social welfare, regulation of business activity, and the general exercise of public power designed to facilitate the functioning of society.[89]

Specific examples of the range of administrative law issues that would affect the lives of most Swedish citizens include: regulation of a driver's license, licenses to operate nuclear power plants, taxes and social insurance benefits, to name a few.[90] The typical situation arising in the Administrative Court would be an appeal by a private individual against an adverse decision of an administrative authority in one of the above areas of interest.[91]

There are three levels of administrative courts.[92] The first level administrative court is the County Administrative Court.[93] There are twenty-four administrative judicial districts each with a County Administrative Court.[94] Jurisdiction of these courts extends not only to appeals from decisions of local or regional authorities but also to certain cases heard as an original matter.[95]

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87. *See* Lavin, *supra* note 71, at 89.

88. Administrative procedure is primarily contained in two laws, the Administrative Procedure Act, 1986:223, and the Administrative Courts Procedure Act, 1971:291.

89. *See* Lavin, *supra* note 71, at 89-90.

90. *See id.* at 89. Not all areas of administrative law are within the jurisdiction of the administrative courts. As mentioned above, some areas of administrative law are considered broad enough and important enough to justify their own special courts. Examples include environmental law and marketing law. *See id.* at 90.

91. *See id.* at 99. An individual who has had an adverse decision from an administrative authority brings most administrative cases in the county administrative court. *See id.* However, it is also possible for an administrative authority itself to file an application directly in the county administrative court. *See id.* Examples would include cases involving care and custody of children or adult drug abusers, psychiatric care, administrative fines, repayment of disbursed social benefits, etc. *See* Lavin, *supra* note 71, at 99.

92. *See* Sterzel, *supra* note 12, at 75.

93. *See* Lena Marcusson, *Administrative Procedure*, *in* SWEDISH LAW A SURVEY, *supra* note 1, at 545, 547.

94. *See id.*

95. *See id.* Examples of cases heard in the first instance include: cases involving involuntary commitment for drug and alcohol abuse, and cases relating to child abuse or neglect that could result in removal of the child. *See id.* Examples of appeal from a local or regional administrative authority include: Tax assessments, social welfare decisions, social security insurance matters. *See id.*

The second level of administrative courts consists of four Administrative Courts of Appeal in Stockholm, Goteborg, Sundsvall, and Jonkoping.[96] These courts hear appeals not only from decisions of the county administrative courts but also directly from decisions of various administrative authorities.[97]

The highest level of administrative court is the Supreme Administrative Court.[98] This court sits in Stockholm and is comprised of nineteen justices and has the power to not only review decisions of the Administrative Courts of Appeal but also to review cases directly from regional or central administrative authorities.[99] The opinions of this court are published and thus in principal, only those cases which impact most broadly are accepted for review.

While it is beyond the scope of this work to review or even to completely describe all the characteristics of the Swedish system of administrative procedure, the following are some generalizations about administrative procedure that deserve mention, albeit superficially.[100] Proceedings in the administrative courts can be conducted either entirely through written submissions or in certain cases via oral presentation.[101] The education and training of administrative judges is the same as that of general court judges.[102]

Certain administrative cases that have the characteristics of a criminal case will often be treated procedurally in the same fashion as regular criminal cases.[103] For example, if an administrative matter is considered criminal in nature, special voting rules to establish liability and proof beyond a reasonable doubt will be required.[104] In addition, in cases of this nature, the administrative court itself will be composed of a legally trained judge and three lay judges.[105] Administrative Courts of Appeal have three legally trained members but usually no lay judges.[106]

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96. *See id. See also* Jacobsson, *supra* note 62, at 497.

97. *See* Marcusson, *supra* note 93, at 547.

98. *See* Sterzel, *supra* note 12, at 75.

99. *See* Jacobsson, *supra* note 62, at 498; Marcusson, *supra* note 93, at 548.

100. For a very good discussion see SWEDISH LAW A SURVEY, *supra* note 1, at 545-66.

101. *See* Lavin, *supra* note 71, at 106. The trend seems to be to allow oral presentations more often in the administrative courts. *See id.* Previously, writing was the only method of proceeding. *See id.* Writing is still an important part of administrative proceedings with written submissions allowed after the oral hearing on the matter. *See id.*

102. *See* Marcusson, *supra* note 93, at 547.

103. *See* Lavin, *supra* note 71, at 107. Typically these cases may result in some penalty if established *e.g.* revocation of licenses (driver's or professional) and disciplinary measures against health care professionals or others. *See id.*

104. *See id.*

105. *See* Riksdag, *supra* note 17. Lay assessors or judges are appointed for a term of six years by municipal councils and sit as a panel in general district and appeals courts (not administrative courts) on criminal, family and in some instances land law matters. *See* Lindblom, *supra* note 2, at 208. They are considered part-time and sit for one or more days per month. *See id.* The lay judge's vote has the same weight as the vote of a professional judge. *See id.*

106. *See* Jacobsson, *supra* note 62, at 497.

A party to an administrative matter is entitled to have legal counsel provided via the extensive Swedish Legal Aid System in the same manner that a person with a private legal matter would be so entitled.[107]

An administrative court has the same range of discretionary power in fashioning a remedy for an individual as the original governmental decision-making authority would have in the first instance.[108] Administrative courts have a broad spectrum of jurisdiction that includes hearing cases on appeal from previous adverse decisions of an administrative authority as well as entertaining administrative cases of first impression.[109] Not all adverse decisions of the county administrative courts are subject to appeal to the Administrative Courts of Appeal. Leave to appeal to the Supreme Administrative Court is granted in only about two to three percent of the cases where it is requested.[110]

2. The General Courts

There are three levels of general courts in Sweden: district courts (tingsratter), courts of appeal (hovratter), and the Supreme Court (Hogsta domstolen).[111] As mentioned above, the general courts are the courts most closely analogous in jurisdiction to American civil and criminal courts. They deal with both criminal and civil cases and generally have jurisdiction over all cases that have not been explicitly excepted from their jurisdiction.[112]

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107. *See* Lindblom, *supra* note 2, at 231. *See infra* Part IV.D3 for a more complete discussion of public legal aid in Sweden.

108. *See* Marcusson, *supra* note 93, at 546.

109. *See id.* at 547. In fact, there are some instances when an administrative authority's decision can not be reviewed by either an administrative or a general court. *See id.* at 546. However, in those cases when court review of an administrative decision is not available there may be an alternative option to seek review from a superior administrative authority. *See id.*

110. *See* Lavin, *supra* note 71, at 105.

111. *See* Lindblom, *supra* note 2, at 203.

112. *See id.* Included among the excepted, in addition to administrative court matters, are certain specific substantive topics such as labor, environmental etc. *See id.* As mentioned previously, special courts have been created to deal with these areas of law and thus they are outside the purview of the general courts. General courts in Sweden may not review decisions of administrative authorities or administrative courts. *See* Marcusson, *supra* note 93, at 546. Interjurisdictional issues can be particularly troublesome in civil law systems with a separate administrative court structure as well as a general court structure. *See* GLENDON ET AL., *supra* note 49, at 118. Generally in many civil law systems special procedures are established to resolve these questions of jurisdiction between the two courts. *See id.* For example, France has a special Tribunal of Conflicts to decide whether a case belongs in the administrative or general court jurisdiction. *See id.* at 119. Germany has a system whereby each court has power to decide if it will take jurisdiction or transfer the case to the other court's jurisdiction. *See id.* Sweden's system is more like Germany than France. Many of the jurisdictional issues are resolved legislatively with a few remaining issues centering on the extent to which a general court could review administrative decisions. *See* Lavin, *supra* note 71, at 96. Recently the Swedish Supreme General Court has limited the jurisdictional power of the general courts to review only private law issues and leave the public law issues to the administrative courts. *See*

There are approximately ninety-six district courts spread throughout Sweden.[113] These are the courts of first instance and the most active in the Swedish legal system. In civil cases, .a three judge quorum hears more complex cases, while small claims and less complicated matters are heard by a single judge.[114] Family law and criminal cases are usually heard by one professional judge and three lay judges.[115] Except for cases involving freedom of the press, there are no juries in the Swedish legal system.[116] However, although not completely analogous, the use of lay judges presents a rather interesting alternative to the American petite jury.

Lay judges sit in panels along-side professional judges in both the district courts and the courts of appeal on matters of criminal, family, and to some extent land law cases.[117] They have the power to decide not only issues of fact but also questions of law.[118] Their decisions on matters of law carry the same weight as professional judges in the case. Lay judges are nominated by the local (municipal) political parties, then they are selected and appointed by the government for a four-year term.[119] Lay judges must reside in the district where they sit, and they cannot be affiliated with the legal profession as either a judge, advokat, prosecutor, or practicing lawyer.[120]

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id. Thus, general courts will not enjoin or order specific performance against administrative authorities. *See id.* Further, general courts will not take jurisdiction of a case which requires special administrative law knowledge leaving such decisions to administrative authorities. *See id.*

113. *See* Lindblom, *supra* note 2, at 203. The size and makeup of these courts vary depending upon the population served. *See id.* For example, Stockholm, the largest city in Sweden, has more than one hundred permanent judges sitting in its district court. *See id.*

114. Unless the case is uncomplicated or the parties consent, there is a requirement for three professional judges to constitute a quorum. *See id.* at 204; SCJP, *supra* note 76, at c.1, §3a.

115. *See* Lindblom, *supra* note 2, at 208.

116. *See id.*

117. *See* Ulla Jacobsson, *Criminal Procedure, in* SWEDISH LAW A SURVEY, *supra* note 1, at 499, 500. The number of required judges, lay and professional, in the district and court of appeals depends upon the penalty that attaches to the crime charged. *See id.* at 501. Generally speaking, one professional judge and three lay judges is sufficient in the district court. *See* SCJP, *supra* note 76, at c.1, § 3b. In more serious criminal cases there can be as many as five lay judges and in the less serious there may not be any lay judges. *See* Jacobsson, *supra* note 118, at 501.

In the courts of appeal for most cases three professional judges constitutes a quorum. *See* SCJP, *supra* note 76, at c.2, § 4. Cases that are in the court of appeal on appeal from the district court will have "at least four legally qualified judges... if the district court consisted of three legally qualified judges." *Id.* at c.2, § 4. In the less serious criminal cases there are usually three professional judges and no lay judges. *See* Jacobsson, *supra* note 118, at 501. In more serious criminal cases three professional judges and two lay judges constitute a quorum. *See id.*

118. *See* SCJP, *supra* note 76, at c.30

119. *See id.* at c.4, § 8.

120. *See id.* at c.4, § 6.

As of 1999, there are six general courts of appeal spread throughout the various regions of Sweden.[121] Technically, any district court decision is subject to appeal to the court of appeal, however, such appeals are very rare.[122] An appeal is in reality a trial de novo as all issues of fact and law are subject to reconsideration by the court of appeal. The composition of the appeals court will vary depending upon the composition of the district court that initially heard the case.[123]

The highest court in the Swedish general court system is the Supreme Court sitting in Stockholm.[124] As of December 1999, it was comprised of sixteen professionally trained justices sitting in two divisions.[125] Three justices sit as a panel on all matters that are considered of a minor nature whereas five justices are necessary to decide more serious issues.[126] The Supreme Court has evolved to the point where it has become a precedent setting court and will only take cases that are considered to be of importance throughout the Realm.[127] When the Supreme Court does take a case, it sits in much the same manner as a district court and a court of appeal, deciding all issues of fact and law.[128]

D. Overview of Procedural Law in Sweden

There are two very important documents necessary to the proper functioning of the Swedish legal system: the Swedish Code of Judicial Procedure (SCJP)[129] and the Enforcement Code (EC).[130] Rules of criminal procedure and civil procedure are contained in the SCJP. The EC contains a rather extensive set of rules and procedures relating to the creation and

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121. *See id.* at c.2, § 6. The two appellate courts in Stockholm and Jonkoping, respectively, trace their beginnings to the seventeenth century. *See* Jacobsson, *supra* note 62, at 497. In addition, there are courts of appeal in Malmo, Umea, Sundsvall, Goteborg. *See id.*

122. *See* Lindblom, *supra* note 2, at 204. Approximately eight percent of civil cases and ten percent of criminal cases are appealed to one of the six appeals courts. *See id.*

123. *See id.* Where the district court case was heard by a professional judge along with lay judges, the appeals court will be composed of three professional judges and two lay judges. *See id.* In cases where there were no lay judges involved in the district court case, the appeals court will be comprised of three professional judges. *See id.* If there were three professional judges sitting on the case in the district court, the appeals court will have four professional judges sitting as a quorum. *See id.*

124. *See* Jacobsson, *supra* note 62, at 497.

125. *See* SCJP, *supra* note 76, at c.3, § 4. At least two members of the Council on Legislation are included within this number of justices. *See* Jacobsson, *supra* note 62, at 497.

126. *See* SCJP, *supra* note 76, at c.3, §§ 5, 6.

127. *See* Lindblom, *supra* note 2, at 229.

128. *See id.*

129. "The Swedish Code of Judicial Procedure was first promulgated in 1942 and came into force on January 1, 1948" SCJP, *supra* note 76, preface. The most recent English translation of the SCJP was published in 1998 by the authority of the Swedish Ministry of Justice. (Norstedts Tryckeri AB, Stockholm 1998).

130. *See* Jacobsson, *supra* note 62, at 488.

administration of a system of enforcement mechanisms for the decisions of all the courts, governmental authorities, and arbitration panels.[131]

1. Enforcement Procedures

Traditionally, in civil law systems the courts have no contempt power.[132] In the absence of contempt power, in order for the court's judgment and decision to be meaningful there must be some other mechanism available to assure enforcement.[133] In Sweden, there are distinct organizations, known as Enforcement Authorities, responsible for court decisions as well as, when necessary, decisions of governmental authorities and arbitration panels.[134] The Enforcement Code sets forth the contours establishing and defining the Enforcement Authorities.[135] Generally, each of the twenty-four counties in Sweden has one Enforcement Authority (Authority).[136] The individual Enforcement Authorities are under the direct control of the National Tax Authority, which is responsible for managing, directing and supervising them.[137] An Enforcement Authority is comprised of officers who are trained in either law or economics and who sit as quasi judicial officials.[138] The Enforcement Authority is authorized to conduct mini hearings known as summary proceedings to determine if the matter presented is ripe for enforcement and meets legal standards.[139] An application is filed with the Enforcement Authority by a claimant requesting relief as awarded through judicial decision.[140] The Enforcement Authority notifies the defendant of the claim and requests a responsive answer.[141] In matters of enforcement of court decisions, the power of the Enforcement Authority does not extend to a re-examination of the case.[142] However, it is within the power of the Enforcement Authority to consider matters such as, "objection by the debtor that he already satisfied the judgment, that he has a set-off claim or that his unsettled matters with the creditor is a hindrance for the enforcement."[143]

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131. For a thorough discussion see Ulla Jacobsson, *Enforcement, in* SWEDISH LAW A SURVEY, *supra* note 1, at 556-65.

132. *See* GLENDON ET AL., *supra* note 49, at 167.

133. *See id.* In the French system, under a process referred to as *astreinte*, the court has the power to impose financial sanctions to add weight to its judgments. *See* Beardsley, *Compelling Contract Performance in France*, 1 HASTINGS INT'L & COMP. L. REV. 93 (1977).

134. *See* Jacobsson, *supra* note 131, at 556. The types of enforcement that might be requested include execution on real property, personal property, debtor's claims, attachment of wages, eviction of a tenant, specific performance of a contract. *See id.* at 559.

135. *See id.* at 556-57.

136. *See id.* at 556.

137. *See id.*

138. *See id.* at 557.

139. *See* Lindblom, *supra* note 2, at 220.

140. *See id.*

141. *See id.*

142. *See* Jacobsson, *supra* note 131, at 557.

143. *See id.*

Subsequently these same officers are responsible for the actual enforcement activities undertaken by the Authority to satisfy the judgment which usually involves some form of attachment or collection.[144]

2. Code of Judicial Procedure

The system of procedural rules in Sweden is rather complicated and to some extent different from many other civil law systems. In civil law cultures, rules of civil procedure tend to maintain a level of importance equivalent to the position afforded to American substantive civil law.[145] Rules of civil procedure govern every aspect of the operation of the legal system, both criminal and civil, and extend from the role of the courts, the bar, and the prosecutors to the actual court proceedings themselves.[146]

3. Legal Aid

i. Civil

There is a rather extensive public legal aid system in place in Sweden.[147] In general terms, the premise behind this system is that every citizen is entitled to legal assistance regardless of his or her ability to pay. Legal aid will be granted in some proportion to anyone and everyone who has a need for legal services and no private legal insurance to pay for it.[148] Technically there is a maximum income limit in order to qualify for public legal aid, but this limit is relatively high by Swedish standards and thus includes a large part of the population.[149] For those who qualify, the amount of public legal aid actually awarded will vary in proportion to the party's financial status.[150] It should be

144. *See id.* at 557-58.

145. *See* GLENDON ET AL., *supra* note 49, at 166.

146. *See* Lindblom, *supra* note 2, at 201.

147. *See id.* at 231-32; "[T]here are five forms of legal aid paid by the State: general legal aid in civil cases, legal advice, public defense counsel, counsel for the aggrieved person and public counsel." *Id.* at 231.

148. *See id.* Legal insurance is rather common in European civil law systems as a means of assuring that legal needs of those of moderate means are met. *See generally*, M. CAPPELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES, 178 n. 3 (1975).

One estimate is that over ninety-five percent of the Swedish population is covered by private legal insurance through either their home or car policy. *See* Lindblom, *supra* note 2, at 231. If a person is capable of having private legal insurance and chooses otherwise they will not be afforded public legal aid. *See id.*

149. *See* Lindblom, *supra* note 2, at 232. This source lists the income limit at 260,000 SEK (approximately $26,000 US) which incorporates approximately ninety percent of the Swedish population. *See id.*

150. *See id.* The variation may be between two and forty percent of costs. *See id.*

pointed out, however, public legal aid does not cover the losing party's obligation to pay the prevailing party's legal costs.[151]
Through a combination of public legal aid and private legal insurance, it seems that no citizen in Sweden is denied access to legal assistance due to an inability to pay.

ii. Criminal

In serious criminal cases an accused is entitled to have public defense counsel appointed by the court in addition to compensation for the costs of preparing a defense.[152] Counsel may be appointed at any stage of the proceeding, including the preliminary investigation stage, before the inquiry has progressed to the initiation of formal charges.[153] While the suspect can request the appointment of a particular legal counsel, it is ultimately the court's decision and in any event the legal aid appointment must be of an Advokat.[154]

E. Civil Proceedings Under the Swedish Code Of Judicial Procedure (SCJP)

The plaintiff begins the civil judicial process in Sweden by filing a written summons application in the district court.[155] This summons must state the plaintiff's claim with facts in support including proposed written evidence.[156] The district court reviews the summons and, if it finds it is based on valid legal ground, will issue a summons to the defendant and order preliminary proceedings to commence.[157] Preparatory proceedings are conducted by a single judge whose function at this stage is to have the parties

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151. *See id.* A party's private legal insurance does fulfill this obligation, however, most private legal insurance coverage is limited to approximately 100,000 SEK. *See id.*

152. *See* SCJP, *supra* note 76, at c.21. Preparation costs may include expenses incurred in relation to the following matters, "production of evidence, travelling expenses and subsistence." Lindblom, *supra* note 2, at 232. Public defense counsel will always be appointed when a person is suspected of committing a serious crime, is detained, or is placed under arrest. *See id.* at 233.

153. *See* Lindblom, *supra* note 2, at 233.

154. *See id.* In 1999, an Advokat was compensated at the rate of 1,000 SEK (approximately $100 US) per hour. *See id.*

155. *See id.* at 214. The SCJP also contains provisions for small claims cases. *See id.* at 217. These provisions were developed to provide a quick, less expensive alternative to the regular civil trial for those civil cases where the financial claims are more modest. *See id.* In 1999, the amount, which is adjusted annually to meet inflation figures, was limited to SEK 16,000 (approximately $2,000 US). *See* Lindblom, *supra* note 2, at 217. The small claims cases are held in the same district courts as other civil cases but different less formal rules apply. *See id.* at 217-19.

156. *See id.* at 214. Plaintiff must append any documentary evidence that is important to her claim. *See id.*

157. *See id.* The defendant is required to answer the summons in writing. *See id.*

lay out the details of their case including a recitation of the evidence upon which they intend to rely.[158]

In theory, under the principle of orality the case must eventually proceed to a courtroom hearing in order for a court decision to be rendered.[159] In certain cases this hearing can take place in simplified form without the formalities associated with a main hearing.[160] The judge may adjudicate the case alone based upon the material presented at the preparatory pre-trial proceeding without the need of a subsequent formal courtroom hearing. If the case continues to the formal hearing stage, the rules of orality, immediateness, and concentration apply and the judgment must be based only upon what is presented orally to the judge or panel of judges at the hearing.[161] These three principles applicable to the Swedish system distinguish it from most other civil law systems where the rule is more often that there is no single trial but rather a continuous series of "meetings, hearings, and written communications during which evidence is introduced, testimony is taken, and motions are made and decided."[162]

The actual procedure during a civil trial in Sweden is similar in many ways to an adversarial civil trial in the American legal system.[163] As

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158. *See* Lindblom, *supra* note 2, at 214. Unlike the American system, there is no party initiated discovery in a civil case. *See id.* at 215. In addition, there is a movement in Sweden to encourage judges to be more directly and actively involved in the preliminary phase of the case. *See id.* The objective is to eliminate any incompleteness and clarify the position of the parties prior to the oral hearing and to encourage settlement where appropriate. *See id.*

159. *See id.* The three main principles of the judicial trial system in Sweden are: orality, immediateness, and concentration. *See id.* at 215-16. In summary, this means that if a case progresses to trial the court's decision must occur immediately following an uninterrupted hearing where oral evidence is presented. *See* Lindblom, *supra* note 2, at 215-16. Although the general principle is that the case cannot be decided without a trial, the judge does have some options to resolve the case at the pretrial phase of the proceedings. *See id.* at 216.

> [T]he court may (1) dispose of the case otherwise than by judgment, (2) enter a default judgment, (3) enter a judgment based upon a party's consent to, or concession of, a claim, (4) confirm a settlement and (5) enter a judgment . . . if neither a main hearing is needed in view of the inquiry into the case nor any of the parties request a main hearing.

Id.

160. *See id.* The principle of immediateness generally requires that to be effective a judgment must be based solely upon what has been presented at a main hearing. *See id.* at 212. However, an exception to the principle exits in cases where the hearing occurs before the judge who has been conducting the preparatory proceedings and is familiar with all the evidence and either renders a decision in conjunction with the pre-trial conference or within fourteen days thereof. *See id.*

161. *See* Lindblom, *supra* note 2, at 212. There are provisions in the SCJP for the court to call recesses and adjournments in the case; however, under the principle of concentration, the case must proceed generally uninterrupted until all evidence is presented and a decision can be made. *See id.* at 216.

162. GLENDON ET AL., *supra* note 49, at 166.

163. *See id.* Of those cases where a summons is requested in the Swedish system, only a small number actually proceed to a main hearing or trial. *See id.* In a way, this is very similar to civil cases in the United States that also tend to settle before trial in large numbers. One

mentioned previously, there are no juries in civil cases in Sweden, but there is a panel of three legally trained professional judges. Each party has an opportunity to make an opening speeches, present oral evidence, and make a closing address to these judges.[164] There are no rules of evidence and each witness, including the parties, although subject to questioning by counsel, as well as the judges, is encouraged to give their testimony unobstructed by objections.[165] Parties need not be represented by legal counsel but if they so desire to be represented they may choose any lay person, legally trained or not, or a legally trained individual who might or might not be a qualified Advokat of the Swedish Bar Association.[166] Finally, in Sweden the losing party pays the litigation expenses of the prevailing party as determined by the court.[167]

F. Criminal Proceedings Under the SCJP

The Swedish criminal justice system has a tripartite organizational structure each interconnected but independent from the other.[168] Included, in

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Swedish commentator has stated: "To-day the majority of civil cases are decided during the preparation and do not proceed to a main hearing." Ulla Jacobsson, *Civil Procedure, in* SWEDISH LAW A SURVEY, *supra* note 1, at 515, 523.

164. *See* Lindblom, *supra* note 2, at 216.

165. *See id.* The examination of witnesses is almost exclusively conducted by counsel in the Swedish system with the judge taking part, more or less, as she believes necessary. *See id.* This process is more akin to the adversarial American model than it is to the typical civil law, more inquisitorial model. A more typical civil law example might be in the nature of that required under German civil procedure. *See* GLENDON ET AL., *supra* note 49, at 170. In the German system, the judge is the prime interrogator of the witnesses asking them, among other things, their name, age, and occupation. *See id.* Then, inviting them to give their testimony uninterrupted. *See id.* Upon completion, legal counsel for the parties might be invited to ask questions of the witness, but rarely is the invitation accepted. *See id.*

166. *See* Lindblom, *supra* note 2, at 216. A party can practice law without being an Advokat, a special designation for a person legally trained who is also a member of the Swedish Bar Association. *See infra* Part V.

167. *See id.* Included in the expenses of litigation are costs for counsel, costs associated with the party's own work on the case, party's loss of time and costs associated with the production of evidence. *See id.* at 216-17. There are provisions for situations where the determination of prevailing party is not clear. *See* Jacobsson, *supra* note 163, at 521. If necessary, under the SCJP

> costs can be divided four different ways...: 1 full reimbursement: if one of the parties has substantially won the case, 2 apportionment: the party who has won the most receives a percentage reimbursement related to the percentage he has won, 3 "set-off": each of the parties is responsible for his own costs...4 special division: one party pays the opposing party's costs in the part of the case he has lost.

Id.

168. See Jacobsson, *supra* note 117, at 499. Of course, the Bar also plays a predominant role in the system as defense counsel. *See id.* at 498. Another independent organization which has a substantial impact on the criminal justice system is the National Prisons and Probation Administration which is responsible for dealing with people convicted of crime, including the issues surrounding parole decisions. *See id.* at 499-00.

addition to the courts, are the Police Authority and the Prosecution Authority.[169]

The Police Authority consists of a National Police Board headed by a National Police Commissioner with supervisory authority over approximately 100 local police districts and twenty county districts.[170] Of course, the primary responsibility of the police is to investigate crimes and work with the prosecutor in developing evidence. There is a National Police College for the training of police officers located in Stockholm.[171] Police service consists of two different career paths, uniformed police officer or criminal investigator.[172] Hierarchically the Prosecution Authority consists of a National Prosecutor-General with supervisory responsibility over district, county, and regional prosecutorial offices.[173] The prosecutor in the Swedish criminal justice system has a variety of tasks similar to those of her American counterpart including: heading the police investigation, deciding on when to prosecute a given case, and representing the State's interest in the prosecution of a case.[174]

Similar to the American and English criminal justice systems and unlike other civil law systems, the Swedish system treats the investigatory stage of criminal proceedings as inquisitorial but the trial stage as more adversarial.[175] However, the Swedish criminal trial process is not completely analogous to an

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169. *See id.* at 499.

170. *See id.* at 499-00.

171. *See* National Council for Crime Prevention, Sweden, *World Factbook of Criminal Justice Systems: Sweden, available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjswe.txt (last visited Jan. 25, 2003) [hereinafter National Council for Crime Prevention].

172. *See id.* Qualifications necessary to train as a uniformed police officer recruit are "Swedish citizenship, a high school education, a minimum of one year work experience outside the police, good health and a suitable body for police work, a driver's license, the ability to swim," and at least twenty years of age at the time of application. *Id.* The training program for a uniformed police officer spans a three year period including an initial ten months at the police college, eighteen months at one of the 117 police districts, and a final period of five months back at the police college before being placed in the field at a district office. *See id.*

In order to become a criminal investigator it is necessary to have a university degree in law. *See id.* In 1991, there were 700 applicants to train for the position of criminal investigator and thirty were accepted. *See id.* In addition to a law degree, training to become a criminal investigator requires three years of study at the National Police College with emphasis on analysis and planning, administration and workplace psychology. *See* National Council for Crime Prevention, *supra* note 172. In addition, it requires field work throughout the criminal justice system including placement with the police, courts, and prosecutor's offices. *See id.*

173. *See* Jacobsson, *supra* note 117, at 500.

174. *See id.* It seems that whenever possible the same prosecutor will be involved in the case from beginning to end, including, with permission of the Prosecutor-General, presenting the case before the Supreme Court.

175. *See id.* at 503. For an excellent beginning to end discussion of a criminal proceeding in a typical civil law system see Rudolf B. Schlesinger, *Comparative Law reprinted in* GLENDON ET AL., *supra* note 49, at 180. A common misconception among Americans is that the civil law system treats the suspect as "presumed guilty until proved innocent." GLENDON ET AL., *supra* note 49, at 179. This is certainly not the case in the Swedish system where there are a number of safeguards in place to protect the suspect at each stage of the criminal process.

adversarial model as the court/judge plays a much more active and direct role in the case in Swedish criminal proceedings.[176] For example, at the trial stage, a judge will often actively question witnesses and may even request parties to submit additional evidence.[177]

The Swedish criminal justice process is divided into four stages: the preliminary investigation, the prosecution, the main hearing, and decision-making.[178]

There is no Grand Jury or counterpart in the Swedish system. A prosecutor who has sufficient evidence to conclude that a suspect is guilty of a crime begins the trial process by filing with the court a written application for a summons.[179] Following is a somewhat superficial outline of the various steps in the criminal justice process. Of necessity it is of a general nature and has substantial subtleties that require further exposition and development beyond the scope of this article.

1. The Preliminary Investigation And Prosecution Stages[180]

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176. *See* Jacobsson, *supra* note 117, at 503. In many civil law systems the court takes an active role along with the prosecutor at an early stage of the investigation. *See id.* This is not the case in Sweden where except for unusual situations where the freedom of the suspect is at issue the court is not usually actively involved until the trial itself begins. *See id.*

177. *See id.*

178. *See id.* at 504.

179. *See id.* at 509. The prosecutor must be very detailed and specific in this application as it provides the framework for the trial. *See* Jacobsson, *supra* note 117, at 509. It must describe the charged offense with specificity including the time, place, and manner of commission with a description of each item of evidence he will use in establishing the case. *See id.* Subsequently a court will not sentence a defendant for an offense not described in the summons. *See id.* A court may allow a prosecutor to expand the definition during the trial under certain circumstances. *See id.*

180. *See id.* As mentioned above, the early stages of the preliminary investigation are conducted outside the scope of the court's supervision, initially by the police and, later, including the prosecutor. *See id.* The court does have a limited role during the preliminary phase on matters such as placing a suspect in custody. *See* Jacobsson, *supra* note 117, at 509. The Swedish criminal justice system is replete with instances at every stage to protect the accused and help to insure that innocent people are not convicted of a crime. *See id.* The concept most often used to describe these protections is *favor defensionis*. *See id.* at 504. The protections are articulated in terms of probabilities in the Code of Judicial Procedure and applied at each phase of the process. *See id.*

> 1. when someone may be *suspected* of a crime ... he is obliged to remain at the police for questioning for 12 hours, CJP ch 23 sec 9,
> 2. when someone can be *reasonably suspected* of a crime ... the prosecutor shall take over the investigation, and the suspect shall be informed, CJP ch 23 sec 3 and sec 18,
> 3. when someone *on probable grounds is suspected* of a crime ... he can be committed into custody by the court, subject to certain further conditions, CJP ch 24, sec 1,
> 4. when there are *sufficient grounds to believe that the suspect is guilty of the crime* ... the prosecutor shall prosecute, CJP ch 23 sec 2 and ch 20 sec 9.

Id. (emphasis added).

When there is reason to suspect that a crime has been committed the police will begin an investigation.[181] In some cases the prosecutor may be involved in an advisory capacity with the police at these very early stages of the investigation.[182] However, more often the prosecutor will not be involved until the police investigation extends beyond the issue of whether a crime has been committed and is more focused on an individual suspect. When a decision is made that there is a person who can be reasonably suspected of a crime, the prosecution takes over and the police work to develop evidence in support of the prosecutor's case.[183]

In Sweden, every citizen is required to appear at the request of the police for questioning in connection with the investigation of a crime.[184] At the point during the investigation when it becomes clear that a person is reasonably suspected of committing the crime, he is informed of his right to public defense counsel.[185] Certain coercive measures may be used against a suspect and his property including apprehension, arrest, prohibition of travel, requirement of reporting to police, physical examination, bodily search, photographing and fingerprinting and ultimately holding in custody.[186] However, physically placing a suspect in custody is a decision that is not made lightly and requires an order of the court.[187]

After making the decision to prosecute, the summons is requested and the prosecutor prepares for the main hearing.[188] A written report is filed with

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181. *See id.* at 505. Of course, in many instances, the suspect may be arrested during or shortly after the commission of a crime. *See* Jacobsson, *supra* note 117, at 505. In these cases the police will begin the investigation with an interrogation of the suspect and the collection of potential evidence. *See id.*

182. *See id.*

183. *See id.*

184. *See id.* The police have the ability to detain a person for questioning up to six hours without the need of any special approval. *See id.*

185. *See* SCJP, *supra* note 76, at c.23, § 5. Defense counsel and the suspect are kept informed during the police investigation of the evidence developed and are encouraged to provide information to assist as the case progresses. *See id.*

186. *See id.* at c.24-28. These sections specify the coercive measures and their requirements in detail.

187. *See id.* at c.24, §§ 1-3; *see also* Jacobsson, *supra* note 117, at 506. In order to have a suspect placed in custody it is necessary for the prosecution to file an application with the court. *See id.* A hearing is required immediately or in any event by the day following the application. *See id.* There are two situations where the court may commit a suspect into custody. *See id.* First, if there are probable grounds to believe the suspect has committed a crime the penalty for which is imprisonment for one year or more he may be held in custody if one of the following special grounds exist: "1. risk of escape, 2. risk of tampering with evidence, 3. risk of continuation of criminal activities." *Id.* Second, if the minimum penalty for the crime is two years or more in prison the court should order custody unless it is evident that none of the grounds listed above exists. *See id.* When the court issues a custody order it simultaneously issues a time limit for the initiation of prosecution. *See* Jacobsson, *supra* note 117, at 507. New hearings for renewal of the custody order must be held at a minimum of two week intervals until prosecution is commenced. *See id.*

188. *See* Lindblom, *supra* note 2, at 224.

the court by the prosecutor containing a full description of what has transpired at the preliminary investigation, including a list of evidence and names of witnesses she expects to present at trial.[189] There is no plea-bargaining in the Swedish system and, thus, there must be a main hearing in every case when a decision is made to proceed with charges.[190]

2. The Main Hearing

Similar to a number of civil law systems, the Swedish trial court has no lay jury but, instead has a mixed panel of professional judges and lay judges.[191] This mixture of judges acts as a single body, simultaneously deciding issues of both law and fact as well as guilt and punishment.[192] Any judgment made must be based on evidence presented to the court on the day of the trial.[193] Similar to Anglo-American adversarial trials, both defense and prosecution in Sweden follow a standard fixed trial progression including opening speeches, presentation of evidence, and closing addresses.[194] In addition to the prosecutor and defense counsel, the injured party in the matter may also be present, with or without counsel, and is entitled to testify, examine witnesses, and present evidence for the court to consider.[195] Neither the defendant nor the

189. *See id.* The court has the power to summons witnesses of its own to the main hearing regardless of the desires of the parties. *See id.*

190. *See* Jacobsson, *supra* note 117, at 505. This procedure should be contrasted with other civil law systems where the prosecutor makes a preliminary decision whether to proceed to the formal charging stage of the process. *See id.* For example, in France, if the decision is made to proceed the prosecutor prepares a very extensive dossier of relevant evidence including witnesses to be called by defense and prosecution. *See* GLENDON ET AL., *supra* note 49, at 182. This dossier is then presented to a panel of judges for a second decision as to whether the evidence is strong enough to proceed to a trial. *See id.* The panel has broad authority, usually inviting defense counsel to present argument on the issue of whether there is "reasonable cause" to proceed to a formal trial. *See id.*

191. *See* SCJP, *supra* note 76, at c.1, § 3b. The bench in the Swedish district court for criminal cases consists of one professional judge and three to five lay judges, depending upon the nature of the charge. *See id.*

192. *See* Lindblom, *supra* note 2, at 224.

193. *See id.*

194. *See id.*

195. *See id.* A person who has in some fashion been harmed by the criminal conduct of the accused and who has a private claim for damages sustained may have his or her claim consolidated, with the prosecutor's assent, as part of the prosecution's case against the defendant. *See* SCJP, *supra* note 76, at c.22. In the trial, witnesses are not restricted by rules of evidence in their testimony. *See* Jacobsson, *supra* note 117, at 509. The tendency is to encourage the witnesses to present their evidence uninterrupted and in a free flowing, unrestricted manner. *See id.* at 510. Questions can be asked of witnesses by the judges and counsel as well as the injured party. *See id.*

injured party testify under oath at the trial.[196] No other witnesses are allowed in the courtroom while the defendant and the injured party testify.[197]

After presenting evidence of guilt or innocence, the parties will immediately present evidence relating to the punishment to be imposed upon conviction and make closing arguments on both issues.[198]

3. Decision Making Phase

Although the Swedish Code of Judicial Procedure is silent on the point, the Swedish Supreme Court has decreed that the prosecution must prove every element of the crime charged beyond a reasonable doubt.[199] Also, as mentioned previously, the principle of free evaluation of the evidence applies in both civil and criminal hearings in the Swedish system.[200] In essence, this requires the court to accept and carefully review all the evidence presented in the case without regard to issues of admissibility.

Judges are required to deliberate and vote on a case immediately upon its conclusion.[201] The lay judges usually do not vote until after the professional judge or judges have voted. The ultimate judgment must be in writing and signed by the professional judge or judges who participated in the decision.[202]

4. Appeal of Criminal Cases

In the Swedish criminal system both the defendant and the prosecutor have the ability to appeal an adverse decision to the Court of Appeals.[203] The

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196. *See* Lindblom, *supra* note 2, at 225. Interestingly the reason for this is that the risk of perjury is too substantial with the parties that have the most interest in the case. Eliminating the fear of a perjury conviction may encourage a defendant or injured party to testify more readily. Of course, the obvious negative implication here is that interested parties always lie to protect their interests.

197. *See id.*

198. *See id.* This evidence is usually presented in writing and consists of matters relating to the personal circumstances, including previous convictions, of the defendant. *See id.*

199. *See* Jacobsson, *supra* note 117, at 512.

200. *See id.* at 494. The theory behind this principle evolves from the reality that while there are no lay juries in the Swedish system, except for Freedom of the Press cases, lay judges are utilized extensively in criminal cases. Lay judges, who are appointed for a term of four years, are more sophisticated than a transient petty jury and, thus, it is more appropriate for them to be allowed along with the professional judges to decide what factual information is fruitful in deciding the issues.

201. *See id.*

202. *See id.* at 513.

203. *See id.* at 511. *See also* SCJP, *supra* note 76, at c.49. This is typical in most civil law systems. *See* GLENDON ET AL., *supra* note 49, at 190. There are minor exceptions to this general rule in Sweden. For example, "review dispensation" must be obtained if the prosecutor or defendant wishes to appeal a case where the sanction imposed was merely pecuniary. *See* SCJP, *supra* note 76, at c.49, § 13. In addition, review dispensation is required if a prosecutor wishes to appeal a case where the defendant was acquitted of a crime which has a maximum penalty of six months imprisonment. *See id.*

case on appeal may proceed either with or without a new main hearing (*de novo*) or without one based upon which is most advantageous to the defendant.[204] If the case proceeds on appeal with a new main hearing, the parties may present new or additional evidence to the Court of Appeal.

It is very rare for the Swedish Supreme Court to accept an appeal of a case with little precedential value.[205] In order for a convicted defendant to appeal his case to this Court, he must seek review dispensation, which is rarely granted except in cases where the defendant establishes extraordinary reasons such as new evidence.[206] In those few cases that are accepted on appeal, the Supreme Court will decide issues of both fact and law.[207] Although it is not required, it is possible for the Supreme Court to hold a new main hearing on appeal with the presentation of evidence including testimony of witnesses.[208]

V. THE LEGAL PROFESSION

In America, and most common law systems, the legal career path upon completion of legal training is rather direct.[209] Upon passing the bar examination in most jurisdictions in America, the law graduate becomes a "lawyer," at least theoretically, licensed to represent clients in any legal context within the state where licensed. Very few irrevocable career choices must be made by a young law student during law school or immediately

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204. *See* Jacobsson, *supra* note 117, at 511. There are special rules that apply to the appeal of cases which have been decided favorably to the defendant in the district court. *See id.* In essence these rules require the appeals court to hold a new main hearing when the prosecution is appealing from a favorable district court decision for the defendant. *See* SCJP, *supra* note 76, at c.51, § 23.

205. *See* Lindblom, *supra* note 2, at 229. The Prosecutor-General may appeal a criminal case to the Supreme Court of Appeal without the need to obtain review dispensation. *See id.*

206. *See* SCJP, *supra* note 76, at c.54, § 10, c.58, § 2. *See also* Jacobsson, *supra* note 117, at 512. "Extraordinary reasons" may be found to exist if there are substantive defects in the court of appeal proceeding, if grave procedural errors have occurred, or a gross oversight or mistake exists as a basis for the court of appeal decision. *See* Lindblom, *supra* note 2, at 229.

207. *See* Lindblom, *supra* note 2, at 229.

208. *See id.*

209. Although each state sets its own bar admission standards, most require that applicants graduate from an accredited law school and possess "good moral character." An interesting study was published in 1982 which divided the American legal profession into two groups based generally upon the type of client that the lawyer chose to represent. One group consisted of those lawyers who choose to represent individual clients and, the other, those who chose corporate or institutional clients. HEINZ AND LAUMAN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982). Of course, there are some common law systems where the young law student must make choices early in their legal training. England, for example, requires students early in their legal education to choose whether they wish to work directly with clients in the more transactional office setting as a Solicitor or be a litigator specially trained to represent the client in court as a Barrister. *See* GLENDON ET AL., *supra* note 49, at 553. Once made the choice is difficult if not impossible to reverse. *See id.*

thereafter.[210] The career choices that are available after law school and throughout one's professional career generally center on whether to work in a large or small firm, solo practice, or in-house with a corporation or a governmental agency.[211] At some point later in one's legal career it is possible for a small number of the profession who have enjoyed distinguished careers to either be appointed or elected to the judiciary.[212]

By contrast, in Sweden, a young law school graduate does not have a specific bar examination or equivalent to confront, has no character standards imposed, and generally has not only the same choices as his or her American counterpart, but also some additional choices that must be made very early in their career.[213] Among these choices are whether to become a judge, a criminal investigator or police officer, a prosecutor, or an Advokat.

A. Legal Education

In many ways, the legal profession in Sweden is a much more accessible profession than it is in the United States or England. Certainly in England and, to a large extent, in America, the legal profession tends to be a closed, self-regulated, tradition-laden, hierarchical community. This is not true in Sweden. Sweden does not have a formal licensing program as such for those who wish

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210. Of course, students will be encouraged to experience different aspects of the legal profession to the extent they can while still in law school. In addition, many students will come to law school with preconceived ideas of specific areas of interest which may or may not change as they make their way through legal study. Students will take courses in areas of interest and even, in many instances, participate in live client clinical experiences and obtain part time employment in their areas of interest prior to graduation. The point is, however, that no hard, fast career choices must be made while still a student. In America we pride ourselves on the fact that after completion of a general legal education and passage of the bar examination, our options are unlimited and continue to be available throughout our careers.

211. American lawyers tend to think of law as a multidimensional profession presenting a variety of career avenues with options to switch from one to another at any time. One may practice law for four or five years and then move to the judiciary, government, or teaching for instance. In civil law systems it is necessary to choose one's legal career path very early in training. A decision to enter the judiciary begins upon completion of legal education with selection to serve as a law clerk and progression to appointment as a sitting judge. There is very little lateral mobility in the legal profession in civil law systems after the initial career decision.

212. Lawyers in America are seldom prepared for the role of a judge other than through the years they have spent as practicing members of the bar. There is no formal training process for those lawyers aspiring to the judiciary and it certainly is not considered a career choice open to every member of the profession.

213. *See generally Legal Studies in Uppsala, at* http://www.jur.uu.se/legal.htm (last visited Jan. 25, 2003) [hereinafter *Legal Studies*]. Indeed, many career choices must be made while still a law student in Sweden, and they tend to be irrevocable. Of course, academic standing plays as much of a significant role in Sweden as it does in the United States in this regard. For example, only about the top five to ten percent of the class will be accepted into the entry level for training as a judge.

to hold themselves out as representatives of the public in legal matters.[214] In fact, regardless of formal training in law, any citizen can represent themselves or any other citizen in any legal matter whether transactional or adversarial and whether civil or criminal.[215] Regardless of this, however, a large number of young people enter university law programs every year.[216]

All education in Sweden is "free" and, at least theoretically, any person who meets the academic standing requirements will be admitted to the law faculty of their choice and may pursue any career path in law upon completion.[217]

It is difficult to obtain statistics as to the exact number of students being trained in the law in Sweden at this time. However, there is information available from which to make some educated guesses. There are five major universities in Sweden, each with a law faculty and a law curriculum.[218] Student enrollments in the law curriculum tend to be very high in all five universities. One example is the University of Lund, located in southern

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214. *See generally The Swedish Bar Association, available at* http://www.advokatsamfundet.se/english/index_eng.htm (last visited Jan. 25, 2003) [hereinafter *Swedish Bar Association*].

215. There are some limitations that will be discussed below. For example, in order to be appointed by a court to represent someone charged with a crime, one must be an Advokat. However, if a citizen is not interested in legal aid they can choose any person they wish to represent them.

216. *See generally Legal Studies, supra* note 214.

217. *See* Susanne Billum, *Social Welfare, in* SWEDISH LAW A SURVEY, *supra* note 1, at 106, 109, *citing Student Support Act* (1973:349). Not only is university education tuition-free, but students are awarded other financial support via state allowance and low interest loans while they are students. *See id.* In fact, "study support" in the form of allowance and loans is available to students at the high school level. *See id.* This "study support" is partly a grant available to any student, regardless of income level. *See id.* University admissions standards reflect a major difference between obtaining a legal education in a civil law country such as Sweden and a common law country such as the United States. *See* John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 861 (1975). Civil law countries tend to be more "democratic" in nature, automatically opening their doors to anyone who has completed the formal prerequisites. *See id.* Contrast this with the more meritocracy-based method applied in most law schools in the United States, where undergraduate grades, and sometimes school, and score on the nationally standardized Law School Aptitude Test are the predominant determinants for admission to law school. *See id.*

218. *See Legal Studies, supra* note 213. The Swedes do not use the term law school to identify that part of the university that teaches a law curriculum. *See id.* More properly a student is enrolled in a law faculty and, even more precisely, it is referred to as "Juridicum." *See id.* As is true in most civil law countries, there are no private law schools apart from the State university system in Sweden as there are in the United States and elsewhere. *See id.* In addition, even though there may be a separate building containing classrooms and offices for the law faculty and students on a university campus, it is an integral part of the university itself. *See id.* As mentioned above, the more precise way to identify that part of the university that teaches law is "Law Faculty." *See id.* In order for clarity and to establish a familiar frame of reference, however, "law school" will be used throughout this article in place of law faculty. *See Legal Studies, supra* note 213. The five major universities in Sweden are: Uppsala, Lund, Stockholm, Göteborg, and Umeå. *See id.*

Sweden outside the large industrial seaport city of Malmö.[219] The University of Lund has a total enrollment of approximately 2500 students in its law curriculum.[220] Somewhere in the vicinity of 350 students complete the program at Lund and enter the workforce each year.[221] Professor Kjell-Åke Modéer of the University of Lund Law Faculty has suggested that approximately 1500 students graduate from all law schools in Sweden each year.[222] While a small number of these graduates will continue their careers as legal scholars in academia, most will go on to other endeavors such as the judiciary, police, prosecutors, private practitioners, civil service and perhaps a small number to become advokats and of course, many will enter into careers in the business community.[223] As mentioned above, all these choices are available and most must be made immediately upon completion of legal education.

Law training in Sweden, similar to most civil law countries, consists of an undergraduate university education. As a generalized contrast with its common law counterpart, European legal education tends to be more theoretical than vocational.[224] Although this remains true in Sweden, there appears to be some movement away from the pure academic model among some Swedish Universities.[225] Certain programs, for example the University of Lund, are beginning to experiment with more practical-oriented courses emphasizing professional skills development.[226] Regardless of the modest

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219. *See* Lund University, *available at* http://web1.jur.lu.se (last visited Jan. 25, 2003).

220. *See id.*

221. *See* Kjell A. Modeer, *From Samuel Pufendorf To The Raoul Wallenberg Institute: Lund University Law School During Three Centuries*, 25 INT'L J. LEGAL INFO. 5, 16 (1997).

222. *See id.*

223. *See id.*

224. *See* Modeer, *supra* note 9, at 45

225. *See id.* "The law schools are in an interesting period of change. Their curricula are changing from having emphasized public law to private law, from national norms to international, from theory to more practice-oriented classes." *Id.* Not surprisingly, legal education in civil law systems is generally designed to comport with the requirements of the profession in those countries where the lawyer/judge is more of a technician engaged in mostly uncreative and routine work in a system that has existed for many years and demands no more of its participants. Quite a contrast from the theoretical model of the American lawyer who is trained as a problem-solving jack-of-all-trades equally adept at resolving specific problems of individuals and those of a broader societal nature. *See* Merryman, *supra* note 217, at 867. Professor Modeer maintains that Swedish legal culture is changing from an idealistic to a pragmatic model. *See* Modeer, *supra* note 9, at 52. Where lawyers previously saw themselves mostly as technicians, or more flatteringly, social-engineers loyal to the state, they have now become "Americanized." *See id.* According to Professor Modeer, a "neo-liberal economy and weakening state economy" have moved the profession away from public sector careers into more lucrative and challenging private-sector careers. *See id.* These changes will, of course, require adjustments in the philosophy and approach to legal education.

226. *See* Modeer, *From Samuel, supra* note 221, at 15. There are many reasons one might surmise for this gradual change in philosophy. Professor Modeer suggests a few in his article. *See id.* Since the late 1950s Sweden has made an effort to expose its population to opportunities for training in other European languages. *See id.* at 14. In particular, students were offered opportunities to study English in early childhood education classes. *See id.* As a result, today

modern trend, Swedish legal education generally remains true to the legal science ideology of nineteenth-century European legal training.[227]

As mentioned previously, five universities in Sweden have law faculties and offer complete programs of study in law.[228] Each university has its own curriculum but there is little overall variation among the universities.[229] All the specific information in this article comes from the law program at the University of Lund Law Faculty.[230]

There are no tuition fees in the Swedish universities. Lund accepts approximately 300 students each year.[231] Requirements for admission are completion of upper secondary school in Sweden or its equivalent elsewhere,

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much of the population in the country over age forty speaks excellent English. *See id.* This generation went on to universities and studied law. *See id.* Many traveled to the United States and obtained advanced law degrees from U.S. law schools and returned as young faculty members to their Swedish law faculties. *See* Modeer, *From Samuel*, *supra* note 221, at 14. Subsequently, as faculty members, they took advantage of opportunities to spend sabbatical time at U.S. law schools where they were exposed to the combination of theory and practice that most U.S. law schools employ. *See id.* Combined with this, the European Community concept was developing and the career opportunities for Swedish students were changing with greater possibilities in the international arena and throughout the European Community. *See id.* The need to rethink the philosophy and objectives of legal education was presented and, slowly, some changes are being implemented today. *See id.* at 14-16.

227. *See id.* at 16. Following is a description of the objectives of the University of Lund Law Program as contained in its 1999-2000 Academic Bulletin:

> Legal education shall provide the knowledge and skill required for work with questions concerning the legal system and the application of law. It shall give a good overview of the legal system and, of such, theoretical knowledge and skill as are required for professions for which the degree of Master of Laws is a qualification and shall provide an understanding of the legal system in an international perspective.

1999/2000 Lund Bulletin, at 15.

228. *See Legal Studies*, *supra* note 213.

229. *See id.* A comparison of the curricula at the University of Lund Law Faculty and Uppsala University Law Faculty shows the similarities of curricula. *See id.* Each program consists of a mandatory course-level and an optional course-level with a degree thesis required. *See id.* While the names of the courses in the two programs may vary somewhat upon review, it is clear that the content is similar. An example of the similarity can be seen by reviewing the first-year curriculum of both programs that require students to take courses in Constitutional Law, Introduction to Swedish Law, and Basic Civil (Private) Law. *See id.* Curriculum uniformity is no less in United States law schools. Certainly a review of first-year programs at most United States law schools would reveal a core of required courses in Contracts, Property, Civil Procedure, and Criminal Law, among others.

230. *See* Modeer, *From Samuel*, *supra* note 221, at 6-7. The law faculty at the University of Lund is known as "Juridicum." *See id.* This is one of the oldest law faculties in Sweden, established as part of the University of Lund's original charter in 1666. *See id.* As of 2000, the University of Lund has a population of slightly more than 37,000 students with approximately 1500 in the law curriculum. *See id.* Among the first law professors at Lund was Samuel Pufendorf, considered the Patriarch of International Law and Jurisprudence. *See* 1999/2000 Lund Information Bulletin; Lund University, *supra* note 219.

231. *See* Lund University, *supra* note 219.

documented knowledge of English and documented knowledge of Swedish.[232] In addition, there are special requirements that applicants have completed upper secondary school courses in Swedish, English, Social Studies and History.[233] There are no special entry examinations for law study.[234] While admission is theoretically open to all students who meet the above-minimum criteria, nevertheless, choices must be made among otherwise qualified applicants given that only about 300 students are admitted to the law program in any one year.[235] Thus, grades are important for admission.[236]

Similar to its American counterpart, the law school year in Sweden is divided into two separate semesters. The autumn semester extends from September to December and the spring semester from January to June.[237] The full time program of study leads to a *Juris Kandidat* (translated in English to Master of Laws) degree and encompasses 180 credits over a four and one-half year period (nine semesters).[238] The program has three distinct components[239] consisting of (1) compulsory courses (totaling 140 credits), (2) optional courses[240] (totaling 20 credits) and (3) Masters Thesis (20 credits). Most of the classes are presented as formal lectures in large classrooms with very little dialogue between student and teacher.[241] Generally, since student participation

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232. *See Democratic Traditions, at* http://www.lysator.liu.se/Nordic/scn/faq727.html (last visited Jan. 25, 2003). Secondary or high school in Sweden is called *Gymnasier* and consists of a three-year program of study which is the minimum qualification necessary for graduates to continue studies at university. *See id.* There are some rare private schools in Sweden usually affiliated with some religion or educational philosophy. *See id.* Parents rarely send their children to private school; however, they can receive government financing equivalent to 80% of the municipality's average cost per pupil when they do. *See id.*

233. *See* 1999-2000 Lund Information Bulletin, at 16.

234. *See* Lund University, *supra* note 219.

235. To a large extent the number of students admitted is dictated by the state. Universities are funded through the State via a rather complicated formula based on the number of students in each particular discipline which, in turn, is established by the state.

236. *See* Lund University, *supra* note 219. Again, while the University of Lund is being used as an example, each law faculty at the other four universities generally apply the same criteria and accept the same number of students. *See* Legal Studies, *supra* note 214.

237. *See* Lund University, *supra* note 219.

238. *See id.*

239. *See* 1999-2000 Lund Bulletin. Following is a list of the courses by semester:

1. Introduction to Law and Constitutional Law
2. Foundations of Private Law
3. Private Law - The Social Dimension. Land Use. and Environmental Law
4. Corporate Law and Revenue Law: The Economic Dimension
5. Criminal Law and Legal Procedure
6. International Law and Comparative Law
7. Legal Theory and Method
8. & 9. Optional Courses and Masters Thesis

Id.

240. Optional courses are roughly equivalent to elective courses in U.S. law schools.

241. As of June 2001, the University of Lund Law Faculty has seventeen full professors and about twenty-three teaching assistants. *See* Lund University, *supra* note 219. The position of Professor of Law is difficult to attain and very prestigious at universities in Sweden. The

in class is not encouraged, there is really no incentive for a student to prepare.[242] There is usually a written examination at the end of each course but little feedback before then.

Upon successful completion of the four and one-half year law program, the graduate will receive a Master of Laws degree and is prepared to embark on a choice of various careers within the Swedish legal system. There are no separate licensing tests or other requirements equivalent to the American Bar Examination.

Similar to other legal education systems the student who has performed at the highest level in law school will be in the best position to take advantage of the most prestigious and lucrative career choices.[243] For example, only students in approximately the top ten percent of the class will be offered law clerk positions in the judicial training hierarchy. These positions are not only

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number of actual positions is controlled by the state and does not increase on a regular basis. Consistent with the overall philosophy of legal education in Sweden and other civil law countries, a Professor of Law, while required to spend some time teaching, is primarily required to engaged in scholarly research and writing. *See* GLENDON ET AL., *supra* note 49, at 160. Publication is the sine qua non of the Professor in Sweden. *See id.* Historically, in a civil law system the legal scholars have enjoyed the same status as eminent jurists of the common law who are credited with creating and propagating the principles of law that form the nucleus of our common law system. *See id.* Civil law scholars dating back to Gaius, Grotius, Pufendorf, and others are as responsible for the development of the civil law as Coke, Marshall, Holmes and the like are responsible for the common law development. *See id.* While the importance of the scholar vis-a-vis the legislator in the civil law system has changed somewhat in modern times, the scholar, nevertheless, remains a very important actor in the continuing development of the civil law. *See id.* Law professors in Sweden today continue as the scholars that carry their predecessors' torch in this regard and are accorded commensurate prestige. *See id.* While the professors teach some classes, most are taught by the teaching assistant. Teaching assistants are law school graduates who are working toward completion of a major research and writing project sufficient to satisfy requirements for a Ph.D. degree and a subsequent career in legal education. *See* Lund University, *supra* note 220. The ultimate objective of the teaching assistant is to complete the Ph.D. requirements and receive an appointment as a professor at one of the five law faculties. There are no guarantees that this will ever happen as the number of Professorships is set by the state and limited in number. Thus, unless there is some attrition it is unlikely that a candidate will be awarded a Professorship. Once the position is attained the individual can remain at the rank for life. Many teaching assistants spend the bulk of their career as salaried Lecturers at the university awaiting the elusive appointment.

242. There are, of course, some exceptions. Some courses are designed as tutorials and there is a movement to offer some courses offering students the opportunity to participate directly. *See* Lund University, *supra* note 219. In addition, as mentioned above, an attempt is being made to integrate more practical skills into the curriculum. *See id.* One example of this can be found in the first-year mandatory course in Foundations of Private Law in University of Lund Law Faculty curriculum. *See* Lund Bulletin, at 17. Part of the description of that course indicates that students will be given opportunities to practice both oral and written presentation. *See id.* Another compulsory course in the fifth semester of the program at the University of Lund entitled "Legal Procedure" also offers students an opportunity to make oral and written presentations as well as "legal argumentation and interpretation of case law." *Id.* at 18.

243. All five university law faculties in Sweden have approximately equal prestige value and thus, unlike their American counterparts, Swedish law graduates need not be concerned about this issue.

necessary for those who wish to make a career in the judiciary, but they also provide the best entry-level training opportunities for those who wish to become Advokats. In addition, employment in an Advokat's office is generally limited to the higher ranked students.

B. Advokat[244]

In addition to the other available options, a young Swedish law graduate may choose at the outset of his or her career to become a member of the Swedish Bar Association, i.e. "Advokat."[245] In general, the requirements for admission as an Advokat include that an applicant must have a Juris Kandidat degree, five years practical experience of which three must be in an Advokat's office and courses in ethics and professional techniques.[246] As of 1999, in a country that graduates approximately 1200 students with law degrees each year, there were as few as 3500 Advokats in the entire country.[247] In a country with a population of approximately 8.8 million people this results in a ratio of 2514 people to one Advokat. This small number is not very surprising given the cultural factors of the Swedish people mentioned above and the added fact that, technically, one does not have to be an Advokat to practice law in Sweden. In fact, while the ratio is interesting, there are probably few

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. 244. *See* The Swedish Bar Association, *supra* note 214. The word "Advokat" as used in the Swedish legal system is a special designation for a lawyer who is a member of the Swedish Bar Association. *See id.* While the Advokat will represent clients in court as an advocate, they hold no special monopoly to do so. *See id.* Throughout this article when reference is made to Advokat, it is designed to identify a member of the Swedish Bar Association.

245. *See* the Swedish Bar Association, *supra* note 214. The Swedish Bar Association started in 1887 as a voluntary organization of academically educated advocates. *See id.* In 1947, it was chartered by the Crown as a quasi-public legal entity and, thus, took on official status. *See id.* The general structure of the Association is contained in the Swedish Code of Judicial Conduct, c. 8.

246. *See* Jacobsson, *supra* note 62, at 498. Membership requirements, as specified in SCJP, are more specific:

> (1) Swedish citizenship or citizenship in a state within the European Economic Area; (2) Domicile in Sweden or another state within the European Economic Area; (3) Juris Kandidat Degree (must have passed all proficiency exams prescribed for competency to a judge's office); (4) five years of law practice in an Advokat's office, at least three of which must be "devoted to professionally assisting the general public in legal matters, either as an associate to an Advokat or a legal aid office as a sole practitioner, and at the time of the application is assisting the public in such a manner, and has taken preparatory courses in ethics and the professional techniques of a lawyer"; (5) applicant must be "known for integrity"; and (6) "is otherwise suitable to carry out the profession of a lawyer."

SCJP, *supra* note 76, at c.2 par. 1-3.

247. *See* Swedish Bar Association website, *supra* note 214. Professor Modeer maintains that "Americanization" of the Swedish legal profession has resulted in an increase in the number of law school graduates who seek membership into the Swedish Bar Association, hoping to facilitate a career in the private sector of law practice. *See* Modeer, supra note 9, at 52.

meaningful inferences regarding the Swedish legal system that can be drawn from it.

The only two distinctions that an "Advokat" has over others who practice law is that only he or she can officially use the title "Advokat" and only he or she can be appointed by the court as public defense counsel in criminal cases.[248] Otherwise it appears there is no difference between the Swedish Bar Association Advokat and any other person who is in the business of representing clients as an advocate in court proceedings or otherwise. In fact, one could argue that there are more disadvantages to being an Advokat than to not being one. For example, an Advokat may not serve as a professional judge, officer of the court, public prosecutor, or enforcement officer while a member of the Bar Association.[249] In addition, an Advokat may not be employed by the state (which includes being a member of a law faculty), or a municipality and simultaneously be a member of the Bar Association.[250] This means that if one accepts appointment as a member of a state university law faculty, one must resign from the Bar Association and refrain from identifying oneself as an Advokat. Unlike others who might be practicing law in Sweden, an Advokat is bound by a Code of Ethics and is subject to discipline, including loss of membership in the Association for violating the rules therein.[251] Further, an Advokat's bookkeeping is subject to inspection and he or she may be required to submit periodic statements to the Board of the Bar Association for review.[252]

As a practical matter, however, there clearly seems to be an amount of prestige that attaches to the title Advokat in Sweden. In addition, anecdotally, it is suggested that people are more likely to seek the assistance of an Advokat to represent them if they must go to court.

C. Code of Conduct for Lawyers

As mentioned previously, the Code of Conduct is not universally applicable to members of the legal profession, but rather, applies only to those who are members of the Swedish Bar Association. Chapter eight of the Code of Judicial Conduct sets forth the general requirements and standards for both the Swedish Bar Association and its Advokat members. Section four of Chapter eight of the Code provides, among other things, that "[a]n advocate shall in his practice honestly and diligently perform the assignments entrusted to him, and shall always observe good advocate mores."[253]

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248. *See* Jacobsson, *supra* note 62, at 498-99.
249. *See* SCJP, *supra* note 76, at c.8, § 2.
250. *See id.*
251. *See id.* c.8, § 4.
252. *See id.* c.8, § 6.
253. *See id.*

In 1984 the governing Council of the Bar Association adopted more detailed rules of ethics in order to carry out the generalized requirements of the Code of Judicial Procedure and provide guidance to its members in this regard.[254] It is made clear in the rules that they are not intended to be all-inclusive.[255] Members are admonished not to believe they are free to do anything that is not specifically forbidden therein.[256]

It is important to reiterate that only Advokats are bound by this Code of Conduct.[257] There is no general Code of Conduct applicable to others trained as lawyers nor do they appear to be held to any higher standard of morality. There are no special courses in the law school curriculum on ethics or standards of conduct.[258] In addition, the major sanction for engaging in wrongful or dishonest conduct is removal from membership in the Association.[259] In theory this means that they may no longer receive court appointments in criminal cases and may not identify themselves as Advokats. However, it does not prohibit them from acting as lawyers in general.

Major provisions in the Swedish Code of Conduct provide: lawyers must include the word Advokat as part of their business name;[260] advokats may advertise as long as it is correct and truthful;[261]advokats are prohibited from direct in-person solicitation;[262] advokats may not split fees with other persons for procuring work for them;[263] advokats are bound by a rule of confidentiality which prohibits them from revealing anything which has been confided to them by the client or which they learn in connection with the confidence they may have received from the client;[264] and an advokat's fee must be reasonable and if a client objects to the fee the Advokat must submit to arbitration conducted by a mechanism provided by the Bar Association.[265]

There is a provision in the Code that provides Advokats are not obligated to verify the correctness of information given to them by their client.[266] An Advokat may not give information in proceedings before a court which he

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254. *See Introduction, in* Code of Conduct for Lawyers (Swedish Bar Association, Nov. 9, 1984) [hereinafter Code of Conduct). The Introduction to the Rules of Conduct makes it quite clear that the rules are considered to be aimed at providing "guidance to members of the Association." *Id.*

255. *See id.*

256. *See id.*

257. *See id.*

258. *See generally* Lund University, *supra* note 219.

259. *See* Jacobbson, *supra* note 62, at 499.

260. *See* Code of Conduct, *supra* note 255, § 3.

261. *See id.* § 5.

262. *See id.* § 6.

263. *See id.* § 8.

264. *See id.* § 19.

265. *See id.* § 25.

266. *See id.* Code of Conduct, *supra* note 254, § 45.

knows not to be true nor can he contest information in court that he knows to be true.[267]

D. Judiciary

Technically, all Swedish citizen law school graduates are eligible to apply for a law clerk position in one of the general or administrative courts located throughout the country.[268] Realistically, only the brightest graduates will be invited to begin the two-year training period initially as a recording clerk either at the district court itself, the office of the prosecutor, or the office of an enforcement authority.[269] At some point during the first year of training, the law clerk most likely will be appointed by the Chief Judge of the court to actually sit and adjudicate certain minor matters.[270] After the two-year training period the law clerk who wishes to continue on the track to become a professional judge can apply for a position as a reporting clerk on one of the courts of appeal.[271] In this position he or she will continue to spend time in the district court as well as the Supreme Court.[272] The law clerk will continue in this capacity until appointed by the government to a permanent professional judge position.[273]

E. Government Service

Sweden is no different from many civil law systems where large numbers of law school graduates enter government service. Sweden, with its extensive network of administrative authorities and agencies at the state, regional and local levels, provides numerous and varied career opportunities for young law school graduates.[274] The more popular government positions available are criminal investigator and prosecutor.

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267. *See id.*

268. *See* Marcusson, *supra* note 93, at 547; Jacobsson, *supra* note 117, at 502.

269. *See* Marcusson, *supra* note 93, at 547; *see also* Stromholm, *supra* note 15, at 43. The district courts in Sweden are different in many ways from American courts of first instance. For example, the Swedish district courts perform many functions that lawyers, or even banks, might perform in the American legal system such as transfers and mortgages of land, registration of wills and inventories of decedent's estates, as well as supervision of guardianships of minors. *See id.*

270. *See* Jacobsson, *supra* note 117, at 502.

271. *See id.*

272. *See id.*

273. *See id.*

274. *See* Nergelius, *supra* note 25, at 74.

1. Criminal Investigator

Along with the courts, the police and prosecution authorities are an integral part of the Swedish criminal justice system.[275] A career option available to a law graduate is as a criminal investigator with the police authority. The university law degree is a prerequisite to training for this position. In 1991, there were 700 applicants who applied for the police-investigator training program and thirty were accepted.[276] The three-year training program takes place at the Police College and includes courses in, among other things, analysis and planning, administration and workplace psychology.[277] Also included is field work throughout the criminal justice system with the police, courts, and prosecutor's office.[278]

2. Prosecutor

Sweden has a National Prosecution Authority under the direction of a Prosecutor-General, who is appointed by the government and responsible for the oversight of the entire prosecutorial system.[279] For purposes of criminal prosecution, the country is divided into region, county and district authorities.[280] Each region is headed by a Director of Public Prosecution, who is appointed by the government and who is also responsible for overseeing a network of prosecutorial offices located throughout the region.[281] It is in these offices where all criminal cases are processed by a staff of public prosecutors.[282] As mentioned previously, public prosecutors are responsible for conducting the preliminary police investigation, making decisions on whether to prosecute in a given case, and representing the state before the court in criminal trials.[283]

Public prosecutors must have a law degree and, thus, this career path is often chosen by young law graduates. Training begins either immediately upon graduation from university or after a short period as a judicial law clerk.

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275. *See* Jacobsson, *supra* note 117, at 499.

276. *See* National Council for Crime Prevention, *supra* note 171.

277. *See id.*

278. *See id.*

279. *See* SCJP, *supra* note 76, at c.7, § 2.

280. *See* Jacobsson, *supra* note 101, at 500.

281. *See* SCJP, *supra* note 76, at c.7, § 2. Each prosecutorial region contains several prosecution "chambers" which are roughly analogous in design and jurisdiction to a District Attorney office in the United States.

282. *See* Jacobsson, *supra* note 117, at 500.

283. *See id.*

F. Private Practitioners

As mentioned at other points in this article, one does not have to have a degree in law or be an Advokat to be a private legal practitioner in Sweden. Thus, at least in theory, anyone can put out a shingle and take on clients. Of course, as a practical matter, unless someone has developed a particular expertise in an area and a certain amount of notoriety, it is unlikely that they will attract many clients.

Certainly a law school graduate can begin a practice in this same fashion with perhaps a bit more credibility and chance for success. In Sweden the legal profession is not officially bifurcated, unlike civil law countries such as France and Germany which, officially divide the legal profession into, *inter alia*, notaries and advocates.[284] Technically any law graduate or other person in Sweden can represent a client in any legal matter in or out of court, except as a court appointed defense counsel.[285] Some law graduates find their way to the more established law offices and begin their careers as aspiring practitioners. Few graduates begin their professional life as solo practitioners without gaining some modicum of experience elsewhere.

VI. CONCLUSION

The fundamental structure, methods of thought, and attitudes toward the law in the Swedish legal system are rather unique and historically well suited to her social, cultural, and historical development. However, her entry into the European Union and other changes rapidly occurring both at home and abroad will require that she assume a more international focus and demand some changes in her internal legal culture. These changes have already begun. Increased human rights protections at home and free movement of goods and people throughout the European Community are placing new demands on the courts and members of the legal profession. Courts are beginning to assume a more active role in the governmental structure and more law students are seeking careers with law firms in the private sector. Changes in the legal culture will be necessary if there is to be a successful transition. Change will not come easily and all actors in the legal system, from the legal educators, scholars, students, and lawyers to the judges, will need to make adjustments. Perhaps the most important of these adjustments will require a re-education of the profession to encourage a more positive and politically active self-image.

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284. *See* GLENDON ET AL., *supra* note 49, at 153. In these systems the notary is a powerful, important person, in contrast to the same position in the United States. For example, among other things, a notary may have primary responsibility for drafting certain documents such as marriage contracts, wills, mortgages etc. *See id.*

285. As a practical matter, lawyers in Sweden are no different than lawyers in other countries with a unified bar in that they naturally tend to divide between those who litigate and those who advise.

RHODESIAN ANTHRAX: THE USE OF BACTERIOLOGICAL & CHEMICAL AGENTS DURING THE LIBERATION WAR OF 1965-80

Ian Martinez*

ABSTRACT

In 1979, the largest recorded outbreak of anthrax occurred in Rhodesia, present day Zimbabwe. The incident, widely known in Africa and in intelligence circles is not widely known in the U.S. or Europe. At the time, Rhodesia was fighting a guerilla war against black nationalist insurgents. Rhodesia first accused the nationalist side of using anthrax as a weapon. In allegations that surfaced in 1998—and persist to this day—external researchers and the current government of Zimbabwe insist that the outbreak in 1978-80 was anything but benign. The government and researchers argue that the original outbreak was the result of a calculated move by the Rhodesian government with the duplicitous acknowledgment of Apartheid South Africa. Furthermore, the government alleges that a current outbreak is the work of disgruntled white farmers in the country. The allegations of the 1979-80 outbreak are given credence by the acknowledgement of Ken Flower, Chief of Rhodesia's Central Intelligence Organization, ("CIO") and CIO Officer, Henrik Ellert, that the white minority regime of Ian Smith used biological and chemical weapons against the guerillas, rural blacks to prevent their support of the guerillas and against cattle to reduce rural food stocks. The current government and researchers have drawn inferences from his statements to show that the unusual outbreak in 1978-80 was a deliberate use of weaponized anthrax. These inferences rely on important aspects which will be highlighted in this paper, mainly: a) by 1978 the 'writing was on the wall' for the white regime and resort to a weapon of last resort was not unfathomable; b) because of its international status, Rhodesia

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* Ian Martinez, is an attorney with Rasco Reininger Perez & Esquenazi, P.L. in Miami. He is a former CIA Intelligence Officer who has written several articles dealing with international law. I wish to thank the Editorial staff of the Review, which worked tirelessly to bring this article forward. I dedicate this article to the thousands of Zimbabweans, both black and white, who suffered needlessly during the war and continue to suffer.

had become an expert in sanctions busting; c) the alliance between South Africa and Rhodesia make the allegations more credible; and d) the current government of Zimbabwe has purposefully failed to launch a formal investigation because it is convenient to its continued survival to vilify the former regime and current white farmers in order to deflect attention away from the twenty-one year old dictatorship of Robert Mugabe and the economic woes that have followed from the regime's mismanagement.

I. HISTORICAL SETTING

On September 12, 1890, a pioneer settler column[1] arrived in present-day Harare—formerly Salisbury—under the auspices of Cecil Rhodes British South African Company (BSAC).[2] The area was thought to be rife with gold deposits and was said to be the ancient site of King Solomon's mines.[3] Through a treaty with the King of the Matabeles, the BSAC was responsible for administration of the territory.[4] In 1893, the Ndebele–another ethnic group–took up arms against the colonizers, but were swiftly defeated in the Matabele War.[5] In 1896, the Ndebele, joined by the Shona, rose again in rebellion against the pioneers.[6] The Chimurenga War[7]—as the indigenous groups called the war—was brutally suppressed by the Rhodesians by 1897.[8]

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1. *See* THOMAS PACKENHAM, THE SCRAMBLE FOR AFRICA 1876-1912, 372-73 (1991). The pioneers consisted of not a single woman, but of 200 raw recruits, 500 police of the British South Africa Company (BSAC), plus hundreds of African porters. *See id.* at 372-73. *See also* ANTHONY THOMAS, RHODES 218 (1996) (describing the force as an 'army' and the 200 men with uniforms of "brown tunics, yellow leathering leggings, and bush hats. Each man carried a Martini-Henry rifle and a revolver.").

2. *See* PACKENHAM, *supra* note 1, at 373.

3. *See* THOMAS, *supra* note 1, at 134.

4. *See id.* at 197. The new territory was to be run by the BSAC, a chartered company. No one told King Lobengula that the purpose of the treaty, and the company, was "to run the government, levy taxes, maintain a police force and when necessary, try a man for his life." *Id.*

5. *See* PETER ABBOTT & PHILIP BOTHAM, MODERN AFRICAN WARS (I): RHODESIA 1965-80 3 (1986); *see also* THOMAS, *supra* note 1, at 246-60; *see also* PACKENHAM, *supra* note 1, at 492-95.

6. *See* PACKENHAM, *supra* note 1, at 498-02. *See generally* THOMAS, *supra* note 1, at 306-21.

7. *See* ABBOTT & BOTHAM, *supra* note 5, at 4. "Chimurenga means 'uprising' or 'resistance' in Chishona." ROY NESBIT & DUDLEY COWDEROY, BRITAIN'S REBEL AIR FORCE: THE WAR FROM THE AIR IN RHODESIA, 1965-1980 33 (1998).

8. *See* CBC News, *Zimbabwe Land*, *at* http://cbc.ca/news/indepth/zimbabawe/history.html (last visited Feb. 13, 2003).

A. Self-government

Immediately after World War I, the British Empire was undergoing a dramatic internal realignment.[9] By 1918, the white-majority dominions of Canada, New Zealand, and Australia were internally self-governed, with the major limitation being lack of control over their international relations.[10] South Africa's white minority was given the same status.[11] An election was held in 1922, to determine Rhodesia's standing within the Empire.[12] The choice was between entry into the Union of South Africa, as its fifth province, or full internal self-government.[13] The Rhodesians opted for self-government.[14] On Sept. 12, 1923, "Southern Rhodesia" was annexed to the crown and became a self-governing colony, a *de facto* Dominion.[15] The British government retained control of external affairs and a final veto with respect to legislation directly affecting Africans.[16]

B. The Roots of UDI: Dominion Status or Federation

Having governed Southern Rhodesia successfully for twenty-four years and having paid a disproportionately high price in human life during World War II,[17] the whites believed that they had earned formal Dominion status. "They were blissfully unaware that Britain was bent on retreating from the Empire and not on acquiring another white-led Dominion."[18] The Southern Rhodesians had essentially three choices: 1) "join South Africa but this had been rejected in 1922 and few still advocated it;"[19] 2) seek dominion status; or

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9. *See generally* P.J. MARSHALL, CAMBRIDGE ILLUSTRATED HISTORY OF THE BRITISH EMPIRE 96-97 (1996).

10. *See id.*

11. *See id.* at 96.

12. *See* HARDWICKE HOLDERNESS, LOST CHANCE: SOUTHERN RHODESIA 1945-1958 19 (1985).

13. *See id.*

14. *See* ALAN BEST & HARM DE BLIJ, AFRICAN SURVEY 295 (1977). The vote was 8774 to 5989 in favor of self-rule. *Id.*

15. *See* NESBIT & COWDEROY, *supra* note 7, at 6. "The limited powers reserved to the British government in 1923 had never been invoked. It seemed that these powers had been ceded by default and could thus be forgotten, so that a *de facto* Dominion status was in being." *Id.*

16. *See* MARSHALL, *supra* note 9, at 97.

17. *See* NESBIT & COWDEROY, *supra* note 7, at 11. For example, the future Prime Minister Ian Smith was shot down twice in the war. *See id.* at 8-9. This military tradition may be one reason Rhodesians were ready for a military conflict in 1965.

18. J.T.R. Wood, *Rhodesian Insurgency*, *at* http://www.rhodesia.myweb.nl/rhomil.htm (last visited Nov. 10, 2001) [hereinafter *Rhodesian Insurgency*]; *see also* MARSHALL, *supra* note 9, at 101.

19. *Rhodesian Insurgency*, *supra* note 18. The Afrikaner National Party won the 1948 elections, plunging South Africa into the apartheid abyss. *See id.* For a detailed explanation of the development of the South African legal system in the early twentieth century, which codified Apartheid in 1948, see MARTIN CHANOCK, THE MAKING OF SOUTH AFRICAN LEGAL

3) federate with Northern Rhodesia (present day Zambia) and Nyasaland (present day Malawi) creating a new British dominion.[20]

Furthermore, there was an idealism in Britain that Southern Rhodesia could help to develop both Northern Rhodesia and Nyasaland, and that whites and blacks could live and work together in a partnership.[21] In 1953, amidst much enthusiasm, the Central African Federation was born.[22] "The most crucial area of administration, that of the African affairs, was left in territorial hands because Britain would not relinquish her role as protector. This meant that Northern Rhodesian and Nyasaland Africans were ultimately ruled by London and Southern Rhodesian Africans by Salisbury."[23] The black population revolted and began guerilla activities aimed at eventual independence in Nyasaland and Northern Rhodesia.[24] The revolt signaled the death knell of the Federation.[25]

C. Southern Rhodesia and Independence -The Growth of African Nationalism

In 1962, Nyasaland (the least developed territory of the Federation) was allowed to secede, even though constitutionally this was forbidden.[26] "Northern Rhodesia's secession terminated the Federation's short life on 31 December 1963."[27] Nonetheless, the tide of black majority rule was stopped by Southern Rhodesia. Whites from the Congo, Nyasaland, and Northern Rhodesia streamed into Southern Rhodesia as refugees, and strengthened the resolve of the white minority.[28] The new line dividing controlled areas from independent black Africa was drawn from Portuguese Angola, across Rhodesia, and on to Portuguese controlled Mozambique. The southern flank was anchored by apartheid South Africa.

With the dissolution of the Federation, Southern Rhodesia wanted independence.[29] According to Ian Smith, the British government had promised

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CULTURE: 1902-1936 (2001).

20. *See Rhodesian Insurgency*, *supra* note 18.

21. *See* MARSHALL, *supra* note 9, at 101. *See also* NESBIT & COWDEROY, *supra* note 7, at 15. All three territories were ruled by a white minority. *See id.* From a purely economic standpoint the Federation made sense; however, from a practical stand point the theory of colonialzation was maintained. *See id.*

22. *See* MARSHALL, *supra* note 9, at 101. The Federation was approved by a referendum vote in Southern Rhodesia, and mandated by London in Northern Rhodesia and Nyasaland. *See* HOLDERNESS, *supra* note 12, at 122.

23. *Rhodesian Insurgency*, *supra* note 18.

24. *See* HOLDERNESS, *supra* note 12, at 230.

25. *See id.*

26. *Rhodesian Insurgency*, *supra* note 18.

27. *Id.*

28. *See* NESBIT & COWDEROY, *supra* note 7, at 19. *See also* GRAHAM BOYNTON, LAST DAYS IN CLOUD CUCKOOLAND: DISPATCHES FROM WHITE AFRICA 33 (1997).

29. *See* MARSHALL, *supra* note 9, at 101.

the Rhodesians their independence before the Federation, "[W]e can have our dominion status tomorrow . . . after our exemplary record, it is there for the asking."[30] Yet, Britain was unwilling to grant Southern Rhodesian independence.[31] The vulnerability of the white regime could be tasted from within the reserves—the hitherto places of imposed internal exile—they quickly became the battleground of the insurgency. [32]

D. The Road to UDI

"Copying their Nyasaland and Northern Rhodesian counterparts, the Southern Rhodesian African nationalists in 1956 adopted a new militancy . . . ."[33] In 1959, the National Democratic Party (NDP)—a nationalist black party—demanded total emancipation. "In mid-1960, the NDP's demands for power provoked violence in Salisbury and Bulawayo and the arrest of its leaders."[34]

> [The] violence in October 1960 was serious enough for the police to lose their enviable record of not having killed anyone in the course of their duties that century. Seven Africans died in prolonged unrest . . . . More disorder provoked [the banning of the] NDP in December, whereupon, Nkomo created the Zimbabwe African People's Union (ZAPU) pledged to secure majority rule.[35]

As early as 1956, the security forces, including the police, recognized that the major problem confronting them would be African unrest.[36] "Thus the security forces trained and prepared for counter-insurgency at home, as well as reinforcing British efforts in Malaya and studying the counter-insurgency effort against the Mau Mau in Kenya."[37] In 1950, Rhodesia created its own Special Air Service (SAS) and sent the team to Malaya to help the British fight a Communist insurgency there.[38] The SAS became the backbone of Rhodesia's special operations team. "The Army devoted half its training to counter-insurgency, while the Air Force formed a counter-insurgency squadron. Because insurgency essentially challenges the law, the police took

30. IAN DOUGLAS SMITH, THE GREAT BETRAYAL 32 (1997).
31. *See* BEST & BLIJ, *supra* note 14, at 297.
32. *See Rhodesian Insurgency*, *supra* note 18.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *See id.*
38. *See* ABBOTT & BOTHAM, *supra* note 5, at 18.

the lead with the military in support. Thus the counter-insurgency campaign began on a low key, led by the (BSAP)."[39]

In early September 1962, the Zimbabwe Liberation Army proclaimed the Zimbabwe Revolution resulting in an outbreak of sabotage and arson.[40] The government "banned ZAPU and declared that it would not be allowed to reappear in another guise. . . . There followed detentions, police raids and the first uncovering of stocks of explosives and weapons, including sub-machine guns and hand-guns. 1,094 persons were arrested."[41] "[I]n 1963, a resurgence of urban violence had been quelled by mandatory death sentences for petrol bombing."[42] The Zimbabwe African National Union (ZANLA, the military wing of ZANU) dispatched young men for guerrilla training in China.[43] The first of the terror killings was in July 1964.[44]

With the indigenous Africans increasingly in rebellion, Ian Smith, the most prominent hard-liner, rose to power within the Rhodesian Front (RF).[45] In December 1962, the RF, led by Smith, won the general elections. Their first priority in 1963 was to secure independence.[46]

> In September 1964 Douglas-Home said he would accept the 1961 Constitution as a formula for independence if Smith could prove that the majority of the inhabitants of Rhodesia were in favour [sic] of it. Smith's response was to hold a referendum on the issue and to convene an indaba of tribal chiefs and headmen, arguing that, as eight of ten Africans lived in the tribal areas and as the membership of the African nationalist parties had been concentrated in the towns, the chiefs reflected tribal opinion. Both produced results favourable [sic] to Smith but were rejected by the new Labour Government of Harold Wilson . . . .[47]

In April 1964, amidst rising pressure, the Prime Minister resigned and Ian Smith became Rhodesia's first native-born Prime Minister.[48] Smith's advent

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39. *Rhodesian Insurgency*, *supra* note 18.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *See id.*
45. *Rhodesian Insurgency*, *supra* note 18.
46. *Id.*
47. *Id.* "A British general election was due in 1964 and Macmillan's replacement as prime minister, Sir Alex Douglas-Home, was reluctant to take a decision which might break the Commonwealth." *Id.*
48. BOYNTON, *supra* note 28, at 65.

to power was followed by the detention of Nkomo, which led to riots in the African townships.[49]

On November 11, 1965, Ian Smith went on the radio and unilaterally declared independence (UDI).[50] "Britain recoiled in angers at this first rebellion by a British territory since the American Revolution. . . . Wilson applied sanctions and backed them by deploying two carrier task forces to cut off Rhodesia's supply of oil."[51] Later, to secure international co-operation, Wilson engineered mandatory sanctions from the United Nations under Chapter VII of the Charter.[52] Selective sanctions were imposed against the regime in 1966 and these were made total in 1968. Sanctions busting became a national priority and was refined to an art.[53] Sanctions were also weakened by the co-operation of Rhodesia's neighbors, Portuguese-ruled Mozambique and South Africa.[54]

II. SECOND CHIMURENGA: PHASE I

Rhodesian Intelligence broke down the Rhodesian Conflict into three phases.[55] Phase One was from UDI until 1968.[56] Phase Two saw a complete cessation of insurgent movements.[57] Phase Three, from 1972 until 1980 saw the collapse of Portuguese rule in neighboring Mozambique, and the intensification of insurgent movements within Rhodesia.[58] This phase allegedly saw the use of bacteriological and chemical weapons.[59]

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49. *Rhodesian Insurgency*, *supra* note 18.

50. *See* SMITH, *supra* note 30, at 103-06.

51. *Rhodesian Insurgency*, *supra* note 18.

52. *Id.*

53. *See generally* NESBIT & COWDEROY, *supra* note 7, at 56-65. An entire wing of the Rhodesian Air Force was dedicated to sanctions busting. *See id.* at 57. Some of the clandestine tactics utilized included: flying planes with fake tail numbers; falsifying bills of lading with false country receivers; forming 'dummy' corporations in third countries. *See id.* at 57. For example, the Rhodesian Air Force flew Alouette helicopters for missions against the insurgents. The French producer of the Alouette complied with the UN arms embargo. The Rhodesians merely set-up a dummy civilian corporation in a neighboring African country which had an Alouette. In the life of this 'company,' the single Alouette required numerous engine repairs, dozens of gear boxes and tail rotor replacements. *See id.* at 56-58.

54. *See Rhodesian Insurgency*, *supra* note 18.

55. *See* NESBIT & COWDEROY, *supra* note 7, at 29.

56. *See id.*

57. *See id.*

58. *See id.* at 39.

59. *See id.* at 41-43. This period saw an increase in military tactics, including the use of Fireforce operations, in which air support was coupled with ground troops. *See id.* at 40. One Fireforce volunteer described one of these Fireforce operations as using aircraft carrying "'SNEB rockets [68 mm diameter, usually of French origin] and Frantan [napalm bombs].'" *See id.* at 42 (quoting an anonymous helicopter pilot who flew during these Fireforce operations). The security forces were also said to have poisoned or doctored food and water supplies to gain tactical advantage over the guerilla forces. *See id.* at 46.

Phase One was characterized by small-scale incursions into Rhodesia, mainly from newly independent Zambia.[60] The incursions were a "complete failure."[61] On April 28, 1966, the first 'battle' occurred when seven rebel soldiers infiltrated Rhodesia in an attempt to occupy the town of Sinoia.[62] In quick order, the BSAP (Rhodesian police) dispatched the infiltrators.[63] Nonetheless, the April 28 battle is the date by which blacks commemorate the second uprising against the white colonizers, which they call the beginning of the Second Chimurenga.[64] From April 1966 onwards, groups of guerrillas infiltrated Rhodesia from neighboring Zambia in steadily increasing numbers, but the war remained a relatively minor police action.[65]

A. Phase III and the Use of Biological Weapons

After their collapse in 1966, the guerilla movements took different approaches to overthrowing the Smith regime. ZIPRA, led by Nkomo[66] and influenced by the U.S.S.R., concentrated on invading Rhodesia as a conventional army.[67] ZANLA, led by Robert Mugabe, and influenced by China, adopted a Maoist strategy of winning the hearts and minds of the rural population and waging a guerilla war in the eastern border areas of Rhodesia.[68] Phase Three was the most intense and it began on December 21, 1972, when ZANLA attacked a farm in the Centenary District, with further attacks on other farms in the following days.[69] As the guerrilla activity increased in 1973, "Operation Hurricane"[70] began, and the military prepared itself for all out

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60. NESBIT & COWDEROY, *supra* note 7, at 29.

61. BRUCE HOFFMAN ET AL., LESSONS FOR CONTEMPORARY COUNTERINSURGENCY: THE RHODESIAN EXPERIENCE 7 (1991).

62. *See* NESBIT & COWDEROY, *supra* note 7, at 20-31.

63. *See id.*

64. *See id.* at 33. April 28th is celebrated as 'Chimurenga Day.' *Id.* at 33.

65. *See id.* at 35.

66. *See* BOYNTON, *supra* note 28, at 75.

67. *See* HOFFMAN ET AL., *supra* note 61, at 9. "ZIPRA did not altogether abandon guerilla warfare, and until 1972, its insurgents conducted hit-and-run raids across the Zambezi River to mine roads in the game reserves frequented by tourists." *See id.* at 9, n.3.

68. *See id.* at 9. The Land Apportionment Act of 1930 divided Rhodesia into distinct farming communities—excluding black Africans from ownership of the best farmland. *See Background to the Land Question in Zimbabwe, at* http://www.mathaba.net/africa/zimlandhistory.htm (last visited Feb. 17, 2003). Whites were given the most fertile land. *See id.* Whites received around fifty-one percent of the land and blacks received around twenty-two percent of the land, while the rest was set aside for future purchasing. *See id.* This resentment may have contributed to recruitment drives by the guerillas.

69. *See* J.K. CILLIERS, COUNTER-INSURGENCY IN RHODESIA 13 (1985); *see also* BOYNTON, *supra* note 28, at 75.

70. *See* CILLIERS, *supra* note 69, at 14-15. Operation Hurricane was the code-name of a "Joint Operation Centre [sic] . . . formed at Army Brigade level of command to counter the internal threat that had developed." *Id.* at 15. Operation Hurricane represented a "committee system approach" to combating insurgent forces in the country, whereby Army, Air Force, and British South African Police collaborated to stem "the flow of insurgents" and to control the

war.[71] During 1974, a major effort by the security forces resulted in many guerrillas being killed and the number inside the country was reduced to "between three and four hundred."[72]

In 1974, a coup in Lisbon ushered in the end of the Portuguese empire in Africa.[73] Almost immediately after the coup, Portuguese colonial troops stopped their patrols and remained in their bases.[74] Even though Portugal was still nominally in control, the effect was to create a second open front along Rhodesia's long border with Mozambique, which was exploited by ZANLA.[75] In 1975, the Portuguese left Mozambique, and a Marxist government, sympathetic to the Zimbabwean nationalist cause, came to power in the former colony, which aided the guerillas in their attacks along the Mozambique-Rhodesian border.[76]

As the guerilla war heated up, the BSAP was soon overwhelmed and the government turned to the security forces. The Rhodesians had inherited a number of military units from the Federation break-up.[77] Most important were: 1) the Rhodesian Air Force (RhAF); 2) the Army; consisting of: a) the SAS;[78] b) the Rhodesian African Rifles (formerly a unit of the King's African Rifles, and an anachronism of the Victorian era, in which white officers commanded blacks);[79] c) the Rhodesian Light Infantry (RLI);[80] and d) the Armoured Car Regiment, collectively, the "Security Forces."[81] The Rhodesians made a strategic decision and made special operations (mainly the SAS, RLI, and RhAF) their primary function and traditional military units their secondary option (i.e. the Armored Car Regiment).[82] They took the

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population within the country. *Id.*

71. *See generally id.*

72. *See id.* at 21.

73. *See id.* at 19.

74. *See* CILLIERS, *supra* note 69, at 19-20.

75. *See* BEST & BLIJ, *supra* note 14, at 306-08. *See also* CILLIERS, *supra* note 69, at 19.

76. *See* BEST & BLIJ, *supra* note 14, at 306.

77. *See generally* ABBOTT & BOTHAM, *supra* note 5, at 15-39 (describing and giving the history of the Rhodesian Security Forces inherited by the government after UDI).

78. *See id.* at 18. Originally a part of the British SAS, the Rhodesian contingent was founded in 1950. *See id.* The unit trained as late as 1962 with the British SAS in Aden. *See id.* This unit was the elite of the Rhodesian military.

79. *See* ABBOTT & BOTHAM, *supra* note 5, at 14-15. The RAR was the oldest unit in the Army, founded in 1940. *See id.* at 14. Black officers were finally allowed in 1979. *See id.*; *see generally* MALCOM PAGE, KAR: A HISTORY OF THE KING'S AFRICAN RIFLES & EAST AFRICAN FORCES (1998) (providing a general history of the King's African Rifles, including the RAR).

80. *See* ABBOTT & BOTHAM, *supra* note 5, at 17. The RLI was formed in 1961 as the Federation's European Army. *See id.* The RLI, similar to the SAS, was never integrated. *See id.*; *see generally* CHRIS COCKS, FIREFORCE: ONE MAN'S WAR IN THE RHODESIAN LIGHT INFANTRY (1988) (giving a general history of the RLI).

81. *See* ABBOTT & BOTHAM, *supra* note 5, at 21. The Armored Car Regiment was formed in 1941, it was disbanded upon break-up of the federation, but was resurrected in 1972. *See id.*

82. *See* HOFFMAN ET AL., *supra* note 61, at 23-24 (the Rhodesians showed the world that small bands of guerillas are best fought by small highly trained bands of special operation units in the field).

lessons learned by their SAS in Malaysia, from the British in Kenya against the Mau Mau, and the United States experience in Vietnam and adopted it to their war. Although they mastered the art of counter insurgency operations—using the SAS—and the mobile use of helicopter borne troops, the Rhodesians —because of their racist policies—were never able to win the campaign for the 'hearts and minds' of black Africans, a prerequisite in any guerilla campaign.[83]

In the early 1970s, the Rhodesians turned to a concept called 'pseudo operations'[84] (pseudo ops), creating the Selous Scouts in 1973 and placing the unit under the auspices of the Central Intelligence Organization's (hereinafter "CIO") Special Branch, rather than the Army.[85] Security personnel would dress as insurgents and infiltrate rural communities seeking out real insurgents.[86] When they found the real insurgents, they could opt for an engagement or call in their position and allow other army units, notably the RLI, to come in. At first, highly trained white officers of the SAS were used for the operations. But language barriers and the distinct physical facial features of the whites necessitated the use of black Zimbabweans. To do so, injured or captured insurgents were "turned" and made to serve the Selous Scouts.[87] Thus compromised, they could never return to their villages and were beholden to the regime for the remainder of their lives.[88] The new recruits were able to provide intelligence and the latest call signs used by the real insurgents. The British had used a similar pseudo ops concept in Malaya and Kenya.[89] The Selous Scouts were housed in a secret facility near Mount Darwin within the Hurricane Theatre of the war. "The Selous Scouts proved extremely effective in providing the security forces with useful and timely intelligence . . . [and] were responsible for a staggering 68 percent of all insurgent kills and captures in their areas of operation."[90]

The CIO consisted of two branches, Special Branch responsible for internal security—thus the placement of the Scouts under its wings—and Branch II, which was responsible for external operations, propaganda, disinformation, covert ops, and psychological operations.[91] The Selous Scouts' unrivalled tracking abilities, survival and counter insurgency skills made them one of the most feared and hated of the army units.[92] The unit was known for

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83. *See id.* at 26-27.

84. *See id.* at 31. "Pseudo-or 'counter-gang' operations were initiated." *See id.*

85. *See* RON R. DALY, LT. COL. (ret.), SELOUS SCOUTS: TOP SECRET WAR (1983). For a general history of this unit see HOFFMAN ET AL., *supra* note 61, at 31; *see also* NESBIT & COWDEROY, *supra* note 7, at 39.

86. *See* HOFFMAN ET AL., *supra* note 61, at 32.

87. *See id.*

88. *See* Jeremy Brickhill, *Zimbabwe's Poisoned Legacy: Secret War in Southern Africa*, COVERT ACTION, No. 43, 6 (Winter 1992/93).

89. *See* HOFFMAN ET AL., *supra* note 61, at 32.

90. *Id.* at 33.

91. *See id.* at 28 (citing CILLIERS, *supra* note 69, at 218-19).

92. *See, e.g.*, Brickhill, *supra* note 88, at 6.

"murder, rape, smuggling, and poaching,"[93] and its members were "psychopathic killers"[94] and "vainglorious extroverts."[95] "To avoid confusion and prevent other government forces from mistaking the Scouts for actual insurgents, any area they were operating in was 'frozen'—that is no other security forces were allowed in its vicinity."[96]

In 1976, Operations "Thrasher" and "Repulse" started in order to contain the ever-increasing influx of guerrillas.[97] At the same time, rivalry between the two main guerrilla factions increased and resulted in open fighting in the training camps in Tanzania, with over 600 deaths.[98] The Soviets increased their influence and began to take a more active role in the training and control of the ZIPRA guerrillas.[99] New tactics were developed on both sides. The Rhodesians decided to take the war to the enemy. Cross-border operations—which had started in 1976 with a raid on a major base in Mozambique in which the Rhodesians had killed over 1,200 guerrillas and captured huge amounts of weapons—were stepped up by the SAS and later the Selous Scouts.[100] Attacks on large guerrilla camps such as Chimoio and Tembue resulted in thousands of guerrilla deaths and the capture of supplies sorely needed by the Rhodesians.[101] The concept of "Fireforce"[102] was also introduced at this time. The Fireforce concept involved helicopters inserting a "stick" of men from the RLI into an area identified by Selous Scouts as containing insurgents.[103] The war externally and internally was "heating-up" for the Rhodesians. By 1976, "no one would say so in public—except for the very public act of emigrating—but in private many were prepared to admit that even if defeat was unlikely, victory was impossible."[104] From 1976-78 the war was at its most intense—during this period it is alleged that biological and chemical weapons were used.

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93. *Id.* at 7.

94. *Id.*

95. *Id.*

96. HOFFMAN ET AL., *supra* note 61, at 33; *see also* CILLIERS, *supra* note 69, at 102, n. 4 (citing *Rhodesian Army Manual Military Support to the Civil Order*, 1976, at xvi, defining a no go area as: "one from which all civilians are excluded by an order of the Protecting Authority .... Only authorised members of the Security Forces, on duty, will move in no-go areas and no action may be instituted against them for any death or injury caused to any person within the area.").

97. *See* CILLIERS, *supra* note 69, at 239. In 1973/74 there were a few 'hundred' insurgents within Rhodesia. *See id.* By 1977, CIO estimated that the combined ZANU/ZIPRA force numbered over '5000.' *See id.* By 1978, the figure was over 9000. *See id.*

98. *See Rhodesian Insurgency*, *supra* note 18.

99. HUFFMAN ET AL., *supra* note 61, at 34.

100. *See generally id.* at 77-87.

101. *See id.* at 80.

102. *See id.* at 21. "Fireforce" was the combination of Rhodesian Airforce and Army units, which used helicopters in raids. For more information see generally NESBIT & COWDEROY, *supra* note 7, at 34-46.

103. *See* NESBIT & COWDEROY, *supra* note 7, at 40.

104. *See* PETER GODWIN & IAN HANCOCK, RHODESIANS NEVER DIE 171(1993).

B. The End of the War

By March 1978, Smith—ready to end the war—hammered out an internal settlement.[105] A black Prime Minister was elected through universal suffrage, but the military and intelligence apparatus remained in firm white control.[106] The international community refused to recognize Zimbabwe-Rhodesia as it was known.[107] In June 1978, the war spiraled out of control, as insurgents shot a civilian airliner out of the sky.[108] Some passengers managed to survive, only to be butchered on the ground by the insurgents. In retaliation, in October 1978 Rhodesian forces invaded Zambia and Mozambique, killing thousands of guerillas in training camps.[109] Britain and the United States condemned the raids, saying they could lead to a superpower confrontation in Southern Africa.

Towards the end of 1979, talks had begun at Lancaster House in England, with both sides seriously interested in stopping the war, but Rhodesian cross-border raids continued; hitting supply-lines, strategic bridges, and railways in an effort to convince Zambia and Mozambique to put pressure on the guerrilla leaders to end the war.[110] Rhodesian losses in men and aircraft were increasing, whereas the supply of equipment and recruits to the guerrillas seemed endless. By the end of 1979, therefore, it was becoming obvious that the Rhodesians would be unable to end the war, despite that their troops were winning every battle and skirmish they engaged in. With the war unwinnable and white emigration on the rise, Ian Smith signed the Lancaster House Agreement in December of 1979.[111] The Agreement ushered in majority rule fourteen years after Smith's UDI.[112] In effect, the clock was turned back to 1965, and a British Governor arrived on December 12, 1979. All parties

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105. *See* SMITH, *supra* note 30, at 249.

106. *See* ABBOTT & BOTHAM, *supra* note 5, at 7. The South Africans took "an active role, out of self interest in behind-the-scenes diplomatic moves with Zambia, Tanzania, and Botswana to help create an atmosphere in which constitutional settlement might be achieved." *See* BEST & BLIJ, *supra* note 14, at 307.

107. *See* ABBOTT & BOTHAM, *supra* note 5, at 6.

108. GODWIN & HANCOCK, *supra* note 104, at 228. The airplane was hit by a SAM 7 missile. *See id.* The pilot was able to land the plane safely, but at the last moment, hit a ditch and the plane broke in two. *See id.* Eighteen people survived the crash. *See id.* Five of the least injured went to get help. *See id.* Soon afterward, insurgents showed up and killed ten of the thirteen still alive. *See id.* ZIPRA's head, Nkomo, claimed responsibility, and a rumor that he laughed about killing civilians sent Rhodesia over the edge. *See id.*

109. *See* GODWIN & HANCOCK, *supra* note 104, at 232. The operation in Zambia led to the RhAF being in control of Zambian airspace for over thirty minutes. *See id.* at 233. The action boosted morale in Rhodesia as the tape was played on the television. *See id.* at 234.

110. See HOFFMAN ET AL., *supra* note 61, at 82-90 for an exhaustive list of these cross-border raids into neighboring countries.

111. *See* ABBOTT & BOTHAM, *supra* note 5, at 7; *see also* NESBIT & COWDEROY, *supra* note 7, at 110.

112. *See* SMITH, *supra* note 30, at 329.

signed a ceasefire agreement on December 21, 1979. The Union Jack was raised upon his arrival, only to be lowered on April 9, 1980, as the nation of Zimbabwe emerged to join the family of nations.[113]

III. THE DIRTY TRICKS: BIOLOGICAL AND CHEMICAL WEAPONS

Early in 1976, the security forces, farmers, and officials urged the government to impose firmer and swifter methods of justice on the "terrorist." From 1976 onward, the "gloves were off" against the insurgents.[114] The Army's Psychological Operations Unit (PSYOPS) presented a plan to eliminate terrorists. The aim of PSYOPS was: "to kill and capture terrorists and to win over the local population."[115] The RLI began to kill prisoners it captured in the field.[116] Government assassination of opposition members was authorized and ZANU's national chairman was assassinated in Zambia by CIO operatives.[117] Zambian officials sympathetic to ZANU rounded up other leaders because of disinformation implicating them in the assassination. The loss of the leadership set ZANU back politically at least two years, according to the CIO.[118]

The effectiveness of the assassination and the desperation of the war effort, lead to the use of bacteriological and chemical weapons as "dirty tricks." In the late 1970s, under siege, the orders were given to use chemical and biological agents against the enemy.[119] The techniques used were: a) poisoning wells; b) spreading cholera; c) infecting clothing used by "terrorists;" and d) using anthrax to kill cattle, thus denying food supplies to the guerillas.[120]

Doctors and chemists from the University of Rhodesia were recruited by the CIO in 1975 and asked to identify chemical and biological agents that could be used against the guerillas.[121] Professor Robert Symington is credited as being the father of Rhodesia's biological warfare program.[122] Symington developed Rhodesia's stockpile of toxins and other agents to help 'supplement' the war effort by the Rhodesian forces.[123] The Rhodesians used

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113. *See* PACKENHAM, *supra* note 1, at 671.

114. CILLIERS, *supra* note 69, at 168.

115. *Id.* at 154.

116. *See* COCKS, *supra* note 80, at 236.

117. *See* GODWIN & HANCOCK, *supra* note 104, at 117; *see also* HOFFMAN ET AL., *supra* note 61, at 35.

118. *See* HOFFMAN ET AL., *supra* note 61, at 35.

119. *See* TOM MANGOLD & JEFF GOLDBERG, PLAGUE WARS: A TRUE STORY OF BIOLOGICAL WARFARE 216 (1999).

120. *See id.* at 222.

121. *See id.*

122. *See id.* at 226.

123. *See id.* at 142.

three toxins: a) Ricin,[124] an extremely potent toxin that "comes from the castor bean and enters the body intravenously"[125]; b) Thallium, a lethal heavy metal similar to rat poison; and c) Parathion.[126] By 1975, clinical trials were performed on humans—a clear and recognized crime against humanity—provided by the CIO from the Selous Scouts' secret detention center in Mount Darwin.[127] The doctors would administer various agents to the prisoners, experimenting with agents and dosages.[128] The CIO then disposed of the bodies of the victims down mine shafts.[129]

By 1976, deployments of the agents were ready and carried out by the CIO, Selous Scouts, and South Africans.[130] The chemical and biological agents used by the CIO in the field included: thallium, organophosphates poisons, warfarin, "anthrax bacterium," and other as yet unidentified bacteriological agents.[131] The CIO and the Scouts used thallium at first. Thallium was injected into canned meat and through the use of pseudo ops techniques, the poisoned meat was given to insurgents who believed they were being re-supplied by other friendly insurgents.[132] In one instance, because of a shortage of food in the Tribal Trust Lands—another deliberate tactic of the CIO and PSYOPS—the guerillas gave their thallium-laced food to innocent villagers, thus killing them.[133]

Unfortunately for the CIO, the use of thallium became known. Neither the manufacturer of the canned meat, nor the Ministry of Health knew of this program.[134] They began an investigation that ultimately led to the uncovering of the facts in the case.[135] In another incident, holes were drilled into bottles of liquor and laced with cyanide or poisons.[136] In their unwavering use of pseudo ops, Selous Scouts—perhaps in an attempt to show that the guerillas

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124. *See* FREDRICK R. SIDELL ET AL., JANE'S: CHEM-BIO HANDBOOK 142 (1999). "Ricin is a toxin made from the mash that is left over after processing castor beans." *Id.* Since processing is worldwide, the material is "easily available." *See id.*

125. MANGOLD & GOLDBERG, *supra* note 119, at 226.

126. *See id.*

127. *See id.* at 222-23.

128. *See id.*

129. *See id.* at 223.

130. *See id.* "South African military and security personnel who not only acted as advisers and monitors, but likely played some part in the development of the chemical and biological agents." *See* MANGOLD & GOLDBERG, *supra* note 119, at 221-23.

131. *See id.*

132. *See id.* at 223.

133. *See* HENRIK ELLERT, THE RHODESIAN FRONT WAR: COUNTER-INSURGENCY AND GUERILLA WAR IN RHODESIA 1962-1980 146-47 (1989). Ellert was a former head in the CIO Special Branch section, which makes his allegations that much more credible. *See id.* at vi. *See also* Al Venter, *Biological Warfare: The Poor Man's Atomic Bomb*, JANE'S INTELLIGENCE R., Vol. 11, No. 3, Mar. 1, 1999, at 43.

134. *See* MANGOLD & GOLDBERG, *supra* note 119, at 223 (citing ELLERT, *supra* note 133, at 146-47).

135. *See id.*

136. *See* Venter, *supra* note 133, at 43.

were responsible—used an unknown poison to contaminate a well near heavy guerilla activity close to the Mozambique border.[137] At least 200 civilians died because the well was the sole source of drinking water for the area.[138] Selous Scouts were instructed to poison watering holes, stagnant water, slow moving streams, and other bodies of water[139] near guerilla camps inside the Mozambiquean border, as such sources were essential for supply lines.[140]

Cholera was also alleged to have been used by the CIO.[141] Selous Scouts were told to spread the disease near the border. SAS operatives—responsible for external raids—probably spread cholera inside Mozambique. Nevertheless, the CIO was worried that the use of cholera could backfire and spread into Zimbabwe uncontrolled and affect the Selous Scouts who operated in the field.[142] Selous Scouts were also told to dump cholera in water supplies, most notably the Ruya River. This incident corresponds to a cholera epidemic along the Mozambican side of the river in which an unknown number of fatalities occurred.[143] This practice was discontinued because the agent was thought to dissipate too quickly to provide any lasting tactical advantage.

The Rhodesians, with possible assistance from the South Africans launched a program of contaminating clothing. In a *mea culpa* account, Ken Flower, the Chief of the CIO stated:

> For more years than I would like to tell, young men were recruited for the guerilla cause under the aegis of CIO and with the willing co-operation of Kanodareka and his helpers who supplied them with poisoned uniforms. The men would be sent on their way to the guerilla training camps, but before reaching, their destination would die a slow death in the African bush. Many hundreds of recruits became victims of this operation. It became so diabolically successful that exposure seemed inevitable and so the principal perpetrators had to be eliminated [Kanodareka]—rather as a hunter will finish off a wounded animal to stop further suffering.[144]

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137. *See id.*

138. *See* MANGOLD & GOLDBERG, *supra* note 119, at 223; *see also* GODWIN & HANCOCK, *supra* note 104, at 8 (citing ELLERT, *supra* note 133, at 112).

139. *See* SIDELL ET AL., *supra* note 124, at 129-30. Cholera exposure is through contact with contaminated water. *See id.* It can "thrive in saline water or water polluted with organic matter for up to six weeks." *Id.*

140. *See* MANGOLD & GOLDBERG, *supra* note 119, at 222.

141. *See Smith's Chemical Warfare Secrets Revealed*, THE OBSERVER, Nov. 10, 1991, at 18.

142. *See* MANGOLD & GOLDBERG , *supra* note 119, at 222.

143. *See* GODWIN & HANCOCK, *supra* note 104, at 8.

144. KEN FLOWER, SERVING SECRETLY: AN INTELLIGENCE CHIEF ON RECORD RHODESIA INTO ZIMBABWE 1964 TO 1981 137 (1987).

The South Africans had two dedicated biological weapons facilities, the Institute of Virology in Johannesburg and the other in a South African Defense Force, (hereinafter, "SADF") veterinary facility near Pretoria.[145] Under an umbrella project named "Alcora,"[146] the South Africans and Rhodesians used poisoning agents.[147] According to a former CIO Officer, they:

> [W]ould give us briefings about certain places and we would be warned that the drinking water or, you know, the wells might have been poisoned - but our soldiers didn't do it. There were places where we were categorically told that the waters had been salted [sic] with cholera and we would have to be careful. Truth is, Rhodesia was being used as a laboratory. There were civilian operators, strange types from South Africa . . . . To be more precise it was South African military intelligence.[148]

Sweatshirts, uniforms, and other apparel were soaked in chemicals[149] and through the Selous Scouts, these were distributed to insurgent groups near the border with Mozambique. The Rhodesians used organophosphates to poison the clothing of guerillas.[150]

A. Anthrax in Rhodesia

For centuries, *bacillus anthracis*, anthrax, has caused disease in animals and uncommonly, serious illness in humans throughout the world.[151] Anthrax is endemic to certain parts of Africa.[152] Naturally occurring anthrax is a disease acquired following contact with an anthrax infested animal or its

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145. *Questions About the Involvement of South Africa Apartheid Regime and its Secret Services in External Operations Like Hit Squads, Chemical and Biological* Warfare, (Nov. 1997), *at* http://www.contrast.org/truth/html/chemical___biological_weapons.html (last visited Feb. 21, 2003) [hereinafter *Chemical & Biological Warfare*].

146. *See id.*

147. *See id.* The Portuguese were also involved in the project before their empire collapsed. *See id.*

148. MANGOLD & GOLDBERG, *supra* note 119, at 221-22.

149. *See Chemical & Biological Warfare*, *supra* note 145.

150. *See Smith's Chemical Warfare Secrets Revealed*, *supra* note 141. After independence, Professor Symington moved to South Africa, and is alleged to have participated in making biological and chemical weapons in that country. *See* GODWIN & HANCOCK, *supra* note 104, at 8.

151. *See Anthrax as a Biological Weapon*, JAMA, Vol. 281, No. 18 [hereinafter *Biological Weapon*].

152. *See* Melissa Hendricks, *Germ War: Designing Disease,* WASH. POST, Jan. 1, 1989, LEXIS; *see also*, Erica Weir, *Anthrax: Of Bison and Terrorism*, CAN. MED. ASS'N J., Sept. 5, 2000, LEXIS.

byproducts.[153] Herbivores are the most common carrier, they usually ingest anthrax spoors residing in the soil.[154] Animal vaccination programs have reduced the rate of infection among animals.[155] In humans, the disease is not contagious, thus it cannot be spread readily from one human to another. Three types of human anthrax infection can occur: 1) inhalational, where spores enter the lungs and within a month or some times less, release two types of toxins which result in blood poisoning; 2) cutaneous or subcutaneous, in which the bacteria penetrates the skin; and 3) gastrointestinal, in which the spores are ingested.[156] Cutaneous Anthrax is the most common natural form of the disease with an estimated 2000 cases reported annually.[157] The human disease typically follows exposure to a diseased animal.[158] Research into the use of anthrax as a weapon began more than eighty years ago, and it remains a popular choice as a weapon of terror, particularly in it its most deadly inhalation form.[159]

In Rhodesia before 1978, there was an average of thirteen cases of anthrax a year.[160] By 1979, the Department of Veterinary Services announced that a cattle-borne illness of anthrax had broken out in three Tribal Trust Lands.[161] The disease claimed twenty-one people.[162] But, there was an inconsistency. On October 19, three days after its announcement, the government announced that the anthrax outbreak had spread to six Tribal Trust Lands.[163] From 1978-80, 10,783 Zimbabweans were infected and 182—all black Zimbabweans—died of cutaneous anthrax.[164] A confidential former Rhodesian officer recently reported,

> It is true that anthrax spoor was used in an experimental role in the Gutu, Chilimanzi, Masvingo, and Mberengwa areas, and the anthrax idea came from army Psyops .... The use of anthrax spoor to kill off the cattle of tribesmen . . . was carried out in conjunction with [the] psychological suggestion to the tribes people that their cattle were sick and dying

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153. *See Biological Weapon, supra* note 151, at 1736.

154. *See id.*

155. *See id.*

156. *See* SIDELL ET AL., *supra* note 124, at 126-28.

157. *See Biological Weapon, supra* note 151, at 1736; *see also First Response to Terror*, INSIGHT ON THE NEWS, Jan. 26, 1998, at 10.

158. *See Biological Weapon, supra* note 151, at 1736.

159. *See id.*

160. *See* MANGOLD & GOLDBERG, *supra* note 119, at 218.

161. *See Zimbabwe-Rhodesia: In Brief; Anthrax Outbreak in Matabeleland TTLs*, BBC (London), Oct. 16, 1979.

162. *See id.*

163. *See Zimbabwe Rhodesia: In Brief; Outbreak of Anthrax*, BBC (London), Oct. 19, 1979.

164. *See Rhodesia Forces Used Anthrax, Cholera in Guerilla Warfare*, AGENCE FRANCE PRESSE (Paris) July 8, 1993 [hereinafter *Rhodesia Forces*].

> because of disease introduced into Zimbabwe from Mozambique by the infiltrating guerillas.[165]

According to another report, a former member of the Rhodesian forces, anthrax was used to kill the cattle of the Zimbabweans.[166] The operation was to reinforce the notion that foreign guerillas were bringing back diseases that would kill cattle. This was another variation of PSYOPS, in its ongoing campaign to alienate the local population from the insurgents.[167] In contrast to the devastation in the black Tribal Trust Lands, only eleven cases of human infections were reported—with no deaths—in the European farming areas.[168]

The use of anthrax as a weapon of last resort is not far fetched. The area of northeastern Zimbabwe has ideal conditions, with the right mixture of alkaline pH, nitrogen, calcium, and organic matter.[169] In attempting to crush their opponents and maintain their white minority regime, the Rhodesians, according to Cilliers, often used food as a weapon.[170] On January 28, 1977, the Rhodesian government introduced an amendment to the Emergency Powers whereby control of food supplies was instituted in various areas of Rhodesia.[171] PSYOPS pushed for food control to keep ZANLA insurgents from obtaining food from friendly rural blacks that worked on the white farms.[172] PSYOPS instituted Operation Turkey in 1977.[173] The aim of Operation Turkey was twofold: a) cut the food supply to ZANLA; and b) increase animosity between the insurgents and the local population by controlling the supply of food.[174] The Operation was relatively successful—guerillas, believing that they were poisoned by villagers sought out and destroyed villages and killed villagers who had prepared food for them. Further restrictions were put upon the blacks by PSYOPS, such as introducing ration cards, placing limits on the amount of food available in stores, and limits on bulk purchases.[175] Viewed from this perspective, anthrax may have been a strong part of a plan to reduce food stocks to the native population and not—like the chemical and cholera incidents—an effort at direct genocide.

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165. MANGOLD & GOLDBERG, *supra* note 119, at 222.

166. *See Rhodesia Forces, supra* note 164.

167. *See* CILLIERS, *supra* note 69, at 40.

168. *See Rhodesia Forces, supra* note 164; *see also* Meryl Nass, *Anthrax Epitzootic in Zimbabwe, 1978-80: Due to Deliberate Spread?*, PSR QUARTERLY, Vol. 2, No. 4, 198, Dec. 1992, *at* http://www.anthraxvaccine.org/zimbabwe.html (last visited Mar. 4, 2003).

169. *See* MANGOLD & GOLDBERG, *supra* note 119, at 217.

170. *See generally* CILLIERS, *supra* note 69, at 158-60.

171. *See id.* at 158.

172. *See id.*

173. *See id.* at 159.

174. *See id.*

175. *See id.*; *see also* GODWIN & HANCOCK, *supra* note 104, at 6.

B. The Nass Report

The first non-Zimbabwean to suspect the deliberate use of anthrax was an American doctor, Meryl Nass, a biological warfare epidemiologist.[176] From 1989-92, she researched the events of 1978-80.[177] She became interested in how anthrax spores spread so quickly—even in the absence of bovine cases—and engulfed six of the eight Rhodesian provinces.[178] Even more remarkable was that the white farmers lost only four heads of cattle, with eleven cases of human exposure and no deaths.[179] Nonetheless, why does Nass believe that it was a deliberate spread? First, the large amounts of those infected. Rhodesia had had only 334 cases from 1950-1978.[180] Doctors in Zimbabwe in 1977 had rarely seen an anthrax case. Yet, during the war, anthrax became one of the country's major causes of hospital admissions.[181] Next, the large-scale infestation is additional proof of a deliberate spread. Most anthrax outbreaks have a high degree of focality.[182] In Zimbabwe most of the Tribal Trust Lands stretching across six of the eight Provinces were infected.[183] Many of the cases occurred in areas where there had not been a previous case. The outbreak was centered only in Zimbabwe.[184] None of its neighbors, according to Nass, had higher than normal reporting of infections.[185] Finally, Nass points out that the outbreak occurred when the war intensified to its greatest levels.[186] Nass, however ends her investigation into the use of anthrax, by concluding that "[t]here exists no generally accepted methodology to serve as a guide for the design of an investigation into the possible use of biological weapons."[187]

C. Analysis of Anthrax and Other Bacteriological Agents

Drawing inferences from the circumstantial evidence particularly when coupled with the personal accounts—of which Flower's and Ellert's personal *mea culpas* are the most convincing—leads one to the conclusion that biological weapons were used in Rhodesia by the security forces. Notwithstanding, Ian Smith's flippant response when confronted by a reporter

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176. *See* MANGOLD & GOLDBERG, *supra* note 119, at 218.
177. *See id.*
178. *See id.*
179. *See* Nass, *supra* note 168; *see also Rhodesia Forces, supra* note 164; *see also* MANGOLD & GOLDBERG, *supra* note 119, at 218.
180. *See* Nass, *supra* note 168.
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.*
185. *See id.*
186. *See* Nass, *supra* note 168.
187. *Id.*

over the alleged use of these weapons was, "first time I've ever heard about it."[188] While there is one explanation for a possible natural occurrence it is not convincing under the circumstances: by mid-1978 veterinary services outside the white farming area had collapsed and the services were no longer provided.[189] Because of the level of violence in the countryside, inoculation of cattle against diseases had become sporadic since at least 1974 and even then, vets were sent in with armed soldiers.[190] Malaria, bilharzias, and other endemic diseases soared during the period of the anthrax spread.[191] Yet, the collapse of the veterinary and medical system alone does not provide a satisfactory explanation of a naturally occurring outbreak of anthrax. The reason is that anthrax vaccination was not practiced in Zimbabwe even before the outbreak because of the low prevalence of the disease.[192] As a consequence, the collapse of veterinary services would not have had a major impact on cattle in the Tribal Trust Lands.[193] The collapse did affect other diseases, such as preventable tick-borne diseases.[194] Between 1975-79 an estimated 250,000 head of cattle died because "dipping" services in the rural areas had been shut down.[195] Sleeping sickness also rose dramatically during this period.[196]

Additional inferences of a deliberate spread can be gleaned from other practices of the Rhodesian CIO along with PSYOPS. CIO's and PSYOPS' use of anthrax would have been consistent with three other practices: 1) it would continue the PSYOPS operation of continuing psychological warfare on rural blacks by highlighting the fact that foreign diseases were the result of the guerillas; 2) CIO was already seeking to deny food supplies to the guerillas in line with "Operation Turkey,"[197] and finally; 3) CIO would have been attracted to a weapon of last resort to break the morale of the rural blacks. To understand CIO's thinking, one must look at Zimbabwe at the time. As in other parts of Southern Africa, wealth is primarily measured by the number of cattle one has.[198] Therefore, without cattle to measure their wealth, rural blacks' morale would sink and support for the uprising would end. For example:

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188. GODWIN & HANCOCK, *supra* note 104, at 99.

189. *See* Nass, *supra* note 168; *see also* CILLIERS, *supra* note 69, at 238.

190. *See* CILLIERS, *supra* note 69, at 141.

191. *See id.* at 239.

192. *See* Nass, *supra* note 168.

193. *See id.*

194. *See id.*

195. *See* Taper Knox Chitiyo, *Land Violence and Compensation: Reconceptualising Zimbabwe's Land And War Veteran's Debate,* TRACK TWO, Vol. 9 No. 1, May 2000, *at* http://ccrweb.ccc.uct.ac.za/two/9_1/zimbabwe.html (last visited Mar. 23, 2003).

196. *See id.*

197. *See* CILLIERS, *supra* note 69, at 158-59.

198. *See* Nass, *supra* note 168.

> There is always hardship, but if cattle die, the family loses its source of wealth; without motive power for ploughing [sic], crops cannot be planted, leading to no food, no money to purchase food, pay school fees, bus fares, taxes, or buy the essentials to life. The family is reduced to grinding poverty and malnutrition becomes rife.[199]

The use of the Selous Scouts furthered this goal. By imitating the guerillas, former officers have retold how massacres were perpetrated. Thus, the rural population would feel threatened by the guerillas. The land allocated to the Zimbabweans was mostly arid, whereas the white areas were relatively fertile. The alkalinity in the soil and the arid conditions would be ideal for the spread of anthrax.[200] Nass suggests that aerial spraying is one possibility.[201] As in other third world insurgencies, the Rhodesians built special protected villages into which the native population was concentrated, mostly involuntarily.[202] Congregation of the rural population into one area could have contributed to the ease of intentional infestation by the Security Forces.[203] This goal would meet the first prong of their desired use.

The second reason CIO and PSYOPS would use anthrax was that by destroying food stocks in rural areas, the original goals of "Operation Turkey" would be enhanced. Food was used as a weapon in Rhodesia.[204] Therefore, it is conceivable that the anthrax program was meant to destroy Shona wealth and food processing. By denying the guerillas food, their morale would sink as their supply lines would be unable to support them. This was especially true as the SAS was simultaneously hitting targets outside Rhodesia. The CIO hoped the guerillas would merely starve in the field.

Finally, the CIO and PSYOPS knew that by 1978 the war was unwinnable. The Security Forces could not be beat, as they had won each battle, but neither could they win the war. In addition, the constant call-up of the male population was increasing emigration.[205] Most knew that concentrated efforts to end the war had failed.[206] The enemy was seen to be the villager as well. As shown earlier, post-1975, the CIO and Selous Scouts used untraditional means of warfare. Their operations were always along the line of reducing rural support for black nationalists and lowering morale. To that end, cholera was spread, thallium was used to poison people, and water supplies were poisoned.[207] An interesting analysis is that of the main

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199. *Id.*
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.*
204. *See* CILLIERS, *supra* note 69, at 158-59.
205. *See* NEWSBIT & COWDEROY, *supra* note 7, at 101.
206. *See id.*
207. *See* Nass, *supra* note 168.

operational area during the war—the Hurricane Theatre. Here, there were numerous "no go" or frozen areas because of Selous Scout activity in the border area at the time.[208] It is plausible, that together with legitimate military operations, the Scouts were engaged in spreading anthrax. For example, as noted previously, the Selous Scouts were instructed to pour cholera agents in the Ruya River.[209] Starting in August of 1973 "Exercise Long Walk" was begun along the Ruya River near Mozambique.[210] Selous Scouts were active in the area and other Security Forces were told to pull out when the Scouts neared their positions.[211] Henceforth, Security Forces were instructed not to approach the frozen zone and to stay at least 4000 meters from the Ruya River.[212] In 1978, in Mozambique large numbers of ZANLA soldiers arrived from training bases near the border with a bleeding disorder.[213] At first, a hemorrhagic fever was suspected, but lab results showed warfarin poisoning.[214]

The first case of anthrax in humans was reported in November 1978, according to Nass.[215] This is one month after the Rhodesian invasions and bombings of Mozambique and Zambia—the height of the war. Therefore, the outbreak would have coincided directly with a peak in hostilities. The use of anthrax could have strengthened the hand of the whites in the negotiating table illustrating that the black population was enduring the worst consequences of the war, and thus had the most to gain through a negotiated settlement. It was classic bargaining from strength of position.

The evidence shows that Rhodesia had a small indigenous bacteriological and chemical program by 1975 led by Dr. Symington under the supervision of the CIO.[216] Anthrax is obtained by lab specimens or through collection of spores in the soil.[217] As noted, the Rhodesians became experts at sanctions busting, with false end certificates, dummy companies, and fake airlines.[218] The RhAF set up dummy corporations such as Air Gabon in Gabon, CargOman in Oman, and Air Trans Africa.[219] Therefore, it is not to hard to imagine that Rhodesians could have obtained a batch of British anthrax spores from sympathetic admirers in Britain or through American labs.[220]

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208. *See id.* Nass suggests that there might be a correlation to the no-go areas and the use of Anthrax by the Selous Scouts. *See id. See also* DALY, *supra* note 85, at 29.

209. *See* GODWIN & HANCOCK, *supra* note 104, at 8.

210. *See also* DALY, *supra* note 85, at 29.

211. *See id.*

212. *See id.* at 41.

213. *See* Nass, *supra* note 168.

214. *See id.*

215. *See id.*

216. *See* MANGOLD & GOLDBERG, *supra* note 119, at 223-26.

217. *See* Nass, *supra* note 168.

218. *See* NEWSBIT & COWDEROY, *supra* note 7, at 56-65.

219. *See id.*

220. *See* Nass, *supra* note 168; *see also* MANGOLD & GOLDBERG, *supra* note 119, at 218-19.

Britain experimented with anthrax during the Second World War.[221] Anthrax does occur naturally in Zimbabwe, but not in sufficient quantities to justify the expense of field cultivation of spores.[222] Discounting the evidence and dismissing the ingenuity of the Rhodesians for sanctions busting, the main culprit in the proliferation of bacteriological weapons to Rhodesia was most likely South Africa.[223]

D. The South African Connection

The main culprit for the Rhodesians obtaining biological weapons has been South Africa.[224] South Africa was an original signatory to the Biological Weapons Convention in 1972, ratifying it November 5, 1975.[225] South Africa has always maintained that its biological weapons program was solely for defensive use.[226] South Africa produced chemical weapons during World War II in Gauteng—responsible for mustard gas production—for the Allies.[227] South Africa claimed that undelivered stocks were destroyed after the war.[228] However, former Allied production sites continued to be used by the South Africans for military purposes.[229] To manufacture anthrax under 'ideal' conditions, high-containment suites are used.[230] However, such facilities were not available to the Allies during World War Two, according to Nass.[231]

In 1968, South Africa provided Rhodesia with military support by sending a small contingent to Rhodesia to help with the insurgency.[232] Nonetheless, to see both as an inseparable alliance of white supremacists is somewhat misleading. In 1975, South Africa pulled out most of its military assistance to Rhodesia.[233] If South Africa assisted in the use of bacteriological weapons in Rhodesia, it was most likely for its own personal gain in research, rather than benevolent love. South Africa and Rhodesia were quite dissimilar with their one unifying aspect being continuation of white minority rule. South Africa was willing to sell out Rhodesia in order to appease the international community and buy time for their own Apartheid state.[234] However, one major piece exculpating the South Africans from involvement has been the Truth and Reconciliation Commission's findings into the South

221. *See* Nass, *supra* note 168; *see also* MANGOLD & GOLDBERG, *supra* note 119, at 219.
222. *See id.*
223. *See* MANGOLD & GOLDBERG, *supra* note 119, at 220.
224. *See id.*
225. *See Chemical & Biological Warfare, supra* note 145.
226. *See* Nass, *supra* note 168.
227. *See id.*
228. *See id.*
229. *See id.*
230. *See id.*
231. *See id.*
232. *See* CILLIERS, *supra* note 69, at 9.
233. *See id.* at 24.
234. *See* SMITH, *supra* note 30, at 232.

African Project Coast.[235] Project Coast may have commenced in the late 1970s to early 1980s, with an exact date unknown.[236] What is known, is that by 1981 the head of 'Project Coast,' Dr. Basson—also known as Dr. Death—visited the U.S., meeting with CBW scientists.[237] Project Coast experimented with cholera, botulism, anthrax, chemical poisoning, and lethal microorganisms.[238] The military is alleged to have used cholera—as in Rhodesia—to poison wells, placed anthrax in cigarettes, and placed paraoxon in whiskey and then distributed it.[239] However, there is no mention of South African and Rhodesian collusion. Yet, former CIO members have indicated that the South Africans bank rolled the Selous Scouts and had unfettered access to their Mount Darwin base.[240] Nonetheless, the methods and choice of weapons used would lead to an inference that at least there was communication on shared technology and application at the operational level.[241] In addition, South Africa launched "Operation Winter" whereby large assets of the Rhodesian military left Rhodesia upon majority rule.[242] In some cases, whole units of the Selous Scouts and SAS joined the South African Defense Force, along with Rhodesia's dirty little tricks.[243]

IV. LEGAL ANALYSIS

The main legal questions are: a) who should be held responsible; b) under what mechanisms; and c) should the state of Rhodesia be held liable or should the perpetrators?

A. Analysis of Rhodesia as a State

Because of Rhodesia's UDI its standing as a 'state' is paramount. The definition of what constitutes a state is well defined in international law. Under international law a state is an entity that has: a) defined territory; b) permanent population, under the control of its government; and c) capacity to

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235. *See Revenge of South Africa's Dr. Death*, BBC News, *available at* http://news.bbc.co.uk/1/hi/world/africa/1920112.stm (last visited Jan. 12, 2003).

236. *See* Dr. Death Implicates West, BBC News, *available at* http://news.bbc.co.uk/2/hi/world/africa/143006.stm (last visited Jan. 10, 2003) [hereinafter Dr. Death].

237. *See* Special Investigation into Project Coast, "South Africa's Chemical and Biological Warfare Programme," *available at* http://www.polity.org.za/govdocs/commissions/1998/trc/2chap6c.htm (last visited Jan. 10, 2003) [hereinafter Special Investigation]; *see also*, Dr. Death, *supra* note 236.

238. *See* Special Investigation, *supra* note 237.

239. *See id.*

240. *See* Brickhill, *supra* note 88, at 10.

241. *See id.* at 8.

242. *See id.* at 59.

243. *See id.*

engage in formal relations with other states.[244] Meeting those requirements, an entity is a state whether or not it has been recognized by other states.[245] However, there is a crucial distinction between state and government. A government, no matter how violent or wrongful in its origin, is a *de facto* government if it was in the "actual exercise of sovereignty over a territory and peoples large enough to be a nation."[246] *De facto* can be compared to *de jure* recognition, where the government is lawfully in power even though it exercises little actual power, for example an exiled government.[247] Rhodesia at UDI had all the requirements of a state and its government was therefore, the *de facto* ruler of the country.

If Rhodesia was a state and *de facto* government, then are the various treaties outlawing the use of bacteriological/chemical weapons applicable to it? For humanitarian international law to apply there must be an internal or external armed conflict.[248] Armed conflict exists when states resort to force, protracted armed violence between governmental authorities and organized groups, or between such groups within a state.[249] Rhodesia was in a period of armed conflict from 1965 to 1980, therefore, international humanitarian law applies.

The first attempt to deal with chemical weapons was the Hague's series of Conventions codifying the law of war, which entered into force in 1910.[250] Rhodesia may have violated the 1907 Hague Convention. Through Article 1, the convention is applicable to members of the Rhodesian Security Forces.[251] Article 23(a) prohibits the use of "poison or poisoned weapons."[252] The use of cholera, thallium, and other bacteriological agents is a clear violation of this article. The use of bacteriological weapons was outlawed by the 1925 Geneva Protocol,[253] of which the United Kingdom is a party. In 1949, the Geneva Convention broadened the applicability of the treaty by adopting the phrase "armed conflict," replacing the narrower phrase of "laws or customs of war,"

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244. *See* Kadic v. Karadzic, 70 F.3d 232, 244 (2d Cir. 1995), *reh'g denied,* (citing the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201); *accord* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2d Cir. 1991); *see also* Montevideo Convention of 1933.

245. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 202 cmt. B.

246. Ford v. Surget, 97 U.S. 594, 620 (1878), (Clifford, J., concurring).

247. *See* BLACK'S LAW DICTIONARY 697 (6th ed. 1990).

248. *See* The Prosecutor v. Dusko Tadic, Case no: IT-94-1-AR72, Appeals Chamber, Oct. 2, 1995; Int'l Crim. Trib. Yugo 1995.

249. *See id.*

250. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention].

251. *See id.* art. 1.

252. *See id.* art. 23(a).

253. Protocol for the Prohibition of the Use in War Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Convention].

as used in the 1907 Hague and 1925 Geneva Convention.[254] The 1949 Geneva Convention was built upon the prior treaties which have been universally applied.[255]

Under Article III of the Geneva Conventions, which makes itself applicable to internal conflicts and civil wars, Rhodesia committed several "grave breaches." By killing cattle, the Rhodesian Security Forces targeted the wealth of the rural population, a violation of Article III(1). Furthermore, the Selous Scouts killed, captured insurgents, or used them for biological experimentation if they did not "turn."[256] These practices are a violation of Article III(1)(a).[257] Great Britain was a signatory to the Geneva Convention, however Rhodesia was not. Nonetheless, international law and recent cases have elevated Article III of the Geneva Convention to customary law.[258] A violation of the Article is a violation of customary law.

In addition to these two treaties, there is the 1972 Biological Weapons Convention (BWC) which renounces the use of biological weapons against human beings.[259] The BWC reflects the post-World War II renunciation of biological weapons by the defeated Axis powers and the unilateral renunciation of the use of such weapons by the U.S. in 1969.[260] By enlarging the scope of the 1949 Geneva Convention, through Article III, the use of chemical weapons in internal armed conflicts is outlawed.[261] With its declaration of UDI, it is arguable whether the use of these weapons would have been 'illegal' under the Geneva Protocol since Rhodesia was never a party to the Convention, which bans the use and possession of biological weapons. Furthermore, Rhodesia's independence was illegal and not recognized by the international community.[262] Nevertheless, the use of such weapons has risen to a violation of customary international law. For a practice to become customary international law there must emerge a general consensus in the international community that furthering the practice violates international customary law.

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254. *See* 1907 Hague Convention, *supra* note 250; *see also* 1925 Geneva Convention, *supra* note 253.

255. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 73 U.N.T.S. 287 (entered into force Oct. 21, 1950)[hereinafter 1949 Geneva Convention].

256. *See* CILLIERS, *supra* note 69, at 33.

257. *See* 1949 Geneva Convention, *supra* note 255.

258. *See generally* Theodore Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348 (1987).

259. Convention on Prohibition of Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Aug. 10, 1972, 86 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter 1972 Biological Weapons Convention].

260. Michael Moodie, *Agents of Death, Forum for Applied Research & Public Policy*, Vol. 15, Issue 1, Apr. 1, 2001.

261. *See* 1949 Geneva Convention, *supra* note 255.

262. U.N. Sec. Council Res., Res. 217, UNSCOR, 20th Sess., 1265th mtg., UN Doc S/RES/217, ¶ 8.

In 1988, Iraq used chemical weapons in an internal conflict.[263] International condemnations of the use of chemical weapons against an internal civilian population were swift, accusing Iraq of violating the 1925 Geneva Convention.[264] Therefore, under the Hague Convention and 1925 Geneva Protocol the use of chemical or biological weapons against internal populations has been raised to a violation of customary humanitarian law.

The successor to Rhodesia through decolonization is Zimbabwe.[265] Under the Vienna Convention a newly independent state begins its existence free of the obligations of its predecessor state, the 'clean slate doctrine.'[266] At independence the United Kingdom attempted a legal fiction. It turned back Zimbabwe's clock to 1965 by appointing a Governor and reincorporating Zimbabwe into the Commonwealth of States, the successor to the British Empire. The illegality of the regime was overturned and Zimbabwe emerged as a new nation under the clean slate doctrine. Therefore, since violation of the treaties is a violation of international customary law Zimbabwe is liable for violations by Rhodesian security forces. This is a non-sequitor, and thus illogical. Therefore, one must turn to the next logical question if the state is not responsible, are the perpetrators and under what judicial model can they be brought to justice?

B. Holding Individuals Accountable

The law of nations does not confine its reach to state actions.[267] There are innumerable references to individuals committing an offense against the law of nations.[268] Therefore, individuals who were part of the Rhodesian Security forces who violated international customary law during the internal armed conflict of 1965-80 should be prosecuted. For example, Symington's experiments on humans are a clear crime against humanity.[269] The question

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263. Christopher Clarke Psoteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151 (2002).

264. U.S. DEPARTMENT OF STATE, *Press Guidance*, Sept. 9, 1988.

> Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against chemical weapons use 'in war' applies to use in internal conflicts. It is clear that such use against civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements.

Id.

265. Revi Nossman, *Existence Tenuous for White Africans*, NEW ORLEANS TIMES-PICAYUNE, June 18, 2000, *available at* 2000 WL 21265452.

266. *See* Vienna Convention on the Law of Treaties, arts. 17, 24, 1153 U.N.T.S. 331, 8 I.L.M. 679 (1969); *see also* International Military Tribunal (Nuremberg) Judgment and Sentences 41 A.J.I.L. 220-21 (1946) [hereinafter International Military Tribunal].

267. *See Karadzic*, 70 F.3d at 238.

268. *See, e.g.*, U.S. v. Smith, 18 U.S. 153, 161-62 (1820).

269. *See* International Military Tribunal, *supra* note 266.

now turns to what forum: a Nuremberg-style court, a domestic court, or a foreign court that may have jurisdiction.

Under international law, the Rhodesian Security Forces committed two major international crimes: 1) war crimes, and 2) grave breaches of the Geneva Conventions.[270] War crimes—violations of the customs of war, i.e. Hague 1907—include: murder or ill treatment of prisoners of war, wanton destruction, use of biological agents, and devastation not justified by military necessity.[271] The grave breaches include: willful killing, biological experiments, compelling a prisoner of war to serve in forces of a hostile power, making the civilian population targets of attack, racial discrimination, deportation of population of occupied territory, and willfully causing great suffering or serious injury to body and health.[272] If a Nuremberg style court is established, which is doubtful because of the time lapse in the events, criminal prosecution can take place against those members of the Security Forces who perpetuated the crimes and their leaders who authorized the use of these tactics.[273]

The principles of the Nuremberg International Military Tribunal provides for individual criminal responsibility for war crimes.[274] Leaders and organizers participating in the formulation or execution of a common plan for war crimes and grave breaches are vicariously responsible for all acts performed by any persons in execution of such plan.[275] Even if a commander did not participate, he may be responsible for the actions of his troops if he knew about the atrocities and did nothing to stop them.[276] Although feasible, a Nuremberg style court, modeled perhaps on the International Criminal Tribunals for the former Yugoslavia and Rwanda are impractical. First, since the accused acted under color of state action and not individually, they are not *hostis humani generis,* enemies of all mankind.[277] Although because of the violations, universal jurisdiction may be allowed, and hence, the concept of *aut dedere aut judicar* (extradite or prosecute) comes into play.[278] Nonetheless,

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270. Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to Protection of Victims of International Armed Conflicts (Protocol 1), 1125 U.N.T.S. 3 (entered into force Dec. 7, 1998). Protocol One applies also because it applies to, "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations . . . ." *Id.*

271. *See id.* art. 85 (5).

272. *See id.* art. 85(3)(a-f).

273. Ken Flower, the head of CIO died in 1987. *See* GODWIN & HANCOCK, *supra* note 104, at 76.

274. *See* George A. Finch, *The Nuremburg Trial and International Law*, 41 AM. J. INT'L L. 20, 20 (1947).

275. *See* In re Yamashita, 327 U.S. 1, 15 (1946).

276. *See id.*

277. *See* WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 71 (University of Chicago Press ed., 1979)(1765).

278. *See generally* M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (2001).

nation states may be hesitant to occupy themselves with matters that occurred nearly twenty years ago. The international community is too preoccupied with other African conflicts, namely Sierra Leone—the *crisis de jure*—to contemplate setting up another African tribunal. Nation states might also be sympathetic to the 'losers,' many of whom did lose their livelihoods and property. Secondly, members of the Rhodesian security services are unlikely to testify against each other because many received amnesty for their acts under the Lancaster agreement. In addition, as in all armed services, a code of silence develops in the fogs of war. Finally, that leaves either domestic remedies for the victims or foreign courts.

C. Forum Choices

Perhaps the first outside confirmation came in 1990 from a Defense Intelligence Agency Cable from Harare to Washington, "[a]ccording to [source deleted], a member of the Rhodesian Selous Scouts admitted in 1978 that 'they' had tried both chemical and biological warfare techniques to kill terrorists."[279] The report went on to say that Rhodesian forces used cholera to poison the water supply.[280] It appears that Washington was, and still is, oblivious to the use of bacteriological weapons in Zimbabwe.[281] Nonetheless, officials of the U.S. Embassy in Harare seem aware of the situation, but dubious as to its credibility.[282]

In 1997, the Minister of Health Tim Stamps—a white Zimbabwean—personally ordered an official investigation into the use of bacteriological agents in the Liberation War.[283] Stamps is convinced that through forged documents, the U.S. or U.K., shipped anthrax for legitimate research in a third country, but it eventually wound up in Rhodesia.[284] Stamps is convinced that the spread of the disease was deliberate.[285] He points out that the Africans were severely restricted in their movements, the focus of the outbreak being so widespread and the targeting of cattle in particular.[286]

In 1999, a call was made by university professors to the government of Zimbabwe to investigate the 1975-80 incidents of bacteriological war, in part because of Stamps' insistence.[287] Yet, to date nothing has been officially

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279. *See* MANGOLD & GOLDBERG, *supra* note 119, at 218.

280. *See id.*

281. Telephone Interview with State Department Desk Officer, Miami FL (Nov. 14, 2001) (on file with author).

282. E-mail Interview with Author's confidential source, Miami, FL (Nov. 15, 2001) (on file with author).

283. *See* MANGOLD & GOLDBERG, *supra* note 119, at 218.

284. *See id.*

285. *See id.* at 218-19.

286. *See id.* at 19.

287. *See Zimbabwe: Government Urged to Probe Reports Citing Use of Chemical Agents*, AFRICA NEWS SERVICE, Nov. 12, 1999.

undertaken by the government of Zimbabwe. The reasons for not acting against the report are twofold. One, the white population in Zimbabwe fell from around 190,000 in 1980, to 90,000 in 2000.[288] They were the economic backbone of the country.[289] To his credit, Mugabe tried to build a multi-racial country.[290] Reconciliation was the tone. The whites were allowed to stay as long as they knew their place in the new country.

During the 1990s, Mugabe faced several problems to his rule. In 1990 there were fewer jobs for blacks than there were in 1975 and real incomes were down from what they were in 1975.[291] In an attempt to escape domestic problems, Mugabe turned to the legacy of land distribution in Zimbabwe. In 2000, farm invasions began as the government attempted to illegally seize white farms.[292] White emigration began again and in 2001, the white population was less than 50,000 consisting mostly of retired persons.[293] Mugabe—through his ministers—keeps the specter of whites being all-powerful and treacherous. Nonetheless, he cannot institute an inquiry because it just might show that anthrax was not used in the conflict or worse yet, that Mugabe and his side might have done their own dirty tricks. Mugabe and his ministers recently insinuated that the remaining whites may use anthrax again against the black government.[294] On October 25, 2001, the Deputy Health Minister said that exiled Rhodesians and white Zimbabweans were preparing an anthrax attack.[295] The state controlled media the same week interviewed rural farmers in a recent anthrax outbreak. The rural farmers claim that the remaining white commercial farmers have activated the anthrax used in the liberation war.[296] In January 2002, the government orchestrated an 'anthrax scare' and blamed it on the opposition political party and white farmers—one of their supporters.[297] However, these inquiries were quickly suppressed:

> ZANLA and/or ZIPRA may also have had complicity in spreading the biotoxins around. The war between ZANLA

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288. *See A Socialist Confronts Poverty With a Wealth of Pragmatism*, WASH. TIMES, Nov. 5, 1990. The White Population was 125,000 in 1990; 90,000 in 1991.

289. *See Zimbabwe's 'Bush Peace' Deadly to White Farmers*, WASH. POST, Mar. 8, 1988 ([i]n 1988 whites held all but twelve of the top 200 executive positions in Zimbabwe's 100 largest companies); *see also Alienated from Africa*, AFRICA REPORT, Feb. 1991.

290. *See Alienated from Africa*, AFRICA REPORT, Feb. 1991.

291. *See* BBC NEWS, *Zimbabwe's Anthrax 'Gimmick,' available at* http://news.bbc.co.uk/hi/english/world/africa/newsid_1752000/1752767.stm (last visited Jan. 10, 2002).

292. *See Zimbabwe Tells Britain to Compensate White Farmers*, Guardian Unlimited, Apr. 7, 2002, *available at* http://www.guardian.co.uk/zimbabwe/article/0,763,181149,00.html (last visited Jan. 10, 2003).

293. Samson Mulgata, Sowing Uncertainty: Zimbabwe's Seizure of White Farmland Hurts Black Workers Too, Newsday, Oct. 6, 2002, *available at* 2002 WL 101394914.

294. *See Zimbabwe Prepared for Anthrax Attacks*, PANAFRICAN NEWS AGENCY, Oct. 25, 2001.

295. *See id.*

296. *See id.*

297. *See* BBC NEWS, *supra* note 291.

> and ZIPRA, was by far the deadliest and most destructive aspect of the liberation struggle. ZANLA was fighting ZIPRA as much as it was the Rhodesian Army. ZANLA may have become aware of the Rhodesians' bio 'dirty tricks' and used them, such as the poisoned food tins, against villages sympathetic to ZIPRA, possibly even with the Rhodesians' help. Or, ZIPRA may have done the same to ZANLA, but I think the former is more likely. I think this is a more logical explanation for why a more comprehensive investigation has never been undertaken. In the current environment, this is the perfect story to vilify the remaining whites in Zimbabwe and justify seizing their property. The GOZ [government of Zimbabwe] would only have to go after a handful to make the case that its campaign against the whites was part of the war on terrorism, and this, in turn, could give the West pause in vilifying the GOZ (I don't think it would lead to a mass white exodus, however). Instead, the 'story' that the whites were planning an anthrax attack, and the 'story' about anthrax-like substances turning up at the central post office disappeared quickly. I suspect someone on high squashed any further investigations because of where it might lead.[298]

In conclusion, domestic remedies against those remaining Security Forces personnel would be highly unlikely under the Mugabe regime and his co-opted justice system. If the trials were to show that there was no use of chemical/biological weapons, Mugabe would be unable to continue to use whites as scapegoats. If whites are found to be guilty of the use of these weapons, the stigma attached could well produce the final exodus of whites in the country, plunging it into complete economic chaos.

Therefore, the last and the most feasible option for those affected during the liberation war is to use the forum of a third country whose laws would allow an alien to seek compensation for damages, like the United States or Belgium. In the United States, Zimbabweans may use the Alien Tort Claim Act, 28 U.S.C. § 1350 (1988), enacted in 1789 which creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations.[299] In addition, federal common law has incorporated international customary law.[300] Therefore, an alien within the U.S. can pursue a claim against the former Rhodesian Security Forces. In fact, on September 9, 2000, Zimbabweans living in the U.S. filed suit against

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298. E-mail Interview with Author's confidential source, Miami, FL Apr. 16, 2002 (on file with author).

299. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

300. *See* The Paquete Habana, 175 U.S. 677, 700 (1900).

Mugabe and two of his associates under the Alien Tort Act for torturing their relative in Zimbabwe because they belonged to another party.[301]

Another venue that would accept alien tort lawsuits is Belgium with its far reaching war crimes law.[302] The 1993 Belgian law gives the country's courts "universal jurisdiction" for crimes against humanity.[303] In October 2001, Cuban exiles in Miami filed suit against Fidel Castro in Belgium's courts under the law.[304] Abuse of the law has created embarrassment for Belgians who seek to limit the powers of the law to reduce lawsuits.[305] Nonetheless, like the U.S. Alien Tort Act, this Belgian law also gives Zimbabweans a ready option for their grievances.

D. South African Actors-Exempt.

If South Africa used bacteriological weapons, it was in violation of Article II of the Convention. If it possessed and developed, along with Rhodesia, bacteriological agents such as cholera and thallium, then it was in violation of Article I of the Convention. If South Africa helped proliferate the spread by helping Rhodesia acquire the technology and the means to use those weapons, it is also in violation of Article III of the Convention. Rather than stop or prevent the development of these weapons domestically, South Africa actively participated in their development in violation of Article IV of the Convention.[306] Under the Convention's Article VI, only state parties to the Convention may lodge alleged violations.[307] To date none has. Nonetheless, domestically, under the Truth and Reconciliation Commission, crimes committed under Apartheid may be pardoned if the perpetrators testify about their crimes. Many in the biological program did and were subsequently pardoned.[308] However, South Africa's 'Project Coast' is still a state secret and its machinations are under "lock and key."[309] A court conducted in Afrikaans, whose main witnesses were throw backs to the 1970s defense establishment, recently found even Dr. Basson, ('Dr. Death')—who did not repent—not

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301. *See Mugabe Sued in New York Over Rights Abuses*, WASH. POST, Sept. 9, 2000, at A3.

302. *See* Kamer keurt aangepaste genocidewet goed, DE STANDARD ONLINE, *available at* http://www.standaard.be/Misc./print.asp?articleID=NFLA02042003_001 (last visited Apr. 3, 2003).

303. *See id.*

304. *See Exiles Seek Castro's Indictment in Belgium*, WASH. POST, Oct. 4, 2001, at A32.

305. *See Belgium 'Embarrassed' by Probe of Sharon*, WASH. POST, July 6, 2001, at A18.

306. *See* 1949 Convention, *supra* note 255, art. III.

307. *See id.* art. IV.

308. *Urged to Speed Up TRC Reparations*, SAPA, Aug. 14, 2002, *available at* 2002 WL 23698917.

309. Dr. Death, *supra* note 236.

guilty.[310] In addition, South Africa was not a belligerent under Article I of the 1907 Hague Convention.[311]

V. CONCLUSION

Through practice, a custom can emerge. Most countries have forsaken the use of bacteriological agents. Therefore, it can be argued that the use of bacteriological weapons by Rhodesians in 1975-80 was a violation of the 1907 Hague Convention, regardless of Rhodesia's international status and Article III of the 1949 Geneva Convention, regardless of its status as an 'illegal' state, since individual responsibility can be used. Therefore, the Rhodesian Security Forces can be prosecuted for War Crimes, although a proper venue will be difficult to find. If the current government is unwilling to put forward claims against the prior regime, then ordinary citizens who were affected can bring forth claims. Since Zimbabwe has descended into a one party dictatorship, Zimbabweans may have to look abroad for a judicial solution to the crimes committed against them.

310. *Revenge of South Africa's Dr. Death*, BBC NEWS, *available at* http://news.bbc.co.uk/2/hi/world/africa/1926117.stm (last visited Aug. 8, 2002).

311. *See* 1907 Hague convention, *supra* note 250, art. I(1-4).

THE OLDE ORDER CRUMBLETH: HIV-PESTILENCE AS A SECURITY ISSUE & NEW THINKING ABOUT CORE CONCEPTS IN INTERNATIONAL AFFAIRS

J.M. Spectar*

I. INTRODUCTION

There is growing realization that in certain regions of the world the unusual virulence of AIDS is connected to the prevalence of insecurity and destabilizing conflict in a mutually reinforcing relationship. The recognition of AIDS as a security issue has significant implications for international law, politics, and diplomacy, particularly on the traditional conceptions of national interest, sovereignty, and non-intervention. This article examines the implications of the link between AIDS and security, focusing particularly on certain policy responses of key international actors, including the UN Security Council and the Clinton Administration. The article argues that the (belated) but nonetheless robust global response, particularly the Security Council resolution on AIDS, signified the on-going development of a new consensus about international governance in an age of galloping globalization and globetrotting super-viruses.[1]

In Part II, the article focuses on the emerging consensus that AIDS is a security threat, in terms of human security[2] as well as national and international security. With respect to human security, the article describes how AIDS weakens and destroys families, communities, economies and

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* Ph.D.1999, Claremont Graduate University; M.A.P. 1997, Claremont Graduate School; J.D. 1992, University of Maryland School of Law; M.A. 1992, George Washington University; M.B.A. 1989, Frostburg State University. Associate Provost for Academic Affairs & Professor of Political Science, University of Scranton, PA. This article is an outgrowth of my notes for a seminar I taught in Princeton University during the spring of 2002 as well as my preparation for a human rights symposium at the University of Connecticut School of Law in December 2001. In addition, the article is also an extension of a lecture this author delivered in Princeton University titled, "*Non-State Violence, HIV-Pestilence & Other Emerging Threats: Rethinking National Interest, Sovereignty and Non-Intervention.*" (Sept. 2002). I would like to express my gratitude to all who participated in these events for their beneficial comments and thought provoking questions. I would also like to thank my former Princeton University students whose love of learning strengthened my faith in the future. Last but not least, I would like to thank my colleague, Professor Vitonio San Juan for his assistance in reviewing this and other articles by this author.

1. It is this sense that the dominant paradigm is shifting that gave rise to my co-optation and invocation of Alfred Lord Tennyson's "The Passing of Arthur" (Part 12 of the Idylls of the King) and its oft-quoted lines: "The order changeth, yielding place to the new . . . ."

2. For an analysis of the terms "human security" and "global security," see PETER J. STOETT, HUMAN AND GLOBAL SECURITY, AN EXPLORATION OF TERMS (1999).

prospects for development in a mutually reinforcing cycle. The article also discusses the link between AIDS and conflict, focusing on the degree to which AIDS exacerbates national, regional, and global security dilemmas and undermines the international capacity to manage conflicts.[3]

Part III analyzes the emerging international response to the link between AIDS and security dilemmas as well as the potential ramifications for international theory and practice. With a focus on certain actions taken by the UN and the Clinton Administration, the article examines the impact of the global response on conventional understandings of the core concepts of national interest, sovereignty, and non-intervention.

The article argues that the intractable nexus between pestilence and international security precipitated a rethinking of traditional conceptions of national interest, security, and sovereignty. Mounting an effective global response to AIDS as a security issue required a re-conceptualization of national interest and security, as well as an integration of national interest and international interest. The policy proposals and pronouncements of key world leaders revealed a reflective reappraisal and critical rethinking of priorities in the throes of the pandemic – a process that sparked an unusually high level of international cooperation and engendered a new consensus about the synergy between national and international interests.

The article further contends that as the human needs/human rights concerns of AIDS victims are increasingly addressed by international organizations, the boundaries around the nation-state—reified by the institution of sovereignty—are under attack. Hitherto prohibited forms of intervention into erstwhile domestic zones[4] are more tolerated, permissible, desirable, and imperative; states are modifying their conceptions of national interest to embrace a broader vision of 'world interest;' the concept of international security itself is undergoing substantial revision and

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3. *See* International Crisis Group, *HIV/AIDS as a Security Issue* (2001), *available at* http://www.crisisweb.org/ projects/issues/hiv_aids/reports/A400321_19062001.pdf (last visited June 9, 2002). *See also* The International Crisis Group, *available at* http://www.intl-crisis-group.org/projects/showreport.cfm?reportid-321 (last visited June 9, 2002); United Nations Special Session on HIV/AIDS, *Fact Sheet: AIDS as a Security Issue, available at* http://www.unaids.org/fact_sheets/ungass/html/fssecurity_en.htm (last visited Sept. 20, 2002); UNAIDS Humanitarian Unit, *UNAIDS Initiative on HIV/AIDS and Security, available at* http://www.unaids.org/security/ Issues/human%20security/docs/SecurityInitiative.ppt (last visited Sept. 20, 2002).

4. *See* U.N. CHARTER, art. 2, para. 7.

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id.

transformation, and the principle of non-intervention is gradually being weakened.[5]

In sum, the Article also argues that the global response to AIDS as a security issue was a significant challenge to the statecentric international system and a key test of its ability to develop a viable normative framework for addressing governance dilemmas catalyzed and exacerbated by runaway globalization. The Article argues that global response suggested the limits of the state-centric system, and its epistemological enabler, political realism, when it comes to resolving the challenges of the emerging global society. By the same token, the response vindicates the growing relevance of neoliberal institutionalist approaches in explaining the heightened international cooperation required to respond to dire human needs as the processes of globalization accelerate at breakneck speed.

II. AIDS & SECURITY

AIDS is a security threat at both the micro-level and the macro-level, imperiling the domestic situation as well as the peace and tranquillity of international society. Due to the conterminous and mutually reinforcing symbiotic realities of HIV-pestilence, violence and security dilemmas in Africa,[6] AIDS is a multidimensional security threat. The Joint United Nations Programme on HIV/AIDS (UNAIDS)[7] and the International Crisis Group (ICG)[8] identified several important ways in which AIDS threatens security. The pandemic is concomitantly: (1) a personal security issue; (2) an economic security issue; (3) a community security issue; (4) a national security issue; and (5) an international security issue.[9] The first three above are, taxonomically, human security issues, whereas the last two are the more traditional or conventional global security issues. While these threats are discussed separately, it should be noted that they are interrelated and mutually reinforcing.

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5. In a lecture at Princeton University, the author argued that much like microbial pestilence, the growing threats posed by terrorists and other violent non-state actors require a proactive and multi-level internationalist foreign policy. To protect and defend our way of life, the U.S. cannot afford to ignore seemingly local problems in 'distant' lands as these issues can fester like a sore wound and eventually wind up infecting us. Thus even as the U.S. must engage in robust and necessary self defense involving the use of force, I contend that other and equally vital dimensions of "self-defense" require perennial and preemptive assessment, engagement and intervention. I advocated a strategy that included "multiple war-heads" some to be launched against poverty, pestilence, ignorance, oppression and other factors exacerbating human insecurity. *See* J.M. Spectar, Lecture for the James Madison Program in American Ideals & Institutions at Princeton University (Sept. 27, 2002).

6. *See* STOETT, *supra* note 2, at 33-34.

7. *See* International Crisis Group, *supra* note 3. *See also* United Nations Special Session on HIV/AIDS, *supra* note 3; UNAIDS Humanitarian Unit, *supra* note 3.

8. *See* UNAIDS Humanitarian Unit, *supra* note 3.

9. *Id.*

A. *AIDS & Human Security*

There is growing recognition that AIDS constitutes a serious human security threat, precipitating severe personal, social, cultural, and economic dislocations that manifest themselves on the global level. As the world awakens to this catastrophe, it is becoming even more apparent that human security is an inextricable aspect of international security. Yet, the notion of human security is itself relatively new in mainstream international political and diplomatic discourse. Commentators such as Peter Stoett have put forth a conception of human security that includes "analyses of those contemporary insecurities which affect us all, as individuals and as part of a global ecosystem."[10] The term has even found its way into the lexicon of James Wolfensohn, President of the World Bank, who has urged states to rethink their approach to security by embracing a focus on human security and its relationship to sustainable development:

> Security develops from within societies. If we want to prevent violent conflict, we need a comprehensive, equitable, and inclusive approach to development. . . . Security, empowerment and opportunity must be recognized as key to freedom from poverty – just as freedom from poverty must be recognized as key to security.[11]

Consequently, Wolfensohn urges development and aid agencies to give careful thought to "the nature of human security."[12]

On the human security plane, AIDS damages the individual and family, and, the disease also ravages economies and communities.[13] HIV/AIDS obliterates advances in health, life expectancy, and infant mortality; imperils agricultural and food production; fractures families and communities; and robs

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10. STOETT, *supra* note 2, at 23.

11. Press Release, The World Bank Group, *Wolfensohn Calls for "War on AIDS," available at* http://wbln0018.worldbank.org/news/pressrelease.nsf/673fa6c5a2d50a67852565e200692a79/a45ef563d190e01e85256862005384d5?OpenDocument (last visited Dec. 31, 2002) [hereinafter Wolfensohn].

12. *See id.*

13. For more on the social, cultural threats posed by the pandemic, see generally J. M. Spectar, *The Hydra Hath but One Head: The Socio-Cultural Dimensions of the AIDS Epidemic & Women's Right to Health*, 21 B.C. THIRD WORLD L.J. 1 (2001) [hereinafter Spectar, *Hydra Hath but One Head*]. With respect to the economic and developmental aspects of the pandemic; J. M. Spectar, *The Hybrid Horseman of the Apocalypse*, GA. J. INT'L & COMP. L. 253 (2001) [hereinafter Spectar, *Hybrid Horseman*]; J. M. Spectar, *Patent Necessity: Intellectual Property Dilemmas in the Biotech Domain & Treaty Equity for Developing Countries*, 24 HOUS. J. INT'L L. 227 (2002) [hereinafter Spectar, *Patent Necessity*].

young people of a "viable future."[14] As a result of AIDS, average life expectancy in sub-Saharan Africa has declined from about sixty-seven years to forty-seven years.[15] Thus, instead of reaching and exceeding the mid sixties by 2010-2015, as would have occurred in the absence of AIDS, life expectancy will regress on average to forty-seven years.[16] In addition, personal household income has fallen by as much as 25% in certain areas in a continent where three-quarters of the people are surviving on less than $2 per day.[17]

The pandemic is having a particularly brutal impact on Africa's children and their prospects or dreams for a better future. Child mortality rates are rising in countries with a high prevalence rate. For instance, up to 70% of deaths of Zimbabwean children under five is attributable to AIDS.[18] In 1998, nine out of ten children under fifteen that were infected with AIDS were Africans. Additionally, about 95% of all AIDS orphans have been African.[19] More than one child in every ten has lost a mother to AIDS, and, by 2010, there will be about forty million orphans in sub-Saharan Africa largely because of AIDS.[20]

As a consequence of these threats to personal security, fissures between social and ethnic groupings may be worsened thus potentially undermining the overall security situation.[21] Additionally, as AIDS manifests itself as a threat to personal security, there may be an upsurge of economic migrants and refugees.[22] Furthermore, children without jobs and prospects are more susceptible to joining or being forced to join local paramilitary groups.[23]

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14. *See* International Crisis Group, *supra* note 3; Spectar, *Hybrid Horseman*, *supra* note 13, at 258-68 (discussing the pernicious cycle between poverty, social insecurity, and pestilence).

15. UNAIDS, *AIDS Epidemic Update – December 2001*, *available at* http://www.unaids.org/worldaidsday/2001/ Epiupdate2001/Epiupdate2001en.pdf (last visited Jan. 2002) [hereinafter *AIDS Update – 2001*] (bi-annual report prepared by the Joint United Nations Programme on HIV/AIDS).

16. UNAIDS, *AIDS Epidemic Update – December 1998*, *available at* http://www.unaids.org (last visited Jan. 2, 2002) [hereinafter *AIDS Update – 1998*]. In the nine countries with an adult prevalence rate exceeding 10% (Botswana, Kenya, Malawi, Mozambique, Namibia, Rwanda, South Africa, Zambia, and Zimbabwe), projections reveal AIDS will on average cost them at least seventeen years of life expectancy. *See id.* For example, today, the average child born in Botswana has a life expectancy of forty-one years, when without AIDS, the life expectancy would be seventy years. *See* Kofi A. Annan, "We the Peoples," The Role of the United Nations in the Twenty-First Century, U.N. Sales No. E. 00.I.16 (2000), *available at* http://www.un.org/millennium/sg/report/full.htm (last visited Dec. 31, 2002). Largely due to AIDS, Botswana dropped twenty-six places down in the Human Development Index, a ranking of countries that considers life expectancy, wealth, and literacy. *See* AIDS *Update – 1998*.

17. *AIDS Update* – 2001, *supra* note 15.

18. *See id.*

19. *See AIDS Update* – 1998, *supra* note 16, at 3.

20. *See* Annan, *supra* note 16, at 27.

21. *See* International Crisis Group, *supra* note 3.

22. *See id.*

23. *See id.*

As an economic threat, the pandemic is having a devastating impact on Africa's economy and development prospects.[24] The pandemic imperils human capital and natural resource development as well as business investment—the critical pillars of national economies.[25] The Joint United Nations Programme on HIV/AIDS (UNAIDS) has dubbed AIDS a "destabilizing factor" because as parents and workers are felled by disease, the "structures and divisions of labour in households, families, workplaces and communities are disrupted."[26] This especially impacts women in developing countries who bear additional burdens due to these dislocations and disruptions.[27]

AIDS also reduces income levels, impedes economic growth, and damages the social fabric.[28] The pandemic has led to a spate of absenteeism, lower productivity, higher overtime costs, escalating death benefits, excessive health expenditures,[29] and additional costs for recruiting and training new employees to replace the dead and dying.[30]

As AIDS attacks the nerve centers of Africa's economy, the impact on the labor pool or human capital is particularly far reaching. Since AIDS in Africa kills most of the victims in their productive years (ages twenty-five to forty-four) the pandemic has attenuated the class of skilled labor such as teachers,[31] doctors, nurses, small business owners, and other members of the managerial and professional elite.[32] In the most affected African countries, the labor pool is expected to be 10-22% smaller, reducing the workforce by about 11.5 million persons.[33]

The pandemic is rapidly decimating key sectors in African economies such as agriculture, mining, and transportation.[34] Agricultural output is increasingly in jeopardy as millions of farm workers have died and continue

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24. *See, e.g.*, Spectar, *Hybrid Horseman*, *supra* note 13.

25. *See* International Crisis Group, *supra* note 3. *See also* Spectar, *Hybrid Horseman*, *supra* note 13.

26. United Nations Special Session on HIV/AIDS, *supra* note 3.

27. *See id. See also* Audry R. Chapman, *Conceptualizing the Right to Health: A Violations Approach*, 65 TENN. L. REV 389, 407-08 (1998) (noting the relative "disempowerment" of women in developing countries and the additional dangers they are exposed to as a result of their relatively "low status").

28. *See* United Nations Special Session on HIV/AIDS, *supra* note 3.

29. *See* Annan, *supra* note 16, at 27. For example, government forecasts in Zimbabwe indicate that about 60% of the health budget will be consumed by HIV/AIDS. *See id.*

30. *See* UNAIDS, *AIDS Epidemic Update – December 1999*, 5, *available at* http://www.unaids.org/ [hereinafter *AIDS Update – 1999*]. *See also* Spectar, *Hybrid Horseman*, *supra* note 13, at 261.

31. *See* Annan, *supra* note 16, at 27. In Côte d'Ivoire, a teacher dies of AIDS every school day. *See id.*

32. *See* Spectar, *Hybrid Horseman*, *supra* note 13, at 262-63.

33. *See* International Crisis Group, *supra* note 3, at 9. *See also* Spectar, *Hybrid Horseman*, *supra* note 13, at 262 (noting that a worsening AIDS pandemic triggered a teacher shortage in Central Africa).

34. *See* International Crisis Group, *supra* note 3, at 11.

to die from AIDS-related causes.[35] A United Nations FAO report indicates seven million farm workers have died from AIDS-related causes since 1985 and sixteen million more are expected to succumb to the virus in the next two decades.[36] Business investment and revenues have fallen dramatically, and there is evidence that companies are leaving Africa because of the impact of AIDS.[37]

Economists studying the impact of the pandemic calculate that the diminishing labor pool, along with rising welfare costs, reduced spending power, and lost investment opportunities are reducing the annual per capita growth in Sub-Saharan Africa by 0.5-1.2%.[38] It is estimated that the impact of AIDS-related illnesses will continue to reduce the rate of growth in Africa by about 1.4% each year for the next two decades.[39] Some estimates even indicate gross domestic product (GDP) could shrink up to 2% annually in certain countries with a prevalence rate higher than 20%.[40] If the loss of economic output continues to accumulate, it is estimated that high prevalence countries (including some of Africa's most industrialized states) could lose over 20% of GDP by 2020.[41]

AIDS is also a threat to community security because the threats to personal and economic security are also "threats to community and social cohesion."[42] It is feared that the burgeoning hordes afflicted by AIDS-induced poverty and dispossession may resort to crime.[43]

The threat of instability is further exacerbated as the pandemic weakens state institutions and undermines the possibility of good governance by affecting civil servants and government officials in the military, the police, and the judiciary.[44] The absence of effective state institutions to arrest the

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35. *See AIDS Update – 2001*, *supra* note 15.

36. *See id.*

37. *See* International Crisis Group, *supra* note 3, at 12 (citing HIV/AIDS: THE IMPACT ON SOCIAL AND ECONOMIC DEVELOPMENT, THIRD REPORT, 2001, HC-354-I) [hereinafter IMPACT, THIRD REPORT].

38. *See AIDS Update – 2001*, *supra* note 15.

39. *See* Jon Peter, *AIDS Sickening African Economies*, WASH. POST, Dec. 12, 1999, at A1-2.

40. *See* United Nations Special Session on HIV/AIDS, *supra* note 3, at 5. Similarly, a U.S. National Intelligence Council report reveals that in the most badly affected areas of Africa, AIDS has reduced GDP by one percentage point. *See id.* at 9.

41. *See* International Crisis Group, *supra* note 3, at 5. *See also AIDS Update – 2001*, *supra* note 15, at 5; Peter, *supra* note 39.

42. International Crisis Group, *supra* note 3, at 14. *See also* Spectar, *Hybrid Horseman*, *supra* note 13, at 265-66 (noting that the pandemic's extraordinarily harsh impact on the younger generation could fuel instability and unrest).

43. *See* International Crisis Group, *supra* note 3, at 14.

44. *See* United Nations Special Session on HIV/AIDS, *supra* note 3, at 5. Between 1998-2000, three-quarters of all fatalities in the Kenyan police force were reportedly due to AIDS. *See AIDS Accounts for 75% of Police Officers Deaths*, NATION, Nov. 27, 2000, at 14, *available at* http://www.nationaudio.com/News/DailyNation/27112000/News/News16.html (last visited Dec. 31, 2002). *See also* Peter Chalk & Jennifer Brower, *Infectious Disease and the Threat to National Security*, JANE'S INTELLIGENCE REVIEW, Sept. 1, 2001.

pandemic may result in social and political instability.[45] As the World Bank observes, "In countries where the state is weak or has ceased to exist, the long history of militarisation has brought about a gradual diffusion of violence through the splintering of official militaries and the emergence of guerrillas and warlords."[46] As people perceive their governments are failing or have failed to solve the problem, the level of discontent may rise further.[47] According to a British House of Commons report, "Evidence suggests that in societies facing economic crisis and lack of clear political leadership the presence of AIDS with its associated stigma may cause instability. The citizens are aware of the increase in illness and death, the stigma associated with it; and lack of leadership leads to blame."[48] In addition, as the citizenry becomes increasingly restive, the risk of "communal violence" against suspected disease carriers is increasingly likely.[49]

It is also increasingly apparent that AIDS thrives in conditions of socio-economic instability and insecurity.[50] Marginalized persons (migrant workers, refugees, ostracized minorities, etc.) subjected to "socioeconomic insecurity" are more susceptible to infection and are just as likely to go without treatment.[51] The lack of economic security also propels some people into the sex trade and its attendant health risks.[52] As the pandemic advances, it exacerbates conditions of socioeconomic instability and insecurity, thereby perpetuating a pernicious cycle of pestilence and high prevalence.[53]

B. National & International Security

Given the relationship between poverty, conflict, instability, and the spiraling African AIDS pandemic, it is apparent that issues of human and global security are inextricably linked. For example, the African AIDS pandemic is a "security crisis—because it threatens not just individual citizens,

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45. *See* United Nations Special Session on HIV/AIDS, *supra* note 3, at 5. *See also* International Crisis Group, *supra* note 3, at 15.

46. International Crisis Group, *supra* note 3, at 15.

47. *See id.*

48. *Id.* (citing, IMPACT, THIRD REPORT, *supra* note 37).

49. *See* International Crisis Group, *supra* note 3, at 17.

50. *See generally* Spectar, *Hydra Hath but One Head, supra* note 13; Spectar, *Hybrid Horseman, supra* note 13.

51. *See* United Nations Special Session on HIV/AIDS, *supra* note 3, at 5. Additionally, it has been observed that gender inequalities in sexual relations and socio-economic status exacerbate women's vulnerability to HIV infection. *See, e.g.*, Allyn L. Taylor, *Women's Health at a Crossroad: Global Responses to HIV/AIDS*, 4 HEALTH MATRIX 297, 314 (1994).

52. *See* United Nations Special Session on HIV/AIDS, *supra* note 3, at 5. As Peter Singer observes, the sex trade is often one of the few thriving businesses in post-conflict zones. *See* Peter Singer, *AIDS and International Security*, 44 SURVIVAL 145 (Issue No. 4, 2002).

53. *See also* United Nations Special Session on HIV/AIDS, *supra* note 3, at 5. *See generally* Spectar, *Hybrid Horseman, supra* note 13.

but the very institutions that define and defend the character of a society."[54] AIDS not only "contribute[s] to international security challenges" it tends to "undermine international capacity to solve conflicts."[55]

While there are many countries outside Africa where AIDS is spreading at an alarming rate, nowhere else has AIDS become "a threat to economic, social and political stability" on the scale seen in many parts of sub-Saharan Africa.[56] More specifically, AIDS is a *national security threat* in many African countries because it disproportionately affects military personnel, police, and peacekeepers and effectively undermining key entities that safeguard statehood. Consequently, Susan E. Rice, the former U.S. Assistant Secretary of State for African Affairs, called AIDS "the greatest threat ever to Africa's security and potential prosperity."[57] In the same vein, the Zambian representative to the Security Council called the pandemic "a threat to [African countries] very survival as viable nations."[58]

The AIDS pandemic has devastated African military personnel and thereby contributed to the weakening of national security and stability in many African countries. In some sub-Saharan African countries, the ministries of defense reported "averages of 20-40 percent positivity within their armed services." [59] Estimates indicate that as much as 50% of military personnel could be HIV positive in countries with adult prevalence rates higher than 20%.[60] It is not uncommon for prevalence rates in the military to far exceed civilian rates. For example, a 1998 UNAIDS report entitled "AIDS and the Military" noted that HIV infection rates among the military in Zimbabwe and Cameroon are three to four times higher than in the civilian population.[61]

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54. Vice President Al Gore, Remarks delivered to the U.N. Security Council Session on AIDS in Africa (Jan. 10, 2000) (transcript available at http://usinfo.state.gov/topical/global/hiv/00011001.htm (last visited Dec. 31, 2002)).

55. *See* International Crisis Group, *supra* note 3.

56. Press Release, U.N. Secretary-General, Kofi Annan Says Efforts Must Be Part and Parcel of Work for Peace and Security in Continent (Jan. 6, 2000), *available at* http://www.unaids.org/whatsnew/speeches/eng/ny100100ka.html (last visited Dec. 31, 2002). Similarly, UNAIDS maintains AIDS is rapidly becoming a "key issue for human security in sub-Saharan Africa." UNAIDS, *Report on the Global HIV/AIDS Epidemic – June 2000*, at 21 (2000), *available at* http://www.unaids.org/epidemic_update/report/Epi_report.pdf (last visited Dec. 31, 2002) [hereinafter *Durban Report*] (the report is also known as the *Durban Report*).

57. Susan E. Rice, former Assistant Secretary for African Affairs, Address at the Corporate Council on Africa Army/Navy Annual Meeting (Jan. 13, 2000) (transcript available at http://www.state.gov/www/ policy_remarks/2000/000113_rice_cca.html (last visited Dec. 31, 2002)).

58. Press Release, U.N. Security Council, Security Council Holds Debate on Impact of AIDS on Peace and Security in Africa (Jan. 10, 2000), *available at* http://www.un.org/News/Press/docs/2000/20000110.sc6781.doc.html (last visited Dec. 31, 2002) [hereinafter Press Release, Debate on Impact of AIDS].

59. *Id. comments of* Michel Duval.

60. *See* International Crisis Group, *supra* note 3, at 5.

61. DEPT. OF STATE, UNITED STATES INTERNATIONAL RESPONSE TO HIV/AIDS, 2, Dept. of State Publication No. 10589 (1999), *available at* http://www.state.gov/www/global/oes/health/1999_hivaids_rpt/1999hivaids.pdf (last visited Jan. 1, 2003) [hereinafter INTERNATIONAL

These high HIV/AIDS infection rates among military personnel could precipitate national security threats as military command structures are diminished and destroyed by the pandemic.[62] The increase in HIV-infected military personnel is steadily attenuating the ability of armed forces to protect their nations and preserve civil order as well as to have access to a healthy conscription pool.[63] As the disease advances, militaries are likely to experience "a debilitated leadership" and they will fail to meet military needs and commitments.[64]

In addition to its impact on national security, it is increasingly apparent that the pandemic is a threat to international security and stability, even if security is defined conventionally. As awareness grew about the potential impact of AIDS on international security, the pandemic was referred to variously as: a "real and present danger to world security;"[65] "the world's most dangerous insurgency;"[66] a "war more debilitating than war itself;" [67] "one of the most devastating threats ever to confront the world community;"[68] and "as

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RESPONSE] (citing UNAIDS, *AIDS and the Military: UNAIDS Point of View*, 2 (May 1998), *available at* http://www.unaids.org/publications/documents/sectors/military/militarypve.pdf/).

62. *See id.*

63. *See id.*

64. *See id.* After examination of the U.S. situation, analysts concluded the AIDS threat to U.S. military readiness and capabilities was a matter of "great concern." *Id.* at 47. Consequently, the U.S. started the U.S. Military HIV Research Program (USMHRP) in 1986 to minimize the impact of HIV on military readiness by monitoring the spread of HIV infection in military forces and developing methods to prevent infection. *See id.* The effort that included the Army, Navy, Air Force, and Marines, was billed as "a highly targeted research" focused on the U.S. military's concerns, including surveilling infection rates and studying HIV mutations worldwide, research/testing of vaccines, clinical studies to slow progression, and prevention programs. *See* INTERNATIONAL RESPONSE, *supra* note 61. The U.S. Department of Defense was also involved in efforts to protect vulnerable politico-military structures by conducting prevention-oriented military-to-military educational programs. *See id.* Meanwhile, the National Intelligence Council prepared national estimates on the potential impact of HIV/AIDS on military personnel around the world. *See id.* Similarly, Defense Intelligence Agency's Armed Forces Medical Intelligence Center (AFMIC) assessed HIV prevalence worldwide and provided forecasts about the impact of AIDS and other infectious diseases on U.S. national security interests and deployed troops. *See id.* at 49. The AFMIC also studied transnational health trends as well as the impact of infectious diseases on foreign military force readiness as well as on military and civilian healthcare infrastructures. *See id.* On the development front, the U.S. Agency for International Development (USAID) funded, through AIDS Prevention and Control (AIDSCAP), a global initiative called the Civil-Military Alliance on HIV/AIDS to provide network cooperation and information sharing opportunities among civilian and military populations worldwide. *See id.* at 8.

65. Vice President Al Gore, *supra* note 54.

66. Press Release, Debate on Impact of AIDS, *supra* note 58, *comments of* Mark Malloch Brown.

67. *Id. comments of* James Wolfensohn. Wolfensohn also remarked that AIDS is "a security crisis," which threatens global peace and stability, particularly on the African continent. *See* Wolfensohn, *supra* note 11.

68. Vice President Al Gore, *supra* note 54.

great a security challenge as [humankind] has faced since the founding of the Security Council."[69]

The pandemic threatens international security because it weakens states and heightens the potential for "increased turbulence and minor violence in the international system."[70] According to official U.S. analysis of the global AIDS situation, the pandemic "also risks becoming a major contributing factor to social and political instability in those countries with hundreds of thousands to millions of infected and affected citizens."[71] A U.S. State Department report noted that the spread of HIV/AIDS is "part of a crippling cycle affecting leadership and governance"[72] that in turn, undermines national and international security. The State Department concluded that the "collective hopes of new markets, foreign investment and stable democracies" could be threatened by the unbridled spread of HIV.[73] The State Department cited the tragedy in Rwanda and the upheaval in the countries of the former Soviet Union as exemplars that illustrate how "political instability and disease have reinforce[d] each other."[74]

AIDS is an *international security threat* because by striking at military personnel and limiting the pool of qualified persons for peacekeeping functions,[75] the pandemic acts as "an inhibitor of international response to security problems."[76] It has been observed that nations ravaged by the epidemic may not be able to "muster troops to keep peacekeeping commitments."[77]

The perceived link between AIDS prevalence and UN peacekeeping activities was brought to international attention, in large part, by Richard Holbrooke, former U.S. Ambassador to the UN. Mr. Holbrooke had been raising the matter of the link between peacekeeping and HIV/AIDS since 1992 when, as a private citizen, he visited UNTAC forces in Phnom Penh

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69. CNN, *U.N. Security Council Adopts First Health-Only Resolution on AIDS*, July 18, 2000 (quoting U.S. Ambassador Richard Holbrooke), *available at* http://www.cnn.com/2000/HEALTH/AIDS/07/18/un.aids/ (last visited Jan. 1, 2003) [hereinafter *First Health-Only Resolution*].

70. *See* International Crisis Group, *supra* note 3, at 21.

71. INTERNATIONAL RESPONSE, *supra* note 61, at 14.

72. *Id.* at 1.

73. *Id.*

74. *Id.*

75. *See id.*

76. International Crisis Group, *supra* note 3, at 22.

77. *Emerging Infectious Diseases Are a National Security Challenge to the United States*, Bureau of Oceans and International Environmental and Scientific Affairs, *available at* http://www.state.gov/www/policy (last visited Aug. 25, 2000) [hereinafter *Emerging Infectious Disease*] (redefining national security in light of the AIDS threat). *See also*, Ambassador Wendy R. Sherman, *Emerging Infectious Diseases Are a National Security Challenge to the United States, available at* http://www.state.gov/www/policy_remarks/1998/980325_sherman_diseases.html (last visited Aug. 25, 2000).

(Cambodia).[78] Holbrooke was so "disturbed by the fact" UN troops were "spreading AIDS"[79] that he immediately took up the issue with members of the UN.[80] Upon becoming U.S. Ambassador to the UN, Holbrooke brought the issue of AIDS and peacekeepers to the forefront of the global agenda. Holbrooke told a UN Security Council gathering, that it was "a fact" and "an unpleasant truth" that due to lack of proper training, education, and prevention techniques, UN peacekeepers were "spreading AIDS inadvertently." [81] As noted that peacekeepers and other international workers "must be made to realize" that in the AIDS virus, they faced "as deadly an enemy as the traditional enemies they usually come in contact with." [82] Similarly, Dr. Peter Piot, the Executive Director of UNAIDS, told UN officials the link between HIV/AIDS and UN peacekeeping, was a "significant" problem.[83]

Although there are no comprehensive statistics concerning HIV and AIDS among UN peacekeepers, many believe "the process of spreading is self-evident."[84] In particular, it is alleged that peacekeepers spread AIDS through "commercial sex with civilians."[85] Many of the world's 36,000 itinerant peacekeepers often "attract women who are working full-time or part-time as prostitutes."[86]

The purported link between AIDS and peacekeepers is strongest in Africa where the UN has deployed most of its peacekeeping operations.[87] In the view of Anwarul Karim Chowdhury, Bangladesh's representative, Africa's armed forces and civilian law enforcement personnel were "slumping as AIDS took a toll on their personnel."[88] Since these forces played a crucial role in

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78. *See Remarks Following the Security Council Vote Approving Resolution 1308, Regarding HIV and Peacekeepers,* July 17, 2000 (remarks by Richard C. Holbrooke), *available at* http://www.state.gov/www/policy_remarks/2000/ 000717_holbrooke_un.html (last visited July 28, 2000) [hereinafter *Remarks Following Vote*].

79. *See id.* Subsequently, Holbrooke also learned there were also some connections between UN peacekeeping activities and the prevalence of AIDS in certain African countries. *See id.*

80. *See id.* When the UN finally took up the issue in 2000, the Ambassador confessed he felt a "sense of grim satisfaction" that the Security Council had at long last, acted on a cause he had been championing for nearly a decade. *Id.* Richard Holbrooke's role in bringing the global AIDS pandemic to the forefront of the global agenda and in directing international attention to Africa's plight is certainly in the view of this author deserving of the highest commendations, including the Nobel Peace Prize.

81. *Id.*

82. *First Health-Only Resolution, supra* note 69.

83. *Id.*

84. *Id.*

85. UNAIDS Report, June 2000, at 50.

86. *First Health-Only Resolution, supra* note 69.

87. *See The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa,* REPORT OF THE SECRETARY GENERAL 9, *available at* http://www.un.org/ecosocdev/geninfo/afrec/sgreport/report.htm (last visited Aug. 11, 2000) [hereinafter *The Causes of Conflict*].

88. Press Release, Debate on Impact of AIDS, *supra* note 58, at 7.

peacekeeping, "their vulnerability to infection affected the defence of the peace."[89]

Due to the efforts of Holbrooke, Peter Piot and other leaders, UN members began to realize "the supreme irony" whereby the very UN peacekeepers charged with preventing conflicts, were actually spreading AIDS —"a disease even more deadly than the conflicts themselves." [90] There was a growing realization that to ensure a first rate defense, a "truly modern and effective military" had to take AIDS education and prevention "seriously." [91] It became clear that since AIDS was also a security threat, peacekeeping troops had to be as protected against "enemies like AIDS," as against conventional military foes.[92]

C. Linking the AIDS Pandemic & Conflict

Due to a multiplicity of internal and external factors, about half of the roughly two-dozen military conflicts raging around the world are in Africa.[93] At the same time, Africa has over 70% of the total HIV/AIDS cases, constituting about 28.1 million HIV-infected persons.[94] The perceived conterminousness between the prevalence of conflict and the AIDS pandemic appears strongest in Africa – a continent with about half of the roughly two-dozen military conflicts raging worldwide.[95] In fact, Africa with just about 10% of the world's total population has over 70% of the total HIV/AIDS cases, constituting about 28.1 million persons living with the virus.[96] Of the 5.4 million people newly infected with AIDS in 1999, four million were Africans South of the Sahara.[97] In 1999, over 90% of the 600,000-plus children infected due to mother to child transmissions were from sub-Saharan Africa.[98]

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89. *Id.*

90. *See Remarks Following Vote, supra* note 78.

91. *See id.*

92. *Id. See also The Causes of Conflict, supra* note 87.

93. *See* Press Release, Debate on Impact of AIDS, *supra* note 58, at 2.

94. *See AIDS Update – 2001, supra* note 15.

95. *See* Press Release, Debate on Impact of AIDS, *supra* note 58, at 2.

96. *AIDS Update-2001, supra* note 15. The 28.1 million figure was augmented by a total of over three million new infections since the last report that had a total of about twenty-five million infections in sub Saharan Africa. *See UNAIDS Report, June 2000, available at* http://www.unaids.org (last visited Aug. 2000). While AIDS "threatens" every region, the pandemic is especially destructive in "a broad swath of African states, endangering millions of lives." *Statement for the Record Submitted to the House Committee on Banking and Financial Services,* Washington D.C. Mar. 8, 2000, *available at* http://www.state.gov//www.policy_remarks/2000/000308_holbrooke_hiv-aids.html (last visited July 2000) (Statement submitted by Richard C. Holbrooke) [hereinafter *Statement for the Record*].

97. *See UNAIDS Report, June 2000, supra* note 96, at 8.

98. *See AIDS Update – 1999, supra* note 30, at 14. In the most AIDS-devastated cities of South Africa, 40% of pregnant women are HIV-positive. *See* Annan, *supra* note 16, at 27. In 1998, these mother-to-child transmissions also constituted about 5-10% of the total new infections in developing countries. *See* INTERNATIONAL RESPONSE, *supra* note 61.

HIV is the leading cause of death in the region,[99] responsible for the deaths of over fifteen million Africans since the onset of the pandemic.[100] The death toll continues to mount, particularly in sub-Saharan Africa. In 1998 alone, two million Africans died of AIDS, ten times the number who died in war.[101] Three years later, the estimated death toll from AIDS in Africa was about 2.3 million[102] with some estimates as high as 2.5 million. Most of these fatalities (about 85%) occur in the crescent of states from Kenya to South Africa.[103]

Despite the high AIDS death toll and infection rates, it remains unclear whether the unusual virulence of AIDS in Africa is *directly* attributable to the prevalence of violent conflict or vice versa. Even if AIDS itself does not cause conflict, it clearly exacerbates the overall security situation and thereby contributes to atrophy and ensuing violence. In a speech to the UN Security Council, Mr. Annan summed up the nexus as follows: "The breakdown of health and education services, the obstruction of humanitarian assistance, the displacement of whole populations and a high infection rate among soldiers—as in other groups which move back and forth across the continent—all these ensure that the epidemic spreads even further and faster."[104]

The fiery mix of war and AIDS wrecks the lives of those least able to defend themselves in developing countries and totally frustrates the realization of fundamental human rights, including right to health.[105]

Africa's wars have "seriously undermined Africa's efforts to endure long-term stability, prosperity and peace for its peoples,"[106]—and this is especially so in the context of the pandemic. For example, in the Democratic Republic of the Congo, where civil strife threatens the food supplies of over ten million people,[107] it is no coincidence that the rate of HIV prevalence is one

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99. *AIDS Update – 2001, supra* note 15.

100. *UNAIDS Report, June 2000, supra* note 96, at 7. The effect of the AIDS pandemic on Africa and the rest of the world was grossly underestimated. In 1991, estimates had predicted that by the end of the nineties, nine million sub-Saharan Africans would be infected and five million would die. *See id.* Yet, by 1999 UNAIDS/WHO reported that 23.3 million Africans were infected and 13.7 million Africans had died. *See AIDS Update – 1999, supra* note 99 at 5.

101. *See UNAIDS Report, June 2000, supra* note 96, at 21.

102. *See AIDS Epidemic Update - 2001, supra* note 15, at 14.

103. *See Statement for the Record, supra* note 96.

104. Press Release, United Nations, Secretary-General Says Fight Against AIDS in Africa Immediate Priority in Global Effort Against Disease, *available at* http://www.unaids.org/whatsnew/speeches/eng/ny100100ka.html (last visited July 2, 2000) [hereinafter Press Release, Immediate Priority].

105. *See generally* Spectar, *Hydra Hath but One Head, supra* note 13. International documents guaranteeing a right to health include Article 25 of the Universal Declaration of Human Rights, G.A. Res. 217 (1948), *reprinted in* BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW 143 (LOUIS HENKIN et al. eds.); the WHO Constitution; and, the International Covenant on Economic, Social and Cultural Rights (G.A. Res. 2200, 21 U.N. GAOR, supp. 16, at 52, U.N. Doc. A/6316 (1967).

106. *The Causes of Conflict, supra* note 87.

107. *See* Press Release, Immediate Priority, *supra* note 104.

of the highest in the world. Not surprisingly, UNAIDS concludes populations are more vulnerable in regions plagued by "famine, repression or violent conflict and war."[108] The ensuing social dislocation and disruption "create fertile settings for HIV transmission."[109] The United Nations Children's Emergency Fund (UNICEF) estimates that in African wars, food and medical shortages, along with "the stress of flight," have killed about twenty times more persons than all the armaments combined.[110]

The atrocities of war also have a particularly damaging impact on children's access to health as they "provoke displacement, aggravate levels of malnutrition and risks of disease, separate children from their families . . . exacerbate pre-existing discrimination of girls and minorities, and vastly reduce access to education and health services."[111] Additionally, children unable to escape conflict zones face forced military recruitment and prostitution, both of which expose such children to premature and dangerous sexual activity with high seropositive persons.[112] Children in refugee camps are also more likely to engage in sexual activity earlier, often without access to health education and HIV-prevention services.[113] Ironically, the main perpetrators of sexual violence in conflict situations are often themselves boys-cum-men who staff various official and unofficial armed units.[114]

As Michel Duval, the Canadian representative to the UN has observed, attempts by African governments to check the spread of AIDS are "hampered by civil strife, refugee flows, rapid urbanization and poverty; each of which, in turn, contributed to further spread of HIV/AIDS."[115] In particular, war can disrupt progress in a comprehensive plan to fight AIDS—as reportedly happened in the Democratic Republic of Congo, where "widespread pillaging" put an end to the anti-AIDS campaign.[116] As governments fail, or are chronically weakened, health systems falter rapidly, leaving populations increasingly prone to illness and even further economic decline.[117] In societies wracked by instability, this "cocktail of disasters is a sure recipe for more conflict," that in turn "provides fertile ground for further infections."[118] Additionally, AIDS overwhelms health systems by destroying the basic fabric of entire societies and precipitating "an unprecedented degree of gloom and

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108. *Fact Sheet, AIDS as a Security Issue*, *supra* note 3, at 5.

109. *Id.*

110. Stuart Malsen, *Symposium: Implementation of the United Nations Convention on the Rights of the Child*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 329, 330 (1996). Between 1986 and 1996, two million children died as a result of war alone. *See id.*

111. *Id.*

112. *See Fact Sheet, AIDS as a Security Issue*, *supra* note 3, at 5.

113. *See id.*

114. *See id.*

115. Press Release, Debate on Impact of AIDS, *supra* note 58, at 10.

116. *See id.* at 19.

117. *See* INTERNATIONAL RESPONSE, *supra* note 61 (National Interest Strategy).

118. Press Release, Immediate Priority, *supra* note 104.

despair."[119] Such conditions of utter hopelessness are in actuality are some of the "most virulent seeds of conflict." [120]

It is believed that the displacement of people associated with military conflict and civil unrest in sub-Saharan Africa may be spreading the epidemic.[121] Conflicts accelerate the spread of HIV/AIDS because "soldiers and displaced civilians on the move [are] important sources for disease dissemination."[122] The spiraling rate of infection in Rwanda after 1997, has been attributed to the "huge population movements" during and immediately after the years of ethnic strife.[123] Before the turmoil of the mid-1990s, relatively extensive surveillance of the HIV epidemic in Rwanda revealed a familiar pattern of infection: high rates in urban areas, but far lower rates (about 1%) in rural areas which were home to the bulk of the population.[124] The Rwandan conflict, and the consequent mass migrations,[125] "changed the shape of the epidemic," leading to higher infection rates, particularly in rural areas.[126] By 1997, survey results indicated an overall Rwandan infection rate of just over 11%, with "little difference" between urban and rural areas.[127] Among teenagers, infection was higher in rural areas than in cities, with up to 4% of twelve-fourteen year olds HIV-positive.[128] Furthermore, migrants who had spent years of conflict outside Rwanda had lower rates of infection than those who had been trapped in the internecine conflict.[129] HIV prevalence among Rwandans who had spent the conflict years in refugee camps was about 8.5%. Many of these people had fled from rural areas where the pre-conflict HIV rate was about 1.3%.[130] Similarly, a significant increase among pregnant women in Luanda, Angola, is believed to be linked to the displacement of people precipitated by the Angolan civil war.[131]

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119. Press Release, Debate on Impact of AIDS, *supra* note 58, at 9 (comments of Mr. Peter Van Walsum, Netherlands). Gelson Fonseca of Brazil echoed these comments, noting that the destruction engendered by AIDS leads to a climate of "despair and disarray that fuelled conflicts" *Id.* at 14.

120. Press Release, Debate on Impact of AIDS, *supra* note 58, at 9.

121. *See AIDS: A Challenge for Government, available at* http://worldbank.org/aids-econ/confront/confrontfull/ chapter1/chap1.html (last visited July 2000).

122. Press Release, Debate on Impact of AIDS, *supra* note 58, at 9 (according to Peter Van Walsum, representative of the Netherlands).

123. *AIDS Update – 1998, supra* note 16, at 12.

124. *See id.*

125. *See id.* About 75% of the 4700 people surveyed after the conflict in 1997 had lived elsewhere between 1994-1997, an "astonishingly high turnover" for a largely rural country. *See id.*

126. *See id.*

127. *See id.*

128. *See AIDS Update - 1998, supra* note 16, at 12.

129. *See id.* In particular, migrants returning from countries with "relatively strong" prevention campaigns such as Uganda and Tanzania had lower rates of HIV infection than those who had endured the strife. *See id.*

130. *See id.*

131. *See Report on the Global HIV/AIDS Epidemic 2000, available at* www.unaids.org, (last visited Sept. 20, 2002).

Massive refugee flows and long-term refugee camps have "severe social and environmental consequences" inimical to health and security.[132] The dramatic increase in HIV/AIDS prevalence in many refugee camps is fueled by dismal social conditions, including "overcrowding, violence, rape, despair and the need to sell or give away sex to survive."[133] Additionally, the AIDS crisis in the Congo was reportedly "exacerbated" by the millions of Rwandan refugees who poured into the country.[134]

Sudden and/or massive refugee flows have the potential of undermining the stability of the host states. The situation is especially grave when already marginal and unstable states are overwhelmed by large numbers of refugees "mingled with (fleeing) combatants."[135] For example, in the African Great Lakes area, the mingling of combatant and non-combatant refugees following the upheavals in Somalia and elsewhere, destabilized neighboring Zaire and other countries. [136]

The impact of huge refugee inflows on health and social well-being is particularly pronounced in Guinea—a country with the highest per capita refugee population worldwide.[137] About 10% of the population is war refugees fleeing Sierra Leone and Liberia,[138] and their presence is creating significant dislocations with implications for overall health and well-being. These "long-term" refugees have had a profound effect on Guinea's economy and resource by fueling rising unemployment and increasing the number of street children.[139] Additionally, the burden on local infrastructure including hospitals and sanitation facilities has been considerable.[140] Thus, refugee flows associated with these conflicts tend to create conditions conducive to the rapid spread of HIV.[141]

Meanwhile, military conflict and civil unrest may be spreading the epidemic[142] when rape is used as an instrument of war.[143] In some cases, rape has been used as a weapon of war "to humiliate and control the behaviour of civilian populations or to weaken the enemy by destroying the bonds of family

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132. *See The Causes of Conflict, supra* note 87.
133. *AIDS Update – 1998, supra* note 16, at 12.
134. *See* Press Release, Debate on Impact of AIDS, *supra* note 58, at 19.
135. *See The Causes of Conflict, supra* note 87.
136. *See id.*
137. *See id.*
138. *See id.*
139. *See id.*
140. *See id.*
141. *See* INTERNATIONAL RESPONSE, *supra* note 61 (National Interest Strategy).
142. *See AIDS: A Challenge for Government, supra* note 121.
143. *See UNAIDS Report, June 2000, supra* note 96, at 50 (noting that combatants frequently use rape as a weapon of war, thus increasing the likelihood of spreading the virus that causes AIDS and other STDs). *See id.*

and society."[144] The probability of HIV infection after rape by military men appears to be higher, since surveys show that in most countries STD infection rates among the military are about two to five times higher than those in comparable civilian populations.[145] In fact some sub-Saharan ministries of defense reportedly have "averages of 20 to 40 percent within their armed services."[146]

It is increasingly apparent that persons trapped in conflict and refugee situations "may have little control over their exposure to HIV and even to sex."[147] Ileka Atoki, the Congolese representative to the UN, claimed that during the Congo conflict,[148] the Ugandan military "sent into the field seropositive soldiers who raped women and girls in the occupied areas, causing HIV infection to increase exponentially."[149] Similarly, rape both inside and outside refugee camps has played a role in spreading HIV in the war torn areas of Rwanda, Ethiopia, and Somalia.[150] A random survey of Ethiopian refugees in a camp in Somalia in 1986 revealed that seventeen knew someone in their village, and, thirteen knew someone in their family who had been raped by the Ethiopian militia.[151] Similarly, over half of Rwandan women who reported they had been raped stated the rape occurred during the course of the conflict.[152] Women and young girls raped by military men suffer more than just the immediate physical and psychological trauma: they are tragically exposed to a much higher risk of HIV/STD infections as the forcible, unprotected sex often leads to torn vaginal or anal tissue, creating an easy entry point for the virus.[153] Among Rwandan women who had been raped, 17% were HIV-positive, as compared with 11% who had not. Additionally,

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144. *See id.* at 50. In Bangladesh's struggle for independence, 250,000 women were raped, resulting in about 25,000 pregnancies; 39% of Vietnamese boat women aged eleven-forty were abducted or raped at sea in 1985. *See id.*

145. *See id.* at 61.

146. Press Release, Debate on Impact of AIDS, *supra* note 58, at 10 (*citing* Michel Duval, Canadian representative at the UN).

147. *AIDS Update – 1998, supra* note 16, at 11.

148. Given that up to nine African countries were at various times involved in the Congo conflict, some have referred to the conflict as Africa's first World War.

149. Press Release, Debate on Impact of AIDS, *supra* note 58, at 19.

150. *See AIDS Update – 1998, supra* note 16, at 12 (noting that rape has "doubtless played a part in spreading the virus in Rwanda). The use of rape as a tool of war gives great urgency to the matter of a robust, effective and well-resourced international criminal court. *See id.* In that regard, it is necessary that all states sign and ratify the Rome Statute of the International Criminal Court, U.N. Diplomatic Conf. of the Plenipotentiaries on the Establishment of an ICC, U.N. Doc. A/CONF.183/9 (1998) (providing that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence are "war crimes" when perpetrated during armed conflicts, and, may in certain cases be deemed "crimes against humanity").

151. *See UNAIDS Report, June 2000, supra* note 96, at 50.

152. *See AIDS Update – 1998, supra* note 16, at 12. (According to the survey, 3.2% of Rwandan women had been raped).

153. *See UNAIDS Report, June 2000, supra* note 96, at 51.

female rape victims were three times as likely as those who were not raped to be afflicted with genital sores.[154]

In sum, the pandemic is demonstrating that the health of nations is integrally or intricately connected to the level of security or stability in a mutually reinforcing interactive relationship.[155] As governments channel disproportionate resources to war making, there is little left to allocate to the creation of social and economic safety nets required to realize the right to health. The UN Secretary General Mr. Kofi Annan summed up the situation as follows:

> By overwhelming the continent's health services, by creating millions of orphans and by decimating health workers and teachers, AIDS is causing social and economic crises which in turn threaten political stability. It also threatens good governance, through high death rates among the elites, both public and private. And high infection rates in the police and armed forces leave African States ill equipped to face security threats.[156]

The dovetailing of the human security threats and their impact on the national and international policies illustrates a new type of three-level game,[157] marked by fluid interactions of the personal, the national and the international levels. By blurring the distinction between matters of local versus global concern, AIDS is a "human security" dilemma that is simultaneously a global security issue.

II. THE GLOBAL RESPONSE & IMPLICATIONS FOR INTERNATIONAL LAW, POLITICS & DIPLOMACY: RETHINKING NATIONAL INTEREST, SOVEREIGNTY & INTERVENTION

This section of the article examines the international response to the link between AIDS and security dilemmas, and it analyzes the implications for conceptions of national interest, sovereignty and intervention. Focusing particularly on the transformational leadership of the Clinton presidency[158] as

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154. *See AIDS Update – 1998, supra* note 16, at 12.

155. The relationship between health and security is not new. Historians speculate that ill health in Rome fueled, in part, by the lead pipes used in Roman aqueducts was partially responsible for a spate of debilitating maladies that afflicted Rome's plutocrats, thus fueling the decline of that empire.

156. Press Release, Immediate Priority, *supra* note 104.

157. *See generally* Bob Putnam's analysis of two-level games in Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42:3 INT'L ORG. (1988).

158. Although the emphasis here is an examination of the Clinton Administration's policies in the period of intense international diplomatic activity leading to the UN resolution on HIV/AIDS (1995-2000), the article will also include a synopsis of the Bush II policies on

well as the UN Security Council resolution on HIV/AIDS, the article argues that a new consensus has emerged regarding the governance of global threats, such as AIDS. These new understandings integrate more seamlessly the national and the international interest with respect to the globalization of health. In addition, the heightened international coordination and cooperation on the AIDS problem is best explained by neoliberal institutionalist approaches as opposed to conventional realism.

At first, the world reacted to the unfolding pandemic with a mixture of denial and defeatist despair.[159] The initial global response to the AIDS pandemic was slow, uncoordinated and many international agencies bickered with each other over turf.[160] In particular, many African governments were demobilized by a paroxysm of debilitating denial about the scale of the pandemic unfolding before them.[161] Additionally, for the first decade of the epidemic, HIV/AIDS was viewed as a health issue affecting mostly gays and drug users.[162] To the chagrin of AIDS and human rights activists, a deafening silence enveloped the pandemic, as millions died around the world.[163]

Nevertheless, after being ignored or denied by many members of the international community during much of the eighties, the global AIDS pandemic and its wide-ranging ramifications have emerged as a key issue at the forefront of the global agenda. By the early nineties, African governments began to recognize HIV as "a real threat to the continent's future."[164] To affirm their seriousness, African leaders meeting at an OAU summit committed themselves to "exert all possible means to limit the spread and impact of the scourge."[165] The recognition of the ravaging AIDS pandemic as a security threat has created even more international attention, sparking "a new surge of momentum" and "a wide-range of action to fight AIDS around the world."[166]

The U.S. administration of William Clinton took a leadership role in rethinking and redefining U.S. national interests regarding international health, as well as in spurring a new global consensus about responding to AIDS as a security threat. Most significantly, the United States steered the Security Council towards the passage of a seminal resolution that crystallized and

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AIDS in Africa. *See infra* at part III. For an analysis of the impact of presidential change on international law see J.M. Spectar, *Elephants, Donkeys or Other Creatures? Presidential Election Cycles & International Law of the Global Commons*, 15 AM. U. INT'L L. REV. 975 (2000).

159. *See* Spectar, *Hybrid Horseman*, *supra* note 13, at 272-73.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. Press Release, Debate on Impact of AIDS, *supra* note 58, at 20 (statement of Ibra Deguene Ka, noting that the 1992 OAU Summit had adopted a resolution on the threat of AIDS).

165. *Id.*

166. *Statement for the Record*, *supra* note 96 (reporting a conversation with Mr. Peter Piot, head of UNAIDS, the UN's principal agency for fighting AIDS).

reflected the new global consensus on international health in a new era of accelerated globalization. Below, the article examines how the new global consensus about HIV-pestilence, as crystallized in large measure by the Council's resolution warrants a rethinking of several core concepts of international theory and practice, including concepts of national interest, security, sovereignty and the associated concept of non-intervention.

A. National Interest & National Security

National interest has often served as rationalization for the choices of statesmen, including their choice of particularly unpleasant courses of action. It appears as if the mere authoritative invocation of "national interest" by a statesperson is sufficient to chill debate on foreign policy questions and to affix the imprimatur of legitimacy on all actions, even including those that contravene principles of international law. Nonetheless, despite its common usage, the concept is often misunderstood. A particularly prevalent misconception relates to the frequent attribution of a reified and concrete meaning to the concept – a semantic transubstantiation that suggests orderings of national interest are largely impervious to the international ecosystem. After a brief examination of the historical meanings of the concept, the author will explore the case of the United States' response to AIDS to illustrate the process of re-conceptualization of national interest and the emergence of a new consensus about core priorities, values and interests. The article also argues that this re-conceptualization is best explained by neoliberal approaches that embrace the modification of core realist[167] variables as a result of continuous engagement in coordinated activity in response to a common problem.

Traditional understandings of national interest and security are anchored to the realist doxology of international relations. Realism, which has been traced back to Machiavelli's politico-historical analyses, made its American debut in the work of Hans Morgenthau and Kenneth Waltz.[168] Since Machiavelli's seminal work about princely statecraft, national interest has been a sacerdotal pillar of foreign policy, rationalizing a potpourri of actions and inactions. Neo-realism has three fundamental properties: the nature of man is characterized by an endless desire for increasingly more power; all states regardless of their size or capability are identical in their fixation regarding a specific concept of national interest as a guide to their actions; and the nature of the state system imposes rational constraints on the unrestrained pursuit of conflicting national interests via the balance of power.[169]

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167. *See* definition of realism *infra*.

168. *See* Robert W. Cox, *Social Forces, States and World Orders: Beyond International Relations Theory, in* FRIEDRICH KRATOCHWIL & EDWARD D. MANSFIELD, INTERNATIONAL ORGANIZATION A READER 343, 347 (1994).

169. *See id.* at 347. American realism, or neo-realism, is the "ideological form abstracted from the real historical framework imposed by the Cold War." *Id.*

As neo-realism developed into a problem-solving theory, history became a mere "quarry providing [the] materials" to demonstrate predictable variations on persistently recurring themes.[170] The approach, which became increasingly ahistorical, "dictates that, with respect to essentials, the future will always be like the past."[171] Notwithstanding its purported value neutrality, neo-realism is also embedded with an inherent normativity and performs a "proselytizing function": the theory rests on the assumption that given the experiences of all actors within the system, they will all adopt the neo-realist formula as a road map.[172]

Intrinsic to the neo-realist dogma is the notion that states act out of well-articulated and rationally derived interests in a process of calculation that is uninfluenced by moral or humanistic considerations. Waltz sums up the neo-realist conception of national interest as follows:

> [T]o say that a country acts according to its national interest means that, having examined its security requirements, it tries to meet them . . . Entailed in the concept of national interest is the notion that diplomatic and military moves must at times be carefully planned lest the survival of the state be in jeopardy.[173]

For Waltz, the "elusive notion of national interest" is made clearer by comparing nations and corporations: the latter presumably "seek to maximize expected returns" while the former "strive to secure their survival."[174] Nonetheless, despite this "assumed interest" it is difficult to generate "useful inferences" unless one can determine what steps are necessary for successful pursuit of the articulated interest.[175] Thus, to say a state seeks its own preservation or pursues its national interest is much more compelling if one can determine just what actions are necessitated by national interest.[176] As each state exercises its prerogative of choosing its own policies, choosing "effectively requires

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170. *Id.*

171. *Id.* (noting that the eighteenth century Neapolitan idealist, Giambattista Vico, criticized the "conceit of scholars" who purport that "what they know is as old as the world."). *Id.* at 348. It is equally wrong-headed to take a doctrine from one historical epoch and from a particular structure of international relations and to hold it up as universally true. *See* Cox, *supra* note 168, at 348.

172. *See id.*

173. *See* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 134 (1979).

174. *Id.* at 134. On the significance of self interestedness, both neorealists and neoliberals are in concurrence. *See* Alexander Wendt, *Anachy Is What States Make of It: The Social Construction of Power Politics*, *in* KRATOCHWIL & MANSFIELD, *supra* note 168, at 77, 77. Neorealists [as well as neoliberals] postulate the "self-interested state as the starting point for theory." *See id.* They assume states are the principal actors in the international system and they both conceptualize security in "self-interested terms." *Id.*

175. *See* WALTZ, *supra* note 173, at 134.

176. *See id.* (Both neorealist and neo-liberal rationalistic approaches treat the interests of state agents as "exogenously given" and they primarily examine how "the behavior of agents generates outcomes"). *See* Wendt, *supra* note 174, at 77.

considering the ends of the state in relation to its situation."[177] Even as large states are constrained by their situations, they are just as able to act to affect them.[178]

The traditional neorealist approach to national interest takes a sober view of the possibility of cooperative politics in an anarchic system marked by a naked propensity to self-help and self-promotion. The anarchic, ipso facto, self-help system, is also marked by a dearth of "central authority and collective security," thus leading to the "inherently competitive dynamics of the security dilemma and the collective action problem."[179] Given the prevailing conditions of self-help, state survival is the primordial value as "survival is a prerequisite to the achievement of other ends."[180] In pursuit of self-interest, a state calculates its actions according to the situation in which it finds itself.[181] Thus, relative gains could be more significant than absolute ones because one's gain counter-balanced against others', impacts the ability to shift for oneself.[182]

Under the competitive neorealist schema, only "simple learning or behavioral adaptation is possible; the complex learning involved in redefinitions of identity and interest is not."[183] Thus, in hobbesian[184] "competitive" schema (as well as in neoliberal "individualistic" security systems) power politics is inherently about "efforts to manipulate others to satisfy self-regarding interests."[185]

However, realist conceptions of national interest fail to capture the dynamic process of reflectivity about the interest matrix, particularly in institutionally-bounded settings where coordination is imperative. The fact of interest re-conceptualization within the context of patterned interactions is more adequately accounted for in neoliberal institutionalist approaches. Unlike neo-realism, which tends to ascribe a "low value on the normative and institutional aspects of world order,"[186] neo-liberal institutionalism is more optimistic about the possibility of warm cooperation; additionally, neo-liberal internationalism neither excludes moral goals nor reduces everything to power equations.[187] Neoliberals challenge the realists' dim view of cooperation arguing that "process can generate cooperative behavior," and that interests and identities can be transformed.[188] Neo-liberal institutionalists reject the notion of fixed exogenously structured interests, citing concepts such as

177. *See* WALTZ, *supra* note 173, at 134.
178. *Id.*
179. Wendt, *supra* note 174, at 77.
180. WALTZ, *supra* note 173, at 134.
181. *See id.*
182. *See id.*
183. Wendt, *supra* note 174, at 77.
184. Hobbes' Leviathan is often considered a precursor to modern realism.
185. Wendt, *supra* note 174, at 81. In neoliberal individualistic systems, states are mostly concerned with absolute rather than relative gains and collective action is more feasible despite the threat of egoistic free riders. *See id.*
186. Cox, *supra* note 168, at 352.
187. *See id.* at 348.
188. *See* Wendt, *supra* note 174, at 78.

"complex learning" [Joseph Nye], "changing conceptions of self and interest" [Robert Jervis] and "sociological conceptions of interest." [Robert Keohane].[189]

In effect, neoliberal institutionalist approaches assume that "institutions transform identities and interests," particularly within a milieu of "relatively stable practice."[190] Thus, within the context of patterned and reciprocal interactions, actors' identities shape or determine their interests. That is, actors do not perpetually carry an unchanging "portfolio of interests" that they cling to "independent of social context"; rather, actors continually or periodically reassess and "[re]define their identities in the process of defining situations."[191] Interests are defined through processes of "reciprocal interaction" and are "constituted by collective meanings" within "relatively stable social [institutional] structures."[192]

The process of creating institutions goes beyond imposing external constraints on the actions of exogenously constituted actors: it encompasses an internalization of "new understandings of self and other, of acquiring new role identities."[193] This constructivist analysis of cooperation focuses on the process whereby expectations generated by patterned interaction transform identities and interests.[194] This contrasts sharply with game theoretic analyses of cooperation wherein identities and interests that constitute the structure of

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189. *Id.* Elsewhere, this writer has discussed the role of epistemic communities in redefinition of interests and values. *See* J.M. Spectar, *Saving the Ice Princess: NGOs, Antarctica & International Law in the New Millennium*, 23 SUFFOLK TRANS. NAT'L L REV. 58, 96-99 (1999) [hereinafter Spectar, *Saving the Ice Princess*]. *See also* Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1990); Peter Haas, *Do Regimes Matter? in* KRATOCHWIL & MANSFIELD, *supra* note 168, at 128, 133-37.

190. Wendt, *supra* note 174, at 85.

191. *Id.* at 80. Identity is an inherently "role-specific understanding and expectation about self" that exists "within a specific, socially constructed world." *Id.* at 83.

192. *Id.* at 83 (emphasis added). These patterned interactions between transnational elites, enmeshed in an interactive network of rules, principles and norms, constitute the substratum of a vibrant Grotian international order. *See* Stephen Krasner, *Structural Causes and Regimes Consequences: Regimes as Intervening Variables*, *in* KRATOCHWIL & MANSFIELD, *supra* note 168, at 97, 101. An on-going interaction may become "embedded in a broader social environment that nurtures and sustains" the preconditions for its operation. *Id.* at 100-01. These "complex [and] persistent patterns" of interaction eventually become suffused with "normative significance" giving rise to regimes. *Id.* at 99. (Regimes are thus defined as "sets of implicit or explicit norms, rules, decision-making procedures around which actors' expectations converge in a given area of international relations"). *Id.* Patterned conduct that reflects on-going assessments (and re-assessments) of interest tend to give rise to regimes, that, in turn, reinforce patterned actions. *Id.* at 100-01. In a Grotian international order, regimes constitute a "significant and pervasive phenomenon" deserving of the sort of attention accorded to variables such as power. *Id.* at 97, 101.

193. Wendt, *supra* note 174, at 87.

194. *See id.*

the game are frozen in a black box and thereby considered "exogenous to interaction."[195]

The accretive process, whereby egoists learn cooperative behavior, is simultaneously a "process of reconstructing their interests in terms of shared commitments to social norms."[196] Thus, even if egoistic reasons are the starting point, the process of cooperation – in the absence of "negative identification" – incrementally recasts those original reasons by "reconstituting" and refocusing identities and interests in light of "new intersubjective understandings and commitments."[197]

Although such transformation in interest conceptualization is largely unintended, there is always the prospect of "critical [strategic] self-reflection" marked by "self-conscious efforts" to dramatically alter the prevailing configurations of identity and interest.[198] Despite the constraining social determinants of self, the "personal determination of choice," catalyzed by reasons for new thinking and unprecedented situations, could impel actors to change their identities and interests and thereby reinvent the game in which they are "embedded."[199] If other actors reward the new practices ushered in by new thinking, this reciprocity lays the foundation for a new process of socialization that leads to the re-conceptualization of identities and interests.[200]

As emergent cooperative patterns are transformed into a mature cooperative security system, states re-conceptualize basic realist variables, such as interest and security. In such cooperative systems, states "identify positively with one another" such that each state's security is viewed as a collective responsibility.[201] In effect, the relevant "self" for purposes of interest conceptualization is "the community" and "national interests are

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195. *Id.* at 86.

196. *Id.* at 87.

197. *Id.* at 88.

198. *See id.*

199. Wendt, *supra* note 174, at 89. Wendt cites the "New Thinking" of Mikhail Gorbachev as an instance and he lamented the fact such critical strategic theory and practice had received scant attention from the students of international politics. *See id.* Rather than taking extant institutions and social power relations as givens, critical theory "stands apart from the prevailing order of the world and asks how that order came about." *See* Cox, *supra* note 168, at 346. Critical theory is geared towards an assessment of the:

> very framework for action, or problematic, which problem-solving theory accepts as its parameters. Critical theory is directed to the social and political complex as a whole rather than to the separate parts . . . the critical approach leads towards the construction of a larger picture of the whole of which the initially contemplated part is just one component, and seeks to understand the processes of change in which both parts and whole are involved.

Id. Whereas the problem-solving theories are favored in conditions of apparent stability, "a condition of uncertainty in power relations beckons to critical theory as people seek to understand the opportunities and risks of change." *Id.*

200. *See* Wendt, *supra* note 174, at 90.

201. *Id.* at 81.

international interests."[202] Identification with the community varies from limited "concerts" to extensive collective security arrangements.[203] The character or practices of the emergent "collective self" is in differing degrees "altruistic or prosocial" and consequently, states' efforts to advance their interests (power politics) are restructured "in terms of shared norms rather than relative power."[204] Thus, being treated by others in "empathic" ways regarding security allows for the "positive identification with others necessary for collective security."[205] Conversely, predatory and aberrantly aggressive egos or bad apples will contaminate the system, forcing other states to behave likewise.[206]

The mix of national interests is neither fixed nor exogenously ordained: in a dynamic international system, interests are progressively transformed or modified by new knowledge and patterns of sustained interactions. With respect to AIDS, the global focus on HIV/AIDS as a security threat was spurred, in part, by a decisive rethinking of U.S. national interests with regard to international health and a more comprehensive view of nexus between national and international security, broadly conceived.[207] The conceptions of U.S. national interest and security (traditional realist variables) were transformed by new understanding about the catastrophic potential of the AIDS, new knowledge about the processes of bio-globalization and visionary reflectivity regarding these new trends. New thinking about security in the vortex of the pandemic ushered in a novel "consensus"[208] about imperative values intrinsic to the long term sustainability and governance of a nascent global society besieged by seemingly implacable microbial foes.

In effect, the new thinking on international security in the era of AIDS was arguably fueled by a "breakdown of consensus"[209] about possibilities of statecentrism in the era of bio-globalization. Just as the collapse in consensus about the possibilities of Marxist-Leninism precipitated Gorbachev's perestroika,[210] so too did the international community awaken to a new way of thinking about national and international interests in the era of globalization and a most ominous plague. Next, the article examines more closely the gradual transformation and re-conceptualization of U.S. national (security) interests with respect to AIDS in Africa and their integration into conceptions

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202. *Id.*

203. *See id.*

204. *Id.*

205. *Id.* at 83.

206. *See* Wendt, *supra* note 174, at 83.

207. *See generally Emerging Infectious Diseases*, *supra* note 77.

208. Wendt, *supra* note 174, at 89. Wendt argues that a "breakdown in consensus" about commitments regarding the Soviet Leninist logic precipitated Gorbachev's abandonment the conflict-laden schematic. *See id.*

209. *Id.*

210. *See id.* Wendt attributes the demise of Marxism-Leninism to a breakdown in the old consensus regarding the viability of that ideology in a changed world. *See id.*

of international interests – at least on the matter of responding to the global AIDS pandemic.

1. Redefining Interests & Priorities in a Changed World: The U.S. Case

In the mid eighties, the Reagan and Bush administrations were in possession of highly classified intelligence reports about the potential scale and scope of the burgeoning AIDS pandemic.[211] Yet there was a prevailing view among U.S. officials that AIDS in Africa and other developing countries was of very little concern to the United States.[212] In other words, staving off the looming epidemic was not in the national interest, and hardly a subject for national security officials to devote significant attention. In fact, two CIA analysts, Katherine J. Hall and William L. Barrows, were rebuffed by the CIA when they sought agency backing to study the mushrooming pandemic.[213] For a three year period (1987-1990), the CIA rejected requests for personnel and resources to study the epidemic, arguing that it was not an appropriate issue for intelligence agencies.[214]

By 1990, the CIA relented and it sanctioned an intelligence appraisal of the burgeoning epidemic.[215] The resultant classified document titled "The Global AIDS Disaster" (Interagency Intelligence Memorandum 91-10005 of July 1991), predicted that AIDS will grow to catastrophic proportions with a projected 45 million infections by 2000.[216] At about the same time, a World Health Organization (WHO) report predicted that that tens of millions would be infected and would eventually die by 2000.[217] The CIA's report on the global AIDS disaster as well as other reports predicting similar calamities were reportedly greeted with "indifference" and inaction by Bush administration officials.[218]

The indifferent or lackluster U.S. response to AIDS in the Reagan and Bush administrations was, in part, a function of the conventionally myopic approach to assessing national interest. This traditional conception of national interest was wedded to the notion of narrow strategic issues related to power and positioning, as shaped by the post Cold War era. It was also fueled by a

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211. *See generally* Barton Gellman, *Death Watch: The Belated Global Response to AIDS in Africa, available at* http://washingtonpost.com/issues/aidsinafrica/A47234-2000Jul14.html (last visited July 14, 2000). The discussion here is a more comprehensive treatment of the national interest issue raised in one of my earlier articles. *See* Spectar, *Hybrid Horseman, supra* note 13, at 256-73 (briefly alluding to the national interest issue).

212. *Id.*

213. *See id.*

214. *See id.*

215. *See id.*

216. *See id.*

217. *See* Spectar, *Hybrid Horseman, supra* note 13, at 256-73.

218. *See id.*

sense that Africa was not an area that the United States needed to concern itself about, except perhaps for its Cold War-bound strategic interests in gaining access to certain resources and important straits or sea lanes.[219] Further, there was such a degree of apathy in some circles that it prompted this writer to dub the African continent the poster child for man's indifference to man.[220] As one U.S. official stated, the epidemic "will be good, because Africa is overpopulated anyway."[221] The large populations and high unemployment rates meant African militaries could also draw from a "limitless [and fungible] pool of unemployed men" to replace AIDS fatalities.[222] Others cynically observed that the deaths of senior African military officials from AIDS would improve morale as more junior officials would be buoyed by the possibility of promotions to higher ranks.[223] In sum, the consensus among administration analysts was that even if the epidemic was going to be as large as predicted, combating AIDS was not in the U.S. national interest, and in any case, there was little the U.S. could do to prevent it.[224]

Following the arrival of the internationalist Clintonites in Washington, one could discern a shift in the rhetoric, tone and substance of U.S. foreign policy with regard to Africa and AIDS.[225] There was a sense that President Clinton would be both more internationalist and more pro-Africa in his articulation of foreign policy goals. These expectations were, for the most part, fulfilled; although, several contradictions and blunders marred Clinton's

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219. *See infra*.

220. *See* Comments by author, Human Rights Symposium, University of Connecticut, December 2001.

221. Gellman, *supra* note 211, at 3. *See also* Spectar, *Hybrid Horseman, supra* note 13, at 256-73.

222. *See* Gellman, *supra* note 211, at 3. One U.S. official reportedly stated: "If you have one 18-year old with a Kalishnikov and he dies, you find another 18-year-old." *Id.*

223. Gellman, *supra* note 211, at 3.

224. *See id.*

225. *See* Tom J. Farer, *International Law: The Critics are Wrong*, *in* FOREIGN POLICY 22 (1988). Tom Farer defines internationalism as an overall "foreign-policy orientation" marked by "international cooperation, international law and institutions, economic interdependence, international development, diligence in seeking arms control, and restraint in the use of force." *Id.* Internationalist foreign policy-making is facilitated by the participation of governing elites (specialists and generalists), global citizens, and, members of epistemic communities who share some or all of the following traits: a critical understanding of how global and local (domestic) processes/problems interact; compassion, solidarity, empathy and goodwill towards all human beings *qua* human beings; a favorable disposition towards constructive cooperative and multilateral approaches to global governance; respect for international human rights; support for international law; and, a willingness to challenge, exhort, and, *lead*, the domestic populace to look beyond borders, and to seek the greater good and long term happiness of *all* humankind – even at some marginally higher short term cost. *See id.* U.S. foreign policy sometimes alternates or oscillates between variants of internationalism and feckless flirtations with isolationism, depending upon the quality of extant presidential leadership and the attendant coterie of foreign policy courtiers. *See id.* Elsewhere, I have discussed presidential election cycles and their impact on the internationalist quality of legal positions staked out by the United States in negotiations over the global commons. *See generally* J.M. Spectar, *supra* note 158.

Africa record.[226] For purposes of this article, it sufficeth to say that the new administration was more responsive to the intelligence estimates about the impact of AIDS, and it took steps to raise the profile of the pandemic in U.S national interest articulation and formulation.

The Clinton-Gore administration effectively presided over a dramatic redefinition of U.S. national interests in light of the new age of bio-globalization and ancillary governance dilemmas. The administration's redefinition of national interest with respect to the pandemic was partly fueled by "new" facts and findings about the interconnectedness of global processes, a greater appreciation of the challenges of global governance, as well as by the determined efforts ardent spokespersons with a deep concern for Africa. In effect, a paradigmatic re-interpretation of U.S. interests and obligations was increasingly evident throughout the Clinton Administration—a shift marked by a growing focus on a range of issues hitherto confined to the under valued realm of "low politics." This transformation eventually culminated in U.S. leadership on the passage of the Security Council Resolution on HIV/AIDS and the emergence of a new global consensus on security.

Clinton administration officials were spurred to action not just by data showing the extent of the pandemic, but by a growing understanding of the increasingly interconnected nature of the threats confronting the United States. In particular, U.S. policy makers were making new interconnections between the escalating threats posed by major infectious diseases (AIDS, tuberculosis, malaria, cholera, and hepatitis) and a range of other U.S. interests in the age of globalization. The growing recognition and articulation of these interconnections increasingly shaped the development of U.S. foreign policy goals by senior officials. The public perorations of U.S. officials about the interconnections between infectious diseases, communications technology, mass migrations, and security in a closely connected globalizing planet provided evidence of critically reflective and "self-conscious efforts"[227] to significantly change the prioritization of key U.S. interests.

A close examination of the Clinton Administration foreign policy, especially from 1995-2000, reveals a marked shift in articulation of U.S. foreign policy goals – at least on the priority accorded issues of global health. The Clinton administration intentionally changed U.S. rhetoric, as well as diplomatic posturing on AIDS, paving the way for a surge of internationalist activism on a global scale. Partly due to strong presidential leadership, the

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226. While a general analysis of Clinton's Africa policies is well beyond the scope of this article, some of the more glaring failures and missed opportunities included the Somalia debacle as well as the Clinton's administration's inability/unwillingness to help contain the massacre in Rwanda. (Arguably, the administration became gun-shy after the Somalia morass and retreated from further military engagement in Africa's unceasing military quagmires). In addition, the administration's initial backing of pharmaceutical companies on the matter of compulsory licensing of AIDS therapies as well its ill-timed and ill-fated bombing of a Sudanese factory left many observers befuddled.

227. Wendt, *supra* note 174, at 88.

new conceptions of national interest, national security, and world interest were increasingly integrated into U.S. foreign policy pronouncements and positions. In addition, the Clinton administration provided commendable international leadership[228] as it worked ensure the global diplomatic agenda included efforts to combat the global AIDS pandemic.

By the mid-nineties, the Clinton administration was confronted with data about the scope and potential ramifications of the AIDS virus and other microbial threats.[229] The administration was quickly spurred into developing a global effort to fight infectious diseases because it recognized the futility of unilateral efforts in an era of accelerating bio-globalization. It was apparent that the staggering costs of controlling the coming microbial threats far outstripped "the means available to any one country or international organization to respond completely."[230] In addition, a 1995 report by the National Science and Technology Council's Committee on International Science, Engineering and Technology (CISET) revealed that the annual aggregate cost to the United States for infectious diseases exceeded an estimated $120 billion.[231]

The Clinton Administration was also impelled to critically rethink national interest and security because of the confluence of related events, including the extant revolution in communications technologies (that made the world even smaller), as well as the quickening processes of globalization. Due to rapid technological growth and the increasing mobility of populations, threats that were once perceived as local could now have catastrophic consequences on a regional or global scale.[232] As the pace of bio-globalization quickened, U.S. leaders recognized they had to adjust their conception of international security to reflect a new world of increasingly menacing globetrotting viruses. Wendy Sherman, a diplomat in the Clinton administration stated:

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228. *See id.* The Clinton Administration's Africa record was occasionally marred by some notable failures and squandered opportunities. As Ambassador Sherman stated, U.S. "responses to these challenges must engage the foreign affairs and national security community along with the health community here and abroad." *Emerging Infectious Diseases, supra* note 77.

229. Reasons for the resurgence and proliferation of microbial threats include: "[g]rowing global population, changes in climate, massive demographic shifts, poverty, greater population mobility and other imbalances between people and nature . . . . Industrialization and even health technologies such as antibiotics have had unintended consequences, including the development of antibiotic resistance." *Id.* (Remarks by former Ambassador Wendy Sherman).

230. *Id.* (Bureau of Oceans and International Environmental and Scientific Affairs). For its part, the U.S. State Department set up an Emerging Infectious Diseases and HIV/AIDS Program (EID) under the auspices of the Bureau of Oceans and International Environmental and Scientific Affairs. *See id.* The EID Program is the nerve center for the development and implementation of U.S. foreign policy objectives with regard to the resurgence of microbial threats and HIV/AIDS. *Id.* The EID Program represented the State Department to departments in the U.S. government as well as to foreign governments and international organizations. *See id.*

231. *See id.*

232. *See Emerging Infectious Diseases, supra* note 77.

> Infectious microbes do not recognize international borders. The modern world is a very small place where any city in the world is only a plane ride away from any other. Infectious microbes can easily travel across borders with their human or animal hosts, in the food and products we trade. No nation is impervious to these health threats. Beyond the terrible AIDS pandemic and the more exotic, publicized diseases such as the Ebola virus in the former Zaire, lie a wide range of microbiological threats.[233]

Noting that these diseases are "the silent enemies of economic growth, national well-being and stability around the globe," Sherman observed that "the threats they pose and the devastation they portend give reason to reexamine how we define 'national security.'" [234]

By the end of the nineties, the Clinton Administration was effectively treating emerging infectious diseases as growing global health threat capable of imperiling several U.S. national interests. The administration believed U.S. national interests were affected because infectious diseases are a challenge to health and economic productivity,[235] as well as a danger to economic development and political stability abroad. [236] In addition, there are "potential dangers of bio-terrorism,"[237] as well as the "necessity of enhanced preparedness to safeguard the U.S. and the global community against the threat of infectious diseases." [238] Furthermore, the U.S. faces the challenge of mobilizing technical and financial resources "to reduce human suffering and stem further disease transmission."[239] Additionally, intelligence reports began to indicate that AIDS and other ravaging epidemics will eventually be significant triggers of conflicts in the Third World, and, in some cases, determine the results of conflicts in the near future.[240] Also, the potential of destabilizing mass migrations spurred by disease and conflict was a source of concern to some analysts.[241] For these reasons, the Clinton Administration gradually expanded its notions of national security to embrace the fight against

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233. *See id.*
234. *Id.*
235. *See id.* (Bureau of Oceans and International Environmental and Scientific Affairs).
236. *See id.*
237. *Id.*
238. *Emerging Infectious Diseases, supra* note 77.
239. INTERNATIONAL RESPONSE, *supra* note 61.
240. *See, e.g.*, Chalk & Brower, *supra* note 44.
241. *See, e.g.*, Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, INTERNATIONAL SECURITY. Policy makers have not shown sufficient appreciation for the destabilizing potential of extant and future mass migrations fueled by disease, resource-diminution, famine, war and poverty. *See id.* As this writer warned in an earlier piece, U.S. presidents in the new millennium must be prepared to contend with inter alia, "mass migrations" from failed states. *See* Spectar, *supra* note 158, at 1037-38.

AIDS – a pandemic it described as "one of the most significant health and security challenges facing the global community."[242]

Consequently, in 1999, the U.S. called on governments around the world to "recognize the political and economic security implications of the pandemic" and to support a vigorous and sustained response to the disease as a major national and international priority.[243] To illustrate this new commitment, the USG sought to "broaden" its approach to infectious disease issues and to include AIDS related issues at the heart of discussions with national leaders at the highest levels.[244] In sum, the increasing awareness of the changes wrought by bio-globalization and associated processes compelled a reassessment of priorities—if only because of the harrowing scenarios conjured by inaction. As Samuel Berger, national security adviser to former president Clinton stated:

> We understand, I think, . . . [in a] global age, and a global economy that instability in other parts of the world which can lead to war and conflict can have a direct effect on the United States. And I think we have an obligation to act with others to try to both deal with the consequences and increase the degree of education and prevention to try to slow this down.[245]

Besides the policy-oriented reasons for the reformulation of U.S. interests, the "self-conscious" reflectivity and zealous advocacy of key U.S. spokespersons catalyzed the process of rethinking and reassessment. The most ardent articulator of Clinton Administration policy on the global pandemic was Richard Holbrooke, a former UN Ambassador. It can be argued that Holbrooke, with some assistance from Vice President Gore, was the pivotal actor in the redefinition of U.S. national interests in this area. For Ambassador Holbrooke, the battle against AIDS was clearly the premier issue of the global agenda:

> Of all the problems that we face in the world today and there are many—the conflicts we are here to try to prevent or

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242. *Emerging Infectious Diseases*, *supra* note 77 (Bureau of Oceans and International Environmental and Scientific Affairs).

243. U.S. Department of State, *U.S. International Response to HIV AIDS*, Office of the Spokesman Press Statement, (Mar. 16, 1999), *available at* http://secretary.state.gov/www/briefings/statements/1999/ps990316.html (last visited Jan. 13, 2003). As Ambassador Sherman stated, the U.S. has "practical as well as humanitarian reasons for broader international action against infectious diseases." *Emerging Infectious Diseases, supra* note 77, at 2.

244. *Id.*

245. *See* Online Newshour, National Security Threat, *available at* http://www.pbs.org/newshour/bb/health/jan-june00/aids_threat_5-2.html (last visited Mar. 3, 2003).

> contain; nuclear proliferation, population issues, environmental issues, and social and economic issues--I think that [AIDS] is the most serious problem we face because of the damage that it can do to everything else.[246]

As Richard Holbrooke argued, it is in the interest of states to "broaden the paradigm of security" by focusing on issues such as AIDS and refugees.[247] Holbrooke challenged policy makers to reassess their view of AIDS as just another health issue. Such thinking was imperative to grapple with the "the greatest global pandemic of our time," which had quickly morphed into diplomatic, economic, trade, security and human rights issue.[248] Holbrooke maintained the global scope of the pandemic necessitated concerted international action:

> AIDS is not just the problem of a single country. It is not just an African problem. It cannot be treated simply as a problem of a single continent. In a world defined by globalization and interdependence—two of the catchwords of the modern era—we can't do triage by countries or continents. And we can't simply focus on economic interdependence. We have to recognize that while interdependence gives economic opportunities, it also can pose global threats. You cannot deny AIDS a visa; you cannot embargo it or quarantine it; you cannot stop it at a border. That's why we must work together.[249]

Besides redefining its own strategic priorities to include the war against HIV/AIDS, the U.S. urged other nations to make AIDS a priority. President Clinton placed infectious disease in his agenda during both of his African trips,[250] where promised assistance to fight AIDS and challenged Africans to take responsibility. In addition, President Clinton subsequently included AIDS in his agenda for all regions, including the Economic Summit with the major industrialized nations (G-8) at Okinawa.[251] Similarly, during her 1999 visits to

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246. *Remarks Following Vote, supra* note 78.

247. *Statement During the Open Meeting on the Month of Africa*, New York, Jan. 31, 2000, *available at* http://www.state.gov/www/policy_remarks/2000/000131_holbrooke_africa.html (last visited July 19, 2000) (Statement by Ambassador Holbrooke).

248. *Statement for the Record, supra* note 96.

249. *Remarks Following Vote, supra* note 78.

250. *See Emerging Infectious Diseases, supra* note 77. *See also Clinton Embarks on Trip to Nigeria's Struggling Democracy, available at* http://www.cnn.com/2000/WORLD/africa/08/25/clinton.africa/index.html (last visited Aug. 25, 2000). In that visit, President Clinton offered Nigeria additional financial support in its struggle against infectious disease. *See id.* at 2.

251. *See Emerging Infectious Diseases, supra* note 77.

Mali, Guinea, Sierra Leone, Nigeria, Kenya, and Tanzania, Secretary of State Albright included HIV/AIDS in her discussions with African Heads of State.[252] In addition, U.S. Ambassador Holbrooke's diplomatic missions to Africa placed the AIDS crisis, along with the related issue of conflict at the top of the agenda.[253]

Nevertheless, given the politicized context of these determinations and policy initiatives, there was considerable dissension about this national interest re-prioritization, especially among certain republican ranks. For example, in the United States, Senate Majority Leader Trent Lott stated that he did not consider AIDS to be a threat to national security and he accused the White House of playing politics with the issue. [254] In addition, while testifying before the Senate Relations Committee, Holbrooke disclosed that the U.S. "idea" to hold a special Security Council session on AIDS was "initially met with some resistance, including from inside the U.S. Mission."[255]

The dissenting views notwithstanding, U.S. leadership on this issue was clearly causing the rest of the world to fall in line. Partly as a result of U.S leadership, the pandemic was one of the main issues in the global diplomatic agenda in between 1999 – 2001,[256] as evidenced by proclamations in major international conferences in from Durban to Okinawa.[257] In what was arguably most visible sign in the on-going redefinition of U.S. national interest ordering the Security Council with very strong U.S. nudging took up a health-only matter for the first time in summer 2000.[258]

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252. *See, e.g., Remarks by U.S. Secretary of State Madeleine K. Albright, HIV/AIDS Event, Kibera District Office, Nairobi,* Oct. 22, 1999, *available at* http://secretary.state.gov/www/statements/1999/991022.html (last visited Apr. 21, 2000).

253. *See Statement for the Record, supra* note 96.

254. *See Clinton Administration Declares AIDS a Security Threat, available at* http://www.cnn.com/2000/HEALTH/ AIDS/04/30/aids.threat.03/index.html (last visited Aug. 25, 2000). Lott charged: "This is just the president trying to make an appeal to certain groups." *Id.*

255. *Testimony Before the Senate Foreign Relations Committee*, Washington DC, July 12, 2000, *available at* http://www.state.gov/www/policy_remarks/2000/000712_holbrooke_africa.html (last visited July 26, 2000) (testimony of Richard Holbrooke).

256. The horrendous terrorist attacks of September 11th also changed the global issue-ordering, moving AIDS and other social issues from the forefront of the international diplomatic agenda.

257. In light of the mutually reinforcing link between AIDS and conflict, the conferees at Okinawa urged the international community to act urgently and effectively to prevent and resolve armed conflict and to foster a "Culture of Prevention" worldwide. *See* G-8 Okinawa, *available at* http://usinfo.state.gov/topical/econ/group8/ summit00/g8forini.htm (last visited Mar. 3, 2003).

258. *See First Health-Only Resolution, supra* note 69.

2. *The Security Council's First Health-Only Resolution & Its Impact*

In a clear demonstration of its revised issue-prioritization, the U.S. strongly supported and even championed Security Council involvement in the AIDS crisis. At the 4086th Security Council Meeting on January 10, 2000, the United States challenged the international community to rethink the pandemic as a security issue. The United States urged the Security Council to "work toward a resolution that describes and responds to the impact of AIDS as a cause and consequence of security crises."[259] In particular, the United States urged the Council to do more to "address the tragic relationship between AIDS, conflict, and peacekeeping."[260]

The new focus on AIDS in the Security Council was in large measure the product of the joint efforts of Richard Holbrooke and Albert Gore, both of whom were determined to approach the matter multilaterally within the framework of the UN system.[261] Given their shared preference for concerted and coordinated multilateral action, the duo was able to lead the Council through uncharted waters as the debate proceeded on this unprecedented resolution. With Holbrooke and Gore leading the charge and declaring AIDS a threat to international security, other states took their cue from robust U.S. leadership, thus precipitating a series of similar proclamations.[262] As Mr. Gore stated, AIDS is a security issue because it "strikes at the military, and subverts the forces of order and peacekeeping."[263] In his groundbreaking peroration at the Security Council meeting on AIDS, Mr. Gore implored the international community to "wage and win a great and peaceful war of our time -- the war against AIDS."[264]

The unanimous resolution of July 18, 2000 sought to intensify the war against AIDS by calling on countries to design and implement long-term strategies to stave off the pandemic.[265] The resolution noted that the Security Council was "deeply concerned by the extent of the HIV/AIDS pandemic worldwide, and by the severity of the crisis in Africa in particular."[266] In the

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259. *See Statement for the Record, supra* note 96.

260. *See id.*

261. It was also happened to be very convenient for the two men that the resolution came up at a time when the U.S. had the presidency of the Council and therefore had a little more leverage in setting or moving the agenda forward.

262. *Remarks as Prepared for Delivery by Vice President Al Gore, supra* note 54.

263. *See id.*

264. *See id.*

265. *See UNAIDS Executive Director Addresses Security Council, Commends Draft Resolution on HIV/AIDS, available at* http://www.unaids.org/whatsnew/press/eng/newyork 170700.html (last visited Aug. 11, 2000).

266. *Security Council Resolution 1308, Relating to HIV/AIDS, Adopted by the Security Council at its 4172nd Meeting July 17, 2000*, United Nations Security Council, *available at* http://www.state.gov/www/regions/africa/ 000717_unsc_hivaids.html (last visited Aug. 5, 2000).

preamble,[267] the Security Council recognized that "the spread of HIV/AIDS can have a uniquely devastating impact on all levels of society" and it reaffirmed "the importance of a coordinated international response to the HIV/AIDS pandemic, given its possible growing impact on social stability and emergency situations." [268] In particular reference to the emerging linkage between the pandemic and conflict and global instability, the Security Council stated:

> The HIV/AIDS pandemic is also exacerbated by the conditions of violence and instability, which increase the risk of exposure to the disease through large movements of people, widespread uncertainty over conditions, and reduced access to medical care, [and] the HIV/AIDS pandemic, unchecked, may pose a risk to stability and security. [269]

The resolution specifically singled out armed forces and peacekeepers, expressing the Security Council's "concern at the potential damaging impact" of AIDS on the health of international peacekeepers and their support personnel.[270] The Council

> Encourages all interested Member States which have not already done so to consider developing, in cooperation with the international community and UNAIDS, where appropriate, effective long-term strategies for HIV/AIDS education, prevention, voluntary and confidential testing and counseling, and treatment of their personnel, as an important part of their preparation for peacekeeping operations . . .. [and] (4) Encourages Member States to increase international cooperation among their relevant national bodies to assist with the creation and execution of policies for HIV/AIDS prevention, voluntary and confidential testing, and treatment for personnel to be deployed in international peacekeeping operations.[271]

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267. Sometimes the debate focused on seemingly trivial matters. As the discussion unfolded, the Members of the Security Council even wondered whether they "could put preambular language into a resolution." *Holbrooke Remarks Following Sec. Council Vote, supra* note 78.

268. *Security Council Resolution 1308, Relating to HIV/AIDS, supra* note 266.

269. *Id.*

270. *See id.*

271. *Id.* The resolution also requests the Secretary General to "take further steps" to accomplish the objectives of protecting peacekeepers from AIDS. *Id.* at § 3. Furthermore, the resolution encourages UNAIDS "to further develop its country profiles in order to reflect best practices and countries' policies" on AIDS. *Id.* § 5.

Amazingly, this unprecedented resolution was passed unanimously, even though it dealt with a subject hitherto considered unsuitable for diplomacy or 'high politics.' In addition, the proponents were able to overcome the resistance of those who viewed this resolution as an unwarranted and unauthorized interference in the domestic jurisdiction of UN Member States.

Supporters of the resolution viewed its passage as a clarion call in the battle against AIDS; they rejected the imputation that it was merely a symbolic gesture presented with plenty of pomp and protocol. The resolution was clearly "historic for the Security Council" and it constituted an "important benchmark in the process" of fighting against AIDS. [272] Additionally, supporters argued the measures in the resolution were "significant steps" [273] and even "ground-breaking."[274] As a delegate to the Security Council stated, the importance of the debate "lies in raising awareness" of the devastation and of the "greater threat ahead if effective action is not taken."[275]

Furthermore, supporters hoped that resolution would "go a long way towards ending"[276] the link between AIDS and peacekeeping, especially to the extent that humanitarian aid workers, military personnel properly trained in HIV prevention and behavioral change could serve as force for prevention.[277] For his part, Richard Holbrooke sought U.S. congressional support for implementation of the resolution, particularly with respect to the education of peacekeepers about the dangers of AIDS.[278] As if to accentuate the new consensus about U.S. perception of its interests, Holbrooke vowed before Congress that "the U.S. will never again vote for a peacekeeping resolution that does not require specific action by the UNDPKO to prevent AIDS from spreading by or to peacekeepers."[279]

However, some were miffed by what they saw as the resolution's excessively narrow focus and the missed opportunities with respect to dealing with the wider issues relating to treatment equity and poverty-as-a-pandemic-purveyor. Despite the broad support for the U.S.-backed approach, some wondered whether the U.S. had defined the issue too narrowly, addressing only U.S. interests while deftly ignoring the larger issues. They criticized its narrow focus on AIDS among peacekeepers rather than on the urgent matter

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272. *Remarks Following Vote, supra* note 78.

273. *Id.*

274. *Id.*

275. Press Release, Debate on Impact of AIDS, *supra* note 58, at 14.

276. *Remarks Following Vote, supra* note 78.

277. *See UNAIDS Executive Director Addresses Security Council, supra* note 266. While Mr. Holbrooke must be commended for his exemplary savoir faire, the savvy plenipotentiary was also willing to share credit with others, especially Dr. Piot of UNAIDS. *See id.* Speaking of Piot, Holbrooke noted that "[W]ithout his vision, his creativity, and his leadership, I don't think we would be here today, and I know that he has told me privately how important the Security Council's efforts are in his efforts." *Remarks Following Vote, supra* note 78.

278. *See Statement for the Record, supra* note 96.

279. *Id.*

of treatment equity.[280] While the resolution "expresses keen interest" in further discussions about access to treatment and care,[281] it did not go as far as many in the South had hoped. The delegate from Zimbabwe expressed his disappointment with this limited approach stating, "It remains painfully clear that the profit motive takes precedence over humanity's well-being."[282]

While some saw the focus on peacekeeping as limiting, Holbrooke took the view that the resolution was an important and targeted step that focused on a key aspect of the problem. Even as he acknowledged that the resolution primarily focused on peacekeeping, Holbrooke maintained that "the ultimate goal must be to increase international intensity and coordination against HIV/AIDS across the board." [283]

B. Sovereignty

The new global understanding of AIDS as a security threat and the global response thereto warrants a rethinking of the principle of sovereignty, particularly as it relates to the putative exclusivity of UN Member states' dominion over so-called "matters essentially within the [member states'] domestic jurisdiction."[284] The principal argument is that due to the extant and emerging threats in the age of bio-globalization, the archaic and static realist conceptions of sovereignty must be modified or discarded in favor of dynamic institutionalist approaches that connect the domestic and international planes in a seamless framework of universal human rights and responsibilities. Below, the article explores the nature of sovereignty and the necessity of a re-conceptualization in the age of globalization, particularly in light of the UN resolution on AIDS.

At the dawn of the seventeenth century and prior to the emergence of the nation-state as we know it, Jean Bodin set forth a doctrine of sovereignty in which the monarch was an absolute ruler within his/her dominions, but equal externally with respect to other sovereigns.[285] Only by voluntary agreement could the sovereign monarch incur obligation from abroad.[286] Following the emergence of the territorial state and the creation of the state system, the

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280. *See First Health-Only Resolution, supra* note 69.
Given the dearth of access to AIDS therapies in the South, many in developing countries argued that the focus should be on achieving treatment equity by increasing access to affordable therapies by price reductions, subsidies and even compulsory licensing. *See id.* For more on the treatment gap as well as recommendations to narrow the gap, see *Patent Necessity, supra* note 13.

281. *Security Council Resolution 1308, Relating to HIV/AIDS, supra* note 266.

282. *First Health-Only Resolution, supra* note 69.

283. *Remarks Following Vote, supra* note 78.

284. U.N. CHARTER, *supra* note 4

285. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY 4 (Richard Pierre Claude & Burns H. Weston eds., 1989); JAMES E. DOUGHERTY & ROBERT L. PFALTZGRAFF, CONTENDING THEORIES OF INTERNATIONAL RELATIONS 8 (1971).

286. HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 285, at 4.

virtually absolutist notions of sovereignty postulated by Bodin became "the most important notion for both domestic and international politics."[287] Consequently, Stanley Hoffman referred to sovereignty as "the prevalent structure of the international system," and he summed up the last two and half or three centuries of international relations as "the age of sovereignty."[288] Similarly, Falk acknowledges that the predominant world ordering logic[289] since Westphalia has been the statist framework of Bodin and subsequently Emmerich de Vattel.[290]

Many commentators continue to wrestle with the "bothersome concept"[291] of sovereignty, bemoaning the lack of consensus regarding its implications for world order and justice.[292] According to Kenneth Waltz, the concept of sovereignty suggests that each state "unit" is like every other in so far as each state is "an autonomous political unit."[293] The sovereign state determines on its own accord, the strategies necessary for coping with its internal and external problems, including whether seek outside assistance and, in doing so, to voluntarily constrain its freedom by making commitments or concessions to other states.[294] As Falk observes, the statist logic, associated with the "will of the territorial sovereign state" has resulted in the government of the state acting as the de jure exclusive agent with regard to formulating the will of the state in external relations.[295] On the domestic front, the principle of sovereignty "signified the establishment of hierarchical patterns of authority"; at the international level, sovereignty symbolized the putative "equality of autonomous actors, analogous to the status of property holders in Roman private law."[296] At the core of the principle is the notion that the state "is

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287. KRATOCHWIL & MANSFIELD, *supra* note 168, at xi.

288. STANLEY HOFFMAN, DUTIES BEYOND BORDERS 46 (1981)

289. *See* Richard Falk, *Theoretical Foundations of Human Rights*, *in* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 285, at 30. Richard Falk has identified "competing normative logics" that arguably provide "independent basis for structuring behavior in prescribed directions." *Id.* A normative logic constitutes "a set of propositions about what ought to happen with respect to the exercise of authority in the world political system." *Id.*

290. *See id.* at 30.

291. WALTZ, *supra* note 173, at 95.

292. *See* STOETT, *supra* note 2, at 6. Peter Stoett hints at the confusion when he poses a series of tantalizing questions relating to the obfuscating nature of the term:

> Does it imply territorial integrity, and autonomy from outside influence? Is it primarily a legal concept denoting the ultimate source of political authority in a given jurisdiction? Does it lay with the people, or citizenry? Or is it a term employed by ruling classes to hegemonize, or legitimize, unjust power relations? . . . Is [sovereignty] diminished in some quantitative or qualitative sense as the state plays a less obvious role in the global economy?

Id.

293. WALTZ, *supra* note 173, at 95.

294. *See id.* at 96.

295. *See* Falk, *supra* note 289, at 30.

296. KRATOCHWIL & MANSFIELD, *supra* note 168, at xi (*citing* John G. Ruggie, *Continuity and Transformation: Toward a Neo-Realist Synthesis*, 35 WORLD POLITICS 261–85 (Jan. 1983).

subject to no other state and has full and exclusive powers within its jurisdiction without prejudice to the limits set by applicable law."[297]

Extreme expressions of sovereignty and non-interventionism alarm cosmopolitan thinkers. In its radical form, the institution of sovereignty "serves to perpetuate modern nation-states" to the detriment of social justice and human rights.[298] For example, commentators who adopt a maximalist view of genocide see the nation state, and the system that supports it, as an accomplice in the deaths of millions either deliberately or unwittingly.[299] It is argued that under the guise of sovereignty, states commit or encourage the commission of large scale atrocities, or permit the exacerbation of catastrophes such as the AIDS pandemic.[300] Thus, Peter Stoett concludes, the "reluctance of some Asian and African governments to respond to the health needs of AIDS patients could be viewed as genocidal."[301] Similarly, Stoett argues the eleven million children who die each year from easily preventable diseases can be considered victims of "silent genocide,"[302] or what Henry Shue dubbed the "Holocaust of Neglect."[303] In the same vein, Leo Kuper remarked: "[T]he sovereign state claims, as an integral part of its sovereignty, the right to commit genocide . . . and the United Nations, for all practical purposes, defends this right."[304]

Thus, when used as a shield, sovereignty is perceived as a threat to enforcement of international human rights and the creation of a just and sustainable world order. Consequently, it is no surprise that some maintain sovereignty is "an oppressive institution that aids the wealthy" and/or "precludes genuine international harmony."[305] Exploiting the legal protections putatively afforded sovereignty, certain ruling elites effectively enjoy sanctuary or immunity from external intervention even as they foment or facilitate massive human rights abuses.[306] In fact, gross human rights abusing states "typically" hide behind sovereignty and nonintervention as they demand all outsiders refrain from direct or indirect interference with their so-called

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297. *See* Robert Keohane, *International Institutions: Two Approaches, in* KRATOCHWIL & MANSFIELD, *supra* note 168, at 49 (*citing* the Wimbledon Case, Permanent Court of International Justice, series A, no. 1 (1923)).

298. STOETT, *supra* note 2, at 42-43.

299. *See id.* at 38-39.

300. *See id.* at 32.

301. *Id.* at 39.

302. *Id.* The term "silent genocide" was coined by Hiroshi Nakajima, director general of the World health Organization in regard to a WHO report that revealed about eleven million children die annually from simple diseases such as measles, pneumonia and diarrhea. *Id.* While Stoett points out the North and the affluent are complicit in these deaths, he concedes that "to charge them with outright genocide raises several unanswerable questions." *Id.* at 41.

303. HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (*quoted in* STOETT, *supra* note 2, at 39).

304. LEO KUPER, GENOCIDE 161 (1982) (*quoted in* STOETT, *supra* note 2, at 39-40).

305. STOETT, *supra* note 2, at 42.

306. *See id.*

"internal" affairs.[307] In the seminal work, This Endangered Planet, Richard Falk claimed:

> A world of sovereign states is unable to cope with endangered-planet problems...Such a system exhibits only a modest capacity for international cooperation and coordination. The distribution of power and authority, as well as the organization of human effort, is overwhelmingly guided by the selfish drives of nations.[308]

Sovereignty's doppelganger, the principle of non-intervention in the internal affairs of sovereign states, taken to its logical and perverse extreme poses a clear and implacable threat to the promotion of international human rights. The values imputed to sovereignty "a legal license to do your own thing" and its associated principle nonintervention ("an injunction to mind your own business") do not meld well with human rights concerns that require each to be her sister's keeper.[309]

Nonetheless, some argue that moderate expressions of sovereignty constitute a positive good for a system of states with unequal capabilities. As Wendt argues, the sovereign state depends on certain "intersubjective understandings and expectations" – leading to a particular type of community marked by a "mutual recognition of one another's right to exercise exclusive political authority within territorial limits."[310] Sovereignty norms are "presupposed by an ongoing artifact of practice"; states thus act against the background of and thus replicate "shared norms" about understandings of the meaning of sovereignty.[311] Therefore, the argument goes, to the degree that states "successfully internalize sovereignty norms they will be more respectful toward the territorial rights of others."[312] In this regard, David Strang argues that sovereignty has a constraining institutional effect to the degree that it increases the protection weak states [Vanuatu, Bahamas etc.] receive inside as opposed to outside "communities of recognition."[313]

As states grapple with new emerging threats that defy borders, such the AIDS pandemic and other problems in the age of galloping globalization, the

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307. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 285, at 3.

308. RICHARD FALK, THIS ENDANGERED PLANET: PROSPECTS AND PROPOSALS FOR HUMAN SURVIVAL 37-38 (1971) (*quoted in* STOETT, *supra* note 2, at 21).

309. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 285, at 3.

310. Wendt, *supra* note 174, at 85.

311. *Id.*

312. *Id.* at 86.

313. *Id.* at 86-87. Unlike the great power with significant national means, smaller powers with adequate capabilities may be more inclined to "learn faster that collection recognition is a cornerstone of security." *Id.*

traditional realist conception of sovereignty is severely wanting.[314] Conventional realists consider sovereignty the "defining feature" of the international political system[315] and they effectively ascribe timeless features to sovereignty as a seminal, causal and analytical variable. At the same time, the power of the sovereign to determine, and act, according to national interests is accorded maximal deference, even when such actions contravene international legality. Realists often overplay the significance of sovereignty and perhaps as a result, overstate distinctions between hierarchy in the domestic setting marked by formal government, law, order and organized force and the international setting ostensibly marked by anarchy or the absence of hierarchy, norms and common values.[316]

Nonetheless, it is wrong-headed to equate the sovereignty of states with their ability to act arbitrarily or according to their wills and wishes.[317] International cooperation is, or should be, possible because in spite of sovereignty, the system is not boundlessly anarchic. Even Bodin recognized the sovereign's power was not unlimited, because God, natural law, and, the law of nations bound the prince.[318] While sovereignty may frustrate the creation of a hegemonic central authority, it does not preclude significant levels of international coordination and cooperation common problems. Sovereign states are sometimes "constrained" to act or not act in certain ways; they may be sovereign yet dependent on others and, of course, they may be impacted by the conduct of other sovereign actors.[319] There is substantial cooperation in international politics; states conclude alliances or treaties, exploit common resources and assign exclusive property rights despite the lack of a world government.[320] Additionally, states surrender certain rights to federations or supranational institutions and sometimes bear significant costs and hardship "to vindicate particular fundamental principles of international conduct."[321] Further, sovereignty, like other basic realist/neorealist variables such as anarchy, security, rationality and power can be modified[322] by social

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314. *See* STOETT, *supra* note 2, at 21 (*citing* David Newman, *The New Diplomatic Agenda: Are Governments Ready?* INTERNATIONAL AFFAIRS 65:1, 29-42; 35 (1989)).

315. STOETT, *supra* note 2, at 42. According to the realists, while sovereignty is the defining feature, "international justice is thus contingent on an order based on sovereignty." *Id.*

316. *See* Edward Mansfield, *The Organization of International Relations*, *in* KRATOCHWIL & MANSFIELD, *supra* note 168, at 1.

317. *See* WALTZ, *supra* note 173, at 95-96.

318. *See* DOUGHERTY & PFALTZGRAFF, *supra* note 285, at 8. With respect to the law of nations, the prince was bound by principles of customary international law (*ius gentium*) and by the principle that treaty obligations must be adhered to (*pacta sunt servanda*). *See id.*

319. *See* WALTZ, *supra* note 173, at 96.

320. *See* Mansfield, *supra* note 316, at 2.

321. *Id.*

322. *See* Yosef Lapid, *Theorizing the "National" in International Relations Theory: Reflections on Nationalism and Neorealism*, *in* KRATOCHWIL & MANSFIELD, *supra* note 168, at 29.

reflection, learning and changes taking place in consciousness.[323] Thus, even as sovereignty appears to be a permanent fixture on the international scene, the notion of untrammeled sovereignty is a canard.

To cope with the emerging threats of the 21st century, it will be necessary to challenge the realists' static conception of sovereignty, and ipso facto, to embrace a dynamic institutionalist perspective. Liberal institutionalists view sovereignty as a "diffuse concept" that is intrinsically "part of a larger network of interstate communication and regime formation."[324] The liberal institutionalist approach accounts for an evolutionary notion sovereignty and provides a viable framework for thinking about sovereignty and justice. Even as the territorial sovereign state "keeps proliferating,"[325] the nature and quality of coeval sovereignty is not static and the institution appears to be undergoing significant transformations.

Although the institution of sovereignty remained relatively unchanged in the first three centuries of the post Westphalia system,[326] the fallout of World War II hastened the pace of change. In the wake of the Nazi horrors, there was a "most radical" shift as many commentators abandoned their unquestioning "reverence" for absolute sovereignty.[327] It became increasingly apparent that traditional notions of sovereignty had to be modified, particularly in instances when significant outside intervention was required to protect people from gross human rights violations.[328] Consequently, the doctrine of sovereignty was changed dramatically by the arrival of the United Nations on the scene and related institutions bent on promoting and securing universal human rights.[329] After the debut of the post War human rights institutions, matters such as "the proper limits of state sovereignty" increasingly became the central focus of most international institutions.[330]

It is often said the domain of international human rights is, among other things, an on-going and escalating "attack upon the concept of state sovereignty as traditionally conceived" involving among other entities, "a spirited movement" of nonstate actors that transcend political boundaries.[331]

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323. *See* Robert Keohane, *International Institutions, in* KRATOCHWIL & MANSFIELD, *supra* note 168, at 55.

324. *See* STOETT, *supra* note 2, at 42. This perspective is inspired by a core of liberal values which at the very least suggests "a sense of universal justice at the individual level." *Id.*

325. HOFFMAN, *supra* note 288, at 46.

326. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 285, at 4.

327. *See id.* at 2.

328. *See id.* at 4.

329. *See id.*

330. *See id.* at 4-5.

331. *See id.* at 3. In addition, the "ever expanding and ever accelerating program" of "political and legal struggle" dubbed international human rights also involves "a goal setting agenda for global policy" as well as norms by which to assess national behavior and state legitimacy. HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 285, at 2.

Notwithstanding their low death rates,[332] states will face greater challenges going forward, including continual erosion or diminution of sovereignty.

As recent practice in international diplomacy with respect to global problems such as AIDS is revealing, the traditional distinction between state versus civil society is no longer tenable in international relations theory and practice.[333] The conceptually disparate spheres are increasingly "so interpenetrated" that the concepts are "only very vaguely and imprecisely indicative of distinct spheres of activity."[334]

As territorial boundaries become more "porous" and as modern communication and transportation technologies proliferate, John W. Burton's "billiard-ball-like states"[335] are headed the direction of the dodo and the mastodon. The pace of change will accelerate as we enter the era of post-international politics, marked by a tangled web of escalating interactions fusing both the domestic and international level.[336] The hyper-linked emerging transnational networks of state and non-state actors "see politics on the surface of the earth as an integrated process operating in a single community."[337]

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332. WALTZ, *supra* note 173, at 95.

333. Robert W. Cox sees a blurring of international/domestic dichotomies. *See* Robert W. Cox, *supra* note 168, at 344. There is a need for interdisciplinary and interdepartmental approaches that study "intermestic" approaches. *See id.* Restructuring institutions of higher education to confront this erosion of boundaries is arguably one of the greatest challenges for higher education leaders in the twenty-first century.

334. Cox *supra* note 168, at 344.

335. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 285, at 12. Burton's allusion refers to impregnable fortress-like states, impervious to anything except influence wielded by states of equal or greater capability. *See* INTERNATIONAL CONFLICT RESOLUTION, THEORY AND PRACTICE 18-19 (Edward A. Azar & John W. Burton eds.) (1986).

336. *See* JAMES N. ROSENAU, TURBULENCE IN WORLD POLITICS: A THEORY OF CHANGE AND CONTINUITY 6 (1990). The era of postinternational politics is defined by a global system that is characterized by increasing interactions between diverse actors including non state actors, various international organizations, financial markets, multinational corporations, terrorists, revolutionaries and a wide range of transnational and social religious and fundamentalist movements. *See id. See also* DOUGHERTY & PFALTZGRAFF, *supra* note 285, at 543-44. *See generally*, LINKAGE POLITICS: ESSAYS ON THE CONVERGENCE OF NATIONAL AND INTERNATIONAL SYSTEMS (James Rosenau ed., 1969); Rosenau, *Compatibility, Consensus, and an Emerging Political Science of Adaptation*, AMERICAN POLITICAL SCIENCE REVIEW, LX1(3), 983-88 (Dec. 1967); Wolfram F. Hanrieder, *Compatibility and Consensus: A Proposal for the Conceptual Linkage of External and Internal Dimensions of Foreign Policy*, AMERICAN POLITICAL SCIENCE REVIEW, LX1(3) 971-82 (Dec. 1967). *See* DOUGHERTY & PFALTZGRAFF, *supra* note 285, at 574 (for a list of sources or works on the new realm of post-international politics). *See generally* Spectar, *Saving the Ice Princess*, *supra* note 189 (arguing that certain transnational non-state actors will have a greater ability to impact the process of international law and treaty-making going forward).

337. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 285, at 12 (*citing* Christopher Hill, *Implications of the World Society Perspectives for National Foreign Policies*, *in* CONFLICT IN WORLD SOCIETY: A NEW PERSPECTIVE ON INTERNATIONAL RELATIONS 174-91 (Michael Banks ed., 1984).

Even if sovereignty is not completely destroyed, the on-going assaults[338] by emerging trends in the global system are effectuating a de facto re-shaping of the institution. As Sir Hersch Lauterpacht had observed, the dominant trend of the last half of the twentieth century involved the sovereign state giving way to the "sovereignty of humankind."[339] For Lauterpacht, the recognition of human rights in the post World War II era was "a brake upon exclusive and aggressive nationalism, which is the obstacle, both conscious and involuntary, to the idea of world community under the rule of law."[340] The process of fundamental re-conceptualization of sovereignty that 'began' in the immediate post war era continues to gather momentum as it is catalyzed by a convergence of forces and processes in the age of bio-globalization.

Although Article 2(7) of the UN charter appears to firmly proscribe intervention of internal matters of states, new interpretations of that provision may be emerging in the age of globalization. In fact, many concede that definitions of the "sovereign rights of states" or what is "essentially within the domestic jurisdiction" are continuously changing.[341] To cope with the new dilemmas of sovereignty and article 2(7) in the age of globalization, international lawyers, publicists and other commentators need to revise and update their understandings of sovereignty.

Some publicists and commentators are already taking up the challenge of re-working sovereignty for a new day. Ivan Simonovic argues that, in the age of globalization, "the old paradigm of international relations," based on assumptions about autonomous sovereign states that only factor their national interest calculations "does not reflect the present reality of international relations."[342] Simonovic puts forth a new conception of sovereignty that builds on the concept of the equality of states: as globalization constrains states and transforms patterns of interactions between individuals, states, and international organizations, the principle of the sovereign equality of states should be transformed into the "principle of equally reduced sovereignty."[343] Simonovic endorses the role of international law and organizations in the governance of globalization, particularly with respect to threats such as environmental degradation, international crime, terrorism, AIDS, and human rights violations.[344] In this context, Simonovic argues UN involvement is a necessary and "significant step" in managing the problems associated with

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338. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 285, at 2.

339. *See id.* at 3.

340. *See id.* (*citing* HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 47 (1973)).

341. *See, e.g.*, Evan Luard, *Human Rights and Foreign Policy*, *in* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 285, at 243.

342. Ivan Simonovic, *State Sovereignty and Globalization: Are Some States More Equal*, GEORGIA J. INT'L & COMP. L. 381, 391 (2000).

343. *See id.* at 403.

344. *See id.* at 402.

rapid globalization.[345] There is clearly a need for additional innovative thinking and scholarship that views sovereignty in new ways, including holistic interdisciplinary approaches that reconcile national, international, and human interests.

C. *International Security*

The invigorated global response to AIDS was possible largely as a result of the broadening of the definition of security. To form a global consensus about the need for concerted international action, members of the Security Council discarded traditional notions of security, recasting the concept in light of exigent realities as well as alternative visions of the future. Given the exigencies of the pandemic, proponents of the resolution contended members had to be willing to "see security through a new and wider prism, and forever after, think about it according to a new, more expansive definition."[346] Although AIDS was not "an issue of strategic security in the classic sense," [347] proponents argued that world community needed to "reshape" thinking about definitions of security. [348]

It was also apparent that unless the matter could be defined in ways that suggested a legitimate role for the Security Council, the Members would not agree that it was appropriate for the Council to discuss a health issue, much less pass a health-only resolution.[349] It was therefore necessary to redefine the AIDS issue in such a way that UN members could make the case that the UN was acting within its constitutional mandate. The task was rendered more difficult because UN founders did not envision, nor provide explicitly, a role for the UN in matters of health. Customarily, matters related to health and other social issues are generally considered to be within the competence of the World Health Organization or reserved for the Economic and Social Council.[350] In effect, throughout its history, the Council confined itself to a "classic security agenda built upon common efforts to resist aggression, and to stop armed conflict."[351] Until the development and acceptance of a broader vision of security, it was unlikely that AIDS would be accepted as an appropriate subject for a high level Security Council discussion.[352]

Prior to and during Council debate, more and more world leaders endorsed a "new agenda for world security" that involved a redefinition of

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345. *See id.* at 402-03.

346. Press Release, Debate on Impact of AIDS, *supra* note 58.

347. *See* Vice President Al Gore, *supra* note 54.

348. *See id.*

349. *See Remarks Following Vote, supra* note 78.

350. As the proponents averred, the Security Council's involvement did not in any way "undercut" the work of the Economic and Social Council, but instead, reinforced it. *See id.*

351. Press Release, Debate on Impact of AIDS, *supra* note 58, at 3.

352. *See Remarks Following Vote, supra* note 78.

international security.[353] The new agenda included low politics issues such as the environment, drugs, poverty, development, terrorism, AIDS, and other pandemics.[354] There was significant consensus on the urgency of embracing a more expansive view of international security that made the necessary interconnections between oft-separated areas such as development, peace, and disease.[355] The members were challenged to realize that in the pandemic era, security had taken on a new and equally pressing meaning. In particular, James Wolfensohn of the World Bank urged the international community to "think beyond battalions or borders" when thinking about security.[356] Wolfensohn called on all to focus on "human security," to increase the efforts aimed at winning the battle against poverty.[357]

> We will be judged on whether we understand the nature of human security and sustainable development . . . Security develops from within societies. If we want to prevent violent conflict, we need a comprehensive, equitable, and inclusive approach to development. A culture of prevention needs to permeate our work. Security, empowerment and opportunity must be recognized as key to freedom from poverty – just as freedom from poverty must be recognized as key to security.[358]

In his usually trenchant prose, Holbrooke summed it up thusly: "post-Cold War international security is about more than guns and bombs and the balance of power."[359]

It was necessary to think of international security in broader terms, in terms that legitimized the Council's intrusion into the health matters of Members – in seeming disregard for article 2(7) of the Charter. The efforts to rethink security were so successful that some members resorted to hyperbole, dubbing AIDS an "aggressor."[360] In urging a re-conceptualization of security, a UN representative argued that the pandemic was the functional equivalent of an armed aggressor and ipso facto,

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353. Press Release, Debate on Impact of AIDS, *supra* note 58, at 2.

354. *Id.* at 2.

355. *See infra* notes 106-12.

356. *See* Wolfensohn, *supra* note 11. *See also* Press Release, Debate on Impact of AIDS, *supra* note 58. (Address by James D. Wolfensohn) (noting that when we think about security, "we must think beyond battalions or borders. We must think about human security, about winning a different war, the fight against poverty.").

357. *See* Wolfensohn, *supra* note 11.

358. *Id.* at 1.

359. *See Statement for the Record, supra* note 96. *See* W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT'L L. 859 (1990).

360. *See* Vice President Al Gore, Remarks at U.N. Security Council Session on AIDS in Africa, *available at* http://www.un.int/usa/00_002.html (last visited Jan. 10, 2002) (analogizing AIDS to an aggressor against women's human rights).

> deserved no less attention in the Security Council than the use or threat of nuclear weaponry. . . AIDS and armed conflict, with all their impact on Africa, should be accorded the status of an international security agenda item, falling within the competency of the Security Council.[361]

In sum, in light of the new consensus about international security, it was argued that the machinery of the United Nations "created to stop wars" should now be summoned in a "common cause, to defeat a common foe" – the AIDS virus.[362]

The passage of the resolution constituted "a benchmark in the evolution of the Security Council,"[363] as well as the recognition of the changed environment. In effect, the vote was a "recognition that AIDS is as great a security challenge" as any other conventional security threat in UN history.[364]

D. International Cooperation: A Revolution of Indeterminate Obligations?

The resolution sparked a heightened level of international cooperative activity and coordination that in turn have given rise to further expectations about future cooperation about a wide range of joint problems. The resolution also had a transformative and normative impact on international diplomatic discourse, fueling an intensified and unprecedented level of cooperation and coordination regarding global health. Supporters saw the resolution as "only a beginning"[365] and they hoped similar resolve would be exhibited in upcoming UN fora. In particular, the stage was set for Members to "take further action" at the upcoming Millennium Summit and in the General Assembly's special session on HIV/AIDS.[366]

As expected, the UN General Assembly followed the Security Council's lead by adopting the "Declaration of Commitment on HIV/AIDS," adopted during the General Assembly's Special Session on June 27, 2001. The General Assembly called on members to ensure, by 2003, the

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361. *See* Press Release, Debate on Impact of AIDS, *supra* note 58, at 19 (comments of Mr. Arthur Mbanefo, the Nigerian representative).

362. Vice President Al Gore, *supra* note 54. Many civic groups are increasingly identifying HIV in militant terms. Former Congressman Dellums exhorted participants at a conference to "view the crisis of AIDS in Africa as the moral equivalent of a war being waged on millions of human lives." International AIDS Economics Network, *A Continent in Crisis: Africa and the AIDS Pandemic*, *available at* http://www.worldbank.org/aids-econ/africa/global.htm (last visited May 20, 2000). In addition, Mr. Dellums challenged the audience to "mobilize a new peace movement to end this war." *Id.*

363. *See Remarks Following Vote*, *supra* note 78.

364. *See id.*

365. *See id.*

366. *See id.*

> inclusion of HIV/AIDS awareness and training, including gender component, into guidelines designed for use by defence personnel and other personnel involved in international peacekeeping operations while also continuing with ongoing education and prevention efforts, including pre-deployment orientation, for these personnel.[367]

The resolution further urged members to:

> develop and begin to implement [by 2003] national strategies that incorporate HIV/AIDS awareness, prevention, care and treatment elements into programmes or actions that respond to emergency situations...and, where appropriate, factor HIV/AIDS components into international assistance programmes.[368]

With respect to national security, the resolution exhorted members to have in place by 2003,

> national strategies to address spread of HIV among national uniformed services, where required, including armed forces and civil defence force, and consider ways of using personnel from these services who are educated and trained in HIV/AIDS awareness and prevention to assist with HIV/AIDS awareness and prevention activities including participation in emergency, humanitarian, disaster relief and rehabilitation.[369]

To realize the goals in the both the Council's resolution and the UNGA declaration, the UNAIDS Secretariat established a global initiative on HIV/AIDS and security with the goal of strengthening partnerships with co-sponsors, especially in areas plagued by conflict.[370] UN efforts to stem the pandemic intensified following the resolution, as evidenced by the dissemination of hundreds of thousands of condoms to peacekeepers in war-torn areas around the world. [371]

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367. *See HIV/AIDS and Conflict, supra* note 3. *See also UNAIDS Initiative on HIV/AIDS and Security, supra* note 3. To achieve this target, UNAIDS initiatives will focus on peacekeeping operations including, ANAMSIL (Sierra Leone), UNMEE (Eritrea/Ethiopia), MONUC (Democratic Republic of Congo), UNMIK (Kosovo), and UNTAET (East Timor).

368. *See UNAIDS Initiative on HIV/AIDS and Security, supra* note 3.

369. *See id.*

370. *See id.*

371. *See First Health-Only Resolution, supra* note 69.

.Other UN agencies including the Economic and Social Council (ECOSOC), the UN Development Program (UNDP), UNAIDS, and the office of UN Secretary General Annan also pledged to develop a collective and coordinated response to the problem of AIDS and conflict.[372] At the World Bank, James Wolfensohn pledged to work with the Security Council on a range of security issues related to the AIDS pandemic.[373] World Bank President James Wolfensohn pledged to focus on a range of human security issues as part of an overall strategy to prevent violent conflict. Wolfensohn called for "a comprehensive, equitable and inclusive approach to development" that is focused on assuring "freedom from poverty," a critical element of human security.[374]

International efforts to stem the pandemic gathered momentum around the world. Some of the more important gatherings included the 2000 African Development Forum meeting and the Organization of African Unity Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases in April 2001 as well as regional efforts in Lake Chad Basin and West Africa.[375] Collaborative efforts between state and non-state actors such as the International Partnership against AIDS in Africa have intensified the leveraging of resources to galvanize national and local action on HIV/AIDS.[376] At least nineteen African countries have set up high-level national AIDS councils or commissions; thirty-four African countries have completed national strategic AIDS plans and seven more plans are near completion.[377]

What was even more impressive about this heightened level international coordination was the focus on Africa—a continent that is not traditionally

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372. *See Statement for the Record, supra* note 96.

373. *See* Wolfensohn, *supra* note 11, at 1.

374. *Id.* Some have argued that the international community address the issues of chronic poverty in tandem with fighting AIDS. *See, e.g.*, Spectar, *Hybrid Horseman, supra* note 13, at 284-94 (advocating the adoption and implementation of a 'holistic development framework' designed to contain 'the syndrome of chronic poverty as a disease vector'). The implementation of the holistic development framework requires, *inter alia*, a serious treatment of the right to holistic development. *Id.* at 284. The right to development is the individual and peoples' collective right to participate in and derive benefit from a sound development policy based on the satisfaction of material as well as non-material human needs or wants. *See* Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L. J. 353, 376 (1998) (*citing* Hector Gross Espiell, *The Right to Development as a Human Right*, 16 TEX. INT'L L. J. 189 (1981)). The right to development includes the collective right of countries to a just, equitable, and sustainable international economic framework, without the structural barriers that constitute impediments to full development. *Id. See also*, Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?* 33 RUTGERS L. REV. 435, 445 (1981). Some suggest the right to development is effectively a "precondition" to the enjoyment of other basic rights, including liberty and justice. *See, e.g.*, Satvinder Juss, *Global Environmental Change: Health and the Challenge for Human Rights*, 5 IND. J. GLOBAL LEGAL STUD. 121, 157 (1997) (*citing* MOHAMMED BEDJAOUI, THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 1177, 1182 (1991)).

375. *Report on the Global HIV/AIDS Epidemic 2000, supra* note 131.

376. *See id.*

377. *See id.*

considered to be of great relevance with respect to the national security calculations of Great Powers.[378] U.S. leadership on this world interest issue was a fine example of the integration of national and international interests. In addition to the interests listed above, the U.S. posture also served the goal of showing commitment to Africa at a time when U.S. Congress members and AIDS activists were becoming restive. It was thought that showing such leadership during the "Month of Africa" was a sign that America was once again reasserting its power and influence in the UN.[379] In lauding the resolution, members gave credit to the United States, with one representative expressing hope that "the pioneering initiative of the United States will be pursued by others in justified earnestness."[380]

By highlighting international attention on African issues in the Security Council discussion of AIDS, development, and war, the Council was helping to "put to rest the canard that Africa doesn't matter; to refute the belief that the international community has one set of rules for Europe or Asia and another for Africa."[381] It was hoped that the Council's action would precipitate worldwide attention to the needs of Africa in the throes of the global AIDS crisis.[382] Proponents of the resolution also expected that the new focus on African conflict zones would lead the UN to "assist African governments in devoting more resources to tackling economic and social problems," and thereby ameliorate the epidemic.[383] Similarly, others hoped that the Council's involvement could "provide the moral and political commitment" needed to secure resources to support civil society initiatives efforts such as the International Partnership Against AIDS in Africa. [384]

The intensified cooperation was also born out of a re-learning of the truism regarding the interconnectedness of the human condition, especially as a result of new communications technologies and the realities of bio-globalization. Thus, James Wolfensohn exhorted the international community to "mobilize" not just for a "war against AIDS," but for "a war for Africa's future and for our own."[385] Similarly, Mark Malloch Brown, Administrator of UNDP, argued that the international community needed to take concerted action because failure to act could endanger everyone: "Today, this is Africa's

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378. Despite its politically incorrect overtones, the words Great Powers, unlike other euphemistic latter day substitutes remains most apt as it continues to symbolize the vast and growing disparities in power and wealth between the so-called Northern or Western industrialized countries vis a vis Africa and the rest of the Third, Fourth, and Fifth Worlds.

379. *See Statement During the Open Meeting on the Month of Africa*, *supra* note 247. As Holbrooke stated in characteristic style, it was a sign "America is back." *Id.*

380. Press Release, Debate on Impact of AIDS, *supra* note 58, at 7.

381. *See* Holbrooke, *supra* note 247.

382. *See Remarks Following Vote*, *supra* note 78.

383. Press Release, Debate on Impact of AIDS, *supra* note 58, at 7. (Comments of Libertine Amathila, Namibia's Minister of Health and Social Services).

384. *See id.* at 12.

385. Wolfensohn, *supra* note 11, at 6.

drama...unmet, it becomes the world's."[386] As Secretary General Annan stated, "In the war against HIV/AIDS, there is no us and them, no developed and developing countries, no rich and poor—only a common enemy that knows no frontiers and threatens all peoples."[387]

In sum, the Security Council debate sparked an enthusiastic response from members as well as a range of actions and optimistic obligation-laden proposals to counter the pandemic. Many expect that in going forward, the Security Council, UNAIDS, and other international agencies would play an even more activist role in coordinating the efforts to combat and contain AIDS and other the pandemics. Potential roles for the UN could include the establishment of a Security Council mechanism for close cooperation and coordination with UNAIDS, involving regular open briefing sessions with the Executive Director of UNAIDS;[388] reinforcing UNAIDS through a "strengthened mandate, greater resources and enhanced coordinating authority for its Executive Director;"[389] the creation of a central register or clearinghouse to monitor and harmonize global efforts to fight the pandemic;[390] a UN campaign to raise funds by "assessing contributions to Member States according to their economic level"[391] as well as voluntary "contributions by universities, research centres, companies, NGOs and individuals."[392] The Security Council resolution and subsequent proposals for greater cooperation derived thereunder generally received broad support, notwithstanding concerns about sovereignty and intervention

In the euphoria of the moment, UN representatives seemingly sought to outdo one another in touting this new era of cooperation. One UN representative saw the new cooperative relations in terms of international legal or moral obligation, maintaining that the world community "owe[s] it to the African people affected by this scourge to deploy every means necessary to defeat the pandemic and transform a legacy of despair into an endowment of hope."[393] The new and broader vision of human security was touted as the true dimension of security[394] as opposed to the narrower or constricted antiquated

386. Press Release, Debate on Impact of AIDS, *supra* note 58, at 5 (Malloch Brown, Administrator of UNDP).

387. *Foreword by Secretary General Annan to Declaration of Commitment on HIV/AIDS, available at* http://www.unaids.org/UNGASS/docs/AIDSDeclaration-en.pdf (last visited Sept. 20, 2002).

388. Press Release, Debate on Impact of AIDS, *supra* note 58 (Representative Lee See-Young, the Republic of Korea).

389. *See id.* at 15.

390. *See id.* at 11 (Sir Jeremy Greenstock, the British representative). Peter Piot, the Executive Director of UNAIDS pledged in January 2000 to intensify such clearinghouse efforts within the UN to assure the flow of current information to all members). *See id.* at 17.

391. Press Release, Debate on Impact of AIDS, *supra* note 58, at 15 (Abuzed Omar Dorda, the Libyan ambassador to the UN).

392. *See id.* at 15.

393. *See id.* at 17 (Sergio Vento, the Italian representative).

394. *See id.* at 7.

notions. In this new epoch, the international community had to credibly address issues of development because it was clear "the world would not be a secure place if women and children had no security of their individual self."[395] Another delegate member noted the link between peace and development, calling them "two sides of the same coin;" true peace was impossible without "economic and social progress for all people."[396] The Malian delegate remarked that peace and security "depended on the socio-economic realities of nations"—not just on the absence of war.[397] Since AIDS "truly threatened the very basis of human security," an effective war against AIDS was a precondition for peace and sustainable development in Africa.[398]

As many UN representatives spoke eloquently about the new-fangled dawn of intensified international cooperation, they unwittingly gave credence to the views of those who felt the UN system was overreaching. While these holistic visions of international security and enhanced international cooperation may indeed augur well for the future of humankind, some observers were alarmed by the prospect increasingly activist international organizations. Below, the Article examines some of the concerns triggered by this new revolution of expanding and indeterminate obligations.

E. Intervention & Humanitarian Intervention

Given the expanded commitments, expectations and potential obligations that could be triggered by a UN resolution on a health-only matter, some commentators were concerned the Security Council resolution could infringe on national sovereignty. Several countries raised objections to what they viewed as U.S.-led interference in their internal affairs.[399] The Russian and the Indonesian delegates were especially skeptical of U.S. motives, expressing concerns that the resolution may be used to infringe upon the sovereignty of UN member states.[400] As the Indonesian representative to the UN stated, "My delegation holds the view that linking HIV to international peacekeeping operations raises serious questions."[401] Additionally, ambassadors whose nations provide peacekeeping troops complained that the U.S., which had relatively fewer UN peacekeeping soldiers, was overstepping its bounds by trying to use the Security Council resolution to mandate training and education for others.[402]

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395. *Id.* (Anwarul Karim Chowdhury of Bangladesh).

396. *See id.* at 10 (Argentinean delegate, Arnoldo Manuel Listre).

397. Press Release, Debate on Impact of AIDS, *supra* note 58, at 12 (Moctar Ouane, the representative of Mali).

398. *See id.* at 16 (Jargalsaikhany Enkhsaikhan of Mongolia).

399. *First Health-Only Resolution*, *supra* note 69.

400. *See id.*

401. *See id.*

402. *See id.* While the U.S. provided about 800 UN police officers and observers, it did not at the time have any UN peacekeeping soldiers. *See id.*

Likewise, some in the U.S. are inherently suspicious of what they perceive to be UN activism, particularly far reaching resolutions that could threaten sovereignty and usurp independence. There is simmering bitterness and even resistance from certain quarters in the far right of the political spectrum against creeping cosmopolitanism and the purported loss of precious sovereignty. In particular, some fear that U.S. participation in international organizations and treaties, even for humanitarian reasons is eroding national sovereignty.[403] This phobia regarding international organizations is intensified when it appears to some that these agencies are deviating from their narrowly focused traditional missions.[404] For diehard adherents of this perspective, coeval international organizations are heedlessly "shifting rapidly towards an activist, internationalist agenda" that undermines U.S. sovereignty in favor of a hostile Third World majority.[405] Under this view traditional conceptions of sovereignty, and constitutional governance are purportedly "being subjugated to self-anointed 'intellectually progressive' and vague concepts of international responsibilities and control."[406]

Proponents of the resolution were quick to reject the contentions that the resolution was a tool for illegitimate and unwarranted intervention. They argued that rather than infringe "on sovereignty or authority of countries," the resolution merely reflected the "collective will of the Security Council."[407] Further, it was argued that resolution was fully within the competence and jurisdiction of the Council. The resolution focused "appropriately on the area where the Security Council has the primary responsibility and the most at stake," to wit, the impact of AIDS on peacekeeping" [408] Rather than usurping powers, the resolution was simply a legitimate extension of Security Council "interest into a field that had previously not been considered."[409] Proponents argued the resolution was not all that different from other council resolutions. Like other Council resolutions, this one too was simply designed "to galvanize international action to meet common threats" – the quintessence of one of the primary purposes for which the UN was founded.[410] As further evidence of their sensitivity towards the institution of sovereignty, proponents pointed to the limited nature of the resolution and its narrow focus on peacekeeping.

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403. *See, e.g.*, Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, HARV. J. ON LEGIS. 299 (2000).

404. *See generally id.*

405. *See id.* at 299. Some warn that U.S. foreign policy has effectuated a "de facto amendment" of the U.S. Constitution with disregard of the procedural and substantive protections of the democratic process. *See id.*

406. *See id.* at 300. Barr blames the "elite and academe" for advocating an "activist and paternalistic U.N."

407. *See Remarks Following Vote, supra* note 78.

408. *See id.*

409. *See id.*

410. *See id.*

The resolution also raises, albeit obliquely, the question and the prospect of humanitarian intervention on behalf of AIDS victims. Humanitarian intervention has been defined as proportionate transboundary help, including forcible help, provided by governments to persons in another state who are being denied fundamental human rights and who themselves would be rationally inclined to rebel against their oppressive government.[411] As some commentators have argued, humanitarian intervention is legitimate and even necessary in cases involving "genocide, famine, *etc.* [sic]." [412] It is no surprise then that for some, the resolution (or perhaps its penumbras) evoke the specter of forcible UN humanitarian intervention on behalf of AIDS victims.

The doctrine of humanitarian intervention remains very controversial. Opponents of the doctrine worry that due to many "inherent difficulties and costs," there is "little consistency in the practice of intervention" and weak states are far more likely to be victims of intervention than powerful states.[413] Others worry humanitarian intervention could become a ruse for "gratuitous interference in the internal affairs of sovereign states."[414]

The practice has very strong advocates, including Mr. Kofi Annan, the UN Secretary General. In remarks that generated some controversy, Mr. Annan advocated the use armed forces in humanitarian interventions to stop mass murder and egregious violations of human rights—a position that has generated significant controversy among UN members.[415] Mr. Annan maintains that when crimes against humanity occur and "peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community."[416] As the Secretary-General argues, the fact that the international community cannot protect people everywhere is "no reason for doing nothing when we can."[417] Unlike intervention for self-determination, humanitarian intervention goes above the principle of sovereignty as it acknowledges certain basic human rights, including the right to life, which "transcends the limits of the state."[418]

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411. For a good discussion of the concept of humanitarian intervention and the acceptability of the use of force to achieve it, see, e.g., FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988). Teson argues that from an "ethical standpoint" governments are mere agents of the people, "their international rights derive from the rights of the individuals who inhabit and constitute the state." *Id.* From this position, Teson justifies forcible unilateral humanitarian intervention and penetration of a sovereign state's borders to protect egregiously aggrieved peoples. *Id.* In reaching this position, Teson rejects the premises of the noninterventionist model of international law and international relations and with it, the primacy of the Hegelian statist myth. *Id.*

412. HOFFMAN, *supra* note 288, at 64.

413. *Id.*

414. Annan, *supra* note 16, at 47.

415. *See id.*

416. *See id.*

417. *See id.*

418. HOFFMAN *supra* note 288, at 64.

Since humanitarian intervention is acknowledged as a very clear exception to the principle of sovereignty,[419] the resolution may be viewed as laying the foundation for subsequent efforts to engage in potentially intrusive interventions on behalf of AIDS victims. In effect, the notion that AIDS is a genocide-like threat to international security opens up intriguing possibilities with regard to humanitarian intervention by the international community in support of the victims. It is feared that this seemingly benign encroachment into health matters—matters essentially within the domestic jurisdiction—could open the door to even more invasive interventions—including perhaps measures under Chapter VII of the Charter.

As far-fetched as it sounds, the prospect of forcible intervention by international organizations on behalf of disease sufferers is not entirely without precedent or historical analogy. Ram Dass and Paul Gorman have written about a dramatic episode during the small pox eradication campaign where an international immunization team invaded an Indian household in the night to "forcibly vaccinate a family against their will."[420]

These concerns notwithstanding, supporters of the resolution aver that the UN, even with the resolution, could not "require member states to force involuntary testing of their troops," as such a move "would violate the United Nations' respect for national sovereignty."[421] However, it is not clear how the Security Council would deal with a very high HIV-prevalence country whose government staunchly and systematically refuses to cooperate with international agencies on implementing the peacekeeping resolution. Regardless of how these questions are eventually resolved, it is clear that the Security Council resolution on AIDS has significantly reshaped coeval understandings of Article 2(7) of the UN Charter that prohibits the UN from encroaching into "matters essentially within the domestic jurisdiction" of Member States.

III. A PERMANENT SHIFT? A NOTE ON BUSH ADMINISTRATION POLICIES

It was feared that the new administration of George W. Bush would rethink U.S. interests in Africa and sharply reverse Clinton's pro-Africa policies. One analyst predicted a Bush presidency would mean a return to the "blatantly anti-African policies of the Reagan-Bush years, characterized by a general disregard for black people and a perception of Africa as a social welfare case."[422] Unlike candidate Gore's policy advisers and likely

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419. *See id.* at 63.

420. *See* Barry S. Levy, *Lecture: Twenty-First Century Challenges for Law and Public Health*, 32 IND. L. REV. 1149, 1151 (1999) (discussing RAM DASS & PAUL GORMAN, HOW CAN I HELP?: STORIES AND REFLECTIONS ON SERVICE (1985)).

421. *See Remarks Following Vote, supra* note 78.

422. Salih Booker, *The Coming Apathy: Africa Policy Under a Bush Administration, available at* http://www.africaaction.org/docs00/bush0012.htm (last visited Oct. 10, 2000).

appointees for positions such as Secretary of State,[423] Mr. Bush was seen as surrounding himself with experts who had shown little interest in African issues, besides oil.[424] Suspicion turned into paranoia when Mr. Bush named Dick Cheney as his vice president; critics quickly noted that in 1986, Cheney was among the minority of mostly republican members of Congress who had voted to oppose the release of Nelson Mandela from prison. When Mr. Bush was asked about his foreign policy regarding Africa during the second presidential debate, he offhandedly remarked: "There's got to be priorities."[425]

Notwithstanding these ominous portents, AIDS and other infectious diseases have emerged as a major priority in the global security agenda of the Bush administration – at least pre-September 11th. Fueled by the leadership of Secretary of State Powell, the U.S. government continued and even expanded Clinton era foreign assistance to combat AIDS. Confounding administration detractors and critics, Secretary of State Powell stated in Spring 2001: "There is no war causing more death and destruction, there is no war on the face of the earth right now that is more serious, that is more grave, than the war we see here in sub-Saharan Africa against HIV/AIDS."[426] In May 2001, the President announced the United States has the "power to help" and pledged that the U.S. is "committed to working with other nations to reduce suffering and to spare lives."[427] President Bush has followed up his words with concrete steps and policy proposals. The Administration established a cabinet-level

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423. *See* CNN.com, *available at* http://www.cnn.com/2000/Health/AIDS/04/30/aids.threat.03/ (last visited June 22, 2000). One of Mr. Gore's chief foreign policy advisers, Leon Fuerth, a progressive internationalist, had identified AIDS, terrorism, and environmental degradation as key threats to U.S. security and as centerpieces of a future Gore foreign policy. *See id.* With respect to AIDS, Fuerth argued that a coordinated global response was required, warning "It isn't as if this disease is going to stay put in sub-Saharan Africa." *Id.* In February 2003, Mr. Fuerth, at this writer's invitation, delivered a public lecture at the University of Scranton entitled "Is HIV/AIDS in Africa an American National Security Issue? A Discussion of America's National Security Interests in the Developing World." In a compelling presentation, Mr. Fuerth warned that left unchecked, the AIDS pandemic could lead to a breakdown of society and chaos that can threaten U.S. security. *See* Borys Krawczeniuk, *Former Gore Advisor Links Terrorism, AIDS*, THE TRIBUNE, Feb. 28, 2003, at A6. Furthermore, it was widely believed that had a few more dimple and pregnant chards broken his way, Mr. Gore would have appointed Leon Fuerth as his National Security Adviser and Ambassador Holbrooke as his Secretary of State. *See id.*

424. Booker, *supra* note 422. As Michael Westphal, Deputy Assistant Secretary of Defense for African Affairs stated, stability in the Africa is of great concern to the United States partly because the continent supplies 15% of U.S. oil. *See* Jim Garamore, *U.S. Policy in Africa seeks Stability to Counter Terror, available at* http://www.defenselink.mil/news/Apr2002/n04022002_200204022.html (last visited May 15, 2002).

425. Booker, *supra* note 422.

426. *AIDS and Violent Conflict in Africa: Special Report*, Oct. 15, 2001, 6, United States Institute of Peace, *available at* http://www.usip.org/pubs/specialreports/sr75.html. *See also* Charles W. Corey, *Powell Places Priority on War Against HIV/AIDS in Africa*, Washington File, *available at* http://usinfo.state.gov/topical/global/hiv/01052703.htm (last visited May 27, 2001).

427. *Fact Sheet: U.S. Leadership on Global Fund to Fight HIV/AIDS, Malrai and Tuberculosis*, U.S. NEWS WIRE, July 20, 2001.

HIV/AIDS Task Force co-chaired by Health and Human Service Secretary (Tommy Thompson) and Colin Powell; it also named Jack Chow to the newly created position of Deputy Assistant Secretary for International Health and Science. In May 2001, the president pledged $200 million for the Global Fund to fight AIDS tuberculosis and malaria.[428] In March 2002, on the eve of the Monterey Summit for Development, the U.S. announced a "compact for development" that included a pledge for an additional $5 billion in development assistance (mostly grants) over the next three years.[429] By June 2001, Secretary Powell was fully engaged in the global war against AIDS, leaving no doubt in the minds of observers that he considered the pandemic a threat to U.S. interests. Powell urged the UN to develop "comprehensive and coordinated efforts" to combat AIDS because posed a grave danger to international security. Sounding like very much like Holbrooke, Powell remarked:

> AIDS is not just a humanitarian or health issue. It not only kills. It also destroys communities. It decimates countries. It destabilizes regions. It can consume continents. No war on the face of the earth is more destructive than the AIDS pandemic.[430]

Until September 11th and the necessary shift in U.S. overseas priorities, it appeared as if the realignment of national interests began in the Clinton administration was going to continue. As the Bush administration turned its attention to the global war on terror, attention to the AIDS pandemic fell off

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428. *See Bush Offers AIDS Help; Funds for African Relief* Newsday, Associated Press, May 12, 2001.

429. *See U.S. Health Secretary visits Africa on Disease Fighting, available at* http://usinfo.state.gov/topica/global/hiv/o2040101.htm (last visited May 12, 2001). Nonetheless, even as the Bush administration was aggressively emulating the Clinton-Gore lead on this issue, the administration was being tugged to the right in certain areas. The administration was the only abstaining party when the fifty-three member UN Human Rights Commission voted on a resolution designed to improve access to AIDS drugs. *See United States Abstains from Vote on AIDS Drugs Resolution, available at* http://usinfo.state.gov/topical/global/hiv/01042302.htm (last visited June 19, 2002) (However, the Commission itself lost a lot of credibility when it took the step of ousting the United States, even as human rights violators such as the Sudan were well ensconced). Additionally, some activists were concerned by what they perceived as a seemingly disproportionate focus on prevention, including abstinence, as opposed to treatment by key Bush administration officials. *See id.* Critiquing what he believed to be a cosmetic response to the gravest health threat in nearly a millennia, Tony Burdon, a senior policy adviser at Oxfam noted the world's richest nations had scrounged up "enough money for some prevention, but not a penny to treat the sick." *Id.* Additionally, the Bush administration mounted a fierce but unsuccessful campaign to defeat the treatment equity proposals by the developing countries at the Doha Ministerial Summit of the WTO in Nov. 2001.

430. *Secretary of State Colin Powell, Address at the United Nations Special Session on HIV/AIDS* June 25, 2001, *available at* http://www.state.gov/secretary/rm/2001/3756.htm (last visited Sept. 9, 2001).

the radar screen. Even as the war on the global terror network remains on the front burner, Bush administration officials continue to view the fight against AIDS as an important U.S. national interest. Speaking in the post September 11 period, Paula Dobriansky, Under Secretary of State for Global Affairs stated that AIDS in Africa remains one of the administration's "highest priorities."[431] During the 2003 State of the Union speech, Bush gave credence to this view when he stated that he would ask Congress for $15 billion over the next five years, including nearly $10 billion in new money to fight AIDS in Africa and the Caribbean.[432] Bush's endorsement of a vigorous campaign to reduce the threat of AIDS "surprised many"[433] of his supporters and detractors alike. In a University of Scranton lecture discussing the threat of AIDS in Africa, Leon Fuerth remarked "Something has happened to the thinking of President Bush along the way . . . It may be the realization that chaos in other countries" increases the likelihood that these countries may become "bases for the operations of terror."[434] Even as some skeptics questioned the President's commitment on the global AIDS issue, this writer saw Bush's pledge as further evidence of the continuing rethinking of 'security' and other concepts in international affairs—a process largely precipitated and accelerated by the Clinton-Gore team, including key advisers such as Richard Holbrooke and Leon Fuerth.

IV. CONCLUSION

The concepts of national interest and sovereignty are not cast in stone, nor are they entombed in a hermetically sealed conceptual casket. In the course of the global response to AIDS, the international community questioned and re-assessed traditional understandings of national interest, security, and sovereignty, precipitating a new consensus about the synergies between national interest and international interest. In reaction to AIDS as a

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431. *"The Global Fight Against HIV/AIDS, Tuberculosis, and Malaria,"* Statement by Paul J. Dobriansky before Senate Foreign Relations Committee, Feb. 13, 2002. Similarly, Richard Holbrooke who continues the campaign as a private citizen hopes the U.S. would continue to focus on the pandemic and the threat it poses to U.S. interests. Holbrooke spoke to several Princeton University students who interviewed him in the course of preparing their final paper for a seminar taught by this author in spring 2002 (audiotape on file with author).

432. *See* CNN, *supra* note 423.

433. *Id.*

434. *Id.* Yet, as even many, including this writer thunderously applauded President Bush's maiden entry into the fray, some observers questioned Bush's credibility on this matter, suggesting that the President was merely planning to divert old money from other equally vital aid programs such as malaria control. In a scathing editorial for the New York Times, Princeton University economist Paul Krugman questioned Bush's program to fight AIDS in Africa, citing it as further evidence of the President's "mendacity," "record of broken promises," and "unfounded claims" that have "discredited the administration's foreign policy" and visited great harm on the reputation of the United States "in the eyes of much of the world." Paul Krugman, *Threats, Promises and Lies Straining Bush's Credibility*, THE SCRANTON TIMES, Feb. 26, 2003, at 4.

transborder security threat, interstate cooperation on health issues is weakening traditional conceptual boundaries, placing into question the conventional meanings of national interest, sovereignty, and non-intervention. Efforts to understand these transformations in the international ecosystem are aided by flexible neoliberal institutionalist perspectives instead of the realists' static conceptions of interest and sovereignty.

The U.S. administration of Bill Clinton took a leadership role in rethinking and redefining U.S. national interests regarding international health, as well as in building global support for a campaign against AIDS as a security threat. In fact, an examination of the global response to AIDS as a security threat is also a case study about the role of U.S. as a force for good. It is apparent that in a uni-polar world dominated by an undisputed hegemon, with disproportionate resources, U.S. leaders have tremendous impact on the quality of world order.[435] In that regard, the Clinton Administration strongly demonstrated the tremendous ability of the U.S. to be a force for good in the battle against AIDS.

The intensified global focus on HIV/AIDS as a security threat was spurred, in part, by a decisive rethinking of U.S. national interests with regard to international health and a more comprehensive view of nexus between national and international security, broadly conceived. Conceptions of national interest and security (traditional realist variables) were transformed by new understanding about the catastrophic potential of the AIDS, new knowledge about the processes of bio-globalization and visionary reflectivity regarding these new trends. New thinking about security in the vortex of the pandemic, ushered in a novel consensus about values intrinsic to the long term sustainability and governance of a nascent global society besieged by seemingly implacable microbial foes. With strong U.S. leadership, world leaders recognized AIDS as a major security crisis, and they placed the pandemic at the apex of global security agenda.

The nature and quality of coeval sovereignty is not static. As the international community developed targeted interventions designed to multilaterally respond to AIDS as a security issue, the institution of sovereignty underwent substantial transformation. The Security Council's engagement on the matter of AIDS and its relationship to conflict is arguably the clearest harbinger yet of a bold new challenge to the sacrosanct institution of sovereignty. The meeting and the ensuing resolution were key indicators of the changing assessments of national interest, international security, and the nature of sovereignty in the age of globalization. The Security Council's resolution on AIDS as well as the heightened level of cooperative synergies portend a significant—even a radical—transformation of sovereignty. The destructive threat of global pestilence effectively re-ordered state's valuations

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435. *See* Spectar, *supra* note 158, at 1036 (suggesting that "like Atlas or the Archimedean lever," the U.S. can, and should, lead the world in resolving or managing the thorny global challenges of the twenty-first century).

of sovereignty and curtailed states' resort to the use of sovereignty as a shield. By challenging the primacy of the state on "local" issues such as health, the global response to AIDS is a challenge to the institution of sovereignty. In effect, the emerging consensus that AIDS is a transborder security requiring sustained concerted responses laid the groundwork for more intensified interstate cooperation on health issues, and ipso facto, a loosening of the bonds of sovereignty. The transformation of the institution of sovereignty and its doppelganger, the principle of non-intervention, is further evidence of the limits of statecentrism and national-interest-based approaches to global problems.

The principle of non-intervention is equally being transformed by increasingly activist international institutions in the war against AIDS. The coordinated global response, especially the Security Council resolution, arguably opens the door for the 'intrusion' of the UN into even more spheres hitherto considered "matters essentially within domestic jurisdiction." This revivified internationalism has raised the dander of UN detractors and others suspicious of a brave new interventionist world order, marked by the erosion of national sovereignty. Despite its seemingly narrow focus, the overall thrust of the resolution and its long term implications portend an expansion of the scope and power of international institutions at the expense of state power. The global response to AIDS might in a sense be a precursor to bolder humanitarian interventions on behalf of victims of the four horsemen.

The heightened international coordination and cooperation on the AIDS problem is best explained by neoliberal institutionalist approaches, as opposed to conventional realism. Liberal institutionalists take a more flexible approach to concepts such as sovereignty and view them to be capable of modification in the interactive processes of interstate discourse and intercourse. The liberal institutionalist approach accounts for an evolutionary notion sovereignty and provides a viable framework for thinking about sovereignty and justice. To cope with the emerging threats of the twenty-first century, it will be increasingly necessary to reject the realists' prescriptions and to embrace a dynamic institutionalist perspective.

The inextricable linkage between global and human security further blurs the distinction between so called international and domestic issues and this is sure to spark further interest in the so called 'intermestic realm.' To the degree that the response to the AIDS pandemic fueled a new consensus about significance of 'intermestic' thinking regarding traditional concepts such as national interest, security, and sovereignty, the pandemic is altering the nature of diplomatic discourse and practice. Given the link between health and security, it would seem that the much-vaunted border between high and low politics is not so impervious after all. International lawyers and political scientists will need to develop new interdisciplinary or transdisciplinary approaches that capture the multidimensional dynamics of this new realm.

By blurring the distinction between matters of local versus global concern, the response to the AIDS pandemic is fueling a new reflective

consensus on core conceptions such as national interest, security and sovereignty. Evidence of the new international consensus is evident in the intensified level of concerted action to come to the rescue of Africa – the vortex of the pandemic. Out of this has come a clear sense of the interconnectedness of the human condition, particularly as technological and socio-economic links demonstrate the relative smallness of the planet. This intensified and concerted response by a broad swath of states was an exemplar of international cooperation at the dawn of a new era. If the promise and momentum created by UN Security Council resolution is sustained, humankind may be at the threshold of a new era of international cooperation.

In its response to AIDS as a security issue, the international community took the first important baby step, transcending the shackles of statecentrism and venturing forth in the development of a viable normative framework for managing galloping globalization. Recognizing the limits of the statecentric system, world leaders opted for intensified cooperative and coordinated activity in the management of a common threat.

Looking ahead, sovereignty will continue to be eroded by increasingly prohibitive forms of intervention into conventionally internal matters. Significant derogations from sovereignty may be necessary and appropriate if the international community is going to successfully manage globalization. States will increasingly modify their conceptions of national interest to embrace a broader vision of 'world interest' and the concept of international security will continue to undergo sustained revision and transformation; likewise, the traditional doctrine of non-intervention will be increasingly limited in scope.[436]

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436. The need for greater cooperation and coordination is made even more urgent today as the new specter of the new SARS epidemic stealthily stalks the planet. *See HK Braces as Global Toll Mounts, at* http://www.cnn.com/2003/HEALTH/04/06/sars.wrap/index.html (last visited Apr. 7, 2003). SARS or severe acute respiratory syndrome is a new communicable disease that reportedly originated from China's Guangdong province but that has spread rapidly to Hong Kong, Canada, and Singapore, and is also threatening the United States and other areas. *Id.* In just a few months, SARS has already infected about 2600 persons and killed ninety-five people around the globe. *Id.* The epidemic is also threatening the global economic recovery. *See* Geoff Hiscoc, *Virus Raises Asian Recession Fear, at* http://www.cnn.com/2003/BUSINESS/asia/ 04/01/asia.sarsimpact.biz/index.html (last visited Apr. 8, 2003) (noting economists' fears that SARS is "potentially the most serious event facing the region since the 1997-98 financial crisis"). On a positive note, it appears as if the international community learned a valuable lesson from its initially slow response to the AIDS pandemic. In the face of impending disruptions of global society and commerce by SARS, the international community is mobilizing a quicker response and chastising China's lackadaisical reaction to the epidemic and her failure to quickly warn her neighbors. The lesson is becoming clearer: a viral outbreak in one country is not an internal matter, a local secret, to be shrouded by the outmoded cloak of national sovereignty, and to be screened from external problem solver and/or decision makers by the myopic prism of national interest. In the age of globalization, marauding microbes threaten the peace, progress, and well-being of global society just as much as two-bit tyrants or terrorists with weapons of mass destruction. The SARS epidemic further highlights the need to continue to rethink the security, sovereignty, intervention, and national interests in the new age of galloping globalization and jet setting microbes.

TAKING LAW INTO THEIR OWN HANDS: UNOFFICIAL AND ILLEGAL SANCTIONS BY THE PAKISTANI TRIBAL COUNCILS

I. INTRODUCTION

In June 2002, a Pakistani tribal village council sentenced a woman to be gang raped in order to restore the honor of an opposing tribe.[1] It is unfathomable that such an atrocious human rights violation could be rendered as a form of punishment in a civilized country. In order to understand how something like that could happen in the twenty-first century, one only need look at the state of Pakistani law and order, or the lack thereof.[2]

This Note will look at the historical effects that led up to the present-day determination that the country is in a state of lawlessness.[3] More importantly, this Note will look at the effects on the Pakistani culture and society when such inhumane punishment is ordered by the tribal justice system. An analysis will be conducted to determine what role these tribal councils play as an alternative to the official court system in resolving disputes and how some of the remedies sanctioned by the council are in conflict with the Pakistan Constitution. In addition, this Note will compare how India officially utilizes the tribal councils within their society for the purpose of illustrating how Pakistan could utilize a tribal jury system effectively and officially. Finally, this Note will analyze whether the tribal councils should be abolished or reformed.[4]

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1. *See* Muhammad Saleem Sheikh, *The Meerwala Incident: Shame in the Name of Justice*, YOU (July 26, 2002), *available at* http://www.jang-group.com/thenews/jul2002-weekly/you-16-07-2002.html (last visited Jan. 19, 2003).

2. *See id.* This type of court system, the *jirga*, is not legal but is maintained by tribal leaders to uphold their feudal authority. *See* Criminology Research Institute, *Punjabi Gang Rape Victim Fears For Her Life After Six Are Sentenced to Hang*, *available at* http://www.thecriminologist.com/cri_news/gang_rape.asp (last visited Nov. 19, 2002) [hereinafter CRI]. What makes it difficult for the police to act against this type of justice, is that the local police officers will do little if nothing to prevent such trials from occurring and are more likely to help by covering up evidence of the tribal proceedings. *See id.* However, this brutal example of medieval justice has prompted the Pakistani Government to take action after the public and human rights organizations outcry against this violation. *See id.*

3. *See* AZHAR HASSAN NADEEM, PAKISTAN: THE POLITICAL ECONOMY OF LAWLESSNESS 1-2 (2002).

4. Several other factors will be addressed in dealing with the much larger issue of lawlessness. However, these issues will only be briefly discussed to allow the majority of the discussion to focus on the interaction between the State and the tribal councils.

II. INCIDENT OF GANG-RAPE

In June 2002, a human rights atrocity occurred in the Punjab[5] province of Pakistan when a young woman from the Gujjar tribe[6] was sentenced to a gang rape in order to restore the honor of another woman from the Mastoi tribe.[7] An unofficial tribal jury, armed with machine guns, laid down the sentence in order to punish the victim's twelve-year-old brother.[8] The victim's brother was allegedly having an illicit affair with a Mastoi woman, who was from a tribe of a higher caste.[9] It was later proven that the alleged affair was simply a cover-up by the Mastoi tribe after several tribal members kidnapped, beat, and sodomized the young boy.[10] They held the boy captive until the boy's uncle requested the boy's captivity be resolved before a tribal council or what is commonly referred to as a *panchayat* in Pakistan.[11] Although the victim's father offered to allow the boy to marry the Mastoi woman, the Mastoi tribe rejected this offer because the boy was from a lower caste.[12] Subsequently, the *panchayat* decided that the aggrieved family members of the higher caste could be restored after members of the Mastoi tribe disgraced a member of the boy's family.[13] The young Gujjar woman had been at the court to seek leniency for her brother, but immediately after the ruling, four Mastoi

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5. *See generally Government of Punjab*, *at* http://www.punjab.gov.pk.html (last visited Jan. 19, 2003). Punjab is located in the northern region of the country, and is also the most populous province of Pakistan. *See id.*

6. *See* Human Rights Watch, *Pakistan: Tribal Councils Source of Abuse*, July 12, 2002, *available at* http://www.hrw.org/press/2002/07/pak0712.htm (last visited Jan. 19, 2003). The Gujjar tribe is located in the village of Meerwala, which is located in southern Punjab. *See id.*

7. *See* Sadaf Zahra, *Rape Cases Highlight Terrible Plight of Women in Pakistan*, *at* http://www.marxist.com/women/pakistan_rape_cases.html (last visited Mar. 14, 2003).

8. *See* Brian Bennett, *A Violation of Justice*, *in* TIME - ASIA MAGAZINE, July 15, 2002, *available at* http://www.time.com/time/asia/magazine/article/0,13673,501020715-300692,00.html (last visited Nov. 19, 2002). The brother was accused of having sexual relations with a twenty-two year old woman of the higher caste Mastoi tribe. *See* CRI, *supra* note 2. Various news reports have conflicting ages for the woman's brother ranging from age eleven to fourteen years old. *See* Zahra, *supra* note 7.

9. *See id.*

10. *See* Amnesty International, *Pakistan - The Tribal Justice System* (Aug. 1, 2002), *available at* http://web.amnesty.org/ai.nsf/Index/ASA330242002?OpenDocument&of=COUNTRIES%5CPAKISTAN (last visited Jan. 19, 2003) [hereinafter Amnesty].

11. *See id.* Tribal village councils are also called *panchayats* in the south and *jirgas* in the north and will be used interchangeably throughout this Note. *See Tribal Law System on Trial After Rape-by-Decree*, *available at* http://www.smh.com.au/articles/2002/07/07/1025667088892.html (last visited Nov. 19, 2002) [hereinafter *Tribal System on Trial*].

12. *See* Associated Press, *The Cancer of Tribalism*, *available at* http://www.khilafah.com/home/category.php?DocumentID=4508&TagID=12 (last visited Nov. 19, 2002). There is great prestige for a family to conclude a marriage for a daughter with a higher-ranking caste; however, much shame or dishonor is brought if the daughter is married to an inferior caste level. *See id.*

13. *See* CRI, *supra* note 2.

tribesmen dragged her to a nearby hut and repeatedly raped her.[14] While this by itself is extremely disturbing, even more appalling was the fact that the young victim, who happened to teach the Quran[15] to the Mastoi tribe's children, pleaded for mercy as several hundred villagers stood outside the hut and jeered and laughed while she was being gang-raped.[16] After the horrendous ordeal, the woman was forced to return home by walking naked through the village; under the Pakistan Penal Code, being in public in a state of undress is a crime in itself.[17]

This story only became public after a local reporter heard about the atrocious act and subsequently published the story in a local newspaper.[18] Upon hearing about this ordeal, Pakistan's President, Pervez Musharraf,[19] and the Pakistani Supreme Court[20] ordered the local police to apprehend the offenders.[21] Additionally, many human rights organizations voiced their outrage at this horrible human rights violation.[22]

Although the victim filed a complaint with the local police, it was not until one week later that the police arrested any suspects in the gang rape.[23] Subsequently, a member of the police force was arrested for failing to file a

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14. *See* Press Release, Amnesty International, *Pakistan: Tribal Councils Must Stop Taking Law Into Their Own Hands*, (July 5, 2002), *available at* http://web.amnesty.org/ai.nsf/Index/ASA330182002?OpenDocument &of=COUNTRIES\PAKISTAN (last visited Jan. 19, 2003) [hereinafter Amnesty Press Release].

15. *See* Rachel Ruane, *Murder in The Name of Honor: Violence Against Women in Jordan and Pakistan,* 14 EMORY INT'L L. REV. 1523, 1579 (2000). The Quran is the primary material source of the word of God as revealed to the Prophet and it is also a source of Islamic guidance. *See id.*

16. *See* CRI, *supra* note 2. It must be assumed that the local police were aware of the event and did nothing to stop it. *See* Amnesty Press Release, *supra* note 14.

17. *See* Amnesty, *supra* note 10. There are a large number of public stripping of women and parading them naked through southern Punjab and upper Sindh region. *See id.* The intended target of humiliation the majority of the time is the woman's male relatives. *See id.* Section 354A Pakistan Penal Code (PPC) makes it unlawful to be public in a state of undress. *See id.*

18. *See* Zahra, *supra* note 7.

19. *See* Islamic Republic of Pakistan, *Basic Facts, available at* http://www.pak.gov.pk/public/govt/basic_facts.html (last visited Jan. 19, 2003) [hereinafter Pakistan *Basic Facts*]. In October 1999, Army Chief of Staff General Pervez Musharraf overthrew the civilian government in a nonviolent coup and named himself Chief Executive. *See* U.S. Dep't of State, 2001 Pakistan Country Reports on Human Rights Practices, (Mar. 4, 2002), *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/sa/8237pf.htm (last visited Jan. 19, 2003) [hereinafter U.S. Dep't of State]. Musharraf was sworn in as the country's President on June 20, 2000. *See id.*

20. *See* Islamic Republic of Pakistan, *Judiciary, available at* http://www.pak.gov.pk/public/govt/judiciary.htm (last visited Jan. 19, 2003). The Supreme Court has a limited degree of independence and is somewhat controlled by President Mushaffar and his government. *See* U.S. Dep't of State, *supra* note 19.

21. *See Tribal System on Trial*, *supra* note 11. The Supreme Court ordered a probe into the sexual assault on the tribal girl after the country was outraged. *See id.* The Supreme Court also inquired as to why the police took so long to register the case. *See* Sheikh, *supra* note 1.

22. *See id. See* Amnesty, *supra* note 10.

23. *See* Sheikh, *supra* note 1.

report of the woman being gang-raped.[24] Local human rights activists accused the police of knowing about the tribal council meeting, but then failing to stop the attack on the woman.[25]

Pakistani officials brought the suspected rapists, as well as some members of the tribal council, to trial in the Anti-Terrorism Court (ATC).[26] The ATC was created under the Anti-Terrorism Act of 1997 in order to expedite criminal trials so they are completed within thirty days.[27] Because the *panchayat* is not an official court and Punjab is not one of the federally recognized tribal areas subject to their own rule, the rapists could not claim that their tribal law was sovereign, and they were, therefore, immune to prosecution.[28] However, one of the accused did try to prove his innocence by claiming that the woman was given to him in marriage and therefore there was no violation of rape.[29] Ultimately, the ATC found six of the fourteen arrested guilty and sentenced them to death.[30]

III. ANALYSIS OF PAKISTANI LAW AND ORDER

It is arguable that Pakistan is not a civilized country, but rather is in a primitive state.[31] One comparison between the two terms "primitive"[32] and

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24. *See id.*

25. *See* Amnesty Press Release, *supra* note 14. It is hard to believe that the police were not aware of what was happening with the reports that hundreds of villagers jeered and laughed outside the hut as the girl was gang-raped. *See id.*

26. *See* CRI, *supra* note 2. The Law Minister of Pakistan arranged for the trial to take place in a specially convened Anti-Terrorist Court because he recognized the threat of interference and possible reprisals by the local tribal members. *See id.*

27. *See* HASAN-ASKARI RIZVI, MILITARY, STATE AND SOCIETY IN PAKISTAN 227 (2000). The ATC is empowered to try acts against the state, conspiracy, kidnapping, and particular "heinous" crimes such as gang-rape and child killings. *See U.S. Dep't of State*, *supra* note 19.

28. *See Six Men Guilty in Gang-Rape Trial*, THE HAMILTON SPECTATOR, Sept. 3, 2002, *available at* 2002 WL 24456633. The tribal areas disregard federal law for their own clan justice. *See id.*

29. *See id.* Rape is only illegal when the sexual intercourse occurs between two individuals who are not married. *See id.* Pakistan does not have a spousal rape law so the rapist claiming this could have been acquitted if the judge had accepted this testimony. *See id.*

30. *See* CRI, *supra* note 2. The four rapists and two tribal members were sentenced to death while other council members were acquitted. *See id.* The remaining eight defendants were acquitted. *See id.* Unbelievably, this is the first time that a tribal jury has been punished for their sanctions. *See* Sami Zubeiri, *Pakistani Tribal Justice Under Attack As Rapists Get Death Penalty*, AGENCE FRANCE-PRESSE, Sept. 1, 2002, *available at* 2002 WL 23590875.

31. *See* Craig Baxter, *Introduction in* ZIA'S PAKISTAN 1-2 (Craig Baxter ed. 1985). Such a form of government transformed from the Western parliamentary system to a one-ruler Islamic state presents political, economic, and social questions. *See id.*

32. *See* MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 934 (1985). Primitive is defined as "a: of or relating to the earliest stage or period[;] b: closely approximating an early ancestral type; little evolved[;] c: belonging to or characteristic of an early stage of development." *Id.*

civilized"[33] indicates that the former is generally where the people identify themselves by a particular blood relationship, whereas in the latter, the people define themselves in terms of relation to a given territory.[34]

Typically, there are two forms of government.[35] The first form, social organization, or society, is analyzed by how the government deals with the people in their capacity as members of tribal groups.[36] The second form, political organization, is based on a territorial state whereby the government deals with the constituents as a region.[37] The rural area of Pakistan consists primarily of tribes that are organized on the basis of kinship with each tribe functioning as a simple society with tribal governments.[38] This has been equated with a primitive government.[39] This varies from a higher civilization where one would find multiple cultures living under the same authority.[40]

A. Historical Aspect

As a result of the partitioning of British India,[41] Pakistan was formed on August 14, 1947.[42] However, many conflicts arose between the Pakistan refugees that came from Afghanistan and India and the traditional rural tribal people who already inhabited Pakistan.[43] The typical village in Pakistan is divided into separate factions based upon kinship, ethnic, ideological, or class rationales.[44]

Many of the country's punishments, such as amputation, whipping, and stoning, have been sanctioned for decades.[45] These punishments are viewed by modern societies as barbaric and uncivilized.[46] The Human Rights

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33. *See id.* at 244. Civilized is defined as "to cause to develop out of a primitive state; *specif:* to bring to a technically advanced and rationally ordered stage of cultural development." *Id.*

34. *See* I. SCHAPERA, GOVERNMENT AND POLITICS IN TRIBAL SOCIETIES 3 (1967).

35. *See id.*

36. *See id.*

37. *See id.* Regions are treated much like a town or a state. *See id.*

38. *See id.*

39. *See* SCHAPERA, *supra* note 34, at 3.

40. *See id.* at 19.

41. *See Introduction in* PAKISTAN: A COUNTRY STUDY, XIX (1975). The partitioning of British India created two separate states of India and Pakistan. *See id.* Prior to this, the area was accompanied by communal riots of unprecedented violence between the Hindu and Muslims. *See id.*

42. *See* Surjit Mansingh, *Historical Setting, in* PAKISTAN: A COUNTRY STUDY, 32 (Richard F. Nyrop, 5th ed. 1984). Pakistan was formed for the Muslim refugees in order to separate the Indian Hindus from those individuals with Muslim beliefs. *See id.* at 26-27. Religion was the key force behind the drive for a separate state. *See* P.A. Kluck, *The Society and Its Environment, in id.* at 78.

43. *See id.* at 33.

44. *See* Charles H. Kennedy, *Rural Groups and the Stability of the Zia Regime, in* ZIA'S PAKISTAN, *supra* note 31, at 28.

45. *See* Baxter, *supra* note 31, at 1.

46. *See id.*

Commission of Pakistan (HRCP)[47] stated that the informal justice the tribal councils provide is simply the tribe taking the law into their own hands and rendering justice in a medieval way.[48]

The state of lawlessness has been present since the Islamic Republic of Pakistan was formed.[49] Ethnic, regional, or sectarian conflicts factored in the breakdown of social order in Pakistan.[50] The State's failure to manage and meet the demands of minority groups drove the tribal areas to change their focus from demanding cultural and political autonomy to seeking territorial sovereignty.[51]

The majority of Pakistan people live in the rural areas as opposed to the urban cities.[52] According to the 1981 census, seventy-one percent (71%) of Pakistan's population lived in a village with fewer than 5000 inhabitants.[53] Pakistan's rural areas suffer from extremely rapid population growth.[54] The major source of this growth is the influx of refugees from Afghanistan and India.[55] Subsequently, such rapid growth played havoc on rural development plans and placed severe demands on an already inefficient local government structure.[56]

The military and civilian rulers created authoritarian measures to oppress the citizens of Pakistan.[57] As a result, several decades of economic and social inequality burdened the development of a democratic regime over a heterogeneous population.[58] In 1981, while the State was under martial law,

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47. *See generally* HUMAN RIGHTS COMM'N OF PAKISTAN, *available at* http://www.hrcp.cjb.net (last visited Jan. 19, 2003) [hereinafter HRCP]. HRCP is a non-governmental organization (NGO) set up to work for the ratification and implementation of the Universal Declaration of Human Rights and other internationally adopted human rights initiatives; to promote studies in the field of human rights; to cooperate and aid with national and international groups engaged in the promotion of human rights; and to take appropriate action to prevent violations of human rights and provide legal aid to victims of human rights violations. *See id.*

48. *See* Amnesty, *supra* note 10.

49. *See* NADEEM, *supra* note 3, at 131.

50. *See id.* at 37.

51. *See* IAN TALBOT, INVENTING THE NATION INDIA & PAKISTAN 283 (2000). As early as 1948, the tribal chiefs sought their own independent state, but their demands were quickly denied as the Pakistan military took action against the rural tribes who then acceded to governance by Pakistan. *See* Mansingh, *supra* note 42, at 34.

52. *See* Kennedy, *supra* note 44, at 23.

53. *See id.* at 23-24.

54. *See* PAKISTAN MINISTRY OF FINANCE, 2001 Economic Survey, *available at* http://www.finance.gov.pk/survey/main.html (last visited Jan. 19, 2003) [hereinafter 2001 Economic Survey].

55. *See* Kennedy, *supra* note 44, at 24. Afghanistan and India are neighboring countries to Pakistan. *See id.*

56. *See id.*

57. *See* Omar Asghar Khan, *Critical Engagements: NGO's and the State*, *in* POWER AND CIVIL SOCIETY IN PAKISTAN 278 (Anita M. Weiss & S. Zulfiqar Gilani eds., 2001).

58. *See* TALBOT, *supra* note 51, at 286.

Zia ul-Haq[59] replaced sections of the 1973 Constitution with a Provisional Constitutional Order that required the judiciary to be subordinate to the military.[60] The current federal justices were forced to take a new oath or else lose their position on the court.[61] Several judges lost their jobs because they would not accept the fact that the courts were under the military's power.[62]

In 1985, Pakistan adopted the United Nations Convention on the Prevention of Crime and the Treatment of Offenders.[63] This UN Convention stated, "certain forms of crime can hamper the political, economic, social and cultural development of peoples and threaten human rights, fundamental freedoms, and peace, stability and security."[64] By adopting this Convention, Pakistan agreed to strengthen crime prevention programs and undertake a criminal justice process that is responsive to the diversity of political and economic systems as well as the ever-changing conditions of society.[65] Despite Pakistan's adoption of this Convention, it is doubtful that Pakistan has adequate programs in place to change social conditions.[66]

During the early 1990s, maintaining law and order was no longer a priority in Pakistan.[67] This resulted in violence and corruption.[68] In addition, the resolution of judicial matters became increasingly difficult.[69] During this time, the Pakistani government routinely denied its human rights abuses.[70] Nevertheless, Pakistan was quick to publicize the deteriorating human rights situation in the valley of Kashmir.[71]

By the early 1990s, institutional life was so underdeveloped and weakened that the tribal areas disregarded the authority of the State.[72] The basic administration of the area, such as census taking, school regulation, and taxation, had been interrupted.[73] Yet, without the interference of federal governmental administration, the tribal people were able to survive in a state

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59. *See* Baxter, *supra* note 31, at 1. General Muhammed Zia ul-Haq assumed power in 1977 when his military associates overthrew the government of Prime Minister Zulfiqar Ali Bhutto. *See id.*

60. *See* RIZVI, *supra* note 27, at 178.

61. *See id.*

62. *See id.*

63. *See* NADEEM, *supra* note 3, at 2-3.

64. *See id.*

65. *See id.*

66. *See* U.S. Dep't of State, *supra* note 19.

67. *See* NADEEM, *supra* note 3, at 47.

68. *See id.*

69. *See id.*

70. *See* TALBOT, *supra* note 51, at 278.

71. *See id.*

72. *See id.* at 222. Pakistan tribes in the rural areas have always maintained a fair amount of autonomy where customary law is their common law. *See* Mansingh, *supra* note 42, at 34.

73. *See id.* In the northern tribal region, transportation is rugged and dangerous around the mountainside. *See* Kluck, *supra* note 42, at 72.

of isolation by continuing their daily struggles regardless of the power plays of the self-interested elites of the local government.[74]

B. Women's Role in Society

Violence against women, within their own families, is an extension of the subordination of women in the larger society, which is reinforced by religious beliefs, cultural norms, traditional practices, and actual laws in Pakistan.[75] The women of Pakistan are subjected to the social code of behavior known as *purda,* which requires that women be safeguarded from unauthorized persons.[76] When a woman is allowed outdoors, she must be covered completely except for the upper part of her face; and she also must be chaperoned by a male family member.[77] This social custom scars the women in Pakistan because they develop a deep-seated fear of any interaction with men.[78]

In Pakistan and some other Muslim countries, there is a unique category of criminal conduct committed by women known as "crimes of honor."[79] Honor is a very important aspect of Pakistani culture whereby a man's honor resides in the actions of the women of his family.[80] These crimes include adultery, freely choosing a marriage partner without the father's permission, or seeking a divorce.[81] This practice has been deeply rooted in tribal societies for decades.[82]

The woman holds all of the honor for the family and the social order depends upon her maintaining this honor.[83] In addition, the woman's honor or shame strongly affects the general standing of the tribe within the

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74. *See* TALBOT, *supra* note 51, at 222.

75. *See* Anita M. Weiss, *Gendered Power Relations: Perpetuation and Renegotiation, in* POWER AND CIVIL SOCIETY, *supra* note 57, at 73. Significant numbers of women are subjected to harassment, violence, rape, and other forms of degradation by spouses and members of society. *See* U.S. Dep't of State, *supra* note 19. Traditional social and legal constraints have kept women in a subordinate position within society. *See id.*

76. *See* IZZUD-DIN PAL, PAKISTAN, ISLAM & ECONOMICS 123 (1999). *Purda* prohibits social contact between women past the age of puberty and the men who are not part of her family circle. *See* Kluck, *supra* note 42, at 110.

77. *See* PAL, *supra* note 76, at 123.

78. *See id.* at 128.

79. *See* Roland Pierre Paringaux, *Asian Women Exposed to Violence – Pakistan: Cost of a Lie,* LE MONDE DIPLOMATIQUE (May 2001), *available at* http://mondediplo.com/2001/05/13pakistan (last visited Jan. 19, 2003).

80. *See* LIBRARY OF CONGRESS, *Pakistan: Men, Women and the Division of Space, available at* http://lcweb2.loc.gov/frd/cs/pktoc.html (last visited Jan. 19, 2003). Complete chastity among a man's female relations is of the essence; only with good reputation of his mother, daughter, sisters, and wife can a man ensure his honor. *See* Kluck, *supra* note 42, at 90.

81. *See* Amnesty, *supra* note 10.

82. *See* Paringaux, *supra* note 79.

83. *See id.*

community.[84] To ensure that the women do not dishonor their families and tribes, women are restricted in their activities, limited in their mobility, and allowed very limited contact with the opposite sex.[85]

In addition to the common occurrence of gang rape, many women have been killed for a violation of honor.[86] Unfortunately for tribal women, the community socially and morally sanctions such "honor killings."[87] Further hindering the system is the fact that the State does not generally condemn these activities nor take action against the murderers.[88] Nevertheless, in 2000 the government declared that there is nothing honorable in this form of murder and that the practice, carried over from ancient tribal customs, is anti-Islamic.[89]

The fact that women are treated less favorably than men is in conflict with the Quran,[90] which says that men and women should be treated equally.[91] Furthermore, the Quran reminds men that women have the same status as human beings that men enjoy.[92] However, the Quran's teachings are in direct conflict with tribal culture, where daughters are often not particularly welcome at birth.[93]

Recent studies referred to rape as an act of deliberate communal humiliation in this region.[94] Rape is so rampant in Pakistan that every two hours a woman is raped.[95] Statistics also report that in Punjab, a woman is gang-raped every four days.[96] However, even with these high rates of occurrence, rape is seldom reported for fear of retaliation.[97] Even the victim

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84. *See* Kluck, *supra* note 42, at 107.

85. *See id.*

86. *See* U.S. Dep't of State, *supra* note 19. For the year 2001, more than 800 women were killed by family members in "honor killings." *See id.*

87. *See* Farzana Bari & Saba Gul Khattak, *Power Configurations in Public and Private Arenas: The Women's Movement's Response, in* POWER AND CIVIL SOCIETY, *supra* note 57, at 230. "Honor killings" is the cultural tradition of killing those suspected of illicit sexual relations in order to restore tribal or familial honor. *See* U.S. Dep't of State, *supra* note 19.

88. *See* U.S. Dep't of State, *supra* note 19. Honor killings rarely lead to criminal prosecution or convictions due to the lack of witnesses willing to come forward due to communal pressures. *See id.*

89. *See* Amnesty, *supra* note 10.

90. *See* Ruane, *supra* note 15. The Quran is the primary material source of the word of God as revealed to the Prophet and it is also a source of Islamic guidance. *See id.*

91. *See* PAL, *supra* note 76, at 132.

92. *See id.*

93. *See id.*

94. *See* AKBAR S. AHMED, JINNAH, PAKISTAN & ISLAMIC IDENTITY 228 (1997).

95. *See* Sheikh, *supra* note 1. The Human Rights Commission of Pakistan (HRCP) estimates that at least eight women are reported to be raped every day; and more than two-thirds of them are victims of gang rape. *See* Mona Eltahawy, *Rape as Punishment* WASH. POST, July 28, 2002, at B7.

96. *See* Sheikh, *supra* note 1. *See also* U.S. Dep't of State, *supra* note 19.

97. *See id.* In 2001, HRCP reported that in the populous province of Punjab, a woman is raped every six hours and a woman gang-raped every fourth day, yet only 321 rape cases were reported last year. *See* ABC NEWS, *Pakistan Supreme Court Orders Probe Of Rape Order*, July 4, 2002, *at* http://www.abc.net.au/news/2002/07/item20020704080758_1.htm (last visited Jan. 19, 2003). HRCP estimates that only one-third of all rapes are actually reported to

of the gang rape discussed did not register a complaint with the local police force until eight days later.[98]

In addition to rape, honor killings frequently occur in Pakistan.[99] The killings are on the rise because the murderers in honor killings are rarely punished.[100] Furthermore, as the women in Pakistan gain knowledge of their rights and begin to assert them, the rate of honor killings also increases.[101]

C. National Identity

The lack of a national identity has a causal connection with Pakistan's state of lawlessness.[102] Within the territorial boundaries, there are several ethnic and tribal areas that maintain their own autonomy.[103] Therefore, Pakistan has a hodgepodge of governing laws gathered from old British laws, Islam laws, state and tribal laws.[104] In the rural areas where transportation and communication is poor, the tribes are independent and the villages tend to be isolated even from neighboring tribes.[105] When the tribes live by the law of their own tribe without the social interaction from other tribes, the traditional social customs dominate their life.[106]

The notion of national identity or loyalty has little value to the Pakistani citizens.[107] Ethnic, regional, caste, and family loyalties factor more in society than the national loyalty.[108] An individual's loyalties are defined in terms of family, local leaders, clan or tribe, and caste.[109] The people of Pakistan have always remained distant from the political system and they have been unable to understand a Constitutional theory or relate to the idea of a consensual plurality or national identity.[110] On the contrary, the citizens have continued to follow the local tribal leaders whom they trust.[111]

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the police. *See* U.S. Dep't of State, *supra* note 19.

98. *See* Sheikh, *supra* note 1.

99. *See WSC Speaks at UN on Kalabagh Dam and the Plight of Women in Sindh*, THE SINDH PERCHAR (World Sindh Congress, Sindh), Dec. 2000, at 1, 9 [hereinafter THE SINDH PERCHAR].

100. *See id.*

101. *See id.*

102. *See* AHMED, *supra* note 94, at 171.

103. *See id.* Pakistan is comprised of distinct diverse cultures each intensely committed to its unique heritage and way of life. *See* Kluck, *supra* note 42, at 80.

104. *See* AHMED, *supra* note 94, at 217.

105. *See id.* at 191.

106. *See id.* at 191-92.

107. *See* Kluck, *supra* note 42, at 78.

108. *See id.* at 67.

109. *See id.* at 78.

110. *See* Lawrence Ziring, *Government and Politics, in* PAKISTAN: A COUNTRY STUDY, *supra* note 42, at 186.

111. *See id.*

Without a national identity, Pakistan has created a weak and shaky political and social structure.[112] As a result, society has disintegrated into a collection of individual and tribes where the lawlessness further reinforces the tribal loyalties.[113] The tribes live and socialize amongst themselves and are only concerned with the political and economic benefits for themselves.[114]

D. Caste Systems

A caste system exists in Pakistan to distinguish the different levels of society.[115] The structure of society in the provinces of Pakistan are caste-ridden and tribal-feudal,[116] with the upper castes having large holdings of land while the lower castes consist of peasants who are treated as slaves.[117] The caste's levels are based upon the specialized occupations that one holds.[118] Ideally, the multi-level caste systems are self-sufficient in providing the community with the needed goods and services thereby alienating them from other tribal interaction.[119]

The landed-elite were favored during the pre-Pakistan days when Britain ruled the region whereby an exchange was made for the British to meet the wants and needs of the Punjab tribal landlords who reciprocated by maintaining the law and order in the rural areas.[120] With agriculture being the main industry in Pakistan's economy, landlords are prominent figures in society because they wield both political and economic power to either grant favors or render sanctions against others.[121] When Pakistan was formed, the State's independence did not change this social and cultural atmosphere.[122] Although the lower castes are guaranteed equal rights through the Constitution, it is clear they are being denied economic and political

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112. *See* AHMED, *supra* note 94, at 218.

113. *See id.* at 247.

114. *See id.*

115. *See* Kluck, *supra* note 42, at 80. There are a variety of castes, based upon occupational groups. *See id.* The most significant social marker is the distinction based upon the caste which one belongs. *See id.* at 83.

116. *See* Kennedy, *supra* note 44, at 28. Pakistan's rural structure contains feudalist elements where the big landlords fulfill the role of the feudal lords, controlling the economic, political, and social order. *See id.* Village caste systems include landowners, farmers, religious leaders, and craftsmen. *See* Kluck, *supra* note 42, at 105.

117. *See* GHULAM KIBRIA, A SHATTERED DREAM: UNDERSTANDING PAKISTAN'S UNDER-DEVELOPMENT 226 (1999).

118. *See* Kluck, *supra* note 42, at 83. Village caste systems varied from the higher landowner farmers to the lower end of the occupations hierarchy containing the craftsmen such as cobblers, sweepers and garbage collectors. *See id.* at 105.

119. *See id.*

120. *See id.* at 83. Landlords presided over the tribal areas with little concern for any outside interference. *See id.* at 84.

121. *See id.* at 68.

122. *See* Kluck, *supra* note 42, at 83.

privileges.[123] Furthermore, the landlords defied the courts and provincial law by holding illegal tribal *jirgas* to settle feuds, award fines, and even sentence people to the death penalty.[124]

Similar to the discrimination that the women in these tribal regions endure, the lower castes are also subjected to discrimination.[125] The higher caste members generally are segregated from the lower castes and typically cannot share food with the lower castes nor can they marry someone from the lower castes.[126] Furthermore, the inequality in the distribution of income adversely affects crime prevention and criminal justice systems.[127] The wealthy and influential citizens benefit from the police protection, while the less fortunate victims and witnesses end up facing retaliation for reporting the offense.[128] Consequently, there is a miscarriage of justice when there is a failure to convict the guilty among the rich and powerful higher castes; while the lower castes are wrongfully convicted.[129] Some citizens petitioned the courts to look into the wrongdoings of the police, but even the court ordered inquiries result in very few trials and so far no convictions have been obtained against any police officers.[130]

E. Economic Effect

Unfortunately, Pakistan has not maintained the economic growth that its neighboring countries have sustained.[131] Countries without the law and order

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123. *See* AHMED, *supra* note 94, at 171. In 1947, in a speech, Muhammad Ali Jinnah, the founder of Pakistan, stated that:

> [If you change your past and work together in a spirit that every one of you, no matter to what community he belongs, no matter what relations he had with you in the past, no matter what is his colour, [sic] caste or creed, is first, second and last a citizen of this State with equal rights, privileges and obligations, there will be no end to the progress you will make.] . . . . [We are starting in the days when there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one State.]

See id. at 174-75. *See also* Jinnah's Presidential Address, Aug. 11, 1947, *available at* http://www.sdp.org.pk/Quaid.htm (last visited Feb. 26, 2003).

124. *See* U.S. Dep't of State, *supra* note 19.

125. *See* AHMED, *supra* note 94, at 51.

126. *See id.*

127. *See* NADEEM, *supra* note 3, at 301. Pakistan is an extremely impoverished country with great extremes in the distribution of wealth. *See* U.S. Dep't of State, *supra* note 19.

128. *See* NADEEM, *supra* note 3, at 302. Members of the police themselves have committed numerous serious human rights violations. *See* U.S. Dep't of State, *supra* note 19.

129. *See* Nadeem, *supra* note 3, at 302.

130. *See* U.S. Dep't of State, *supra* note 19.

131. *See* Shahid Javed Burki, Politics of Power and Its Economic Imperatives: Pakistan 1947 – 99, *in* POWER AND CIVIL SOCIETY, *supra* note 57, at 163. *See also* WORLD BANK, *2002 PAKISTAN COUNTRY BRIEF: Pakistan's Development Progress, available at* http://www.worldbank.org.pk/sar/sa.nsf/083c4661ad49652f852567d7005d85b8/e446d9087f72838e85256b02006

problems that plague Pakistan, generally benefit from having economic stability and economic growth.[132] Because of its state of lawlessness, Pakistan has suffered the effects of the industrialists fleeing the region.[133]

Also, Pakistan is somewhat disadvantaged where foreign investment is concerned.[134] Economists believe that foreign investment is closely related to domestic investment.[135] Many of the more advantaged members of society are merely concerned with their wants and needs.[136] As a result, foreign investors do not build business relationships with the local entrepreneurs.[137] Many of the impoverished are in the rural areas where they are plagued with problems.[138] The Pakistan government has not made sufficient efforts to provide any social services to the tribal people.[139] Thus, even though millions are being spent on nuclear warfare, most of society remains in poverty.[140] The amount of funding that is allocated for criminal justice administration is extremely inadequate.[141] Nonetheless, it is reported that Pakistan spends seventy percent (70%) of its budget on defense-related projects.[142]

Additionally, the Pakistani economy ultimately is disadvantaged because they have excluded women from the social and political process.[143] Modern economic advisers see the need for women to participate in the economic sector in order to promote development of the country.[144] Unfortunately, the traditional cultural norm is that women should not be allowed out of the house, much less employed.[145]

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cbff4 (last visited Jan. 19, 2003). Pakistan still lags behind countries with comparable per capita income in most social indicators. *See id.*

132. *See* NADEEM, *supra* note 3, at 300. Economic development has been tied to political instability and lawlessness. *See id.* at 137. In the late 1960s, the breakdown of law and order led to a fall of annual growth rate from earlier in the 1960s average year's rate of 5.5 percent to 1.4 percent. *See id.* at 138. "[C]onditions of law and order must have direct and significant bearing on the peace and pattern of economic development of a country." *Id.* at 1.

133. *See id.* at 162.

134. *See id.* at 176.

135. *See id.*

136. *See* NADEEM, *supra* note 3, at 177.

137. *See id.*

138. *See* AHMED, *supra* note 94, at 218. The lower caste members are generally the tenants who do not own land and are often treated as slaves of the feudal landlords that own vast estates. *See id.*

139. *See id.* Reforms by the government have had little effect on reducing inefficiency and corruption in some levels of government. *See* U.S. Dep't of State, *supra* note 19.

140. *See* Dr. Rubina N. Shaikh, *Briefing on Human Rights Situation in Sindh*, THE SINDH PERCHAR (World Sindh Congress, Sindh) Dec. 2000, at 7.

141. *See* NADEEM, *supra* note 3, at 56.

142. *See id.*

143. See PAL, *supra* note 76, at 121.

144. *See id.*

145. *See id.*

IV. ROLE OF TRIBAL COUNCILS

In some rural areas of Pakistan, a tribal judiciary forum traditionally deals with crimes of dignity and punishes the offenders outside of Pakistani law.[146] Their role is to bring reconciliation between the conflicting parties, based upon evidence and arguments presented.[147] During this process, the respected elder members of the *jirga* are consulted frequently.[148]

Similar to the Western tort law system, the tribal council's focus is on reconciliation and conflict resolution; however, it is not focused on punishment.[149] Also, tribal law is not necessarily aimed at finding out the truth.[150] In the federal court system, often the individual takes an oath, and then fearing that the truth will come out and he will consequently lose the case, he proceeds to lie in his testimony.[151] In contrast, the *panchayat* system allows the individual to give a true account because there is trust among the locals as opposed to the federal justices who are mistrusted.[152] With regard to reconciliation, the *panchayat* system has the objective of ending the hostility peacefully.[153] In a trial court, the hostility remains after the verdict and sentence are imposed.[154]

The *jirgas* often resolve land conflicts between two warring factions, water disputes, inheritance disputes, honor breaches, and internal and external tribal killings.[155] Many cases have been reported where the *jirgas* have sentenced the tribes to pay for crimes its members have committed such as kidnapping or theft.[156] Some wrongful death claims have also been settled before a *jirga*.[157] The tribal juries have been known to impose cruel and degrading punishments; and although they rarely impose the death penalty, they have rendered the death sentence in some honor cases.[158]

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146. *See* Associated Press, *supra* note 12.

147. *See* Amnesty, *supra* note 10.

148. *See id.*

149. *See id.* Justice is understood not in terms of punishment thereby leading to remorse and rehabilitation, but strictly in terms of conciliation to restore the balance that was disturbed by the offense. *See id.*

150. *See id.*

151. *See id.*

152. *See* Amnesty, *supra* note 10.

153. *See id.*

154. *See id.* In January 2000, in the Pakistan province of Baluchistan, a Chief Justice of the Baluchistan High Court was murdered in a personal vendetta arising out of a court matter. *See* U.S. Dep't of State, *supra* note 19.

155. *See* Amnesty, *supra* note 10.

156. *See id.* Tribal juries are reported to have imposed fines for those breaking the peace. *See id.*

157. *See id.*

158. *See id.* In the remote areas outside of the jurisdiction of federal political agents, the jirgas often levy harsher punishments including flogging or death by stoning. *See* U.S. Dep't of State, *supra* note 19.

It appears that the tribal council form of justice increased in the past few years.[159] The HRCP[160] filed a report in 2001 with three full pages dedicated to a discussion of *jirga* rule.[161] There also are regular adjudication days that are widely known and attended by many individuals.[162]

Generally, the State has been supportive toward the actions of the tribal councils.[163] When actions have violated human rights or caused severe physical harm, the council members have not been prosecuted by the State.[164] However, after the gang-rape incident, the government urged the local police to investigate and arrest those that violated the law.[165]

Many human rights organizations and others would like to see these tribal councils eliminated.[166] It is clear that the *jirgas* affect the human rights of the citizens.[167] However, the State appears to acquiesce to these frequent practices.[168] Although the Pakistan Constitution outlaws the *panchayats*, Pakistan is ultimately responsible for their actions.[169] The government has failed to use due diligence to prevent the abuses and provide adequate justice to the victims.[170]

The councils consist of non-elected bureaucrats who usually come from the prominent landholding class.[171] Many tribal leaders are actually parliamentary members themselves or have family links with the government administration.[172] However, there is no specialized training provided to the tribal councils who are making judgments.[173]

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159. *See* Amnesty, *supra* note 10.

160. *See* HRCP, *supra* note 47.

161. *See id.* In 1999, the annual report did not even discuss the *jirgas* but in 2000, the report devoted a half page discussing the tribal councils' efforts as a judicial tribunal. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See* Associated Press, *supra* note 12. Punjab government's Law Minister visited the village and promised a full investigation. *See id.* Punjab's Deputy Inspector General of Police informed the village that the top officer at the local police station had been suspended in response to their failure to investigate the incident. *See id.* Ultimately, the ATC found the four rapists and two council members guilty or rape and sentenced them to death. *See* Kamila Shamsie, *Child Abuse in Belgium "Shocks the Nation": So Why is Gang Rape in Pakistan "A Cultural Issue," in* THE GUARDIAN (Sept. 6, 2002), *available at* 2002 WL 26657006.

166. *See* Sheikh, *supra* note 1.

167. *See* Amnesty, *supra* note 10.

168. *See id.*

169. *See* The Constitution of the Islamic Republic of Pakistan, art. 175 (1) & (2), *available at* http://www.pakistani.org/pakistan/constitution/ (last visited Jan. 19, 2002) [hereinafter Pak. Const.]. Specifically, stated in the System of Sardari (Abolition) Act of 1976 "The system of Sardar, prevalent in certain parts of Pakistan, is the worst remnant of the oppressive feudal and tribal system which, being derogatory to human dignity and freedom, is repugnant to the spirit of democracy and equality . . . in the Constitution of the Islamic Republic of Pakistan." Amnesty, *supra* note 10.

170. *See id.*

171. *See* Kennedy, *supra* note 44, at 28.

172. *See* Amnesty, *supra* note 10.

173. *See id.*

Some courts refer civil disputes to the tribal councils.[174] Although state officials avoid recognizing the tribal justice system as a legitimate judiciary, the officials ask for advice on how to handle complicated cases.[175] However, those proceedings related to criminal actions, including murder, assault, and land trespasses, are to be tried by the constitutional court system.[176] Yet, in the tribal regions, the government has little or no authority over citizens, rendering the federal court system somewhat useless.[177]

Primarily, laws enforced in the tribal courts have been handed down from one generation to the next.[178] Rural tribal villages have persisted effectively for centuries without laws but have maintained a code of informal standards of social conduct.[179] Furthermore, the informal set of codes that the tribes follow may have a more powerful hold on behavior of its members than the State's formal laws.[180] The tribal code has been enforced through the conscience of the tribal members and also by the tribal councils sanctions such as ostracision.[181] Typically, the social pressure from the tribal community requires that the verdicts be carried out.[182]

The tribal jury may consult with tribal elders or schoolteachers when determining decisions.[183] These advisers or counselors feel honored when consulted and their opinions are respected and highly valued.[184] The proceedings continue through a mediation-type process until a compromise is met.[185] There is no appellate procedure; thus, the Supreme Court cannot hear an appeal on a *jirga* ruling because they do not recognize the tribunal.[186]

V. CONFLICTS WITH PAKISTANI LAW

Pakistan is a country with Muslim ideology as the rule of law.[187] According to some modern Muslim leaders, a country cannot be an Islamic state when there is a feeling of insecurity as a result of lawmakers breaking the

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174. *See id.*

175. *See id.* Tribal council leaders have confirmed that members of the judiciary had approached them for advice on cases that have an impact on the tribes. *See id.*

176. *See id.*

177. *See* Eugene K. Keefe, *National Security, in* PAKISTAN: A COUNTRY STUDY, *supra* note 42, at 304.

178. *See* SCHAPERA, *supra* note 34, at 69.

179. *See* NADEEM, *supra* note 3, at 15.

180. *See id.*

181. *See id.*

182. *See* Amnesty, *supra* note 10.

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See* LIBRARY OF CONGRESS, *Pakistan: Role of Islam, available at* http://lcweb2.loc.gov/frd/cs/pktoc.html (last visited Jan. 19, 2003). Efforts to apply Quranic law in a modern political contest have had a direct impact on Pakistan's political history. *See id.* The official name of the State is the Islamic Republic of Pakistan. *See* Pakistan *Basic Facts, supra* note 19.

law.[188] Subsequently, the citizens fear the police, who are there to protect and enforce the law, more than fearing those that break the law.[189]

The Pakistan Constitution[190] has an Equal Protection section that prohibits discrimination on account of religion, race, caste, color, or creed.[191] Although fundamental rights were given through the Pakistan Constitution, they are still subject to law.[192] Consequently, if the laws in question are in conflict with public morality or public order, it is likely that these fundamental rights will be ignored.[193]

Although the *panchayat* involved in the gang rape of the Gujjar woman rendered the sanction, rape is a criminal offense in Pakistan.[194] However, this is not an isolated event where the *panchayat* has sexually harassed a party to the dispute.[195] It also has been reported that a Punjab village council ordered the wife of a man who was convicted of rape to be raped by the victim's husband.[196] The tribal community socially and morally accepted these sanctions as punishment.[197] Furthermore, the State failed to take any action against the tribal councils for their human rights violations.[198]

Other violations of human rights committed by the tribal councils include the trading or killing of women as a means of retribution to settle the scores between conflicting parties,[199] and the handing over of women as a form

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188. *See* KIBRA, *supra* note 117, at 224-25.

189. *See id.*

190. *See* Pak. Const., *supra* note 169.

191. *See id.* Article 25 states that:

> All citizens are equal before law and are entitled to equal protection of law.
> There shall be no discrimination on the basis of sex alone.
> Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

Id. See also PAKISTAN GOVERNMENT, *Responsibilities Covering Human Rights, available at* http://www.infopak.gov.pk (last visited Jan. 20, 2003.)

192. *See* Farooq Hassan, *Religious Liberty in Pakistan: Law, Reality and Perception*, 2002 BYU L. REV. 283, 288 (2002).

193. *See id.*

194. *See* Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan From A Woman-Sensitive Perspective*, 18 MICH. J. INT'L L. 287, 288 (1997).

195. *See Tribal System on Trial*, *supra* note 11.

196. *See* Bari & Khattak, *supra* note 87, at 230. A village council near Mithankot in the province of Punjab, ordered a wife of a man convicted of rape to be raped by the victim's husband. *See id.* Similar to the gang-rape incident, several tribal elders watched as the sentence was carried out without intervening. *See id.*

197. *See id.* The community also sanctions the death penalty. *See id.* A tribal council in Hyderabad imposed the death penalty on a newly married couple because they had committed adultery by having sexual intercourse prior to their marriage. *See id.* It is reported that approximately 15,000 people watched as the executions were rendered. *See* Bari & Khattak, *supra* note 87, at 230.

198. *See id.*

199. *See id.* There is a custom in which teenage girls are bargained away to settle feuds. *See* Ralph Joseph, *Musharraf Targets Abuse of Pakistani Women*, WASH. TIMES, Aug. 16, 2002, *available at* http://www.washtimes.com/world/20020816-68542664.htm (last visited Jan. 20, 2003).

of settlement of a dispute.[200] In this often-repeated act, the unfortunate women are not consulted, nor do they give their consent, yet they are turned over to live in a hostile environment.[201] Disputes involving honor result in the exchange of women.[202] For purposes of compensation payments, the standard amount of compensation for the murder of a man is rs200,000[203] while the murder of a woman is rs400,000.[204] However, when murder has occurred, the *jirga* generally resolves the dispute without having the local authorities involved.[205]

One *jirga* decided that two very young girls from the murderer's side of the family would be turned over to the family of the victim.[206] Unfortunately for females, the handing over of women is considered to be the best way to cool tempers and heal the conflict by bringing the families together through marriage.[207]

Before 1979, the Pakistan Penal Code[208] regulated the criminal offense of rape.[209] However, after a military coup brought General Zia[210] to power with a goal to Islamisize Pakistan, he enacted the Zina Ordinance,[211] which repealed the crime of rape under the Pakistan Penal Code. [212] The Zina Ordinance regulated sexual intercourse between two individuals who were not married, whether it was consensual or not.[213] If the intercourse was

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200. *See* Amnesty, *supra* note 10.

201. *See id.*

202. *See id.* However, land or water disputes usually will involve compensation in the form of money, land, or water. *See id.*

203. *See* Pakistan *Basic Facts*, *supra* note 19. The amount represents 200,000 rupees, which is the Pakistan form of money. *See id.*

204. *See* Amnesty, *supra* note 10. The higher award for women is based on the fact that women are not involved in the dispute and therefore are innocent parties of the dispute. *See id.* However, some tribal councils have taken into consideration the economic standing of the perpetrator and have lowered the imposed rates accordingly if the culprit is poor. *See id.*

205. *See id.*

206. *See id.* The eleven year old daughter of one of the accused was made to marry the forty-six year old father of the victim while a six-year old daughter of an accused was forced to marry the eight year old brother of the victim. *See id.*

207. *See* Amnesty, *supra* note 10.

208. *See* LIBRARY OF CONGRESS, *Pakistan: Courts and Criminal Procedure*, *available at* http://lcweb2.loc.gov/frd/cs/pktoc.html#pk0108 (last visited Jan. 20, 2003). Pakistan has an extensive penal code, based on the Indian Penal Code of 1860. *See id.* The Pakistan Penal Code contains provisions for punishment of crimes against the state or against public tranquility. *See id.* The majority of the code deals with crimes against persons and properties such as robbery and misappropriation of property. *See id.*

209. *See* Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 WIS. INT'L L.J. 179, 184 (1999).

210. *See* Baxter, *supra* note 31, at 1. General Zia overthrew the government of Pakistan in 1977. *See id.*

211. *See* Lawyers for Human Rights and Legal Aid, *defining* Zina Ordinance P.L.D. Cent. Statutes 51 (1979), *available at* http://www.lhrla.sdnpk.org/hudood.html (last visited Jan. 20, 2003).

212. *See* Quraishi, *supra* note 194, at 288; *see also* Chadbourne, *supra* note 209, at 183-84.

213. *See* Quraishi, *supra* note 194, at 289; *see also* Chadbourne, *supra* note 209, at 191.

consensual, the crime of *zina*[214] was committed; and if the intercourse was not consensual, the crime was *zina-bil-jabr*.[215] In addition, the Zina Ordinance sets forth the evidentiary standards and the punishments available for the criminal offense of rape.[216]

The punishment for rape, if convicted, is the death penalty; however, there have been no executions carried out under this law.[217] Despite the punishments available for the crime of rape, it is so widespread that rape has been decriminalized.[218] Furthermore, the burden of proof in a rape claim falls upon the victim.[219] This is extremely hard to prove because the Law of Evidence provides that the testimony of a woman is equated to that of two

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214. *See* Quraishi, *supra* note 194, *citing* Zina Ordinance §§ 4,5 P.L.D. 1979 Cent. Statutes at 52.

> Zina is liable to hadd [punishment] if--
> (a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or
> (b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be married.

Quraishi, *supra* note 194, at 290.

215. *See id. citing* Zina Ordinance §6 P.L.D. 1979 Cent. Statutes, at 52.

> A person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely—
> (a) against the will of the victim,
> (b) without the consent of the victim,
> (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or
> (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

Id. at 289. Zina-bil-jabr means *zina* with force. *See id.* at 288. *See also* Chadbourne, *supra* note 209, at 191-92.

216. *See* Quraishi, *supra* note 194, *citing* Zina Ordinance § 8 P.L.D. 1979 Cent. Statutes at 53. The Zina Ordinance specifies the evidence required to prove both zina and zina-bil-jabr.

> Proof of zina or zina-bil-jabr liable to hadd shall be in one of the following forms, namely—
> (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or
> (b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of tazkiyah al-shuhood [credibility of witnesses], that they are truthful persons and abstain from major sins (kabair), give evidence as eyewitnesses of the act of penetration necessary to the offence [sic].

Quraishi, *supra* note 194, at 290; *see also* Chadbourne, *supra* note 209, at 184. The evidentiary standards for successful prosecution under the Zina Ordinance require proof of sexual activity by witnessing the sexual intercourse or the accused must confess in court. *See* Quraishi, *supra* note 194, at 295.

217. *See* U.S. Dep't of State, *supra* note 19.

218. *See* Paringaux, *supra* note 79.

219. *See id.*

men.[220] In addition, claims of rape can be proven by the rapist admitting to the attack after the woman has filed a First Information Report (FIR)[221] or by having four male witnesses of good standing in the community to verify the claim.[222] Although rape is hard to prove, if successfully proven, possible punishments include death by hanging.[223]

The 1973 Constitution ensured full participation of women in all walks of life and declared that discrimination on the basis of sex or creed is illegal.[224] Yet, with the aforementioned rape statistics,[225] it is clear that women are not being protected and are further discriminated against with the code of honor.[226] The legislature enacted to protect women are constantly being breached, and seldom observed as law.[227] Women fear that if they do report being raped, they will be subjected to prosecution under the Zina Ordinance if they are unable to prove the offense.[228]

The State, as well as the police department, has a responsibility to provide protection to life, property and honor of the people and also to ensure justice to all persons.[229] However, the antiquated Act presupposes a society without a governing agreement or Constitution and provides for authority with no recognition of fundamental rights and no accountability.[230] The Act also did not allow for any provisions of a national police force organized at the national level.[231] Additionally, as a result of the martial law that was enacted when the military came to power, the policing is done in a paramilitary fashion.[232]

The police authority in Pakistan is typical of the roles that police officers across the world perform: executing orders and warrants; ensuring public order; preventing crimes; and apprehending criminals.[233] It is the police who

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220. *See* TALBOT, *supra* note 51, at 211. The Law of Evidence of 1984 laid down the principle that the evidence of two women was only equal to that of one man. *See id.*

221. *See* Chadbourne, *supra* note 209, at 194. First Information Report (FIR) is also known as a police report. *See id.* After the FIR is filed by the complainant, the police may then arrest an individual based on the report. *See* U.S. Dep't of State, *supra* note 19.

222. *See* TALBOT, *supra* note 51, at 211.

223. *See* KEEFE, *supra* note 177, at 299. In 1979, a new legal code from the Islamization of Pakistani Society set forth the new punishments for sexual offenses. *See id.*

224. *See* PAL, *supra* note 76, at 135.

225. *See* Eltahawy, *supra* note 95.

226. *See id.*

227. *See* Kluck, *supra* note 42, at 112. When asked about the rape statistics in Punjab, it was one Punjab police officer's opinion that the registered rapes were usually instances of adultery and not sexual intercourse by force. *See* Weiss, *supra* note 75, at 73.

228. *See id.* at 72.

229. *See* Sheikh, *supra* note 1.

230. *See* NADEEM, *supra* note 3, at 214.

231. *See* KEEFE, *supra* note 177, at 294.

232. *See* NADEEM, *supra* note 3, at 263.

233. *See* LIBRARY OF CONGRESS, *Pakistan – Internal Security: Role and Structure of the Security Forces, available at* http://lcweb2.loc.gov/frd/cs/pktoc.html#pk0108 (last visited Nov. 19, 2002).

are responsible for the prevention and detection of crime, thereby protecting the life and property of the public and ensuring peace in the community.[234] Yet, the police in Pakistan, despite the large population they govern, are limited in resources due to lack of funding.[235] They fail to provide security to law-abiding citizens and appear to be indifferent to the *jirgas* who commit atrocious human rights violations.[236]

As a result of the current law and order situation, there is an element of fear that keeps the citizens from creating a relationship with the police.[237] Despite the role the police fulfill in society, the public perceives them as cruel and corrupt.[238] The public confidence in the rule of law has been eliminated causing most crimes to never be reported; and those crimes that are reported to the police are not usually ever registered[239] for an investigation.[240] Additionally, it is reported that many bribes are made to police officials to buy the culprits release.[241] The citizens feel socially and politically oppressed by the police and therefore do not see the fulfillment of its role as protector and preserver of peace.[242]

Persons who commit honor killings are not seen as criminals, but merely the person rendering the punishment to the wrongdoer.[243] Yet, Pakistani and international law considers this to be murder.[244] However, the law is scarcely applied in this culture where honor is of utmost importance and consequently the killings continue.[245] When the courts rule in favor of the victim, community hostility and violence are carried out against the victims.[246] The

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234. *See* NADEEM, *supra* note 3, at 214-15.

235. *See id.* at 216. Police training is inadequate by only requiring six months of training. *See* U.S. Dep't of State, *supra* note 19. Developed countries show a higher allocation of policemen per number of citizen than Pakistan. *See* NADEEM, *supra* note 3, at 263. Punjab has 140 policemen for every 825 citizens; and England has 140 police officers for every 427 citizens and Japan has 140 officers for 555 citizens. *See id.*

236. *See* Amnesty, *supra* note 10. Local police do not take any action to stop the criminal intimidation by the *jirga*. *See id.* An example being where a woman married a male without her father's permission and the tribe was intending to kill the woman, the police failed to ensure the woman's physical safety or to secure her right to have a say in her marriage. *See id.*

237. *See* NADEEM, *supra* note 3, at 224.

238. *See id.* at 214.

239. *See* U.S. Dep't of State, *supra* note 19. The First Incident Report is a complaint that is filed with the local police that registers the allegation. *See id.*

240. *See* NADEEM, *supra* note 3, at 115.

241. *See* KEEFE, *supra* note 177, at 298. "A constable who fails to make at least twice his official wages in bribes gets fired for laziness." *See id.* In the rural tribal areas, some culprits are either powerful and well-connected or simply manage to bribe their way out of trouble. *See* Amnesty, *supra* note 10.

242. *See* NADEEM, *supra* note 3, at 219.

243. *See* Paringaux, *supra* note 79.

244. *See id.* The Pakistani government has criticized the practice of "honor killings" but they have failed to take any corrective actions to end this practice, so the killings continue. *See id.*

245. *See* U.S. Dep't of State, *supra* note 19.

246. *See* Paringaux, *supra* note 79.

Gujjar woman, previously discussed, and her family planned to move out of their village for fear of reprisal after they received threats from her attackers' clan.[247] Judges who render the verdicts are also potential victims and may receive threats of being attacked.[248]

The Ombudsman office[249] was established by the Constitution to ensure that no wrongs are done to Pakistani citizens.[250] The Ombudsman has the authority to take remedial action such as rendering compensation to victims of an administrative abuse of authority.[251] Government officials, including President Musharraf,[252] the Ombudsman, and the Minister of Women's Affairs, gave the Gujjar woman who was gang-raped an award of rs500,000 to compensate her for her horrible ordeal at the hands of the local *panchayat*.[253] In addition, the federal government stepped in when a woman was sexually/genitally mutilated by her husband by providing medical treatment from abroad at the State's expense.[254] Unfortunately, these actions are not sufficient to overcome the traditional norms that have been in practiced by the rural tribes for decades.[255]

Aside from Pakistani law, the country has adopted the United Nations Convention for Elimination of Discrimination Against Women (CEDAW).[256] CEDAW defines discrimination against women as:

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women,

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247. *See* Zahid Hussain, *Six To Be Hanged For Pakistan Gang Rape*, TIMES (London), Sept. 2, 2002, *available at* 2002 WL 4236993. The police have increased security at the home of the gang-rape victim because of the threats against the woman as well as those who support her. *See* CRI, *supra* note 2.

248. *See* U.S. Dep't of State, *supra* note 19. A Chief Justice was killed in a personal vendetta arising out of a court case. *See id.*

249. *See* LIBRARY OF CONGRESS, *Pakistan: Judiciary*, *available at* http://lcweb2.loc.gov/frd/cs/pktoc.html#pk0108 (last visited Nov. 19, 2002). The Ombudsman office was set up under the judiciary to create a system fro enforcing administrative accountability, through investigating and rectifying any injustice done to a person through maladministration by a federal or government official. *See id.* Excluded from their jurisdiction are those matters relating to foreign affairs, national defense, and the military. *See id.* Basically, the institution was designed to help curb a public servant's misuse of discretionary powers. *See id.*

250. *See* U.S. Dep't of State, *supra* note 19.

251. *See id.*

252. *See* Pakistan *Basic Facts*, *supra* note 19.

253. *See* Zahra, *supra* note 7.

254. *See* Bari & Khattak, *supra* note 87, at 225.

255. *See* Amnesty, *supra* note 10.

256. *See* Convention on the Elimination of All Forms of Discrimination Against Women, Jan. 22, 1980, 19 I.L.M. 33 (entered into force Sept. 3, 1981), *available at* http://www.unhchr.ch/html/menu3/b/e1cedaw.htm (last visited Feb. 3, 2003) [hereinafter CEDAW]. As a signatory to the CEDAW, the States agree to abolish discriminatory laws and to take all appropriate steps to promote essential human rights freedom for women. *See id.*

> irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[257]

Although Pakistan became a signatory to CEDAW on March 12, 1996,[258] the government fails to abide by this United Nations Conventions and other international human rights conventions.[259]

VI. OFFICIAL PAKISTANI JUSTICE SYSTEM

The judicial system of Pakistan consists of a Supreme Court, provincial high courts, and lower courts that exercise jurisdiction over civil and criminal matters.[260] As previously mentioned, some criminal matters are heard in the ATC in order to expedite the process.[261] There is also the Shariat Court[262] that determines whether a civil law is aligned with the law of Islam.[263] The Shariat Courts were set up at the provincial level to review consistency with Islam

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257. CEDAW, *supra* note 256, art. 1, part 1.

258. *See id.* at Status of Ratification. Other parties to the CEDAW are: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador Egypt, Ed Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Kyrgystan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstine, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritius, Mexico, Mongolia, Morocco, Mosambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Saudi Arabia, Senegal, Seychelles, Sierrra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Tajikistan, Thailand, The Forem Yugoslav Republic of Macedonia, Togo Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Kingdom of Great Britain and Norther Ireland, United Republic of Tanzania, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Yugoslavia, Zambia, and Zimbabwe. *See id.*

259. *See* Pakistan Press International, *NGO's Concern Over Forcible Marriage*, (Jul. 20, 2000), *available at* LEXIS The Pakistan Newswire.

260. *See* Pakistan *Basic Facts, supra* note 19.

261. *See* RIZVI, *supra* note 27, at 227.

262. *See* PAL, *supra* note 76, at 9. The Sharia Act was passed by the National Assembly in 1991, making it the supreme law of Pakistan. *See id.* Federal Shariat Court holds jurisdiction over cases where there is a questions of repugnancy of laws to the injunctions of Islam. *See* Pakistan *Basic Facts, supra* note 19.

263. *See* RIZVI, *supra* note 27, at 227.

beliefs.[264] However, the Shariat Courts were excluded from having jurisdiction over Constitutional, fiscal law, and legislation concerning personal status.[265] In a well-known case, the Federal Shariat Court was banned from making binding decisions on land reform cases.[266] Aside from these exceptions to the Shariat Court, this Islam-based judicial forum benefits Pakistan because an individual can bring a complaint to the Shariat Court or the Anglo-Saxon court system the State has set up.[267]

Justice is not free and is very time consuming in Pakistan.[268] Overall, the credibility of the justice system in Pakistan is very low.[269] Similar to other countries' judicial systems, Pakistan's judiciary is limited in resources by a backlog of cases.[270] For every 1000 persons there are five cases pending.[271] There is only one judge per every 85,000 persons, and on average every judge has some 450 cases pending.[272] The backlog can mean wasted months as one waits for his case to eventually go through the court hearings and appeals process.[273]

VII. COMPARISON OF INDIA'S PANCHAYAT SYSTEM

There are other countries that have tribal village councils acting as the official judiciary.[274] India utilizes various legal cultures including: the traditional *panchayat*, which use customary law and procedures to settle disputes and maintain social control; the State legal system or adversary system; and a combination of the state system and the *panchayat*, called the

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264. *See* Kluck, *supra* note 42, at 122.

265. *See id.*

266. *See* Kennedy, *supra* note 44, at 36, *citing* Hafiz Md. Ameen v. Islamic Republic of Pakistan, P.L.D. 1981 FSC 23. The Federal Shariah Court was banned from making binding decision on land reform cases. *See id.*

267. *See* Baxter, *supra* note 31, at 3.

268. *See* Shaikh, *supra* note 140, at 7.

269. *See* U.S. Dep't of State, *supra* note 19. The justice system is subject to not only executive and other outside influence by political and religious groups, but also corruption, inefficiency and lack of resources. *See id.* Some justices are threatened of being transferred if they do not respond in the manner the influential desire. *See id.*

270. *See id.*

271. *See id.*

272. *See id.* Court officials report that on an average day, a judge may review between seventy and eighty cases per day. *See* U.S. Dep't of State, *supra* note 19.

273. *See* NADEEM, *supra* note 3, at 271. Case backlogs have led to extremely long delays in trials. *See* U.S. Dep't of State, *supra* note 19.

274. *See* Kimberly A. Klock, *Resolution of Domestic Disputes Through Extra-Judicial Mechanisms in the United States and Asia: Neighborhood Justice Centers, The Panchayat and the Mahalla*, 15 TEMP. INT'L & COMP. L.J. 275, 285 (2001). In India and Uzbekistan, the *panchayat* and mahalla are extra-judicial structures that attempt to resolve issues of domestic violence and other community disputes by evaluating them they look at societal norms that influence social standing, the role of women in society, and effective punishment for the dispute. *See id.*

Nyaya *panchayat*.[275] The Constitution of India provides for the organization of village *panchayats*.[276] In India, the *panchayat* is an example of a society where the power is held closest to the people.[277] It is an institution in the rural areas that allows the tribes to govern themselves.[278] The Constitution declared that a certain number of seats on the tribal council must be reserved for women so that the decisions rendered by the *panchayat* are sensitive to female issues.[279] These councils have jurisdiction over disputes about agriculture, land reforms, soil conservation, water management, and maintenance of community assets.[280] The village councils have the power to make decisions

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275. *See* Theodore A. Mahr, *An Introduction to Law and Libraries in India*, 82 LAW LIBR. J. 91, 107 (1990). The Nyaya *panchayats* are created by the State as an attempt for decentralization by formulating and implementing social change at the village level. *See id.* This form of legal system has decreased over the years. *See id.*

276. *See* INDIA CONST., *available at* http://parliamentofindia.nic.in (last visited Feb. 3, 2003). Part IX, 243B discusses the Constitution's directive:

> There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part.

Id.

277. *See* Shalini Bhutani & Ashish Kothari, *The Biodiversity Rights of Developing Nations: A Perspective from India*, 32 GOLDEN GATE U. L. REV. 587, 606 (2002).

278. *See id.* at 606.

279. *See* INDIA CONST. § 243D, *supra* note 276.

> (1) Seats shall be reserved for-
> (a) the Scheduled Castes; and
> (b) the Scheduled Tribes, . . .
> (2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Schedule Tribes.
> (3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.
> (4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide:
>
> Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women.

Id. See also Klock, *supra* note 274, at 287.

280. *See id. See* INDIA CONST., *supra* note 276, art IX, § 243G. Section detailing the powers, authority and responsibilities of the *panchayats*:

> Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein, with respect to-
>
> (a) the preparation of plans for economic development and social justice;
> (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

Id.

on the biological resources of the community and they are to be consulted with regard to decisions on development of their lands.[281] In contrast, Pakistan utilizes these village councils to resolve family and civil disputes.[282] The 1996 Panchayat Act further regulated the process of Indian tribal councils.[283] This Act extended the self-government regulations to the tribal areas of India.[284]

In India, the *panchayat* process consists of meetings, consultations, and discussions with different leaders of the community.[285] Similar to Pakistan's *jirgas*, mediation and conciliation are used to resolve disputes and achieve justice.[286] Finding a resolution through consensus and nonviolence has been the traditional foundation of Indian justice.[287] However, in contrast, when the *panchayat* hears the case, the village council and community as a whole are brought together for a compromise.[288] The adversary court system renders a decision that is free of community opinion and they often have problems ascertaining the facts.[289] Yet, the *panchayat* is more productive because the individuals that are involved in the case have personal knowledge of the case.[290]

India utilizes the *panchayat* for the purpose of bringing satisfaction to the parties involved and the community.[291] It is a tradition that is controlled by the village elite.[292] There is no court reporter to record the process.[293] The *panchayat* does not use case precedence in determining decisions.[294] Because there is no binding precedence or preservation of case law, the justice system was decentralized to the village level where the community determined the law.[295]

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281. *See id.* at 606.

282. *See* Cheri M. Ganeles, *Cybermediation: A New Twist On An Old Concept*, 12 ALB. L.J. SCI. TECH. 715, 722 (2002).

283. *See* The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 *available at* http://ncscst.nic.in/panchayats.htm (last visited Feb. 3, 2003). *See* Klock, *supra* note 274, at 286.

284. *See* Bhutani & Kothari, *supra* note 277, at 606. The 1996 Panchayat Act provided villages with more substantive input in the decision-making process. *See id.* The Act clearly distinguished consultation from the more desired meaningful participation. *See id.*

285. *See* Klock, *supra* note 274, at 285.

286. *See* Mahr, *supra* note 275, at 95.

287. *See id.* The Indian citizens compromised quite often because the preservation of the autonomy and peace of the caste or tribe took precedence over an individual's rights and duties. *See id.* Although the *panchayats* are consensual, the majority could not impose their decision upon a party, the decision must be agreed upon by everyone in the *panchayat*. *See id.*

288. *See* Mahr, *supra* note 275, at 103.

289. *See id.* at 104.

290. *See id.*

291. *See id.*

292. *See id.*

293. *See* Klock, *supra* note 274, at 286.

294. *See id.*

295. *See* Mahr, *supra* note 275, at 99.

VIII. ABOLISH OR REFORM?

Many human rights organizations and others would like to see these Pakistani tribal councils eliminated.[296] The widespread use of extra-judicial verdicts sanctioning gang rape and other human rights abuses has led to international condemnation and domestic opposition.[297] Despite the fact that the State officials indicate that they will not tolerate the human rights abuses at the hands of *jirgas*, their actions tend to counter this indication.[298] Local governmental leaders and members of political parties participate and support the tribal councils.[299] Incredulously, a former federal secretary and a new District Coordination Officer actually attended a *jirga* in 2001.[300]

In the United States, alternative dispute resolution mechanisms are popular and effectively and efficiently resolve the disputes while eliminating the backlog of cases.[301] Consequently, access to the U.S. justice system has increased with more disputes being resolved.[302] Similarly, allowing an alternative dispute resolution program utilizing the *panchayat* system could alleviate the constraint and overload on the Pakistani judicial system.[303] The informal revival of the *panchayat* system, although illegal, has resolved some disagreements that have been ongoing for several years whereby several opposing tribal members were murdered.[304] Consequently, these resolutions have put an end to the further loss of life.[305] In one example, a dispute ongoing for eight years between two warring tribes cost the lives of six tribal members.[306] A tribal council was called and the dispute was resolved within four hours with monetary compensation to the families whose kin were murdered.[307] In order to deter the tribes from continuing with their dispute, the *jirga* often orders steeper penalties if the resolution is breached or disregarded and the parties end up before the council in the future.[308]

The government cannot meet the efficient and timely trials requirement because of its limited resources and the frequent demand for justice.[309] Thus, if the workload of the police and court system were reduced, the effectiveness

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296. *See* Sheikh, *supra* note 1.

297. *See* TALBOT, *supra* note 51, at 283.

298. *See* Amnesty, *supra* note 10.

299. *See id.* A Federal Law Minister defended the *jirgas* as being a cultural tradition which had its merits even though women often were victims of the councils. *See id.*

300. *See id.*

301. *See* Klock, *supra* note 274, at 275.

302. *See id.*

303. *See discussion, infra* Note VI. *See also* NADEEM, *supra* note 3, at 271.

304. *See id.* at 237.

305. *See id.*

306. *See* Amnesty, *supra* note 10.

307. *See id.* The tribal courts reach decisions very quickly with even more complicated disputes resolved in a matter of days. *See id.*

308. *See* Amnesty, *supra* note 10.

309. *See* NADEEM, *supra* note 3, at 272.

of the police and the judiciary would increase.[310] By handing over less important cases to the tribal councils, police are able to respond to the more serious crimes.[311] Furthermore, their efficiency will naturally improve when they are only dealing with a fraction of their original workload.[312]

The process should bring both parties forward to discuss any direct or circumstantial evidence relative to the dispute; and keeping with the customs and traditions of the social conditions, the resolution is more likely to be suitable to both parties.[313] In successful resolutions, the local police and the respected tribal officials were involved in the compromise that brought reconciliation between the parties.[314] The restoration of the tribal councils can greatly benefit the rural sector of society, plagued with the long delays and the huge expenses that are involved when seeking justice even when the dispute is minute.[315]

It is expected that rural areas would greatly benefit from the revival of the *panchayats* because the majority of the flare-ups are temporary and not longstanding whereas both sides are willing to compromise and resolve the situation.[316] Yet, if the local police and justice system handle the case, the dispute would be ongoing with great loss of time, money, and energy while waiting for the investigation and court proceedings.[317] The tribal council is likely to be successful at finding a settlement in a matter of a few days.[318]

IX. OTHER SOCIAL FACTORS FOR CONSIDERATION

A. Education

In order to overcome cultural and social concern, the Pakistan government must attack this custom of unofficial justice and promote education.[319] Unfortunately, according to the 1981 Census, only fifteen percent (15%) of the rural population over the age of ten years old is literate.[320]

Education plays a big role in giving the poor a voice to bring awareness to the issues that plague their communities.[321] As a result, they are able to

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310. *See id.*
311. *See id.*
312. *See id.*
313. *See id.*
314. *See id.* at 237.
315. *See* NADEEM, *supra* note 3, at 237.
316. *See id.* at 272.
317. *See id.*
318. *See id. See also* Amnesty, *supra* note 10.
319. *See* Paringaux, *supra* note 79.
320. *See* Kluck, *supra* note 42, at 125. Within rural areas, the female literacy rate is two percent or less. *See* U.S. Dep't of State, *supra* note 19. Overall, thirty-three percent (33%) of the population are found to be literate when using a very low standard. *See id.*
321. *See* NADEEM, *supra* note 3, at 51.

articulate their concerns, make suggestions and voice complaints in a manner that is socially acceptable.[322]

High rates of illiteracy can lead to communication problems with the police.[323] A widely recognized case involving a woman who was raped by her husband's brother was taken to the police office to register a FIR on March 26, 2001.[324] Unbeknownst to her, the father-in-law, who did all the talking to the police officers, did not name his son as the culprit, but named another man.[325] The FIR contained the woman's thumbprint, which leads one to believe that she was illiterate since she did not sign the report.[326] After her father-in-law gave the statement, she was immediately arrested and went to trial for adultery.[327]

Currently, there is a massive need to educate a rapidly growing population in Pakistan.[328] Schools, teachers, and textbooks are limited in supply as compared to their demand.[329] If young girls go to school, they are only allowed to attend school until puberty.[330] However, problems may arise if women are urged to seek out an alternative life style.[331] The women may feel safe and stable under the confines of *purda*.[332] Nonetheless, social change can occur by overcoming illiteracy by establishing more schools, colleges and universities for all persons of Pakistan.[333]

B. State Role

The social environment in which the tribal council exists is an important factor in the effectiveness of the *panchayat*.[334] The *panchayat* evaluates the issues by looking at the norms in the society that influence social standing.[335] However, when the *panchayat* violates the human rights of tribal members, the State must take action against those councils that orders the rapes or honor

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322. *See id.*

323. *See id.*

324. *See* Int'l Network for the Rights of Female Victims of Violence in Pakistan, *Zafran Bibi Case: Background & Legal Information*, *available at* http://inrfvvp.org/cases/zafran_bibi.html (last visited Feb. 3, 2003).

325. *See id.*

326. *See id.*

327. *See id.* After the woman exonerated the innocent man, the court found her guilty of adultery and sentenced her to death by stoning. *See id.* However, it is likely that the Federal Shariat Court will overturn the sentence when the appeal is heard. *See id.*

328. *See* TALBOT, *supra* note 51, at 221-22. It is not possible for the formal education system to keep up with the challenges of rapidly increasing population. *See* 2001 Economic Survey, *supra* note 54.

329. *See id.*

330. *See* THE SINDH PERCHAR, *supra* note 99, at 9.

331. *See* PAL, *supra* note 76, at 129.

332. *See id.*

333. *See* KIBRIA, *supra* note 117, at 2.

334. *See* Klock, *supra* note 274, at 291.

335. *See id.* at 285.

killings.[336] Where women are included in the tribal councils, they provide insight into the role that women play in society.[337] The Pakistan government fails to sensitize the police and judiciary to the role of women in society.[338]

The local police need to remove fears and create interactive relationships where the police are accessible and visible.[339] Being the agency that is ultimately responsible for the prevention and detection of crime, the police force should be efficient and held accountable while gaining the confidence and respect of the local citizens.[340] The police should foster a close and supportive relationship with the public so that the public is more willing to share information regarding incidents, thereby reducing the potential crimes from occurring.[341] Additionally, a multi-agency approach combining sources from social, economic, cultural, and educational agencies can lead to a proactive collaboration to develop solutions by looking at the root causes rather than the symptoms of crime.[342]

The Punjab Police Department set up women complaint centers to address the lack of attention by the police of solving crimes against women and apprehending the perpetrators.[343] The types of complaints that can be registered with these centers are household disputes, crimes where women are either victims or the accused, and requests to escort women to the courts or hospitals.[344]

Evidentiary standards will also need to be developed for the tribal councils in order for them to effectively serve in a judicial role.[345] The tribal *jirgas* have used the act of walking over burning coals to determine guilt of innocence.[346] In some cases, if the accused was able to walk over the burning coals without getting burned, he was declared innocent and released.[347] An automatic declaration of guilt was rendered if the defendant was unable to

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336. *See* Amnesty, *supra* note 10. By delivering the death sentence to the individuals who gang-raped the Gujjar woman, the ATC hopes to deter other *panchayats* from rendering similar punishments. *See* Shamsie, *supra* note 165.

337. *See* Klock, *supra* note 274, at 286.

338. *See* THE SINDH PERCHAR, *supra* note 99, at 1.

339. *See id.* at 224.

340. *See id.* at 214. Currently, when allegations of rape and abuse by the police force have been brought to the attention of authorities, the officers are generally transferred or suspended for their actions. *See* U.S. Dep't of State, *supra* note 19. Not one police officer has ever been convicted of police abuse, rape or extrajudicial killings. *See id.*

341. *See* NADEEM, *supra* note 3, at 218.

342. *See id.* at 219.

343. *See Government of Punjab, Police Department, at* http://www.punjab.gov.pk/police/women_complaints.htm, (last visited Nov. 19, 2002).

344. *See id.*

345. *See* Amnesty, *supra* note 10.

346. *See id.*

347. *See id.*

walk over the burning coal or if he was burnt in the process.[348] Clearly this is an inhumane and ineffective way of determining the guilt of a party.[349]

Because the tribes are not official courts, there is no legislation governing them.[350] Consequently, women are not allowed to attend the *jirgas* nor are they allowed to serve as witnesses.[351] Other than traditional or customary rules that the tribes follow, there are no references or uniform codes to offer *panchayats* guidance.[352] Some moves have been made to develop a uniform code of conduct for the *jirgas* to follow in order to settle tribal disputes.[353] However, the uniform code should be passed through legislation to reinforce the interaction between the State and the tribal councils.[354]

C. *Decentralization*

The Pakistan Constitution encourages local Government institutions.[355] Other countries have already taken steps to amend their laws to decentralize government.[356] Citizens interact at the local level with the governmental structures on a daily basis.[357] The national government is removed from the experiences of the daily life.[358] Thus, citizens rely on the local level government for their needs and problems.[359] Thus, Pakistan could benefit from a decentralized government, which gives the local government councils the power to initiate programs.[360]

However, local governments are very weak and their position is not only affected by a lack of resources but also by an inadequate legal framework.[361] Many governments fail to provide the services needed on a local level on a regular basis.[362] Thus, if the local government meets the needs of the local

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348. *See id.*

349. *See id.*

350. *See id.*

351. *See* Amnesty, *supra* note 10.

352. *See id. Panchayats* rely on unwritten, customary law. *See* Mahr, *supra* note 275, at 109. Written law as reference has never been important for *panchayats* or tribal councils because they rely on unwritten, customary law. *See id.*

353. *See* Amnesty, *supra* note 10. In 1998, all of the Upper Sindh tribes were invited to develop a uniform code of conduct for *jirgas* to use. *See id.* The next appointed Commissioner further laid the foundation to assist the *jirgas* in resolving disputes. *See id.*

354. *See id.*

355. PAK. CONST. (1973), § 32.

356. *See* Walter Kaelin, *Legal Aspects of Decentralisation in Pakistan, available at* http://www.preventconflict.org/portal/centralasia/issuelist.php?i=2069&r=2004 (last visited Oct. 7, 2002) (copy on file with author). India has amended its Constitution in 1992 with a long chapter on village *panchayats*. *See id.* The Philippines and Sri Lanka also are showing a strong trend to strengthen their local governments. *See id.*

357. *See id.*

358. *See id.*

359. *See id.*

360. *See* Kaelin, *supra* note 356.

361. *See id.*

362. *See id.*

citizens, the programs and services can be more easily adapted to the particular circumstances and needs of the local area.[363] Ultimately, the close relationship that is developed between the citizens and the local governments fosters accountability of the government which thereby helps prevent the governmental agents from abusing their powers.[364] In addition, the decision making process is kept close to the people, building a sense of community and permitting more meaningful participation in self-government.[365] The distribution of power to different levels of government, as well as the threatening competition to attain the power, allows for a system of checks and balances; this ensures that the central government does not overstep or abuse its powers.[366]

The Ombudsman's Office and the Minister of Women's Affairs are two governmental agencies that can work with local tribes on social and education problems.[367] A separate office of Ombudsperson for Women should be created to deal with complaints of ill treatment toward women exclusively.[368] Community involvement should include participation in consultation groups, victim support programs, crime prevention groups, and interactive relations with the local business community.[369] Consultation groups should include individuals that are elected to serve but non-elected should be involved also.[370] Yet, decentralization does not automatically mean that a better administration will be developed and maintained.[371] The local governments must be properly equipped to fulfill their responsibilities.[372] In order to create stability among the local government, an amendment to the Constitution could prevent the provincial governments from weakening the local governments.[373]

X. CONCLUSION

It is definite that the effect of Pakistan's lawlessness affects the social, political and economic aspects of the State.[374] Countries without law and order problems, generally, benefit greatly from economic stability and growth.[375] It

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363. *See id.*

364. *See id.*

365. *See id.*

366. *See* Kaelin, *supra* note 356.

367. *See* PAKISTAN GOVERNMENT, *Responsibilities Covering Human Rights, available at* http://www.pak.gov.pk/public/govt/resp_humanright.htm (last visited Feb. 3, 2003).

368. *See id.*

369. *See* NADEEM, *supra* note 3, at 264.

370. *See id.*

371. *See* Kaelin, *supra* note 356.

372. *See* NADEEM, *supra* note 3, at 264.

373. *See* Kaelin, *supra* note 356. Local governments cannot function properly if the higher levels of government can dissolve them easily or are able to change their territories. *See id.*

374. *See* NADEEM, *supra* note 3, at 137-38.

375. *See id.* at 1.

is believed that Pakistan has three routes it can take into the future.[376] First, Pakistan can simply continue to exist in a state of lawlessness.[377] Second, the government can respond by restructuring the social and political policies in order for Pakistan to fulfill the destiny predicted when the nation was born in 1947.[378] In order to do this, Pakistan needs to exercise justice so that all persons, whether male or female, as well as different caste members, can feel safe.[379] In addition, the corruption of the government and police officials needs to be challenged and the citizens need to learn tolerance.[380] Society must combat intolerance and eliminate the catering to the ethnic and religious demands.[381] Furthermore, there must be a conscious de-escalation of the discrimination of hatred based on cultural, social, religious and political.[382]

Finally, Pakistan can apply temporary fixes to the social structure in order to survive without making any meaningful changes.[383] Unfortunately, this may be the path that Pakistan will choose.[384] If actions are taken to reform the abuse of human rights with respect to lower castes, it is likely this would lead to violence in the community.[385] Thus, the social norms which have dictated their culture and communities for years is the accepted way of life.[386]

Citizens in Pakistan must take positive social and moral measures by fighting the caste system and feudalism.[387] Economic development can also increase as confidence is built among the citizens as well as foreign investors.[388] The time has come to reform the feudal system where some families dominate society as a whole.[389] The government needs to step in and curb the patronage that is given to feudal landlords.[390]

Pakistan should readjust its budget spending to properly allocate funds to promote social and economic growth.[391] The Ministry of Finance[392] conducted an economic survey indicating that education is the cornerstone of

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376. *See* AHMED, *supra* note 94, at 251.
377. *See id.* at 251-52.
378. *See id.*
379. *See id.*
380. *See id.*
381. *See id.* at 252. *See* Shamsie, *supra* note 165.
382. *See* AHMED, *supra* note 94, at 252.
383. *See id.*
384. *See id.*
385. *See id.*
386. *See id.*
387. *See* KIBRIA, *supra* note 117, at 226.
388. *See* NADEEM, *supra* note 3, at 138.
389. *See id.* at 307.
390. *See id.*
391. *See* U.S. Dep't of State, *supra* note 19. Progress in certain areas can only be made in the long term with significant resource commitments. *See id.*
392. *See* PAKISTAN GOVERNMENT, *available at* http://www.pakistan.gov.pk/MinDiv.jsp (last visited Nov. 15, 2002). The Ministry of Finance is a department of the Pakistan government. *See id.* The Ministry of Finance deals with economic affairs such as revenue and planning and development. *See id.*

economic growth and poverty reduction.[393] Education can play a huge role in reform by allocating proper funding to programs to educate society.[394] It appears that Pakistan initiated this process by allocating more funds for the rehabilitation of existing school facilities.[395] The government has high hopes that this focus on education will increase the literacy rate to sixty percent (60%).[396]

Decentralizing the government to enable local governments to play the role of oversight of the tribal councils has the potential to provide autonomy for traditional religions, political minorities or ethnic minorities.[397] This allows local government to create local laws that affect the tribes and their lands.[398] A successful decentralization will need a secure existence including accountability to the citizens as well as the higher governments, and partnership between the central and local governments.[399] A multi-agency crime enforcement and prevention program can resolve some of the fears of the police force.[400] It could change the public perception and reduce the incidents of violence.[401] The police should prevent crimes, detect offenses, maintain order, and keep the peace.[402] They should also administer justice, not deny civil liberties, engage in reprisals, or terrorize the communities.[403] Similar to India's *panchayat* system, further amendments to the Pakistan Constitution should be made to provide legislation that the tribal councils can utilize as reference or guidance.[404]

Nonetheless, a federal judiciary will need to provide assistance to minorities to ensure that their political or cultural rights are enforced at the local levels of government.[405] There needs to be public confidence in the criminal justice system, which maintains a proper balance between the rights of the citizens and the needs of the community as a whole.[406] The State judiciary should also monitor the actions of the tribal councils.[407]

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393. *See* 2001 Economic Survey, *supra* note 54.

394. *See* NADEEM, *supra* note 3, at 52. Education is seen as the key to progress and economic growth can be achieved with a higher emphasis on the quality of its human capital. *See* 2001 Economic Survey, *supra* note 54.

395. *See id.* An amount of 1.57 billion rupees has been allocated from the 2001-02 budget for educational services. *See id.*

396. *See id.*

397. *See* Kaelin, *supra* note 356.

398. *See id.*

399. *See id.*

400. *See* NADEEM, *supra* note 3, at 215.

401. *See id.* at 215.

402. *See id.* at 309.

403. *See id.*

404. *See* INDIA CONST., *supra* note 276, art. IX. India has provided reference for the *panchayats* to follow when self-governing. *See id.*

405. *See* Kaelin, *supra* note 356.

406. *See* NADEEM, *supra* note 3, at 302-03.

407. *See id.*

Women must be empowered to serve as members of the tribal councils where they are able to form opinions and address issues according to the female perspective and not simply what their husbands dictate.[408] Current relationships between women and men do not reach beyond the external society outside of their households.[409] Thus, if there were frequent interaction between women and men, society may benefit by changing the cultural atmosphere that has hindered the equality of women in the tribal regions.[410]

In India, the Constitution requires that a certain number of seats on the *panchayats* be reserved for women so that their views are reflected in the decision made by the local governments.[411] Some non-governmental organizations began programs that attempted to bring legal help to rural women to empower them to question the discriminatory cultural norms sanctioned by these tribal councils.[412] In addition, positive responses have been received regarding a task force for the Rural Support Programme[413] in northern areas of the country.[414] Although the program has mainly dealt with alleviating poverty, it is recognized that these programs should be expanded to deal with other issues such as gender discrimination and human rights violations.[415]

Female participation in the administration of affairs at educational institutions is an important step toward social growth.[416] This would enable women to play a role in the new community while creating a new consciousness of the human rights of women provided for in Pakistan's Constitution.[417] Healthier and better-educated women would be more able to fulfill their roles of cultural and biological transmission.[418]

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408. *See* U.S. Dep't of State, *supra* note 19. Pakistan has initiatives to empower women by increasing women's participation in local governments. *See id.* The government has reserved one-third of the seats of local governing bodies for women. *See id. See also Rawalpindi: Need For Women Empowerment Stressed*, DAWN, Nov. 22, 2002, *available at* http://www.dawn.com/2002/11/22/local14.htm (last visited Feb. 3, 2003) [hereinafter *DAWN*].

409. *See* PAL, *supra* note 76, at 129.

410. *See DAWN*, *supra* note 408.

411. *See* Kaelin, *supra* note 356.

412. *See* Bari & Khattak, *supra* note 87, at 235. The NGO's have begun programs such as Law and Status Programme which encourages women to use law for the protection of their rights. *See id.*

413. *See National Rural Support Programme, available at* http://www.nrsp.org.pk/ (last visited Nov. 19, 2002). The NRSP was set up in November 1991 as a non-profit organization to undertake development activities in the rural areas of Pakistan. *See id.* The main objective of the program is to foster a countrywide network of grassroots level organizations to enable rural communities to plan, implement and manage developmental activities for the purpose of ensuring productive employment, alleviation of poverty and improvement in the quality of life. *See id.*

414. *See* Khan, *supra* note 57, at 284. *See National Rural Support Programme*, *supra* note 413.

415. *See id.*

416. *See* TALBOT, *supra* note 51, at 57. Those countries that facilitated women in education and other sectors earned respect in the international community.

417. *See id.*

418. *See id.*

Finally, the government should establish the systems and procedures to ensure that a local tribal council program is not in violation of any human rights.[419] Human development strategies stress the importance of institutions for improving human rights conditions.[420] This can only be done through proper supervision and monitoring of the *panchayats*.[421] The State must provide better training to enhance the professionalism of the tribal council members.[422] Subsequently, the establishment of a participatory institution of police and judiciary at a community level will strengthen law and order in the region.[423] If the police had performed their assigned roles in the community, rather than allowing crime and injustice to be committed, then maybe a young woman would not have been gang-raped and forced to walk home naked through the streets of the community. Furthermore, maybe more women would come forward to file a complaint with the police and feel confident that the investigation would be handled with accordance to the law.

The revival of the *panchayat* system could be very advantageous in preserving law and order in Pakistan while ensuring an environment conducive to economic and social growth.[424] President Musharraf's government has given human rights organizations encouragement by focusing on the violations such as rape and honor killings that have been at the hand of the *jirgas*.[425] Tribal councils must abide by the Pakistan Constitution and other international human rights treaties that Pakistan has ratified.[426] The maintenance of law and order can effectively be monitored by an interaction of the State and society, and ultimately further the Constitutional standard of protecting life, liberty and property.[427]

Marie D. Castetter[*]

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419. *See* NADEEM, *supra* note 3, at 302.
420. *See id.* at 17.
421. *See id.* at 302.
422. *See id.*
423. *See id.*
424. *See id.* at 343.
425. *See* Joseph, *supra* note 199.
426. *See* Amnesty, *supra* note 10. CEDAW, states that:
> State Parties shall take all appropriate measures:
> (a) 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 stereoptyped roles for men and women.

See CEDAW, *supra* note 256, art. 5, part 1.
427. *See* NADEEM, *supra* note 3, at 17.

* J.D., Indiana University School of Law – Indianapolis, 2004 (*expected*); B.S. in Organizational Leadership, Purdue University, 1997. The author would like to extend thanks to her husband and family for their support and encouragement throughout this project.

PUTTING THE BOSS BEHIND BARS: USING CRIMINAL SANCTIONS AGAINST EXECUTIVES WHO POLLUTE - WHAT CHINA COULD LEARN FROM THE UNITED STATES

Whether it was greed or stupidity, I don't know what happened.[1]

I. INTRODUCTION

Industry in the United States is heavily regulated, especially in the area of pollution control.[2] When monetary fines imposed for violations of pollution control laws had become a mere "cost of doing business,"[3] criminal sanctions for executives and managers who pollute on their watch were added to the American regulatory scheme.[4] Pollution control is so pervasive that plant managers and corporate executives who may play little, if any, direct role in the day-to-day operations of their firms are considered constructively notified

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1. Peter Pochna, *New Jersey Executive Gets 12-Years in Environmental Crime*, THE HACKENSACK RECORD, Nov. 8, 2002, *available at* 2002 WL 102881772. New Jersey Superior Court Judge Joseph Conte's statement, upon handing down a twelve-year prison sentence for illegal dumping authorized by a corporate executive. *See id.* James O'Brien was sentenced to twelve years in prison for authorizing the illegal dumping of vats of sludge containing cyanide and arsenic generated from his New Jersey electro-plating plant. *See id.* O'Brien was sentenced under New Jersey's illegal dumping laws. *See id.* Clean-up costs at O'Brien's abandoned plant were estimated to be $500,000, with O'Brien ordered to pay $200,000 for remediation costs in addition to his prison term. *See id.* However, due to his financial circumstance, O'Brien's actual fine was $4,000. *See id.* Furthermore, O'Brien admitted to fraudulently obtaining a $75,000 small business loan for the purchase of pollution control devices for his plant that were never installed. *See* Pochna.

2. *See* Robin Weiner et al., *Environmental Crimes*, 28 AM. CRIM. L. REV. 427 (1991). Federal enforcement of environmental laws through criminal sanctions occurs under eight principal statutes. *See id.* The Clean Air Act imposes penalties on those who knowingly violate federal or state air quality regulations. *See id.* The Federal Water Pollution Control Act, the Rivers and Harbors Act, and the Safe Drinking Water Act protect the nation's surface and groundwater. *See id.* The Resource Conservation and Recovery Act criminalizes improper transport, storage, and disposal of hazardous wastes. *See id.* The Comprehensive Environmental Response, Compensation, and Liability Act mandates the remediation of contaminated sites. *See id.* The Toxic Substances Control Act regulates the processing, manufacture, and distribution or disposal of chemicals that pose a risk to public or environmental health. *See* Weiner at 427-28. Finally, the manufacture, registration, transportation, sale, and use of toxic pesticides is regulated by the Federal Insecticide, Fungicide, and Rodenticide Act. *See id* at 428.

3. *See U.S. Eco Rules Effective Under Criminal Law*, WORLD REPORTER – ASIA INTELLIGENCE WIRE, Mar. 24, 2001, *available at* 2001 WL 14489023 [hereinafter *U.S. Eco Rules*].

4. *See id.*

by the mere existence of regulation, thereby negating any ignorance defense.[5] What is the ultimate goal of criminalizing this behavior? Deterrence.[6]

Conversely, China's environmental control policy has few criminal sanctions for executives and managers who pollute and very little enforcement of the laws that do have sanctions.[7] With its new leadership, China is poised to become an economic superpower.[8] However, as China continues to move toward a market-based economy,[9] it must balance the incredible tension between its economic potential and the stress that economic growth places on its natural environment.[10]

There is no quick cure to problems caused by the competition between a nation's interest in economic growth and its fundamental need for a sustaining natural environment. Furthermore, this Note does not propose that the United States' method is ideal. It is far from it. Rather, this Note is an exploration of one possible addition that Chinese law may make as it continues the transition from a state-run economy to a market-based economy.

With this in mind, this Note will examine the United States' treatment of corporate pollution through the "responsible corporate officer" doctrine.[11] Section two focuses on the United States use of criminal sanctions as a policy enforcement mechanism, with particular emphasis placed on regulation of hazardous waste. Section three looks at China's environmental situation with particular focus on China's "crimes against the environment" doctrine.[12] Section four looks toward the potential for China to include vicarious corporate liability for environmental crime similar to the responsible corporate officer doctrine. Finally, section five provides observations on general corporate governance and impacts on the environment.

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5. *See* 42 U.S.C. § 6928(d) (2000).

6. *See U.S. Eco Rules, supra* note 3.

7. *See* Chun-Xi Yang, *China's Treatment of Crimes Against the Environment: Using Criminal Sanctions to Fight Environmental Degradation in the PRC*, 8 J. CHINESE L. 145, 146 (Fall 1994).

8. Erik Eckhold, *China Carries Out an Orderly Shift of Its Leadership*, N.Y. TIMES, Nov. 15, 2002, at 1. Hu Jintao replaced Jiang Zemin as General Secretary of the Communist Party. *See id.* Jintao's ascendance to the head of the Communist Party was accompanied by many other changes within the Party structure and Politburo, generally symbolizing a generational shift in Chinese politics. *See id.*

9. *See* Geoff Winestock, *China Wants to Upgrade to Market Economy*, ASIAN WALL ST. J., Sept. 26, 2002, *available at* 2002 WL-WSJA 23018052. *See also, China and the WTO*, THE ECONOMIST 25, Nov. 20, 1999; Mao Baigen, *Wholly Individually-Owned Enterprises Leap Forward*, 13 CHINA L. & PRAC. 19 (Asia L. & Prac. Pub., Ltd.)(June/July 1999).

10. *See infra* notes 149-54.

11. *See* Barbara DiTata, *Proof of Knowledge Under RCRA and Use of The Responsible Corporate Officer Doctrine*, 7 FORDHAM ENVTL. L.J. 795, 806-07 (1996). Under the responsible corporate officer doctrine, a corporate officer may be held criminally liable if by virtue of his or her position and authority within the company, the officer had the power to prevent or correct the conduct that gave rise to the violation. *See id.* This liability may attach even though the officer did not personally participate in the commission of the offense. *See id.*

12. *See* Yang, *supra* note 7, at 146.

II. THE AMERICAN SYSTEM

Enforcement of criminal liability for environmental crimes in the United States is on the rise.[13] "Clean up your act or go to jail" is a message increasingly sent to corporate executives and managers.[14] Increased political pressure and public awareness has resulted in more vigorous prosecution.[15] In a single year, seventy-eight percent of the environmental prosecutions handled by the United States Department of Justice involved corporations and their managers.[16] More significantly, the Department of Justice has been achieving a ninety-five percent conviction rate for all environmental prosecutions.[17] The total number of years assessed for criminal sentences rose from 146 in 2001, to 256 in 2002.[18] At the close of the year 2000, the total of all criminal fines assessed under all environmental criminal enforcement programs totaled nearly 720 million dollars.

The application of criminal liability for environmental crime to corporate executives is known as the responsible corporate officer doctrine.[19] Under this theory of liability a corporate officer is liable for the acts of his or her employees.[20] Juries are allowed to infer culpability based on the officer's position, responsibility, and authority in a company.[21] The responsible

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13. *See* Kevin A. Gaynor, *Environmental Enforcement: Industry Should Not Be Complacent,* 32 ENVTL. L. REP. 10488 (2002).

14. Janet L. Woodka, *Sentencing the CEO: Personal Liability of Corporate Executives for Environmental Crimes,* 5 TUL. ENVTL L. J. 635 (1992).

15. Steven M. Morgan, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders,* 45 SW. L.J. 1199, 1210-11 (1991).

16. *See* Gaynor, *supra* note 13.

17. *See* David Aufhauser et al., *Environmental Crimes, 1990 Annual Report,* 1990 A.B.A. SEC. NAT'L RESOURCES, ENERGY, & ENVTL. L. 211 (1990). Statistics reported are from 1990. *See id.*

18. *See* Gaynor, *supra* note 13. Years cited were fiscal rather than calendar years. *See id.*

19. *See* DiTata, *supra* note 11, at 806-07.

20. *See* Morgan, *supra* note 15, at 1200.

21. *See id.* By way of comparison, the responsible corporate officer doctrine is not universally applied. For instance, the nation of Japan imposes no such fiction of culpability through a "should have known" standard. *See* Kensuke Itoh, *Criminal Protection of the Environment and the General Part of the Criminal Law in Japan,* INT'L REV. OF CRIM. L. 1013, 1045 (1994). Vicarious criminal liability for corporate oversight of environmental violations conflicts with the cultural principles of responsibility and substantive due process as found in the Japanese Constitution. *See id.* It is not just a foreign concept to Japanese environmental law; it is foreign to all Japanese law. *See id.* However, the general principles of Japanese criminal law still apply and crimes against the environment are treated no differently than any other health or property violations. *See id.* Therefore, imputability to a corporate executive or plant manager must be direct and found in the factual evidence rather than implied through the legal construct of vicarious liability. *See id.* Therefore, an executive or manager who directly orders a subordinate to violate Japanese environmental law would be criminally liable for aiding and abetting the act. *See id.* However, there is a possibility that an executive actions or general

corporate officer doctrine imposes what has been colloquially called a "should have known" standard of responsibility on corporate officers for activities or violations that they supervise.[22] Not only are corporate officers expected to monitor and exercise control, they are also expected to do so in an effective manner.[23]

Courts' acceptance of the "should have known" *mens rea*[24] makes obtaining convictions against corporate officers less difficult than crimes requiring specific knowledge.[25] Early sentences for environmental convictions commonly involved suspended sentences, probation, and community service.[26] However, prosecutorial zeal, combined with strict adherence to the federal sentencing guidelines, has led to higher fines and incarceration.[27]

Hazardous waste protection in the United States is covered primarily under two statutes: the Resource Conservation and Recovery Act (RCRA)[28]

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pattern of leadership, or lack thereof, could be constituted as inciting criminal behavior. *See* Itoh, at 1045. For a general review of Japan's environmental policy, including a specific discussion on the Japanese preference for proactive regulatory solutions and general reluctance to use criminal law, though it is in force, as a post hoc regulation, see JULIAN GRESSLER ET AL., ENVIRONMENTAL LAW IN JAPAN (1981).

22. *See* Woodka, *supra* note 14, at 650.

23. *See id.* at 651. By way of comparison, Australia stands in the gap of the United States' responsible corporate officer doctrine and Japan's repudiation of such a doctrine. *See* Itoh, *supra* note 21, at 1045. In Australia, the concept of vicarious liability for environmental crimes being imposed on corporate officers exists, but it requires a greater causal link. *See* Karen Bubna-Litic, *Criminal Liability of Company Directors for Pollution Damage,* 1995 AUST. J. CORP. L., Vol. 4, *available at* 1995 AJCL LEXIS 15. Australian law requires that the actions of the responsible individual must be traced directly to a corporate executive. *See id.* Therefore, if someone in the organization committed an offense to which the directors had not delegated authority, then the actions of the individual were not also the actions of the organization. *See id.* Without directly telling subordinates to flout the environmental regulations, executives may set profit or productivity goals at such a level that managers are unable to meet them and comply with the law. *See id.* The functional result of this scheme results in vicarious liability ending somewhere in the middle-management level of the corporate chain. *See id.*

24. "Mens rea" is defined as "an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and willfulness." BLACK'S LAW DICTIONARY 985 (6th ed. 1990).

25. *See* DiTata, *supra* note 11, at 798-99.

26. *See* Morgan, *supra* note 15, at 1210.

27. *See id.* at 1211. Factors that can result in an increased sentence under the federal sentencing guidelines include:

> If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance into the environment; If the offense resulted in a substantial likelihood of death or serious bodily injury; If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required substantial expenditure; If the offense involved transportation, treatment, storage or disposal without a permit or in violation of a permit; and, If a record-keeping offense reflected an effort to conceal a substantive environmental offense.

Id.

28. *See* 42 U.S.C. §§ 6901-92 (2000). The Public Health and Welfare Acts, The Resource Conservation and Recovery Act.

and the Comprehensive Environmental Responsibility, Compensation, Liability, and Recovery Act (CERCLA).[29] RCRA controls hazardous chemicals in use, storage, and disposal.[30] CERCLA primarily deals with spills and abandoned contaminated sites.[31]

A. The Resource Conservation And Recovery Act

RCRA, enacted in 1976, authorizes the federal government to regulate the generation, storage, treatment, and disposal of hazardous wastes.[32] The primary purpose of RCRA is to reduce creation of hazardous waste, manage its safe transport, and eliminate its dangerous disposal.[33] RCRA establishes standards governing generators and transporters of hazardous waste, as well as, owners of treatment and disposal facilities that may require a permit from the United States Environmental Protection Agency (EPA).[34]

RCRA requires development of state or regional solid waste plans.[35] RCRA also addresses the obligations of hazardous waste generators and transporters through detailed permitting and notification requirements,[36] violations of which may result in criminal sanctions.[37]

RCRA is divided into nine subtitles with the hazardous waste provisions being located in Subtitle C.[38] "Hazardous waste" must first be categorized as a "solid waste."[39] "Solid waste" is any "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material."[40] The EPA and regulated industries have

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29. *See* 42 U.S.C. §§ 9601-75 (2000). The Public Health and Welfare Acts, The Comprehensive Environmental Responsibility, Compensation, Liability, and Recovery Act.

30. *See* 42 U.S.C. §§ 6902(a)(3)-(5) (2000).

31. *See* 42 U.S.C. § 9604 (2000).

32. 42 U.S.C. §§ 6901-92(k) (2000).

33. *See, e.g.*, Meghrig v. K.F.C. W. Inc., 516 U.S. 479, 484 (1996) (RCRA authorizes regulation to minimize current and future dangers to human and environmental health).

34. *See* Am. Mining Cong. v. United States Environmental Protection Agency (EPA), 824 F.2d 1177, 1189 (D.C. Cir. 1987) (approving petition by industry trade group to limit EPA authority under RCRA to regulate non-discarded materials that would be re-processed and recycled). The D.C. Circuit has sole review authority of pre-enforcement petitions. *See* 42 U.S.C. § 6976(a)(1) (2000).

35. *See* 42 U.S.C. §§ 6901-92(k) (2000).

36. *See* STEVEN FERREY, ENVIRONMENTAL LAW 294-95 (2d ed. 2001).

37. *See* 42 U.S.C. § 6928 (2000).

38. *See* 42 U.S.C. §§ 6921-39 (2000). These sections are grouped under the heading "Hazardous Waste Management." *Id.*

39. *See* United States v. ILCO, Inc., 996 F.2d 1126, 1130 (11th Cir. 1993) (material cannot be designated and regulated as "hazardous waste" unless it is first determined to be "solid waste").

40. 42 U.S.C. § 6903(27) (2000); 40 C.F.R. § 261.2(a)(2) (2001).

litigated the difference between abandoned waste and materials set for reuse within the production process.[41]

RCRA categorizes hazardous wastes as two types: "listed" and "characteristic."[42] "Listed" wastes are those wastes enumerated by the EPA as known hazardous wastes.[43] "Characteristic" wastes are those solid wastes that contain enough hazardous substances to exhibit characteristics of a hazardous waste.[44] The most common criteria for establishing a "characteristic" waste are ignitability, reactivity, corrosiveness, and toxicity.[45]

RCRA is unique in that it establishes the use of manifests.[46] A manifest is a traveling document prepared by the generator[47] for waste leaving their site.[48] The purpose of the manifest is to track waste through generation, transportation, storage, and eventual disposal.[49] The manifest travels with the substance from generation, at the cradle, through its useful life, until its eventual disposal, at the grave. This is why the RCRA scheme of waste tracking is commonly referred to as "cradle-to-grave tracking" of the waste.[50]

1. Criminal Liability Under RCRA

The criminal prohibitions under RCRA apply to the entire "cradle-to-grave" process. It is illegal to transport waste to an unregulated facility.[51] Treatment, storage, or disposal of wastes without a permit is also illegal.[52] RCRA prohibits omissions or making false statements on any report, manifest,

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41. *See* Ass'n of Battery Recyclers v. EPA, 208 F.3d 1047, 1050-56 (D.C. Cir. 2000) (setting aside EPA's new reclamation regulations that expanded "discarded" and "recycled" materials to include any secondary material not continuously used as an input in the production process); *see also Am. Mining Cong.*, 824 F.2d at 1189.

42. *See* 40 C.F.R. § 261.3(a) (2001).

43. Currently listed wastes can be found at 40 C.F.R. § 304.4 (2001).

44. *See* 40 C.F.R. §§ 261.3(a)(2)(i), 261.20(a) (2001).

45. *See* 40 C.F.R. § 261 (2001). For examples of statutes that discuss the criteria for characteristic wastes, see 40 C.F.R. § 261.21 (2001) (ignition); 40 C.F.R. § 261.22 (2001) (corrosion); 40 C.F.R. § 261.23(2001) (reaction); 40 C.F.R. § 261.24 (toxicity) (2001). For a criticism of the RCRA hazardous waste designation process as being over-inclusive, see Christopher J. Urban, *EPA's Hazardous Waste Identification Rule for Process Waste Gone Haywire Again*, 9 VILL. ENVTL L.J. 99 (1998).

46. *See* FERREY, *supra* note 36, at 495.

47. *See* 42 U.S.C. § 6903(6). The term "hazardous waste generation" means the act or process of producing hazardous waste. *Id.*

48. *See* FERREY, *supra* note 36, at 495.

49. *See id.*

50. *See id.* at 295-96.

51. *See* 42 U.S.C. § 6928(d)(1), (d)(5) (1988).

52. *See id.* at § 6928(d)(2), (d)(4). The smallest amount of illegally dumped hazardous waste that was criminally prosecuted was one fifty-gallon drum in New Jersey. *See* New Jersey v. Parmar, 17 ENV'T REP. CAS. 307 (BNA) (N.J. Sup. Ct. 1986). In *Parmar*, under New Jersey's version of RCRA, the defendants faced a maximum sentence of fourteen years in prison. *See id.*

or other required document.[53] RCRA authorizes the EPA to inspect facilities upon the *ex parte* issuance of an administrative search warrant.[54]

RCRA contains two separate criminal provisions. The first imposes liability on individuals who knowingly violate RCRA.[55] The second provides for penalties for knowing endangerment.[56] The "knowingly" requirement is a major point of contention in applying RCRA's criminal standard. In *United States v. Hayes Int'l Corp.*,[57] the defendants were convicted of transporting hazardous waste to a facility without a permit.[58] The prosecution was required to prove that the defendants knew the landfill to which the waste was being transported did not have a permit.[59] However, the Alabama district court found that the prosecution could demonstrate scienter[60] with circumstantial evidence from which the jury could draw inferences.[61] In its opinion, the court stated "knowledge does not require certainty, and the jurors may draw inferences from all of the circumstances, including the existence of the regulatory scheme."[62]

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53. *See* 42 U.S.C. § 6928 (d); *see also* 40 C.F.R. §§ 122, 262, 264 (containing reporting requirements for hazardous waste permits for generators, storage facilities, or disposal firms); *see, e.g.*, United States v. W.R. Grace & Co., 19 ENV'T REP. 204 (BNA) (D. Mass. 1988) (Grace was convicted for filing false statement on amount of hazardous chemical used in company's process).

54. *See* 42 U.S.C. § 6928(d)(1); *see* National-Standard Co. v. Adamkus, 685 F. Supp. 1040, 1050 (N.D. Ill. 1988) *aff'd*, 881 F.2d 352 (7th Cir. 1989) (expanding EPA's inspection and sampling authority to any area where hazardous wastes have been kept).

55. *See* 42 U.S.C. § 6928(d) (2000). Congress expanded the "knowingly" requirement to include "willful blindness." *See id.* Criminal responsibility cannot be avoided by deliberately remaining ignorant about the conditions or requirements of a permit. *See* House Judiciary Comm., *Hazardous and Solid Waste Amendments of 1984*, H.R. Rep. No. 198 (Part III), 98th Cong., 2d Sess. 9.

56. *See* 42 U.S.C. § 6928(e) (2000).

57. United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (M.D. Ala. 1986).

58. *See id.*

59. *See id.*

60. Scienter is used:

> to signify an allegation . . . setting out the defendant's previous knowledge of the cause which led to the injury complained of, or rather his previous knowledge of a state of facts which it was his duty to guard against, and his omission to do which has led to the injury complained of. The term is frequently used to signify the defendant's guilty knowledge.

BLACK'S, *supra note* 24, at 1345.

61. *See Hayes*, 786 F.2d at 1504. The government may establish "knowledge" by (1) showing that the defendant was aware that a result was practically certain to follow from particular conduct; (2) showing that the defendant willfully failed to determine the permit status of the landfill it selected; (3) raising inferences from the context of the transportation of the defendant's waste; or (4) presenting evidence of failure to follow regular waste disposal procedure. *See id.*

62. *Id.* at 1505. *See generally* Karen M. Hansen, *Knowing Environmental Crimes*, 16 WM. MITCHELL L. REV. 987 (1990) ("knowing" requirement for prosecution under RCRA and other environmental protection laws is too difficult to prove, and therefore, the responsible corporate officer doctrine and the willful blindness doctrine are being used by prosecutors to circumvent the knowledge requirement).

Hayes' defense was ignorance of the waste disposal requirements imposed under RCRA.[63] The court rejected that defense, noting the heavily regulated nature of the waste disposal business and the inherent dangers it posed to the public.[64] The court established that "the jurors must find that the defendant knew what the waste was" and knew of the absence of a permit.[65]

Other courts have not required the *Hayes* level of proof when establishing knowledge. In *United States v. Hoflin,* the Ninth Circuit Court of Appeals found that the government need not prove that the defendant violated RCRA by not having a permit, but only that the defendant knew that the waste was hazardous.[66]

In *United States v. Johnson & Towers, Inc.,*[67] the Third Circuit required a higher level of knowledge than in *Hayes.* The prosecution was required to show specific intent to violate RCRA.[68] Thus, the government was required to demonstrate that the defendant's actions were done with knowledge that there was no permit.[69] The *Johnson Towers* requirement of showing knowledge of every RCRA provision has been criticized for failing to further the Congressional intent of deterring pollution through criminal sanctions.[70]

2. Disposal And Storage Under RCRA

For cases involving storage and disposal of hazardous waste without a permit, the government must prove that the material was "waste"[71] and that the defendant knew that the waste was at least generally harmful or dangerous.[72] The prosecution was not required to prove that the defendant knew that the

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63. *See Hayes,* 786 F. 2d at 1504.

64. *See id.* at 1503. *See also* United States v. Goldsmith, 978 F.2d 643, 645-46 (11th Cir. 1992) (prosecutors must only show defendant had general knowledge of hazardous character waste); United States v. Hines, 210 F.3d 390, 392 (10th Cir. 2000) (prosecutors must only show that defendant knew that waste had the potential to harm people or the environment and not necessarily the chemical composition of the waste).

65. *See Hayes,* 786 F.2d at 1505.

66. *See* United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989).

67. *See* United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984).

68. *See id.*

69. *See id.* at 668-69.

70. *See* Morgan, *supra* note 15, at 1206.

71. *See* United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 435 (6th Cir. 1998) (requiring government to prove that defendant knew the material was waste); *see also* United States v. Sellers, 926 F.2d 410, 416 (5th Cir. 1991) (requiring proof of knowledge that material was waste through a showing of what waste was).

72. *See Kelley,* 157 F.3d at 436 (prosecutors need only prove knowledge of materials harmful potential to others and the environment). *See also* United States v. Baytank, 934 F.2d 599, 613 (5th Cir. 1991) (requiring the government to prove only the defendant's knowledge of the harmful potential of the waste). *See also,* United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990)(requiring the government to prove defendant's knowledge of "general hazardous character" of the waste).

waste was hazardous under RCRA, that there was no disposal permit, or that a permit was required.[73]

In *United States v. Harwell*,[74] the district court for the northern district of Georgia at the time imposed the longest prison sentence ever for an environmental crime on two corporate officials of a waste disposal facility in Georgia.[75] The officials were convicted of storing, transporting, and disposing hazardous wastes without a permit and for making false statements.[76] The president of the company received a twenty thousand dollar fine and a three year prison term, while a vice-president was fined ten thousand dollars and sentenced to eighteen months in prison.[77] Similarly, in *United States v. Vanderbilt Chemical Corp*,[78] the vice-president/plant manager was given a three-year suspended sentence, three-years probation, a ten thousand dollar fine, and three hundred hours of community service for illegally disposing hazardous waste under RCRA.[79] Also, the company paid one million dollars in fines and restitution.[80]

In *United States v. Cuyahoga Wrecking Corp*,[81] the owner of a hazardous waste disposal company was convicted and sentenced on two counts of conspiracy to transport hazardous waste in violation of RCRA and one count of storing and disposing of hazardous waste without a permit.[82] The defendant was sentenced to four years in prison, four years of probation, and fined one thousand dollars.[83]

Public officials are also liable in their capacity in executive level positions.[84] In *United States v. Dee*,[85] the defendants were civilian engineers employed to develop chemical warfare systems for the United States Army.[86] As heads of their departments, the defendants were responsible for ensuring compliance with RCRA.[87] The defendants claimed ignorance of RCRA.[88] The

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73. *See Kelley*, 157 F.3d at 436-37 (rejecting defendant's argument that knowledge of permit requirement necessary element for conviction).

74. United States v. Harwell, 17 ENV'T REP. (BNA) 1573 (N.D. Ga. 1987).

75. *See id.*

76. *See id.*

77. *See id.* at 1573-74.

78. United States v. Vanderbilt Chem. Corp., 20 ENV'T REP. (BNA) 334 (D. Conn. 1989).

79. *See id.*

80. *See id.*

81. United States v. Cuyahoga Wrecking Corp., 19 ENV'T REP. (BNA) 75, 76 (D. Md. 1988).

82. *See id.*

83. *See id.*

84. *See* United States v. Bogas, 920 F.2d 363 (6th Cir. 1990) (applying criminal liability to airport commissioner for burial of solvent drums on the airport grounds).

85. *See* United States v. Dee, 912 F.2d 741, 748-49 (4th Cir. 1990).

86. *See id.*

87. *See id.*

88. *See id.* The defendants offered an immunity defense because they were federal employees working at a federal facility. *See id.* The Fourth Circuit rejected this argument, though admitting that federal employees do enjoy a degree of immunity for specific actions.

Fourth Circuit Court of Appeals did not agree, citing the generally hazardous nature of the substances the defendants were working with as sufficient notice to overcome an ignorance defense.[89]

In assessing criminal liability for corporate executives, prosecutors often combine other charges with the RCRA violations. In *United States v. MacDonald & Watson Waste Oil Co.*,[90] a federal grand jury indicted a Rhode Island company and its president under RCRA violations, racketeering charges, and mail fraud.[91] The indictment, with fifty-three total counts, charged the company president and three employees with illegally transporting hazardous waste to an unpermitted facility and falsifying the waste manifest documentation.[92]

3. *Transportation Of Waste Under RCRA*

In finding liability of a corporate officer for transporting hazardous waste under RCRA, the government must show similar "knowing" elements as in storage and disposal. In *MacDonald*,[93] the owners of a transportation company were found to have knowingly transported toluene-contaminated soil to a facility that was not permitted to accept that type of waste.[94] The First Circuit Court of Appeals rejected the trial court instruction that the officer knew the violation occurred.[95] The court held that the trial court's taking judicial notice of the defendant's knowledge was incorrect and the prosecution could prove knowledge by actual knowledge and circumstantial evidence suggesting knowledge.[96]

See id. However, there is no general immunity from criminal liability for actions taken while in public service. *See Dee*, 912 F.2d at 748-49.

89. *See id.* The Fourth Circuit pointed to the public welfare nature of RCRA by stating "where. . . obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of that regulation." *Id.* at 745. The court also rejected the defendant's argument that they were being prosecuted for "sloppy storage procedures." *Id.* at 747. The court did not agree and retorted by saying that is just such a behavior that is an "evil RCRA was designed to prevent." *Id.*

90. United States v. MacDonald & Watson Waste Oil Co., 18 ENV'T REP. (BNA) 2554, 2555 (D.R.I. 1988).

91. *See id.*

92. *See id. See also* United States v. Paccione, 751 F. Supp. 368 (S.D.N.Y. 1990). The defendant fraudulently obtained a permit for acceptance of medical waste worth approximately $35,000,000. *See id.* The transporter was sentenced to two years of supervised release and fined. *See id.* The owners of the landfill were sentenced to 151 months in prison. *See id.* The severity of sentence against the operators was justified by the financial magnitude of the fraud and by the fact that they continued operation after an injunction was issued. *See id.*

93. *See MacDonald*, 933 F.2d at 35.

94. *See id.*

95. *See id.*

96. *See id.* at 53.

4. Knowing Endangerment

Violators face stricter penalties for RCRA offenses if it can be proven that the violator knowingly placed others in imminent danger of death or serious bodily injury.[97] For such "knowing endangerment" offenses, violators may be fined up to two hundred fifty thousand dollars,[98] imprisoned for up to five years, or both.[99] Corporations may face additional fines up to one million dollars.[100]

Knowing endangerment has two elements: (1) the defendant must have committed an offense under RCRA, such as false reporting on a manifest or disposal at an unpermitted site, and (2) at the time of the offense, the defendant must have known that he was placing another person in imminent danger of death or serious injury.[101] To prove the first element, the government need only show that the defendant was "aware of the nature of his conduct."[102] In other words, "the government need only prove that the defendant was aware of the conduct, and that the conduct was illegal."[103] To prove the second element, however, the prosecution must prove that at the time of the offense the defendant was "aware or believes that this offensive conduct is substantially certain to cause danger of death or serious bodily injury."[104] The prosecution must show that the offense was committed by a preponderance of the evidence.[105] A corporate officer who did not physically spill or bury hazardous waste may still be culpable for the violations caused by a subordinate.[106]

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97. *See* 42 U.S.C. § 6928(f)(6) (2000). "Serious Bodily Injury" is defined as: "(a) bodily injury which involves a substantial risk of death; (b) unconsciousness; (c) extreme physical pain; (d) protracted and obvious disfigurement; or (e) protracted loss or impairment of a bodily member, organ, or mental faculty." *Id.*

98. *Id.* § 6928(f)(4).

99. *Id.*

100. *Id.*

101. Volz & Gray, *Knowing Endangerment: The New Darling of Environmental Prosecutors*, 16 CHEM. WASTE. LITIG. REP. 39, 41 (1988).

102. 42 U.S.C. § 6928(f)(1)(A) (2000).

103. *See* Volz & Gray, *supra* note 101, at 42.

104. 42 U.S.C. § 6928(f)(1)(C) (2000).

105. *Id.* § 6928(f)(2). Circumstantial evidence may be used in proving the defendant's possession of actual awareness. *See id.; see also* United States v. Hansen, 262 F.3d 1217, 1243 (11th Cir. 2001). Based on documentary and oral testimony showing culpable mental states, the court upheld three convictions of corporate officers for knowing endangerment because they knew the violations caused by their plant were inevitable, the plant could not comply with existing environmental requirements, and that the plant employees were endangered while working within this environment without being informed or protected from the health risks. *See id.*

106. *See Hansen*, 262 F.3d at 1243. Though management did not physically dump the waste, they were knowingly responsible for permitting and directing plant employees to process and handle waste in such as way that was previously subject to violations. *See id.*

The first conviction of an individual under the knowing endangerment provisions was in 1988 in *United States v. Turmin*.[107] The defendant purchased three fifty-five gallon drums of ethyl ether, a highly explosive material listed as a hazardous waste by the EPA.[108] The defendant later disposed of the drums in a vacant residential lot.[109]

The first conviction of a corporation for knowing endangerment came in *United States v. Protex Industries Inc.*[110] The Tenth Circuit upheld the constitutionality of the knowing endangerment criminal penalties.[111] Protex had exposed its employees to hazardous chemicals at a drum recycling facility resulting in psycho-organic syndrome.[112] The court found that a corporation is criminally liable under RCRA's knowing endangerment provision, if "in violating other provisions of RCRA, it places others in danger of great harm and it has knowledge of that danger."[113]

B. Comprehensive Environmental Response, Compensation, And Liability Act

Enacted in 1980, Congress intended CERCLA to "establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."[114] CERCLA's purpose was to address orphaned sites where liability and ownership was in doubt "by creating a comprehensive and uniform system of notification, emergency governmental response,

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107. United States v. Turmin, No. 87-CR-448, slip op. (E.D. N.Y.), *reviewed in* NAT'L ENVTL. ENFORCEMENT J., June 1988, at 27.

108. *See id.*

109. *Id.*

110. United States v. Protex Indus. Inc., 874 F.2d 740, (10th Cir. 1989).

111. *See id.* at 745-46.

112. *See id.* Government experts testified that without these proper safety precautions, the employees were at an increased risk of suffering solvent poisoning. *See id* at 742. Solvent poisoning may cause psycho-organic syndrome, of which there are three types. *See id.* Symptoms of Type 1 psycho-organic syndrome are disturbances in thinking, behavior and personality, and sleeping disorders. *See Protex*, 874 F.2d at 742. Type 1 is quickly reversible and goes away when exposure ends. Type 2 psycho-organic syndrome is divided into two categories, A and B. *See id.* An individual suffering from Type 2-A suffers changes in personality and has difficulty controlling impulses; the individual engages in unplanned and unexpected behavior, lacks motivation, and usually experiences severe mood swings. *See id.* If exposure to the toxic chemicals ends, an individual suffering from Type 2-A will eventually recover. *See id.* An individual suffering from Type 2-B psycho-organic syndrome, however, will have additional, nonreversible symptoms, such as concentration problems, short and remote memory problems, decreased learning ability, and cognitive impairment. *See id.* Finally, an individual suffering from Type 3 psycho-organic syndrome suffers a severe loss of learning capabilities, severe memory loss, severe psychiatric abnormalities, and gross tremor. *See id.*

113. *Protex*, 874 F.2d at 744.

114. Crofton Ventures Ltd. P'ship v. G & H P'ship, 258 F. 3d 292, 296 (4th Cir. 2001) (summarizing CERCLA's purpose to cleanup contaminated sites and seek costs from responsible parties).

enforcement, and liability."[115] In 1986, the more notable Superfund Amendments and Reauthorization Act (SARA), or Superfund, supplemented CERCLA.[116] CERCLA is primarily a backward-looking, or remedial statute.[117] However, CERCLA provides for criminal sanctions in certain instances.

Civil enforcement of CERCLA is much more common than criminal enforcement.[118] However, CERCLA's criminal sanctions reach: (1) failure to report the release of a hazardous substance, or false reporting of such a release,[119] (2) failure to inform EPA of an unpermitted site where hazardous waste is illegally accepted and stored or dumped,[120] (3) knowingly destroying or falsifying records,[121] and (4) submitting false claims for reimbursement for clean-up under Superfund.[122] CERCLA violators are grouped into two

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115. United States v. Carr, 880 F.2d 1550, 1552 (2d Cir. 1989) (convicting maintenance foreman for failure to report illegal dumping even though defendant did not exercise complete control over the site).

116. *See* 42 U.S.C. § 9603 (2000).

117. Liability for discharges has been imposed to previous owners after they have relinquished control of the facilities. *See* Satellite Sys. Inc. v. J.F.D. Elec. Corp., 19 ENVTL. L. REP. (Envtl. L. Inst.) 20,839 (E.D.N.C. 1988) (noting that previous owner can be liable even if sales agreement contains "as is" clause); New York v. Gen. Elec. Co., 592 F. Supp. 291, 297 (N.D.N.Y. 1984) (holding seller of PCB contaminated transmission liable for contamination subsequently caused by buyer); *but see* United States v. Aceto Agrichemicals Corp., 872 F.2d 1373, 1379 (8th Cir. 1989) (holding hazardous substance manufacturer liable for third-party disposal though manufacturer lacked control over third-party because manufacturer retained ownership of hazardous substance and benefited from the disposal); United States v. Carolina Transformer Co., 650 F. Supp. 157, 158 (E.D.N.C. 1987) (subjecting chairman of the board to liablility for disposal response costs); New York v. Shore Realty Corp. 759 F.2d 1044, 1049 (E.D.N.Y. 1985) (holding current owners liable for disposal at site even if it occurred prior to their ownership).

118. Since the civil and criminal provisions of CERCLA are roughly similar, criminal provisions could be interpreted similarly to previously interpreted civil provisions. *See* Elizabeth M. Jalley et al., *Environmental Crimes*, AM. CRIM. L. REV. 403, 470 (2002). For example, under civil law, a parent corporation can be liable for the CERCLA offenses of its subsidiary if the corporate veil is pierced, or if the parent "operated" the subsidiary. *See* United States v. Bestfoods, 524 U.S. 51, 63-64 (1998) (attributing responsibility for subsidiary's actions to the parent corporation, especially when corporate structure furthers the criminal activity).

119. *See* 42 U.S.C. § 9601(22) (2000). A "release" is any spilling, leaking, pumping, pouring, leaching, dumping, or disposing into the environment. *Id. See generally* United States v. Dico, Inc. 136 F.3d. 572 (S.D. Iowa 1998). Unlike RCRA's definition of hazardous waste and the cases challenging that definition, discussed *supra* notes 40 and 41, CERCLA defines "hazardous substances" very broadly, save the complete exclusion of petroleum and natural gas products. *See* A&W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1110 (9th Cir. 1998). "CERCLA gives the [EPA] carte blanche to find anyone liable who disposes of just about anything. Drop an old nickel that actually contains nickel? A CERCLA violation. Throw out an old lemon? It's full of citric acid, another hazardous substance." *Id. accord* United States v. Cantrell, 92 F.Supp.2d 704, 713 (S.D. Ohio 2000) (finding "miniscule" amount of evidence of a hazardous substance sufficient to constitute a CERCLA violation). To avoid confusion, "hazardous substances" under CERCLA include "hazardous wastes" as defined by RCRA. *See* Woodka, *supra* note 14, at 637-38.

120. *See* 42 U.S.C. § 9603(c) (2000).

121. *See* 42 U.S.C. § 9603(d)(2) (2000).

122. *See* 42 U.S.C. § 9612(b)(1) (2000).

categories: (1) owners and operators of a facility involved in a CERCLA offense[123] and; (2) prior owners or operators of a facility where hazardous waste is stored or disposed if he or she owned or operated the facility at the time the waste was received.[124]

1. Criminal Liability Under CERCLA

To establish criminal liability for failure to report a release of a hazardous substance, prosecutors must show: (1) that the substance was "hazardous,"[125] (2) that it was a reportable quantity,[126] (3) that it was released into the environment,[127] (4) that the release was not a federally permitted release,[128] (5) that the defendant was a person "in charge" of the facility,[129] and

123. *See Hansen*, 262 F. 3d at 1253-54 (finding adequate district court's jury instruction regarding "in charge" element of CERCLA offense of "[I]t is only necessary that the individual have or share such control of the facility where the release occurred").

124. *See* Foster v. United States, 130 F. Supp. 2d 68, 75-76 (D.C. 2001). The District of Columbia Circuit Court found defendant was a prior operator under CERCLA, because at the time of contamination it (a) conducted day-to-day management of the site and (b) made all primary decision regarding waste disposal at the site. *See id.*

125. *See* 42 U.S.C. § 9601(14) (2000). CERCLA defines "hazardous substance" very broadly; explicitly excluding only petroleum and natural gas products. *See id.*

126. *See* 42 U.S.C. § 9602(b) (2000). A "reportable quantity" is one pound of hazardous substance unless superseded by any regulation promulgated pursuant to 42 U.S.C. § 9602(a). *See id.*; *see Hansen*, F.3d at 1253 (requiring government to show at least one pound of mercury released and at least ten pounds of chlorine were released into the environment during a twenty-four hour period to meet elements of separate CERCLA charges associated with both substances).

127. *See* Tosco Corp. v. Koch Industries, 216 F. 3d 886, 891-94 (10th Cir. 2000) (finding adequate evidence of "actual release was provided by the fact that defendant 'could not account for seven percent of its daily throughput, thus evidencing a large volume of material, including liquid phase petroleum hydrocarbons containing hazardous constituents, leaking from the process units into the environment'"). A "release" is to be distinguished from "disposal" according to CERCLA 42 U.S.C. § 9601(29) (2000). *See* Bob's Beverage v. Acme, Inc., 264 F.3d 692, 697 (6th Cir. 2001) (finding disposal did not occur because contamination was caused by passive migration of hazardous materials present in environment before defendant took any action). *But see Crofton Ventures*, 258 F.3d at 297 (applying narrow interpretation of "disposal" to require proof that defendant actively dumped hazardous waste on their property fails to recognize CERCLA's strict liability scheme).

128. *See* United States v. Freter, 31 F.3d 783, 788 (9th Cir. 1994) (allowing an exception for federally permitted release as affirmative defense so government need not prove release was not federally permitted).

129. *See Hansen*, 262 F.3d at 1253-54 (determining "in charge" as an individual that has or shares control of a facility where a release occurs); United States v. Carr, 880 F.2d 1550, 1554 (2d Cir. 1989) (finding maintenance foreman criminally liable for acquiescence in illegal dumping); *but see* United States v. Township of Brighton, 153 F.3d 307, 314-15(6th Cir. 1998) (holding operator or owner must have actual control and must have performed affirmative actions, although the owner-operator is also responsible for similarly negligent acts or omissions).

(6) the defendant did not notify the EPA immediately upon learning of the release.[130]

Though the "failure to notify" provision for the existence of an unpermitted facility has only received limited judicial interpretation, the statute[131] suggests the government must also prove that the defendant owned or operated the facility at which the hazardous waste was stored, and that they knowingly failed to notify the EPA of the existence of the facility.[132] Failure to notify an appropriate agency of a release of hazardous waste can result in a fine or imprisonment up to one year, or both.[133] Failure to notify the EPA of an unpermitted disposal site can result in a fine up to $10,000, a year in prison, or both.[134]

The "knowing destruction" provision or falsification of records criminal provisions under CERCLA has undergone limited judicial interpretation.[135] The statute implies that prosecutors must show that the defendant was a person required under Section 9603 of the Act to provide notification,[136] that the defendant knowingly destroyed files,[137] and that the EPA identified the destroyed files that were subject to the reporting requirements.[138] A person convicted of knowing destruction or falsification of documents can be fined, imprisoned for three years, or both.[139]

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130. *See* United States v. Laughlin, 10 F.3d 961, 966 (2d Cir. 1993) (requiring that defendant need only be aware that his acts are harmful for criminal conviction under CERCLA. He does not have to know the specific requirements of CERCLA that have been broken). In *Laughlin,* the Eleventh Circuit only lists four elements for a criminal conviction: (1) the defendant was, in fact, in charge of the facility; (2) that a reportable quantity was released; (3) the defendant knew of such a release; (4) after learning of the release, the defendant failed to immediately notify the EPA. *See* Jalley, *supra* note 118, at 489.

131. 42 U.S.C. § 9603(c) (2000).

132. *See* 42 U.S.C. § 9603(d)(2000). *See* United States v. Wade, 577 F. Supp. 1326, 1341 (E.D. Pa. 1983) (finding individual personally liable as transporter for actions taken in capacity as officer of company involved in transportation of wastes because he participated in the wrongful acts); United States v. Collins, 18 ENVTL. L. REP. (Envtl. L. Inst.) 2555 (N.D. Ala. 1988) (convicting company owner of illegally disposing liquid electroplating wastes from 1978 to 1987; sentenced to serve eighteen months and five years probation and to pay $200,000 fine).

133. *See* 42 U.S.C. § 9603(b) (2000) (Holding liable any person "in charge" for failure to report). *See* United States v. Goodner Bros. Aircraft Inc., 966 F.2d 380, 382-83, 385-87 (8th Cir. 1992) (imposing $7,500 fine and fifteen-month sentence on aircraft company owner for illegally disposing and failing to notify authorities of release of hazardous substances).

134. *See* 42 U.S.C. § 9603(c) (2000).

135. *See id.*

136. *See* 42 U.S.C. § 9603(d) (2000) (authorizing EPA to promulgate rules specifying the records that any person required to provide notice of existence of a facility under § 9603 shall keep). The reporting requirements include "the location, title, or condition of a facility; and the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in a facility." *Id.*

137. *See id.*

138. *See id.*

139. *See* 42 U.S.C. § 9603(c) (2000).

Similarly, there has been limited judicial interpretation of CERCLA's criminal penalties for filing false claims for reimbursement.[140] The language of the statute again suggests that the government must prove that the defendant knowingly gave erroneous information in a claim for a Superfund reimbursement.[141]

There are criminal penalties for filing a false claim under Superfund.[142] However, these criminal penalties can be mitigated through voluntary cooperation with the EPA,[143] so much so, that the EPA would decline to refer violations to the Department of Justice for prosecution.[144] Voluntary measures such as general cooperation, preventative measures, self-policing and compliance programs, and voluntary disclosure of information can forestall prosecution by the EPA and Department of Justice.[145]

CERCLA, through Superfund, authorizes the EPA to pay a $10,000 reward to any citizen who provides information leading to the arrest and conviction of a CERCLA violator.[146] Violations subject to this reward include failure to report a release of a hazardous substance and the destruction of records.[147] Rewards are evaluated by the severity of the reported violation and the overall value of the report leading to arrest and conviction.[148]

III. THE CHINESE SYSTEM

China faces serious environmental problems. They include: increases in smoke and dust emissions by seven percent per year;[149] dependence on coal as a fossil fuel which increases the prevalence of acid rain deposition to the point of causing harm to agriculture and fishing;[150] production of 100 million tons of wastewater per day;[151] industrial solid waste expected to reach a mark of 250 million tons[152] annually with two million tons categorized as hazardous waste;[153] and host to seven of the ten most polluted cities in the world.[154]

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140. *See* 42 U.S.C. § 9612(b)(1) (2000).

141. *See id.* "Any person who knowingly gives or causes to be given any false information as a part of" a Superfund reimbursement may be held criminally liable. *Id.*

142. *See* Baranowski v. EPA, 699 F.Supp. 1119, 1120 (E.D. Pa. 1988) (grand jury indictment for seven counts of false claims under Superfund).

143. *See* Morgan, *supra* note 15, at 1214.

144. *See id.*

145. *See id.*

146. *See* 40 C.F.R. § 303.10 (2001).

147. *See* 40 C.F.R. § 303.12(a),(b) (2001). Failure to report provisions are located at 42 U.S.C. § 9603(a). Destruction of records provisions are located at 42 U.S.C. § 9603(d).

148. *See* 40 C.F.R. § 303.30(c),(f) (2001).

149. *See* Yang, *supra* note 7, at 146.

150. *See id.*

151. *See id.*

152. *See id.*

153. *See* China OnLine, Feb. 15, 2002, *at* http://www.chinaonline.com, *available at* 2002 WL 10273166. Hazardous waste amount listed in the text is for the year 2000. *See id.* A combination of China's poverty and failure to adequately dispose of its hazardous medical

An overly simple, but possibly accurate, answer for the cause of these problems is that the combination of China's incredible population size, poverty level, per capita income, and the incredible growth of China's economy has led to a voracious need for resources.[155] The problem is only exacerbated by the actions of more developed nations; particularly those that use China's lack of well developed environmental safeguards as an advantage.[156]

From the founding of the People's Republic of China until the mid-1970's, the government has focused the majority of its resources on modernization and economic growth.[157] Environmental protection was afforded only marginal consideration in national economic planning.[158] As a result, resources were only dedicated to environmental issues during emergency health situations.[159]

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waste has led to a disturbing problem. *See id.* Medical waste, such as gauze, has been used as batting to make quilts or as liners in cotton-padded jackets for sale to unsuspecting buyers. *See id.*

154. *See Cleaning Up Can Pay*, S. CHINA MORNING POST, Sept. 27, 2001, *available at* 2001 WL 27816886.

155. *See* Chun-Xi Yang, *supra* note 7, at 147-48. China's population accounts for about one-fifth of the entire world population. *See id.* Average per capita income in 1994 was the equivalent of $360.00 (U.S.). *See id.* China's economy doubled between the years 1979 and 1994. *See id.*

156. *See U.S. Waste 'Dumped' on Mainland*, S. CHINA MORNING POST, Feb. 27, 2002, *available at* 2002 WL 15003568 [hereinafter *Dumped*]. United States technology waste, particularly obsolete computers and toxic wiring, is being "exported" to mainland China. *See id.* An estimated 100 million obsolete computers parts have been shipped by the United States to China, India, and Pakistan. *See id.* Scavengers burn the plastic parts in order to recover valuable metals. *See id.* The scavenged waste is then dumped in irrigation canals, near rivers, or in open fields, resulting in the fouling many drinking water sources. *See id.* The United States is the biggest offender in this practice as it has failed to ratify the Basel convention, which bans the export of hazardous waste from developed countries to developing countries and the United States own hazardous waste laws specifically exempt "electronic waste." *See id.* Estimates suggest that by 2004, the United States will generate approximately 315 million obsolete computer parts. *See Dumped.* For further discussion of the impacts of U.S. failure to ratify the Basel Convention see, Mark Bradford, *The United States, China, & The Basel Convention On The Transboundary Movements of Hazardous Wastes and Their Disposal*, 8 FORDHAM ENVTL. L.J. 305 (1997).

157. *See* Bryan Bachner, *Regulating Pollution in the People's Republic of China: An Analysis of the Enforcement of Environmental Law*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 373, 377 (1996).

158. *See id.* A direct result of the government's failure or inability to adequately enforce environmental protections has led to infrequent, though unpunished, use of self-help. *See* Vincent Cheng Yang, *Punishing For Environmental Protection? Enforcement Issues in China*, 44 INT'L & COMP. L.Q. 671, 681 (1995). In cases where a polluter is causing ongoing damage to either health or property and all peaceful means of negotiation have been exhausted, groups of individuals that exercised self-help measures, such as destruction of equipment, have avoided prosecution. *See id.* Prosecution was avoided not from a judicial finding, but rather from an order of the Vice-Premier. *See id.*

159. *See id.* at 681.

Though China has recognized the need for a more comprehensive environmental policy, the programs implemented are in the formative stages.[160] The first step in this reformulation was the public admission that environmental degradation was a direct outcome of market-driven planning.[161] Within that admission, the Communist party proposed adopting an environmental policy that would establish liability for environmental damage through causation.[162]

With such awakenings comes change. China's goals for changes in environmental policy are:

> (1) the clarification of institutional responsibilit[y] toward the environment; (2) the incorporation of internationally recognized principles [of environmental policy], including the polluter pays principle;[163] (3) establishment of administrative controls, such as permitting, registration, and reporting requirements; and (4) the use of economic measures, such as fines and taxes, to induce acceptable behavior.[164]

With the rapid establishment of a market economy in China, a principle concern for policymakers is to encourage state-run companies to make independent decisions, rather than relying on their previous custom of receiving orders and instructions under a centralized government.[165] However, in making such market reforms, the government has been less concerned with the extent of new government regulation and more concerned about whether the government should be involved at all.[166] It has been speculated that the Chinese government will not only take a reduced role in directly managing economic affairs, but will also remain aloof in environmental affairs as well.[167]

The new fiduciary duties of managers toward their respective enterprises, combined with the diminished relationship between government and those enterprises, may have a negative effect on the impact of corporations on

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160. *See id.*

161. *See id.*

162. *See* Bachner, *supra* note 157, at 377. Though the focus of these remarks was directed toward establishing a "polluter pays" system of assessing the costs for environmental harm, it is fairly implied that the Communist party directive includes expansion of individual liability that could impose expanded criminal liability as well. *See id.* For a general explanation of the "polluter pays" principle, see P. BIRNIE & A. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 109 (1992).

163. *See* Bachner, *supra* note 157, at 377.

164. *See id.* at 379-80.

165. *See id.* at 382. For further discussion on China's conversion of state-owned enterprises to corporate ownership and China's Company Law, see Robert C. Art & Minkang Gu, *China Incorporated,* 20 YALE J. INT'L L. 273 (1995).

166. *See* Bachner, *supra* note 157, at 380.

167. *See id.*

China's environment.[168] The current environmental regulatory framework includes few criminal enforcement mechanisms for environmental crimes.[169] Those regulations that do contain criminal provisions do not specify with great detail either the elements of the crime or the punishment to be imposed.[170] Rather, those regulations make a general reference to the Criminal Code.[171] However, China does recognize health and property violations under the concept of "crimes against the environment."[172] As of yet, corporate liability has not explicitly emerged in China's environmental regulatory scheme.[173]

A. Crimes Against The Environment

Unlike the United States, China provides for environmental protection directly through its constitution. China's constitution provides for environmental protection in two ways. First, the constitution provides for rational use of natural resources,[174] and that the state will control pollution and the human environment.[175] Second, the constitution provides for indirect protection of the environment through such broad language as "socialist public property is sacred and inviolable."[176] Since most property in China is state-owned public property, the constitution provides a large base for regulation of activities that could damage the environment.[177] The constitution also provides

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168. *See id.* at 382.

169. *See* John Head, *Using Criminal Sanctions to Fight Environmental Damage in the PRC*, 9 E. ASIAN EXEC. REP. 9, 17 (1995).

170. *See id.*

171. *See id.*

172. Bachner, *supra* note 157, at 382.

173. *See* John Head, *Environmental Legislation: Report on Recent Developments*, 1 E. ASIAN EXECUTIVE REP. 13 (1996). This is ironic from the standpoint that China's criminal code does criminalize corporate behavior for such crimes as falsifying trademarks, producing shoddy products, copyright breach, smuggling, taking bribes, or creation of pornography. *See* Vincent Cheng Yang, *supra* note 158, at 677-78.

174. *See* CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, Xianfa, art. 9, ¶ 2. (adopted Dec. 4 1982), translated in Constitution of the People's Republic of China and Amendments to the Constitution of the People's Republic of China (Foreign Languages Press, 2 ed. 1990) [hereinafter PRC CONSTITUTION].

175. *See id.* art. 26.

176. *Id.* art. 12, ¶ 1.

177. *See id.* arts. 6, 10. Article 6 reads: "The basis of the socialist economic system of the [PRC] is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people." *Id.* art. 6, ¶ 1. Article 10, amended in 1988, reads:

> Land in the cities is owned by the state. Land in the rural areas . . . is owned by the collectives except for those portions which belong to the state in accordance with the law; house sites and private plots of cropland. . . are also owned by the collectives . . . . No organization or individual may appropriate, buy, sell, or lease land, or unlawfully transfer land in other ways. The right to use the land may be transferred in accordance with the law.

PRC CONSTITUTION, *supra* note 174, art. 10.

for state responsibility for the health of citizens.[178]

China's criminal code, adopted in 1979, has no special provision or category for "crimes against the environment," but it does contain some provisions that would apply to prevention of harming the environment.[179] The crimes that could have environmental implications are divided into "Crimes of Endangering Public Security"[180] and "Crimes of Undermining the Socialist Economic Order."[181]

Upon amending the Chinese constitution to include state responsibility for protecting the people's living environment and natural resources, many separate pieces of environmental legislation were promulgated,[182] of which, many carry criminal penalties for environmental harm.[183]

In specifying crimes and punishments, the Criminal Code refers almost exclusively to natural persons.[184] However, the Code recognizes the possibility of corporate criminal behavior for acts taken by representative, or juridical, persons. A step in this direction is taken by including punishments for "state personnel."[185] This would include those administrators responsible for the actions of a governmental unit.[186]

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178. *See id.* art. 21. Under Article 21, "The state . . . promotes . . . sanitation activities of a mass character, all to protect the people's health." *Id.*

179. THE CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA, adopted July 1, 1979, *translated* in The Criminal Law and the Criminal Procedure Law of the People's Republic of China (1990) [hereinafter PRC CODE].

180. *Id.*

181. *Id.* Of particular interest is Article 115 of "Crimes Endangering Public Security." This article requires that whoever violates the regulations on the control of articles of an explosive, combustible, radioactive, poisonous or corrosive nature, giving rise to a major accident in the course of production, storage, transportation or use and causing serious consequences, is to be sentenced to not more than three years fixed term imprisonment or criminal detention; when the consequences are especially serious, the sentence is to be not less than three years and not more than seven years of fixed-term imprisonment. *See id.* art. 115. The first portion of the Chinese criminal provisions basic guidelines are nearly identical to those set in the "characteristic hazardous waste" definition of RCRA. See 40 C.F.R. § 261, *supra* note 45 for RCRA "characteristic hazardous waste" definition.

182. *See* Yang, *supra* note 7, at 157.

183. *See id.* at 157-58. The Environmental Protection Law of 1989 provides that if a violation causes a serious pollution accident, leading to grave consequences of heavy losses of public or private property or human injuries or death, the persons directly responsible for such an accident shall be investigated for criminal responsibility according to the law. *See* ENVIRONMENTAL PROTECTION LAW OF THE PEOPLE'S REPUBLIC OF CHINA, art. 43 (1992). Though the "directly responsible" causation language of the law would make imputing vicarious liability, such as the American "responsible corporate officer" doctrine, unlikely, finding direct responsibility of an executive or manager who acted negligently could be possible, as in the Australian method. *See generally* Bubna-Litic, *supra* note 23.

184. *See* Yang, *supra* note 7, at 162.

185. *See id.* at 163. State personnel includes "all personnel of state organs, enterprises and institutions and other personnel engaged in public service according to the law." *Id.*

186. *See id.*

Regarding corporate officers, the Criminal Code chapter entitled "Crimes of Dereliction of Duty" imposes criminal responsibility on "state personnel."[187] That chapter refers to major loss of public property or the interests of the state and people.[188] This could support a charge for a crime against the environment committed by a responsible state agent. Furthermore, some specific statutes impose criminal liability on individuals and liability for persons directly responsible for the violating organization.[189] In these instances, this creates a mechanism whereby criminal liability may be imposed on managers and supervisors in their official capacity for crimes against the environment by the corporation.[190]

Implying liability to corporate officers through a theory of vicarious liability for crimes against the environment is difficult because China's criminal law does not extend to many indirect or unintended consequences.[191] Some crimes against the environment prescribe criminal detention,[192] but with most major violations likely to be committed by large factories or organizations, criminal sanctions are harder to apply due to China's reticence to extend criminal liability to corporate entities.[193]

B. Courts And Crimes Against The Environment

The case against Zhang Changlin serves as a model of the Chinese system to better understand China's method of imposing criminal liability for Crimes Against the Environment.[194] Changlin was a worker at the Suzhou People's Chemical Plant of Suzhou.[195] Before Changlin left work at 3:50 p.m. on September 12, 1979, he failed to close a valve through which liquid sodium cyanide passed from a one hundred fifty ton storage tank to an eight ton measurement tank.[196] Upon returning to work later that day, Changlin again failed to turn off the valve.[197] The liquid sodium cyanide overflowed from the

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187. *See* PRC CODE, *supra* note 179, art. 187. State personnel who, because of neglect of duty, cause public property or the interests of the state and the people to suffer major losses are to be sentenced to not more than five years of fixed-term imprisonment or criminal detention. *See id.*

188. *See id.*

189. *See* FISHERIES LAW OF THE PEOPLE'S REPUBLIC OF CHINA, *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1983-1986 207 (1987).

190. *See* Yang, *supra* note 7, at 155-56.

191. *See id.*

192. *See, e.g.*, PRC CODE, *supra* note 179, art. 187.

193. *See* Yang, *supra* note 7, at 165-66, 170-71.

194. LESTER ROSS & MITCHELL A. SILK, ENVIRONMENTAL LAW AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA 250 (1987).

195. *See id.* This may have been the first case to interpret and enforce the Environmental Protection Law of 1979. *See id.* at 257. Changlin and two of his superiors were prosecuted under Article 115 of the Criminal Code and Article 32 of the Environmental Protection Law. *See* PRC CODE, *supra* note 179, art. 115.

196. *See* ROSS & SILK, *supra* note 194, at 250.

197. *See id.*

measurement tank and passed through a hole in a retaining wall and flowed into an adjacent river until the next morning when factory workers discovered the leak and closed the valve.[198] Approximately twenty-eight tons of liquid cyanide had been discharged into the river.[199] Though emergency remediation measures were taken to counter the cyanide spill, there was a massive fish kill, including damage to a nearby fish hatchery.[200] Changlin was found guilty and sentenced to two years imprisonment.[201]

The Suzhou Chemical case is a prime example of China's application of "crimes against the environment doctrine" to an individual. The court found Changlin to be negligent in performing his duties at the plant.[202] The case was highly publicized and was meant to be a "warning shot" to encourage compliance with the Environmental Protection Law.[203]

There was more than enough background information to suggest Changlin, though negligent, may not have been alone in his negligence. Changlin was found to be the direct cause of the spill.[204] Further, Changlin was found to be responsible for failing to repair the hole in the retaining wall.[205] However, when addressing the issue of whether Changlin's superiors also acted negligently in this matter, the court found that two of the five factory leaders committed criminal acts, while the remaining three were adjudged not to have been at the factory long enough to contribute to the unsafe work atmosphere.[206]

Though judged to be the direct cause of the accident, Changlin was as much a victim of poor luck and bad timing as he was a careless worker. The

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198. *See id.* The valve was left open for approximately thirteen hours. *See id.* at 251.

199. *See id.*

200. *See id.*

201. *See* ROSS & SILK, *supra* note 195, at 252. Changlin's good attitude, guilty plea, remorse, and cooperation were found to be mitigating factors in his sentencing. *See id.*

202. *See id.* at 250-51.

203. *See id.*

204. *See id.* at 252-53.

205. *See id.* at 254.

206. *See* ROSS & SILK, *supra* note 194, at 255-56. The opinion does not indicate what the charges or penalties were against the two senior factory leaders. *See id.* The three junior factory leaders were sentenced to "serious education through self-criticism . . . based on their individual actions and . . . attitudes." *Id.* at 256. The opinion states that "factory management was in turmoil, rules and systems of operation were incomplete, and safety and production were . . . ignored by the factory leaders." *Id.* at 255. There was no uniform protocol for handling liquid cyanide and this was the fifth spill at the plant since 1973. *See id.* Four of the spills, including Changlin's, involved workers leaving their post without authorization. *See id.* The originally constructed retaining wall never passed inspection when constructed in 1978. *See* ROSS & SILK, *supra* note 194, at 255-56. Inspections of the plant by factory leaders were only cursory. *See id.* Factory workers received little or no training on emergency spill measures. *See id.* Lenient treatment of managers and leaders is not uncommon. *See* Vincent Cheng Yang, *supra* note 158, at 677. The 1982 Jianjiang Pesticide disaster, where nitrogen polluted water was released into a river killing approximately 330,000 fish and fouling the drinking water for three counties, resulted in only as administrative warning for the party secretary that directly ordered the release. *See id.*

opinion admits that operating and safety procedures were non-existent at the plant.[207] However, when faced with assessing liability for the factory leaders, their actions are minimized on the grounds that their errors were only of poor judgment and not criminally negligent.[208] The case was a vehicle for mass education to publicize the government's desire to encourage self-policing under the Environmental Protection Law.[209] There was also speculation that the trial was even rigged for this purpose.[210]

Though Changlin's case implies the possibility of corporate responsibility, China courts have recently found that direct action of corporate executives is culpable behavior.[211] William Ping Chen, an American citizen, was sentenced to ten years criminal imprisonment for attempting to smuggle two hundred thirty eight tons of household and medical waste into Shanghai from the United States.[212] Chen's conviction was the first of its kind in China.[213] Prosecutors alleged that Chen smuggled solid waste in violation of China's Law on Solid Waste Pollution Prevention and Control despite previous warnings of the violations.[214] Chen's punishment is a departure from the results in the Changlin case. Had the reasoning used in Changlin been applied, those individuals who off-loaded the waste would have been found directly responsible, while Chen would have only been found indirectly involved.[215] However, direct liability applied because Chen's act, smuggling, was explicitly criminal.[216] Nevertheless, Chen's prosecution and the implications of the Changlin decision suggests that executive liability is a possibility for crimes against the environment.[217]

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207. *See* ROSS & SILK, *supra* note 194, at 255.

208. *See id.* at 255-57. Changlin received no such mercy because of his error in judgment. *See id.* Changlin left his post to return home to care for his children. *See id.* at 250-51.

209. *See id.* at 258.

210. *See id.* Changlin was not represented by effective counsel. *See* ROSS & SILK, *supra* note 194, at 258. The trial bench actually consulted with the Party Committee, public security department, and propaganda department before the trial. *See id.* The effect of Changlin trial as a mass education tool cannot be measured, however, it is fairly implied that his case helped to emphasize the general environmental degradation that had been prevalent in major cities such as Suzhou. *See id.*

211. *See U.S. Businessman Sentenced to 10 Years for Illegal Waste Imports*, BNA DAILY ENVT'L REP., Jan. 15, 1997, at 10 DEN A-4 [hereinafter *Businessman*].

212. *See id.*

213. *See id.*

214. *See id.* Reporters were denied access to the Port of Shanghai and therefore could not verify China's reports of illegal waste importing. *See id.*

215. *See* ROSS & SILK, *supra* note 194, at 258.

216. *See Businessman, supra* note 211. Chen's Chinese joint-venture partner was not charged with any waste smuggling violations. *See* Tom Korski, *10 Year Term Backed for Jailed U.S. Businessman*, SOUTH CHINA MORNING POST, Nov. 26, 1997, *available at* 1997 WL 13277354. There was no justification given for not charging Chen's Chinese partner. *See id.*

217. *See Businessman, supra* note 211.

IV. ANALYSIS

The responsible corporate officer doctrine is a concept of legal liability based on the construct of *respondeat superior*.[218] The greatest fault of the doctrine is that it imposes criminal liability on an individual who may not have taken a physical role in committing an environmental crime.[219] However, the liability is justified because had the corporate officer correctly done his job, the crime would not, or possibly could not, have been committed. The doctrine implies that the environmental harm would not have occurred but for management's complicity or ineptitude. Furthermore, knowledge of the crime is imputed based upon the greater public welfare purposes of environmental protection laws.[220] Specific knowledge need not be proven.[221] Rather, under the doctrine, prosecutors need only show the dangerous nature of the acts.[222]

The broad framework for establishing a form of the responsible corporate officer doctrine in China is in place. China's constitutional provisions regarding environmental quality and health are beyond any such provisions in the United States' Constitution.[223] China's Criminal Code provides for environmental crimes caused by "dereliction of duty."[224] Further, there is some evidence that in China's jurisprudence, criminal sanctions for factory leaders have been considered and imposed, if only rarely.[225] Yet with the legal framework in place to prosecute those leaders who allow environmental harm, prosecution and enforcement remains sparse.[226] This can be explained somewhat by the command economy system previously in place.[227] However, with China's transition to a market system, an enforcement mechanism geared toward corporate, rather than state, entities is justified.

Beyond more rigid adherence to the provisions currently in place, a practical improvement for the Chinese system is to include specific criminal sanctions in each environmental statute, as in RCRA[228] and CERCLA.[229] An explicit and clear statement in each statute, stating the duties of both workers

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218. *See* BLACK'S, *supra* note 24, at 1311-12. "Let the master answer. This doctrine . . . means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." *Id.*

219. For a general discussion and criticism of using vicarious liability in enforcement against corporations, see Deborah DeMott, *Organizational Incentives To Care About The Law*, 60 AUT LAW & CONTEMP. PROBS. 39 (1997).

220. *See* DiTata, *supra* note 11, at 814.

221. *See id.*

222. *See id.*

223. *See* PRC CONSTITUTION, *supra* note 174, art. 9.

224. *See* PRC CODE, *supra* note 179, art. 187.

225. *See* ROSS & SILK, *supra* note 194, at 251.

226. *See* Vincent Chen Yang, *supra* note 158, at 677.

227. *See id.* at 678.

228. *See* 42 U.S.C. §§ 6901-92 (2000). The Public Health and Welfare Acts, The Resource Conservation and Recovery Act.

229. *See* 42 U.S.C. §§ 9601-75 (2000). The Public Health and Welfare Acts, The Comprehensive Environmental Responsibility, Compensation, Liability, and Recovery Act.

and managers in preventing and reporting pollution, would avoid the confusion inherent in the current loose confederacy of constitutional provisions, statutes, and enforcement mores.

Inherent in the enforcement of any crime is the ability to discover it, or catch someone in the act of committing it. America's success in regard to environmental enforcement is the ability to monitor the generation or movement of waste, or to have real time outputs on smokestacks and outflow pipes.[230] For China to effectively enforce its "crimes against the environment," it must first know they are happening. This will not happen until China forces its new corporations to monitor and report the pollution generated at their plants and factories.

For China to improve its protection of the natural environment, it must take aggressive and direct action while the conversion of state-owned industry to independent corporations is still in its formative stages. China's existing laws, particularly dereliction of duty, are sufficient to apply a form of the responsible corporate officer doctrine. Environmental statutes can be improved with clear and explicit statements of corporate culpability based on a should have known standard. Finally, greater effort should be made in the monitoring and enforcement of the environmental protection laws.

V. CONCLUSION

What is most shocking about using criminal sanctions against corporate leaders is that the sanctions are even needed at all. Judge Conte's quote opening this Note reflects his shock and frustration at having to sentence an executive for illegal dumping.[231] In that proceeding, he stated that "the crimes are particularly vexing because [the defendant] had the education and financial means to create a good life for himself and his family."[232] It can be implied that Judge Conte believes in a "should have known better" standard of liability rather than a "should have known" standard.

Executives and managers are not only leaders within their organizations, but also, they are often leaders in their communities. The best explanation for their actions is the desire to compete and succeed, with measurement based in terms of profit, speed, or productivity. However, in doing so, they were compelled to cheat by ignoring environmental protection law.[233] For a white

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230. *See* PETER S. MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW AND POLICY 235-40 (1994).

231. *See* Pochna, *supra* note 1.

232. *Id.*

233. Unfortunately, environmental crimes are only a component of the corporate duplicity being exposed at the beginning of the new millennium. The financial collapse of Enron, Worldcom, Waste Management, Tyco, Qwest, and Arthur Andersen have all been linked to illegal and / or unethical management and accounting practices. *See Corporate Scandals and Politics: The Backlash Against Business,* THE ECONOMIST, July 6, 2002. *See also WorldCom: Accounting for Change,* THE ECONOMIST, June 29, 2002. Of these corporations, some will face

collar executive, one would think that the possibility of incarceration with violent felons would focus the attention like few other sanctions. The cases in the American section of this Note are not only explanations of the law, but also reminders of the pervasive and continuing problem of corporate duplicity in complying with public welfare statutes such as RCRA and CERCLA. The result of such actions is remediation costs born by the public and a more dangerous environment.

If anything, this Note should be viewed as a cautionary tale as much as an analysis of the environmental control laws in the United States and China. Though imperfect, the implied liability of America's "should have known" standard applied to executives for acts committed in their facilities are justified in order to deter future pollution through careless or conniving management. China must find a way to balance its economic power with its environmental fragility. Imposition of a form of the "responsible corporate officer" doctrine may deter corporate leaders from the allure of greater production at the expense of environmental quality on China's journey to a full market economy.

Jeffrey M. Bellamy[*]

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criminal sanctions. *See id.* Taken as a whole, the corporate scandals of 2001 and 2002 have led to recession, damaged consumer confidence, and a general perception that corporations operate above the law. *See id.* For further discussion on corporate perception and the law, see Faith Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001*, 76 TUL. L. REV. 1579 (June, 2002).

* J.D., Indiana University School of Law - Indianapolis, 2003 *(expected)*; M.PI., Indiana University, 1998; B.S.P.A, Indiana University, 1996. The author would like to thank his mother, Carrie Bellamy, for her support and vigilant copy editing.

GLOBAL PATENT LAW HARMONIZATION: BENEFITS AND IMPLEMENTATION

I. THE IMPORTANCE OF GLOBALLY HARMONIZED PATENT LAW

> The international intellectual property arena, as it exists today, is a segmented potpourri of national patent systems that serve to inhibit the efficient and economical resolution of international patent issues. As the distances and differences between countries become smaller through emerging technology, the need for a truly global patent system becomes imperative as opposed to the fiercely nationalistic systems of today.[1]

There have been many discussions on global patent law harmonization throughout the past one hundred years.[2] Despite these efforts, global patent law harmonization has yet to be achieved.[3] However, it is still important that the world continue to make an effort to globally harmonize patent law because the protection of intellectual property rights worldwide is critical to the international trading of goods and services as at some level nearly all legitimately traded goods and services operate under patent, copyright, or trademark protection.[4]

Global harmonization of patent law is necessary for many reasons.[5] One main reason is that because nations are transforming from industrial-based economies to information-based economies, worldwide uniform protection of intellectual property deeply affects trade issues.[6] Another main reason is that patent law harmonization would evenly spread the administrative burden and redundancy present in prosecuting international patent applications among participating nations.[7] Consequently, uniform patent laws would reduce the cost of prosecuting an international patent.[8]

This Note will explore several aspects of international patent law while analyzing the benefits and implementation of a globally harmonized system

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1. Anneliese M. Seifert, *Will the United States Take the Plunge into Global Patent Law Harmonization? A Discussion of the United States' Past, Present, and Future Harmonization Efforts*, 6 MARQ. INTELL. PROP. L. REV. 173, 173 (2002).

2. *See id.*

3. *See id.*

4. *See* John E. Guist, *Noncompliance With TRIPs by Developed and Developing Countries: Is TRIPs Working?*, 8 IND. INT'L & COMP. L. REV. 69, 69 (1997).

5. *See* Kevin Cuenot, *Perilous Potholes in the Path Toward Patent Law Harmonization*, 11 J. LAW. & PUB. POL'Y 101, 101 (1999).

6. *See id.*

7. *See id.*

8. *See id.*

of patent law. Part II of this Note will discuss the basics of patent law. Part III will discuss important, multinational agreements in the history of international patent law. Part IV will discuss aspects of current patent systems in the world and how some of these systems function as obstacles for globalizing patent law. Part V will discuss the benefits of globally harmonizing patent law.[9] Part VI will provide two different types of globally harmonized patent law systems and discuss their implementation and aspects. Finally, Part VII will conclude this Note with a discussion of what the future may hold for the global harmonization of patent law.

II. THE BASICS OF PATENT LAW

The patent system is the primary mechanism for extending property rights to new technology.[10] "A patent is a government grant of a monopoly on an invention for a term of years, after which, the technology enters the public domain."[11] Patents protect the fundamental elements of inventions and emerging technology.[12] Subject matter protected by patents can range from products, machines, compositions, or processes.[13] The patent describes the invention and gives the owner the right to exclude others from producing, using, or selling the invention without consent.[14] "In order for an invention to be patentable, it must possess a minimum degree of non-obviousness and novelty."[15]

Domestic patent laws have dual functions: (1) they stimulate scientific research by rewarding inventors with limited monopolies on their inventions; and (2) they foster economic benefits for the inventor's nation.[16] Without some type of international protection beyond the domestic protection, the benefits of patents would be frustrated, and a nation's economy and trade ultimately would suffer.[17]

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9. When discussing the benefits of patent law, three perspectives will be used. The United States will be one perspective. The European community will be another perspective discussed. The third and final will be the perspective of developing nations.

10. *See* Donald S. Chisum, *The Harmonization of International Patent Law*, 26 J. MARSHALL L. REV. 437, 437 (1993).

11. Isaac Hasson, *Domestic Implementation of International Obligations: The Quest for World Patent Law Harmonization*, 25 B.C. INT'L & COMP. L. REV. 373, 375 (2002).

12. *See id.*

13. *See id.*

14. *See id.*

15. *Id.*

16. *See id.*

17. *See* Hasson, *supra* note 11, at 375.

III. HISTORICAL INTERNATIONAL PATENT LAW

A. *The Paris Convention for the Protection of Industrial Property*[18]

The need for international protection of intellectual property[19] was realized as early as 1873.[20] Many inventors kept their inventions secret due to the fear of having their ideas stolen or exploited.[21] The Paris Convention for the Protection of Industrial Property (Paris Convention) was entered into in 1883 to reduce these fears.[22] This treaty was the precursor of all modern-day multinational protection for intellectual property.[23]

The Paris Convention established several fundamental principles.[24] These fundamental principles of "national treatment,"[25] "right of priority,"[26]

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18. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583 [hereinafter Paris Convention].

19. The Paris Convention covers industrial property, namely, patents, trademarks, trade names, industrial designs, and unfair competition. Gerald J. Mossinghoff & Vivian S. Kuo, *World Patent System Circa 20XX A.D.*, 38 IDEA 529, 532 (1998).

20. *See* Cuenot, *supra* note 5, at 103.

21. *See id.* at 104.

22. *See id.* Originally, fourteen nations signed the treaty. *See id.* Before this treaty, inventors had to submit patent applications simultaneously in all the countries where protection was desired. *See* Mossinghoff & Kuo, *supra* note 19, at 532. "Failure to do so could preclude patent protection in all but one country, with the first application destroying the 'novelty' of the invention for subsequent applications." *Id.* "In addition, inventors had to comply with often radically different procedural and substantive requirements to obtain patent protection." *Id.* "This lack of adequate protection for foreign inventors became apparent during the international exhibition of inventions in 1873 in Vienna; inventors refused to participate for fear of losing patentability of their inventions." *Id.*

23. *See* Mossinghoff & Kuo, *supra* note 19, 532.

24. *See id.*

25. Article 2(1) of the Paris Convention contains the following:

> Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

Paris Convention, *supra* note 18, art. 2(1).

26. The relevant sections of the Paris Convention are as follows:

> Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.

Id. art. 4(A)(1). "The periods of priority referred to above shall be twelve months for patents . . . ." *Id.* art. 4(C)(1).

and "special agreements"[27] have been incorporated in all subsequent multinational patent agreements.[28] "National treatment" requires member states to accord nationals of other member states the same advantages under their domestic patent laws as they accord to their nationals.[29] "Right of priority" entitles a patent applicant of one member country to a period of twelve months after the initial patent application to apply for protection.[30] Member nations can also enter into "special agreements," forging stronger cooperation in patent protection.[31] "These 'special agreements' may be bilateral or multilateral, but they must not contravene the other provisions of the Paris Convention."[32] This is an important part of the treaty because all subsequent multinational and regional patent protection schemes are derived from this provision and are regarded as "special agreements."[33]

Although the Paris Convention eliminated some major roadblocks,[34] it is rather rudimentary in providing inventors with any uniform standard of substantive patent rights.[35] In short, the Paris Convention provides an important entry for inventors to journey down the path of multinational patent protection.[36]

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27. Article 19 of the Paris convention provides: "It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention." *Id.* art. 19.

28. *See* Mossinghoff & Kuo, *supra* note 19, at 534.

29. *See id.* at 532. Practically speaking, this means a national of one member country enjoys the same rights in every member country of the Paris Convention as nationals of the country where the patent application is filed. *See id.* at 533. "However, nationals seeking patent protection in a member country must comply with the domestic laws of the member country from which they seek patent protection." *Id.* at 534.

30. *See id.* "Within this one year period, nationals of member countries are further entitled to tie subsequent applications back to the earliest filing date." *Id.* "This provision offers great practical advantages to applicants desiring multinational patent protection." Mossinghoff & Kuo, *supra* note 19, at 534. "It avoids intervening prior art which would otherwise prevent a patent and serves to overcome the novelty requirement, and it allows applicants time to assess the economic viability of their inventions and determine where they desire patent protection." *Id.*

31. *See id.* at 534.

32. *Id.*

33. *See id.* "By structuring a multinational patent protection system under this provision of the Paris Convention, these regional and multinational patent efforts must, at the minimum, provide for national treatment and the right of priority." *Id.*

34. *See* Mossinghoff & Kuo, *supra* note 19, at 534. The roadblocks were both preclusion of cross-border patent protection and inventors being unable to exploit their inventions internationally. *See id.*

35. *See id.* "The Paris Convention does not define patentable subject matter, prescribe patent term, provide meaningful limitations to compulsory licenses or guide patent claim interpretation and enforcement. It relegates those substantive issues to the discretion of each member country." *Id.*

36. *See id.*

B. The Patent Cooperation Treaty ("PCT")[37]

"Whereas the Paris Convention dealt with substantive issues of patent protection, the . . . [PCT] deals with procedures to obtain international patent protection."[38] The United States took the lead role in the late 1960s in creating a new multilateral patent treaty to minimize duplicative patent application and examinations worldwide.[39] The PCT took effect on January 1, 1978.[40] The PCT constituted an important step towards rationalizing the filing of patent applications worldwide.[41] "Stripped down to its essentials,[42] the PCT enables an inventor to prosecute a single international patent application to obtain patent protection in multiple regions."[43]

Although the PCT did not focus directly on the substance of patent law,

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37. Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645 [hereinafter PCT]. A list of the members of the PCT is located on the website of the World Intellectual Property Organization (WIPO). PCT member nations, *available at* http://www.wipo.org/treaties/documents/english/pdf/m-pct.pdf (last visited Jan. 21, 2003).

38. Cuenot, *supra* note 5, at 106.

39. *See* Mossinghoff & Kuo, *supra* note 19, at 535. This took an economic burden off of inventors who no longer had to file patent applications in multiple countries. *See* Cuenot, *supra* note 5, at 106.

40. *See* Cuenot, *supra* note 5, at 106.

41. *See* Mossinghoff &Kuo, *supra* note 19, at 535.

42. The actual PCT process is carried out as follows:

> The first step requires the applicant to file an international application in one of several designated national patent offices. The PCT permits applicants to designate as many of the contracting states as desired during this filing process and delays, for as long as thirty months, the need for multiple filings in the individual states. The PCT also extends the inventor's national state entry under the Paris Convention from twelve to twenty months. Once an international application is received by an appropriate receiving national patent office, the office examines the application as to formal requirements, and, if it is designated as an international Searching Authority, conducts a novelty search and completes an international Search Report. This report indicates the classification of the invention, the technical fields searched and citations to the prior art. In almost 80% of PCT applications, applicants also request an International Preliminary Examination B a non-binding opinion on whether the invention appears to be novel, to involve an inventive step (to be non-obvious), and to be industrially applicable. The goal is to remove some of the duplicative efforts expended by examiners from various countries in reviewing formalities and conducting prior art searches. By allowing one office to handle some of the pre-filing and post-filing requirements, examiners from other national offices are able to focus on the substantive applications of their domestic laws. The next step of the PCT process is the national phase. Once an applicant receives the International Search Report and an International Preliminary Examination, if requested, for his or her invention, the applicant may enter the national stage in the various patent offices where protection is desired. The patent officials at those offices examine the application in light of the PCT results, but based entirely on their own national patent requirements and decide whether to grant or deny a patent.

Id. at 535-36.

43. Cuenot, *supra* note 5, at 107.

it indirectly provided substantial impact.[44] Also, the PCT rationalized the patent application process concerning filing, searching, and preliminary examination, it does not result in a globally harmonized patent system, which would result in one international patent.[45]

C. The Failed World Intellectual Property Organization[46] (WIPO) Harmonization Discussions

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44. *See* Mossinghoff & Kuo, *supra* note 19, at 536. "The accession process for member states requires minimum patent standards and regulations." *Id.* "Many countries augmented their national patent standards to become signatory states." *Id.* "Although the PCT has been criticized for its extensive procedural requirements and the lack full faith and credit accorded to International Search Reports and International Preliminary Examinations, the number of member states and applications submitted to the PCT have continued to grow." *Id.*

45. *See* Cuenot, *supra* note 5, at 107.

46. The WIPO offers a description of itself at its website:

> The World Intellectual Property Organization (WIPO) is an international organization dedicated to promoting the use and protection of works of the human spirit. These works – intellectual property – are expanding the bounds of science and technology and enriching the world of the arts. Through its work, WIPO plays an important role in enhancing the quality and enjoyment of life, as well as creating real wealth for nations. With headquarters in Geneva, Switzerland, WIPO is one of the 16 specialized agencies of the United Nations system of organizations. It administers 23 international treaties dealing with different aspects of intellectual property protection. The Organization counts 179 nations as member states.

WIPO, *About WIPO*, *at* http://www.wipo.org/about-wipo/en/ (last visited Jan. 21, 2003). The WIPO also discusses the challenges associated with globalization:

> While a decade ago the term 'international' was most commonly used to describe the relations between nations, the current trend is to use 'globalization.' This change in terminology denotes a fundamental *shift in the manner in which the world interacts*. The world is witnessing a transformation of a model based on the interaction between fragmented territorial components, 'nations,' to one of seamless interaction across the globe.

WIPO, *Challenges: Globalization*, *at* http://www.wipo.org/about-wipo/en/ (last visited Nov. 25, 2002).

> One element that is both a cause and effect of globalization is the creation of a legal framework that is geared to facilitate it. It is evident that global commerce is greatly hampered by a patchwork of inconsistent regulations across the different national territories in which it is conducted. Increased *harmonization* of the various legal disciplines that come into play on the global marketplace is therefore an indispensable ingredient of any policy agenda geared towards globalization. This need is felt throughout the legal system, including in particular the area of intellectual property law, because of the ever-growing importance of this discipline for those industries driving the modern economy, such as the information technology, entertainment and biotechnology industries. Intellectual property rights and the mechanisms to enforce them are fundamentally territorial in nature. The scope of the rights created in each country is determined by that country, and the effect of these rights, as well as their protection, are, in principle, defined by and confined to the territory of the nation State. As the organization competent and responsible for the formulation of intellectual property policy at the international level, the first challenge for WIPO will be to adjust the existing intellectual property system in order to make it function harmoniously in a global world.

Id. at 6-7.

In 1985, the WIPO began discussions regarding global harmonization of patent laws.[47] "This treaty would have changed the United States patent system from a first-to-invent to a first-to-file system,[48] created a prior user defense, called for publishing applications, and based the patent term on the filing date rather than the date of issuance."[49]

> In exchange for these concessions, the United States asked for (1) a grace period for disclosures and removal of the absolute novelty principle;[50] (2) an international doctrine of equivalents;[51] (3) the removal of the pre-grant opposition procedure; and (4) the ability to file applications in English, with the English application to serve as the official copy in cases of translation errors.[52]

The United States also requested a delay and in 1994 declared that it would not switch from a first-to-invent system to a first-to-file system.[53] "As a result, the conference ended because the first-to-file concession was the cornerstone of all of the negotiations."[54]

D. Trade-Related Aspects of Intellectual Property Rights[55] (TRIPS Agreement)

At the conclusion of World War II, nations began to recognize the desirability of international trade agreements.[56] This began the General

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47. *See* Seifert, *supra* note 1, at 184. These discussions took place in Geneva, Switzerland. *See id.*

48. *See infra* Part IV.

49. Seifert, *supra* note 1, at 184.

50. The one-year grace period is unique to the United States, whereas most countries require "absolute novelty," in other words, if information relating to the function of a patent occurs in any type of publication prior to the application for patent, then the inventor loses his patent rights. *See* Donald R. Palladino, *The Publication Bar: How Disclosing an Invention to Others Can Jeopardize Potential Patent Rights*, 37 DUQ. L. REV. 353, 354 n.8 (1993). The United States however, allows a unique, one-year grace period after publication before an inventor loses his patent rights. *See* 35 U.S.C. § 102(a)-(b) (2002).

51. *See infra* Part V(A).

52. Seifert, *supra* note 1, at 184.

53. *See id.*

54. *Id.* "The inauguration of the Clinton administration is cited as the reason that the United States pulled out of negotiations." *Id.* "Previous successful negotiations occurred during the Reagan and Bush administrations." *Id.* at 184-85.

55. General Agreement on Tariffs And Trade - Multilateral Trade Negotiations: Agreement On Trade-Related Aspects Of Intellectual Property Rights, January 1994, 33 I.L.M. 81 [hereinafter TRIPS].

56. *See* Hasson, *supra* note 11, at 375.

Agreement on Tariffs and Trade[57](GATT) negotiations.[58] The TRIPS Agreement was created in 1994 at the Uruguay Round,[59] the most recent of

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57. The history and rationale of the GATT is as follows:

> The WTO's predecessor, the GATT, was established on a provisional basis after the Second World War in the wake of other new multilateral institutions dedicated to international economic cooperation - notably the 'Bretton Woods' institutions now known as the World Bank and the International Monetary Fund. The original 23 GATT countries were among over 50 which agreed a draft Charter for an International Trade Organization (ITO) - a new specialized agency of the United Nations. The Charter was intended to provide not only world trade disciplines but also contained rules relating to employment, commodity agreements, restrictive business practices, international investment and services. In an effort to give an early boost to trade liberalization after the Second World War - and to begin to correct the large overhang of protectionist measures which remained in place from the early 1930s - tariff negotiations were opened among the 23 founding GATT 'contracting parties' in 1946. This first round of negotiations resulted in 45,000 tariff concessions affecting $10 billion - or about one-fifth - of world trade. It was also agreed that the value of these concessions should be protected by early - and largely 'provisional' - acceptance of some of the trade rules in the draft ITO Charter. The tariff concessions and rules together became known as the General Agreement on Tariffs and Trade and entered into force in January 1948. Although the ITO Charter was finally agreed at a UN Conference on Trade and Employment in Havana in March 1948 ratification in national legislatures proved impossible in some cases. When the United States' government announced, in 1950, that it would not seek Congressional ratification of the Havana Charter, the ITO was effectively dead. Despite its provisional nature, the GATT remained the only multilateral instrument governing international trade from 1948 until the establishment of the WTO. Although, in its 47 years, the basic legal text of the GATT remained much as it was in 1948, there were additions in the form of plurilateral - voluntary membership - agreements and continual efforts to reduce tariffs. Much of this was achieved through a series of 'trade rounds.'

E. Kwan Choi, *The Roots of the WTO: A Brief History of the GATT, at* http://www.econ.iastate.edu /classes/econ355/choi /wtoroots.htm (last visited Jan. 21, 2003).

58. *See* Hasson, *supra* note 11, at 376.

59. "The Uruguay Round also established the World Trade Organization (WTO) to oversee GATT and [the TRIPS Agreement]." *Id.* "Developed signatories support the WTO because it promotes enhanced enforcement of rights in developing countries by undertaking a proactive trade surveillance role." *Id.* The history of the WTO is provided on its website:

> The past 50 years have seen an exceptional growth in world trade. Merchandise exports grew on average by 6% annually. Total trade in 2000 was 22-times the level of 1950. GATT and the WTO have helped to create a strong and prosperous trading system contributing to unprecedented growth. The system was developed through a series of trade negotiations, or rounds, held under GATT. The first rounds dealt mainly with tariff reductions but later negotiations included other areas such as anti-dumping and non-tariff measures. The last round -the 1986-94 Uruguay Round -led to the WTO creation.
>
> The negotiations did not end there. Some continued after the end of the Uruguay Round. In February 1997 agreement was reached on telecommunications services, with 69 governments agreeing to wide-ranging liberalization measures that went beyond those agreed in the Uruguay Round. In the same year 40 governments successfully concluded negotiations for tariff-free trade in information technology products, and 70 members concluded a financial services deal covering more than 95% of trade in banking, insurance, securities and

several rounds of GATT negotiations.[60] The TRIPS Agreement primarily resulted from the concern among developed countries that lobbied for protection against international piracy of intellectual property rights.[61]

The TRIPS Agreement formally recognizes the "need to 'promote effective and appropriate means for the enforcement' of intellectual property rights, and provides for 'expeditious procedures for the multilateral prevention and settlement of disputes' relating to private intellectual property rights."[62]

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financial information.

In 2000, new talks started on agriculture and services. These have now been incorporated into a broader agenda launched at the fourth WTO Ministerial Conference in Doha, Qatar, in November 2001. The agenda adds negotiations and other work on non-agricultural tariffs, trade and environment, WTO rules such as anti-dumping and subsidies, investment, competition policy, trade facilitation, transparency in government procurement, intellectual property, and a range of issues raised by developing countries as difficulties they face in implementing the present WTO agreements.

WTO, *The WTO In Brief: Part 1 The multilateral trading system past, present and future, at* http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (last visited Nov. 25, 2002). The organization of the WTO is also described on the WTO website:

The World Trade Organization came into being in 1995. One of the youngest of the international organizations, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT) established in the wake of the Second World War.

WTO, *The WTO In Brief: Part 2 – The organization, at* http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (last visited Nov. 25, 2002).

The WTO overriding objective is to help trade flow smoothly, freely, fairly and predictably. It does this by: [a]dministering trade agreements; [a]cting as a forum for trade negotiations; [s]ettling trade disputes; [r]eviewing national trade policies; [a]ssisting developing countries in trade policy issues, through technical assistance and training programs; [and] [c]ooperating with other international organizations. The WTO has more than 140 members, accounting for over 97% of world trade. Around 30 others are negotiating membership.

Decisions are made by the entire membership. This is typically by consensus. A majority vote is also possible but it has never been used in the WTO, and was extremely rare under the WTO predecessor, GATT. The WTO agreements have been ratified in all members parliaments. The WTO top level decision-making body is the Ministerial Conference which meets at least once every two years. Below this is the General Council (normally ambassadors and heads of delegation in Geneva, but sometimes officials sent from members capitals) which meets several times a year in the Geneva headquarters. The General Council also meets as the Trade Policy Review Body and the Dispute Settlement Body. At the next level, the Goods Council, Services Council and Intellectual Property (TRIPS) Council report to the General Council. Numerous specialized committees, working groups and working parties deal with the individual agreements and other areas such as the environment, development, membership applications and regional trade agreements.

WTO, *The WTO In Brief: Part 2 The organization, at* http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (last visited Nov. 25, 2002).

60. *See* Hasson, *supra* note 11, at 376. The TRIPS Agreement was signed after the failure of the WIPO harmonization discussion. *See id.*; *see supra* Part III(C).

61. *See* Hasson, *supra* note 11, at 376.

62. *Id.*

The practical effect on patent systems has actually been the some harmonization of the world's patent laws. [63] The resulting harmonization comes from requirements of the TRIPS Agreement that all signatories enact domestic legislation to implement the minimum levels of patent protection provided by the TRIPS Agreement.[64]

The TRIPS Agreement also establishes the criteria for patentable subject matter.[65] A patent must be made available for any invention, product, or process, regardless of its field of technology.[66] Also, existing guidelines define subject matter that may not be patentable.[67] Furthermore, the TRIPS Agreement provides that all rights under it are to apply to all of its members, thereby disposing of the past use of reciprocity.[68] Moreover, the TRIPS Agreement applies the most favored nation principle in affording patent protection, where with few exceptions any advantage, favor, privilege, or immunity granted by an Agreement member to the nationals of any other country must be granted immediately and unconditionally to the nationals of all other members.[69]

It also establishes the basic rights that must be accorded to each Agreement member's nationals.[70] "The major provisions of the TRIPS legislation changed the patent term from seventeen years from the date of issuance, to twenty years from the date of filing and implemented a provisional application."[71] A maximum five-year term extension could be obtained for delays attributed to successful appeals, secrecy orders, and interferences.[72]

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63. *See id.*

64. *See id.* "Thus, developed and non-developed signatories alike must adhere to an international baseline for patent protection and ensure effective, expeditious, and impartial application of patent rights." *Id.*

65. *See id.* at 377. Article 27 provides that, "[a patent] shall be available for any invention . . . in all fields of technology, provided that they are new, involve an inventive step, and are capable of industrial application." TRIPS, *supra* note 55, art. 27.

66. *See* Hasson, *supra* note 11, at 377. "In addition, Article 27 sets forth clear guidelines for subject matter that may not be patentable." *Id.*

67. *See id.*; *see also* TRIPS, *supra* note 55, art. 27. However exceptions do exist, which includes: inventions necessary to protect "*ordre public*" (emphasis added) or morality; diagnostic, therapeutic and surgical methods for the treatment of humans or animals; and naturally existing plants, animals, and essentially biological processes for the production of plants or animals. *See* Hasson, *supra* note 11, at 377.

68. *See* Hasson, *supra* note 11, at 377. This is different than the national treatment clauses, such as included in the Paris Convention, whereby each signatory is compelled to accord to the nationals of other member countries no less favorable than each signatory country would treat its own nationals. *See id.*; *see infra* Part III(A).

69. *See* Hasson, *supra* note 11, at 377.

70. *See id.*

71. Seifert, *supra* note 1, at 185. "Because the patent term is measured from the date of filing, expedient prosecution is crucial." *Id.*

72. *See id.* "Additionally, TRIPS put an end to the United States' practice of skirting the Paris Convention and discriminating as to place of invention." *Id.*; *see infra* Part III(A). For a definition of "interferences" see *infra* note 127.

Even with the advantages of the change in patent term,[73] there has been opposition to the twenty-year patent term.[74] The TRIPS Agreement also provides that a patent grants an inventor the right to prohibit third parties from making, using, selling, offering to sell, or importing the subject matter of a patent.[75]

The TRIPS Agreement also addresses developing countries by providing for a delayed schedule for its entry into force in developing countries.[76] "The leniency expressed in these articles allows a developing country an opportunity to slowly adapt and further expand its economy prior to compliance."[77] These provisions relating to developing countries represent the concessions made by developed nations in order to acquire the consent of the underdeveloped members of the TRIPS Agreement.[78] Initially developing Agreement members rightfully contended that stringent protection of intellectual property would further impede their development, because they believed that the Agreement would result in a loss of their sovereignty and increased dependence on more developed Agreement members.[79] "However, many such nations ultimately assented, believing that the potential gains from freer trade were 'irresistible.'"[80]

To be truly effective, enforcement provisions were considered necessary.[81] The TRIPS Agreement requires that all members to have

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73. *See* Seifert, *supra* note 1, at 186. Three advantages exist: "First, patents would receive a longer term because applications would only take an average of nineteen months to issue." *Id.* "Second, basing the term from the date of filing would discourage 'submarine patents.'" *Id.* "Third, dates used to gain priority, such as a foreign filing date, would not be used when computing the patent term." *Id.* The term "submarining" refers to the practice of a party delaying issuance of a patent until the industry has caught up with the technology in order to gain larger royalties. *See* Dana Rohrabacher, *Pennies for Thought: How GATT Fast Track Harms American Patent Applicants,* 11 ST. JOHN'S J. LEGAL COMMENT 491, 497 (1996).

74. *See* Seifert, *supra* note 1, at 186. "The patent term is measured from the date of filing." *Id.* "Because the length of prosecution can vary, uncertainty in the length of the patent term creates difficulty in attracting licensees and capital." *Id.* "Also, many inequalities are created when one patent lasts longer than another." *Id.* "Furthermore, patents in complex areas such as biotechnology take much longer than nineteen months to issue." *Id.* "Critics also state that TRIPS should have provided the option of either a seventeen-year term from the date of issuance, or a twenty-year term from the date of filing." *Id.*

75. *See* Seifert, *supra* note 1, at 186; *see also* TRIPS, *supra* note 55, art. 28.

76. *See* Hasson, *supra* note 11, at 378. Under the TRIPS Agreement, developing Agreement members were entitled to delay implementation of the TRIPS Agreement for four years. *See id.*; *see also* TRIPS, *supra* note 55, art. 65. Also, "least developed" Agreement members were allowed to delay implementation for ten years. *See* Hasson, *supra* note 11, at 378; *see also* TRIPS, *supra* note 55, art. 65.

77. Hasson, *supra* note 11, at 378.

78. *See id.*

79. *See id.*

80. *Id.*

81. *See id.*

enforcement procedures available under their laws.[82] Other procedural safeguards exist in the Agreement as well.[83] Also, the TRIPS Agreement formally recognizes the need for "procedures for multilateral prevention and settlement of disputes."[84]

"Thus, the TRIPS Agreement laid the foundation for the international protection of patents."[85] All members were required to join the WTO and were also compelled to adapt their domestic patent laws, pursuant to the Agreement, in exchange for mutual protection of intellectual property.[86]

IV. CURRENT PATENT SYSTEMS AND OBSTACLES TO HARMONIZATION

"[I]nherently competing interests exist on both the national and international levels for providing patent protection."[87] On the national level, a conflict exists between the rights of the inventor to his invention versus the public interest of promoting technological and economic development.[88] On the international level, conflicts exist arising from the interests a sovereign nation has in providing national patent protection versus the interests of the international community in unrestricted trade and technology transfers.[89]

Both patent protection and the patent grant itself derive from the sovereign as incidents of national law.[90] The national government seeks to

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82. *See id.* Article 41 provides that each Agreement member "shall ensure that enforcement procedures . . . are available under [domestic] laws so as to permit effective" and expeditious remedies against any act of patent infringement. *See* TRIPS, *supra* note 55, art. 41.

83. *See* Hasson, *supra* note 11, at 378. "Under [the] TRIP[S] [Agreement], all patent infringement actions must be: (1) decided on the merits; (2) in writing; and (3) reasoned only upon evidence after each party thereto is afforded an opportunity to be heard." *Id.* at 379. "In addition, a party is entitled to judicial review of administrative decisions." *Id.* "In providing remedies for a contesting state, judicial authorities are permitted to award judgment in the form of an injunction, damages, and even an order that the infringing goods be destroyed without compensation." *Id.*

84. *Id.* "For example, [the] TRIP[S] [Agreement] provides a suitable binding dispute resolution procedure that former international intellectual property conventions lacked." *Id.* "Under Article 64, the dispute settlement procedures set forth in GATT are made applicable to patent dispute resolution and are to be monitored by the Council for [the] TRIP[S] [Agreement]." Hasson, *supra* note 11, at 379. "Furthermore, all signatories are required to abide by the decisions of the Dispute Settlement Body of the WTO." *Id.* "The Dispute Settlement Body, consisting of a panel of three Members to make initial decisions and another three Member appellate panel, possesses the authority to make findings or recommendations, and may authorize a country to take reprisals against an erring WTO Member." *Id.*

85. *Id.*

86. *Id.* "Some of these required changes . . . compelled the United States to expand the scope of patent infringement actions, permit consideration of evidence of inventive activity abroad in patent prosecution, and expand the term of a patent to twenty years." *Id.* at 379-80.

87. Anthony Sabatelli & J.C. Rasser, *Impediments to Global Patent Law Harmonization*, 22 N. KY. L. REV. 579, 584 (1995).

88. *See id.* at 584.

89. *See id.*

90. *Id.*

control its patent system because it gives the government control over technological and economic developments for its own country.[91] Also, nationalistic and protectionist tendencies resist pressures for change from outside the national borders.[92]

Goods and technology constantly flow across national borders in today's world.[93]

> The international impact of patents is ever increasing for three primary reasons: (1) commerce in intellectual property has become an even greater component of trade between nations; (2) world commerce has become ever more interdependent, thus establishing a need for international cooperation; and (3) piracy of intellectual property is ever increasing, particularly in the Third World, and underscores the increasing conflicts of the rights of intellectual property owners in the developed world with the economic goals of the developing world.[94]

However, with increasing world trade and multinational corporation growth, the problem exists of obtaining uniform patent protection that extends beyond national borders, namely international patent protection.[95] "This need for international patent protection is the primary impetus in the quest for patent law harmonization."[96] "For patent harmonization to be truly effective, it must encompass a number of areas, including the following: a uniform definition of patentable subject matter; uniform application and filing procedures; uniform examination and grant procedures; and uniform interpretation, remedies, and enforcement."[97] Enforceable national treaties must address all of these aspects of patent harmonization.[98]

One major problem of a national patent grant is that it is only valid and enforceable within the granting, territorial nation.[99] Without an international treaty, a nation is powerless to enforce a patent beyond its national borders.[100] "However, there have been unilateral attempts to achieve some extraterritorial control over patent enforcement."[101] For example, in the United States,

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91. *See id.*
92. *See id.*
93. *See* Sabatelli & Rasser, *supra* note 87, at 584.
94. *Id.* at 585.
95. *See id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *See* Sabatelli & Rasser, *supra* note 87, at 585.
100. *See id.*
101. *Id.*

changes in the U.S. Code were enacted[102] in response to the U.S. Supreme Court's decision in *Deepsouth Packing Company v. Laitram Corporation*,[103] which held that there is no patent infringement if all the parts of an accusing device are manufactured domestically but the final construction occurs abroad.[104] The United States has attempted to exert effective patent enforcement extraterritorially with these code provisions.[105] "However, these attempts by the United States to achieve extraterritorial control and enforcement of intellectual property rights have been viewed as trade barriers by the international community."[106]

Tension between national patent rights and international trade issues and technology transfer issues is also caused by the many differences among the

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102. Specifically, the sections enacted were 35 U.S.C. § 271 (f) and (g). Part (f) requires:

> (1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.
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> (2) Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

35 U.S.C. § 271(f) (2002). Part (g) requires:

> Whoever without authority imports into the United States or offers to sell, sells, or uses within the United States a product which is made by a process patented in the United States shall be liable as an infringer, if the importation, offer to sell, sale, or use of the product occurs during the term of such process patent. In an action for infringement of a process patent, no remedy may be granted for infringement on account of the noncommercial use or retail sale of a product unless there is no adequate remedy under this title for infringement on account of the importation or other use, offer to sell, or sale of that product. A product which is made by a patented process will, for purposes of this title, not be considered to be so made after --
>
> (1) it is materially changed by subsequent processes; or
>
> (2) it becomes a trivial and nonessential component of another product.

35 U.S.C. § 271(g) (2002).

103. Deepsouth Packing v. Laitram Corp., 406 U.S. 518 (1972).

104. *See* Sabatelli & Rasser, *supra* note 87, at 585.

105. *See id.* "For example, section 271(f) prohibits United States-based entities from exporting offending components of a patented invention with the object of causing an infringement outside the United States." *Id.* A product importation that has been made by the unauthorized use of a process patented in the United States is prohibited under 35 U.S.C. section 271(g). *See id.* Furthermore, the United States has other trade laws that seek to place economic pressure on those countries which have either inadequate intellectual property laws or inadequately enforced them. *See id.*

106. *Id.*

patent laws of the countries of the world.[107] Comparing the United States patent system with the rest of the world exemplifies inconsistencies in patent laws from country to country.[108] For example, what constitutes patentable subject matter varies among nations.[109] Patent protection in the United States is extended to any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement.[110] This protection has been extended to cover computer programs when entwined with a patentable process, genetically engineered non-human organisms and therapeutic methods of treating humans.[111] "However, many other countries of the world, both developed and developing, do not provide such protection."[112]

"Another major issue is the first-to-file controversy."[113] The United States awards patents to the first-to-invent[114] as opposed to the first-to-file a patent application.[115] However, essentially all other countries of the world operate on a first-to-file system.[116] This conflict allows for the situation to arise in which a patent for the same invention could be awarded to different parties in the United States versus other countries of the world.[117] Also, in the United States a patent application is examined for novelty and obviousness in a formal ex parte proceeding by the United States Patent and Trademark Office (U.S.P.T.O.).[118] "In many other countries, the patent application simply publishes after a period of time and is never examined except as to non-substantive formalities."[119]

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107. *See* Sabatelli & Rasser, *supra* note 87, at 586.

108. *See id.*

109. *See id.*

110. *See id.*; *see also* 35 U.S.C. § 101 (2002).

111. *See* Sabatelli & Rasser, *supra* note 87, at 586-87.

112. *Id.* at 587. "For example, pharmaceutical products are excluded from patent protection in Argentina, Japan, Turkey, and Venezuela." *Id.*

113. *Id.*

114. *See* 35 U.S.C. § 102(g) (2002).

115. *See* Sabatelli & Rasser, *supra* note 87, at 587.

116. *See id.*

117. *See id.*

118. *See id.*

119. *Id.* "Countries such as Egypt, Italy, Spain, and Switzerland follow this latter procedure." *Id.* There are other important areas of international non-uniformity. *See* Sabatelli & Rasser, *supra* note 87, at 587. Examples of these non-uniformities, from the perspective of the United States, are as follows:

> First, in the United States there is a requirement for disclosing the 'best mode' for making the invention that is known at the time of the filing of the patent. However, in most other countries there is no such best mode requirement, with the patent being required merely to disclose a single, but not necessarily the best, mode of carrying out the invention. Second, most countries provide for automatic publication of their patent applications eighteen months after filing. In the United States, all patent applications are currently kept secret, being prosecuted before the U.S.P.T.O. in an ex parte proceeding, and do not publish unless they are examined and allowed to issue. Third, in the United States, only

V. GLOBAL PATENT LAW HARMONIZATION BENEFITS

A. The United States

"The most divisive issue in the harmonization debate is whether the United States should adopt a first-to-file system."[120] For the United States to be included in any meaningful patent harmonization treaty, it likely must abandon its first-to-invent system and adopt the first-to-file system.[121] There are three reasons the United States should adopt the first-to-file system: (1) the first-to-file system is superior to a first-to-invent system; (2) the change will not pose a significant harm to American inventors; and (3) adoption of the first-to-file system will enable the United States to exact concessions from other nations to the benefit of this country.[122]

Adoption of the first-to-file system would benefit to the United States because of its superiority over the first-to-invent system.[123] The first-to-invent system requires records to be kept that the first-to-file system does not.[124] "The first-to-invent system results in complicated and expensive interference proceedings[125] that would be unnecessary under a first-to-file system. [126] The small, independent inventor is most always at a major disadvantage in an interference proceeding against a large corporation.[127] Adoption of the first-to-file system satisfies the question of the right to a patent between interfering

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> the inventor can apply for a patent, although the patent later can be assigned. In most of the world, the assignee can also apply for the patent. Fourth, the United States provides for a twelve-month grace period after public disclosure of an invention during which the inventor can modify and optimize the patent application. The remainder of the world recognizes no such grace period. Fifth, the United States distinguishes between domestic and foreign prior art as a statutory bar to patentability. There is little uniformity in the rest of the world for dealing with this domestic/foreign prior art dichotomy. Sixth, interpretations and enforcement procedures vary widely from country to country.

Id. at 587-88.

120. Robert W. Pritchard, *The Future Is Now – The Case for Patent Harmonization*, 20 N.C. J. INT'L L. & COM. REG. 291, 312 (1995).

121. *See id.*

122. *See id.*

123. *See id.* at 313.

124. *See id.* "American inventors are required to keep accurate records of all acts of invention in the event that a patent is involved in an interference proceeding and the inventor is required to prove conception, reduction to practice, and diligence." *Id.*

125. "In patent terms, when two independent inventors lay claim to the patent for the same invention, a 'priority dispute' arises." Sean T. Carnathan, *Patent Priority Disputes--A Proposed Re-Definition of "First-to-Invent,"*, 49 ALA. L. REV. 755, 756 (1998). The mechanism for resolving the dispute before the United States Patent & Trademark Office [U.S.P.T.O.] is called an interference. *Id.*

126. Pritchard, *supra* note 120, at 313.

127. *See id.* "Currently, interference proceedings are 'cumbersome, inadequate, and often seemingly inexplicable.'" *Id.*

parties by a quick examination of filing dates, thus eliminating the need for interference proceedings.[128] This would greatly diminish the cost of the patenting process to the parties and the patent society.[129] Also, a first-to-file system may prove to be a significant advantage to small companies and independent inventors when contrasted with the complications, costs, and difficulties associated with proving that an inventor made an invention first under the current system.[130] "Adoption of a first-to-file system will end the inherent disadvantage of independent inventors in interference proceedings against large corporations, as a simple comparison of filing dates will end any question of priority."[131] The United States should be receptive to this since it is thought to view patent law more for the protection of the inventor than for the public benefit.[132]

The first-to-file system also brings predictability, whereas the first-to-invent system does not.[133] The first-to-file system does not require anything more than the date of filing to prove who was the first to deserve the patent, unlike the first-to-invent system.[134] Adoption of the first-to-file system will settle the question of inventorship at the time the applicant files an application, and will end the uncertainty and unpredictability that can arise under the current first-to-invent system.[135] Also, it is unlikely that changing to the first-to-file system would be detrimental to many parties involved.[136]

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128. *Id.*

129. *See id.*

130. *See id.*

131. Pritchard, *supra* note 120, at 313.

132. *See generally* Victoria Cooper, *U.S. Adoption of the International Standard of Patent Priority: Harmony or Schizophrenia*, 16 LOY. L.A. INT'L & COMP. L.J. 697 (1994).

133. *See* Pritchard, *supra* note 120, at 313.

134. *See id.* Under 35 U.S.C. § 102(g) of the Patent Act, a person is not entitled to a patent if another person invented the invention first. 35 U.S.C. § 102(g) (2002). *See, e.g.*, New Idea Farm Equip. Corp. v. Sperry Corp., 916 F.2d 1561, 1566-67 (Fed. Cir. 1990). The Court of Appeals for the Federal Circuit held that "[i]t is well established that, in a priority contest, the party first to conceive and first to reduce to practice prevails." *Id.* Therefore, at any time during the patent term a third party has the opportunity to demonstrate a prior act of invention that can destroy a patent under § 102(g). *See* Pritchard, *supra* note 120, at 314. The President of the American Intellectual Property Lawyer's Association has stated that one advantage to a first-to-file system is "an end to the cumbersome interference procedure for defining inventorship, and more certainty and simplicity in the application process." *See id.* at 314.

135. *See* Pritchard, *supra* note 120, at 314.

136. *See id.* "Adoption of a first-to-file system does not affect the vast majority of patent applicants, and the change would not be nearly as harmful as some predict." *Id.* "First, most American companies already operate on a first-to-file system, so a change to first-to-file would not have a substantial effect." *Id.* "Since the rest of the world awards the patent to the first person to file a patent application, American companies with foreign interests who are already bound by the first-to-file system in other countries would not be adversely impacted by a change to first-to-file in the United States." *Id.* "Large American corporations would not be affected by a change to a first-to-file system, and neither would most independent inventors." *Id.* "Statistics for the fiscal years from 1988 to 1991 indicate that out of approximately 170,000 patent applications, the average number of inventors who were second to file, but first to invent, was only fifty-five per year." Pritchard, *supra* note 1200, at 314. "Because only a fraction of

By converting to the first-to-file system, the United States would have more leverage to demand concessions from the rest of the world on other patent harmonization issues.[137] One successful demand would be the establishment of an international grace period.[138] Currently, United States patent law grants a one-year grace period during which a public disclosure will not be considered prior art for the purpose of a federal statutory bar[139] to patentability.[140] This is in conflict with most of the rest of the world.[141] The United States could potentially get other countries to adopt an international grace period, thus allowing American inventors public disclosure without forfeiting international opportunities.[142]

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patentees in the United States are independent inventors, the statistics demonstrate that only one to four independent inventors per year would lose a patent under the first-to-file system out of over 170,000 applications that are filed every year." *Id.* "Furthermore, if the United States adopted a first-to-file system, the first inventors in that small fraction of cases would have the incentive to file sooner, thus reducing the number of applicants who are first to invent but second to file to almost zero." *Id.* at 314-15. "Thus, a change to first-to-file would not affect a significant number of inventors." *Id.* at 315. "The United States should not refuse to adopt meaningful patent harmonization because of the possibility of a tiny fraction of first inventors losing patent rights due to delay in filing." *Id.*

137. *See id.* at 318. "If the United States were to give up the first-to-invent system in favor of first-to-file, it could demand reform in other countries to the benefit of American inventors, both corporate and independent." Pritchard, *supra* note 120, at 317. It has been stated that harmonization presents the United States with a unique opportunity to strengthen the protection for the invention of American industry and individual inventors around the world. *See id.*

138. *See id.*

139. *See generally* 35 U.S.C. § 102 (2002).

140. *See* Pritchard, *supra* note 120, at 319. "The grace period enables American inventors to publish results of tests and to make preliminary public sales without fear of losing the right to possibly valuable patent protection." *Id.*

141. *See id.* "Most other countries operate on the theory of absolute novelty without a grace period, however, and will not issue a patent if there has been any disclosure prior to the date of filing." *Id.* "As a result, when an American inventor publishes an invention in reliance upon the grace period, he or she automatically forfeits any right to a patent 'in virtually every country other than the United States.'" *Id.* "While most large American corporations have adapted to the absolute novelty requirements of other countries, independent inventors are often not aware of the adverse consequences of early publication, and therefore forfeit foreign rights unknowingly." *Id.* "University researchers that place a premium on publication often give up foreign patent rights in favor of early publication." Pritchard, *supra* note 120, at 319. "The result is that foreign companies have a repository of information in the U.S. Patent Office in the form of patents that can only be valid in this country due to the grace period." *Id.* at 319. "This information can be freely used in the rest of the world, and the American inventor has no protection." *Id.* This problem could be rectified if the United States was able to pressure the rest of the world to adopt an international grace period." *Id.* "American adoption of a first-to-file system as part of a complete harmonization package would enable the United States to pressure the rest of the world to adopt an extremely valuable grace period that would benefit small inventors and universities in this country." *Id.* "This benefit alone would justify the change to first-to-file; a small price to pay for international protection of American innovation." *Id.*

142. *See* Pritchard, *supra* note 120, at 319.

Leverage would also help deal with the doctrine of equivalents.[143] In the United States, "if a device that is not precisely identical to the patented device 'performs substantially the same function in substantially the same way to obtain the same result,'[144] a patentee may invoke the doctrine of equivalents to claim infringement."[145] This doctrine prevents potential infringers from subtly altering or making insignificant substitutions to a patented device to avoid infringement, while still gaining all of the benefits of the innovation.[146] However, the nature of the laws and the judicial practice of some countries have resulted in courts' narrow interpretations of patents, thus allowing an infringer who made minor alterations to a patented innovation to escape liability.[147] Adopting a first-to-file system would allow the United States to pressure other countries to adopt the doctrine of equivalents, thereby increasing worldwide protection for American inventors.[148]

An additional benefit to harmonization would be to allow American inventors to file patent applications in English and supply a translated application at a later time.[149] Currently, American inventors must obtain a translation of the application before filing, resulting in two problems when attempting to obtain protection abroad.[150] The first problem is caused when an American inventor is in a race to submit a patent application in a foreign country against another inventor who has the application already in that language.[151] The American inventor is placed at a disadvantage due to the delay in obtaining a translation.[152] The second problem occurs if any error made during translation which is essential to the scope of the claims or the patentability of the entire invention, the error is not correctable, and the American inventor either loses the patent or obtains greatly reduced coverage due to a clerical mistake.[153] Allowing the English language original application to serve as the priority date of the patent for purposes would solve the first problem.[154] The second problem is solved if the English language application would be considered the official application for purposes of correcting

143. *Id.*

144. *See id.*; *see also* Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 42 (1929). The Court observed: "A close copy which seeks to use the substance of the invention, and although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement." *Id.* (citing Ives v. Hamilton, 92 U.S. 426, 430 (1875)).

145. Pritchard, *supra* note 120, at 319.

146. *Id.*

147. *See id.*

148. *See id.* at 320.

149. *See id.*

150. *See id.*

151. *See* Pritchard, *supra* note 120, at 320.

152. *See id.*

153. *See id.*

154. *See id.*

typographical or clerical errors in translation.[155] If the United States adopted a first-to-file system as part of a harmonization package, it could demand this change from all other nations, thereby benefiting American inventors.[156]

"The costs of a universal, harmonized patent system would be greatly reduced, thereby increasing the small inventor's accessibility to the world market."[157] A universal first-to-file system would eliminate the transaction costs required for securing multiple licenses for world-wide purposes.[158] A harmonized system of international patent laws would also reduce the time and expense required to obtain international protection.[159] Specifically, harmonization of patent laws would save independent inventors and university researchers' time and money, and would expand their zone of protection to nations that they were never able to reach under the isolationist first-to-invent system.[160]

The benefits of patent harmonization throughout the world would cost the United States the relatively small price of moving from a first-to-invent system to first-to-file.[161] Implementing the first-to-file system in this country will allow the United States to join in the efforts of the international community to harmonize international patent law.[162] "Harmonization will enable the American inventor to expand the zone and scope of patent protection around the world, and adoption of a first-to-file system is a small price to pay for international acceptance and recognition of American innovation."[163]

B. The European Community

Even though Europe[164] has endeavored to make strides towards continental harmonization, i.e., the Euro, European patent law has failed to become harmonized.[165] Currently, Europe has two systems under which

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155. *See id.* "An agreement between the United States and Japan signed on January 20, 1994, provides that American inventors will be permitted to file an English language application to establish a priority date so long as a Japanese translation follows 'in a reasonable period of time.'" *Id.* at 320-21.

156. *See* Pritchard, *supra* note 120, at 321.

157. *Id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See* Pritchard, *supra* note 120, at 321.

163. *Id.*

164. For purposes of this Note, the European countries Part IV(B) refers to throughout consist of the nations that subscribe to the European Patent Office's way of issuing patents. *See infra* Part IV(B). These countries are listed on the European Patent Office website at http://www.european-patent-office.org/epo/members.htm (last visited Nov. 25, 2002).

165. *See* Kara M. Bonitatibus, *The Community Patent System Proposal and Patent Infringment Proceedings: An Eye Towards Greater Harmonization in European Intellectual Property Law*, 22 PACE L. REV. 201, 202 (2001). For more on the European community's attempt to harmonize its patent laws, see Christopher Heath, *Harmonizing Scope and Allocation of Patent Rights In Europe – Towards A New European Patent Law*, 6 MARQ. INTELL. PROP. L. REV. 11 (2002).

inventors can choose to protect inventions by patent – a national and a European Patent system.[166] The national system is country specific.[167] Each country can issue its own national patent and all proceedings related to that patent are governed by the granting country's laws.[168] The European Patent Office[169] (EPO) grants the European patents.[170] These patents are essentially a bundle of national patents.[171] This European patent system allows a single application and granting procedure.[172] However, each nation which is a party to the European Patent Convention[173] (EPC) is allowed to maintain certain requirements regarding its own patent system, such as keeping translations of the patent in its own language.[174] Besides the one application, each patent exists separately in each sovereign state from which it is issued.[175]

These two systems cause inconsistencies and unpredictability in patent protection.[176] "Such uncertainty and unpredictability result from the fact the

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166. *See* Bonitatibus, *supra* note 165, at 202.

167. *See id.* at 203.

168. *See id.*

169. The EPO describes itself on its website:

> The European Patent Office (EPO) grants European patents for the contracting states to the European Patent Convention (EPC), which was signed in Munich on [October 5, 1973] and entered into force on [October 7, 1977]. It is the executive arm of the European Patent Organization, [sic] an intergovernmental body set up under the EPC, whose members are the EPC contracting states. The activities of the EPO are supervised by the Organization's [sic] Administrative Council, composed of delegates from the contracting states.

EPO, *Information About the EPO – The European Patent Office*, *available at* http://www.european-patent-office.org/epo/pubs/brochure/general/e/epo_general.htm (last visited Nov. 25, 2002). The EPO also provides its history on the website:

> The EPO was set up by the contracting states to the EPC [European Patent Convention] with the aim of strengthening cooperation between the countries of Europe in the protection of inventions. This was achieved by adopting the EPC, which makes it possible to obtain such protection in several or all of the contracting states by a single patent grant procedure, and establishes standard rules governing the treatment of patents granted by this procedure. More than two decades have clearly demonstrated the advantages of this approach. Looking to the future, the EPO is continuing its efforts to optimize [sic] the European patent system by making it more efficient and cost-effective, and better adapted to the applicant's needs.

EPO, *Information About the EPO – Origins and perspectives*, *available at* http://www.european-patentoffice.org/epo/pubs/brochure/general/e/origins_e.htm#fn (last visited Nov. 25, 2002) [hereinafter EPO].

170. *See* Bonitatibus, *supra* note 165, at 203.

171. *See id.*

172. *See id.*

173. *See generally* EPO, *supra* note 169.

174. *See* Bonitatibus, *supra* note 165, at 203. This is a main requirement EPC members are allowed to keep. *See id.*

175. *See id.*

176. *See id.* Uncertainty and unpredictability obviously denigrate the very purposes of the patent system, which is to allow the creator of certain kinds of inventions that contain new ideas to keep others from making commercial use of those ideas without the creator's permission. *See id.*

national courts of Europe 'continue to apply differing procedural rules and employ different approaches in patent infringement actions.'"[177] A large weakness of the current EPC patent system is the cost of translating an application to obtain a patent.[178] The cost of a European patent, which includes translation costs, as well as other various fees, is three to five times more than a Japanese or United States patent.[179] "An acceptable level of cost for a European patent should be comparable to the cost of a patent covering the same economic area . . . ."[180]

Because of the greater costs of the European patent, companies often cannot afford extending coverage of its patents to all members of the European Union.[181] Instead, companies compromise and designate only a few countries, which are key countries in terms of market and competition.[182] This proves detrimental to the smaller countries.[183] These problems urgently need a remedy to this high cost situation, which does not provide any incentive for inventors to apply for a patent in Europe.[184]

Another major disadvantage for the European system is a lack of a "Community Patent Appeal Court," analogous to the federal Court of Appeals system in the United States.[185] Under the EPC, disputes, including infringement proceedings, are resolved in the national courts that are competent.[186]

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177. *Id.*

178. Bonitatibus, *supra* note 165, at 209-210. A study conducted for a proposal to unify the European community's patent system estimates the cost of an average European patent as approximately 30,000 Euros. *See id.* at 210. The breakdown of the total cost is as such: fourteen percent for fees due the European Patent Office; eighteen percent for representation before the EPO; thirty-nine percent for translations required by the contracting states; and twenty-nine percent for renewal fees paid to member states. *See id.* A patent must be translated into the relevant official languages of a designated country in order for the patent to be valid. *See id.* at 211. "Potentially, the patentee may be required to translate their patent into all of the eleven official languages." *Id.* "Arguments raised for the necessity of this requirement include that 'translations are necessary to ensure full access to patented technology by industry and research institutions in all E.C. countries.'" *Id.* "These costs of translation, though burdensome to all patent applicants, will be exceptionally burdensome to small inventors with limited marketing areas." Bonitatibus, *supra* note 165, at 211.

179. *See id.*

180. *Id.* at 210.

181. *See id.*

182. *See id.* at 211.

183. *See id.*

184. *See* Bonitatibus, *supra* note 165, at 211.

185. *See id.*

186. *See id.* at 212. "[I]n principle, 'there can be 15 different legal proceedings, with different procedural rules in every Member State and with the risk of different outcomes.'" *Id.* "So, while the deficiency of a common court permits a considerable advantage to a plaintiff patentee who engages in forum shopping in the European Union, it also leads to increased costs of litigation and the potential for inconsistent results and, undesirably, unpredictable protection of one's patent." *Id.*

There are other minor weaknesses of the European system because of its lack of harmonization.[187]

A harmonized patent system would allow a patent to be registered for all of the European Union members – allowing the patent to issue in all nations instead of an inventor having to choose at the outset.[188] Also, the patent would be subjected to only one interpretation throughout the world.[189] There would be one unified court or, at the least, one unified process for proceedings[190] allowing one judgment to be passed on a patent.[191] Finally, costs to obtain a patent throughout the world for the European community could be reduced because of translation guidelines that may be set.[192]

C. Developing Countries

Developing countries not only provide insufficient patent protection under the substantive law, but often inadequately enforce the legal standards that do exist.[193] This leads to inadequate protection of patents.[194] Several developing countries have deficiencies in their patent systems.[195] For instance, businessmen of developing countries resorted to various techniques to minimize their losses of intellectual property, which have limited their ability

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187. *Id.* "Additional weaknesses of the current system include the speed (or lack thereof) in patent infringement proceedings, and the 'high cost of renewal fees and issues associated with secret prior user rights.'" Bonitatibus, *supra* note 165, at 212. "As stated and demonstrated above, renewal fees paid to member states are estimated to be approximately 29% of the cost of an average European patent." *Id.* "The time involved in patent infringement proceedings may be significant; however, it is noted that 'it is more important to reach the right decision after proper consideration than to reach the wrong decision by rushed justice.'" *Id.* "Thus, some debilities of the current system may actually be necessary flaws." *Id.*

188. *See id.* at 230.

189. *See id.* "Thus, 'there would be no need to be concerned about interpretation, or for that matter, the applicability of cross-border injunctions.'" Bonitatibus, *supra* note 165, at 230.

190. *See infra* Part VI.

191. *See* Bonitatibus, *supra* note 165, at 231.

192. *Id.*; *see infra* Part VI.

193. *See* Marshall A. Laeffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 275 (1991).

194. *See id.* at 277.

195. Robert M. Sherwood, *Why a Uniform Intellectual Property System Makes Sense for the World*, *in* GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 68, 73 (Mitchel B. Wallerstein, et al. eds., 1993). "This work has been concentrated in Brazil, where more than 20 weeks were spent, but interviews were also conducted in Mexico, Argentina, Colombia, Venezuela, and in what are now Russia, Belarus, and Estonia." *Id.* "The effort has been to talk to with people who have a direct stake in the local intellectual property system." *Id.* "More than 200 interviews were conducted, mainly with local businessmen, but also with university researchers, venture capital firm owners, ranchers, research park directors, state enterprise officials, and then, to help in formulating reflections, with local academic economists." *Id.*

to make technological advances.[196] In universities, researchers who have come up with inventions, sometimes by surprise, found they had to start their own company to commercialize their inventions.[197] Unfortunately, most researchers are not aware of existing protections to maximize the financial and technological potential of their inventions.[198]

Also, venture capital firms cannot obtain useful information about the underlying technology on which start-up firms base their requests for venture capital because the typical start-up company fears losing its technology to the venture capital firm.[199] Consequentially, the venture capital firms do not even reach the stage of contemplating whether they are willing to invest in such start-up firms.[200]

Also, research park directors reported they are having difficulty raising funds to support their work.[201] The expected synergy in these research parks has not appeared at the levels observed in countries with high-stimulation systems.[202] "Both deficiencies are traceable to low protection environments."[203]

Weak intellectual property protection results in very high costs on the development process.[204] The costs are mostly located in the area of opportunity losses.[205] "Counting things that do not happen is frustrating, but this does

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196. *See id.* at 74. One frequent way competitors get their hands on technology is to hire away key employees, a kind of "predatory hiring." *See id.* "To defend against this, businessmen segment their technology, exposing the fewest possible workers to each segment." *See* Sherwood, *supra* note 195, at 74. In conjunction with other techniques, this works to a limited degree to prevent technology loss, but those same techniques have a negative effect on employee training. *See id.* "Human resource development suffers in silent, unnoticed ways in low-protection intellectual property environments." *Id.* "Most important, as noted, there seems to be a direct connection between low protection and lack of stimulation to perform in-house research." *Id.*

197. *See id.* Most researchers that stumble onto an invention are usually ill equipped to function as entrepreneurs, they neglect their students, and worse, they neglect their ongoing research. *See id.* "Some, who have studied abroad, understood that if they could effectively protect their inventions with patents[,] . . . it would be possible to license the invention to others better prepared to commercialize the new technology." Sherwood, *supra* note 195, at 74.

198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.* "This is a serious problem, particularly when government research expenditure diminishes." *Id.*

202. *See* Sherwood, *supra* note 195, at 74.

203. *Id.* "Normally, private funds will not be invested in research, other than as an act of charity, if the expected results cannot be appropriated through the application of the tools of intellectual property." *Id.* "Within research parks, investigators who are brought together to stimulate each other's thinking, are instead wary of sharing proprietary technical knowledge for fear it will be misappropriated by others at the center." *Id.* "In countries with adequate protection, this fear is overcome by enforceable confidentiality agreements and other protective mechanisms." *Id.*

204. *See id.*

205. *See* Sherwood, *supra* note 195, at 75.

not mean the costs are not great."[206] To measure these costs research methods are needed.[207]

Examples exist that demonstrate that some of these problems can be alleviated by implementing a harmonized system.[208] One example is found in the activity patterns following a developing country's intellectual property upgrades.[209] For instance, after Mexico reformed its patent laws in June 1991, large numbers of patent applications were filed by Mexican nationals.[210] Apparently, the level of protection rose such that it made a difference to local activity.[211]

A common assumption is that all technology comes from developed countries.[212] This leads to the belief that developing countries cannot be expected to generate technology.[213] "As a consequence of this thinking it is presumed that weak protection for intellectual property will assist in obtaining developed country technology at little or no cost."[214] The possibility that developing countries could generate valuable technology comes almost as a shock.[215] However, this is precisely the point of urging strong intellectual property protection in developing countries, so that this possibility can be realized.[216] "It is far less likely to be realized without protection."[217]

VI. IMPLEMENTATION OF A GLOBALLY HARMONIZED PATENT SYSTEM

Having identified the benefits of a globally harmonized patent system, discussion of how these benefits can be implemented is now necessary. This section will provide two different types of global patent law systems as possible ways of implementing harmonization benefits. The first comprises

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206. *Id.*
207. *See id.*
208. *See id.* at 72.
209. *Id.* at 72.
210. *See id.*
211. *See* Sherwood, *supra* note 195, at 72. "Although the changes to Mexico were probably the most sweeping, reforms in Korea, Taiwan, Singapore, Brazil (copyright for software), and China present interesting before-and-after situations." *Id.* Even though this note deals exclusively with patent law, other intellectual property types may still give some insight. *See id.* "A small but striking example of before-and-after shift comes from Columbia where copyright protection for software took effect in 1989. More than 100 Columbian nationals have since produced application software packages that have been registered with the copyright office, with hundreds more written but not registered." *Id.* "Many of these customized programs help run local industrial manufacturing processes." *Id.* "This example hints that there is a great deal of very useful technology that could be generated in developing countries by local people, given the stimulus of an intellectual property system that works." *Id.*
212. *See* Sherwood, *supra* note 195, at 72.
213. *See id.*
214. *Id.*
215. *See id.*
216. *See id.*
217. *Id.*

an extreme system where the world would operate under one uniform system. The second system would have some jurisdictional variation, but would still have underlying uniform principles to which nations would adhere.

A. The World Patent System

1. Office Set-Up

The overriding characteristic of a World Patent System (WPS) is that it would be a multinational organization established, managed and administered, not by national patent offices, but by international civil servants in a multinational setting established by treaty.[218] In its primordial stages it would operate in parallel with national systems.[219] However, to be truly effective, it will not grant a bundle of national patents – as is now done by the European Patent Office[220] – but a single unitary patent respected in all of the member states.[221]

The WPS would have regional offices to search and examine patent applications, to grant patents, and to staff regional branches or "circuits" of a World Patent Court.[222] Eight candidates would likely be worthy of a regional office: Europe, Japan, China, Latin America, Africa, Eurasia, East Asia and North America.[223] However, the WPS must not be viewed as "belonging" to a specific region or constituency.[224]

2. Language Requirements

Under the WPS, the first-to-file system would be implemented as well as the grace period, both discussed earlier.[225] However, a language agreement would also need to be reached.[226] "Currently, as many as two dozen languages must be used to reasonably cover a single invention internationally."[227] The EPO[228] now has three "official" languages - English, German and French - in which examinations are conducted.[229] However, the bundle of patents elected at the time of the EPO grant must be translated into the respective language of

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218. *See* Mossinghoff & Kuo, *supra* note 19, at 547.
219. *See id.*
220. *See infra* Part V(B).
221. *See* Mossinghoff & Kuo, *supra* note 19, at 547.
222. *See id.*
223. *See id.* at 547-48. "Deciding where to locate offices of multinational organizations has traditionally been a matter of intense diplomatic negotiations involving [several] factors." *Id.* at 548. "A strong case can be made for each of these eight locations-and perhaps several more." *Id.*
224. *See id.*
225. *See supra* Part IV.
226. *See* Mossinghoff & Kuo, *supra* note 19, at 551.
227. *Id.*
228. *See supra* Part V(B).
229. *See* Mossinghoff & Kuo, *supra* note 19, at 551.

each selected country.[230] No less than ten translations would be required at the end of the examination process by electing all of the EPO countries.[231] With additional EPO memberships from Central/Eastern Europe,[232] the costs of translations in the EPO alone could simply become overwhelming.[233] "This European Tower of Babel will have many neighbors if the newly industrialized countries of East Asia and other regions insist on using their own languages in their emerging patent systems."[234] A WPS that would use all of the languages of the world would clearly not be reasonable.[235]

English should be considered the world language of trade, science, technology, and intellectual property.[236] "By conservative estimates, 750 million persons speak English, almost half of them as their native language."[237] Two-thirds of the world's scientific information is published in English,[238] and eight-five percent of all information now stored in computers is in English.[239] A large majority of EPO-filed cases are now in English, with those filed in French accounting for less than ten percent.[240] "Cases in the EPO originating from outside Europe - notably from the United States and Japan - are virtually all in English."[241] The EPO, Japan patent office and Chinese patent office all require their patent examiners to be fluent in English.[242] Choosing English as the language of the WPS[243] simply recognizes that English is the only practical choice for a World Patent System that will demand a common world language.[244]

Given the success of the Japanese Patent Office (JPO) in moving to a "paperless" environment, and the corresponding strides in the United States and the EPO, the World Patent System would use a single electronic database

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230. *See id.*

231. *See id.*

232. Such as Poland, Bulgaria, Romania, Hungary and Czech and Slovak Republics. *See id.*

233. *See id.*

234. *Id.*

235. *See* Mossinghoff & Kuo, *supra* note 19, at 551.

236. *See id.*

237. *Id.* at 551-52. "If India and China are added, some estimates range toward two billion." *Id.* at 552.

238. *See* Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L. J. 429, 455 n. 80 (1997).

239. *See* Mossinghoff & Kuo, *supra* note 19, at 552.

240. *Id.*

241. *Id.*

242. *See id.* "A proposed East Asia Patent Office B a planed regional patent system of Indonesia, Republic of Korea, Malaysia, Singapore, Taiwan, Thailand, among others-is now being designed with the assumption that English will be the single language employed." *Id.*

243. *See id.* Choosing English as the WPS language should in no way be an affront to the rich culture and history of France, Spain, Portugal or any other country or region. *See* Mossinghoff & Kuo, *supra* note 19, at 552.

244. *See id.* "Just as English has been used as the only language for air traffic control worldwide for decades, there should be an agreement that English will be the language of the WPS." *Id.*

of worldwide prior art against which to search and examine patent applications.[245] Eventually, machines may be fully capable of "conversing" with patent professionals.[246] Even though patents would be examined and enforced in English, the WPS should take advantage of machine translations to provide patent disclosures to all countries in their own languages.[247] "This will reinforce the use of patents as a uniquely rich source of scientific, technical and business information."[248]

3. The WPS Judicial System

As noted,[249] patents essentially are national instruments to be enforced by national courts.[250] The WPS envisioned here would be in sharp contrast to this.[251] "There would be a single World Patent Court (WPC) with branches or 'circuit' courts at the locations of the regional patent offices to decide appeals from those regional offices of the World Patent System and to hear and decide enforcement actions, including both infringement and validity issues."[252] "Under the treaty establishing the [WPS], decisions of the [WPC] would be given full faith and credit and implemented and enforced through national courts of all of the member states."[253]

Instead of appeals and enforcement actions being heard by national jurists, panels of expert multinational jurists, appointed through a merit system administered by the World Patent System would be used.[254] Patent enforcement trials would be presided over by what the United States would refer to as hearing examiners or special magistrates, throughout the nations that establish the WPS.[255] "To ensure impartiality, the multinational jurists who make up the [WPC] and the hearings examiners or special magistrates would be assigned, not based upon their nationality, but rather on their technical expertise and to assure a fair and competent balance in any hearing or enforcement action."[256] For instance, an appeal in a United States regional court could be heard and decided by a three-judge panel - one from Europe, one from Latin America, and one from Asia - depending on the results of impartial, probably random, assignments.[257] "The [WPC] would have to have

245. *See id.*
246. *See id.*
247. *See id.*
248. *See* Mossinghoff & Kuo, *supra* note 19, at 552.
249. *See supra* Part II. "There have been limited instances of cross-border enforcement of patents . . . ." Mossinghoff & Kuo, *supra* note 19, at 553.
250. *See* Mossinghoff & Kuo, *supra* note 19, at 553.
251. *See id.*
252. *Id.*
253. *Id.*
254. *See id.*
255. *See id.*
256. Mossinghoff & Kuo, *supra* note 19, at 553.
257. *See id.*

firm control over pretrial and trial procedures in preparing cases for decisions, drawing upon the best experience of the member states."[258] Alternate dispute resolution based upon the best international models would be strongly encouraged to lower the cost of patent enforcement actions.[259]

Some international treaties shed some light about the potential of the WPS.[260] The TRIPS Agreement[261] achieves more harmonization aspects faster than anyone could have predicted just one decade ago.[262] "It demonstrated quite dramatically that political will, implemented by skilled and innovative negotiators, can overcome generations of local biases."[263]

Although the WPS looks good theoretically, a high level of statesmanship is required in reaching agreement among the major countries of the world on such a system.[264] Also, there are a host of critically important but lesser matters that would need to be agreed upon in establishing a World Patent System.[265] "It is certain that all of the existing national/regional patent systems of the world would remain in place during the initial years of a World Patent System to function in parallel with it until all concerned gained experience and comfort with the effectiveness of the new system."[266]

B. Baseline Requirement System for World Patent System

Unlike the detailed system outlined above, another alternative to a globalized patent law system may be based on a basic set of rules while each nation maintains similar performance levels.[267] This system would only need to maintain certain characteristics instead of matters being decided by one central court with world-regional branches.[268]

The first characteristic of a harmonized system is that each nation *need not* be identical.[269] Some feel that identical systems would require uniformity beyond that needed to achieve the beneficial effects of a uniform system.[270]

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258. *Id.*
259. *See id.*
260. *See id.* at 553.
261. *See supra* Part III(D).
262. *See* Mossinghoff & Kuo, *supra* note 19, at 553.
263. *Id.* at 553-54.
264. *See id.* "[C]ertainly no less than that required when [the U.S.] Founding Fathers delegated to the new Federal Government the exclusive power to grant patents, which until then had been granted by individual states." *Id.*
265. *See id.*
266. *Id.*
267. *See generally* Sherwood, *supra* note 195.
268. *See supra* Part VI(A)(3).
269. *See* Sherwood, *supra* note 195, at 68 (emphasis added).
270. *See id.* "Harmonization of laws, procedures, and rules in every country is not called for, although that could follow and is indeed already an objective being sought by some countries." *Id.* at 69.

This system would not contain just one of one court of appeals or one single patent office.[271]

The second characteristic is congruence.[272] Congruence would be based on robust similarities of outcome from one country to another, instead of identical statutory provisions.[273] The congruence would allow the large issues to be easily considered without having to research nations individually.[274] Any differences existing between nations would be handled by specialty attorneys.[275]

The third characteristic is stimulation.[276] "People involved in the process of invention, technical advancement, and creative expression will be stimulated by confidence that the results of their efforts can be safeguarded from misappropriation and unauthorized copying, no matter which country becomes the location of their activity."[277]

A quasi-numerical based model best exemplifies how these characteristics would create an efficient globally harmonized patent system.[278] This system rates countries from a scale from one to one-hundred on intellectual property systems relative to one another.[279] For this rating, the entire intellectual property system is taken into consideration.[280] "As examples, Germany can be rated at slightly more than 90, the United States and some of the European countries in the high 80s, and Mexico after its . . . reforms at about 75, whereas Argentina and Brazil currently rank in the 30s and 40s."[281]

Only countries with a system above seventy will produce positive results.[282] The results can be measured in terms of three critical occurrences: private venture capital firms become willing to invest in technology-based start-up companies, valuable technical knowledge flows more readily from

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271. *See id.*

272. *See id.*

273. *See id.*

274. *See* Sherwood, *supra* note 195, at 68. For a discussion on first-to-invent versus first-to-file see *supra* Part V.

275. *See* Sherwood, *supra* note 195, at 68. "Where congruence does not exist, people other than lawyers are troubled by system differences when making investment, research, and licensing decisions." *Id.*

276. *See id.*

277. *Id.* "The knowledge that others can be prevented from unauthorized copying has been widely experienced as a powerful stimulus to invest time, resources, and effort in inventive activity." *Id.* at 69. "What constitutes reasonable protection can, in part, be gauged by the degree to which this stimulation is active in the technology-producing infrastructure of a country." *Id.*

278. *See* Sherwood, *supra* note 195, at 69.

279. *See id.*

280. *See id.* This consists of substantive rules, administrative practice, and judicial enforcement. *See id.*

281. *Id.*

282. *See id.*

university laboratories to the marketplace, and local firms' willingness to devote substantial resources to internal research.[283]

Some commentators feel that this kind of patent system would be better in the long run[284] than a system such as the WPS.[285] This idea is based on the fact that some variation from jurisdiction to jurisdiction would be valuable.[286] The theoretical literature on this "jurisdictional variation" posits that the primary reason for such variation is to permit each jurisdiction to match its laws to the unique tastes and preferences of its population.[287] This argument has a strong and weak version, with the weaker being more relevant to the international context.[288] The weaker argument assumes a stable set of preferences within each jurisdiction and concludes that the diverse laws of each jurisdiction more closely match the individual preferences within the jurisdiction than would a uniform set of laws imposed across all jurisdictions.[289] An example of this in the patent context exists relating to the TRIPS Agreement's[290] flexibility.[291] The TRIPS Agreement itself recognizes

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283. *See* Sherwood, *supra* note 195, at 69.

284. *See* John. F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685 (2002). There are those who feel even more strongly against patent harmonization. For a summary of the attacks on patent harmonization see Coe A. Bloomberg, *In Defense of the First-to-Invent Rule*, 21 AIPLA Q. J. 255 (1993); *see also* Charles R.B. Macedo, *First-to-File: Is American Adoption of the International Standard in Patent Law Worth the Price?*, 18 AIPLA Q. J. 193 (1990).

285. *See infra* Part VI(A).

286. *See generally* Duffy, *supra* note 284. Historically, patent law owes its birth not to harmony but to diversity of law. *See id.* at 691. A fifteenth century Venetian statute pioneered patent law, and was an experiment in law. *See id.* This statute was a departure from the classical hostility to government-sanctioned exclusive rights. *See id.*

287. *See id.* at 703.

288. *See id.* "The strong version assumes individuals are free to move between jurisdictions and concludes that, under certain assumptions, the resulting diversity of laws between jurisdictions reflects an optimal provision of public goods." Duffy, *supra* note 284, at 704. "While this version of the argument is important for diversity in local and state jurisdictions, it has little force in the international setting because changing nationality is relatively expensive for individuals." *Id.*

289. *See id.* This argument is relied upon in explaining why the GATT/WTO structure does not attempt to harmonize worldwide regulatory law:

> Uniform health, labor, safety, and environmental regulations are unlikely to be appropriate for all members of the world trading community, as members of the WTO vary widely in their levels of development. As a result, they will rationally choose different regulatory standards. It is wrong to assume, for example, that Indian and American regulations on water purity should necessarily be the same. Indians may not be able to afford American water safety standards, just as they unfortunately cannot afford many other goods that Americans can.

Id.

290. *See supra* Part III(D).

291. *See* Duffy, *supra* note 284, at 704. Regarding the TRIPS Agreement's flexibility it has been said:

> [Skepticism exists] that there will always be a 'best' rule for every problem that will arise under the TRIPS Agreement. Promoting innovation requires that care be taken not to raise the cost of knowledge to so high a level that

the value of local diversity.[292] An example showing the validity of jurisdictional variation exists when considering applying rules from highly-developed countries in the less-developed world.[293] This uniformity could be considered inappropriate because the widest divergence of preferences might well be found between developed and less-developed countries.[294]

However, there are two significant limitations to the local preferences argument.[295] First, harmonized patent law does not result in the same degree of uniformity as other harmonized laws, e.g., wage law.[296] Second, and more importantly, the local preferences argument is less compelling where the diversity occurs between nations having similar preferences than where preferences are likely to be widely divergent.[297] However, the case for jurisdictional variation does not rest solely on matching local preferences.[298]

Another justification for permitting jurisdictional variation is that tolerating variation will breed jurisdictional competition, in turn, checking governmental inefficiency and abuse.[299] However, this argument does not

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> it impedes further inventiveness. How that problem is best solved can depend on a country's intellectual and industrial development, its culture, and the types of creative work in which its citizens are engaged. Thus, the nature (and advantage) of a minimum standards regime is that where there is no best rule that will work in every economy, each country can tailor the law to its own needs.

Id.

292. *See id.* "Its very first article guarantees that 'Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.'" *Id.* at 705. "Similarly, Article 27, which generally mandates that patents shall be available in all fields of technologies, allows countries to create exceptions from patentability 'necessary to protect ordre public or morality' - a standard understood to 'depend to a certain degree on the particular culture of a country or region.'" *Id.*; *see* TRIPS, *supra* note 55, art. 27. "Consistent with theory, the TRIPS Preamble explicitly recognizes 'the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base.'" Duffy, *supra* note 284, at 705. "Special provision is also made for countries and nations 'in the process of transformation from a centrally-planned into a market, free-enterprise economy,' both of which are likely to have preferences that widely diverge from those in developed, free-market nations." *Id.*

293. *See* Duffy, *supra* note 284, at 705.

294. *See id.*

295. *See id.* at 706.

296. *See id.* "The patent right does not mandate any particular price for an innovation. Patentees are free to sell their inventions and license their rights on different terms in different areas." *Id.* "In fact, the available evidence demonstrates that patentees often do engage in price discrimination - for example, by lowering the prices of patented drugs in poorer countries." *Id.*

297. *See* Duffy, *supra* note 284, at 706. "If local preferences were the sole reason for maintaining legal diversity, a general harmonization of law among similarly situated nations, e.g., among developed nations, might be desirable." *Id.*

298. *See id.*

299. *See id.* "This is sometimes referred to as the 'Leviathan' argument because the competition checks otherwise harmful tendencies of monopolistic governmental power." *Id.* at 707.

present very powerful reasons for resisting global patent harmonization because even where harmonization is pursued in a number of legal issues, competition on other points can still provide an effective check on government.[300] Also, patent law presents this argument with a problem because the variation now existing among nations' patent law is not imposing any significant check on government inefficiency.[301]

Jurisdictional variation may also allow legal innovation to occur more rapidly.[302] A legal innovation can be valuable not only to the jurisdiction of the innovation, but to others based upon information produced by the results of the innovation.[303] This innovation rationale has other implications apart from the others reasons supporting jurisdictional variation.[304] The innovation rationale is different than a rationale based on matching local preferences because any innovations in patent law are probably more likely to occur in developed nations, which already possess a sophisticated understanding of the area.[305] Innovations are less likely in less-developed nations, which do not have long experience with patent systems.[306] Because an experimentation rationale gives reason to tolerating diversity between developed nations, it may be sensible to tolerate more diversity between developed nations than between developed and less-developed nations.[307] However, even if only the developed countries

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300. *See id.* "The point here is familiar to regulated industries scholars: Even where regulation constrains competition along one axis (e.g., by fixing price), firms can still compete with each other along other axes (e.g., by improving quality)." *See* Duffy, *supra* note 284, at 707. "Thus, harmonizing law in one particular area (e.g., IP) would leave jurisdictions free to compete for capital and, to a lesser extent, labor, through jurisdictional differences in other areas of law (e.g., tax policy, environmental standards, etc.)." *Id.* at 707.

301. *See id.* "With few exceptions, the government of each nation still holds a monopoly on the power to issue patents within its borders, and thus government patent offices are not subject to any significant competition under the current state of affairs." *Id.* "To the extent that a patent office has incentives to be lazy or abusive, those incentives will not be checked by competition from other jurisdictions." *Id.* "Therefore, consolidation of national offices into a single world patent office would not necessarily have any significant costs in terms of sacrificing competitive checks on bureaucrats." *Id.*

302. *See* Duffy, *supra* note 284, at 707. The point was made famous by Justice Brandeis, who observed that "it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." *Id.* at 708; *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

303. *See* Duffy, *supra* note 284, at 707.

304. *See id.* at 708. "It provides a more substantial basis to oppose patent harmonization than does the Leviathan argument because, as previously explained, enforcing uniformity in one area of law may still permit significant legal competition to check government inefficiency." *Id.* "But any degree of harmonization necessarily removes the harmonized point from parallel experimentation by different jurisdictions and is thus likely to significantly retard further development as to that aspect of the law." *Id.*

305. *See id.*

306. *See id.* "It may also be unwise for less-developed nations to undertake risky experiments with their embryonic patent systems, which may not be able to weather a failure." Duffy, *supra* note 284, at 708.

307. *See id.*

are able to experiment through legal innovation, the history of patent law has shown that even experimentation conducted by large nation-states can produce significant new ideas in law.[308]

VII. CONCLUSION

It is obvious many obstacles need to be overcome before a globally harmonized patent system is put into place. The United States will play a large part in this, because, in order for there to be one global patent system, it likely needs to convert to the first-to-file system,[309] used in the rest of the world. Recently the head of the U.S. Patent Office stated that he was prepared to reconsider the first-to-invent principle in the interest of securing a harmonized global system that would make it easier and cheaper for inventors to obtain patent protection worldwide.[310] This would be a major step in the quest for patent harmonization. It is unlikely that this step alone would transform the current state of international patent law into that of one unified system such as the WPS[311] discussed earlier.

Developing countries will need to agree to harmonization laws as well, as these countries develop and become bigger contributors to the world's technology. It may be that a system with jurisdictional variation[312] would be more suited for smaller countries. If this were the case, it would be impossible for the world to be productive using one unified system.

Whatever the case may be, it is apparent that world has been making strides for more than a century to come to some agreement on common patent law rules.[313] However, these agreements have only begun the harmonization and have not changed the core principles to which individual nations adhere. To create an even, more uniform system, nations will most likely have to make compromises in how they perceive patent systems functioning. Only when these countries are willing to make these sacrifices will the world possibly see one globally harmonized patent law system.

Randy L. Campbell[*]

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308. *See id.* "The value of jurisdictional diversity in encouraging legal innovation has remained controversial in the literature." *Id.*

309. *See supra* Part IV.

310. Frances Williams, *U.S. Softens Stance on Patents*, FINANCIAL TIMES (London), Mar. 27, 2002, International Economy section, at 5.

311. *See supra* Part VI(A).

312. *See supra* Part VI(B).

313. *See supra* Part III.

* J.D. Indiana University School of Law – Indianapolis, 2003 (*expected*); M.S.E.E., Purdue University 2000; B.S.E.E., Purdue University, 1997.

PHYSICIAN-ASSISTED SUICIDE AND EUTHANASIA: SAFEGUARDING AGAINST THE "SLIPPERY SLOPE" – THE NETHERLANDS VERSUS THE UNITED STATES

I. INTRODUCTION

O for a draught of vintage! that hath been
Cool'd a long age in the deep-delved earth,
Tasting of Flora and the country green,
Dance, and Provencal song, and sunburnt mirth!
O for a beaker full of the warm South,
Full of the true, the blushful Hippocrene,
With beaded bubbles winking at the brim,
And purple-stained mouth;
That I might drink, and leave the world unseen,
And with thee fade away into the forest dim: . . . .
John Keats, "Ode to a Nightingale"[1]

Physician-assisted suicide (PAS) and euthanasia are highly controversial topics, and the proposed legalization of both has fueled a highly emotional debate. Those who adamantly oppose the legalization of PAS and euthanasia provide a very grim "slippery slope argument" that predicts the mass extermination of vulnerable groups of people.[2] In comparison, those who avidly support the legalization of PAS and euthanasia promote the right to die in a humane and dignified manner, free from terrible pain and suffering.[3] Two countries providing fuel to this debate are the Netherlands and the United States. The Netherlands has increasingly permitted PAS and euthanasia through the common law system for the past twenty years,[4] and on April 1, 2002, the Termination of Life on Request and Assisted Suicide Act (TLRASA)

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1. JOHN KEATS, ODE TO A NIGHTINGALE 286, *reprinted in* THE OXFORD AUTHORS (Elizabeth Cook ed., 1990).

2. *See* Marcia Angell, *Euthanasia in the Netherlands – Good News or Bad?*, 335(22) NEW ENG. J. MED. 1676 (1996).

3. Margaret P. Battin, *Is a Physician Ever Obligated to Help a Patient Die?, in* REGULATING HOW WE DIE 23 (Linda L. Emanuel ed., 1998). "The principle of mercy, or avoidance of suffering, underwrites the right of a dying person to an easy death, to whatever extent possible, and clearly supports physician-assisted suicide in many cases." *Id.*

4. *See* Angell, *supra* note 2, at 1676. If PAS and euthanasia are legalized, a country will slide down the "slippery slope" toward involuntary euthanasia "performed on the very old, the very young, the disabled, and those who [are] financially costly or otherwise burdensome." *Id.*

formally established the legalization of PAS and euthanasia.[5] In the United States, the state of Oregon legalized PAS in 1994 under the Death With Dignity Act (DWDA).[6] Are these two countries the trailblazers of the ultimate right to control the manner of one's own death or are they swimming in the murky waters of selective termination?

This Note provides an in-depth analysis of the historical background of PAS and euthanasia in the Netherlands and the United States. The analysis supplies the framework necessary to support the conclusion that the cultural differences between the two countries have resulted in different levels of determining which patients are eligible for assistance in death: Oregon's DWDA drawing an objective line and the Netherlands' TLRASA drawing a subjective line. Part II introduces two different concepts of PAS and euthanasia and the two opposing arguments surrounding the debate over legalization of PAS and euthanasia. Part III focuses on the historical evolution of the legalization of PAS in Oregon and provides a detailed description of the DWDA. Part IV examines the Netherlands' case law over the last twenty years that led to the legalization of PAS and euthanasia and a critical evaluation of the TLRASA. Part V compares the DWDA and the TLRASA and the cultural differences between the United States and the Netherlands. Part VI supplies the conclusion that the cultural differences between the two countries support the theory that the Netherlands' utilization of a subjective line to determine who is qualified to request assistance in death is equally protective against abuse as Oregon's objective line.

II. THE DEBATE OVER THE LEGALIZATION OF PAS AND EUTHANASIA

A. Euthanasia and PAS Defined

Before delving into the debate whether euthanasia and PAS should be legalized, the definitions of both terms are necessary. Euthanasia and PAS are two separate concepts defined by actions taken by both physician and patient.[7] The terms are distinguished by whether the physician actively participates at the time of the patient's death or whether the patient plays a physical role in the act of his or her death.[8]

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5. Termination of Life on Request and Assisted Suicide (Review Procedures) Act §§ 1-24, *available at Ministry of Foreign Affairs-The Netherlands*, http://www.minbuza.nl/english/Content.asp?Key=416729&Pad=400025,257588,257609 (last visited Feb. 26, 2003) [hereinafter TLRASA].

6. The Oregon Death With Dignity Act, 13 OR. REV. STAT. §§ 127.800-.897 (2000) [hereinafter DWDA].

7. Richard M. Sobel & A. Joseph Layon, *Physician-Assisted Suicide: Compassionate Care or Brave New World?*, 157(15) ARCH. INT. MED. 1638 (1997).

8. Diane E. Meier, *Doctors' Attitudes and Experiences with Physician-Assisted Death: A Review of the Literature, in* PHYSICIAN-ASISTED DEATH 7-8 (James M. Humber et al. eds., 1994).

Euthanasia is defined as an "act of causing death painlessly, so as to end suffering."[9] Most laypersons think of euthanasia as "mercy killing" or putting someone out of his or her misery.[10] Euthanasia is classified as voluntary or involuntary.[11] Voluntary euthanasia is the lethal injection of medication into the patient's bloodstream by the physician at the patient's request to hasten his or her death.[12] Involuntary euthanasia is the lethal injection of medication by the physician without the patient's explicit request for assistance in death.[13]

PAS is the lethal prescription of medication written by the physician at the patient's request.[14] PAS is considered voluntary because this form of assistance requires the patient to self-administer the lethal dose of medication.[15] Hence, the physician does not have an active role at the time the patient ingests the medication.[16]

The concepts of euthanasia and PAS are not new to the modern world.[17] Many ancient societies not only allowed suicide, but encouraged it when one outlived his or her usefulness to society.[18] Furthermore, ancient Romans and

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9. WEBSTER'S NEW WORLD DICTIONARY AND THESAURUS 211 (1996). *See also* GERALD DWORKIN ET AL., EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE: FOR AND AGAINST 108 (1998). The word euthanasia originates from the Greek language and is defined as "good death." *Id.*

10. DEREK HUMPHRY, LAWFUL EXIT: THE LIMITS OF FREEDOM FOR HELP IN DYING 13 (1993). Mercy killing is defined as "ending another person's life without his or her request in the belief that it is a compassionate act." *Id.*

11. *See* Meier, *supra* note 8, at 7.

12. Steven Miles M.D. et al., *Considerations of Safeguards Proposed in Laws and Guidelines to Legalize Assisted Suicide, in* PHYSICIAN-ASSISTED SUICIDE 208 (Robert F. Weir ed., 1997). *See also* Meier, *supra* note 8, at 8.

> Implicit in the definition of voluntary euthanasia is the recognition that death is in the best interest of the patient requesting assistance, as assessed by the patient, that his or her pain and suffering outweigh the benefit of any additional duration of life, and that the patient is physically incapable of suicide.

Id.

13. *See* Meier, *supra* note 8, at 7.

14. *See id.* at 8.

15. *See id.*

16. *See* Miles et al., *supra* note 12, at 208. The physician who supplies the prescription for the lethal dose of medication is viewed as the facilitator. *See id.* The facilitator is the person who provides the opportunity for the other person to commit suicide. *See id.* The patient who requests the prescription and ingests the medication to hasten his or her death is viewed as the principal - the one who committed the ultimate act of suicide. *See id.*

17. A. Alvarez, *The History of Suicide, in* LAST RIGHTS: ASSISTED SUICIDE AND EUTHANASIA DEBATED 63-65 (Michael M. Uhlmann ed., 1998).

18. *See generally* Thane Josef Messinger, *A Gentle and Easy Death: From Ancient Greece to Beyond Cruzan*, 71 DENV. U. L. REV. 175, 180-84 (1993). The ancient civilization of Ceos promoted a tradition of gathering the elderly together at somewhat of a celebratory feast where all would partake in the consumption of a lethal drink. *See id.* The Ceos civilization viewed the elderly as no longer beneficial to society. *See id.* In ancient Greece, hemlock, a poisonous plant, was available to those persons who gained permission to end his or her life from the Senate. *See id.* Ancient Rome considered terminal illness as good cause for suicide and seemed to differentiate between "lengthening life or death." *Id.* The sentiment of the people seemed to be if one's body was no longer able to function, then why not "free the

Greeks widely believed that "man [was] the master of his own body, with the right to decide his own fate."[19] Is the modern world simply looking backward or creating a precedent of personal autonomy and freedom of choice?

B. Proponents of PAS and Euthanasia

Arguments favoring PAS and euthanasia surround two common themes, personal autonomy and the right to be free from undue suffering at the end of life.[20] Proponents contend "that the decision to end one's life is intensely personal and private, harms no one else, and ought not be prohibited by the government or the medical profession."[21] Advancements in medical technology over the past twenty years have resulted in the ability to keep people alive much longer than in the past.[22] Before the modern era of medicine, physicians did not have the scientific technology to prolong a patient's life and dying was accepted as a natural event.[23] Today, "the possibility of being maintained indefinitely on life-support engenders a fear of prolonged suffering and loss of dignity and control during our final days."[24] The modern mindset evolved from the hope of prolonging life to analyzing the quality of life that has been retained.[25] "Medicalization" of the dying process led to a strong argument in favor of individual control at the end of life and personal autonomy.[26] Proponents assert that PAS and euthanasia provide appropriate safeguards against the invasion of medical technology and

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struggling soul." *Id. See also* DWORKIN, *supra* note 9, at 94-95.

19. *See* Messinger, *supra* note 18, at 182.

20. *See* Battin, *supra* note 3, at 23.

21. Lois Snyder et al., *Physician-Assisted Suicide*, 135(3) ANNALS INTERNAL MED. 209 (2001).

22. HARRY A. SULTZ & KRISTINA M. YOUNG, HEALTH CARE USA: UNDERSTANDING ITS ORGANIZATION AND DELIVERY 166-67 (1997). "The array of medical interventions and diagnostic modalities has increased exponentially in the past [thirty] years, including a vast expansion of pharmaceuticals to treat acute conditions and manage chronic ones." *Id. See also* Charon Pierson, *The Public and Private Problem of Euthanasia: A Comparison of the Netherlands and the United States*, 19(6) GERIATRIC NURS. 309 (1998).

23. *See id.* at 309.

24. *Id.* Factors connected to the "medicalization" of the dying process include: "fee-for-service insurance, . . . entitlement payment systems, [i]ncreased services . . . ." *Id. See also* DWORKIN, *supra* note 9, at 84. In the past people may have feared death, but now with the advent of medical science, people often fear the alternative to death; a drawn out, painful affair, attached to numerous machines and away from the comfortable surroundings of home. *See id.*

25. Dr. Nickolas A. Pace, *Law and Ethics at the End of Life: The Practitioner's View, in* DEATH, DYING AND THE LAW 9 (Sheila A.M. McLean ed., 1996).

26. *See* Snyder, *supra* note 21, at 209. End of life suffering includes: pain, nausea, anxiety, depression, loss of bowel and bladder functions, total dependency on others for activities of daily living, feelings of hopelessness, and lack of dignity. *See id. See also* Pierson, *supra* note 22, at 309. *See also* JOHN GRIFFITHS ET AL., EUTHANASIA & LAW IN THE NETHERLANDS 169 (1998). Those in support of personal autonomy believe that a person is "entitled to define his own conception of human dignity . . . ." *Id.*

outliving one's own death.[27] Hence, the debate concerning PAS and euthanasia has developed with ferocious speed along with strong opinions for and against the legalization of PAS and euthanasia.[28]

Proponents of the legalization of PAS and euthanasia suggest that if one has total control of his or her life, one should have the same control over the time, place, and manner of one's death.[29] A further contention is that all persons should have the complete right to self-determination; moreover, "[c]hoosing how to die is part of choosing how to live."[30] Thus, PAS and euthanasia provide people with the ability to die with dignity and not in a manner that would be considered offensive and self-degrading. [31]

Another argument in support of PAS and euthanasia is the principle of mercy.[32] The basis for this principle is that one should not cause pain and suffering, and when possible, act to eliminate such pain.[33] This principle seems to comport naturally with the role of the physician.[34] Physicians are in the best position to provide PAS and euthanasia because they can provide the appropriate medication or prescription to the patient; physicians have the expertise to control any possible adverse effects of the medication; physicians can make decisions in an objective manner; and physicians have a duty to abide by professional medical standards.[35] Hence, physicians, in their role as caretaker, can prevent patients from undue suffering caused by a protracted dying process by providing a "merciful" death.[36]

Additionally, some argue that physicians have an obligation to provide all-encompassing end-of-life treatment to their patients, which under certain circumstances involves assistance in death.[37] Proponents assert that if this care

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27. *See* Snyder, *supra* note 21, at 209. *See also* DWORKIN, *supra* note 9, at 84. "The greater the ability of health professionals to prolong lives that would otherwise ebb away, the more necessary it becomes for societies to institute safeguards to allow patients to reject medical interventions that serve only to prolong dying." *Id.*

28. DEREK HUMPHRY & MARY CLEMENT, FREEDOM TO DIE: PEOPLE, POLITICS, AND THE RIGHT-TO-DIE MOVEMENT 314 (1998).

29. *See* GRIFFITHS, *supra* note 26, at 169.

30. *See* Battin, *supra* note 3, at 23.

31. William J. Winslade Ph.D., J.D., *Physician-Assisted Suicide: Evolving Public Policy, in* PHYSICIAN-ASSISTED SUICIDE, *supra* note 12, at 227.

32. *See* GRIFFITHS, *supra* note 26, at 172. The principle of mercy is compassion at the end of life and prevention of undue suffering. *See id.*

33. *See* Battin, *supra* note 3, at 23.

34. *See id.*

35. *See id.* at 26. *See also* DWORKIN, *supra* note 9, at 133.

36. *See* Battin, *supra* note 3, at 23. "Suicide assisted by a humane physician spares the patient the pain and suffering that may be part of the dying process, and grants the patient a 'mercifully' easy death." *Id. See also* Winslade, *supra* note 31, at 228. Physicians are viewed as "gatekeepers at the borders of life and death." *Id.*

37. Roseamond Rhodes, *Physicians, Assisted-Suicide, and the Right to Live or Die, in* PHYSICIAN ASSISTED SUICIDE: EXPANDING THE DEBATE 171 (Margaret P. Battin et al. eds., 1998). The rationale supporting the contention that physicians have an obligation to assist their patients in end-of-life decisions is that "by professional training, doctors should know how to hasten death with minimum discomfort or violence, and . . . because of their access to medical

is not provided, patients may feel a sense of abandonment at the time physicians are most needed.[38] Hence, medical science indirectly caused the suffering that terminally[39] and chronically ill[40] patients must endure.[41] Therefore, physicians should not turn their backs on patients requesting relief from pain and suffering "even at the price of shortening life."[42] Based on the physician-patient relationship, granting a patient his or her request to die in a peaceful, dignified manner could be viewed as one of the most compassionate acts physicians perform.[43] During his testimony to the House of Representatives Committee involving an oversight hearing on PAS, Dr. Timothy E. Quill, an advocate for complete end-of-life care, stated:

> All available options to alleviate suffering must be publicized to both physicians and patients, for we have an obligation to be responsive to those who are disintegrating as persons in spite of our best efforts without violating their or our personal values. The method used to help patients at the very end is less important than more fundamental processes of caring, joint decision making [sic], excellent palliative care, and a commitment not to abandon no matter how the process unfolds.[44]

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technology and pharmacology . . . ." *Id.* at 171.

38. *See* Snyder, *supra* note 21, at 209.

39. *See* WEBSTER'S, *supra* note 9, at 633. Terminal is defined as "close to causing death." *Id.*

40. MOSBY'S DICTIONARY: MEDICAL, NURSING, & ALLIED HEALTH 255 (3d ed. 1990). Chronic disease is defined as "a disease that persists over a long period of time as compared with the course of an acute disease. The symptoms of chronic disease are usually less severe than those of the acute phase of the same disease." *Id.*

41. L.L. BASTA, LIFE AND DEATH ON YOUR OWN TERMS 52-53 (2001).

42. Howard Brody, *Assisting in Patient Suicides is an Acceptable Practice for Physicians, in* PHYSICIAN-ASSISTED SUICIDE, *supra* note 12, at 138.

43. Timothy E. Quill et al., *The Debate Over Physician-Assisted Suicide: Empirical Data and Convergent Views*, 128(7) ANNALS OF INTERNAL MED. 552 (1998). Although the author, Dr. Quill, asserts that all physicians are obligated to providing supportive end-of-life care, he does not agree that physicians are obligated to provide PAS if it is against their moral and fundamental values. *See id.* Dr. Quill suggests that if legalized PAS is an option for the patient and after much discussion of alternatives, the patient is still adamant in his or her desire for PAS and his or her physician does not morally agree, then the physician should refer the patient to a physician with views more similar to that of the patient. *See id.*

44. *House of Representatives Committee on the Judiciary Subcommittee on the Constitution Oversight Hearing on "Assisted Suicide in the United States," Testimony by Timothy E. Quill, M.D.*, (Apr. 29, 1996), *available at* http://www.house.gov/judiciary/2168.htm (last visited Nov. 15, 2002). Dr. Quill is a proponent of PAS but not euthanasia. *See id.* The position that Dr. Quill takes is PAS should be used as a last resort measure. *See id.* Dr. Quill stated in his testimony to the House of Representatives that "[a]ssisted suicide should never be an alternative to good palliative care." *Id.* Nonetheless, if palliative care no longer relieves the patient's suffering and all other alternatives have been explored, then PAS should be a legal option. *See id.*

Caring for patients over a long period of time and allowing them to live in a manner of their choosing should naturally lead to caring for patients in their time of death.[45] Thus, physicians supplying end-of-life care to their patients should be allowed to relieve their patients' suffering with all viable options, including PAS and euthanasia if so indicated.[46]

The distinction between "killing" and "letting die" is another component in the debate regarding whether PAS and euthanasia should be legalized.[47] The Acts and Omissions Doctrine[48] frames the distinction between "killing" and "letting die."[49] The Doctrine sets forth that "failure to perform an act, with certain foreseen bad consequences of that failure, is morally less bad than to perform a different act which has identically foreseeable bad consequences."[50]

Proponents of PAS and euthanasia assert that "killing" and "letting die" are morally equivalent.[51] However, opponents of euthanasia and PAS disagree.[52] For example, many opponents view the act of withdrawing fluids and nutrition or turning off a respirator as "letting die."[53] On the other hand, PAS and euthanasia are considered "killing" because the physician writes the lethal prescription or injects the patient with a lethal dose of medication.[54]

Proponents of PAS and euthanasia view the two cases as equivalent because, in both situations, the physician acts, and the patient's death.[55] Moreover, when nutrition and fluids or oxygen are withdrawn, the patient

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45. *See* Rhodes, *supra* note 37, at 163, 171. Proponents additionally argue that if patients know their physician will not allow them to needlessly suffer, the trust between patient and physician will be strengthened. *See id.* Trust between patients and their physicians normally develops from a continuum of supportive and appropriate care provided by the physician over a period of years. *See id.* Patients who have placed a high amount of trust in their physicians in the past usually have an expectation that their physician will continue to provide the same supportive care in the future. *See id.* Furthermore, with PAS and euthanasia as an option, patients may be more willing to attempt additional therapeutic measures based on the knowledge that if the measures do not better their situation or even worsen their suffering, there are still means available to alleviate their suffering. *See id.*

46. *See id.* at 163.

47. Bernard Gert et al., *An Alternative to Physician-Assisted Suicide: A Conceptual and Moral Analysis, in* PHYSICIAN ASSISTED SUICIDE: EXPANDING THE DEBATE, *supra* note 37, at 186. Another argument involving "killing" and "letting die" involves the psychological aspect of the physician. *See id.* Many propose that it is psychologically easier to "omit rather than to act." *Id. See also* Tom L. Beauchamp, *The Autonomy Turn in Physician-Assisted Suicide*, 913 ANNALS OF N.Y. ACAD. OF SCI. 111 (2000).

48. *See* GRIFFITHS, *supra* note 26, at 158.

49. *See also* Beauchamp, *supra* note 47, at 111. "*[K]illing* is causal action that brings about another's death, whereas *letting die* is the intentional avoidance of causal intervention so that disease, system failure, or injury causes death." *Id.*

50. *See* GRIFFITHS, *supra* note 26, at 158 (quoting Glover 1977:92).

51. F. M. KAMM, MORTALITY, VOL. II 18 (1996).

52. *See* Beuchamp, *supra* note 47, at 111.

53. *See id.* at 115. "Letting die" is the termination of life-saving medical technology because it is futile or because the patient has refused such treatment. *See id.*

54. *See* GRIFFITHS, *supra* note 26, at 159.

55. *See id.*

normally dies as the result of starvation and dehydration or lack of oxygen, not the underlying disease.[56] Thus, the logical conclusion seems to be that allowing a patient to suffer from starvation or lack of oxygen is inhumane when compared to a "merciful" death provided by PAS or euthanasia.[57]

C. *Opponents of PAS and Euthanasia*

The principal argument against PAS and euthanasia is the "slippery slope" argument.[58] Opponents contend that the legalization of PAS and euthanasia will lead to cataclysmic events resulting in the arbitrary termination of vulnerable groups of people.[59] Some argue, "[R]estrictions initially built into legislation will eventually be revised or ignored, ever increasing the possibilities for unjustified killing."[60] Thus, the legalization of PAS and euthanasia would promote discrimination against the mentally ill, the elderly, and the disabled.[61]

Additionally, the legalization of PAS and euthanasia will lead to society, and more importantly, physicians becoming calloused toward the termination of life.[62] The Health Council of the Netherlands[63] postulated that:

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56. *Cf.* Beuchamp, *supra* note 47, at 115. Another distinction between the two concepts surrounds the causation of death. *See id.* Opponents assert that when fluids and nutrition are withdrawn, the patient dies from the underlying disease. *See id.* Yet, when the patient ingests or is injected with a lethal dose of medication, his or her death was caused by the action of the physician and not the underlying pathology. *See id.*; *see also* GRIFFITHS, *supra* note 26, at 159. "Letting die" is allowing nature to take its course. *See id.*

57. *See* GRIFFITHS, *supra* note 26, at 159.

58. John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?, in* EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES 262 (John Keown ed., 1995). The basic "slippery slope" argument in regard to the legalization of PAS and euthanasia is: If voluntary PAS and euthanasia are legalized, society will become desensitized to both forms of assisted death, which will gradually lead to the involuntary termination of vulnerable groups that are viewed as no longer useful to society. *See id.*

59. *See* DWORKIN, *supra* note 9, at 43. *See also* Herbert Hendin, *The Dutch Experience; Euthanasia*, 17 ISSUES L. & MED. 223 (2002). *See also* Herbert Hendin, *Physician-Assisted Suicide and Euthanasia in the Netherlands: Lessons From the Dutch*, 277(21) JAMA 1720 (1997).

60. *But cf.* Beuchamp, *supra* note 47, at 111. Beauchamp suggests that although the "slippery slope" argument contains valid social concerns, the argument does not set forth valid reasons to "deny vulnerable or non-vulnerable parties" assistance in death. *Id.* Moreover, Beauchamp proposes that the opponents' argument is somewhat paternalistic in the fact that it essentially suggests that these vulnerable groups are not capable of making a valid decision concerning PAS. *See id.*

61. *See* DWORKIN, *supra* note 9, at 43. Because these vulnerable groups suffer from distinct hardships, they would not be adequately protected if the legalization of PAS and euthanasia permeates throughout society. *See id. See also* Hendin, *supra* note 59, at 223.

62. *See* Hendin, *supra* note 59, at 223.

63. Mission Statement of the Health Council of the Netherlands, *available at* http://www.gr.nl/missie.php (last visited Nov. 22, 2002). The Health Council of the Netherlands is an advisory board that informs the Ministers and Parliament of issues encompassing all areas of public health. *See id.*

> A danger lurks in the possibility that the freedom to engage in euthanasia will lead to a certain routine and habituation, which raises the danger that required standards of care will not always be adhered to in making judgments whether or not euthanasia or assistance with suicide is in fact indicated.[64]

Persons inflicted with the mental illness of depression are considered vulnerable to the legalization of PAS and euthanasia.[65] Terminally ill patients who request PAS or euthanasia are likely suffering from depression.[66] If depression is not correctly diagnosed and treated by physicians during an evaluation in regard to a request for PAS and euthanasia, many patients may be assisted in death prematurely.[67] Opponents contend that depression is difficult to diagnose especially in cases of terminally ill patients.[68] Furthermore, many physicians do not perform a correct assessment of the patient's mental condition or refer the patient for psychiatric evaluation.[69] Thus, without proper treatment, depressed patients are more likely to request and receive assistance in death.[70]

The elderly and disabled are also considered groups that would be vulnerable to the abuses of legalized PAS and euthanasia.[71] One argument is that these two groups are more likely to be pressured into requesting PAS or

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64. *See* GRIFFITHS, *supra* note 26, at 178 (quoting Gezondheidsraad 1982:72).

65. WESLEY J. SMITH, FORCED EXIT: THE SLIPPERY SLOPE FROM ASSISTED SUICIDE TO LEGALIZED MURDER 124 (1997).

66. *See* Mark E. Chopko, *Responsible Public Policy at the End of Life*, 75 U. DET. MERCY L. REV. 557, 580 (1998). In most studies of persons who commit suicide, ninety-five percent have a mental illness at the time of death. *See id.*

67. *See id.*

68. *See* Quill, *supra* note 43, at 552. The difficulty in diagnosing depression in the terminally ill patient is due to the overlapping symptoms of depression and a terminal illness. *See id.* Those symptoms include: "fatigue, sleep disturbance, poor concentration, loss of interest in normal affairs, weight loss, and preoccupation with death." *Id.* Additionally, if a patient is diagnosed with depression based on suicidal thoughts, then every person requesting assistance in death would be considered depressed. *See id.*

69. *See* DWORKIN, *supra* note 9, at 48. *See also* GRIFFITHS ET AL., *supra* note 26, at 223. A survey of psychiatrists in the Netherlands reported that only three percent of patients requesting PAS or euthanasia were referred for psychiatric consultation. *See id.*

70. *See* DWORKIN, *supra* note 9, at 48. A survey by New York State Task Force on Life and the Law provided information that "most doctors 'are not trained to diagnose depression, especially in complex cases such as patients who are terminally ill'." *Id.* Moreover, even if a patient is diagnosed with depression, the survey showed that those patients often went untreated. *See id.* Terminally ill patients who receive appropriate treatment for depression and pain will no longer desire assistance in death. *See id.*

71. Mark C. Siegel, Note, *Lethal Pity: The Oregon Death With Dignity Act, Its Implications for the Disabled, and the Struggle for Equality in an Able-Bodied World*, 16 LAW & INEQ. 259, 261 (1998).

euthanasia because of financial burdens and "social devaluation."[72] A second argument is that the legalization of PAS and euthanasia has nothing to do with a fundamental right or liberty but serves as a vehicle for "bigotry against disabled people that sends the loud message that disabled people's lives are worthless."[73] Moreover, if PAS and euthanasia are only offered to the terminally ill or the severely disabled and not offered to all competent adults, society will only further devalue these vulnerable groups.[74]

Many elderly and disabled people are not gainfully employed and are dependent on others for financial assistance.[75] The lack of financial support decreases the choices available to the elderly and disabled, and persons in this circumstance may tend to more readily accept the option of death.[76] Moreover, the elderly and disabled may feel as if they are an emotional and financial burden to their families, and the legalization of PAS and euthanasia may lead them to end their lives prematurely.[77] Thus, the option of PAS and euthanasia "may create a generally pressured climate where patients feel the need to justify their decisions to go on living."[78]

In addition to financial burdens placing the disabled and elderly at a higher risk for being pressured into requesting assistance with death, the attitude that the young and healthy are more valuable than the elderly and disabled also places these two groups in danger of coercion.[79] A society that is outwardly uncertain and apprehensive in regard to its disabled citizens and how those citizens conform to its culture only compounds and strengthens the disabled citizens' feelings of worthlessness.[80] This "sense of despair" coupled with the lack of financial stability might lead elderly and disabled persons to request PAS and euthanasia more often than would persons who have high

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72. *See* Kristi L. Kirschner M.D. et al., *Physician-Assisted Death in Context of Disability in* PHYSICIAN-ASSISTED SUICIDE, *supra* note 12, at 164.

73. *See* SMITH, *supra* note 65, at 181. Opponents suggest that if disabled persons choose PAS or euthanasia, they only did so out of despair over their treatment by society. *See id.* Furthermore, declaring that PAS and euthanasia are options that promote personal autonomy is oxymoronic in the case of the disabled. *See id.* Opponents assert that disabled persons have been denied every other fundamental choice in their lives such as: the right to employment; they have been made to live separately from the rest of society; they have not been able to pursue certain educational aspirations; and their romantic and sexual expressions have been prohibited. *See id.*

74. Felicia Ackerman, *Assisted Suicide, Terminal Illness, Severe Disability, and the Double Standard, in* PHYSICIAN ASSISTED SUICIDE: EXPANDING THE DEBATE, *supra* note 37, at 151.

75. *See id.*

76. *See id.*

77. *See id.*

78. *Id.*

79. *See* SMITH, *supra* note 65, at 39.

80. *See id.*

societal value and adequate financial resources.[81] Thus, the lives of the elderly and disabled would be terminated at a much higher rate than others.[82]

Opponents predict that the legalization of PAS and euthanasia will lead to the atrocities that occurred in Nazi Germany.[83] Karl Brandt, the officer in charge of the "Nazi killing program," testified during his trial that: "The underlying motive was the desire to help individuals who could not help themselves and were thus prolonging their lives of torment."[84] Opponents acknowledge that an extreme distance distinguishes the ideology of Nazi Germany and the modern views regarding PAS and euthanasia, but they warn, "Lessons from the past can only be ignored at our peril."[85]

In addition to the "slippery slope" argument, opponents contend that the legalization of PAS and euthanasia will destroy the patient-physician relationship.[86] The main thrust of the argument is that legalization would "undermine the patient-physician relationship and the trust necessary to sustain it [and] alter the medical profession's role in society."[87] This lack of trust could result in people not seeking medical treatment when ill and a society that fears physicians and hospitals.[88]

Historically, the role of the physician in society has been the healer of the sick.[89] Opponents posture that PAS and euthanasia do not comport with

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81. *See id.*

82. *See id.*

83. Ja Emerson Vermaat, *"Euthanasia" in the Third Reich: Lessons for Today?*, 18 ISSUES IN L. & MED. 93 (2002). *See also* Siegel, *supra* note 71, at 263-64. When Adolf Hitler became the leader of Germany in the 1930s between 100,000 to 200,000 disabled persons were arbitrarily terminated. *See id.* at 264. Hitler possessed an immense hatred for "inferior human beings." *Id.* This hatred led to the sterilization of 375,000 disabled persons between 1933 and 1939. *See id.* The Disabled included: "physically disabled, mentally ill or challenged, deaf, blind, alcoholic or who otherwise did not meet Hitler's specifications of a healthy Aryan." *Id.* Hitler gave his approval to an order called Aktion T-4; a program that called for the systematic killing of the disabled. *See id.* The "qualified" patients were removed from the hospital and taken to a separate facility. *See* Siegel, *supra* note 71, at 263-64. Once at the facility they would be taken as a group into the "shower room" and the door would be locked. *See id.* The physician would then push a button that released carbon monoxide into the room killing the patients. *See id.*

84. *See* Vermaat, *supra* note 83, at 93. *See also* Wikipedia Encyclopedia Website, *available at* http://www.wikipedia.org/wiki/Karl_Brandt (last visited Nov. 22, 2002). Karl Brandt was Adolf Hitler's personal physician and was assigned to administer the Nazis' T-4 Euthanasia Program, otherwise known as the "killing program." *See id.* Brandt participated in many different experiments on humans and was instrumental in the euthanasia of thousands of mentally and physically handicapped. *See id.* After World War II, Brandt was tried and convicted for these crimes. *See id.* Brandt was sentenced to death by hanging. *See id.*

85. *See* Vermaat, *supra* note 83, at 93.

86. *See id. See also* Snyder, *supra* note 21, at 212. *See also* Gaylin et al., *Doctors Must Not Kill*, 259 JAMA 2140, 2141 (1988).

87. *See* Snyder, *supra* note 21, at 209.

88. *See id.*

89. *See id.* at 212. "The profession's most consistent ethical traditions have always emphasized healing and comfort and have demurred at the idea that a physician should intentionally bring about the death of any patient." *Id.*

this traditional role and cite the Hippocratic Oath (Oath)[90] in support of this contention. The Oath states in relevant part,

> I will follow that system of regimen which, accord my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will neither give a deadly medicine to anybody if asked for it, nor will I make a suggestion to this effect.[91]

If physicians are obligated by law to provide their patients with a lethal prescription or injection upon request, physicians will no longer be viewed as healers but those who take life.[92] Moreover, if PAS and euthanasia are legalized and physicians are obligated to assist in death, the consequence will be that physicians become the principal decision-makers regarding who will receive this treatment.[93] This contention is grounded in the theory that the determination of pain and suffering can never be truly objective.[94] Thus, the floodgates will open and euthanasia will be provided to those who have not made their desires known because the physicians will subjectively decide who is unbearably suffering.[95] This result is not compatible with the trusting relationship between patients and their physicians.

Those who are against the legalization of PAS and euthanasia propose that the goal should be for physicians to use their medical knowledge to alleviate the pain and suffering with the use of palliative care, not to intentionally kill patients with a lethal prescription or injection of medication.[96] In her testimony to the Judiciary Subcommittee on the Constitution, Dr. Kathleen Foley,[97] an opponent of legalizing PAS and euthanasia, stated that:

> [Physicians] must focus [their] efforts and attention on improving the care of the dying. The currently proposed laws

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90. Ludwig Edelstein, *The Hippocratic Oath: Text, Translation, and Interpretation, in* CROSS-CULTURAL PERSPECTIVES IN MEDICAL ETHICS 3-9, (Robert M. Veatch ed., 2nd ed. 2000). The Hippocratic Oath was written by Hippocrates, an ancient Greek physician, during the 400's B.C. [hereinafter Oath]. *See id.* The Oath reflects the high standards that govern the actions of physicians. *See id.* Furthermore, the Oath requires physicians, in their role as healer, to aid those who are sick and not cause any harm. *See id.*

91. *Id.*

92. *See* Gaylin, *supra* note 86, at 2141.

93. HERBERT HENDIN, SEDUCED BY DEATH 164 (1997).

94. *See id.*

95. *See id.*

96. *See* Snyder, *supra* note 21, at 209.

97. Testimony Judiciary Subcommittee on the Constitution "Medical Issues Related to Physician Assisted Suicide" Kathleen M. Foley, M.D., (Apr. 29, 1996), *available at* http://www.house.gov/judiciary/2167.htm (last visited Nov. 22, 2002). Dr. Foley is the Chief of Pain Service at Memorial Sloan-Kettering Cancer Center, and Professor of Neurology, Neuroscience, and Clinical Pharmacology at Cornell University. *See id.*

> only provide for protection of physicians. They do little to advance the care of patients at the end of life. They provide a false sense of autonomy. Real autonomy at the end of life can only be realized when a full range of treatment is available and affordable and patients understand all their options . . . . Control of pain, of other symptoms, and of psychological, social and spiritual problems is paramount . . . . Palliative care—affirms life, and regards dying as a normal process; neither hastens nor postpones death; provides relief from pain and other distressing symptoms; integrates the psychological and spiritual aspects of patient care; offers a support system to help patients live as actively as possible until death; offers a support system to help the family cope during the patient's illness and their own bereavement.[98]

III. HISTORICAL BACKGROUND OF PAS IN THE UNITED STATES

A. Physician-Assisted Suicide in the United States

Although euthanasia continues to be prohibited in the United States, steps toward legalizing PAS have emerged in the past fifteen years.[99] Currently, Oregon is the only state that formally legalized PAS.[100] PAS is statutorily illegal in thirty-six states and the District of Columbia.[101] In ten states, PAS is illegal under state common law.[102] Three states do not have statutory or common law prohibiting PAS.[103]

Shortly before Oregon's DWDA was passed and in the years succeeding, other states have also attempted to pass laws allowing PAS and euthanasia.[104]

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98. *Id.*

99. SUSAN M. BEHUNIAK & ARTHUR G. SVENSON, PHYSICIAN-ASSISTED SUICIDE: THE ANATOMY OF A CONSTITUTIONAL LAW ISSUE 14 (2003).

100. *See id.* at 28.

101. *Assisted Suicide Laws By State – July 1998*, USA TODAY, July 6, 1998, *available at* http://euthanasia.com/stlaws.html. (last visited Nov. 22, 2002). The thirty-six states that statutorily prohibit PAS are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin. *See id.* The District of Columbia also statutorily prohibits PAS. *See id.*

102. *See id.* The ten states that prohibit PAS under common law include: Alabama, Idaho, Maryland, Massachusetts, Michigan, Nevada, Ohio, South Carolina, Vermont, and West Virginia. *See id.*

103. *See id.* The three states that do not have statutory laws or common laws prohibiting PAS are: North Carolina, Utah, and Wyoming. *See Assisted Suicide Laws By State, supra* note 101.

104. *See* SMITH, *supra* note 65, at 213.

In 1988, California attempted to legalize euthanasia for terminally ill patients, but the bill lacked the amount of signatures required to qualify initiative for the ballot.[105] In 1991, Washington proposed a similar bill, called initiative 119, that would allow euthanasia for terminally ill patients.[106] However, the bill was rejected.[107] In 1992, California once again tried to legalize euthanasia for the terminally ill with the introduction of Proposition 161.[108] Proposition 161 was voted down by referendum fifty-four percent to forty-six percent.[109] In 1994, Michigan attempted to legalize euthanasia for the terminally ill and disabled.[110] This bill was never voted on due to lack of sufficient signatures.[111]

Oregon legalized PAS in 1994 when it approved the DWDA.[112] Although the law was passed in 1994, it did not become effective until October 27, 1997, because of numerous legal proceedings that resulted in an injunction against the DWDA.[113] In an effort to repeal the statute because of doubts surrounding sufficient safeguards within the DWDA, the Oregon Legislature introduced Measure 51 in November of 1997.[114] Oregon voters confirmed their desire to legalize PAS by defeating the Measure by a margin of sixty percent to forty percent.[115]

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105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See* SMITH, *supra* note 65, at 213.

111. *See id.*

112. *See* DWDA, 13 OR. REV. STAT. §§ 127.800-.897. *See also* Joseph Cordaro, Note, *Who Defers to Whom? The Attorney General Targets Oregon's Death With Dignity Act*, 70 FORDHAM L. REV. 2477, 2484 (2002). Measure 16 was passed by referendum with a fifty-one to forty-nine percent vote. *See id. See also* Cheryl K. Smith, *Safeguards for Physician-Assisted Suicide: The Oregon Death with Dignity Act in* DEATH DYING AND THE LAW, *supra* note 25, at 71. Definition of referendum: when a state's legislature has approved a bill and then allows the people of the state to vote on whether or not to approve the bill. *See id.* The bill does not become effective until after voter approval is obtained. *See id.*

113. Lee v. Oregon, 107 F.3d 1382, 1386 (9th Cir. 1997). One day before the DWDA was to become effective District Judge, Michael Hogan, temporarily enjoined the implementation of the Act. *See id.* In 1995, Judge Hogan held that the Act violated the Equal Protection Clause of the United States Constitution and granted a permanent injunction against the implementation of the Act. *See id.* On appeal, the Ninth Circuit Court of Appeals concluded that the plaintiffs lacked standing to bring suit against Oregon and vacated the District Court's judgment. *See id.* The United States Supreme Court denied certiorari of the case. *See id.*

114. *See* BEHUNIAK & SVENSON, *supra* note 99, at 152. The arguments of the Oregon Legislature to repeal the Death with Dignity Act included: the use of oral medication may not be effective in bringing about a quick and painless death; Measure 16 does not include any specific requirement for psychological counseling or family notification; strong enforcement requirements are not in place to compel physicians to report assisted suicide to the state Health Division; Measure 16 does not include a definition for residency, which could lead to a flood of people into Oregon who wish to utilize the PAS law. *See id.*

115. *See* Cordaro, *supra* note 112, at 2484. *See also* Beauchamp *supra* note 47, at 111.

B. The Constitutional Battle Surrounding PAS

A turning point in the right to die movement in the United States occurred after the Supreme Court's decision in *Cruzan v. Director*,[116] which set forth that patients have a constitutionally protected right to refuse food and hydration.[117] The *Cruzan* decision and Oregon's legalization of PAS caused quite a stir among many states, resulting in the promulgation of laws specifically prohibiting PAS.[118] The specific ban on PAS in Washington and New York led to proponents of PAS in both states filing lawsuits based on Constitutional grounds.[119]

In 1997, the United States Supreme Court handed down two decisions in *Vacco v. Quill*[120] and *Washington v. Glucksberg*[121] regarding constitutional issues surrounding the PAS debate.[122] In both cases, a group of terminally ill patients and several physicians sued the states of Washington and New York on the ground that the states' laws prohibiting PAS were unconstitutional and abridged their fundamental liberty right to PAS.[123] The Court unanimously concluded in both cases that a terminally ill patient does not have a constitutionally protected right to PAS.[124]

In *Glucksberg*, the plaintiffs asserted that Washington's law violated the Due Process Clause of the Fourteenth Amendment of the United States

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116. Cruzan v. Dir., Mo. Dep't Health, 497 U.S. 261 (1990).

117. *See Cruzan*, 497 U.S. at 261. This case involved a thirty-two year old woman, Nancy Cruzan, who was in a persistent vegetative state after suffering injuries in a car accident. *See id.* The lack of oxygen to Cruzan's brain after the accident was the cause of her permanent brain damage. *See id.* A person in a permanent vegetative state does show some motor reflexes but has no cognitive function. *See id.* After the accident, Cruzan was able to breathe independently because her brain stem was intact. *See id.* However, because Cruzan could not orally ingest food or water, a feeding tube was surgically placed in her stomach. *See id.* Cruzan's parents wanted the feeding tube removed in order to hasten their daughter's death based on the grounds that she would not have wanted to live in such a state. *See id.* The hospital refused to comply with the parents' request. *See Cruzan*, 497 U.S. at 261. The Cruzans then sought judicial consent to remove the feeding tube. *See id.* The United States Supreme Court concluded that the Fourteenth Amendment of the United States Constitution provides a competent adult with a fundamental right to refuse lifesaving nutrition and hydration. *See id.* The Court also concluded that Missouri was allowed to require a clear and convincing standard of proof regarding a person's wishes prior to being incompetent. *See id.* The Missouri Supreme Court had previously held that Nancy Cruzan did not meet this evidentiary standard and the feeding tube was not removed. *See id.* However, the Cruzans later presented additional evidence to a Missouri Superior Court. *See Cruzan*, 497 U.S. at 261.. The court found in favor of the Cruzans, and Nancy Cruzan's feeding tube was removed. *See id.* A few weeks after the removal of the feeding tube, Nancy Cruzan died. *See id.*

118. *See* BEHUNIAK & SVENSON, *supra* note 99, at 57.

119. *Id.*

120. Vacco v. Quill, 521 U.S. 793 (1997).

121. Washington v. Glucksberg, 521 U.S. 702 (1997).

122. *See Vacco*, 521 U.S. at 793; *see also Glucksberg*, 521 U.S. at 702. *See also* Chopko, *supra* note 66, at 569.

123. *See Vacco*, 521 U.S. at 793; *see also Glucksberg*, 521 U.S. at 702.

124. *See Vacco*, 521 U.S. at 796; *see also Glucksberg*, 521 U.S. at 705.

Constitution.[125] The plaintiffs argued that the Due Process Clause "extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide."[126]

The United States Supreme Court held that Washington's law prohibiting PAS did not violate the Due Process Clause.[127] The Court noted that the practice of assisted suicide has been illegal under common law for over 700 years and is still illegal in the vast majority of the states.[128] Although the Court recognized that many of the fundamental rights protected by the Due Process Clause are grounded in personal autonomy, it concluded that the Due Process Clause could not be extended to all such personal decisions.[129] Furthermore, the Court found that the Washington statute was rationally related to the State's interest in: "1) preserving life; 2) preventing suicide; 3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; 4) protecting family members and loved ones; 5) protecting the integrity of the medical profession and; 6) avoiding future movement toward euthanasia and other abuses."[130]

Although the Court held that terminally ill patients do not have a fundamental right to PAS, the door to PAS was not completely closed. The Court noted that the United States is a democratic society and the debate over PAS should continue throughout the states.[131] Thus, each individual state must make the determination of whether to legalize PAS.[132]

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125. *See Glucksberg*, 521 U.S. at 708.

126. *Id.* at 708. The Ninth Circuit Court of Appeals affirmed the district court's decision holding that Washington's law was unconstitutional because it placed "an undue burden on the exercise of that constitutionally protected liberty interest." *Id.* at 709.

127. *See id.* at 709, 720-21. In deciding the case, the Supreme Court used the two-pronged substantive analysis test, which includes: 1) whether the right in question is "deeply rooted in this Nation's history and tradition;" 2) whether the plaintiff has provided a "careful description" of the right in question. *Id.* at 720-21.

128. *See id.* at 710-19. The laws prohibiting suicide have never included exceptions regarding terminally ill persons, and in the past few years, states have again evaluated the prohibition of assisted suicide and reaffirmed its illegality. *See Glucksberg*, 521 U.S. at 716. The Court also noted the Federal Assisted Suicide Funding Restriction Act of 1997 in support of its holding. *See id.* at 718. The Federal Assisted Suicide Funding Restriction Act prohibits the spending of federal funds in support of PAS. *See id.*

129. *See id.* at 722, 727. The plaintiffs asserted the following descriptions of interests: "a right to determine the time and manner of one's death . . . the right to die . . . a liberty to choose how to die . . . a right to control of one's final days, the right to choose a humane . . . dignified death . . . and the liberty to shape death." *Id.* at 722. Rights protected under the Due Process Clause that are concerned with personal autonomy include: right to procreate; right to marry; and abortion. *See id.* at 726.

130. *See Glucksberg*, 521 U.S. at 728. The court also considered the possible abuses of legalization such as: the discriminatory termination of the disabled, terminally ill, and elderly; the fear of sliding down "the slippery slope" toward voluntary and involuntary euthanasia. *See id.* at 733.

131. *See id.* at 735.

132. *See id.* at 789.

In *Vacco*, the plaintiffs brought suit against the state of New York based on the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[133] The plaintiffs asserted that if New York allows a competent patient to refuse life-sustaining treatment, then a competent patient should also have the right to request PAS because there is no basic difference between the two situations.[134] The Supreme Court held that New York's ban on PAS did not violate the Equal Protection Clause and was "rationally related to a state interest."[135]

The Court's analysis drew a bright line between the causation and intent of PAS and the refusal of life-sustaining treatment.[136] The Court set forth that in the case of refusal or withdrawal of life-sustaining treatment, the patient dies from the underlying disease, whereas in the case of PAS, the patient dies from the lethal prescription of medication.[137] Moreover, the Court concluded that the physician's intent is different in the two circumstances.[138] In the refusal or withdrawal of life-sustaining treatment, the physician is only comporting with his patient's desire to stop treatment and this may or may not result in the patient's death.[139] In the case of PAS, where the physician prescribes the lethal dose of medication, the physician intends the termination of the patient's life.[140]

C. Oregon's Death With Dignity Act

Although the United States Supreme Court ruled that there is no constitutional right to assisted suicide, this does not ban the individual states

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133. *See Vacco*, 521 U.S. at 793.

134. *Id.* at 798-99. The Second Circuit Court of Appeals accepted this argument when it held that New York's ban on PAS resulted in the unequal treatment of competent patients and furthermore, the unequal treatment was not "rationally related to any legitimate state interest." *Id.*

135. *Id.* at 797, 808-09. The court listed the same state interests as in the *Glucksberg* case: "prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding the possible slide toward euthanasia . . . ." *Id.* Although the Court found no violation of the Constitution in regard to the statutes prohibiting PAS, Justice O'Connor's concurring opinion held that the democratic process will lead the States to "strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure." *Id.* This opinion seems to give the debate over the legalization of PAS back to the States (likely quoting *Glucksberg*). *See Vacco*, 521 U.S. at 808-09.

136. *Id.* at 800-01. The Court reasoned that "the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational." *Id. See also* Chopko, *supra* note 66, at 575.

137. *See Vacco*, 521 U.S. at 801.

138. *See id.*

139. *See id.*

140. *See id.* at 802.

from promulgating their own laws regarding PAS.[141] Currently, the only state that has passed a law legalizing PAS is Oregon.[142] Oregon's DWDA allows a person who meets specific criteria to obtain a lethal prescription of medication from a physician for the purpose of ending his or her life in a humane and dignified manner.[143] In order to qualify for such a prescription: 1) the person must be a "capable" adult;[144] 2) the person must be a resident of Oregon;[145] 3) the person must be suffering from a terminal disease and;[146] 4) the request for PAS must be voluntary.[147]

To aid in the prevention of abuse,[148] several safeguards were included in the DWDA.[149] First, a physician must diagnose the patient with a terminal disease, and further determine if the patient is competent and has voluntarily

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141. *See* Justice O'Connor, *The Supreme Court Decides the 'Glucksberg' and 'Quill' cases, in* LAST RIGHTS: ASSISTED SUICIDE AND EUTHANASIA DEBATED, *supra* note 17, at 614.

142. *See* SMITH, *supra* note 65, at 116.

143. DWDA, 13 OR. REV. STAT. §§ 127.800-.897 (2001).

144. *See id.* ch. 127.800 § 1.01(1) - (6). Capable adult is defined by the Act as a person who is eighteen years of age or older and has the ability to make health care decisions and communicate these decisions to his or her health care provider. *See id.*

145. *See id.* ch. 127.860 § 3.10. Determinations of residency include: Oregon driver license, voter registration card, ownership or lease of property, or tax return. *See id.* All factors must be inclusive to the state of Oregon. *See id.*

146. *See id.* ch. 127.800 § 1.01(12). Terminal disease is defined by the Act as an "incurable and irreversible" disease diagnosed by a physician that will result in death within six months. *See* DWDA, 13 OR. REV. STAT. 127.800 § 1.01(12).

147. *See id.* ch. 127.810 § 2.02. To aid in the determination of whether a request is voluntary, the patient must sign a formal written request with two witnesses who can verify that the patient is "capable" and is making the request without any coercion. *See id.* Moreover, to provide assurances of no undue pressure, one of the witnesses is prohibited from being: a relative by blood, marriage, or adoption; someone who would benefit financially from the patient's death, such as a beneficiary of the patient's will or; a person who owns or operates a health care facility where the patient resides or receives medical treatment. *See id.* Additionally, the physician who primarily cares for the patient and treats his or her disease is never allowed to be a witness to the written request. *See id.* To further safeguard the voluntary nature of the patient's request, the Act provides that anyone who coerces the patient to request PAS is subject to criminal liability. *See id.* ch. 127.890 § 4.02.

148. Susan R. Martyn & Henry J. Bourguignon, *Now is the Moment to Reflect: Two Years of Experience with Oregon's Physician-Assisted Suicide Law*, 8 ELDER L.J. 1, 3 (2000). Possible abuses of the Oregon Death With Dignity Act include: 1) undue coercion used to influence a patient to request PAS; 2) inadequate protection of those persons with mental illness or who are incompetent; 3) the physician, not the patient will make the decision about assisted suicide. *See id.*

149. *See* Steven Miles M.D. et al., *Considerations of Safeguards Proposed in Laws and Guidelines to Legalize Assisted Suicide, in* PHYSICIAN-ASSISTED SUICIDE, *supra* note 12, at 212. Safeguards to the DWDA include some limits on a patient's autonomy. *See id.* The rationale behind the safeguards is to protect vulnerable patients who might be coerced into requesting PAS. *See id.* The three main safeguards in place are: 1) the request for PAS must be carefully considered and not made under circumstances suggesting undue influence of others; 2) the patient must be able to participate in his or her own death; 3) the patient must be able to provide sound reasoning for requesting PAS. *See id. See also* DEATH DYING AND THE LAW, *supra* note 25, at 74-80.

requested PAS.[150] Second, the physician must inform the patient of: the diagnosis; all alternative treatment available;[151] the risks and adverse effects of the medication prescribed;[152] the end result of ingesting the prescribed medication; and[153] that he or she can revoke the request for PAS at anytime.[154] Third, the treating physician must refer the patient to another physician for a confirmation of the terminal illness, a determination of patient competency, and affirmation of the voluntary nature of the request.[155] In addition to referring the patient to another physician, the treating physician must also refer the patient for psychological counseling if physician determines that the patient is depressed or experiencing any "psychiatric or psychological disorder." [156] Furthermore, the treating physician must also suggest that the patient inform his or her family of the decision,[157] have someone present when he or she takes the medication, and ingest the medication in a private location.[158]

In addition to providing the above safeguards, the DWDA also contains an additional layer of protection against abuse by requiring that a prescription for a lethal dose of medication can only be written if certain time periods are complied with and the patient requests PAS on at least three occasions.[159] A physician must wait fifteen days after the patient's initial oral request for PAS and two days after the patient's written request before writing the prescription.[160] Moreover, at the time the patient makes his or her second oral request for PAS, the physician must offer the patient the chance to revoke the request.[161] Also, before the physician writes the prescription he or she must

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150. *See* DWDA, 13 OR. REV. STAT. 127.815 § 3.01(1)(a).

151. *See id.* ch. 127.815 § 3.01(1)(c)(E). Alternative treatment consists of but is not limited to "comfort care, hospice care and pain control." *Id.*

152. *See id.* ch. 127.815 § 3.01(1)(c).

153. *See id.* ch. 127.815 § 3.01(1)(c)(C)-(D); *see also id.* ch. 127.820 § 3.02. The physician providing the second opinion must confirm the referring physician's diagnosis in writing. *See* DWDA, 13 OR. REV. STAT. 127.820 § 3.02.

154. *See id.* ch. 127.815 § 3.01(1)(h); *see also id.* ch. 127.845 § 3.07. The statute also provides that the patient may revoke the request in "any manner without regard to his or her mental state." *Id.* This seems to imply an additional safeguard of allowing the patient to rescind the request even though he or she may be incompetent at the time of revocation as compared to the requirement of competency when requesting PAS. *See id.*

155. *See id.* ch. 127.815 § 3.01(1)(d).

156. *See* DWDA, 13 OR. REV. STAT. 127.815 § 3.01(1)(e); *see also id.* ch. 127.825 § 3.03. The statute sets forth that no patient requesting PAS shall be prescribed a lethal dose of medication until it is determined that the patient "is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment. . . ." *Id.*

157. *See id.* ch. 127.815 § 3.01(1)(f); *see also id.* ch. 127.835 § 3.05. As long as the patient has met the other criteria of the statute, his or her request for PAS will not be denied if the family is not notified. *See id.*

158. *See* DWDA, 13 OR. REV. STAT. 127.815 § 3.01(1)(g).

159. *See id.* ch. 127.840 § 3.06. The patient must make two oral requests within fifteen days of one another and a formal written request for PAS. *See id.*

160. *See id.* ch. 127.850 § 3.08.

161. *See id.* ch. 127.840 § 3.06.

confirm that the patient is making a voluntary, informed decision.[162] Additionally, the physician who prescribes the lethal dose of medication must document all of the above requirements in the patient's medical record.[163] Upon dispensing the medication, the physician is required to file this information with the Oregon Department of Human Services.[164] Finally, to ensure against any possibility of sliding down the "slippery slope," the DWDA specifically prohibits euthanasia[165] and imposes criminal liability on anyone who fabricates a request for PAS or destroys a revocation of the request with the purpose of causing the patient's demise.[166]

D. The Survival of Oregon's Death With Dignity Act

The strongest challenger of the DWDA is the Attorney General of the United States, John Ashcroft.[167] On November 6, 2001, Ashcroft issued a

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162. *See id.* ch. 127.815 § 3.01(1)(i). *See also* DWDA, 13 OR. REV. STAT. 127.800 § 1.01(7)(a)-(e). Informed decision is defined as a decision by a patient "based on an appreciation of the relevant facts" provided that the treating physician has discussed specific information with the patient: the medical diagnosis, prognosis, possible adverse effects of the prescribed medication, the outcome of ingesting the medication, and all "feasible" alternatives to PAS. *Id. See also* Cheryl K. Smith, *Safeguards for Physician-Assisted Suicide: The Oregon Death with Dignity Act, in* DEATH DYING AND THE LAW, *supra* note 25, at 76. The informed decision is comparable to an informed consent. *See id.* An informed consent is required before a physician performs surgery or other invasive procedure on a patient. *See id.* Before performing the procedure, the physician is required to disclose to his or her patient the nature of the procedure, all alternatives, and all risks involved. *See id.* The informed decision requirement of the DWDA is more stringent than an informed consent because it explicitly requires a physician to inform the patient of all other options to PAS. *See id.* The drafters of the DWDA required this more stringent requirement based on the grounds that the decision to end one's life is considerably more significant than the decision to undergo an invasive medical procedure. *See id.*

163. *See* DWDA, 13 OR. REV. STAT. 127.855 § 3.09(1)-(7).

164. *See id.* ch. 127.865 § 3.11.

165. *See id.* ch. 127.880 § 3.14. The Act sets forth that "[n]othing [in the statute] shall be construed to authorize a physician or any other person to end a patient's life by lethal injection, mercy killing or active euthanasia." *Id.*

166. *See id.* ch. 127.890 § 4.02(1). A person involved in this type of illegal conduct will be guilty of a Class A felony. *See id.* Additionally, a person who coerces a patient into requesting PAS will be guilty of a Class A felony. *See* DWDA, 13 OR. REV. STAT. 127.890 § 4.02(1).

167. Robert Steinbrook, *Physician-Assisted Suicide in Oregon – An Uncertain Future*, 346(6) NEW ENG. J. MED. 460 (2002). Ashcroft is a conservative Republican and has been a staunch opponent of PAS. *See id.* In addition to the Attorney General's challenge to Oregon's Death With Dignity Act, Congress has made two attempts to invalidate the Act. *See id.* The Lethal Drug Abuse Prevention Act of 1998 would have given the Drug Enforcement Agency the authority to revoke any physician's registration to prescribe a controlled substance for the purpose of PAS. *See id.* This bill never received a vote by the House of Representatives and died with the end of the 1998 Congressional Session. *See id.* The Pain Relief Promotion Act of 1999 would have made PAS a federal crime with a prison term of up to twenty years. *See id.* The bill was passed by the House of Representatives but never received a vote in the Senate; thus, the bill was terminated at the end of the 106th Congress. *See* Steinbrook, *supra* note 167,

ruling, otherwise known as the "Ashcroft Directive,"[168] which concluded that Oregon's DWDA was in violation of the federal Controlled Substances Act (CSA)[169] and physicians were prohibited from prescribing any medication for the purpose of PAS.[170] Ashcroft based his ruling on the theory that prescribing a lethal dose of medication for the purpose of PAS was not a "legitimate medical purpose."[171] The effect of this ruling on Oregon physicians who prescribed a lethal dose of medication for their patients would be revocation of their prescription license, possible criminal prosecution, and jail term.[172] As a result, Oregon filed a lawsuit to enjoin Ashcroft from any attempted enforcement of the ruling.[173] The United States District Court for the District of Oregon issued a temporary restraining order on November 8, 2001.[174]

On April 17, 2002, the District Court held that the prescription of a lethal dose of medication for the purpose of PAS does not violate the CSA.[175] Furthermore, the Court concluded that Ashcroft's ruling did not hold any weight and was not deserving of any judicial deference.[176] Along with this holding, the Court issued a permanent injunction against the "Ashcroft

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at 460. *See also* Cordaro, *supra* note 112, at 2485.

168. *See* BEHUNIAK & SVENSON, *supra* note 99, at 198-99. Based on the Controlled Substances Act, Ashcroft issued a decision that narcotics and other controlled substances may not be dispensed to assist in suicide. *See id.* If a physician prescribed a controlled substance for the purpose of assisted suicide, his or her license to prescribe medication would be suspended. *See id.* Ashcroft further expounded that the ruling was applicable regardless of whether the State statutorily allowed PAS. *See id.* Proponents of the legalization of PAS vehemently objected Ashcroft's ruling on the ground that the CSA was never intended to regulate medical practice; the CSA was promulgated to enforce laws against illegal drug abuse and drug trafficking. *See id.*

169. *See id.* at 170.

170. *See* Steinbrook, *supra* note 167, at 460. *See also* Michael C. Dorf, *Ashcroft v. Oregon: Telling the States What to do in Cases of Physician-assisted Suicide*, *available at* http://writ.news.findlaw.com/dorf/20011114.html (last visited Nov. 22, 2002). The federal Controlled Substances Act (CSA) is a 1970 law aimed at the prevention of drug abuse and illegal-drug trafficking. *See id.* The ruling by Ashcroft essentially reversed the previous ruling of the former Attorney General, Janet Reno. *See id.* Reno had previously ruled that the intention of the CSA was not to remove the states as the main regulators of medical practice. *See id.*

171. *See* Cordaro, *supra* note 112, at 2479.

172. *See* Dorf, *supra* note 170.

173. Oregon v. Ashcroft, 192 F.Supp.2d 1077, 1079 (Dist. of Or. 2002). The suit was based on the ground that the ruling of Ashcroft was an encroachment of the federal government "into the sovereign interests" of the state. *Id.*

174. *Id.*

175. *Id.* at 1093. *See also* BEHUNIAK & SVENSON, *supra* note 99, at 203. The Court decided the case based on statutory interpretation of the CSA and concluded that the CSA does not prohibit the dispensing of controlled substances by a physician in acquiescence with a prudent state statute. *See id.*

176. *Ashcroft*, 192 F.Supp.2d at 1079.

Directive."[177] Presently, the case is on appeal to the United States Court of Appeals for the Ninth Circuit.[178]

In addition to the federal government's attack on Oregon's DWDA, a class action lawsuit, *Lee v. Oregon*,[179] was filed by a group of terminally ill patients and their physicians against Oregon to enjoin the enforcement of the DWDA.[180] In *Lee*, the plaintiffs asserted that the DWDA violated their equal protection and due process rights under the Fourteenth Amendment of the United States Constitution, their freedom of religion and association rights under the First Amendment, and their legal rights contained within the Americans with Disabilities Act.[181] The Ninth Circuit Court of Appeals held that the plaintiffs lacked standing to initiate the lawsuit and, moreover, the lawsuit was not ripe for decision.[182] Hence, the case was dismissed and the DWDA became effective on October 27, 1997, giving Oregon's citizens the option of PAS.[183]

E. Oregon Statistical Information

Every year Oregon publishes a statistical report containing numerical data regarding the patients who have requested PAS and have taken the lethal prescriptions to hasten their death.[184] Since the DWDA's enactment in 1997, 129 patients have died from ingesting a lethal dose of medication prescribed

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177. *Id.*

178. *See* BEHUNIAK & SVENSON, *supra* note 99, at 203.

179. *See Lee*, 107 F.3d. at 1382-92.

180. *Id.* The district court held that the DWDA did violate the equal protection clause of the Fourteenth Amendment and ordered a permanent injunction against the enforcement of the Act. *See id.* The district court based its ruling on the ground that the DWDA did not provide sufficient safeguards to depressed patients who might be more apt to request PAS. *See id.* Thus, resulting in an unequal protection for those who are mentally ill as compared to those who are not. *See id.* In support of its decision, the district court pointed to the lack of requirement to refer a patient requesting PAS to a mental health specialist under the DWDA. *See id.* The Court also mentioned the problem of the somewhat arbitrary nature of determining the longevity of a terminal disease; the exact timetable of when a disease will progress to the stage of death can only be definitely determined by hindsight. *See Lee*, 107 F.3d. at 1382-92. Moreover, the Court was concerned with the fact that the DWDA did not include a provision for an oversight committee to review these decisions to grant requests. *See id. See also* HENDIN, *supra* note 93, at 170.

181. *Lee*, 107 F.3d at 1386.

182. *See id.* at 1391-92. The Court reasoned that the DWDA did not force the physicians to grant a patient's request with any threat of criminal punishment. *See id.* Therefore, the plaintiffs had not suffered any injury that could be remedied by the law. *See id.*

183. *See id.* at 1392.

184. *Fifth Annual Report on Oregon's Death with Dignity Act, available at* arresult.cfm (last visited Apr. 8, 2003) [hereinafter Oregon Report]. *See also* William McCall, Oregon Assisted Suicides More Than Double, *available at* http://story.news.yahoo.com/news?tmpl=story2& acid=541&u=/ap/20030305/ap_on_he_me/a (last visited Mar. 17, 2003). In 2002, thirty-eight terminally-ill patients in Oregon ended their lives by ingesting a lethal dose of medication. *See id.* This was double the number of patients that ended their lives by PAS in 1998. *See id.*

by a physician.[185] Approximately one out of six requests for PAS has been granted since the enactment of the DWDA, and approximately one out of ten requests has resulted in the hastening of death.[186]

Persons most likely to request PAS are divorced females who have a college education.[187] The majority of terminally ill patients who received a prescription for a lethal dose of medication were suffering from cancer.[188] Patients did not list pain as the main reason for requesting PAS.[189] In 2002, the principal motives for requesting PAS were: loss of autonomy (eighty-four percent); the lack of ability to participate in enjoyable activities (eighty-four percent); and losing control of certain bodily functions (forty-seven percent).[190] Only one patient who succumbed to death as the result of PAS in 2002 did have health insurance and ninety-two percent of patients were receiving treatment from a hospice program.[191] The majority of the physicians, who acceded to the request for PAS, were oncology specialists.[192]

F. The Culture and Attitude Toward PAS and Euthanasia in the United States

The majority of the American public endorses the legalization of PAS.[193] Surveys reveal that up to sixty percent of American physicians endorse

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185. *See* Oregon Report, *supra* note 184.

186. *Nine in 10,000 Oregonians Die by Assisted Suicide; Vulnerable Groups not Overrepresented*, 57(10) AM. J. HEALTH-SYS. PHARM. 932 (2000). After receiving palliative care, some patients, who had been given the lethal prescription, elected not to ingest the lethal dose of medication. *See id.*

187. *See Oregon's Death with Dignity Act, available at* http://www.ohd.hr.state.or.us/chs/pas/ar-tbl-1.htm (last visited Nov. 16, 2002). The numerical data is: sixty-two percent female; thirty-eight percent had their college degrees compared to fourteen percent who did not; thirty-three percent were divorced compared to fourteen percent who were not. *See id.*

188. *See* Oregon Report, *supra* note 184. Other diseases included: amyotrophic lateral sclerosis, chronic lower respiratory disease, AIDS, congestive heart failure, multi-system organ failure, scleroderma, Shy-Drager syndrome, and interstitial pulmonary disease with fibrosis. *See id.*

189. *See id.*

190. *See id.*

191. *See* Oregon Report, *supra* note 184. The remaining twenty-four percent of the patients that were not involved with hospice were offered hospice care and had refused. *See id.*

192. *See id.* The 2002 survey's numerical breakdown is: internal medicine (twenty-nine percent), oncologists (forty-five percent), family practitioners (twenty-four percent, and other (five percent). *See id.*

193. *See* Quill, *supra* note 43, at 552. Surveys over the past fifteen years show that two-thirds to three-fourths of the American public support assistance in death by physicians. *See id.* Moreover, the surveys provide evidence that Americans do not view PAS and voluntary euthanasia as morally distinct. *See id.* Quill suggests that these surveys may not be the accurate view of the public based on an inadequate understanding of the availability of hospice care and the right to refuse treatment. *See id. See also* Ezekiel J. Emanuel, *Euthanasia and Physician-Assisted Suicide: A Review of the Empirical Data From the United States*, 162(2) ARCH. OF INT. MED. 142-52. Those who oppose PAS and euthanasia tend to be Catholic faith or have a strong religious faith. *See id.*

PAS.[194] Although the majority of physicians approve PAS, only half of the physicians surveyed would personally provide PAS to their patients.[195] Surveys indicate that most physicians are much less likely to support the legalization of euthanasia as compared to PAS.[196] Unlike physicians, the American public does not distinguish between PAS and euthanasia.[197] Furthermore, the preeminent medical association of the United States, the American Medical Association (AMA), strongly opposes the legalization of PAS or euthanasia.[198]

A factor contributing to the resistance against the widespread legalization of PAS in the United States is the deterioration of the physician-patient relationship.[199] Before the industrial boom and the advent of modern technology, physicians were considered friends of the family; however, in modern American, this close relationship is no longer viable.[200] Today, "physicians tend to be strangers whom we are suspicious of rather than friends we can trust."[201] This new attitude has resulted in patients questioning the care provided by physicians as evidenced by a tremendous increase in medical malpractice lawsuits filed in the United States.[202]

The movement away from family practice physicians to specialists is another reason for the deterioration of the physician-patient relationship.[203] In the past, patients spent more time with one physician who treated the entire person.[204] Today, many physicians specialize in a particular field of medicine

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194. *See* Quill, *supra* note 43, at 552.

195. *See id.*

196. *See id.*

197. *See* Emanuel, *supra* note 193, at 145.

198. *See* AMA Official Website, *Euthanasia Policy* E-2.21 and *Physician-Assisted Suicide Policy* E-2.211, *available at* http://www.ama-assn.org/apps/pf_online/?f_n=browse&doc=policyfiles/CEJA/E... (last visited Nov. 25, 2002). The AMA is the predominant medical association in the United States. *See id.* "The involvement of physicians in euthanasia heightens the significance of its ethical prohibition." *Id.* The AMA recommends aggressive palliative care for end-of-life treatment. *See id.* "Physician-assisted suicide is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks." *Id. See also* HENDIN, *supra* note 93, at 149.

199. JAMES M. HOEFLER, DEATHRIGHT: CULTURE, MEDICINE, POLITICS, AND THE RIGHT TO DIE 76 (1994).

200. *See id.* Due to advances in industry and science, the interpersonal relationship between patient and physician declined steadily in the last century. *See id.* Instead of visiting patients in their homes, patients were required to travel to the physician's office. *See id.* This increased the volume of patients a physician could see per day; thus, increasing his or her salary. *See id.* Furthermore, with the advent of medical technology more patients were being treated at hospitals where the latest equipment could be used to diagnose disease. *See id.*

201. *See* HOEFLER, *supra* note 199, at 71.

202. *See id.* at 63.

203. *See id.* at 77.

204. *See id.*

resulting in patients seeing a variety of physicians for each medical ailment.[205] The following is a description of this new trend:

> Patients and specialists tend to be strangers almost by definition since patients only go to a specialist when first encountering a particular sort of disorder and stop going when the problem has been addressed. As a result, specialization cannot help but diminish and discount the interpersonal involvement between patient and physician.[206]

The decrease in physicians' personal involvement in the patient-physician relationship has led to decreased communication regarding a patient's health decisions over the duration of his or her life.[207] Thus, poor communication between patient and physician, especially in regard to end-of-life care, may result in patients not receiving adequate measures of comfort during the dying process.[208]

In addition to the advances in industry and science, the major changes in health insurance in the past twenty years have led to insurance companies

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205. *See id.* *See also* SULTZ & YOUNG, *supra* note 22, at 168. Seventy percent of the physicians in the United States are specialists. *See id.* Because of the high number of specialists, many Americans equate specialty medical treatment with higher quality of care. *See id.* In certain cases, this notion may be true. *See id.* However, in cases where a specialist is not needed, the cost of health care can be unnecessarily increased by the utilization of high-priced diagnostic tests. *See id.*

206. *See* HOEFLER, *supra* note 199, at 77.

207. *See id.*

208. *See* HENDIN, *supra* note 93, at 152-53. The American culture is preoccupied with economic growth, strength, and maintaining the vigor and attractiveness of youth. *See id.* This ideal leads people to disregard the thought of growing old, let alone contemplating one's own death. *See id.* This preoccupation is related to the modern day lack of connection with family and the egocentric nature of the modern American society. *See id.* Americans are now more likely to die in an institutional hospital setting rather than in the comfort of their homes surrounded by family members. *See id.* Thus, the United States has become an individualistic society that has moved away from the sense of connectedness to family and community. *See id.* A consequence of this loss of connectedness to family and community is that Americans have fewer emotional relationships. *See* HENDIN, *supra* note 93, at 152-53. Hence, the fear of death is strong in an individualistic society. *See id.* Therefore, when death occurs in one of these relationships, it is felt deeply and intensely. *See id.* *See also* Linda L. Emanuel, *A Question of Balance, in* REGULATING HOW WE DIE, *supra* note 3, at 247. *See also* HOEFLER, *supra* note 199, at 10. Before the twentieth century, "death was an accepted part of the life cycle that spanned the birth-death continuum." *Id.* at 11. The reasons given for this acceptance were that the culture was more farm-based and many households consisted of several different generations. *See id.* The sick were taken care of in the home by family members and died in the home surrounded by loved ones. *See id.* Along with the industrial revolution came employment outside of the family home and the relocation away from families to obtain these industrial jobs. *See id.* The author described the dying process by stating that "what has generally been an accepted phase of life for two millennia in most parts of the world has been transformed in the late-twentieth-century United States into a lonely, disconcerting, and disconnected process to be avoided at all costs." *Id.* at 27.

instructing physicians how to operate their practices and placing limits on monetary reimbursement for treatment.[209] To compensate for the decreased amount of remuneration received from insurance companies, physicians have increased their patient volume, thus, lessening the amount of time spent with each patient.[210] Furthermore, private insurance companies that govern the United States health care system have led to a consumer approach to medical treatment where patients "shop around" for physicians who accept their insurance.[211] Due to physician "shopping," most Americans have contact with several physicians throughout their lifespan and do not receive the comprehensive care needed to facilitate a good life and a good death.

The modern approach to medical care in the United States has resulted in many citizens not being able to afford health insurance.[212] As of 2001, approximately forty million Americans were not covered by health insurance.[213] Lack of insurance leads to less availability of necessary medical treatment to those patients who likely need it the most, such as terminally ill patients not receiving sufficient care at the end of life.[214] Hence, the

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209. *See* SULTZ & YOUNG, *supra* note 22, at 188-95. Reform concerning how health care is financed and delivered has changed dramatically in the last century. *See id.* In the early 1900s Americans paid health related expenses out-of-pocket. *See id.* During the New Deal era the financing of health care moved rapidly away from this source of payment to government programs and private insurers. *See id.* In the 1960s the federal government became heavily involved in the financing of health care by the promulgation of Medicare and Medicaid insurance regulation for the poor and aged. *See id.* By the 1970s, fee-for-service financing of health care was the predominant model. *See id.* Fee-for-service paid for each medical service provided by the physician or hospital, thus, promoting the overuse of services that may not have been essential for treatment. *See id.* at 190. Along with fee-for-service financing, the explosion in medical technology in the 1970s added to the rising costs of health care. *See* SULTZ & YOUNG, *supra* note 22, at 190. Furthermore, American workers utilized the health care system unabashedly with no regard to cost containment. *See id.* Beginning in the mid 1970s, the U.S. health system started to move rapidly toward the model of managed care in an attempt to restrict the out-of-control costs of health care. *See id.* Under the managed care model of health care finance, "providers are paid in advance a preset amount for all the services their insured population is projected to need in a given time period." *Id.* If the physician exceeds the amount allotted for services, he or she suffers a financial loss. *See id.*

210. *See* HOEFLER, *supra* note 199, at 226.

211. *See id.*

212. *See id.*

213. *See* SULTZ & YOUNG, *supra* note 22, at 22-23. Before managed care, many physicians would accept patients without insurance or unable to pay for services. *See id.* at 22-25. The physicians could provide care for these patients because they could spread the cost of treatment to their insured patients by increasing the amount of fees charged to the insurance companies. *See id.* Currently, many physicians refuse to provide care to these patients, because the physicians are no longer compensated for their services. *See id.; see also* Quill, *supra* note 43, at 552; *see also* Susan M. Wolf, *Facing Assisted Suicide and Euthanasia in Children and Adolescents, in* REGULATING HOW WE DIE, *supra* note 3, at 108. The United States is the only developed country that does not provide all citizens with health care coverage. *See id.*

214. *See* Quill, *supra* note 43, at 552. Limited access to "preventive care, emergency care, hospitalization, long-term care, and hospice" provides sub-optimal treatment to patients. *Id.* Persons who are not covered by insurance include the indigent, disabled, and the elderly. *See id.* Many times these are the exact groups who require greater medical attention based on other

diminished levels of patient-physician communication and progressive changes in health care delivery in the United States has resulted in many Americans not receiving adequate care during the dying process.

IV. HISTORY OF PHYSICIAN-ASSISTED SUICIDE AND EUTHANASIA IN THE NETHERLANDS

A. The Last Twenty Years of Case Law

Until the Netherlands' TLRASA became effective on April 1, 2002, case law legalized PAS and euthanasia.[215] Before the TLRASA was enacted, euthanasia and PAS were illegal under the Dutch Criminal Code (Code).[216] Although illegal, three theories were employed to legitimize assisted suicide and euthanasia against the legal implications of criminal liability under the Code.[217] First, a defendant could contend that he or she was "compelled by an overpowering force to put the welfare of his patient above the law," otherwise known as *force majeure* or *overmacht*.[218] Second, a defendant could assert that the Code simply does not apply to physicians.[219] Third, an argument could be made that the defendant's behavior may have violated the letter of the law but not the purpose of the law, otherwise known as the doctrine of "absence of substantial violation of the law."[220]

One of the first cases dealing with euthanasia in the Netherlands, *Postma*,[221] was decided in 1973.[222] In *Postma*, a physician injected her mother

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socioeconomic factors. *See id.*

215. Ezekiel J. Emanuel, *Euthanasia: Where the Netherlands Leads Will the World Follow?*, 322(7299) BRIT. MED. J. 1376, 1377 (2001).

216. THE AMERICAN SERIES OF FOREIGN PENAL CODES, THE DUTCH PENAL CODE 200 (Louise Rayar & Stafford Wadsworth trans., 1997) [hereinafter DUTCH PENAL CODE]. *See also* INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS 313 (Jeroen Chorus et al. eds., 1993). The Dutch employ a national penal code that has its roots in the French Code Penal. *See id.*

217. *See* DUTCH PENAL CODE, *supra* note 216, at 200; *see also* GRIFFITHS, *supra* note 26, at 308 (quoting Articles 293 and 294 of the Dutch Penal Code). "A person who takes the life of another person at that other person's express and earnest request is liable to a term of imprisonment of not more than twelve years . . . ." *Id.* "A person who intentionally incites another to commit suicide, assists in the suicide of another, or procures for that other person the means to commit suicide, is liable to a term of imprisonment of not more than three years . . . ." *Id.* The Code did provide a defense of justification or necessity. *See id.* at 307. "A person who commits an offense as a result of a force he could not be expected to resist . . . is not criminally liable." *Id.*

218. *See* HENDIN, *supra* note 93, at 47. *See also* GRIFFITHS, *supra* note 26, at 99.

219. *See* GRIFFITHS, *supra* note 26, at 61. This defense is called the "medical exception" argument. *Id.*

220. *Id.*

221. Postma, Netherlandse Jurisprudentie 1973, no. 183: 558, *cited in* GRIFFITHS, *supra* note 26, at 51-53.

222. *See id.* The physician's mother was a seventy-eight year old widow who was residing in a nursing home after suffering a stroke that resulted in left-sided paralysis. *See id.* On many occasions, the physician's mother requested her daughter's assistance in death. *See id.* The

with an overdose of morphine[223] for the purpose of assisting her mother in death.[224] Although the District Court in Leeuwarden found the physician guilty of killing on request, it adopted conditions as to when it is permissible for a physician to provide a patient with an amount of pain medication that could possibly result in the hastening of his or her death. The permissible conditions adopted were: when a patient is suffering from an incurable illness;[225] when the patient is inflicted with unbearable mental or physical suffering;[226] when the patient has made a written request for termination of his or her life; and when the treating physician is the person who complies with the request.[227] In addition to this decision, the Royal Dutch Medical Association (KNMG)[228] announced in the same year that, "euthanasia should remain prohibited under Article 293,[229] but that combating pain and discontinuing futile treatment could be justified, even if the patient dies as the result of the act or omission."[230]

In 1981, the Rotterdam District Court decided the *Wertheim* case.[231] *Wertheim* set forth that physicians must comply with certain criteria in order for assisted suicide to be justifiable under Article 294[232] of the Code.[233]

Medical Inspector testified at court of the acceptable conditions under which a physician could provide a dose of pain medication that could possibly hasten the patient's death. *See id.* The District Court accepted all of the conditions except the requirement that the patient be in the "dying phase" of his or her illness. *See Postma*, 1973, no. 183: 558, *cited in* GRIFFITHS, *supra* note 26, at 51-53. Because the physician gave the injection of morphine with the purpose of immediately terminating her mother's life instead of for palliative care, the Court found the physician guilty of killing on request. *See id.* The physician was given a sentence of one week in jail and one year probation. *See id. See also* Jocelyn Downie, *The Contested Lessons of Euthanasia in the Netherlands*, 8 HEALTH L. J. 119, 120-22 (2000).

223. DAVIS'S DRUG GUIDE FOR NURSES 797 (3rd ed. 1993). Morphine is a narcotic analgesic that causes respiratory depression when an overdose is given. *See id.*

224. *See Postma*, 1973, no. 183: 558, *cited in* GRIFFITHS, *supra* note 26, at 51-53.

225. *See id.*

226. *See id.*

227. *See id.*

228. *See* GRIFFITHS, *supra* note 26, at 5. The KNMG is the predominant medical association of physicians in the Netherlands. *See id.*

229. *See* DUTCH PENAL CODE, *supra* note 217, 200; *see also* GRIFFITHS, *supra* note 26, at 308 (quoting the Dutch Penal Code).

230. *Physician-assisted Suicide and Euthanasia in the Netherlands: A Report to the House Judiciary Subcommittee on the Constitution*, 14 ISSUES IN LAW & MED. 301 (1998).

231. Wertheim, Netherlands Jurisprudentie 1982, no. 63: 223, *cited in* GRIFFITHS, *supra* note 26, at 58-60.

232. *See* DUTCH PENAL CODE, *supra* note 217, at 200; *see also* GRIFFITHS, *supra* note 26, at 308 (quoting the Dutch Penal Code).

233. *See Wertheim*, 1982, no. 63: 223, *cited in* GRIFFITHS, *supra* note 26, at 58-60. The woman assisted with suicide was sixty-seven years old, suffering from numerous physical and mental inflictions, and had previously made several statements concerning her desire for death. *See id.* The woman had requested assistance from her physician; however, he refused and referred her to the activist. *See id.* After meeting with the woman on more than one occasion, the activist agreed to assist her in death. *See id.* The District Court concluded that the activist did not comply with the criteria it set forth to provide assistance with suicide and found her in violation of Article 294 of the Code. *See id.* The activist received a six-month jail term and one

Wertheim involved a voluntary-euthanasia activist who assisted a woman with suicide after the woman's physician had refused to do so.[234] The activist's defense was duress caused by the woman's persistent yearning for death.[235] Although the activist was found guilty, the District Court adopted standards for justifiable assisted suicide in regard to Article 294 of the Code, which included:

> [T]he physical or mental suffering of the person was such that he experiences it as unbearable; this suffering as well as the desire to die were enduring; the decision to die was made voluntarily; the person was well informed about his situation and the available alternatives, was capable of weighing the relevant considerations, and had actually done so; there were no alternative means to improve the situation; the person's death did not cause others any unnecessary suffering.[236]

The Court further concluded that justifiable assisted suicide requires: 1) the decision to provide assistance must be made by more than one person;[237] 2) the decision-making process must involve a physician, and he or she must decide the manner which is employed to bring about death;[238] 3) "the decision to give assistance and the assistance itself must exhibit the utmost care."[239]

In 1984, another important euthanasia case, *Schoonheim*, was decided.[240] In *Schoonheim*, a physician administered a lethal injection to a ninety-five year old woman to terminate her life.[241] The Netherlands Supreme Court concluded

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year probation. *See id.*

234. *See Wertheim,* 1982, no. 63: 223, *cited in* GRIFFITHS, *supra* note 26, at 58-60.

235. *See id.*

236. *See* GRIFFITHS, *supra* note 26, at 59.

237. *See Wertheim,* 1982, no. 63: 223, *cited in* GRIFFITHS, *supra* note 26, at 58-60.

238. *See id.*

239. *See id.* The patient is provided "Utmost care" if he or she is in the terminal phase of his or her illness and the physician discusses the patient's treatment with another physician or, if the patient is not in the terminal phase, he or she is referred to a mental health clinician. *See id. See also* Downie, *supra* note 222, at 122.

240. Schoonheim, Nederlandse Jurisprudentie 1985, no. 106, *cited in* GRIFFITHS, *supra* note 26, at 62-65. This was the first case of euthanasia to come before the Supreme Court of the Netherlands. *See id.* In this case, the ninety-five year old woman was mentally competent, but had many physical afflictions that had left her bedridden and decreased her vision, speech, and hearing. *See id.* Furthermore, the woman had made repeated statements to her physician in regard to her suffering and had asked the physician to perform euthanasia on numerous occasions. *See id.* In the short period before her death, the woman's health declined rapidly, and she once again asked for help in terminating her life. *See id.* After the physician had consulted with his assistant and the woman's family members, he acceded to the request for euthanasia. *See id.* The physician then reported himself to the police. *See Schoonheim,* 1985, no. 106, *cited in* GRIFFITHS, *supra* note 26, at 62-65. *See also* Downie, *supra* note 222, at 123-24.

241. *See Schoonheim,* 1985, no. 106, *cited in* GRIFFITHS, *supra* note 26, at 62-65. *See also* Downie, *supra* note 222, at 123-24.

that the lower court did not sufficiently consider the *overmacht* defense[242] for necessity and referred the case back to another appellate court.[243] The Appellate Court then determined that the physician's defense of necessity was appropriate.[244] Thus, the physician was acquitted of the crime of euthanasia.[245] Moreover, the decision of the Court firmly established the defense of justification or necessity.[246]

Soon after the *Schoonheim* case was decided, the KNMG published its official position on euthanasia.[247] The KNMG's position closely coincided with the decisions of the courts.[248] The KNMG set forth guidelines for physicians performing euthanasia or PAS that included: 1) the request must be voluntary; 2) the patient must carefully consider such a request; 3) the desire for death must be firm; 4) the patient has "unacceptable suffering;" and 5) the physician has discussed the request with another physician who affirms the planned euthanasia.[249]

Admiraal was the first case to confirm that a physician may not be held criminally liable for performing euthanasia as long as he or she complies with the KNMG's guidelines.[250] In *Admiraal*, the physician, after complying with

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242. *See Schoonheim*, 1985, no. 106, *cited in* GRIFFITHS, *supra* note 26, at 62-65.

243. *See id.* The Court did reject the "no substantial violation of the law" theory; however, the Court wanted the necessity theory of *overmacht* analyzed more thoroughly. *Id.* The Supreme Court's reasoning in its decision included an analysis of the patient's "unbearable suffering," lack of dignity, the ability to die with dignity, and the consideration of alternatives to euthanasia. *See id.*

244. *See id.*

245. *See id.*

246. Pols, Nederlandse Jurisprudentie 1987, no. 607, *cited in* GRIFFITHS, *supra* note 26, at 63-64. This case involved a psychiatrist who assisted a friend with suicide at the friend's request. *See id.* The Supreme Court rejected the psychiatrist's defense of "medical exception" and held that the necessity defense to euthanasia was not intended as a sole exception applicable to physicians. *See id.* However, the Court, as it did in the *Schoonheim* case, disagreed with the lower court's refusal to allow the defense of *overmacht* in regard to necessity and referred the case back to another court of appeals for further analysis. *See id.* The Court of Appeals rejected the defense of necessity based on the grounds that the psychiatrist did not consult with any other physician before performing euthanasia, and moreover, the relationship with the woman extended beyond that of doctor-patient. *See id.*

247. *See* Keown, *supra* note 58, at 261. The official opinion regarding permissible euthanasia was published in 1984. *See id.*

248. *See id.*

249. *See* Pieter Admiraal, *Voluntary Euthanasia: The Dutch Way, in* DEATH, DYING AND THE LAW, *supra* note 25, at 114.

250. Admiraal, Nederlandse Jurisprudentie 1985, no. 709, *cited in* GRIFFITHS, *supra* note 26, at 66-67. The patient, who the physician assisted in death, resided in a nursing home and totally depended on others for her care. *See id.* She had asked the physician at the nursing home for his assistance with euthanasia but he refused. *See id.* After the patient was referred to Admiraal, she informed him on more than one occasion of her suffering. *See id.* Admiraal discussed the plan for euthanasia with his colleagues before complying with the request. *See id.* During the trial, the prosecution argued that Admiraal failed to meet the guideline of consulting another physician because he did not contact a neurologist having the special expertise in the area of multiple sclerosis. *See id.* The District Court disagreed and held that by consulting his colleagues, Admiraal had met the consultation requirement. *See Admiraal,*

the KNMG's criteria, provided euthanasia to a woman suffering from multiple sclerosis.[251] Because the physician followed the KNMG's guidelines, he was acquitted.[252] This decision was further strengthened when the Minister of Justice informed the KNMG that physicians who acted in accordance with the "Requirements of Careful Practice" would not be criminally prosecuted for the crime of euthanasia.[253]

Another case that implemented the KNMG's guidelines was *Chabot*.[254] In *Chabot*, a psychiatrist supplied PAS to a patient inflicted only with psychological ailments.[255] Once again, the Netherlands Supreme Court confirmed that assisted suicide and euthanasia could be justified by proving *overmacht*.[256] In addition, the Court verified that a patient with only mental suffering might receive assistance in death by euthanasia or PAS if the KNMG's standards were followed.[257] Nonetheless, the physician was convicted of assisted suicide because he failed to have the patient independently examined by another physician.[258] Thus, the Court drew a line between physical and mental suffering by suggesting that if a person is only inflicted with mental agony, then a mere discussion with another colleague is not enough to satisfy the KNMG's guidelines.[259]

In 1995 and 1996, two similar cases, *Prins*[260] and *Kadijk*,[261] were presented to the Dutch courts regarding the assistance in death of two newborn infants, both inflicted with severe anomalies.[262] Due to the infants' suffering

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1985, no. 709, *cited in* GRIFFITHS, *supra* note 26, at 66-67.

251. *See id.*

252. *See id.*

253. *See Admiraal*, 1985, no. 709, *cited in* GRIFFITHS, *supra* note 26, at 66-67. *See also* Downie, *supra* note 222, at 124.

254. Chabot, Nederlandse Jurisprudentie 1994, no. 656, *cited in* GRIFFITHS, *supra* note 26, at 80-82. *See also* Downie, *supra* note 222, at 125-26.

255. *See Chabot*, 1994, no. 656, *cited in* GRIFFITHS, *supra* note 26, at 80-82. The woman provided euthanasia was fifty years old and had gone through repeated traumatic events regarding the loss of family members and divorce. *See id.* She had previously sought psychiatric treatment without results and had once before attempted suicide. *See id.* The woman's official diagnosis was "an adjustment disorder" and depression. *See id.* After several meetings with this woman and numerous consultations with colleagues, Dr. Chabot found that her suffering was intense, enduring over a long period of time, "unbearable" to her, and she had no hope for recovery. *See id. See also* Downie, *supra* note 222, at 125-26.

256. *See Chabot*, 1994, no. 656, *cited in* GRIFFITHS, *supra* note 26, at 80-82.

257. *See id.*

258. *See id.* Although the physician was convicted, he did not receive any punishment. *See id.*

259. *See Chabot*, 1994, no. 656, *cited in* GRIFFITHS, *supra* note 26, at 80-82. *See also* Downie, *supra* note 222, at 126.

260. Prins, Nederlandse Jurisprudentie 1995, no. 602, *cited in* GRIFFITHS, *supra* note 26, at 83-84. *See also* Downie, *supra* note 222, at 126.

261. Kadijk, Tijdschrift voor Gezondheidsrecht 1996, no. 35, *cited in* GRIFFITHS, *supra* note 26, at 83-84. *See also* Downie, *supra* note 222, at 126-27.

262. *See* MOSBY'S DICTIONARY, *supra* note 40, at 69. The definition of anomaly is a "deviation from what is regarded as normal; a congenital malformation, such as the absence of a limb or the presence of an extra finger." *Id.*

and no chance of survival, the parents requested euthanasia from the physicians.[263] Thus, in both cases, the physicians performed euthanasia on patients who had not specifically requested it.[264] Both District Courts accepted the defense of necessity and both physicians were acquitted.[265] The *Prins* court based its decision on the grounds that certain guidelines are to be met in such a situation.[266] The guidelines include:

> [T]he baby's suffering had been unbearable and hopeless, and there had not been another medically responsible way to alleviate it; both the decision-making leading to the termination of life and the way in which it was carried out had satisfied the 'requirements of careful practice;' the doctor's behavior had been consistent with scientifically sound medical judgment and the norms of medical ethics; termination of life had taken place at the express and repeated request of the parents as legal representatives of the newborn baby.[267]

Thus, based on these two cases, the door opened in the Netherlands for the occurrence of involuntary euthanasia.[268]

B. Termination of Life on Request and Assisted Suicide (Review Procedures) Act

The above cases and guidelines shaped the history of the Netherlands' legalization of PAS and euthanasia.[269] The case law outlined the defense of justification for physicians who elected to provide euthanasia or assisted suicide but did not set forth that patients have a right to PAS and euthanasia.[270] This changed in April 2002, when the Netherlands' TLRASA became

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263. *See Kadijk,* 1996, no. 35 and *Prins,* 1995, no. 602, *cited in* GRIFFITHS, *supra* note 26, at 83-84. *See also* Downie, *supra* note 222, at 126. In both cases, the physicians complied with the requests after consultation with other colleagues. *See id.*

264. *See Kadijk,* 1996, no. 35 *and Prins,* 1995, no. 602, *cited in* GRIFFITHS, *supra* note 26, at 83-84. *See also* Downie, *supra* note 222, at 126.

265. *See Kadijk,* 1996, no. 35 *and Prins,* 1995, no. 602, *cited in* GRIFFITHS, *supra* note 26, at 83-84. *See also* Downie, *supra* note 222, at 126.

266. *See Kadijk,* 1996, no. 35 *and Prins,* 1995, no. 602, *cited in* GRIFFITHS, *supra* note 26, at 83-84.

267. *See* GRIFFITHS, *supra* note 26, at 83.

268. *See id.*

269. *See id.*

270. *See id.* at 107. Because the Netherlands case law created a justification for physicians to perform euthanasia, "the patient, even when his [or her] case [met] all of the legal requirements, [had] no 'right' to euthanasia." *Id.*

effective.[271] The TLRASA codified the Netherlands case law and the KNMG's guidelines, in effect giving Dutch citizens the right to request PAS and euthanasia.

The TLRASA allows a physician to assist a patient, who has attained the age of twelve years and is "deemed capable of making a reasonable appraisal of his own interests,"[272] with suicide or perform euthanasia provided that he or she follow certain guidelines referred to as "due care criteria." [273] To comply with the criteria, the physician must be satisfied that: 1) the patient's suffering is "unbearable, and . . . there [is] no prospect of improvement;"[274] 2) the patient's request was made voluntarily after careful consideration and;[275] 3) based on the patient's situation, no "reasonable alternative" is available.[276] In addition to the above criteria, the physician must inform the patient "about his situation and his prospects"[277] and refer the patient to another physician who is required to write an opinion based on the above criteria.[278]

After a physician provides a patient with PAS or euthanasia, he or she is required to complete a comprehensive report regarding compliance with the "due care criteria" and notify the municipal pathologist.[279] The report is then forwarded to a regional review committee for an assessment of whether the physician followed the "due care criteria."[280] If the committee concludes that the physician did not follow the criteria, they notify the Board of Procurators General of the Public Prosecution Service for the purposes of a criminal investigation.[281] If a physician does not meet the "due care criteria" as set

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271. *See* TLRASA § 1-24, *available at Ministry of Foreign Affairs-The Netherlands*, http://www.minbuza.nl/english/Content.asp?Key=416729&Pad=400025,257588,257609 (last visited Nov. 1, 2002).

272. *Id.* § 2(2)-(4). The Act sets forth: 1) if the patient requesting PAS or euthanasia is between the ages of twelve and sixteen, his or her parents or guardian must *agree* to the termination of life; 2) if the patient is between the ages of sixteen and eighteen, his or her parents or guardian must be *consulted*. *See id.* Moreover, if the patient is sixteen or older and "no longer capable of expressing his [or her] will," PAS or euthanasia can be provided if before reaching this "state," he or she was "capable of making a reasonable appraisal of his [or her] own interest" and had made a written request for such termination of his [or her] life. *Id.*

273. *See id.* § 2(1)(a)-(f). *See also* The Netherlands Penal Code Art. 293(2), *available at* http://www.minbuza.nl/english/Content.asp?Key=416729&Pad=400025,257588,257609 (last visited Nov. 22, 2002). The Code sets forth that PAS or euthanasia is not an offense if the physician follows the "due care criteria" and files a report with the municipal pathologist. *See id.*

274. *See* TLRASA § 2(1)(b).

275. *See id.* § 2(1)(a).

276. *See id.* § 2(1)(d).

277. *Id.* § 2(1)(c).

278. *See id.* § 2(1)(e).

279. *See id.* § 7(2).

280. *See* TLRASA § 3(1); *see also id.* § 8(1). Along with the report, the committee may ask the physician to provide additional information either orally or in writing to aid in the assessment of the physician's conduct. *See id. See also id.* § 8(2).

281. *See id.* § 9(2)(a).

forth in the TLRASA, he or she can be held criminally liable and imprisoned for up to twelve years.[282]

C. *Netherlands Statistical Information*

The government of the Netherlands supported two national surveys performed in 1990 and 1995, concerning PAS and euthanasia.[283] In 1990, 1.8% or 2300 of all deaths in the Netherlands were the result of euthanasia and 0.3% or 400 deaths were the result of PAS.[284] In 1995, 2.4% or 3200 of all deaths were caused by euthanasia and 0.3% or 400 deaths were caused by PAS.[285] Probable reasons for the increase in the number of euthanasia cases from 1990 to 1995 were the rising number of elderly, higher average age at death, the advance of medical technology, and a higher number of cancer cases resulting in death.[286] Additionally, the number of accepted euthanasia and PAS requests increased from thirty percent in 1990 to thirty-seven percent in 1995.[287] The authors of the studies attributed the increase in requests for PAS and euthanasia to the evolving societal climate of young persons who were more likely to request PAS or euthanasia.[288]

Like the Oregon survey, pain was not the first indicator of a request for PAS or euthanasia.[289] In 1990, the predominant reasons for requesting PAS or euthanasia were loss of dignity (fifty-seven percent), pain (forty-six percent), "unworthy dying" (forty-six percent), the desire not to be dependent on others (thirty-three percent), and "tiredness of life" (twenty-three percent).[290] Cancer was the most likely underlying disease of the patients requesting PAS or euthanasia.[291] Moreover, more women than men received PAS or euthanasia.[292]

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282. *See* The Netherlands Penal Code art. 293(1).

283. *See* GRIFFITHS, *supra* note 26, at 207. The two surveys include: Van der Maas, Van Delden & Pijnenborg 1992 and Van der Wal & Van der Maas 1996. *See id. See also* Angell, *supra* note 2, at 1676. A commission was appointed in 1990 by the Dutch Government to determine the statistical information related to the practices of PAS and euthanasia. *See id.* Professor Jan Remmelink, the attorney general of the Dutch Supreme Court, was chosen to supervise the study. *See id.*

284. *See* GRIFFITHS, *supra* note 26, at 210.

285. *See id.*

286. *See id.* at 211.

287. *See id.*

288. *See id.*

289. Paul J. Van der Maas et al., *Euthanasia and Other Medical Decisions Concerning the End of Life*, 338 LANCET 669, 672 (1991).

290. *See id.*

291. *See* GRIFFITHS, *supra* note 26, at 224. In the 1995 survey, eighty percent of patients who received PAS or euthanasia were suffering from cancer. *See id.*

292. *See id.* at 223. In the 1995 survey fifty-five percent of those who received PAS or euthanasia were women. *See id.*

Furthermore, both studies collected data on the number of deaths caused by euthanasia without the patients' request.[293] The data revealed that in 1990, 0.8% or 1000 deaths in the Netherlands were the result of euthanasia without the patients request, and in 1995, 0.7% or 900 deaths occurred by euthanasia absent patient request.[294] The authors of the 1990 study analyzed the circumstances surrounding involuntary euthanasia.[295] In most of the cases, the physician had previously discussed euthanasia with the patient and the patient had stated his or her desire for such treatment if suffering became unacceptable.[296] The majority of the patients were near death and experiencing an extreme amount of suffering.[297] Moreover, the physician consulted the patient's family before performing euthanasia.[298]

D. The Culture and Attitude Toward PAS and Euthanasia in the Netherlands

Historically, the Dutch have been known for their liberal views and tolerance.[299] In the 1960s, the social revolution made its impact on the Dutch culture.[300] Secularism became the dominant power in society.[301] No longer did most of the population look to the Dutch Reformed Church and the Roman Catholic Church for guidance.[302] The Dutch embraced the idea of personal

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293. *See* SMITH, *supra* note 65, at 100-01. Opponents suggest that physicians provide euthanasia to patients that have not explicitly asked for assistance in death because they feel comfortable in a legal system that allows them to "kill." *See id.*; *but c.f.*, GRIFFITHS, *supra* note 26, at 226-27. Proponents contend that physicians provide euthanasia to patients without their explicit request based on a long-standing relationship with that person. *See id.* This relationship allows the physician to understand what assistance the patient would desire. *See id.*

294. *See* GRIFFITHS, *supra* note 26, at 210.

295. *See* Van der Maas, *supra* note 289, at 672.

296. *See id.* The patient then usually experienced deterioration in health due to the underlying illness and was no longer able to communicate with the physician. *See id.; see also* GRIFFITHS, *supra* note 26, at 225.

297. *See* Van der Maas, *supra* note 289, at 672. *See also* GRIFFITHS, *supra* note 26, at 225.

298. *See* Van der Maas, *supra* note 289, at 672.

299. *See* Hendin, *supra* note 59, at 223. In the sixteenth and seventeenth centuries, the Dutch battled to secure their religious freedom. *See id.* The Netherlands provided a home for "Jews, Catholics, and free thinkers." *Id.* During this same time period, the Dutch became a major force of the seafaring trade. *See id.* Thus, acceptance of several cultures and customs was required for the country to excel in the world of maritime trading. *See id.* Today, diversity in the Netherlands is manifested by the existence of fifty different religions and twenty-five different political parties existing within its boundaries. *See id.*

300. *See* Hendin, *supra* note 59, at 223.

301. *See id.* The Dutch are known for their liberal attitudes toward prostitution, drug use, and pornography. *See id.*

302. *See* HENDIN, *supra* note 93, at 137. The Dutch Reformed Church and the Catholic Church were both the result of Dutch Calvinism. *See id.* The school of thought of Calvinism was that one should live a simple life, be dedicated to work, deny any form of pleasure, and find redemption in suffering. *See id.*

autonomy and pleasure over pain.[303] Thus, this social and cultural climate created a fertile foundation for the topic of euthanasia and PAS to be openly discussed and debated by the general public, physicians, and politicians.[304]

Since the 1970s, opinion polls in the Netherlands have shown that the majority of Dutch citizens approve euthanasia and PAS.[305] Most Dutch religious and political affiliations also support the legalization of euthanasia and PAS.[306] Moreover, Dutch physicians have been at the forefront of the legalization movement regarding PAS and euthanasia.[307] In support of this contention, the KNMG stated in its report of 1984 that it "considered euthanasia to be a fact of life," and the issue of euthanasia should be regarded as appropriate between physician and patient.[308] Furthermore, Dutch physicians and patients prefer euthanasia over PAS, because once the patient and physician determine that assistance in death is appropriate, physicians feel it is their personal responsibility to fulfill the request in an ethical manner that does not permit the possibility of adverse events.[309] Additionally, Dutch physicians do not distinguish between euthanasia and PAS, because both acts are intended to result in hastening the patient's death.[310]

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303. *See* Hendin, *supra* note 59, at 223.

304. *See generally* GRIFFITHS, *supra* note 26, at 50.

305. *See id.* at 199. Both Dutch men and women have an equally positive opinion regarding the legalization of PAS and euthanasia. *See id.* A small gap does exist between the older and younger generations being that the elderly have less favorable opinions toward euthanasia. *See id.*

306. *See id.* The majority of support for euthanasia comes from those without any religious affiliation. *See id.* However, Catholics also show a high support of euthanasia. *See* GRIFFITHS, *supra* note 26, at 199. The Humanist Society asserted that "the law should allow room for doctors to give support in the dying process in accordance with medical professional standards." *See id.* at 55. The Dutch political party, VVD, supported PAS and euthanasia being allowed as long as the patient made a careful, deliberate request for such assistance. *See id.* at 55.

307. *See id.* at 304. *See also* Pierson, *supra* note 22, at 309. The predominant medical society in the Netherlands, the KNMG, was highly visible in the movement toward legalizing euthanasia in the Netherlands. *See id.* The judicial system and the KNMG worked closely together to create the guidelines surrounding euthanasia. *See id.* This was evidenced by the many court decisions that adopted the guidelines set forth by the KNMG regarding euthanasia. *See id.*

308. *See* GRIFFITHS, *supra* note 26, at 65-66.

309. *See id.* at 111. Euthanasia provides a forum where the physician has control of the medication and is present in the case of any untoward side effect, such as vomiting, as compared to PAS where the physician may not be in attendance to correct any unexpected events. *See generally id.* at 113.

310. *See* Emanuel, *supra* note 193, at 145.

Health insurance is available to nearly all citizens of the Netherlands.[311] Medical costs are considered "normal" or "exceptional."[312] "Normal" medical costs include: "[h]ospitalization and medical care by specialists, the services of GPs [general practitioners], paraprofessional services such as physical therapy, speech therapy, midwifery and dental care for the youth . . . ."[313] "Exceptional" medical costs are equated with long-term care or expensive medical treatment.[314] Both "normal" and "exceptional" medical costs are covered by a national health insurance plan.[315] Thus, all Dutch citizens enjoy the benefit of adequate medical treatment without the worry of treatment being too expensive or financially burdensome.[316]

To promote continuity of care, the Dutch health care system registers every citizen with a General Practitioner (Practitioner).[317] The Practitioner has significant contact with his or her patients because the patient must see the Practitioner before being referred to a specialist or to a hospital.[318] Moreover, the Practitioner usually provides care to an entire family, and seventeen percent of the visits between patient and physician occur in the patients' homes.[319] Studies reveal that in the majority of cases involving euthanasia, a Practitioner was the physician who administered the lethal medication.[320] Moreover, most Dutch citizens die at home in the presence of their Practitioner.[321] Hence, the continuity of care in the Netherlands supplies Dutch citizens with the opportunity of developing a long-term relationship with their physician.[322] This long-term relationship promotes good patient-physician

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311. *See* GRIFFITHS, *supra* note 26, at 31-35. All Dutch citizens are provided coverage under this national program. *See id.* For those that are not covered by the public health insurance programs (approximately thirty-five percent of the Dutch population), private health insurance is available under a standard package similar to the public program. *See id.* Dutch citizens pay approximately ten percent of their health-care costs out-of-pocket. *See id.* The government pays another ten percent. *See id.* "The remaining [eighty percent] is covered by insurance premiums, of which [sixty-five percent] are in the context of the public health insurance scheme and [fifteen percent] are for private insurance." *Id.* at 32.

312. *See* GRIFFITHS, *supra* note 26, at 31-32. A national health insurance program also covers "normal" medical costs; however, this coverage is only available to those who earn less than a specified amount of income per year, such as elderly patients and persons receiving social security. *See id.*

313. *Id.*

314. *See id.* A national health insurance program covers these "exceptional" medical costs. *See id.* Expensive medical treatment includes: "long-term residential and nursing care for the elderly, comprehensive psychiatric care, home-based care, and comprehensive care for the physically and mentally handicapped." *Id.* at 31.

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

316. *See generally* GRIFFITHS, *supra* note 26, at 31-32.

317. *See id.*

318. *See id.* at 36-37. "The impact of gatekeeping is reflected in the low referral rate: 90% of all complaints are treated by GPs." *Id.*

319. *See id.* at 31-35.

320. *See id.*

321. *See* Pierson, *supra* note 22, at 309.

322. *See generally* GRIFFITHS, *supra* note 26, at 36-37.

communication that likely results in discussions regarding end-of-life decisions.[323]

V. COMPARISON OF THE UNITED STATES AND THE NETHERLANDS

A. Oregon's Objective DWDA v. Netherlands Subjective TLRASA

Problems facing both Oregon and the Netherlands in drafting the DWDA and TLRASA, respectively, were how to establish who is eligible for PAS and/or euthanasia and where the determining line should be drawn.[324] Both countries agree that a possibility of the "slippery slope" exists and safeguards must be implemented to protect against selective termination of vulnerable groups of people.[325] The TLRASA and DWDA have some similarities; however, the Netherlands has drawn a subjective line in deciding who should receive PAS and euthanasia, whereas Oregon has drawn an objective line.[326]

A major difference between the DWDA and the TLRASA is that the DWDA only allows PAS and strictly prohibits euthanasia,[327] whereas the TLRASA allows both PAS and euthanasia.[328] One reason for this difference may be related to the cultivation of the two statutes.[329] In the United States, patients instigated the movement toward legalized PAS by asserting their "right to die." [330] However, in the Netherlands, the physician's scope of practice, not patients' rights, shaped the laws regarding PAS and euthanasia.[331] Additionally, in the Netherlands, the KNMG supported the legalization of PAS and euthanasia and was instrumental in drafting the permissive PAS and

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323. *See id.*

324. *See* REGULATING HOW WE DIE, *supra* note 3, at 245.

325. *See id.*

326. *See* TLRASA, ch. 2, § 2(b). The requirement of illness or disease is satisfied if the patient has unbearable suffering and "no prospect for improvement." *Id.*; *see also* DWDA, at ch. 127.800, § 1.01(12). The DWDA requirement is objective because it only allows a physician to provide PAS to a patient who is terminally ill with death likely to result within six months. *See id.* Unlike the Netherlands' TLRASA, this DWDA specification prevents physicians from providing PAS to patients who may be suffering from chronic disease or afflicted with mental illness. *See id.*

327. *See* DWDA, ch. 127.880, § 3.14. "Nothing in ORS 127.800 to 127.897 shall be construed to authorize a physician or any other person to end a patient's life by lethal injection . . . ." *Id.*

328. *See* GRIFFITHS, *supra* note 26, at 111.

329. *See id.*

330. *See id.*

331. *See id.* "The issue was legally formulated not so much in terms of what patients have a right to demand as in terms of what doctors are authorized to do." *Id.* Because the KNMG has been instrumental in the movement toward legalization of PAS and euthanasia, public debate in the Netherlands has not been focused on patient rights but on the boundaries of physician judgment. *See id.* at 304. "[T]he Dutch seem comfortable with the idea that doctors can be trusted with the discretion to perform euthanasia . . . ." *See* GRIFFITHS, *supra* note 26, at 304.

euthanasia laws, whereas in the United States, the AMA opposes the legalization of PAS and euthanasia.[332] The KNMG and Dutch physicians do not differentiate between PAS and euthanasia; both are viewed as comfort care provisions that allow patients not to suffer during the dying process.[333] Moreover, Dutch physicians would rather provide euthanasia than PAS because of the possible adverse events that could occur if the patient ingests a lethal dose of medication without supervision.[334] Conversely, many American physicians do differentiate between PAS and euthanasia.[335] Several American physicians consider euthanasia the act of killing because it requires the physician to inject the lethal dose of medication into a patient's bloodstream as compared to PAS, which only involves writing a lethal prescription.[336] The American rationale lends itself to an objective decision as to whom is eligible to receive assistance in death, those patients who are terminally ill and have the physical capability of ingesting the lethal dose of medication.[337] Thus, if a patient receives the lethal prescription, he or she must decide whether to have the prescription filled and is required to make the ultimate decision of whether to consume the medication that will hasten his or her death.[338] Therefore, all of the responsibility in assisting death is not placed with the physician.[339]

In addition to allowing both PAS and euthanasia, the TLRASA permits either form of assistance in death to terminally ill or chronically ill patients.[340] However, the DWDA requires patients requesting PAS to be terminally ill and likely to die within six months.[341] This precondition in the DWDA seems very specific when compared to the "unbearable suffering with no hope for recovery" standard of the TLRASA.[342] The TLRASA requirement allows a broad interpretation of what the patient and physician deem "unbearable."[343]

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332. *See* Pierson, *supra* note 22, at 309. *See also* AMA Official Website, *supra* note 198 and accompanying text. *See also Vacco*, 521 U.S. at 793. *See also* Brief of Amici Curiae American Medical Association et al., *available at* 1996 WL 656281. The AMA adamantly opposes PAS and euthanasia and has supported opponents of PAS and euthanasia in court cases by co-authoring legal briefs. *See id. See also* HENDIN, *supra* note 93, at 145-46. The "KNMG euthanasia guidelines have been virtually adopted by the courts . . . ." *Id.*

333. *See* GRIFFITHS, *supra* note 26, at 111.

334. *See id.* at 111-13.

335. *See id.*

336. David Orentlicher, *The Alleged Distinction Between Euthanasia And The Withdrawal Of Life-Sustaining Treatment: Conceptually Incoherent And Impossible To Maintain*, 1998 U. ILL. L. REV. 837, 840 (1998).

337. *See id.*

338. *See id.*

339. *See id.*

340. *See* TLRASA, ch. 2, § 2(1)(b).

341. *See* DWDA, ch. 127.815, § 3.01(1)(a); *see also id.* ch. 127.800 § 1.01(12).

342. *See* TLRASA, § 2(1)(b).

343. *See* Hendin, *supra* note 59, at 223. The Dutch have legalized both PAS and euthanasia on the theory that to only allow PAS would be discriminatory against those who meet all the specific criteria but cannot physically bring about their own death by taking the

Comparatively, the DWDA's objective line does not permit the physician or patient to determine what suffering is "unbearable."[344] Thus, the DWDA's requirement of terminal illness seems tangible and less prone to subjective interpretation.

Another difference between the two statutes is that the TLRASA allows patients who are twelve years old and older to request assistance in death[345] as compared to the DWDA, which only allows patients eighteen years old and older to request PAS.[346] Again, the DWDA omits any subjective thought by only allowing adults to request PAS. Additionally, the TLRASA extends assistance in death to those patients who are "no longer capable of expressing [their] will."[347] The DWDA, unlike the TLRASA, only allows competent patients that have the ability to communicate to request PAS.[348] Providing euthanasia to an incompetent patient places the physician in a position to subjectively decide what the patient's wishes might have been before he or she became mentally incapacitated.[349] By only allowing mentally competent patients to request PAS, a physician is not placed in such a position.[350]

Both the TLRASA and the DWDA offer safeguards against the possible termination of vulnerable patients.[351] The safeguards that both laws have in common include: 1) the patient's request must be voluntary; 2) the physician must inform the patient of his or her underlying disease and prognosis; 3) the physician must discuss all other possible alternatives to assisted death; and 4) the physician must refer the patient to another physician for consultation.[352] Additionally, both laws contain reporting requirements when PAS or euthanasia is performed and provide criminal punishment for physicians who do not comply with the required safeguards.[353]

Although the two laws have similar safeguards and criminal punishments for violation of the requirements, the DWDA is much more particular and

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medication prescribed by the physician. *See id.* Furthermore, the Dutch did not want to discriminate against the chronically ill by only offering the option of assisted death to terminally ill patients. *See id.* The rationale behind this reasoning is that it would be unfair not to provide PAS and euthanasia to chronically ill patients because they will likely suffer longer than a terminally ill patient. *See id.*

344. *See* DWDA, ch. 127.800, § 1.01(12).

345. *See* TLRASA, §§ 2(2) -(4). If the patient is between the ages of twelve years old and sixteen years old, the parents must agree to the assistance in death. *See id.*

346. *See* DWDA, ch. 127.800, § 1.01(1).

347. *See* TLRASA, § 2(2). This option is only available to those patients sixteen years old or older. *See id.* Before the patient became incompetent, he or she must have made a written request for euthanasia. *See id.*

348. *See* DWDA, ch. 127.800 § 1.01(3).

349. *See* BASTA, *supra* note 41, at 121-22.

350. *See id.*

351. *See* TLRASA, § 2(1)(a)-(e). *See also* DWDA, ch. 127.815 § 3.01.

352. *See id.*

353. *See* TLRASA, § 21. *See also id.* § 20(B). *See also* DWDA, ch. 127.865 § 3.11; *see also id.* ch. 127.890 § 4.02; *supra* note 166 and accompanying text.

carefully worded as compared to the TLRASA.[354] For example, the DWDA lists "comfort care, hospice care and pain control" as possible alternatives to PAS.[355] Instead of listing possible options to PAS or euthanasia, the TLRASA stipulates that the physician and patient must conclude that there is "no reasonable alternative in light of the patient's situation."[356] Based on the wording of this section, the TLRASA is subjective and seems to promote patient-physician collaboration in the decision of assisted death.[357] In comparison, the DWDA is more objective because it requires the physician to follow a thorough process without any deviation before providing PAS.[358]

B. Cultural Explanations

One explanation for the divergence between the objective line of the DWDA and the subjective line of the TLRASA is the physician-patient relationships in both countries.[359] In the Netherlands, physicians and patients normally have a long-term relationship[360] as compared to the United States, where patients see numerous specialists or are forced to physician "shop" because of insurance requirements.[361] The long-term patient-physician relationship in the Netherlands results in more opportunities for communication; therefore, Dutch physicians are more likely to understand the needs of their patients more completely than American physicians.[362] This understanding coupled with a trusting relationship between patient and physician has likely allowed the Dutch to feel comfortable with a flexible statute that is not overly strict and objective.[363]

Additionally, the difference in the availability of health insurance in the Netherlands and the United States explains the objective line of the DWDA

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354. *See* BASTA, *supra* note 41, at 121.

355. *See also* DWDA, ch. 127.815 § 3.01(1)(c)(E).

356. *See* TLRASA, ch. 2, § 2(1)(d).

357. *See id.*

358. *See* DWDA, ch. 127.800-97 §§ 1.01-6.

359. *See* HOEFLER, *supra* note 199, at 77; *supra* notes 199-208 and accompanying text. *See* GRIFFITHS, *supra* note 26, at 31-35.

360. *See* GRIFFITHS, *supra* note 26, at 31-35. The General Practitioner in the Netherlands acts as a gatekeeper. *See id.* Patients must see the Practitioner before being referred to a hospital or a specialist. *See id.* Thus, the referral rate in the Netherlands is quite low. *See id.* Practitioners address Ninety percent of patient complaints of illness. *See id. See also supra* notes 317-23 and accompanying text.

361. *See* GRIFFITHS, *supra* note 26, at 31-35. *See also supra* notes 317-23 and accompanying text.

362. *See* DWORKIN, *supra* note 9, at 135.

363. *See* HENDIN, *supra* note 93, at 146. The relationship between Dutch physicians and their patients is facilitated by the fact that most general practitioners reside and practice medicine in the same community as their patient population. *See id.* Furthermore, many Dutch physicians continue to make house calls to their extremely ill and dying patients. *See id.*

and the subjective line of the TLRASA.[364] Because many Americans lack insurance, they do not have adequate access to health care[365] as compared to the Dutch who enjoy the benefits of national health insurance.[366] Private insurance companies mainly concerned with monetary goals provide health coverage to Americans that are insured and have adequate access to medical care.[367] Based on the monetary goals, Americans might fear that insurance companies would be more likely to cover the lesser cost of PAS as compared to higher-priced treatments.[368] Based on their national health care system, the Dutch do not have this concern.[369] Thus, the DWDA's strict requirements and objective line likely dispels Americans' fears of coercion by insurance companies.

VI. CONCLUSION

Opponents of euthanasia and PAS in the Netherlands claim that the TLRASA is too subjective and does not provide sufficient safeguards against the at-will termination of vulnerable groups.[370] A logical conclusion would be that the employment of objective standards like those in the DWDA would provide better protection against selective termination. However, based on statistical information, neither the Netherlands nor the United States (Oregon) is sliding down the "slippery slope."[371] The notion that only an objective line of reasoning would adequately protect against the "slippery slope" may be too paternalistic for the Dutch culture.

The Netherlands has allowed PAS and euthanasia for the last twenty years as compared to the United States where PAS was recently legalized in the state of Oregon in 1994. The Dutch had the benefit of the common law

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364. *See* REGULATING HOW WE DIE, *supra* note 3, at 246-47. *See also supra* notes 209-14 and accompanying text. *See also* GRIFFITHS, *supra* note 26, at 31-32. National health insurance for all Dutch citizens is the result of "the country's cultural commitment to social equity and solidarity." *Id.*

365. *See* SULTZ & YOUNG, *supra* note 22, at 22, 42.

366. *See* DWORKIN, *supra* note 9, at 135. *See also* Emanuel, *supra* note 208, at 246-47.

> Most vulnerable at such times are the many Americans who have no health insurance, let alone a long-standing relationship with a personal physician such as those with whom most Dutch citizens can discuss their fears and problems at length before reaching a choice about whether or not to seek to die.

Id.

367. *See generally* SULTZ & YOUNG, *supra* note 22, at 172-75.

368. *See id. See also* GRIFFITHS, *supra* note 26, at 304. "The fear often expressed in the American discussion, that . . . the costs of medical care might . . . induce doctors for economic reasons to engage in life-shortening practices . . . ." *Id.*

369. *See id.* at 31-35.

370. Interview with David Orentlicher M.D., J.D., *Samuel R. Rosen Professor of Law*, Indiana University School of Law-Indianapolis, Indianapolis, Ind. (Sept. 27, 2002).

371. *See supra* notes 184-92 and accompanying text; *see also supra* notes 283-98 and accompanying text; *see also* BASTA, *supra* note 41, at 120.

and full support of its preeminent medical association when they promulgated the TLRASA, whereas Oregon was a pioneer of legalizing PAS in the United States and did not have the cooperation of its dominant medical society. Although the TLRASA seems vulnerable to wide interpretation, many years of corroboration between the Dutch judiciary and the KNMG have resulted in a workable statute that relies heavily on physician judgment and comports well with the liberal views of the Dutch society. Thus, the objective, paternalistic approach utilized in the DWDA may be appropriate for the first PAS law in the United States as compared to the TLRASA that was passed after many years of development within the common law.

Furthermore, the cultural differences between the Netherlands and the United States have led to the opposite lines drawn in determining who is eligible to receive assistance in death.[372] The subjective line used in the TLRASA comports with the continuity of care employed by the Dutch health care system in allowing a patient and physician to collaborate freely in regard to end-of-life decisions. Conversely, the objective line drawn by the DWDA logically conforms to the absence of long-standing patient-physician relationships and the paucity of patient-physician communication in the United States. A relationship without trust usually requires specific and definite guidelines before moving forward into untested waters. Although the subjective line employed by the TLRASA and the objective line used by the DWDA in defining who will receive assistance in death are quite divergent in theory, both provide sufficient safeguards and protect against the possibility of sliding down the "slippery slope."

*Kelly Green, R.N.**

372. *See* Interview with David Orientlicher M.D., J.D., *supra* note 370.

* J.D., Indiana University School of Law-Indianapolis, 2004 expected.