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NOTES

USING INTERNATIONAL AND FOREIGN HUMAN RIGHTS LAW IN PUBLIC INTEREST ADVOCACY

Florence Wagman Roisman*

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Litigation and Advocacy Directors Conference
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It is a joy and a privilege for me to be here with you all — friends and colleagues of very long standing and new (dare I say "younger"?) colleagues with whom I look forward to forming lifelong friendships.

[Much of the depressing material that we have been discussing has to do not with substance, but with procedure — who can gain access to the courts or legislatures, what statutory or regulatory language will be held to be enforceable at the instance of private plaintiffs, etc.* Although this is not what I am going to discuss, I do want to underscore that access to the courts and legislatures is crucial. I never understand why so-called conservatives want to keep people out of these institutions, for when aggrieved people do not have such access, they are more likely to express their grievances in other ways, often including violence.[1]]

I want to focus on the substance of our work and to talk about how I think

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* Florence Wagman Roisman is the William F. Harvey Professor of Law at Indiana University School of Law — Indianapolis. She is very grateful to Professors Connie de la Vega and George Edwards for reading an earlier draft of this speech and making helpful suggestions. She also thanks librarian Richard Humphrey, faculty assistant Mary R. Deer, and research assistant Steven J. LeClere for their invaluable assistance.

** Bracketed material was in the speech prepared for delivery but omitted in the actual presentation in order to keep within the time limit for the session.

*** This refers to the preceding presentation by Marianne Engleman Lado, Esq.

1. As Nadine Gordimer, Nobel Laureate, wrote in reflecting on the fiftieth anniversary of the Universal Declaration of Human Rights,

> [w]hen people are deprived over years of any recourse to the provisions of civil society as a means of seeking redress for their material and spiritual deprivations, they *lose the faculty* of using the law when, at last, such recourse is open to them. The result of this conditioning now is fashionably called 'the culture of violence'
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> . . . .

Nadine Gordimer, *Foreword* to THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND viii (Yael Danieli, Else Stamatopoulou, & Clarence J. Dias, eds., 1999) (emphasis in original) [hereinafter UDHR: FIFTY YEARS AND BEYOND].

we ought to be developing that substance. In doing so, I will expand today upon a theme I sounded at the Litigation and Advocacy Directors Conference here in Snowbird in 2002.[2] I hope you will read that speech and a pertinent article of mine, called *The Lawyer as Abolitionist.*[3] The speech is on [the National Legal Aid and Defender's Association]'s webpage and on my [Indiana University] webpage. I will put this speech and links or citations to several articles and books relevant to what I am about to say on the NLADA webpage[4] and on my IU webpage.[5]

The theme I want to develop is this: legal services and legal aid are part of a movement that has both depth and breadth. The depth is historical — legal services grew out of twentieth century anti-poverty and civil rights advocacy (which was called human rights advocacy) and nineteenth century anti-slavery and women's rights campaigns — all of this is part of the great movement for human rights, which has ancient roots. The breadth incorporates the modern spectrum of human rights protections — for people of color; women; children; language minorities; people with disabilities; people who are gay, lesbian, bisexual, or transgendered; people who are poor; immigrants; refugees; displacees. The breadth is not only national, but international; indeed, universal.

Since the middle of the twentieth century, this doctrine of human rights has been codified in a set of international documents.6 Human rights have been codified also in the constitutions of other countries (such as South Africa)7 and regional organizations (such as the Council of Europe's European Convention on Human Rights).8 The range of protection is vast: international and foreign human rights law protects civil, political, economic, social, and cultural rights. Its prohibitions of discrimination are broader than those expressed in domestic U.S. law.

I am here to urge that in all of our work we ought to be using the standards of international and foreign human rights law. I think that we ought

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2. Florence Wagman Roisman, Keynote Address to the 2002 NLADA Litigation and Advocacy Directors Conference, Snowbird, Utah: Aggressive Advocacy, June 23, 2002, *available at* http://www.nlada.org/DMS/Documents/1028824673.77/document_info; http://www.indylaw.indiana.edu/instructors/roisman/.

3. Florence Wagman Roisman, *The Lawyer as Abolitionist: Ending Homelessness and Poverty in Our Time*, 19 ST. LOUIS U. PUB. L. REV. 237 (2000), *reprinted in* REPRESENTING THE POOR AND HOMELESS: INNOVATIONS IN ADVOCACY 21 (Sidney D. Watson, ed., 2001).

4. *See infra*, Recommended Reading.

5. *Id.*

6. A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION (2001) ("[T]he movement for the international protection of human rights is largely a product of the Second World War and its immediate aftermath.").

7. S. Afr. CONST. 1996 § 184, *available at* http://www.info.gov.za/documents/constitution/index.htm.

8. European Convention on Human Rights, Nov. 4, 1950 – Jan. 20, 1966, *available at* http://www.hri.org/docs/ECHR50.html.

to be doing this in all forums — in federal and state courts, in Congress and in state legislatures and city councils, in the media, and in every venue in which we contribute to public education — giving speeches, writing letters to the editor and op-ed pieces, participating in blogs, and talking to our families and friends. Whatever we are doing, whatever issues we are addressing, whatever arguments we are making, whatever forums we are employing, we always ought consciously to add a human rights component.

Now, you might be inclined to react to this by thinking that I have gone off the deep end — that it was bad enough that I thought that we could end poverty and homelessness in our time,[9] but it is ridiculous to think that we can do that by importing into domestic jurisprudence and common discourse the standards of international and foreign human rights law. I hope to persuade you that this is not ridiculous — that it is the logical next step in the program that started with validating the full humanity and citizenship of people of color and of women. Please remember that much that seemed ridiculous a hundred years ago is completely accepted now.

One hundred years ago, in the United States, women could not vote. One hundred years ago, in most of the United States, African-Americans could not vote, either — prevented not by laws but by widespread, governmental and private violations of laws and the use of such trickery as all-white primaries. One hundred years ago, "separate but equal" was the legally accepted rule, and "separate and unequal" was the reality — in education (from grade school through professional education); in transportation (interstate and intrastate); in employment (public and private); in public accommodations; in healthcare — in every aspect of our lives.

I will not bore you with more details; I am sure you take the point. Our legal, political, and social system has changed dramatically since 1906. We can only begin to imagine how our legal, political, and social system will change in the next one hundred years; but we can and must help to shape those changes by advancing a discourse of human rights.

We, as lawyers, have great skills of advocacy and persuasion and the ability to compel people to pay attention to us. [Recalcitrant, haughty officials always are astonished that they have to respond to accusations made by gadflies, whether those accusations are made in the public discourse or in court.] We, as advocates for poor and oppressed people, have the power to advance the recognition and protection of fundamental human rights in the United States. We have that power, and we also have that duty.[10]

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9. *See* Roisman, *The Lawyer as Abolitionist*, *supra* note 3.

10. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) art. 29(1) [hereinafter UDHR]. The UDHR provides that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible." As Nobel Laureate John Polanyi has written, this "refers to the individual's obligation to act in support of those rights. The time has come to underscore the fact that our and others' rights are contingent on our willingness to assert and defend them." UDHR: FIFTY YEARS AND BEYOND, *supra* note 1, at xii.

The use of human rights discourse is much more advanced in South Africa, Europe, and other parts of the world than it is in the United States, but it seems to me inevitable that the U.S. will move forward from its current backward status and submit to enforceable legal protection of human rights, as other countries already have. Because this program involves *legal* standards, it's peculiarly within the province of us as *legal* advocates — although I do want to emphasize, as this entire conference testifies, that we need to do our persuasive work in the media and with the public in order to make legislators, executives, and judges ready to accept and enforce these principles.

In the brief time I have, I want to explain some of the reasons why I am positive that the time is ripe for us to be using human rights law and then outline some of the riches available in human rights jurisprudence.

I. WHY THIS ISN'T JUST "PIE IN THE SKY"

[As legal services/legal aid lawyers, of course it is part of our job to know what courts are holding now and what they are entertaining as bases for decision. But it also is a crucial part of our job to know what courts ought to be holding, and what they ought to be entertaining as bases for decision. And that means that we ought, persistently, to be presenting to state and federal courts the standards established in international law and applied in countries more humane than the United States, so that the courts of the United States may be able to catch up to the rest of the civilized world.]

We should be using international and foreign human rights law, even if domestic courts were now totally resistant to consideration of such doctrine. But the fact is that domestic courts have been considering such legal principles. Indeed, as I will explain in a bit more detail in a minute, a majority of the Supreme Court — a majority of the current, John Roberts, Supreme Court — has been using international and foreign human rights law in its decisions.

The Rehnquist Court moved gradually to using international and foreign human rights standards in its opinions. To cite only quite recent cases, in 2003, in *Lawrence v. Texas*, Justice Kennedy, writing for a five-member majority of the Court, referred to a decision of the European Court of Human Rights, citing an amicus brief filed on behalf of Mary Robinson, former U.N. High Commissioner for Refugees.[11]

Lawrence v. Texas, of course, was the case that overruled *Bowers v. Hardwick*.[12] In his concurring opinion in *Bowers v. Hardwick*, Chief Justice Burger had said that homosexual conduct had "been subject to state

11. Lawrence v. Texas, 539 U.S. 558, 576-77 (2003); *see also* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 188 (2006) (discussing preparation of this brief by "a team centered at Yale Law School" who "argued that decisions by international tribunals and courts in other Western democracies had recognized the fundamentality of the right to adult consensual sexual intimacy.").

12. Bowers v. Hardwick, 478 U.S. 186 (1986).

intervention throughout the history of western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards."[13] The *Lawrence* majority responded to Chief Justice Burger's statement by referencing the European Court of Human Rights decision and noting that "other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."[14] The *Lawrence* court concluded that "the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[15]

In his 2003 speech to the American Society of International Law, Justice Breyer explained why he — and Justices O'Connor, Ginsburg, Stevens, and Souter — have found foreign or international law pertinent.[16] After describing "five different ways in which foreign or international law has a growing impact on" the work of the Supreme Court, Justice Breyer urged lawyers to present such arguments. He said:

> Neither I nor my law clerks can easily find relevant comparative material on our own. The lawyers must do the basic work, finding, analyzing, and referring us to, that material. I know there is a chicken and egg problem. The lawyers will do so only if they believe the courts are receptive. By now, however, it should be clear that the chicken has broken out of the egg. The demand is there.[17]

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13. *Id.* at 196 (Burger, C.J., concurring).

14. *Lawrence*, 539 U.S. at 576; *see also* Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, at 48 (quoting Justice Kennedy as saying:

> [w]hen Bowers was being argued, the European Court of Human Rights had just decided Dudgeon v. United Kingdom, which went exactly the way the defendant wanted our court to go .... Yet the lawyers didn't even cite it in their briefs ... . Today, no lawyer would think of not telling us how courts around the world have approached the same question.

Id.)

15. *Lawrence*, 539 U.S. at 577.

16. Stephen Breyer, The Supreme Court and the New International Law, Address at the Ninety-Seventh Annual Meeting of the American Society of International Law, Washington, D.C. (Apr. 4, 2003), *available at* www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html; *see also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999); Maria Foscarinis, Brad Paul, Bruce Porter, & Andrew Scherer, *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. 97 (July-Aug. 2004).

17. Breyer, *supra* note 16, at 4; *see also* Jeffrey Toobin, *supra* note 14, at 48 (noting that "[i]n many American courts, including the Supreme Court, foreign nations and international organizations regularly file briefs citing their own laws" and quoting Anne-Marie Slaughter, Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University, as saying "[t]he opinions [of foreign and international courts] are out there, easy to get, and the briefs are being filed. If the Justices didn't cite them, it would be like pretending the

Justice Breyer urged lawyers and law students to present arguments based on foreign and international legal principles, not only in litigation, but also "among the interested publics, affected groups, specialists, legislatures, and others, who interact through meetings, journal articles, the popular press, legislative hearings," and in the many other ways that he says law is created.[18]

This kind of non-litigation advocacy can be immensely important. In a moment, I will cite one of my favorite examples, but first I want to discuss with you the Supreme Court's 2005 decision in *Roper v. Simmons*, in which a majority of the Court held that the Constitution bars execution of an offender who was older than fifteen, but younger than eighteen, when he committed the capital crime.[19] It is important to note that the four dissenters in *Roper v. Simmons* were Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas — meaning that the substitutions of Chief Justice Roberts for Chief Justice Rehnquist, and Justice Alito for Justice O'Connor, would make no difference in the result.[20]

The majority opinion, written by Justice Kennedy (and joined by Justices Stevens, Souter, Ginsburg, and Breyer), incorporated, and thereby made more authoritative, language from a 1958 plurality opinion in *Trop v. Dulles*. Quoting *Trop*, the *Roper* court said that to interpret "expansive language in the Constitution, . . . we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society.'"[21] The Court's holding in *Roper* was based on its conclusion that a "national consensus against the death penalty for juveniles" had developed within the United States;[22] but the majority went out of its way to discuss how this holding relates to international legal standards and the laws of other nations.[23] The Court said that, at least since the *Trop* decision in 1958, "the Court has referred to the laws of other countries and to international

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rest of the world didn't exist"); *see also id.* at 50 (quoting Justice Kennedy as stating:

> [t]he European courts, in particular the transnational courts, have been somewhat concerned, and some feel demeaned, that we did not cite their decisions with more regularity . . . . They cite ours all the time. And, basically, they were saying, '[w]hy should we cite yours if you don't cite ours?

Id.).

18. Breyer, *supra* note 16, at 4.

19. Roper v. Simmons, 543 U.S. 551, 578-79 (2005).

20. It is also worth noting that Justice O'Connor expressly disagreed with the other three dissenters' objections to the use of international and foreign law, as I will discuss after I have outlined the majority opinion. *Id.*

21. *Roper*, 543 U.S. at 560-61, (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Justice O'Connor, dissenting in Roper, agreed with *Trop's* statement that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 587, 589 (O'Connor, J., dissenting).

22. *Roper*, 543 U.S. at 564.

23. It is interesting that in *Roper*, the State of Missouri, as well as the defendant, used international law as a basis for its argument. The State, urging that there was not a national consensus against capital punishment for juveniles, noted that when the Senate ratified the International Covenant on Civil and Political Rights, "it did so subject to the President's proposed reservation regarding" the prohibition of capital punishment for juveniles. *Id.* at 567.

authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[24] The Court supported this by citing the plurality decision in *Trop* ("the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); the 2002 decision in *Atkins v. Virginia* (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved");[25] the 1988 plurality opinion in *Thompson v. Oklahoma* (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community");[26] the 1982 decision in *Enmund v. Florida*;[27] and the 1977 plurality opinion in *Coker v. Georgia*.[28] The *Roper* court then referred to the U.N. Convention on the Rights of the Child (ratified by every country but Somalia and the U.S.), the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the African Charter on the Rights and Welfare of the Child, and amicus briefs submitted by the European Union, the Human Rights Committee of the Bar of England and Wales, former U.S. diplomats, and President James Earl Carter, Jr., et al. The Court also referred to the practices of other nations, noting that only seven countries other than the United States had executed juveniles since 1990, and that since then each of the other countries had either abolished or publicly disavowed the practice.[29] The court gave particular emphasis to the practice in the United Kingdom "in light of the historic ties between our countries and in light of the Eighth Amendment's own origins."[30]

The *Roper* Court said that "[i]t is proper that we acknowledge the overwhelming weight of international opinion . . . [; t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[31] The Court concluded by stating that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[32] [Thus, we see that a

24. *Id.* at 575.

25. Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citing *Trop*, 356 U.S. at 102).

26. Thompson v. Oklahoma, 487 U.S. 815, 830 (1988).

27. Enmund v. Florida, 458 U.S. 782, 796-97 (1982).

28. Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977).

29. *Roper*, 543 U.S. at 577; *see also* Brief for The Human Rights Committee of the Bar of England and Wales, et al. as *Amici Curiae* Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633) 2004 U.S. S. Ct. Briefs LEXIS 432. The amicus brief was submitted by Professor Connie de le Vega. *Id.*

30. *Roper*, 543 U.S. at 577.

31. *Id.* at 578.

32. *Id.* Justice O'Connor dissented from the majority because she did not agree that a domestic consensus against the juvenile death penalty had evolved. *Id.* at 604 (O'Connor, J., dissenting). Nevertheless, Justice O'Connor went out of her way to say that she "disagree[s]

majority of the members of the current, John Roberts, Supreme Court have used international and foreign human rights law in the Court's opinions. Justices Scalia and Thomas and Chief Justice Rehnquist opposed such use, but they have been and continue to command only a minority on the court. Moreover, the new Chief Justice himself has not ruled out the use of such material. At the confirmation hearings for Chief Justice Roberts and Justice Samuel Alito, Senators Kyl, Sessions, and Coburn, in particular, expressed their opposition to the use of international and foreign law and sought to elicit the nominees' views on that subject. While then-Judge Alito said that he did not "think that foreign law is helpful in interpreting the Constitution,"[33] then-Judge Roberts was more circumspect.[34]]

As I mentioned, Justice Breyer's 1993 speech urged lawyers to make arguments based on international and foreign human rights law, not only in court, but also in other forums. An illuminating instance of the non-litigation use of international human rights law occurred in connection with one of the most important civil rights / human rights decisions of the U.S. Supreme Court, *Shelley v. Kraemer*, and its companion, *Hurd v. Hodge*, in which the Court barred the judicial enforcement of racially restrictive covenants.

The decisions in *Shelley* and *Hurd* were a dramatic, indeed radical, change in the Court's jurisprudence, for the Court had repeatedly, and recently, refused to interfere with the enforcement of such covenants. Scholars have worked hard over the decades to understand why the Court made such a radical

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with Justice Scalia's contention . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, [t]he Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." *Id.* (citing *Atkins*, *Thompson*, *Enmund*, *Coker*, and *Trop*). Justice O'Connor also wrote that "this inquiry reflects the special character of the Eighth Amendment, which . . . draws its meaning directly from the maturing values of civilized society." *Id.* at 604-05. Recognizing the distinctiveness of U.S. law in some situations, as urged by Justice Scalia, she stated:

> this nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement — expressed in international law or in the domestic laws of individual countries — that a particular form of punishment is inconsistent with fundamental human rights.

Id. at 605.

33. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., Before the Senate Committee on the Judiciary*, 109th Cong., 2nd Sess. 370, 410, 471, cf. 581 (2005) [hereinafter *Alito Hearings*] (responding to Senator Leahy: "Most of our common law is an outgrowth of English common law, and I think it helps to understand that background often in analyzing issues that come up.").

34. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr., before the Senate Committee on the Judiciary*, 109th Cong., 1st Sess. 199-201, 292-293 (2005) [hereinafter *Roberts Hearings*]; *see also Alito Hearings*, *supra* note 33, at 471 (Senator Coburn asking Judge Alito if the Supreme Court should use foreign law, and stating that he "could not get Judge Roberts to answer [the question] . . . because of the conflict that might occur afterwards . . . .").

change. Everyone agrees that a big part of the explanation is that the U.S. Department of Justice participated in those cases amicus curiae, submitting a brief signed not only by the Solicitor General, but also by the Attorney General, and presenting oral arguments by the Solicitor General himself, Philip Perlman.[35]

Solicitor General Perlman told the Supreme Court that this was "the first instance in which the government had intervened in a case to which it was not a party and in which its sole purpose was the vindication of rights guaranteed by the Fifth and Fourteenth Amendments."[36] Given that the participation of the United States goes very far to explain why the Court adopted the position urged by DOJ, the burning question then becomes: why did the Department of Justice take this dramatic step? Again, there are many elements to that answer,[37] but part of the explanation lies in the use of international human

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35. Brief for the United States as Amicus Curiae supporting Petitioner-Appellant, Shelley v. Kraemer, 334 U.S. 1 (1947) (Nos. 72, 87, 290, 291), 1947 WL 44159; *see* Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1306 (2000) ("[T]here can be little doubt, in this period of utmost fragility in civil rights litigation, that the cautious Supreme Court would attach great significance to the position — if any — the Tenth Justice [that is, the Solicitor General] might choose to take."); *see also* CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 220 (1955) ("[W]ithout the government's intervention it is doubtful that the Supreme Court would have accepted review" of the two cases.). Abrams misspeaks here, for the Supreme Court accepted review before the government expressed its support for the petitioners. The only amicus in support of the petition was the St. Louis Civil Liberties Committee. CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP AND THE RESTRICTIVE COVENANT CASES 196 (1959).

36. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 91, 277 (2000) (paraphrasing Solicitor General Philip Perlman's oral argument to the Supreme Court).

37. *See, e.g.*, VOSE, *supra* note 35, at 173 (stating that when the participants at the NAACP planning session in September 1947 agreed it was "important to get government in on" the case, Phineas Indritz, an attorney in the Department of the Interior who had been volunteer co-counsel with Charles Hamilton Houston in the *Hurd* case, advised "it would be a good idea for the directors of the various organizations represented to visit the heads of the various departments. There should be a well-coordinated group action to get behind these agencies"); *see also* Arnold R. Hirsch, *Searching for a 'Sound Negro Policy': A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 HOUSING POL'Y DEBATE 393, 397 (2000) and Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between* Shelley *and* Brown, *in* FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH CENTURY AMERICA 211-22 (John F. Bauman, Roger Biles, & Kristin M. Szylvian, eds., 2000) (describing the work of Dr. Frank S. Horne, an African-American who was the Racial Relations Adviser in the Housing and Home Finance Agency and a special assistant to HHFA administrator Raymond M. Foley); *see also* Philip Elman, interviewed by Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 818 (1987) (Philip Elman said that he and Phineas Indritz arranged to have Oscar Chapman write to the Attorney General to request an amicus brief in the restrictive covenant cases and that he, Elman, was responsible for the letters that went to the DOJ from the NAACP, the ACLU, the American Jewish Committee, the American Jewish Congress, and other organizations, as well as the State Department); *but see* Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938, 1940 (1987) ("Elman's memoir is . . . a classic example of the treachery of nostalgia. In the end, its combination of factual errors and poor

rights law in a non-litigation context by the National Association for the Advancement of Colored People (NAACP).

On June 6, 1946, the National Negro Congress (NNC) presented to the United Nations a petition, drafted by Herbert Aptheker, seeking relief for the plight of African-Americans in the United States.[38] The NNC did not have the organizational capacity or political credibility to pursue its petition effectively.[39] But the NAACP, which had supported the NNC, then prepared its own, much more extensive, petition to the U.N.

Under the leadership of Dr. W.E.B. Du Bois, on October 23, 1947, the NAACP filed with the United Nations "an appeal to the world," a lengthy, detailed, substantial petition protesting the treatment of African-Americans in the United States.[40] Reacting to the NAACP's petition to the U.N., Attorney General Tom Clark said, "I was humiliated . . . to realize that in our America there could be the slightest foundation for such a petition."[41] Speaking on October 27, a few days after the NAACP petition had been filed, Attorney General Clark declared that the Justice Department would move "'with as great vigor and force as is permitted under the law where states through negligence, or for whatever reason, fail . . . to protect the life and liberties of the individual.' He also announced the civil rights section of the Justice Department would be enlarged and strengthened."[42] On October 30, 1947, a week after the NAACP had filed its petition with the United Nations, the U.S. Department of Justice announced its decision to file an amicus brief in the restrictive covenant cases in the Supreme Court.[43]

I certainly do not mean to say that the NAACP petition was *the* cause of the decision to have DOJ participate amicus in *Shelley* and *Hurd*, but I do think it is reasonable to believe that the NAACP petition had some impact on that decision. This is particularly likely in view of the fact that "only three months earlier, the NAACP had tried to enlist Justice Department support in a series of restrictive covenant cases, but neither Attorney General Tom Clark nor Solicitor General Philip Perlman was interested."[44] (Attorney General Clark,

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judgments makes it unreliable legal history and bad reminiscence"); *id.*at 1948 (referring to "Elman's . . . revisionism.").

38. ANDERSON, *supra* note 5, at 80-81.

39. *Id.*, at 81-92.

40. *See* DAVID LEVERING LEWIS, W.E.B. DUBOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919-1963 (2000) at 528-29; *see also* WILLIAM C. BERMAN, THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION 65-66 (1970) (giving the date as Oct. 23); *see also* DUDZIAK, *supra* note 36, at 44 (The petition "created an international sensation.").

41. DUDZIAK, *supra* note 36, at 45.

42. BERMAN, *supra* note 40, at 66.

43. VOSE, *supra* note 35, at 169, 173; *compare* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 253 (2004) ("The week after the publication of the Committee's report, the Department decided to intervene as amicus curiae.").

44. CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 128 (1992).

from Texas, certainly was not then noted as a civil libertarian.)[45] Some scholars have suggested that the reason for the change of heart was the administration's interest in securing the votes of African-Americans in the North,[46] but it is certainly reasonable to give to the NAACP (and the NNC) petitions credit for making the restrictive covenant issue even more salient for the administration and the voters it was trying to woo.

Moreover, it is pertinent that the brief filed by DOJ used international and foreign standards. The Justice Department's brief relied on, inter alia, provisions of the Charter of the United Nations (which had been approved by the Senate as a treaty); a declaration of the U.N. General Assembly; a resolution adopted by the Eighth International Conference of American States at Lima, Peru, in 1938; the "Economic Charter of the Americas," adopted by the Inter-American Conference on Problems of War and Peace in 1945, which said that "the fundamental economic aspiration of the peoples of the Americas, in common with peoples everywhere, is to be able to exercise effectively their natural right to live decently . . ."; another resolution adopted by the Inter-American Conference, and a statement made by the U.S. Secretary of State at the conclusion of the conference in which he said that "we have rededicated ourselves . . . to American principles of humanity and to raising the standards of living of our peoples; so that all men and women in these republics may live decently in peace, in liberty, and in security."

The Department of Justice also relied on a decision of the Ontario High Court in Canada and made the point that it had "found no English or Australian cases on the point."[47] In arguing against the covenants because they contravened a "policy of free alienability" of real property, the Department noted that "a few early British cases . . . looked the other way, but they felt the great weight of judicial and professional disapproval."[48] The DOJ argued that

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45. VOSE, *supra* note 35, at 172 ("Clark . . . had no name in the civil-rights field . . . . Also, like Clark, Solicitor General Perlman was without any public record as a supporter of civil rights.").

46. *See e.g.*, CLAYTON, *supra* note 44, at 127-28; ELMAN, *supra* note 37, at 817-18; DUDZIAK, *supra* note 36, at 25, 86; BERMAN, *supra* note 40, at 74.

47. DUDZIAK, *supra* note 36, at 47; *see* TOM C. CLARK & PHILIP B. PERLMAN, PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS 21, 92 n.62, 101 n.11, 103 n.28 (1948). The brief also noted an apparently contradictory Ontario decision. *Id.* at 92 n.62.

48. *Id.* at 105-06 CLARK & PERLMAN, PREJUDICE AND PROPERTY, *supra* note 47, at 76-77, 99 n.7; *see also id.* at 92 n.63 (discussing "[t]he rather unclear state of the English common-law rule on restraints on alienation . . . .") In this connection, it is worth noting that critics of the use of foreign law complain, inter alia, that using foreign law allows judges to "pick and choose among those foreign laws that we liked or didn't like." Senator Kyl, *in Roberts Hearings, supra* note 34, at 199. Then-Judge Roberts responded:

> In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or whatever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there.

Roberts Hearings, supra note 34, at 201. Chief Justice Roberts may have been referring to a

these authorities supported the argument that racially restrictive covenants should not be judicially enforceable in the United States.[49] The Department of Justice may not be using international and foreign law under the direction of Alberto Gonzales and Paul Clement, but it has done so in the past and, I have no doubt, will do so in the future.

[I am not breaking new ground in urging that we use foreign and international law in our domestic arguments, in and out of court. Legal aid lawyers have been raising international human rights claims for decades, and public interest lawyers continue to do so. Connie de la Vega, Andy Scherer, Maria Foscarinis, and other legal services and public interest lawyers have been using and writing about using international human rights law in our advocacy.[50] Some of our colleagues have been participating in such activities as filing with the U.N. Special Rapporteur on Housing a statement regarding housing segregation in the U.S., prepared for the 2005 North American Consultation on Women and the Right to Housing, and filing a submission on racial segregation and the right to housing before the Inter-American Commission on Human Rights in connection with the Commission's consideration of the situation of the right to adequate housing in the americas.[51]]

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concurring opinion by Justice Scalia in Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring), which Justice Scalia mentioned in his dissent in *Roper*, 543 U.S. at 617 (Scalia, J., dissenting). In *Conroy*, Justice Scalia commented that "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy*, 507 U.S. at 519. In *Roper*, Justice Scalia applied this to the use of "scientific and sociological studies." *Roper*, 543 U.S. at 617. As the Justice Department's reference to foreign law contrary to its position illustrates, responsible advocates and judges will refer to standards that support the position they oppose and then indicate why those standards should not be adopted in the instant case.

49. CLARK & PERLMAN, *supra* note 47, at 70-73. The Department of Justice again used "treaties and international agreements" in its brief in Henderson v. United States. Brief for the United States, Henderson v. United States, 339 U.S. 816 (1950) (No. 25), 1949 WL 50329, at 62-63 (citing the U.N. Charter and a resolution adopted at the 1945 Inter-American Conference on Problems of War and Peace).

50. *See, e.g.*, Brief for Human Rights Advocates and the University of Minnesota Human Rights Center in Support of Petitioners, as Amici Curiae supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 399226 (submitted by Connie de la Vega); Amici Curiae Brief in Support of Respondent, Roper v. Simmons, *supra* note 29; Connie de la Vega, *Using International Human Rights Law in Legal Services Cases*, 22 CLEARINGHOUSE REV. 1242 (1989); Connie de la Vega, *Protecting Economic, Social and Cultural Rights*, 15 WHITTIER L. REV. 471 (1994); Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423 (1997); Foscarinis et al., *supra* note 16; Martha F. Davis, *Human Rights in the Trenches: Using International Human Rights Law in "Everyday" Legal Aid Cases*, 41 CLEARINGHOUSE REV. 414 (2007).

51. *See* Allard K. Lowenstein, International Human Rights Clinic, Yale Law School, on behalf of Poverty and Race Research Action Council, Submission on Racial Segregation and the Right to Housing, for the 122nd Period of Sessions of the Inter-American Commission on Human Rights: Situation of the Right to Adequate Housing in the Americas Hearing (Mar. 8, 2002), *available at* http://www.ccr-ny.org/v2/legal/govt_misconduct/docs/PPEHR_PPRAC.pdf; *see also* Brief Statement from Philip Tegeler, Director, Poverty & Race Research Action Council, Washington, D.C., to The Hon. Miloon Kothari, U.N. Special Rapporteur on Housing on the Issue of Housing Segregation in the United States, prepared for the 2005 North American

[I am by no means alone in believing that these efforts will be successful. Yale law professor Kenji Yoshino, in his fascinating new book, *Covering: The Hidden Assault on our Civil Rights*, says that "the Supreme Court's shift toward a more universal register can . . . be seen in its nascent acceptance of human rights" and predicts that "the universal rights of persons will probably be the way the Court will protect difference in the future."[52]]

II. WHAT WE HAVE TO USE

Having, I hope, given you reason to be open to considering the use of foreign and international human rights standards, let me briefly review what those standards are. Their genesis in public discourse in the United States can be dated to President Franklin Roosevelt's 1941 declaration of the four freedoms: freedom of speech and belief and freedom from fear and want.[53] [These goals were embodied in the Atlantic Charter of August 1941, in which President Roosevelt and British Prime Minister Winston Churchill seemed to "commit . . . the allied powers to improving the quality of life for the world's inhabitants, and promise . . . a peace that would secure for all people the four freedoms, especially freedom from fear and want."[54]]

They were reflected also in the U.N. Charter of 1945, which provides that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[55] The four freedoms then became a "touchstone for the framers of the" Universal Declaration of Human Rights (UDHR), promulgated by the United Nations in 1948.[56] And the UDHR then was fleshed out in two important international covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on

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Consultation on Women and the Right to Housing (Sept. 30, 2005); Noah Leavitt, *International Human Rights Violations Here in the U.S.: A U.N. Visit to Chicago's Cabrini-Green Housing Project*, May 6, 2004, http://writ.news.findlaw.com/leavitt/20040506.html; *PPEHRC Travels to Washington DC for Hearing of the OAS, Poor People's Economic Human Rights Campaign*, Mar. 2000, http://economichumanrights.org/updates/oashearing.htm; Noah Leavitt, Durban — Gone But Not Forgotten: Global Anti-Discrimination Efforts in a Difficult Year, 10 J. OF THE INTERNATIONAL INSTITUTE 1 (2002); Noah Leavitt & Rafi Rom, *Oh, Give Me A Home, AlterNet*, Mar. 10, 2005, http://alternet.org/module/printversion/21469; Rabbi Jill Jacobs & Noah Leavitt, *Shelter the Displaced Among Us*, SOCIALACTION.COM: AN ONLINE JEWISH RESOURCE FOR REPAIRING THE WORLD, June 19, 2006, http://www.socialaction.com/issues/economic_justice/housing_homelessness/SheltertheDisplaced.shtml.

52. YOSHINO, *supra* note 11, at 188.

53. Franklin D. Roosevelt, U.S. President, State of the Union, Jan. 6, 1941, *available in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: 1938-1950, at 672 (Random House 1950) (1938).

54. ANDERSON, *supra* note 5, at 16.

55. U.N. Charter art. 55, ch. IX, , June 26, 1945, *available at* http://www.un.org/aboutun/charter.

56. MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 176 (2001); *see also* UDHR, *supra* note 10, art. 25.

Economic, Social and Cultural Rights (ICESCR).[57] Subsequent conventions have dealt with, inter alia, the elimination of racial discrimination, the elimination of discrimination against women, discrimination in education, and the rights of the child.[58]

Regionally, the Organization of American States adopted the American Declaration of the Rights and Duties of Man in 1948 and the American Convention on Human Rights (ACHR) in 1969.[59] "The ACHR has . . . optional protocols dealing with . . . economic, social, and cultural rights."[60] There are additional conventions dealing with, inter alia, violence against women.[61] The ACHR created the Inter-American Court of Human Rights in 1978.[62] The "core of international human rights law" is contained in these six instruments: the Charter of the United Nations; the ACHR; and what is called "the International Bill of Human Rights," consisting of the UDHR, the ICESCR, the ICCPR, and the optional protocol to the ICCPR.[63]

International human rights law may be especially useful to us in two respects: its protections against discrimination (which are more expansive than

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57. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXII), U.N. Doc. A/6136 (Mar. 23, 1976), [hereinafter ICCPR] (entered into force March 23, 1976, adopted by the United States Sept. 8, 1992); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc.A/6316 (Jan. 3, 1976) [hereinafter ICESCR] (entered into force July 18, 1978, adopted by United States Oct. 5, 1977); Article 11(1) of the ICESCR also provides "[t]he States Parties will take appropriate steps to ensure the realization of this right . . . ." *See also* Committee on Economic, Social, and Cultural Rights, *General Comment 1, Reporting by States Parties*, 3rd Sess., U.N. Doc. E/1989/22, annex III at 87 (1989), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 8 (2003) (calling on member states "to realize progressively the full range of economic, social and cultural rights.").

58. Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/6014 (Dec. 21, 1965) (opened for signature March 7, 1966, entered into force Jan. 4, 1969, adopted by the United States Nov. 20, 1994) [hereinafter CERD]; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 36th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (entered into force Sept. 3, 1981, adopted by the United States July 17, 1986) [hereinafter CEDAW]; Convention Against Discrimination in Education, 49 U.N.T.S. 93 (opened for signature Dec. 14, 1960, entered into force May 22, 1962) [hereinafter after CADE]; Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR Supp.No. 149 at 167, 44th Sess., Supp. No. 49, at.167, U.N. Doc. A/44/49 (opened for signature Nov. 20, 1989, entered into force Sept. 2, 1990, adopted by the United States Feb. 16, 1991) [hereinafter CRC].

59. American Declaration of the Rights and Duties of Man, Approved by the Ninth International Conference of American States, Bogotá, Columbia, 1948, O.A.S. Res. XXX, *available at* http://cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm; American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, November 22, 1969, O.A.S. Treaty Series No. 73 (1990) *available at* http://cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm.

60. de la Vega, *Using International Human Rights Law*, *supra* note 50, at 1243.

61. *Id.* at 1243 n.9.

62. FRANCISCO FORREST MARTIN ET AL., INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES AND ANALYSIS 24 (2006).

63. de la Vega, *Using International Human Rights Law*, *supra* note 50, at 1243.

are those in domestic U.S. law) and its protection of economic, social, and cultural rights. As to the first, Article 2 of the UDHR states "everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour [sic], sex, language, religion, political or other opinion, property, birth[,] or other status."[64]

Article 2 of the ICCPR provides that

> each state party to the . . . Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour [sic], sex, language, religion, political or other opinion, national or social origin, property, birth[,] or other status.[65]

The ICCPR also provides that "each state party . . . undertakes to take the necessary steps, in accordance with its constitutional processes . . ., to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present covenant."[66] The U.S. has ratified the ICCPR, which has the status of a treaty.[67] The U.S. made its acceptance of the ICCPR subject to the understanding that such distinctions are permitted "when such distinctions are, at minimum, rationally related to a legitimate government objective."[68] Even with the reservations, however, this is more generous than the prohibitions now included in U.S. domestic law, as it expressly prohibits discrimination based on language, property, and "other status."

As to the second, the UDHR states that:

> everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age[,] or other lack of livelihood in circumstances beyond his control.[69]

This provision of the UDHR was then fleshed out in the International Covenant on Economic, Social and Cultural Rights, which recognizes "the right of

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64. UDHR, *supra* note 10, art. 2.

65. ICCPR, *supra* note 57, art. 2; *see* de la Vega, *Civil Rights During the 1990s*, supra note 50, at 431-37 (discussing the ICCPR).

66. ICCPR, *supra* note 57, art. 2.

67. *Id.*, art. 2(1).

68. U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 (daily ed. April 2, 1992) (Understandings ¶ 1). Note, however, that the U.N. Charter art. 55 also prohibits discrimination on the basis of language. As to reservations, understandings, declarations, etc., see de la Vega, *Civil Rights During the 1990s*, *supra* note 50, at 452-63.

69. UDHR, *supra* note 10, art. 25(1).

everyone to an adequate standard of living . . ., including adequate food, clothing[,] and housing, and to the continuous improvement of living conditions."[70] [To its shame, the U.S. has not ratified the ICESCR, but it has ratified the Convention on the Elimination of all Forms of Racial Discrimination, which applies to, among other things, "economic, social[,] and cultural rights, including the rights to housing; to public health, medical care, social security and social services; to education and training; and to work, equal pay for equal work, and just and favourable [sic] remuneration."[71]]

[The international human rights principles can be used not only in litigation, but also with the public, the media, and in administrative and legislative fora. In state and federal courts, the International Human Rights standards can be used in a variety of ways. As Professor Connie de la Vega lays out in her Whittier Law Review article, three of those are direct enforcement of treaties, using these standards as customary international law, and using international principles to interpret federal and state constitutional and statutory provisions.[72] I would add to that, though this may only be making explicit what is implicit in the interpretive use of international standards, using international standards as a way of establishing what is public policy — which is essentially what DOJ was doing in its amicus briefs in *Shelley* and *Hurd*.]

For advocacy in the United States, I think it is particularly important to emphasize that the human rights language in these international documents originated in the United States and that it was the United States that advocated for the international codification.[73]

[To mark the fiftieth anniversary of the UDHR, the United Nations published a collection of essays about human rights. The essays were

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70. ICESCR, *supra* note 57. Article 11(1) also provides that "The States Parties will take appropriate steps to ensure the realization of this right . . . ."; *see also* Committee on Economic, Social, and Cultural Rights, *supra* note 57.

71. CERD, *supra* note 58, art. 5; *see also* de la Vega, *Civil Rights During the 1990s*, *supra* note 50, at 425-431 (discussing the CERD and its requirement of affirmative action); Foscarinis et al., *supra* note 16, at 102 (citing Concluding Observations of the Human Rights Committee: United States of America, CCPR/C/79/Add.50; A/50/40 ¶ 291, Oct. 3, 1995) (discussing the U.N. Human Rights Committee's 1995 review of U.S. compliance with the treaty, the Committee expressed concern because

> disproportionate numbers of Native Americans, African Americans, Hispanics[,] and single parent families headed by women live below the poverty line and that one in four children under six [lives] in poverty . . . [and] that poverty and lack of access to education adversely affect persons belonging to these groups in their ability to enjoy rights under the Covenant on the basis of equality.

Id.).

72. *See* de la Vega, *Using International Human Rights Law*, *supra* note 50, at 1244; de la Vega, *Civil Rights During the 1990s*, *supra* note 50 at 423; *see also* Foscarinis et al., *supra* note 16, at 107-11.

73. *See supra* note 40; *see also* Simpson, *supra* note 6, at 243-247 (discussing the U.S. initiation and pursuit of human rights provisions in international documents while accommodating the U.S.'s interest in "ruling out any meddling with the embarrassing racial discrimination practiced by some states, and with U.S. immigration policies.").

introduced by brief reflections from four Nobel laureates, one of whom was John Polanyi, a Nobel laureate in chemistry. I would like to close by telling you how he concluded his remarks — and I ask you to remember that he is talking about what *scientists* should do, and I think this applies even more strongly to us as lawyers. He wrote the following:

> In challenging my own NGO, the community of scientists, to a greater degree of awareness and activism, I am heeding a passage in the Universal Declaration which I believe must figure more largely in the half-century to come. I refer to the phrase in Article 29 that, following a long litany of rights, refers to the individual's obligation to act in support of those rights. The time has come to underscore the fact that our and others' rights are contingent on our willingness to assert and defend them.[74]

I repeat, to and for all of us: with respect to the human rights that grew out of the four freedoms enunciated by President Franklin Roosevelt and have been recognized in international law for more than fifty years, "the time has come to underscore the fact that our and others' rights are contingent on our willingness to assert and defend them."]

Thank you very much.

RECOMMENDED READING

Rachel G. Bratt, Michael E. Stone, & Chester Hartman, *Why a Right to Housing Is Needed and Makes Sense: Editors' Introduction, in* A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 1 (Rachel G. Bratt, Michael E. Stone, & Chester Hartman, eds., 2006).

A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA (Rachel G. Bratt, Michael E. Stone, & Chester Hartman, eds., 2006)

Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely,* 65 U. CIN. L. REV. 423 (1997).

Connie de la Vega, *Protecting Economic, Social and Cultural Rights,* 15 WHITTIER L. REV. 471 (1994).

Connie de la Vega, Using International Human Rights Law in Legal Services Cases, 22 CLEARINGHOUSE REV. 1242 (1989).

74. John Polanyi, *in* UDHR: FIFTY YEARS AND BEYOND, supra note 1, at xii.

Maria Foscarinis, Brad Paul, Bruce Porter, & Andrew Scherer, *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. 97 (2004).

Maria Foscarinis, Homelessness and Human Rights: Toward an Integrated Strategy, 19 ST. LOUIS U. PUB. L. REV. 327 (2000).

Chester Hartman, The Case for a Right to Housing, 9 HOUS. POL'Y DEBATE 223 (1998), *reprinted in* A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 177 (Rachel G. Bratt, Michael E. Stone, & Chester Hartman, eds., 2006).

National Perspectives on Housing Rights (Scott Leckie, ed., 2003).

Francisco Forrest Martin, Stephen J. Schnably, Richard Wilson, Jonathan Simon, Mark Tushnet, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES, & ANALYSIS (2006).

DIE KUNDIGUNG, LICENCIEMENT, RECESSO DAL CONTRATO, 'FIRING', OR 'SACKING': COMPARING EUROPEAN AND AMERICAN LAWS ON MANAGEMENT PREROGATIVES AND DISCRETION IN TERMINATION DECISIONS

Carol Daugherty Rasnic*

My bills are all due, and the babies need shoes, but I'm busted....
- Ray Charles, American blues singer, 1963[1]

An oft-used statement in American and Canadian legal writings is that an employer's unilateral termination of a worker is the capital punishment of industrial relations.[2] The employment-at-will rule prevalent in most American states is the antithesis to the law in most European countries, where job security laws abound. This rule permits either the employer or employee to terminate the employment relationship at any time, with or without cause.

Domestic legislation in Europe consistently requires the employer not only to show good cause but also to tender statutory notice to a worker who is to be terminated. Moreover, these laws usually require the company to pay the affected worker severance pay, generally gauged by his period of service. The American at-will rule, the absence of statutory severance pay, and the dearth of pre-termination notice are anomalous to worker protections common in Europe.

This article will compare and contrast American law with the usual European laws regarding restrictions on employers and rights of employees in termination cases. Part I addresses relevant supranational conventions and treaties that have instigated much domestic employment legislation in Europe. In particular, the International Labor Organization and the European Commission have been significant in this area.

Part II has two sub-sections. First, an elaboration of Irish law exemplifies the myriad of worker protections and management obligations in termination decisions. The second section includes more summary treatment of some other European countries: four pre-2004 European Union member states (Austria,

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* Carol Daugherty Rasnic is Professor Emerita of Employment and Business Law and Professor of World Studies at Virginia Commonwealth University, Richmond, Virginia, USA. She has been Fulbright Visiting Professor of Law at Friedrich-Alexanders Univesitaet in Germany, NUI Galway and Karl-Franzens Universitaet Graz (Austria), and Fulbright Distinguished Professor of Law at Queens University Belfast. She has taught at numerous law schools in Austria and Germany and has been admitted to the state bars of Virginia and Tennessee.

1. "Busted," lyrics by American composer Harlan Howard.

2. *See, e.g.*, Ontario Superior Court Justice Isaac's opinion in Keays v. Honda, 2005 C.L. 230-013, 40 C.C.E.L. (930) 268, aff'd 2006 C.L.L.C. 230-030, 52 C.C.E.L. (3d) 165, 260 A.C. 3, 82 O.R.3d 161; ROBERT A. COVINGTON & KURT H. DECKER, EMPLOYMENT LAW IN A NUTSHELL 323 (2002).

France, Germany and Greece); four of the new member states with the expansion in May 2004 (the Czech Republic, Hungary, Slovakia and Slovenia); and two candidates for EU membership (Croatia and Turkey).

Part III explains the employment-at-will rule, its origins in American law, and the more usual exceptions to that rule. Court-created exceptions imply a sense of judicial frustration over the fundamental inequity inherent in the underlying legal principle.

Finally, Part IV discusses and contrasts this area of American law with European domestic legislation. Of especial note are provisions related to the reason(s) for which termination is permitted: statutory notification periods, financial obligations of the employer to the discharged employee, and any special provisions relating to collective redundancies (or, in American terminology, mass layoffs) and plant closures.

The purposes of this article are both practical and scholarly. The first is to present a guide for international businesses regarding these diametrically different commitments and rights under the applicable laws. The second is to provide a foundation for continued research on this issue for legal academics on both sides of the Atlantic. Addressed herein is the law, rather than any "law of the shop" — that is, any contractual agreement between worker and management, whether individual or collectively bargained.

I. AN INTERNATIONAL PERSPECTIVE: THE INTERNATIONAL LABOR ORGANIZATION AND THE EUROPEAN COMMISSION

A. International Labor Organization

Founded in 1919, the International Labor Organization (ILO) is the only remaining entity from the Treaty of Versailles, which gave rise to the failed League of Nations. As the first United Nations specialized agency, the purpose of the ILO is to further social justice and human rights for labor.

In addition to propagating legal protections for workers, the ILO also tracks international labor legislation and provides a summary of domestic laws affecting worker termination. A helpful ILO resource is the *Termination of Employment Legislation Digest,*[3] an on-line resource with a comparative law perspective of termination legislation in more than seventy countries.

The first international recognition that workers must have legal protections from unjustified and arbitrary termination was the ILO Termination of Employment Recommendation, 1963.[4] This recommendation was the first step in the adoption in 1982 of the Termination of Employment Convention,[5]

3. ILO, Termination of Employment Legislation Digest, http://www.ilo.org/public/english/dialogue/ifpdial/info/termination/ (last visited Dec. 22, 2007).

4. ILO, Termination of Employment Recommendation, June 5, 1963, No. 119.

5. ILO, Termination of Employment Convention, June 2, 1982, No. 158 [hereinafter

enacted with a supplementary recommendation (No. 166). Conventions bind signatory nations, and recommendations generally contain guidelines as aids to implementation of conventions or treaties. ILO Convention 158, which became effective in 2006, has been ratified by only thirty-four countries.[6] From within the European Union, only Finland, France, Latvia, Luxembourg, Portugal, Slovenia, Spain and Sweden have signed. Notably, the two Scandinavian countries (Finland and Sweden) arguably have the most sweeping social legislation in Europe.

The thesis of this convention is job security. Convention 158 directs subscribing countries to assure a reasonable period of pre-termination notice, or cash payments to the worker in lieu of notice. The ILO also tracks international labour legislation and provides a summary of domestic laws affecting worker termination. A helpful ILO resource is the *Termination of Employment Legislation Digest,*[7] an on-line resource with a comparative law perspective of termination legislation in more than 70 countries. Recommendation 166 favors a domestic law provision for a reasonable paid time off work to allow sufficient time for the worker to seek new employment.

Convention 158 also requires legislation obligating the employer to notify, inform and consult with a workers council, if any. The ILO adopted a workers council treaty in 1971,[8] which directs that domestic law be enacted to require the employer to notify the designated federal labor authority if termination is based on business reasons. Convention 158 also stipulates that severance pay, based on length of time worked for the terminating company and the amount of his wage or salary, be required by law to paid by the employer or that the worker be entitled to unemployment insurance payments, or a combination of severance pay and insurance payments.[9] If the worker is terminated for his own serious misconduct, he is not entitled to severance pay.[10] Recommendation 166 suggests requiring the employer to avoid the harshness of layoff for business reasons and to use suggested criteria to consider which workers are chosen (such as length of employment, skills, and family obligations).

Although Convention 158 is obligatory only upon signatory countries, it is nonetheless a model for what workers regard as ideal legal protections.[11]

Convention 158].

6. Brazil, one of the thirty-four signatories, has since retracted its ratification.

7. http://www.ilo.org/public/English/dialogue/ifpdial/info/termination.

8. ILO, Workers' Representatives Convention, June 2, 1971, No. 135.

9. Art. 12, Convention 158.

10. For an elaborate survey on the treaty in practice, *see* ILO, 1995, "Protection against unjustified dismissal," *General Survey on the Termination of Employment Convention (No. 158) and (No. 166), 1982*, Report III (4B), 82nd Session, 1995, ¶ 274.

11. The author is grateful to Angelika Muller, Labour Legislation and Labour Administration Branch, ILO, for her presentation at the annual *Internationaler Arbeitsrechtlicher Dialog* (International Employment Law Dialogue) [hereinafter *Dialog*] in Graz, Austria, October 24-25, 2006, for her remarks explaining the role of the ILO and the conventions and recommendations incorporated into this section.

B. European Commission

The European Union (EU), the geographic entity governed by the European Commission (EC) and the European Court of Justice, began as an economic conglomerate of only six countries. Since January 1, 2007, the date of formal admission to new member states Bulgaria and Romania, it has increased in size to its current twenty-seven members.

The EC has a paucity of directives regarding job security. Prof. Dr. Frank Hendrickx of the University of Leuven Law School has posed two reasons for this: (1) the EU had economic beginnings, and its social directions commenced relatively recently; and (2) there is a stark lack of consensus among member states.[12] The three directives addressing layoffs are the directive on collective redundancies[13]; portions of the Transfer of Undertakings Directive[14]; and the directive addressing job rights upon the insolvency of the employer.[15] It is reflective of the economic foundation of the EU that all of the directives are primarily in the context of marketing operations, corporate restructuring, and maintaining competitiveness, rather than employee protections.

As a rule, the domestic law within Europe has not encroached upon the prerogative of the employer in economic decision-making, but rather has provided procedures for notifying (and sometimes consulting with) workers and workers' representatives about such decisions. The exception is the Transfer of Undertakings Directive, in which the worker is to retain his job, absent any material change in the business that affects employment duties, either qualitatively or quantitatively.[16]

The Single European Act of 1986[17] required a qualified majority vote by the Commission on issues regarding health and safety in general.[18] At the Strasbourg Summit in December 1989, the Heads of State of eleven member states of the then-twelve member states (only the United Kingdom was not in favor) signed the Charter of Fundamental Social Rights for Workers.[19] Interestingly, the Charter did not address rights in termination situations.

The EU social policy initiatives that included provisions on job loss protections, began with the 1993 Maastricht Treaty.[20] In 1997, this agreement

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12. Presentation of Dr. Frank Hendrickx of the University of Leuven, *Dialog*, *supra* note 11.

13. Council Directive 75/129, 1975 O.J. (L 48) 29 (EEC).

14. Council Directive 98/50, 1998 O.J. (L 201) 88 (EC).

15. Council Directive 80/87 1980 O.J. (L 283) 23-27 (EEC).

16. Hendrickx, *supra* note 12.

17. The Single European Act, Feb. 28, 1986, 1986 O.J. (L169).

18. *Id.* Art. 148, at 205. The more usual rule for voting in the Council, comprised of heads of state of all member states, is by qualified majority, although some subject matter requires unanimity. Qualified voting is a statistical weighting of votes so as to allot greater strength to the larger countries.

19. 2000 O.J. (C 364) 1.

20. Treaty for European Union, Feb. 7, 1992, 1992 O.J. (C 191) [hereinafter TEU]. An excellent primer on the drafting and approval of TEU is R. CORBETT, THE TREATY OF

was subsumed into the Amsterdam Treaty.[21] Notably, the social charter empowered the Commission and the Council to address the "protection of workers where their employment contract is terminated."[22] The most significant post-Amsterdam directives affecting job security have been the two 2000 non-discrimination directives, the so-called race directive[23] and the framework directive.[24] The race directive is the broader of the two in that it applies not only to the work setting, but also to transportation, accommodations, and discrimination in general. On the other hand, the breadth of the framework directive, albeit limited to employment issues, prohibits discrimination on many grounds other than race and/or ethnicity (for example, religion, political beliefs, sex and sexual orientation). Although the EC has required member states to adopt laws prohibiting discrimination in the workplace, it has not addressed dismissal law in a comprehensive fashion.

Professor Hendrickx predicts that the EC's current ongoing discussions on the concept of "flexicurity"[25] will initiate a more aggressive European activity in the area. "Flexicurity" is the term referring to a palliative ideal for both labor and management, providing workers with job *security* ("-curity"), but for an undetermined time by permitting management the *flexibility* ("flexi"-) of using fixed-term employment contracts and/or temporary placements. For apparent reasons, this concept is more acceptable to employers than the workers, workers' representatives and unions.[26]

The ILO has adopted potent language embracing worker protections from unfair terminations, but subscribing nations are relatively few among the countries that are the subject of this article. European mandates to member states with respect to employee terminations have been limited to collective redundancies, transfers of ownership of businesses, employer insolvency regarding several terminations, and workplace discrimination on stated grounds regarding individual terminations. The legal task has been delegated for the most part to individual member states that have devised disparate job protections.

MAASTRICHT (1993).

21. Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340). The sole purpose of the Amsterdam Treaty was to incorporate amendments into existing treaty law. It is likely that European legal scholars perceived another purpose: making useless much information they had committed to memory. Amsterdam re-numbered all sections of the treaty.

22. *Id.* at Article 137.

23. Council Directive 2000/43, 2000 O.J. (L 180) 22 (EC).

24. Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC).

25. *See Commission White Paper on Growth, Competitiveness and Employment: The Challenges and Ways Forward into the 21st Century*, COM (1993), 7000 final (Dec. 5 1993); *Commission Green Paper*, COM (1997) 128 final (Apr. 16, 1997).

26. *See From the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Taking Stock of Five Years of the European Employment Strategy*, at 15, COM (2002), 416 final (May 17, 2002) (Reports surveys showing only twenty-eight percent employee approval, as compared with seventy-eight percent employer approval).

II. EUROPEAN DOMESTIC LAWS RESTRICTING MANAGEMENT'S TERMINATION RIGHTS

A. Irish Law on Employment Termination

1. The Unfair Dismissals Acts 1977-1993

Post-"Celtic Tiger" Ireland — the late 1990's economic boom — enjoys a commendably low unemployment rate of 4.4 percent.[27] Prior to this time, businesses suffered economically, and for this reason, governmental constraints upon companies' employment decisions were unusual. An exception to this generality was the enactment of the first Unfair Dismissals Act in 1977.[28] This legislation may appear to have been before its time, but that time rapidly came in its aftermath, with the economic strides that Ireland has made.

Many employment statutes in Ireland were triggered by EC dictates, so in this sense, the Unfair Dismissals Act is somewhat unusual. The framework used by the *Dail* was legislation in the United Kingdom.[29] Interestingly, ILO Convention 158 [30] was not adopted until 1982, after the passage of Ireland's Unfair Dismissal Act.

The underlying principle of the Irish unfair dismissals legislation is the assurance of job security unless the employer has good reason to terminate. It also provides for fair procedures in dismissals. A prerequisite for this protection is a minimum of one year's service with the employer.[31] Computation of time worked is established in the Minimum Notice and Terms of Employments Acts, 1973-1991,[32] and judicial law has excluded all time not

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27. The term "Celtic Tiger" refers to the period of economic boom in Ireland from 1995 to 2000. For each of the past 15 years, Ireland's economy gre by more than 7%. "Top of the Money," October 18, 2007, Economist.com. Moreover, Ireland's unemployment rate of 4.4% in 2007 was third among the 27 European Union member states, behind only Denmark (3.4%) and the Netherlands (3.5%). Eurostat, *Eurozone unemployment fell to 7.3% in February; Lowest rates were in Denmark and the Netherlands,* Mar. 30, 2007, *available at* www.finfacts.com/irelandbusinessnews/publish/printer_1000article_10009621.shtml.

28. Unfair Dismissals Act 1977 (Act No. 10/1977) (Ir.) *available at* http://www.irishstatutebook.ie/1977/en/act/pub/0010/index.html.

29. 293 *Dail* Deb (Nov. 4, 1976). The British statutes that served as the model were the Industrial Relations Act, 1971, c. 72, (Eng.); and the Trade Union and Labour Relations Act, 1974, c. 52. The author thanks Dr. Darius Whelan of the law faculty, University College Cork and President Ferdinand VonProndynski, Professor Law and President, Dublin City University, for this background on the Irish statute.

30. *See supra* notes 3-11 and accompanying text.

31. Minimum Notice and Terms of Employment Act, 1973 (Act No. 4/1973) (Ir.), at First Schedule, *available at* http://www.irishstatutebook.ie/1973/en/act/pub/0004/index.html (last visited Jan. 4, 2008, 2007).

32. *Id.*

worked because of statutory holidays.[33] Inexplicably, such time is included in determining the two-year service requirement for redundancy legislation coverage.[34] Similar to redundancy legislation, only workers age sixteen to sixty-six are protected by the Unfair Dismissals Acts.[35]

Excluded from this one-year service requirement are terminations that are allegedly retaliatory because of the worker's membership in trade union activities, pregnancy or request for maternity or parental or *force majeure* leave.[36] A recent case is explanatory; a store manager for Five Star Foods, Ltd. in Dublin replaced a pregnant worker to the employer's peril. Upon learning of her pregnancy, the worker asked for a reduction of hours. After having exercised her statutory right to time off for medical treatment,[37] she returned to work, but was informed by the manager that she had been replaced. He explained that he had interpreted her request for time off as a resignation. She filed an unfair dismissals charge, and the Employment Appeals Tribunal (EAT) awarded her €14,500 (and an additional €388 for having received neither one week's notice nor an explicit reason for her dismissal).[38]

An important distinction between unfair dismissals law and redundancy legislation is that all dismissals are presumed to be unfair, and the burden of proving its reasonableness and/or fairness is upon the employer.[39] Conversely, the burden is on the worker to prove that a business situation is not, in fact, a redundancy.

A 2005 decision by the EAT exemplifies the importance of the employer's use of fair procedures in termination cases. In *James Mulcahy v. H.C. Cahill Ltd t/a Cahill Quality Foods*,[40] the worker was discharged because he had been stopped by police while driving a company truck with illegal drugs in his possession. In a meeting shortly after the incident, he openly admitted to the employer's general manager and two other employer representatives that he

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33. *See* Twomey v. O'Leary Office Supplies Ltd., [2000] E.L.R. 42 (Ir.).

34. Redundancy Payments Act, 1967 (Act No. 21/1967) (Ir.) at Schedule 3, *available at* http://www.irishstatutebook.ie/1967/en/act/pub/0021/index.html (last visited Oct. 18, 2007).

35. Redundancy Payments Act 1971, (Act No. 20/1971) (Ir.), sec. 3, as amended by sec. 5 Redundancy Payments Act 1979, as amended by sec. 46(c) (d) Equality Act, 2004 (Act No. 24/2004) (Ir.) *available at* http://www.irishstatutebook.ie/2004/en/act/pub/0024/sec0046.html#partii-sec46 (last visited Oct. 18, 2007).

36. Unfair Dismissals (Amendment) Act, 1993 (Act No. 22/1993) (Ir.), sec. 14, Unfair Dismissals Act, 1977, *supra* note 28, sec. 6(2)(f), as amended by Maternity Protection Act, 1994 (Act No. 34/1994) (Ir.), sec. 38(5), *available at* http://www.irishstatutebook.ie/1994/en/act/pub/0034/index.html (last visited Oct. 18, 2007) and by Parental Leave Act 1998 (Act No. 30/1998) (Ir.), sec. 25(2), *available at* http://www.irishstatutebook.ie/1998/en/act/pub/0030/index.html (last visited Oct. 18, 2007).

37. Maternity Protection Act 1994, *supra* note 36, sec. 15, entitles pregnant workers paid time off for pre- and post-natal care.

38. Conor Feehan, *Worker Sacked for Being Pregnant*, WEEKEND HERALD, Apr. 29, 2006, at 1.

39. *See* FRANCES MEENAN, WORKING WITHIN THE LAW 398 (1999).

40. [2004] M.N. 769 (Ir.) and [2004] U.D. 969, May 5, 2005.

had also possessed and used drugs in the workplace. Understandably (at least to most management personnel), he was instantly terminated. However, because the employee had not been informed prior to the meeting of the purpose and the procedures to be used, the EAT awarded him €4,000. This decision arguably lends true meaning to the reverse of an old adage that no bad deed goes unrewarded. The same necessity to utilize fair procedures applies in redundancy cases.

The Irish courts have often found that the employer has met its burden of proving reasonableness in unfair dismissal claims. This concept of "reasonableness" encompasses both the substantive reason for the termination and the adherence to fair procedures. A dismissal will be fair under the statute if it is based upon the "capability, competence, or qualifications" of the employee in the performance of tasks involved in the job for which he had been hired; his unacceptable conduct; his redundancy; or the existence of a statutory prohibition on one party to the employment contract.[41] In determining whether the employer acted fairly, the courts have required the employer to have completed an adequate investigation of the cause leading to the dismissal. Otherwise, the dismissal will be found unfair.[42]

Part-time workers are fully protected under the Unfair Dismissals Acts. Prior to December 20, 2001, a part-time worker was expected to work a minimum of eight hours per week in order to be protected.[43] This proviso has been repealed.[44]

For any dismissal that is not a redundancy, a worker with at least thirteen weeks of service must be given a statutory period of notice. The minimum length of the notice is based upon the length of service.[45]

41. Unfair Dismissals Act, 1977, *supra* note 28, sec. 6(6).

42. *See, e.g.*, Hennessey v. Read and Write Shop, Ltd., [1978] U.D. 192 (Ir.).

43. Worker Protection (Regular Part-Time Employees Act), 1991 (Act. No. 5/1991) (Ir.) *available at* http://www.irishstatutebook.ie/1991/en/act/pub/0005/index.html (last visited Oct. 18, 2007).

44. Protection of Employment (Part-Time Work) Act, 2001 (Act No. 45/2001) (Ir.) *available at* http://acts.oireachtas.ie/en.act.2001.0045.1.html (last visited Jan. 4, 2008).

45. Minimum Notice and Term of Employment Act 1973 (Act No. 4/1973) (Ir.), sec. 4(2), *available at* http://acts.oireachtas.ie/zza4y1973.1.html (last visited Jan. 4, 2008).

Length of Service	*Notice*
Thirteen weeks to two years	One week
Two to five years	Two weeks
Five to ten years	Four weeks
Ten to fifteen years	Six weeks
Fifteen plus years	Eight weeks

Significantly, the courts have at times literally construed the statutory word "minimum." For example, a worker with many years of service might be regarded as equitably entitled to more than the minimum as stated in the Act. Unlike many courts, the EAT is empowered to require only the statutory minimum.[46]

Another limitation on the EAT is the amount of compensation that can be awarded to a victorious unfair dismissals claimant. The maximum this body might grant is 104 weeks' wage or salary,[47] whereas a court might award more.

An anomaly in Irish legislation is that a fixed-term or specified purpose worker might also file an unfair dismissal claim when the employment ends without notice at the conclusion of the contract. Such workers are protected by the legislation unless the contract of employment is (i) signed by both parties and (ii) specifies that the Unfair Dismissals Act is inapplicable to this employment relationship.[48] However, in the event either of these requirements has not been met, the employer might nonetheless prevail. The effect of this notice requirement is to shift to the employer the burden of proving the parties intended to limit the employment for the specified period of time. For example, the legendary luck of the Irish was with the employer in *O'Mahony v. Trinity College*.[49] The EAT held that, despite the absence of evidence that the two statutory requirements had been met, the evidence substantiated that temporary employment had been the clear intent of both parties. The claimant had accepted a fixed-term temporary position, and his subjective hope or expectation that this contract might be renewed did not alter or affect the mutual understanding with respect to the fixed and temporary nature.

A case in which the employer was not as fortunate as the one in *O'Mahony* was *Fitzgerald v. St. Patrick's College, Maynooth*.[50] This claimant had a fixed-term contract as lecturer at one of the national universities of Ireland, pending the college's implementation of required procedures to advertise and fill the position on a permanent basis. Because of intervening

46. MEENAN, *supra* note 39, at 374.

47. Unfair Dismissals Act, *supra* note 28, sec. 7(1)(c), as amended by Unfair Dismissals Act 1993, *supra* note 36, sec. 6(a).

48. Unfair Dismissals Act 1977, *supra* note 28, sec. 2(2)(b).

49. [1998] E.L.R. 15 (Ir.).

50. [1978] U.D. 244, reported in KERR & MADDEN, CASES AND COMMENTARIES ON UNFAIR DISMISSALS 86.

delays in completing these procedures, she was offered and accepted a second fixed-term contract. When the second contract was not renewed, the employee filed an unfair dismissals claim. The EAT held for the employee, finding that the college had not met its burden of proving any commercial justification for having entered the first contract on a fixed-term basis. This decision illustrates how an employer might avoid liability simply by fulfilling the two simple requisites in the statute.

Because some companies apparently endeavored to use fixed-term contracts in a manner to evade the necessity of complying with the Unfair Dismissals Acts, the law was amended in 1993. Prior to this amendment, an employer might have hired all workers for fixed-terms of less than one year and re-hire them after a brief hiatus. This would preclude such workers from attaining the necessary one year of service. The law as amended prevents an employer from avoiding compliance if he rehires a fixed-term worker within three months after the expiration of his term.[51]

The concept of constructive dismissal applies to both the Unfair Dismissals Acts and the Redundancy Payments Act. A worker will be regarded as having been unilaterally terminated if he proves that his working conditions had become too intolerable for a reasonable person to continue working. A recent case is illustrative. In *MBNA Ireland v. A Worker*,[52] a worker resigned because of management personnel's circulation of false rumors about her mental health (specifically, that her mother had once had her admitted to a mental hospital). She had asked to have the false information removed from her file, but the company refused. Her claim was filed under the Industrial Relations Act, and, in a non-binding recommendation, the Labor Court agreed the refusal had been unreasonable. Nonetheless, the Court also held that she had other available alternatives short of resigning, and that she had not proven constructive discharge.[53] The recommendation was that the company tender her a written apology, remove the false information from her files, and donate €5,000 to a charity of the worker's choice. Unless this claimant was particularly altruistic, her victory was a Pyrrhic one indeed.

2. Statutory Redundancies in Ireland: The Redundancy Payments Acts 1967-2003: The Concept of "Redundancy"

Closely related to the Unfair Dismissals Acts is legislative protection for workers in redundancy situations. "Redundancy" is defined in the statute as a termination caused by something beyond the control of the affected worker that is necessitated by business or economic reasons.[53] The statute lists five grounds that will justify a redundancy, and two factors are reflected in each. First, the

51. Unfair Dismissals Act, 1993, *supra* note 36, sec. 22(b).

52. [2005] C.D.140 recommendation No. 18300, 23 August 2005.

53. Redundancy Payments Act 1967, *supra* note 34, sec. 7(2), as amended by Redundancy Payments Act 1971, *supra* note 35, sec. 4.

reason must be impersonal and unrelated to the worker himself. For example, if he is being terminated because of inability to perform the duties inherent in the job, the termination is a dismissal rather than a redundancy. Second, the courts have interpreted a redundancy as always involving some intra-business change.[54]

Within the concept of redundancy is a short-term layoff, provided it is at least four weeks in duration, or six weeks within a thirteen-week period with no four of these weeks having been consecutive.[55] At the option of the worker, redundancy also might include so-called "short-time," defined as a diminution of the worker's workload such that his remuneration is decreased to less than one-half his usual wage or salary.[56] For example, assume that Seamus has worked for eight years as a quality control checker for Baits 'n' Hooks Ltd., a manufacturer of fishing paraphernalia. His usual workweek is forty hours, and his hourly wage is €10.50. Thus, Seamus' weekly wage is €420. If his supervisor has told him that necessary economic downsizing by the company requires his workweek to be reduced to a twenty-four-hours and his hourly rate of pay lowered to €7.70, these changes will result in diminishing his weekly pay from €420 to €184.80. Since this amount is less than one-half his prior earnings, Seamus has been given notice of "short time." He has the option of declaring his situation a redundancy, and, in such case, he would be entitled to redundancy payments.

Once a termination or short-time is determined to be a redundancy, it cannot be an unfair dismissal, since the two concepts are mutually exclusive. Significantly, the redundancy must be impersonal and unrelated to the worker, but rather to the functions of the job itself.[57] Conversely, if the root cause of a statutory dismissal is the worker himself, then it is presumed to be unfair, unless the employer can prove otherwise.

3. Which Workers Are Protected Under Redundancy Legislation?

A worker who is protected is entitled to notice and redundancy payments as specified in the legislation. First, only those between the ages of sixteen and sixty-five are protected.[58] Second, only workers with at least two years of service with the company who have made contributions to the state social insurance fund are covered.[59] Third, a worker must work a minimum of twenty-one hours per week.[60] Finally, one is not protected if his employer is his parent, step-parent, son or daughter, grandson or granddaughter, sibling or half-

54. *See, e.g.*, St. Ledger v. Frontline Distribution Ltd., [1994] U.D. 56 (Ir.).

55. Redundancy Payments Act 1967, *supra* note 34, sec. 12(2)(a)(b).

56. *Id.* sec. 11(2).

57. Moloney v. Deacon & Sons, [1996] E.L.R. 230 (Ir.).

58. Redundancy Payments Act, 1967, *supra* note 34, sec. 7(5) and Redundancy Payments Act, 1971, *supra* note 35, sec. 3(1).

59. Redundancy Payments Act, 1967, *supra* note 34, sec. 7(9)(a)(b).

60. *Id.* sec 4(2).

sibling with whom the worker lives.[61] Despite the existence of a redundancy, a worker is not protected if the reason for the dismissal was his misconduct.[62]

In the second requirement, that is, the two-year service rule, the time must have been continuous. Thus, one who worked eight months for a company, after which he left and later returned, with a service record of one and a half years since resumption, does not have the required two years. Continuity is presumed,[63] and, unlike the Unfair Dismissals Act's one-year requirement, much time not actually worked is included in the calculation. For example, continuity is not broken because of time not worked because of a strike or lockout, statutory leave, or statutory holidays.

Importantly, if a worker challenges the termination as not being a redundancy, but rather a dismissal, he has the burden of proving the dismissal.[64] Even if a redundancy exists, the affected worker might raise a second issue:[65] that of his selection for redundancy.

The statute does not establish which factors an employer must consider in selection, such as the worker's age, length of service, or family obligations. However, the Unfair Dismissals Act lists unlawful grounds for dismissals. This infers that redundancy determinations also might not be based on these factors. In order to prevail, the worker must prove that he was selected for redundancy because of his trade union membership or activities; religion or political opinion or position; any connection with or participation in civil or criminal proceedings against the employer; race; sex; pregnancy; sexual orientation; age; membership in the traveling community; or denial of maternity rights.[62] Most employment law experts concur that such cases are rare because of the difficulty of the burden of proof.[66] However, at least one decision was against the employer for having singled out part-time workers (all female) rather than full-time (all male) workers when redundancies became necessary. In *Michael O'Neill and Sons Ltd. v. Two Female Employees*,[67] this was found to be unlawful sex discrimination.

If such a claim is successful, the worker might have one of several types of remedies. He might be (i) compensated; (ii) awarded reinstatement with back pay and any missed benefits; or (iii) re-engaged. The latter resembles, but is not identical to, reinstatement. Re-engagement is usually not re-employment in the same position, but in a different position that is suitable for the claimant/plaintiff. Also, re-engagement generally does not include back pay

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61. *Id.*

62. *Id.* sec 14.

63. *Id.* at Schedule 2 ¶ 4.

64. Redundancy Payments Act, 1971, *supra* note 35, sec. 10(b), states the presumption that a redundancy exists.

65. Unfair Dismissals Act, 1977, *supra* note 28, secs. 5 and 6, as amended by Unfair Dismissals Act, 1993, *supra* note 36, secs. 4 and 6.

66. *See* Meenan, *supra* note 39, at 418.

67. [1988] D.E.E. 1.

and lost benefits.[68]

An employer usually might defend a selection process based solely on seniority. Additionally, the general rule is that it might lawfully justify a decision to retain a more efficient, productive worker in favor of a less productive one.[69] In the latter situation, the company must be prudent in following correct procedure. The EAT has imposed an additional non-statutory obligation on the employer. In *Kirwan v. Iona National Airways*,[70] the worker successfully challenged his selection for redundancy because the employer had never discussed with him any problems with inadequate productivity.

Moreover, the employer must follow any procedure contained in a collective bargaining agreement or any other agreement with workers and/or a worker representative. Irish law also imposes upon the employer the obligation to inform the workforce of the method being used for selection of which workers will be made redundant, and failure to have done so has been held by the EAT to result in an unfair dismissal.[71] In *Roche v. Richmon Earthworks Ltd.*,[72] the EAT held that notification of redundancy without any prior consultation and discussion with the affected worker was tantamount to an unfair dismissal.

A summary of selection rules in Irish redundancy law shows that selection based on any of the prohibited grounds is patently unlawful; the employer must comply with any collective bargaining or other workers' representative agreement procedure, or any procedure that is the norm in the workplace by reason of custom; the method of selection must be explained to workers prior to notification; and any deficiencies in the employee's work performance must been discussed with him prior to notification. An employer will generally avoid unfair dismissal liability if he uses the "last-in-first-out" seniority rule of thumb in redundancy selections, and a decision to keep a better worker and to choose a less proficient one for redundancy is acceptable, provided that the unsatisfactory work performance had earlier been discussed with the one chosen for redundancy. In such cases, the employer should be able to present objective proof of the selected worker's inferiority to the one being retained.

4. Employer's Statutory Obligations to the Redundant Worker

The employer has two obligations in a statutory redundancy. First, it must give the requisite notice to those workers to be made redundant. Second, it must pay statutory severance money to each entitled worker.

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68. Unfair Dismissals Act, 1977, *supra* note 28, sec. 2, as amended by Unfair Dismissals Act, 1993, *supra* note 36, sec. 7.

69. *See, e.g.*, Cassidy v. Smith and Nephew Southalls (Ireland) Ltd., [1983] U.D. 35.

70. [1987] U.D. 156.

71. *See, e.g.*, Boucher and Others v. Irish Production Centre [1995] E.L.R. 205.

72. [1997] U.D. 329.

The notice is similar to that required for a dismissal, except that the worker's entitlement begins at two years of service.[73]

Length of service	*Required notice*
Two to five years	Two weeks
Five to ten years	Four weeks
Ten to fifteen years	Six weeks
Over twenty-five years	Eight weeks

The two years includes holidays and annual time leave. Thus, the time frame is two calendar years.

Length of tenure with the business also governs the required amount of redundancy payments. The worker is entitled to two weeks' pay for each year worked (presuming that he has the requisite two years of minimum service), subject to a maximum of €600 per week, plus one week's pay as a bonus.[74] For example, a worker with eight years of service would be entitled to seventeen weeks of pay.

Before the redundant worker has the right to redundancy payments, he must notify the employer in writing of his intent to claim this money. This notice must be no later than one month from the end of the employment relationship, or one month from his having been notified of the EAT's decision to deny his claim, if he had filed an unfair dismissal claim.[75]

Payments are the obligation of the employer, but the Social Insurance Fund will reimburse 55% of the amount paid if the lump sum paid to the redundant worker is not in excess of twenty times his normal weekly wage.[76] Mathematically, this would apply to workers with at least ten years of service. For payments that exceed this amount, the employer's reimbursement will be in the amount of 55% of payments made, plus the entire amount payments exceeded this 55% figure.[77] The company must claim this rebate within one year of the payment to the worker, or within two years, upon a showing of reasonable cause for the delay.[78] This rebate is increased 2.5%, provided that it does not exceed 70%, if the employer provides the Minister of Enterprise, Trade and Employment a copy of the notice to the worker(s) at least three weeks prior to the date of the end of employment.[79] Additionally, the employer must apply for the rebate within six months of payment to the worker(s).[80]

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73. Minimum Notice and Terms of Employment Acts, 1973, (Act No. 4/1973) (Ir.), sec. 4, *available at* http://www.irishstatutebook.ie/1973/en/act/pub/0004/index.html (last visited Jan. 4, 2008).

74. Redundancy Payments Act, 1971, *supra* note 35, sec. 17(1).

75. Redundancy Payments Act, 1967, *supra* note 34, sec. 12(2).

76. Redundancy Payments Act, 1971, *supra* note 35, sec. 1.

77. *Id.* sec. 13, amending Redundancy Payments Act, 1967, *supra* note 34, sec. 29(1)(b).

78. *Id.* sec. 12, amending Redundancy Payments Act, 1967, *supra* note 34, sec. 24.

79. *Id.* sec. 13, amending Redundancy Payments Act, 1967, *supra* note 34, sec. 29(2).

80. DEPARTMENT OF ENTERPRISE, TRADE, AND EMPLOYMENT, GUIDE TO THE REDUNDANCY

There is a statutory maximum for redundancy lump-sum payments. Formerly 250 Irish punt per week, or 13,000 punt maximum; these ceilings were increased in 1994 to 300 punt per week, or 15,600 punt maximum, respectively. The current maximum of €600 per week reflects Ireland's 2002 conversion to the Euro as her monetary unit. [81]

Despite these provisions, in Ireland, it is customary for the employer and trade union to have agreed upon a determined amount of redundancy payments that generally contain no maximum.[82] It is of significance that union membership in Ireland is on the decline. The overall national percentage of unionized workers was 45.8% in 1994. As of 2004, this percentage had fallen to 34.6%. Among private sector workers, union membership is only about 20%.[83]

A conscientious employer might make an effort (but is not legally required) to find alternate work within the business for the employee who is made redundant, since this may result in relieving the employer of the redundancy payment obligation. If the employer makes a written offer to the worker who has received notice of redundancy, the offered work should not differ substantially from the worker's prior job. If the worker declines, he will lose his right to redundancy payment. This rule applies if the employer's offer was made within two weeks of the notified termination date and if the employer's proposed renewal of the work contract or re-engagement of the employee would be effective within four weeks of the end of the employment relationship.[84] Similarly, his right to redundancy might be relinquished if the offer within the same time frames were for re-employment in a position suitable for the employee, although it would differ with regard to terms and conditions of employment.[85] An example would be the same work to be performed at a different location or during a different shift.

5. *Collective Redundancies*

The European Commission has required the enactment of domestic legislation that imposes additional duties on the employer in the event of a collective redundancy, as defined by member state law.[86] The Irish implementing legislation is the Protection of Employment Act 1977, amended by the Protection of Employment Order.[87] These directives expressly exclude

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PAYMENTS SCHEME 28 & 67 (2005).

81. Redundancy Payments (Lump Sum) Regulations 1994 (S.I. No. 64 of 1994), *available at* http://www.irishstatutebook.ie/1994/en/si/0064.html (last visited Jan. 4, 2008).

82. GARY BYRNE ET AL., LAW SOCIETY OF IRELAND: EMPLOYMENT LAW 140 (2003).

83. Chris Dooley, *Unions Succeed in Forcing Their Issues to the Top of the Agenda*, THE IRISH TIMES, Feb. 1, 2006, at 16.

84. Redundancy Payments Act, 1967, *supra* note 34, sec. 15(1)(a), (b).

85. *Id.* sec. 15(2)(a)-(e).

86. Council Directive 75/129, *supra* note 13, as amended by Council Directive 92/56, 1992 O.J. (L 245) 92 (EEC). These two directives were consolidated in 1998 into Council Directive 98/59, 1998 O.J. (L 225) 16 (EC).

87. Protection of Employment Order 1996 (S.I. No. 370 of 1996) (Ir.), *available at*

contracts for a fixed-term or a specified purpose, public workers, and sea-going vessel crews.

"Collective redundancy" is defined in the Order according to the number of workers made redundant within a thirty-day period, gauged by the total number of workers in the business:

> (i) five workers for a company with twenty-one to forty-nine workers;
>
> (ii) ten workers for a company with fifty to ninety-nine workers;
>
> (iii) 10% of the workforce for a company with 100-299 employers;
>
> (iv) thirty workers for a company with 300 plus workers.[88]

There are two additional duties imposed upon the employer in a collective redundancy. First, it must consult with the employee representative.[89] This representative might be a trade union or a person or person(s) chosen by workers to represent them. Notably, there are no statutory works councils in Ireland. The goal of this consultation, as expressed in the legislation, is the reaching of an agreement that might reduce or entirely avoid the redundancies. Second, the employer must notify the Minister for Enterprise, Trade and Employment no later than thirty days prior to the terminations.[90]

The employer's failure to comply with these requirements in a statutory redundancy is punishable by fine.[91] Because of the avoidable nature of such noncompliance and intra-company administrative oversight, there is no substantial body of law in Ireland on collective redundancies.

6. The Common Law of Wrongful Termination

A worker cannot file both a claim under the Unfair Dismissals Act and a common law action for wrongful termination, and there are several significant factors in determining his choice. First, the statute of limitations for an Unfair Dismissals Act claim is six months, a period that might be extended up to twelve months if a Rights Commissioner or the EAT decides that "exceptional circumstances" prevented a timely filing.[92] Once this claim has been filed with a Rights Commissioner or the EAT, the worker is precluded from filing an

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http://www.irishstatutebook.ie/1996/en/si/0370.html (last visited Jan. 4, 2008).

88. *Id.* ¶ 4..

89. Protection of Employment Act, 1977 (Act No. 7/1977) (Ir.) sec. 9(2), as amended by paragraph 8 of the 1996 Order, *available at* http://www.irishstatutebook.ie/1977/en/act/pub/0007/index.html (last visited Jan. 5, 2008).

90. Protection of Employment Act, 1997, (Notification of Proposed Collective Redundancies) Regulations 1977 (S.I. No. 140 of 1977) (Ir.), *available at* http://www.irishstatutebook.ie/1977/en/si/0140.html (last visited Jan. 5, 2008).

91. Protection of Employment Act, 1977, *supra* note 89, secs. 11, 13.

92. Unfair Dismissal Act, 1993, *supra* note 36, sec. 8(2).

action at common law.[93] The same rule applies if he has filed a lawsuit. This would prohibit his filing an Unfair Dismissals Act claim.

Regarding the statute of limitations in an action at law, the plaintiff might base his charge upon breach of contract, for which the statute is six years,[94] or on tort, for which the limitations period is three years.[95] Clearly, the statute will have run on an unfair dismissals claim before the time period for an action at common law.

Drawbacks to pursuing a judicial remedy are the relatively longer time involved for dispensation and the relatively higher costs. One benefit to the action at common law is the court's capacity to award a greater amount in damages. Neither a Rights Commissioner nor the EAT is authorized to award more than two years' pay.[96] Another positive feature is that the court might be a forum for redress for the plaintiff with less than one year's service with the defending employer.

There had been some doubt regarding whether the constructive dismissal theory was also available in a common law action for wrongful termination. This doubt was laid to rest when the High Court held in *Pickering v. Microsoft*[97] that constructive discharge counts are alive and well in the Irish courts. The plaintiff in *Pickering* based her action on both contract and tort. On the tort claim, she was awarded €60,000 for pain and suffering to date and €20,000 for future pain and suffering; on the contract claim, she was awarded €20,000 for future loss of earnings.

7. Transfer of Business

In 1977, the European Commission adopted a directive requiring domestic legislation to ensure job security upon the transfer of a business or part of a business.[98] Irish compliance came in the form of statutory regulations.[99]

The regulations are operable any time the identity of the business changes. A business might transfer in its entirety, or in part, regardless of any change in actual ownership.[100] In such cases, the directive provides a defense

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93. Unfair Dismissal Act, 1977, *supra* note 28, sec. 15.

94. Statute of Limitations Act, 1957 (Act No. 6/1957), (Ir.) sec. 11(a), *available at* http://www.irishstatutebook.ie/1957/en/act/pub/0006/index.html (last visited Jan. 5, 2008).

95. Statute of Limitations (Amendment) Act, 1991 (Act No. 18/1991) (Ir.), sec. 3(1), *available at* http://www.irishstatutebook.ie/1991/en/act/pub/0018/index.html (last visited Jan. 5, 2008).

96. Unfair Dismissals Act, 1977, *supra* note 28, sec. 7(1)(c), as amended by Unfair Dismissals Act, 1993, *supra* note 36, sec. 6(a).

97. Pickering v. Microsoft, [2005] U.D. 21 (December 2005) (H.Ct.)(Ir.).

98. Council Directive 77/187, 1987 O.J. (L 61) 26 (EEC).

99. European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations, 1980 (S.I. No. 306 of 1980) (Ir.), *available at* http://www.irishstatutebook.ie/1980/en/si/0306.html (last visited Jan. 5, 2008).

100. *See* Redmond Stitching v. Bartol, [1992] I.R.L.R. 366. The European Court of Justice

for the employer that challenges its applicability, the so-called ETO defense ("economic, technical or organizational reasons").[101] Ireland has looked to English courts for guidance in the absence of Irish precedent, and the English judiciary has upheld non-hires of pre-transfer workers if the workers would have become redundant absent the transfer.[102]

In order for the ETO defense to succeed, the new company must present objective proof that the actual motive for a decision not to rehire a worker was based on bona fide changes in the workplace. This requirement is identical to the requirement in a challenged redundancy in a non-transfer situation,[103] and Irish courts have consistently applied the same rule to the ETO defense. In *Morris v. Smart Brothers Ltd.*,[104] a company (Smart Brothers) sold some of its eight retail clothing stores to various purchasers because of business difficulties. The EAT approved some non-hires on redundancy grounds. One such new owner in particular had reduced its workforce by becoming only 50% retail, altering its sales to one-half wholesale. *Smart Brothers* is an illustrative case in point because different circumstances led to the holding that some non-hires were unfair dismissals and some were proven redundancies, depending upon the natures of the particular transferee's business.

The only contractual rights of a worker that do not transfer are any right to pension contributions by the earlier employer and any right to health or survivors' benefits funded by that employer. The directive expressly excludes any right to benefits that are not under the domestic social security obligations,[105] and there is no legal mandate in Ireland that the employer must provide its workers with a pension plan or health coverage.[106]

8. Employer's Insolvency

European law precipitated Irish legislation involving workers' rights in the event of insolvency of the employer.[107] Other relevant Irish statutory law is the Bankruptcy Act 1988, which effectively transfers all property belonging to the insolvent business to an Assignee in Bankruptcy contemporaneously with the adjudication of bankruptcy.

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held the directive applied to a change by the Groningen local authority in the Netherlands of the grantee of charitable funding for drug addicts from one institution, the Redmond Foundation, to another, the Sigma Foundation. This decision applied the directive to non-profit-making bodies. The Court held that the directive might apply regardless of any change in ownership, requiring only that the identity of the entity remained the same subsequent to the transfer.

101. Council Directive 77/187, *supra* note 98, at art. 4.

102. *See, e.g.*, the English cases of Gorictree Ltd. v. Jenkinson, [1984] I.R.L.R. 391 and Trafford v. Sharpe & Fisher (Building Supplies) Ltd., [1994] R.R. 325.

103. Redundancy Payments Act, 1967, *supra* note 34, sec. 7(2).

104. Morris v. Smart Brothers Ltd., [1993] U.D. 688.

105. Council Directive 77/187, *supra* note 98, at art. 3(3).

106. If the employer did have a pension plan, the worker might have rights under the Pensions Acts 1990-2003, but there is no obligation on the part of the transferee company in this regard.

107. Council Directive 80/87, *supra* note 15.

Clearly, automatic termination of the employment relationships occurs upon the company's insolvency and liquidation, since it is no longer a viable business for which the affected employees might work. The Bankruptcy Act's list of priority of creditor payments from the company's assets is (1) liquidation fees (including Revenue Commissioner, if there are any unpaid taxes); (2) secured creditors (these refer to fixed charges, such as a mortgage on land); and (3) preferred creditors.[108]

Unpaid wages and salary are included in the third category provided that it was earned during the last four months prior to adjudication and up to a statutory maximum. Other employee rights as creditors of the employer are arrearages in holiday and/or sick pay and any unpaid money because of unfair dismissal.[109] It should be noted that redundancy payments in insolvency situations are paid by the Social Welfare Fund,[110] rather than from the employer's assets.

In order to attain this preferred creditor status, the worker must meet the same requirement for redundancy payments, that is, he must have two years of continuous service with the employer[111] and be between the ages of sixteen and sixty-six. Those workers who have reached the age of sixty-six will be within this class of creditors if they have no social insurance. Significantly, workers who have been away from Ireland during the past year or longer are excluded.[112]

B. Summaries of Other Selected European Countries' Laws

1. Austria, France, Germany, and Greece: Examples of Four Pre-2004 expansion European Union Member States

Austria

Employment law in the lovely land of Mozart and Strauss has developed quite similarly to employment law in Germany, Austria's neighbor to the west. Both bodies of law in general have strong social state philosophies with solid worker protection features. The works council in Austria, however, has a much more substantial role than does its counterpart in Germany.

Austria distinguishes between *Arbeiter* ("blue collar" workers) and *Angestellten* ("white collar" employees). In general, the major statute

108. Sec. 81 Bankruptcy Act 1988.

109. Unfair Dismissals Acts 1977-1991 and Redundancy Payments Acts 1967-1992.

110. Sec 39 Social Welfare (Consolidation) Act ,1981 (Act No. 1/1981) (Ir.), sec. 39, *available at* http://www.irishstatutebook.ie/1981/en/act/pub/0001/index.html (last visited Jan. 5, 2008).

111. Sec 2 Social Welfare Act, 1982 (Act No. 2/1982) (Ir.), sec. 2, *available at* http://www.irishstatutebook.ie/1982/en/act/pub/0002/index.html (last visited Jan. 5, 2008).

112. *See* Kenny v. Minister for Trade and Employment, [1999] E.L.R. 163.

applicable to white-collar employees is the *Angestelltengesetz.*[113] Within that statute, however, is an elaborate network of cross-referencing to a legion of statutes that define with some specificity which workers fall into which category and sub-category. White-collar employees include some people who work for merchants, provided they work a designated number of hours according to a detailed mathematical formula; bankers; attorneys; and some employees for commercial companies. Austria is perhaps unique in its classification of private sector workers that are quasi-*Angestellten*, but who are subject to special rules in separate statutes. For example, there are rural workers (*Bauerarbeiter-Schlechtwetterentscheadigungsgesetz und Landarbeitergestz*), mountain workers and miners (*Bergarbeitergesetz*), bakers (*Bäckereiarbeitergesetz*), journalists (*Journalistengesetz*), domestic workers (*Hausgehilfen-und Hausangestelltengesetz*), construction workers (*Bauarbeiter-Urlaubs-und Abfertigungsgesetz*), and actors (*Schauspielergesetz*), to name a few. These separately classified workers are treated generally as white-collar workers. All others not specified in these statutes constitute the blue-collar group.[114] The law on termination of the employment relationship differs only according to the two major classifications of blue- and white-collar workers.

The Austrian statutes, as do those in most continental of Europe, refer to dismissals as ordinary, meaning with the notice required by statute, or extraordinary meaning immediate termination.[115] For fixed-term contracts, Austrian law does not require the employer to give notice of termination, unlike Irish law. However, similar to Irish law is the court-imposed prohibition on successive fixed-term contracts used implicitly to avoid compliance with statutory notification and termination payment requirements.[116]

Dismissal must be for cause, either (i) related to the business (for example, downsizing), (ii) inability, or (iii) misconduct.[117] In the law applicable to white-collar workers, for "ordinary" termination, statutory notice measured by the length of the worker's service with the employer is required.[118]

113. *Angestelltengesetz* [AngG],Bundesgesetzblatt Teil, [BGBl] No. 292/1921 (Austria).

114. *See* Gottfried Winkler, *The Employment Concept and Groups of Employees*, in A BRIEF OUTLINE OF AUSTRIAN LABOUR LAW (Tomandl and Winkler, eds., 1990).

115. Sec 27 *Angestelltengesetz* [AngG] BGBl. 292/192.

116. FRANZ SCHRANK, ON THE DURATION AND TERMINATION OF EMPLOYMENT CONTRACTS 48-49.

117. *Arbeitsverfassungsgesetz* [ArbVG] Bundesgesetzblatt Teil [BGBl] No. 22/1974, § 105 Abs. 3.

118. AngG, *supra* note 115, § 20 Abs. 2.

Length of service	*Notice*
Less than two years	Six weeks
Two to five years	Two months
Five to fifteen years	Three months
Fifteen to twenty-five years	Four months
More than twenty-five years	Five months

The notice can be written or verbal, and only in stated exceptions (for example, for actors and performers covered by the *Schauspielergesetz*), there is no specified statutory form.[119]

For the blue-collar worker, the minimum notice is fourteen days, regardless of the length of service.[120] Inexplicably, this relatively short notice has not been changed since it was first enacted in 1859, during the reign of the Austrian-Hungarian Empire. For the blue-collar worker, this statutory notice might be lengthened through collective bargaining. This is not the case for the white-collar employee.[121]

Austrian law is perhaps as strict as any within Europe regarding the establishment of works councils. Every company with at least five workers must have a *Betriebsrat,* or works council.[122] In addition to the requirement that this body be consulted prior to any management change, its consent is required for an employee's termination.[123] A statutory process involving the works council and the employer must precede any notification to the worker to be terminated. Although notification to the works council need not be in writing, most Austrian labor lawyers advise written notification to avoid any lack of clarity regarding the employer's reasons.[124] If the works council objects to the termination within five working days,[125] the burden shifts to the employer to show that its reason was one of the three broad statutory grounds.[126]

For an immediately effective termination, the employer must show that it is impossible to continue the relationship by reason of the worker's action. There are six statutory grounds, much more specific than the three grounds listed for a termination with notice: (i) the worker's unfaithfulness, or

119. WALTER SCHWARZ AND GUENTHER LOESCHNIGG, ARBEITSRECHT 389 (9th ed. 2001).

120. *Gewerbeordnung* [GewO] Reichsgesetzblatt [RGBl] No. 227/1859, § 77.

121. SCHARZ AND LOESCHNIGG, *supra* note 119, at 390.

122. ArbVG, *supra* note 117, at § 40.

123. *Id.* § 105 Abs. 1.

124. Conversation with Professor Dr. Reinhard Resch of the Labor and Social Law Institute at Johannes-Kepler Universitaet in Linz, January 15, 2008. *See also* Carol Daugherty Rasnic, *Balancing Rights in the Employment Contract*, 4 JOURNAL OF INTERNATIONAL LAW AND PRACTICE 441, 462 (fall 1995) [hereinafter Rasnic, *Balancing Rights*]

125. *Id.* § 105 Abs. 3.

126. *See* JOSEF CZERNY, ARBEITSVERFASSUNGSGESETZ: GESETZ UND KOMMENTARE 499 (8th ed. 1987).

divulgence of confidential or inappropriate business information; (ii) his permanent inability to perform work duties; (iii) his having engaged in competition with the employer; (iv) his substantial neglect of work; (v) his unreasonably long absence from work for reason(s) other than illness; or (vi) his having caused injury at the workplace or his commission of an offense repugnant to the morals and honor of the employer, any management personnel, his co-workers, or any of their families.[127] If the employer has discharged a worker without notice, it must be prepared to present evidence of one of these six grounds, or it will be liable to the discharged worker in damages. Although an earlier statute that gave the worker the right to reinstatement has not been repealed, several later laws have limited recovery to damages.[128]

The omnipresent works council also plays a significant role in this extraordinary termination without notice. Both this body and the affected worker are notified simultaneously, and the procedure is thereafter the same as for the ordinary termination with notice. There are two distinctions. First, the time for the works council to object to an ordinary termination is five working days. For the extraordinary termination, it is only three working days.[129] Second, a works council objection to an ordinary termination can be by simple majority vote. For the extraordinary termination without notice, this works council objection vote must be by two-thirds majority.[130]

A collective redundancy is defined under the Austrian statute according to the total number of workers and the number being laid off within any thirty-day period. A collective layoff for the company with twenty to ninety-nine workers is five workers; for a company with 100-600 workers, a layoff of 5% of all workers; and for the company with more than 600 workers, a layoff of thirty workers.

Notice to the affected workers and to the works council must be no later than thirty days prior to termination,[131] and the employer must consider "social reasons" in selecting which workers are to be made redundant (for example, seniority, age of the worker, number of dependents, or family responsibilities, etc.).[132] According to Dr. Franz Schrank, Professor of the Economic Council of Styria (*Wirtschafstkammer Steirmark*) and Professor of Labor Law at Universität Wien, the courts will intervene only with regard to the selection issue, whether the company appropriately considered these social factors, but they will not address the employer's decision regarding the redundancies.[133]

Severance pay is the same for the blue-collar and white-collar worker, calculated according to the worker's time of service with the employer and the

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127. AngG, *supra* note 115, at § 27.

128. The unrepealed statute is *Allgemeines Bürgerliches Gesetzbuch* [ABGB], § 1162a.

129. ArbVG, *supra* note 117, § 106 Abs. 1.

130. *Id.* § 106 Abs. 2.

131. Arbeitsmarktförderungsgesetz [AMFG] Bundesgesetzblatt Teil [BGB1] No. 31/1969, §§ 45, 45a.

132. Sec 97 Abs. 1 Z 4 ArbVG.

133. *Dialog*, *supra* note 11.

worker's earnings (computed according to his last month of work):[134]

Length of service	*Amount of pay*
Three to five years	Two months' wage / salary
Five to ten years	Three months' wage / salary
Ten to fifteen years	Four months' wage/ salary
Fifteen to twenty years	Six months' wage / salary
Twenty to twenty-five years	Nine months' wage / salary
More than twenty-five years	Twelve months' wage / salary

The employee who has voluntarily quit is entitled to the same statutory severance pay, provided (i) his resignation was with statutory good cause and (ii) he has given the required one month's notice to the employer.[135]

France

French law has been a vanguard in worker protections and the establishment of the thirty-five-hour workweek, notably shorter than the European norm. Three sections of the French Labor Code (*Code du Travail*) apply to worker terminations.[136] A worker might resign at any time and for any reason. To the contrary, the employer must have an objectively substantial reason to dismiss a worker. The relevant statutes lists these reasons as incompetence of the worker; a serious breakdown of the employment relationship that has led to the employer's loss of confidence in the worker; the worker's prolonged absence (even if by reason of illness); the worker's physical inability (provided it did not result from an industrial accident or occupational illness); the advanced age of the employee (that is, forced retirement); or the worker's negligence or misconduct. The law requires the company to consider social factors (age of the worker, his number of dependents, and any special status such as being a personal with a disability or single parenthood). In redundancy cases, the employer must obtain a permit from the French authorities.

This requirement that the employer have good cause for termination applies only to employment contracts of unlimited duration. A separate part of the *Code du Travail* applies to contracts of specified duration.[137] In France, a fixed-term position may not exceed eighteen months, and limited term hires are lawful only if there are justifying reasons (such as the need to fill a position temporarily for a worker who is ill, a temporary increase in production, or seasonal employment).

Unlike other European countries, France has a relatively new statute of limited application similar to the American employment-at-will rule. The

134. Arbeitsabfertigungsgesetz [ArbAbfG] Bundesgesetzblatt Teil [BGBl] No. 107/1979, § 2; AngG, *supra* note 115, § 23.

135. AngG, *supra* note 115, § 23 Abs. 7.

136. Act of 13 July 1967, Law of 13 July 1973, and Act of 3 Jan. 1975.

137. Act of 12 July 1990.

Contrat Nouvelles Embaucheries ("New Hiring Contract," or CNE)[138] provides an exception to the general rule requiring "real and serious" cause to terminate a worker after a short trial period, which under French law cannot exceed six months. This ordinance, applicable only to employers with twenty or fewer workers, permits termination without cause. If hired under a CNE, an employee may be discharged without good reason during his first two years of work, provided the employer: (i) sends him a termination letter by registered mail; (ii) complies with the notice period; (iii) pays the employee an indemnity equal to 8% of all remuneration due to him up to termination date: and (iv) pays the unemployment fund an indemnity equal to 2%, the same remuneration figure paid to the worker. The May 6, 2007, elections and change of government might affect the future of the CNE, which is now somewhat dubious. Moreover, it has been challenged as a violation of IOLO Convention 158, the outcome of which is still in the French courts. Also, procedures on compliance are still pending while an ordinance might be superseded by subsequent legislation.

Government statistics show that as of March, 2007, 850,000 CNEs had been signed since the effective date of the ordinance, and 460,000 workers had current CNE status. These same statistics reveal that the employment of one of two CNE workers has been terminated during the first year of employment. This is somewhat misleading, however, since one-half of these terminations were resignations by the worker.[139]

French law requires a minimum notice of one month by registered mail to a worker who is to be terminated, provided he has six months' uninterrupted service with the employer. If he has two or more years of service, this notice is two months. In reality, collective bargaining agreements in heavily unionized France establish longer periods of notification. Summary dismissal is permitted only in those rare cases in which the worker has been guilty of gross misconduct, an issue generally settled by a court or tribunal. The initial notice is simple, informing the worker only of the date of his termination and summoning him to a hearing (with a co-worker, if the worker so chooses) during which he will be given the reason(s) for termination. Within one day after this meeting, the employer sends a second registered letter to the worker, confirming the decision to terminate for the reasons given at the meeting, beginning the statutory period of notification. If the worker desires to challenge the dismissal, he must respond within ten days of receipt of the second letter. The employer then must respond by registered letter within ten days.

The employer is required to retain the worker if at all possible, including providing further training for a possible different position with the company.

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138. Ordinance of Aug. 2, 2005. An ordinance in French legal terminology is a governmental mandate under parliamentary authorization. It is somewhat comparable to the executive order under American federal law.

139. Jerome Debost, *The New Hiring Contract*, MONDAQ BUS. BRIEFING, Aug. 18, 2007, http://www.mondaq.com/article.asp?article_id=47750.

Indeed, a company with at least fifty workers must have a written employment retention plan. The company might even offer a position for the worker in its offices in another country, but if the worker refuses an alternate position, he does not forfeit his rights. Resolution might be in an industrial tribunal or a conciliation board (*Conseil des Prud'hommes*) or the Court of Appeal, and, ultimately, the Supreme Court (*Cour de Cassation*). Should the court or tribunal determine the termination was unlawful, it might propose reinstatement, which either the worker or the employer may decline. In such case, the remedy is damages in the minimum amount of six months of the worker's remuneration.

The relevant French statute[140] requires all companies with fifty or more workers to have a works council (*comite d'enterprise*). This body must be informed, but not consulted, regarding the employer's decision to terminate. For businesses with eleven to forty-nine workers, this same statute requires a workers' representative, without any of the participatory functions of the works council.

A collective redundancy is defined under French law as one in which ten workers will be terminated within any thirty-day period. The employer is then required to consult with the works council.

Severance pay is only paid to those workers who have at least two years of service with the employer. This amount is a relatively meager 10% of the wage or salary for the white-collar worker or twenty hours wages for the blue-collar worker for each year of service.[141]

According to Professor Gerard Vachet of the University of Toulon, the French view is contrary to international developments. First, the EU model is a market economy model, but the French do not support the market-led principle. In Professor Vachet's opinion, this is problematic for France. Second, 80% of French workers prefer working in civil service because of its near-absolute job security. He distinguishes job security (that is, the desire of the worker to retain his job) and employment insecurity (that is, the unemployed are usually in two groups: older workers with qualifications that do not fit today's market and younger worker with qualifications that are simply not useful). He further notes that twelve of the finest institutions of higher education in France are business schools, indicative of the trend to remedy the insufficiency in pragmatic training and skills.[142]

Professor Frank Hendrickx of the University of Leuven in Belgium refers to France as "swimming against the European stream," since workers refuse to work longer hours, and France in general has reduced the usual age for retirement.[143] Moreover, French law protects the position, not the employment

140. Law of 28 Oct. 1990.

141. Law of 19 Jan. 1978.

142. *Dialog*, *supra* note 11 (remarks by Professor Vachet translated from the French into English by Professor Frank Hendrickx, University of Leuven).

143. The foregoing French law is in scattered sections of Ordinance of 13 July, 1973 and

of the individual worker. Both Professor Hendrickx and Professor Vachet support the more traditional European view of protecting the person rather the job.[144]

Germany

German law is replete with social considerations and benefits. This is no coincidence, since the first recorded comprehensive social security laws were the brain child of late nineteenth-century Chancellor Otto von Bismarck.[145] Germany's elaborate and historically developed social benefit structure, a model for much of Europe, is a philosophy imbedded in her labor law statutes.

The statutory blue- white-collar worker distinction has always prevailed in Germany. Unlike Austria, the legislation, albeit massive, is not complex. The general line of demarcation is the element of discretionary judgment in job functions for the white-collar worker.[146]

For an employee with at least six months' service with the employer, good cause is imperative in justifying any termination of the employment relationship in Germany.[147] Another difference from Austrian law is that Germany imposes identical requirements for "good cause" for the blue-collar and white-collar worker.[148] German law previously required a minimum of six weeks notice for white collar workers[149] and only two weeks for the blue-collar worker.[150] In 1990, the *Bundesverfassungsgericht (*Federal Constitutional Court) held this unconstitutional under the *Grundgesetz* [GG] (Basic Law) Article 3, which assures to all equality before the law.[151] Thus, the *Bundestag (*federal legislature) amended the law and adopted a statute identical to that in the former *Deutsche Demokratische Republic* (Republic of East Germany), using a six-week to seven month notice period, based upon length of service, for all workers.[152]

Act of January, 1975, on Termination of Workers.

144. *Id.*

145. Germany's social legislation, the first in the world, was the *Gesetz betreffend die Krankenversicherung der Arbeiter* (statute for Health Insurance for the Worker) (1883). *See* Social Security Programs Throughout the World, in 1989 Research Report No. 62 U.S. Dept. of Health & Human Services (Social Security Administration), Office of International Policy, Office of Research and Studies) (May 1990), which provides an in-depth universal look at programs then in effect. For example, Belgium's first federal pension law was enacted in 1924, Austria's in 1906, France's in 1910, Ireland's in 1908, Italy's in 1919, the Netherlands' in 1913, Spain's in 1919, Sweden's in 1913,and Great Britain's in 1908.

146. *See* Reinhard Richardi, "Kommentar zur Bürgerliches Gesetzbuch mit Enführungsgesetz und Nebensetzen," *Recht der Schuldverhältnisse* 334 (Julius von Staudinger ed., 12th ed., 1957).

147. Sec 1 *Kündigungschutzgesetz* [KSchG] 1969 BGBL. I 1317.

148. [KundFG], 7 October, 1993 (BGBl. I 1668).

149. *Gesetz uber die Fristen fur die Kundigung von Angestellten* 1926 RGBl. I 399, ber. 412, geandert durch Gesetz vom Dez. 1989, BGBl. I S. 226.

150. Sec 622 *Burgerliches Gesetzbuch* [BGB 1896 RGBl]. Sec. 195, zuletzt geandert 1983 BGBl. 195.

151. The decision was *Bundesverfassungsgericht* [BverfG' Eintscheidung] 82 S.126=AP Nr. 28 zu sec. 622 BGB, 30 May, 1990.

152. Secs. 621 and 622 BGB, *Gesetz zur Vereinheitlichung der Kundigungsfristen von Arbeitern und Angestellten* [*Kundigungsfristgesetz*].

Fixed-term contracts simply end on the designated date, without any obligation on the employer to notify the worker. However, not unlike landlord-tenant laws, if the employer permits the worker to continue working after the termination date, the presumption is that the relationship has converted into one for an indefinite term[153]

The German statute contains the three general causes for termination: (i) economic concerns related to the business (*betriebsbedingt*); (ii) inability or lack of capacity beyond the worker's control (*personensbedingt*); or (iii) the employee's deliberately inferior work or misconduct at the workplace (*verhältungsbedingt*).[154] The work-related concept is sacrosanct under German employment law. For example, a worker's immoral, or even unlawful or criminal, conduct may well be abhorrent to the employer, but unless it affects his work, it will not constitute sufficient cause to terminate the employment contract.[155]

Under the first cause, *betriebsbedignt*, if the employer relies upon an economic or business related ground, the social factors recurring throughout European domestic law regarding the selection of which workers will be made redundant are statutory in Germany. The express factors the company must consider are the worker's age, seniority, and number of dependents.[156]

With respect to the second cause — *personensbedingt* — if the employee's prolonged absence because of illness is the triggering cause, the German courts have imposed upon the employer the duty of hindsight. That is, the employer must rely on a medical prognosis. Moreover, if a prognosis that was reasonable at the time the employer gave the employee notice of termination changes, the notice must be revoked.[157] This requirement that the employer exercise continuing due diligence can indeed be problematic. The German courts have generally deferred to the employer's judgment in such cases, applying an objective standard. For example, the *Bundesarbeitsgericht* (Federal Labor Court) sustained a dismissal of an employee suffering from AIDS who had attempted suicide because of his despondence over the illness. The attending physician had certified the employee's mental and physical state rendered him incapable of fulfilling his work responsibilities.[158] In another case, the Court approved the termination of an orchestra concertmaster whom

153. Secs 620, Abs. 1 u. 625 *Bürgerliches Gesetzbuch* [BGB] 1896 RGBl. 195, 1995 BGBl. I S 1668.

154. KSchG, *supra* note 147, §§ 1 Abs. 2, 1, 2, and 3.

155. *See* Wilfred Berkowsky, *Die Personen und Verhältensbedingte Kündigung* 107, 46. On 23 February 1979, the *Bundesarbeitsgericht* (BAG) (Supreme Labour Court) held that the instigating cause must affect the work.

156. Manfred Weiss, *The Role of Neutrals in the Resolution of Labor Disputes in the Federal Republic of Germany*, 10 COMP. LAB. L. 339, 352 (1989) (a good discussion in the English language of how the tribunals and courts have applied this duty). Prof. Weiss is Professor of Labor Law at Johann Wolfgang Goethe Universität in Frankfurt.

157. Berkowsky, *supra* note 155, at 89.

158. BAG Feb. 16, 1989.

the employer had assessed as lacking the requisite leadership ability.[159]

Somewhat enigmatically, the employer seems not to have the same degree of discretion in terminations because of the worker's conduct. In determining whether to terminate an employee for his deliberate conduct, the standard the courts have imposed on the German employer is one of a "calm, understanding and non-judgmental employer" (*ruhig und verständigurteilten Arbeitgeber*), rather than one of a "reasonable employer."[160] This patient-and-tolerant yardstick is consistent, even if the person making employment decisions has a particularly demanding or idiosyncratic temperament. Even a dismissal on this ground when the employer has proven that the employee's work output is well below his capability will not be sustained if the employee measures well in comparison to his co-workers.[161] Additionally, the Court has consistently held that any decision to terminate is premature if the worker had not first been warned of his inferior performance.[162]

An interesting by-product of German unification in 1991 resolved the discriminatory minimum time for notification of dismissal as between blue- and white-collar workers. Previously, white-collar employees were assured at least six weeks' notice,[163] whereas the blue-collar workers were entitled to only two weeks' notice.[164] Because the German Constitution requires equality before the law,[165] the *Bundesverfassungsgesetz* (Federal Constitutional Court) held this differing treatment to be unconstitutional.[166] Official reunification soon followed, and the *Bundestag* (Federal Parliament) simply repealed the law in 1993, simultaneously adopting the same notification periods used in the former *Deutsche Demokratische Republik* (German Democratic Republic, or East Germany). The current minimum notice is the same for white- and blue-collar workers.[167]

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159. BAG July 29, 1976.

160. [BAG] Nov. 2, 1961 AP Nr. 3 zu Verhaltungsbedingte Kündigung [NJW] 1962, 556; [BAG] Mar. 13, 1987 AP Nr. 18 Sec 1 KSchG 1969, Verhaltungsbedingte Kündigung [NA] 1987, 518.

161. Berkowsky, *supra* note 155, at 89.

162. BAG 28 September 1961 AP Nr. 1 zu sec KSchG *Verhaltungsbedinge Kündigung*; BAG 29 July 1976; BAG 18 Jan. 1980; and BAG 12 Nov. 1985.

163. Gesetz über die Fristen für Kündigung von Angetellten (Statute on Termination of White Collar Workers), 192 RGBl. I 399, ber. 412, geaerndert durch Gesetz vom (amended by law of) Dec. 1989, BGBl. I S 2261.

164. BGB, *supra* note 153, § 622 Abs. 2.

165. *Grundgesetz* [GG] (Basic Law) Article 3.

166. Bundesverfassunsgericht [BverfG) (Federal Constitutional Court) Entscheidung 82 S. 126=AP Nr. 28 zu sec 622 BGB, 30 Mar. 1990.

167. Kündigungsfristengesetz (Statute for Employment Termination Protection) vom 7 Oct. 1993 (BGBl. 1668), sec 622 (1) BGB.

Length of service	*Minimum notice*
Less than two years	Interval between pay period (unless worker is paid quarterly, in which case notice is six weeks)
Two to five years	One month
Five to eight years	Two months
Eight to ten years	Three months
Ten to twelve years	Four months
Twelve to fifteen years	Five months
Fifteen to twenty years	Six months
Twenty plus years	Seven months

The employer might require as an entitlement to notice that the affected worker be at least twenty-six years of age. At each interval, the month is rounded off to the end of the calendar month. Notice must in written form.[168] The employer might (but is not required by law to) give the worker the option of continuing work, but subject to different terms of employment. The employee has three weeks to decide whether to accept the offer.[169]

The German statutory works council, although a requirement for all businesses with five or more workers,[170] is not as prevalent as in Austria. Many smaller businesses simply do not comply with this mandate.[171]

In one respect, Austrian law is much stricter with regard to works councils, for the statutory compliance with the works council requirement is absolutely enforced. In another, the works council in Germany is considerably more significant. In larger businesses in Germany, this body possesses much more managerial power.

First, the German employer must notify the works council before implementation of most management decisions, including determining workplace rules.[172] For companies with 2,000 or more workers, the *Mitbestimmungsgesetz*,[173] an employer's nemesis, applies. In such cases, worker representatives are required to be among the members of the *Vorstand* (Board of Directors).[174] Indeed, employee representatives (including white- and blue-collar workers proportionate to their inclusion in the company) must constitute 50% of the Board. This is a basic version of worker co-

168. BGB, *supra* note 153, §§ 623 and 120.

169. KSchG, *supra* note 147, § 2.

170. Sec 1 Betriebsverfassungsgesetz [BetrVG] (Basic Stuate on the Workplace), 1988 BGBl. I 2261.

171. Weiss, *supra* note 156, at 83.

172. BetrVG, *supra* note 170, §§ 90, 99, and 102.

173. Mitbestimmungsgesetz [MitbG] (Statute of Worker's Right to Consult in Management Decisions) 1976, BGBl. I 1153.

174. *Id.* § 7(1), (3).

determination in the broadest sense.

In dismissal cases, the works council is notified prior to the worker. This body has one week to object on one of five grounds listed in the works council legislation.[175] First, if the termination were work-related, the works council can object regarding the choice of the particular worker(s). Second, if the business has 1,000 or more employees, the employer is required to take into account demographics (such as average age of workers and percentage of women workers). Third, the works council might contend that a worker might plausibly be placed in another position within the company. Fourth, it might insist that such alternate employment would be appropriate, provided only that the worker be properly trained. In such cases, it is the employer's obligation to provide such training. Finally, the works council might insist that the worker be retained in his current position, provided he is willing to agree to some changes, which might in fact be advantageous to the company. The works council must first have the worker's consent before it may object on the final ground.[176]

Once the affected worker has been notified, he must notify the works council. This body then has one week to make objections.[177] The works council often chooses to intervene and try to mediate a settlement. Notably, in an ordinary dismissal the works council is notified after the worker has been informed of his dismissal, but in the extraordinary (immediate) dismissal, the works council is notified concurrently with the worker. If the works council objects and the issue is not resolved, the worker may file a petition with the local *Arbeitsgericht* (Labor Court) within three weeks after his initial notification.[178]

German law includes the same ordinary and extraordinary termination distinctions as the Austrian legislation. The extraordinary dismissal is without notice. The procedural difference is simply that the employer must notify the worker and the works council concurrently, and the works council is given only three days, rather than the usual week to object. From that stage, the steps are identical to ordinary termination.[179]

The evidentiary burden upon the employer to justify an extraordinary discharge is a heavy one. The worker's conduct must be shown to be of such severity that the result is a permanent negative effect on the atmosphere of the workplace. One example of this would be sexual harassment of co-workers. Two judicial decisions in the employer's favor on this issue are instructive.

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175. The procedural provisions regarding the works council are included in BetrVG, *supra* note 170, § 102 Abs. 2, 3.

176. *Id.*

177. Sec. 102 abs. 2 *Betriebsverfaxssungsgesetz* [BetrVG], 1988 BGB. I 2261.

178. Sec. 52 U Br, 3 kut b, 5I, 1 ArbGG, ortliche Zustandigkeit (secs. 46 II ArbGG, 17ZPO, 161 II, 124 I, HGB des ArbG Reutlingen als Sitz den XKG, nach sec I ArbGG; Arbeitsgericht; and sec. 4 KSchG.

179. See Rasnic, *Balancing Rights*, *supra* note 124, at 475-476 for detailed procedures in Germany.

One local labor court held that there had been cause for immediate termination of a worker who had stated to a non-citizen colleague that "[f]oreigners and Turks ought to be burned to death."[180] Another local court sided with the employer who dismissed a worker because of the worker's persistence, despite warnings, in using working hours to attempt to proselyte fellow workers into the Church of Scientology.[181]

German legislation contains the usual additional protections against termination for persons with a disability, who are entitled to at least four (4) weeks' notice, regardless of length of service.[182]

Severance pay is assured to all terminated workers, regardless of cause, including those dismissed without notice. The amount is one-half the monthly earnings for each year worked, calculated according to the last year worked. This calculation includes not only monetary wages or salaries, but also payments in kind. Any time worked that exceeds six months is rounded off to a full year. [183]

A mass layoff, or collective redundancy,[184] is determined according to the following scale of number laid off within a one-month period:

Total Number of Workers	*Number Dismissed Within One Month*
Twenty to fifty-nine	Five
Sixty to 499	Ten percent or more than twenty-five, whichever is less
500 plus	Thirty or more

In a collective redundancy, the employer must inform in writing both the works council and the *Agentur für Arbeit* (Federal Office of Employment).[185] Then, someone from this public office must be given a tour of the business, accompanied by one representative for each two workers, an employer representative, and any other public officials determined by the Federal Office of Employment to be appropriate. These federal officials take into account the interests of the company and the workers, as well as any effect on the labor market and the economy, before making a written statement as to whether the

180. ArbG Siegburg (Labor Court in Siegburg), Nov. 4, 1993.

181. ArbG Ludwigshafen (Labor Court in Ludwigshafen), May 12, 1993.

182. Sec 86 Sozialgesetzbuch [SGB] (Federal Social Act) 1 x, June 19, 2001 (BGBl. I, S. 1046). According to Prof. Dr. Gerhard Ring of the law faculty at University of Freiburg, the employer must also consider any physical or mental impediments that might negatively affect re-employment. Gerhard Ring, *Kündigung und Ihre allgemeine Beschränkungen im deutschen Recht* to be published in INTERNATIONALES UND VERGLEICHENDES ARBEITS- UND SOZIALRECHT, BAND II (International and Comparative Employment and Labour Law, Vol. II) (Verlag des OeGB, Vienna, 2007) at 14 [hereinafter *Vergleich*].

183. KSchG, *supra* note 147, § 1a Abs. 2.

184. *Id.* §§ 17 *et seq.*

185. Sec. 17 abs. 1 KSchG.

layoff is necessary.[186] At least one month must follow the publication of this statement, a period that is extended to two months if the Federal Office of Employment has determined it advisable.[187] Consequently, the implementation of most collective redundancies is postponed.

Greece

As in Austria and Germany, Greece also distinguishes between blue-collar and white-collar workers, in particular, with regard to notice before termination and amount of severance pay. [188] The blue-collar worker has no statutory entitlement to any notice whatsoever, a drastic contrast to white-collar protections. Before a termination for a member of this latter group with at least two months' service is legally effective, he must be given at least two months' notice. There is a twenty-eight-step increase in the length of required notice, culminating with twenty-four months.[189] Two years is an unusually long period of notification by usual European standards, particularly in view of the absence of required notice for blue-collar workers.

The *Aeropag* (the Greek legislature) has provided that the employer might "buy-out" the notice period by paying the employee his salary in lieu of notice.[190] This section also provides that the employer might give a reduced notice and pay a minimum of one-half the employee's wage during the notice period. According to Dr. Nikos Gavalas, practicing attorney and member of the law faculty at University Demokritus in Thrace, in the vast majority of cases[191] employers do not exercise this option, but choose rather simply to give no notice and pay the worker for the time not worked. Additionally, this notice period might be less if the reason for dismissal is economic. In such cases, although the notification must be in written form, there is no necessity for the employer to state its reason. Dr. Gavalas explains that statutory notice thus has little relevance in Greek law.[192]

The Greek Civil Code applies a nebulous objective test regarding what constitutes grounds for termination.[193] In practice, this usually is based upon the worker's incompetence or misconduct or other economic, business or technical reasons.[194] The national legislature has been more conservative than the courts. Notably, the Supreme Court of Greece has held that the employer must not have acted arbitrarily in deciding whether to terminate a worker.

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186. *Id.*

187. *Id.*

188. Nomos (1920:2112) [Greek Employment Statute]

189. Nomos (1920:2112) Art. 1.

190. Nomos (1920:2112) Art. 3.

191. In an estimated 95% of all cases, companies in Greece choose simply to give no notice of termination and to pay the worker for entire notice period. *See* Nikalaos Gavalas, *Aspekte der Kündigung aus wirtschaftlichen Gründen im griechischen Arbeitsrecht*, to be published in *Vergleich*, *supra* note 182, at 3.

192. *Id.* at 2.

193. Astikos Kodikas [Greek Civil Code] Art. 28.

194. Gavalas, *supra* note 191, at n.4. Thus, Dr. Gavalas refers to the statutory objective test as "quasi-objective" in practice.

Moreover, even though the courts have also required companies to take into consideration social factors in redundancy situations, they generally have deferred to the employer's discretion.[195] These "social considerations" are of little regard, since Greece has ratified neither ILO Convention 158 nor the Article 24 revisions to the European Social Charter. It is somewhat anomalous that Greek statutory law has essentially no protections against arbitrary termination, contrary to the overall legal climate among European Union member states.[196]

There is also no requirement for an employer to report a termination to any federal office or authority. Although a 1988 statute provides for works councils, they are not required. Consequently, there are few such bodies in Greece.[197] Courts only apply the "ultimate ratio principle," requiring the employer to endeavor to place the worker in an alternate position within the company if at all possible, only when layoffs occur for economic reasons. The courts have directed employers to consider factors such as age, length of employment, and family responsibilities in selecting which workers are to be made redundant when this type of layoff occurs.[198]

Since enactment of a 1920 statute, white-collar workers have been entitled to severance pay, whereas the source of blue-collars' severance rights is the union bargaining process.[199] However, the distinction between the respective rights of the two groups is strikingly evident:

White-Collar Severance Entitlement

Length of service	*Amount of pay*
Two months to one year	One month's pay
One to four years (amount gradually increases up to)	Two month's pay
Twenty-eight plus years	Twenty four months' pay

* The statutory maximum is €6,500.

Blue-Collar Severance Entitlement

Length of service	*Amount of pay*
Two months to one year	Five days' wages
One to two years	Seven days' wages
Two to five years	Fifteen days' wages

195. *Id.* at 8. Greece has not ratified ILO Convention 158.

196. There are, to be sure, the protections that are typical in Europe of specific groups, for example, mothers (Nomos 1984:1418), union representative (Nomos 1982:1264), disabled workers (Nomos 1998:2643), and those protection under the 2000 European Commission directives. The Greek statute complying with these directives is Nomos (2005:3304).

197. Gavalas, *supra* note 191, at 10-11.

198. *Id.* at 9, 10.

199. Nomos (1920) (Severance statute) and Nomos (2006) (Collective Bargaining Agreement statute).

Five to ten years	Thirty days' wages
Ten to fifteen years	Sixty days' wages
Fifteen to twenty years	100 days' wages
Twenty to twenty-five years	120 days' wages
Twenty-five to thirty years	145 days' wages
Thirty plus years	165 days' wages

The disparity is patent. The white collar worker is entitled to severance pay of an entire month's earnings, whereas his blue-collar counterpart is entitled to wages for a mere five days. This discrepancy and the white-collar right to notice have been adamantly criticized by labor as discriminatory and unconstitutional. Since the time of Aristophanes, Sophocles, and Plato, great Greek minds have questioned the logic of subordinating women, and dramatist Alcidamas deplored slavery. However, the moral lamentations against these discriminations seem not to have been transferred into the lower level of workers in Greek law. Similar to the United Kingdom, Greece — although often referred to as the "cradle of western civilization" — has no written constitution, and courts decide what rises to the level of constitutional law on an ad hoc basis.[200]

A mass layoff, or collective redundancy, is defined by statutory law as applying only to companies with at least twenty workers.[201] For the company with twenty to two hundred workers, a layoff of at least five workers within one calendar month is collective. For the company with 201 or more workers, a collective redundancy is a layoff of at least 2 percent of the total workforce. The same statute applies to closures. In such cases, the employer must consult with the representative chosen by the workers. For redundancies (but not for business closings), failure to reach agreement with this representative (which occurs in most instances) will require the company to obtain permission of the competent governmental authority, a step that is purely protocol.

2. *The Czech Republic, Hungary, Slovakia and Slovenia: Examples of Four New EU Member States*

Czech Republic

The Czech Republic is one of the most stable and economically productive of the former communist Eastern European countries. The indomitable spirit of former Czechoslovakians, as reflected in the temporary liberalization achieved in the Prague Spring of 1968 (the so-called "Velvet Revolution"), might likely be credited with this status. After finally overthrowing the Soviet presence in Czechoslovakia in 1989, the small country was again peacefully divided politically just four years later (the "Velvet

200. Gavalas, *supra* note 191, at 11.
201. Nomos (1983:1387).

Divorce"). Both countries — the Czech Republic and Slovakia — are among the ten EU member states admitted on May 1, 2004.

The Czech legislature adopted a comprehensive labor law statute in 2006 that made some revisions to the former 1965 law.[202] Other statutes apply in specific sectors, for example, local, regional, and federal governments, and the shipping industry, but the 2006 legislation applies to all except these limited areas. The changes, although numerous, are substantively minor. Slight revisions were enacted to the notification periods, instances when dismissal is justified on business-related grounds, definition of collective redundancy, significance of the collective bargaining agreement, and amount of severance pay.[203] Unless expressly repealed, sections of the former statute are still in effect.

Czech statutory law has an unusual provision regarding temporary workers hired to perform a designated job. The general rule is that they remain technically employed for fifteen days after this work has been completed.[204]

The statutory period of notice is the same for white- and blue-collar workers, and there are no sliding scales according to length of service. The worker must be given two months' written notice of his dismissal, regardless of other factors.[205] This period commences on the last day of the calendar month when notice is proffered. Moreover, the Supreme Administrative Court of the Czech Republic has decided that this notification period is strictly enforced and cannot be altered by a collective bargaining agreement.[206]

Identical sections in both the former and the new statute list grounds for termination, which are the usual inability or misconduct of the worker or business/economic reasons.[207] The employer might cite one or more reasons, but once this written notice is given, it is not subject to change. Additionally, a union contract cannot effectively add or delete from these statutory grounds for discharge.[208]

The works council in the Czech Republic has little function in termination proceedings. The company is obligated to notify the union, if any, before the worker is given his written notice. The union might object to the dismissal within fifteen days of its notification, and its response must be written. In economic terminations, the employer has the duty to attempt to place the worker in an alternate position within the company. Regardless of whether the union consents, the dismissal proceeds. Nevertheless, the company

202. Zákon č. 65/1965 Sb., zákonic prace. The new statute is § 44 *et sea.* zákon, č. 262/2006 Sb. zákonik prace, in effect since January 1, 2007.

203. Martin Stefko, *Kündigung und ihre allgemeine Beschränkungen in der Tschechischen Republik*, to be published in *Vergleich, supra* note 182, at 2.

204. Zákon č. 65/1965 Sb., sec 70b (former law).

205. Zákon č. 65/1965 Sb., sec 45 (former law).

206. Decision from Mar. 10, 1976, Cpj 42/76, Bulletin Nr. 3, 1977, at 11.

207. Zákon č. 65/1965 Sb., sec 46 (former law); zákon, č. 262/2006 Sb, sec 52. (new law).

208. By decision of the Supreme Administrative Court, 16 Co 331/99, Oct. 11, 1999, *Soundnick rozhledech,* Nr. 1, at 18-20.

must continue to meet with union representatives for a one-year period to attempt to resolve the issue, which may be a unique example of a legally-required union/company negotiation in Europe. Without this continued negotiation, the termination will be automatically revoked.[209] The only recourse for the union is to challenge the dismissal in court. However, courts only have jurisdiction over the issue of whether there is indeed another job in the company for this worker. In certain situations (for example, the worker is a single parent caring for a child under the age of fifteen years or supports a disabled person), the employer must report the dismissal to the designated federal administrative office. This office will use its resources to work with the employer to help the terminated worker find new gainful employment.[210]

The law determining which layoffs are considered collective redundancies is similar to other European statutes: for a company with 20 to 100 workers, ten layoffs within a thirty day period; for a company with 101 to 300 workers, 10 percent the total workforce; and for one with 300 plus workers, a layoff of thirty are mass layoffs. [211] In these cases, the employer must give affected workers, the union, and the works council, if any, thirty days' written notice. The contents must include the reason(s) for the layoffs; total number to be terminated; names and work categories of those affected; criteria used in selecting those made redundant; and the amount of severance pay for each.

Statutory severance pay in the Czech Republic is three times the workers' average wage or salary as calculated from last quarter of the year during which he is dismissed, an amount that might be increased through collective bargaining. Essentially, the worker is paid the amount he earned during that time, plus any other benefits or bonuses. [212]

Hungary

The Hungarians, similar to the independent-minded Czechoslovakians only twelve years later, engaged in a peaceful but forceful revolution in 1956. Predictably, invading Soviet forces defeated the rebels, whose unilateral withdrawal from the Warsaw Pact was only temporarily effective.[213] The determined Hungarians finally achieved independence in 1989, and Hungary is now a member of the EU.

The Hungarian statute regulating employment terminations was first

209. Zákon č. 65/1965 Sb., sec. 59 (former law).

210. Zákon č. 65/1965 Sb., sec. 47 II (former law).

211. Zákon č. 65/1965 Sb., sec. 52(1) (former law); zákon, č. 262/2006 Sb., secs 46(1), 62, 63 and 64 (new law).

212. Zákon, č. 262/2006 Sb., secs. 67 and 68 (new law).

213. The Warsaw Pact was a Soviet institutionalization of its Eastern European countries (*viz.*, Albania, Bulgaria, Czechoslovakia, Eastern Germany, Hungary, Poland, Romania and the Soviet Union) through a multilateral Treaty on Friendship, Cooperation and Mutual Assistance. A complex convention in effect from 1955 until 1970, one part of the Warsaw Pact solidified the U.S.S.R.'s power as leader of this communist bloc. *Czechoslavakia: A Country Study*, Glenn E. Curtis, ed. (Washington, D.C.: Federal Research Division of the Library of Congress, 1992).

adopted in 1950 and has been changed sparsely.[214] Unlike the laws of Germany and Austria, the massive Civil Code is inapplicable to the employment relationship. The statute has the usual provisions distinguishing dismissals because of the employee himself from those for business-related reasons, and according to Dr. Lajos Pal of the law faculty at the University of Budapest, these provisions closely follow the Austrian statute.[215] Because of these similarities, only distinctions from Austrian law are herein noted.

The statute expressly permits augmenting workers' rights to pre-termination notification through the collective bargaining process or by an individual contract of employment, provided the provision does not designate a notice period that exceeds one year.[216] The same statutory notification duty attaches without regard to which party — employer or worker — has made the decision to terminate the employment relationship.[217] This notice is a minimum of thirty days without any required minimum period of service. It increases slightly for the worker who has three years of service with the employer in gradations up to the maximum required notice total of ninety calendar days for one with twenty or more years of service.

The worker might unilaterally shorten the period until the contract terminates, but there is no corresponding right for the employer.[218] The Hungarian statute imposes a duty on the employer that does not exist in any of the other countries surveyed. It must permit the notified worker to be absent for at least one-half of his work time for the purpose of seeking new employment, without any decrease in pay.[219] The remedy for a wrongfully discharged worker or one who has not been given the statutory or contractual notice is limited to damages, rather than reinstatement.[220]

Unlike the usual administrative procedures, the statute provides only for judicial resolution of disputes. Typical of continental European countries, Hungary has a special Labor Court, which is the forum for such disputes.[221] The statute of limitations for a worker to commence such proceedings is short. He has only thirty days from notification of dismissal,[222] and this challenge does not stay the termination. Although the court cannot order reinstatement, it can recommend it. In general, companies choose to pay damages in the form of severance pay. This statutory amount is between two (2) to twelve months' the worker's wage/salary. In such decisions, the court considers factors such as the worker's age, the prospect for him of new employment, and the personal

214. Munka Torvenyverol szalo 1992. evi XXII. Torveny (Nr. IIXX/1992).

215. Lajos Pal, *Dialog*, *supra* note 11 (remarks on Hungarian law of dismissal). For Austrian law, see *supra* notes 112-132 and accompanying text.

216. Secs. 30 and 76(4), respectively.

217. *Id.* sec. 92.

218. *Id.* sec. 94.

219. *Id.* sec. 93.

220. *Id.* sec. 101.

221. *Id.*

222. *Id.* sec. 202.

difficulties that unemployment likely will impose.[223] The works council plays no role under the Hungarian law of dismissal.

The provision determining whether a layoff of several workers for economic or business-related reasons is a collective redundancy is exactly the same as the Czech statute (that is, for businesses with a minimum of twenty workers, ten to thirty workers are affected). It is germane that there is no duty upon the employer to factor into its choice of which workers are to be made redundant any special characteristics (seniority, age, number of dependents), and that the court does not have jurisdiction to address this decision.[224]

Hungarian law essentially enforces a mandatory retirement age. A worker who has reached the age at which he is entitled to pension payments may be terminated without reason.[225]

Slovakia

Slovakia is the eastern part of the area comprising Czechoslovakia prior to the political separation in 1993. Since the 1919 Treaty of St. Germaine and until the end of World War II, Czechoslovakia was among those countries that comprised the German-ruled Sudetenland. The survival mentality and pride of the Slovakian people achieved EU membership in 2004. Slovakia now has the lowest labor costs in Europe.

Dismissal must be founded on good cause.[226] Within the EU, the potential impact upon the labor market is always pertinent, but perhaps especially so in Slovakia, second only to Poland in high unemployment. A comparison with the EU average of 7.5% is instructive. These two member states had rates exceeding 15% in the early part of the new millennium, even though the unemployment rate in Slovakia had decreased to 12% by the end of 2006.[227] The significance is that, with such high unemployment, discharging a worker takes on a special meaning. Slovakia is representative of the relatively depressed economies of the ten new EU member states.

As is typical of civil law countries, the statute specifies the events that will end the employment relationship, including the usual grounds of business-related hardships, worker's lack of ability, and worker misconduct.[228] The legislation expressly prohibits dismissal for reasons of a worker's absence for illness or accident; service in military or civil service; pregnancy or child rearing responsibilities for a child under the age of fifteen years; or

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223. *Id.* sec 100(4)

224. For the Czech statutory provisions, *see supra* note 195 and accompanying text.

225. Sec 82(2).

226. Art. 36 Social Basic Rights Law.

227. This compares with 4.5% in the United Kingdom, 4.17% in Japan, and 4.7% in the United States. Wikipedia, *Economy of the European Union*, en.wikipedia.org/wiki/Economy_of-the_European_Union (last visited Aug. 24, 2007). Because of its relative size, the Union States merits special mention. The state with the highest rate is Mississippi, with 7.5%. The lowest rate is in Hawaii, only 2%. Bureau of Labor Statistics, www.bls.gov (last visted Jan. 4, 2008) (hereinafter "Bureau of Labor Statics").

228. Sec. 59 General Civil Code of Slovakia.

responsibility for a person with a disability. The statutory notice is two months for the worker with less than five months' service, and three months for a worker with a longer tenure with the company, except for immediate dismissal for extraordinary reasons.[229] Before a business-based termination is effective, the employer must attempt to find suitable alternate work for the worker within the company.[230]

If there is a works council and/or union representing the worker, either (or both) must be notified of the impending termination before notification to the worker. These bodies must also be notified if the worker has given notice of his resignation. Unless the works council or union consents, or if it objects in a timely fashion, the dismissal is ineffective.[231] The employer must meet with the worker and discuss the reasons, and if the works council or union does not object within ten days of notice to the worker, it is presumed the dismissal was lawful.[232]

The two-month notice requirement does not apply to the part-time worker, who is entitled only to fifteen days notice.[233] Nor does the statute require the employer to take into account any special social factors, an oddity in view of the high rate of unemployment in Slovakia. However, termination of a worker with a disability presents an additional procedural hurdle for the company. It must first obtain the consents of both the employee representative and the Department of Labor, Social Security and Family Affairs. The latter requirement is not imposed if the affected worker is sixty-five years of age or older. Additionally, a worker cannot be terminated during pregnancy or during parental leave (which can be taken until the third birthday of the child).[234]

Statutory severance pay is only twice the worker's average monthly wage, regardless of his length of service.[235]

The mass layoff (collective redundancy) provision applies to all businesses with at least twenty workers,[236] but unless there is a closure, those affected are only somewhat larger companies. A layoff is considered collective if at least twenty are dismissed for business-related grounds within a ninety-day period, irrespective of the total number of workers.[237] The employer must then consult with the works council or workers' representative and the union, if any, in an effort to avoid or decrease the number of layoffs.[238]

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229. Art. 36 Social Basic Rights Law, sec 63(1).

230. *Id.* sec. 63(2).

231. *Id.* secs. 74, 240. Note the notice period begins the first day after the end of the month written notice was given. *Id.* sec. 18. For termination of a part-time worker (those who work fewer than twenty hours per week), notice begins at the exact time given. *Id.* Notice for part-time workers is only fifteen calendar days. *Id.* sec. 49.

232. *Id.* sec. 240(7).

233. *Id.* sec. 49.

234. *Id.* secs. 66 and 74.

235. *Id.* sec. 74(1).

236. Sec. 73 General Civil Code of Slovakia.

237. *Id.*

238. *Id.* sec. 73.

Professor Helena Barancova of the University of Trnava Faculty of Law has perceived a prevailing distrust of unions and little interest for works councils among Slovakian workers, a situation that seems commonplace throughout the ten new EU member nations.[239] Poland, Slovakia's neighbor to the North, exemplifies this truism. It has been more than twenty years since Solidarity union leader and 1983 Nobel Peace Prize winner Lech Walesa was so revered in Poland. Although he was resoundingly elected President of Poland in 1990, Walesa lost both his strong initial public support and his bid for re-election in 1995. Perhaps Walesa' fate is reflective of the distrust of unions within Eastern Europe to which Professor Barancova refers. Because of Slovakia's new affiliation with the EU, this absence of social partners will likely change.[240] The result is a current system with strong statutory protections against groundless worker dismissals, but one that usually is not supported by a strong network of worker representatives.

Slovenia

Of the seven countries that were part of the former Yugoslavia, Slovenia is the only one that is a member state of the EU. It is also the only one that has adopted the Euro as its official currency. The necessary legislative efforts that preceded this membership included substantial additions to the law affecting the social structure and the working sector.

Slovenian social system changes in 2002 included the first comprehensive labor and employment law statute.[241] A contract of employment terminates upon any of the following events: expiration of the designated time for fixed-term employment; death of either employee or employer; mutual agreement of the parties (in which case the agreement to termination must be signed by both and must include a provision whereby the worker waives the right to unemployment insurance payments); end of statutory notice from the employer; immediate termination in extraordinary cases; or the order of a court in disputed cases.[242]

The legislators recognized the relatively weak status of the worker by enacting a law replete with worker protections. A business cannot dismiss an employee during his absence from work due to illness or injury, statutory parental leave, care for an immediate family member, or membership or participation in union activities. The period of absence that cannot justify a dismissal is six months, and this refers also to a worker's prison sentence. Any termination must be for serious and well-founded reasons that make any continued employment virtually impossible. The company must make a

239. Helena Barancova, *Die Kündigung aus wirtschaftlichen Grünnden und ihre Beschränkungen in der Slowakischen Republik*, to be published in *Vergleich*, *supra* note 182, at 22-13.

240. FRANZ MARHOLD, EUROPAISCHES ARBEITSRECHT 130 (Vienna, 2004).

241. Employment Relations Act (Official Gazette RS, No. 40/2002), effective Jan. 1, 2003, as amended 2007 (the Official Gazette of the Republic of Slovenia (OGRS), No 42/2002 and 103/2007.

242. Art. 75.

genuine effort to determine whether there is an alternate position for the worker, and is obligated to train him for such a job if he lacks the necessary skills. If this offered job is unsuitable for this employee at the time of its offer, he has the right to decline. According to Professor Etelka Korpic-Horvat of the University of Maribor, the Slovenian legislation imposes a more detailed and exhaustive duty upon the business in this regard than do most European statutes.[243] Slovenia is a signatory to ILO Convention 158 and the amended European Social Charter,[244] and the new law also incorporated the broad social dimensions of ILO Recommendation 166 that accompanied Convention 158. Thus, the Slovenian worker is assured substantial job security.

The period of pre-termination notice for ordinary dismissals varies from thirty days to 150 days, according to a sliding scale based upon the length of service.[245] The thirty-day minimum notice provision applies to all workers with less than five years of service, and the maximum 150 days applies to those with twenty-five or more years of service with the employer. A collective bargaining agreement might lengthen, but not reduce, these statutory minimums. The worker is insured at least two hours each week during working hours to seek new employment without any pay reduction.[246] It is germane that even a discharge because of the fault of the worker requires thirty days notice (regardless of length of service).[247] In accordance with ILO Convention 158,[248] the worker might agree in writing to waive this right and accept full compensation for the statutory period in lieu of notice.[249]

If the termination was generated by the worker's fault, the employer must have preceded the notice with a written warning that an additional contractual violation or unacceptable act will result in dismissal, giving him a legally enforceable second chance. These "fault" reasons include slight negligence.[250] Slovenian law is quite paternalistic in this respect, and the law is somewhat unique in addressing a dismissal for fault of the worker in the same manner as one for business organizational or economic reasons.

Only in cases of gross negligence or inexcusable intentional conduct is immediate termination permissible. The employer bears a heavy burden of proof to substantiate the gravity of the act, which must be one among those in a lengthy list in the statute.[251] In general, the action of the worker in these situations has nuances of criminality. Another ground for immediate dismissal

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243. Etelka Korpic-Horvat, Termination of Employment Contracts at the Initiative of the Employer in the Republic of Slovenia, to be published in Vergleich, supra note 182, at 4.

244. Council of Europe, European Social Charter, art. 24.

245. Article 92, sec. 2 Employment Relationships Act [hereinafter "ERA"].

246. *Id.* art. 95.

247. *Id.* art. 92, sec. 1.

248. Termination of Employment Convention, International Labor Organization 158, art. 11.

249. ERA, supra note 245, art. 94.

250. *Id.* art. 83, sec. 2.

251. *Id.* art. 111, sec. 1.

is the worker's failure to have returned to work within five days after the expiration of a disciplinary suspension.[252] This additional five days leniency reflects the worker protections that prevail under Slovenian legislation. Even in particularly serious fault cases, the company must act expeditiously. It will be considered to have waived the right to terminate if it has not notified the worker within thirty days after learning of the infraction or within six months of the occurrence, whichever comes first.[253] The latter can make fault dismissals impossible in some instances. Additionally, there is the typical European prohibition of terminating a member of the works council,[254] an "older" worker (defined as those fifty-five years of age and older), [255] a pregnant or breast-feeding worker,[256] one on parental leave,[257] or a person with a disability.[258] The latter is harsh indeed and one that conceivably might have the inherent effect of dissuading a company from employing a person with a disability.

Slovenian law also differs slightly from the norm within Europe regarding required notice to the worker's union because union notification is required only if the worker requests.[259] Thus, even though notification to the union will be subsequent to notice to the worker himself, it carries with it a potential detriment to the company: union objection will suspend the implementation of the dismissal, or, in the alternative, the employer might refuse to permit him from working, but it must continue to pay his usual wage or salary.[260] This rule regarding union notice applies both to ordinary dismissals and dismissals without notice. The union must respond with any objections within eight days, upon which time the resolution process (usually arbitration) begins. Since the termination is suspended in the interim, Slovenian unions carry a proverbial big stick. Although Slovenia has statutory works councils,[261] for an individual dismissal, no notice to the works council is required.[262]

Another body that might suspend a termination is the Labor Inspectorate, a governmental administrative body. In addition to its duties and powers of inspections, if notified by a worker of his termination, the Inspectorate can stay

252. *Id.* art. 111, sec. 1, para. 3.

253. *Id.* art. 110, sec. 2.

254. *Id.* art. 133.

255. It is somewhat puzzling that this "older person" protection attaches only to male workers. Perhaps it is due to Slovenia's new membership in the EU that the legislature has adopted some discrimination laws that may be incompatible with this provision.

256. *Id.* art. 115.

257. *Id.*

258. *Id.* art. 116, secs. 1, 2.

259. *Id.* art. 84, sec. 1.

260. *Id.* art. 85. Sec. 2. Note that this section specifies that termination will not be effective until the court-imposed term for arbitration has terminated or judicial decision has occurred.

261. Worker Participation in Management Act RS, Nos. 42/93 and 56/01 (Official Gazette).

262. Address by Dr. Etelka Korpic-Horvat, Professor of Labor Law, University of Maribor, at *Diolog* in Graz, Austria, *supra* n. 11.

the termination until resolution before a court or arbitration body.[263]

The provisions applicable to collective redundancies apply to any business-related layoff of 10 or more workers within a 30-day period by a business with 21-99 workers, or of 20 or more workers by a business with 100 or more workers within a 3 month period.[264] In such a case, the employer must notify the trade union and the works council (the statutory language is that this must be done "as soon as possible"). Before such terminations can be effective, the company is obligated to consult with both bodies in an attempt to reach agreement.[265] (There is no provision addressing any possible conflict between the union and the works council.) If the parties do not resolve by reaching agreement on the avoidance or reduction of the number of layoffs, or on the employers selection among workers,[266] the usual approach is for an arbitrator to decide.[267] Thus, either the union or the works council might effectively suspend, or even abrogate, a collective redundancy, an encroachment upon management's authority that is likely the most extreme among EU member nations.

Severance pay is relatively meager. The highest entitlement is one-third of the average monthly pay during the prior three months for a worker who has more than fifteen years of service.[268] With five to fifteen years of service, the entitlement is one-quarter of this amount.[269] The minimum amount for the worker with at least one year but no more than five years of service is only one-fifth this amount.[270] However, the right to unemployment benefits complements severance pay and might continue for as long as two years after termination, depending upon the worker's length of service with this immediate past employer.[271]

The relatively considerable encroachment on employers' rights in termination decisions under Slovenian law is intended to curb the high rate of unemployment. At the end of 2004 (the first year of EU membership), this rate was 10.6%.[272]

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263. Labour Inspectorate Act, RS, Nos. 38/94, 32/97 and 36/2000 (Official Gazette).

264. ERA, *supra* note 245, art. 96, secs. 1, 2.

265. *Id.* art. 97, secs. 1, 2.

266. The 2002 employment statute mandates that the employer to consider the usual social factors: the worker's years of service, educational or qualifications, additional skills, and work experience.

267. Communication from Dr. Etelka Korpic-Horvat, Professor of Labor Law, University of Maribor, February 5, 2008.

268. ERA, *supra* note 245, art. 109, secs. 1, 2.

269. *Id.*

270. *Id.*

271. Art. 25 Slovene Employment and Unemployment Insurance Act (1991, as amended 2006), (OGRS) No. 107/2006.

272. Annual Report of the Employment Service of Slovenia (2004).

3. *Croatia and Turkey: Examples of Two Aspiring EU Member States*

Croatia

The employment statute in Croatia[273] adheres to the worker protection philosophy, recognizing that the worker is the subordinate party in the employment contract. The legislature used German statutory law as its model, and this part of Croatian legislation conforms to ILO Convention 158 and all relevant EU directives.[274] Thus, the same German statutory requirement for cause appears in the law of Croatia.[275]

The statutory minimum notice is two weeks for workers with less than one year of service, a period that gradually increases to three months notice for one with more than twenty years of service.[276] This required notice is augmented by an additional one month if the worker has a disability.[277] Additionally, the notification period is extended by one week if the worker is between the ages of fifty and fifty-five years and has more than twenty years of service and by an additional month if he is older than fifty-five and has worked for the company for more than twenty years.[278] These notice periods were actually reduced by one-half in 2003. According to Ivana Vukorepa of the faculty of law at the University of Zagreb, the purpose was to lower costs to the company in termination cases and to increase its ability to remain competitive.[279]

Several groups are protected from notification of dismissal, including (1) the pregnant worker or one on parental leave (for this group, notification cannot be prior to fifteen days subsequent to the birth of the child or end of the leave, whichever comes later);[280] (2) the worker who is temporarily disabled by reason of an occupational disease or industrial accident;[281] and (3) one who is absent from work in order to complete the legally obligatory civil or military service.[282]

Unlike Slovakia and Poland, the works council constitutes a strong component in the Croatian workplace. Each business with at least twenty workers[283] must have a works council, and this body must be notified in detail before a planned

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273. Narodne novine 38/95, 54/95 (1995), Nr. 68/05 (2005). *See* Zeljko Potocnjak and Ivana Vukorepa, *Betriebsbedingte Kündigung in der Republik Kroatia*, to be published in *Vergleich, supra* note 182.

274. MANFRED WEISS, DIE ARBEITNEHMER MITWERKUNG IN EINER GLOBALISIERENDE ARBEIT: LIBER AMERICORUM 403-414 (Hoeland, Armin et al., 2005).

275. Croation Labour, art. 106(1), discussed *supra* note 227.

276. Art. 113, sec. 1 Narodne novine.

277. Art. 113(1), 113(3), Narodne novine Nr. 14/02i 33/05.

278. Art. 113(1).

279. Magister Ivana Vukorepa, Address (Oct. 24-25, 2006), *Dialog, supra* note 11.

280. Croation Labour, *supra* note 275, art. 70.

281. Art. 73.

282. Art. 225(7)-(9).

283. Arts. 117, 145 and 146. Before the 2003 amendment, employers with ten or more workers were required to have works councils.

termination. This notice must contain the name, age, date of employment, duties and job classification, and status of the worker's health, and must precede notice to the worker.[284] The works council must communicate any objections to the employer within a strictly enforced eight day period, and objections are confined to the refutations not among those listed in the statute.[285] If there is no works council, this function is fulfilled by the union.[286] Resolution of the issue is by a court, rather than an administrative body or arbitrator.[287]

If the dismissal is business related, the employer has the obligation to place the worker in a different position, if possible.[288] During the notice period, the worker is entitled to a minimum of four hours paid leave per week, so that he might use the time to seek new employment.[289]

The collective redundancy provisions apply if twenty or more workers are notified of dismissal within a ninety-day period.[290] In such case, the company must have an elaborate written social plan to be used in determining which workers are chosen for the layoffs, and this plan must be approved by both the works council and the State Employment Department.[291]

The severance pay requirement is limited to workers with a minimum of two years' service with the company,[292] but the amount is unusually low. For each year worked, he is paid one-third his monthly wage or salary, which is averaged over the prior three months and increased to six times this base amount (that is, two months' remuneration), in accordance with length of service.[293] For the disabled worker, this severance entitlement is doubled.[294] Prior to the 2003 amendments, this pay was an entire one month's pay. Presumably the rationale was the same as Ms. Vukorepa's explanation of the reduction of notice periods, two instances that reflect exceptions to the general statutory stance in Croatia that favors the employee.

Turkey

This aspiring EU member state is much like a former commercial for an American automobile rental company. The frequently seen advertisement for the Avis company, then consistently second to Hertz in total rentals, stated "We try harder." Despite the enactment of Turkey's first comprehensive employment rights legislation in 2002,[295] much more legislative activity in the

284. *Id.*
285. *Id.*
286. Art. 148(3).
287. Art. 145(1), (5), (6), (7).
288. Art. 106(3).
289. Art. 113(4).
290. OGHRK Rev 615/00.
291. Croation Labour, *supra* note 275, arts. 120(1), 119(2).
292. Article 118 Narodne novine.
293. Croation Labour, *supra* note 275, art. 118(3).
294. Art. 79(1).
295. Is Guvencesi Yasasi Nr. 4473, 15 Aug. 2002. This law took effect Mar. 15, 2003.

collective worker area will be necessary in order to meet EU requirements. According to Dr. Alpay Hekimler Director of the Social Science Institute at Namik Kemal University,[296] an abundance of new legislation is necessary, and the federal legislature has not even begun discussions on addressing changes in the labor and employment area. Turkey indeed must "try harder" if it hopes to be among the EU member states.

The current law contains much of what is usual in European statutes, such as the requirements for cause and minimum notice before a dismissal is lawful. Additionally, any immediate termination must be for a sufficient reason.[297] There is nonetheless paucity in the statute regarding some pertinent issues, and some provisions have limited application so as to result in relatively little worker protection.

The 2002 statute applies to all workers in companies with at least thirty workers, and all permanent workers (that is, not fixed-term) are covered.[298] This thirty-worker minimum is a distinct variation from the European norm, since it sharply reduces protection for workers of smaller businesses.

The minimum notice period required for ordinary dismissals follows the usual structure that increases the length according to time in service.[299]

Length of service	*Minimum notice*
Less than six months	Two weeks
Six months to one and one-half years	Four weeks
One and one half years to three years	Six weeks
More than three years	Eight weeks

Without notice in an ordinary termination, the employer must pay the affected worker his remuneration during the statutory period. These periods can be extended to four months through collective bargaining, but typically the bargaining process results in a reduction of the statutory period, oddly permissible under the law. During the notification period, the employer must permit the worker to have two hours paid leave per week in order to search for new employment.[300]

The worker is protected from termination if the ground is his membership or activities in a trade union, his work as a worker representative, his race, color, sex, family status, pregnancy or pre-natal absence, religion, or political

296. *Dialog*, *supra* note 11.

297. The the worker's physical attack upon a co-worker provides an example of a judicially determined permissible immediate termination. Yargutay 9 HD 4302/16781, Oct. 10, 2003.

298. Article 18, sec. 1 Turkish Labor Law Statute of June 10, 002 (Nr. 4857).

299. Art. 17.

300. Art. 27(1).

opinion.[301] However, the worker does not have blanket protection *from* discharge for these reasons. Rather, these reasons simply cannot be the *basis* of the decision to discharge, a substantive difference. This is much like American law in that the burden of proof is upon the employee to prove that his dismissal was in fact based upon one of the grounds prohibited by statute. Another difference from the usual European domestic law, with the exception of Ireland, is that there is no required consideration in a redundancy of social factors such as the worker's age, length of service, or family circumstances. Indeed, according to Dr. Heklimer, Turkish law approaches effects of employment decisions on the marketplace more than any other country within Europe, making the economy, rather than the worker, the focus of protection.[302] There is one demographic consideration, that of older workers. However, the reason is not altruistic, but rather economic. Since enactment of a 1936 statute, Turkey has had a social security payment system. Because the older worker might indeed find re-employment relatively more difficult than his younger counterparts, he likely will receive government-funded unemployment benefits for a longer period of time. Thus, he receives this indirect protection not for his own benefit, but rather to result in savings to the federal economy.[303] Moreover, this "protection" of the older worker does not address seniority or loyalty to the company. For the same reason, special attention is given to a worker who is married and has as many as two children. Social payments to such an unemployed person equal 42.7% of his former gross wage or salary, a figure that is recomputed monthly according to the negative impact on the economy.[304]

There is a mass layoff provision that applies to redundancies within a one-month period of ten or more workers for the company with twenty to 100 workers; 10% of all workers for the company with 101-300 workers; or thirty workers for the company with more than 300 workers.[305] Two comments are germane. First, the statute applies in general only to companies with thirty or more workers, so this is an aberration from that general coverage of smaller businesses. Second, the only additional requirement for a collective redundancy is notification from the employer to the Minister for Employment and Social Security, the Employment Office and the union, if any.[306] This notice must be written and must include reasons for the redundancies, the number of layoffs, and the departments or sections of the business affected. The sole role of the union is to meet with the employer's representative to discuss a possible retraction of the redundancy or a decrease in the number of

301. Arts. 18, 47(9).

302. Alpay Hekimler, *Die Lage des turkischen Arbeitsmartes und die Leistungen bie Arbeitslosigkeit in der Tuerkei;* ZFSH/SGB Sozialrecht in Deutschland und Europa 8/2005 SS. 453-452, referring to Baru Askin *Das Sozialversicherungssystem der Turkei,* address in Marburg, Germany, January, 2004.

303. *Id.* "Older worker" is not defined.

304. This computation is statutory. *See* Art. 14.

305. Art. 29.

306. *Id.*

workers dismissed. Whatever the period of notification due to the worker, a collective redundancy cannot be effective until thirty days after notice has been given to these three bodies.

This union notification has little significance, since the role of unions in the Turkish labor setting is nearly inconsequential, except preemptively through collective bargaining. One example of such rare effective bargaining was the achievement of the metal industry's worker-favorable contract in 2005.[307] It also merits mention that Turkish law contains no provisions for works councils. To be sure, according to Dr. Hekimler, such worker representative councils exist in Turkey, but they have no relevancy in dismissals. Most economists and legal scholars predict that they will not likely evolve into the strong worker support entities such as those in the Austrian and German models.[308]

To borrow from another 1970's American commercial, one for Virginia Slims cigarettes, Turkey must "come a long way, baby" before its labor legislation will meet EU standards. If she is to be a member state, the employment legislation must be substantially amended so as to view dismissals from the human rights, worker protection, and social perspectives, rather than from the perspective of the national economy.

III. THE AMERICAN EMPLOYMENT-AT-WILL RULE

Any alterations to the common law, that is, the body of English law inherited by the former British colonies that comprise common law jurisdictions, must be by statute.

One such rule of law which most American states have tenaciously retained is the employment-at-will rule that permits either party to the employment contract to terminate at any time, with or without reason. Although England has abandoned the employment-at-will rule, it persists in American states.

It is somewhat anomalous that English law was originally more sympathetic to workers than is the current American employment-at-will rule. British statutory law responded to the drastic shortage of workers in the aftermath of the tragic Black Death in the fourteenth century by designating all employment contracts that did not specify otherwise to be for a one-year term.[309] Since an employer could terminate a fixed-term worker only for good cause, this gave those in the workforce a more stable employment status, albeit one with a brief shelf-life.[310] Although some early American courts adopted this fixed-term one-year presumption[311], by the late nineteenth century these

307. Metal Industrie Manteltarifvertrag, 2004, MESS.

308. *See, e.g., Die Beendung des Arbeitsverhältnisses durch Kündigung und ihre Beschraänkungen in der Turkei*, at 10 (forthcoming in *Vergleich, supra* note 182).

309. W. BLACKSTONE, COMMENTARIES 425 (1765).

310. *Id. See infra* note 260 for same rule in American fixed-term employment contracts.

311. *See, e.g.*, Adams v. Fitzpatrick, 26 N.E. 143 (N.Y. 1891).

same courts gradually began to adopt the employment-at-will rule.[312] The rationalization that the rule was fair since it applied equally to both parties in the employment contract was disingenuous. The relative harshness such a rule imposes upon the worker is patently evident, particularly if the business is a large one.

The actual American source that assumed the rule that English law had forgotten was neither a legislature nor a court. Rather, New York lawyer H.G. Wood published a treatise on master and servant law in 1877, anachronistically announcing this rule without any legal authority.[313] In 1884, the Tennessee Supreme Court, citing Wood, became the first state court to apply the employment-at-will rule.[314] Other states followed,[315] and it soon became established law throughout the country.

A. Exceptions to the Rule

As with any general rule of law, there are exceptions. United States federal law paved the way for what has become the norm, prohibiting employment discrimination if based on any of several listed grounds, and most European legislatures followed this lead. These laws prohibit employment discrimination if based on the worker's race, color, religion, national origin, or sex,[316] age,[317] or disability.[318]

The United States Congress enacted a lengthy statute in the wake of the Enron corporate scandals in an effort to lessen the likelihood that such corporate graft would recur. Among the provisions of the Sarbanes-Oxley Act[319] is one that makes retaliatory discharges of officers, employees, contractors, and/or subcontractors because of their "whistleblowing" illegal activities.[320] This term "whistleblowing" refers to an employee's reporting of any illegal employer activity to the appropriate government official. There are many state laws with similar proscriptions for those companies not covered by these federal statutes.[321]

312. ROBERT COVINGTON AND KURT DECKER, EMPLOYMENT LAW 325-26 (2d Ed. 2002).

313. H.WOOD, MASTER AND SERVANT § 134 (1877, 3d ed. 1886).

314. Payne v. Western & Athletic R.R., 81 Tenn. 507, 518-520 (1884).

315. *See, e.g.*, McCullough Iron Co. v. Carpenter, 11 A. 176 (Md. 1887); *see also*, Martin v. New York Life Ins. Co., 42 N.E. 416 (N.Y. 1895).

316. 42 U.S.C. §§ 200e-200h (1964).

317. 29 U.S.C. § 623(a)(1) (1967).

318. Pub. L. No. 101-336, 104 Stat.327 (codified in 42 U.S.C. §§ 12101-12213).

319. Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act) (hereinafter "Sarbanes-Oxley Act"), 15 U.S.C. §§ 7201-7266.

320. 18 U.S.C.§§ 1514(A), 1107, 1513.

321. For listing of such states as of 1995, see DAWN BENNETT-ALEXANDER AND LAURA PINCUS, EMPLOYMENT LAW FOR BUSINESS 12-13 (Richard D. Irwin, Inc., 1995).

B. Plant Closings and Mass Layoffs

The concept of legislatively required minimum notice for a termination is generally alien to American law. The primary exception is a 1988 federal statute, the Workers Adjustment and Retraining Act (WARN), commonly referenced as the Plant Closing Act.[322] This law is implemented largely through Department of Labor regulations.[323]

WARN mandates at least sixty days written notice to workers affected by a plant closing or mass layoff, an American neologism for collective redundancies. Significantly, this statute applies only to larger companies with no fewer than 100 full-time employees or its equivalent,[324] in contrast to the usual European counterpart legislation affecting businesses with twenty or more workers. To clarify the concept of "equivalent," American workers work an average of forty hours per week, so 100 full-time workers would work a minimum total of 4,000 hours. Similarly, 200 part-time workers, each working twenty hours per week, would work 4,000 hours per week, an equivalency to 100 full-time workers. Implementing regulations include among the definition of "employee" one who is on temporary layoff or leave provided he has a "reasonable expectation of recall."[325] "Mass layoff" is defined in the Act as one within a thirty-day period that results in an employment loss for (i) one-third of the total work force, or (ii) at least 500 workers, without regard to the number of employees.[326]

An alternate statutory trigger for coverage is an employment loss for two or more groups of employees at a single site during a ninety-day period, when neither group reaches the minimum number (*i.e.*, one-third the total workforce or 500 employees), but the aggregate is the statutory minimum.[327] Regulations provide that the employer might rebut the presumption of aggregation of workers in such case if it can show that the layoffs were the "rule of separate and distinct actions and causes . . . and . . . not an attempt to evade the requirements of WARN."[328] An example of proof of such separate and distinct causes was *Michigan Region Council of Carpenters Employee Benefit Fund v. Holcroft, L.L.C.*[329] In this case, the first layoff during the ninety-day period was the result of lack of production because the employer had completed two manufacturing contracts but was not awarded a third, as it had anticipated. The second layoff was subsequent to the company's sale of the business.

With regard to a sale of business, American law markedly contrasts with

322. 29 U.S.C. §§ 2101-2109 (2007).
323. 29 U.S.C. § 2107; *see* 20 C.F.R. 639 (2007).
324. 29 U.S.C. § 2101(1)(A)(B) (2007).
325. 29 C.F.R.§ 639.3(a)(1)(ii) (2007).
326. 29 U.S.C. § 2101(a)(3)(i), (ii).
327. 29 U.S.C. § 2102(d).
328. 29 C.F.R. § 639.5.
329. 171 F.Supp. 2d 693 (E.D. Mich. 2001), *vacated on other grounds*, 195 F.Supp. 2d 1908 (E.D. Mich. 2002).

European Commission law,[330] which requires EC member states to enact domestic legislation protecting workers from job losses in the event of a business transfer. The only issue in such instances under WARN is the determination of which party — seller or buyer — is responsible for tendering the statutory notice to workers that they will be laid off. If the closing or layoff occurs up to and including the date of the sale, the seller has the sixty-day written notification duty. Should the actual layoff occur after that date, the obligation falls to the purchaser.[331]

There are two exemptions from the notification obligations of WARN. First, the company need not give workers notice of their termination if the closing were that of a temporary facility or the result of completion of a project, and the workers had been hired with the understanding that the jobs would continue only until the facility closed or the project were completed.[332] Second, the notice obligation does not apply if the closing were caused by a strike or lockout in a bona fide labor dispute not intended to serve as a subterfuge to avoid WARN requirements.[333]

Significantly, those employees who do not participate in a called strike are not within the exemption.[334] An example would be one likely to occur in a right-to-work state. Federal labor legislation permits so-called union shop agreements, i.e., a collective bargaining agreement between union and management in which the employer agrees that it will dismiss any worker who does not join the union within a minimum of thirty days' employment.[335] This same statute permits the individual states to adopt state legislation making such agreements unenforceable.[336] Most of the Southern states, for example Virginia,[337] have adopted such legislation and are referred to as "right-to-work" states. That is, one has the right to employment with or without joining the union. Thus, assume that the Newport News Shipbuilding and Dry-Dock Company in Newport News, Virginia, a heavily unionized company, had been unable to reach consensus with its union, Peninsula Shipbuilders Association, and the agreement expired last week. The union voted by a majority to strike as of that date if the parties had still not reached agreement. Suppose that forty-six workers are not union members, and as such are ready and willing to continue working. However, with nearly 20,000 workers on strike, the company has no alternative other than to close during the labor dispute. The forty-six non-strikers are entitled to statutory notice sixty days prior to the closing.

Federal regulations have established four mandatory inclusions in the written notice. The written notice sent or given to each employee must include

330. Council Directive, 77/187, Feb. 14, 1977 O.J. 061, 26.
331. 29 U.S.C. § 2101(b)(1).
332. 29 U.S.C. § 2103(1).
333. 29 U.S.C. § 2103(2).
334. 29 C.F.R. § 2103(2).
335. 29 U.S.C. § 158(a)(3).
336. 29 U.S.C. § 14(b); Taft-Hartley Act, 29 U.S.C. § 164(b).
337. VA. CODE ANN. § 40.1-59-61. (1947).

(1) the name and address of the site where the closure or layoff will occur and the name and telephone number of the company official who is to be contacted for information; (2) the status of the planned closure or layoff, i.e., whether it is intended to be temporary or permanent; (3) the expected date of the first termination of employment and the anticipated schedule for additional terminations; and (4) job titles and names of all employees affected.[338]

The statute expressly states that its provisions do not change or affect contractual or state statutory remedies.[339] Examples of states with such plant closing acts are the New England states of Connecticut, Maine, and Massachusetts.[340]

There is no statute of limitations in WARN, and the United States Supreme Court has held that the applicable limitations period will be the most analogous one in the state where the violation occurred.[341] For example, in states other than those with plant closing legislation, a court might imply that the employer had the contractual duty to give notice on a duty-implied-by-statute theory. In such cases, the statute of limitations for breach of contract would apply.

The notification might be shorter than sixty days in three instances.[342] These are affirmative defenses for an employer charged with having violated the duty to give notice, and, as such, the burden of proving that it falls within one of these three exceptions is on the employer. First, the employer might have anticipated receipt of capital resources (money or additional business) that would have kept the business operating, and the one in charge reasonably and in good faith believed that giving notice would have adversely affected the possibility of obtaining this capital. Second, the business circumstances that led to the closing or layoffs were not "reasonably foreseeable" when the sixty-day period began. To exemplify the strictness of this standard, a federal district court held in *IAM District Lodge 776 v. General Dynamics Corporation* that a company's failure to meet a deadline and cost overruns that resulted in loss of a major contract did not constitute such "unforeseeable circumstances." [343] Third, shorter notice is permissible if closure resulted from a natural disaster. Recent examples are the many companies demolished in September of 2005 by Hurricane Katrina in the New Orleans, Louisiana and coastal Mississippi regions, and the October 2006 earthquake in Hawaii. For each of these exceptions, notice must be "as much as practicable."[344]

There are several cumulative remedies and penalties. The employer who has failed to give notice according to WARN might be subject to a civil penalty

338. 20 C.F.R. § 639.7(c).
339. 29 U.S.C. § 2105.
340. COVINGTON & DECKER, *supra* note 2, at 363.
341. North Star Steel Co. v. Thomas, 515 U.S. 29 (1995).
342. 29 U.S.C. § 2102(b).
343. 821 F.Supp. 1306, 1313 (E.D. Mo. 1993).
344. 29 U.S.C. § 2102(b)(3).

up to $500 for each day of the violation. Each aggrieved employee can be awarded back pay for each day that he did not receive the notice to which he was entitled. This actually would result in double pay, since he would have worked on those days and would have received his usual remuneration. Finally, the court has the discretion to award costs, including the worker's attorney fees.[345]

The primary defense is a claim of "good faith."[346] The employer must prove this good faith from both subjective and objective perspectives,[347] and objective good faith can be difficult to prove. For example, the employer did not show objective good faith in *Jones v. Kayser-Roth Hosiery, Inc.*[348] In that instance, the employer contended that there had been a possibility that it would not close, and based on this possibility it did not give notice. The court found this likelihood so remote that it decided the failure to notify was not based on good faith.

This law stands out as the only legislation similar to the European concept of redundancy, that is, termination of employees for business reasons. However, the word "similar" should not be perceived to mean "identical." For the appropriate perspective, the reader should bear in mind that the Plant Closing Act requires *only* a minimum notice. It has *no effect on the employer's right* to close a plant or to lay off any number of workers, for whatever reason, or even without a reason other than the employer's desire. Indeed, the statute expressly precludes any right of action for injunctive relief to prevent or delay a closing or mass layoff.[349] Thus, American law has no true counterpart to the European "redundancy" with respect to statutory duties on the employer.

C. State Common Law and Statutory Exceptions

The employment-at-will rule has been defended as being patently fair, although it permits the employer to terminate the employment relationship without cause, it also permits a worker to resign without cause.[350] Nonetheless, it is obvious that the rule in practice operates much more harshly upon the worker than on the employer. A worker who suddenly quits is replaceable, but one who is told without any warning that his employment is to end is without money for subsistence for him and his dependents.

A worker might challenge his discharge by claiming it is unlawful under either contract or tort theory. Because the at-will rule is presumed, the burden is upon the terminated employee to prove that the circumstances rendered his dismissal unlawful.

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345. 29 U.S.C. § 2104(a)(6).
346. 29 U.S.C. § 2104(a)(4).
347. *See* Saxion v. Titan-C-Manufacturing Inc., 86 F.3d 553 (6th Cir. 1996).
348. 748 F.Supp. 1276 (E.D Tenn. 1990).
349. 29 U.S.C. § 2104(b).
350. COVINGTON & DECKER, *supra* note 2, at 328.

D. Contract

1. Express Contract

The employer may communicate to the worker an express commitment to only discharge the worker for good cause. Such promise may be communicated to either an individual worker or to the entire workforce, either orally or in writing.

In a unionized setting, the collective bargaining agreement generally will contain a job security clause, i.e., an assurance that workers will be discharged only for good cause. In such case, the company might nonetheless be victorious, but it must produce evidence of objective good cause.

2. Implied Contract

In the early 1980s, some state courts began to recognize an implied promise on the part of the employer from provisions in employee handbooks or written personnel policies. Language that stated, or even inferred, that a worker would be retained unless there were good cause to terminate the employment contract was first to be held contractually binding on the employer by the Michigan Supreme Court in *Toussaint v . Blue Cross & Blue Shield of Michigan.*[351] The handbook that was given to the employee-plaintiff at the time of hire stated that it was the employer's policy to terminate only for good cause, and the court held the manual to be a part of the employee's contract by implication.[352] Interestingly, this court found no significance in the plaintiff's admission that he had not read the handbook provisions until subsequent to his termination. Thus, there was no evidence of any reliance on his part, nor did the court require such.

Essentially, the plaintiff's position in such cases will be that such employee handbook language simply takes this employment contract out of the at-will variety. Some courts that have held such manuals to be contractual have required, however, that the language be lucid and clear enough to have instilled in the employee the reasonable expectation of employment that would continue absent good cause for termination. This line of reasoning also required a showing of reliance by the employee on the handbook provisions, as the Illinois Supreme Court held in *Duldulao v. St. Mary of Nazareth Hospital Center.*[353] Likewise, the Minnesota Supreme Court applied strict contract reasoning by viewing such a manual as an offer, which the employee had accepted upon

351. 292 N.W.2d 880 (Mich. 1980).
352. *Id.* at 905.
353. 505 N.E.2d 314 (Ill. 1987).

assuming his position in *Pine River State Bank v. Metille*.[354] This is a classic unilateral contract, acceptance by the worker having been his continued performance of services for the employer. Interestingly, the court in *Pine River Bank* found the handbook's provision titled "Job Security" was only internal company policy, rather than an offer to the plaintiff. However, the "Disciplinary Policy" section was held to be a different matter indeed. This section set forth with clarity the sequence of steps that would be followed in the event of a termination, and the court held that whether the employer's failure to follow these procedures and to have summarily dismissed the plaintiff might have been a breach of its agreement with the employee was a question of fact that was appropriate for jury determination.[355] The Minnesota Supreme Court then affirmed a jury verdict for the plaintiff in excess of $24,000.

The advice generally given to companies by employment lawyers is simply not to distribute such handbooks. For the employer that insists upon doing so, it would be advisable to include at the bottom of each page a highlighted disclaimer, reminding that the book is not a contract, and that the employment is at-will. Some courts have been adamant in holding that in order to effectively remove the contract from the presumption that the employer is bound, these disclaimers must be prominent, usually in bold type.[356]

In a 1987 case, *Miller v. SEVAMP, Inc.*, [357] the Supreme Court of Virginia circumvented having to address the issue of whether handbook provisions are contractual in nature when handbook language stating that the employment contract would be terminated only for cause conflicted with unrefuted testimony regarding the employer's contrary statement to the employee at the time of hire.[358] More recently, a federal district court applying Virginia state law held that termination because of a reduction in force was valid despite handbook language that the employment relationship would be ended only for cause. The court held that, despite conflicting statements in the handbook, the principle of at-will employment prevailed, any language to the contrary was not enough to overcome the common law presumption.[359]

Regarding the reliance requirement in *Duldalao*, some courts have held this to be immaterial. In *Woolley v. Hoffmann-LaRoche, Inc.*,[360] the New Jersey Supreme Court held that even though the plaintiff did not receive the manual until after he had accepted the offer of employment, nor had he been aware of its contents until subsequent to his sudden dismissal, it would nonetheless be regarded contractual unless the defending employer could produce evidence of a prominent disclaimer in the manual.[361] (Only portions of

354. 333 N.W.2d 622 (Minn. 1983).
355. *Id.* at 630.
356. *See, e.g.*, Jimenez v. Colorado Interstate Gas Co., 690 F.Supp. 977 (D.Wyo. 1988).
357. 362 S.E.2d 915 (Va. 1987).
358. *Id.* at 916.
359. Willey v. County of Roanoke, 2005 WL 1719948 (W.D. Va. 2005 Jul. 21, 2005).
360. 491 A.2d 1257 (N.J. 1985), *modified* 499 A.2d 515 (N.J. 1985).
361. *Id.* at 1269-1270.

the manual had been introduced at trial, and the appellate court remanded to allow the employer the opportunity to show such a disclaimer.)

Many courts have not followed the lead of the Michigan and New Jersey decisions. For example, the Montana Supreme Court held in *Gates v. Life of Montana Ins. Co.*[362] that no contractual obligations flow from an employer's distribution of such manuals or handbooks to workers.

During the 1980s, nearly three-fourths of the states recognized some type of handbook exceptions.[363] However, some legal scholars have pointed out that these state courts have not established with precision the pivotal question regarding whether and under what circumstances and/or conditions the employer might unilaterally alter the terms of such handbooks, especially those addressing job security. Because of this, some have viewed this fact as one that will ultimately lead to a "dwindl[ing] away" of the handbook exception.[364]

3. Defined Term

Generally regarded as beyond the scope of the employment-at-will rule are employment contracts for a specified term.[365] This does not mean that a worker with a defined-term contract cannot be discharged, but rather that he might be terminated only for objective cause. The employer has the burden of proving such good cause.

4. Consideration from Employee in Addition to Performance of Services

A rather unusual situation might exist in which an employee might have made a commitment to his employer to do something for the employer other than and in addition to the expected performance of services inherent in the job. One example was *Bondi v. Jewels by Edwar, Ltd.*,[366] in which the employee had been required by his employer to sell his own business before commencing work. In another case, *Bussard v. College of St. Thomas, Inc.*,[367] the employee had been required by the employer to sell his stock in the employing company's predecessor in exchange for the company's agreement to retain him. This additional consideration from the employee was held to imply a reciprocal promise on the part of the employer to terminate him only for good cause.[368]

The rationale underlying this rule is based upon the additional

362. 638 P.2d 1063 (Mont. 1982).

363. MARK A. ROTHSTEIN *ET AL.*, EMPLOYMENT LAW § 8.3 at 229-243.

364. Elinor Schroeder, *Handbooks, Disclaimers and Harassment Policies: Another Look at Clark County School District v. Breeden*, 42 BRANDEIS L.J. 581 (2003-2004).

365. *See, e.g*, Rochester Capital Leasing Corp. v. McCracken, 295 N.W.2d 375 (Ind. 1973).

366. Bondi v. Jewels by Edwar, Ltd., 73 Cal. Rept. 494 (1968).

367. Brussard v. College of St. Thomas, Inc., 200 N.W.2d 155 (Minn. 1972).

368. *Id.* at 162.

consideration given by the worker. In exchange for this "extra" from the employee, courts have implied that there must a corresponding "extra" from the employer. An example would be the simultaneous hire by Acme Company of two draftsmen, Bob and Sam. Their duties are identical, as are their salaries, benefits, and hours of work. However, the company requests from Bob a commitment to play on the company softball team, a task he willingly accepts. This additional "duty" on Bob's part would entitle him to something additional from the company. A court could imply the promise to terminate his employment only for good cause.

5. Covenant of Good Faith and Fair Dealing

A "covenant" is by definition a promise, and, at times by inference, a contract. While the broad employment-at-will doctrine is judicially-created law, i.e. common law, some state courts have created a narrow exception by implying a mutual covenant of good faith and fair dealing.[369] Although the general at-will doctrine applies, the plaintiff-employee might prove that he comes within this narrow exception if he can show that the employer acted in bad faith, deceitfully, and/or maliciously. One state that has recognized this exception is Delaware. Just four years after its application of this exception,[370] the Delaware Supreme Court in *E.I. DuPont de Nemours and Company v. Pressman*[371] agreed that the covenant has characteristics of a tort cause of action. In the 1992 decision, the Court had awarded punitive damages for breach of that covenant. However, in *Pressman* the Court held that the trial court's instructions to the jury overstated the exception. The *Pressman* court emphasized that a showing of the actor's malice and intentional bad faith directed toward the plaintiff must be causally linked to his termination. The plaintiff was a highly regarded Ph.D. in Biomedical Engineering who had been "courted" by DuPont and literally hired away from Johns Hopkins Medical School in 1986. About one year after he was hired, his supervisor terminated him. The plaintiff had discussed a possible conflict of interests arising from the supervisor's paid advisory involvement with another company. The plaintiff presented evidence of the supervisor's retaliatory campaign to persuade higher management to terminate him, including evidence of the supervisor's placing false and negative information about the plaintiff in his personnel file. However, the Supreme Court of Delaware reversed a jury verdict for the plaintiff that included punitive damages solely because of the trial court's overly-broad instructions to the jury regarding facts to support a breach of the covenant verdict. This decision exemplifies the narrowness of this covenant in the employment setting.

In 1991, the Model Employment Termination Act (META) was approved

369. *See* RESTATEMENT (SECOND) OF CONTRACTS 205.
370. Merrill v. Crothall-American, Inc., 606 A.2d 96 (Del. 1992).
371. 679 A.2d 436 (Del. 1996).

by the National Conference of Commissioners on Uniform State Laws. This body was first organized in the late twentieth century by the American Bar Association to draft statutes suggested for adoption by state legislatures (even in an altered form) in areas of the law where some uniformity is desirable.[372] These model or uniform acts are then presented to the states and recommended for adoption. State legislatures have no co-existing duty to pass, or even to consider passage of, such proposed statutes.

META is a model law that is not a likely candidate for adoption by legislative bodies in business-minded states. It would require good cause for any termination of an employee with at least one year's service with a company, provided that he had worked a minimum of 520 hours during the prior twenty-six weeks, an average of twenty hours per week, in order to provide protection for part-time workers. A worker could waive such protection, but only if the contract contained a provision permitting waiver on the condition that the worker would receive severance pay of no less than one month's wage or salary for each one year worked. Remedies would include reinstatement with back pay or a lump-sum severance pay of up to thirty-six months the worker's wage or salary. Debates during the drafting of META, a legislative package that is common in European domestic law, were contentious and controversial. Indeed, designation as a "model" rather than a "uniform" act is indicative of the strong opposition to its proposal.[373] Montana is the only state that has adopted a statute embracing the provisions of META.[374]

The precursor of the passage of the Montana statute emphasizes the temperament of both the state legislature and the state courts as an aberration in American employment law. Although most American state courts had refused to imply the covenant of good faith and fair dealing to employment contracts,[375] the Montana Supreme Court held otherwise in *Stark v. Circle K Corp.*[376] Shortly after the decision in *Stark Circle K*, the Montana state legislature became the first state to follow the Commissioners' recommendation by enacting a quite comprehensive wrongful discharge statute. The essence of the Montana statute follows the preclusion in META of an employer's unilateral termination of the employment relationship without "good cause."[377] "Good cause" might be in the form of intentional or negligent acts of the worker, the inability of the worker to perform his duties, or the needs of the business. Note

372. By the late 1990s, this conference had drafted nearly 100 uniform acts and twenty-four model acts. PATRICK CIHON & JAMES OTTAVIO CASTAGNERA, Employment and Labor Law 20 (West Publishing Co. 3d ed., 1999).

373. COVINGTON & DECKER, *supra* note 2, at 353.

374. Montana Wrongful Discharge in Employment Act, MONT. CODE. ANN. §§ 39-1 901 through 39-2-915.

375. For example, the federal district court for the Eastern District of Virginia recently reaffirmed the principle Virginia does not recognize the employment covenant of good faith and fair dealing. Devnew v. Brown &Brown, Inc., 396 F.Supp.2d 665 (E.D. Va. 2005).

376. 751 P.2d 162 (Mont. 1988).

377. Model Employment Termination Act (META) § 3(a).

that, even under META, an employer would nonetheless be given wide latitude regarding the best interests of the company.

E. Common Law Tort

Two comments are germane. First, a terminated employee may plead in the cumulative or in the alternative. That is, he may claim that the employer breached a contractual commitment *and* that it committed the tort of wrongful discharge. Second, the most significant distinction between the two is the element of damages. In a breach of contract case, the successful plaintiff is awarded the difference between what he would have earned but for the breach and what he actually earned. For example, suppose that a worker earned $72,000 per year (i.e., $6,000 per month). If he were discharged on November 1, 2005 and obtained other employment on January 1, 2006, at a salary of $72,000 per year, his loss would be $12,000 (two months' earnings). On a tort theory, the employer would be charged with having committed an *intentional* tort, for which punitive damages may be awarded. Usually these damages have no relation to the actual injury sustained and indeed are often much in excess of actual damages.

1. Retaliation Against Employee for Exercise of Constitutional Right

The seminal case for retaliation against an employee for exercising a constitutional right is *Perry v. Sindamann*.[378] The plaintiff was an instructor in a Texas public community college whose contract was not renewed after he publicly criticized college administration. As president of the teachers union, he addressed contentious issues on behalf of other teachers. The United States Supreme Court held that this retaliatory non-renewal of a contract that normally would be routinely re-offered annually violated his constitutional guarantee of free speech.[379] It should be noted that constitutional protection attaches only in a public setting. Thus, had the employer been a private college, it might have been able to act in the same manner with impunity.

2. Retaliation for Exercise of Statutory Right

Similar to the wrongful discharge of a public sector employee in retaliation for the exercise of his constitutional right is the principle of retaliation against any worker — public or private — by termination because of acts that are in accordance with a right guaranteed by statute. One of the first such cases was the Indiana Supreme Court's decision in *Frampton v. Central Indiana Gas Co.*[380] The Court held unlawful the discharge of an employee

378. 408 U.S. 561 (1972).
379. U.S. CONST. amend. 1.
380. 297 N.E.2d 425 (Ind. 1973).

because he had filed a worker's compensation claim against his employer.[381]

The Supreme Court of Virginia, which is generally considered to be among the more conservative of state courts, also upheld such an exception to the employment-at-will rule in *Bowman v. State Bank of Keysville.*[382] The two plaintiffs in *Bowman* had participated in an employee stock-option plan and thus held shares in their employer bank. They were terminated after they had voted against the bank's board of directors' proposal to merge with another institution. The vote had been quite close, and the plaintiffs' collective shares had been decisive in the proposal's defeat. They had initially voted in favor of the proposal after having been told by two of the bank's officers that a negative vote might adversely affect their employment. The proposal barely carried, but they asked for a revote, charging the bank of violations of federal and state statutory proxy requirements. As expected, the second vote resulted in a "no" vote for the merger, and the plaintiff-employees consequently were dismissed. A Court that was unanimous on this issue repeated the state's strong adherence to the employment-at-will rule, but approved this narrow exception. The Virginia corporation code[383] vested in shareholders the right to vote their shares according to their own volition, and retributive action against them for having done so was held to be unlawful. Significantly, the *Bowman* opinion emphasized that this exception was a very narrow one indeed and that Virginia still adheres strictly to the employment-at-will rule.[384]

3. Retaliation for Employee's Refusal to Violate Statutory Law

This theory first arose in *Peterman v. Teamsters.*[385] The facts evolved from a Congressional investigation into allegations of corruption within the International Teamsters Union in the 1950's. The plaintiff was an executive employee of the union who had been subpoenaed to testify before the federal legislative commission. He was terminated as a result of his refusal to comply with his employer-union's demand that he falsely testify under oath. Perjury is a felony in all states, and he challenged his dismissal on wrongful discharge grounds. The California court upheld his claim that the employer's reason was unlawful under the tort of wrongful discharge.

A similar decision was *Sheets v. Teddy's Frosted Foods, Inc.*[386] In this case the highest court of Connecticut held unlawful the termination of a worker because he had insisted that his employer comply with state law applicable to

381. *See also* Harless v. First National Bank of Fairmont, 246 S.E.2d 270 (W.Va. 1978), Nees v. Hocks, 536 P.2d 512 (Ore. 1970) and Sabine Pilot Services, Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985).

382. 331 S.E.2d 797 (Va. 1985).

383. VA.CODE ANN. § 13.1-32.

384. 331 S.E.2d at 800.

385. Peterman v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396, 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

386. 427 A.2d 385, 389 (Conn. 1980).

labeling of retail foods, judicially affirming the legality of "whistle-blowing," as explained in (e) below.

4. Retaliation for "Whistle Blowing"

Several state legislatures have adopted statutes protecting workers who report wrongdoing on the part of their employers. These states include California, Connecticut, Florida, Hawaii, Louisiana, Maine, New Jersey, New York, and Ohio.[387] The New York State Court of Appeals has held that such protection extends to the employee who was mistaken in his belief that his employer was in violation of a health and safety law, provided his belief was honest.[388]

The primary focus of the much-discussed Sarbanes-Oxley Act[389] was the prevention of insider profiting and dishonest misuse of funds at the expense of general workers whose pension plans had been depleted by companies such as the scandalized Enron Corporation in late 2001. However, it is also necessary that employment lawyers heed this legislation, since it extends "whistle-blower" protection to officers, employees, contractors, subcontractors, and agents who report any such wrongdoing.[390] This law applies to any company with a class of securities required to be reported under section 12 and 15(d) of the Securities Exchange Act of 1934.[391] Penalties against companies that retaliate against such protected persons include criminal sanctions.[392]

5. The Judicial Public Policy Exception

Some courts have taken a liberal stance as to what constitutes "public policy" and which body (or bodies) may determine the public policy of a state. Representative of more judicially conservative states, the Virginia Supreme Court has held that such determination lies solely with the legislature. In *Lawrence Chrysler-Plymouth v. Brooks*,[393] the Court reversed a jury verdict for a plaintiff who had been terminated after he refused his superiors' instruction to repair a motor vehicle in a manner the plaintiff, who was the chief mechanic for the defendant car dealership, deemed unsafe. The floor of the chassis of the car was split, and he believed it should be replaced. Although replacement would have been much more costly for the company than a fusion of the existing chassis, the mechanic explained welding the split part together to be patently unsafe. The mechanic's refusal resulted in his discharge. In his lawsuit, he charged that this was in violation of the Virginia automobile salvage

387. CIHON & CASTAGNERA, *supra* note 372, at 232-33.
388. Bordell v. General Electric Co., 667 N.E.2d 922 (N.Y. 1996).
389. Sarbanes-Oxley Act, 15 U.S.C. §§ 7201-7266; 18 U.S.C. § 1514.
390. Sarbanes-Oxley Act, 1 U.S.C. § 806; 18 U.S.C. § 1514A(a).
391. 15 U.S.C. § 781.
392. 18 U.S. C. § 1514(A)(a).
393. 465 S.E.2d 806 (Va. 1996).

and consumer protection laws. However, the Court viewed the language in those statutes too general to address this precise method of repair and held the termination did not violate public policy. In holding the narrow *Bowman* exception[394] did not apply, the highest court in Virginia implicitly declared the state legislature as the single decider of what constitutes specific state public policy.[395]

An interesting case illustrating the broader view that courts may take in determining public policy is *Wagenseller v. Scottsdale Memorial Hospital.*[396] In what may be a unique set of facts, the plaintiff, a nurse who became good friends with her supervisor, the head nurse, had consistently received excellent work appraisals. This suddenly changed after a hospital employees' eight-day rafting trip on the Colorado River. Shortly following this social gathering, her former friend-supervisor starkly criticized her work and terminated her employment in summary fashion.

The plaintiff had been one of the few at the picnic who did not become inebriated. She described their actions as including urinating and defecating openly. Most the other employees began to perform in a skit, with background music from the movie "Breakfast at Tiffany's." The song was "Moon River," and all those who participated would "moon" the audience, that is, expose their naked buttocks to viewers. The plaintiff later testified that she found this repugnant, and she refused to participate. Her supervisor then allegedly harassed her and used abusive language toward her in the presence of fellow workers. This was confirmed at trial by testimony from other employees.

Although an Arizona statute[397] penalized public nudity, it applied to "offensive" behavior. Since none of those participating found it offensive, there was arguably no statutory violation. Nonetheless, the Arizona Supreme Court held her termination to have been in violation of public policy in general. Necessary for this finding was the Court's statement that "[p]ublic policy is usually defined by . . . something that the legislature has forbidden. But the legislature is not the only source of such policy. In common-law jurisdictions, the courts too have been sources of law."[398] In this more liberal state court, public policy, then, is not limited to directives from the legislature, but includes mandates formulated by the courts.

It is submitted that had the facts of *Wagenseller* been submitted to the Supreme Court of Virginia, the plaintiff would not have been victorious. Similarly, had the Arizona Supreme Court heard the appeal in *Brooks,* it is quite probable that the plaintiff would have prevailed.

Even those courts that have adopted the public-policy exception to the

394. Bowman v. State Bank of Keysville, 331 S.E.2d 797 (Va. 1985).

395. 465 S.E.2d 809.

396. 710 P.2d 1025 (Ariz. 1985).

397. ARIZ. REV. STAT. § 13-1402.

398. Wagenseller, 710 P.2d at 1033 (*quoting* Lucas v. Brown & Root, 736 F.2d 1202, 1205 (Ark. Ct. App. 1984)).

employment-at-will rule have narrowly applied it. A prime example is *Geary v. United States Steel Corp.*[399] In this case that preceded the *Lawrence* decision in Virginia and which had similar facts to *Lawrence*, an employee had been terminated because of his refusal to sell a product that he had determined to be unsafe. The plaintiff presented no evidence that he had any expert qualifications in making such judgments, and the state's highest court upheld the lower court's judgment for the employer. The Supreme Court of Pennsylvania, although recognizing that there may indeed be some situations in which a strong public policy exception prohibits a worker's termination, expressly refused to "define in comprehensive fashion the perimeters" of the public policy exception, and it did not agree that . . . the time has come to impose judicial restraints on an employer's power of discharge."[400]

A final comment about a recent business closure in Virginia merits mention. In September 2006, the union, Local 67, filed an unfair labor practice charge[401] with the National Labor Relations Board against J.W. Ferguson & Sons Co., a business established in Virginia before the Civil War (1861-1865).[402] Failure to give notice would violate WARN,[403] unless the company could prove a statutory justification for such failure. However, most lawyers would concede that the employer did not commit an unfair labor practice when it instantly terminated these workers on September 14, 2006, without notice and without severance pay, when it closed allegedly because of financial necessity. The reason for the closure is actually irrelevant, since the Supreme Court of the United States has held that a business might close completely for whatever reason without being in violation of federal labor laws.[404] Consequently, the only possible positive outcome for the union would be proof that the closure was only a partial closure motivated by union hostility[405] and was affected in order to avoid union activity, which had not even been alleged. This exemplifies a fundamental distinction between American and European laws

399. 319 A.2d 174 (Pa. 1974).

400. *Id.* at 180.

401. A 1935 statute, commonly referred to as the Wagner Act, as amended by the 1947 Taft-Hartley Act, 29 U.S.C. §§ 151 *et seq.*, contains five unfair labor practices for employers and seven unfair labor practices for unions. This charge was likely filed under § 8(a)(3) (29 U.S.C. § 158(a) (3)), an alleged unlawful refusal by the employer to bargain with the union.

402. Gregory J. Gilligan, *Union battles Henrico label firm*, RICHMOND TIMES-DISPATCH, Sept. 19, 2006, at B-1, col. 1.

403. *Supra* notes 265-92 and accompanying text.

404. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965).

405. *Id.* In *Textile Workers*, the Supreme Court held that the employer had acted unlawfully, since it had closed only a part of its business, a closure motivated by union hostility. The National Labor Relations Board presented on behalf of the union ample proof that this was a variation of the so-called "runaway shop," a move of one plant to another geographical area to avoid the necessity of bargaining with a union. In this case, the employer had closed only one factory of an entire network of plants constituting a single company for bargaining purposes. Thus, the closure was partial, not total. This was held to be a discriminatory action against workers because of their union affiliations, an unfair labor practice under § 8(a)(3) of the Taft-Hartley Act. 29 U.S.C. § 158(a)(3).

with regard to job protection for workers.

IV. COMPARISONS AND CONTRASTS

The tables below provide matrices of characteristics of most European laws of dismissal.

TABLE 1: TERMINATIONS IN SELECTED PRE-2004 EU MEMBER STATES

Country	Good cause required?	Notice to employee	Notice to WC and / or union	Time off to look for work?	Statutory severance pay?
Austria	Yes	14 days – 6 weeks for BC. 6 weeks – 5 mos. for WC.	WCou (if 5+ employees)	No	Beginning at 3 mos. Service – 2 mos.-12mos. wage/salary
France	Yes	1-2 mos. if 1 yr. service	If 50+ employees	No	1/10 mo. wage/salary for each yr. worked (provided 2yrs. Service) for WC; 20hrs. pay for WC.
Germany	Yes	Up to 7 mos.	WCou (if 5+ employees)	No	½ mo. pay for each yr. worked
Greece	Yes	None for BC; 2 mos. – 24 mos. for WC	No	NO	WC only (1-24 mos. pay, maximum €6500; for BC, national CBA 5 days – 165 days pay
Ireland	Yes	1-8 weeks (provided 13 wks. of service	No Wcou	No	2 wks. Pay per each yr. worked plus one week bonus w/ €600/week maximum (only if 2 yrs. Service)

(* Works Council in France has no right of consultation in terminations.)
Legend: WC=white collar worker / BC=blue collar worker / WCou=works council

TABLE 2: TERMINATIONS IN SELECTED NEW (2004) EU MEMBER STATES

Country	Good cause required?	Notice to employee	Notice to Wcou and/or union?	Time off to look for work?	Statutory severance pay?
Czech Republic	Yes	2 mos.	No to Wcou Yes to union	No	3x average mo. wage/salary
Hungary	Yes	30 – 90 days	No	½ work time during notice period	2 – 12 mos. wage/salary
Slovakia	Yes	2 mos.	Yes (both)	No	2x monthly wage/salary
Slovenia	yes	30 – 150 days	No to Wcou Yes to union (but only if employee requests	2 hrs /week	1/5 to 1/3 one month wage/salary

Legend: WCou=works council

TABLE 3: TERMINATIONS IN TWO EU APPLICANTS FOR MEMBERSHIP

Country	Good cause required?	Notice to employee	Notice to WCou and/or union?	Time off to look for work?	Statutory severance pay?
Croatia	Yes	2 weeks – 1 mo. (more if employee is over 55 and has 20 yrs. Service)	Yes to both (WCou if 20+ employees)	4 hrs. / week	1/3 wage/salary for each year of service (double amount if employee disabled)
Turkey	Yes	2 wks. – 8 wks.	No	2 hrs/wk	No (only social unemployment benefits

Legend: WCou=works council

For purposes of comparison, a fourth table indicates the same characteristics under American employment law.

TABLE 4: AMERICAN STATES AND US FEDERAL LAW

Country	Good cause required?	Notice to employee?	Notice to WCou or union?	Time off to look for work?	Statutory severance pay?
USA	Only in Montana (statute)	Only if plant closing or mass layoff	No (and no statutory WCou)	No	No

* See WARN, a 1988 federal statute. This law applies only to business with at least 100 full-time employees or the equivalency.

The contrasts are stark. Even the American concept of collective redundancy/mass layoff provides considerably less basic protection for the affected worker. The typical European statute applies to a collective job loss for twenty workers. The number of job losses is ten in the Czech Republic, Hungary, Slovenia, and Turkey.. In Ireland, Austria, Germany, and Greece, a layoff of as few as five is considered collective. The number of layoffs required for the mass layoff concept under United States federal law is one-third of the total workforce or 500 workers, whichever is less. The difference becomes even more vivid under the limited employer coverage of the mass layoff legislation in the United States, which applies only to businesses with 100 or more full-time workers. The threshold for coverage in European legislation is for companies with a total of only twenty workers.

Prior or contemporaneous notice to a works council is required in most European states with statutory works councils, and in Austria and Germany, these bodies also have the right of consultation before a dismissal is effective. In Slovenia, the union or the federal office of the Labor Inspectorate might even suspend a collective redundancy, an intrusion into management prerogative that is unknown under American law. There is no counterpart to the European works council in American legislation. An additional requirement in a typical European requirement is statutory notification to the worker's union, which would be a management duty under American federal labor law only if it had been agreed upon through collective bargaining. In addition to the absence of any such statutory requirement under American law, the diminishment of the role of unions is noteworthy. In 2007, only 7.4% of American private sector workers were members of unions.[406]

Many laws in Eastern Europe impose upon the employer the obligation to permit the worker paid time off during the notification period. This period is two hours per week in Slovenia and Turkey, four hours per week in Croatia, and one-half the total working hours in Hungary. Only mass layoffs require the

406. George Will, *Desperate Unions Ask Congress to OK Shortcut*, RICHMOND TIMES-DISPATCH (WASHINGTON POST WRITERS GROUP), Feb. 27, 2007, at A-13, col. 1-3.

employer to give notice to the American worker, and there is no parallel statutory duty to provide the employee with any paid time off work during the notification period.

Recurring in European domestic employment laws is the obligation of the employer to place a worker to be terminated in an alternate position if possible (see, for example, France, the Czech Republic, Slovenia, and Croatia), and there is often the requirement that social factors such as the worker's age and number of dependents, be considered (see, for example, Austria, Germany, Greece, and Croatia). Both the American courts and the legislatures have deferred to managerial discretion in such decisions.

The general rule in Europe is that the employer must provide statutory severance pay to the affected worker. American legislation does not address such a duty. Indeed, the only post-dismissal compensation that a worker might lawfully claim is state unemployment pay. Each company pays a federal and state imposed tax contribution to this overall fund, and its tax rate rises proportionately to the number of workers who have received benefits during the period designated by statute. The general rule among the states is that, regardless of the length of unemployment, state unemployment benefits continue for a maximum of six months.[407] The duration subject to this maximum is generally gauged according to the claimant's length of employment, not only for this employer, but also for others, during the most recent two years or so. The weekly benefit amount usually is calculated according to his earnings during that time. These amounts are always subject to a maximum, and some states are fairly parsimonious in determining limits on these benefits.[408] The indirect expense to the employer of increased unemployment taxation does not amount to what the European employer must bear by paying direct severance money. Additionally, if a worker were terminated by reason of his own deliberate conduct, which is tantamount to work-related misconduct, or his resignation had been without good cause, he would not be entitled to receipt of unemployment benefits. As such, there would be no consequential effect on the company's taxation rate.

Irrespective of those differences, however fundamental they may be, the most striking distinction between European and American laws of dismissal is the American employer's unilateral right to terminate the employment relationship at-will without good cause. This results in a management-dominated hegemony and a continued employment relationship that is subject entirely to the discretion of the employer.

It may well be that there is no causal effect of worker protections upon unemployment statistics, but if such a causal impact does exist, it is perhaps

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407. *See, e.g.*, VA. CODE ANN. § 60.2-602.

408. *Id.* The current maximum in Virginia is $367. The state with the highest weekly maximum is Maine, with $860, and the lowest is Mississippi, with a maximum of only $210. The maximum in most states ranges from $300 to $400. United States Department of Labor http://www.doleta.gov (last visited Jan. 7, 2008).

surprising. Unemployment in the European Union as a whole is approximately 7.5%, and in the United States, 4.7%. The EU member states with the lowest unemployment are Austria, Denmark, Ireland, the Netherlands, and the United Kingdom, each with a rate of approximately 4.5%. The highest, Poland and Slovakia, are between 12% and 13%.[409] In comparison, the overall unemployment rate in the United States is substantially lower at 4.7%. The currently highest rate is in Mississippi, with 7.5%, precisely that of the EU, while the state with the most impressive rate is Hawaii at only 2%.[410] Whatever ill effect the comparatively unfettered management powers of American employers, employment levels remain nonetheless, and perhaps inexplicably, high.

CONCLUSION

Statutory job protection for the non-union American worker is dramatically inferior to the employment securities characteristic of European domestic laws. Domestic legislation in Europe has consistent requirements for minimum notice prior to any ordinary dismissal, and the general rule is that the company must make an exhaustive effort to find an alternate position within the company for a business-related termination. Additionally, many statutes require notice to the works council, the union, or a federal office, particularly in cases of collective redundancies. Every country among those surveyed, with the exception of Turkey, assures the dismissed worker severance pay from the employer. American federal and state law is quite the reverse.

The employment-at-will rule has long been the legal bedrock of the workplace under the American common law, a rule that contrasts markedly with the pro-worker European stance in which the employer has the burden of proving good cause for any dismissal. When strictly applied, this American rule leaves little, if any, remedy for the worker who may have been unfairly, but not unlawfully, discharged. Even when taking into account the exceptions to this rule by some courts (broader in some states than in those with more conservative judiciaries), the evidentiary burden rests squarely upon the worker to prove that he falls within an exception.

Within the United States, only Montana has enacted a wrongful discharge statute that compares with European statutory protections. Absent proof by an American worker that his employer has breached the employment contract or has terminated him on a wrongful ground that falls into a "public policy" exception, he has no cause of action against the employer. Moreover, what constitutes public policy has been construed by many states is only that explicitly stated in legislation. Even in those states where courts have determined that the judiciary is also authorized to determine public policy, the concept is so nebulous as to make this determination inconsistent and thereby

409. *See* United States Bureau of Labor Statistics, http://www.bls.gov.
410. *Id.*

unpredictable.

The only significant American legislation mandating a minimum notice before termination is the federal Workers Adjustment Retraining and Notification Act, a statute that applies only to larger companies. Therefore, dismissal is often harsh and immediate. Additionally, the American workplace does not have the works council that is so omnipresent in Europe (with the exception of Ireland), and the power of organized labor has diminished proportionately with its drastically decreasing membership. The consequence is that the American worker generally does not have the legal support system characteristic of the European workforce.

Generally, the American employee might be terminated without cause and without notice. Since he might be dismissed without cause, any implied duty of the employer to find another position for him would be contradictory. Moreover, he has no right to severance pay. Loss of work for the American worker portends bleak days indeed, much more so than for his European counterpart who enjoys beneficent statutory protections and recourse.

BRINGING ENERGY TRADE INTO THE WTO: THE HISTORICAL CONTEXT, CURRENT STATUS, AND POTENTIAL IMPLICATIONS FOR THE MIDDLE EAST REGION

Susan L. Sakmar, JD, LL.M.*

I. INTRODUCTION

Two emerging energy issues at the World Trade Organization (WTO)[1] have the potential to significantly impact the oil producing countries in the Middle East North Africa (MENA) region. The first is a call for a new round of WTO trade negotiations that would address the energy sector and seek to treat oil and gas like other traded goods. The second is the growing demand to subject energy services to freer trade under the General Agreement on Trade in Services (GATS).[2]

As oil prices topped seventy dollars per barrel in 2006, it became clear that the world was entering a period of historic transition where calls for new energy policies and "energy security" grew louder by the day.[3] Indeed, energy security has become the new lens through which governments view international relations. The record-high oil prices led Peter Mandelson, the European Union's top trade official, to call for a new round of global trade talks[4] focusing on energy and subjecting trade in oil and gas to the same rules

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* Professor of Law (adjunct), University of San Francisco Law School (USF). Ms. Sakmar received her LL.M. in International Law from Georgetown Law Center and her JD from USF School of Law where she teaches a seminar on International Trade Law. Her research is focused on Energy, International Trade, and Middle East economies. This article was originally presented at the 6th International Conference of the Middle East Economic Association, Dubai, United Arab Emirates, March 14-16, 2007. Ms. Sakmar is licensed to practice law in California and was an attorney in San Francisco prior to teaching.

1. *See generally General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, 33 INT'L LEGAL MATERIALS 1125, (1994). The WTO was established on January 1, 1995, and provides a forum for implementing the multilateral trading system, negotiating new trade agreements and resolving trade disputes. *Id.* The Agreement Establishing the World Trade Organization (WTO Agreement) incorporates the original General Agreement on Tariffs and Trade (GATT), which continues to apply to issues not covered by the more specific agreements negotiated during the Uruguay Round. *Id.*

2. General Agreement on Trade: Multilateral Trade Negotiations, Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1B, Article X, Apr. 15, 1994, 33 I.L.M. 1125, *available at* http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (last visited Jan. 1, 2008) [hereinafter GATS].

3. Saint Petersburg Summit 2006, Global Energy Security, *available at* http://peopleandplanet.org/dl/climate/g8_energy_security.pdf (last visited Jan. 1, 2008).

4. Marc Champion & Juliane von Reppert-Bismark, *Politics & Economics: EU Trade Chief Poses WTO Rules in Energy Sector*, WALL ST. J., June 23, 2006, at A6.

as other goods under the General Agreement on Tariffs and Trade (GATT).[5]

Due to the strategic importance of petroleum and the initial non-participation of most key energy exporters in the early GATT rounds, energy products have largely been exempted from multilateral trading rules. Instead, international trade in petroleum has been treated as a special case subject to political pressures and national security exceptions under the GATT. This does not mean that multilateral trade rules do not apply to petroleum products; there is nothing in GATT expressly excluding such products. Moreover, some fifty-one countries and the European Union (EU) have been using the Energy Charter Treaty (ECT),[6] which provides a multilateral framework for cooperation on energy-related policymaking and serves as a basis for international rules on energy. The EU's proposal for a new round of WTO talks focused specifically on energy would undoubtedly be based upon the ECT.

Although a new round of talks focusing on energy is likely years away, a push for freer trade in those energy services already within the current Doha Development Agenda (Doha Round) has already occurred.[7] In February 2006, a group of *demandeurs* from energy-importing nations formally submitted to the WTO a request asking a group of developing nations, including Egypt, Kuwait, Nigeria, Qatar, and the United Arab Emirates, to open up their markets to freer trade in energy services.[8] The proposal seeks liberalization in core activities of oil and gas production, processing, and distribution.

Because the current WTO proposals must be viewed in the context of the historical and more recent concerns over energy security, Section II of this paper discusses the geopolitics of oil and some of the current market forces driving the calls for trade rules focused on energy. Section III addresses the EU's proposal for a new round of trade talks on energy and looks at the current treatment of energy under GATT/WTO rules. Section III also discusses the ECT which might be used as the basis for the EU's proposed trade round. Since it is unlikely a new trade round focusing on energy will take place in the

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5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 187 [hereinafter GATT].

6. Council and Commission Decision 98/181, 1998 O.J. (L69) (EC, ECSC, Euratom), *available* attp://eur-ex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Decision&an_doc=1998&nu_doc=181;
see also Energy Charter, http://www.encharter.org/index.php?id=1&L=0.

7. WTO member governments agreed to launch a new round of trade negotiations at the Fourth Ministerial Conference held in Doha, Qatar, in November 2001. World Trade Organization, Doha Development Agenda: Negotiations, implementation and development, http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Jan. 1, 2008). They also agreed to work on other issues, in particular, the implementation of the present agreements. *Id.* The entire package is called the Doha Development Agenda (DDA). *Id.*

8. International Forum on Globalization, Collective Request in Energy Services, *available at* http://www.ifg.org/pdf/collective-request-in-energy-services.pdf (last visited Jan. 1, 2008) [hereinafter Collective Request].

near future, Section IV of this paper analyzes the *demandeurs'* proposal regarding freer trade in energy services. Section V analyzes the potential implications these trade proposals might have on the oil-producing countries in the MENA region. Lastly, Section IV concludes that uncertainty in the world's energy markets will result in a continued focus on energy security and the ways in which trade rules can evolve to promote energy security.

II. THE GEOPOLITICS OF OIL

There is no doubt that energy markets and energy security have changed dramatically in the three decades since the oil supply disruptions of the 1970s. "Up to 1970, the Seven Sisters (Royal Dutch Shell, Exxon, Gulf, Texaco, BP, Mobil, and Standard Oil of California (Chevron)) dominated world petroleum trade."[9] These vertically integrated companies produced, shipped, refined, marketed and sold petroleum products all over the world. "As the main suppliers of crude oil to most refiners worldwide" and also the main distributors of refined products, "they could readily adjust supply and demand, thereby greatly influencing price."[10]

Concern over the exploitation of their resources led Saudi Arabia, Iran, Iraq, Kuwait, and Venezuela to form the Organization of Petroleum Exporting Countries (OPEC) in 1960.[11] OPEC wielded very little power during the 1960s due to a worldwide oil glut combined with pricing wars between oil companies.[12] In the 1970s, world events significantly changed OPEC's influence in the world energy markets. By that time, many countries had taken control of the production of energy within their borders by nationalizing their oil industries. In the United States, oil production had peakedbut consumption had more than doubled. For the first time, the United States was forced to turn to the world oil markets, and in particular to OPEC member states, to satisfy its rising demand for oil.[13] The United States' increased reliance on foreign oil

9. FRED BOSSELMAN ET AL., ENERGY ECONOMICS AND THE ENVIRONMENT, CASES AND MATERIALS 413 (2006) (citing THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, THE CRITICAL LINK: ENERGY AND NATIONAL SECURITY IN THE 1980s 126-27 (Ballinger, rev. ed. 1982)). These major oil companies received concessions from the oil-bearing countries under which the companies developed oil fields in certain areas for a certain period of time. *Id.* In return, the companies paid royalties or excised taxes to the host governments. *Id.* This royalty system gave the companies complete control over production, pricing, and exports. *Id.* Although the companies bore all the risk of failure, they also reaped all of the financial rewards of success. *Id.*

10. *Id.*

11. BOSSELMAN ET AL., *supra* note 9, at 126-27.

12. *Id.*

13. *Id.* at 411 (citing DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER 395-96, 531-32, 544, 567, 569 (1991). The early 1970s also brought environmental concerns regarding oil exploration to the forefront in the United States; many promising areas were closed to oil exploration. *Id.*

would ultimately lead to several "oil shocks" in the 1970s.[14]

A. The Oil Shocks

The Yom Kippur war of 1973 led to what is known as the first oil shock.[15] After Arab nations declared an embargo on the shipment of oil to the United States and other countries friendly to Israel, "U.S. refineries scrambled for oil and shortages sent crude prices soaring."[16] "A second oil shock hit in 1979, when the Shah of Iran was ousted and replaced by a . . . government headed by the Ayatollah Khomeini."[17] In response to the taking of hostages by Iran, U.S. President Jimmy Carter banned the importation of Iranian produced oil. The government of Iran responded with an embargo and oil prices skyrocketed again.[18]

A third oil shock occurred in the mid-1980s, although this time the consequences ran in the opposite direction, with plummeting prices that led exporters scrambling for markets and buyers scrambling for the lowest price.[19] This oil shock was caused in part by technological innovations, such as higher fuel efficiency standards, and growing tensions between Iran and Saudi Arabia, leading the Saudi government to "open its taps."[20]

After the price of oil plunged to $10 per barrel in 1986, oil prices stayed relatively stable, in the range of $15 to $19 per barrel through the end of 1999.[21] This price range represented a consensus of both OPEC and non-OPEC nations, all of whom had an interest in stabilizing oil prices at approximately $18 per barrel.[22] By early 2000, the price of crude oil had crept back to over $30 per barrel, with the United States urging OPEC "to increase output to moderate the impact on importing countries[']economies."[23]

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14. BOSSELMAN ET AL., *supra* note 9, at 126-127.
15. *Id.* at 411.
16. *Id.* at 412.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 419-20.
21. *Id.* at 421.
22. *Id.* at 421. As a large domestic producer of oil, "$10 barrel oil would cripple the United States' domestic oil industry with its high-cost wells." *Id.* It has been reported that George H.W. Bush. "warned the Saudis on a visit in 1986 that the US would impose a tariff on imported oil if prices remained so low." *Id.* "Whether this warning was real or not, the December 1986 meeting of OPEC ministers adopted a 'reference price' of $18 a barrel, and OPEC members agreed to quotas" to ensure a price increase. *Id.* (citing Yergin, *supra* note 13, at 750-64).
23. BOSSELMAN ET AL., *supra* note 9, at 423. Although there is often the misconception that OPEC sets the price of oil, this is not the case; oil trades as a commodity and oil prices are set on the commodity markets such as the New York Mercantile Exchange (NYMEX). *Id.* at 421. Spot markets (short-term buying and selling) determine industry pricing. *Id.* However, since OPEC's oil exports represent about 55% of the oil traded internationally, there is no doubt that OPEC has a strong influence on the oil market, especially if OPEC reduces or increases its

B. Energy Security in the 21st Century

It appears that even OPEC has had only limited success in maintaining fixed prices when market forces shift; and prices continued to rise relentlessly from 2000 to 2006, topping $70 per barrel in the fall of 2006.[24] By this point, it seemed the global energy system was stretched to its breaking point.[25] Although much debate over "peak oil" theories has occurred, there is now general consensus that global demand for energy is rising and at least some question whether global supplies of conventional oil can keep pace with demand.[26]

According to the International Energy Agency (IEA),[27] the demand for energy is estimated to rise by more than 50% by the year 2030, approximately 80% of which will still be met by fossil fuels.[28] Nearly half of the global oil demand growth over the next ten years will occur in the Asia Pacific region, with China and India accounting for most of the demand.[29] The IEA has cautioned that since non-OPEC production of conventional crude oil and natural gas is set to peak within a decade, "OECD and developing Asian countries will become increasingly dependent on imports."[30] The Middle East is the only region with enough proven oil reserves to meet this rising demand over the next decades.[31] Of the twenty countries with the largest proven reserves, seven are in the MENA region and account for approximately 62% of the world's total reserves.[32]

"The concentration of oil production in a small group of countries with large reserves - notably the Middle East OPEC members and Russia - will increase their market dominance and their ability to impose higher prices."[33]

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level of supply. OPEC.ORG, *What is Opec?*, Oct. 2007, *available at* http://www.opec.org/library/what%20is%20OPEC/whatisOPEC.pdf.

24. Oil prices remained volatile in 2007 and briefly skirted with $100 a barrel in early 2008. *See generally*, James Burkhard and Ruchir Kadakia, *Ten Times Ten: What Future for Oil Prices?*, Feb. 12, 2008, WSJ Special Advertising Section, Focus on Energy: CERAWeek 2008.

25. *The New Energy Security Paradigm*, WORLD ECONOMIC FORUM, Spring 2006, at 7.

26. For an excellent discussion of various Peak Oil theories, see BOSSELMAN ET AL., *supra* note 9, at 423-28.

27. International Energy Agency, About the IEA, http://www.iea.org/about/index.asp (last visited Jan. 1, 2008) ("The International Energy Agency acts as an energy policy advisor to [twenty-six] member countries" and was created in response to the oil shocks of the 1970s.).

28. Global Energy Security, *supra* note 3.

29. *The New Energy Security Paradigm*, supra note 25, at 14.

30. World Energy Outlook 2006, Summary and Conclusions, *available at* http://www.iea.org/Textbase/npsum/WEO2006SUM.pdf (last visited Jan. 1, 2008).

31. *Id.*

32. IEA Report (citing OIL AND GAS JOURNAL, (2006)); *see also* British Petroleum, Chart of Proved Reserves, http://www.bp.com (last visited Jan. 1, 2008) (follow "Statistical Review of World Energy" hyperlink; then download "Historical Data Work Book") (noting that by the end of 2005, the Middle East region had 742.7 billion barrels of proved oil reserves accounting for 61.9% of the total world proved oil reserves).

33. IEA Report, *supra* note 32 (citing Sam Fletcher, *CERA: Crude Oil Production Capacity to Grow 25% in 10 Years*, OIL AND GAS JOURNAL, Dec. 19, 2005). Countries in the EU face additional concerns regarding the transit of oil and natural gas and supply disruptions

Moreover, the IEA has expressed concerns that "OPEC's price and production policies and national policies on developing reserves are extremely uncertain."[34] This uncertainty is exacerbated by the fact that large portions of the world's reserves of oil are found in countries that maintain restrictions on foreign investment. Thus, there is no guarantee future investment in these countries will be large enough to boost capacity sufficient to meet the projected increase in demand.[35] Based on the IEA's assessment, it is easy to see why, in the context of energy security, uncertainty over supply from the Middle East ranks as a top issue of concern for governments and CEOs alike.[36]

Against this backdrop, heads of states from the Group of Eight (G8) industrialized leaders met in Saint Petersburg, Russia in July 2006.[37] During the meeting, G8 leaders agreed that ensuring an "uninterrupted, sufficient, reliable and secure supply of energy at prices reflecting economic fundamentals and market principles is a challenge for the entire world.[38] To meet this challenge, leaders acknowledged the serious impediments they would have to address, including:

- high and volatile oil prices;
- growing demand for energy;
- increasing import dependence in many countries;
- enormous investment requirements along the entire energy chain;
- the need to protect the environment and to tackle climate change;[39]
- vulnerability of critical energy infrastructure;
- political instability, natural disasters and other threats.[40]

To meet these challenges, leaders pledged to take several actions directly related to trade rules. First, they vowed to increase the transparency, predictability, and stability of global energy markets. Leaders stated that efforts would be made to "advance transparency; to deepen and spread the rule of law; to establish and strengthen predictable efficient fiscal and regulatory regimes; and to encourage sound energy supply and demand policies."[41] A clear and stable regulatory framework was deemed essential to global energy security.[42]

Second, leaders vowed to improve the investment climate in the energy sector. G8 leaders noted that "ensuring an adequate global energy supply will require trillions of U.S. dollars in investment throughout the entire energy chain by 2030." As such, leaders pledged to work to "reduce barriers to energy

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from Russia. *Id.*

34. World Energy Outlook, *supra* note 30, at 15.

35. *Id.*

36. *The New Energy Security Paradigm*, *supra* note 25, at 6.

37. The G8 consists of Canada, France, Germany, Italy, Japan, Russia, United Kingdom, and United States. *G8 Agree to Promote Energy Security*, BRIDGES TRADE BIORES, Vol. 6, No. 14, July 28, 2006, *available at* http://www.ictsd.org/biores/06-07-28/story2.htm.

38. Global Energy Security, *supra* note 3.

39. Although an important component of energy policy, a detailed discussion of environmental measures and their relation to energy policy is beyond the scope of this paper.

40. Global Energy Security, *supra* note 3.

41. *Id.*

42. *Id.*

investment and trade." The reduction of such barriers would allow

> companies from energy producing and consuming countries [to] invest in and acquire upstream and downstream assets internationally in a mutually beneficial way and respecting competition rules to improve the global efficiency of energy production and consumption. Market-based investment flows between and among nations will also enhance energy security by increasing confidence in access to markets or sources of supply.[43]

III. THE CALL FOR A NEW WTO ROUND ON ENERGY

Building on the pledges made at the G8 Summit, in June 2006, EU Trade Commissioner Peter Mandelson called for a new round of WTO negotiations that would focus on the energy sector and seek to treat oil and gas like other traded goods.[44] Mr. Mandelson acknowledged that energy goods have generally been used as a source of political strength; thus, trade in energy has largely been exempted from the rules of trade based on national security issues.[45] Nonetheless, he stated that a global forum, such as the WTO, where most parties are at the table, "is the best way to attain 'structural change'" in energy issues.[46] To entice energy producers to come to the table, Mr. Mandelson suggested offering more security in their export markets and increased investment.[47]

By November 2006, it seemed clear that leaders in developed countries, particularly the EU and U.S., were looking to expand and enhance trade policy to include energy. In a speech to a conference on strategic energy policy, Mr. Mandelson argued that "more international rules" and "trade policy can make an important contribution to energy security and to calming some of the existing tensions in the system."[48]

A. Current Treatment of Energy under WTO/GATT Rules

Although generally applicable trade rules, such as most favored nation treatment (MFN)[49] and national treatment,[50] apply to trade in energy products,

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43. *Id.*

44. Champion & von Reppert-Bismark, *supra* note 4.

45. *Id.*

46. *Id.*

47. *EU Trade Chief Moots*, *supra* note 45.

48. Peter Mandelson, Conference on Strategic Energy Policy, Mandelson Calls for "Negotiated Solutions" to Govern Trade in Energy, Brussels (Nov. 21, 2006), *available at* http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_131225.pdf.

49. GATT art. I(1). Article I(1) of GATT sets forth the MFN clause and provides that

the initial non-participation of most key energy exporters in early GATT rounds precluded significant discussion of energy issues.[51] Indeed, when OPEC was founded in Baghdad in 1960, none of the founding members — Kuwait, Iraq, Iran, Saudi Arabia, and Venezuela —were contracting parties to the GATT.[52] The composition of both OPEC and the WTO has grown over the years and seven of the eleven OPEC countries are now members of the WTO: Indonesia, Nigeria, Kuwait, Venezuela, Qatar, the United Arab Emirates (UAE), and Saudi Arabia.[53] Notably, Saudi Arabia, a key energy exporter, only recently acceded to the WTO after years of protracted negotiations.[54]

Additionally, the strategic importance of petroleum to the world economy has meant petroleum has been historically treated in a largely political context, and not within the GATT multilateral trade rules.[55] Indeed, since there appears to have been a "'gentlemen's agreement,' *not* to bring up petroleum issues" in early GATT negotiations, issues related to trade in petroleum "[do] not appear to be set out in any written documents."[56]

The United Nations Conference on Trade and Development (UNCTAD) research also concluded that:

> there were no negotiations under the Uruguay Round on tariffs applied to petroleum and petroleum products (with the exception of those involving the EU). However, their levels in the main importing markets (EU, Japan, and the United States) are generally very low and in many cases not bound. This fact

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"any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." *Id.*

50. GATT art. III(4). Article III provides, with respect to internal taxation and domestic laws, regulations and requirements, imported products shall be accorded treatment "no less favourable" than the treatment accorded to domestic products. *Id.*

51. *See* Melaku Geboye Desta, *The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements*, 37 JOURNAL OF WORLD TRADE 523, 529 (2003) [hereinafter Desta, *Organization*].

52. Melaku Geboye Desta, *OPEC and the WTO: Petroleum as a Fuel for Cooperation in International Relations* (2004), http://www.mees.com/postedarticles/oped/a47n10d01.htm; *see also* Desta, *Organization*, *supra* note 53. For the full article see Melaku Geboye Desta, *OPEC, the WTO, Regionalism and Unilateralism*, JOURNAL OF WORLD TRADE, vol. 37 (2003) 43.

53. Members include: Algeria, Angola, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, UAE, and Venezuela. OPEC, http://www.opec.org/aboutus/ (last visited Jan. 1, 2008). Compare OPEC member list with WTO member list. World Trade Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 1, 2008).

54. *WTO General Council Successfully Adopts Saudi Arabia's Terms of Accession*, WTO 2005 Press Release, Nov. 11, 2005, *available at* http://www.wto.org/english/news_e/pres05_e/pr420_ehtm (last visited Feb. 16, 2008).

55. *See generally* U.N. Conference on Trade & Dev., *Trade Agreements, Petroleum and Energy Policies* (2000), *available at* http://www.unctad.org/en/docs/itcdtsb9_en.pdf (last visited Jan. 1, 2008) [hereinafter UNCTAD].

56. *Id.* at 15.

> confirms that tariffs in the energy sector typically reflect more the dictates of energy policy — securing adequate supplies — than a trade policy in the classic sense.[57]

In summary, UNCTAD concluded that the Uruguay Round had hardly any impact on MFN tariffs for crude oil and only a limited impact on petroleum products.[58]

"The U.S. tariffs on crude oil are very low but *unbound.* This means that there is no legal guarantee that this tariff will remain at such a low level."[59] In other words, "the [U.S.] could impose a much higher tariff rate without violating WTO [rules]."[60] With record-high oil prices, it seems unlikely tariffs will be an issue. Hypothetically, there is a risk that some countries might face increased tariffs for national security reasons. It is also possible that a future U.S. administration might consider imposing an oil-import fee, either to raise revenue or to discourage the consumption of hydrocarbons. This hypothetical risk might be reason enough for oil exporting countries to use the binding of U.S. tariffs as a bargaining chip in any future trade negotiations in the energy sector.

Of greater significance, at least from the stand point of oil exporting countries, is the issue of internal taxes levied on consumption. Petroleum-exporting countries have historically believed that the high-consumption and excise taxes imposed by certain importing countries on gasoline and other petroleum products undermines the ability to derive income from their own natural resources.[61] However, since these taxes are imposed in a non-discriminatory manner on both imports and domestic production, high-consumption and excise taxes are not inconsistent with GATT obligations.[62] Regardless, they can be the subject of negotiated concessions. Thus, it is possible that the binding and reduction of high-consumption and excise taxes could be included in a future round of WTO negotiations.

Another specific exception in the GATT applicable to the petroleum sector is the national security exception in Article XXI, which has been called "a major loophole in GATT law."[63] The strategic importance of oil has led the

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57. *Id.* at 26.

58. *Id.* at 27.

59. *Id.* at 11 (emphasis added).

60. *Id.*

61. *Id.* at 27. UNCTAD research found that "[a]ccording to some estimates provided by OPEC, in 1996, the G-7 nations' (United States, Canada, Japan, Germany, Italy, United Kingdom, and France) oil tax incomes totaled U.S. $270 billion, while OPEC Petroleum Export Revenues were U.S. $160 billion." *Id.* at 27 n.27 (citing OPEC.ORG, *What is Opec?*, Oct. 2007, *available at* http://www.opec.org/library/what%20is%20OPEC/whatisOPEC.pdf.).

62. *Id.*

63. UNCTAD, *supra* note 57, at 118. Article XXI provides:

> Nothing in this Agreement shall be construed
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

United States to impose import restrictions on several occasions.[64] "These restrictions, which have variously been [applied] on a global or country-specific basis," would most likely fall under Article XXI if challenged under the WTO.[65] "States have traditionally [been accorded] a high degree of discretion in invoking [Article XXI and] it has been generally accepted that States have almost total discretion in [determining] what constitutes an 'essential security interest.'"[66] As such, it is possible that Article XXI might be used to justify import or export restrictions in a wide range of circumstances.

Although there is no explicit exclusion of petroleum products from the scope of the multilateral trade agreements under the WTO, a review of GATT jurisprudence leads to the conclusion that a combination of factors has essentially led to their exclusion from this forum.[67] More recently, energy trade issues have been the source of protracted negotiations as more energy exporting countries, such as Saudi Arabia, have sought entry into the WTO. The United States, in particular, uses the accession process as an opportunity to obtain commitments and concessions from the acceding countries. "From the U.S. perspective, accession negotiations have [a distinct] advantage[] over other WTO talks . . . [since they] are [almost] entirely one-sided: the acceding country must pay an 'entry fee' to the existing members, but can demand no concessions in return."[68]

B. The Energy Charter Treaty as a Model for Future WTO Negotiations

The EU has thus far been the main proponent of the call for a new WTO round to address energy issues. As such, it is likely that any new round sought by the EU would look to the provisions of the Energy Charter Treaty as a model. The ECT entered into legal force in April 1998 and as of January 2007 had been signed or acceded to by fifty-one states plus the European Communities.[69]

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Id. at 28-29.

64. UNCTAD, *supra* note 57, at 118.

65. *Id.* at 118.

66. *Id.* at 29.

67. UNCTAD, *supra* note 57, at 118.

68. *Id.* at 115.

69. Energy Charter, *supra* note 6. Members of the ECT include: Albania, Armenia, Austria, Australia,* Azerbaijan, Belarus* Belgium, Bosnia and Herzegovina, Bulgaria, Croatia,

When the ECT first came into existence in the early 1990s, almost half of the states that were to join the ECT were not contracting parties to the GATT. This was the main reason for making the GATT 1947 (and later WTO rules) applicable in the ECT for trade relations involving non-WTO members.[70] Consequently, the ECT allowed non-WTO members to benefit from stable, predictable and non-discriminatory trade rules in the energy sector.[71] The ECT also serves as a "stepping stone" for signatory states[72] seeking to join the WTO by providing a "useful external anchor for trade reforms" and by allowing "[states] to familiarise themselves with the practices and disciplines that WTO membership entails."[73]

The primary goal of the ECT is to "strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thereby mitigating risks associated with energy-related investments and trade."[74] According to the EU's energy policy and the ECT framework, the "right" energy framework is "one that is open to investment, innovation and trade, and one that encourages energy efficiency."[75] Any new WTO round proposed by the EU would seek to address these issues.

The ECT is both narrower and broader than the WTO rules. It is narrower because it "does not provide for legally binding tariff commitments and the WTO Agreements on Trade in Services (GATS) and Trade-Related Intellectual Property Rights (TRIPS) do not apply."[76] The ECT is broader than the WTO in two significant ways. First, unlike the WTO, the ECT provides broad protections for energy sector investments. Second, the ECT more thoroughly addresses issues such as energy transit, and includes a distinctive

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Czech Republic, Cyprus, Denmark, Estonia, European Communities, Finland, France, Georgia, Germany, Greece, Hungary, Iceland,* Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Netherlands, Norway,* Poland, Portugal, Romania, Russian Federation,* Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, Uzbekistan, United Kingdom. (* denotes ratification pending). Energy Charter, Members & Observers, http://www.encharter.org/index.php?id=61&L=0 (last visited Jan. 1, 2008). Observer states to the ECT include: Afghanistan, Algeria, People's Republic of China, Canada, Islamic Republic of Iran, Republic of Korea, Kuwait, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Serbia, Tunisia, United Arab Emirates, United States of America, Venezuela. *Id.*

70. *See* Energy Charter; About the Charter, http://www.encharter.org/index.php?id=7&L=0 (last visited Jan. 1, 2008).

71. *See id.*

72. Azerbaijan, Belarus, Bosnia & Herzegovina, Kazakhstan, Russian Federation, Tajikistan, Turkmenistan, Ukraine, Uzbekistan (as of January 2007). Energy Charter: 1998 Trade Amendment, http://www.encharter.org/index.php?id=26&L=0 (last visited Jan. 1, 2008).

73. *Id.*

74. Energy Charter: About the Charter, *supra* note 72.

75. Henning Christophersen, Chairman of the Energy Charter Conference, The Role of Gov'ts and Int'l Orgs. in Promoting Energy Security (Oct. 25, 2006), *available at* http://www.encharter.org/fileadmin/user_upload/Conferences/2006_Octii/Christophersen.pdf.

76. Energy Charter: Treaty Provisions, http://www.encharter.org/index.php?id=40&L=0 (last visited Jan. 1, 2008).

mechanism to resolve energy transit disputes.[77]

In terms of investment, the ECT recognizes that "[t]here is a huge need for new investment in order to meet [the] global demand for energy."[78] A significant risk to energy security is a framework that does not promote investment in the most efficient energy supply or energy-saving projects.[79] The ECT seeks to reduce this risk by creating a favorable investment climate based on openness, consistency, and non-discrimination.

The ECT takes a balanced approach to investors' access to resources. The ECT is explicit in confirming national sovereignty over energy resources: each member country is free to decide how, and to what extent, its national and sovereign energy resources will be developed, and also the extent to which its energy sector will be opened to foreign investments.[80] There is an explicit requirement, however, that rules on the exploration, development, and acquisition of resources must be publicly available, non-discriminatory, and transparent.

> Once a foreign investment is made in line with a country's national legislation, the Treaty is designed to provide a reliable and stable interface between this investment and the host government. The Treaty protects foreign investors against non-commercial risks such as discriminatory treatment, direct or indirect expropriation, or the breach of individual investment contracts. The need for stability in the relationship between investors and host governments is particularly acute in the energy sector, where projects tend to be long-term and highly capital intensive.[81]

The ECT's rules significantly mitigate the risk to member nations and provide for international arbitration if a dispute arises.[82]

The ECT also recognizes that transit is indispensable for ensuring secure energy flows, and transit issues are gaining in importance with the increased interdependency and integration of energy markets. In recent years, transit has been an especially important issue in the EU due to Russia's continued disputes with Belarus over the price of gas which has led to numerous supply disruptions.[83] The ECT is the only multilateral agreement directly addressing

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77. Energy Charter: Trade & Transit, http://www.encharter.org/index.php?id=5&L=0 (last visited Jan. 1, 2008).

78. Energy Charter: Investment, http://www.encharter.org/index.php?id=6&L=0 (last visited Jan. 1, 2008).

79. *Id.*

80. *Id.*

81. *Id.*

82. Energy Charter: Dispute Settlement, http://www.encharter.org/index.php?id=269&L=0 (last visited Jan. 1, 2008).

83. Michael Connolly, *Resisting Moscow's Energy Imperialism*, WALL ST. J., Nov. 13,

the complex political, economic, and legal issues associated with energy transit. In this regard, the ECT is broader than the WTO/GATT in developing a specific transit-related regime for the energy sector and requires states to:

> to take the necessary measures to facilitate transit of energy, consistent with the principle of freedom of transit, and to secure established energy flows. Transit countries are also under an obligation not to interrupt or reduce existing transit flows, even if they have disputes with another country concerning this transit.[84]

IV. FREER TRADE IN ENERGY SERVICES

Although a new round of WTO negotiations focused on energy is unlikely in the near term, some members, particularly the United States, will continue to pursue more open trade in energy services under the current Doha Round. As a leader in providing "top quality services," the United States has long advocated that liberalizing services "promote[s] the interchange of goods, people, and ideas . . . [and] [t]o the extent that the services sector is opened and modernized, countries will receive an economic boost."[85] As such, the United States has indicated that it is seeking "broad removal of foreign barriers" in various services sectors, including energy services.[86]

A. Overview of GATS and Oil Services

The GATS[87] was created with essentially the same objectives as its counterpart directed toward trade in goods (the General Agreement on Tariffs and Trade (GATT)). These objectives include creating a credible and reliable system of international trade rules, non-discrimination among all participants, stimulating economic activity through guaranteed policy bindings, and

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2006; *see also Russia and Belarus: Loveless Brothers*, ECONOMIST, Jan. 11, 2007, *available at* http://www.economist.com/background/displaystory.cfm?story_id=8521935. Russia and Belarus have been in a protracted dispute over the price of gas demanded by Russia. The dispute ultimately led Russia to stop pumping oil into a pipeline that crosses Belarus and delivers 12.5% of the EU's oil needs; thus, disrupting supplies to Poland, Germany, and other Central European countries. *Id.*

84. Energy Charter: Trade & Transit, *supra* note 79.

85. Press Release, Office of United States Trade Representative, The United States Announces Proposals for Liberalizing Trade in Services (July 1, 2002), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2002/July/United_States_Announces_Proposals_for_Liberalizing_Trade_in_Services.html [hereinafter Liberalization Proposal].

86. Fact Sheet, Office of United States Trade Representative, Free Trade in Services: Opening Dynamic New Markets, Supporting Good Jobs (May 31, 2005), *available at* http:// http://www.ustr.gov/Document_Library/Fact_Sheets/2005/Free_Trade_in_Services_Opening_Dynamic_New_Markets,_Supporting_Good_Jobs.html.

87. GATS, *supra* note 2.

promoting trade and development through progressive liberalization.[88]

Obligations contained in the GATS may be categorized into two broad groups: general obligations and specific commitments. General obligations apply automatically to all Members and services sectors, and include MFN Treatment[89] and transparency. Transparency means GATS members are required to publish all measures of general application and establish national enquiry points mandated to respond to other Members' information requests.[90]

Specific commitments concern market access and national treatment in designated sectors. Market access is negotiated as a commitment in specified sectors. Such commitments may be made subject to various types of limitations that are enumerated in Article XVI(2), such as limitations imposed on the number of services suppliers, service operations, or employees in the sectors.[91]

A commitment to national treatment implies that the Member concerned will not operate discriminatory measures for the benefit of domestic services or service suppliers. The key requirement is not to modify, in law or fact, the conditions of competition in favor of the Member's own service industry. Again, the extension of national treatment in any particular sector may be made subject to conditions and qualifications.[92]

Each WTO Member is required to have a Schedule of Specific Commitments, which identifies the services for which the Member guarantees market access and national treatment and any limitations that may be attached. The Schedule may also be used to assume additional commitments such as the implementation of specified standards or regulatory principles. Commitments are undertaken with respect to each of the four different modes of service supply.[93]

Most schedules consist of both sectoral and horizontal sections. The "Horizontal Section" contains entries applied across all sectors subsequently listed in the schedule. Horizontal limitations often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. The "Sector-Specific Sections" contain entries that apply only to the particular service. Any Member is free to expand or upgrade its existing commitments at any time.[94]

According to the WTO, energy services were not negotiated as a separate sector during the Uruguay Round. Rather, the Uruguay Round was only the first step in a long-term process of multilateral rulemaking and trade

88. *Id.*

89. Under Article II of GATS, Members must extend to all other Members "treatment no less favourable than it accord[ed] to like services and service suppliers of any other country." GATS art. II.

90. GATS art. III.

91. GATS art. XVI.

92. GATS art. XVII.

93. GATS art. XX.

94. GATS art. XXI.

liberalization.[95] Although a few WTO members have made limited commitments in the energy-related services, "the vast majority of the global energy services industry is not covered by specific commitments under the GATS."[96]

The Doha Round of services negotiations began in January 2000 and included negotiations in energy services. Pursuant to the Doha mandate, participants in the energy services negotiations have exchanged requests and offers since 2002.[97] The Doha Round was scheduled to conclude in 2005 but the deadline was extended and the Round ultimately suspended in July 2006.[98] Negotiations under Doha resumed in early 2007[99] and it is hoped that the negotiations will conclude by the end of 2008.[100]

A chief difficulty in the services negotiations has been the definition and classification of energy services. The WTO "Services Sectoral Classification List," commonly known as "W/120," does not include a separate classification for energy services.[101] Rather, three specific subclasses of energy services are

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95. Although services currently account for over 60% of global production and employment, services represent no more than 20% of total trade. This share is likely to increase significantly in the coming years, as more services become internationally mobile. *Id.* Service industries are a major component of U.S. economic activity, accounting for 80% of U.S. employment and 63% of the U.S. Gross Domestic Product (GDP). Press Release, Office of the United States Trade Representative, United States Announces Proposals for Liberalizing Trade in Services (July 1, 2002), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2002/July/United_States_Announces_Proposals_for_Liberalizing_Trade_in_Services.html?ht=. The United States is also the world's largest exporter of services and U.S. services exports have more than doubled over the last ten years, increasing from $137 billion in 1990 to $279 billion in 2000. *Id.*

96. WTO, Services: Sector by Sector, Energy Services, http://www.wto.org/english/tratop_e/serv_e/energy_e/energy_e.htm (last visited Jan. 1, 2008).

97. Irene Musselli & Simonetta Zarrilli, *Oil and Gas Services: Market Liberalization and the Ongoing GATS Negotiations*, 8 J. INT'L ECON. L. 551, 551-52 (2005). GATS negotiations take place in Geneva through a process of formal "requests and offers," whereby countries seeking to access the service sectors of other nations "request" that a country "offer" to make specific commitments to open its market to more foreign service suppliers. *Id.* "Requested" or "demanded" countries are not obliged to offer anything to the "requesting" or "demanding" countries, but are often subjected to intense political pressure to do so. *Id.* A fundamental principle in GATS is "progressive liberalization," which stipulates governments may initially exempt certain sectors today or place limitations on the extent that they commit these sectors to the GATS. *Id.* These exemptions and limitations are targeted for removal in successive rounds of GATS negotiations. *Id.*

98. WTO, 2006 News Items, General Council Supports Suspension of Trade Talks, Task Force Submits "Aid for Trade" Recommendations (July 27-28, 2006) http://www.wto.org/english/news_e/news06_e/gc_27july06_e.htm.

99. WTO, 2007 News Items, Lamy: "We have resumed negotiations fully across the board." (Feb 7, 2007), *available at* http://www.wto.org/english/news_e/news07_e/gc_dg_stat_7feb07_e.htm.

100. WTO, 2008 News Items, Lamy: "We are on the last lap." (Feb. 5, 2008), *available at* http://www.wto.org/english/news_e/news07_e/gc_dg_stat_7feb07_e.h.

101. *Id.* at 559. The WTO Services Sectoral List is commonly known as W/120. It is a non-negotiated document created by the WTO Secretariat as a reference point in scheduling specific commitments. *Id.* at 559 n.9.

included in different sectoral categories in W/120: (1) "services incidental to energy distribution[;]" (2) "services incidental to mining" (both services listed as a sub-class of 'Other Business Services'); and (3) "pipeline transportation of fuel" (listed as a subclass of 'Transport Services').[102]

In addition, a number of other activities related to the energy services sector "chain cut horizontally across the W/120 list," including "architectural and engineering services, construction work for civil engineering, wholesale and retail trade services with respect to fuels and energy equipment, transportation services, and several specific financial services."[103] A "number of specific energy services are not yet specified in the existing GATS classification" and the "W/120 does not appear to fully reflect the commercial reality of the energy supply system."[104]

A group of WTO Members, the so-called "Friends of Energy Group," has been working on a new classification of energy services that will better reflect the current market realities for the energy sector.[105] Two such lists have been submitted to the attention of the whole WTO membership.[106] The first list is sponsored by Chile, the European Communities, Japan, and the United States.[107] This proposed list does not advocate a new classification structure; rather, it is based on the United Nations Provisional Central Product Classification (UNCPC) list[108] "and major segments of the energy services activities."[109]

B. Demandeurs WTO Submission

In February 2006 a group of *demandeurs* from several major energy importers and exporters[110] formally submitted to the WTO a collective request asking for a target group of developing nations[111] to open up their markets to

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102. *Id.* at 559.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* (citing Job (03)/89, May 12, 2003).

108. *Id.* at 560 n.11 (noting the UNCPC "does not list energy services as a separate category [but that] Annex I, however, provides a compendium of energy-related products listed under different headings in the [UN]CPC, including energy-related services").

109. *Id.* at 560 n.12 (noting "activities are divided into four broad categories: exploration and development services; pipeline transportation of fuels and energy transmission and distribution services; energy commercialization services; and other services important to the provision of energy, energy products and fuels").

110. The *demandeurs* include: Australia, Canada, the European Communities, Japan, Norway, The Kingdom of Saudi Arabia, Republic of Korea, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Singapore, and the United States. Collective Request, *supra* note 8, at 2.

111. The target group includes six of seven OPEC Members who are also WTO Members, excluding Venezuela. Also receiving the request were seven Latin American countries and almost every major developing nation with growing energy needs, including China, India, and

freer trade in energy services. The overall objective of the request is to ensure the ongoing service negotiations result in "a high level of liberalization for the supply of services relevant for a Member's energy sector." The stated goal was a "thriving energy sector — including energy services" as a "basic element of economic well-being."[112] The *demandeurs*' request elaborated:

> The availability of varied sources of energy at competitive prices contributes to a nation's ability to compete in the world marketplace. . . . Moreover, modern energy services provide the means to develop energy resources in an environmentally sound manner and in ways that promote responsible and efficient development and use of energy resources.[113]

The three primary issues in the request are: ownership of energy resources, sectoral coverage, and specific commitments.

1. Ownership of Energy Resources

In a separate document[114] issued to clarify their request, the *demandeurs* reiterated that the request does not extend to ownership of natural resources. States have sovereign rights over the natural resources found in their territories; therefore, states are empowered to regulate the exploration, development and exploitation of these resources. However, these states often grant these rights to state-owned or private companies (or joint companies in which the state-owned company owns a majority share) in the form of a license or on the basis of a production-sharing agreement.

To carry out production, the licensee often contracts with the government of the sovereign nation for a number of specific activities. The scope of such requests includes a range of energy services provided by energy service suppliers to the licensee; however, requests do not address or define the relationship between states and those entities authorized to produce the natural resource.

2. Sectoral Coverage

"The collective request on Energy services results from a convergence of views on where energy services can be found in the W/120 classification."[115]

South Africa. International Forum on Globalization, The Other Oil War: Halliburton's Agenda at the WTO (June 2006) (*prepared by* Victor Menotti), *available at* www.ifg.org/reports/WTO-energy-services.htm [hereinafter Other Oil War].

112. Collective Request, *supra* note 8, at 2.

113. *Id.*

114. International Forum on Globalization, Plurilateral Negotiations on Energy Services (May 3, 2006), *available at* http://www.ifg.org/pdf/plurilateral-negotiations-on-energy-services.pdf.

115. *Id.* at 2.

The illustrative list includes a wide range of services such as surveying, map-making, locating mineral deposits, project management services for developing exploitation of an oil field or wind power project, design services for a mining plant, on land site preparation, on land rig installation, drilling, testing and analysis services, and many others.[116] The list is expressly "not exhaustive,"[117] and the *demandeurs* requested that "commitments be taken with the widest possible sectoral coverage."[118]

3. Specific Commitments

The GATS distinguishes between four modes of supplying services: (1) cross-border supply is defined to cover services flows from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail); (2) consumption abroad refers to situations where a service consumer (e.g. tourist or patient) moves into another Member's territory to obtain a service; (3) commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and (4) presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors, or teachers).[119]

The *demandeurs* made the following requests regarding specific commitments:

Mode 1: Since a number of energy services may be and are currently often provided through cross-border mode of supply, for those services we request:
- Substantial reduction of market access limitations
- Removal of existing requirements of commercial presence

Mode 2: We request commitments whenever technically feasible

Mode 3: Commercial presence being an essential mode of supply for most energy service activities, we make the following request:
- Removal or substantial reduction of foreign equity limitations
- Substantial elimination of joint ventures and joint operations requirements for foreign service suppliers
- Removal or substantial reduction of economic needs tests
- Elimination of discriminatory licensing procedures

116. *Id.*
117. *Id.* at 2-5.
118. Collective Request, *supra* note 8, at 3.
119. GATS art. I.

Mode 4:[120]

- Make commitments in accordance with paragraph 1(d) of Annex C of the Hong Kong Ministerial Declaration
- No general exclusion of energy services from horizontal Mode 4 commitments.[121]

Although the *demandeurs'* request was designed to "jump start" the WTO services negotiations, very little attention was given to the request.[122]

V. IMPLICATIONS FOR THE MENA REGION

At this point, only very broad suggestions and proposals have been made regarding a trade round focused on energy and the liberalization of energy services. Moreover, there has been very little public debate or scholarly work focused on energy issues under the WTO. Nonetheless, there are several foreseeable implications for the MENA region. First, as more energy producers accede to the WTO, the WTO is likely to exert greater influence over the energy sector. Second, current WTO members will continue to push for increased access to the energy sector in the MENA region. Finally, to effectively participate in the multilateral trading regime and have an impact on whether energy trade is brought into the WTO, oil producing countries in the MENA region need to increase their trade capacity.

A. The WTO'sInfluence Over The Energy Sector Is Likely To Increase

The composition of the WTO's membership is one of the determinants of how quickly energy issues evolve under the WTO. Saudi Arabia became the 149th member of the WTO in December 2005.[123] This is significant because it brings an important part of energy trade under the purview of the WTO's multilateral rules.

Saudi Arabia's accession was the result of difficult and protracted negotiations with the United States. Under accession to the WTO, Saudi Arabia committed to opening additional service markets to foreign investment, which will provide substantial benefit to the U.S. services sector in particular. In the United States, the Coalition of Service Industries was consulted continuously throughout the negotiation process to ensure U.S. service

120. For this element, the United States is not a requesting Member, but shall be deemed a recipient. Collective Request, *supra* note 8, at 4 n.1.

121. *Id.* at 4.

122. Press Release, Office of United States Trade Representative, United States Is Active Participant in Coalition to Jump Start WTO Services Negotiations (Feb. 28, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/February/United_States_is_Active_Participant_in_Coalition_to_Jump_Start_WTO_Services_Negotiations.html.

123. *WTO General Council Successfully Adopts Saudi Arabia's Terms of Accession*, WTO 2005 Press Release, Nov. 11, 2005, *available at* http://www.wto.org/english/news_e/pres05_e/pr420_e.htm.

industries would garner the best concessions from Saudi Arabia.[124] Some of the greatest concessions made by Saudi Arabia were in the energy services sector.

Although current Saudi Arabian regulations close oil exploration, drilling, and production to foreign investment,[125] the investment climate is expected to improve as Saudi Arabia implements its commitments under the WTO. In fact, "[f]oreign investment in the full upstream hydrocarbon sector will be vital in the coming decades if Saudi Arabia hopes to expand production and refining capacity to meet expected growth in international demand."[126] In contrast to the upstream sector, foreign investment in refining and petrochemical development is not prohibited, and significant foreign investment in the downstream Saudi energy sector already exists.[127]

All eyes will be on Saudi Arabia as it implements the various agreements under the WTO over the next few years. Several other important energy producers, such as Russia, Kazakhstan, and Algeria are in line to accede to the WTO as well.[128] Thus, as the traded portion of oil and gas consumption increases, there will likely be growing discussion over how to eliminate various energy-trade barriers.[129] There is no doubt that the WTO will take the lead in

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124. Letter from Norman R. Sorensen, Chairman, Coal. of Services Indus., to the Senate Finance Committee and the House Ways and Means Committee (Aug. 17, 2005) (noting that the US service sector has expanded markedly in recent years and "now represents 80% of U.S. private sector GDP, 75% of private sector employment, and 30% of total U.S. exports") (on file with Indiana International & Comparative Law Review).

125. However, in July 2003, "the Ministry of Petroleum announced an auction to open up part of the Ghawar area to foreign investors for non-associated natural gas exploration. In January 2004, six companies competed in the auction for the three offered blocks" with the winners being Russia's Lukoil, China's Sinopec, and a joint bid by Italy's Eni and Spain's Repsol. United States Department of State, 2006 Investment Climate Statement — Saudi Arabia (Feb. 2006), *available at* http://www.state.gov/e/eeb/ifd/2006/62029.htm [hereinafter 2006 Investment Climate Statement]. Each signed a forty-year exploration and production contract. *Id.* The deal marked the first time since the 1980 nationalization of ARAMCO foreign companies have been allowed to explore in Saudi Arabia. *Id.* No further deals have authorized foreign investment. *Id.*

126. *Id.*

127. Exxon Mobil and Shell are the largest foreign investors in Saudi Arabia; both are 50% partners in refineries with Saudi Aramco. *Id.* Saudi Aramco is currently engaged in selecting foreign bidders to join as equity partners in two new export refineries scheduled for completion in 2009, at an estimated cost of $4 to 5 billion each. *Id.* Several US firms submitted bids on the refinery projects. In addition, Exxon Mobil, Chevron Texaco, and Shell have formed joint ventures with the Saudi Arabian Basic Industries Corporation (SABIC) to build world-scale petrochemical plants that utilize feedstock from Saudi Aramco. *Id.*

128. WTO News: Speeches – DG Pascal Lamy, *Lamy highlights environment dimensions of the trade talks*, May 10, 2006, *available at* http://www.wto.org/english/news_e/sppl_e/sppl25_e.htm.
Three important OPEC members, Iraq, Iran, and Libya, remain outside the WTO.

129. According to Fatih Birol, chief economist at the IEA, there has been growing discussion over how to eliminate energy-trade barriers as the traded portion of oil and gas consumption increases. "The IEA projects that the traded portion of global oil production will rise from 50% today to 66% in 25 years, while traded gas would rise from 18% to 33%." Fatih Birol, Chief Economist, Int'l Energy Agency, Testimony at United States Senate Committee on

this discussion.

B. Current WTO Members Will Continue to Push for Increased Access to Energy in the MENA Region

In light of the ongoing difficulties in concluding the Doha Round, it is unlikely that a new round of trade negotiations focused on energy will start anytime soon. However, a senior WTO official has said a proposal to launch an energy-focused round of talks "would be given serious thought,"[130] thereby opening the door for a future round of trade talks focused on the energy sector.

If any new round is proposed, the EU will most likely push for the ECT as model, but will want even broader commitments over transit issues to resolve its ongoing disputes with Russia. From the perspective of the EU, and in line with the ECT framework and the Saint Petersburg Plan of Action, a new round would seek to address issues particularly related to investment, transparency, transit, and supply.

The EU's proposal for a new round of energy talks demonstrates that $70 per barrel oil coupled with increased demand and tight supply has officials around the globe searching for ways to rebalance the energy market more in favor of consuming nations. One possible way to achieve this balance would be to bring energy trade directly under the WTO.

Bringing trade in oil directly under the WTO might also limit OPEC's influence over the global supply of oil and world energy prices. , During the 1970s, the United States viewed the potential power that OPEC and its member states had over the price of oil as an impediment to orderly and stable markets and a threat to the national interests of the United States.[131] This bias against OPEC continues to this day.[132] One way to limit OPEC's control over world energy markets would be to move more energy trade under the purview of the WTO's multilateral agreements.

Even in the absence of a new round of talks devoted to energy, there is likely to be continued pressure put on countries in the MENA region to further liberalize their markets. For example, Saudi Arabia has promised additional measures "to create a more investor friendly environment and promote increased foreign investment, such as a pledge to set up a special court for trade

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Energy and Natural Resources, Oil Market Outlook and Policy Implications (Jan. 10, 2006) [hereinafter Fatih Birol Testimony].

130. Champion & von Reppert-Bismark, *supra* note 4.

131. Former U.S. Secretary of State Henry Kissinger stated "both the Nixon and Ford Administrations had no higher priority than to bring about a reduction of oil prices by breaking the power of OPEC." Desta, *Organization, supra* note 53, at 527 (citing HENRY KISSINGER, YEARS OF RENEWAL: MEMOIRS, Vol. 3 668-69 (1999)).

132. In the fall of 2006, OPEC nations announced steps to boost world oil prices. This led U.S. Senator Frank R. Lautenberg (D-NJ) to call on President Bush to file an action in the WTO against OPEC's plan to limit crude oil production, claiming a violation of Article XI of GATT. Press Release, Senator Frank R. Lautenberg, Lautenberg Calls on Bush to File WTO Complaint against OPEC to Prevent the Cartel from Boosting Oil Price (Oct. 11, 2006), *available at* http://lautenberg.senate.gov/newsroom/record.cfm?id=264566&.

disputes between foreign and Saudi firms."[133]

C. The MENA Region Needs to Increase Its Trade Capacity

Many of the countries in the MENA region have only recently joined the WTO. As such, these countries need to increase their trade capacity and reassess their trade policies to become more competitive in the global trading regime. The WTO's recent Trade Policy Review (TPR)[134] of the UAE supports this assertion.

The WTO's TPR found the UAE's generally liberal economy has grown by 6% per year on average over the past decade and 9% in the period between 2003 and 2005. "[D]espite some diversification, the UAE still depends on crude oil and gas exports for a significant share of its national income."[135] The Report by the Secretariat noted that "[t]he entire oil and gas sector, as well as electricity and water utilities, remains state controlled, with foreign participation generally in the form of minority partnerships."[136] The Secretariat further noted that "internal barriers to trade, resulting largely from the absence of a competition policy, institutional weaknesses, and restrictions on foreign participation in the economy, are impediments to doing business in the UAE and are hindering the diversification into services, a sector that is rapidly becoming a strategic priority."[137]

The Report by the UAE recognized the need to strengthen its trade capacity and indicated a number of ways in which it would do so. These included a desire to partner with a selected UAE university to create a degree in WTO issues, the organization of numerous seminars and training on WTO issues, and having UAE candidates attend various training sessions at the WTO.[138] Issues related to energy were not specifically mentioned, but it would

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133. 2006 Investment Climate Statement, *supra* note 126.

134.

> Trade Policy Reviews are an exercise, mandated in the WTO agreements, in which member countries' trade and related policies are examined and evaluated at regular intervals. Significant developments that may have an impact on the global trading system are also monitored. For each review, two documents are prepared: a policy statement by the government of the member under review, and a detailed report written independently by the WTO Secretariat. These two documents are then discussed by the WTO's full membership in the Trade Policy Review Body (TPRB).

www.wto.org.

135. Press Release, WTO, A Generally Liberal Economy Whose Performance Could Further Improve with Structural Reform (April 24, 26, 2006), *available at* http://www.wto.org/english/tratop_e/tpr_e/tp263_e.htm [hereinafter WTO, Generally Liberal Economy].

136. WTO Secretariat, *Trade Policy Review: United Arab Emirates*, WT/TPR/S/162 (Mar. 20, 2006), *available at* http://www.wto.org/english/tratop_e/tpr_e/s162-0_e.doc [hereinafter WTO Secretariat, *Trade Policy Review*].

137. WTO, Generally Liberal Economy, *supra* note 136.

138. WTO Secretariat, *Trade Policy Review*, *supra* note 137.

be wise for MENA governments to undertake internal assessments to understand the full consequences of binding any part of their energy sectors to WTO rules.

An insight into the possible future agenda for negotiations related to energy issues can be gleaned by examining how these issues have been treated at the regional level. In many cases, the approaches taken in regional agreements have appeared on the multilateral stage. Thus, countries in the MENA region should become familiar with other regional agreements on which various energy proposals could be based, including, but not limited to, the ECT.

VI. CONCLUSION

During 2006 and 2007, the world's energy markets were faced with increased demand for crude oil and numerous disruptions to supply. This combination of factors led to high and volatile prices.[139] With oil prices already topping the inflation-adjusted record price set during the second oil shock, it seems likely that 2008 will be just as volatile as 2006-2007.[140]

The continued uncertainty and volatility in the energy markets will keep issues related to energy security at the top of the global political agenda for the foreseeable future. Indeed, the continued focus on energy security was recently reflected at CERA Week 2008, where the conference topic was "Quest for Security, Strategies for a New Energy Future."[141]

To ensure energy security in the future, the EU and the United States will most likely continue to push for more rules to govern the trade in energy. While the ECT and the WTO have laid the foundation for countries to address the trade-related aspects of energy, these rules need to evolve to address energy trade more comprehensively. The inability of trade ministers to conclude the Doha Round has, for the moment, stalled the movement calling for a new trade round to regulate energy. Undoubtedly, this pause will be brief since energy security remains a top priority for policy leaders in the 21st Century.

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139. According to the Energy Information Administration which provides official energy statistics from the U.S. Government, the spot price of West Texas Intermediate (WTI) crude averaged $66.02 per barrel in 2006 and $72.32 per barrel in 2007. EIA, Short-Term Energy Outlook, Feb. 12, 2008, *available at* http://www.eia.doe.gov.steo.

140. Jad Mouawad, Oil Tops Inflation-Adjusted Record Set in 1980, The New York Times, March 4, 2008, *available at* http://www.nytimes.com/2008/03/04/business/worldbusiness/04oil.html?em&ex=12047796 (noting that oil prices hit a record high on March 3, 2008 of $103.95 a barrel which exceeded the record of $39.50 a barrel which equals $103.76 today when adjusted for inflation).

141. Organized by Cambridge Energy Research Associates, "CERAWEEK has been ranked one of the five most influential senior executive conferences in the world, and the only one focused on a specific industry. CERAWEEK brings together almost 2,000 leaders from more than 55 countries to discuss and debate the global energy future." Focus on Energy: CERAWeek 2008, Special Advertising Section, Wall Street Journal, *available at* http://www2.cera.com/ceraweek2008/ CERAWeekWSJ2008-02-13.pdf.

THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION AND AMERICAN IMPLEMENTING LAW: IMPLICATIONS FOR INTERNATIONAL ADOPTIONS BY GAY AND LESBIAN COUPLES OR PARTNERS

Lynn D. Wardle[1]

Bruce C. Hafen Professor of Law, J. Reuben Clark Law School

Brigham Young University

I. INTRODUCTION: IMPLICATIONS OF THE HAGUE CONVENTION AND AMERICAN IMPLEMENTING LAWS AND REGULATIONS FOR ADOPTIONS OF CHILDREN BY GAY AND LESBIAN ADULTS

A. The Hague Convention and Its Potential Significance

One of the most important developments in international adoption law and practice has been the promulgation of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,[2] generally known as "the Hague Convention on Intercountry Adoption" (hereinafter "Hague Convention," or "HCIA"). As of March 1, 2007, seventy-four nations had signed, ratified, or acceded to this Hague Convention,[3] and the HCIA had entered into force in seventy-one nations.[4] The United States Senate has approved the HCIA; it will be deemed ratified and take effect as soon as the legal mechanisms for its implementation have been established.[5]

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1. I have benefitted from feedback, advice, and information from my colleagues Richard G. Wilkins and A. Scott Loveless, and the comments of the participants in the Symposium on Children's Rights and Adoption at BYU Law School, March 2, 2007. The very useful research assistance of Cliff Arthur and Kelly Schaeffer-Bullock, and the valuable word processing assistance of Marcene Mason is also gratefully acknowledged. For the final article, including all its errors, I must take personal responsibility.

2. Hague Conference on Private International Law, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, *available at* http://www.hcch.net./index_en.php?act=conventions.text&cid=69 [hereinafter HCIA].

3. *Id.* at Status Table. Fifty-two nations have signed this Convention; forty-nine nations have ratified it; twenty-two nations have acceded; forty-nine nations have both signed and ratified the Convention; and a total of seventy-four nations have taken some step to join by signing and/or ratifying and/or acceding. *Id.*

4. *Id.*

5. Intercountry Adoption Act of 2000, 71 Fed. Reg. 8131, 8064 (Feb. 15, 2006) (to be codified at 22 C.F.R. § 96), *available at* http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/06-1067.htm; *see also* Anna Mary Coburn, et al., *International Family Law*, 38 INT'L LAW 493

When the Hague Convention was being drafted, between 1988 and 1993,[6] the adoption of children by gays and lesbians was generally prohibited. As recently as 1993, when the Adoption Convention was approved by the Hague Conference, adoptions by gay and lesbian couples were generally not allowed in any country, and were legal in only one American state.[7] Today, by contrast, adoption by lesbian and gay couples is allowed in several nations, and in over one-fourth of the American states.[8] However, there have been expressions of serious objections to such adoptions as a matter of child welfare policy, as well as charges of potential deception and misrepresentation by lesbian and gay couples seeking to adopt children internationally.

This article reviews the HCIA text, legislative history, and U.S. implementing laws and regulations to evaluate the potential impact on lesbigay adoption. Many issues surrounding lesbigay international adoption remain unsettled. May sending countries under the Convention refuse to allow adoption by lesbians and gays? May receiving countries refuse to allow lesbigay adoptions under the Convention? Are such adoptions by gays and lesbians mandated or prohibited under the Hague Convention? Is recognition of such adoptions by other signatory states required? Do the Hague Convention, U.S. implementing statutes, or U.S. implementing regulations address these policy questions? Does the Convention or its implementing provisions raise any constitutional issues? These inquiries are fundamentally important and are the focus of this article.

(2004) (one of the co-authors, Adair Dyer, is the former Secretary of the Hague Conference, who participated in the drafting of the HCIA, and two other authors, Anna Mary Coburn and Mary Helen Carlson, were attorneys for the U.S. Department of State, which participated in the Hague Convention proceedings); Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323 (2005) [hereinafter Wardle, *Parentlessness*]; Curtis Kleem, Note, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT'L & COMP. L. 319 (2000); Rosanne L. Romano, Comment, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT'L LAW 545 (1994). *See also infra,* note 99, and accompanying text.

6. *See generally* Peter H. Pfund, *The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement*, 30 U.C. DAVIS L. REV. 647, 647 (1997); Mark T. McDermott, *Intercountry Adoptions: Hague Convention Update*, 2006 Adoption Law Institute, PLI Order No. 8637, 207 PLI/Crim 379, 381 (Dec. 2006); *see also* Hague Conference on Private International Law (HCCH), Proceedings of the Seventeenth Session, tome II, *Adoption – Co-operation* (1993); Howard E. Bogard, Comment, *Who Are the Orphans? Defining Orphan Status and the Need for an International Convention on Intercountry Adoption*, 5 EMORY INT'L L. REV. 571, 594 n.130 (1991).

7. *See generally* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 892 (1997) [hereinafter Wardle, *Potential Impact*] (reviewing Scandinavian adoption law); Ruth Colker, Response, *The Example of Lesbians: Posthumous Reply to Professor Mary Joe Frug*, 105 Harv. L. Rev. 1084, 1091 (1992) (Denmark does not allow lesbians or gays to adopt); Ruth Colker, *Marriage*, 3 YALE J. L. & FEMINISM 321, 321 n.2 (1991) ("Denmark has gone the farthest but, even under Danish law, lesbian and gay people are not provided with the privilege of adopting children.").

8. *See generally* Lynn D. Wardle, *The "Inner Lives" of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV 511 (2005) [hereinafter Wardle, *Inner Lives*] (reviewing status of lesbigay adoption in American states).

B. The Significance of Intercountry Adoption Generally

The reasons these questions are so important is because intercountry adoption is so important. Intercountry adoption involves the removal of a child from one country (the state of origin) to another country (the receiving state) for the purpose of being adopted by residents of the receiving country. While some intercountry adoptions involve adoptions by relatives (as when a child is adopted by members of his or her extended family who have emigrated from the state of origin to the receiving state), most intercountry adoptions are "stranger" adoptions by unrelated adults who often never knew the child before beginning the adoption process.[9]

International adoptions make the world a better place; there are few international transactions that compare with the selfless, charitable, and compassionate act of responsible adults taking stranger children from foreign countries and cultures into their homes, as members of their own families, and assuming the obligation to feed, clothe, house, teach, love, nurture and protect the children until they become adults. Intercountry adoption is usually a magnificent and wonderfully humane commitment of service and love.

However, even well-intentioned legal processes like adoption can be manipulated, abused, or exploited by profiteers willing to sell children, unscrupulous persons willing to buy children, and adults seeking to obtain children for baseless or selfish reasons, such as sexual labor, criminal exploitation, or personal aggrandizement (as a feather in the cap of adults seeking a particular status or reputation).[10] Abuses like these raised concerns about intercountry adoption and led to the drafting of the Hague Intercountry Adoption Convention.

The need for intercountry adoption is undeniable.[11] While the exact number of parentless children in the world is unknown, "UNICEF estimates about 100 million street children exist in the world today. About forty million are in Latin America, twenty-five to thirty million in Asia, and ten million in Africa."[12] These numbers are rising; by 2010, it is predicted that in developing countries there will be at least twenty-five million (and possibly up to 100

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9. *See* Elizabeth Bartholet, *International Adoptions*, PLI Order No. 7583, Adoption Law Institute, 203 PLI/Crim 9, 11 (Dec. 2005).

10. *See generally* Christina Crawford, MOMMIE DEAREST (1978) (biographical account by Joan Crawford's adopted daughter of her abuse at the hands of Ms. Crawford, indicating the actress' motive in adopting several children was self-serving, to promote her image).

11. *See* Wardle, *Parentlessness*, *supra* note 5, at 325-30.

12. Susan O'Rourke Von Struensee, *Violence, Exploitation and Children: Highlights of the United Nations Children's Convention and International Response to Children's Human Rights*, 18 SUFFOLK TRANSNAT'L L. REV. 589, 616-17 (1995); *see also* Victor Rodríguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593 (2000); Marc D. Seitles, *Effect of the Convention on the Rights of the Child Upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala*, 16 IN. PUB. INT. 159, 159 (1997-1998). The 100 million figure includes women and children. *Id.*

million) "AIDS orphans," ranging in age from newborns to children fifteen years old.[13] Parentless children in poor nations often become "homeless persons" or "street children."[14] In Bogota, Colombia, it is estimated that there are over 200,000 street children.[15] "The number of street children is predicted to grow by tens of millions as poverty in the Third World becomes increasingly urban-based."[16] In Mexico City alone, a city with a population of 23 million, there are approximately 13,000 children without homes.[17] A 2002 UNICEF, UNAIDS study reported that in 2001, 108 million orphans (including thirteen million AIDS orphans) were living in eighty-eight less-developed nations in Africa, Asia, Latin America, and the Caribbean, and by 2010 there would be 106 million orphans (including twenty-five million AIDS orphans) in those nations.[18]

The plight of parentless children is extreme. Many parentless children are unable to survive - they die, and often not tidily, not antiseptically, not with dignity, but horribly of starvation, with bloated bellies, listless, bony bodies, and huge pain-drenched eyes, with cries of hunger and fear. Their suffering and death should stun and shame us. The United Nations estimates that approximately "50,000 [human beings] die every day as a result of poor shelter, water, or sanitation",[19] and parentless children are especially vulnerable to these ravages. Parentless children are also vulnerable to many forms of exploitation and abuse. While living on the street, most of these desperate children turn to crime to survive and, consequently, often suffer violent deaths.[20]

Intercountry adoption is one small way that adults and families in more affluent countries can make a dent in the huge problem of global parentless children. Intercountry adoption can make an incredible, life-changing difference in the lives of all involved, especially in the otherwise tragic and

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13. *AIDS Creating Global 'Orphan Crisis'*, CBS NEWS, July 10, 2002, http://www.cbsnews.com/stories/2002/07/09/health/main514560.shtml. "Another report released . . . by the Swiss-based advocacy and research group Association Francois-Xavier Bagnoud, predicted an even worse scenario — as many as 100 million orphans by 2010." *Id.* Predictions from international agencies "only count children up to the age of [fifteen] because government statistics classify people in [five]-year age groups . . . ." *Id.*

14. Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 885 (2004).

15. Anthony D'Amato, *Cross-Country Adoption: A Call to Action*, 73 NOTRE DAME L. REV. 1239, 1241 (1998).

16. Von Struensee, *supra* note 12, at 616-17 (1995). *See also* Seitles, *supra* note 12, at 159.

17. Annette Lopez, Comment, *Creating Hope for Child Victims of Domestic Violence in Political Asylum Law*, 35 U. MIAMI INTER-AM. L. REV. 603, 619 (2004).

18. UNAIDS, *Children on the Brink 2002: A Joint Report on Orphan Estimates and Program St rategies*, at 3 (July 2002), *available at* http://pdf.usaid.gov/pdf_docs/PNACP860.pdf.

19. Janet Ellen Stearns, *Urban Growth: A Global Challenge*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 140, 141 n.2 (1999).

20. Seugling, *supra* note 14, at 885-86; *see also* Lopez, *supra* note 17, at 610.

wasted lives of some of the most fragile, vulnerable, and hopeless children on the earth.

We do not know the exact number of intercountry adoptions because there are no existing mechanisms to collect such data. Even the HCIA authorities cannot provide such information, for the Convention is only applicable in about one-third of the nations in the world. Also, some nations do not keep such records. In 2001, a British demographer at a general population conference reported that the best data available indicated there were a total of approximately 162,000 known intercountry adoptions, and with an estimated five-to-ten percent shortfall, and average of 17-18,000 per year, during the 1980s.[21] Peter Selman estimated that during the 1990s the number of intercountry adoptions ranged from over 19,000 in 1988 to a little under 32,000 in 1997-99.[22]

Historically, adoption of unrelated children has not been widely practiced in many nations. Indeed, legal adoption for the sake of the child is a modern innovation, first introduced in Massachusetts during 1851.[23] In many countries, significant cultural, social, and customary barriers to the practice of adoption remain. As a result, many orphaned and abandoned children are doomed to be raised in temporary foster care or in state- (or private-) run institutions, euphemistically called group homes. The silver lining of this tragedy is that such organizations can facilitate and provide a pool of children for intercountry adoption. Unfortunately, political and legal barriers to such adoptions exist in many countries.

C. The Significance of Intercountry Adoptions in the United States

The 2000 Census reported that over two million adopted children under age eighteen were living in American homes and that 2.5% of all minor children were adopted.[24] Astoundingly, data on adoptions has not been collected by the U.S. government since 1992 when records indicate a total of 126,951 children were adopted.[25] The National Council for Adoption, a consortium of American adoption agencies that compiles adoption data, found the number of domestic adoptions had fallen about 5% from 1992 to 1996, and

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21. Peter Selman, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Twenty-Fourth Annual IUSSP General Population Conference (Aug. 2001), at 5, http://www.iussp.org/Brazil2001/s20/S27_P05_Selman.pdf (last visited Dec. 12, 2007).

22. *Id.*

23. *See* Homer H. Clark, Jr., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 20.1, at 851 (2d ed. 1988).

24. Rose M. Kreider, *Adopted Children and Stepchildren: 2000*, Census 2000 Special Reports, Table 1, at 2 (Oct. 2003), *available at* http://www.census.gov/prod/2003pubs/censr-6.pdf; *see also* The Evan B. Donaldson Adoption Institute, *Overview of Adoption in the United States*, http://www.adoptioninstitute.org/FactOverview.html#head (last visited Dec. 12, 2007) (*citing* Jason Fields, U.S. Census Bureau, Current Population Reports 1996, *Living Arrangements of Children: Household Economic Studies*, at 9 (2001)).

25. *Id.*

international adoptions had doubled, rising by nearly 5,000, nearly offsetting the drop in domestic adoptions.[26] Approximately 45% of all American adoptions are step-parent adoptions, and another 15% are foster-parent adoptions.[27] In 1996, approximately 65,000 adoptions were of unrelated children, including domestic and foreign children.[28] Since 1996, the number of intercountry adoptions has increased by approximately 10,000.[29]

The United States has always been, and still is, the largest single "importer" of foreign children for intercountry adoption.[30] For example, in 1998, when nearly 16,000 intercountry adoptions took place in the United States, the country with the next most intercountry adoptions, Sweden, had well under 1,000 adoptions.[31] However, a comparison of relative populations illustrates that Sweden is doing very well. By 1998, the U.S. rate of adoption per 100,000 individuals was 5.7, while it was 14.6 in Norway, and it had been as high as 22.7 in Sweden.[32] In 1999, the best estimates indicate there were just over 32,000 intercountry adoptions in the leading fourteen adopting countries in the world, and over half of these, 16,363 adoptions, were of children coming to the United States.[33] Thus, in almost any given year, as many foreign children are placed for adoption with families in the United States as are placed for intercountry adoption in the other thirteen leading adoption nations in the world, combined.[34]

"Over the last decade, the number of intercountry adoptions to the United States has more than doubled,"[35] and has tripled between 1990 and 2005.[36]

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26. *Id.* at 31.

27. *Id.*

28. *Id.*

29. *See supra* note 20.

30. Caeli Elizabeth Kimball, Article, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT'L L. & POL'Y 561, 564-65 (2005) (*citing* Ethan B. Kapstein, *The Baby Trade*, Foreign Aff., Nov./Dec. 2003, *available at* LEXIS, News Library, Foreign Aff. File) ("In 2001, over 34,000 intercountry adoptions took place worldwide, with the United States receiving over 19,000 adoptees."); Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597 (2004) (discussing adoption trends between China and the United States, the country receiving the most foreign adoptees); Jennifer M. Lippold, Note, *Transnational Adoption From an American Perspective: The Need for Universal Uniformity*, 27 CASE W. RES. J. INT'L L. 465, 468-69 (1995) (the United States has been the recipient of over 100,000 foreign children from 1950-1991).

31. Selman, *supra* note 21, at 7, tbl. 2.

32. *Id.* at 7-8 (the figure of Sweden was for 1980).

33. *Id.* at 5-6.

34. *See* HCIA, *supra* note 2. *See generally* Australian InterCountry Adoption Network – Adoption Statistics, http://www.aican.org/statistics.php (last visited Dec. 12, 2007) (showing that the United States engaged in 21,580 intercountry adoptions during the same time that all other countries combined only engaged in 19,474 intercountry adoptions).

35. *U.S. Takes Domestic Measures to Implement Hague Adoption Convention*, 100 AM J. INT'L L. 461, 461 (2006).

36. Appendix 2, *Immigrant Visas Issued to Orphans Coming to the United States*, *infra*

Between 1971 and 2001, Americans adopted over 265,000 children from other countries.[37] In 2001, more than 20,000 out of approximately 70,000 adoptions in the United States were of unrelated children (excluding step-parent adoptions) from intercountry adoptions. It is estimated that about 500 American children are placed for adoption in other countries every year.[38]

Yet, it appears that international adoptions of children to the United States are beginning to wane. "After tripling over the past [fifteen] years, the number of foreign children adopted by Americans dropped sharply in 2006, the result of multiple factors that have jolted adoption advocates and prompted many would-be adoptive parents to reconsider their options."[39] Moreover, the drop in international adoptions in the United States was not trivial, but the number fell 10% in one year, from 22,728 international adoptions in America in 2005 to only 20,679 in 2006 — a substantial one-year change.[40] The impact on the children who are not adopted is profound. As a spokesman for the National Council for Adoption said, "[i]t's not just numbers — it's a tragedy."[41]

II. OVERVIEW OF THE HAGUE CONVENTION AND OF AMERICAN IMPLEMENTING LAWS AND REGULATIONS

A. Origins of the Hague Convention

The HCIA is a multilateral treaty governing intercountry adoptions of children who leave their countries of origin to be adopted into families in other receiving countries. It is one of three Hague conventions drafted since 1980 that deal specifically with the legal protection of children in a transnational context.[42]

In October 1988, delegates from the member states to the Sixteenth Diplomatic Session of the Hague Conference on Private International Law

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37. The Evan B. Donaldson Adoption Institute, *International Adoptions Facts* (2002), http://www.adoptioninstitute.org/FactOverview/international.html, 11 n.3 (last visited Dec. 12, 2007).

38. Jill Smolowe, *Babies for Export*, TIME, Aug. 22, 1994, at 64, *available at* http://www.time.com/time/magazine/article/0,9171,981280,00.html.

39. David Cary, *Foreign Adoptions by Americas Drop*, ASSOCIATED PRESS, INTELLIGENCER, Jan. 7, 2007, at A4, *available at* 2007 WLNR 981300.

40. *Id.* ("Overall, according to new State Department figures, international adoptions by Americans fell to 20,679 in the 2006 fiscal year from 22,728 in 2005 the first significant decline since 1992." *Id.*); *see also* U.S. Department of State, Bureau of Consular Affairs, *Immigrant Visas Issued to Orphans Coming to the U.S.*, *available at* http://travel.state.gov/family/adoption/stats/stats_451.html (last visited Dec. 12, 2007).

41. *Id.*

42. Pfund, *supra* note 6, at 647. The other two conventions are the 1980 Hague Convention on the Civil Aspects of International Child Abduction *reprinted in* 19 I.L.M. 1501 (1980), and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, *reprinted in* 35 I.L.M. 1391 (1996).

voted to prepare a convention on intercountry adoption at their next Diplomatic Session.[43] That decision set the drafting process in motion. Over the next two years, the Hague Conference's Permanent Bureau prepared a lengthy study on intercountry adoption.[44] The study resulted in a preliminary draft of the text of a convention and was prepared by a special commission of the Hague Conference during three two-week sessions of a preparatory between June 1990 and February 1993.[45] In September 1992, that preliminary text and a report were circulated and written comments were solicited from the member nations of the Hague Conference; nearly forty member nations responded to the call for input.[46] Additionally, in May of 1993, about thirty non-member nations with significant intercountry adoption emigration and eighteen international organizations participated in the deliberations before and during the Seventeenth Diplomatic Session of the Hague Conference, at which the proposed HCIA was considered.[47]

On May 29, 1993, by a unanimous vote of the fifty-five nations, the Hague Conference adopted the final text of the HCIA.[48]

The HCIA built upon several previously drafted international agreements that were drafted to govern adoption.[49] In 1964, the Hague Conference promulgated the Hague Convention on Jurisdiction, Applicable Law, and Recognition of Decrees relating to Adoption.[50] It was approved by only three European nations (Austria, Switzerland and the United Kingdom); each of the three nations later withdrew from the Convention.[51] While the overall structure and some of the provisions of this Convention were sound,[52] it left too many

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43. Pfund, *supra* note 6, at 649; *see* McDermott, *supra* note 6, at 381; *see also* Bogard, *supra* note 6 at 594 n.130.

44. Pfund, *supra* note 6, at 649.

45. *Id.* at 651; McDermott, *supra* note 6, at 381.

46. McDermott, *supra* note 6, at 381.

47. *Id.*

48. *Id.*, at 381; Hague Conference on Private International Law (HCCH), tome II, *Adoption – Co-operation, supra* note 6.

49. *See generally* Romano, *supra* note 5 (providing an overview of intercountry adoption); Bogard, *supra* note 6, at 590-94 (describing the European Convention on Adoption of Children and the Hague Convention, two international agreements involving intercountry adoption).

50. Hague Conference on Private International Law: Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (1965), *reprinted in* 4 I.L.M. 338 (1965), *available at* http://www.hcch.net./index_en.php?act=conventions.text&cid=75.

51. Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions: Status Table, http://www.hcch.net./index_en.php?act=conventions.statusprint&cid=75 (last visited Dec. 12, 2007).

52. Bogard, *supra* note 6. For example, it vested jurisdiction in the authorities of the state where the adopter habitually resided or had nationality, applied the consent law of the nation of the child's nationality, and only allowed revocation under the law of the state granting the adoption. *Id.* at 592-94. In some respects, the 1993 HCIA contains more developed versions of some provisions included in primitive form in the 1964 Hague Convention. *Id.* at 593-94 (describing 1964 proposed Convention).

serious substantive conflicts unresolved and "contain[ed] exceptions, reservations and restrictions to satisfy nationalistic viewpoints to such an extent that its usefulness [was] questionable."[53]

In 1967, the European Convention on the Adoption of Children was drafted, and the following year it became effective upon signatory member states of the Council of Europe.[54] Eventually eleven European nations signed the European Convention; however, its provisions proved inadequate because it focused on children orphaned by the death of their parents and failed to account for voluntarily abandoned children. Children whose parents had voluntarily relinquished parental rights apparently were ineligible for international adoption under the European Convention.[55]

Two United Nations compacts also promoted interest in, and provided examples of, drafting international standards for international adoptions. In 1986, the United Nations approved the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (herein "Declaration").[56] "The Declaration's twenty-four articles address issues pertaining to family and child welfare, foster care, and domestic problems, as well as concerns regarding intercountry adoption . . . ."[57] However, the Declaration embodied a preference for intracountry institutional care over international adoption, was ambiguous in significant areas, and called for the status quo "safeguards and standards" for national adoptions to be applied to international adoptions.[58]

In 1989, the General Assembly of the United Nations approved the Convention on the Rights of the Child (herein "CRC"),[59] which has become popular world-wide; it has been signed and endorsed by all but two of the sovereign nations in the world.[60] Article 21 of the CRC addresses adoption,

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53. Bogard, *supra* note 6, at 594 (citing 52 Dep't St. Bull. 265, 267 (1965) (report of the United States delegate to the Hague Convention recommending the adopting authorities apply the law of the national state of the child when deciding issues concerning the consent of a child to adoption)).

54. European Convention on the Adoption of Children, Apr. 24, 1967, 634 U.N.T.S. 256, available at http://conventions.coe.int/Treaty/EN/Treaties/Html/058.htm (last seen 18 February 2008).

55. Romano, *supra* note 5, at 567-68.

56. G.A. Res. 41/85, 41 U.N. GAOR, Supp. No. 53, at 265, U.N. Doc. 41/85 (1986).

57. Romano, *supra* note 5, at 569.

58. *See generally* Ahilemah Jonet, Note, *International Baby Selling for Adoption, and the United Nations Convention on the Rights of the Child*, 7 N.Y.L. SCH. J. HUM. RTS. 82, 86-96 (1989); Mary C. Hester, Comment, *Intercountry Adoption from a Louisiana Perspective*, 53 LA. L. REV. 1271, 1279 (1993); Romano, *supra* note 5, at 569-70.

59. G.A. Res. 44, U.N. GAOR, 25th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (Nov. 20, 1989), *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm [hereinafter C.R.C.].

60. Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (as of June 9, 2004), *available at* http://www.unhchr.ch/pdf/report.pdf. The United States has signed, but not

and provided that where adoption is allowed "the best interests of the child shall be the paramount consideration," committed the nations to specific procedural protections (supervision, information, and informed consent), to "[r]ecognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;" agreed to apply to international adoption the same "safeguards and standards equivalent to those existing in the case of national adoption;" committed nations to "[t]ake all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;" and agreed to "[p]romote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs."[61]

While these CRC provisions repeated the defective principles of the 1986 Declaration (including no preference for intercountry adoption over intracountry foster care and application of status quo domestic adoption standards to international adoptions), the general popularity of the CRC and the express commitment to enter into "bilateral or multilateral" treaties to protect the interests of children in international adoption gave a definite boost to the movement to draft the HCIA.[62]

Both of these U.N. instruments, the Declaration and the CRC, directly influenced the development and content of the HCIA. Indeed, the preamble of the Hague Convention explicitly notes and acknowledges that the Convention "tak[es] into account the principles set forth in" the Declaration and the CRC.[63]

The progress of the Hague Convention also benefited from a globally galvanizing scandal that began with the discovery in 1989-90 of the horrific conditions in which orphaned and unwanted children had been warehoused in Romania under the regime of Nicolae Ceausecu,[64] and continued with the subsequent unregulated flood of well-intentioned persons and organizations from other countries who poured into Romania to rescue and adopt the neglected Romanian children. "Individuals and entities rushed in, some with humanitarian and others with less charitable motives to facilitate international adoptions, resulting in gray and black market practices."[65] The chaos of the

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ratified, the CRC. Office of the United Nations High Commission for Human Rights, *Status of Ratifications of the Principal Human Rights Treaties*, at 11 (June 9, 2004) *available at* http://www.unhchr.ch/pdf/report.pdf.

61. C.R.C., *supra* note 59, art. 21.

62. *See generally* CYNTHIA R. MABRY & LISA KELLY, ADOPTION LAW, THEORY, POLICY AND PRACTICE (2006).

63. HCIA, *supra* note 2, at Preamble.

64. Anthony D'Amato, *supra* note 15, at 1240-42; Wardle, *Parentlessness, supra* note 5, at 328-30.

65. Jini L. Roby, *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J. L. & FAM. STUD. 303, 314 (2004).

adopting rescuers and the unethical practices used by some led to a counter-reaction of severe restrictions on adoption in Romania.[66] Several years after the Romanian orphanage-and-adoption debacle, "[i]nternational adoption . . . received an unprecedented amount of media coverage . . . much of it unfavorable,"[67] underscoring the need for international regulation of international adoption. Thus, when the respected, nonpartisan, collaborative Hague Conference promulgated its Convention on Intercountry Adoptions in 1993, the time was right, and the international community was very supportive.[68]

B. Overview of the Hague Convention

The HCIA consists of forty-eight Articles organized into seven Chapters,[69] the main provisions of which are herein summarized. Chapter I describes the scope of the convention. The objectives are to establish safeguards to ensure that the best interests of children will be protected in intercountry adoption, to prevent trafficking in children, and to ensure recognition of intercountry adoptions.[70] The Convention applies when a child under 18 years of age[71] is a

> habitual resident in one Contracting State ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State'), either after his or her adoption in the state of origin by spouses or a person habitually resident in the receiving state, or for the purposes of such an adoption in the receiving state or in the state of

66. *Id.*; *see also* Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT'L & COMP. L. REV. 121, 124 (1994) (describing Romanian orphan plights and resulting international adoption abuses.); Press Release, National Council for Adoption, Romanian Extension of Ban on Intercountry Adoption Harmful to Children (May 23, 2003), http://www.adoptioncouncil.org/press/pr_8.html; *see also* Press Release, National Council for Adoption, Romanian Orphans in Jeopardy Again: Romanian Legislators Essentially Eliminate International Adoptions, http://www.adoptioncouncil.org/press/pr_15.html. (criticizing over-reactive restrictions on adoption); *see generally* Bogard, *supra* note 6 (describing the adoption process, abuses, and solutions).

67. Carro, *supra* note 67, at 123. *See also* David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnaping [sic], and Stealing Children*, 52 WAYNE L. REV. 113 (2006); David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281 (2004); *see generally* David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 403-06 (2005) (recounting international adoption scandals of recent years).

68. *See supra*, notes 43 through 67, and accompanying text.

69. *See infra* Appendix 1.

70. HCIA, *supra* note 2, art. 1.

71. *Id.* art. 3.

origin.[72]

Chapter II sets forth the requirements for intercountry adoption under the Convention, including: (1) that "competent authorities" in the state of origin must establish eligibility of the child for adoption; (2), that placement in the receiving state must be in the child's best interests; (3) that required counseling and consents must be given properly and without improper financial inducement;[73] (4) that "competent authorities" in the receiving state have determined the prospective adoptive parents are eligible and suitable to adopt; and (4) that "the child is or will be authorized to enter and reside permanently in that state."[74]

Chapter III defines and regulates central authorities and accredited bodies. Each signatory state must designate at least one Central Authority to fulfill convention obligations,[75] and accredit competent non-profit bodies, staffed by qualified, ethical, supervised persons.[76]

Chapter IV sets forth procedural requirements applicable in intercountry adoptions between the party states. The intercountry adoption process begins with application by the adopters to the Central Authority of the state of their habitual residence.[77] "[I]f satisfied that the applicants are eligible and suited to adopt," the Central Authority sends a report to the Central Authority in the child's state of origin.[78] If satisfied the child is adoptable and all consents have been properly obtained, the Central Authority in the state of origin returns a report to the Central Authority in the receiving state.[79] Agreement to the adoption and compliance with the standards by both Central Authorities is repeatedly emphasized. [80] Central Authorities may designate other public authorities, accredited bodies, and competent persons to perform Central Authority functions under their supervision.[81]

Chapter V governs recognition and effects of intercountry adoption under the Convention. "An adoption certified by the competent authority of the state of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States,"[82] and includes recognition of the child-adoptive parent relationship, parental authority, and termination of prior parent-child relationship if according to the

72. *Id.* art. 2.
73. *Id.* art. 4.
74. *Id.* art. 5.
75. *Id.* art. 6.
76. *Id.* arts. 10,11. A body accredited in one state can only act in other states if also accredited in those states. *Id.* art. 12.
77. *Id.* art. 14.
78. *Id.* art. 15.
79. *Id.* art. 16.
80. *Id.* arts. 17,19.
81. *Id.* art. 22.
82. *Id.* art. 23.

law of the state of adoption,[83] or after adoption by the law of the receiving state.[84] Recognition may be refused "only if the adoption is manifestly contrary to [such state's] public policy, taking into account the best interests of the child."[85]

Chapter VI contains general provisions. The Convention allows, but does not require, the state of origin to be the place of adoption,[86] generally forbids contact between adoptive and biological parents or guardians until proper consents have been given,[87] and allows payment only of actual costs, expenses, and reasonable professional fees, while prohibiting "improper financial or other gain" from intercountry adoption.[88] In states with federal or plural legal systems, it provides the laws and authorities of the applicable local unit of habitual residence apply. It explicitly forbids reservations to the Convention,[89] and makes the Convention applicable to all applications received after the Convention is in force in the receiving state and state of origin.[90]

Chapter VII contains "Final Clauses" regarding administration and logistics. The depositary of the Convention is the Ministry of Foreign Affairs of the Kingdom of the Netherlands (hereinafter the "Ministry"). Accordingly, instruments of ratification, acceptance, or approval by Hague Conference member states and other states who participated in the HCIA Session are to be deposited in the Ministry.[91] Instruments of accession by other states should be deposited in the Ministry as well.[92] States with federal or plural legal systems may make the Convention applicable to all units or only certain units.[93] The Convention enters into force in a state the first day of the third month after the state deposits its third instrument of ratification, acceptance, approval, or accession.[94] A state may withdraw from the Convention by depositing a notice of denunciation, effective twelve months later.[95]

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83. *Id.* art. 26.

84. *Id.* art. 27 (conversion subject to proper consent).

85. *Id.* art. 24. However, if the adoption is in derogation of certain Articles of the Convention by bilateral treaty, states may choose to deny recognition of such adoptions. *Id.* arts. 25 & 39(2).

86. *Id.* art. 28.

87. *Id.* art. 29.

88. *Id.* art. 32.

89. *Id.* art. 40.

90. *Id.* art. 41.

91. *Id.* art. 43. The depository is obliged to notify the Hague Conference States and other party States of signatures, ratifications, acceptances, approvals, accessions, and deunuciations. *Id.* art. 48.

92. *Id.* art. 44(1), (2). But, the Convention obligations do not apply between an acceding state and any party State timely objecting to it. *Id.* art. 44(3).

93. *Id.* art. 45.

94. *Id.* art. 46.

95. *Id.* art. 47.

C.American Endorsement of the Hague Convention

The United States signed the Hague Convention on March 31, 1994, indicating intent to ratify the HCIA.[96] In 1998, after an extensive review of the terms of the Convention was completed by the U.S. State Department, President Clinton transmitted the Convention to the Senate for advice and consent to ratification.[97] Interestingly, conservative Senator Jesse Helms led the movement for Senate consent to the Convention and its implementing statute.[98] On September 20, 2000, the U.S. Senate gave its advice and consent to U.S. ratification of the Hague Convention, subject to the completion of implementing laws and regulations.[99] Since the implementing laws and procedures are not yet completed, ratification by the United States is not final.[100]

Three months after the U.S. instrument of ratification is deposited with the Netherlands Ministry of Foreign Affairs, the Hague Convention will enter into force in the United States and will be legally applicable to adoptions between the United States and the other countries that have ratified the Convention.[101] The process of drafting regulations seems nearly complete, and the accreditation of adoption agencies at the state and federal level is underway. The U.S. State Department has announced that the Convention will take effect in the U.S. on April 1, 2008.[102]

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96. Pfund, *supra* note 6, at 654; Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: A Review of the Hague Conference on Intercountry Adoption*, 30 TULSA L. J. 243 (1994); McDermott, *supra* note 6, at 382.

97. President William J. Clinton, Transmittal to the Senate on Intercountry Adoption (June 11, 1998) 1998 WL 306339.

98. Kleem, *supra* note 5, at 332. Senator Helms, Chair of the Senate Foreign Relations Committee, and Senator Mary Landrieu introduced the Hague Convention and implementing legislation to the Senate. *Id.*

99. Coburn, *supra* note 5, at 493-94. *See* 146 CONG. REC. S8866 (daily ed. Sept. 20, 2000) (statement of Sen. Biden); *see also* Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 1993 WL 1480918.

100. The U.S. Department of State Office of Children's Issues has announced that President Bush signed the U.S. instrument of ratification of the Hague Intercountry Adoption Convention on November 16, 2007. It also stated that the United States will deposit the instrument of ratification, officially joining the Hague Adoption Convention, on December 12, 2007, and that the convention is expected to enter into force in the U.S. on April 1, 2008. U.S. Department of State, Office of Children and Family, U.S. on Track to Join the Hague Adoption Convention in December, available at http://travel.state.gov/family/adoption/convention/convention_3852.html (last seen December 5, 2007). See further NCFA (National Council for Adoption), eMemo for December 4, 2007, at 1.

101. Coburn, *supra* note 5, at 494.

102. U.S. on Track, *supra* note 100. *See further* McDermott, *supra* note 6, at 384 (earlier optimistic predictions).

D. Overview of the American Implementing Laws and Regulations

"Countries that become parties to the Hague Convention are required to adopt procedures, typically by implementing legislation, to comply with the Hague Convention's obligations and requirements."[103] Upon transmittal of the Hague Convention by the President to the Senate, both the Senate and House began to consider implementing legislation.[104] Several hurdles to developing such legislation existed.[105] In October 1999, committees in both houses held hearings on proposed implementing legislation.[106] In September 2000, at about the same time as the Senate approved ratification of the HCIA, both houses of Congress passed the Intercountry Adoption Act of 2000 (herein "IAA"), which President Clinton signed into law on October 6, 2000.[107]

The IAA consists of five titles, containing a total of twenty-one sections.[108] Though shorter and more compact than the HCIA, which it implements, the IAA's structure resembles the Hague Convention, and its content complements the provisions of the Convention.

The stated purposes of the IAA are as follows:

> (1) to provide for implementation by the United States of the Convention; (2) to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests; and (3) to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States.[109]

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103. Coburn, *supra* note 5, at 493.

104. *See* H.R. 2909, 106th Cong. (1999); *see also* Bartholet, *supra* note 9, at 21.

105. *See generally* H.R. REP. NO. 106-691, pt. 1 (2000) (describing the procedure for the House's adoption of a bill regarding intercountry adoption); S. REP. NO. 106-276 (2000) (describing the procedure for the Senate's adoption of a bill regarding intercountry adoption).

106. McDermott, *supra* note 6, at 382.

107. Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901-44 (2000); *see also* Bartholet, *supra* note 9; *see generally* D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349 (2005); Coburn, *supra* note 5; Mary Eschelbach Hansen & Daniel Pollack, *The Regulation of Intercountry Adoption*, 45 BRANDEIS L.J. 105 (2006); Malinda L. Seymore, *International Adoption & International Comity: When Is Adoption "Repugnant"?*, 10 TEX. WESLEYAN L. REV. 381 (2004); Amy Grillo Kales, Note, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 GEO. WASH. INT'L L. REV. 477 (2004).

108. *See* Appendix 3, *infra* 53.

109. H.R. REP. NO. 106-691, pt. 1, tit. V § 505 (b)(1)–(3) (2000).

To implement the IAA, the Department of State, which will act as the Central Authority for the United States under the HCIA, has gone through three cycles of rule making.[110] The regulations that they have promulgated are contained in title 22 of the *Code of Federal Regulations*, parts 96, 97, and 98.[111] The process of refining and completing the administrative regulations is not complete, but could be completed this year.

III. CONTROVERSIES ABOUT INTERNATIONAL ADOPTIONS BY GAYS AND LESBIANS

A. The Increase of Controversial Adoptions by Gays and Lesbians

While the HCIA was being drafted from 1988 to 1993, no country allowed gay couples to adopt.[112] Even Denmark (which pioneered same-sex domestic partnerships in 1989), the Netherlands (which pioneered same-sex marriage globally in 2001), and Scandinavia (which was the first global region to allow same-sex partnerships) generally prohibited adoptions by gays and lesbians in 1993.[113]

Today, adoptions by gay or lesbian partners are allowed by appellate court decision or legislation in the District of Columbia and in at least twelve

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110. *See* HCIA; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. 54064 (Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96).

111. *See* Hague Convention on Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, 22 C.F.R. pts. 96-98 (2006), *available at* http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/06-1067.htm.

112. *See generally In re* Adoption of B.L.V.B., 628 A.2d 1271, 1278 (Vt. 1993). Only two months before the promulgation of the Hague Convention, the small American state of Vermont became the first jurisdiction to permit by appellate decision the adoption of children by gay or lesbian partners., *Id.*

113. *See* Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order*, 37 HARV. INT'L. L.J. 307, 384 (1996) (denying homosexuals the right to adopt in Denmark); Paul Vlaardingerbroek, *Marriage, Divorce, and Living Arrangements in the Netherlands*, 29 FAM. L. Q. 635, 644 (1995) ("Currently, adoption is only possible for a married couple" in the Netherlands); Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1034 n.9 (1994) (describing difference between marriage and domestic partnerships, including inability to adopt); Marianne Hojgaard Pedersen, *Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce*, 30 J. FAM. L. 289, 290 (1992) (denying adoption by domestic partners in Denmark); David G. Richardson, *Family Rights for Unmarried Couples*, 2 KAN. J. L. & PUB. POL'Y 117, 121 (1993) (indicating same-sex domestic partners throughout Scandinavia cannot adopt) Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1191 n.134 (1992) (inability to adopt even in progressive northern European countries).

American states.[114] It appears that approximately fifteen nations allow some same-sex couples to adopt some children in at least some circumstances (often limited to adoption of the biological children of a registered same-sex domestic partner).[115]

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114. *See generally* Wardle, *Inner Lives, supra* note 8, at 513. The American jurisdictions in which lesbigay adoption has been approved by statute or appellate court precedent are: California, Connecticut, District of Columbia, Illinois, Indiana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont. *Id.* at 513-14 n.3. However, such adoptions are expressly forbidden by statute or appellate court ruling in at least eight other states. *Id.* at 514 n.4.

115. Richard R. Bradley, *Making a Mountain Out of A Molehill: A Law and Economics Defense of Same-Sex Foster Care Adoptions*, 45 FAM. CT. REV. 133, 135 (2007), indicating:

> The Netherlands, Denmark, and Iceland currently allow same-sex couples to adopt each other's children as long as they are registered partners. The Netherlands has gone one step further and allowed registered partners to adopt unrelated children, thus mirroring the adoption rights that heterosexual couples enjoy.... Catalan law [] does not preclude a gay man or lesbian from adopting a child as an individual ....

Id. (citations omitted). "However, Norway, Sweden, France, Spain, and Germany prohibit homosexual adoptions outright despite recognizing the union of homosexual couples." *Id.* at 135 (citation omitted). Alfonso Cardinal López Trujillo, *The Nature of Marriage and Its Various Aspects*, 4 AVE MARIA L. REV. 297, 329 (2006) ("The Spanish parliament, on June 30, 2005, approved a same-sex marriage law that also gives homosexual couples the right to adopt children."); Robert Wintemute, *Same-Sex Marriage: When Will It Reach Utah?*, 20 BYU J. PUB. L. 527, 534 (2006) (discussing Spain's authorization of adoption by gay couples in 2005); Nancy G. Maxwell & Caroline J. Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples As Legal Parents: A Call For Recognizing Intentional Parenthood*, 38 FAM. L.Q. 623, 638-40 (2004) (describing development of Dutch adoption law). In January 2007, the United Kingdom adopted legislation requiring all adoption agencies to facilitate adoptions by gay and lesbian prospective adopters. *See* Equality Act (Sexual Orientation Regulations 2007 (U.K.) §15, available at http://www.opsi.gov.uk/si/si2007/uksi_20071263_en_1 , (last seen 18 February 2008); *Gay adoption laws forced through by the Lords*, Daily Mail, March 22, 2007, available at http://www.dailymail.co.uk/pages/text/print.html?in_article_id=443942&in_page_id=1770 (last seen 18 February 2008) (controversial bill requiring all adoption agencies, including Catholic agencies, to place children with gay couples passes on 168-122 vote). South Africa reportedly legalized adoptions by gays and lesbians in 2002. Mark Levy, *South Africa Legalizes Gay Marriage*, 365 GAY, NEWS & ISSUES, Dec. 1, 2005, http://www.365gay.com/Newscon05/12/120105safMarr.htm. An undocumented internet source reports adoption by same-sex couples is also legal, in at least some situations, in Andorra, Belgium, Germany, Guam, Norway, Ireland, Israel, Sweden, some provinces in Canada, and some parts of Australia. *LGBT Adoption: Legal Status Around the World*, Answers.com, http://www.answers.com/topic/adoption-by-same-sex-couples (last visited Dec. 12, 2007). In 2007, France reaffirmed that adoption by gay and lesbian couples was prohibited. *See* Bradley, *supra* note 115; Alexis Unkovic, *France Appeals Court Prohibits Lesbian From Adopting Child of Partner*, JURIST: LEGAL NEWS AND RESEARCH, Feb. 20, 2007, http://jurist.law.pitt.edu/paperchase/2007/02/france-appeals-court-prohibits-lesbian.php; *French Court Bars Adoption for Lesbian Couple*, KHALEEJ TIMES ONLINE, Feb. 20, 2007, http://www.khaleejtimes.com/DisplayArticleNew.asp?xfile=data/theworld/2007/February/theworld_February628.xml&section=theworld&col (The top court in France, the Cour de Cassation:

> barred a woman from adopting the biological child of her lesbian partner, saying it was not in the interest of the child. Lesbian couples are prohibited under

Adoption by same-sex partners is extremely controversial around the globe. Even some nations that allow some form of same-sex unions generally forbid adoption by gays and lesbians, especially lesbigay couples. Polls in progressive Europe show the majority of people in most EU nations oppose allowing gays and lesbians to adopt.[116] For example, in 2003, the European Omnibus Survey (EOS) (based on interviews with over 15,000 persons living in 30 European countries)[117] found that in only four of the thirty countries surveyed a majority favored legalization of adoption of children by same-sex couples and in the remaining twenty-six nations, at least 50% of the population (up to 87% of the population) opposed legalization of adoption by same-sex couples throughout Europe.[118] Three years later, a similar survey by Eurobarometer for the European Commission revealed that the number of nations in which a majority of the population favored allowing legalized adoption by gay or lesbian couples throughout Europe had dropped to only two nations, and support for gay adoption in eighteen of the nations was only 33% or less, with only single-digit support in four nations.[119]

Gay adoption also remains very controversial in the United States, where a majority of Americans still oppose the practice.[120] After more than a decade of an aggressive gay-rights movement, fewer than half of the states have legalized adoption by gay and lesbian partners and couples and just a handful of the 191 sovereign nations of the world allow children to be adopted by homosexuals, clearly indicating the controversial nature of lesbigay adoptions.[121]

French law from adopting, but the partners of biological mothers have used adoption as a way of establishing the rights of both parents over the child. *Id.*); *but see France Broadens Gays' Parental Rights*, CBS NEWS, Feb. 25, 2006, http://www.cbsnews.com/stories/2006/02/25/ap/world/mainD8FVTSJO0.shtml (discussing a 2006 case in which the French Cour de Cassation ruled that a lesbian mother in a "stable" relationship could "share" her parental rights; the ruling appears to follow a distinction similar to France's marriage/PACS distinction).

116. *See* European Commission, *Eurobarometer 66: Public Opinion in the European Union,* TNS OPINION & SOCIAL, at 43-46 (2007), *available at* http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.pdf. Europeans are more accepting of gay relations generally but are more protective of children generally than Americans. *Id.; see also infra,* note 118.

117. Gallup Europe, The European Omnibus Survey, *Homosexual Marriage, Child Adoption by Homosexual Couples: Is the Public Ready?*, *available at* http://www.ilga-europe.org/content/download/3434/20938/file/GALLUP%20Europe%C202003%20report.pdf (survey was based on interviews with over 15,000 people living in thirty European countries).

118. *Id.* (Included in the twenty-six remaining nations are eleven of the fifteen liberal nations of old Europe, both non-EU nations, and all thirteen countries of New Europe).

119. *See* European Commission, *Eurobarometer 66: Public Opinion in the European Union, supra* note 116, at 45.

120. *See* The Pew Research Ctr. for the People & the Press, *Less Opposition to Gay Marriage, Adoption and Military Service: Only 34% Favor South Dakota Abortion Ban*, Mar. 22, 2006, *available at* http://people-press.org/reports/display.php3?ReportID=273 (48% of U.S. respondents oppose lesbigay adoption while only 46% favor it; but, these numbers represent an increase in support from seven years earlier when only 38% favored and 57% opposed).

121. *See supra* notes 119-122 and accompanying text. *See further* Paul Vlaardingerbroek,

Adoptions by gays and lesbians are controversial as a matter of public policy because such adoptions deviate from the global ideal of child-raising by a mother and father. Allowing a child to be raised by two "mothers" or two "fathers" insures the child will be deprived of the parenting influence of the missing-gender parent.[122] To begin with, concerns about the social pathologies resulting from fatherlessness makes this controversial. [123] Also, adoptions by gays and lesbians have a political-ideological dimension and seem to reflect an adult-centric rather than child-centric perspective. [124] Further, potential detriment to the child from being raised in a gay or lesbian environment is a serious concern.[125] The homosexual lifestyle is often characterized by hyper-sexualization; indeed, even the nature of "gay" and "lesbian" relationships is defined by sexuality.[126]

Concerns about children being influenced into the gay or lesbian lifestyle are not unfounded, as many studies, including some designed and conducted by pro-gay parenting advocates, have found disproportionate rates of premature sexualization, homosexual identification, and homo-erotic behaviors.[127] Concerns about religious and moral effects on children raised by gays and lesbians are substantial, given the significant moral objections to homosexuality of most religious traditions in the world.[128] Concerns about the impact upon the integrity of the adoption system and of the willingness of parents to relinquish children they cannot care for must be considered.[129] Thus, the transnational adoption of children (especially unrelated children) by lesbigay individuals, partners, and couples raises many serious policy issues.

Trends on (Inter-Country) Adoption by Gay and Lesbian Couples in Western Europe, 18 ST. THOMAS L. REV. 495 (2005) (describing limited gay adoption in Western Europe); Wardle, *Inner Lives, supra* note 8. (describing status of lesbigay adoption in the United States: less than half of the states allow by statute or appellate decision.).

122. *See* Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 187 (2005) [hereinafter Wardle, *Parenthood*].

123. DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 1 (1995) (arguing that separation of children from their fathers is "the engine driving our most urgent social problems, from crimes to adolescent pregnancy to child abuse to domestic violence against women." *Id.* at 1.).

124. Wardle, *Parenthood, supra* note 122, at 187.

125. *Id.*; *see also* Wardle, *Potential Impact, supra* note 7, at 852-67.

126. Wardle, *Inner Lives, supra* note 8.

127. Lynn D. Wardle, Considering the Impacts on Children and Society of "Lesbigay" Parenting, 23 QUINNIPIAC L. REV. 541, 541-44 (2004).

128. *See, e.g.*, Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 463 (2007) ("Most mainstream religions in the United States disapprove of homosexuality, and the Catholic Church, which is the country's largest single religious institution, has taken a particularly strong stance against homosexual conduct."); *see further* Robert P. George, *Group Conflict and the Constitution: Race, Sexuality and Religion: Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L. J. 2475, 2495-2501 (1997)(natural law view of human nature puts procreation at core of marriage, and thus dual gender parenting at core of parenthood) .

129. Wardle, *Inner Lives, supra* note 8 at 529.

B. Concerns About Abuses, Deceptions, and Frauds in Some International Adoptions by Gays and Lesbians

Apart from the controversy surrounding the policy of allowing parentless children to be placed for adoption with gays and lesbians, especially lesbigay couples, disreputable international adoption practices by some gays and lesbians and their supporters in some adoption agencies and service providers have contributed to the controversy surrounding international adoptions by gays and lesbians.

For example, "Chinese regulations explicitly prohibit adoption by homosexual persons,"[130] yet,

> [a] significant number of gay or homosexual individuals reportedly have been adopting Chinese orphans under the form of single parent adoption. It appears that some social workers within the United States are willing to create 'home studies' of homosexual individuals and couples that portray the home as simply that of a 'single' person, thus permitting gay individuals and couples to largely escape the force of laws or customs in sending nations prohibiting or disfavoring gay adoption. Social workers within the United States may perceive these actions as supported by principles related to equal rights for gay persons, the best interests of children, or simply privacy. The result is that the United States sends over documents key to the intercountry adoption process that could be viewed from a Chinese perspective as fraudulent or at least as uninformative. Under these circumstances, one practical means for China to enforce its limit on gay adoption is to limit adoption by single persons. Thus, it is possible that the Chinese policy on single parent adoption is, at least in part, a means of enforcing its prohibition of gay adoption.[131]

This kind of deception and fraud has been occurring for at least a decade.[132] Their practices represent precisely the kind of manipulation, misuse, and exploitation of intercountry adoption that the Hague Convention was intended to eliminate.

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130. Luo & Smolin, *supra* note 30, at 607.

131. *Id.* at 608. *See* Smolin, *Child Laundering, supra* note 67; Smolin, *Intercountry, supra* note 67; Smolin, *The Two Faces of Intercountry Adoption, supra* note 67, at 405.

132. Jessica L. Singer, Note, *Intercountry Adoption Laws: How Can China's One-Child Policy Coincide with the 1993 Hague Convention on Adoption?*, 22 SUFFOLK TRANSNAT'L L. REV. 283, 288 (1998) (*citing* Glenn Schloss, *Americans Queue for Chinese Babies*, SOUTH CHINA MORN. POST, Aug. 10, 1997, at 1).

IV. QUESTIONS ABOUT HOW THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION AND IMPLEMENTING AMERICAN STATUTES AND REGULATIONS WILL AFFECT INTERCOUNTRY ADOPTION BY GAYS AND LESBIANS IN THE UNITED STATES

The recent drop in international adoptions coincides to some extent with the rise of gay and lesbian adoptions in the United States and several other countries.[133] It also appears to coincide with the implementation of the HCIA. These correlations may be purely coincidental; however, critics of the HCIA have predicted that adoption of the Convention by the United States will result in an increase in bureaucracy, expense and delay, and will impede, deter, and ultimately reduce intercountry adoptions.[134] One of the assumed purposes of the HCIA is to encourage international adoption;[135] it would be ironic if one effect of the HCIA was to reduce the number of legitimate international adoptions.

A. Potential for Influencing Adoptions by Gays and Lesbians

It is conceivable the HCIA could be interpreted to require allowance or recognition of some otherwise impermissible intracountry adoptions by gays

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133. *See* Gary Gates, et al., Adoption and Foster Care by Lesbian and Gay Parents in the United States (Urban Institute, March 27, 2007) available at http://adoption.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=adoption&cdn=parenting&tm=13&gps=140_536_1276_863&f=11&su=p284.8.150.ip_&tt=12&bt=0&bts=0&zu=http%3A//www.urban.org/publications/411437.html (last seen 18 February 2008) (estimated 65,500 adopted children are living with lesbian and gay parent(s)); *see further supra* note 118 and accompanying text (UK liberalization of rules to promote gay adoption).

134. *See generally* Blair, *supra* note 107, at 403 (arguing need implementing legislation to focus on reducing bureaucracy and expense); Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181, 189-90 (noting unnecessary bureaucracy and expense of international adoptions generally); *id.* at 194-95.

> However it might be significantly more difficult to accomplish an international adoption under the Convention if countries choose to apply and adapt the Convention in a restrictive manner, focusing solely on the risks presented by adoption and not on the opportunities. The required Central Authority could easily cause problems, leading to the kind of state take-over of the adoption process that has often seriously curtailed international adoption activities.

Id.; Lisa M. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 297-98 (discussing expense and burden of international adoption). "Indeed, the hassles of a bureaucratic maze have significant effects on the prospective parents, the child involved, and the overall procedure. Problems arise in obtaining visas, in completing all of the paperwork, and in the constantly changing laws of sending countries. *Id.* at 298-99; *id.* at 315 (discussing the constraints on independent adoption imposed by the Hague Convention); *id.* at 326 (discussing how the Convention could multiply problem of bureaucratic red tape and cause greater delays); Carlson, *supra* note 96, at 255 (admitting the most frequently asked question about the Hague Convention concerns possible expansion of adoption bureaucracy).

135. *See supra notes* 70 – 95 and accompanying text.

and lesbians.[136] While the issue of lesbigay adoption is not expressly addressed in the Convention,[137] some of the facially neutral provisions of the Convention, such as those promoting the placing of parentless children into "family" environments, might be interpreted as endorsing, or in the view of some advocates, requiring placement of children into the homes of gay and lesbian couples in preference to leaving the children in orphanages or foster care.[138] The "best interests of the child" provision might be construed in the same way.[139]

In The Netherlands, the potential for some impact of the HCIA on adoptions by gays and lesbians in America has been contemplated. In 2004, when the Dutch Parliament was considering legalizing adoptions by gays and lesbians (which it later did), the Parliament asked the government of the Netherlands to investigate whether the United States would allow American children to be adopted by Dutch same-sex registered or married partners.[140] The Dutch Minister of Justice notified Parliament, indicating a new survey would be undertaken in 2005 to see which other countries of origin would be prepared to allow such adoptions. He specifically mentioned surveying the United States. He also "announced that *if the United States would ratify the* [HCIA], he would investigate whether another supplementary bilateral treaty on the matter could be agreed upon between the Netherlands and the United States."[141] Dutch authorities apparently saw ratification of the HCIA by the United States as critical to facilitating intercountry recognition of adoptions by gays and lesbians in the United States.

There are three ways in which the HCIA and implementing laws and regulations might influence adoptions by gays and lesbians in the United States: by direct substantive adoption law requirements, by indirect procedural requirements, and by inter-jurisdictional adoption recognition requirements. The constitutionality of any such impacts upon American laws must also be considered. Thus, there are seven questions about the potential impact of the Hague Convention and implementing regulations in this area:

1. Does the HCIA substantively require or prohibit adoptions by gays or lesbians?

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136. *See generally* Lisa Hillis, Note, *Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?*, 6 IND. J. GLOBAL LEG. STUD. 237, 238 (1998) ("[P]erhaps the Convention can also serve as the first formal recognition of homosexual persons' desirability as intercountry adoptive parents.").

137. *Id.* at 250. *See infra* notes 143-159 and accompanying text.

138. *Id.* at 249-50.

139. *Id.* at 250.

140. Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569, 575 n.29 (2004) (citing Kamerstukken II (Parliamentary Papers of the Lower House) 2003/2004, 28457, nr. 12, *available at* http://www.overheid.nl/op/index.html) (follow "Kamerstukken" hyperlink).

141. *Id.* at 575 (emphasis added).

2. Do American implementing laws or regulations substantively require or prohibit adoptions by gay or lesbian individuals and/or couples?
3. Will HCIA procedures influence adoptions by gay or lesbian individuals and/or couples?
4. Will American implementing laws or regulations influence adoptions by gay or lesbian individuals and/or couples?
5. Does the HCIA require or prohibit recognition of adoptions by gays or lesbians?
6. Do American implementing laws or regulations require or prohibit recognition of adoptions by gay or lesbian individuals and/or couples?
7. Does the HCIA or American implementing laws or regulations violate the Constitution of the United States in any of these respects?

B. Impact of HCIA and IAA on Substantive Adoption Policies

1 Does the HCIA substantively require or prohibit adoptions by gay or lesbian individuals or couples?

With regard to the substantive policies regulating adoption, the HCIA incorporates the domestic laws of the state of origin and the receiving state. The HCIA commits party nations to a few general policies, namely: favoring best interests of children, opposing profiteering and child-selling, preventing undue influence, requiring informed consent, respecting the religious and cultural values of the families, etc.[142] None of those policies or principles endorses or opposes adoptions by gays and lesbians. Nothing in the text of the HCIA provides any requirement or indicates any intent to directly promote or discourage adoptions by gays and lesbians. Nothing in the commentary on or of the drafting history of the Convention demonstrates any such intent.[143] The Convention is "clean" (i.e. neutral and nonpartisan) regarding whether adoptions by gays and lesbians is permitted.

However, some of the substantive standards used in the Convention could operate to prevent placing children for adoption with American gays and lesbians. It uses the local standard of "eligibility" and "suitability" to define whether an adoption by particular adults is appropriate.[144] Central Authorities in both states must agree the adoption is "suitable."[145] The Central Authority in

142. HCIA, *supra* note 2, arts. 4(b), (c)(1)-(3), (d)(2)-(3); 5(a); 7(1)-(2)(a); 9(e); 11(c); 12; 14; 15(1)-(2); 16(1)(b)-(d); 17(a)-(d); 19(1)-(2); 21(1)(b) & (2); 24; & 32(1)-(3).

143. *See infra* notes 147-159 and accompanying text.

144. HCIA, *supra* note 2, art. 5(a), 15(1)-(2).

145. *Id.* art. 17(c), (d).

the receiving state must consider and report on the "suitability" of the prospective adopters, including their "background, family and medical history, social environment, [and] reasons for adoption."[146] In preparing its report regarding adoptability, the Central Authority in the state of origin must consider "the child's upbringing . . . [and] ethnic, religious and cultural background,"[147] and the child's "background, social environment, [and] family history"[148] The match with the prospective parents must be "in the best interests of the child."[149] If followed, these standards could weed out some of the most deceptive, or dangerous international adoptions attempted by gays, lesbians, and other prospective adopters.

The official records of the legislative (drafting and delegate discussion) history of the HCIA clearly shows the Convention was intended and understood to not compel inter-jurisdictional recognition of adoptions by homosexual individuals, couples, or partners.[150] The Official Explanatory Report by G. Parra-Aranguren explained that the Special Commission had specifically considered whether the HCIA should apply to "adoptions applied for by . . . homosexuals or lesbians, living as a couple of individually," and found the issue was "thoroughly examined" and deemed to be a "false problem[]" because of two specific protections in the Convention. First, the state of origin and the receiving state will be cooperating with each other with full disclosure throughout the process and both or either "may refuse the agreement for the adoption to continue" because of the "personal conditions of the prospective adoptive parents." Second, regarding subsequent recognition, "other Contracting States are entitled to refuse its recognition on public policy grounds, as permitted by Article 24."[151]

Because the matter is "a very sensitive one, [A]rticle 2" was drafted to cover "only the adoptions by 'spouses' (male and female) and by 'a person' . . . ."[152] (Of course, when Article 2 was drafted, gay and lesbian couples had never been permitted to marry in any nation, and could not become "spouses" in any

146. *Id.* art. 15(1).

147. *Id.* art. 16(1)(b).

148. *Id.* art. 16(1)(a).

149. *Id.* art. 16(1)(d), 15(1).

150. Hague Conference on Private International Law (HCCH), tome II, *Adoption – Co-operation*, *supra* note 6. I commend my research assistant, Cliff Arthur, for his excellent detective work in finding these pinpoint discussions and cites. An academic colleague who attended some of the Proceedings of the Seventeenth Session mentioned there had been some brief discussion of gay and lesbian adoptions, but we had no idea whether or where in the official record these discussions could be found. The library staff at the Howard W. Hunter Law Library at Brigham Young University Law School diligently persisted in searching for and finding a law library that had and would loan the Proceedings of the Seventeenth Session. My research assistants and I divided up the two volumes to search for any reference to this, and Mr. Arthur's diligence was rewarded when he found the needle in the haystack.

151. *Id.* ¶ 79, at 559-61, ¶ 79.

152. *Id.* at 561, ¶ 80.

nation in the world.)[153] Moreover, while the word "spouses" is used in the English version, Article 2 of the co-official French version of the Convention uses the word "*epoux*," which "only applies to heterosexual couples, because the homosexual couples are known as '*partenariat*' . . . ."[154]

This issue was of concern to a number of countries, and various proposals were introduced to clarify that adoptions by homosexual couples were not covered by the Convention, including Working Document 14, submitted by Korea, and Working Document 15, submitted by Colombia.[155] The Reporter emphasized

> "spouses in the sense of [A]rticle 2 meant a couple of mixed gender and that it was not the purpose of the Convention to determine whether non-married couples or even couples of the same gender shall be allowed to adopt a child. He finally explained that the question . . . would not be decided by the Convention but left to every single country . . . ."[156]

Later, the final Official Report emphasized that the problems of gay and lesbians adopting, surrogacy, and non-family adoptions "are not under the scope of the Convention and should be solved according to the internal law of each contracting state."[157] While the Colombian proposal to explicitly exclude adoptions by same-sex couples from the coverage of the Convention did not succeed because it was deemed unnecessary for the reasons previously stated, the Official Reporter acknowledged "the underlying idea was accepted by a consensus . . . ."[158]

2. *Do American Implementing Laws or Regulations Substantively Require or Prohibit Adoptions by Gay or Lesbian Individuals or Couples?*

Facially, it appears nothing in the International Adoption Act or its implementing regulations generally requires or encourages adoptions by gays and lesbians or directly overturns state adoption policies on this issue.

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153. The Parra-Aranguren Report is dated December 31, 1993 and reflects research, reports, and discussions occurring even earlier. Same-sex couples were not permitted to marry in any nation until nearly seven and one-half years later, on April 1, 2001, when the Netherlands became the first, and for several years the only, nation to allow same-sex marriage.

154. Hague Conference on Private International Law (HCCH), tome II, *Adoption – Co-operation*, *supra* note 6, at 561, ¶ 83.

155. *See, e.g., id.* at 359-63 (proposal by Colombian delegate, endorsement by Costa Rican delegate).

156. *Id.* at 362.

157. *Id.* at 561, ¶ 82.

158. *Id.* at 561, ¶ 84. The Report specifically noted the Conference indicated a preference for married spouses, provided priority for placement in families, and recognized the importance of family stability. *Id.*

Consistent with the Convention, the IAA provides "a state or political subdivision thereof [is not preempted] from enacting any provision of law with respect to [intercountry adoption]" so long as it is not inconsistent with the Convention or the IAA.[159]

C. Impact of HCIA and IAA on Procedural Adoption Policies

1. Will HCIA procedures influence adoptions by gay or lesbian individuals or couples?

The HCIA requires compliance with some significant procedural protections before intercountry adoptions between party nations can occur. None of those procedures directly promote or prevent adoptions by gays and lesbians. Nothing in the text of the HCIA provides any requirement or indicates any intent to directly promote (or discourage) adoptions by gays and lesbians.

However, the Convention procedures are not entirely "neutral." Some of the procedural provisions of the Convention appear to be designed to prevent the fraud , deception and abuse committed when some American gays and lesbians adopt children from foreign countries in violation of foreign adoption policies.[160] For example, the mandatory disclosure of information to the Central Authorities in the receiving state regarding prospective adopters' "background, family and medical history, social environment, [and] reasons for adoption,"[161] and the mandatory transfer of such reports to the Central Authority in the state or origin to determine if the adoption is "eligible" and "suitable" could prevent some abuses. Mandatory disclosures and mandatory informed consent procedures applicable to the child and his/her parents or guardians[162] and prohibition of inducing payment[163] may also prevent some fraud and some buying of babies by controversial would-be adopters. The transparency provisions and greater government scrutiny of adoptions may discourage or reduce some lesbigay adoption, in at least some countries.[164]

2. Will American Implementing Laws or Regulations Procedures Influence Adoptions by Gay or Lesbian Individuals or Couples?

It appears that nothing in the procedural requirements of the IAA or its implementing regulations directly encourages or discourages adoptions by gays and lesbians or directly overturns state adoption policies on this issue.

159. 42 U.S.C. § 14953(a) (2000).
160. *See infra* notes 143-45, and accompanying text.
161. HCIA, *supra* note 2, art. 15(1).
162. *Id.* art. 4(c)(1)-(3).
163. *Id.* art. 4(c)(1)-(2).
164. Hillis, *supra* note 136, at 251-52.

However, like the HCIA, the IAA establishes procedural protections potentially preventing illicit practices by gays, lesbians, and other controversial adopters. For example, he IAA requires the agency facilitating the adoption to "ensure[] that a thorough background report (home study) on the prospective adoptive parent or parents has been completed in accordance with the Convention and with applicable Federal and State requirements and transmitted to the Attorney General with respect to each Convention adoption."[165] The report shall include:

> a full and complete statement of all facts relevant to the eligibility of the prospective adopting parent or parents to adopt a child under any requirements specified by the central authority of the child's country of origin . . . including, in the case of a child emigrating to the United States for the purpose of adoption, the requirements of the child's country of origin applicable to adoptions taking place in such country.[166]

The U.S. Secretary of State is responsible for annually requesting the central authorities from all other party states to "specify . . . restrictions on the eligibility of persons to adopt, with respect to which information on the prospective adoptive parent or parents in the United States would be relevant,"[167] and to make such information available to all agencies, persons, or entities performing home studies.[168] These procedures may catch attempts to circumvent adoptions by persons ineligible to adopt under the law of the state of the child's origin. Similarly, requiring certification that the adoption is in the best interests of the child may reduce prohibited adoptions.[169]

D. Impact of HCIA and IAA on Adoption Recognition Policies

1. Does the HCIA Require or Prohibit Recognition of Adoptions by Gays or Lesbians?

One of the express purposes of the HCIA is to "secure the recognition in Contracting States of adoptions made in accordance with the Convention."[170] Article 23 expressly requires recognition by party states of adoptions between party states completed pursuant to the Convention. Such intercountry adoptions "shall be recognized by operation of law in the other Contracting States."[171] However, one express provision of the Hague Convention appears

165. 42 U.S.C. § 14923(b)(1)(a)(ii) (2007).
166. *Id.*
167. 42 U.S.C. § 14912(b)(2) (2007).
168. 42 U.S.C. § 14912(b)(3) (2007).
169. 42 U.S.C. § 12932(a)(2).
170. HCIA, *supra* note 2, art. 1(c).
171. *Id.* art. 23(1).

to protect the right of nations (and arguably of American states) to refuse to recognize foreign adoptions by gay and lesbian partners and couples. Article 24 provides: "[t]he recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child."[172] This *ordre public* or *public policy* exception to recognition of foreign judgments reflects the historic private international law rule concerning judgment recognition.[173]

This nonrecognition provision in the Convention is intended to embody a narrow exception.[174] First, the adoption must be "manifestly contrary to . . . public policy" in the forum state. This requirement would seem to be satisfied when a state has a statute or unambiguous appellate court ruling forbidding adoption by gay or lesbian partners or couples.[175] Second, that the nonrecognition decision must also take into account the "best interests of the child[,]" adds another factor intended to discourage (but not deny) the exercise of the power to deny recognition. Thus, whether the child would be abandoned or left without legal support or guardian could influence (but need not dictate) the decision.[176] However, since the Convention provides the child may be placed with another prospective adopter in the receiving state if the adoption fails, suggesting the Convention is comfortable with alternative child-care arrangements, it is unlikely that nonrecognition of particular gay or lesbian adoptions would clearly harm the best interests of the child in many cases.

The legislative history of the Hague Convention on the ability of a Contracting State to decline recognition of an adoption by gay or lesbian couples or individuals under Article 24 is somewhat cloudy. As to the general scope of Article 24, the language suggests a somewhat narrow exception was favored. Further, as a general matter, the official Report notes that "the fact that the recognizing State does not have the institution of adoption, or a particular form of adoption, cannot be used as a ground to deny recognition to foreign adoptions."[177] However, as to the specific question of whether the public policy exception of the Convention indicating a contracting state could decline to recognize an adoption by homosexual couples or individuals from another contracting state, the official Report explicitly declares that the ability

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172. *Id.* art. 24.

173. *See generally* Seymore, *supra* note 107, at 381; *see* Hilton v. Guyot, 159 U.S. 113, 167-68, 230 (1895).

174. Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53, 58 (1994) (*ordre public* exception intended to be used "only in rare and very narrow circumstances" and almost never by a third-party state).

175. *See supra* note 73, and accompanying text.

176. *See generally* Hillis, *supra* note 136, at 250-51; Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption & Reproduction*, 2 DUKE J. GENDER L. & POL'Y 5, 8-9 (1995) (endorsing lesbigay adoptions).

177. Hague Conference on Private International Law (HCCH), tome II, *Adoption – Co-operation*, *supra* note 6, ¶ 428, at 617. The U.S. delegate, and delegates from other nations, introduced various unsuccessful proposals to narrow the scope of the public policy exception. *Id.* ¶¶ 421-28, at 616-17.

of signing States to refuse recognition of such adoptions is one of the safety-net protections for states opposed to such adoptions that made it unnecessary to specifically exclude adoptions by gay or lesbian couples or individuals from coverage of the Convention.[178] The Reporter repeatedly emphasized that the matter was for the individual contracting states to decide individually; no state would be required to alter its internal law regarding such issues.[179]

2. Do American Implementing Laws or Regulations Require or Prohibit Recognition of Adoptions by Gay or Lesbian Individuals or Couples?

What the Convention gives in the way of a public policy exception, Congress may have taken away under the IAA. The Convention provides: "[a] final adoption in another Convention country, certified by the Secretary of State pursuant to subsection (a) of this section or section 303 [42 U.S.C. 14932(c)], shall be recognized as a final valid adoption for purposes of all Federal, State, and local laws of the United States."[180] The certification is to be given to American citizens who adopt children abroad pursuant to the Convention.[181] In principle, the adoption by gays or lesbians in a foreign country will not be allowed if it would not be permitted in the home state of the adopting United States citizen.[182]

However, this provision only applies to adoptions by United States citizens of foreign children.[183] For example, it does not appear to mandate recognition in the United States of Dutch lesbigay adoptions by Dutch citizens. Otherwise, the language of the House Committee Report is an oversimplification.[184]

Nonetheless, the potential for two-step mandatory inter-state recognition remains. Simply put, if Massachusetts and foreign authorities do not object to placing a foreign child with a Massachusetts lesbian couple for adoption in Massachusetts, the adoption may proceed. Thereafter, if the lesbian parents move to another state in which adoptions by lesbians are prohibited and not known in the law, the IAA and regulations appear to require recognition of that adoption in all other states. The constitutional obligation of states to recognize adoptions not otherwise allowed in their territories is not clear; the historic

178. *Id.* at 559, ¶ 79.

179. *Id.* at 559, ¶ 81; *id.* at 358-362; *id.* at 617 ¶ 428.

180. 42 U.S.C. § 14931(b) (2007).

181. 42 U.S.C. § 14931(a).

182. But, in some cases, a person may begin an adoption in Massachusetts, where lesbigay adoption is permitted, then move to Florida, which prohibits such adoption, where the adoption is completed. The action of the Florida authorities would be necessary to prevent violation of state policy. See *id.*

183. 42 U.S.C. § 14931(a)(1).

184. H.R. REP. NO. 106-691, at *28 (2000).

practice appears to allow non-recognition in some cases,[185] suggesting that historic practice and doctrine may be jeopardized by the IAA and the new regulations.

E. Constitutionality of Such Provisions

Should the Hague Convention be interpreted as requiring states to allow or recognize adoptions of children by lesbians and gays, it would create serious constitutional questions.[186] The Supreme Court has stated that the Constitution cannot be amended by treaty.[187]

Moreover, federalism in family law is one of the foundational principles of constitutional law, and a treaty depriving the states of their reserved sovereignty to regulate adoption would fly in the face of over two centuries of deference to the constitutional supremacy of states in matters of family law.[188]

One objection to the proposed Constitution in 1787 addressed by Madison and Hamilton in several essays in *The Federalist Papers* argued the strengthened national government would "absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes."[189] In addition, the authors were concerned the federal government might leave "the governments of the particular states" impotent[190] and effect "an abolition of the State governments . . . ."[191] In *The Federalist*, No. 10, James Madison famously declared: "[t]he federal Constitution forms a happy combination . . . ; the great and aggregate interests being referred to the national, the local and

185. *See generally* Lynn D. Wardle, *A Critical Analysis of Interstate Adoption Recognition of Lesbigay Adoption*, 3 AVE MARIA L. REV. 561, 561-68 (2005).

186. *See generally* Richard G. Wilkins & Suzanne H. Curley, *Defining Offenses Against the Law of Nations: A Statutory Solution to Determine the Binding Effect of International Law*, (forthcoming). *See also* Richard G. Wilkins & Jacob Reynolds, *International Law and the Right to Life*, 4 AVE MARIA L. REV. 123 (2006).

187. The Cherokee Tobacco, 78 U.S. 616, 620 (1870) ("It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument"); *see also* Reid v. Covert, 354 U.S. 1, 16 (1957) ("[n]o agreement with a foreign nation can confer power on the Congress or on any other branch of Government which is free from the restraints of the Constitution."); Missouri v. Holland, 252 U.S. 416, 432 (1920) ("It is said that a treaty cannot be valid if it infringes the Constitution"); Holden v. Joy, 84 U.S. 211, 243 (1872) (finding treaties are valid "if not inconsistent with the nature of our government and the relation between the States and the United States"); Doe v. Braden, 57 U.S. 635, 657 (1854) (finding courts "have no right to annul or disregard any . . . provisions" of a treaty unless it violates the Constitution).

188. Lynn D. Wardle, Tyranny, Federalism and the Federal Marriage *Amendment*, 17 YALE J. L. & FEMINISM 221, 221 (2005) (discussing history of and justifications for federalism in family law); *see* Richard G. Wilkins, et al., *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 412 (2003) ("[w]e have concluded that the CRC's sweeping reconstruction of family life lies beyond Congress' reach.").

189. THE FEDERALIST NO. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

190. THE FEDERALIST NO. 45 ,at 288 (Clinton Rossiter ed., 1961).

191. THE FEDERALIST NO. 9,at 76 (Clinton Rossiter ed., 1961).

particular to the State legislatures."[192] Thus, Madison reassured readers the states would exercise full sovereign governmental authority over matters of local, domestic concern under the Constitution. In *The Federalist* No. 14, he emphasized:

> [T]he general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. *The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity.*[193]

The use of the verb "retain" indicates that the states were to keep the same full authority over "all those other objects which can be separately provided for" that the states historically exercised. Madison emphasized that the states would be as supreme in the areas of their retained sovereignty (including the regulation of family relations) as the national government was in its delegated fields of sovereignty.[194] In *The Federalist* No. 45, he further explained:

> The powers delegated by the proposed constitution to the federal government are few and defined. Those that remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . *The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.*[195]

In numerous cases over many years, the Court has emphasized and protected federalism in family law. For example, in 1975 the Court upheld a one-year durational residence requirement for divorce against an individual rights (travel) constitutional challenge.[196] In language oft-repeated, Justice Rehnquist stated: "domestic relations . . . [have] long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact."[197]

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192. THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).
193. THE FEDERALIST NO. 14, at 102 (James Madison) (Clinton Rossiter ed., 1961).
194. THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).
195. THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).
196. Sosna v. Iowa, 419 U.S. 393, 410 (1975).
197. *Id.* at 404. *See also* Sherrer v. Sherrer, 334 U.S. 343, 362 (1948) (mem.) ("The

Thus, if the HCIA were interpreted or applied as transferring power of state adoption policy (including whether states must recognize lesbigay adoptions from other states, which were not previously recognized), it would raise a very substantial constitutional issue, possibly impeding the effectiveness of the HCIA in the United States.

V. CONCLUSION

Ironically, encouraging intercountry adoption is not one of the formal objectives of the Convention.[198] Establishing safeguards and procedures for stopping abuses existing in a small-but-sensational minority of international adoptions are explicit objectives of the HCIA; one way to achieve those objectives is to significantly reduce international adoptions, slowing them to a trickle of exactingly screened, perfectly comfortable adoptions. From the restrained language of the HCIA, it appears the drafters believed that the abuses they wanted to stop were partially caused by too much enthusiasm for intercountry adoption and that if they expressed direct support for intercountry adoption that might lead to more abuse.

Thus, a skeptic might view the HCIA as an *anti*-intercountry adoption instrument. However, the Convention: (1) "[r]ecogniz[es] that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin[;]"[199] (2) obligates Central Authorities to co-operate and, "as far as possible, eliminate any obstacles" to its application;[200] and (3) mandates Central Authorities to "facilitate . . . and expedite proceedings with a view to obtaining the [intercountry] adoption[s]"[201] and to "take all necessary steps to obtain permission for the child to leave the state of origin and to enter and reside permanently in the receiving state."[202] As a practical matter, the institutions, organization, procedures, and requirements established by the HCIA have created a system for international adoptions which could entice more nations to permit their parentless children to be adopted by families in other countries; it could also facilitate more, rather than fewer, intercountry adoptions. Indeed, in the first dozen years of its existence, the number of international adoptions steadily increased.

Because international adoption is seen by some as evidence of the country of origin's failure to adequately provide for all of its children, of imperialistic intrusion by receiving foreign countries, or as exploitation of the poverty of parents in the sending country by adoptive couples from the rich receiving country, countries sending significant numbers of children to be adopted abroad

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[f]ramers left [the] power over domestic relations in the several States, and every effort to withdraw it from the States within the past sixty years has failed.").

198. HCIA, *supra* note 2, art. 1.

199. *Id.* Preamble.

200. *Id.* art. §7(2)(b).

201. *Id.* art. §9(b).

202. *Id.* art. §18.

seem to go through cycles of permissive and restrictive adoption.[203] To some extent, the HCIA appears to have been drafted during one of the restrictive cycles in international adoption, responding to several high-profile abuses of lax international adoption regulations in a number of nations and exploitation of the lack of integrating mechanisms between countries in such adoptions.

The Hague Convention might also be viewed by a skeptic as a device intended to restrict, limit, impose upon, and give the international community control and supervision over adoptions in the United States, at least adoptions of foreign children by United States citizens. Since the United States of America generally receives and effectuates approximately as many intercountry adoption of children from foreign countries as *all* other nations in the world combined,[204] that will be the practical effect of the Hague Convention when it comes into force in the United States. In structure, design and content, the Hague Convention reflects a "unified" and "civilian" (as opposed to federal and common law) approach to adoption regulation.[205] The HCIA utilizes unitary standards, central government control, government pre-approval requirements, expansive government supervision, extensive government bureaucracy and distrust of and limited scope for private initiative. This is at variance with the American tradition of encouraging private endeavors, individualism, flexible government regulation, pragmatic supervision, and of generally trusting private individuals and organizations.[206]

Whether, and how, creation of a Central Authority in the United States and implementation of bureaucratic requirements of the Convention will impact the flow of intercountry adoptions into the United States remains to be seen. Abuses due to government under-regulation of intercountry adoption may be replaced by abuses due to oppressive government over-regulation. The abuses of a few private adoption agencies may be replaced by the tyranny of monopolized agencies and central authorities. The occasional tragedies of overzealous enthusiasm for intercountry adoption may be replaced by the even more frequent tragedies of unassisted, parentless children being relegated or abandoned to institutional care in miserable warehouses for unwanted children in third-world countries, while families yearning to love and raise those children remain childless and child-deprived in the world's most affluent nations. The HCIA and its implementing laws also could become instruments for the international promotion and mandatory intercountry recognition of lesbigay adoptions.

Alternatively, the institutions, standards, and procedures established by

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203. Wardle, *Parentlessness*, *supra* note 5, at 348; Kleem, *supra* note 5, at 338-41.

204. *See supra* notes 32 – 40 and accompanying text.

205. Kales, *supra* note 107, at 477; *see also* Gina M. Croft, Note, *The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 GA. J. INT'L. & COMP. L. 621, 631 (2005).

206. Kales, *supra* note 107, at 477; *see also* Gina M. Croft, Note, *The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 GA. J. INT'L. & COMP. L. 621, 631 (2005).

the HCIA may significantly reduce or eliminate many current intercountry adoption abuses (such as baby-selling, profiteering, and fraud). The Convention organizations, structure, and requirements may work to facilitate intercountry adoptions of the world's parentless, abandoned, and institutionalized children in even greater numbers. The transparency required by the HCIA may eliminate the deception, fraud, and disregard of national policies in many countries by ineligible prospective adopters, including some gays and lesbians. It may encourage finding homes with a mother and a father for thousands more of the world's parentless children, and it may protect the policies of states that have high dual-gender parenting standards for couple adoptions. The HCIA has great potential, but whether the HCIA will follow a path of positive development or one of detrimental development depends upon many decisions by policy-makers in the United States and other nations in the future.

Thus, the future impact of the Hague Convention on Intercountry Adoption is uncertain, and seems to be in our hands. May we all work diligently toward the goals of implementing the Hague Convention to make intercountry adoption more abuse-free, lawful, and respectful of each nation's adoption policies and values to provide responsible family homes to more of this world's needy, parentless children.

APPENDIX 1:

Outline of the Hague Convention on Intercountry Adoption

Chapter I - Scope of the Convention

Art. 1. Objectives to establish safeguards, protect best interest of the child, prevent child trafficking, ensure recognition of intercountry adoptions.

Art. 2. Convention applies when "a child habitually resident in one Contracting State ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either for permanent adoption or after such adoption.

Art. 3. Convention applies only to adoption of children under eighteen years old.

Chapter II - Requirements for Intercountry Adoption

Art. 4. "Competent authorities" in the state of origin establish eligibility of the child for adoption, that placement is in the child's best interests, that required counseling and consents have been given properly and

without improper financial inducement. However, if the adoption is in derogation of certain Articles of the Convention by bilateral treaty states may choose to deny recognition to such adoptions.

Art. 5. "Competent authorities" in the receiving state must determine that the prospective adoptive parents are eligible and suitable to adopt, and that "the child is or will be authorized to enter and reside permanently in that State."

Chapter III - Central Authorities and Accredited Bodies

Art. 6. Each signatory state must designate at least one Central Authority to fulfill convention obligations.

Art. 7. Central Authority must cooperate with central authorities in other party states to protect children; accomplish the purposes of the Convention; and take, give and keep information.

Art. 8. Central Authority must prevent improper gain from adoption.

Art. 9. Central Authority must get and provide information needed to complete intercountry adoptions, to provide useful reports, and promote adoption counseling.

Art. 10. Central Authority must accredit only competent bodies.

Art. 11. Accredited bodies must be non-profit, staffed by qualified, ethical, supervised persons, and must communicate to the Hague Permanent Bureau information about designation and accreditation.

Art. 12. A body accredited in one state can only act in other states if also accredited there.

Art. 13. Central Authorities must exchange contact and organizational information.

Chapter IV - Procedural Requirements in Intercountry Adoptions

Art. 14. The intercountry adoption process begins with application by the adopters to the Central Authority of the state of their habitual residence.

Art.15. If satisfied that the applicants are eligible and suited to adopt, that Central Authority sends a report to the Central Authority in the child's state of origin.

Art.16. If satisfied that the child is adoptable, and that all consents have been properly obtained, that Central Authority sends a report to the

Central Authority in the receiving state.

Art.17. Agreement to the adoption and compliance with the standards by both Central Authorities required.

Art. 18. Both Central Authorities to facilitate immigration of child.

Art. 19. Both Central Authorities to comply with all requirements before child is transferred.

Art.20. Cooperation and communication between the Central Authorities is emphasized.

Art.21. Procedures governing failed adoptions. If after transfer of the child but before adoption is completed the Central Authority determines the adoption is not in the child's best interest, another placement in the receiving state is preferred.

Art.22. Central Authorities may designate other public authorities, accredited bodies, and qualified persons to perform Central Authority functions under its supervision.

Chapter V - Recognition and Effects of the Adoption

Art.23. "An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States."

Art.24. Recognition may be refused "only if the adoption is manifestly contrary to [such state's] public policy, taking into account the best interests of the child."

Art. 25. If the adoption is in derogation of certain Articles of the Convention by bilateral treaty, states may choose to deny recognition to such adoptions.

Art.26. Recognition includes recognition of the child-adoptive parent relationship, parental authority, and termination of prior parent-child relationship if according to the law of the state of adoption.

Art.27. By conversion under the law of the receiving state, parental rights of an adopted child may be terminated.

Chapter VI - General Provisions

Art.28. Convention allows but does not require the state of origin to

be the place of adoption.

Art.29. Contact between adoptive and biological parents or guardians before proper consents have been taken is forbidden generally.

Art. 30. Preservation of information required and optional access to child and parental identity information authorized.

Art. 31. Information to be used only for authorized purposes.

Art. 32. Payment of actual costs, expenses, and reasonable professional fees allowed but "improper financial or other gain" from intercountry adoption prohibited.

Art. 33. Central Authorities obliged to remedy violations of the Convention.

Art. 34. Translation of documents for authorities in the receiving state required upon request.

Art. 35. Central Authorities obliged to act expeditiously in adoptions.

Art. 36. In states with federal or plural legal systems, the laws and authorities of the applicable local unit of habitual residence incorporated.

Art. 37. Law of state determines which legal system applies.

Art. 38. Plural legal systems treated same as unitary legal systems.

Art. 39. Preserves existing obligations under other international instruments regarding international adoption, and permits party states to enter into other agreements with party states to improve implementation of the Convention in derogation of most of the Central Authority Articles.

Art. 40. Other reservations to the Convention forbidden.

Art. 41. Convention applicable to all applications received after the Convention is in force in both the receiving state and state of origin.

Art. 42. Secretary General of the Hague Conference must periodically convene a Special Commission to review operation of the Convention.

Chapter VII - Final Clauses

Art. 43. Ministry of Foreign Affairs of the Netherlands is the depositary of the Convention, and receives instruments of ratification,

acceptance or approval by Hague Conference member states and other states who participated in the HCIA Session.

Art. 44. Depository to receive instruments of accession by other states also.

Art. 45. States with federal or plural legal systems may make the Convention applicable to all those units or only certain units.

Art. 46. The Convention enters into force in a state three months after it deposits its ratification, acceptance, approval, or accession. The Convention obligations do not apply between that state and any Party State who timely objects to the newly acceding state.

Art. 47. A state may withdraw from the Convention by depositing notice of denunciation, effective twelve months later.

Art. 48. The depository is obliged to notify the Hague Conference States and other party states of signatures, ratifications, acceptances, approvals, accessions, and denunciations.

Source: Hague Conference on Private International Law, Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption, available at http://www.hcch.net./index_en.php?act=conventions.text&cid=69, (last seen March 1, 2007), *reprinted in* 32 I.L.M. 1134 (1993).

APPENDIX 2

IMMIGRANT VISAS ISSUED TO ORPHANS COMING TO THE U.S.

Year	# Visas
2006	20,679
2005	22,728
2004	22,884
2003	21,616
2002	20,099
2001	19,237
2000	17,718
1999	16,363
1998	15,774
1997	12,743
1996	10,641

1995 - 8,987
1994 - 8,333
1993 - 7,377
1992 - 6,472
1991 - 8,481
1990 - 7,093

Source: U.S. Department of State, Bureau of Consular Affairs, *Immigrant Visas Issued to Orphans Coming to the U.S.*, available at http://travel.state.gov/family/adoption/stats/stats_451.html (last visited Nov. 15, 2007).

APPENDIX 3
OUTLINE OF INTERCOUNTRY ADOPTION ACT OF 2000

PUB. L. 106-279, *CODIFIED AT* 42 U.S.C. §§ 14901-44 (2000)

TITLE I-UNITED STATES CENTRAL AUTHORITY

Sec. 101. Designation of Central Authority.
Sec. 102. Responsibilities of the Secretary of State.
Sec. 103. Responsibilities of the Attorney General.
Sec. 104. Annual report on intercountry adoptions.

TITLE II-PROVISIONS RELATING TO ACCREDITATION AND APPROVAL

Sec. 201. Accreditation or approval required in order to provide adoption services in cases
subject to the Convention.
Sec. 202. Process for accreditation and approval; role of accrediting entities.
Sec. 203. Standards and procedures for providing accreditation or approval.
Sec. 204. Secretarial oversight of accreditation and approval.
Sec. 205. State plan requirement.

TITLE III-RECOGNITION OF CONVENTION ADOPTIONS IN THE UNITED STATES

Sec. 301. Adoptions of children immigrating to the United States.
Sec. 302. Immigration and Nationality Act amendments relating to children adopted from Convention countries.
Sec. 303. Adoptions of children emigrating from the United States.

TITLE IV-ADMINISTRATION AND ENFORCEMENT

Sec. 401. Access to Convention records.
Sec. 402. Documents of other Convention countries.
Sec. 403. Authorization of appropriations; collection of fees.
Sec. 404. Enforcement.

TITLE V-GENERAL PROVISIONS

Sec. 501. Recognition of Convention adoptions.
Sec. 502. Special rules for certain cases.
Sec. 503. Relationship to other laws.
Sec. 504. No private right of action.
Sec. 505. Effective dates; transition rule.

Source: Implementation of the Hague Convention on Intercountry Adoption-Report of the House Committee on International Relations, H.R. REP. NO. 106-691 (2000).

RETHINKING NAFTA'S NAALC PROVISION: THE EFFECTIVENESS OF ITS DISPUTE RESOLUTION SYSTEM ON THE PROTECTION OF MEXICAN MIGRANT WORKERS IN THE UNITED STATES

Adam Brower*

INTRODUCTION

Since its novel inception in 1994, the North American Agreement on Labor Cooperation (NAALC), a labor side agreement to the North American Free Trade Agreement (NAFTA), has been the center of heated political debate.[1] Over the past decade, experts and proletarians alike have lined up on both sides of this debate armed with conjectures and experiential data that both claim to bolster their support for and/or defiance of this truly innovative[2] agreement.[3] Mirroring that debate should be a discussion of the NAALC's inclusion of migrant worker protection in its eleven core Labor Principles, and whether the NAALC has been both proficient and effective in actually protecting Mexican migrant workers in the United States.

Protection of migrant workers' rights in the U.S. is an extremely important endeavor considering migrant workers make up an estimated three-and-one-half-percent of the U.S. labor force[4] and can be considered the "threads that hold together the tapestry we call North America."[5] Moreover,

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1. Brianna Busch, *Free Trade Agreements and Labor Considerations After the NAALC; How the U.S.-Chile Free Trade Agreement Created a Faulty Template*, 4 INT'L BUS. L. REV. 59, 61 (2004), *available at* http://www.alsb.org/international/ijrnl/busch/busch2004.pdf.

2. Commission for Labor Cooperation, Foreword, http://www.naalc.org/english/report4_1.shtml (last visited Nov. 20, 2007). *See also infra* notes 24-33 of this Note and the accompanying text.

3. Busch, *supra* note 1, at 61.

4. Susan M. Richter et al., *Impacts of Policy Reform on Labor Migration from Rural Mexico to the United States* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 11428, 2005), *available at* http://www.nber.org/papers/w11428 (last visited Nov. 21, 2007).

5. Commission for Labor Cooperation, GUIDE TO LABOR AND EMPLOYMENT LAWS FOR MIGRANT WORKERS IN THE UNITED STATES 7, http://www.naalc.org/migrant/english/pdf/guide_en.pdf (last visited Nov. 21, 2007) [hereinafter GUIDE].

with accounts of migrant workers in America "liv[ing] in poverty, [and] endur[ing] poor working conditions," we must look long and hard at the laws and regulations in the U.S. to see if they are of sufficient standing and are utilized to their maximum potential.[6] Since the NAALC was specifically created for protecting labor rights, and given the fact that it explicitly calls for the protection of migrant workers' rights,[7] the center of that focus should be on the dispute resolution mechanism espoused in the NAALC, itself.[8]

As the NAALC may be becoming a model for new labor agreements,[9] and as the U.S. looks to regulate and conform to the continuing influx of migrant workers,[10] now is the time to start the evaluation process yet again. Part I of this Note will briefly describe the history of the NAFTA within the political climate that existed at that time. This should then shed light on how the NAALC eventually came to fruition and why it so instrumental in changing the way we look at labor guidelines.

This Note will then discuss the intricacies of the NAALC's dispute resolution system and the process by which the three countries and their inhabitants can file a claim against another participating country. This initial understanding of the resolution process will prove crucial in determining its effectiveness as a whole, especially as it relates to protecting migrant workers particularly. To comprehend the full effect this process has on the Mexican migrant workers in the U.S., Part II of this Note will focus on who comprises the migrant workforce spilling from the border of Mexico into the U.S. and why these people seek work north of their native land. This insight will give a foundation for understanding the hardships the migrant workers face while in the U.S., which then opens the door for understanding why migrant workers need the protection of the NAALC in the first place. Then, Part III of this Note discusses the tribulations the migrant workers face by analyzing their quandaries through the lens of the U.S. laws and regulations formulated and required by the NAALC to protect them.

This groundwork permits Part IV of this Note to address whether the dispute resolution system has been effective in protecting the rights of Mexican migrant workers in the U.S. This will be accomplished through evaluating the submissions filed in Mexico against the U.S. for alleged failures to protect the Mexican migrant workers within its borders. Submissions filed in Canada

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6. Katrina Bull, *The NAALC Boomerang: Another Backfired Attempt to Advance U.S. Migrant Workers' Right of Freedom of Association*, 14 INT'L LEGAL PERSP. 6, 4 (2004).

7. COMMISSION FOR LABOR COOPERATION, PROTECTION OF MIGRANT AGRICULTURAL WORKERS IN CANADA, MEXICO, AND THE UNITED STATES, Introduction, *available at* http://www.naalc.org/english/pdf/study4.pdf (last visited Nov. 21, 2007) [hereinafter PROTECTION OF MIGRANT WORKERS].

8. Bull, *supra* note 6, at 11.

9. Busch, *supra* note 1, at 60.

10. Julie Watts, *Mexico-U.S. Migration and Labor Unions: Obstacles to Building Cross-Border Solidarity* 4 (The Center for Comparative Immigration Studies, Working Paper No. 79, 2003).

against the U.S. will also be examined as a comparative tool to determine whether the issues raised are exclusively Mexican-American labor relations or are more universally applicable. The outcome of those submissions will help analyze just how effective the submission process is overall. Ultimately, Part V of this Note will address the advantages and disadvantages of the resolution system; and in return, will promote continued improvement in the NAALC's areas of strength, while, if possible, systematically offering alternative ways to improve the process.

I. A BRIEF INTRODUCTION TO THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

A. A Broad Overview of NAFTA and Its Side Agreements

Nearly five years before NAFTA was enacted, Canada and the U.S. established their own accord, the U.S.-Canada Free Trade Agreement, to alleviate some concerns over the shared border between the two countries.[11] Having observed the initial success of the accord between the U.S. and Canada, President Salinas of Mexico initiated preliminary talks with President George H. Bush in hopes of establishing a similar agreement between the U.S. and Mexico.[12] Soon thereafter, President Bush wrote the U.S. Congress concerning Mexico's interest as well as Canada's rejuvenated curiosity in a trilateral agreement between the nations.[13] Negotiations quickly began among the three countries in mid-1992, and by December of 1992, the three countries concluded their negotiations and signed the NAFTA.[14] Its goals were to eliminate barriers to trade, promote conditions of fair competition in free trade, increase investment opportunities between the three countries, and provide adequate and effective protection and enforcement of intellectual property rights for the three countries.[15]

Shortly after signing the agreement, the U.S. was in the midst of a

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11. Vancouver Career College, The History of NAFTA – North American Free Trade Agreement, http://www.vancol.com/history-of-nafta.cfm (last visited Nov. 21, 2007).

12. *History of NAFTA*, http://www.mtholyoke.edu/~vochoa/WorldPoliticsFolder/history2.html (last visited Nov. 21, 2007) [hereinafter Mtholoyoke]. President Salinas actually wrote President Bush a letter in an attempt to begin preliminary negotiations on August 21, 1990. *Id.*

13. *Id.* As Canada, Mexico, and the United States eventually signed a trilateral Free Trade Agreement, the original U.S.-Canada Free Trade Agreement was then "suspended due to NAFTA." Duke Law, *NAFTA*, http://www.law.duke.edu/lib/researchguides/nafta.html (last visited Nov. 21, 2007).

14. Mtholoyoke, *supra* note 12.

15. North American Free Trade Agreement, U.S.-Can.-Mex. art. 102, Dec. 17, 1992, 32 I.L.M. 289 (1983).

presidential election[16] and President Bush was "touting NAFTA as a major achievement."[17] The Democratic presidential hopeful, William Clinton, criticized NAFTA's lack of specific detail as to labor rights in all the three countries, and specifically, the deficiency of standards for Mexican workers in Mexico.[18] This was a real concern, because in 1992 the Mexican workforce was earning approximately $0.58/hour, while the U.S. federal minimum wage was much higher at $4.25/hour; therefore, Clinton often spoke of the fear that U.S. businesses would move south in search of cheaper labor.[19]

Consequently, during his race for presidency, Clinton touted his general support for the prior NAFTA accord; yet, he proposed two "side agreements" be added to address labor problems and environmental issues, both of which were scarcely mentioned in the original agreement.[20] Clinton went on to defeat President Bush during the 1992 election and, soon after taking office, immediately began talks with Canada and Mexico to discuss his suggested side agreements.[21] During those negotiations, Canada and Mexico agreed on the need for the side agreements; in August of 1993, the three countries signed the NAALC and the North American Agreement on Environmental Cooperation (NAAEC).[22] Both side provisions went into effect on January 1, 1994.[23]

B. The Specifics of the NAALC and Its Dispute Resolution System

The NAALC was the first agreement of its kind and brought about changes prior agreements had yet to encompass.[24] For example, the NAALC is "the first international agreement on labor issues that has been coupled with a free trade agreement," and the oversight commission it established within it, is the first "international body since the creation of the International Labor Organization in 1919 to be dedicated solely to labor rights."[25] Furthermore, the

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16. Bull, *supra* note 6, at 10. The two candidates vying for the 1992 presidency were incumbent, President George H. Bush, and his challenger, and eventual winner, President William Clinton. *Id.*

17. CONCEPTS AND STRATEGIES IN INTERNATIONAL HUMAN RIGHTS 140 (George J. Andreopoulos ed., 2002) [hereinafter HR Concepts].

18. Bull, *supra* note 6.

19. *Id.* (citing Karla Shantel Jackson, *Is Anything Ever Free? NAFTA's Effect on Union Organizing Drives and Minorities and the Potential of FTAA Having a Similar Effect*, 4 SCHOLAR 307, 324 (2002)). *See also* Frederick Englehart, *Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation*, 29 CASE W. RES. J. INT'L L. 321, 349-50 (1997).

20. HR Concepts, *supra* note 17.

21. *Id.*

22. *Id.* Both side agreements went into effect on January 1, 1994. *Id.* at 140-41.

23. *Id. See also* NATHANIEL GOETZ ET AL., A BLUEPRINT FOR NAFTA: THE UNITED STATES, CHILE, AND THE FUTURE OF THE NORTH AMERICAN FREE TRADE AGREEMENT 14-17 (2001).

24. COMMISSION FOR LABOR COOPERATION, *supra* note 2, at Foreword.

25. ABOUT NAALC, http://www.duke.edu/web/pps114/policy2003/2f/index4.html (last

NAALC extended to the International Labor Organization (ILO) by including "protections for migrant workers and workers' compensation."[26] The NAALC is also uniquely "non-invasive," because it does not affirmatively require that any of the three countries create or adopt any new laws regarding worker rights, nor does it mandate the commitment to any international standards.[27] Instead, it requires the three countries to enforce those laws already existing within each country.[28] At the core of the NAALC, the agreement states all three countries agree to a common collaboration of seven objectives.[29] The countries must also "commit themselves" to the following eleven Labor Principles:

1. Freedom of association and protection of the right to organize;
2. The right to bargain collectively;
3. The right to strike;
4. Prohibition of forced labor;
5. Labor protections for children and young persons;
6. Minimum employment standards;
7. Elimination of employment discrimination;
8. Equal pay for women and men;
9. Prevention of occupational injuries and illnesses;
10. Compensation in cases of occupational injuries and illnesses;
11. Protection of migrant workers.[30]

These principles encompass five basic worker rights from the U.S. trade laws,[31] six core ILO labor standards,[32] and two additional rights: workers' compensation and migrant worker protection.[33] The principles are sub-divided into three groups: Group I: Labor Principles 1, 2, and 3; Group II: Labor Principles 4, 6 (as it relates to overtime pay), 7, 8, 10, and 11; Group III: Labor Principles 5, 6 (as it relates to minimum wages), and 9.[34]

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visited Nov. 21, 2007) [hereinafter ABOUT NAALC].

26. Bull, *supra* note 6, at 11 (quoting Joel Solomn, *Trading Away Human Rights: The Unfulfilled Promise of NAFTA's Labor Side Accord*, HUMAN RIGHTS WATCH 1 (2001)).

27. U.S. DEP'T OF STATE, CRS REPORT FOR CONGRESS: NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER THE WORKER RIGHTS AND FAST-TRACK DEBATE 6, Order Code 97-861 E, *available at* http://fpc.state.gov/documents/organization/8118.pdf (last visited Nov 21, 2007) [hereinafter CRS Lessons].

28. *Id.*

29. Commission for Labor Cooperation, Objectives of the NAALC, http://www.naalc.org/english/objective.shtml (last visited Nov. 21, 2007). Those standards include improving working conditions and living standards, promoting the eleven Labor Principles in the agreement, encouraging cooperation for innovation and productivity and quality, encouraging publication and exchange of information with joint studies, pursuing cooperative labor-related activities for mutual benefit, promoting compliance and enforcement of the labor laws of each country, and to foster transparency in the administration of the laws. *Id.*

30. *Id.*

31. CRS Lessons, *supra* note 27, at n. 5.

32. *Id.*

33. *Id.* Migrant worker protection is the focus of this Note.

34. *Id.* at 7. These classifications play a major role in how each Labor Principle is treated during the dispute resolution stage of the NAALC provision, which will be discussed in Part V,

The NAALC is governed by the Commission for Labor Cooperation (Commission), located in Washington, D.C., which consists of labor ministers from the U.S., Mexico, and Canada.[35] The three labor ministers also have a support staff called the Secretariat.[36] The Secretariat conducts "regular and special research reports on comparative labor law and labor market issues as well as serv[es] as the administrative arm of the Commission."[37] All members of the Secretariat are considered "international civil servants" who should not and cannot "take instruction from any government."[38]

Significantly, a dispute can only be brought directly to the Commission when one of the countries disputes the lack of enforcement or the inappropriate application of another country's labor laws.[39] All other complaints,[40] by either individuals or those who make up a group of people, must go through the National Administrative Office (NAO)[41] of the person or group's native country.[42] For all practical purposes, any "labor law matter" relating to one of the eleven Labor Principles can be grounds for a submission.[43] Concomitantly, throughout the history of the NAALC, many entities, such as trade unions, human rights organizations, labor lawyers for associations, and student groups, have filed submissions.[44]

Once the complaint is received, each NAO of the affected country can meet with one another to confer and hold hearings on the matter in question.[45] If the NAO officials cannot come to an agreement, the labor ministers from the

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subsection A., *infra*. *Id.*

35. HR Concepts, *supra* note 17, at 141. The ministers get together once a year to discuss the Commission's work and the "implementation of the [a]greement" as a whole. *Id.*

36. CRS Lessons, *supra* note 27, at Fig. 2.

37. HR Concepts, *supra* note 17, at 141.

38. *Id.* This is important because it gives the Secretariat a truly independent point of view, hoping decisions and research will not be biased toward outside, governmental influences. *See id.*

39. ABOUT NAALC, *supra* note 25. For example, if the United States thought Mexico was failing to implement its labor laws, the United States could file directly to the Commission. *Id.*

40. "Complaint" is a term coined by the media in place of the verbiage "submissions" or "public communication," as it is referenced in Article 16(3) of the NAALC agreement. HR Concepts, *supra* note 17, at 141.

41. Each NAO is headed by a Secretary and is located in the labor department of each of the three countries. CRS Lessons, *supra* note 27, at CRS-7. It is also important to note all three NAOs have different procedures for filing an actual dispute. *Id.*

42. *Id.* The United States and Mexico allow submissions from citizens or organizations within the United States or outside the country; however, the submission cannot involve a matter arising from the same country in which it is filed. *Id.* at n. 7. Therefore, if the claimed violation was in the United States by a Mexican citizen, the submission could not be filed in the United States and must be filed in Mexico against the United States. CRS Lessons, *supra* note 27, at CRS-7.

43. HR Concepts, *supra* note 17, at 142.

44. *Id.* "[A]ny citizen of any country or organization based in any country can submit a complaint to any of the NAOs." *Id.*

45. CRS Lessons, *supra* note 27, at CRS-7.

affected countries may be consulted regarding a potential resolution.[46] If no agreement is reached at this stage, the Ministerial Council (MC) may be summoned along with help from the Secretariat. [47]

At this stage, the distinction between the three groups of Labor Principles established under the NAALC agreement becomes important.[48] Up to this point, all three groups were entitled to NAO review and Ministerial Consultation; however, if the complaint has yet to be resolved by either stage, and if the complaint falls under Group I, the process ends.[49] For Group II, including the protection of migrant workers, and Group III, if the dispute is not settled, the MC can refer the matter on a "case-by-case basis" to the Evaluation Committee of Experts (ECE).[50] The ECE is made up of an independent,[51] three-person team which "performs a comparative study" on the labor principal(s) specifically addressed by the MC.[52] The ECE may then conduct investigations of "alleged non-enforcement" and issue its proposal, which is then evaluated by the MC once more.[53] Although the recommendations are non-binding, they are publicly declared; consequently, it is possible pressure will be placed upon the affected government to act in accordance with its offerings.[54] Nonetheless, not one complaint out of the thirty-four filed has made it past the MC's review; therefore, speculating as to what the possible results is mere conjecture.[55]

If the ECE is unable to resolve the issue, or if the MC is unwilling to follow its recommendation, all complaints under Group II principles are tabled, while complaints under Group III principles progress to the final stage, which is a review by an Arbitral Panel (AP).[56] The AP is made up of five members who are on the MC's "roster" and has the authority to implement monetary fines

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46. *Id.*

47. *Id.* The Ministerial Council is made up of the U.S. Secretary of Labor in Washington and the equivalent counterparts from Canada in Ottawa and Mexico in Mexico City. *Id.*

48. *See supra* note 34. Part I, Subsection B., *infra* provides further explanation regarding what constitutes the three main groups.

49. GARRET D. BROWN, MAQUILADORA HEALTH AND SAFETY SUPPORT NETWORK, NAFTA'S 10 YEAR FAILURE TO PROTECT MEXICAN WORKERS' HEATH AND SAFETY, at tbl.2, *available at* http://mhssn.igc.org/NAFTA_2004.pdf (last visited Nov. 22, 2007).

50. CRS Lessons, *supra* note 27, at CRS-7.

51. Independent as used by this author suggests that it is outside of the Commission and consists of three experts summoned by the MC. *Id.*

52. HR Concepts, *supra* note 17, at 142.

53. CRS Lessons, *supra* note 27, at CRS-7. However, if the complaint is determined by the MC the "matter is not trade-related or is not covered by mutually recognized labor laws," the ECE may not rule on the matter. *Id.* at n. 8.

54. HR Concepts, *supra* note 17, at 142.

55. *See* U.S. Dep't of Labor, *Status of Submissions Under the North American Agreement on Labor Cooperation (NAALC), available at* http://www.dol.gov/ilab/programs/nao/status.htm (last visited Jan. 7) [hereinafter Dep't of Labor Summary].

56. *See* CRS Lessons, *supra* note 27, at CRS-4, CRS-7.

against a country that has failed to "enforce its own standards."[57]

Sanctions may include trade sanctions on the "firm, industry, or sector" which is the cause of the submission in the first place.[58] The maximum penalty may be to suspend the NAFTA benefits up to "the amount of the monetary penalty (which may be no greater than NAFTA benefits from tariff reductions) for one year."[59] Importantly, only violations of the Group III principles, including minimum wage, child labor, and safety and health, can bring about sanctions, while the remaining eight Labor Principles are left without recourse.[60] In the thirteen-plus years it has been in existence, no submissions have reached the AP stage.[61] As a result, little legal authority exists to compel the three countries to enforce their own standards; instead, the process is simply seen as a "[c]ooperative consultation" process for settling disputes.[62]

II. A BRIEF LOOK AT THE TYPICAL MEXICAN MIGRANT WORKER IN THE U.S. AND THE CONDITIONS THEY FACE

> Migration is one of the major ties that bind our societies. It is important that our policies reflect our values and needs, and that we achieve progress in dealing with this phenomenon.... we [] believe there should be an order framework for migration that ensures humane treatment, legal security, and dignified labor conditions.[63]

A. The Typical Mexican Migrant Worker

A migrant worker is generally defined as "any person who for the purpose of obtaining work moves from his or her permanent residence or place of origin and takes up temporary residence elsewhere."[64] Conservative estimates have Mexican migrant workers at three-and-one-half percent[65] of the U.S. workforce, while other approximations have these numbers closer to four

57. *Id.*
58. HR Concepts, *supra* note 17, at 142.
59. CRS Lessons, *supra* note 27, at CRS-7.
60. *See id.* at Summary.
61. *See* Dep't of Labor Summary, *supra* note 55.
62. CRS Lessons, *supra* note 27, CRS-9.
63. A co-released statement by President George W. Bush and President Vicente Fox. *See* Watts, *supra* note 10, at 12, n. 23, *available at* http://www.whitehouse.gov/news/releases/2001/02/20010220-2.html (last visited Nov. 22, 2007).
64. PROTECTION OF MIGRANT WORKERS, *supra* note 7, at intro.
65. Richter, *supra* note 4, at 2.

percent.[66] The population of Mexican workers in the U.S. has more than doubled in the past decade, and nearly forty-three percent of the future U.S. jobs will not require an advanced degree to fill, opening the door further for the availability of more work for Mexican migrant workers.[67]

The actual breakdown of the jobs Mexican migrant workers are filling in the U.S. and the demographics of where the migrant workers domicile are important. Many owners and managers have consistently relied and will persistently lean on Mexican migrant labor in industries such as: "factories, restaurants, hotels, construction sites, hospitals, orchards, and innumerable other places of employment . . . ."[68] With these industries struggling with continued worker shortages in America,[69] Thomas J. Donahue, a former President and C.E.O. of the U.S. Chamber of Commerce, testified in 2001 before the U.S. Senate about U.S.-Mexico migration and queried, "[w]ho will fill the millions of essential worker positions that we will create? Immigration must be one answer."[70]

In fact, the U.S. Department of Labor found sixteen of the top thirty occupations in the U.S. with the highest projected job growth between years 2000-2010 will require only minimal education and "short-term, on-the-job training."[71] Although many of the migrant workers coming from Mexico have little to no formal education, they do have the requisite skills to satisfy these job vacancies in the U.S., as well as the ability to be trained; thus, making them perfectly suited to fit the needs the U.S. Department of Labor has determined exist and will subsist for quite some time.[72] Because of this continual need, nearly every American industry has seen a "dramatic increase in its reliance on

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66. American Immigration Law Foundation, *Mexican Immigrant Workers and the U.S. Economy: An Increasingly Vital Role*, IMMIGRATION POLICY FOCUS, Sept. 2002, *available at* http://www.ailf.org/ipc/ipf0902.asp [hereinafter AILF]. This statistic is quite staggering when compared to 1990, where Mexican immigrants comprised only two percent of the American workforce; thus, between 1990 and 2000, the number of Mexican immigrants working in the United States doubled. *Id.*

67. *Id.* As the United States is seeing an increase in citizens with formal education and a lesser likelihood those people will fulfill these new jobs, the door is left wide open for migrant workers to perform the unattractive work that the formally educated would rather not entertain. *Id.*

68. *Id.*

69. *Id.*

70. *Evaluating a Temporary Guest Worker Proposal: Hearing Before Immigration, Border Security and Citizenship Subcommittee of the Senate Committee on the Judiciary*, 107th Cong. (2004) (quoting statement of Richard R. Birkman, President, Texas Roofing Company of Austin on behalf of the National Roofing Contractors Association (NRCA)), *available at* http://www.ewic.org/CongressionalHearing/Senate02122004.html. *See also* AILF, *supra* note 66.

71. AILF, *supra* note 66. The U.S. Dep't of Labor also found 15.1% of future employment opportunities will require only "moderate-term on-the-job training." Daniel E. Heckler, *Occupational Employment Projections to 2010*, MONTHLY LABOR Review, Nov. 2001, at 83, *available at* http://www.bls.gov/opub/mlr/2001/11/art4full.pdf.

72. *See AILF*, *supra* note 66.

Mexican workers [since] the 1990s."[73] Given the presence of these industries throughout the U.S., nearly "every state of the Union" has seen an increase in the number of Mexican immigrants looking for work.[74]

B. Where Are the Mexican Migrant Workers Living and Working in the U.S.?

In 1990, California, Texas, and Illinois employed approximately eighty-five percent of all the Mexican migrant workers in the U.S.[75] Today, this percentage has dropped to sixty-eight percent in those three states, while other parts of the U.S. have seen increases in areas not "traditionally associated with Mexican immigration."[76] The U.S. Census Bureau divides the U.S. into nine regions: New England, Middle Atlantic, East North Central, West North Central, South Atlantic, East South Central, West South Central, Mountain, and Pacific.[77] From years 1990 to 2000, all but one region more than doubled its percentage of Mexican migrant workers.[78]

Remarkably, East South Central (Alabama, Kentucky, Mississippi, and Tennessee) experienced a 3,808% increase, while West North Central had the second highest total growth at 520%.[79] The South Atlantic saw a 493% boost, while New England and the Middle Atlantic also saw increases in the mid-300% range.[80] In a purely numerical sense, the Pacific states, including California, had the highest augmentation of Mexican migrant workers, with 954,216 workers from years 1990 to 2000.[81] Texas, in the West South Central region, saw an increase of 510,000 Mexican workers during the same period.[82]

C. Conditions Migrant Workers Face in the U.S.

Most of the immigrants coming to the U.S. from Mexico do so with little or no formal education and often with little comprehension of the English language.[83] A majority seek refuge in the U.S. in hopes of "escap[ing] poverty in their countr[y] of origin, to earn money to send back to their families, most

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73. *Id.* For specific industrial breakdowns, *see generally id.* at tbl.2.

74. Inter-American Commission on Human Rights, *Special Rapporteurship on Migrant Workers and Their Families*, para. 159, *available at* http://www.cidh.org/Migrantes/2003.eng.cap5c.htm (last visited Nov. 22, 2007).

75. AILF, *supra* note 66.

76. *Id.*

77. U.S. Census Bureau, Census Regions and Divisions of the United States, *available at* http://www.census.gov/geo/www/us_regdiv.pdf (last visited Oct. 12, 2007).

78. AILF, *supra* note 66, at tbl.4.

79. *Id. See also* AILF, *supra* note 66.

80. *Id.*

81. *Id.*

82. *Id.*

83. *See id.*

often their children, and to save money for their futures."[84] As a result of these conditions, and due to financial, educational, and linguistic limitations, the workers are often subject to "egregious conditions" in the workplace, with little understanding of their rights while in the U.S. [85]

Unfortunately, wide spread reports indicate labor is being trafficked into the U.S., with workers being "deceived about the conditions of their [future] employment," only to be placed into programs of forced labor and servitude while in the U.S. [86] In those environments, the workers often make less than the U.S. minimum wage, work over nineteen hours a day, are subject to psychological and physical abuse, and are refused permission to speak to or come in contact with people outside their work environment.[87] As it relates to farming and the agricultural community in the U.S., "[m]ost migrant farmworkers . . . 'live in poverty, [and] endure poor working conditions[,]'"[88] with some conditions described as "sweatshops in the fields."[89] In fact, the average migrant farm worker in the U.S. makes around $7,500 per year, well below the U.S. poverty level.[90] These conditions led Cesar Chavez[91] to state, "[i]t is ironic that those who till the soil, cultivate and harvest the fruits, vegetables, and other foods that fill your tables with abundance have nothing left for themselves."[92]

While not every migrant worker who enters the U.S. from Mexico suffers from such poverty, it exists on a large enough scale it must be considered when evaluating whether migrant workers are truly protected.[93] Given the NAALC is intended as a means to voice concerns regarding the treatment of migrant workers, it is important to evaluate both the positive and

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84. Human Rights Watch, *Hidden in the Home: Abuse of Domestic Worker with Special Visas in the United States* 1 (2001), *available at* http://www.hrw.org/reports/2001/usadom/usadom0501.pdf [hereinafter Hidden in the Home].

85. *Id.* at 1.

86. *Id.*

87. *Id.*

88. Bull, *supra* note 6, at 4 (quoting Laboris, Unofficial Translation of Public Communication on Labor Law Matters Arising in the United States submitted to the NAO of Mexico under the NAALC, *available at* http://labor.uqam.ca/anacdt.htm (last visited Oct. 12, 2007).

89. Bull, *supra* note 6, at 4 (quoting Global Exchange, *Campaigns: Farmworkers,* ,www.globalexchange.org/countries/americas/unitedstates/farmworkers/ (last visited Oct. 12, 2007).

90. *Id.*

91. *See generally* lasCulturas.com, *The Story of Cesar Chavez,* http://www.lasculturas.com/aa/bio/bioCesarChavez.htm (last visited Oct. 12, 2007). Cesar Chavez was an outspoken leader for Mexican workers' rights and fought hard, with some success, for changes both in the United States and Mexico and to raise labor standards. *Id.*

92. Bull, *supra* note 6, at 5-6.

93. Hidden in the Home, *supra* note 84. Human Rights Watch (HRW) determined that all the conditions listed in n. 86 and accompanying text of this Note were present in five of the forty-three cases they reviewed, while, at least one of those conditions was prevalent in most of the employment relationships examined. *See generally id.*

negative conditions migrant workers face once they enter the U.S. After all, "[m]igrant workers are one of the threads that hold together the tapestry we call North America."[94]

III. A BRIEF INTRODUCTION INTO THE LAWS AND REGULATIONS REGARDING MIGRANT WORKERS WITH THE U.S.

A. How Does One Become a Mexican Migrant Worker in the U.S?

A large number of Mexican migrant workers come into the U.S. by one of three legal ways: (1) the family reunification system, (2) an employment-based visa system, and/or (3) through some sort of temporary worker visa program.[95] The family reunification system allows immigrant workers within the U.S. to sponsor relatives in their native country, with hopes those relatives may eventually come to the U.S. as legally admitted immigrants.[96] Some of the larger employment-based visa system classifications include: on-campus employment as a student,[97] off-campus employment due to severe economic hardship,[98] extraordinary aliens,[99] religious workers,[100] and NAFTA professionals.[101] Under a temporary worker program, Mexican migrant workers can enter the U.S. through numerous legal avenues.[102] A few workers gain visas as H-1A nurses, H-1B aliens in specialty occupations, while many also obtain visas as H-2A temporary agricultural service workers, H-2B other workers, or a H-3 temporary trainees.[103]

Despite the numerous avenues existing for Mexican immigrants to enter the U.S. legally, a great number of Mexican migrant workers enter the U.S. illegally.[104] Estimates from 2005 suggest nearly six million unauthorized

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94. Guide, *supra* note 5, at intro.

95. AILF, *supra* note 66.

96. Federation for American Immigration Reform, *Chain Migration*, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters3e2a, (last visited Oct. 12, 2007). As a result of the family reunification system, a large number of Mexican immigrants are not admitted for their ability to contribute to the U.S. work force, but rather because of their relationship to a current worker in the United States who has chosen to sponsor them abroad. *Id.*

97. *See* BARBARA BROOKS KIMMEL & ALAN M. LUBINER, ESQ., IMMIGRATION MADE SIMPLE, AN EASY-TO-READ GUIDE TO THE U.S. IMMIGRATION PROCESS 5, 16 (7th ed. 2006).

98. *Id.* at 5, 18.

99. *Id.* at 35. Extraordinary Aliens often times have "extraordinary ability in the sciences, arts, education, business or athletics." *Id.* Many out of country television and motion picture stars are labeled under this category while they reside in the United States. *Id.*

100. *Id.* at 37.

101. *Id.* at 38.

102. *Id.* at 20-25. *See also* notes 108-111 and accompanying text.

103. *Id. See also* notes 108-111 and accompanying text.

104. Michael Hoefer et al., *Estimates of the Unauthorized Immigrant Population Residing*

Mexican immigrants were living in the U.S., the vast majority of whom had sought some type of employment.[105] For many Mexican immigrants, the choice of illegal entry may be attributed to the low probability they have of being allowed into the U.S. legally for employment reasons when compared to the success rate of admittance for immigrants seeking work from other countries.[106] In 1999, only 29.3% of the Mexicans admitted to the U.S. received employment visas, while immigrants from other countries averaged around 45.3% percent.[107]

Adding to the pressure to enter illegally, most migrant workers face long lines and even longer waiting periods to gain admittance into the U.S. legally.[108] All the while, the need from employers in the U.S. steadily surpasses the supply of American citizens willing to fill vacant jobs.[109] Moreover, in 1998, 43.5% percent of the Mexican migrant employment-based visas issued were for H-2A temporary agricultural jobs.[110] Therefore, if a Mexican migrant worker wishes to work in an American industry other than agriculture, his or her chances of gaining the legal, temporary visa he or she desires is both statistically unlikely and temporally burdensome.[111]

The NAFTA was enacted, partially and purposefully, to help ebb the flow of illegal immigrants from Mexico who are in search of work inside the U.S.[112] In 1986, prior to the NAFTA, the Immigration and Reform and Control Act (IRCA) was established in hopes of obtaining the same goal.[113] The IRCA had two primary functions: (1) to make the hiring of illegal aliens grounds for both fines and/or imprisonment against employers, and (2) to "provide[] amnesty to illegal aliens who . . . lived in the U.S. continually since 1982, if they applied before 1988."[114] Despite similar goals, the NAFTA and NAALC have been at odds with one another since their creation.[115] Because amnesty was granted to so many by IRCA, future generations have been rushing to the U.S. borders, hoping similar amnesty deals may be on the horizon, while employers sit willing to employ them, despite the threat of hefty fines and possible imprisonment.[116]

These elements help explain, but are by no means all-encompassing,

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in the United States: January 2005, http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf (last visited Oct. 12, 2007).

105. *Id.*
106. AILF, *supra* note 66.
107. *Id.*
108. *Id.*
109. *See supra* notes 68-74 and accompanying text for further explanation.
110. AILF, *supra* note 66.
111. *Id.*
112. Richter, *supra* note 4, at 2.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*

why the U.S. has seen a steady influx of illegal immigrants from Mexico in search of work and a better life. Once these workers enter the U.S. from Mexico, whether documented or undocumented,[117] the protections of U.S. laws and regulations along with the guarantees delineated in the NAALC instantaneously vest in those workers.[118]

B. Significant Laws and Regulations that Effect Mexican Migrant Workers in the U.S.

Once more, the NAALC requires the U.S., Mexico, and Canada to enforce the laws each respective country has in place for the protection of workers' rights, whether native or foreign-born.[119] Accordingly, it is important for the analysis of this Note to look at a few, significant laws established for the defense of workers rights in the U.S.

In general, workers in the U.S., whether documented or undocumented,[120] have many of the same rights that other workers around the world enjoy.[121] Those rights include, but are not limited to: "the right to form and join unions, the right to compensation if injured on the job, the right to a safe workplace, the right to be free from forced labor, and the right to be free from discrimination in the workplace."[122] Within those confines, migrant workers can file complaints for alleged violations in several ways: (1) with the different local or federal agencies charged with upholding the specific law(s) in question,[123] (2) with "legal aid" offices' assistance for low-income immigrants,[124] and/or (3) with the

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117. "Undocumented workers" is a classification label for those workers who have not gained valid working permits and have not registered with the U.S. government in order to legally obtain work as a foreign born worker. *See generally* GUIDE, *supra* note 5, at Guide to Labor Relations Law in the United States. Most U.S. laws and regulations treat the documented and undocumented workers the same. *Id.* "However, certain remedies for unfair labor practices, such as reinstatement or back pay for work not performed" are available to documented workers, but are not extended to undocumented workers under the National Labor Relations Act. *Id.* Also, undocumented workers do not receive unemployment insurance. *Id.* at Foreign Workers' Guide to Labor and Employment Law in the United States.

118. *See generally* GUIDE, *supra* note 5; *see also* North American Free Trade Agreement, *supra* note 15.

119. *See supra* note 28 and accompanying text.

120. *See supra* note 114 for further explanation of benefits not afforded to undocumented workers.

121. GUIDE, *supra* note 5, at Foreign Workers' Guide to Labor and Employment Laws in the United States 1.

122. *Id.*

123. *Id.* at 2-3. Those state or federal agencies include, but are not limited to: (1) the federal Equal Employment Opportunity Commission for discrimination in the workplace, etc; (2) the federal Wage and Hour Division of the Dep't of Labor for an employer's failure to pay the minimum wage, or for overtime, or withholds payment all together, etc; (3) the state or federal Occupational Safety and Health Administration for reporting unsafe working conditions, etc; and (4) the state Dep't of Labor for unfair termination of employment, etc. *Id.*

124. *Id.* at 3.

NAO office in the country where he or she is originally from.[125]

The U.S. has specifically enumerated protections for labor relations rights under the National Labor Relations Act (NLRA) as well. These include the right to:

1. Form, join or assist labor organizations to organize the employees of an employer;
2. Bargain collectively through representatives of their own choosing;
3. Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, typically to modify wages or working conditions;
4. Strike to secure better working conditions;
5. Refrain from union activity.[126]

Under the NLRA, a worker must be classified as an "employee" before they can receive protection.[127] Several workers do not receive protection under the NLRA by definition, including agricultural workers, domestic workers, managers, supervisors, confidential employees, independent employees, and employees covered by the Railway Labor Act.[128] The NLRA typically covers foreign workers, which include documented or undocumented migrant workers; however, undocumented workers may not seek the remedies of reinstatement and back pay for work not performed.[129] It is important to note farm workers, who make up an average of 43.5% of those who gain visas to work in the U.S., are not included in the protection of the NLRA.[130]

The NLRA does protect against several unfair labor practices: (1) employer threats of termination of employment if the workers joins a union, (2) questioning workers of their "sympathies or activities in circumstances that tend to interfere with . . . their rights . . . ," (3) discouraging union support by offering rewards for non-involvement, and (4) "[t]ransferring, laying off, terminating or assigning" workers more difficult jobs because of their chosen enrollment in union activities.[131]

The U.S. also protects migrant workers from forced labor under The Victims of Trafficking and Violence Protection Act of 2000 and other U.S. laws.[132] Forced labor usually comes in one of the following forms: (1) an

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125. *See generally* North American Free Trade Agreement, *supra* note 15. *See also* notes 38-47 and accompanying text for explanation on the N.A.O submission process.

126. GUIDE, *supra* note 5, at Guide to Labor Relations Law in the United States 1.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* However, a few states do provide other legal protections to help compensate for the lack of federal protection under the NLRA. *Id.*

131. *Id.*

132. GUIDE, *supra* note 5, at Guide to Laws Prohibiting Forced Labor in the United States 2. Under these provisions, it does not matter whether an individual is a foreigner or a citizen of the United States. *See generally* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

employer threatening physical harm on its employees if they leave the job, (2) an employer threatening to destroy passports or immigration papers, (3) an employer attempting to keep his/her employee from traveling, (4) a "coyote"[133] requiring the workers to work for free as payment for smuggling them into the country, (5) an employer requiring workers to work to pay off their debt, and (6) employers forcing workers to partake in prostitution.[134]

While in the U.S., migrant workers are also entitled to certain minimum employment standards, which include "minimum wages, overtime pay, legal wage deductions, unemployment compensation, and time off from work for family and medical leave."[135] Curiously, farm workers do not have the right to receive overtime pay, while undocumented non-farming related workers do.[136] Additionally, the Family Medical Leave Act allows all employees, both documented and undocumented, to take off work for the birth or adoption of a child; to care for a child, spouse or parent; and/or to accommodate the employee's serious health complications.[137] Mexican migrant workers are also entitled to protection from employment discrimination due to "race, color, national origin, sex, religion, age, or disability."[138] This safeguard affords workers freedom from being fired, paid less or receiving fewer benefits, and/or receiving sexual harassment because of their race, color, nationality, etc.[139]

All workers, even those absent an official work permit, are also assured a healthy and safe workplace.[140] This pledge is governed by the Occupational Safety and Health Act (OSH Act), overseen by the Occupational Safety and Health Administration (OSHA), which requires employers to: (1) maintain OSH standards, (2) inform employees of those standards, (3) retain safety equipment and tools, (4) provide training and medical exams when necessary, (5) report to OSHA when mandated, and (6) post and provide remedies for citations issued by OSHA.[141] A few programs are also designed to further

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133. U.S. Immigration Support, *Illegal Immigration*, http://www.usimmigrationsupport.org/illegal_immigration.html (last visited Nov. 22, 2007).

134. GUIDE, *supra* note 5, at Guide to Laws Prohibiting Forced Labor in the United States 1.

135. GUIDE, *supra* note 5, at Guide to Minimum Employment Standards, Pay Deductions and Unemployment Compensation in the United States 1. Fortunately, both undocumented and documented workers are entitled to the U.S. minimum wage with very few exceptions. *Id.*

136. *Id.*

137. *See generally* The Family and Medical Leave Act, Pub. L. No. 103-3, §§ 101-601 (1993). *See* U.S. Dep't of Labor, *The Family and Medical Leave Act (FLA)*, http://www.dol.gov/compliance/laws/comp-fmla.htm (last visited Oct. 12, 2007).

138. GUIDE, *supra* note 5, at Guide to Employment Discrimination Laws in the United States 1.

139. *Id.* at 1-2. Again, these protections are guaranteed to all workers, documented, undocumented, foreign, farmer or otherwise, and are best raised with the EEOC. *Id.*; *see generally* U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/ (last visited Nov. 22, 2007) (providing more information on the EEOC).

140. GUIDE, *supra* note 5, at Guide to On-the-Job Safety and Health in the United States 1.

141. *Id.* at 1-2. *See generally* U.S. Dep't of Labor, Occupational Safety and Health Administration, http://www.osha.gov (last visited Nov. 22, 2007) (providing more information

protect farm workers, even beyond the confines of the OSH Act.[142] The Field Sanitation Standard,[143] the Office of Pesticide Programs,[144] and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)[145] are a few instances in which the U.S. government goes above and beyond OSHA regulations and requirements.[146]

In most cases, the U.S. allows workers to be compensated if and when they are injured while on the job.[147] In general, most workers are entitled to workers' compensation benefits[148] if they are hurt on the job, and employers are not allowed to "retaliate" against any worker for filing a workman's compensation claim.[149] Foreign workers, including those with H-2A visas, are entitled to workers' compensation, regardless of whether they are documented; however, farm workers are not entitled to workers' compensation in every state.[150] Interestingly, employees may not sue their employer over workers' compensation; instead, employees may merely file a workers' compensation claim and/ appeal it if all administrative remedies are denied.[151]

Despite the aforementioned protections guaranteed to migrant workers under the U.S. laws, the NAALC process has yet to remedy a single alleged violation of those laws over the past thirteen years.

IV. SUBMISSIONS FILED BY MEXICO AS AGAINST THE U.S. AND A COMPARATIVE LOOK AT CANADA'S SUBMISSIONS AGAINST THE U.S.

To appreciate the breadth of where most of the filings originate, it is essential to step back and view the entire status of submissions under the NAALC. As of July, 2006,[152] thirty-four submissions had been filed under the auspices of the NAALC.[153] Of the twenty-one submissions filed by the U.S.,

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on OSHA).

142. GUIDE, *supra* note 5, at Guide to On-the-Job Safety and Health in the United States 2.

143. *Id.*

144. *See generally* U.S. Environmental Protection Agency, Pesticides, http://www.epa.gov/pesticides (last visited Nov. 22, 2007) (providing more information on the U.S. Environmental Protection Agency and its policies on Pesticides).

145. *See generally* U.S. Dep't of Labor, Employment Law Guide, http://www.dol.gov/compliance/guide/mspa.htm (last visited Nov. 22, 2007).

146. *See generally* U.S. Dep't of Labor, Occupational Safety and Health Administration, http://www.osha.gov (last visited Nov. 22, 2007) (providing more information on OSHA).

147. GUIDE, *supra* note 5, at Guide to On-the-Job Injuries 1.

148. Most benefits include medical benefits, wage benefits, and vocational rehabilitation benefits. *Id.* at 4.

149. *Id.* at 1.

150. *Id.* at 2. Though most states require employers of farmworkers to carry workers' compensation insurance, a few states such as Alabama, Indiana, Kansas, Kentucky, Mississippi, Nebraska, New Mexico, North Dakota, Rhode Island, South Carolina, and Tennessee do not. *Id.* at 2.

151. *Id.* at 3-4.

152. The United States Dep't of Labor has yet to revise the list of submissions since its last update in July of 2006. Dep't of Labor Summary, *supra* note 55, at Overview.

153. *Id.*

nineteen were against Mexico, while the remaining two were against Canada.[154] All of Mexico's submissions were against the U.S., while Canada filed three against Mexico and two against the U.S.[155] The U.S. has had eight submissions reviewed by the MC, while Mexico has had five and Canada has had only one, none of which have gone beyond ministerial review.[156]

A. A Quick Look at the Mexican Submissions Filed Against the U.S.

On February 9, 1995, the Mexican Telephone Workers Union filed Mexico NAO Submission 9501 (SPRINT) concerning a subsidiary of the Sprint Corporation which had been purposefully closed just before a vote for union election consolidation was to occur.[157] While the NLRB originally ruled in favor of the workers, on December 27, 1996, a U.S. Appeals Court overturned its decree.[158] Nonetheless, a ministerial consultation was requested to discuss the "effects of such a plant closure on union organizing efforts."[159] The U.S. Secretary of Labor and the Mexican Secretary of Labor and Social Welfare held a public forum in California to "allow interested persons an opportunity to convey their concerns about the effects of sudden plant closings."[160] In June of 1997, the tri-national Labor Secretariat also conducted a study on effect of sudden plant closings on the freedom of association and workers' rights to organize; however, the plant was never re-opened and the workers never regained their lost jobs.[161]

On April 13, 1998, the Local 1-675 of the Oil, Chemical, and Atomic Workers International Union (OCAW), along with the "October 6" Industrial and Commercial Workers Union, the Labor Community Defense Union (UDLC), and the Support Committee for Maquiladora Workers (SCMW), filed Mexico NAO Submission No. 9801 (SOLEC).[162] The submission claimed Solec, Inc. and the U.S. despoiled their: (1) freedom of association, (2) right to organize, (3) right to bargain collectively, (4) assured federal minimum wage requirement, (5) guaranteed employment standards, and (6) right to a safe and

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154. *Id.*

155. *Id.*

156. *Id.*

157. Human Rights Watch, *NAALC Case Summaries*, http://www.hrw.org/reports/2001/nafta/nafta0401-05.htm (last visited Nov. 23, 2007) [hereinafter HRW Summary].

158. *Id.* The U.S. Court of Appeals for the District of Columbia reversed the decision citing the alleged violation was done under proper financial grounds. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission 9501 (SPRINT).

159. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission 9501 (SPRINT).

160. *Id.*

161. *See id. See also,* HRW Summary, *supra* note 157, at Sprint Case (Mexican NAO Case No. 9501).

162. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9801 (SOLEC).

healthy work environment free from injury and illness.[163] Allegedly, company officials fired workers who wanted an increase in pay, official inspections were not sufficient and comprehensive, and the U.S. failed to maintain fair labor tribunals.[164] Upon review by the Mexican NAO, a ministerial consultation was requested, and it was decided that final consideration of Submission 9801 should be reviewed alongside Mexico NAO Submission 9802 and 9803 discussed below.[165]

The third submission filed in the NAO of Mexico came from a group of migrant workers in the State of Washington's apple industry.[166] Mexico NAO Submission No. 9802 raised issues of "freedom of association, safety and health, employment discrimination, minimum employment standards, protection of migrant workers, and compensation in cases of occupational injuries and illnesses."[167] This was the first submission to specifically speak of a failure to explicitly protect migrant workers,[168] as guaranteed in the objectives of the NAALC provision.[169] The migrant workers claimed they were not receiving equal treatment under U.S. law as compared to domestic workers because migrant workers were receiving less than minimum employment standards and were refused their explicit right to organize a union.[170]

The migrant workers claimed they were receiving unequal protection in "a) rights to freedom of association and collective bargaining, b) the compensation system, c) the H-2A foreign agricultural workers program, and d) housing."[171] As to the infringement upon their freedom of association and collective bargaining rights, the migrant workers claimed they were being turned into the Immigration and Naturalization Service (INS) each time they tried to structure a union.[172] Furthermore, the migrant workers asserted they received less compensation in seventeen states, and, in the State of Washington, migrant workers received fifty percent fewer benefits than domestic workers for the death of a family member on the job.[173] Finally, migrant workers claimed

163. HRW Summary, *supra* note 157 at *Solec Case* (Mexican NAO Case No. 9801).

164. *Id.*

165. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9801 (SOLEC). After Mexico NAO Submission No. 9801, 9802, and 9803 were reviewed, an agreement was signed whereby all three submissions would be addressed collectively in government-to-government discussions on how effective the U.S. laws are in dealing with the issues raised in all three submissions. *Id.*

166. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9802 (APPLE GROWERS).

167. *Id.*

168. Commission for Labor Cooperation, Public communications submitted to the Mexican National Administrative Office (NAO), http://www.naalc.org/english/summary_mexico.shtml (last visited Nov. 22, 2007).

169. *See supra* note 30 and accompanying text.

170. U.S. Dep't of Labor, Public Report of Review of Mexico NAO Submission No. 9802, http://www.dol.gov/ilab/media/reports/nao/mxnao9802.htm (last visited Nov. 22, 2007).

171. *Id.*

172. *Id.*

173. *Id.*

the H-2A program provided unequal protection because it excluded workers from the Agricultural Worker Protection Act (AWPA), and they were thus unprotected against poor "work conditions and wages, records of agricultural work contractors and minimum transportation, safety and housing standards."[174] The Mexican NAO recommended ministerial consultations regarding all of the aforementioned issues raised by the migrant workers in the apple industry.[175] Again, Mexican NAO Submission 9802 was coupled alongside 9801 and 9803 for final review purposes.[176]

The Mexican Confederation of Labor (CTM) submitted Mexico NAO Submission No. 9803 (DECOSTER EGG) in August of 1998.[177] Among the issues voiced were a lack of freedom of association, protection of migrant workers' rights, employment discrimination, safety and health, and workers' compensation.[178] More particularly, the migrant workers brought forth information the U.S. "ha[d] not provided them and w[as] not providing them with any guarantee of enforcement of the U.S. laws designed to protect them."[179] "They point out that 'Mexican workers have never received the legal protection they need to ensure that they are not hired by deceitful means.'"[180] To further this contention, the migrant workers described being "required to pay for transportation and housing when they had originally been told that such costs would be covered."[181] Migrant workers also alleged they had been injured on the job with no notification of what their workers' compensation rights may be, and were given no notice of the benefits afforded under U.S. employment law; furthermore, their injuries were not properly documented.[182]

After reviewing the assertions, the Mexican NAO suggested ministerial counsel to determine whether the migrant workers were enjoying the same privileges guaranteed under U.S. law as domestic workers.[183] Once more, in May of 2000, the MC called for a collective evaluation of Mexico NAO Submission 9801, 9802, and 9803.[184] In order to comprehensively evaluate all three submissions, government-to-government meetings were held in

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174. *Id.* The migrant workers claimed nearly 30,000 workers in Washington State "live in housing that lacks basic sanitary conditions." *Id.* The Petitioners also claimed only half of the migrant workers are protected by minimum wage standards, which then places most of those workers at or below the poverty level. HRW Summary, *supra* note 157, at Washington State Apples Case (Mexican NAO Case No. 9802).

175. Commission for Labor Cooperation, *supra* note 168, at Mexican NAO 9802.

176. *See supra* note 165 and accompanying text.

177. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9803 (DECOSTER EGG).

178. *Id.*

179. U.S. Dep't of Labor, Public Report of Review of Mexico NAO Submission No. 9803, http://www.dol.gov/ilab/media/reports/nao/mxnao9803.htm (last visited Dec. 22, 2007).

180. *Id.*

181. *Id.*

182. *Id.*

183. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9803 (DECOSTER EGG).

184. *See supra* note 165 and accompanying text.

Washington in May of 2001, with follow-up sessions in Mexico in late May and early June of that year.[185] Public forums were also held in Yakima, Washington, and Washington, D.C. in August of 2001 and in Augusta, Maine, in June of 2002.[186]

In June of 2002, a public forum was held and "[g]overnment officials, employer representatives, educators, legal counselors, advocates and other service providers" gathered to discuss all of the issues raised in the three submissions previously delineated and the need to protect Mexican migrant workers in the U.S.[187] Most importantly, at both public forums, the three countries began to devise a tri-national guide, which has since been completed, so migrant workers would know their rights while in the U.S.; however, no specific allegations in the three submissions were explicitly remedied.[188]

Mexico NAO Submission No. 9804 (YALE/INS) was presented by "a group of immigration rights and union organizations headed by the Yale Law School Workers' Rights Project" in September 22, 1998.[189] The submission charged the U.S. with failing to implement minimum employment standards and other statutes that were in place to protect migrant workers.[190] More specifically, it was alleged those protections were violated under the Memorandum of Understanding (MOU) between the U.S. Department of Labor and the INS.[191] The migrant workers claimed the MOU subjected them to deportation if the Department of Labor received grievances from them about alleged minimum wage and overtime infringements.[192]

On the same day the Yale/INS submission was accepted for review, the Department of Labor and the INS revised the MOU, and the Department of Labor vowed not to share future complaints with the INS.[193] The ministerial consultations brought about a joint declaration in June of 2002, which resulted in the following agreement: (1) informational materials were to be made in Spanish for migrant workers and (2) there was to be further "collaboration" between Mexico and the U.S. to "promote the protection of labor rights of migrant workers."[194]

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185. Commission for Labor Cooperation, *supra* note 168, at Mexican NAO 9803.

186. *Id.*

187. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9803 (DECOSTER EGG).

188. *See generally* Commission for Labor Cooperation, *supra* note 168. That guide was eventually finished and is available online at http://www.naalc.org/migrant/english/mgtabusa_en.shtml (last visited Dec. 22, 2007).

189. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9804 (YALE/INS).

190. HRW Summary, *supra* note 157, at Mexican NAO Case No. 9804.

191. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9804 (YALE/INS).

192. HRW Summary, *supra* note 157, at Mexican NAO Case No. 9804.

193. *See* Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9804 (YALE/INS).

194. *Id.*

On October 24, 2001, Mexico NAO Submission No. 2001-01 was filed by both individual employees and workers' rights groups such as the Chinese Staff and Workers Association, National Mobilization Against Sweatshops, and Workers' Awaaz and Asociación Tepeyac.[195] The submission claimed there was a lack of "prevention of and compensation for occupational injuries and illnesses in the state of New York and labor protections for migrant workers."[196] The petitioners alleged the judges for the New York workers' compensation administration were complicating the process by failing to follow formal rules and procedures, which delayed processing claims from four to twenty years.[197]

In November of 2002 a Public Report of Review was issued to promote further consultations between the Mexican NAO and U.S. NAO about the issues raised in this submission.[198] After ministerial consultations were requested by the Mexico NAO and Mexican Secretary of Labor, the U.S. Department of Labor tabled the motion by suggesting consultations occur with the Council Designee or at the NAO level.[199]

The Farmworker Justice Fund, Inc., and Mexico's Independent Agricultural Worker Central (CIOAC) filed Mexico NAO Submission 2003-1 on February 11, 2003.[200] The submission raised concerns about the H-2A program in North Carolina, which involved the farm workers' rights to minimum employment standards, to strike, to freedom of association, against employment discrimination, to safeguards for occupational injuries/standards, and for the protection of migrant workers' rights.[201]

The Mexican NAO has yet to "issue a report of review on the submission."[202] Nevertheless, the U.S. Department of Labor and Mexico's Foreign Relations Secretariat took initiative to sign two Letters of Agreement and a Joint Declaration promoting further protection of Mexican migrant workers' rights.[203] Currently, the U.S. Department of Labor and local Mexican consulates in North Carolina are evaluating the issues and laws addressed in this submission and hope to address them "fully and satisfactorily;" however, to date, nothing particular has been done.[204]

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195. Commission for Labor Cooperation, *supra* note 168, at Mexican NAO 2001-1.

196. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 2001-01 (NEW YORK STATE).

197. Commission for Labor Cooperation, *supra* note 168, at Mexican NAO 2001-1. Also, the claim took issue with the New York workers' compensation agency, stating it was not providing translators as required. *Id.*

198. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 2001-01 (NEW YORK STATE).

199. *Id.*

200. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 2003-1 (NORTH CAROLINA).

201. *Id.*

202. *Id.*

203. *Id.*

204. *See generally id; see also* HRW Summary, *supra* note 157, at Mexican NAO Case No. 9501.

The most recent submission was Mexico NAO Submission 2005-1, which was filed on April 13, 2005, by the Northwest Workers' Justice Project, the Brennan Center for Justice at New York University School of Law, and Andrade Law Office.[205] The submission claims violations under the H-2B visa program in Idaho involving forced labor, failure to enforce minimum employment standards, employment discrimination, equal pay for the sexes, occupational injuries, lack of compensation, and a failure to protect migrant workers.[206] As of this writing, no reviews have been summoned for this submission, nor have there been calls for ministerial consultation.[207]

B. A Brief Look at the Canadian Submissions Filed Against the U.S.

Canada has filed a total of three submissions against Mexico and two against the U.S., with only one of those claims reaching the important level of ministerial consultation.[208] The two submissions filed against the U.S. were Canadian NAO Submission No. CAN 98-2 (YALE/INS) and Canadian NAO Submission No. CAN 99-1 (LPA), both of which the Canadian NAO was unwilling to consider for review.[209]

Canadian NAO Submission No. CAN 98-2 (YALE/INS) was filed six days after Mexico NAO Submission No. 9804 (YALE/INS).[210] The issues raised in this Canadian submission mirrored the allegations raised by its prior Mexican counterpart, 9804.[211] Here, the Canadian NAO denied review due to the latest MOU issued after Mexico NAO Submission No. 9804 (YALE/INS), which "replicate[d]" most of the concerns raised by this Canadian submission.[212]

On April 14, 1999, the Labor Policy Association and EFCO Corporation filed Canadian NAO Submission No. CAN 99-1 (LPA).[213] This submission alleged the U.S. National Labor Relations Board's construal and application of existing U.S. laws prohibiting employer domination and interference with trade unions led to the preclusion of valuable "employee involvement" programs.[214]

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205. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 2005-1 (H-2B VISA WORKERS).

206. *Id.*

207. *See generally* The NAALC, *available at* http://www.naalc.org (last visited Dec. 22, 2007) (providing information on the NAALC and the status of all submissions filed).

208. *See* Dep't of Labor Summary, *supra* note 55, at Overview.

209. Dep't of Labor Summary, *supra* note 55, at Canadian NAO Submission No. CAN 98-2 (YALE/INS) - Canadian NAO Submission No. CAN 99-1 (LPA).

210. Dep't of Labor Summary, *supra* note 55, at Canadian NAO Submission No. CAN 98-2 (YALE/INS) - Canadian NAO Submission No. CAN 98-2 (YALE/INS).

211. Dep't of Labor Summary, *supra* note 55, at Canadian NAO Submission No. CAN 98-2 (YALE/INS).

212. *Id.*

213. Dep't of Labor Summary, *supra* note 55, at Canadian NAO Submission No. CAN 99-1 (LPA).

214. Commission for Labor Cooperation, Public Communications Submitted to the

The submission further claimed this resulted in a "failure to provide for high labor standards, and to apply effectively and enforce laws relating to freedom of association and the right to organize unions."[215] Nevertheless, the Canadian NAO wrote a letter to the petitioners informing them the matter would not be reviewed because the information offered by the U.S. NAO, AFL-CIO, and petitioners failed to proffer evidence of non-compliance with the enumerated obligations in the NAALC.[216] Despite the request for reconsideration, the Canadian NAO refused to resurrect the issue.[217]

Canada and Mexico have both filed ten submissions in total against the U.S., none of which have gone beyond the ministerial consultation stage.[218] Mexico has had five submissions against the U.S. reach the ministerial consultation level, while Canada has failed to have a single complaint against the U.S. reach that fundamental stage.[219] As MC has been the highest level any submission has ever reached,[220] it is fascinating to see which of the three countries most utilized it in the evaluation process. Interestingly, Canada's NAO has been the strictest in using ministerial review, exemplified by only twenty percent of submissions reaching ministerial review (one of five filed), while the U.S. had slightly over thirty-eight percent (eight of twenty-one) and Mexico had 62.5% (five of eight) of their respective cases reaching the highest level of review thus far.[221]

Moreover, petitioners in the U.S. and Canada have yet to specifically address the protection of migrant workers as an issue in any of their claims, while Mexican petitioners have explicitly mentioned it in six of the eight submissions filed.[222]

V. STRENGTHS, WEAKNESSES, AND THOUGHTS OF IMPROVEMENT FOR THE NAALC AND ITS DISPUTE RESOLUTION SYSTEM

A. The Strengths of the NAALC and Its Dispute Resolution System

The NAALC was, incontrovertibly, the first in a host of free trade agreements to break ground and pioneer an accord specifically addressing labor protection.[223] In so doing, the agreement single-handedly initiated the support and encouragement for the "[e]nforcement of labor laws in the NAALC

Canadian National Administrative Office (NAO), http://www.naalc.org/english/summary_canada.shtml (last visited Dec. 22, 2007).

215. *Id.*
216. *Id.*
217. *Id.*
218. Dep't of Labor Summary, *supra* note 55, at Overview.
219. *Id.*
220. *See generally* Dep't of Labor Summary, *supra* note 55.
221. *Id.*
222. *Id.* at Overview – Mexican NAO Submission 2005-1 (H-2B Visa Workers).
223. CRS Lessons, *supra* note 27, at CRS-1.

countries."[224] Similarly, the NAFTA and NAALC are important because they have strengthened the bonds between the three conjoined nations, which, in due course, has helped to "open doors and break down barriers" previously serving as impediments.[225] Some have attributed this to the NAALC's "non-invasive" approach to advancing autonomy for each individual country to impose its own labor laws without pressure from the other two countries demanding enforcement of their own regulations.[226] Consequently, it could be argued sovereignty has brought forth trilateral communication which need not be strained by outside political pressure and governmental interference from the other countries.[227]

As trade relationships among the three countries continued to grow stronger, new lines of communication and dialogue opened.[228] Because the agreement mandates governmental agencies to communicate through the NAO office of each respective country, an increase in "cross border networking" between unions and community groups has also occurred.[229] Before the NAALC was signed, "information comparing laws and labor market indicators among the three countries was not always readily available[,]" however, the agreement has since generated "studies comparing the labor laws of the three countries, nurtured the development of a standardized system of labor market indicators, and been responsible for studies comparing productivity levels and wages."[230] These newly spawned studies, seminars, and reports have brought forth awareness in the media to the many issues workers in Mexico face and the need for further protection of immigrant workers inside the borders of the U.S.[231]

The addition of media scrutiny has been collectively referred to as "The Sunshine Effect."[232] Basically, with the advent of the NAALC, individual workers, unions, and other groups are able to use the different media outlets as

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224. PIERRE S. PETTIGREW ET AL., NAFTA: A DECADE OF STRENGTHENING A DYNAMIC RELATIONSHIP 4, *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file606_3595.pdf (last visited Dec. 22, 2007).

225. *Id.* at 1. The opinions quoted came from three drafters of the report: Pierre S. Pettigrew, Minister for International Trade, Canada; Robert Zoellick, United States Trade Representative, United States of America; and Fernando Canales, Secretary of the Economy, Mexico.

226. CRS Lessons, *supra* note 27, at CRS-3. However, others have claimed the lack of pressure makes the NAALC "weak." *See infra* notes 268-273 and accompanying text.

227. CRS Lessons, *supra* note 27, at CRS-3.

228. *Id.* at CRS-11.

229. LINDA DELP ET AL., NAFTA'S LABOR SIDE AGREEMENT: FADING INTO OBLIVION? AN ASSESSMENT OF WORKPLACE HEALTH & SAFETY CASES 28 (2004), *available at* http://www.labor.ucla.edu/publications/nafta.pdf.

230. CRS Lessons, *supra* note 27, at CRS-11. This "tripartite participation" provides forums for discussions between the three nations about the equilibrium between policy debates and programs already in place. PETTIGREW ET AL., *supra* note 224 at 4.

231. DELP, *supra* note 229, at 24.

232. *Id.*

spotlights on the issues they were facing.[233] Though workers were initially suspicious and believed no "real concrete resolutions" would result from their submissions under the NAALC, workers also knew they could bring attention to their problems because the process was tri-nationally supported and formalized.[234]

For example, in Mexico, the NAALC and the publicity it has spawned increased the occupational safety and health of workers in Mexico by reducing the number of injuries reported and illnesses claimed by thirty percent in its first three years.[235] Specifically, the NAALC has been beneficial to Mexico by providing "greater awareness of occupational health and safety issues in some Mexican workplaces, broader knowledge of government regulations and enforcement procedures among some Mexican workers, and unprecedented cross-border solidarity and joint activities between workers, unions, women's groups, environmentalists and occupational health professionals."[236] However, it is alleged the great successes Mexico has seen may have come from the publicity created by the workers themselves, rather than the combined efforts of the Mexican government, Labor Departments, and the NAALC's respective NAO offices.[237]

Many proponents of the agreement indicate public awareness and input have helped aid and facilitate over fifty trilateral programs that have subsequently been fostered as a result.[238] In addition, after ministerial consultations were held for Mexico NAO Submissions 9801, 9802, and 9803, because of the public awareness and the inclusion of communal input during those public forums, a tri-national guide was created to insure that future migrant workers would know exactly what their guaranteed rights are within foreign borders.[239] The three countries have also formed cooperative efforts on employment standards, industrial relations, occupational safety and health, employment training, child labor, and workers' rights.[240] Finally, all three countries have provided numerous training sessions, onsite visits to workplaces, and public symposiums to better inform the public of the "best practices" available to further assist workers' rights.[241]

At the bare minimum, the NAALC and its resulting media interest have played a critical role in shedding light on the shortcomings of labor protection

233. CRS Lessons, *supra* note 27, at CRS-11.
234. DELP, *supra* note 229, at 24.
235. CRS Lessons, *supra* note 27, at CRS-12.
236. BROWN, *supra* note 49, at 2.
237. *Id.*
238. PETTIGREW ET AL., *supra* note 226, at 5.
239. *See supra* notes 185-189 and accompanying text.
240. Office of the United States Trade Representative and Related Entities, *Study on the Operation and Effect of the North American Free Trade Agreement: Chapter 3*, *available at* http://www.usinfo.org/trade/nafta/chap3_1.stm.html (last visited Dec. 22, 2007).
241. *Id.*

in all three countries, despite the effectiveness of its procedures.[242]

B. The Weaknesses of the NAALC and Its Dispute Resolution System

Over the past thirteen years, many critics have placed their criticism of the NAALC in one of three categories: (1) it has failed to live up to the original plan; (2) it sounds "alarm[s]" and raises red flags; (3) while others claim it has become completely archaic.[243] An overarching concern for all those who oppose the provision is its failure to go to the lengths needed to provide adequate protection for all workers.[244]

One of the most apparent red flags raised is that not a single complaint brought under the NAALC dispute resolution system has led to a fine, sanction, or moved beyond the ministerial consultation stage.[245] A few government and legal professionals have theorized a fear to take submissions to the ECE, one step beyond the ministerial review, exists because an independent body evaluates the submission, thus taking it out of the negotiating hands of the three countries.[246] Another theory behind this fear may be the possibility that those in power in these three countries may be forced to accept the awkward truth their respective governments have failed and are culpable for their own shortcomings.[247] In fact, all three countries are evaluated during this process, not just the country alleged to have failed to enforce the provisions of the NAALC; therefore, all three can be subject to recourse.[248]

Even more, not one illegally terminated worker, including Mexican migrant workers, has been reinstated; not one independent union has been bargained for and/or created; and, finally, not a single occupational safety or health violation has been remedied.[249] Despite the focus of this Note being on migrant workers specifically, it appears as if most of the shortcomings of the agreement actually apply equally to all the Labor Principles.[250] Though "reports, seminars, conferences, websites, and outreach sessions" have been generated in this regard, it is easy to see why many feel the enforcement mechanism of the NAALC falls short of remedying the very things sought, including the much desired and illusive sanctions.[251]

In spite of the NAALC's explicit ability to "reduc[e] or eliminat[e] trade

242. *See supra* notes 232-237 and accompanying text.

243. CRS Lessons, *supra* note 27, at CRS-8, 9.

244. *Id.*

245. *See* Dep't of Labor Summary, *supra* note 55, at Overview.

246. DELP, *supra* note 229, at 27 (quoting government and legal professionals when questioned about the "[f]ear of taking cases to the next level").

247. *Id.*

248. *Id.*

249. BROWN, *supra* note 49, at 1.

250. *Id.*

251. *Id.*

sanctions," those who have been found "persistently" non-compliant still can elude punishment by a few ancillary "escape clauses" in the narrative.[252] The NAALC takes into consideration five main decisive factors in evaluating sanctions:

> 1. the pervasiveness and duration of the Party's persistent pattern of failure to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards;
> 2. the level of enforcement that could reasonably be expected of a Party given its resource constraints;
> 3. the reasons, if any, provided by the Party for not fully implementing an action plan;
> 4. efforts made by the Party to begin remedying the pattern of non-enforcement after the final report of the panel; and
> 5. any other relevant factors.[253]

It is entirely possible, therefore, for a non-complying party to skirt responsibility so long as the reviewing parties can contort a few of the five aforementioned decisive factors in favor of that party.[254] Thus, this provision is unlikely to command respect from any of the three countries so long as it is not utilized and accountability fails to closely follow those committing the infractions.[255]

Many detractors allege the procedure for filing a complaint has structural weaknesses.[256] Those limitations range from: a high cost of filing petitions,[257] which specifically hurts low-income and financially insecure migrant workers, to the many years it may take for some submissions to "move from the filing stage to ministerial consultations to obtaining [a] ministerial agreement,"[258] to the diminutive level of reviews the respective Labor Principles receive,[259] to the

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252. *Id.* at 5.

253. Commission for Labor Cooperation, Annex 39: Monetary Enforcement Assessments, http://www.naalc.org/english/agreement11.shtml (last visited Dec. 22, 2007). *See also* BROWN, *supra* note 49, at 5.

254. *See* BROWN, *supra* note 49, at 5.

255. *Id.* at 5, 8. *See also* notes 48-57 for explanation of the discrimination of certain Labor Principles.

256. Watts, *supra* note 10, at 24.

257. *Id.* (quoting Thea Lee of the AFL-CIO, who indicated "consultation and dispute resolution procedures are so lengthy and torturous as to discourage complaints and petitions." *Id.* (quoting Congressional testimony of Thea Lee). *See also id.* at n. 43.

258. *Id.* at 24.

259. BROWN, *supra* note 49, at 4-5.

lack of involvement and information available to those who actually file.[260]

As previously stated, the review process only calls for a limited amount of review for each of the Labor Principles.[261] Some argue many of the Labor Principles are valued more than others because of the availability of scrutiny afforded.[262] To add insult to injury, if the submission involves a failure to uphold child labor laws, minimum employment standards, or occupational safety and health principles (the only three Labor Principles which afford sanctions as a remedy), the burden of proof becomes so lofty "that it diminishes the likelihood of success" for those who file the claims.[263]

In order to be successful on the merits at this high level, the filing petitioner must show a "persistent pattern of failure"[264] on behalf of the opposing party, while the accused party need only show they acted "reasonab[ly],"[265] which, ironically, is defined by the government given the authority[266] to enforce its own laws.[267] Accordingly, despite the ability to initiate sanctions for some infractions, with the added procedures, added time restraints, and a country's ability to regulate itself, the road is often long and fruitless. [268]

Sovereignty, which some have claimed is an advantage to the NAALC, has also been raised as one of its primary faults.[269] Because each respective country is obliged to enforce its own labor laws, each county merely needs to "enforce [its labor laws] as it sees fit."[270] If a country lacks specifically protected NAALC Labor Principles, that country cannot be compelled to create laws or regulations to incorporate the principles.[271] In fact, given the autonomic nature of the NAALC, no country can force another country to impose its own existing laws regarding labor.[272] The remaining countries must, as an alternative, go through the processes spelled out in the dispute resolution system itself, bearing in mind sanctions are only available to three of the eleven core Labor Principles.[273] This problem has subsequently raised the issue of

260. *Id.* at 5.

261. *See supra* notes 48-57 and accompanying text.

262. Busch, *supra* note 1, at 70-71.

263. *Id.* at 71-72.

264. Commission for Labor Cooperation, art. 27, Consultations, http://www.naalc.org/english/agreement6.shtml (last visited Dec. 22, 2007). *See also* Busch, *supra* note 1, at 71-72 for further explanation.

265. Commission for Labor Cooperation, art. 49, Definitions, http://www.naalc.org/english/agreement7.shtml (last visited Dec. 22, 2007). *See also* Busch, *supra* note 1, at 71-72 for further explanation.

266. CRS Lessons, *supra* note 27 at Summary.

267. *Id.* at CRS-9.

268. *Id.* at CRS-5.

269. *Id.* at CRS-9.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

"harmonization" discussed *infra*.[274]

Contention has also surfaced because, once a submission is filed, the petitioners who file it instantaneously loses their ability to actively participate in the process.[275] The entire sequence is handed over to the respective NAO of each particular party's country; then, the claimants effectively lose standing and the "means to correct illegal practices by their employer . . . ."[276] The fate of the filer's claim lies entirely on acceptance for review, then on the procedures provided by the NAALC, and finally on the mercy of the agreements forged by the two negotiating factions.[277]

Even more despairingly, only Group III Labor Principles call for the ability of the governing body to issue sanctions against the party guilty of not fulfilling their obligations.[278] A few Labor Principles which do not carry the possibility of sanctions are: prohibition of forced labor, non-discrimination, equal pay, workers' compensation, and the focus of this Note, migrant worker protection.[279] Perhaps the lack of sanctions for migrant workers could be condoned if a single workers' employment had been reinstated, their freedom of association was enforced, or if their equal pay claims were seriously addressed; however, by looking at the past submissions by Mexican migrant workers, not one has occurred to date.[280]

In addition, the "three most basic of all labor rights - the right to organize, bargain collectively, and strike" are completely left off the table.[281] This inability to sanction employers who limit their workers' rights to organize, bargain, and strike have collectively been referred to as a "fatal flaw."[282] Of all the Labor Principles set forth under the NAALC, those three factions receive the least amount of procedural treatment.[283] In evaluating the Mexican NAO submissions to date, five of the eight claims specifically raise one or all of these three fundamental rights. Yet, not one of the five resulted in increased rights for the ability to organize, bargain collectively, and/or strike for those who file the claims, including migrant workers.[284] This has led many to demand higher levels of scrutiny for these three specific Labor Principles,[285] while many others have said all Labor Principles should receive the same treatment.[286]

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274. BROWN, *supra* note 49, at 10.

275. *Id.* at 5.

276. *Id. See also* DELP, *supra* note 229, at 25.

277. *See supra* notes 45-62 and accompanying text.

278. CRS Lessons, *supra* note 27, at CRS-9.

279. BROWN, *supra* note 49, at 5 tbl.2.

280. *See supra* notes 152-222.

281. CRS Lessons, *supra* note 27, at CRS-9.

282. *Id.*

283. BROWN, *supra* note 49, at 5 tbl.2. *See also* notes 45-62 and accompanying text.

284. Dep't of Labor Summary, *supra* note 55.

285. *See generally* Bull, *supra* note 6 (discussing the importance of Freedom of Association and its effect on the Mexican migrant farmworkers in the Apple Growers' submission).

286. CRS Lessons, *supra* note 27, at CRS-9.

Perhaps the most tragic aspect of all is the failure to protect migrant workers in the U.S., and specifically migrant farm workers from Mexico. As an example, in 1999 Mexican farm workers with an H-2A visa made up an estimated 43.5% of Mexican migrant workers in the U.S.[287] Yet, while reports of forced labor and servitude still exist, and while conditions resembling sweatshops are prevalent, it is hard to claim the NAALC has been a complete success in furthering their protection.[288] Quite the opposite seems true.

Considering some workers fear physical abuse if they report their problems, it is hard to evaluate how the NAALC can help, given the fact that the process is already very lengthy, too costly, and has underscored concerns Mexican migrant workers have been handed over to the Immigration and Naturalization Services purely for voicing their concerns.[289] As Cesar Chavez so eloquently stated, "[o]ur struggle is not easy. Those that oppose our cause are rich and powerful, and they have many allies in high places. We are poor. Our allies are few."[290]

Chavez was attempting to demonstrate migrant workers rely on patronage from their guaranteed right of freedom of association because they do not have the financial means nor do they possess a powerful enough political voice.[291] Nevertheless, no matter how fundamental freedom of association may be to gaining the protection the migrant workers need, freedom of association cannot bring about sanctions under the existing dispute resolution system.[292] The collective question becomes who or what will protect migrant workers if not the unions or the employers themselves?

C. Thoughts of Improvement for the NAALC and Its Dispute Resolution System

"The first step in developing effective protections of labor rights . . . in international trade and investment agreements is a thorough and open evaluation of the NAALC experience to identify the obstacles to effective enforcement and what remedies are needed to overcome these."[293] After all, "[a]n open process for applying lessons from the NAALC to other trade agreements . . . is needed; not the closed process that brought about NAFTA and the NAALC nor the obliqueness that characterizes the submissions

287. AILF, *supra* note 66.

288. Hidden in the Home, *supra* note 84; *see also* Bull, *supra* note 6, at 4. Many farmworkers receive less than the U.S. minimum wage, work close to twenty hours a day, and are subject to abuse, both physically and psychologically. Hidden in the Home, *supra* note 84.

289. *See supra* notes 243-286 of this Note; *see also supra* notes 189-194, 257 of this Note and accompanying text.

290. Bull, *supra* note 6, at 1.

291. *Id.* at 4.

292. *See supra* notes 278-286 of this Note and accompanying text.

293. BROWN, *supra* note 49, at 10.

process."[294] The following are a few suggestions proffered by the cynics.

One of the first significant changes suggested for the NAALC process is to find ways to include the petitioners in the actual review process.[295] The "[l]ack of [t]ransparency" in the process leads to years of review without word on how the claims are being addressed; and, ultimately, once the consultation is concluded and recommendations are given, the procedure ends whether the filer believes his or her grievance has been remedied or not.[296] The closest any worker has ever come to involvement is being present at the hearing on the submission they filed, which has only happened ten times in the past thirteen years, and all of which were held for American citizens working in another country.[297]

Another diminutive way workers can get involved is to attend and participate in the public forums on their submission, assuming they can afford to travel to the specified location and miss work.[298] "Given the reliance of the National Administrative Office on public submissions to highlight violations, the NAALC will only function if workers and their advocates are encouraged to participate and if mechanisms are in place to protect workers who do . . . ."[299]

Additional steps should also be taken to eliminate some of the structural weaknesses inherent in the agreement as a whole.[300] Despite the media's ability to bring public awareness to the many issues discussed above,[301] "lack of political will to resolve [the] problems brought to light and refusals to use the process to its full potential nullifies the effectiveness of the NAALC."[302] Two remedies would help eliminate the structural weaknesses of the agreement. First, lowering the cost of filing a petition would ease financial tension on the migrant workers. Second, it would be beneficial to decrease the time it takes for a request to be filed, reviewed, and remedied.[303] If the process continues to take multiple years to reach the ministerial level, even if the process is opened up to higher review/scrutiny, the current process will only promise to take much longer.[304] If the time is shortened on each step, more claims could be processed

294. DELP, *supra* note 229, at 38.

295. BROWN, *supra* note 49, at 9.

296. *Id.*

297. *See* Dep't of Labor Summary, *supra* note 55. Not a single hearing was held for Mexican migrant workers working inside the United States. *Id. See also* BROWN, *supra* note 49, at 9.

298. *See* Dep't of Labor Summary, *supra* note 55. "[R]equiring that hearings be held at a convenient site for affected workers" has been mentioned. CRS Lessons, *supra* note 27, at CRS-11.

299. DELP, *supra* note 229, at 40.

300. Watts, *supra* note 10, at 24.

301. *See supra* notes 232-241 and accompanying text.

302. DELP, *supra* note 229, at 39.

303. Watts, *supra* note 10, at 24.

304. *See generally* Dep't of Labor Summary, *supra* note 55 (summarizing the submissions filed and chronicling the filing dates to the dates of ministerial review). *See also* Watts, *supra* note 10, at 24 (referring to the length of time the resolution process takes).

by the limited number of personnel currently devoted to processing the submissions, which then opens the door for previously unavailable claims for review.[305]

Nevertheless, if the temporal commitment is reduced, the door should be opened for utilizing all of the available avenues for review for all the Labor Principles laid out in the NAALC process.[306] After all, why should a workers' right of freedom of association, to bargain collectively, and to strike be given virtually a quarter of the available avenues of review as compared to minimum wage requirements, while the remaining five principles, including protection of migrant workers, receive just over half of the available methods?[307] Some critics have agreed, stating the tier system should be eliminated completely,[308] thereby lowering the burden of proof for those filing the claims, which happens to be regulated under the strictest of the three tiers.[309] Along those same lines, it has been suggested sanctions should be available for all of the Labor Principles, while simultaneously extending "complaint mechanisms and enforceable sanctions" to employers as well as the respective countries.[310]

This is exactly the type of reform migrant workers need, especially given workers' fundamental reliance on the unions supporting their efforts for workplace protection under U.S. law.[311] Without sanctions or a better enforcement mechanism to bring claims, the NAALC's eleventh Labor Principle, which guaranties the right to equal protection under U.S. laws, is purely rhetoric and not for application. Without doing so, the migrant workers will continue to face the hardships the public forums and seminars are facially meant to address and theoretically discuss, but continue to fail to seriously address the real problems at hand.[312]

Given the NAALC hands-off approach to enforcing the Labor Principles and Objectives set forth in the text of the agreement, other countries, as well as all the workers who have filed claims, are powerless to compel another country to enforce their own labor laws and standards.[313] Consequently, each respective NAO office has the unbridled authority to accept or reject a submission, which it knows may inadvertently have an affect on its interests with another country.[314] Even so, critics fall on both sides of the aisle, some think the NAALC should not have penalties at all, while others think it does not go far

305. CRS Lessons, *supra* note 27, at CRS-11.
306. *Id.* at CRS-9.
307. BROWN, *supra* note 49, at 5 tbl.2.
308. Bull, *supra* note 6, at 13.
309. Busch, *supra* note 1, at 71-72.
310. BROWN, *supra* note 49, at 10.
311. *See generally* Bull, *supra* note 6.
312. *See* BROWN, *supra* note 49, at 1.
313. Bull, *supra* note 6. *See also* notes 268-273 and accompanying text.
314. Bull, *supra* note 6, at 13. In so doing, the NAO office is able to ignore the claims it deems too low on its hierarchy of Labor Principles, further limiting the availability of equal protection under the agreement. *Id.*

enough.[315] A few ideas have come forth regarding how to increase enforcement: (1) "a penalty for anyone offering to waive a NAALC principle to induce or retain an investment[;]" (2) "establish an arbitral disputes panel to prevent the importation into any NAALC nation of goods produced with exploitative child labor, slave or forced labor, or by unhealthy processes[;]" and (3) simply raising penalties for those countries that do not enforce their own existing labor laws.[316]

This lack of enforcement capability has brought forth the idea of "harmonization."[317] Rather than each country having its own subset of labor laws and regulations, some claim there should be "an international 'floor' based on the conventions and recommendations of the tri-partite International Labor Organization."[318] As such, a uniform set of guidelines would be established which all the three countries could, idealistically, collectively embrace and promise to uphold.[319]

Along those same lines, some claim recognition of the ILO standards by all three countries would eliminate the need for the NAALC, because a new set of labor guarantees would be agreed upon by the three countries.[320] Those critics claim the ILO suffices because it is "a large organization with more than 1,800 employees, [and] has been working for more than 75 years to promote and monitor worker rights adoption around the world on a voluntary basis, and needs no assistance [from the NAALC] in this matter." [321]

Others have attempted to offer recommendations to further protect Mexican migrant workers who could create pressure from outside the actual political course of action. For example, some have argued the Migrant and Seasonal Agricultural Worker Protection Act and Fair Labor Standards Act need more specific protections for migrant workers.[322] There are also concerted efforts to increase the availability of the U.S. court system to migrant workers,[323] to establish more enforceable guest worker programs, and which call for a complete reform of the visa and monitoring system currently in place for migrant workers in the U.S.[324] Nevertheless, if past lack of enforcement of the NAALC is any indicator, new laws may do little to further increase migrant workers' protection.

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315. CRS Lessons, *supra* note 27, at CRS-10.

316. *Id.*

317. *Id.* at CRS-9.

318. BROWN, *supra* note 49, at 2.

319. *See id. See also* CRS Lessons, *supra* note 27, at CRS-10.

320. CRS Lessons, *supra* note 27, at CRS-9

321. *Id.* Despite its uniqueness, this idea still presents a problem for enforceability under the current NAALC system. *Id. See also supra* notes 304-306 and accompanying text.

322. Bull, *supra* note 6, at 4.

323. Lisa J. Bauer, *The Effect of Post-9/11 Border Security Provisions on Mexicans Working in the United States: An End to Free Trade?*, 18 EMORY INT'L L. REV. 725, 745 (2004).

324. Human Rights Watch, Migrant Domestic Workers Face Abuse in the U.S. (2001), http://hrw.org/english/docs/2001/06/14/usdom176.htm last visited Dec. 22, 2007.

CONCLUSION

As one stands and looks at the past thirteen years in retrospect, a unique opportunity exists to re-assess whether the goals set forth in the NAALC have been met with unparalleled achievement, capricious regret, or perhaps a little of both. Appreciatively, while over the last thirteen years critics have made their voices louder than the advocates of the agreement, it would be hasty to say it has been an absolute frustration of time and resources.[325] After all, in 1994,[326] the three nations had no model to follow, no treatises to read, nor precedent on which to rely to formulate such an ambitious principle; an idea seeking to change the way one looked at how to truly protect labor forces at home and abroad.[327] It is safe then to assume at least some failures were expected. Yet, with over a decade of scrutiny, the more appropriate question has become whether these disappointments have surmounted the usefulness of the agreement.

On one hand we have seen an increase in dialogue among the three nations and an enhanced awareness to the issue of labor protection within their borders.[328] Yet, on the other hand, stories of migrant farm worker mistreatment still runs rampant,[329] while reports indicate not a single submission under the NAALC has resulted in sanctions against an employer or government, reinstatement of lost jobs or wages, or reversal of job discrimination and lack of equal protection under the laws.[330] Though shortcomings are to be expected in most new endeavors, is that enough to skirt accountability and chalk the misfortunes up to naïveté, while we wait for the next chance to try again? Can we rest on our laurels, believing the resulting public awareness and media attention are good enough? The answer is certainly no to both.

As more and more Mexican migrant workers deluge the border into the U.S. in search of the jobs American employers frantically seek to fill, the pandemic of migrant worker mistreatment will maintain, if not grow more prevalent, in the coming years.[331] In addition, as new free trade agreements use the NAALC as a model for labor protection in other countries, it is important to make sure other countries do not purely mirror this labor agreement without evaluating first what has worked and what has not.[332] Through critical analysis and exhaustive research of the NAALC mechanism, critical mistakes can be repealed and crucial successes can be mimicked. After all, the best way to learn

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325. *See supra* notes 225-243 and accompanying text.

326. GOETZ, *supra* note 23, at 14.

327. John S. McKennirey, *Foreword* to Commission for Labor Cooperation, http://www.naalc.org/english/report4_1.shtml (last visited Dec. 22, 2007). *See also supra* notes 24-34 and the accompanying text.

328. *See supra* notes 232-241 and accompanying text.

329. *See generally* Bull, *supra* note 6.

330. Dep't of Labor Summary, *supra* note 55.

331. *See supra* notes 95-118 and accompanying text.

332. *See* Busch, *supra* note 1, at 60.

from our blunders and misguided notions is to look into the past and examine the very things that shaped our history; and it can surely be contended the NAALC fits nicely into that mold.

It seems imprudent to entirely consent to the notion "the NAALC is headed toward oblivion[;]" however, it has become apparent reform is definitely needed to ensure proper application in the future, despite the efforts of the three countries.[333] Meanwhile, migrant workers continue to need the very protections this agreement was initially promulgated to provide, yet has truly fallen short of achieving.

333. DELP, *supra* note 229, at 40.

PENSION PROTECTION? A COMPARATIVE ANALYSIS OF PENSION REFORM IN THE UNITED STATES AND THE UNITED KINGDOM

Sarah D. Burt*

I. INTRODUCTION

Captain Tim Baker, a pilot at US Airways, Inc. for nineteen years, was promised a six-figure retirement pension annually by his employer.[1] Instead, when he retires in twelve years, he is going to receive only $28,585 per year in pension benefits, plus any amount he can save through his employer's 401(k) plan.[2] Financially troubled US Airways turned their pilot's pension plan, which was a "sinkhole of unfunded liabilities," over to the Pension Benefit Guaranty Corporation (PBGC) to help enable the company to emerge from bankruptcy.[3] Turning the pension plan over to the PBGC means that pilots will collect significantly less benefits than they were promised by the airline: some will collect "less than 50 cents on the dollar."[4]

"It has totally destroyed my life and that of my family and we might even have to sell our home to survive."[5] Englishman John Benson used these words to describe the impact the loss of his pension had on him.[6] John contributed money to his employer's pension fund for thirty-eight years, expecting to receive an annual income of £8,000 to supplement his state pension.[7] The financial collapse of his employer caused John to lose the extra income he had anticipated.[8] Now, John must stock shelves at a store to try to make up for the lost pension income, instead of enjoying his retirement.[9]

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* J.D., Indiana University School of Law- Indianapolis, 2008. I would like to thank my husband, Will, and my family for all of their support and encouragement in writing this Note. I would also like to thank Joe Cattivera, who sparked my interest in the topic; Professor Charles Hessler, my note advisor; Ronald Graham, for his assistance with UK law; and everyone else who offered advice on this Note.

1. Nanette Byrnes & David Welch, *The Benefits Trap; Old-line Companies Have Pledged a Trillion Dollars to Retirees. Now They're Struggling to Compete with New Rivals, and Many can't Pay the Bill*, BUS. WK., July 19, 2004.

2. *Id.* Since pilots are required to retire at age sixty, instead of the usual sixty-two or sixty-five, their benefits through the PBGC are reduced. Ellen E. Schultz & Theo Francis, *Most Workers are in Dark on Health of Their Pensions --- US Airways Killed a Plan that Pilots had no Inkling was in Financial Danger*, WALL ST. J., July 1, 2003, at A1.

3. Byrnes & Welch, *supra* note 1

4. *Id.*

5. Sharlene Goff, *National News Business and Economy: Stark Contrast to Hopes of Happy Retirement*, FIN. TIMES (U.K.), Mar. 15, 2006, *available at* 2006 WLNR 4305236.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id. See also* Joseph Watts, *Pay Up on Lost Pensions*, NOTTINGHAM EVENING POST,

Currently, stories about employees losing their retirement benefits litter the media in both the United States and the United Kingdom.[10] Both countries have enacted pension legislation[11] in an attempt to prevent defined benefit pension plan participants, like Tim Baker and John Benson, from losing promised benefits. The economic environment that has lead to this most recent pension reform "is a global problem, caused by . . . a combination of lower market returns, an era of low inflation and bond yields, and, arguably, a failure to act by governments, plan sponsors and fund managers."[12]

When considering pension reform, it is important to take into account risk factors that must be allocated between the employer and the pension plan participant. Two important risk factors considered in this Note are the risk of investment and the risk of longevity.[13] The risk of investment is allocated to the party who "finance[s] and direct[s] the investment;" this party will also be rewarded with investment gains or suffer investment losses.[14] The risk of longevity is the possibility one could outlive his or her retirement savings.[15] Due to the inherent difficulty in balancing the interests of the plan participant and the employer, there is no perfect solution to pension problems.

This Note compares the recent pension legislation in the United States, the Pension Protection Act of 2006 (PPA 2006), and in the United Kingdom, the Pensions Act 2004 (PA 2004).[16] It compares the actual effects of this legislation on employer-sponsored defined benefit plans or final salary schemes

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Nov. 7, 2006, at 6.

10. *E.g.*, Trebor Banstetter, *Pension Shocker: Many Retired Delta Pilots are Forced to Cope with a Sharp Drop in Income*, FORT WORTH STAR-TELEGRAM, Oct. 15, 2006, *available at* 2006 WLNR 17871167; Byrnes & Welch, *supra* note 1; Schultz & Francis, *supra* note 2; Goff, *supra* note 5; Watts, *supra* note 9.

11. Pension Protection Act of 2006, Pub. L. No. 109-280 (2006) (codified as an amendment to 29 U.S.C.A. ch. 18 (2007)); Pensions Act 2004, 2004, c. 35 (U.K.).

12. Ian Yuill, *Dealing with Pensions Deficits: The Global Problem of Pensions Deficits Will Provide Asset Managers with Some Unique Opportunities—But also Some Troubling Challenges*, EUROMONEY INSTITUTIONAL INVESTOR, July 1, 2006, at 39. This economic environment has been dubbed the "perfect storm." Robert Kuttner, *The Great American Pension-Fund Robbery*, BUS. WK., Sept. 8, 2003, at 24. However, Kuttner also argues that rather than a "perfect storm," pension problems are instead "a leaky boat ravaged by pirates," due to systematic looting of pension plans by corporate sponsors. *Id.*

13. COLLEEN MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 108-09 (West 2004). *See also* Philip Booth & Terry Arthur, Adam Smith Inst., *Submission to the Review on Private Pensions Simplification*, http://www.adamsmith.org/images/uploads/publications/private-pensions-simplification.pdf (last visited Jan. 20, 2008) (arguing that regulations should not seek to remove financial risk from retirement schemes).

14. MEDILL, *supra* note 13, at 109.

15. *Id.*

16. Pension Protection Act of 2006, Pub. L. No. 109-280 (2006) (codified as an amendment to 29 U.S.C.A. ch. 18 (2007)). Pensions Act 2004, c. 35 (U.K.). Most of the PA 2004 extends to England, Wales and Scotland; however, some sections also extend to Northern Ireland. DEP'T FOR WORK AND PENSIONS, Pensions Act 2004 Explanatory Notes, 2004, at 4, http://www.opsi.gov.uk/acts/en2004/ukpgaen_20040035_en.pdf (last visited Jan. 20, 2008) [hereinafter WORK AND PENSIONS].

with the intentions underpinning the enactment of the legislation. Part I-A and I-B of this Note examine the history of pensions in the United States and the United Kingdom, as well as set out the most recent provisions enacted pertaining to these types of pension plans. Part II provides an in depth discussion of the provisions in each country, the effects of the provisions, and the intent of the drafters of the provisions. Part III compares and contrasts the reform set out by the PPA 2006 and the PA 2004 and the effects, focusing on lessons, if any, the United States can learn from the United Kingdom. Finally, part IV sets out other possible solutions for the United States to correct funding and PBGC deficits.

A. Brief History of Pensions in the United States

Employee benefits programs came into existence in the United States as early as 1636 when Plymouth Colony created a military program for veterans.[17] The first official corporate pension plan did not exist until 1875, when American Express provided retirement benefits to its employees.[18] This encouraged other companies to follow suit and create pensions as well.[19] Pensions increased in popularity at a time when industrialization and urbanization were becoming more prevalent.[20] Younger generations were not supporting elderly family members as they had in the past. As a result, the elderly needed savings to fund their retirement.[21]

While savings were needed to retire, people were either unable or unwilling to save sufficient amounts.[22] Thus, elderly employees inefficiently remained in the workforce long after they were able to meet the standards of their jobs.[23] Pensions evolved because employers could not afford to pay elderly employees the same compensation as they paid younger workers, as elderly employees were less able to fulfill their work obligations than younger workers.[24] As an alternative to firing elderly employees, pension plans were created to allow employees to retire voluntarily with financial support during retirement.[25]

These early private retirement pension plans were not required by law to provide the benefits they promised to employees.[26] After World War II, but before 1974, the only government regulation that pertained to employers who

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17. Jill L. Uylaki, *Promises Made, Promises Broken: Securing Defined Benefit Pension Plan Income in the Wake of Employer Bankruptcy: Should We Rethink Priority Status for the Pension Benefit Guaranty Corporation?*, 6 ELDER L.J. 77, 81 (1998).

18. *Id.*

19. *Id.* By 1992 there were more than 708,400 plans. *Id.*

20. DAN M. MCGILL ET AL., FUNDAMENTALS OF PRIVATE PENSIONS 3 (8th ed. 2005).

21. *Id.*

22. *Id.*

23. *Id.* at 5.

24. *Id.* at 3.

25. *Id.* at 7.

26. Uylaki, *supra* note 17, at 81.

had retirement plans provided the employers with favorable tax treatment.[27] Therefore, employee retirement plans were generally viewed as a "type of 'gratuity' or 'thank-you' from the employer to be disbursed only at the employer's discretion."[28] The number of pension plans continued to grow until the Depression in 1929.[29] While the Depression slowed the growth of pension plans, financial difficulty and unemployment for the elderly gave rise to the Social Security Act of 1935.[30] After the Depression, "general consciousness about retirement income security, the beneficial way in which Social Security was implemented, and the favorable tax treatment of employer-sponsored retirement programs" caused the number of pension plans to expand quickly from the 1950s through the 1970s.[31]

One of the most important events culminating in the enactment of the Employee Retirement Income Security Act of 1974 (ERISA) was the 1963 closing of the Studebaker automobile plant.[32] When the Studebaker plant closed, the pension plan was also terminated.[33] The plan did not have sufficient assets to cover all of the promised benefits; as a result, only the retired and active employees eligible for retirement as of the date of the plan termination received their full benefits.[34] Some of the younger employees received a lump sum payment, worth only a fraction of their expected benefit, while others received no pension benefits at all.[35] The Studebaker failure was disturbing because it illustrated that a "pension could be funded and operated in accordance with applicable laws and still result in massive numbers of employees receiving little to no benefit" and was considered "a tremendous

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27. *Id.* at 81-82. The government encourages employers to sponsor retirement plans by allowing employer contributions to be a deductible expense, within a specified limit, when they are contributed to the plan. MCGILL ET AL., *supra* note 20, at 54-55. No taxes are assessed on contributions or investment earnings until the retirement benefits are paid to the employees. *Id.* These types of plans are called qualified plans because they meet specific statutory requirements enabling them to receive the tax deductions mentioned above. *Id.* These plans are described in the Internal Revenue Code sections 401 through 416. MICHAEL J. CANAN, QUALIFIED RETIREMENT PLANS, VOL. 1 § 2.1, at 23-24 (2005).

28. Uylaki, *supra* note 17, at 82 n.24. Many plans specifically stated that the employer could "deny benefits to any employee and . . . reduce or terminate benefits that had already commenced." MCGILL ET AL., *supra* note 20, at 16.

29. MCGILL ET AL., *supra* note 20, at 3.

30. *Id.* at 4. Social security is outside the scope of this Note; however, for more information see *Id.* at 40-51.

31. *Id.* at 4.

32. *Id.* at 83. *See generally* James A. Wooten, *"The Most Glorious Story of Failure in the Business:" The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683 (2001) (discussing in greater detail the effect of the Studebaker plant closing).

33. MCGILL ET AL., *supra* note 20, at 83.

34. *Id.* The United Automobile Workers had negotiated increases in current benefits as well as benefits for past service that Studebaker was not able to fund. *Id.* The retirement age for the plan was sixty. *Id.*

35. Wooten, *supra* note 32, at 684. There were several long term and senior employees who were just shy of age sixty who received significantly less pension benefits than they were promised. MCGILL ET AL., *supra* note 20, at 83.

failing of the federal regulatory regime."[36]

Thus, ERISA was enacted to provide a "comprehensive legislative scheme designed to obligate an employer to provide a regular program of contributions to fund its pension plan."[37] ERISA imparts minimum requirements for funding, vesting, participation and benefit accrual for all private retirement pension plans, requiring plans to "provide participants with information about the plan" and requiring accountability for plan fiduciaries.[38] The impetus for the enactment of ERISA was to provide a measure of protection for individual employees and ensure employers are adequately funding their pension plans.[39]

One type of retirement plan ERISA governs is a defined benefit plan, which can be classified as either a single or multiemployer plan.[40] Defined benefit plans are qualified employer-sponsored plans whose "plan document defines the amount of the benefit that will be paid by the plan to the participant at retirement."[41] The benefit must be definitely determinable, so the plan must define a benefit formula as well as identify how benefits accrue under that formula.[42] Typically, a defined benefit plan calculates its benefit formula using the number of years worked for an employer and the employee's compensation.[43]

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36. MCGILL ET AL., *supra* note 20, at 83.

37. Uylaki, *supra* note 17, at 82.

38. U.S. Department of Labor Frequently Asked Questions about Pension Plans and ERISA, http://www.dol.gov/dolfaq/go-dol-faq.asp?faqid=225&faqsub=ERISA&faqtop=Retirement+Plans+%26+Benefits&topicid=4 (last visited Feb. 24, 2008). Prior to 1974, there were no regulations governing any of these aspects of pension plans. MCGILL ET AL., *supra* note 20, at 23.

39. Uylaki, *supra* note 17, at 82.

40. 29 U.S.C. § 1001 (2000). Generally, multiemployer plans are plans maintained by more than one unrelated employer, are created in accordance with at least one collective bargaining agreement, and satisfy any other requirement set out by the Secretary of Labor, including certain related employers pursuant to 26 U.S.C. § 414 (2000). CCH, PENSION PROTECTION ACT OF 2006: LAW, EXPLANATION AND ANALYSIS 143-144 (2006). A "'single-employer plan' means a plan which is not a multiemployer plan." 29 U.S.C. § 1002(b)(41) n.3 (2006).

41. MEDILL, *supra* note 13, at 109 (emphasis omitted). In contrast to the defined benefit plan, the defined contribution plan is another type of qualified retirement plan governed by ERISA. *Id.* As the name "defined contribution" suggests, the plan document defines a contribution amount that the employer must make to the plan each year. *Id.* at 107. This allocation is then divided, as set out in the plan document, into individual accounts for each eligible participant in the plan. *Id.* At retirement or other termination, a participant will receive the nonforfeitable balance of his or her account, which includes contributions and earnings, rather than a designated monthly amount. *Id.*

42. *Id.* at 109.

43. *Id.* Several different types of formulas can be used for the computation of defined benefit plan benefits. These include the flat benefit formula, career average formula and final pay formula. *Id.* at 110. These formulas take into account the employee's years of service, which "is defined as a twelve consecutive month period during which an employer has worked at least 1,000 *hours of service*." *Id.* at 118. A flat benefit formula is calculated by multiplying a fixed dollar amount by the number of years of service. *Id.* at 110. Calculating a career average

In order to pay these promised benefits, employers must contribute enough money to fully fund the plan benefits accrued that year and make up for any previous underfunding.[44] Plans are not required to fund 100% of their plan's liabilities; rather, pension liabilities are considered fully funded when 90% or more of their current liabilities are met.[45] Once an employee reaches normal retirement age, the defined benefit plan will pay a set amount each month for the rest of the employee's life.[46]

Defined benefit plans have several advantages. For employees, an important advantage is that the employer bears the risk of investment and must make up any shortfall that might occur.[47] These types of plans are most advantageous for employees who work for the same employer for a long period of time; otherwise the employees may not accrue significant benefits.[48] Employers also bear the risk of longevity, as they must pay the participants' pension benefit, usually "in the form of a monthly annuity for the life of the participant or the joint lives of the participant and the participant's spouse," until the participant dies.[49] Finally, tax incentives also benefit employees and encourage employers to sponsor qualified plans.[50] Employer-sponsored qualified plans receive three types of tax advantages: earned income is tax-

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formula benefit involves multiplying the "fixed percentage of the participant's compensation" for each year of covered employment and then aggregating such amounts. *Id.* A final pay formula benefit is calculated using a fixed percentage of the employee's compensation over the last five to ten years of their employment. *Id.*

44. U.S. SENATE REPUBLICAN POLICY COMM., H.R. 4- PENSION PROTECTION ACT OF 2006, S. DOC. NO. 53, at 5 (2006). Typically, only employers contribute to defined benefit plans, though sometimes employees are required or allowed to contribute. Internal Revenue Service, Choosing a Retirement Plan: Defined Benefit Plans, http://www.irs.gov/retirement/article/0,,id=108950,00.html (last visited Jan. 20, 2008) [hereinafter Choosing a Defined Benefit Plan]. However, "[t]he 2000 Department of Labor survey of employee benefits in private establishments found that 95 percent of participants in defined benefit plans were in noncontributory plans." MCGILL ET AL., *supra* note 20, at 379.

45. U.S. SENATE REPUBLICAN POLICY COMM., H.R. 4- PENSION PROTECTION ACT OF 2006, S. DOC. NO. 53, at 5-6 (2006).

46. MEDILL, *supra* note 13, at 110. Most private defined benefit plans have designated a normal retirement age of sixty-two or sixty-five. CONG. BUDGET OFF., NORMAL RETIREMENT AGE AND MINIMUM-SERVICE REQUIREMENT, http://www.cbo.gov/OnlineTaxGuide/Page_1D2b.htm (last visited Jan. 21, 2008). Unless waived by the employee or the employee's spouse (if married), the employer will use plan assets to provide an annuity for the employee that will pay the employee's accrued benefit each month. MEDILL, *supra* note 13, at 110.

47. Kathleen H. Czarney, *The Future of Americans' Pensions: Revamping Pension Plan Asset Allocation to Combat the Pension Benefit Guaranty Corporation's Deficit*, 51 CLEV. ST. L. REV. 153, 166 (2004). Unlike defined benefit plans, defined contribution plans shift the investment risk to the employee since employees are only entitled to their individual vested account balance. *Id.* at 169.

48. *Id.* at 167. Accrued benefits from a defined benefit plan will not be recognized by a new unrelated employer. *See* MEDILL, *supra* note 13, at 110.

49. MEDILL, *supra* note 13 at 110. However, if the plan allows for a lump sum benefit and the participant elects to take his or her defined benefit pension as a lump sum, this transfers the risk of longevity to the participant. *Id.* at 109-10.

50. Czarney, *supra* note 47, at 165.

exempt so long as it remains in a tax-exempt trust, employer contributions within certain limits are tax deductible, and an employee is not treated as having received taxable benefits, even though those benefits are already vested, until the employee actually receives benefits from the qualified plan.[51]

While there are several advantages to defined benefit plans, there are also several disadvantages. Defined benefit plans are complicated to administer and difficult to understand.[52] Additionally, plan sponsors with defined benefit plans must contribute enough money today to ensure that there are enough assets to pay pension benefits in the future; however, there are many formulas involved in calculating the pension plans funding status.[53] Due to the complexity of the formulas, most pension participants do not really understand the nature of their defined benefit pension benefit.[54] It is also difficult for participants to monitor the funding level of their defined benefit plan; accordingly, participants may not be aware that their employer is having difficulty meeting their plan's funding liabilities.[55]

Although companies are required to file pension information with the Securities and Exchange Commission, large employers will often have several pension plans listed together in the filings.[56] A "list of the 50 companies with the most-underfunded pension plans" was published annually until 1997; however, outcry from the companies led to the termination of its publication.[57] Therefore, participants are often forced to rely upon their employers to apprise them of the health of their pension plans.[58] The accuracy of information supplied by employers may also be dubious, as employers might be motivated to either "exaggerate the ill-health" or "mask a deteriorating health of the pension plan."[59]

ERISA also created the PBGC, which is a federal corporation that insures the pensions of American workers and retirees in qualified single-employer and multiemployer defined benefit pension plans.[60] When an employer is unable to

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51. STANLEY N. BERGMAN & DAVID L. REYNOLDS, 350 T.M., PLAN SELECTION- PENSION AND PROFIT-SHARING PLANS A-1 (Supp. 2004).

52. Czarney, *supra* note 47, at 167. Complexity has been cited as one of the reasons that the number of defined benefit plans is decreasing. *Id.*

53. MEDILL, *supra* note 13, at 109-110. The plan's actuary determines "[t]he present value of the plan's benefit obligations . . . on the basis of actuarial assumptions that are reasonable both individually and in the aggregate and represent the actuary's best estimate of anticipated experience under the plan." Deloitte, Securing Retirement: An Overview of the Pension Protection Act of 2006 6, (Aug. 3, 2006), http://deloitte-tax.12hs.com/S1/C4AUDO/F36Y0NX2/M/.

54. Czarney, *supra* note 47, at 167. The plan sponsor hires an actuary to calculate the complex funding formulas. Choosing a Defined Benefit Plan, *supra* note 44.

55. Czarney, *supra* note 47, at 167.

56. Schultz & Francis, *supra* note 2, at A1.

57. *Id.* at 3.

58. *Id.* at A1.

59. *Id.*

60. Welcome to PBGC, http://www.pbgc.gov/ (Nov. 10, 2007). Plans not insured by the PBGC include individual account plans, church, and government plans. MCGILL ET AL., *supra*

meet its pension plan promises to employees, the PBGC effectively takes the plan over and becomes directly responsible for all pensions guaranteed under ERISA.[61] Consequently, the PBGC is now "responsible for the current and future pensions of about 1,271,000 people."[62] The PBGC was also created to "encourage the continuation and maintenance of . . . defined benefit pension plans, provide timely and uninterrupted payment of pension benefits, and keep pension insurance premiums at a minimum."[63] While the PBGC is a federal agency, it is not funded with tax dollars, but rather by collecting insurance premiums from all employers who sponsor insured pension plans, as well as money from investments, and from plans that it takes over.[64] The Deficit Reduction Act of 2005 (DRA) recently increased the annual flat rate premium to $30 per participant for single-employer plans and $8 per participant for multiemployer plans.[65] Some single-employer plans are also required to pay a variable rate premium of $9 for every $1,000 the plan falls below the 90% "full funding limit," in addition to the flat rate premium.[66] The PBGC is responsible for paying pension benefits to retirees whose plans it has taken over, as well as for the payment of future benefits to participants who have not yet retired.[67]

Employers may voluntarily end their pension plans in either a standard or a distress termination.[68] For an employer to be eligible for a standard termination there must be enough money in the plan to pay all vested nonforfeitable benefits.[69] The PBGC is no longer responsible for guaranteeing the plan once annuities have been purchased for plan participants.[70] Distress terminations occur when the plan does not have enough money to pay all of the

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note 20, at 802.

61. Welcome to PBGC, *supra* note 61.

62. PBGC Who We Are, http://www.pbgc.gov/about/about.html#1 (last visited Jan. 18, 2008).

63. *Id.*

64. *Id.*

65. Sal L. Tripodi & Teresa T. Bloom, Key Provisions of HR 4 Pension Protection Act of 2006, 4 (Aug. 31, 2006), http://www.asPPA 2006.org/government/comment08-02-06.htm. The rate was formerly $19 per participant for single-employers and $2.60 for multiemployer plans. CONG. BUDGET OFF., COST ESTIMATE S. 1932 DEFICIT REDUCTION ACT OF 2003 74, (2006), http://www.cbo.gov/ftpdocs/70xx/doc7028/s1932conf.pdf (last visited Jan. 20, 2008).

66. U.S. SENATE REPUBLICAN POLICY COMM., H.R. 4- PENSION PROTECTION ACT OF 2006, S. Doc. No. 53, at 10. However, the variable rate premium is waived for any plan meeting the 90% "full funding limit," even if the plan could not meet 100% of its liabilities, since 90% funded is defined as the "full funding limit." *Id.*

67. PBGC Who We Are, *supra* note 62.

68. 29 U.S.C. § 1341 (2000).

69. PBGC How Pension Plans End, http://www.pbgc.gov/about/termination.html (last visited Jan. 20, 2008).

70. *Id.* Employers must use the assets in the pension to purchase an annuity from an insurance company that will pay the participant his or her lifetime vested benefit or, if the plan allows, employers can offer the participant a lump sum payment equivalent to his or her lifetime vested benefit. *Id.* Employers must also give the participants an advance list of insurance companies from whom the employer might purchase annuities. *Id.* The PBGC is no longer responsible for guaranteeing the pension once an annuity has been purchased or the lump sum payment made. *Id.*

benefits.[71] To qualify for a distress termination, the employer must show severe financial distress.[72] Once the employer establishes financial distress, the PBGC will pay guaranteed benefits and will then attempt to recover funds from the employer.[73]

Finally, the PBGC can act to terminate any single-employer plan, without the sponsoring employer's consent, in order to protect the interests of the workers, the plan, or PBGC's insurance fund.[74] A distress termination for a multiemployer plan may occur if the employer cannot pay its guaranteed benefits and it meets one of the PBGC's financial distress tests.[75] If the financial distress test is met, the PBGC will take over the plan, using both its own assets and any remaining assets from the plan, ensuring retirees receive their benefits, subject to the PBGC's legal limits.[76]

The PBGC only pays guaranteed basic benefits, set under ERISA and adjusted on a yearly basis, which are calculated using the guaranteed amount in the plan and the year in which the plan terminates.[77] The basic benefits the PBGC guarantees are: "pension benefits at normal retirement age, most early retirement benefits, annuity benefits for survivors of plan participants, and disability benefits for disabilities that occurred before the date the plan

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71. *Id.*

72. *Id.* It must be shown to either the PBGC or a bankruptcy court that the only way the employer can remain in business is by terminating the pension plan. *Id.*

73. PBGC Distress Terminations, http://www.pbgc.gov/practitioners/plan-terminations/content/page13261.html (last visited Jan. 21, 2008). The maximum monthly guarantee is an amount set by law that limits the amount of benefits the PBGC will cover. What PBGC Guarantees, http://www.pbgc.gov/workers-retirees/benefits-information/content/page13181.html (last visited Jan. 20, 2008). The limits are based on the year in which the plan terminated and the age at which the participant begins receiving benefits from the PBGC. PBGC Maximum Monthly Guarantee Tables, http://www.pbgc.gov/workers-retirees/find-your-pension-plan/content/page789.html (last visited Jan. 20, 2008). If there is a benefit for a survivor, such as a spouse, then the survivor's age is also taken into account. *Id.* A participant whose plan terminated in 2007, and who begins receiving benefits at sixty-five, can receive a monthly maximum of $4,125 for a straight-life annuity or $3,712.50 for a joint and 50% survivor annuity. *Id.*

74. How Pension Plans End, *supra* note 70. For example, the PBGC can terminate a plan if there is not enough money to pay the current benefits due. *Id.*

75. PBGC Distress Terminations, *supra* note 73. One of the following financial distress tests must be satisfied: filing a petition to seek liquidation in bankruptcy; filing a petition to seek reorganization in bankruptcy that has been granted with approval for a plan termination because the plan cannot reorganize with the pension plan intact; demonstrating the only way the employer can continue business is if the plan is terminated; or demonstrating the plan is unduly burdened by the pension plan solely due to a declining number of covered employees in the plan. *Id.*

76. *Id.* The PBGC will attempt to collect plan underfunding from the employer and will share any recovered assets with participants and beneficiaries. *Id.* For a discussion on the obstacles the PBGC faces in recovering plan underfunding, see also Nicholas J. Brannick, *At the Crossroads of Three Codes: How Employers are Using ERISA, the Tax Code, and Bankruptcy to Evade Their Pension Obligations*, 65 OHIO ST. L.J. 1577 (2004); Czarney, *supra* note 47, at 157.

77. What PBGC Guarantees, *supra* note 73.

ended."[78] The PBGC limits what it will guarantee; for instance, benefits of plans that increased their benefit formulas within five years of termination may not be fully covered.[79] Finally, the PBGC does not cover ancillary benefits, such as health and welfare benefits or vacation pay.[80]

After the passage of ERISA and throughout the 1980s, the number of employers with defined contribution plans grew rapidly.[81] As a result of the increase in defined contribution plans, the burden of financing the plans shifted from the employer to the employee.[82] Interestingly, throughout the 1980s and most of the 1990s, an average of 75% of defined benefit plans were overfunded.[83] During this time, the stock market inflated pension assets; however, when the stock market and interest rates declined in value, around the year 2000, many pension funds became underfunded by millions of dollars.[84] The decrease in the ratio of active workers to retirees is also partially responsible for the current deficit.[85] These events also impacted the PBGC, which lost $11.3 billion in 2002 alone.[86] The main reason for the huge deficit was the termination of underfunded plans sponsored by large companies, such as: Trans World Airlines, Grand Union, Acme, Singer, Polaroid and Bethlehem Steel.[87]

The Pension Funding Equity Act of 2004 (PFEA) was enacted to help relieve some of the financial pressure on employers who sponsored defined benefit plans, which was caused by required pension contributions that were

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78. *Id.*

79. *Id.*

80. *Id.*

81. MCGILL ET AL., *supra* note 20, at 386-87. Many of the employers who adopted defined contribution plans at this time already had defined benefit plans in place. *Id.* at 387.

82. *Id.* at 387.

83. *Id.* at 58, Table 3-2. Plan overfunding refers to a plan with more assets than actuarial accrued benefit or current liability. *Id.* at 58.

84. Uylaki, *supra* note 17, at 82. Two main causes for the deficit are: a decrease in investment returns which cut "into the stockpiles that companies set aside to fund their future pension obligations" and a drop in interest rates which increased the amount companies must set aside to fund future liabilities. Kathy M. Kristof, *Panel to Debate Pension Measure; Firms Would Save. But Critics Say Bill Could Put Payment Security at Risk. Bush Threatens to Veto It*, L.A. TIMES, Feb. 2, 2004, at 1. Pension plan assets declined $970 billion between 1999 and 2002. MCGILL ET AL., *supra* note 20, at 391. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL COMMITTEES, PRIVATE PENSIONS: RECENT EXPERIENCES OF LARGE DEFINED BENEFIT PLANS ILLUSTRATE WEAKNESSES IN FUNDING RULES (May 2005).

85. CCH TAX BRIEFING, PENSION FUNDING EQUITY ACT OF 2004 2 (2004), http://tax.cchgroup.com/Tax-Briefings/2004-Pension-Funding-Act.pdf. In 1980 the active worker to retiree ratio was 4:1; it decreased to 1:1 in 2002. *Id.*

86. MCGILL ET AL., *supra* note 20, at 387. The PBGC started 2002 with a surplus of $7.7 billion, but ended the year with a deficit of $3.6 billion. *Id.* This loss was greater than any other one-year loss the PBGC had experienced since its inception. *Id.*

87. *Id.* at 387-88. Other plans also terminating in 2002 included retailers Bradlees, Caldor, and Payless Cashways; manufacturers Harvard Industries, Durango, and National Steel. *Id.*

growing increasingly larger.[88] The PFEA was designed to temporarily replace the rate at which pension liabilities are calculated.[89] A portion of the minimum funding requirement for pension funding is determined by comparing the current plan liabilities to the value of plan assets.[90] Prior to the enactment of the PFEA, pension liabilities were calculated using the 30-year Treasury bond rate.[91] This created a problem because the 30-year Treasury bond rate has become extraordinarily low compared with other market interest rates.[92]

To help mitigate these effects, the PFEA allowed plans to calculate pension liabilities using a long-term corporate bond rate for the 2004 and 2005 plan years.[93] The long-term corporate bond rate is considerably higher than the 30-year Treasury bond rate, so it reduces the calculated current liability.[94] In turn, the contribution the employer must make to meet its minimum funding requirement is also reduced.[95] Finally, the PFEA also assisted the struggling airline and steel industries by allowing some employers to elect to use alternate deficit reduction contributions.[96]

The PPA 2006, called the "most significant pension legislation since . . . ERISA was enacted in 1974," was principally written to ensure that employer sponsored defined benefit plans remained solvent.[97] One of the primary objectives of the PPA 2006 was to require most defined benefit plans to become fully funded.[98] The PPA 2006 has implemented new minimum required contribution rules, requiring most funds to become fully funded within four years,[99] although the airline industry was given a longer period.[100]

The PPA 2006 encourages strong pension plans through both incentives

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88. CCH TAX BRIEFING, *supra* note 85, at 1; 15 U.S.C. § 37b (2004).

89. Internal Revenue Service, Pension Funding Equity Act of 2004, http://www.irs.gov/retirement/article/0,,id=129503,00.html (last visited on Jan. 20, 2008).

90. *Id.* Contributions based on this calculation are called deficit reduction contributions, as they are designed to help reduce the pension plan's deficit. *Id.*

91. Kristof, *supra* note 84. A notice specifying the prior month's 30-Year Treasury Rate is published in the Internal Revenue Bulletin each month. Internal Revenue Service, *supra* note 89, at n.1.

92. Internal Revenue Service, *supra* note 89.

93. *Id.*

94. *Id.*

95. *Id.* This can reduce the deficit reduction contribution to zero for some plans, which means the employer must only contribute enough to fund its current liabilities. *Id.*

96. *Id.* The alternate deficit reduction contribution allowed the employers to contribute only 20% of their deficit reduction contribution. *Id.*

97. *President Signs Landmark Pension Reform Law*, KAN. EMPLOYMENT LAW LETTER (Foulston Siefkin LLP), Oct. 2006 [hereinafter EMPLOYMENT LAW LETTER].

98. *Id.*

99. *Id.*

100. U.S. SENATE REPUBLICAN POLICY COMM., H.R. 4- PENSION PROTECTION ACT OF 2006, S. DOC. NO. 53, at 10 (2006). Airlines are given additional years based on the status of their pension plan. *Id.* If no future benefits are accruing, then the employer has an additional ten years to fully fund the plan. *Id.* If future benefits are still accruing, the airline has three extra years to fund the plan, but they must follow the other funding rules as well. *Id.*

and penalties.[101] Incentives include a tax deduction for the employer in the amount that it costs to fully fund an underfunded plan and a provision allowing employers to make contributions in excess of the amount required for plans to be fully funded.[102] Allowing employers to contribute extra money to the pension plan during flourishing years can help keep the plan fully funded, even if the employer struggles to fund the plan at a future date.[103] The use of long-term corporate bond rates as set out in the PFEA has also been extended for plan years 2006 and 2007 to give plans more flexibility in attaining fully funded status.[104]

The PPA 2006 also amended several PBGC rules.[105] Since the DRA just increased the flat rate premiums, no changes were made to the rates.[106] However, since pension plans are now required to be 100% fully funded, all underfunded plans are now required to pay the variable rate premium.[107] Finally, all employers who terminate their pension plans and transfer any liabilities to the PBGC must pay $1,250 per participant per year for three years after plan termination.[108]

B. Brief History of Pensions in the United Kingdom

The first occupational pensions schemes in the United Kingdom date back to the 15th Century, with modern forms emerging in the 17th Century.[109] About one million people were covered by occupational schemes by 1900, though the pensions were still considered to be gratuitous provisions, rather

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101. EMPLOYMENT LAW LETTER, *supra* note 97.

102. *Id.*

103. *Id.*

104. Pension Protection Act of 2006, Pub. L. No. 109-280, §§ 302-03 (2006) (codified as amendment to 29 U.S.C.A. § 1055; 26 U.S.C.A. §§ 417, 415 (2007)); Tripodi & Bloom, *supra* note 65, at 2. For plan years after 2007, employers will have the option to either phase in new interest rate assumptions or to adopt them outright. *Id.*

105. Pension Protection Act of 2006, Pub. L. No. 109-280, §§ 404(c), 405(b), 410(a)(2) (2006) (codified as amendment to 29 U.S.C.A. §§ 1322(c), 1306(b), 1350(a)(2) (2007)).

106. Tripodi & Bloom, *supra* note 65, at 4.

107. U.S. SENATE REPUBLICAN POLICY COMM., H.R. 4- PENSION PROTECTION ACT OF 2006, S. DOC. NO. 53, at 10 (2006).

108. INST. OF MGMT. & ADMIN., *What Benefits Managers Need to Know About the Pension Protection Act of 2006*, 10 HUM. RESOURCES Vol. 2006 No. 10 (Oct. 2006). The premium applies to plans terminated:

> by the PBGC, (1) in a distress termination due to the sponsor's bankruptcy, (2) due to the inability of the employer to pay its debts when due, or (3) due to a determination that a termination is necessary to avoid unreasonably burdensome pension costs caused solely by a decline in the workforce.

THOMSON RIA, RIA's COMPLETE ANALYSIS OF THE PENSION PROTECTION ACT OF 2006 274-75 (2006). If the employer is reorganizing, the premium does not have to be paid until the employer has completed the reorganization process. *Id.*

109. George Walker, *United Kingdom Pension Law Reform*, 64 BROOK. L. REV. 871, 877 (1998).

than provisions to which an employee was entitled.[110] By the 1950s, concern about financing pensions due to an increasing elderly population emerged, as well as concern about the progressively more complex tax treatment of pensions.[111] Around the same time, pensions stopped being viewed as a gratuity and instead began being viewed as deferred salary compensation.[112]

In the 1990s, pensions underwent further reform in response to The Mirror Group pension scandal.[113] Robert Maxwell purchased the Mirror Group and withdrew £420 million from the pension funds.[114] The Pension Law Review Committee (Committee) was formed to investigate occupational pension schemes and make recommendations for pension reform.[115] The Committee found that employees of occupational pension schemes had a reasonable expectation of a protected benefit which accrued through service at the company.[116] Among a total of 218 recommendations,[117] the Committee found that a "minimum solvency requirement," which required that certain funding levels be met so that an employer could fund its liabilities to the pension scheme as they were due, was proper and advised how the requirement should be implemented.[118]

The Pensions Act 1995 (PA 1995) was introduced as a result of the recommendations by the Committee seeking in part to "increase confidence in the security of occupational pensions."[119] The PA 1995 established minimum funding requirements, as recommended by the Committee, which necessitated that scheme assets must be valued at least at 90% of scheme liabilities.[120] Scheme trustees also had to acquire actuarial valuations certifying the adequacy of contributions and adhere to a schedule of contributions to ensure the level of funding complied with the minimum funding requirements.[121]

The Occupational Pensions Regulatory Authority was also established "with new powers of investigation and enforcement and a separate compensation scheme created to protect members against asset withdrawal."[122] While the PA 1995 did set minimum funding levels, the execution of this Act

110. *Id.* at 878.
111. *Id.* at 881.
112. *Id.* at 881-82.
113. *Id.* at 885.
114. *Id.* at 887. After Maxell bought The Mirror Group, he imposed a pensions holiday, which allowed the Mirror Group to avoid making £800,000,000 worth of annual contributions to the pension fund. *Id.* at 885. While Maxwell's actions were considered unusual, they were not illegal at that time because "precedent involving employer tampering with employee pension funds failed to exist." *Id.* at 886.
115. *Id.* at 890-91.
116. *Id.* at 893.
117. *Id.* at 910.
118. *Id.* at 894-95.
119. *Id.* at 911.
120. *Id.* at 915.
121. *Id.*
122. *Id.* at 911.

has been criticized since its enactment.[123] The execution of the PA 1995 struggled because "the methodology and actuarial assumptions for assessing funding and determining minimum contributions under the minimum funding requirement were outdated and inflexible and the timescales for rectifying minimum funding requirement funding shortfalls are arguably overly prescriptive."[124]

As a response to the failings of the PA 1995, the Pensions Act 2004 (PA 2004) was enacted primarily to provide greater protection for members of occupational pension schemes by replacing the minimum funding requirements with the statutory funding objective (SFO).[125] One of the ways the PA 2004 sought to accomplish this was by creating the Pensions Regulator, which replaced the Occupational Pensions Regulatory Authority as the new regulatory agency governing employer-sponsored pension schemes.[126] The Pensions Regulator has a "defined set of statutory objectives, wider powers to investigate schemes and take action where necessary; takes a proactive, risk-focused approach to regulation; and provides practical support for the regulated community."[127] Finally, the Pensions Regulator can take steps to protect scheme member's benefits if it determines that the security of their scheme is in danger, and it can also take action to prevent an employer from intentionally avoiding its pension obligations.[128]

The PA 2004 also sought to protect pensions through the creation of the Pensions Protection Fund (PPF).[129] The PPF, partially modeled on the United States' PBGC,[130] was created to "provide compensation to members of eligible defined benefit pension schemes, when there is a qualifying insolvency event in relation to the employer and where there are insufficient assets in the pension scheme to cover the Pension Protection Fund level of compensation."[131] An

123. Hymans Robertson, *Farewell to the MFR: The Future of Pension Scheme Funding* 2 (May 2005), http://www.hymans.co.uk/hrllp/templates/research.asp?id=49&research=y.

124. *Id.*

125. The Pensions Trust, *The Pensions Act 2004*, http://www.thepensionstrust.org.uk/TPT/SHPS/ForEmployers/LatestCommitteePensionsNews/The+Pensions+Act+2004.htm (last visited Jan. 20, 2008); *see also* Hymans Robertson, *supra* note 123.

126. The Pensions Regulator About Us, http://www.thepensionsregulator.gov.uk/aboutUs/powers.aspx (last visited Jan. 20, 2008).

127. *Id.*

128. *Id.*

129. *Welcome to the Pension Protection Fund Website*, http://www.pensionprotectionfund.org.uk/ (last visited Jan. 20, 2008) [hereinafter PPF Welcome]; *but see* Yuill, *supra* note 12 (arguing the creation of the PBGC and the PPF contribute to the problem of pension deficit because the existence of those agencies encourages employers to turn over underfunded plans rather than engage in costly measures to fund the plans).

130. John J. Papadakis & Rosalind J. Connor, *The Pensions Act 2004: Pension Protection Fund*, http://www1.jonesday.com/pubs/pubs_detail.aspx?PubID=S1091 (last visited Jan. 21, 2008).

131. Main Functions of Pension Protection Fund,

eligible scheme is one that has not started wind up prior to April 5, 2007.[132] The PPF can assume responsibility for an eligible scheme if "a scheme rescue is not possible; and the scheme has a deficit."[133]

Funding for the PPF is supplied by a levy, calculated based on the size and solvency of the scheme, issued on all defined benefit plans.[134] The PPF is also financed by funds it receives from schemes it takes over and by payments into those schemes by employers.[135] There is great concern that the levy will become significantly larger during times of financial distress, when more employers are likely to become insolvent.[136]

The PPF pays compensation to members of eligible pension schemes on two different schedules.[137] Scheme members who have reached the normal pension age specified by their scheme, or members who are already receiving a pension from the scheme, receive 100% level of compensation from the PPF.[138] The 100% level of compensation is equal to the amount of compensation paid from the pension scheme immediately before the assessment date, subject to review of the scheme's rules by the PPF.[139] This amount is increased commensurate with the Retail Price Index, at no more than 2.5% a year, which could be lower than the yearly increase provided for by the pension scheme.[140]

Scheme members below the pension scheme's normal pension age and not already receiving a pension will receive 90% of their level of compensation accrued prior to the assessment date from the PPF.[141] These scheme members are entitled to an increase proportionate to the increase in the Retail Price Index of no more than 5% per year between the assessment date and the start of payments.[142] All scheme members who have reached normal pensions age or are already receiving a pension are entitled to a maximum compensation which is equivalent to £26,050 at age sixty-five.[143] Once these scheme members start

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http://www.pensionprotectionfund.org.uk/index/main-functions.htm (last visited Jan. 21, 2008).

132. Qualifying Conditions of Pension Protection Fund , http://www.pensionprotectionfund.org.uk/index/who-is-eligible/qualifying-conditions.htm (last visited Jan. 21, 2008).

133. Papadakis & Connor, *supra* note 130.

134. FAQs: Pension Protection Levy 2006/07, http://www.pensionprotectionfund.org.uk/index/pension_protection_levy-2/faqs_pension_protection_levy_2007_08.htm (last visited Jan. 21, 2008).

135. Papadakis & Connor, *supra* note 130.

136. *Id.*

137. Pension Protection Fund – Compensation, http://www.pensionprotectionfund.org.uk/index/main-functions/compensation.htm (last visited Jan. 21, 2008) [hereinafter PPF- Compensation].

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id. But see* Johnston Press Plc, *New Deal Call for T&N Pensioners*, BUXTON ADVERTISER, July 27, 2006 (stating employees who took early retirement could lose up to 80% of their benefits, current employees approximately 40%, and pensioners up to 30%).

142. PPF- Compensation, *supra* note 137.

143. *Id.* This includes people of any age who are already receiving a "survivors' pension or a pension on the grounds of ill health." *Id.*

receiving payments, their yearly increase will also be commensurate with the Retail Prices Index, up to a maximum of 2.5%.[144] While the PPF has the ability to adjust levies as needed to meet its liabilities, it can reduce compensation in severe situations.[145]

The PA 2004 also sought to protection pensions by creating the Fraud Compensation Fund (FCF), which funds pension schemes that have lost funds due to dishonesty.[146] There are four requirements that must be met before compensation can be received from the FCF: 1) the scheme must be an eligible occupational pension scheme; 2) a qualifying insolvency event must have occurred or, if none has occurred, it is likely that the employer is facing bankruptcy; 3) a notice of no potential for scheme rescue has been issued; and 4) the Board of the Pension Protection Fund has determined that scheme assets are missing due to fraudulent action.[147]

Schemes seeking assistance from the FCF have a twelve month period, the "authorised period," from the occurrence of the insolvency event, or the date when managers or trustees should have known the employer was facing bankruptcy, to file for assistance from the FCF.[148] Funding for the FCF comes from a levy on all eligible occupational pension schemes and must be enough to cover all payments paid out by the FCF.[149] The amount of compensation a scheme receives, if any, is calculated by the Board of the PPF.[150] Payments are generally calculated as the difference between "the value of the assets as stated in the audited scheme accounts, or the Pension Protection Fund valuation . . . and the value of the assets immediately before the application date as reported by an accountant."[151] The FCF is a last resort agency, so all attempts to recover scheme assets must be made before assistance from the FCF is sought.[152]

Another major change perpetuated by the PA 2004 was the enactment of the SFO, which replaced the minimum funding requirements set out by the PA 1995.[153] The premise of the SFO is to ensure that trustees "have sufficient assets to meet their scheme's technical provisions[,]" which means that the plan has enough assets "in today's terms required to meet the payment of future benefits, allowing for prudent assumptions of investment returns and mortality, among other factors."[154] In contrast to the rigid funding requirements previously in effect, the new rules give the trustees and the employer much

144. *Id.*

145. *Id.*

146. Fraud Compensation Fund, http://www.pensionprotectionfund.org.uk/index/main-functions/fraud_compensation_fund.htm (last visited Jan. 12, 2008) [hereinafter FCF].

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Debbie Harrison, *FT Fund Management: More Power for Scheme Guardians to Ensure Solvency*, FIN. TIMES, June 12, 2006, *available at* 2006 WLNR 10020730.

154. *Id.*

more flexibility and responsibility in determining the level of contributions.[155]

First, the trustees must "assess the strength of the employer's covenant, which is its opinion of financial position and prospects of the employer as well as its willingness to continue to support the scheme."[156] Then, the trustees must prepare a statement of investment principles, which shows investment strategy, as well as a statement of funding principles, which states the manner in which the SFO will be met.[157] The statement of investment principles and funding principles are designed to be read cooperatively.[158] In the event that a plan is determined to be underfunded, as many final salary scheme plans will likely be, the statement of funding principles must be supplemented with a recovery plan.[159]

The recovery plan establishes the contribution schedule that the employer must adhere to in order to bring the scheme into compliance with the SFO.[160] While the trustees must rely on the employer to provide information, such as its balance sheet and business plan, the trustees should not rely solely on information provided by the employer.[161] In cases of a plan shortfall, the trustees are expected to negotiate the quickest method the employer can afford to bring the scheme into conformity with the SFO, while still working with the employer.[162] In situations where an employer wants to engage in any actions that might compromise the strength of the covenant, such as taking on new debt, the trustees and the employer should join efforts to seek the authorization of the Pensions Regulator.[163]

II. PENSION REFORM IN THE UNITED STATES AND THE UNITED KINGDOM

The pension crisis is a global problem due to local forces; however, the solutions tend to be unique to each country.[164] Both the United States' PPA 2006 and the United Kingdom's PA 2004 were enacted to deal with pension deficits, but the manner in which each statute has approached the problem is vastly different.[165] Despite disparate local forces, two universal problems

155. *Id.*

156. *Keeping Everything Ship Shape*, FIN. TIMES, Apr. 13, 2006, *available at* 2006 WLNR 6229973.

157. Harrison, *supra* note 153.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Jennifer C. Rankin, *Leaving the Nest: World Pension Reform*, http://www.loma.org/res-10-06-world.asp (last visited Jan. 20, 2008). Such forces include "local politics, budgets, constituents, laws, regulations, and social contracts." *Id.*

165. *Compare* Pension Protection Act of 2006, Pub. L. No. 109-280 (2006) (codified as an amendment to 29 U.S.C.A. ch. 18 (2007)); Pensions Act 2004, c. 35.

remain.[166] The first problem involves changing world demographics.[167] Birth rates have declined and life expectancy rates have increased;[168] therefore, fewer workers are available to support the increasing number of retirees.[169] The proportion of elderly people in the United States is expected to increase to 23.2% of the population by the year 2080.[170] Since the percentage of retirees is expected to continue to increase, this issue must be addressed for pension reform to succeed.[171]

The second dilemma concerns the impact of market forces, such as the rate of returns on investments and interest rates, on pension funds.[172] Rates of return on investments impact pension funds because plans must contribute enough funds yearly to offset their liabilities in the future.[173] Even with prudent financial planning, the market can make a downward shift which would cause the plan to lose substantial assets.[174] A shift in interest rates can also negatively affect pension plans, because interest rates are also part of the calculation used to determine the amount plans are required to contribute each year.[175] A fluctuation of only 1% in the interest rate assumption used when calculating current pension liabilities can increase or decrease "the long-run cost estimate by about 25%."[176]

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166. Rankin, *supra* note 164.

167. *Id.*

168. *Id.* In 1900, 4.05% of the United States population was over sixty-five, but that rate grew to 12.43% in 2000. MCGILL ET AL., *supra* note 20, at 10 tbl.1-3. Birthrates in the United States for white women have decreased from just fewer than 4.0 in 1900 to just over 2.01 in 2000. *Id.* at 12 fig. 1-2. In the United States in 1900, the average life expectancy for men was 47.3; however, in 2000 the life expectancy had increased by almost thirty years to 77.1. *Id.* at 13 tbl. 1-4. Finally, the fastest growing segment of the population in the United States is people over the age of eighty-five. *Id.* at 13-14.

169. Rankin, *supra* note 164.

170. MCGILL ET AL., *supra* note 20, at 15. People are considered to be elderly once they reach age sixty-five. *Id.*

171. *See Id.*

172. Rankin, *supra* note 164. The Standard and Poor's 500 stock index decreased significantly from 2000 through 2002. *Subcomm. on Aviation Hearing on Airline Pensions: Avoiding Further Collapse*, http://www.house.gov/transportation/aviation/06-22-05/06-22-05memo.html (last visited Jan. 21, 2008) [hereinafter *Aviation Hearing*]. *See also* Internal Revenue Service, *supra* note 89.

173. MCGILL ET AL., *supra* note 20, at 595.

174. Internal Revenue Service, *supra* note 89. Since roughly half of the assets of defined benefit pension plans were invested in the stock market from 1995 to 2000, the decline in the stock market caused many plans to go from overfunded status, to underfunded status in a short time. *Aviation Hearing*, *supra* note 172.

175. Internal Revenue Service, *supra* note 89; *See also* Hymans Robertson, *supra* note 123, at 31.

176. MCGILL ET AL., *supra* note 20, at 612.

A. United States' Minimum Required Contribution and United Kingdom's SFO

Both the minimum required contribution enacted by the United States and the SFO enacted by the United Kingdom strive to improve the security of pension funds.[177] Determining funding for defined benefit plans can be very complex, since funding must be calculated to meet benefits that are payable many years in the future.[178] Planning to pay benefits due years in the future assigns the risk of investment and the risk of longevity to the employer.[179] The question remains as to whether legislation in either the United States or the United Kingdom will succeed in shoring up funding for defined benefit pensions.

1. The United States' Minimum Required Contribution

The new minimum required contribution, which becomes effective in the 2008 plan year, consists of only a single funding method, which is a simplification over the current two-tiered funding system.[180] The new minimum required contribution requires single-employers to contribute enough funds to cover the cost of the benefits accrued that plan year, plus any other liabilities that have been amortized over a period of time.[181] A funding shortfall occurs when the plan assets are less than the plan liabilities in a plan year.[182] According to the new minimum required contribution, the funding shortfall is amortized over a seven-year period and must be paid in installments each year, starting the year the funding shortfall occurs[183] Each subsequent year, the employer must recalculate "the amount of underfunding based on that year's assets and liabilities."[184] If the funding shortfall increases, then this additional

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177. *See generally* Pension Protection Act of 2006, Pub. L. No. 109-280 (2006) (codified as an amendment to 29 U.S.C.A. ch. 18 (2007)); Pensions Act 2004, c. 35.

178. *See supra* p. 23 and note 172.

179. MEDILL, *supra* note 13, at 108-09.

180. CCH, *supra* note 40, at 90. Pension Protection Act of 2006, Pub. L. No. 109-280 (2006) (codified as an amendment to 26 U.S.C.A. § 179 (2007)). The previous minimum funding standard consisted of the minimum funding standard account rule and the deficit contribution. Tripodi & Bloom, *supra* note 65, at 1.

181. THOMSON RIA, *supra* note 108, at 61. Pension Protection Act of 2006, Pub. L. No. 109-280 (2006) (codified as an amendment to 26 U.S.C.A. § 179 (2007)); *see also* THOMSON RIA, *supra* note 108, at 60-130 (providing additional information regarding calculation of the minimum required contribution).

182. Deloitte, *supra* note 53, at 8. Funding shortfalls can stem from "unfunded past service liability and changes in past service liability due to plan amendments, assumption changes, and experience gains and losses over a period that can exceed 30 years." CCH, *supra* note 40, at 91.

183. Deloitte, *supra* note 53, at 8; Pension Protection Act of 2006, Pub. L. No. 109-280, § 102 (codified as an amendment to 29 U.S.C.A. § 1083 (2007)).

184. Tripodi & Bloom, *supra* note 65, at 6; Pension Protection Act of 2006, Pub. L. No. 109-280, § 102 (codified as amendment to 29 U.S.C.A. § 1083 (2007)). Amortization payments are not required if the assets of the plan are greater than its liability target. Tripodi & Bloom,

funding shortfall amount must be amortized separately over a new seven-year period.[185] The PPA 2006 now defines a fully funded plan as one with enough assets to meet 100% of its current liabilities.[186] Therefore, employers are only required to make contributions to the plan up to the full funding limitation of 100% of their current liabilities.[187]

As a continuation of the ideas behind the PFEA, actuarial assumptions and means of calculating present value have also been significantly modified.[188] The PPA 2006 requires that "determination of present value and other funding computations will be made on the basis of reasonable actuarial assumptions and methods that take into account the experience of the plan and offer the actuary's best estimate of the anticipated experience under the plan."[189] For plan years beginning prior to 2007, the PPA 2006 has extended the use of corporate bond rates outlined in the PFEA;[190] however, for plan years beginning after 2008 present value will be determined "based on the performance of corporate bonds as reflected in a segmented yield curve that reflects the age of an employer's work force."[191] The Secretary of the Treasury will set the yield curve, which will be calculated using the yields on investment grade bonds.[192] The yield curve will then be divided into segments based on when the benefits are expected to be paid.[193] Accordingly, employers who have an elderly work force will be using a short-term corporate rate, which will require them to make higher contributions.[194] Any plan that existed before 2008 will have the option to implement the segmented yield curve over a three-year period.[195]

As an alternative to the segment yield rates, however, employers may choose to use the full yield curve, which consists of the "interest rates under the corporate bond yield curve for the month preceding the month in which the plan year begins."[196] Selection of mortality tables used to compute present

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supra note 65, at 6.

185. Deloitte, *supra* note 53, at 8.; Pension Protection Act of 2006, Pub. L. No. 109-280 § 102 (codified as an amendment to 29 U.S.C.A. § 1083 (2007)).

186. CCH, *supra* note 40, at 95. Formerly plans were considered fully funded when they had enough assets to pay 90% of their total liabilities. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 104.

190. *Id.* at 105.

191. *Id.*

192. *Id.* at 106. The corporate bonds used will be of "varying maturities that are in the top three levels available." *Id.*

193. *Id.* at 104. The segments will be divided into the following categories: "0-5 years, 5-20 years, or over 20 years." *Id.*

194. *Id.* The yield curve illustrates the relationship between funding liabilities and the age of the plan's participants. *Id.* Companies with a younger demographic have a smaller funding obligation, "because [those companies'] liabilities would be discounted at short-term interest rates." *Id.*

195. *Id.* at 106. While employers are not required to phase in the segmented yield rates, this election can only be revoked with permission from the Secretary of the Treasury. *Id.* at 107.

196. *Id.* at 106. However, this alternative election can only be rescinded with the

value or required funding have also been impacted by the PPA 2006.[197] The Secretary of the Treasury is now required to select tables "based on the actual experience of pension plans and projected trends in experience."[198] Unlike the new interest rates, the mortality tables are not going to be phased in, so neither will the differences in assumptions between the old and new tables.[199]

While multiemployer plans are currently treated as single-employer plans by ERISA and the Internal Revenue Code for funding rule purposes,[200] the PPA 2006 sets out funding requirements that treat multiemployer plans differently than single-employer plans.[201] All multiemployer plans have a standard funding account that is credited with employer contributions and debited with plan expenses each year.[202] The PPA 2006 reduces amortization of costs debited or credited to funding standard accounts established on or after 2008 to a standardized fifteen-year amortization schedule.[203] However, plans that obtain Internal Revenue Service approval can adopt an amortization schedule that is as long as twenty-five years.[204] For plan years beginning after 2007, "actuarial assumptions and methods used to determine costs, liabilities, interest rates and other factors" must be independently reasonable and take "into account the plan's experience and reasonable expectations."[205]

A new set of minimum required contributions, effective through 2014, has been created to help shore up plans whose status is "endangered" or "critical."[206] Plans in "endangered" or "seriously endangered" status are required by the PPA 2006 to formulate and execute a funding improvement plan, with the goal of decreasing underfunding in endangered plans by one-third and seriously endangered plans by one-fifth.[207] A plan in "critical" status

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authorization of the Secretary of the Treasury. *Id.*

197. *Id.* at 107

198. *Id.* These tables must be updated at least every ten years and must continue to take into account the experience of the plans and projected trends. *Id.*

199. *Id.*

200. U.S. SENATE REPUBLICAN POLICY COMM., H.R. 4- PENSION PROTECTION ACT OF 2006, S. DOC. NO. 53, at 6 (2006).

201. Deloitte, *supra* note 53, at 10.

202. CCH, *supra* note 40, at 144.

203. *Id.* at 145-46. Prior to the PPA 2006, amortization schedules could be as long as thirty years. Deloitte, *supra* note 53, at 11. These changes in the amortization periods align multiemployer plans with the amortization periods of single-employer plans. CCH, *supra* note 40, at 146. However, this means employers will have to make larger contributions to fund any increased costs, since the payments on those costs will be spread out over a fewer number of years. *Id.*

204. Deloitte, *supra* note 53, at 11.

205. CCH, *supra* note 40, at 148. Formerly, the actuarial assumptions and methods were only required to be reasonable in the aggregate. *Id.*

206. Deloitte, *supra* note 53, at 10. Plans must be less than 80% funded or have or estimated in the next six years to have an accumulated funding deficiency for its status to be considered "endangered." *Id.* A plan's status is considered to be "seriously endangered" if both the previously mentioned circumstances are met. *Id.* Finally, a plan is in "critical" status when it is projected that it will be unable to fulfill the minimum funding requirements or it become insolvent with three to six years. *Id.* at 11.

207. *Id.* The funding improvement plans should require an increase in contributions and a

must formulate a rehabilitation plan with the goal of emerging from critical status within ten years.[208] The plan's actuary must certify that the plan is following its stated plan to increase funding yearly.[209] Finally, while these provisions sunset in 2014, a plan is permitted to follow its funding plan until it achieves its goals or the applicable time period expires.[210]

Concern with the financial situation in the commercial passenger airline industry caused Congress to set out provisions within the PPA 2006 specifically for that industry.[211] Congress was primarily concerned that if the commercial airlines had to make the minimum required contribution, it would divert cash that was needed to keep the companies solvent.[212] Plans that are sponsored by commercial airlines can choose to apply either the alternative funding schedule or a relaxed version of the new funding requirements.[213] If an employer elects to adopt the relaxed version of the new funding requirements, then beginning in the 2008 plan year, the plan would amortize any funding shortfall over a ten-year period, rather than the normally required seven-year period.[214] The alternative funding schedule requires the plan to "freeze benefit accruals and restrict benefit increases, and provide for contributions that pay for the plan's unfunded liability over 17 years."[215] Measures required by the alternative funding schedule, however, will not reduce the employee's accrued benefits.[216]

Minimum required contributions are calculated by dividing the amount of the unfunded plan liability by the seventeen-year amortization period.[217] This minimum required contribution amount is recalculated each year in the same manner.[218] As a result, the benefit of the amortization period decreases every year while the number of years remaining in the amortization period also decreases.[219] Finally, at the end of the amortization period, the plan will once again be subject to the regular minimum funding contribution standards.[220]

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decrease in benefits over a ten-year period (fifteen-year period for seriously endangered plans) so that the funding percentage is increased. *Id.* Plans that do not comply or adopt these measures may be subject to civil penalties and excise taxes. CCH, *supra* note 40, at 150.

208. Deloitte, *supra* note 53, at 11. A 10% surcharge, though this is reduced to only 5% the first year, is levied on the employer's contribution each year the plan remains in "critical" status. *Id.*

209. *Id.* Penalties could also be assessed if the plan's funding goals are frustrated. *Id.*

210. *Id.*

211. CCH, *supra* note 40, at 138.

212. *Id.*

213. THOMSON RIA, *supra* note 108, at 116.

214. *Id.* This election must be made by December 31, 2007. *Id.*

215. *Id.* Specifically, pension, death or disability, and social security benefits must be frozen and all other benefits must be eliminated. CCH, *supra* note 40, at 138.

216. THOMSON RIA, *supra* note 108, at 117.

217. CCH, *supra* note 40, at 139.

218. *Id.*

219. *Id.*

220. *Id.* Note, however, any carryover balance will be zero beginning the plan year after the alternative funding schedule ends. *Id.*

2. United Kingdom's SFO

The PA 2004 replaced the minimum funding requirements that were set out in the Pensions Act of 1995 with a SFO.[221] The new SFO apply to all plans that were subject to the minimum funding requirements, including "most private sector defined benefit occupational pension schemes."[222] Instead of requiring all pensions to meet a universal funding requirement, the SFO is more individualized and takes into account the circumstances particular to each pension.[223] The plan's trustees, managers and sponsoring employer must all work together to formulate an actuarially advised "strategy for funding the pension commitments and for correcting any funding deficits, and to set this out in a statement of funding principles."[224]

The SFO must, however, be formulated to cover the plan's actuarially calculated liabilities.[225] The plan's trustees or managers are permitted to choose which methods and assumptions are suitable to use when calculating the plan's liabilities.[226] The PA 2004 requires the Pensions Regulator to issue a code of practice that will provide guidance to the plan's trustees regarding their duties in determining scheme funding.[227] However, plans cannot use any provision that allows the plan's liabilities to be limited by the plan's assets.[228] Once the plan has formulated its SFO, the plan must issue a written statement of funding principles which contains "the trustees' policy for ensuring that the statutory funding objective is met."[229] The Pensions Regulator may impose a civil penalty on the plan's trustees or managers if they do not use reasonable measures to meet the requirements established in the statement of funding principles.[230]

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221. WORK AND PENSIONS, *supra* note 16, § 220 ¶ 792. The new provisions are also subject to "the requirements of the European Directive 2003/41/EC on the activities and supervision of institutions for occupation retirement provision (the IORP Directive). *Id.* § 221 ¶ 794; *see generally* OFFICIAL J. OF THE EUROPEAN UNION, *European Directive 2003/41/EC of the European Parliament and of the Council of June 3, 2003 on the Activities and Supervision of Institutions for Occupational Retirement Provision*, 2003 O.J., 10 (L235), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_235/l_23520030923en00100021.pdf., as this directive is outside the scope of this Note.

222. WORK AND PENSIONS, *supra* note 16, § 220 ¶ 792.

223. *Id.* § 220.

224. *Id.*

225. *Id.* § 222 ¶ 795. Current liabilities are also referred to as the "technical provisions" of the plan. *Id.* § 220 ¶ 796.

226. *Id.* § 222 ¶ 797.

227. *Id.*

228. *Id.* § 222 ¶ 798.

229. *Id.* § 223 ¶ 799. The statement of funding principals must be periodically reviewed and revised as necessary or at least every three years. *Id.* § 223 ¶ 801. The statement must set out any decisions made regarding "the methods and assumptions to be used in calculating the scheme's technical provisions; and the period over which a failure to meet the statutory funding objective would be rectified and the manner in which it will be rectified." *Id.* § 223 ¶ 800.

230. *Id.* § 223 ¶ 801.

In order to comply with the requirements of the PA 2004, an actuarial valuation must be prepared yearly;[231] however, the trustees of the plan are allowed to order actuarial valuations every three years if an actuarial report is obtained in the intervening years.[232] The actuary must certify the calculations of the plan's current liabilities and that they are within the guidelines of the plan's SFO when completing actuarial valuations.[233] Finally, the trustees are required to make available to the employer within seven days any actuarial valuation or report.[234]

In the event that the trustees or managers determine by using the plan's actuarial valuation that the scheme is not going to meet its SFO, they are either required to create a recovery plan, or if one is in place, to reevaluate its terms.[235] A recovery plan must specify what steps will be taken to satisfy the SFO, as well as the timeframe in which the SFO must be achieved.[236] The recovery plan "must be appropriate having regard to the nature and circumstances of the scheme," and the trustees must consider any prescribed matters.[237] While the trustees have some discretion in creating the recovery plan, they are still subject to regulations that might require other conditions in which the recovery plan must be reviewed or revised.[238] In these situations, the trustees must provide a copy to the Pensions Regulator within a reasonable time of the recovery plan's preparation or revision.[239]

The trustees are also responsible for preparing a schedule of contributions, as well as regularly reviewing and revising the schedule when necessary.[240] A schedule of contributions must include the rates at which the employer will contribute to the scheme as well as the dates on which the contributions will be paid.[241] While the trustees maintain some degree of control over the schedule of contributions, it is still subject to regulations and certification by the actuary before it will become effective.[242] The schedule of contributions is subject to regulations that govern when the schedule must be

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231. Pensions Act 2004, c. 35, § 224(1)(a). "An actuarial evaluation is a written report, valuing the scheme's assets and calculating its technical provisions, prepared and signed by the scheme actuary." WORK AND PENSIONS, *supra* note 16, § 224 ¶ 804.

232. Pensions Act 2004, c. 35, § 224(1)(a). "An actuarial report is a written report, prepared and signed by the scheme actuary, on changes to the scheme's technical provisions since the last actuarial valuation." WORK AND PENSIONS, *supra* note 16, § 224 ¶ 804.

233. Pensions Act 2004, c. 35, § 225. The Pensions Regulator can issue a fine against any actuary who does not supply this information within a reasonable time frame. WORK AND PENSIONS, *supra* note 16, § 225 ¶ 813.

234. Pensions Act 2004, c. 35, § 224(7).

235. *Id.* § 226(1).

236. *Id.* § 226(2).

237. *Id.* § 226(3)-(4).

238. *Id.* § 226(5).

239. *Id.* § 226(6). A trustee who does not comply will be subject to civil penalties. *Id.* § 226(7).

240. *Id.* § 227(1).

241. *Id.* § 227(2).

242. *Id.* § 227 (3)-(6).

prepared, reviewed, revised, and becomes effective.[243]

The schedule of contributions is also not considered to be complete or effective until the scheme's actuary has certified it.[244] The actuary's certification must state that in his or her opinion the schedule of contributions is in agreement with the statement of funding principles.[245] It must also certify that the rates in the contribution schedule are ample enough that in periods when the SFO was not met, it could be met within the time laid out in the recovery plan.[246] The rates must also be sufficient enough so that when the SFO is met for a period, it can be also expected to be met for the entire timeframe in which the schedule of contributions is in effect.[247] In the event that the SFO is not met for any period, the trustees are required to send a copy of the schedule of contributions to the Pensions Regulator.[248] The trustees are also responsible for reporting any missed contributions to the Pensions Regulator if they believe that failure is "of material significance."[249]

While the trustees have a great amount of responsibility for administering and guiding the pension scheme, they must obtain the approval of the employer:

> to any decision about the methods and assumptions which are to be used by the actuary in calculating the scheme's technical provisions; to any matter which is to be included in the scheme's statement of funding principles; to any recovery plan; and to any matter to be included in the schedule of contributions.[250]

Amendments can be made, but they cannot negatively affect rights of the scheme participants, or those of the participant's beneficiaries.[251] Finally, if the trustees cannot come to an agreement with the employer on any matter mentioned above, the trustees must inform the Pensions Regulator of this in writing.[252]

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243. *Id.* § 227(3).

244. *Id.* § 227(5).

245. *Id.* § 227(6)(a).

246. *Id.* § 227(6)(b)(i).

247. *Id.* § 227(6)(b)(ii).

248. *Id.* § 227(7). Again, failure to comply with this requirement subjects the trustees to civil penalties. *Id.* § 227(8). If for some reason the actuary cannot certify the schedule of contributions, they must report this to the Pensions Regulator or also be subject to civil penalties. *Id.* § 227(9).

249. *Id.* § 228(2). Civil penalties apply when the trustees have not taken reasonable steps to inform the Pensions Regulator or when the employer does not have a "reasonable excuse" for nonpayment of a contribution. *Id.* § 228(4).

250. WORK AND PENSIONS, *supra* note 16, § 229 ¶ 833. However, if the trustees think they cannot obtain approval from the employer in a timely manner, the trustees can adopt a resolution to amend the future accrual of benefits, with the employer's permission. Pensions Act 2004, 2004, c. 35, § 229(2).

251. Pensions Act 2004, c. 35, § 229(3).

252. *Id.* § 229(5). Again, civil penalties apply to any trustee who does not attempt to

The scheme's trustees and the employer must also consider information provided by the scheme's actuary.[253] The scheme's actuary must be consulted on matters such as: "the methods and assumptions which are used by the actuary in calculating the scheme's technical provisions; preparing or revising the scheme's statement of funding principles; preparing or revising a recovery plan; preparing or revising the schedule of contributions; or modifying the scheme as regards the future accrual of benefits."[254] The scheme's actuary is also required to consider any guidance set out by approved organizations.[255]

The scheme's trustees, employer, and actuary must all work together to create the scheme's funding provisions,[256] which can sometimes lead to disagreement amongst the parties.[257] In situations where a disagreement occurs, the Pensions Regulator is authorized to intervene and help resolve the disagreement.[258] If there is a failure to meet any of the funding requirements mentioned above, or there is a dispute between the scheme's employer and trustees, the Pensions Regulator has the authority

> to modify future benefit accruals under the scheme; to give directions about the manner in which the scheme's technical provisions should be calculated, including the methods and assumptions which should be used in the calculation; to give directions about how, and over what period any failure to meet the statutory funding objective should be rectified; to impose a schedule of contributions on the scheme setting out the contributions to be paid and the dates they are to be paid.[259]

The Pensions Regulator, however, must refrain from making any amendments to the funding requirements that would negatively affect the existing rights of any scheme participants or their beneficiaries.[260]

B. United States' PBGC Compared with United Kingdom's PPF and FCF

1. United States' PBGC

The new provisions in the PPA 2006 pertaining to the PBGC were

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comply with these regulations. *Id.* § 229(6).

253. *Id.* § 230.

254. WORK AND PENSIONS, *supra* note 16, § 230 ¶ 839.

255. *Id.* § 230 ¶ 841. Approved organizations include the Faculty and Institute of Actuaries, which also has the approval of Secretary of State. *Id.* Again, civil penalties apply if these regulations are not followed, or not even attempted to be followed, by the scheme's trustees. Pensions Act 2004, c. 35, § 230(4).

256. WORK AND PENSIONS, *supra* note 16, at §220 ¶ 793.

257. *Id.* § 231 ¶ 843.

258. *Id.*

259. *Id.* § 231 ¶ 844-45.

260. *Id.* § 231 ¶ 846.

enacted to address two basic problems with the PBGC's premium structure which have contributed to the PBGC's deficit.[261] The first problem was that "the premium structure did not adequately reflect the different levels of risk posed by plans of strong and weak companies."[262] The second problem was the premium structure did not raise enough income to reduce the current or expected future shortfall.[263] The PPA 2006 made permanent the temporarily DRA increased flat rate premiums, from $10 to $30 per participant for single-employer plans.[264] While the DRA raised the flat rate premium, this increase, without raising the variable rate premium, was still not sufficient to raise additional needed revenue.[265]

In response to these problems, the PPA 2006 now requires all employers who do not have enough assets to meet 100% of their current liabilities to pay the variable rate premium.[266] This should help solve two problems for the PBGC, as it encourages employers to fully fund their plans, which will decrease the number of underfunded plans, and will also raise more revenue for the PBGC.[267] However, for small employers, the PPA 2006 capped the variable premium rate at $5, instead of $9, per plan participant for each $1,000 the plan is below the 90% full funding limit.[268] The reasoning behind this cap is that the variable rate premium has been viewed as responsible for the decline in the number of small employers who maintain defined benefit plans.[269]

The PPA 2006 also included several provisions pertaining to plans that enter bankruptcy.[270] One of these provisions made permanent the $1,250 termination premiums initially set out in the DRA.[271] Another provision "provides for an earlier plan termination date where a contributing sponsor

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261. CCH, *supra* note 40, at 204.

262. *Id.*

263. *Id.*

264. *Id.* at 202.

265. *Id.* at 204. The flat rate premium was not sufficient for two reasons. *Id.* First, allowing plans that are only 90% funded to be exempt from the variable rate premium meant only a few plans actually paid the variable rate premium. *Id.* Second, "variable rate premium revenue is artificially low because current liability 'understates liabilities at plan termination, often dramatically so.'" *Id.* (quoting former PBGC executive director Bradley Belt's testimony before the Committee on Budget, US Senate June 12, 2005).

266. *Id.*

267. *Id.*

268. *Id.* at 205. Small employers have twenty-five or less employees. *Id.*

269. *Id.* at 206. "This provision will provide sorely needed relief for many small plan for which the PBGC variable rate premium, which is calculated as a percentage of underfunding for *vested* benefits, has been excessive in relation to underfunding for *guaranteed* benefits." *Id.* "There has often been, a large gap between vested and guaranteed benefits for small plans due to the special limitations on the guarantee for substantial owners." *Id.*

270. Pension Protection Act of 2006, Pub. L. No. 109-280, §§ 401(b)(1), 404(a)-(b) (codified as an amendment to 29 U.S.C.A. §§ 1306, 1322, 1344 (2007)).

271. CCH, *supra* note 40, at 205. This provision is often referred to as the "exit fee" and could be substantial for a large plan. *Id.* This could then lead to employers having difficulty reorganizing after bankruptcy which might result instead in asset sales. *Id.*

enters into a bankruptcy proceeding before the date that would otherwise have been treated as the plan termination date for purposes of determining the amount of PBGC's guarantee of benefits . . . ."[272] This means that the amount of benefits guaranteed by the PBGC is frozen once the employer has entered bankruptcy.[273]

Treating the date of the employer's bankruptcy petition "as the plan termination date shortens the time frame for participants to establish entitlement to benefits, for benefits to become nonforfeitable, for participants to establish disability, and/or for a plan account to be valued at less than the $5,000 lump-sum distribution threshold."[274] Essentially, this may lead to a reduction in the amount of benefits for which the PBGC is responsible.[275]

2. United Kingdom's PPF and FCF

The PPF was created by the PA 2004 to insure qualified defined benefit pension schemes in case the scheme's sponsoring employer does not have enough assets to meet the obligations to the scheme.[276] The PPF is funded by levies collected from covered schemes, any money borrowed, interest earned from investment of assets, and any amounts recovered, transferred from or repaid from schemes.[277] When the PPF began operating on April 6, 2005,[278] an initial levy on eligible schemes took place to provide preliminary funding.[279] The initial levy was assessed on a per plan basis, determined by the number of participants in the scheme and their status.[280] The levy was £15 for each participant and each retiree, or beneficiary who was collecting a retiree's benefit, and £5 for each deferred member.[281] The initial levy was estimated to bring in about £150 million in funding for the PPF.[282]

Starting in the 2006 financial year, a pension protection levy, consisting of risk-based and scheme-based factors, will be issued yearly to all eligible

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272. THOMSON RIA, *supra* note 108, at 278.

273. *Id.*

274. *Id.* at 278-79.

275. *Id.* at 279.

276. Welcome to PBGC, *supra* note 60.

277. Pensions Act 2004, c. 35, § 173(1).

278. Welcome to PBGC, *supra* note 60.

279. Pensions Act 2004, c. 35, § 174(1).

280. Pension Protection Fund, A Guide to the Pension Protection Levies 2005/06 4, http://www.pensionprotectionfund.org.uk/guide_to_levies.pdf (last visited Jan. 19, 2008) [hereinafter Guide to Levies].

281. *Id.* at 4. A deferred member is a participant in a scheme "who has rights due to their past pensionable service under the scheme." *Id.* at 11. The amount of the initial levy for deferred members reflects the fact that typically they have a lower vested benefit then other scheme participants. *Id.* at 4.

282. Pension Protection Fund- The Levies, http://www.pensionprotectionfund.org.uk/index/main-functions/the-levies.htm (last visited Jan. 20, 2008) [hereinafter PPF Levies].

schemes.[283] The risk-based levy is calculated by taking into account several factors, including:

> the difference between the value of a scheme's assets . . . and the amount of its protected liabilities, . . . [as well as] the likelihood of an insolvency event occurring in relation to the employer in relation to a scheme, and . . . if appropriate one or more other risk factors . . . .[284]

Other risk factors could include a possible high risk when comparing the scheme's investments with its liabilities and any other matters the Board of the PPF considers relevant.[285] Schemes are classified as underfunded for purposes of assessing the risk based levy by periodically submitting actuarial valuations and any other requested information that might show the financial health of the scheme to the Board or Pensions Regulator.[286]

Scheme-based levies are determined by examining "the amount of a scheme's liabilities to or in respect of members," and any other factors the Board of the PPF finds relevant,[287] such as: the number of participants or beneficiaries of the scheme; "the total annual amount of pensionable earnings of active members of a scheme[;]" and any other factors the Board may decide to examine.[288] Each year, the Board is required to state factors it will consider when assessing levies, the rate of the levies, the time frame for calculating the levies, and when payment of the levies is due.[289]

However, before the Board sets out these provisions each year, it must determine how much revenue it needs to collect that year to not exceed the "levy ceiling for the financial year."[290] Eighty percent of the estimated pension

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283. Pensions Act 2004, c. 35, § 175(1).

284. *Id.* § 175(2)(a).

285. *Id.* § 175(3).

286. *Id.* § 179(1).

287. *Id.* § 175(2).

288. *Id.* § 175(4).

> "Pensionable earnings," in relation to an active member under a scheme, means the earnings by reference to which a member's entitlement to benefits would be calculated under the scheme rules if he ceased to be an active member at the time by reference to which the factor within subsection (4)(b) is to be assessed.

Id. § 175(8).

289. *Id.* § 175(5).

290. *Id.* § 177(1)-(2). The levy ceiling is set by the Secretary of State before each financial year begins. *Id.* § 178(1). The levy ceiling must "be increased each year by the percentage increase in the level of earnings in Great Britain for the review period." WORK AND PENSIONS, *supra* note 16, § 178 ¶ 652. The review period refers to "the period of 12 months ending with the prescribed date in the previous financial year." Pensions Act 2004, c. 35, § 178(4). However, with the permission of the Board and the Treasury, the Secretary of State can increase the levy ceiling beyond the amount "which exceeds the increase in the level of earnings." *Id.* § 178(8).

levies set for a year must be funded by the risk-based levy.[291] Beginning the second financial year after the initial levy, has been collected, the Board cannot raise a scheme's pension levy by more than 25% of the levy collected the previous year.[292] Finally, an administrative levy was also assessed to help fund the start up and administrative costs for the PPF.[293] The administrative levy is based upon the number of participants in a scheme and a charge per participant is determined.[294]

While the PPF was established to fund pensions schemes where there is "a qualifying insolvency event in relation to the employer and where there are insufficient assets in the pension scheme"[295] to meet the funding requirements of the PPF, the FCF was created "to provide compensation to occupational pension schemes that suffer a loss that can be attributable to dishonesty."[296]

There are several ways that a scheme might qualify for payment from the FCF.[297] First, the FCF will make payments if the scheme's employer has suffered "a qualifying insolvency event, a binding scheme failure notice . . . where a scheme rescue is not possible and a cessation event has not occurred and is not a possibility."[298] The FCF will also make payments if the scheme's sponsoring employer has applied for payment because it "is unlikely to continue as a going concern, the prescribed requirements are met in relation to the employer [as set out by the regulations]," and the Board "has issued a notice . . . confirming that a scheme rescue" is impracticable.[299]

The application for FCF payments must be "made within the period of 12 months beginning with the later of the time of the relevant event, or the time when the auditor or actuary of the scheme, or the trustees or managers, knew or ought reasonably to have known that a reduction of value" had occurred or the Board can grant a longer time frame if they deem it to be appropriate.[300] Even though a scheme may be eligible for fraud compensation payments, the trustees are still required to make reasonable efforts to recover lost assets.[301] The Board will set a timeframe for making payments, while taking into account the

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291. *Id.* § 177(3).

292. *Id.* § 177(5). However, this percentage can be modified by the Secretary of State, so long as the Board "consult[s] appropriate persons before making" that modification. *Id.* § 177(6)-(7).

293. PPF Levies, *supra* note 282. "The initial start up costs will be collected over a three year period." *Id.*

294. Guide to Levies, *supra* note 280, at 7. "Minimum levies are set out so that a scheme with fewer participants has to pay a smaller levy than a scheme with more participants. *Id.* The 2005-2006 minimum levies range from £24, for schemes with 2 to11 participants, to £10,600, for schemes with 10,000 or more participants. *Id.*

295. PPF Welcome, *supra* note 129.

296. FCF, *supra* note 146.

297. WORK AND PENSIONS, *supra* note 16, § 182 ¶ 661.

298. *Id.* § 182 ¶ 662.

299. Pensions Act 2004, c. 35, § 182(4). The Board's notice must be binding. *Id.*

300. *Id.* § 182(6). A scheme cannot apply for FCF payments once the Board has taken over the scheme. *Id.* § 182(7).

301. *Id.* § 184(1).

likelihood of any more assets being recovered.[302]

The Board will also be responsible for making fraud compensation payments as they deem appropriate;[303] however, the amount cannot "exceed the value of the loss less any recovered funds."[304] If the responsibility for the scheme has already been taken over by the Board, then the Board would also be entitled to collect fraud compensation payments on behalf of the PPF.[305] Since the Board would stand in the shoes of the trustees, they must also make reasonable efforts to recover any assets[306] and are not entitled to payments that "exceed the value of the loss less any recovered funds."[307]

Finally, the FCF is funded by income from the fraud compensation levy, interest earned on its assets, and any other amounts transferred, paid or borrowed.[308] A fraud compensation levy is calculated by "tak[ing] into account estimated current and future expenditure as well as actual expenditure already incurred."[309] All schemes that are eligible to receive payments from the FCF will be required to pay the fraud compensation levy.[310]

III. COMPARING AND CONTRASTING PENSION REFORM IN THE UNITED STATES AND THE UNITED KINGDOM

A. The United States' Minimum Funding Contribution and the United Kingdom's SFO

While both the minimum funding contribution and the SFO strive to eliminate defined benefit pension plan deficits, the United States and the United Kingdom have taken very different approaches in crafting their solutions.[311] The minimum funding requirement has set out a uniform schedule which requires all plans to become 100% fully funded,[312] while the SFO allows the scheme's plan sponsor, trustees and actuary to work together with the Pensions Regulator to formulate a custom funding plan.[313]

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302. *Id.* § 184(2).

303. *Id.* § 185(2).

304. WORK AND PENSIONS, *supra* note 16, § 185 ¶ 676. Notice of the Board's decision regarding fraud compensation payments must be provided to the Pensions Regulator, the scheme's trustees, and the employer or an insolvency practitioner. Pensions Act 2004, c. 35, § 187(5).

305. Pensions Act 2004, c. 35, § 187(2). Payments made in these situations are known as fraud compensation transfer payments. *Id.*

306. *Id.* § 187(3).

307. *Id.* § 187(5).

308. *Id.* § 188(1).

309. WORK AND PENSIONS, *supra* note 16, § 189 ¶ 692.

310. PPF Levies, *supra* note 282.

311. *See* CCH, *supra* note 85, at 84; *see generally* The Pensions Trust, *supra* note 125.

312. CCH, *supra* note 85, at 95.

313. WORK AND PENSIONS, *supra* note 16, § 220 ¶ 792.

The United Kingdom originally tried to deal with pension scheme deficits by creating minimum funding requirements when it enacted the PA 1995[314] that were similar to the minimum funding contribution required by the United States' PPA 2006.[315] The effects of the minimum funding requirements, however, were considered to "be counterproductive to the extent that it gives trustees a spurious sense of certainty about funding levels and weakens the fiduciary responsibility that should be at the heart of protection for members of defined benefit schemes."[316] The minimum funding requirement has also been called "outdated and inflexible and the timescales for rectifying [the minimum funding requirement] funding shortfalls are arguably overly prescriptive."[317]

It could be argued that the United States' PPA 2006, due to the rigidity of its provisions, is vulnerable to the same problems that caused the criticism, and ultimately the demise, of the United Kingdom's PA 1995.[318] One of the main criticisms of the United Kingdom's PA 1995 was of "its use of a set of reference assets to calculate discount rates for liabilities . . . ."[319] The United States' PPA 2006 also requires pension plans to use a statutorily prescribed set of references; for example, the interest rate at which a plan's current liability is determined is a "yield curve" based on investment grade corporate bonds, even though that is not the amount of interest the plan is actually earning on its investments.[320]

Another criticism of the minimum funding standard is that "any fixed standard such as the [minimum funding requirement] is only of limited use."[321] The United States' PPA 2006 also requires a fixed standard of funding; plan sponsors must fund 100% of their current liabilities,[322] which is problematic because it only records the financial health of the plan at one point in time.[323] However, "financial markets and economic conditions change constantly," so a false sense of security regarding the funding of the pension plan can occur.[324] Finally, the rigid approach required by a fixed standard of funding can encourage plan sponsors to close their defined benefit pension plans.[325]

In contrast, the United Kingdom's PA 2004 requires plan sponsors, trustees, actuaries and the Pensions Regulator to work together to formulate a

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314. The Myners Report, Institutional Investment in the UK: A Review 114 (Mar. 2001), http://www.hm-treasury.gov.uk/media/1/6/31.pdf [hereinafter Myners].

315. *See generally* CCH, *supra* note 40, at 95; Myners, *supra* note 314, at 114.

316. Hymans Robertson, *supra* note 123, at 1.

317. *Id.* at 2.

318. *See* Myners, *supra* note 314, at 115.

319. *Id.*

320. CCH, *supra* note 40, at 93, 95.

321. Myners, *supra* note 314, at 115. "It simply records that state of the fund at one point in time, but financial markets and economic conditions change constantly." *Id.* Therefore, stating that a fund has met "an annual target can create a misleading sense of security." *Id.*

322. CCH, *supra* note 40, at 95.

323. Myners, *supra* note 314, at 115.

324. *Id.*

325. *Id.*

funding plan that is most advantageous for the goals of the defined benefit pension scheme, as well as the business sponsoring the scheme.[326] However, allowing plans to have this kind of flexibility can culminate in its own set of problems. It is more costly for the plan sponsor and the Pensions Regulator to allow plans to formulate their own SFO. Trouble could also arise for a smaller plan sponsor who may not have sophisticated business people employed and will therefore have to employ additional people besides the trustees to protect the plan sponsor's interest when formulating the SFO. Since the United Kingdom's PA 2004 has been in effect less than two years,[327] it remains to be seen whether the SFO will be more successful in protecting pensions than the United Kingdom's PA 1995.

B. The United States' PBGC compared and contrasted with the United Kingdom's PPF

Both the United States and the United Kingdom have a governmental agency, the PBGC and the PPF respectively, which insures defined benefit pension plans so that plan participants do not lose all of their pension benefits in the event their employer becomes insolvent.[328] There are, however, two big differences between the structure of the United States' PBGC and the United Kingdom's PPF. The first difference relates to how the agencies are funded[329] and the second difference involves the function of the agencies.[330]

The United States' PPA 2006 funds the PBGC with a flat rate premium, as well as a variable rate premium assessed to pension plans whose current liabilities are less than 100% funded.[331] Conversely, the United Kingdom's PA 2004 requires that the PPF be funded by assessing risk and scheme based funding.[332] The United Kingdom's PA 2004 also allows the PPF to determine how much revenue they need to generate yearly, though it cannot raise its scheme funded levy by more than 25% of the amount of the levy the previous year.[333] The United States' PPA 2006 sets out a different method of funding for the PBGC, as a set charge per participant is statutorily prescribed.[334] Arguably, allowing the agency that is responsible for insuring pensions to determine its premiums, as the United Kingdom's PA 2004 allows the PPF to

326. WORK AND PENSIONS, *supra* note 16, § 220 ¶ 792.

327. The Pensions Trust, *supra* note 125. "Most of the provisions are expected to be effective between April 2005 and April 2006." *Id.*

328. Welcome to PBGC, *supra* note 60; Pension Protection Fund- Main Functions, *supra* note 131.

329. CCH, *supra* note 40, at 202-07; FAQs: Pension Protection Levy 2007/08, *supra* note 134.

330. PBGC Who We Are, *supra* note 62; PPF Welcome, *supra* note 129.

331. CCH, *supra* note 40, at 95.

332. Pensions Act 2004, c. 35 § 175(1).

333. *Id.* § 177(5).

334. CCH, *supra* note 40, at 202.

do,[335] is a more prudent way to generate revenue for that agency than by allowing Congress to determine the revenue, as the United States' PPA 2006 does for the PBGC.[336] However, allowing the United Kingdom's PPF to determine how much revenue it needs to generate,[337] then collecting different designated amounts from each pension scheme is more complicated and likely more costly than charging a flat rate per participant.[338] Finally, both the United States' PPA 2006 and the United Kingdom's PA 2004 do assess a risk based premium, so that pension plans that are more likely to terminate, and thus be taken over by the appropriate agency, are paying a higher premium than pension plans that pose less risk of being taken over.[339]

Finally, while the United States' PBGC was created to protect pension income for pension plan participants, the United Kingdom's PA 2004 has broken up this function into two different agencies. The United Kingdom's PA 2004 created both the PPF, to insure against a "qualifying insolvency event,"[340] and the FCF, which protects against losses "that can be attributable to dishonesty."[341] While it is interesting that the United Kingdom's PA 2004 created these agencies to address two different types of funding problems, to address employer insolvency and underfunding due to dishonesty, the two agencies still work together to insure pension benefits and recover lost assets.[342] It is debatable that two agencies are needed to address this problem, especially when they work closely together. Having two agencies insuring pensions, albeit against different types of losses, creates more government bureaucracy and could potentially cause delay if it was unclear why the loss to the pension plan occurred. Finally, it should not matter what specifically caused the loss, as the most important factor is that pension plan participant benefits are insured.

IV. OTHER SOLUTIONS TO PENSION DEFICITS

A. Funding Pensions

The defined benefit plan has serious design flaws that may not be corrected by the PPA 2006. Since these plans are heavily influenced by market forces, such as interest rates and the stock market, it is very difficult to make accurate actuarial assumptions when trying to fund defined benefit plans. The United States should consider adopting a more plan specific funding requirement, like the United Kingdom has recently done through the PA 2004.

335. Pensions Act 2004, c. 35, § 177(5).
336. CCH, *supra* note 40, at 202.
337. Pensions Act 2004, c. 35, § 177(5).
338. CCH, *supra* note 40, at 202.
339. *Id.* at 203-05; Pensions Act 2004, c. 35, § 175.
340. PPF Welcome, *supra* note 129.
341. FCF, *supra* note 146.
342. Pensions Act 2004, c. 35, § 188.

This would enable employers to tailor their funding plan in a way that would allow them to take into account circumstances that impact them in particular. Allowing employers to have more control over their funding requirements would also prevent Congress from having to write legislation to address industry specific problems, as it did for the airline industry in the PPA 2006. Though allowing plan sponsors to customize their own funding plans would be more costly to both the plan and the entity that approved the plans, ultimately the benefits of allowing plans to take ownership in their funding plans would be worth the extra administrative cost.[343]

It is very important to recognize that there are no perfect solutions for pension reform. There are always risks involved with pension plans and those risks must be balanced between the plan sponsor and the plan participant. The two risks most emphasized in this Note are again, the risk of longevity, meaning that a participant might outlive their retirement benefits,[344] and the risk of investment, which refers to who bears the risk or reward of investment choices.[345] When examining pension reform, deciding whether a reform is feasible is often a matter of determining who can best bear these risks.

Ultimately, employers should stop opening and funding defined benefit plans. Due to people living substantially longer, it is unrealistic for an employer to think that they will be able to provide retirement income to an employee for their entire retired lifetime. Other countries, for example Mexico, have instituted reform that created a new entity that dealt directly with employee's retirement funds, cutting out the employer entirely.[346] Therefore, a possible solution is to implement a centralized federal retirement plan for all American workers, like Mexico has done.

Having a government administered centralized plan for all American workers has several advantages. First, the government is better able to fund pension administration costs and is more secure than a private employer, as it is less likely to go out of business. The longevity and centralization of using the government, rather than an employer, is much better suited to funding pensions for a person's lifetime. A system could be established that would require employees to contribute a certain amount of their earnings to these individual government funds. These types of plans are better for helping employees amass retirement wealth because unlike 401(k) contributions, these contributions would be mandatory.

There would also not be a problem with employees losing track of their retirement funds after switching jobs or with having to wait a certain amount of

343. Currently, the Department of Labor (DOL) polices whether employers are following ERISA rules. *See* Department of Labor, http://www.dol.gov/opa/aboutdol/mission.htm (last visited Jan. 20, 2008). Therefore, the DOL is the logical choice to assume the duties the Pensions Regulator assumes for plans in the United Kingdom.

344. *See supra* pp. 2-3 and note 15.

345. *See id.* pp. 2-3 and notes 13, 14.

346. Rankin, *supra* note 164.

time before being allowed to participate in the employer's retirement plan. Both of these problems are becoming more common in a society where employees switch jobs more and more frequently.[347] Administrative costs would also be less than in a defined benefit plan or even a defined contribution plan, as the employer would just send the government the money it withheld from its employees' earnings. This is something employers are used to doing, since they do this already for tax withholding. This solution, however, also has several problems. First, this type of government run system is very similar to social security. While each employee would have their own individual account, unlike social security, it is still possible that the government could "borrow" from these accounts, in the same manner that it is "borrowing" from social security.[348] This could lead to funding shortfalls in the long term, which is also a problem social security is currently facing.[349] Second, it is a very paternalistic solution that would shift the burden of administering retirement plans to the government. Finally, unlike a defined benefit plan, employees would only get their contributions plus earnings, which will not ensure they will have a steady retirement income throughout their retirement years.

A better alternative is to allow employers to continue to fund retirement plans for employees; however they should move toward the defined contribution model. Most importantly, since the plan participant's retirement lifestyle will be dependent upon their retirement benefit or lack there of, the participant ultimately should be responsible for bearing the risk of longevity and investment. One possible solution already in existence is a money purchase plan. A money purchase plan requires that the sponsoring employer make a minimum contribution each year.[350] For example, an employer could decide that they would implement a money purchase plan that would contribute 5% of every employee's compensation each year.[351] One way a money purchase plan differs from defined benefit plan is that the employer puts the contribution into individual accounts designated for each participant, rather than into a general pool for all the participants.[352] Contributions to money purchase plans are subject to ERISA's vesting rules, since they are funded by employer

347. A worker who changes jobs more frequently and is required to sit out a year before being eligible to participate in a 401(k) plan, which is the maximum allowed under ERISA, can significantly decrease the amount a worker can save for retirement. MEDILL, *supra* note 13, at 120. *See also* 29 U.S.C. § 1053(b)(1) (2000).

348. *See* CNN, *CBO: Social Security Funds Needed to Balance the Books*, Aug. 29, 2001, http://archives.cnn.com/2001/ALLPOLITICS/08/28/budget/.

349. MCGILL ET AL., *supra* note 20, at 50-51.

350. Internal Revenue Service, Choosing a Retirement Plan: Money Purchase Plan, http://www.irs.gov/retirement/article/0,,id=108949,00.html (last visited Jan. 20, 2008) [hereinafter IRS]. This yearly required minimum contribution is the reason that a money purchase plan was suggested instead of other defined contributions plans like profit sharing or 401(k) plans. *Id.* A required employer contribution means that all plan participants, even those who cannot or will not contribute themselves, still receive a retirement benefit. *Id.*

351. *Id.*

352. CANAN, *supra* note 27, at 294.

contributions.[353] Money purchase plans can be set up by any employer, including employers who already sponsor other types of retirement plans.[354] Finally, because "pre-approved money purchase plans are available" administering these types of plans can be relatively simple.[355]

Since the contributions to the participants' accounts would be participant directed, meaning the participants would be responsible for choosing the investment vehicle for their own account, the participants will need some investment education to help them make an informed decision.[356] The PPA 2006 has addressed this issue and provides that qualified

> "fiduciary advisers" can offer personally tailored professional investment advice . . . pursuant to "eligible investment advice arrangement" under which (1) portfolio recommendations are generated for a participant based on an unbiased computer model that has been certified and audited by an independent third party, or (2) fiduciary advisers provide their investment advice services by charging a flat fee that does not vary depending on the investment option chosen by the participant.[357]

Now, employers can also provide investment information such as: "plan information; general financial and investment information; asset allocation models; and interactive investment materials" without acquiring liability as investment advisors.[358]

Replacing defined benefit plans with money purchase plans would solve many of the problems that defined benefit plans are currently facing. The participant should bear the risk of investment, as only they know what goals they have for retirement. Allowing the participant to bear the risk of investment enables the participant to benefit from gains on his or her investment and to

353. MCGILL ET AL., *supra* note 20, at 108. The PPA 2006 expanded the accelerated vesting schedule that applied to employer matching contributions to all employer contributions in defined contribution plans. CCH, *supra* note 40, at 272. If a plan uses cliff vesting, all participants must be fully vested in all employer contributions by the end of their third year of service. *Id.* at 274. Plans using graduated vesting must vest participants in all employer contributions "at the rate of 20% per year, beginning with the second year of service." *Id.* "The faster vesting schedules may increase an employer's cost of maintaining a defined contribution plan because they may decrease forfeitures that could otherwise be used to pay administrative expenses or reduce future employer contributions." *Id.*

354. MCGILL ET AL., *supra* note 20, at 108. Unlike other retirement plan types, there are no restrictions on the size of an employer who sponsors a money purchase plan. *Id.*

355. *Id.*

356. 29 U.S.C. § 1104(c) (2003).

357. CCH, *supra* note 40, at 236. While many companies already provided investment education materials to their plan participants, there has been concern that providing specific advice would violate ERISA's fiduciary liability rules. *Id.* at 238.

358. *Id.* at 238.

plan accordingly for retirement based on his or her account balance. A money purchase plan has individual accounts for each participant, so it is much easier for the participant to monitor the health of his or her retirement benefit than with a defined benefit plan.[359] Having individual accounts also makes it easier for the participants to understand how their retirement benefit accrues, as many employees have no idea due to the complexity of the benefit accrual formulas.[360]

Defined benefit pension plans do not always provide the benefit that the employee thinks it will, especially if the PBGC takes over the plan.[361] It is extremely important for plan participants not to be disillusioned about the benefits they should expect to receive at retirement, so that they can plan accurately for retirement.

Another benefit is that once an employee has a vested balance in the money purchase plan, that vested balance can be portable.[362] If the plan allows, the participant can rollover their vested balance to an individual retirement account or possibly to their new employer's retirement plan when they terminate service with their previous employer.[363] Portability is increasingly more important in our society where people switch jobs with more regularity than in previous years.[364] Defined contribution plans, such as money purchase plans, are also less expensive to administer than defined benefit plans, because no actuarial assumptions are required to predict how much money will be needed in the future. Finally, since employer contributions must be made each year, a funding shortfall is less likely to occur with a money purchase plan, than with a defined benefit plan.[365]

While money purchase plans could solve some of the problems defined benefit plans are facing, there are several disadvantages to money purchase plans as well. Since money purchase plans are defined contributions plans, the benefit the employee receives is only the account balance plus earnings, rather

359. It is often difficult for employees to monitor the health of their pension plan, as often companies do not want to provide current information about the pension plan. Schultz & Francis, *supra* note 2, at A1. The PPA 2006 requires that a benefits statement must be provided "at least once each calendar quarter to each participant or beneficiary who has the right to direct the investment of assets in his or her account under the [defined contribution] plan . . . ." CCH *supra* note 40, at 231.

360. MEDILL, *supra* note 13, at 110.

361. *See supra* note 74.

362. MEDILL, *supra* note 13, at 109. While pension plans can be written so that a plan participant can receive payment of their pension benefits when they terminate service with his or her employer, it can also be written so that plan participants cannot receive their pension benefits until normal retirement age. 26 U.S.C. § 401(a)(14) (2000).

363. MEDILL, *supra* note 13, at 109.

364. "Part of [the defined contribution plans] appeal has been that a more mobile workforce can take their benefits with them as they hop from job to job." Byrnes, *supra* note 1.

365. MEDILL, *supra* note 13, at 107. The Internal Revenue Code imposes an excise tax on employers who do not meet "the amount dictated by the terms of the plan document." *Id.* at 107-08. *See also* 26 U.S.C. §§ 412(a), 4971 (2000).

than an annuity payment each month as provided by a defined benefit plan.[366] This means that the risk of longevity is shifted to the participant and they bear the risk that they will out live the account balance in their money purchase plan account.[367] Since it would be the participant's responsibility to invest the money according to their retirement goals, the participants also stand to lose retirement assets, if their investment strategy does not provide adequate returns.[368] Finally, elderly workers will not benefit as much from a money purchase plan as younger workers would, mainly because they have fewer years to earn interest on the money in their accounts.

B. Insuring Pensions

It is very important that the United States' PBGC is adequately funded so that they can meet their liabilities.[369] Even if no new defined benefit plans are opened and all the existing plans are closed today, the PBGC is still responsible for the liabilities they have already taken on, even though the liabilities may not become payable for many years in the future. The United States' PPA 2006 requires employers with at-risk plans to pay a premium based on the amount of risk the employer's plan has of transferring liabilities to the PBGC.[370] These statutes force plans that are more likely to be taken over by the PBGC to help fund the risk that they are creating.[371] Requiring at-risk plans to help defray any future costs the plans may have is a prudent move. However, since the method by which the risk-based premium is calculated has recently changed;[372] only

366. IRS, *supra* note 350; *but see* U.S. GOV'T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL REQUESTERS: PRIVATE PENSIONS PARTICIPANTS NEED INFORMATION ON RISKS THEY FACE IN MANAGING PENSION ASSETS AT AND DURING RETIREMENT 13 (2003) (finding that plan sponsors are offering lump sum payments as an option in pension plans because employees "generally prefer them to annuities.").

367. *See supra* pp. 2-3 and notes 13, 15.

368. *Id.* at pp. 2-3 and notes 13-14.

369. *But see* Richard A. Ippolito, *How to Reduce the Cost of Federal Pension Insurance*, POL'Y ANALYSIS, NO. 523, Aug. 24, 2004, at 13-15, *available at* http://www.cato.org/pubs/pas/pa523.pdf (last visited Jan. 20, 2008). Ippolito, who formerly served as the PBGC's chief economist, argues "that Congress [should] convert defined benefit pension insurance from a government sponsored and guaranteed program to a private pooling mechanism, through which all plan sponsors would collectively bear the risk of an individual plan sponsor's termination and market and sponsor-specific factors would set premiums." BRANNICK, *supra* note 76, at 1617. The PBGC would be terminated after the federal government made up the difference between the PBGC's assets and its liabilities. *Id.* Then "plan sponsors would belong to a self-insurance pool that would have a governing board to set premiums and policy." *Id.* Eventually, plan sponsors could opt out of the self-insurance pool by obtaining private insurance. *Id.* "Sponsors of underfunded plan will then have an interest in reducing their reliance on payments from well-funded plans so as to keep them as a source of some help in solving the underfunding problem." Ippolito, *supra*, at 14.

370. CCH, *supra* note 40, at 203-05.

371. *See* Brannick, *supra* note 76, at 1618.

372. The risk based premiums for the PBGC are effective "[f]or plan years beginning after 2007." THOMSON RIA, *supra* note 108, at 270.

time will tell if the revenue from these premiums is sufficient to meet future liabilities.

While increasing revenues will help defray the costs of insuring defined benefit pension plans, it still may not be enough to make up for the increasing liabilities the PBGC is incurring.[373] The increase in premiums for cash strapped employers may be the final straw and could encourage employers to terminate their plans, "rather than continuing to make contributions and pay[ing] high premiums."[374] Finally, increasing premiums may not generate enough revenue to cover liabilities.

One alternative, suggested in a student note, is a "mandatory allocation of 20 percent of an individual's defined benefit pension funds, to be put into a low-risk [Federal Depository Insurance Corporation] FDIC insured [Individual Retirement Account] IRA."[375] The FDIC is similar to the PBGC, in that it is a nonprofit government organization, but "the FDIC insures deposits if the bank becomes insolvent."[376] Moving a portion of the defined benefit plan's assets to an FDIC insured IRA requires the employer to shift "assets into a low-risk investment."[377] This would help ensure that guaranteed income can be paid to the participants during their lifetime, which is the primary goal of a defined benefit pension plan.[378] This security is achieved by shifting "the excessive burden of underfunded and unfunded pension plans away from the PBGC and onto the FDIC."[379] Since FDIC insured IRAs are a low-risk investment they "will increase or maintain a safe level of earnings for the employer in the long-run" and will also prevent employers from "taking unreasonable investment risks at the cost of the employee."[380] Since the PBGC will not have to insure the funds in the FDIC insured IRAs, it could instead focus these resources on its deficit.[381]

This solution is not ideal, as shifting such a small portion of the burden of insuring pension plans to the FDIC does not really address the funding problems that the PBGC is facing. First, this suggestion requires the employer to create a second pension plan called a simplified employee pension (SEP) plan.[382] SEP plans consist of "IRAs that are set up and financed for each

373. In January 2007 alone, the PBGC assumed responsibility for the pension plans of Kaiser Aluminum & Chemical, Venture Holdings Corp and Foss Manufacturing, as well as became trustee for the Delta Pilots Pension Plan. PBGC 2007 News Releases Index, http://www.pbgc.gov/media/news-archive/news-releases/2007/index.html (last visited Jan. 20, 2008). Those plans have a combined shortfall of $3.03 billion, though the PBGC will not have to make up for the entire amount of the shortfall. *Id.*

374. Brannick, *supra* note 76, at 1618.

375. Czarney, *supra* note 47, at 191.

376. *Id.* at 187. Note FDIC insurance only covers $100,000 per depositor. *Id.*

377. *Id.* at 186.

378. *Id.*

379. *Id.* at 191.

380. *Id.* at 192.

381. *Id.*

382. *Id.* at 188.

individual employee by the employer."[383] This means that administration costs for the plan sponsor will increase, as they must now maintain a SEP plan and a defined benefit plan. Also, since the assets will no longer be considered part of the defined benefit pension plan, the PBGC will no long be responsible for insuring them. Therefore, it will not really lessen the PBGC's burden, as the PBGC is still responsible for guaranteeing participant's remaining accrued benefit in the defined benefit plan.[384]

Second, moving a portion of the plan's assets into low-risk FDIC insured IRAs could also subject the rest of the pension plan's assets to more risky investments, since the rest of the assets will need to earn greater returns to make up for the small returns that the assets in the low-risk IRAs are earning. In a volatile investment market, this could expose the pension plan to large losses, which could exacerbate existing underfunding. Finally, using the FDIC to insure a portion of the plan assets fails to bring more revenue into the PBGC, which is needed to fund liabilities the PBGC has already incurred.

Many people have suggested over the years that the PBGC be given some sort of lien priority status.[385] Professor Daniel Keating has proposed that "no assets of a company with a terminated pension program be transferred until the reimbursement claim of the PBGC is satisfied fully."[386] This would give the PBGC priority over even secured creditors, which would help ensure the security of the participant's pensions.[387] It would also prevent sponsoring employers from dumping their pension obligations on the PBGC and gaining a competitive edge over their competitors who are still funding their pensions.[388]

Another solution, proposed in a student note, is "that the PBGC's lien against employers with unfunded or underfunded defined benefit pension plans should receive an eighth priority status under § 507(a)(8) of the Bankruptcy Code of 1978."[389] Allowing the PBGC to have lien priority status would make employers more accountable for promises that they make to employees by forcing the plan sponsor, and not the PBGC, to fund the pension liabilities.[390] The burden of policing plan sponsor debt would also shift to the plan sponsor's creditors, since the lien priority status of the PBGC would make it less likely that a creditor could recover amounts loaned to the plan sponsor in the event of plan sponsor insolvency.[391]

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383. *Id.* at 188-89.

384. *See supra* p. 12 and note 77.

385. *See generally* Daniel Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 WIS. L. REV. 65 (1991); Uylaki, *supra* note 17; Brannick, *supra* note 76 (discussing various ideas as to how the PBGC could obtain more assets from plan sponsors going through bankruptcy).

386. Keating, *supra* note 385, at 100.

387. *Id.* at 101.

388. *Id.* at 101-02.

389. Uylaki, *supra* note 17, at 110.

390. *Id.* at 77.

391. *Id.* at 111.

Finally, another student note suggested that a floating lien mechanism be created to protect the PBGC.[392] This would enable the PBGC

> to perfect a lien against employers in the amount by which minimum funding contributions prove inadequate (in light of market realities) at the end of each tax year, [then] the PBGC would not be left with a wholly unperfected security interest when an employer files Chapter 11 [bankruptcy] and then seeks to terminate its pension plan.[393]

Under this theory, the PBGC would establish reasonable actuarial assumptions for a group of comparable employers and then determine how ERISA should be amended to enable the PBGC "to perfect a lien against the assets of those who fail to meet minimum funding standards at the end of each taxable period, and by moving the power to grant waivers for minimum funding from the IRS to the PBGC, which actually bear the risk of allowing such waivers."[394]

Since the new risk-based premiums set out by the PPA 2006 will not be in effect until the 2008 plan year,[395] it is difficult to predict if these premiums will significantly boost the PBGC's revenues. However, given the amount of liabilities the PBGC is now responsible for,[396] the premiums likely will not be enough on their own to significantly increase revenues. Therefore, Congress should consider granting the PBGC one of the priority lien status proposals previously mentioned.[397] This will also make plan sponsors more accountable and could in the long run deter plan sponsors from making decisions that will ultimately lead to their pension plans being taken over by the PBGC. Allowing the PBGC to have priority lien status in conjunction with the new risked based premiums will help shore up the finances of the PBGC by bringing in significant amounts of revenue.

V. CONCLUSION

Underfunded defined benefit pensions are a problem in both the United States and the United Kingdom. Within the last two years, both of these countries have enacted statutes to try to repair underfunded pensions, though in very different ways. The United States enacted more stringent requirements for

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392. Brannick, *supra* note 76, at 1623.

393. *Id.* at 1621.

394. *Id.*

395. CCH, *supra* note 40, at 203.

396. "As of September 30, 2005, the end of the 2005 fiscal year, PBGC reported a $22.8 billion deficit in the financial statements for its single-employer pension insurance program." PBGC Understanding the Financial Condition of the Pension Insurance Program, http://www.pbgc.gov/media/key-resources-for-the-press/content/page15247.html (last visited Jan. 20, 2008).

397. *See supra* notes 333-42 and accompanying text.

funding, while the United Kingdom took a more flexible, plan specific approach. Both countries should also consider establishing lien priority status for the PBGC, PPF and FCF. This could help these agencies meet their future funding requirements, even if defined benefit plans become obsolete and the agencies do not take responsibility for additional plans. Only time will tell if these approaches can succeed in curbing pension underfunding; however, both countries should monitor the other's progress, as predicting the effectiveness of either solution to pension underfunding is difficult.

Ultimately, defined benefit plans are facing a bleak future in their current state.[398] It is of utmost importance that employers do not promise pension plan participants retirement benefits that they will be unable to provide. The best solution for both employers and employees is to move toward funding individual accounts with employer money. While moving from a defined benefit pension model to a defined contribution model will shift the risk of investment and longevity to the participant, the participant is the party who is best situated to ensure that these risks are managed in a way that is appropriate for their retirement.

398. MCGILL ET AL., *supra* note 20, at 96.

IN THE FACE OF DANGER: A COMPARATIVE ANALYSIS OF THE USE OF EMERGENCY POWERS IN THE UNITED STATES AND THE UNITED KINGDOM IN THE 20TH CENTURY

Brian McGiverin*

"History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."
– Justice Thurgood Marshall[1]

"It may help to understand human affairs to be clear that most of the great triumphs and tragedies of history are caused, not by people being fundamentally good or fundamentally bad, but by people being fundamentally people."[2]

This Note is an examination of emergency powers, a term which refers to the expanded authority that a government may exercise during an emergency. It will briefly examine emergency powers in general, and will then move to a comparative analysis of the use of emergency powers by the United States and the United Kingdom over the course of the last century.

Section I speculates on the legitimacy of emergency powers and then on the advisable means through which a government may exercise those powers. Section II delves into a comparative analysis of emergency powers in the United States and the United Kingdom – first a legal/political analysis of the means through which emergency power can be exercised by the respective government, followed by an historical evaluation of how those powers have actually been utilized.

I. EMERGENCY POWERS IN THEORY

A. Emergency Power

It is important to begin this exercise by defining what an emergency power is. In brief, it is the partial or complete suspension of a state's normal legal system,[3] involving the expansion of government power through the

* JD Candidate 2008 (expected), Indiana University School of Law – Indianapolis. B.S. Criminology 2005, Indiana State University.

1. Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

2. NEIL GAIMAN & TERRY PRATCHETT, GOOD OMENS 18 (1996).

3. GIORGIO AGAMBEN, STATE OF EXCEPTION 23 (Kevin Attell trans., University of Chicago Press 2005). Agamben refers to a state's normal legal system as its "juridical order."

curtailment of individual liberties and/or the reassignment of authority between the branches of government.[4] The latter manifests in such a way that the lines between the political branches begin to blur, generally giving the executive branch the kind of influence over legislation and adjudication normally reserved for the other branches.[5]

A persuasive justification for the use of emergency power by a modern constitutional democracy can be found in the notion that such a state's political system is designed with an intricacy predicated on the calm waters of a normal environment, and that the likelihood of successfully maintaining a government of such intricacy during the turbulence of a *genuine* crisis is low.[6] This argument could be interpreted as applying to the state a form of the justification of necessity, *necessitas legem non habet*, which generally holds that a person may legitimately transgress against a rule of the legal system during circumstances in which acceding to the letter of the law would violate the law's ultimate purpose of furthering "the common well-being of men."[7] This logic of necessity – the recognition that in order to ensure that the law is enforced justly it must "promote the achievement of higher values at the expense of lesser values" and allow a technical breach of legal mandates so that "a more desirable result than adherence to the law" may occur – harkens at least as far back as Aristotle.[8]

This should not suggest that the state itself has an inherent right to exist; that would directly conflict with the averment that legitimate governing authority is derived only from the consent of the governed.[9] Rather, governments exist to secure the rights of the individual.[10] Indeed, Locke went so far as to argue that rebellion against the state was justified if it sought to invade the liberties it was created to protect, dramatically positing that a government which made such an invasion was composed of rebels who had placed themselves in a state of war against the people.11 It stands to reason, however, that within this normative restriction, a government could still legitimately expand its power vis-à-vis the individual if such an expansion was

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Id.

4. MICHAEL FREEMAN, FREEDOM OR SECURITY 6 (2003).

5. *See* AGAMBEN, *supra* note 3, at 7.

6. *See* FREEMAN, *supra* note 4, at 6.

7. AGAMBEN, *supra* note 3, at 24-25. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) ("justification, n. 2. A showing, in court, of a sufficient reason why a defendant did what the prosecution charges the defendant to answer for. • Under the Model Penal Code, the defendant must believe that the action was necessary to avoid a harm or evil and that the harm or evil to be avoided was greater than the harm that would have resulted if the crime had been committed. Model Penal Code § 3.02. -- Also termed *justification defense*; *necessity defense*.")

8. Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 83 (1989).

9. THE DECLARATION OF INDEPENDENCE (U.S. 1776), *available at* http://www.archives.gov/national-archives-experience/charters/declaration_transcript.html.

10. *Id.*

11. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 227 (1689), *available at* http://www.constitution.org/jl/2ndtreat.htm.

consented to by the governed.

One permutation of the necessity justification as applied to state action, in which the state's existence is buttressed by emergency powers so that it may continue to exist into the future to perform its legitimate functions, is sometimes called "reason of state."[12] A small state temporarily curtailing individual liberty during a war in which it seeks to avoid being swallowed by a larger neighbor illustrates this form of necessity. A second permutation of necessity can be found in the phrase *salus populi suprema lex*, "the welfare of the people shall be the supreme law,"[13] suggesting that a state has the moral imperative to exceed the mandates of written law when doing so is the only means of acting in accordance with its underlying purpose of pursuing its citizens' common wellbeing.[14] One example of this second justification would be commandeering private property, by means of improper procedure, for use as life-saving shelter during a natural disaster.

Unfortunately, accepting that emergency powers could be exercised legitimately in theory does little to clear the muddy waters involved in questions over the legitimacy of their use *in practice*, because ideas such as "lesser evil" and "common good" are necessarily subjective determinations.[15] Moral legitimacy is unavoidably jeopardized when it can conceivably be claimed with equal strength by both sides of a dispute.[16] The subjectivity inherent in the normative evaluation of the underlying justifications for the use of the extraordinary powers adopted by states in times of emergency imbues their availability with a peril. Within the legalism of the modern state, governments have repeatedly used emergency powers as a means for "the physical elimination not only of political adversaries but of entire categories of citizens who for some reason [could not] be integrated into the political system."[17]

The legitimacy of emergency powers is further imperiled because the exigencies of the circumstances may well place a government in the position of acting as its own judge. The words of Abraham Lincoln effectively illustrate this point:

> Every man thinks he has a right to live and every government thinks it has a right to live. Every man when driven to the wall by a murderous assailant will override all laws to protect himself, and this is called the great right of self-defense. So every government when driven to the wall by a rebellion will trample down a constitution before it will allow itself to be

12. LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000 331 (2001).

13. DAVID BONNER, EMERGENCY POWERS IN PEACETIME 55 (J. P. W. B. McAuslan ed., 1985).

14. LOCKE, *supra* note 11, § 160.

15. AGAMBEN, *supra* note 3, at 30.

16. DONOHUE, *supra* note 12, at 338.

17. AGAMBEN, *supra* note 3, at 2.

destroyed. This may not be constitutional law but it is a fact.[18]

Such a situation calls into question the legitimacy of the use of emergency powers, as being the judge of one's own case is a violation of the most basic principles of due process.[19] As was stated by Madison, "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."[20]

B. Separation of Powers

This analysis of emergency powers leaves us with something of a quandary. We find ourselves in a position in which statesmen will act on the basis of subjective notions of justice, which may or may not be shared by the citizenry through which governing authority derives legitimacy. Though clearly a tool of great power with the potential to be used for benevolent purposes, these powers cut both ways, in that they can and have been used for stunning malevolence. Do emergency powers amount to a sword with no handle, a tool which will inevitably expose us to the perils of an unbridled and capricious state? Perhaps not.

From the records available, it is evident that concern about the potential for a state to accumulate absolute power was planted firmly in the minds of the Founding Fathers. In the Federalist Papers, Madison pointed out with profound clarity that "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[21] The solution to this dilemma presented by the "Father of the Constitution" was a government of separated powers, in which each branch would serve as a check upon the others.[22] Though all actors in government might be filled with ambition, dividing those people into groups with conflicting interests would help serve as an incentive for one branch to limit the institutional power of the other branches.[23] "Ambition must be made to counteract ambition."[24]

Arguably, the availability of emergency powers undermines the possibility of a government of divided power, because the branch capable of triggering those powers can easily circumvent any bulwarks to its authority.[25] In other words, a President capable of ignoring Congress and the Judiciary may

18. BONNER, *supra* note 13, at 2.

19. JOHN V. ORTH, DUE PROCESS OF LAW 15-32 (2003).

20. THE FEDERALIST NO. 10 (James Madison), *available at* http://thomas.loc.gov/home/histdox/fed_10.html [hereinafter FEDERALIST NO. 10].

21. THE FEDERALIST NO. 51 (James Madison), *available at* http://thomas.loc.gov/home/histdox/fed_51.html [hereinafter FEDERALIST NO. 51].

22. *Id.*

23. *Id.*

24. *Id.*

25. FREEMAN, *supra* note 4, at 42.

as well be called king. This is not necessarily so, however, because although the activation of emergency powers moves a state to a juridical order different than that used during normal circumstances, it is possible for the principles of self-restrained government to continue serving as a bridle for state power.26 What is required is a division between the authority to trigger emergency power and the authority to exercise emergency power.27 Justice Souter opined:

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory... A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights."[28]

If designed thusly, not only does the initial activation of emergency power require the consent of competing branches of government, it also provides both the opportunity to continuously monitor the use of those powers and the key to their revocation.[29]

C. Influence of the Citizenry

Despite lengthy reflections on mitigating the chances of tyranny by dividing the government into separate branches, it seems that the Founding Fathers did not consider that sort of internal restraint to be the first bulwark against the abuse of power.30 Rather, as Madison wrote, "[a] dependence on the people is, no doubt, the primary control on the government."[31] In justifying the creation of a new federal government with more power than that which was afforded under the Articles of Confederation, Madison argued that a large republic would be less likely to devolve into an authoritarian state than a small republic because, by increasing the size of a republic, one also increases the

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26. *See id.*
27. *Id.*
28. Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring).
29. *See* FREEMAN, *supra* note 4, at 43.
30. *See* THE FEDERALIST NO. 51, *supra* note 21.
31. *Id.*

number of citizens, and in doing so "you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."[32] Thus, a diverse array of distinct interests ameliorates the chances of finding a political faction which includes a majority of the state's citizens, which might be willing to invade the rights of the remainder, "sacrific[ing] to its ruling passion or interest both the public good and the rights of other citizens."[33]

Despite the apparent strength of Madison's reasoning, the United States has experienced many periods in which the political demands of the day have led to the new and immediate invasion of a minority group's rights. Some commentators have suggested that events such as the Sedition Act of 1798, the prosecution of northern antiwar advocates during the Civil War, the Espionage and Sedition Acts of World War I, Japanese internment during World War II, and the Smith and Internal Security Acts of the McCarthy era are representative of "a form of constitutional pathology, during which the nation's foundational commitment to civil liberties is either seriously undermined or all but abandoned."[34] This phenomenon can be explained within Madison's framework by utilizing contemporary observations of social mechanics. The relationship between citizen and government in general is much more complex than Madison's description. While it seems to be true that government policy is dependant upon public opinion,[35] public opinion itself tends to be highly malleable; social mechanisms sometimes allow the "cognitive errors, emotive responses, and moral stratagems" of a few people to be amplified and transferred to a much larger group.[36] Public opinion may be influenced by a "social cascade" in which "many people end up thinking something," either factual or normative, "because of the beliefs or actions of a few early movers."[37] This can be observed in the reaction caused by the opinions of so-called elites (e.g. "politicians, journalists, policy experts, certain activists" and others who are the most vocal about contemporary political issues), which can influence the public to the point of inducing "citizens to hold opinions that they would not hold if aware of the best available information and analysis."[38]

Alternatively, popular opinion can be affected through group polarization, in which "[g]roup cohesiveness, self-censorship, insulation, and homogeneous

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32. THE FEDERALIST NO. 10, *supra* note 20.

33. *Id.*

34. MARTIN H. REDISH, THE LOGIC OF PERSECUTION 46-49 (2005).

35. Nancy C. Wilkie, *Public Opinion Regarding Cultural Property Policy*, 19 CARDOZO ARTS & ENT. L.J. 97, 99-100 (2001).

36. Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ? What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559, 574 (2006).

37. *Id.* at 574-76.

38. Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 928-30 (2005). *See also* Michael K. Gusmano, *Policy Feedback and Public Opinion: The Role of Employer Responsibility in Social Policy*, 27 J. HEALTH POL. POL'Y & L. 731, 735 (2002).

ideology" cause a person to adopt the opinion of a group with whom he identifies, through a process of "selective bias in the processing of information, failure to survey and assess alternatives adequately, or reluctance to examine the risks of a preferred choice."[39] These patterns of human interaction might explain why there tends to be a temporary surge of public opinion in support of government policy during times of emergency, sometimes called the "rally-round-the flag" effect,[40] which may in turn create a condition appropriately described in Madisonian terms as a temporary majority faction – i.e. the alignment of otherwise politically heterogeneous groups temporarily united by fear and a concern for national security. Finally, in the long term, simple inertia may influence public opinion, in that individuals become accustomed to and accepting of a government policy after being subjected to it over time.[41]

This ability of society to surmount procedural guards against tyranny is especially alarming when one considers that in a time of emergency the majority may choose to demonize a specific minority group, categorizing it as an antagonist within a normative framework which serves the natural human desire "to impose order on events that are experienced as irrational and frightening."[42] As Carl Jung averred,

> The real existence of an enemy upon whom one can foist off everything evil is an enormous relief to one's conscience. You can then at least say, without hesitation, who the devil is; you are quite certain that the cause of your misfortune is outside, and not in your own attitude.[43]

Many theories have been put forward in an attempt to explain this phenomenon. One, a theory of delinquency developed by Sykes and Matza, allows for the selective neutralization of particular norms that are characteristic of the dominant social order.[44] "The perpetrator claims an exceptional situation in which breaking the norm is justifiable without questioning the validity of the norm as such. Neutralization thus makes it possible for the violation to appear acceptable, if not legitimate."[45] A second theory posits that individuals are capable of using moral compartmentalization to establish an alternative moral

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39. Marks, *supra* note 36, at 576-77.

40. Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1005 n. 26 (2006).

41. Gusmano, *supra* note 38, at 734-35.

42. Collin O'Connor Udell, *Parading the Saurian Tail*, 42 Ariz. L. Rev. 731, 749-50 (2000).

43. *Id.* at 752.

44. Frank Neubacher, *How Can it Happen That Horrendous State Crimes Are Perpetrated?*, 4 J. INT'L CRIM. JUST. 787, 792-794 (2006). The five individual techniques are denial of responsibility, denial of injury, denial of the victim, condemnation of the condemners, and appeal to higher loyalties. *Id.*

45. *Id.* at 792.

framework to apply to an exceptional circumstance while avoiding feelings of moral dissonance, even though it conflicts with the old moral framework that the person otherwise continues to hold.[46] A third theory holds that an individual may dehumanize a person, relegating him from what he regards as the "in-group" to the "out-group", effectively moving him outside of the community to whom he feels morally bound.[47] In any of these situations, the protection normally provided by political pluralism would arguably fall away, leaving the rule of law as the only protection for the rights of the targeted minority.

II. COMPARATIVE ANALYSIS

A. The United States

1. The American System of Emergency Power

As previously discussed, evocating emergency powers may involve either a transfer of authority between the branches of government (generally to the effect of strengthening the executive branch) or the expansion of government authority at the expense of individual liberties.[48] While the United States has had occasion to use the latter method, it has in large part managed to abstain from altering the formal balance of power between the three branches as a means of dealing with emergencies, especially when compared to the United Kingdom.[49]

Aside from the limited powers exclusively afforded to the executive branch by Article II of the Constitution, the President's legitimate domain of action is defined by Congressional mandate[50] and has traditionally been evaluated within that context.[51] As such, the courts have been protective of the

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46. Marks, *supra* note 36, at 571-72, 579-82.

47. Neubacher, *supra* note 44, at 792.

48. *Supra* section I(A).

49. *Infra* section II(B).

50. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring). The formula for Presidential power described in Justice Jackson's concurrence has been the most influential articulation from Youngstown. Jason Collins Weida, *Note, A Republic of Emergencies*, 36 CONN. L. REV. 1397, 1430-1433 (2004). Or, at least, within as much of a mandate as one can hope for within the context of the ambiguity characteristic of the legislature. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2353-54 (2006).

51. *Compare* Ex parte Mitsuye Endo, 323 U.S. 283 (1944) (finding that although the power to detain citizens of Japanese descent was a legitimate activity of the executive because it was impliedly authorized by Congress as a necessary step to achieving an explicitly authorized goal – the removal of said persons from designated military areas –, the detention of a *concededly loyal citizen* of Japanese descent was not legitimate, as Congress's purpose in authorizing exclusion was to prevent the occurrence espionage and sabotage by those who were

right to due process as a means of ascertaining whether the executive is acting within the realm its legitimate authority,[52] finding that individuals have the right to a minimum degree of due process regardless of the difficulty that it presents the government.[53] The courts have simultaneously ruled, however, that due process can be satisfied through the use of military tribunals[54] – non-Article III courts which may be convened under the authority of the jointly-held war powers of the President and Congress to try individuals for violations of the laws of war.[55] These tribunals can only exercise jurisdiction over an American citizen if he is in military service, if he is tried at a time when Article III courts are not functioning, or if he is accused of being an unlawful combatant.[56]

Congress, in defining the powers of the executive in times of emergency, faces few obstacles. Though the Supreme Court has made grandiose claims during times of peace that no emergency could justify Congressional transgression upon certain inalienable rights,[57] an observation of judicial history reveals that in times of emergency the Supreme Court will acquiesce to restrictions of individual rights that it would not allow during times of normalcy.[58] Rather than enforcing civil rights against the government, the Court has preferred to endorse the liberty/security balances sought by Congress.[59] "Thus, although there are no specific emergency powers as such, the interpretation of the Supreme Court of the United States has been flexible enough to permit required action to be taken to meet emergencies."[60] Speculation over the Court's motivation for doing so include the presumption

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potentially *disloyal*) *and* Sarah A. Whalin, Note, *National Security Versus Due Process: Korematsu Raises its Ugly Head Sixty Years Later in Hamdi and Padilla*, 22 GA. ST. U. L. REV. 711, 716-17 (2006) *with* Hamdi v. Rumsfeld, 542 U.S. 507, 518-19 (2004) (finding that detention, when used "to prevent a combatant's return to the battlefield" is "a fundamental incident of waging war," and was thus impliedly authorized by Congress in the "necessary and appropriate force" language of Congress's Authorization for Use of Military Force) *and* Whalin, *supra* note 53, at 722-23.

52. *See Hamdi*, 542 U.S. at 528-36 (finding the government's obligation to provide an individual with due process wanes in the face of national security concerns, but that the "essential constitutional promises" of receiving "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker" cannot be abridged). *See also* Whalin, *supra* note 51, at 724-26.

53. *Hamdi*, 542 U.S. at 538.

54. *Id.* ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal").

55. Benjamin V. Madison, III, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the U.S. Constitution*, 17 U. FLA. J.L. & PUB. POL'Y 347, 366-90 (2006).

56. *Id.*

57. *See* John S. Richbourg, *Liberty and Security: The Yin and Yang of Immigration Law*, 33 U. MEM. L. REV. 475, 488-90 (2003). See also Avigael N. Cymrot, *Reading, Writing, and Radicalism: the Limits on Government Control Over Private Schooling in an Age of Terrorism*, 37 ST. MARY'S L.J. 607, 635-36 (2006).

58. W.S. Tarnopolsky, *Emergency Powers and Civil Liberties*, CANADIAN PUBLIC ADMINISTRATION, Vol. 15 Issue 2, 1972, at 201.

59. Levinson, *supra* note 50, at 2350.

60. Tarnopolsky, *supra* note 58, at 202-03.

that the Court acknowledges that balancing liberty against security requires an ability to gather information for which the courts are comparatively ill equipped;[61] that the Court is concerned that decisions made contrary to the wishes of Congress and the President would not be enforced;[62] and the possibility that the Justices, as individuals, shared the belief-structures which galvanized the rest of society during times of perceived emergency.[63]

The greatest opposition that the Court has shown to the other branches of government has probably been in the preservation of its own role in the tripartite system. The judiciary as a whole faces the real possibility of being nudged into a lesser position depending on the interpretation given to the Constitution's Suspension Clause,[64] which governs the suspension of the writ of habeas corpus and thus judicial review of detention by the government; and the Exceptions Clause,[65] which governs Congress's control of the Supreme Court's appellate jurisdiction. In the past, the Court has preferred to interpret both clauses on statutory rather than Constitutional grounds.[66] Consequently, the precise meaning of each clause is still the source of intense debate among jurists. Both sides of the debate over the Suspension Clause appear to agree

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61. David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2570 (2003).

62. *Id.* at 2570-71.

63. *Id.* at 2570. *See also* REDISH, *supra* note 35, at 57.

64. U.S. CONST. art. I, § 9, cl. 2.

65. U.S. CONST. art. III, § 2, cl. 2

66. *E.g.* Felker v. Turpin, 518 U.S. 651, 660-62 (1996).

> No provision of Title I mentions our authority to entertain original habeas petitions; in contrast, § 103 amends the Federal Rules of Appellate Procedure to bar consideration of original habeas petitions in the courts of appeals. Although § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of § 2241 of Title 28—its descendant, n. 1, *supra*—by implication now. This conclusion obviates one of the constitutional challenges raised... The Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its "gatekeeping" function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2.

Id., *See also* I.N.S. v. St. Cyr, 533 U.S. 289, 301 n. 13 (2001) (finding "[t]he fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely"); Hamdan v. Rumsfeld, 464 F. Supp.2d 9, 15 (D.C. 2006) ("In two relatively recent cases involving the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), indeed, the Court has carefully avoided saying exactly what the Suspension Clause protects").

that it requires some degree of judicial review over an individual's detention.[67] The real bone of contention is whether it protects the judiciary's ability to utilize the writ as a cause of action,[68] or if the clause would allow for the abridgement of the writ if alternative avenues for judicial review of detainment were instituted.[69] A similar debate rages over the Exceptions Clause. At one extreme is the belief that Congress's authority to limit the Court's appellate jurisdiction is absolute; at the other extreme is the notion that the nation's whole judicial power is vested somewhere in the federal judiciary.[70] Intermediate ideas generally involve the notion that the whole power of the federal judiciary must be vested somewhere, though not necessarily with the Supreme Court.[71]

The meaning of the Suspension Clause, at least, may soon be made clearer as a result of the recently passed Military Commissions Act of 2006 ("MCA").[72] Section 7 of the MCA inserted new language into 28 U.S.C.A. § 2241, the statute defining the federal courts' ability to issue of a writ of habeas corpus, providing the following:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[73]

This language has the potential to abridge the Suspension Clause in only a particular set of circumstances. The first is through petitions by detainees held at Guantanamo Bay, Cuba. The Court ruled quite some time ago that non-citizens receive the protections of the individual rights embodied in Constitution only when they are within the "territory over which the United States is sovereign,"[74] though there has been some indication since then that the Court might ultimately move away from a strictly territorial approach to the Constitution,[75] or that it might question whether the writ of habeas corpus

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67. Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 259, 285 (2006).

68. *Id.* at 277. *See also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 969 (1998).

69. Alexander, *supra* note 67, at 285. *See also* Richard H. Fallon, Jr., *Response, Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1082-84 (1998).

70. Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 529-30 (2006).

71. *Id.* at 530-32.

72. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

73. Power to grant writ, 28 U.S.C.A. § 2241(e)(1).

74. Johnson v. Eisentrager, 339 U.S. 763, 777-78 (1950). *See also* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2532 (2005).

75. *See* Reid v. Covert, 354 U.S. 1 (1957) (ruling Americans abroad would be protected

should even be considered an individual right, or rather if the writ is a restriction on Congress's ability to legislate, which would be applicable in all circumstances.[76] At this moment, the United States government contends that sovereignty over Guantanamo Bay remains with Cuba[77] as was stated in the lease agreement made when control over the territory was acquired,[78] and so far the courts have been receptive to that claim.79 The second instance in which the MCA has the potential to abridge the Suspension Clause is in regard to aliens within the territorial United States who may be detained.[80] In instances of detainment followed by prosecution, the Suspension Clause may be satisfied if the Supreme Court sides with the interpretation of the clause which merely requires judicial review;[81] however, the procedures outlined in the MCA would not, by any stretch of the imagination, satisfy the Suspension Clause for noncitizens who are detained within this country without being brought to trial.[82]

2. World War I and the Red Scare

At the time of America's entry into the World War I, and the time immediately preceding it, there was little popular support for intervening in the conflict; in fact several politicians were elected into office on antiwar campaign platforms.[83] This environment of apathy and dissent among the populace led the Wilson administration to attempt the cultivation of war-time hysteria,[84] and

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by rights granted under the Constitution for the first time). *See also* Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the US Constitution in the Guantanamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165, 192-93 (2006).

> The last concentric circle is a dotted one, because it represents a doctrinal development that was not formally adopted by the Supreme Court. After Reid v. Covert, the Supreme Court decided several other cases involving citizens under military jurisdiction, but the Court did not turn its attention to aliens abroad again until 1990 in Verdugo-Urquidez. In the intervening years, lower courts took guidance from Reid and looked to the concept of control, rather than sovereignty, as the trigger of constitutional rights. In this phase of expansion in the extraterritorial application of the Constitution, the Constitution was extended to territories over which the United States was not technically sovereign, but exercised significant control and authority.

Id. at 193.

76. Boumediene v. Bush, 476 F.3d 981, 994-95 (D.C. Cir. 2007) (Rogers, dissenting), *cert. granted*, 127 S.Ct. 3078 (Jun 29, 2007). The Supreme Court will weigh in on this important case sometime in its 2007-2008 term.

77. Raustiala, *supra* note 74, at 2501.

78. Rasul v. Bush, 542 U.S. 466, 471 (2004).

79. *Boumediene*, 476 F.3d at 991-92.

80. Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 § 950g (2006).

81. Alexander, *supra* note 67, at 286-87.

82. *Id.* at 287-90.

83. Howard Zinn, *Forward* to STEPHEN M. KOHN, AMERICAN POLITICAL PRISONERS xii (1994).

84. REDISH, *supra* note 34, at 50.

the means through which it did so was the creation of a propaganda agency known as the Committee on Public Information (CPI).[85] This agency, created less than a week after the declaration of war,[86] "flooded the public with pamphlets, press releases, newsreels, and even government-authored political cartoons," by some accounts leading newspapers to publish "at least 20,000 columns of CPI material each week."[87] These efforts to create public support for the war were ultimately very successful.[88]

Two months after America entered the war, Congress passed the Espionage Act of 1917,[89] which criminalized espionage and sought to punish those who willfully caused, attempted to cause, or conspired to cause interference with the draft, or "insubordination, disloyalty, mutiny, or refusal of duty" in the armed forces, with a fine of $10,000 or up to twenty years in prison.[90] The following year, the Espionage Act was amended by the Sedition Act of 1918,[91] making the list of acts which incurred the above punishment even more extensive, significantly limiting freedom of speech as it related to the war. A portion of the expanded list of proscribed activities read:

> whoever, when the United States is at war, shall willfully *utter, print, write, or publish* any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United

85. ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA 105 (1978). *See also* Ann Bartow, *Trademarks of Privilege: Naming Rights and the Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 957 n. 117 (2007).

> Wilson hired a publicist, George Creel, to head the "Committee on Public Information" (CPI)--a propaganda ministry with the sole purpose of "selling the war." CPI produced films, pamphlets, curriculum guides--all designed to "paint Germany in a bad light." Wilson's propaganda ministry encouraged businesses to spy on their employees, parents to spy on their children, and neighbors to spy on neighbors. Most importantly, the CPI urged Americans to report "disloyal" pro-German sentiments. Creel himself stated that he demanded, "100% Americanism."

Id.

86. The United States declared war on Germany on April 6, 1917. The CPI was created by executive order on April 13. J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST. COMMENT. 37, 54 n. 58 (2002).

87. Jodie Morse, Note, *Managing the News: The History and Constitutionality of the Government Spin Machine*, 81 N.Y.U. L. REV. 843, 850 (2006).

88. GOLDSTEIN, *supra* note 85, at 105.

89. Espionage Act of 1917, ch. 30, § 1, 40 Stat. 217 (1917).

90. Espionage Act of 1917, 40 Stat. 217 §§ 3-4. *See also* KOHN, *supra* note 83, at 8.

91. Sedition Act of 1918, ch. 75, § 1, 40 Stat. 553 (1918) (repealed 1921).

> States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute . . . and whoever shall *by word* or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both . . . .[92]

In the case of each law, both Representatives and Senators unabashedly admitted that their motivation for supporting the legislation was derived from the desire to suppress domestic dissent ranging from anti-war passivism, to union activism, to racial tensions.[93]

The combination of the feverish public opinion fostered by the CPI and the laws passed by Congress to limit the ability of private individuals to express opposition to the war defined a period arguably characterized by the "the virtual complete collapse of support for concepts of civil liberties among all segments of the population except for those groups that came under direct attack."[94] It was within this vacuum that the government presided over the dismembering of two groups which had formed a core of political dissent in the nation for decades: the International Workers of the World (IWW) and the Socialist Party of America (SPA).

The IWW was one of the most successful American unions in the late nineteenth and early twentieth centuries, a time when unionization was not legal and strikes were sometimes ended violently by private strike breakers and/or the government.[95] By 1917, the group had expanded to about 100,000 members.[96] Conversely, the SPA had achieved a great deal of success in the political realm, with Socialists being elected to Congress and over a thousand municipal offices across the country,[97] due in part to their antiwar election platforms.[98] Total membership was also around 100,000, and Socialist literature was routinely sent to roughly one million people.[99] The Espionage and Sedition Acts were "used to systematically destroy" both organizations.[100]

Many of the top leaders of the SPA were arrested immediately before the off-year elections in November 1917, disrupting the party's political activity and sometimes culminating in the jailing of candidates.[101] After the election,

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92. Sedition Act of 1918 § 3 (emphasis added).
93. KOHN, *supra* note 83, at 8-9.
94. REDISH, *supra* note 34, at 50.
95. GOLDSTEIN, *supra* note 85, at 90-94.
96. *Id.* at 98.
97. Howard Zinn, *Forward* to KOHN, *supra* note 83, at xii.
98. *Id.*
99. *Id.*
100. *Id.* at 14.
101. GOLDSTEIN, *supra* note 85, at 119.

"sedition indictments were returned against virtually every major SPA leader," some of whom received twenty year sentences.[102] Eugene Debs, who had been the SPA's presidential candidate five-times, was also arrested and convicted.[103] Further, by the end of the war, virtually all of the leaders of the IWW had been arrested, as well.[104] Put into mass trials, they were prosecuted under the theory that the IWW had distributed statements and made speeches against the war and/or the United States.[105] Hundreds were convicted, mostly on charges of conspiracy, with their IWW membership being the only evidence against them.[106] Ultimately, about 2100 people were indicted under the acts, and about 1000 convicted,[107] none of whom were convicted for the sections of the act genuinely related to espionage.[108]

Three convictions based upon this abridgment of freedom of speech reached the Supreme Court.[109] In the first, *Schenck v. United States*,[110] Justice Holmes articulated the "clear and present danger" test for the first time, which on its face appeared to be a substantially more protective doctrine than that previously used by the Court.[111] However, while he argued in favor of this new doctrine in dissenting opinions in subsequent years,[112] in the unanimous opinion that he authored in *Schenck*, Holmes upheld a conviction for printing anti-war circulars,[113] and in doing so he appears to have failed to apply his newly articulated test in place than the older "bad tendency" test, given that he declined to offer any evidence that the leaflets amounted to a "clear and present danger."[114] Rather, in explaining the Court's balancing of the national interest against the First Amendment, Holmes stated:

> [w]e admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done... When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any

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102. *Id.*
103. *Id.*
104. *Id.* at 118.
105. KOHN, *supra* note 83, at 14.
106. GOLDSTEIN, *supra* note 85, at 117-118.
107. *Id.* at 113.
108. *Id.*
109. Robert S. Tanenbaum, *Preaching Terror*, 55 AM. U. L. REV. 785, 793 (2006).
110. Schenck v. United States, 249 U.S. 47, 52 (1919).
111. David G. Barnum, *The Clear and Present Danger Test in Anglo-America and European Law*, 7 SAN DIEGO INT'L L.J. 263, 272 (2006).
112. *Id.* at 275-76.
113. Tanenbaum, *supra* note 109, at 794.
114. Barnum, *supra* note 111, at 272.

constitutional right.[115]

Holmes failed to even mention the clear and present danger test[116] in the opinions he authored for *Frohwerk v. United States*[117] and *Debs v. United States*[118] just one week later.

The period in the United States immediately after the First World War has come to be known as the Red Scare.[119] Several intervening events had occurred between America's entry into the war and the end of 1919 which served to inflame public opinion. In particular, in November of 1917, the Bolsheviks seized control of Russia and, following the armistice with Germany in 1918, several communist uprisings occurred in the territory of the defeated Central Powers.[120] At roughly the same time that these foreign events were seeding domestic fears, many communist parties were forming in the United States.[121] The fact that these new parties were heavily composed of aliens, who Americans had traditionally associated with radicalism, helped to create a demand among the citizenry to deport aliens that were involved in radical political activities.[122] Subsequently, on January 2, 1920, federal agents, under the direction of Attorney-General Alexander Palmer, swept down on 30 cities, arresting between five and ten thousand people, two to seven thousand of whom were arrested without warrants.[123] This raid, along with one the previous December, came to be known as the Palmer Raids.[124] At the time, Congress, the press, and the public clamored for mass deportation of those arrested,[125] and the courts decided that deportation hearings were an administrative matter not subject to the courts' review.[126] The fate of those detained appeared to be set.

Ultimately, the executive branch's hand was temporarily stayed by the administrators of the Department of Labor, which at the time was responsible for approving deportations, who balked at deporting the detainees *en mass*.[127] Before this obstruction could be circumvented, the public hysteria began to subside and many respected Americans began to speak out against the raids and the invasions of civil liberties that had been committed.[128] In May, a group of prominent lawyers released an extensive report condemning the illegality of the

115. *Schenck*, 249 U.S. at 52.
116. Barnum, *supra* note 111, at 273. Tanenbaum, *supra* note 109, at 794-95.
117. Frohwerk v. United States, 249 U.S. 204 (1919).
118. Debs v. United States, 249 U.S. 211 (1919).
119. REDISH, *supra* note 34, at 50.
120. William M. Wiecek, *The Legal Foundations of Domestic Anticommunism*, 2001 SUP. CT. REV. 375, 387 (2001).
121. GOLDSTEIN, *supra* note 85, at 153-54.
122. *Id.*
123. *Id.* at 156.
124. REDISH, *supra* note 34, at 50.
125. EDWIN P. HOYT, THE PALMER RAIDS 1919-1920 107 (1969).
126. GOLDSTEIN, *supra* note 85, at 154.
127. *Id.* at 160.
128. REDISH, *supra* note 34, at 51.

raids,[129] and similar opposition arose from the press, religious figures, and lower branches of the judiciary.[130] Soon thereafter, the Department of Labor began to make individual rulings over deportation cases and found that no basis for deportation existed in the majority of cases.[131] In the end, only 556 of the people originally detained (about 5-10 percent) were deported.[132] When, in response, the President demanded that Congress begin impeachment proceedings against the Assistant Secretary of Labor who was responsible for these unanticipated events, the House Rules Committee concluded that it was in fact the President and Palmer, rather than the Department of Labor, who constituted the menace to American liberty.[133] Within just a few months of the raids, calmer minds had prevailed and public policy had altered course.

This period of abnormal invasion of individual liberties went into remission with the end of the Red Scare.[134] The Espionage Act ceased to be in effect when the war with Germany was formally concluded in mid-1921, and the Sedition Act had been repealed shortly before.[135] Two years later in 1923, the U.S. Pardon Attorney, in a communication with the Attorney General, recommended that the people who remained imprisoned based on convictions made under the Espionage and Sedition Acts be pardoned, opining that the evidence did not support the charges that had been against them.[136] Soon thereafter, the sentences of the remaining prisoners were commuted.[137]

3. Japanese Internment

The typical examination of the Japanese Internment during World War II always seems to begin with the bombing of Pearl Harbor on December 7, 1941 – tagged with the well known phrase "a date which will live in infamy"[138] – as if this event was the sole causative factor in the United States' treatment of Japanese immigrants and their descendants during the war. The real story begins much earlier.

The first Japanese immigrants came to Hawaii and the United States in the late nineteenth[139] and early twentieth centuries as agricultural laborers,[140]

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129. HOYT, *supra* note 125, at 115-17.

130. GOLDSTEIN, *supra* note 85, at 159-60.

131. *Id.* at 160.

132. *Id.*

133. Wiecek, *supra* note 120, at 391.

134. GOLDSTEIN, *supra* note 85, at 139. REDISH, *supra* note 34, at 51.

135. GOLDSTEIN, *supra* note 85, at 172.

136. KOHN, *supra* note 83, at 20.

137. *Id.*

138. Franklin D. Roosevelt, Asking Congress to Declare War Against Japan (1941), *available at* http://www.law.ou.edu/ushistory/infamy.shtml (last visited Dec. 22, 2007).

139. Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Lad Lands" as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37, 45 (1998).

140. John Schelhas, *Race, Ethnicity, and Natural Resources in the United States: A Review*, 42 NAT. RESOURCES J. 723, 734 (2002).

filling a labor niche created by a coinciding shift in focus among farmers of the West Coast to more labor-intensive crops.[141] Although the local population initially welcomed the expansion of the labor pool,[142] it quickly became less hospitable as the Japanese immigrants began climbing the economic ladder, purchasing their own land, and directly competing with white farmers, many of whom had previously been the immigrants' employers.[143] In the time surrounding the First World War, the western states began enacting legislation, now collectively known as the Alien Land Laws, which prohibited the ownership of real property by "aliens ineligible to citizenship," which included first generation Japanese immigrants.[144] Though the legislation itself was framed in racially neutral terms, voter pamphlets candidly explained that the purpose of these laws was "to drive the Japanese immigrants out of their agricultural holdings."[145] These laws succeeded in causing the dramatic decline of Japanese-owned land between 1920 and 1925.[146] The Alien Land Laws, along with the Immigration Act of 1924, which prevented further immigration from Eastern Europe, Southern Europe, and Japan, were part of the larger anti-immigrant fervor that gripped America in the 1920s.[147] However, these laws were not capable of barring land ownership among second-generation Japanese immigrants, who were American citizens by virtue of being born on US soil.[148] As such, those among the first wave of immigrants did their best to transfer what they owned to their children.[149]

In the wake of Pearl Harbor, anti-Japanese sentiment resurfaced and it pressed its attack for the second time. In 1942, an article published in the nationally circulated Saturday Evening Post illustrated local sentiment when it quoted the secretary of the Salinas Vegetable Grower-Shipper Association as saying:

> We're charged with wanting to get rid of the Japs for selfish reasons. We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over . . . . They undersell the white man in the markets. . . . They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we

141. Aoki, *supra* note 139, at 45.
142. *Id.* at 52.
143. *Id.* at 53. *See also* Schelhas, *supra* note 140, at 734.
144. Aoki, *supra* note 139, at 38.
145. Schelhas, *supra* note 140, at 734.
146. Aoki, *supra* note 139, at 59.
147. *Id.* at 62.
148. *Id.* at 51-52. *See* U.S. CONST. amend. XIV, § 1.
149. Aoki, *supra* note 139, at 63.

don't want them back when the war ends, either.[150]

Government action, once it began, was swift. On February 19, 1942, President Roosevelt issued Executive Order 9066, giving the Secretary of War a broad mandate for the strategic control of US territory:

> I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.[151]

Shortly thereafter, on March 21, Congress passed an act making it a misdemeanor to knowingly disregard the restrictions made by military commanders pursuant to the President's executive order,[152] after thoroughly examining the executive's intent to evacuate "persons of Japanese ancestry, citizens as well as aliens," which the Supreme Court later found to have been a ratification of Executive Order 9066.[153] By May, military orders had provided the groundwork necessary for internment.[154] General Dewitt, who commanded the Western Defense Command, was quoted as saying:

> I don't want any Jap back on the Coast.... There is no way to determine their loyalty.... It makes no difference whether the Japanese is theoretically a citizen--he is still a Japanese. Giving him a piece of paper won't change him.... I don't care what they do with the Japs as long as they don't send them back here. A Jap is a Jap.[155]

Gathered in relocation centers ostensibly for the purpose of being relocated into the interior of the country, Japanese Americans never went anywhere.[156] That was because the Governors of the interior states refused to

150. Korematsu v.United States, 323 U.S. 214, 239 n. 12 (1944) (Murphy, J., dissenting).

151. Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

152. Approval of military orders, 56 Stat. 173 (1942).

153. Hirabayashi v. United States, 320 U.S. 81, 90-91 (1943).

154. See Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. Rev. 933, 951 (2004).

155. *Id.* at 987 (footnote omitted).

156. *Id.* at 940.

accept them, apparently due to local prejudice.[157] Wyoming's governor went so far as to say that his constituents had "a dislike of any Orientals, and simply [would] not stand for being California's dumping ground." He said that if Japanese Americans resettled in Wyoming, "[t]here would be Japs hanging from every pine tree."[158] Utah's governor suggested that they be put into camps as forced labor.[159]

Interment was a reality by the time the first case involving internees reached the Supreme Court;[160] however, while the Court chose to grant certiorari, it seems to have delayed its decisions so as not to conflict with the will of the political branches, ultimately doing nothing to stand in opposition to the internment of so many people. In hearing the internment cases, the Court exercised a style of decision making sometimes called "minimalism," an approach that "say[s] no more than necessary to justify an outcome, and leav[es] as much as possible undecided."[161] In its decisions, the Court segmented the relevant issues (curfew, exclusion, and relocation), addressing the least controversial issue presented and ignoring the others.[162] In so doing, it "obscure[d] its own agency" and thus its role in what took place.[163]

An activist named Gordon Hirabayashi brought the first interment case before the Court[164] in an attempt to challenge interment in its entirety.[165] Hirabayashi had been convicted of violating two military orders – one controlling the curfew, and the other exclusion – and received two concurrent sentences.[166] The Court, anxious to avoid the possibility of opening review to the entire internment process, declined to address exclusion.[167] Instead, it upheld the curfew, and since Hirabayashi had been given a concurrent sentence, averred that no reason existed for the Court to address his second conviction for exclusion.[168]

The next important case before the Court was *Korematsu v. United States*.[169] Although the *Korematsu* and *Hirabayashi* cases were certified to the

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157. Mark D. Friedman, *Say "Cheese." Uncle Sam Wants Your Photograph and Fingerprints or You Are Out of Here. Does America Have A Peace Time Constitution in Danger of Being Lost?*, 30 NOVA L. REV. 223, 239 (2006).

158. Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 124 n. 118 (2006).

159. *Id.*

160. 97,000 people were held in assembly centers by June, 1942. In November, they were moved to "relocation camps," where they would remain interned. Kang, *supra* note 155, at 940-41. Hirabayashi came before the court in June, 1943. *See infra* note 165.

161. Kang, *supra* note 154, at 966 (citing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3 (1999)).

162. *Id.* at 944.

163. *Id.* at 955.

164. Hirabayashi v. United States, 320 U.S. 81 (1943).

165. Kang, *supra* note 154, at 945.

166. Friedman, *supra* note 157, at 241.

167. Kang, *supra* note 154, at 945.

168. *Id.* at 945. *See also* Friedman, *supra* note 157, at 241.

169. Korematsu v. United States, 323 U.S. 214 (1944).

Supreme Court at the same time, the Court used procedural mechanisms to delay deciding *Korematsu* for about a year and a half.[170] By that time, the military was busy mothballing the interment camps and sending the detainees home, so there was no risk of the Court interfering with the other two branches.[171] In making its decision, the Court again segmented the issues to avoid addressing the broader issue of internment, instead isolating the issue of exclusion.[172] Although the exclusion order was a fundamental part of the resulting internment, the Court went to great pains to characterize it as a wholly separate issue.[173] As such, the Court reasoned that the remainder of the internment regime was beyond the scope of the case at hand, while simultaneously legitimizing the government's rational of military necessity.[174] Later, we shall see that the Court already had good reason to believe that the rationale of military necessity, and the denial that exclusion was founded upon racist motives, were both false.

The Court finally addressed the issue of internment in *Ex parte Endo*,[175] though it declined to review the case on constitutional grounds.[176] First, the court sanctioned the internment program, saying that "temporary detention" might be a legitimately implied part of the authorized exclusion program.[177] Second, it absolved both the President and Congress of the internment debacle by characterizing internment as a plan exclusively of the War Relocation Authority (WRA),[178] the agency responsible for the administration of relocation, despite being aware that Congress had received testimony and held hearings about the mass detainment that was taking place and had continued to give the WRA annual appropriations to maintain its camps.[179] To exonerate Congress in this way, the Court used a means of analysis completely at odds with the reasoning used to authorize curfews in *Hirabayashi*, where the Court had reasoned that testimony about curfews before Congress had been sufficient to suggest that Congress intended to authorize curfews.[180]

The convictions of Gordon Hirabayashi and Toyosaburo Korematsu were later overturned under a writ of coram nobis[181] after historians discovered that the executive branch had suppressed factual evidence during the internment

170. Kang, *supra* note 154, at 949-50.
171. Cole, *supra* note 61, at 2575.
172. Kang, *supra* note 154, at 951-52.
173. *See id.* at 951-52.
174. *Id.* at 952-54.
175. Ex parte Endo, 323 U.S. 283 (1944).
176. Friedman, *supra* note 157, at 241-42.
177. Kang, *supra* note 154, at 960.
178. *Id.* at 959-60.
179. *Id.* at 961-62.
180. *Id.* at 963.
181. BLACK'S LAW DICTIONARY (8th ed. 2004) ("coram nobis, n. 2. A writ of error directed to a court for review of its own judgment and predicated on alleged errors of fact. -- Also termed *writ of error coram nobis*; *writ of coram nobis*.").

cases.[182] For example, the prosecution failed to alert the Supreme Court that General DeWitt had admitted to the Department of War that he did not regard speedy action against the Japanese population as necessary, and that several government agencies had discounted the idea that the group posed any threat (e.g. the "FBI had concluded that the call for evacuation was based primarily upon public and political pressure, not good data").[183] The courts ultimately overturned the convictions because of the prejudice that these omissions evoked in the Court.[184] The problem with this conclusion is that the internment Court was not ignorant of these facts; during the trial it either received this precise information or something comparable to it.[185] As the Court was independently aware of this evidence, the decision could hardly have been prejudiced by the prosecution's omission of it.

During the war, about 100,000 people were taken from their homes and put into internment camps,[186] about 70 percent of whom were US citizens.[187] Many were forced to sell their homes, businesses,[188] and other property, suffering substantial loss.[189] Until 1988,[190] the only compensation paid by the government for these losses was provided by the Japanese-American Evacuation Claims Act of 1948, which paid a maximum of $2500 in damaged per claim.[191]

4. The McCarthy Era

The seeds for the McCarthy Era were planted before the Second World War, and were perhaps themselves part of the aftershocks from the Red Scare. Between 1927 and 1939, the American communist movement saw a massive resurgence.[192] Benefiting politically from both the Great Depression and the rise of fascism in Europe, it managed to achieve "a position of some influence in American public life."[193] In counterpoint, the anticommunist movement, composed of both businessmen and conservative politicians, had not gone away.[194] In ominous tidings of what was to come, the 1930's anticommunist movement had largely moved away from its previous anti-immigrant orientation to one of partisan politics, attacking the New Deal, the power of the federal

182. Kang, *supra* note 154, at 934-35.
183. *Id.* at 977-78.
184. *Id.* at 985-86
185. *Id.* at 987-92.
186. Green, *supra* note 158, at 125.
187. Kang, *supra* note 154, at 940.
188. Friedman, *supra* note 157, at 240.
189. Schelhas, *supra* note 140, at 735.
190. Eric L. Muller, *Fixing a Hole: How Criminal Law Can Bolster Reparations Theory*, 47 B.C. L. REV. 659, 671 (2006).
191. Aoki, *supra* note 139, at 64.
192. Wiecek, *supra* note 120, at 394.
193. *Id.* at 394-395.
194. *Id.* at 397.

government, and Democrats that they labeled "soft on Communism."[195] This would later prove to be an effective attack on the Democratic Party, which seemingly could only be ameliorated by adopting a focus of equal animosity to the communist movement.[196]

This tension nearly reached a head with World War II. Along with re-enacting the Espionage Act of 1917, in 1940 Congress passed the Smith Act,[197] the country's first peacetime sedition law.[198] In addition to making it illegal to advocate the desirability of overthrowing the government of the United States by force or violence, the Smith Act also made it illegal to be a member of an organization advocating such a position.[199] With the outbreak of war a few months later, the government began limited efforts to prosecute dissidents on both the Right and the Left – fascists and communists.[200] Soon, however, the Soviet Union became an important military ally to the United States, and the prosecution of individuals from the Left quickly abated.[201] In fact, the war ultimately proved to be a benefit for the domestic communist movement. The American Communist Party, whose membership soared to over 75,000 during this period, strongly backed the war effort, and the public began to look upon the Soviet Union more favorably than it ever had before.[202]

Foreign affairs only provided a temporary stay of prosecution; things changed as the relationship between the new superpowers became less congenial.[203] As the months passed, it became increasingly clear that the Russians did not plan to withdraw their influence from the countries of Eastern Europe that they had rolled through on their push to Berlin. In retrospect, it has been argued that Russia merely intended to maintain a buffer between itself and the states of Europe, because it had been invaded by western powers three times in twentieth century and had suffered over 30 million casualties in the Second World War alone. However, the Soviets, sitting on the brink of war ravaged Western Europe with the most powerful array of land forces in the world, were the subject of great fear in the West. The American response was to buttress the military capacity of Western Europe (and later countries in the Middle East, Central Asia and East Asia) in an effort to contain potential Soviet aggression, a strategy known as the Truman Doctrine. Over time Europe began to bifurcate under the influence of the two powers: economically, between the Marshall

195. *Id.*

196. *Id.*

197. Smith Act, ch. 439, 54 Stat. 670 (1940).

198. GOLDSTEIN, *supra* note 85, at 245.

199. *Id.* Alternately known as the Alien Registration Act, it also required all aliens above the age of 14 to register with the federal government. About 5 million people were registered. Lewis M. Stevens, *The Life and Character of Earl G. Harrison*, 104 U. PA. L. REV. 591, 597 (1956).

200. Wiecek, *supra* note 120, at 402.

201. *Id.* at 403.

202. GOLDSTEIN, *supra* note 85, at 287-89.

203. *See id.* at 289-96.

Plan, the Bretton Woods regime and the Comecon; militarily, between NATO and the Warsaw Pact; and politically, between the marginalization of non-communists in Eastern Europe and the marginalization of communists in Western Europe.[204] If this grinding standoff was tinder for the public anxiety that was sparked by events such as the Berlin Blockade and the Korean War, then domestic politics were gasoline to the flame.[205]

America was not in the grip of fear at the conclusion of the war. Even with the Soviets occupying Eastern Europe, "42 percent of Americans believed that U.S.-Soviet relations would improve, and only 19 percent felt they would worsen."[206] This made things difficult for the Truman Administration; before it chose the stance it would take toward the Soviet Union, the Democratic left-wing was critical of any policy that was overly aggressive towards the Soviets while Republicans were critical of any policy seen as being soft on communism.[207] Truman's solution was two fold: he took an aggressive policy toward the Soviets abroad, which stole the wind from the Right's sails by essentially adopting its position, and labeling the opposition to his policy at home as part of a subversive plot, dramatically undermining the left wing of his party.[208]

Similar activities took place in Congress. In the House of Representatives, the House Un-American Activities Committee (HUAC) became a standing committee in 1945.[209] Its authorizing resolution gave the committee a mandate to investigate propaganda in the United States; particularly that which attacked the form of government "guaranteed by the Constitution," and all related questions that would aid Congress in forming remedial legislation.[210] This reflected the constitutional duty of Congressional committees to limit the scope of their investigations to gathering information necessary for making legislation.[211] However, since the time of its initial creation in 1938 as a special committee, the members of HUAC were candid about their self-perceived role as investigating and exposing "subversives" in government and private employment in order to subject them to both public shame and to discrimination from employers, i.e. blacklisting.[212] In 1947, HUAC went so far as to officially announce an eight-point program designed to identify and expose communists and their sympathizers in the federal government.[213] While these activities were politically beneficial to the committee's members, who traveled around the country to hold their

204. *See* PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS 480-492 (1989).
205. GOLDSTEIN, *supra* note 85, at 292-99.
206. *Id.* at 296.
207. *Id.* at 296-99.
208. *Id.*
209. *Id.* at 292.
210. REDISH, *supra* note 34, at 37.
211. Watkins v. United States, 354 U.S. 178, 187 (1957). REDISH, supra note 34, at 38.
212. Barenblatt v.United States, 360 U.S. 109, 153-158 (1959) (Black, J., dissenting).
213. GOLDSTEIN, *supra* note 85, at 296.

investigations, often during election years and in their own districts,[214] it was quite beyond the scope of constitutional committee activity.[215] Though the Supreme Court was presented with this separation-of-powers issue in cases such as *Watkins v. U.S.*,[216] and though it noted at various points that the committee was performing a non-legislative function which negatively impacted on First Amendment and due process rights, the Court never chose to take its opportunity to invalidate the committee's investigatory authority.[217]

While events in the House of Representatives played their part in affecting American public opinion, the real political showdown took place in the Senate. By the time Senator Joseph McCarthy rose to prominence in America, anti-communism was already a major issue, and had been used by both parties to further their political agendas.[218] Buoyed by the Korean War, the Rosenberg prosecution, and Mao's final triumph in China, McCarthy famously took the reins of strategy for the Republican Party, devastating political rivals with allegations of "communist infiltration" and racing around the country to support friendly politicians; indeed, he received more invitations to speak "than all other republican spokesmen combined."[219] Meanwhile, flagging Democrat candidates also attempted to use red scares in their election campaigns.[220]

The President and members Congress, acting primarily to advance their individual political agendas, worked together to help fuel the country's hysteria.[221] The issue of anti-communism slowly changed from focused criticism on immigration and unionism in the early part of the century to a crisis upon which the country's survival seemed to hinge.[222] Fear of communism gradually increased, to the point in 1954 where an estimated 81% of Americans felt that communists posed a significant danger to the country.[223] Any position on foreign policy advocating anything less than the strongest possible opposition to communism was deemed suspect.[224] Congress went so far as to pass the Internal Security Act of 1950,[225] which posited the belief of an international communist conspiracy intended to create world wide dictatorship, and empowered the Attorney General in a time of national emergency to detain anyone that he had reasonable ground to believe "probably will engage in, or

214. *Id.* at 345-46.
215. *Watkins*, 354 U.S. at 187. REDISH, *supra* note 34, at 38.
216. *Watkins*, 354 U.S. at 178.
217. REDISH, *supra* note 34, at 40-41.
218. GOLDSTEIN, *supra* note 85, at 320.
219. *Id.* at 320-25.
220. *Id.*
221. *Id.* at 320-21.
222. Wiecek, *supra* note 120, at 400.
223. Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 134 (2005).
224. GOLDSTEIN, *supra* note 85, at 371.
225. Internal Security Act of 1950, 64 Stat. 987 (alternately known as the McCarran Act and the Emergency Detention Act).

conspire with others to engage in, acts of espionage or sabotage."[226] Coming on the heels of Japanese internment during World War II, this statute provided for the mass roundup of individuals based on the mere prediction of future illegal activity,[227] forbidding access to the courts by those detained.[228] It was later repealed in 1971 due to the concern that it could "become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views" – which reflected the radical extent to which it had empowered the government.[229]

Within this context, the executive resumed prosecuting members of the communist party.[230] Though the political capital gained through these prosecutions was rooted in the image of combating espionage, spying was not the legal basis for most of these prosecutions;[231] rather, the government made most of its prosecutions under the Smith Act,[232] convicting people for being members of the communist party.[233] Since the Smith Act directly conflicted with freedom of speech and freedom of association,[234] the question of its constitutionality was quickly appealed to the Supreme Court after twelve leaders of the communist party were convicted in 1948 for their membership in the party.[235] While the Court used the clear and present danger test in reviewing the law's validity, it expanded the scope of the elements of the test dramatically so that the law could be upheld.[236] It first allowed the "present" requirement to be satisfied by the indication that a rebellion would occur "as speedily as circumstances would permit."[237] Doing so amounted "to nothing more than a complete rejection of the relevance of that prong of the test."[238] The Court then gutted the danger requirement, allowing it to be satisfied by the party being "highly organized," and noting the turmoil that was taking place elsewhere in the world.[239] As a result, rather than gauging the speech "in terms of the probability of success, or the immediacy of a successful attempt," the Court expanded the test so that the government could "punish speech even when it is unlikely to bring about unlawful action, provided the unlawful action itself [would be] sufficiently 'grave.'"[240]

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226. Wiecek, *supra* note 120, at 426-427.

227. GOLDSTEIN, *supra* note 85, at 323.

228. Wiecek, *supra* note 120, at 426.

229. Sarah A. Whalin, *National Security Versus Due Process: Korematsu Raises its Ugly Head Sixty Years Later in Hamdi and Padilla*, 22 GA. ST. U. L. REV. 711, 718 (2006).

230. REDISH, *supra* note 34, at 81.

231. *Id.* at 6.

232. Smith Act, 54 Stat. 670 (1940).

233. REDISH, *supra* note 34, at 79-80.

234. *See supra* notes 197-199 and accompanying text.

235. Dennis v. United States, 341 U.S. 494 (1951).

236. *See* REDISH, *supra* note 34, at 91-92. Barnum, *supra* note 111, at 276.

237. *Dennis*, 341 U.S. at 509-510.

238. *See* REDISH, *supra* note 34, at 91-92.

239. *Dennis*, 341 U.S. at 510-511. *See also* REDISH, *supra* note 34, at 91-92.

240. Barnum, *supra* note 111, at 277.

After this green flag, the government increased its prosecutions. The Truman Administration began targeting second-string leaders of the communist party, indicting sixty-eight people under the Smith Act in 1951 and 1952.[241] The trend continued under Eisenhower, with forty-two indicted from 1953 to 1956.[242] When the Supreme Court finally began to overturn convictions made under the Smith Act in 1957, closing the door it had opened for prosecutors six years prior, the facts in the overturned cases were little different from those in the initial cases.[243]

B. The United Kingdom

1. The British System of Emergency Power

The first major difference between the British and American systems of government is that the United Kingdom lacks a written constitution. Although the United Kingdom is guided by centuries of practice and tradition, there are no Articles I or II to serve as a foundation for identifying the delineated powers of government, which tends to make the balance between executive and legislature much more flexible.

Contrary to the common misperception in America, the monarchy continues to be a valid legal entity in the government of the United Kingdom. Today, the Crown retains several prerogatives,[244] including the right to declare "war, peace, or neutrality"[245] however, royal powers have been highly constrained since the final triumph of parliamentary supremacy in the late seventeenth century.[246] As a practical matter, royal prerogatives are exercised according to the wishes of Parliament,[247] in that they may be limited legislatively, and in practice are only exercised on the advice of the Prime Minster.[248] Indeed, the Prime Minster himself is beholden to Parliament

241. GOLDSTEIN, *supra* note 85, at 332.

242. *Id.* at 339.

243. Yates v. United States, 354 U.S. 298, 318-19 (1957) (reinterpreting the Smith Act, determining that it had not in fact been passed with the intent to punish the advocacy of an abstract doctrine – in complete contradiction of the Court's decision in *Dennis* in 1951). *See also* Corey Robin, *Fragmented State, Pluralist Society*, 69 MO. L. REV. 1061, 1079 (2004).

244. BLACK'S LAW DICTIONARY (8th ed. 2004) ("prerogative, n. An exclusive right, power, privilege, or immunity, usu. acquired by virtue of office").

245. Tarnopolsky, *supra* note 58, at 198. *See also* Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1201 (2006).

246. Robert C. Sarvis, *Legislative Delegation and Two Conceptions of the Legislative Power*, 4 PIERCE L. REV. 317, 318-320 (2006) (parliamentary supremacy is a result of the Glorious Revolution, in which Parliament played an active role in replacing James II with William III).

247. Tarnopolsky, *supra* note 58, at 198.

248. Andrew C.S. Efaw, *Free Exercise and the Uniformed Employee: A Comparative Look at Religious Freedom in the Armed Forces of the United States and Great Britain*, 17 COMP. LAB. L.J. 648, 664 (1996).

because, unlike the President of the United States, who can only be removed by impeachment,[249] the Prime Minster can be removed at any time by a vote of no confidence.[250] This is another manifestation of the doctrine of parliamentary supremacy, the doctrinal basis of the United Kingdom's political system, which defines the legislature as the foremost power in government, unrestrained in its actions; it may make or unmake any law, and faces no legal restriction on its ability to do so.[251] It should be noted though that this arrangement is a matter of convention, i.e. non-legal tradition, rather than "law."[252] Furthermore, Parliament has lacked even the procedural impediment of bicameralism for almost a century, because as a result of the Parliament Acts[253] the House of Commons no longer requires the assent of the House of Lords to pass legislation.[254]

Parliamentary supremacy has important ramifications for the judiciary. The origin of the American Bill of Rights can be found in England's tradition of philosophical thought about the rights of the individual,[255] exemplified in such documents as the Petition of Right[256] and the English Bill of Rights.[257] While such enunciation of rights may have the political impact of impressing respect for them in public opinion,[258] "no court of law or other body in the United Kingdom has the constitutional right to challenge an act of parliament."[259] In evaluating an act of Parliament, the power of the courts is limited to interpreting Parliament's intent.[260] As the House of Lords stated in an evaluation of government emergency powers:

> in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good

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249. U.S. CONST. art. II, § 4.

250. John C. Reitz, *Political Economy and Separation of Powers*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 579, 593 (2006).

251. Michael L. Principe, *Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain*, 22 LOY. L.A. INT'L & COMP. L. REV. 357, 360-361 (2000).

252. Adam Tomkins, *The Republican Monarchy Revisited*, 19 CONST. COMMENT. 737, 742-47 (2002).

253. Parliament Act, 1911, 1 & 2 Geo. 5, c. 13. Parliament Act, 1949, 12, 13 & 14 Geo. 6, c. 103.

254. Jeremy Waldron, *The Internal Point of View in Law and Ethics*, 75 FORDHAM L. REV. 1697, 1702 n. 20 (2006).

255. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 64 (1986).

256. The Petition of Right (1628), *available at* http://www.constitution.org/eng/petright.htm (last visited Dec. 22, 2007).

257. The English Bill of Rights (1689) (claiming the basic rights of Englishmen include the existence of independent courts, freedom to petition, freedom to bare arms, freedom of speech in Parliament, and freedom from cruel and unusual punishment), *available at* http://www.yale.edu/lawweb/avalon/england.htm (last visited Dec. 22, 2007).

258. CURTIS, *supra* note 255, at 21.

259. Tarnopolsky, *supra* note 58, at 198.

260. BONNER, *supra* note 13, at 52.

> sense of the people in the system of representative and responsible government which has been evolved.[261]

In the United States, when Congress passes legislation treading upon the grounds of inalienable rights, the legitimacy of the legislation requires five Supreme Court Justices to be on board. Parliament has no such limitation.

This status of the courts in the United Kingdom, compared to those in the United States, represents a doctrinal split in judicial philosophy. In early seventeenth century England, when "the common law itself supplied the rules now described as constitutional,"[262] Sir Edward Coke, the chief justice of the Court of Common Pleas, famously stated:

> And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.[263]

In colonial American, this rule was rephrased to say: "[a]n act contrary to the constitution is void."[264] Though this doctrine was effectively dead in England by the time of the American Revolution,[265] it lived on in the colonies, with Chief Justice John Marshall ultimately introducing the concept into the federal judiciary in *Marbury v. Madison*.[266]

> The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant

261. Liversidge v. Anderson, [1942] A.C. 206 (H.L.), *available at* http://uniset.ca/other/cs5/1942AC206.html (last visited Dec. 22, 2007).

262. ORTH, *supra* note 19, at 99.

263. *Id.* at 18-20.

264. *Id.* at 20.

265. *See id.* at 25.

266. Marbury v. Madison, 5 U.S. 137 (1803).

to the constitution, is void.[267]

Some scholars have speculated that the absence of judicial review and a binding list of fundamental rights in the United Kingdom has caused the government to afford itself more power than it otherwise would have during times of emergency.[268]

Somewhat paradoxically, while the legislature of the United Kingdom is supreme in its authority, it has a habit of ceding its authority to the executive. Whereas the U.S. Constitution limits Congress in the degree to which it may delegate authority to the President with the prescription "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"[269] Parliament faces no such restriction. Further, when it delegates authority for emergency powers, it typically does so through means that marginalize the ability of the judiciary to scrutinize the executive's actions, such as by "fram[ing] discretionary powers in subjective terms, rather than in the objective terms which more clearly impart a judicially reviewable standard" and by being "rather vague as to the criteria governing the exercise of [that] power."[270] With judicial scrutiny thus obviated, oversight of the executive's use of emergency power is left to the legislature.[271] The effectiveness of Parliament's role as "watchdog," however, is somewhat limited. Though the power to legislate appears to give Parliament full control of emergency powers, "it is well known... that legislation is made elsewhere and legitimated in Parliament," that emergency legislation is often brought forward and passed quickly, and that it is rare for its key provisions to be amended.[272] And further, although Parliament sometimes inserts provisions into enabling acts which require the Parliament to approve executive regulations before they take affect, or which allow Parliament to annul them later,[273] a dramatic asymmetry of information exists between the government's executive actors and "the watchdogs" in regard to how the executive's powers are actually being used.[274]

2. War Powers (The First and Second World Wars)

It was no surprise to anyone when war came to the European continent in 1914; tensions had been building for a decade before the first shots were

267. *Marbury*, 5 U.S. at 177.

268. Dana Keith, *In the Name of National Security or Insecurity?*, 16 FLA. J. INT'L L. 405, 415 (2004).

269. U.S. CONST. art.I, § I. See *Limitations on rule; permissible delegation*, 16A AM. JUR. 2D Constitutional Law § 297 (2006).

270. BONNER, supra note 13, at 53-54.

271. JOHN EAVES, JR., EMERGENCY POWERS AND THE PARLIAMENTARY WATCHDOG 14 (1957).

272. BONNER, *supra* note 13, at 37-38.

273. TONY BUNYAN, THE POLITICAL POLICE IN BRITAIN 55 (2d ed. 1976).

274. BONNER, *supra* note 13, at 49.

fired.[275] Shortly after the outbreak of hostilities, Parliament passed the Defence of the Realm Act 1914 (DORA)[276] without debate.[277] DORA allowed the executive to pass regulations with the force of law[278] for the purpose of public safety and "the defence of the realm."[279] The regulations that were created gave the government extensive control over the economy;[280] the power to detain individuals on the basis of "hostile origin or association," with 30,000 people ultimately being detained without trial; as well as the power to prohibit assemblies, clear areas, and impose curfews.[281] During this time, the government also used DORA to constrain freedom of speech by punishing the causation of "mutiny, sedition, or disaffection" among the military or civilian population, and freedom of the press by prohibiting the publishing "of statements or reports likely to 'cause disaffection' or to 'prejudice the recruiting, training, discipline, or administration' of the military."[282] Although DORA was not popular among the British people,[283] popular opinion seemed to indicate the restriction on freedom was necessitated by the war with Germany.[284]

The Second World War was also seen on the horizon long before its arrival.[285] Perhaps the primary difference for Britain in the time leading up to these conflicts was that prior to the First World War it had been in a superior position compared to its adversaries,[286] whereas it entered the Second World War as the underdog.[287] As such, it should be of little surprise that emergency regulations were again passed with only nominal debate[288] – this time in the form of the Emergency Powers (Defence) Act 1939 (EPA 39).[289] The executive was essentially given the same authority: to create regulations for the purpose of "public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war, and the maintenance of supplies and services essential to the life of the community."[290] Among other choices,

275. *See* KENNEDY, *supra* note 204, at 324-328.

276. Defence of the Realm Act, 4 and 5 Geo. V, c. 29.

277. EAVES, *supra* note 271, at 8-9.

278. Rachel Vorspan, *Law and War: Individual Rights, Executive Authority, and Judicial Power in England During World War I*, 38 VAND. J. TRANSNAT'L L. 261, 267 (2005).

279. EAVES, *supra* note 271, at 8-9.

280. *Id.*

281. Vorspan, *supra* note 278, at 270. Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 BROOK. J. INT'L L. 495, 500 (2006).

282. *Id.* at 270.

283. EAVES, *supra* note 271, at 8-9.

284. Vorspan, *supra* note 278, at 271-72. EAVES, *supra* note 263, at 8-9.

285. *See* KENNEDY, *supra* note 203, at 433-39.

286. *Id.* at 332-33.

287. *Id.* at 439-41.

288. BONNER, *supra* note 13, at 38.

289. Emergency Powers (Defence) Act 1939, 2 and 3 Geo. 6, c. 62.

290. EAVES, *supra* note 271, at 15-16.

internment was again practiced, with about 28,000 people being interned.[291]

Parliament did little to constrain the executive in its exercise of legislative power under DORA. The enabling statute contained no specific provisions requiring Parliament to approve, or allowing it to annul, regulations issued by the executive.[292] Further, it was written to remain in effect until the executive declared hostilities to have ended,[293] which did not occur until 1920,[294] a flaw which would not be repeated in future legislation.[295] Regardless, the judiciary was able to exercise a degree of control over the executive through the language of DORA.[296] The courts interpreted it to have created an objective standard for the executive to follow in creating regulations for the defense of the realm, in theory allowing regulations to be struck down if they were found to fall outside of Parliament's mandate.[297]

In the EPA 39, Parliament expanded its watchdog function, while circumscribing the role of the courts. Regulations came into force automatically, and had the power to amend or repeal existing laws, but either house of Parliament could annul a regulation within the first 28 sitting days after its issuance.[298] Further, rather than allowing the executive to determine when these emergency powers would cease to be in effect, the act was set to expire after twelve months if it was not renewed, though it wasn't actually repealed until 1959.[299] This time, the judiciary's influence was limited because the legislation was framed in a subjective standard, merely requiring the executive to show that its regulations appeared to be necessary or expedient.[300] This measure may have been unnecessary; because even when the courts were in a position to wield influence over the executive they exhibited a noticeable deference, apparently with the rationale that the necessities of war justified the expansion of government power at the expense of individual rights.[301] The judiciary event went so far as to interpret legislative mandates in a broader manner than would normally apply in order to support the executive's aims.[302]

3. Labor Emergencies

In the early twentieth century, Great Britain was home to an increasingly powerful labor movement. Particularly strong were the country's coal miners, railroad workers, and transportation workers, who had formed a loose affiliation

291. Moeckli, *supra* note 281, at 500.
292. BONNER, *supra* note 13, at 41.
293. Tarnopolsky, *supra* note 58, at 200.
294. BUNYAN, *supra* note 273, at 52.
295. BONNER, *supra* note 13, at 41.
296. EAVES, *supra* note 271, at 18.
297. *Id.*
298. BUNYAN, *supra* note 273, at 55. *See also* EAVES, *supra* note 271, at 18.
299. BUNYAN, *supra* note 273, at 55. *See also* EAVES, *supra* note 271, at 18.
300. EAVES, *supra* note 271, at 18.
301. *See* BONNER, *supra* note 13, at 55-59.
302. *Id.* at 59.

known as the Triple Alliance.[303] This perturbed government officials, who recognized that a strike by the alliance of unions had the potential to bring the country to a standstill.[304] Further, in the shadow of the 1917 Russian Revolution, the government feared the social upheaval which could result from such a massive strike might lead to revolutionary turmoil in Britain.[305] Since 1914, the government had been able to use legislation such as DORA during labor emergencies, but as the war and access to those war powers began drawing to a close, Parliament began to look toward legislation which could be used for similar purposes during peacetime.[306]

Parliament ultimately passed the Emergency Powers Act 1920 (EPA 1920)[307] to give the executive emergency power to forestall the inhibition of a community's access to the "essentials of life,"[308] empowering the government to counter "major strikes, civil disorders and pre-revolutionary situations."[309] The act was introduced by Parliament in the midst of a miners' strike, which spectators thought the railroad workers might soon join, making it "precisely the time when Parliamentary and public opinion was least able dispassionately to weigh up either its short-terms merits or long-term consequences."[310] However, as much as the EPA 1920 was demanded by the representatives of certain parts of the country, it faced substantial opposition from many other legislators.[311] The dramatic division in public sentiment is likely the reason why the emergency powers created were far less extensive than those afforded to the government during the wars in 1914 and 1939.[312]

Under the EPA 1920, the executive was again vested with the power to create regulations after declaring a state of emergency, this time to "restore order and maintain supplies" whenever it *appeared* "to the government that the essential services of the country" were threatened by "any action [that] has been taken or is immediately threatened by any persons or body of persons."[313] As was true in the later EPA 39, the subjective element of this prescription vastly diminished the potential scope for judicial review of the executive's actions.[314] Parliament, however, perhaps having already learned its lessons from DORA, implemented several watchdog functions. Though it could not directly annul a regulation, any regulation which Parliament did not approve within seven days would have become void.[315] Further, the whole bundle of regulations had to be

303. *Id.* at 224.
304. *See id.* at 224.
305. BUNYAN, *supra* note 273, at 10.
306. *Id.*
307. Emergency Powers Act, 10 & 11 Geo. V, c. 55.
308. EAVES, *supra* note 271, at 9.
309. BUNYAN, *supra* note 273, at 52-53.
310. BONNER, *supra* note 13, at 39-40.
311. *See* EAVES, *supra* note 271, at 9.
312. *See* BONNER, *supra* note 13, at 13.
313. BUNYAN, *supra* note 273, at 52-53.
314. *See* BONNER, *supra* note 13, at 234.
315. *Id.* at 43.

renewed by Parliament every month.[316] The criticism the bill faced during the debates over its passage also led its supporters to add explicit limits to the scope of the executive's rulemaking power.[317] Accordingly, the government could not criminalize participation in a strike, it could not impose military or industrial conscription, and it could not "punish by fine or imprisonment without trial."[318]

Aside from those limitations, the executive had the power to suspend any law in order to achieve its goals.[319] The regulations created by the government were mostly designed to allow soldiers to do civilian work, including the work of dockworkers, sewage workers, prison officers, etc.[320] An amendment to the law in 1964 allowed the use of soldiers in agricultural work.[321] Regulations were also used to expand police powers for stopping individuals, entering homes, searching, and arresting.[322]

The EPA 1920 was activated 12 times[323] before it was replaced in 2004 by the Civil Contingencies Act (CCA).[324] The CCA again allows the executive to create regulations, if it is "satisfied [the regulations are] appropriate for the purpose of preventing, controlling or mitigating an aspect or effect"[325] of an emergency that "has occurred, is occurring or is about to occur."[326] This is clearly another set of subjective criteria, limiting supervision by the judiciary. Under this legislation, the term "emergency" encompasses war, terrorism, or any other event or situation that "threatens serious damage" in the form of loss of human life, human illness or injury, damage to property, the disruption of communication, transportation, the supply of food or fuel, etc. Parliament continues to play an important role because regulations will lapse after seven days if not approved, and may be annulled or amended subsequently.[327]

4. Anti-Terrorism

The British tradition of anti-terrorism legislation was spawned as a means of combating the Irish Republic Army (IRA), which remained the focus of this branch of law for over half a century.

The Prevention of Violence (Temporary Provisions) Act 1939 (PVA

316. BUNYAN, *supra* note 273, at 53.
317. BONNER, *supra* note 13, at 39-40.
318. *Id.* at 234-35. However, this limitation didn't necessarily preclude detention regarded as preventative rather than punitive. *Id.*
319. BUNYAN, *supra* note 273, at 53.
320. BONNER, *supra* note 13, at 229-30.
321. *Id.* at 229.
322. *Id.* at 239.
323. *Id.* at 13.
324. Civil Contingencies Act, 2004, c.36 (Eng.).
325. *Id.* § 22.
326. *Id.* § 21.
327. *Id.* § 27.

39),[328] the country's first piece of anti-terrorism legislation, was drafted in response to an IRA bombing campaign in England.[329] Passed in July after four days of Parliamentary consideration,[330] the new law had broad support[331] which was buttressed by the fear that the IRA was being "actively stimulated" by the United Kingdom's wartime enemies on the continent.[332] By that time, 66 people had already been arrested for their suspected participation in the 127 attacks which had occurred thus far.[333]

Unlike the previous examples of British emergency legislation examined in this Note, the PVA 39 did not give the executive the authority to create regulations.[334] Instead, it enabled the executive to require foreigners to register with the government, to expel people from the country if reasonably satisfied the person "was engaged in the preparation or instigation of" an act of violence, or to prohibit that person's entry if reasonably satisfied that the person might be trying to enter "with a view to being so engaged."[335] It also empowered the police to arrest people they "reasonably suspected" to be guilty of one of the terrorism-related offences created by the PVA 39, "of being subject to an expulsion or prohibition order, or of being concerned in the preparation or instigation of acts of violence to which the Act was directed."[336] Although the PVA 39 was passed with the intention of being a short-term statute with a lifespan limited to two years if not renewed,[337] and although the bombing campaign it was designed to combat ceased in March 1940,[338] Parliament kept it alive until 1954,[339] then resurrected the majority of its provisions less than twenty years later.[340]

Northern Ireland itself was subject to an additional statutory regime at this time[341] known as the Civil Authorities (Special Powers) Act,[342] which had been instituted in 1922 at the time of the Irish partition,[343] with the intention of

328. Prevention of Violence (Temporary Provisions) Act, 1939, 2 & 3 Geo. 5, c. 50 (Eng.).

329. BONNER, *supra* note 13, at 14.

330. *Id.* at 38-39; TIM PAT COOGAN, THE IRA: A HISTORY 97 (1994).

331. Donohue, *supra* note 12, at 316.

332. COOGAN, *supra* note 330, at 97.

333. *Id.*

334. *See* BONNER, *supra* note 13, at 168.

335. *Id.* at 168.

336. *Id.*

337. DONOHUE, *supra* note 12, at 306.

338. COOGAN, *supra* note 330, at 97; BONNER, *supra* note 13, at 14.

339. DONOHUE, supra note 12, at 306-07; see also Reuven Young, *Defining Terrorism: the Evolution of Terrorism as a Legal Concept in International Law and its Influence of Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 73 (2006).

340. DONOHUE, *supra* note 12, at 307.

341. Colm Campbell, *'Wars on Terror' and Vicarious Hegemons*, 54 INT'L & COMP. L.Q. 321, 335 (2005). In fact, Northern Ireland has arguably been in a state of permanent emergency since its creation. *Id.*

342. Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 5, c. 5 (N. Ir.).

343. Stephen J. Schulhofer, *Checks and Balances in Wartime*, 102 MICH. L. REV. 1906, 1936 (2004).

only being in force for a year.[344] This act gave the local executive authorities the power to establish regulations "as may be necessary for preserving the peace and maintaining order," hundreds of which were ultimately issued,[345] and served as the legal basis for internment without trial in Northern Ireland multiple times[346] by the early 70s, when a renewed IRA bombing campaign began in England.[347] In 1971, internment powers were again established and were actively used until 1975, during which time almost two thousand people were detained without trial.[348] Some detainees were subject to extreme interrogation techniques, such as being forced to stand in stress positions for hours, hooded, subject to loud noise, and were deprived of food, water and sleep,[349] for the purpose of eliciting confessions and intelligence.[350] It was also alleged the detainees were subject to beatings, electrical shocks, and the forcible administration of drugs.[351]

Soon thereafter, Parliament suspended the Northern Ireland Parliament, taking direct control of the region,[352] and replaced the Special Powers Act[353] with the Northern Ireland (Emergency Provisions) Act, 1973 (EPA 73).[354] This new legislation did little to restrain the government's internment powers;[355] rather, the significant change that it made was to introduce into Northern Ireland a system for trials known as the "Diplock Court."[356] Used to try suspected terrorists, the two most notable features of this system were the absence of a jury and special rules of evidence; in particular, the courts allowed confessions obtained through "intensive interrogations" into evidence.[357] At one point in time, confessions were the primary evidence relied upon in 90 percent of the cases heard before Diplock Courts.[358] Other evidentiary changes in these courts included the infringement of the right to silence, the use of

344. Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 325 n. 91 (2006).

345. Civil Authorities (Special Powers) Act § 1; *see also* Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 256 (2005).

346. Moecki, *supra* note 281 at 503 n. 46. In 1922-24, 1938-45, and 1956-61. *Id.*

347. DONOHUE, *supra* note 12, at 316.

348. Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistake Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1678 (2003).

349. Sara A. Rodriguez, *The Impotence of Being Earnest*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 61, 98 n. 237 (2007); Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 327 (2004).

350. S.P. Zochowski, *Will Labour Keep its Promise?*, 5 J. INT'L L. & PRAC. 403, 411 (1996).

351. Campbell, *supra* note 341, at 336.

352. Donohue, *supra* note 345, at 258.

353. Keith, *supra* note 268, at 427.

354. Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 21 (Eng.).

355. Schulhofer, *supra* note 343, at 1937.

356. Keith, *supra* note 268, at 427.

357. Campbell, *supra* note 341, at 327.

358. *Id.* at 327 n. 31.

secret witnesses, and the use of "supergrasses,"[359] a term used for "former paramilitary informants given inducements to testify against alleged co-conspirators."[360] These informants often testified against a large number of defendants in any one trial, giving some the impression that these prosecutions were show trials.[361]

Between 1971 and 1974, while there were several bombings in England, at locations such as the Old Bailey, Whitehall, Scotland Yard and the Tower of London,[362] special anti-terrorism legislation was not introduced outside of Northern Ireland. This changed in the wake of the politically inflammatory Birmingham pub bombings, in which 21 people were killed and roughly 168 injured.[363] In response to popular outrage similar to that of 1939,[364] Parliament passed a new piece of anti-terrorism legislation after a single day of deliberation[365] known as the Prevention of Terrorism (Temporary Provisions) Act 1974 (PTA 74),[366] the provisions of which had been drafted a year earlier without being presented for passage.[367] It was basically a reintroduction of PVA 39 with the addition of proscription,[368] which allowed the government to proscribe any organization appearing to be "concerned in terrorism occurring in the United Kingdom and connected with Northern Irish affairs, or in promoting it or encouraging it."[369] Membership in such a group warranted a punishment of up to 5 years in prison.[370] It also became a crime to publicly display support of a proscribed organization, or to arrange a meeting of three or more persons that would be addressed by a member of a proscribed organization.[371] Judicial review over the PTA 74 was technically greater than judicial review in the war powers cases and the earlier antiterrorism legislation because the courts began to refuse to allow "subjective language in statutes to negate their powers to review ministerial action," though in practice the court would "only be willing to interfere with a decision on this issue where the suspect could establish that the Secretary of State acted in bad faith, a burden impossible to discharge in practice."[372]

Though the PTA 74, like PVA 39, was meant to be implemented for a limited period, it included the same obstacles to repeal as its predecessor.

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359. John D. Jackson and Sean Doran, *Conventional Trials in Unconventional Times: The Diplock Court Experience*, 4 CRIM. L.F. 503, 507 (1993).

360. O'Connor, *supra* note 348, at 1697 n. 184.

361. Jackson, *supra* note 359, at 507.

362. COOGAN, *supra* note 330, at 293.

363. *Id*; *see also* BONNER, *supra* note 13, at 39.

364. Keith, *supra* note 268, at 428.

365. BONNER, *supra* note 13, at 39.

366. Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56 (Eng.).

367. BONNER, *supra* note 13, at 39.

368. DONOHUE, *supra* note 12, at 307.

369. BONNER, *supra* note 13, at 183.

370. BUNYAN, *supra* note 273, at 54-55.

371. BONNER, *supra* note 13, at 183-84.

372. *Id.* at 193.

Structurally, it contained the same protection: it would expire after two years if not renewed by Parliament,[373] but again, this nominally temporary legislation was renewed consistently, decades into the future.[374] The barrier was largely political; the goals of the legislation were fuzzy, giving no real indication of what would have to be achieved before the emergency powers would cease to be necessary.[375] In effect, "the burden shifted from those supporting emergency measures to prove that they were imperative, to individuals seeking to repeal the legislation needing to demonstrate that an emergency no longer existed."[376] Ultimately, the powers of the PTA 74 were replaced by new legislation, the Terrorism Act 2000 (TA 2000),[377] which was, in part, a blending of the PTA 74 and the EPA 73.[378] Unlike the earlier measures, TA 2000 was explicitly intended to be permanent, and did not need to be renewed by Parliament.[379] The other major difference from past anti-terrorism legislation was the use of a broader definition of terrorism, which expanded the focus from domestic terrorism to include international terrorism.[380] Its applicability is no longer confined by geography, including any act "designed to influence the United Kingdom (or a foreign government) or to intimidate a population that is done for the purpose of advancing a political, religious, or ideological cause,"[381] including those endangering life and public safety[382] or disrupting power supplies, water supplies, or key computer systems.[383]

TA 2000 was in effect for a very short time before the events of September 11th in the United States helped usher new legislation through Parliament,[384] though it was passed without a sense of public emergency comparable to that which accompanied the United States Patriot Act.[385] This new legislation was the Anti-Terrorism, Crime and Security Act 2001 (ATCSA).[386] While its implementation brought some changes to the government's handling of terrorist finances, aviation security, and the nuclear industry,[387] the most notable addition to Great Britain's antiterrorism regime was the possibility of indefinite detention "to prevent [a] suspected noncitizen

373. DONOHUE, *supra* note 12, at 307.
374. *See* Keith, *supra* note 268, at 429-31.
375. DONOHUE, *supra* note 12, at 317.
376. Keith, *supra* note 268, at 429.
377. Terrorism Act, 2000, c. 11 (U.K.)
378. Keith, *supra* note 268, at 429.
379. *Id.* at 431.
380. Richard Raimond, *The Role of Indefinite Detention in Antiterrorism Legislation*, 54 U. KAN. L. REV. 515, 533-34 (2006).
381. Young, *supra* note 339, at 74.
382. *Id.*
383. Keith, *supra* note 268, at 432.
384. *Id.* at 432.
385. *Id.* at 433-34.
386. Anti-Terrorism, Crime and Security Act, 2001, c.24 (U.K.).
387. Sir David Williams, *The United Kingdom's Response to International Terrorism*, 13 IND. INT'L & COMP. L. REV. 683, 693 (2003).

terrorist from engaging in any future terrorist activities."[388] This measure could only be utilized against noncitizens who could not be deported because the United Kingdom's human rights treaty obligations prevented it from deporting a person to a destination country where the person faced the possibility of being tortured.[389]

This was a significant departure from past practice in the UK – while internment for reasons related to terrorism had been instituted repeatedly in Northern Ireland,[390] it had never been used to combat terrorism in the mainland.[391]

The possibility of indefinite detentions conflicted with the United Kingdom's obligations under the European Convention on Human Rights (ECHR), an agreement protecting civil and political rights similar to the protections found in the U.S. Bill of Rights.[392] Article 15 of the ECHR permits its members to derogate from some of its requirements "[i]n time of war or other public emergency threatening the life of the nation," which is essentially a means of condoning the use of emergency powers, but only to the extent "strictly required by the exigencies of the situation."[393] At the same time, the Human Rights Act 1998[394] allows the House of Lords, in its judicial capacity, to "declare a statute is incompatible with fundamental human rights norms,"[395] with the expectation that Parliament would then modify such a statute to remove the incompatibility.[396]

When a case involving detention under ATCSA came before the House of Lords in accordance with the Human Rights Act 1998,[397] the Law Lords evaluated two questions: (1) whether a "public emergency threatening the life of the nation within the meaning of Article 15(1)" existed and (2) whether the

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388. Keith, *supra* note 268, at 434.

389. Raimond, *supra* note 380, at 534.

390. Donohue, *supra* note 345, at 318 ("In Northern Ireland, for instance, between 1922 and 1972, internment occurred on four occasions"); *see also* Christopher K. Connolly, *Living on the Past: the Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT'L L.J. 401, 415 (2006), noting

> [t]he rule of law never applied to Northern Ireland in the same way as it did to other parts of the UK. Britain turned a blind eye towards the discriminatory practices of Northern Ireland's Unionist government between 1921 and 1969, and after the outbreak of the Troubles it implemented practices of prolonged internment and secret, non-jury "Diplock Courts" that were employed liberally, especially against the Catholic community.

Id.

391. Keith, *supra* note 268, at 434.

392. *Id.* at 451.

393. Raimond, *supra* note 380, at 535.

394. Human Rights Act, 1998, c. 42 (U.K.).

395. Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1, 7 (2006).

396. *Id.*

397. A v. Sec'y of State of Home Dep't, [2005] All E.R. 169 (Eng.)

derogation was "strictly required by the exigencies of the situation."[398] The Law Lords were deferential in evaluating the first element, indicating it was a political judgment for which the political branches were better suited,[399] but found detention under ATCSA violated the proportionality requirement of the second element, because it ignored similar threats presented by British citizens (noting evidence that roughly a thousand had attended training camps in Afghanistan), and allowed for the detention of individuals who had links to a terrorist organization presenting no direct threat to the United Kingdom, divorcing detention from the original emergency justifying derogation.[400]

The House of Lords "strongly recommend[ed]" the detention aspect of the ATCSA be replaced, suggesting new legislation should either deal with all terrorism, "whatever its origin or the nationality of its suspected perpetrators" or be drafted in a manner requiring no derogation from the ECHR.[401] Following the decision, Parliament abolished the detention provisions created under the ATCSA, replacing detention with the power to issue "control orders" created by the Prevention of Terrorism Act 2005 (PTA 2005).[402] These control orders, issued against terrorism suspects, can require a range of measures, including curfews, electronic tagging, forbidding communication with other terror suspects, and indefinite house arrest; a control order would apply equally to citizens and noncitizens. It is unclear whether some of these provisions also conflict with the ECHR Article 5.[403]

Mostly recently, in response to the London bombings in July 2005,[404] the United Kingdom enacted the Terrorism Act 2006 (TA 2006)[405] after six months of debate.[406] PTA 74 had already criminalized speaking in support of proscribed organizations, and TA 2000 expanded the subject matter basis for proscribing a group. TA 2006 expanded the criminalization of speech, [407] making it a crime to make "a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism," by "glory[ing] the commission or preparation (whether in the past, in the future or generally) of such acts."[408]

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398. Raimond, *supra* note 380, at 537.

399. Mark Elliott, *United Kingdom: Detention Without Trial and the "War on Terror,"* 4 INT'L J. CONST. L. 553, 555-56 (2006).

400. Raimond, *supra* note 380, at 538.

401. *Id.* at 539.

402. Prevention of Terrorism Act, 2005, c. 2 (U.K.).

403. Raimond, *supra* note 380, at 539; Jane Andrewartha, *English Maritime Law Update: 2005*, 37 J. MAR. L. & COM. 359 (2006).

404. Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 CARDOZO L. REV. 2151, 2172 (2006).

405. Terrorism Act, 2006, c. 11 (U.K.).

406. Barnum, *supra* note 111, at 292 n. 134.

407. Roach, *supra* note 404, at 2179-80.

408. Terrorism Act, 2006, c. 11 (U.K.).

III. FINAL THOUGHTS

The House of Lords' effect on the indefinite detention portion of the Anti-Terrorism, Crime and Security Act 2001 has led to some controversy in the United Kingdom, because, even though the House of Lords was acting under the authorization of another piece of Parliamentary legislation, it represented a boldness that has been absent from the British judiciary for quite some time.[409] Commentators wondered to what degree the Human Rights Act 1998 would free the British courts from their traditional shackles, and if through the interpretation of the European Convention on Human Rights the courts would help to curb "the worst excesses of majoritarianism."[410]

Either way, British courts would lack the power to strike down laws violating the ECHR, but would that make a significant difference? No conclusive reason exists to believe the power of judicial review itself has prevented majoritarian excess. This Note has documented instances in which the U.S. Supreme Court bent over backward to facilitate the panicked, majoritarian impulses of the country. Judge Learned Hand once said:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes. . . . Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, nor court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[411]

It may be that the benefit provided to the United Kingdom by the ECHR and the HRA – an explicitly enumerated system of rights, and an independent body of judges to gauge how well contemporary legislation conforms to those rights – is the primary benefit that America has received from the Bill of Rights and judicial review. As Madison said when he argued in favor of adopting the Bill of Rights:

> It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention. I am sensible they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defense; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority

409. *See* Elliott, *supra* note 399, at 553.
410. *Id.* at 560-61.
411. Cole, *supra* note 61, at 2568.

from those acts to which they might be otherwise inclined.[412]

Even if the only real check against a tyrannical majority is political sentiment, our straits may not be overly dire. Support for human rights in the United Kingdom was great enough to force Parliament to alter course, and the United States has witnessed a dramatic increase in the number of groups devoted to human and civil rights in recent years, especially since the end of the Cold War.[413] Then again, polls in the United States have found that almost half of the population associate Islam with violence, a quarter holds extreme anti-Muslim views,[414] nearly one-quarter believes that the government should be allowed to use torture in some circumstances,[415] while popular television pundits call for explicit racial profiling.[416] The use of racial profiling by London police, along with a shoot-to-kill policy for potential terrorists, has also been condoned in some quarters.[417]

How the chips will fall in our time is anyone's guess. As for myself, I will leave you with the words of Mark Twain: history does not repeat itself – it rhymes.[418]

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412. CURTIS, *supra* note 255, at 21.

413. *Id.* at 2584-85.

414. Jim Lobe, *Sharp Rise in Anti-Muslim incidents reported*, NEW PITTSBURGH COURIER, Sept 28, 2006, at A8, *available at* http://www.washingtoninformer.com/RELAntiMuslim2006Sep28.html.

415. *See* Marks, *supra* note 36, at 572.

416. Bill O'Reilly, Talking Points: More Airline Terror Chaos, FOX NEWS, http://www.foxnews.com/story/0,2933,208900,00.html (August 17, 2006).

> Now it's long past time for the USA to stop the nonsense and institute profiling at airports. We're not at war with Granny Frickett. We're at war with Muslim fanatics. So all young Muslims should be subjected to more scrutiny than Granny. And we should blend some Israeli screening procedures with our own. For example, trained security people should receive the passenger list on every flight and interview those people most likely to be terrorists.... Passengers who are Muslims ages 16 to 45 all should be spoken with. And if the ACLU doesn't like it, tough. This isn't racial profiling. This is criminal profiling.... The wrong-headed notion that you can't scrutinize Muslims, even though the terror war is driven by them, is beyond dumb. It's self-defeating and acutely dangerous. Profiling must begin now.

Id. *See also* Ann Coulter, Terrorists Win: Deodorant Banned from Airlines, http://www.anncoulter.com/cgi-local/article.cgi?article=143 (August 16, 2006) ("Without the ethnic profiling going on outside of airports, no security procedure currently permissible inside airports would have prevented a terrorist attack that would have left thousands dead.... We have to target the fanatics themselves. Baby formula doesn't kill people. Islamic fascists kill people").

417. Glenn Frankel & Tamara Jones, *In Britain, a Divide Over Racial Profiling*, WASHINGTON POST, July 27, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/26/AR2005072601789.html; *'Shoot-to-kill' policy to remain*, BBC NEWS, July 25, 2005, http://news.bbc.co.uk/1/hi/uk/4713199.stm.

418. Lawrence P. Wilkins, *Symposium: Then, Now and Into the Future: A Century of Legal Conflict and Development*, 28 IND. L. REV. 135, 137 (1995). Apparently some dispute exits as to whether Mr. Twain actually uttered these words. *Id.* at n. 4. However, I am inclined

to believe that if he did not, then he would have been pleased to accept the free publicity.