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ARTICLES

NOTES

THE MAGIC CONFLUENCE: AMERICAN ATTORNEYS, CHINA'S RISE, AND THE GLOBAL VALUE CHAIN

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I. INTRODUCTION

It is now widely acknowledged that the unprecedented rise of China's economic engine is one of the most compelling events in history. Many in the United States have considered the implications for American businesses and the U.S. economy. It appears that, with all of its complexity and risk, China is and will continue to be a unique prospect for American businesses and entrepreneurs. The legal industry is no different; yet no literature to date has afforded a complete view of the matter.

This article aspires to provide American attorneys with a comprehensive blueprint on how to benefit from China's economic rebirth. Many factors — including the timing and extent of China's rise, America's position as the world's incumbent economic leader, the fundamental importance of law to doing business in the modern world, and the nature of the legal profession in the United States — are now converging to create an almost magic confluence of circumstances. Never before have attorneys from the United States enjoyed such a surge of new opportunities and potential for innovation.

Globalization is here to stay. As the world's economic leader, the United States has acutely felt the consequences of the new economic order. Businesses of all types operate abroad and partner with foreign firms. At the same time, older industries within the United States are suffering at the hands of cheaper and sometimes more talented labor from other countries. American attorneys and law firms have begun adjusting. As one eloquent scholar notes, "[e]vidence of internationalization is ubiquitous in the legal services market. Greater economic interaction among national actors . . . has stimulated growing interaction among nationally based lawyers and law firms."[1] As with many

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service-oriented industries, the international movement of American law firms has been largely motivated by a desire to follow and retain existing clients, as well as to expand the client base to include lucrative foreign interests.[2] This article illustrates that China's rise can behoove all American attorneys, not merely those practicing in the largest law firms.

Because the law is fundamental to doing business in the modern world and additional complexities are created in doing business across borders, attorneys hold a unique position in global commerce. As one practitioner observed, "[l]awyers play an important role in the deals that bring the world's nation-states closer together. By educating themselves about their clients, the deals, and the places the deals affect, lawyers ideally help ensure a productive and smooth-operating global market."[3] American attorneys, as it will be shown, hold an especially great potential for exercising this role, and China is distinguished as *the* destination for their focus.

Part II of this article briefly reviews the economic transition underway in China and considers what this transition means for American businesses generally. Part III implicates academic business literature to show why American attorneys hold a unique position in the global value chain, and why this is unlikely to change anytime soon.

Employing the two preceding sections, Part IV reviews the specific legal services U.S. attorneys can provide with respect to China. Additionally, this section identifies and evaluates the employers that will increasingly demand American attorneys with expertise in Chinese legal services. Part V argues that American lawyers, by virtue of their legal backgrounds, are advantageously positioned to compete in *non-legal* business capacities relating to China. Part V also explores some unique applications of the position American lawyers have to further capitalize on China's rise.

Part VI advises U.S. attorneys and law students on how they can best position themselves to pursue a career focused on China. This section also suggests and advocates specific courses of action. Finally, Part VII briefly concludes the discussion.

& Williams, Beijing); Matthew McConkey (Partner, Mayer Brown JSM, Beijing); Steven N. Robinson (Partner, Hogan & Hartson, Beijing, Shanghai, Hong Kong); Lester Ross (Partner, Wilmer Hale, Beijing); Benedict Tai (Partner, Jones Day, Beijing); and Xiaohua (Sarah) Zhao (Partner, Akin Gump Strauss Hauer & Feld, Beijing). Special thanks also to Elizabeth Cole (Partner, Orrick, Herrington & Sutcliffee, Shanghai), for her leadership and guidance through the ABA, and to Dr. Philip T. Powell (Clinical Associate Professor of Business Economics & Public Policy and Chairperson of the MBA Program, Indiana University Kelley School of Business – Indianapolis), for his services as advisor on the early drafts of this article. The author can be reached at juwevans@alumni.iu.edu.

1. Carole Silver, *Winners and Losers in the Globalization of Legal Services: Situating the Market for Foreign Lawyers*, 45 VA. J. INT'L L. 897, 897 (2005).

2. *Id.* at 914.

3. Cynthia Losure Baraban, Note, *Inspiring Global Professionalism: Challenges and Opportunities for American Lawyers in China*, 73 IND. L.J. 1247, 1271 (1998).

II. WHY CHINA?

A. A Brief Survey of China's Growth

A brief statement regarding China's economy is merited, as it offers one metric to quantify the opportunities that country is now affording the world. The global gross domestic product ("GDP") grew in 2005 by a rate of 3.5%.[4] The United States and China grew by 3.2%[5] and 10.7%,[6] respectively. China is by far the world's fastest-growing major economy: between 2000 and 2006, China's GDP ballooned from US $1.2 trillion to $2.6 trillion.[7] Other indicia are correlated with this increase in GDP. China's exports have expanded exponentially, from $325.6 billion in 2002 to $969.1 billion in 2006.[8] Similarly, China's foreign direct investment expanded from $49.3 billion to $78.3 billion between 2002 and 2006.[9]

Even the once-dubious Chinese stock market now reflects the country's awesome progress. For example, a 2007 downturn in China's stock market reverberated throughout the world for the first time.[10] And while there are differing opinions as to the attractiveness of China's stock market today,[11] few seriously question its long-term viability. All other things being equal, there exists a dire opportunity cost for ignoring China: un-competitiveness on a global scale, which ultimately threatens total business failure.

B. Implications of China's Economic Rise for American Businesses

As with any other investment abroad, an American interest doing business in China, or with a Chinese firm elsewhere, assumes some degree of risk. Yet it is equally clear that China's business environment boasts some

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4. THE WORLD BANK GROUP, WORLD DATA PROFILE, Apr. 2007, *available at* http://devdata.worldbank. org/external/CPProfile.asp?PTYPE=CP&CCODE=WLD.

5. THE WORLD BANK GROUP, UNITED STATES DATA PROFILE, Apr. 2007, *available at* http://devdata.worldbank.org/external/CPProfile.asp?PTYPE=CP&CCODE=USA.

6. THE WORLD BANK GROUP, CHINA DATA PROFILE, Apr. 2007, *available at* http://devdata.worldbank.org/external/CPProfile.asp?PTYPE=CP&CCODE=CHN.

7. *Id.*

8. THE WORLD BANK, CHINA: KEY INDICATORS, http://siteresources.worldbank.org/INTEAPHALFYEARLYUPDATE/Resources/550192-1194982737018/Indicators-EAP-Update-Nov2007.pdf.

9. *Id.*

10. Maria Bartiromo, *China Syndrome: How Scary?*, BUS. WK., Mar. 12, 2007, at 106.

11. *Compare id.* (citing Don Straszheim, vice-chairman of investment bank Roth Capital Partners, who commented, "I'm a skeptic about many of the equities on the Shanghai and Shenzhen markets . . . [Those] markets are still highly vulnerable, with enormous inherent risk to Western investors . . . .") *with* Brian Bremner, *Doing the Shanghai Shuffle*, BUS. WK., Mar. 12, 2007, at 44 (indicating "[s]tock gyrations, however savage, have little impact on [China's overall growth] trends . . . . The real danger to investors isn't a stock market crash but a Chinese economy that grows so fast the government has to intervene and slam on the brakes.").

exceptionally attractive attributes. As the U.S. Department of State has noted, "China's ongoing economic transformation has had a profound impact not only on China but on the world. [China's] market-oriented reforms . . . have unleashed individual initiative and entrepreneurship. The result has been the largest reduction of poverty and one of the fastest increases in income levels ever seen."[12] China's accession to the World Trade Organization has encouraged and will continue to encourage market reforms, which in turn will create still greater potential for foreign businesses. While "serious concerns remain, particularly in the realm of intellectual property rights protection[,]"[13] China has nevertheless "made significant progress implementing its WTO commitments . . . ."[14]

China has a compelling interest in continuing to open its economy to the world.[15] Chinese law and policy, as the mechanisms through which the country's economic reforms are implemented, play a fundamental role in their economic expansion. Through its laws and policies, China continues incremental liberalization.

Two noteworthy scholars cite "at least five reasons why the need to become global has . . . become a strategic imperative for virtually any medium-sized to large corporation."[16] These reasons include: the need to grow, the need to be efficient, the need to expand one's knowledge base, the fact that customers are global, and the fact that competitors are global.[17] With respect to China in particular, two especially appealing factors motivate American firms to attempt market entry. First, U.S. firms operating in China can take advantage of the country's relatively inexpensive and skilled workforce.[18] Second, U.S. firms with a presence in China can more efficiently sell their outputs (whether goods or services) to the growing middle class there.[19] Each step of the way, lawyers ultimately save costs, avoid future complications, and facilitate entry and operations.

U.S. businesses are also taking note of the international shopping spree

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12. U.S. Department of State, *Background Note: China*, (Oct. 2007), http://www.state.gov/r/pa/ei/bgn/18902.htm.

13. *Id.*

14. *Id.* Numerous instances abound of U.S. goods now circulating in China. As one example illustrates, "U.S. agricultural exports have increased dramatically, making China [the U.S.'s] fourth-largest agricultural export market . . . . Over the same period (2001-2006), U.S. imports from China rose from $102 billion to $287.8 billion." *Id.*

15. *Id.* "Opening to the outside remains central to China's development. Foreign-invested enterprises produce about half of China's exports, and China continues to attract large investment inflows." *Id.*

16. Anil K. Gupta & Vijay Govindarajan, *Managing Global Expansion: A Conceptual Framework*, 43 BUS. HORIZONS, Mar.-Apr. 2000, at 45, 45.

17. *Id.* at 45-46.

18. *See, e.g.*, Peter Coy, *Just How Cheap is Chinese Labor?*, BUS.WK., Dec. 13, 2004, at 46, *available at* http://www.businessweek.com/magazine/content/04_50/b3912051_mz011.htm?chan=search.

19. *See, e.g.*, *A Billion Three, But Not for Me*, ECONOMIST, Mar. 20, 2004, at 6.

underway by their Asian counterparts. Several journalists have noted, "Chinese companies, flush with cash and in command of the world's lowest-cost manufacturing plants, are doing some foreign investing of their own."[20] This foreign investment is rational: "China has now recognized that to achieve sustainable growth, it needs to develop its relationship with the global economy beyond a simple export-driven model."[21] This is significant for American businesses. Chinese firms will become competitors around the globe, and Chinese firms may invest in U.S. businesses. The degree to which American interests can effectively mold the emerging picture to suit their interests will be a function of several things — including, *inter alia*, the quality of their legal counsel.

Barring some unforeseen catastrophe, China's economy should continue to advance. There is some awareness within the legal profession of what this means for attorneys. One observer of the Wisconsin legal market remarked,

> [a]s China [grows], more Wisconsin companies are looking at business ventures there. Those business activities mean opportunities for the law firms representing state manufacturers and entrepreneurs . . . . Business opportunities [for U.S. law firms] will continue to grow as China's middle class increases and the country develops as a nation of consumers.[22]

While such awareness is encouraging, the next section of this article aims to more fully develop the potential that U.S. lawyers enjoy with respect to China.

III. AMERICAN ATTORNEYS IN THE GLOBAL VALUE CHAIN

A. Law as a Fundamental Link in the Chain: Competitiveness Generally

1. Overview: The Nature of Services and the Work of Attorneys

At times, lawyers produce what might be called a *good*: a legal document, for example, physically printed on paper. But at their core, lawyers provide *services*: "bundles of benefits, some of which may be tangible and others intangible, and [which] may be accompanied by a facilitating good or goods."[23]

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20. Dexter Roberts, et al., *China Goes Shopping*, BUS.WK., Dec. 20, 2004, at 32.

21. ACCENTURE, CHINA SPREADS ITS WINGS — CHINESE COMPANIES GO GLOBAL 2 (2005) http://www.accenture.com/NR/rdonlyres/6A4C9C07-8C84-4287-9417-203DF3E6A3D1/0/Chinaspreadsitswings.pdf.

22. Tony Anderson, *China Practice: Advice to Wisconsin Law Firms Establishing Offices in China*, WISC. L. J., Feb. 8, 2006, at 1.

23. JACK R. MEREDITH & SCOTT M. SHAFER, OPERATIONS MANAGEMENT FOR MBAS 8

The nature of the legal profession presents U.S. attorneys with some unique opportunities and challenges in China.

Service operations lay claim to several distinctive characteristics, including the participation of customers in the service process, simultaneous production and consumption of services, time-perishable capacity, the role of customers' location in the determination of site selection, labor intensiveness, intangibility, and the difficulty in measuring output.[24] Certainly, these characterize the U.S. attorney. Customers, for example, are participants in the legal service process: a lawyer typically meets with his or her clients to become familiar with their needs before commencing work on their behalf.

Service providers, including those in legal services, must often account for the locations of both their current and desired customers in their site selection. This makes intuitive sense: the nature of a "service" and the need for the customer to be involved in the process often make physical proximity necessary. Although time and technological innovations, especially the Internet, may be reducing the importance of geography in some contexts, legal services are unlikely to succumb altogether to the trend.[25] The importance of proximity holds especially true for U.S. attorneys interested in practice related to China. There are several reasons for this, including the vital importance of relationships in China, the complexity of the Chinese business environment, and the importance to American attorneys of understanding the context in which their advice will be implemented. Additionally, "[f]or services, *the process is the product.* The presence of the customer in the service process negates the closed-system perspective that is taken in manufacturing . . . . [C]ustomer impressions of service quality are based on the total service experience, not just on the explicit service that is performed."[26]

Within the service process matrix, lawyers are categorized with other professional service providers.[27] That is, lawyers offer services that are highly labor intensive and that are characterized by a high degree of interaction with, and customization for, clients. This buoys the competitiveness of American attorneys in both domestic and transnational practice.

(1999).

24. *See* JAMES A. FITZSIMMONS & MONA J. FITZSIMMONS, SERVICE MANAGEMENT 27-33 (2nd ed. 1998).

25. Outsourcing has made some incursions into the American legal profession. Krysten Crawford, *Outsourcing the Lawyers*, CNNMoney.com, Oct. 15, 2004, http://money.cnn.com/2004/10/14/news/economy/lawyer_outsourcing/?cnn=yes. But "[state] licensing rules make it highly unlikely that the most lucrative work that lawyers do . . . will ever leave U.S. shores." *Id.*

26. FITZSIMMONS & FITZSIMMONS, *supra* note 24, at 34-35.

27. The service matrix is a four-quadrant grid. One axis concerns the "degree of labor intensity" while the other provides the "degree of interaction and customization." Each axis then has a row/column of "high" and a row/column for "low." Professionals (including lawyers) fit in the "high, high" box, as noted above. *Id.* at 24 fig. 2.1.

2. The Enviable Position of the Legal Services Industry

As a whole, service providers face a variety of challenges, including relatively low overall entry barriers, minimal opportunities for economies of scale, erratic sales fluctuations, no advantage of size in dealing with buyers or suppliers, product substitution, customer loyalty, and exit barriers.[28] These very dimensions, however, reveal why professional service providers have fared well compared to non-professional service providers in resisting outsourcing. Barriers to entry are a fine example. Many professional endeavors require extensive training that is usually costly and highly competitive. In the case of lawyers, this training includes the costs associated with law school and the difficulty of gaining the formal license to practice. The legal industry, then, like many professional service occupations, is largely insulated from competitors.

Another example of legal services breaking free from traditional challenges concerns product and service substitution. Virtually all U.S. states make it a crime[29] to practice law[30] without a law license. The net result is that by virtue of the rigors of professional regulation, lawyers enjoy a kind of monopoly in providing legal services. Only a formally licensed lawyer may practice law. For a person or organization in need of legal services, there is no reliable substitute for a licensed attorney.[31]

Lawyers appear to avoid most of the other challenges that are common to service organizations as well. Large firms can enjoy economies of scale, particularly in the application of knowledge. Larger practices, and even well established smaller ones, do not often encounter extreme sales fluctuations. Larger firms can leverage size in dealing with buyers and suppliers, offer highly refined expertise not available elsewhere and can boast the best individual lawyers for particular types of cases. Firms also have connections within the legal world to decision-makers and other specialists. Attorneys and firms can command exceptional customer loyalty, not only by virtue of distinguishable quality and expertise but also because legal representation often involves access to the confidential information of clients — information that clients normally want to share as infrequently as possible.

For any stable, developed society, the law remains a fundamental dimension of business. Consequently, those who supply legal services will remain an integral part of the commercial and social value chain in both the United States and China.

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28. *Id.* at 51.

29. *See, e.g.*, IND. CODE § 33-43-2-1 (2006).

30. "The definition of the practice of law is established by law and varies from one jurisdiction to another." MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2007). Most define the practice of law broadly. *See, e.g.*, D.C. CT. APP. R. 49(b)(2).

31. Individuals, even non-lawyers, are free to represent *themselves* in legal matters. This is known as "representing oneself *pro se*." However, the advantages of hiring professional legal representation remain substantial.

3. Competitive Strategies of the U.S. Legal Services Provider

Three basic competitive strategies are available to service providers: overall cost leadership, differentiation, and focus.[32] Irrespective of one's strategy, the same basic principles apply to attorneys as to other service industries in winning clients.[33] To this end, legal service providers should expressly consider their resources with respect to market demand. One useful tool for doing so is the resource activity map.[34]

The implications of this for a legal service provider's internal affairs depend upon the nature of the business. Michael Porter's original work

> developed the concept of a *value chain* as a way to improve the coordination among various functional groups. The value chain approach . . . emphasized the organization as a system of interdependent activities that create value for the customer . . . . Porter's value chain presented a new view of management, depicting the organization as a system of value-creating vertical processes rather than a collection of independent activities.[35]

Hence, a large law firm may structure itself differently from a smaller firm, consulting firm, or corporation. Legal service providers should not attempt to exempt themselves from the basic notions applicable to businesses in this regard. Reorganization in a global legal market may be warranted; innovative organization in China may also prove indispensable.

4. Other Miscellaneous Considerations — U.S. Lawyers on the International Scene

"The value a company creates," Porter writes,

> is measured by the amount that buyers are willing to pay for a product or service . . . . To gain competitive advantage over its rivals, a company must either perform these activities at a lower cost or perform them in a way that leads to

32. FITZSIMMONS & FITZSIMMONS, *supra* note 24, at 52-55.

33. These tactics include availability, convenience, dependability, personalization, price, quality, reputation, safety, and speed. *Id.* at 55-56.

34. *See generally* Colin G. Armistead & Graham Clark, *Resource Activity Mapping: The Value Chain in Service Operations*, 13 SERVICE INDUSTRIES J. 4, 221 (1993) (providing a resource activity map that links an organization's costs and resources to the services it provides. Resource activity mapping can, *inter alia*, help a legal services provider better understand its potential in the Chinese-services marketplace).

35. MEREDITH & SHAFER, *supra* note 23, at 14 (citing MICHAEL E. PORTER, COMPETITIVE ADVANTAGE 33-61 (1985)).

> differentiation and a premium price (more value).[36]

This characterization applies to legal service providers as much as to any other enterprise, and gives rise to the question of how U.S. law firms are competitive globally.

One academic attributes the international competitiveness of U.S. law firms to a variety of factors.[37] Some of these are structural (*e.g.*, America's role in the global economy and the dominance of U.S.-based financial institutions and capital markets).[38] Other factors, however, result from the skill set developed by members of American firms. Examples of these factors include genuine expertise in U.S. law, experience with sophisticated transactions, relationships with financial service firms whose activities are fundamental to the international economy, and a unique brand of pragmatism.[39] This last factor is a notion with significant implications both for managing an American legal services provider in the international context and for U.S. attorneys in China who pursue opportunities beyond those that are strictly law related.[40]

American attorneys and their employers should seek out competencies in these areas. While the entry of a firm into the international scene is complex and challenging,[41] American firms must appreciate the domestic competitive advantages that accrue to firms boasting a worldwide presence. As human resource gurus will likely agree, the people with whom a company is staffed are crucial to the company's performance. The same is true for U.S. lawyers in the international context.

> American lawyers — culturally and educationally equipped as we are to be business planners — *are uniquely qualified to serve as middlemen* in [cross-cultural business transactions]. . . . Without them, good deals frequently die; bad deals more often survive . . . . "While an international lawyer need not be, indeed cannot be, a universal legal expert, he should at least be able to build bridges to foreign counsel and integrate their

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36. Michael E. Porter & Victor E. Millar, *How Information Gives You Competitive Advantage*, HARV. BUS. REV., July-Aug. 1985, at 149, 150.

37. Carole Silver, *Globalization and the U.S. Market in Legal Services — Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093, 1093 (2000).

38. *Id.* at 1095. It is worth noting that when China's role in the global economy rivals that of the United States, American attorneys with expertise in China will be all the more competitive. Hence, we should anticipate an environment long-term in which expertise in China will behoove those in the American legal profession.

39. *Id.*

40. *See infra* note 73 and accompanying text.

41. *See generally* Symposium, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994) (providing an outstanding discussion concerning what a law firm will confront when it contemplates a foreign branch).

work with his."[42]

American attorneys are uniquely positioned to contribute to the global value chain. This position is magnified in the business context, as U.S. attorneys are trained to provide help in business planning, and not merely to give legal advice.

From a client's perspective, one of the chief values added by professional legal representation is the mitigation of risk.[43] The knowledge, skill, and viewpoint that U.S. attorneys bring to international transactions serve to make their clients more competitive in foreign environments. This is true even when the client retains local counsel.[44]

A successful American corporation operating in China should evolve in three phases: entry, country development, and global integration.[45] In each of these phases, U.S. attorneys can and should add value to corporate clients as they fight to compete in China. During the entry phase, for example, a corporation's goals are two-fold: "determine the right business model" (use China as a manufacturing base and/or sell in China) and "establish a presence" (choose a locality; select a partner, if any; learn the domestic operating environment; and begin to establish the brand). These goals suggest that the ideal China manager is entrepreneurial, creative, flexible, and has experience in developing countries.[46] Plainly, American attorneys well versed in business planning fit this mold. In a place as complex as China, lawyers can assume an even more enhanced stature as business advisors. Attorneys can account for the legal repercussions of strategic choices and for the practical realities of the business environment itself. A similar rationale holds for the country development[47] and global integration[48] phases.

5. Initiative — The Key Link in the Chain

Based upon the foregoing, American attorneys might be confident that

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42. John P. Cogan, Jr., *The International Lawyer as Conductor of the Global Symphony*, *in* CAREERS IN INTERNATIONAL LAW 31, 43 (Mark W. Janis & Salli A. Swartz eds., American Bar Association 2001) (citation omitted) (emphasis added).

43. *See generally* Donald R. Lessard, *Risk and the Dynamics of Globalization*, *in* THE FUTURE OF THE MULTINATIONAL COMPANY 76 (Julian Birkinshaw, et al. eds., 2003) (discussing risk).

44. *See infra* Part III.B.

45. Kenneth Lieberthal & Geoffrey Lieberthal, *The Great Transition*, *in* HARVARD BUSINESS REVIEW ON DOING BUSINESS IN CHINA 1, 17 (2004).

46. *See id.* at 17-18.

47. Here, a corporation's goals are to: expand the operation to several initiatives and several localities; coordinate lobbying and negotiation with the Chinese government across business units; and articulate an approach of "one face to China." *Id.* at 17-19. An "expansion of operations" always generates legal questions, particularly in China, where localities vary greatly in their legal, cultural, and economic idiosyncrasies.

48. During the third and final phase, a corporation has only one overarching goal: to establish full integration of its China operations into regional and global efforts. *Id.* at 18-19.

their place in the global value chain is secure. This is a misguided inference. The foregoing shows merely that the *potential* for American lawyers in the global value chain is extraordinary (indeed, unrivaled). But their *actual* place will not be realized unless American lawyers take the initiative on a broad scale to seize these new opportunities. History has shown that regardless of the manner in which an economy is structured, demand has a curious way of being met. American attorneys are uniquely positioned to capitalize on China's rise, but they must take the initiative.[49]

B. Why American Lawyers Will Remain Competitive Vis-à-vis Chinese Lawyers

How can American lawyers hope to gain China-related work, let alone realize spectacular opportunities, when Chinese lawyers are also on the rise? China authority James McGregor advises U.S. companies to "[not] rely exclusively on the law in China. You will lose. Use laws and regulations to enhance political and business arguments in favor of your position."[50] Yet a nagging question remains: why will American lawyers be required? U.S. counsel does, after all, cost more. As it turns out, China's own complexity creates opportunities for American lawyers vis-à-vis their Chinese counterparts, even in matters related to China.

1. It's Not All Rosy — Challenges for American Attorneys

U.S. attorneys cannot simply enter China's market and expect to be competitive. They must fight an uphill battle to establish their role in the global value chain. Three factors suggest the proportions of this struggle: the inherent advantages accruing to native firms; the intensity of competition in the Chinese legal services market; and crackdowns by the Chinese government against foreign legal service providers.

Considering the first of these factors, it comes as no surprise that Chinese law firms argue that they are better positioned to provide legal services in China.[51] In support of this, Chinese attorneys advance several claims. First, they declare, the English language capabilities of Chinese law firms have improved over the last ten years.[52] Though not implausible, there does not appear to be any concrete data to substantiate this claim. Even if this is accurate, it is hardly sufficient to conclude that outside firms are condemned to

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49. *See infra* Part VI.

50. JAMES MCGREGOR, ONE BILLION CUSTOMERS: LESSONS FROM THE FRONT LINES OF DOING BUSINESS IN CHINA 154 (2005).

51. *See generally* Glenda Korporaal, *China's Homegrown Lawyers Step into the International Spotlight*, THE AUSTRALIAN, May 5, 2006, at 29 (detailing how Chinese law prohibits foreign law firms from practicing domestic law in China and how Chinese law firms are more educated with regard to China's legal eccentricities).

52. *Id.*

permanent impotence in the Chinese environment. Second, some claim, native firms understand Chinese culture and government better than foreigners do.[53] While this is admittedly true as an initial matter, American attorneys are capable of "learning" Chinese culture and how the government functions to a highly competitive degree.[54] Finally, it is noted, only Chinese lawyers may represent clients in Chinese courts.[55] This, as it turns out, is not nearly so great an advantage as it appears at first blush. The Chinese legal system is distrusted such that even those disputes that are limited to Chinese parties seldom appear before a court. Instead, alternative dispute resolution is normally employed.[56] Even those Chinese attorneys most enthusiastically advocating the foregoing strengths acknowledge their limitations.[57]

Irrespective of the inherent advantages enjoyed by Chinese attorneys, the competition in the Chinese legal services market is undeniably intense.[58] "China is the most favored nation for new offices among [western] law firms . . . and the most difficult to crack. Competition is fierce among the [one hundred] foreign firms now operating in China . . . ."[59] To complicate matters further, the competition is not supplied merely by other sophisticated, western interests: "Chinese law firms, with a lower cost structure, more associates and local contacts, are undercutting American and English firms on routine regulatory and compliance work required to establish small businesses . . . ."[60] Virtually every Chinese industry that is no longer under government monopoly faces intense competition. While it appears that native Chinese firms are (at least for now) limited to "routine regulatory and compliance work," this work is nevertheless profitable. Moreover, much of the greatest potential in China lies with start-up companies. American lawyers would do well to compete not only

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53. *Id.*

54. Perhaps the greatest advantage enjoyed by Chinese firms is the cultural distrust (or, at least, skepticism) of outsiders who have no relationships in China. It is crucial for Americans to be first-movers in establishing trust-based, working relationships with others in one's field. The forces of resistance can be countervailed by Americans with diligent persistence and immediate action. *See infra* Part VI.B.9.

55. Korporaal, *supra* note 51.

56. *See infra* Part IV.A.7.

57. These attorneys concede that many foreign law offices combine legal services with business consultation, creating a further competitive competency, and that, as a practical matter, foreign law firms are pushing the envelope in terms of what they do now. Moreover, the leading Chinese attorney interviewed for the Korporaal article "believes China will open the door for foreign lawyers to practice local law in China if the Government believes there is a market need." Korporaal, *supra* note 51.

58. Caroline Byrne, *China Is the Most Favored Nation for Expanding Law Firms*, INT'L HERALD TRIB (Paris), May 17, 2006, at 16 (describing the intense competition in the Chinese legal marketplace).

59. *Id.* Indeed, "'China is a staggeringly big challenge for a law firm,' Christopher Stephens, the head of Orrick's team in the country, said . . . . 'You have to commit on real estate and people, a new tax regime, a new currency and a new banking regime without knowing with any certainty what return you are getting.'" *Id.*

60. *Id.*

for large corporate clients, but also for the small businesses that will someday become global.[61]

A third force that makes the Chinese legal services market so challenging is the country's ubiquitous government. While China is plainly not a liberal democratic state,[62] one distinguished scholar makes the compelling case that the government is becoming increasingly responsive to business lobbying.[63] Nevertheless, foreign law firms in China are feeling protectionist resistance. For example, the Shanghai Bar Association implied it would push the Chinese Ministry of Justice to crack down on foreign law firms for conducting unauthorized activity.[64] Resistance like this is not surprising; it is a phenomenon occurring every place in which globalization is making inroads, including the United States. American attorneys hoping to compete in China cannot forget this. Chinese legal service providers may not be motivated exclusively by their desire to remain competitive. In China, where a cultural respect for authority and order combine with a Sino-centric worldview, most Chinese take exception to what they regard as criminal behavior that other cultures might not. American attorneys will have to leverage the full force of their skills to optimize the competitiveness of their own operations, thereby denying native firms some clients, without offending local ethical mores.

2. U.S. Lawyers Providing Services in or About China – Generally

Notwithstanding these challenges, U.S. lawyers can and should bring to bear their own competitive competencies in the Chinese legal services market. The most distinctive of these tools is that American attorneys are best positioned to understand the big picture. On average, lawyers from the United States can more readily afford international training and experience than their Chinese competitors. As a result, American attorneys are better positioned to develop a cumulative understanding of the two legal systems and business environments. China expert John Chan remarked, "[w]hile some local lawyers [in China] are often cheaper [than international ones], if they have not spent extensive time in the West, they may not have the professional insight into or

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61. *See infra* Part VI (discussing how to capture these clients).

62. *See generally* JUNE TEUFEL DREYER, CHINA'S POLITICAL SYSTEM (2008) (providing excellent information on Chinese government and politics). Businesspeople involved with China must have a sophisticated appreciation for the role that government and policy play in Chinese society.

63. *See generally* SCOTT KENNEDY, THE BUSINESS OF LOBBYING IN CHINA (2005) (detailing lobbying in China). *See also infra* Part IV.A.8 (discussing the role of American attorneys in lobbying).

64. *See China May Crack Down on Foreign Law Firms*, CHINA DAILY, May 16, 2007, *available at* http://www.chinadaily.com.cn/china/2006-05/16/content_590787.htm. "[L]ike many Chinese laws, restrictions are vague. Foreign law firms are allowed to provide information about China's legal environment, but not to interpret the 'applicability of Chinese laws' . . . ." *Id. See also infra* Part IV.C.1 (discussing the restrictions China's law imposes on the ability of non-Chinese lawyers to fully practice in China).

understanding of the foreign side to really act as an effective 'bridge.'"[65]

Chinese lawyers are coming to embrace this reality: a refined macro-view of the world is an indispensable feature of today's competitive global attorney. A race is underway to determine who can train the fastest and the best, and attorneys from both China[66] and the United States[67] are in the running. Yet here, too, American lawyers generally have greater financial resources at their disposal, creating an advantage. There exists no reason why U.S. attorneys should fall behind their Chinese counterparts in developing global insight.

U.S. lawyers in China can remain competitive for several reasons in addition to their global vantage point. Oftentimes, for example, an American company interested in entering China will want to employ the insight and network of a local Chinese law firm. At the same time, however, the business may also want to retain its own lawyers, to give objective advice already known to be trustworthy and competent, and to manage the legal relationship between the company and its Chinese attorneys. Consequently, the demand for American attorneys operating in China should grow irrespective of the other advantages particular to them. Of course, U.S. counsel should help in the actual selection of foreign counsel.[68]

As Chinese businesses evolve, there may be demand for American lawyers on the payrolls of Chinese enterprises and law firms. Most of these will likely be consulting or managerial positions,[69] but Chinese firms may also hire American attorneys as their legal counsel. This is especially true if the attorney is to work in the United States, where he or she is fully admitted to practice law. "'Chinese companies are now going west because they are so cash rich they are going to buy things . . . . They need a strong legal team to

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65. JOHN L. CHAN, CHINA STREETSMART 95 (2003). Even American lawyers who set up their own firms in China can leverage their expert global insight as against local competitors:

> Ed Lehman, another excellent prominent China lawyer . . . is one of the few foreigners who work[s] for a Chinese law firm. In fact his firm today, Lehman, Lee & Xu, is registered as a local Chinese law firm. He commented that many of the local law firms operate more like a big shopping mall, with many of them working under one roof, but operating more independently.

Id.

66. One observer notes that "training from international organizations is in high demand from Chinese lawyers . . . ." The chief legal officer of a Chinese firm adds that "[i]nternational law firms . . . can help a lot with the training of in-house counsel, because as international lawyers, they have a legal education in foreign jurisdictions and they have practical experience.'" Clare Smith, *The Challenge Facing China's Corporate Lawyers*, FIN. TIMES, July 28, 2005, at 1.

67. One authority notes that U.S. law firms often ignore foreign lawyers that earn LL.M. degrees in the U.S. Silver, *supra* note 1, at 915. U.S. interests continue to favor American attorneys, though not exclusively.

68. *See* Salvador J. Juncadella, *The Legal Profession in a Globalized World*, 30 U. MIAMI INTER-AM. L. REV. 1, 6 (1998) (offering advice on how a multinational attorney should assist multinational clients in selecting a native lawyer in a foreign country).

69. *See infra* Parts IV.B., V.B.1., V.B.2.

back them up when they are dealing with their counterparts in the [W]est.'"[70]

U.S. lawyers with experience in China may also discover that their legal backgrounds make them well suited to pursue non-legal opportunities there. Two of the most promising fields for such a career shift are consulting and entrepreneurship. While lawyers as consultants and lawyers as entrepreneurs are given a more robust analysis below,[71] we should note here the inherent strength of these transitions.

With respect to consulting, one key "aspect of U.S. lawyers' services is a particularly American pragmatism in approaching business and legal issues regardless of the applicable law. This quality . . . is as important to the competitiveness of U.S. lawyers as it is elusive."[72] Lawyers, as we will see, are naturals for becoming consultants.

With respect to entrepreneurship, a competent U.S. attorney already brings many skills to the table: an aptitude for using legal knowledge to foresee and elude many potential problems; a tendency to see the big picture; and a refined ability to weigh alternatives.[73] Naturally, a lawyer must understand the entrepreneur's business before he or she can render sound legal advice.[74] With this ability to understand business, together with venture skills and the entrepreneurial spirit, lawyers can themselves become successful entrepreneurs. The real-world potential for this appears to know few bounds.[75] Lawyers desiring to become entrepreneurs must adopt the proper mindset[76] and seek out experience as well as formal business training. Once these have been acquired, the American attorney will be uniquely positioned to create his or her own business in China.

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70. Smith, *supra* note 66.

71. *See infra* Parts V.B.2, V.B.4.

72. Silver, *supra* note 37, at 1096-97 (citations omitted).

73. Jane Easter Bahls, *Law Talent*, ENTREPRENEUR MAG., Oct. 2004, *available at* http://www.entrepreneur.com/magazine/entrepreneur/2004/october/72712.html.

74. *Id.*

75. *See generally* Cliff Collins, *The Engine of Growth: Lawyers Take a Lead in Helping Emerging Businesses to Grow*, 59 OR. ST. B. BULL. 9, 12-13 (1998) (providing a broad overview of the role of attorneys in helping emerging businesses). *See also infra* Part V.B.4 (discussing the role of entrepreneurship and American attorneys in China).

76. *See generally* Marianne Moody Jennings, *Lawyers for Entrepreneurs: Do They Exist?*, 12 BUS. FORUM, Spring 1987, at 4. One lament amongst businesses is their lawyers' outlook:

> By the time they hit law practice, all new lawyers are seasoned in the art of telling clients what can't be done . . . . Lawyers are trained for compliance and not creativity. Lawyers often serve as a hindrance . . . because they throw up obstacles intended for protection instead of functioning with the business client's commitment to success.

Id. Attorneys should be innovative problem-solvers rather than deal-stoppers. While legal training has evolved since the time Jennings enumerated these concerns, attorneys must nevertheless take care to emphasize innovation to keep themselves and their clients competitive in the global marketplace. *Id.*

3. A Natural Source of Competitiveness: Expertise in U.S. Law

China has been criticized for moving slowly toward true liberalization in many of its industries, including the legal industry;[77] however, American states have regulations in place to discourage foreigners from gaining a law license in the United States.[78] Since the vast majority of people in the world who have credibility in American law are American lawyers, attorneys from the United States have another decisive advantage in the global value chain. On most occasions when U.S. law is implicated in a transaction between the United States and China, American attorneys will be involved on the U.S. side of the transaction.[79]

Indeed, recent history shows that Chinese firms are increasingly in need of U.S. legal experts. "[T]he opportunities to provide legal services are not just a one-way street. China also is showing tremendous growth in the amount of money it is investing outside the country. 'The other opportunity we ultimately see is that Chinese companies will look to the U.S. to sell their products' . . . ."[80] American attorneys are increasingly finding very lucrative work defending Chinese firms in lawsuits brought in the United States. These actions typically involve accusations that the Chinese business in question has engaged in unfair trade practices or has otherwise violated U.S. trade and customs laws.[81]

4. Many Transactions Require Independent Representation for Both Sides

American businesses often enter into cooperation with a Chinese counterpart. Whether such arrangements are memorialized in a formal contract, both sides often desire to have their own representation throughout the negotiations and the ensuing relationship. The most common example of this is the joint venture.[82]

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77. *See infra* Part IV.C.1.

78. *See* NATIONAL CONFERENCE OF BAR EXAMINERS & AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION & ADMISSION TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (Eric Moeser & Margaret Fuller eds., 2007) *available at* http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/2007CompGuide.pdf (providing a synopsis of these regulations).

79. *See supra* Part III and *infra* Part IV.C.2 (for more on why the same need not necessarily hold true for American attorneys in China and Hong Kong).

80. Anderson, *supra* note 22.

81. *See* Murray Hiebert, *When It Comes to Law, China Buys American*, WALL ST. J., Feb. 17, 2006, at C1. Hiebert writes, "lawyers familiar with such cases estimate that they typically cost at least several hundred thousand dollars." *Id.* "The number of cases against Chinese exporters has grown to roughly half the total U.S. antidumping probes launched against foreign firms . . . . [O]fficials in Beijing say more Chinese corporations are looking for help from top U.S. lawyers." *Id.* One Chinese manager has stated that "hiring U.S. lawyers is now 'a must' even if they are expensive. 'This is money worth spending, if you want to continue exporting to the U.S. market.'" *Id.*

82. *See generally* YADONG LUO, PARTNERING WITH CHINESE FIRMS: LESSONS FOR

There is a great deal of literature extolling the virtues of having a local partner in China.[83] Under many circumstances, joint venture partners appear to be advantageous for American firms doing business in China. In deciding whether to take on a local partner, U.S. firms and businesses should consider a variety of strategic factors, including their own marketing competence, relationship building, market position, industrial experience, strategic orientation, and corporate image.[84]

American corporations should consult U.S. lawyers in the strategic evaluations of whether to enter China, whether to create a joint venture, and, if so, which Chinese firm to partner with. Additionally, U.S. attorneys can add a great deal of value during the actual creation of a joint venture. Because each side potentially has divergent interests, each should retain its own independent representation. Negotiations and the resulting legal documentation should optimize each partner's well being. Here, too, U.S. lawyers can add value for their clients in the complex Chinese context.

5. "International" Law[85]

For American attorneys interested more in international rules than the unique laws of China and the United States, but who nevertheless remain intrigued by China, a career in international law may be the right fit. In the abstract, a career in international law can encompass movement across frontiers, a procedural specialty, a substantive specialty, and practice as a generalist.[86] In a more concrete sense, a major source of international law today arises from the World Trade Organization ("WTO"). "The WTO Agreement. . . is not self-executing," two experts explain.

> U.S. law reflects the U.S. interpretation and implementation of those international obligations and controls the conduct of a trade remedy proceeding in the United States. An exporting country that considers that the U.S. law or practice concerning such proceedings is not in conformity with the international standards may bring a challenge through the WTO dispute settlement procedures. A party that believes the conduct of a trade remedy proceeding is contrary to U.S. law has administrative and judicial appeal options in the United

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INTERNATIONAL MANAGERS (2000).

83. *See, e.g., id.* at 46.

84. *Id.* at 49-54.

85. Strictly speaking, there is a difference between "international law" and "transnational law." *Compare* BLACK'S LAW DICTIONARY 835 (8th ed. 2004) *with id.* at 1537. An attorney practicing "international law" works not with the unique laws of particular countries, but with agreements mutually subscribed to by multiple nations (e.g., WTO law). *Id.* at 835. In contrast, a "transnational lawyer" works with the unique laws of specific countries. *Id.* at 1537. However, for the sake of simplicity, this paper uses the terms "international" and "transnational" interchangeably.

86. Cogan, *supra* note 42 at 32-33.

States.[87]

A career litigating Sino-American disputes before the WTO, then, is one of many options that "international" American attorneys can pursue.[88]

6. Concluding Thoughts — An Optimistic Outlook

Part III has sought to show both that attorneys are central to the value chain of international transactions and that American attorneys can be competitive even as against the domestic Chinese legal industry. Although hurdles clearly exist, there is more reason to be optimistic than ever before. The opportunities now extending into both law-related functions and other professional endeavors appear to be boundless.

The following sections provide some practical insight into how one can actually go about building a career related to China.

IV. THE MECHANICS OF BUILDING A CHINA-RELATED LEGAL CAREER

A. Substantive Legal Career Options

1. Overview: A Tremendous Diversity of Legal Functions

The specific law-related services that American attorneys provide in relation to China are already substantial and continue to expand, seemingly by the day.[89] At times, services related to China are stated generally. Consider for example, Baker & Daniels, LLP, headquartered in Indianapolis: the firm (1) acts as "business and legal counsel to clients on the application of Chinese laws and regulations"; (2) represents clients in "mediation, arbitration, and litigation oversight"; (3) "coordinate[es] and advis[es] on enforcement of intellectual property rights"; and (4) advises "foreign investors on how to do business in China."[90] Specific services can cover a wide range of disparate areas. Baker & McKenzie, LLP, for example, uses its offices in China to advise in such fields as:

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87. Peggy Clarke & John D. Greenwald, *An Overview of Trade Remedy Law*, *in* TRADE REMEDIES FOR GLOBAL COMPANIES 1, 3 (Timothy C. Brightbill et al., eds., 2006).

88. *See generally, e.g.*, Raj Bhala, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE (2d ed. 2000).

89. *See generally* INTERNATIONAL LAWYER'S DESKBOOK (Lucinda A. Low et al., eds,. 2d ed. 2002) (providing a great overview of various international law practices). *See generally* Robert Haibin Hu, *A Guide to Resources on Careers in Foreign and International Law*, 93 LAW LIBR. J. 479 (2001) (providing an impressive collection of resources for China-related legal careers).

90. Baker & Daniels LLP, China, http://www.bakerdaniels.com/services/servicedetail.aspx?service=470 (last visited Mar. 11, 2008).

> [1] Banking and Finance; [2] Capital Markets; [3] China Trade and Investment; [4] Construction; [5] Corporate and Commercial; [6] Dispute Resolution; [7] Employment; [8] Insurance and other financial services; [9] Intellectual Property; [10] Major projects [and] Project Finance; [11] Mergers and Acquisitions; [12] Property; [13] Securities (both domestic and international); [14] Taxation; [15] Technology, Media and Telecommunications; [16] Venture Capital; [and] [17] WTO and Trade [matters.][91]

Still other firms choose to specialize. Skadden, Arps, Slate, Meagher & Flom LLP, for example, targets "[i]nnovative [m]ergers and [a]cquisitions," "[j]oint [v]entures and [d]irect [i]nvestment," "[p]rivate [e]quity", "[c]apital [m]arkets and [p]rivatizations," and energy project finance.[92] And Vinson & Elkins, LLP notes that their "Beijing office, staffed with U.S., English and PRC lawyers, maintains a practice primarily focused on developing, acquiring and financing infrastructure projects, including energy and telecommunications projects in China."[93]

These examples indicate that some of the services currently offered by U.S. firms are specific to China (for example "China trade and investment"), while others are on par with services offered within the United States (for example, construction). The niche option is attractive, considering China's size and the complexity of its legal system. Other firms are pursuing the appealing strategy of breadth, in which a firm can serve as a one-stop shop for transactions in China. Whether a given firm should attempt the specialist approach or the generalist approach depends upon its resources, competencies, and overall strategy.

2. The "Softer" Functions

An American attorney providing legal services in China should fulfill two key functions that often go unappreciated in practice: bridging the cultural gap and promoting the rule of law. The first of these, "bridging the cultural gap," is motivated by a concern to provide the most effective representation possible. As one expert notes, the role of the transnational lawyer is "not simply to present the local legal structure, but also to provide a certain degree of guidance regarding the manner of compliance with local social and cultural aspects of the

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91. Baker & McKenzie, China, http://www.bakernet.com/BakerNet/Locations/Asia+Pacific/Offices/China/default.htm (last visited Mar. 11, 2008).

92. Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, China, http://www.skadden.com/Index.cfm?contentID=47&practiceID=33&focusID=1 (last visited Mar. 11, 2008).

93. Vinson & Elkins LLP, Beijing, http://www.vinson-elkins.com/offices/offices_detail_print.asp?H4OfficeID=000320814305 (last visited Mar. 11, 2008).

foreign system."[94] It is the human connection, and not merely skill, that adds value to business in China.[95] The same is true for lawyers. Moreover, our ethics rules likely demand a sound grasp of Chinese culture for those whose practice is related to China.[96]

In addition to bridging the cultural gap, U.S. attorneys involved with China should seek to promote the rule of law there. The rule of law has not traditionally been a part of the Chinese culture; however, as China continues what appears to be a trend in favor of the rule of law, the transparency and stability of the business environment will be bolstered. China's embrace of the rule of law may be motivated more out of necessity in a globalized world than out of a truly internalized ethos. American attorneys would therefore serve their clients well, not to mention their own business interests, by proactively promoting the rule of law in China. The American Bar Association is a leading force in this area.[97]

3. Advising on Chinese Law

American attorneys can advise their clients on Chinese law.[98] One expert recently noted that "[a]dvising on foreign law represents a new strategy for U.S. law firms." "[A]s rules of practice liberalized, firms most likely decided to add local law expertise to their offshore office offerings in order to generate revenue from these offices .... By going local — shifting foreign offices from a U.S.-law focus to a local-law focus — U.S. firms have globalized their practices."[99]

U.S. law firms have increasingly frequent occasions to advise their clients on substantive Chinese law. To meet this demand, U.S. law firms will need to recruit attorneys with some exposure to Chinese law. As with other areas of law, American attorneys can become competent in the laws of a foreign country through diligent self-study.[100] While some outstanding resources exist for self-study,[101] perhaps the best preparation in this area is the LL.M. degree in

94. Roger J. Goebel, *The Internationalization of Law and Legal Practice: Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 453 (1989).

95. See *infra* Part VI.B.9 for more on the heightened importance of interpersonal relations to doing business with the Chinese.

96. *See* Goebel, *supra* note 94, at 454.

97. *See* American Bar Association, Rule of Law Initiative, Asia, http://www.abanet.org/rol/asia/ (last visited Mar. 15, 2008) (detailing the ABA's Rule of Law initiative and its impact in Asian countries, including China).

98. In theory, American lawyers in China are somewhat restricted in the advice they can give to clients. In the Chinese context, it is difficult to tell where, in practice, the "practice of law" begins and ends. *See infra* Part IV.C.1.

99. Silver, *supra* note 1, at 922-23.

100. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. 1, 2, 4 & 5 (2006).

101. *See generally* JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK (2d ed. 2005) (providing what is likely the finest recent English-language, introductory-level guide to substantive Chinese law).

Chinese Law.[102] However, the LL.M. requires at least one year to complete; therefore, self-study may be a more attractive option to American attorneys, particularly for those already in practice.

4. U.S. Customs and International Trade Law

Another way for American attorneys to be involved with Chinese issues from the United States is to practice in U.S. customs and international trade law.[103] This subfield has evolved considerably over time.[104] Change is a great fount of opportunity for the legal profession, and this area is likely to remain dynamic in the future.

Trade remedies are the creation of federal law and are designed to provide protections to domestic business interests in the United States against foreign competitors. Trade remedies fall within three broad categories: antidumping,[105] countervailing duties,[106] and safeguards.[107] There are four classes of safeguard actions, and two of them concern China specifically: general China safeguard actions and textile safeguards imposed on imports from China.[108]

Most trade remedy actions require an exhaustion of administrative remedies before resorting to the courts. Thus, an attorney may represent a client either before a regulatory body (such as the International Trade Commission) or before a court (the U.S. Court of International Trade or the U.S. Court of Appeals for the Federal Circuit).

In the public sector, a trade attorney might be involved with a variety of tasks, including trade agreements, trade-related legislation, dispute settlement, litigation, advice and advocacy for U.S. exporters and investors, and technical assistance for foreign countries.[109] In the private sector, the range of jobs is at least as extensive, including employment as a country risk analyst, customs

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102. *See infra* Part VI.B.5.

103. See Clarke & Greenwald, *supra* note 87, at 2-3 for a concise synopsis of U.S. trade remedies.

104. *See* I.M. Destler, *Changing the Rules: The Rise of Administrative Trade Remedies*, *in* AMERICAN TRADE POLITICS 137-67 (4th ed. 2005) (providing a great synopsis of the development of U.S. trade remedy law).

105. "Antidumping cases involve claims that foreign producers/exporters in a particular country are selling their goods in the U.S. market at 'less than normal value' (sometimes referred to as 'less than fair value')." Clarke & Greenwald, *supra* note 87, at 2.

106. These are claims that foreign businesses' government-subsidized imports are damaging or threaten to damage an American industry. *Id.*

107. Safeguards are other miscellaneous statutes designed to protect domestic industries against particular types of incursions and tactics from foreign competitors. *Id.* at 3.

108. *Id.* at 3. *See also* James M. Lyons, et al., *Safeguards: An Overview of Global, China, Textile, and FTA Measures*, *in* TRADE REMEDIES FOR GLOBAL COMPANIES, *supra* note 87, at 147, 155-57 (providing further information on these China-specific safeguards).

109. *See* Eleanor Roberts Lewis, *The Practice of International Trade Law in the Public Sector*, *in* CAREERS IN INTERNATIONAL LAW, *supra* note 42, at 101, 103-05. For an extensive list of opportunities in the federal government related to international trade law *see id.* at 109-11.

broker, export credit manager, international trade analyst, international trade and investment consultant, and in banking.[110]

5. Litigation

American attorneys may be involved with litigation concerning Chinese entities within the United States.[111] As trade and investment between the United States and China continues to grow, U.S. attorneys may increasingly find themselves involved with litigation in China. As noted before, foreign attorneys may not appear in a Chinese court on behalf of a client.[112] A U.S. attorney may nevertheless be involved with the case, even if the attorney does not personally appear in court. Familiarizing oneself with how the Chinese legal process works (both in theory and practice) would behoove an American lawyer whose clients may find themselves before a Chinese court.[113]

6. Business Negotiations

American attorneys often assist their clients in domestic business deals and can provide the same service for clients negotiating with Chinese entities. The international dimension adds an exciting and challenging angle to the traditional function of an attorney.[114] As with many other China-related jobs, conducting international negotiations with a Chinese firm places some unfamiliar obligations upon the American lawyer.[115]

Chinese culture presents some unique challenges for U.S. businesses and their counsel. Interpersonal relations, for example, take precedence over commercial transactions.[116]

> A Chinese entity will not go into commercial cooperation with its counterpart until it has established a trust in that counterpart. Therefore, in China, large transactions between

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110. JD PREFERRED 6.8-6.11 (1994).

111. *See* Hiebert, *supra* note 81 and accompanying text.

112. Korporaal, *supra* note 51. *See also infra* Part IV.C.1 (detailing the restrictions the Chinese government has placed on foreign attorneys with regard to the practice of law in China).

113. *See generally* Fang Shen, Comment, *Are you Prepared for This Legal Maze? How to Serve Legal Documents, Obtain Evidence, and Enforce Judgments in China*, 72 UMKC L. REV. 215 (2003) (discussing how Chinese litigation proceeds).

114. *See generally* Jay G. Foonberg, *The Role of the Lawyer: A Checklist*, *in* THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS 139, 139-145 (James R. Silkenat & Jeffery M. Aresty eds., 2d ed. 2000) [hereinafter ABA GUIDE] (providing a useful checklist for the U.S. attorney entering international law).

115. *See generally* James R. Silkenat & Jerffrey M. Aresty, *Introduction*, *in* ABA GUIDE, *supra* note 114, at 1, 1-3 (detailing the challenges faced by the U.S. attorney entering the international arena).

116. Zhang Jiachun, Zeng Shiji & Li Li, *International Business Negotiations in the People's Republic of China*, *in* ABA GUIDE, *supra* note 114, at 399, 400-01.

> two companies usually come only after a friendship or at least some sort of acquaintance has been established between the leaders or personnel of related departments of the two companies.[117]

U.S. attorneys cannot be satisfied with mere efforts to extract favorable terms from the Chinese side. Rather, American attorneys represent their clients in negotiations best when they invest themselves in fostering relationships between their clients and the Chinese personnel.

Negotiations can be complicated by the fact that Chinese attorneys are not held in the same social esteem as their counterparts in the United States. The Chinese historically associate lawyers with confrontation; thus, many Chinese firms even today will not have lawyers present during any business negotiations.[118] Americans understand that attorneys have many non-confrontational functions, including assistance in business negotiations, and Chinese business leaders are beginning to appreciate this distinction in the Western tradition.[119] Hence, U.S. attorneys may or may not directly conduct negotiations, depending upon the situation. Many observers have evaluated the skills necessary to do this.[120] Perhaps the most important of these is patience, a virtue not often extolled in our adversarial system: "The Chinese are excellent at brinkmanship, and their patience often seems endless."[121]

7. Alternative Dispute Resolution

Most businesses are now aware that "[t]o avoid the unpredictable and sometimes corrupt Chinese court system, [foreign] investors might add a clause to their contracts which specifies that contractual disputes will be settled through arbitration."[122]

Both arbitration and mediation are forms of alternative dispute resolution; both seek to resolve disputes outside of the traditional courtroom setting. They are distinguishable in that with arbitration, the parties agree to empower a third person to act as a judge and render a binding decision. A mediator has no such binding authority. Rather, the mediator's job is to help the parties reach an agreement between themselves.

U.S. attorneys might advocate for their client's position during Chinese

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117. *Id.*

118. *Id.* at 405.

119. *Id.*

120. *See generally* Jeffrey C. Y. Li, Comment, *Strategic Negotiation in the Greater Chinese Economic Area: A New American Perspective*, 59 ALB. L. REV. 1035 (1996) (discussing the skills and strategies for negotiating in China).

121. *Id.* at 1059.

122. Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 37 (2005).

arbitration proceedings, or they might serve as arbitrators themselves. Because arbitration is, by definition, not a court proceeding, it seems likely that U.S. attorneys could perform these functions even in China. Enforcing these judgments in China may, however, require resorting to Chinese courts.

Mediation involves an effort by disputing parties to sit down and, using the mediator as a go-between, attempt to reach a settlement acceptable to both sides. The parties have an opportunity to craft their own settlement instead of having a third party impose one upon them (as in arbitration or court).

"Interest in mediation is rocketing, in countries of all legal traditions.... [T]he head of [the Centre for Effective Dispute Resolution] talks of a 'global revolution.'"[123] U.S. attorneys can serve as mediators, or they can represent clients as advocates in mediation. Because an arbitration award might find its way into Chinese courts anyway, mediation is appealing for U.S. businesses in China. If an American business can jointly arrive at a resolution with its Chinese counterpart — a resolution which the Chinese entity is voluntarily accepting — it is more likely that the U.S. firm will get what it desires out of the process. American attorneys who are certified mediators, or who have mediation or arbitration experience, can apply their skills in the Chinese context.

8. Lobbying

Many U.S. lawyers become lobbyists. "Classical economists did not anticipate a world in which developing nations like China and India could win in both skilled and unskilled labor, producing both cheap low-value items and cheap high-value items."[124] Small businesses in the U.S. are being squeezed extra hard by competition: "small firms do not have the clout in Washington to obtain the benefits large firms get written into trade deals.... [And] once trade deals are signed, the government often has no plan to help entrepreneurs benefit."[125] An enterprising attorney might build a business around representing the policy needs of small businesses and entrepreneurs with respect to China.

A new frontier in lobbying is emerging — this time in China. The extent to which foreign firms might reasonably hope to influence China's business and

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123. *Knocking Heads Together*, ECONOMIST, Feb. 1, 2007, at 62.

124. Joshua Kurlantzick, *Broken Bridges: For Entrepreneurs, the Real Trade Barriers Lie Close to Home*, ENTREPRENEUR, Jan. 2007, at 30, *available at* http://www.entrepreneur.com/article/printthis/171886.html.

125. *Id.* Kurlantzick writes,

> I have encountered many U.S. entrepreneurs working overseas, but I've never found any who credited federal or state agencies for their success. Just the opposite. When I asked one . . . if he'd gotten assistance from the U.S. government, he just laughed in my face. And unless small companies start advocating for their exporting needs in Congress, they'll have to continue laughing — or crying.

Id.

trade policies remains unclear. Once more, enterprising attorneys from the United States might find undiscovered opportunities by lobbying (formally or informally). This may be most tenable at the local level in China, where regional officials are in more frequent contact with foreign investors in their localities.

9. Other Substantive Legal Functions

American attorneys have a variety of other avenues they can pursue in the law with respect to China: international financing; political risk insurance; international payment methods; secured transactions; e-commerce; intellectual property; international antitrust; securities; U.S. taxation of international transactions; export controls, sanctions, and anti-boycott laws; government procurement; the legalization of documents for use abroad; creditors' rights and bankruptcy; foreign investment in the U.S.; immigration; international labor-and-employment law; wills, trusts, estates, and related taxes; and family law (including transnational adoptions).[126] Even those attorneys in small or sole practice[127] should take notice, as many needs such as immigration and matters related to family law arise for individuals. Some well-established fields, including international environmental law, humanitarian law, admiralty law, and academia are also benefiting from China's rise.[128]

This amazing variety illustrates two harbingers for the future of the American legal profession. First, the business of law will be healthy with respect to China as a great deal of work presently exists and a great deal more will be created. Secondly, attorneys of all types can find something of interest in the law related to China.

B. Legal Employment Options

For American attorneys pursuing a legal career related to China, several employers stand out. These include law firms, consulting firms, businesses (in-house counsel), a wide array of government agencies, and smaller operations (small firms and solo practice). Each of these is considered below.

1. U.S. Law Firms: Both U.S. and China Offices

Law firms are the most significant business organizations within the legal profession. In addition to competitive salaries, large firms command a variety of resources, including many of the most important intangible resources

126. *See generally* INTERNATIONAL LAWYER'S DESKBOOK (Lucinda A. Low, Patrick M. Norton & Daniel M Drory eds., 2d ed. 2002) (providing detailed information regarding each of these areas of law).

127. *See infra* Part IV.B.5 (discussing small and sole firm China practices).

128. *See generally* CAREERS IN INTERNATIONAL LAW, *supra* note 42 (providing information regarding these areas of international law).

necessary to succeed in China: intellectual capital, broad networks within the legal and business communities of the United States and China, and information. While many American firms staff their offices in China primarily with Chinese lawyers, there is still plenty of room for American attorneys. On the whole, American law firms appear convinced that attorneys from the United States are among the best-trained and best-qualified to staff their ranks.

Those who are inspired by the thought of working overseas in a firm setting are in luck as "[c]ertain foreign offices recently began recruiting new U.S. law school graduates. Firms justify this practice by pointing to a foreign office's larger legal staff, which enables transactions to be staffed by more than one lawyer, thus leading to a greater capacity to train new lawyers."[129] No concrete data currently exist, but one might expect this general trend to apply in China as readily as anyplace else.

Large U.S. law firms undoubtedly suffer some drawbacks, as any employer does. In all likelihood, the same lifestyle and intensity of work pervades international firms as much as purely domestic ones. From a business perspective, U.S. law firms going overseas sometimes fail to conduct Michael Porter's five forces analysis, a standard in academic business and strategic consulting circles. In particular, law firms often neglect to appreciate the full gauntlet of competition that awaits them overseas.[130] Naturally, the greater the range of services a law firm or individual lawyer offers, the more competitors it will encounter. Law firms, like the business clients they represent, must make strategic choices about their operations in China. Poor strategic leadership can have disastrous results for a firm operating in the pressure of the Chinese environment. U.S. lawyers considering a career with an international law firm should do their homework first to ensure that the firm's management team is business-minded, and not merely law-minded.

Adding to the pressure on U.S. law firms are clients themselves. Supply chain technology is now routinely deployed by clients to ensure value: "In law

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129. Carole Silver, *Lawyers on Foreign Ground, in* CAREERS IN INTERNATIONAL LAW, *supra* note 42, at 1, 9.

130. "Competitors" are simply "companies that satisfy the same customer need." PHILIP KOTLER, A FRAMEWORK FOR MARKETING MANAGEMENT 127 (3d ed. 2007).

> By vigorously invoking unauthorized practice of law statutes and the professional rules of conduct against assisting nonlawyers in the practice of law, state bar associations [in the United States] have managed to prevent a large-scale entry into the [United States] marketplace of corporate competitors such as financial advisors, banks, and insurance companies. Outside the United States, however, these competitors regularly joust with law firms for the legal business of large commercial organizations. *The failure of U.S. law firms to appreciate this difference in the marketplace* is one reason they have encountered serious financial problems in establishing and maintaining profitable branch offices in other countries. *They have misunderstood the marketplace and misidentified their competition.*

Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1085-86 (1997) (emphasis added).

firms and other contexts, supply-chain technology allows clients to carefully scrutinize what they are receiving for dollars spent, and thus what legal functions might be better or more economically performed in-house."[131] One should be wary of an employer that cannot distinguish itself in the marketplace on the basis of quality, efficiency, and innovation.

2. U.S. Consulting Firms: Both U.S. and China Offices

Two forces have motivated consulting firms to bring attorneys into their ranks. First, most consulting firms, particularly those of the managerial and strategic variety, aspire to be full service providers for their clients. Since the law is so fundamental to business, the best consulting firms account for the law in the strategic consultations they perform. Two of the largest and most prestigious consulting firms, McKinsey & Company and Boston Consulting Group, seek holders of advanced professional degrees, and both expressly seek applicants who hold JDs.[132]

Second, the skills valued by consulting firms overlap with legal skills. Watson Wyatt Worldwide is typical in that it seeks candidates who are self-motivated, detail-oriented, possess strong computer prowess, and hold a "degree in a field that requires analytical thinking."[133] While JD students have been known to joke about attending law school because their math skills are unrefined, the opportunity to use math in law school and in practice exists for those who desire it, particularly in business-related classes and in transactional matters involving business clients. For lawyers with MBAs, the analytical dimension is enhanced even more.[134]

As the complexities of the Chinese environment continue to multiply, the demand for lawyers in consulting will grow as well.[135]

3. Corporate In-House Counsel: Both U.S. and China Offices

For some American corporations doing business in China, it may be economical to hire an in-house attorney with expertise in Chinese law and culture. An informal survey of the market suggests that most corporations in need of China expertise still outsource this function (*i.e.*, hire a law firm). Still, the demand in corporate law departments for in-house personnel with expertise

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131. Michael A. Hitt, Leonard Bierman, & Jamie D. Collins, *The Strategic Evolution of Large U.S. Law Firms*, BUS. HORIZONS, Jan.-Feb. 2007, at 27.

132. *See* McKinsey & Co., Apply Now, http://www.mckinsey.com/careers/how_do_i_apply/apply_now.aspx (last visited Mar. 17, 2008). *See also* Boston Consulting Group, Join BCG, http://www.bcg.com/careers/ (last visited Mar. 17, 2008).

133. Watson Wyatt Worldwide, Skills Wanted, http://www.watsonwyatt.com/careers/graduates/graduates_skills.asp (last visited Mar. 17, 2008).

134. *Infra* Part VI.B.1.

135. *See infra* Part V.B.2 for more on China-consulting and the U.S. attorney.

in Chinese law is likely to climb. The same may eventually be true for Chinese firms seeking experts in U.S. law:

> [t]he proactive model of lawyering springs from personal and professional traits seemingly unique to U.S. lawyers. It is characterized by a "can do" attitude that focuses on problem-solving and mixes business and legal counseling with little concern for the boundaries between them. It is closely related to another distinct phenomenon of U.S. lawyering known as "legal entrepreneurialism."[136]

An in-house lawyer in China will face a variety of challenges. First, the in-house counsel must "educate the foreign law firms that serve as outside counsel . . . with respect to her clients' expectations, thereby encouraging them to adopt a new, more expanded role."[137] The in-house counsel "must also educate the organization's foreign employees . . . to accept the proactive counseling of U.S. lawyers."[138] Both of these require cultural and communication skills which U.S. attorneys should possess anyway.

Ethical duties imposed upon American attorneys, including the attorney-client privilege, may prove difficult to apply in the international context,[139] because legal ethics codes differ or simply do not exist in other countries.[140] U.S. lawyers serving a corporation in China must take care not to run afoul of ethical obligations while at the same time respecting the demands and cultural expectations of Chinese society.

4. U.S. Government Agencies

The U.S. government employs a large number of attorneys, many of whom may get the opportunity to do work related to China. International trade and customs laws are a principal source of China-related government work,[141] though there are others.[142] While government attorneys are not paid nearly what the private sector fetches, government employees are consistently ranked among the most satisfied with their jobs. Less stress, fewer hours, and competitive benefits attract many attorneys to government employment, and most view their jobs as compatible with family life. In addition, government attorneys may have the opportunity to assist companies going to China,[143] and

136. Daly, *supra* note 130, at 1068.
137. *Id.* at 1078.
138. *Id.* at 1080.
139. *See id.* at 1099-108.
140. *See id.* at 1090-99.
141. *See supra* Part IV.A.4.
142. *See* Lewis, *supra* note 109, at 109-11 (listing opportunities in the U.S. government, most of which are related to international trade law).
143. *See, e.g.*, U.S. Commercial Service, China, *How We Help U.S. Companies*,

former government attorneys entering private practice may have a competitive edge based upon their knowledge and experience in government.

5. Small Firm or Sole Practice

Even small law firms and sole practitioners can enjoy a China-related practice. While this is a path less taken,[144] career advice is available to American attorneys desiring to go this route.[145] It is likely that the small firm or sole practitioner will focus on servicing individual clients, as opposed to corporate clients, in such areas as immigration and family law. The degree to which smaller firms and sole practitioners can compete effectively in China has not been quantified. However, it seems likely that with corporate clients hiring larger firms, and with larger firms focusing on their corporate clients, individuals will likely seek smaller, less expensive alternatives to the large firms for their legal needs in China.

C. REGULATORY LIMITS UPON THE PRACTICE OF LAW IN CHINA

1. A Patchwork of Restrictions — Mainland China

China is now a member of the WTO and, like other members, has agreed in principle to open most industries to foreign competition; however, there are several exceptions. One such exception applies to the practice of law. With respect to professional services, "China will permit foreign majority control *except for the practice of Chinese law* (an exception common among many WTO members)."[146]

The Working Party on China's Accession enumerated those functions that foreign law firms may perform in China:

> (a) to provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and practices; (b) to handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work; (c) to entrust, on behalf of foreign

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http://www.buyusa.gov/china/en/howhelpus.html (last visited Mar. 17, 2008).

144. *See, e.g.* Law Offices of Aaron Schildhaus, *Practice Areas*, http://www.schildhaus.com/practice.html (last visited Mar. 17, 2008) (providing an impressive illustration of the sole practitioner in international law).

145. *See generally, e.g.*, Jeffrey M. Aresty & Ansrew S. Breines, *Using the Internet to Run a Small-Firm International Business Law Practice*, *in* CAREERS IN INTERNATIONAL LAW, *supra* note 42, at 23 (discussing the role of the Internet in international law).

146. YADONG LUO, HOW TO ENTER CHINA: CHOICES AND LESSONS 46 (2000) (emphasis added).

> clients, Chinese law firms to deal with the Chinese legal affairs; (d) to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs; [and] (e) to provide information on the impact of the Chinese legal environment.[147]

This list of approved functions conspicuously lacks the authority to represent clients in Chinese courts (foreigners may not become members of the Chinese bar). Yet we have also noted that this glaring omission is not, in practice, as great a loss for foreign lawyers as one might expect. Native Chinese and foreigners alike distrust the Chinese court system, and most legal disputes in China are settled outside of the courts.

Still, the no-court restriction, together with a prohibition against foreign firms directly employing Chinese lawyers,[148] has provoked some to complain to the government.[149] Ironically, China's own regulations preventing foreign firms from employing Chinese attorneys are depressing the number of Chinese lawyers who are able to gain international training. This in turn artificially inflates the relative value of American attorneys in China, who do have international training and exposure. This favors U.S. attorneys in China because the number of domestic competitors is reduced. For now, the only effective tradeoff is the seldom-desired ability to appear before Chinese courts. Perhaps American attorneys should advocate for the retention of the current restrictions. After all, "the flood of foreign investment into China has given overseas law firms all the work they can handle."[150]

2. A Genuinely Liberalized System — Hong Kong

When the British returned Hong Kong to Chinese authorities in 1997, Beijing guaranteed it would preserve many of the city's most-cherished features. Today, while Hong Kong is a part of China (it is a "special administrative region" or "SAR"), it retains a relatively unfettered capitalist economy,[151] as well as its own legal system. Hong Kong serves as an example of what a truly capitalist China could look like.

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147. Working Party on the Accession of China, *Schedule of Specific Commitments on Services List of Articles II MFN Exemptions,* WT/ACC/CHN/49?Add.2 (Oct. 1, 2001), *available at* http://www.uschina.org/public/documents/2005/05/specificcommitment.doc.

148. Bill Savadove, *Barriers to Foreign Law Firms Decried,* S. CHINA MORNING POST, Dec. 25, 2006, at 6. Of course, so long as U.S. law firms cannot directly employ Chinese lawyers to staff their Chinese offices, American lawyers must fill the void: a benefit for American lawyers wanting to establish a China-related career. *See id.*

149. *Id.*

150. *Id.*

151. Before China joined the WTO, Hong Kong was a member state on its own. *See* World Trade Organization, *Member Information: Hong Kong, China and the WTO,* http://www.wto.org/english/thewto_e/countries_e/hong_kong_china_e.htm (last visited Mar. 17, 2008).

Several differences exist between mainland China and Hong Kong. Mainland China, as mentioned above, is a civil law country and does not allow foreigners to join its bar. In contrast, Hong Kong inherited a common law system from the British and does allow foreigners to become full members of its bar. Hong Kong, like Great Britain, recognizes two categories of lawyers. *Solicitors* are lawyers who are authorized to meet with clients and prepare legal documents, but who do not have the authority to appear in a court of law on the client's behalf unless specifically authorized.[152] *Barristers*, in contrast, are lawyers who are fully empowered, so that they may appear in a court of law on behalf of a client.[153] While the majority of lawyers in Hong Kong are solicitors, foreign lawyers may seek admission to the Hong Kong Bar as barristers.[154] To do so, an American attorney must satisfy three major requirements: (1) he or she must be admitted to practice law in the United States, be in good standing, and have practiced law for three years prior to taking the Hong Kong Bar Exam; (2) he or she must take and pass the Hong Kong Bar Exam; and (3) he or she must spend a period of time (usually twelve months, but sometimes as few as three) practicing law under the direction of an experienced lawyer (this apprenticeship is referred to as one's "pupilage").[155]

For U.S. attorneys who do not know Chinese, Hong Kong removes a substantial hurdle.[156] The Hong Kong Bar Exam is in English, most legal documents are written in English; and most trials are conducted in English (although documents can be drafted in Chinese and a minority of trials are now conducted in Chinese).

Unfortunately, no formal review course currently exists for the Hong Kong Bar Exam. This means that American lawyers contemplating the exam must prepare for it entirely by themselves. A very helpful document provided by the Hong Kong Bar Association, however, guides foreign lawyers through the exam topics and makes extensive recommendations of English-language materials for preparation.[157]

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152. BLACK'S LAW DICTIONARY 1427 (8th ed. 2004).

153. *Id.* at 160.

154. *See* Legal Practitioners Ordinance, (1997) Cap. 159, 4, § 1(b), (H.K.), *available at* http://www.legislation.gov.hk/blis_ind.nsf/da97f6a8ed4002074825648200006b580/1a4bfca29d92b04c48256cca002aeddb?OpenDocument; Hong Kong Bar Association, *Admission and Registration Rules*, http://www.hkba.org/admission-pupillage/general/index.html (last visited Mar. 18, 2008).

155. *See* Hong Kong Bar Association, *Admission Under S.27(1) of the Legal Practitioners Ordinance*, http://www.hkba.org/admission-pupillage/images/chart.pdf (last visited Mar. 18, 2008) (providing a useful flowchart/timeline on how to seek admission to the Hong Kong bar as a foreign lawyer).

156. While many contend that a mastery of Chinese is not necessary for working in mainland China, it is undoubtedly very helpful. *See infra* Part VI.B.2.

157. The document, entitled "Hong Kong Bar Association: Admission of Overseas Lawyers," is broken into four different PDF files on the Bar Association's website. *See* Hong Kong Bar Association, *Information Package 2007*, *available at* http://www.hkba.org/admission-pupillage/info-package2007.pdf; Hong Kong Bar Association, *Examination Supplement*, *available at* http://www.hkba.org/admission-pupillage/exam-supp2007.pdf (last visited Mar. 17,

One might ask, in light of mainland China's rise,[158] why an American lawyer would bother with Hong Kong. One expert suggests that Hong Kong facilitates, and will continue to facilitate, operations between mainland China and the west: "[T]he same compelling factors that led foreign investors to set up operations in the British Crown Colony of Hong Kong apply to the Special Administrative Region. Hong Kong has one foot in China and one foot in the west and facilitates dealings between the two."[159]

This same expert persuasively argues that Hong Kong will remain a valuable base for corporate Chinese operations or law firms serving corporations. Hong Kong's legal system is preferable to mainland China's, because it is more transparent and is a common law system similar to that of the United States. Additionally, knowledge and information are more readily available in Hong Kong, human resources are favorable, and transportation links connect Hong Kong to the mainland.[160] Furthermore, Hong Kong is a major global finance center, it enjoys its own remarkable foreign direct investment, and it has a more attractive tax system.[161]

Hong Kong's economy should continue its trailblazing ways. It is an especially appealing environment for entrepreneurs. One Hong Kong business leader has stated, "[w]hat's driving Hong Kong is a large number . . . of small and midsize enterprises . . . . Hong Kong is producing a new breed of company."[162]

V. THE MECHANICS OF BUILDING A CHINA-RELATED BUSINESS CAREER

The practice of law in the new China is now within reach of American attorneys, but some of our most exciting possibilities are the inviting overtures of the business world. This section first explores how American attorneys who continue to practice law can proactively extend their interests in the Chinese business environment. It then considers the most promising career options outside of legal practice.

A. The Synergy of Law and Business: Equity for Services

It may occur to the American lawyer practicing in China that as profitable

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2008); Hong Kong Bar Association, *Syllabus and Reading Lists for the Examination, available at* http://www.hkba.org/admission-pupillage/Syllabus-and-ReadingList.pdf (last visited Mar. 17, 2008); Hong Kong Bar Association, *Specimen Questions/Past Papers, available at* http://www.hkba.org/admission-pupillage/specimen2007.pdf (last visited Mar. 17, 2008).

158. *See supra* Part II.

159. Sharon J. Mann, *Hong Kong as China Headquarters, in* CHINA AND HONG KONG IN LEGAL TRANSITION: COMMERCIAL AND HUMANITARIAN ISSUES 151 (Joseph W. Dellapenna & Patrick M. Norton eds., 2000).

160. *See id.* at 151-55.

161. *See id.* at 155-62.

162. Joan Magretta, Fast, *Global, and Entrepreneurial: Supply China Management, Hong Kong Style — An Interview with Victor Fung, in* HARVARD BUSINESS REVIEW ON MANAGING THE VALUE CHAIN 29, 58-59 (2000).

as the law is, there are many high-growth business ventures that could prove still more lucrative. Yet for many of these attorneys, the law suits them well. As it turns out, it is possible to retain one's legal practice while simultaneously expanding one's interests in the Chinese business realm. Doing so requires finding the right clients and a willingness on the part of the attorney to embrace some higher-than-normal risks. In short, U.S. attorneys operating in China can accept part-ownership in a business entity in lieu of monetary payments in exchange for their legal services. In essence, such an arrangement makes the lawyer a venture capitalist, except that the lawyer provides legal services instead of cash to the client.

The Model Rules of Professional Responsibility explicitly endorse this type of arrangement, provided it is done in the form of a contingency fee.[163] Equity-for-services is an appealing notion as, over time, an American attorney in China can build a private portfolio consisting of a variety of former clients. All of the benefits of small-business ownership — including monies from dividends or partnership payouts, capital gains from selling the stake, or proceeds from going public — would accrue to the attorney.

There are a number of considerable risks inherent in this arrangement, however. First, the lawyer must have enough cash that he can afford to provide legal services in exchange for something other than cash. This implies that a lawyer could not make a practice exclusively out of equity-for-services unless he has some other reliable source of income. Second, few closely held businesses will want to part with equity interests unless they must. This implies that the type of client an equity-for-services attorney will generally seek out are those desperate for legal help and short on cash. Third, the rate of failure among start-up companies is high in the brutally competitive business environment of China. An equity-for-services attorney could find his or her ownership interest in the business worthless if the company goes bankrupt. Lawyers embracing the equity-for-services model must therefore scrutinize the clients they agree to represent. The skills of a good venture capitalist are necessary. Fourth, the Model Rules require equity-for-services arrangements to take the form of a contingency fee if the equity interest is itself the cause of action or subject of litigation.[164] This means that if the lawyer performs the legal services needed but has not fulfilled the contingency, he is not entitled to the equity interest contracted for.

A fifth risk inherent in equity-for-services arrangements is the fact that the lawyer will rarely possess a majority interest in the enterprise. Few small business owners would be willing to sign away their creation in exchange for legal services.[165] Even if the lawyer could find someone willing to give them a

163. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(c), R. 1.5 cmt. 4, R. 1.8(i)(2), & R. 1.8 cmt. 16 (2006).

164. *See supra* note 163, at R. 1.8(i)(2).

165. On the other hand, entrepreneurs who are willing to give a controlling interest in the business to venture capitalists may be willing to do so for attorneys but only if the legal services

controlling interest, he would then be responsible for ensuring the business's well being, lest his newly won interest become valueless. A lawyer desiring the time to continue practicing law would be ill advised to accept a majority interest unless he already has trusted and competent people to whom he could delegate the day-to-day operations of the business. Finally, the equity-for-services attorney assumes the same risk that can beset minority shareholders of closely held corporations in the United States: the majority owner may orient the business in a direction frustrating to the minority owner-attorney. For example, the minority owner-attorney may want the small corporation to declare dividends while the majority owner may want to reinvest the corporation's revenues back into the business. This risk, more so than the others above, can be abated by the initial attorney-client contract.[166]

Additionally, U.S. attorneys must consider the restrictions that U.S. federal law places on the manner in which American professionals achieve results overseas. The principal concern in this regard is the Foreign Corrupt Practices Act, which forbids bribes to foreign officials and specifies mandatory recordkeeping practices for many publicly traded interests.[167] Practice in China, then, can present difficult ethical situations. American attorneys must be most vigilant.[168]

With all of the risks inherent to the equity-for-services arrangement, it is no surprise that few attorneys appear to pursue this route. Nevertheless, for the ambitious entrepreneurial lawyer who wants both a continuing legal practice and a portfolio that extends beyond the law, equity-for-services offers an option to help achieve this goal.

B. From Law to Business — The Majesty of the Magic Confluence

Some of the most exciting opportunities for U.S. attorneys in China can be found outside of the practice of law altogether. These opportunities share the common requirement of innovation. Two insightful consultants define innovation as the product of creativity and risk taking. This has been expressed as an equation: "Innovation = Creativity x Risk Taking."[169] International

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provided are as crucial to the survival and/or expansion of the business as cash would be in the ordinary case of venture capital.

166. For example, the lawyer could agree to become a minority owner with respect to dividends but have a disproportionately large voice in managerial decisions. It does not appear that any Chinese laws or regulations forbid such an arrangement, but this possibility assumes that none exists.

167. *See generally* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICE ACT AND THE NEW INTERNATIONAL NORMS (2005) (discussing the Foreign Corrupt Practices Act). *See also id.* at 10 (highlighting the basic elements of the anti-bribery provisions).

168. For a supremely eloquent and practical synopsis of the ethical issues arising for transnational lawyers licensed in the United States see Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135 (2001).

169. JACQUELINE BYRD & PAUL LOCKWOOD BROWN, THE INNOVATION EQUATION 22-23 (2003).

lawyers must be creative and not overly risk-averse. As such, within ethical bounds, a legal practice related to China can serve as a staging ground. To be effective, American attorneys in China must be creative in crafting legal arguments[170] and in finding solutions to complex problems.

More specifically, creativity is driven by four factors: the ability to operate in an ambiguous situation, independence, inter-directedness, and uniqueness. Somewhat analogously, risk-taking is driven by three factors: authenticity, resiliency, and self-acceptance.[171] As any experienced lawyer will attest, a successful legal practice depends on developing these skills. Those lawyers who do so best, and who embrace risk, are well positioned to excel in the business world. American attorneys can enter business as innovators by virtue of their legal experience.

Lawyers tend to under-appreciate the transferability of legal skills. As one authority puts it,

> [o]ur work as lawyers helps us develop and perfect a wide variety of skills used and valued in other environments: for example, negotiation and persuasion; gathering, organizing and analyzing data; simplifying complex concepts; oral and written communication [.] . . . Many of us, however, get so used to thinking in technical terms — taking depositions, writing briefs, filing motions, drafting contracts — that we are unable to see the relationship between our legal experience and the demands of other fields.[172]

Lawyers determined to enter the Chinese business environment must place a premium upon innovation and the development of these transferable skills.

1. Corporate Leadership

"The diversity of corporate positions currently held by people with legal training is evidence of the vast range of opportunity . . . ."[173] Lawyers rise in corporate ranks in many areas such as tax, finance, government relations, risk management, regulatory compliance, contract administration, marketing, and intellectual property.[174] One law school advises that "[m]any options are

170. This is not a metaphor advocating specious argumentation. Rather, the law, by its very nature, requires lawyers to consider all dimensions of a given question. Approaching a question in a new way need not be intellectually dishonest; innovative legal arguments are made in good faith every day in matters throughout the United States.

171. BYRD & BROWN, *supra* note 169, at 48-68.

172. Deborah Arron, *Nontraditional Careers for Lawyers*, *in* CHANGING JOBS: A HANDBOOK FOR LAWYERS IN THE NEW MILLENNIUM 302 (1999).

173. GARY A. MUNNEKE & WILLIAM D. HENSLEE, NONLEGAL CAREERS FOR LAWYERS 54 (4th ed. 2003).

174. *Id.* at 54-79.

available [for law school graduates] in the world of business" including "[m]anagement positions and entrepreneurial ventures." However, "[n]on-traditional careers are not easy to get. They require patience and persistence and an all-out effort. Contacts are important...." Still, "[m]any of the CEO's of Fortune 500 companies are attorneys."[175]

An American corporation is more likely to appoint a manager in China after the individual has proven herself capable in the United States. Consequently, American attorneys aspiring to a managerial position with a U.S. corporation in China should first seek experience in the domestic corporate ranks. This can be accomplished by working for the in-house counsel's office or by entering the ranks of management.

Although it can easily be assumed that U.S. corporations will turn to native Chinese managers when seeking to fill managerial positions in their Chinese offices, "[b]urgeoning economies in Asia have increased the demand for high-quality global managers with MBAs."[176] Numerous commentators from both the United States and China have observed that on the whole, Chinese management does not approach the level of global sophistication that many American companies have achieved.[177] To date, Chinese business schools have been completely unable to remedy the competitive gap.[178]

2. Consulting

Fundamentally, consultants and attorneys provide the same basic services: they resolve their clients' problems or help clients avoid problems. Consulting, then, is a sister occupation to the law,[179] one that is potentially as challenging and exciting. Lawyers, most of whom have experience with the analytical rigors of resolving legal problems, will find the transition into consulting especially natural. In discussing Toyota's efforts to manage its supply chain, two academics note that "because participants at all layers speak the same language and follow the same principles, understanding is achieved with relative ease."[180] This is also true of business law attorneys-turned-consultants. Speaking the language of one's clients is an immense asset: it makes possible the communication necessary to solve complex problems in the real world. Few occupations prepare one to communicate so well as the law.

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175. Indiana Law, *Legal Career Options: Corporate Practice*, http://www.law.indiana.edu/careers/guides/career_ options_corporate.shtml (last visited Mar. 17, 2008).

176. Kerry Miller, *B-School is Hip Again*, BUS.WK. ONLINE, Aug. 7, 2006 (citation omitted). *See also infra* Part VI.B.1 (discussing the advantages of obtaining an MBA).

177. *See, e.g.*, *China's People Problem*, ECONOMIST, Apr. 16, 2005, at 54.

178. *See* Dexter Roberts, *China MBAs: Most Likely to Fall Short*, BUS.WK., Dec. 4, 2006, at 106.

179. For more on consulting *see supra* Part IV.B.2.

180. Toshihiro Nishiguchi & Alexandre Beaudet, *Fractal Design: Self-Organizing Links in Supply Chain Management*, *in* KNOWLEDGE CREATION: A SOURCE OF VALUE 199, 204 (Georg von Krogh, Ikujiro Nonaka, & Toshihro Nishiguchi eds., 2000).

Of course, communication is not the only qualification that attorneys bring to consulting. The knowledge and experience one garners through the practice of law translates directly into the consultant's role as a student of the client's problems and an engineer of the client's solutions.

> Through [their] process of mutual learning, firms come to share a set of common "codes" and understandings . . . . Firms share *result* knowledge: that is, in the form of a solution to a given problem, which among other things helps firms identify which practices are effective . . . . They also share dense, contextual, and tacit *process* knowledge, enabling participants retrospectively to decode result information into directly applicable knowledge. In other words, firms share not only "information" but also "know-how" . . . and often "know-why."[181]

Of course, the facts of a client's case are crucial, and the emphasis placed upon case facts in law school reflects this. Every business problem an attorney confronts is like a real-world MBA case study. The insights attorneys gain into business clients and the legal process are invaluable in the world of consulting.

Attorneys are trained to look for creative solutions to their clients' problems; this can be further reinforced with an MBA.[182] Legal experience involving the representation of business clients is directly transferable to the world of consulting. In particular, U.S. attorneys with legal (or other) experience in China are especially well positioned to move into China-related consulting.

One of the most redeeming features of consulting is that it can be undertaken anyplace in the world. An attorney-turned-consultant can advise clients on China-related matters while residing in the United States. One could also live and consult in China. Salaries at the largest consulting firms are highly competitive, many consulting positions involve travel, and the attorney can continue to be a real-world problem-solver.

3. Venture Capitalism

Venture capital is simply "[m]oney used to purchase [an] equity-based interest in a new or existing company."[183] By investing in high-risk start-up companies that need cash to grow, the venture capitalist hopes that the value of the company will appreciate quickly and substantially so that he can sell his interest for far more than his original investment. Typically, venture capitalists

181. *Id.* at 202-03.

182. *See infra* Part VI.B.1.

183. Venture Capital Glossary, *Venture Capital*, http://www.vcaonline.com/resources/glossary/index.asp (last visited Mar. 18, 2008).

("VCs") contribute their money to funds, which are in turn managed by other VCs. Since entrepreneurs are normally the type of people who both need capital for their businesses and cannot get other sources of funding,[184] venture capital is closely intertwined with entrepreneurship. "In truth, venture capital and private equity firms are pools of capital . . . . Far from being simply passive financiers, venture capitalists foster growth in companies through their involvement in the management, strategic marketing and planning of their investee companies. They are entrepreneurs first and financiers second."[185] Individual VCs, known as "angel investors," may also make investments in new companies, but this is a less common source of entrepreneurial capital than are the VC funds.[186]

In Part V.A we considered another form of venture capitalism available to U.S. attorneys in China in which the attorney comes to own part of the client company by providing legal services. In contrast, traditional VCs provide cash.[187] As cash is the most fundamental asset to business, it is often the one most in demand.

VCs have been attracted to China in record numbers.[188] Some enterprising law firms have already attached VC services to their legal operations: "[s]ome lawyers are taking a cue from their venture-capital clients — by investing in start-up companies that come to them for legal advice . . . . Some law firms are even reinventing themselves as venture capitalists and launching their own funds."[189] Lawyers can compete:

> law firms with their own venture funds have a bit of an edge because they "are perceived by entrepreneurs as being more entrepreneurial". . . . And attorneys see investment opportunities daily. When deciding to take on a client, law firms perform much of the same due diligence . . . before investing, so law firms have a bit of expertise in assessing whether a business plan is viable.[190]

184. Entrepreneurs often turn to VCs when banks and other established loan organizations deem the new business too risky.

185. National Venture Capital Association, What Is a Venture Capitalist?, http://www.nvca.org/def.html (last visited Mar. 17, 2008).

186. *Id.*

187. While VCs will undoubtedly provide highly valuable guidance to the companies in which they invest, their most important contribution is often cash.

188. Christopher M. Vaughn, Note, *Venture Capital in China: Developing a Regulatory Framework*, 16 COLUM. J. ASIAN L. 227, 228-30 (2002). For an illuminating discussion of the regulatory framework governing VCs in China, *see id.* at 243-47.

189. Raymond Hennessey, *Deals & Deal Makers: Lawyers Set Up Funds to Back Start-Up Clients*, WALL ST. J., July 13, 2000, at C22. Of course, American attorneys must be careful not to violate any ethics rules while acting as VCs. *Id.*

190. *Id.*

The individual benefits of doing so can be substantial.[191]

The recently formed China Venture Capital Association has been increasingly active since its inception.[192] As with other areas of business, VCs should also ensure a healthy working relationship with the entrepreneurs in whose companies they invest.[193]

4. Entrepreneurship

The innovative, savvy American lawyer seeking out entrepreneurial opportunities in China will find himself operating in a country that is undergoing changes of truly historic proportions. It is the world's greatest business frontier, the magic confluence — a climate in which all of the elements of a successful enterprise have come together in a place and a time unmatched by any other era. Today's American lawyer who follows his entrepreneurial spirit to China can become an alchemist writ large.

This assertion is not meant to suggest that U.S. attorneys will have it any easier or will necessarily succeed at a higher rate than other entrepreneurs. It is only to illustrate the uniqueness of the entrepreneurial opportunities of modern China,[194] and that American attorneys are as well situated as anyone, Chinese or otherwise, to build a truly great business there. "A surprisingly large number of lawyers are entrepreneurs."[195]

A legal background undeniably adds skills and experiences to the would-be entrepreneur's repertoire, skills that few other professions can replicate as well. Running a commercial business is analogous to serving as a partner in a large law firm.[196] There is evidence that an increasing number of Chinese lawyers are starting businesses there, particularly those who study law overseas.[197] American attorneys, especially those with legal or other business experience in China, should not feel shy about following suit. Entrepreneurs should understand the law,[198] and lawyers should internalize business.

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191. *Id.*

192. *See generally* China Venture Capital Association, http://www.cvca.com.hk/index.asp (last visited Mar. 17, 2008).

193. *See* Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 WIS. L. REV. 45 (2002).

194. Of course, there are skeptics. *See, e.g.*, Yasheng Huang, *China is No Haven for Entrepreneurs*, FIN. TIMES (U.S. ed.), Feb. 2, 2007 at 1. The consensus, however, is generally one of optimism.

195. MUNNEKE & HENSLEE, *supra* note 173, at 111.

196. *Id.* at 50-51.

197. "[I]n recent years a number of people who went abroad for law study . . . have come back to start businesses in China. Their good command of both Chinese and Western laws, coupled with the rich experience they have gained with international business, means that the highest level of law service in China is in line with the international level." Jiachun, et al., *supra* note 116, at 406.

198. "An understanding of the law is especially important to entrepreneurs because the law touches every aspect of a new venture . . . . Students who acquire these tools . . . will be better equipped to achieve success in entrepreneurial ventures." George J. Siedel, *Six Forces and the*

As we will see below,[199] relationships are of paramount importance to succeeding in China. Perhaps nowhere are relationships more important than in entrepreneurship. Anyone thinking about starting their own business in China must have a large network of people to draw upon, from potential business partners and legal counsel to potential employees and financial backers.[200]

Attempting to start one's own business is fraught with risks and challenges. Naturally, starting a business outside of the United States is even more daunting. The Chinese market is an extraordinarily competitive and complex place in which to operate. Yet American attorneys have the skills and potential to lead the world's next great wave of creation. In doing so, they can benefit not only themselves and the United States, but also further the development of the rule of law in China as well as friendship and understanding between the two countries. The more that Americans are involved in building China's economy, the more wealth will be created for the United States. The closer the ties between the United States and China, the more secure and stable each is likely to be. The magic confluence is calling upon American attorneys. Whether we answer or not is entirely up to us.

VI. LAYING THE GROUNDWORK FOR THE CHINA-FOCUSED CAREER

A. General Lessons

A few general observations will substantiate the specific recommendations made below. First, it is clear that most of the opportunities awaiting U.S. attorneys in China are related to business (serving business clients or working in a business capacity). Increasingly, however, individuals require attorneys who specialize in matters related to China.[201] Second, work experience in the American legal environment seems to be a universally useful prerequisite to making a career in China. Before leaving for China, the U.S. lawyer should seek at least a year of experience in the United States. Working

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Legal Environment of Business: The Relative Value of Business Law Among Business School Core Courses, 37 AM. BUS. L.J. 717, 736-37 (2000).

199. *See infra* Part VI.B.9.

200. "VCs look for three things — people, people and people. VCs are as interested in the person bringing in the business as they are in the business itself." Drew Senyei, *What Venture Capitalists Look For in Business Proposals*, SAN DIEGO BUS. J., No. 4, Vol. 22, Jan. 22, 2001, at 29.

201. The most promising practice areas geared toward individual clients are those in which regulations are creating artificially high levels of complexity. International adoptions are a fine example. China will implement greater restrictions upon the adoption process, "barring people who are single, obese, older than 50 or who fail to meet certain benchmarks in financial, physical or psychological health from adopting Chinese children, according to adoption agencies in the United States." Pam Belluck & Jim Yardley, *China Tightens Adoption Rules for Foreigners*, N.Y. TIMES, Dec. 20, 2006, *available at* http://query.nytimes.com/gst/fullpage.html?sec=health&res=9400EFDC1031F933A15751C1A9609C8B63. The more difficult the law makes it for individuals to accomplish their goals, the more they need attorneys.

in a firm, in a judicial clerkship, or in any other *analytical* capacity, will better prepare the American attorney to succeed in China. Finally, people skills are as important to succeeding in China as are technical skills and knowledge. In whatever pre-China work the U.S. attorney does, his or her work should emphasize communication.

B. Specific Items[202]

1. Obtain an MBA, Preferably from an American School

The marketplace reflects the value of an MBA, a notion MBA graduates affirm.[203] This holds true for people pursuing international careers as well.[204] An MBA enables the attorney to better understand what issues to look for in the problems confronting their clients or in their own businesses. An MBA better equips attorneys with the technical knowledge to analyze and solve business problems. Most MBA graduates also develop a broader network of contacts. Of course, any coursework focused on China or international strategy is especially useful to pursuing a career in China.

Perhaps the greatest benefit of obtaining an MBA is learning the language of business and developing the vocabulary to communicate with individuals engaged in business. "[G]ood emerging business lawyers need to be able to talk to entrepreneurs in their own language."[205] Knowing how to express one's ideas so that they are intelligible to the listener is crucial in the complex world of business, and understanding how to listen to a client is equally important.

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202. Several U.S.-licensed attorneys practicing in China provided me their valuable insights with respect to the most important skills for American attorneys to possess in planning a China career. I would like to acknowledge and thank each of them individually (all are partners in their respective firms' Beijing offices, with offices other than Beijing also noted): Hon. Charlene Barshefsky (Wilmer Hale, Washington, D.C.); Joseph Cha (Heller Erhman, Shanghai); Dr. Lucas Chang (Morgan Lewis, Palo Alto, Califonia); Kalley Chen (King & Wood); Gary Chodorow (Law Offices of Frederick W. Hong); Jon Christianson (Skadden, Hong Kong); Eliot Cutler (Akin Gump Strauss, Washington, D.C.); Paul Deemer (Vinson & Elkins, Shanghai); Stephen Harder (Clifford Chance, Shanghai); Richard Lawrence (Holland & Knight); David Livdahl (Paul Hastings); Manual Maisog (Hunton & Williams); Matthew McConkey (Mayer Brown JSM); Michael Moser (O'Melveny & Myers, Hong Kong); Steve Payne (White & Case); Steven Robinson (Hogan & Hartson, Shanghai, Hong Kong, Washington, D.C.); Anthony Root (Milbank Tweed, Hong Kong); Lester Ross (Wilmer Hale); Ben Tai (Jones Day); and Xiaohua (Sarah) Zhao (Akin Gump Strauss, Washington, D.C.).

203. *See* Graduate Management Admission Council, *What Graduating MBAs Say,* http://www.mba.com/mba/AssessCareersAndTheMBA/TheValueoftheMBA/TheMBAInTheMarketplace/WhatGraduatingMBAsSay.htm (last visited Mar. 17, 2008).

204. *See generally* The B-School Net, *The MBA — A Passport to an International Career, available at* http://www.b-school-net.de/MBA_news/archive_2004/topmba_04032004.htm (last visited Mar. 17, 2008).

205. Cliff Collins, *The Engine of Growth: Lawyers Take a Lead in Helping Emerging Businesses to Grow*, 59 OR. ST. B. BULL. 9, 12 (1998).

An MBA better enables the lawyer to do both.

American attorneys looking to work in China will be glad to have an MBA. China and its business environment are quite complex. The skills developed in a competitive MBA program compliment both the JD and legal experience nicely, affording the attorney a more comprehensive view of the world and a greater analytical skill set.

2. Develop a Working Knowledge of the Chinese Language

To better hone U.S. attorneys' competitiveness in a global economy, law schools should develop foreign language curriculums. One academic has argued that monolinguism leads to limitations on the imagination.[206] The communicative advantages are equally compelling: "[t]he knowledge of one or more foreign languages is incredibly useful and often essential in some types of transnational law practice, particularly when a lawyer must spend substantial amounts of time in a foreign society."[207] In China, where relatively few people speak English, the American attorney fluent in Chinese will likely find himself at a great advantage.

These realities are reflected in the hiring practices of today's international law firms.

> The number of attorneys working in the foreign offices of law firms jumped last year by 23 percent, according to the *National Law Journal*, making U.S.-trained lawyers with foreign-language skills particularly sought-after applicants. The standard French or German will still come in handy, but aspiring lawyers may do even better to study Mandarin . . . . "A lot of European lawyers speak English fluently, but the Asian languages are a specialty much in demand."[208]

Learning a foreign language is no small undertaking, but every moment spent learning Chinese is a worthwhile investment for a practitioner interested in working in China. Determining which of the seven major dialects one should learn depends upon where or with whom one anticipates working. If this is uncertain, learning Mandarin is the most rational choice: it is the official language of China, and the one most widely spoken.[209]

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206. Vivian Grosswald Curran, *The Role of Foreign Languages in Educating Lawyers for Transnational Challenges*, 23 PENN ST. INT'L L. REV. 779, 779-80 (2005).

207. Goebel, *supra* note 94, at 451.

208. Nisha Ramachandran, *Hiring Is Again in Vogue*, U.S. NEWS & WORLD REP. 1, *available at* http://www.usnews.com/usnews/edu/grad/articles/brief/gblawcareers_brief.php (emphasis added).

209. *See* Languages of China, *Chinese Language Group Members*, http://www.chinalanguage.com/content/index.php?c=book&id=179 (last visited Mar. 18, 2008).

3. Study the Complimentary Disciplines

Liberal arts degrees are often maligned, but many of them are directly applicable to the U.S. attorney working in China or with Chinese parties. History, political science, sociology, psychology, and economics are especially useful to grounding one's understanding of the Chinese macro-picture. "In view of . . . the need for American transnational lawyers to assist clients in bridging the cultural gap, it is definitely desirable for an American law student to have some specialized education to help develop the particular skills necessary for such a practice."[210]

4. While in Law School, Emphasize International Courses

For the student interested in pursuing a career focused on China, or any other country, law school is an opportunity for the aspiring lawyer to learn all she can about the nature of transnational law.[211] Any courses or studies abroad dedicated exclusively to China should be taken (regrettably, these remain limited), as should any courses pertaining to the fields one might practice in relation to China, such as trade.

5. Obtain an LL.M. in Chinese Law, Preferably from a Chinese Law School

The LL.M. degree, or "Master of Laws,"[212] offers attorneys the option of earning an educational specialization. For American attorneys serious about a career focused on China, an LL.M. degree in Chinese law is a powerful tool. The curriculum of an LL.M. is likely to consist of a broad overview of key areas in Chinese law. Most LL.M. programs require either one or two years of full-time study.

The insights gained through an LL.M., as well as people met through such a program, directly translate into competitive capabilities for the U.S. lawyer in China. Writes one expert:

> [an important] development on the educational front is the ubiquity of the LL.M. degree, not only for foreign lawyers studying in the United States, but also for U.S. lawyers studying overseas . . . . I can attest that there is really no substitute for these popular LL.M. programs. They provide a uniquely accessible opportunity to better the cross-cultural understandings so critical for a successful international legal

210. Goebel, *supra* note 94, at 454-55.

211. *See id.* at 455.

212. The degree is so named because law is an undergraduate degree in most countries, and was in the United States until the later half of the twentieth century. Consequently, even American attorneys who earn the Doctor of Jurisprudence take an LL.M. degree after the J.D.

practice.[213]

Clearly, China is the best place to study.[214] Many of China's leading law schools, including Peking University, Tsinghua University, and Hong Kong University, offer LL.M. degrees in Chinese Law. All of these programs are geared toward western lawyers, as English is the language of instruction in all three.[215]

6. Seek Admission in Hong Kong

Part IV.C.2 revealed that Hong Kong occupies a unique position. Unlike in mainland China, American attorneys can take the Hong Kong Bar Exam and become fully licensed to practice law there. Particularly if one's law firm or entrepreneurial interests lie in Hong Kong, the U.S. lawyer should strongly consider gaining experience there and perhaps even taking the Hong Kong Bar Exam.

7. Get Work Experience in China

This seems like an obvious recommendation: "[t]rust is essential in a service economy where all a firm has is its reputation for dependability and good service."[216] Working in China, regardless of the nature of the work, should be viewed as an opportunity to gain trust and lay the necessary groundwork for long-term success.

> A Western lawyer should develop his own guanxi, building close friendships and gaining the trust of his Chinese counterparts through reliability, constant contact and a show of great interest in Chinese culture and way of life . . . . The key to the Chinese legal market is not to try too much too soon and to remain patient at all times. Time spent in

213. Mark W. Janis, *Perspectives of an Academic International Lawyer, in* CAREERS IN INTERNATIONAL LAW, *supra* note 42, at 169, 173. *See also* Silver, *supra* note 1, at 933.

214. *See* Goebel, *supra* note 94, at 456.

215. *See* Peking University, The Master of Laws (LL.M.) Program in Chinese Law, http://www.law.pku.edu.cn/llmp/En_001.asp (last visited Mar. 17, 2008); Tsinghua University, Master of Law (LL.M.) Program in Chinese Law: An Overview, http://www.tsinghua.edu.cn/docsn/fxy/english/llmPrgm.htm (last visited Mar. 17, 2008); *and* Hong Kong University, Master of Laws in Chinese Law, http://www.hku.hk/law/programmes/pp_ llm_chinese.html (last visited Mar. 17, 2008).

216. LINDA K. TREVINO & KATHERINE A. NELSON, MANAGING BUSINESS ETHICS 49 (2007). Although the authors make this point to encourage ethical behavior, the notion is also applicable to why U.S. interests *and individual attorneys* must establish a *physical presence in China* — to build trust and credibility.

reconnaissance and relationship building is never wasted.[217]

One law student who spent a summer as a legal assistant in a prominent Beijing law firm commented, "[the internship] looked amazing on my resume. . . . As the world gets more interconnected, the opportunity for business has increased beyond (U.S.) borders . . . . It's an untapped market. I just wanted to get in on the ground of promoting business in China."[218]

American lawyers working in China should seek out the opportunity to befriend government officials,[219] especially those local officials too often overlooked by Americans in China. Of course, all activities should conform to the Foreign Corrupt Practices Act and Rules of Professional Conduct. Healthy personal relationships can be formed over time, however, only if the American attorney is physically located in China.

8. If You're Already Working ...

For attorneys already in the workplace and who have not previously been involved with China in any way, the transition to a career focused on China is more challenging primarily because of the time investment that is required for such a transition. Those who are already working must be disciplined in identifying the investments of time and making priorities that will most likely help them in their career change.[220]

9. Establish Credibility by Establishing Relationships

Lawyers should enjoy solid relationships with their clients.[221] In order to provide optimal assistance to clients and to succeed in non-traditional careers, the American lawyer must also establish relationships with people in China. "A single lawyer will often take on a large percentage of the work in China and can make all the difference whether a firm gets hired or not. 'In China today, you still hire the lawyer and not the firm,' says William Chua of Sullivan & Cromwell."[222]

One expert advises,

[f]orget the organization charts . . . . As anyone with a

217. Edward Holroyd Pearce, *Careers: Orienteering in the Chinese Legal Market*, THE LAWYER, Oct. 16, 2006, at 49.

218. Maria Kantzavelos, *Foreign Experiences Orient Law Students to a Globalizing Profession*, CHICAGO LAWYER, May 1, 2006, at 12.

219. *See* Lieberthal & Lieberthal, *supra* note 45, at 15.

220. *See generally* Nancy D. Israel, *Changes in Direction in a Legal Career*, *in* CAREERS IN INTERNATIONAL LAW, *supra* note 42, at 93.

221. *See* Juncadella, *supra* note 68, at 1.

222. James Rice, *How to Choose the Best Local Lawyers for Equity Work*, 24 INT'L FIN. L. REV. 1 (2005).

> modicum of experience in the PRC can tell you, the key to getting anything accomplished in China lies not in the formal order, *but rather in who[m] you know, and in how that person views his or her obligations to you* . . . . If you have *guanxi*, there is little you can't get accomplished, even if it is technically — or sometimes even brazenly — against the rules. If you *don't* have *guanxi*, on the other hand, the opposite might be true. Your life is likely to be a series of long lines and tightly closed doors, and a maze of administrative and bureaucratic hassles.[223]

The first order of business when arriving in China is to establish *guanxi*.[224] Relationships can result in more than small personal favors; multi-million dollar deals, and even entire businesses, are made and broken based upon *guanxi*.[225] The American attorney must bear in mind that there is a difference, even in China, between "networking" and creating *bona fide* relationships.[226]

Americans should not attempt to delegate the task of building *guanxi* to Chinese partners. "It is only the naïve and uninitiated who leave all the *guanxi*-building to their Chinese partners. Good relationships with [decision-makers] charged with oversight of foreigners and their affairs are as good as gold in China."[227] This, again, requires a physical presence in China to accomplish. "Guanxi is well within the grasp of foreigners who wish to cultivate it. Often all it takes is an overture . . . [and] [f]oreigners who live and work in China may become integrated into relationship networks . . . ."[228]

American lawyers interested in China can make themselves all the more valuable by establishing their own *guanxi* apart from their company's. Relationships in China require diligence, however. *Guanxi* is, after all, "a renewable resource and can be reestablished even after much time has passed. But it may also be an exhaustible resource if the ledger between two people does not remain in approximate balance."[229] For attorneys contemplating the leap into consulting or entrepreneurship, relationships can literally make the impossible possible. "The expression *Duo yige guanxi, duo yitiao lu* —'One more connection offers one more road to take' — really says it all."[230]

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223. SCOTT D. SELIGMAN, CHINESE BUSINESS ETIQUETTE 180-81 (1999).
224. *Id.* at 183.
225. *Id.* at 181.
226. *See id.* at 183-84.
227. *Id.* at 188.
228. *Id.* at 195.
229. *Id.*
230. *Id.* at 182.

10. Assume a Productive Mindset

For American attorneys who incorporate China into their practice, patience and determination are the paramount virtues. Bearing this in mind will help attorneys to persevere. Experience shows that Americans can create long-lasting business relationships in China. The potential language barrier, cultural gap, relative inexperience of many Chinese in dealing with westerners, and corruption are all barriers to effective *guanxi*-building. Yet these barriers can and must be overcome to maximize one's chances for success.

The American lawyer who conforms to Chinese mores, rather than expects the Chinese to conform to his, will find his Chinese acquaintances considerably more cooperative, and will discover that his business efforts are far more effective. While this appears to be a simple choice, it is sometimes difficult to keep the proper perspective while immersed in a foreign culture. The American attorney must always remember that his own attitude is the single most important factor in determining success or failure.

VII. CONCLUSION

As the twenty-first century progresses, the United States and China will likely be the two most powerful and affluent nations in the world. American attorneys have great potential to not only advance their own prosperity but also help promote friendship between the two nations. Americans can help mold the rule of law in China while learning a great deal from the Chinese, and while expanding their business interests around the world. The American lawyer plays a unique and fundamental role in the global value chain, and if we approach that role correctly, U.S. attorneys can compete in China.

For the individual American attorney contemplating a China-related career, there are an immense number of practice areas within the law, and a correspondingly large number of potential employers. For those who may not always want to practice law, U.S. lawyers are competitively positioned to succeed in China as corporate leaders, consultants, venture capitalists, and entrepreneurs.

The magic confluence beckons us. If American attorneys are wise, we will not hesitate to respond.

ANALYTICS FOR BUSINESS, POLICY AND LAW IN A COMPARATIVE REVIEW OF ENHANCED WIRELESS EMERGENCY NUMBER CALL SERVICES SYSTEMS IN THE EUROPEAN UNION AND UNITED STATES*

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Arno Forst*****

I. INTRODUCTION

Imagine you are attending a conference at a resort somewhere in North America, Europe or another continent. While relaxing in your spacious bungalow or room, your right arm starts to shake, with numbness running from your fingers to your elbow, and you hear your heart pounding loudly in your chest. You just know that you need immediate emergency medical assistance. Responding like a creature of habit, you quickly grab your cellular telephone and dial the local emergency call number that is near the nightstand in your room. You scream "please help me, I am dying of a heart attack!" Immediately thereafter, you give your first name and then lose consciousness before you can give your precise location. The emergency center receives your cellular telephone number but is not equipped to determine your location. Based on this small center's past experiences with local emergencies, it gives the resort your first name and cellular telephone number in about three minutes. In approximately four minutes, the resort finds your first name and number in its database and enters your bungalow or room. Fortuitously, your numbness and pounding are just a bad case of intestinal gas. You are alive and well. Of course, others have not been as fortuitous.[1]

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Against the backdrop of the global dependence on wireless, mobile or cellular technologies and their imminent public policy implications are excruciating needs for effective public safety, telecommunications, privacy, liability and economic policies. National or regional regulation and policies would *obligate* wireless carriers to transmit timely, accurate *location information* to establish and implement enhanced *wireless* emergency call number systems that receive wireless callers' requests for emergency medical, fire, police and rescue services and assistance.[2] The 911 emergency wireline

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Hill, 1983.

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1. *See* Anne Marie Squeo, *Cellphone Hangup: When You Dial 911, Can Help Find You?*, WALL ST. J., May 12, 2005, at A1. There have been numerous incidents where wireless subscribers or callers have suffered or died unnecessarily because emergency centers could not determine their precise location. *See id.* Ms. Squeo reports that "[i]n March [2004], a man died in a Long Island snowstorm after calling 911 form an older cellphone that couldn't transmit his coordinates, even though the local call center had satellite-locator technology." *Id.* at 2. In the aftermath of that incident, New York City installed an enhanced wireless call number system that receives the wireless callers' telephone numbers and locations. *Id.* at 5. The global use of wireless telephones means that the Long Island incident can occur anywhere in the world that does not require wireless carriers or operators, to transmit to emergency centers both the telephone number and location information of emergency callers.

2. *See* MARTII LUMIO, EUROPEAN COMMUNITY, TELECOMMUNICATIONS IN EUROPE, (2006), *available at* http://observatorio.red.es/documentacion/actualidad/boletines/statistics.pdf [hereinafter EU Telecommunications Statistics]. The European Community publication finds that:

> [t]he rapid growth of mobile telephony continued in 2004. In absolute numbers, it even accelerated. In relative terms, however, it slowed down. The average annual growth rate of 36.2% over the eight year period 1996–2004 is still impressive. The largest markets in terms of the total number of subscriptions were Germany (71.3 million), Italy (62.8 million) and the UK (61.1 million).
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> . . .
>
> The number of operators has in general slightly risen, but in some cases the opposite is true. In 2004, every Member State had more than one operator, which should guarantee a degree of competition throughout EU.

Id. Another communications problem facing the global society is blurring of telecommunication and information technology boundaries. *See id. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, On the Review of the EU Regulatory Framework for Electronic Communications Networks and Services*, at 6, COM (2006) 334 final (June 29, 2006) [hereinafter Communication on Regulatory Framework of Telecommunications] (discussing the need for convergence of markets in a single European market). New services will provide voice, TV, and internet. *Id.* at 6. Finally, the telecommunications regulatory frameworks must be capable of addressing new technologies, such as the Voice over Internet Provider (VOIP). *See*

call services system originated on the European continent in 1937[3] In fact, England created the first emergency call services system.[4] In the 1960s, Haleyville, Alabama adopted the first American 911 wireline emergency call number services system.[5] European national and American state governments had adopted the wireline emergency call services system that required wireline carriers to transmit to emergency personnel the telephone numbers of callers who need emergency medical, fire, police and other services.[6] Presently, the wireline carriers must transmit to emergency personnel both telephone numbers and locations for emergency callers who request emergency services or assistance in the European Union[7] (EU) on call number 112, or in the United States[8] on 911. Transmitting both telephone number and location information creates enhanced *wireline* emergency call number systems that are E911 and E112 of the U.S. [9] and EU,[10] respectively.

This Article compares and contrasts public safety, business and telecommunications policy guidance, policies and regulation to establish, implement and sustain enhanced *wireless* E911 or E112. Part I outlines and explains the scope of the article as a comparative analytical review of U.S. and EU policy guidance, policies and regulation of business and markets to secure and provide public safety.

A. Illustrating the Impact of Policies, Business, Market and Laws on EU and U.S. Emergency Call Systems

This Article first uses a macro-analytical framework of policy or environmental forces and their interests and then uses micro-analysis of

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id. The EU and U.S. policy-makers are both reviewing and considering regulation of VOIP. *See* European Telephone Network Operators, Annual Report 2004, at 16, *available at* http://www.ETNO%20Annual%20Report%202004.pdf.

3. Peter P. Ten Eyck, *Dial 911 and Report a Congressional Empty Promise: The Wireless Communications and Public Safety Act of 1999*, 54 FED. COMM. L.J. 53, 55 (2001) (citing Betram A. Maas, Comment, *"911" Emergency Assistance Call Systems: Should Local Governments Be Liable for Negligent Failure to Respond?*, 8 GEO. MASON U. L. REV. 103, 103 n.1 (1985)).

4. Ten Eyck, *supra* note 3, at 53.

5. *Id.* at 56 (citing Implementation of 911 Act: The Use of N11 Codes and Other Abbreviated Dialing Arrangements; Compatibility with 911 Emergency Calling Systems, 65 Fed. Reg. 56752, 56752 (Sept. 19, 2000)).

6. *See* Council Decision 91/396, Introduction of a Single European Emergency Call Number, 1991 O.J. (L 217), [hereinafter Decision 91/396/EEC]; *See infra* Part IV and accompanying notes (examining European Community communications and public safety policies and laws establishing and implementing emergency call services numbers); *see* Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999) (codified at 47 U.S.C. § 251 and other sections of 47 U.S.C.); *see infra* Part V and accompanying notes (examining United States communications and public safety policies and laws establishing and implementing emergency call services numbers).

7. *See* Decision 91/396/EEC, *supra* note 6, at 2.

8. *See* 47 U.S.C. § 251 (2006).

9. *See id.*

10. *See* Decision 91/396/EEC, *supra* note 6, at 2.

business, legal and policy criteria to conduct a comparative review of EU and U.S. policy guidance, policies and regulations establishing and implementing enhanced *wireless* emergency number call systems. The comparative review illustrates how wireless telecommunications technology, and its regional business-market concerns and state public safety needs, create similarities and differences in designing and enforcing E112 and E911 policy guidance, policies and regulation. Collectively, it is public safety, telecommunications, personal privacy, tort liability and economic policies that establish and implement enhanced wireless emergency call number regulatory scheme in the U.S. and EU. These emergency call number schemes impact the lives, welfare and security of tens of millions of wireless subscribers who are not permanently fixed at any one location but who make millions of wireless emergency calls from various locations in the U.S. and EU.[11] In terms of the impact of these schemes on business and markets, wireless E911 and E112 regulatory schemes force wireless carriers or telecom operators to absorb the cost of developing, deploying, and diffusing location acquisition, networking and other communication technologies. These carriers or operators must transmit to public safety answering ports (PSAPs) or emergency call centers the telephone numbers and locations of wireless subscribers or callers in the EU[12] and U.S.[13]

1. Nature of the Analytics Utilized to Review the Use of Telecommunications Regulation to Address Public Safety Needs

This Article uses environmental and policy forces and business and policy criteria of macro- and micro-analytical frameworks, respectively, to

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11. COORDINATION GROUP ON THE ACCESS TO LOCATION INFORMATION FOR EMERGENCY SERVICES (CGALIES), FINAL REPORT: REPORT ON IMPLEMENTATION ISSUES RELATED TO ACCESS TO LOCATION INFORMATION BY EMERGENCY SERVICES (112) IN THE EUROPEAN UNION, 10 (2002) [hereinafter CGALIES Report] (an inquiry by an EU Coordinating Group consisting of public and private sector members to study the implementation of 112 in the EU). The CGALIES Report found 40 million calls were made from cellular phones in the EU. *Id.*; *see* DALE N. HATFIELD, A REPORT ON TECHNICAL AND OPERATIONAL ISSUES IMPACTING THE PROVISION OF WIRELESS ENHANCED 911 SERVICES, ii, (2002), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513296239 (an inquiry by a Telecommunications Consultant for the Federal Communication Commission (FCC) as to the technical and operational issues affecting the deployment of wireless Enhanced 911 (E-911) services in the United States, recognizing 130 million wireless subscribers existed in the United States).

12. *See* Commission Recommendation 2003/558, Processing of Caller Location Information in Electronic Communication Networks for the Purpose of Location-Enhanced Emergency Call Services, 2003 O.J. (L 189) 49 (EC) [hereinafter Recommendation 2003/558/EC]; Council Directive 2002/22, art. 26, 2002 O.J. (L 108), 51, 65 (EC) [hereinafter Directive 2002/22/EC].

13. *See* 47 U.S.C. § 251 (2006) (providing pertinent parts of the Wireless Communications and Public Safety Act of 1991); Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004, Pub. L. No. 108-494, Title I, 118 Stat. 3986 (codified at 47 U.S.C. § 615 and other parts of 47 U.S.C.).

review how U.S. and EU policies address conflicting interests present in regulating wireless carriers, accommodating member states, coping with emerging digital technologies, considering the telecommunications industry, and providing public safety for wireless subscribers. Implementing wireless E911 and E112 for the U.S. and EU has proven long and drawn out, if not elusive, in that contributing policy-making and environmental forces are not, and have never been, totally subservient to public safety and other social needs. This Article examines policy guidance, public policy and regulation by using business, legal and policy analytics to conduct a comparative analytical review of U.S. and EU enhanced wireless emergency call services systems. Against a global backdrop and the certain universal need for emergency call number systems, this Article applies these analytics to show how EU and U.S. technological, political, economic, social and public policy forces and their most dominant interests influence U.S. and EU legislative, agency and other policy-making in establishing and implementing enhanced wireless emergency call service system policy guidance, policies and regulation.

2. *Finding Policy Guidance and Business and Market Concerns in Establishing E112 and E911*

This comparative review finds and examines similarities and differences caused by the most pertinent underlying interests of economic, social, technological, political, and public policy forces, singly or jointly, influencing the design, enactment and implementation of U.S. and EU enhanced emergency services policies. With an eye toward identifying EU and U.S. policy-making flaws and troublesome conflicts between public and business interests, this Article examines public policy, legislative findings and objectives, and business and market decisions and strategies that have been made in designing, establishing, implementing and sustaining U.S. and EU enhanced wireless emergency systems. Both EU and U.S. telecommunications and public safety policy-making and business and market regulation impact the telecommunications, information management systems and information technology industries and the ability of state and local governments to provide emergency services and other public safety services. This Article identifies business concerns and market restraints that influence strategic industry programs and operational business decisions, such as developing and marketing new communications technology. Thus, this Article sets forth public policy guidance to address public policy failures and ineffective regulation, such as the business costs of providing public safety benefits.

B. Outlining the Nature and Analytics of Policy-Making Approaches and Policies in a Review of U.S. and EU Emergency Call Number Systems

This Article consists of seven parts that set forth and apply legal, policy and business market analytics to find and examine how and why similarities and differences exist in the influence and impact of economic, social,

technological, political and public policy forces. Specifically, this application uses pertinent underlying interests and business and policy criteria of these EU and U.S. forces to ascertain how economic, industry and other forces might impact establishing, implementing and sustaining U.S. and EU enhanced emergency services policies. Part I introduces these forces, interests, and criteria as the analytics of a comparative review of policy guidance business, regulation and public policy. Part I is the Introduction and raises a question regarding the *global* policy, legal and business implications of similarities and differences in U.S. and EU policy guidance, policies and regulation for enhanced wireless emergency call service systems to locate and assist wireless or cellular subscribers requesting emergency assistance on the *ubiquitous* cellular or wireless phone. The question is a global policy concern for national and regional governments that presently rely on cellular or wireless phones to bring communications to isolated and undeveloped regions. In these areas, the lack of automatic location technology for emergency assistance means that visitors and local citizens may not be able to rely on cellular phones to request emergency assistance in all circumstances.

1. Nature of Business, Regulation and Public Policy in Conducting a Comparative Review

Part II discusses the nature of seminal public and private interests, identifies pertinent regional policy-making forces and introduces the management of policy-making, policies and regulation to establish and implement enhanced wireless emergency services in the EU and U.S. Part III discusses the state of cellular and automatic location information (ALI) technologies and the nature of EU and U.S. policy-making schemes. It also creates and establishes an analytical framework to find and examine the impact of technology, public policy, economics, social and political forces and their most pertinent underlying force-specific interests on U.S. and EU enhanced wireless emergency number call services policy-making and policies. Parts II and III build the analytical framework that identifies forces and elements used to compare and contrast EU and U.S. policy guidance, policies, and regulation set forth in Parts IV and V. Part IV summarizes pertinent EU public policy-making that includes EU decisions, recommendations and committee actions[14] establishing and implementing an E112 or enhanced wireless emergency call service by relying primarily on the use of a single wireless cellular standard and one type of ALI technology. Part V summarizes pertinent U.S. telecommunication and public safety policy-making that includes U.S. legislative acts, agency regulation and their public objectives and purposes for establishing and implementing an E911 or enhanced wireless emergency call system that voluntarily relies on competing wireless standards and ALI technologies.

14. *See infra* Part III.C and accompanying notes.

2. *Reviewing Dissimilarities of Government Means and Public Ends by Using Comparative Analytics for Legislative Substance*

Parts IV and V examine inherent substantive differences or dissimilarities of EU and U.S. policy guidance, policies and regulation by legislatures and agencies establishing and implementing enhanced wireless emergency services systems. Moreover, Part VI compares and contrasts U.S. and EU policy guidance, policies and regulation establishing and implementing E911 and E112, respectively, using the comparative public policy-business market analytical framework.[15] This analytical framework recognizes, finds and then examines the most pertinent policy or environmental influences on legislative and agency policy-making and ascertains how one or more force-specific interests shaped and dominated the direction of U.S. and EU emergency call services policy-making and policies.[16] The application of *this* public policy-business market analytical framework to EU and U.S. public safety policies established under telecommunications policy and regulation leads to two seminal conclusions as source of business and market suggestions and public policy guidance for establishing and implementing enhanced wireless emergency call number systems.

Part VII, the Conclusion, contains suggestions that have national and global policy implications for the need to establish and implement emergency number call systems. The first conclusion is that location-based and wireless business, market competition, technology development, intergovernmental relations, telecommunications and public safety are more likely the most dominant interests, but are also conflicting interests substantially influencing the policy-making shaping the direction of U.S. and EU policies and substance of regulations to establish and implement enhanced wireless emergency call number services systems. The first conclusion encompasses the fact that the telecommunications and location information technologies needed to implement enhanced wireless emergency call systems present business and market concerns that presently exist under both U.S. telecommunication policy to preserve interstate competition and EU telecommunication policy to create inter-European market and competition. In fact, EU and U.S. communication policy-making and policies illustrate an emerging global policy concern between the use of cellular or wireless phones to provide basic rural and urban communications and the need to establish enhanced emergency call number services in developing and underdeveloped countries.

The second and ultimate conclusion is that any similarities and differences in U.S. and EU policies and regulation result primarily from the fact that U.S. and EU public interests and their respective policy forces may be accorded different weights or priorities in U.S. and EU public safety, national security, fiscal and telecommunications policy-making. The second conclusion

15. *See infra* Part III.A and accompanying notes.

16. *See infra* Part VI and accompanying notes.

may result from the fact that EU and U.S. policy-makers who establish E112 and E911 have shown much deference or comity to sovereign states that must manage municipal governments and PSAPs to implement enhanced emergency call services systems and that must console Local Exchange Carriers (LECs) and wireless carriers to develop, deploy and diffuse telecommunications technology to transmit timely, accurate emergency calls by wireless subscribers.

A comparative analytical review of E911 and E112 emergency call systems requires an analysis of business and market situations and policy-making and policy environments of unique or entirely different regions. This analytical review compares and contrasts broad environmental forces and their interests that impact the design, enactment and implementation of emergency call number service policy guidance, policies and regulation. This analytical review compares and contrasts policies and regulation but does not always attribute differences and similarities to public needs and welfare. This analytical review identifies and examines policy or environmental forces and their interests and relies on business, market and policy criteria to examine and explain the impact of a force-specific interest on policy guidance, policies and regulation of a region's emergency call number service.

C. Recognizing the Nature of U.S. and EU Emergency Call Services Systems

This comparative analytical review of U.S. and EU public policy and their business and market impacts necessarily identifies, analyzes and weighs pertinent European and American technological, political, economic, social and public policy forces and then identifies their most dominant or pertinent interests from an examination of EU and U.S. business and market commentaries and studies, legislative hearings and acts and agency reports and regulations. These interests support and justify establishing and implementing policies and regulation to create emergency call services systems. These policies and regulation are telecommunications policies and legislation to govern telecommunication, information management and information technology organizations and their industries, such as wireless carriers and location information providers.

In making policies and regulation, similar or different types of governments, such as confederalisms[17] and federalisms,[18] may pursue entirely

17. JOHN MCCORMICK, UNDERSTANDING THE EUROPEAN UNION: A CONCISE INTRODUCTION 6-7 (2d ed. 2002). Mr. McCormick states, "[c]onfederalism is a loose system of administration in which two or more organizational units keep their separate identities but give specified powers to a central authority for reasons of convenience, mutual security or efficiency." *Id.* In confederalism, the central government makes laws for the states, but exists solely at the discretion of the states. *Id.* at 7.

18. *Id.* at 9. Federalism is a "system . . . in which at least two levels of government – national and local – coexist with governments separate or shared powers, each having clearly defined and independent functions but neither having supreme authority over the other." *Id.*

different public policy and business-market approaches that lead to different government means and objectives to establish and implement legislative policies.[19] The EU fits neither the confederalism nor federalism designation,[20] and even if both the EU and the U.S. are federalisms, they may not necessarily share similar public policies, legislative means and business and market objectives to establish and implement enhanced wireless emergency number call services policies. Both the U.S. and EU can impose regulatory mandates on business organizations, namely wireless carriers[21] and local exchange carriers (LECs),[22] and impose voluntary and a few mandatory obligations for governments, namely states,[23] municipalities and counties, including their public safety answering points (PSAPs).[24] In applying elements of both approaches, this comparative analytical review uses environmental, business and legal analytics to examine and weigh the impact of emergency call number services policies and regulation on the policy guidance and policies and business and markets of telecommunications, information management and information technologies.

The United States of America is a federal system.

19. *See id.* at 12-18; *See* WALTER VAN GERVEN, THE EUROPEAN UNION: A POLITY OF STATES AND PEOPLES 34-35 (2005). Professor van Gerven explains the recognition of an EU policy and its implementation through legislative acts by stating:

> [I]n the European Union sovereign powers that are enjoyed by the Union are exercised by EU institutions with the participation of Member State authorities. That is particularly the case of the Council of Ministers, which is part of the Union's legislative branch, in which national ministers participate, as members of the Council in making and preparing Union law and policies.

VAN GERVEN, *supra*, at 35. Moreover, the EU is a regional integration bringing together countries at different social, economic, and political levels for various reasons. MCCORMICK, *supra* note 17, at 12-13. The EU has achieved some level of economic integration through the development of a single market for trade and monetary system. *Id.* at 13, 167-68. The EU has achieved a level political integration as a weak or lesser confederalism. *Id.* at 13. Political integration exists in EU institutions or central governments sharing some lawmaking, judicial, and enforcement powers with member states. *See id.* at 13, 118-19. Thus the central government has the power to recognize European public policy and address it with legislative acts. *See id.* at 118-19. The obvious difference in U.S. and EU levels of political and economic integration is a determinant of the nature of public safety and other social policies and their relationship with business markets in the development of a single market. *Id.* at 13-14. One example is the creation of cross border competition within Europe among wireless carriers and other telecommunication operators.

20. *See* MCCORMICK, *supra* note 17, at 8-10. The United States is a federation. *Id.* at 9-10. The EU is neither a federation nor confederation and shares qualities of both types of governmental systems. *See id.* at 8-9, 11.

21. *See* 47 U.S.C. § 222 (2006); Decision 91/396/EEC, *supra* note 6.

22. *See* Hatfield, *supra* note 11, at 32 (recognizing the role of local exchange carriers (LECs) as the interface between wireless carriers or operators and public safety answering points (PSAPs)); *see* CGALIES Report, *supra* note 11, at 26 (addressing the need for interface and interoperability between Telecom Operators or LECs and PSAPS).

23. *See* 47 U.S.C. § 615 (2006) (not permitting the FCC to impose obligations or costs); *see infra* Part VI and accompanying notes (contrasting and comparing EU and U.S. policy guidance, policies, and regulation).

24. *See* 47 U.S.C. § 615 (2006).

1. Describing Policy-Making Approaches of Public Needs and Objectives

One policy-making approach is a business-market approach that supports, accommodates and weighs favorably the private interests of business organizations, commercial markets and technology industries while it furthers or advances various public interests, such as public safety.[25] This business-market approach identifies, examines and weighs the impact of the business and market on specific legislative policies, where such business and markets include wireless carriers and location-based providers. These policies and regulation of legislatures and agencies or commissions establish, implement and sustain public programs, such as enhanced wireless emergency call number services. Foremost, the business market approach and its public policy objectives determine whether public programs, such as E911 or E112 systems, are partially or totally dependent on another business or industry and are subject to its policies for implementation and sustainability, such as the development of ALI and telecommunications technologies and their impact on the implementation of E112. Next, the business-market approach determines whether regional policy-makers are supporting the dominant business and markets at the expense of the subservient market for economic and other reasons, such as to bolster both domestic and international competition. Furthermore, the business-market approach determines how business restraints and indifference to market solutions, such as commercialization of ALI technology, in the dominant business and markets, namely the telecommunications industry, affect the less dominant or subservient public policy, namely public safety. Under the business-market approach, a comparative review explains how policy guidance, policies, regulation favorable to business and markets, such as the telecommunications industry, impact establishing and implementing a public safety program, such as E112 and E911.

Another policy-making approach is a public policy approach that includes public objectives that further public interests with little emphasis on finding business solutions and market ideas to preserve an economic force and its force-specific interests, such as the economic system and competition among competitors.[26] Foremost, the public policy approach identifies, examines and weighs social needs, political interests and other force-specific or policy concerns of regional policy-making to establish and implement public programs, such as E112 and E911. Next, the public policy approach determines how policies and laws designed to protect a public interest by establishing and implementing a public program, such as public safety, relate to other public policy and interests, such as telecommunications policy. Furthermore, the public policy approach determines the importance and priority

25. *See infra* Part II. C. 2 and accompanying notes.
26. *See id.*

assigned pertinent social needs, economic wants and other public or private interests in policy-making to establish policies, such as telecommunications legislation. Finally, a comparative review of a public policy-centered approach explains the weight or emphasis government policies and regulation of competing public and private interests place on or give to business or industrial and commercial or market interests in legislative and agencies policy-making to establish and implement E911 and E112.[27] This comparative analytical review examines business-market and public policy approaches to explain the nature and impact of policy forces and their dominant interests on E112 and E911 policy guidance, policies and regulation.

2. *Examining Public Policy and Business and Commercial Markets*

Giving greater weight to public interests in regional or national policy-making usually produces policy choices, namely legislative mandates, to provide for social welfare and political needs, such as emergency services, though economic and technology forces may have other needs and demand other policy choices. As set forth below in Part III.C, a comparative analytical framework of E112 and E911 policy guidance, policies and regulation identifies and examines broad domestic policy forces and dominant force-specific interests[28] to evaluate the impact of these forces on region-specific policies and regulation and business and commercial markets. As demonstrated in Part VI, the analytical framework analyzes and ascertains the likelihood that any one or more policy or environmental forces and their interests, such as politics and its form of government, respectively, causing or exerting a substantial level of influence on establishing or implementing enhanced emergency call services policies and regulation. As set forth below in Part III.C, the comparative analytical framework examines narrow interests among and within economic, political and other forces using business, market and public policy criteria to evaluate the role, nature and influence of these narrow interests, such as industrial competitiveness, commercial markets and public safety, in the design of telecommunications, information management and information technology policies.

This comparative analytical framework considers public and private forces and the most influential interests that could be minimized by giving greater weight or priority to emerging public safety needs created by the deployment and diffusion of new technologies. Weighing particular force-specific interests such as competitiveness in wireless carrier markets, reveals the tension between business interests of the technology industry and public

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27. *See* 47 U.S.C. § 615. The pertinent language of Section 102 of the Act states, "for the sake of our Nation's homeland security and public safety, a universal emergency telephone number (911) . . . should be available . . . ." *Id.*

28. *See infra* Part III.C and accompanying notes.

safety interests of society. To illustrate, the deployment, adoption and diffusion of cellular standards and location information technology do not make E112 or E911 services accessible to all subscribers who purchase and use cellular phones.[29] Legislative and agency policy-makers must consider economic, technology and other interests, such as the protection of individual privacy, the cost of developing technology and detection of national security threats, in the policy-making process of increasing accessibility to emergency number call services. A comparative analytical review of E112 and E911 policy-making and policies needs a comparative analytical framework powerful enough to recognize the influence of policy-making and policy forces and their respective force-specific interests. Moreover, this framework uses narrower business, market and policy or political criteria to examine policy guidance, policies and regulation enacted and implemented to address public policy, business and market concerns raised by less harmonizing state government and wireless carrier needs.

II. POLICY FORCES AND THEIR INTERESTS AND COMPARATIVE ANALYTICS OF EMERGENCY CALL SERVICES POLICIES

The U.S. and EU have established and implemented enhanced wireless emergency call services policies that were made using policy-making to consider and weigh the impact of U.S. and EU politics, economics, social, technology and public policy and their underlying interests in the need for public safety mandates for wireless E112 and E911. This policy-making affects business organizations and product and service markets of the telecommunication industry, which must develop, adopt and diffuse wireless cellular standards (WCS),[30] automatic location information[31] (ALI) and telecommunications technologies.[32] The business of the communications and telecommunication industry includes providing the software and hardware used to locate subscribers and transmit location and other information for enhanced wireless emergency call services. Establishing and implementing the E911 or enhanced wireless emergency call system policy must advance public safety interests, but must also accommodate business development and market interests, further technology development and other technology interests, and meet intergovernmental and other political interests.

29. *See* Squeo, *supra* note 1, at 1.
30. *See* 47 U.S.C. § 615 (2006).
31. *See infra* Part III.B and accompanying notes.
32. *See infra* Part III.C and accompanying notes.

A. Governmental Nature of Policy Forces and Their Interests Influencing EU and U.S. Policy Making and Policies

The nature of economic, social, political, technological and public policy environments consists of American and European forces influencing U.S. and EU , respectively, policy-making and policies and business development and markets. Examining these forces, interests and their impact on private business and markets and government policies and regulation involves legislative and agency policy-making to further public safety and welfare needs, recognize the business and market impact on the telecommunication industry and affect state lawmaking to implement municipal or county emergency call number services. As stated above, our comparative analytical framework is a public policy-business market approach.[33] However, this approach shows that EU and U.S. policies and national and state policy-making forces and their underlying interests may be given different weights and priorities in legislative or agency policy-making under unique territorial circumstances, such as culture, history, economic status and others. Under this approach, any reference to state means a U.S. state or EU member state that has a mandatory or voluntary obligation to implement emergency call number services under U.S. or EU communication policies.

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33. *See infra* Part III.A and accompanying notes. The analytics include an analytical framework that is applied to ascertain the most pertinent policy-making and policy forces and their business market interests impacting E911 and E112 policy-making. The analytics include the consideration and weighing of policy choices made by legislative, agency, and quasi public policy-makers in choosing among competing and conflicting policy forces and their respective interests. *See infra* Parts IV, V and accompanying notes. The analytical framework analyzes public policy, legislative law, policy and agency regulations of public safety and communication fields, and the impact of public safety and telecommunication policy guidance, policies, and regulation on the business and market interests of the telecommunications industry. *See infra* Part VI and accompanying notes.

These analytics are a qualitative analytical approach to examining the more significant impact of economic, social, technological, political, and public policy forces and their most pertinent underlying interests on U.S. and EU public policy-making and policy to establish and implement enhanced wireless emergency services. Of course, an empirical or quantitative analysis would more readily identify these forces and their respective interests and their most likely impact on EU and U.S. public safety and communication policy-making and policies for emergency call services. But that is no guarantee that policy-makers would make other policy choices.

We see the need for the quantitative or empirical analysis of the impact and use of new and emerging telecommunication technologies on the relationship between public policy and business and market interests. *See supra* note VI and accompany text (recognizing the impact of new telecommunication technology on the erosion of privacy). In the meantime, our qualitative approach provides usable indicators of the most likely impact of political, social, economic, technological, and public policy forces and their underlying interests on establishing and implementing U.S. and EU emergency call services policies and laws.

1. State Forces and Their Interests in the Design of Regional or Federal Policy-Making and Policies

All policy-making and policy forces and their interests at work in the U.S. and the EU may not be exclusively American or European, such as national security, or even exert a total EU or U.S. territorial need, such as monetary policy. The U.S. and EU consist of sovereign governments that have different, if not unique, cultures, demographics, economies and other policy forces. These forces are state, regional and municipal, in many instances, in their policy-making impact or influence on public and business interests and commercial markets. However, state forces can impact U.S. and EU public policy-making depending on the nature and importance of an underlying interest of the state force, such as ethnic identity underlying cultural force. State forces may include culture, politics, privacy, economy and other matters of limited national influence and often overlapped by U.S. and EU environmental or policy forces. In fact, a state force and its underlying interests may eventually point out weakness in EU and U.S. policy-making and their relationship with technology, economics, social, politics and public policy.[34]

2. Impact of Intergovernmental Politics and State Needs and Interests on Regional Policy-Making

Government documents, such as treaties and constitutions, establish intergovernmental relations and how the existence of economic, social and other policy forces and their interests will impact regional policy-making and its policies and regulations.[35] Thus the political force of states in the U.S. and EU may have more than a marginal impact on U.S. and EU policy-making;[36] however, the impact of state financial interests, such as a lack or mismanagement of public funds, may have a limited or marginal, if any, influence on EU and U.S. regional wireless enhanced emergency call services or public safety interests.[37] The U.S. and EU do not avoid legislative and agency policy-making simply because one or more states cannot comply for fiscal policy reasons or choose to delay compliance for political, fiscal or other reasons.[38] A state political or other force may signal a broader underlying problem in U.S. and EU policies or economies, which means we cannot always

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34. *See infra* Part V.C and accompanying notes (discussing U.S. legislation that attempts to encourage state to implement wireless E911).

35. *See infra* Part III.A.1 and accompanying notes.

36. *See id.*

37. *See id.* One must recognize that an EU recommendation is not a ringing endorsement of federal or regional implementation. *See infra* Part IV.A and accompanying notes. Likewise, the U.S. carrot approach to induce state implementation of E911 is not strident. *See infra* Part V.C.2 and accompanying notes.

38. *See infra* Part V.B and accompanying notes (finding that Congress chose not to mandate any state fiscal obligations).

ignore the status or condition of similar state and EU or U.S. policy forces. In state policy-making, unemployment, tax, privacy, fiscal or another state force may influence state policy choices and priorities of state legislative or policy-making bodies assign to implementing a non-mandatory EU and U.S. public policy or public interest, such as public safety.[39] Addressing how U.S. and EU enhanced wireless emergency call services policies could be greatly influenced by a state force, such as culture, fiscal or economy, is not within the scope of this paper, but a state's delay in implementing U.S. and EU enhanced emergency services policies may deny emergency assistance to wireless subscribers.[40]

B. Recognizing Conflict between Public Safety Needs and Business and Market Interests of Telecommunications in U.S. and EU Policy-Making

U.S. and EU policy-making approaches and their business impact on the telecommunication industry in establishing and implementing public safety needs involve primarily four policy-making and business concerns and their interrelationships. These concerns also involve the interrelationships among public interests and business market interests that underlie policy forces influencing or impacting government policy-making.

In this comparative analysis, the four seminal policy-making and business and market concerns are: (1) government policy-making to regulate the telecommunication industry that develops competing and incompatible WCS and ALI technologies; (2) government regulation of deployment, adoption and diffusion of ALI and WCS technologies to protect public safety; (3) the business impact of public or government policy-making, namely regulation, on the telecommunications or communications industry that is mandated to protect public safety and welfare; and (4) the business advantage of commercializing ALI technologies to support the furtherance of public obligations and corporate market objectives.[41] In the interrelationship among these concerns, business interests and public needs are not inherently antagonistic in public policy-making. Legislative and agency policy-makers can establish and implement public safety and directly related telecommunication policies to provide enhanced wireless emergency call number services. At the same time, these policy-makers must minimize unmanageable or unreasonable financial, product, service and other market disadvantages that could be faced by the telecommunication industry in developing, adopting and diffusing cellular standards, location information and other technologies under public mandates.

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39. *See infra* Part V.C and accompanying notes (explaining that Congress offered unfunded financial incentives to state governments that had delayed implementation of E911).

40. *See* Anne Marie Squeo, *Cellphone Hangup: When You Dial 911, Can Help Find You?*, THE WALL ST. J., May 12, 2005, at A1.

41. *See infra* Part III and accompanying notes (explaining the nature and structure of government, the nature and kinds of technologies and policy forces in a comparative analysis of two federated groups of states).

1. Finding a Business Market Solution in Regulating an Industry to Provide for Public Safety Needs

Mandating or obligating the telecommunication industry to develop, adopt and diffuse technologies solely to provide a public safety need furthers public policy that is often a demand of society or the public. Obviously, these EU or U.S. mandates are not corporate business objectives that will require market and financial decisions to increase profit or market share. Wireless carriers and LECs comply with enhanced wireless 911 emergency services obligations or mandates to further emergency call services policies at their own expense. However, if they can commercialize ALI and other technologies, they can offset corporate costs of development, adoption and diffusion of ALI and other technologies, especially the next generation of E112 and E911 technologies, such as video cellular phone, telematics and other devices. This market solution is not new. For example, the commercialization of caller identification (Caller ID) services by wireline carriers is too obvious to ignore. The commercialization of Caller ID by wireline carriers was a business or market interest that now has commercial value. Caller ID provides timely and accurate subscriber number identification in enhanced wireless and wireline emergency call service systems and fulfills wireless and wireline carriers' obligation to transmit the caller or subscriber's telephone number to the PSAPs.[42]

This comparative review explores and reveals how U.S. and EU policy-making and policies deal with conflicting business, market and public interests that include commercializing location information technology and creating a workable interface among PSAPs, LECs and wireless carriers that may use different technology standards.

2. Regulating the Telecommunications Policy to further Public Safety Policies and Needs

U.S. and EU enhanced wireless emergency call number services policy-making addresses public safety needs or concerns but depends intractably on the design of telecommunication and information technology policies.[43] These needs are dependent on the deployment, adoption and diffusion of wireless standard, ALI and other technologies. EU and U.S. public safety needs want timely and accurate location information to assist wireless subscribers who must depend on public safety officers to find and assist them by providing emergency assistance. Public safety needs touch or overlap national security policy that relies on emergency services and assistance to deter and respond to acts of

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42. *See* 47 C.F.R. § 20.18(d) (2006).

43. *See id.* (setting wireless technology and public safety policy for E911); *see* Directive 2002/22/EC, *supra* note 12 (setting EU telecommunication policies and establishing the E112).

terrorism.[44] Moreover, national security and public safety are dependent on a ubiquitous communication system and directly implicate telecommunication policy.

Public safety interests are not the only public policy that EU and U.S. policy-makers must address and implement to provide public safety needs, namely emergency services. This comparative review examines how the EU and U.S. policy-makers amend and implement telecommunication policies influencing the operations of the communication industry, including both wireline and wireless carriers.[45] EU and U.S. policy-makers directly influence

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44. *See* 47 U.S.C. § 615. Specifically, Section 102 states: "[t]he Congress finds that—(1) for the sake of our Nation's homeland security and public safety, a universal emergency telephone number (911) that is enhanced with the most modern and state-of-the-art telecommunications capabilities possible should be available to all citizens in all regions of the Nation." *Id.* Likewise, Recommendation 2003/558/EC recognizes the impact of telecommunication policies on public safety policy in establishing and implementing E112. Recommendation 2003/558/EC, *supra* note 12. Recommendation 2003/558/EC states that: "[h]aving regard to the Directive 2002/21/EC on a common regulatory framework for electronic communications and services (the 'Framework Directive') (1), and in particular Article 19 thereof," Recommendation 2003/558/EC, *supra* note 12.

45. *See* Directive 2002/22/EC, *supra* note 12. The EU Commission, Council and Parliament in Directive 2002/22/EC illustrates the nature of EU telecommunication policy. *Id.* Directive 2002/22/EC states that:

> Whereas:
>
> (1) The liberalisation of the telecommunications sector and increasing competition and choice for communications services go hand in hand with parallel action to create a harmonised regulatory framework which secures the delivery of universal service. The concept of universal service should evolve to reflect advances in technology, market developments and changes in user demand. The regulatory framework established for the full liberalisation of the telecommunications market in 1998 in the Community defined the minimum scope of universal service obligations and established rules for its costing and financing.

Id. The EU is reviewing its telecommunication policies and regulation for the creation of a single market. *See* Communication on Regulatory Framework of Telecommunications, *supra* note 2. The European Commission seeks to review the telecommunication regulatory frameworks that have set forth the telecommunication policies of the EU single market. *See id.* Summary, 3n., citing Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC (OJ L 108, 24.4.2002, p. 7) and 2002/58/EC (OJ L 201, 31.7.2002, p. 37). The Communication on Regulatory Framework of Telecommunications addresses the need to revise or change the telecommunications and information technology policies of the EU. Communication on Regulatory Framework of Telecommunications, *supra* note 2. *Id.* at 3. The European Commission states that:

> Creating a single European information space with an open and competitive internal market is one of the key challenges for Europe [footnote omitted], within the broader strategy for growth and jobs. Electronic communications underpins the whole of the economy, and at EU level is supported by a regulatory framework that entered into force in 2003. The aims of the framework are to promote competition, consolidate the internal market for electronic communications and benefit consumers and users. It is designed to take account of convergence, in that it deals with markets and not technologies. Markets are defined according to competition law principles, based on general demand and

the development, adoption and diffusion of cellular standards, automatic location and other technologies necessary to implement public safety policies. Enhanced emergency call number regulatory schemes demand wireless carriers, LECs and PSAPs, to provide both the telephone number and location of wireless subscribers requesting emergency services or assistance. This comparative analysis examines how EU and U.S. policy-makers balance public safety, communication, national security and other policies in establishing and implementing enhance wireless emergency call services by creating demands and imposing mandates on LECs, PSAPs and wireless carriers. Eventually, private and public entities must conform to or comply with state-imposed schedules to meet central government, both U.S. and EU, public safety obligations.

C. Establishing E112 and E911 Policies Under Conflicting Public Safety and Telecommunications Interests

Reviewing EU and U.S. policy guidance, policies and regulation to find similarities and differences in establishing and implementing enhanced wireless emergency number call services systems requires an analysis of the weight and influence of social, economic, political, technology and public policy forces and their underlying interests, such as public safety, privacy and technology development. Specifically, ascertaining the weight and influence includes describing the nature of these forces and their interests, examining the roles and impact of dominant interests, and weighing the likely impact of an interest on

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> supply side considerations, and are independent of changes in the underlying technology. The framework provides for the progressive removal of regulation as and when competition becomes effective.

Id. ¶1, Background, 3.

The telecommunications policy of the United States has undergone a recent change to reflect global and domestic changes in the telecommunication and information technologies and their respective industries. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), (amending and repealing parts in 47 U.S.C. §§ 151 et seq.) (2006). The Telecommunications Act was a complete overhaul of the Communications Act of 1934, Pub. L. No. 73-416, § 1 48 Stat. 1064 (1934) (codified at 47 U.S.C. § 151 et seq.) (2006). Congress states that the purpose of the Telecommunication Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 47 U.S.C. §157. Moreover, Section 1 sets forth the purposes and policies of the Communications Act by stating:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority. . . .

47 U.S.C. § 251 (2006).

public safety and technology development and business and market growth. This analysis or review of legislative acts, administrative regulations and policy guidance and business development and commercial markets requires business, legal and policy analytics.

1. Policy Making and Setting Objectives for the Public Interests and National Competition

Public policy approaches and objective setting recognize public safety needs and other interests and decide whether to establish and implement legislative policies and acts and create agency regulations to further the interests underlying these policies and acts.[46] Legislative or policy objectives recognize a public interest and its importance, nature and state.[47] Once legislative findings show sufficient harm or a substantial enough threat to an important public interest, such as public safety or access to emergency care, the legislature establishes objectives and enacts legislation to protect this interest.[48] Public policy objectives justify the need to protect one or more public interests, such as safety, privacy or domestic competition, by regulating behavior or conduct of wireless carriers and location-based services providers.[49] These objectives justify legislation and agency regulations[50] that resolve policy conflicts existing among competing public interests, such as protecting wireless subscribers and preserving competition among wireless carriers, by giving greater weight to or protecting one or more public interests in a regulatory scheme.[51]

Judicial and legislative conflict between public needs arises when wireless carriers do not want to pass on to subscribers the administrative, research and implementation costs of developing, deploying and diffusing newer technologies needed solely to implement emergency wireless call

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46. *See* Directive 2002/22/EC, *supra* note 12 (recognizing the nature of the EU telecommunication and public safety services policy environments for E112 policy-making); *See* 47 U.S.C. § 251 (2006)(recognizing the nature of US telecommunication and public safety policy environments for establishing E911 policy-making).

47. *See* Directive 2002/22/EC, *supra* note 12 (setting forth purposes to provide universal service and create a harmonized regulatory environment in the EU); *See* 47 U.S.C. § 251 (setting forth purposes to provide for public safety and national defense and establish universal services in the US).

48. *See* 47 U.S.C. § 615 (2006)(setting forth US national needs for the development of wireless emergency call services); *see infra* Parts V and accompanying notes (discussing US or federal policies and regulation establishing wireless emergency call services).

49. *See* 47 U.S.C. § 942 (2006) notes (listing the purposes of Ensuring Needed Help Arrives Near Callers Employing [ENHANCE] 911 Act of 2004, Pub. L. No. 108-494, Title I, 118 Stat. 3986 (codified at scattered parts of 47 U.S.C.)).

50. *See* 47 U.S.C. § 942 (2006) notes; *see infra* Part IV.B and accompanying notes (examining and explaining the Enhanced 911 Act of 2004).

51. *See In re Revision of the Comm'n's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Sys.*, 12 FCC Rcd 22665,¶5 &123 (1997) (hereinafter In re Revision, 12 FCC Rcd) (establishing emergency call services but promoting technology neutral standards in regulatory scheme to avoid interference with competition).

services.[52] In managing competing public interests, public policy-making must address policy conflicts that impact development, deployment and diffusion of telecommunications technologies and effect managerial, market and financial stability of wireless carriers that are quintessential in establishing and implementing enhanced wireless emergency call services or other public interests.[53] Legislative acts and agency regulations are either supportive or restrictive of business market interests that include the entry, growth, profitability and sustainability of an industry, market or technology, such as location information or acquisition technologies. Therefore, the public policy approach includes justifying and weighing competing and conflicting public interests and then enacting voluntary or mandatory public safety and telecommunications legislation that obligates business organizations and imposes restraints on market activities.[54]

2. *Business and Markets and Setting Objectives for Business and Technology Development*

The business-market approach and objective setting include the impact of public safety interests and regulation on the commerce or business and markets of wireless carriers and telecommunications industry.[55] Legislative acts and agency regulations impose public obligations on LECs, wireless carriers and operators, as well as automatic location and other services. Yet, LECs, wireless carriers and PSAPs rely on telecommunications, information and information management technologies of the telecommunications industries.

If legislative and regulatory policy-makers weigh favorably how new obligations impact American business and market needs, the imposition of public safety, namely E911 or E112, obligations may leave wireless carriers in the telecommunications industry more discretion to manage the development, deployment and diffusion of wireless, location information and other technology.[56] These obligations can affect how wireless carriers, location-based services or telecommunication businesses: (1) develop new information and telecommunications technologies; (2) meet competition in domestic product and service markets; (3) meet the competition of global inventors and producers of telecommunications products and services; and (4) adapt to the market, financial and other regulatory burdens of implementing enhanced wireless

52. *See* U.S. Cellular Corp. v. FCC, 254 F.3d 78, 86 (D.C. Cir. 2001) (rejecting to force the FCC to impose a cost recovery mechanism).

53. *See infra* Parts IV, V, and accompanying notes (discussing EU and U.S. public policy-making for enhanced emergency call services and its business impact).

54. *See id.*

55. *See infra* Part III.B and accompanying notes (discussing cellular standards and ALI technologies used by wireless carriers that must connect to the emergency call services systems).

56. *See infra* Part IV and accompanying notes (discussing EU wireless enhanced emergency call services policies that permit wireless carrier to use existing technologies whiling developing and commercializing new technologies).

emergency call services systems.[57] Normally, public safety and telecommunications policies and regulation govern business and markets to effect the development, deployment and diffusion of telecommunications and information technologies.[58]

The impact of regulation on wireless cellular, location and other telecommunications services implicates business and market interests that are business-market concerns. These concerns arise when business organizations and the telecommunications industry must commercialize location and other technologies already subject to stringent public obligations, compete globally with competitors subject to fewer obligations in the global market, execute corporate business strategies subject to new public needs and regulation and adapt to the financial impact of new policies and regulation on market and business performances to provide public benefits.[59] Business and market policy concerns show limits or restraints on business performance and markets caused by mandates that can (1) create entry hurdles for new domestic competitors that must meet the obligations of new regulation, (2) reduce the ability or survival of domestic competitors competing in a global market, (3) curtail the development and eventual growth of services and products by imposing heavy public costs and benefits and (4) dampen business growth and market performance that delay the deployment and diffusion of new wireless and other technologies. These restraints and limitations mean that business and market interests underlying both E112 and E911 can antagonize and conflict with public interests under U.S. and EU policy-making.

The comparative analysis used to contrast and compare U.S. and EU enhanced wireless emergency services systems rely on a business market-public policy analytical framework.[60] In this framework, this combination of business, legal and policy analytics find, examine and explain U.S. and EU policy-making forces and examine or evaluate underlying force-specific public interests and business and market concerns. In fact, one or more public interests or business interests exert, jointly or singly, a dominant influence on the design and implementation of U.S. and EU policy guidance, policy and regulation to establish and implement enhanced wireless emergency call number services systems, namely E112 and E911.

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57. *See infra* Parts IV, V, and accompanying notes (discussing economic objectives of EU and U.S. policy-making for wireless enhanced emergency call services policies).

58. *See infra* Parts IV, V, and accompanying notes (discussing the EU and U.S. enhance wireless emergency number call system mandates on wireless carriers and operators).

59. *See id.*

60. *See supra* Part I.C. and accompanying notes (combining business, market, and public policy analytics to create a business market-public policy approach to examine and explain dissimilar forms of EU and U.S. policy guidance, policies, and regulation).

III. NATURE OF POLICY-MAKING, TECHNOLOGIES AND ANALYTICS OF REVIEWING U.S. AND EU EMERGENCY CALL NUMBER SYSTEMS

This comparative analysis focuses on the development of public policy that culminates in mandatory or voluntary obligations in enhanced wireless emergency call number services systems. The comparative analysis must consider the nature of U.S. and EU government policy-making and the U.S. and EU state of telecommunication technologies. The comparative analysis relies on an analytical framework to recognize, find and examine economic, social, political, technological and public policy forces and their underlying interests of the U.S. and EU. Of these policy forces, technology and politics may play the more dominant roles. Specifically, the nature of EU and U.S. political or policy-making structures determines or greatly affects the choice of policies, regulation and state guidance establishing and implementing both mandates and voluntary obligations for emergency call services. In addition, the state of U.S. and EU telecommunications industries or technologies greatly determines the availability of cellular and ALI technologies to wireless subscribers and PSAPs and also affects the accessibility of PSAPs and LECs to wireless carriers' location information. The nature of policy-making and state of technologies play major roles in establishing and implementing public safety, telecommunications, information technology and other policies.

A. *The Nature of EU and U.S. Public Policy-Making and Law-Making*

The EU and the U.S. use different political systems to establish and implement enhanced wireless emergency call number services systems under state emergency call services policies, incompatible cellular standards and different location technologies. In these political or governmental systems, the EU and U.S. central governments share powers with their respective states,[61]

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61. *See* U.S. CONST. amend. X. The Tenth of Amendment of the United States Constitution states that all powers not delegated to the Federal government are reserved by people or states. *Id.*

The EU Constitution has not been approved by a majority of member states. Economist, *Survey: Constitutional Conundrum*, June 17, 2007, 9 (stating that voters in France and the Netherlands may have temporarily stopped any efforts of creating an EU constitution). The EU was created and presently operates under treaties. *See* Treaty Establishing the European Community (Nice Consolidated Version), Official Journal C 325, 24/12/2002 P. 0033 – 0184 or Official Journal C 340 , 10/11/199 Consolidated version (hereinafter Treaty Establishing EU). The Treaty Establishing the EU delegates powers to EU institutions, namely the European Commission, Parliament, and Council. *Id.*

EU members tried to amend the Treaty Establishing the EU by adopting and ratifying the EU Treaty of Lisbon in December 2007. *See* Treaty on the Functioning of the European Union, Amending the Treaty on European Union and The Treaty Establishing the European Community, OFFICIAL JOURNAL OF THE EUROPEAN UNION, 2007/C306/010 (December 12, 2007)(hereafter Treaty on the Functioning of the EU). On June 12, 2008 or thereabout, 18 of the 27 EU members had ratified the Treaty on the Functioning of the EU when Irish voters

and thus do not always have authority to issue mandates on all policy-making matters and instead must often issue policy guidance aimed at encouraging states to establish and implement policies.

1. EU Policy Guidance and Substantive Policy and Regulation

The nature and types of substantive law and policy guidance enacted by the European Union Commission, Parliament and Council[62] reveal the nature and use of EU policy-making to establish and implement public policy by regulation, policy and policy guidance in member states.[63] EU legislative actions include three kinds of law and one type of policy guidance, and thus EU lawmaking has varying degrees of coverage and enforceability in establishing and implementing EU legislative policies.[64] First, EU regulations are mandates with the force of law. are binding on all member states.[65] No transformation of the EU regulation into national law is necessary as a prerequisite for its applicability. By contrast, the second form of EU legislative action, the EU directive, requires member states to engage in legislative actions to implement

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voted not to ratify this treaty. *World News: European Union Softens Stance on Ireland Over Treaty Rejection; Conciliatory Sarkozy Sees No Need For Two-Tier Bloc*, WALL ST. J., Jun. 17, 2008. pg. A13

62. *See, e.g.*, EUROPEAN UNION COMMISSION DELEGATION TO THE UNITED STATES, THE EUROPEAN UNION: A GUIDE FOR ALL AMERICANS 6-9, http://www.eurunion.org/infores/euguide/euguide2008.pdf, (last visited on Apr. 15, 2008)(hereinafter EU Guide). "Legislation is drafted by the Commission and requires approval by the Council and, in most cases, the Parliament. The Commission considers legislation only when it believes an EU-level remedy is necessary for a problem that cannot be solved by national or local governments." *Id.* at 9. The EU Commission drafts laws or regulations, which is one form of EU legislation. *Id.* The EU Parliament and Council must approve these laws or regulations, which that are legislative bodies of the EU Community. *Id.* They enact the laws, decisions, and directives and can provide policy guidance for member states by recommendations. *Id.*

63. *See* Treaty Establishing EU, *supra* note 61, at Part V, Title I, Section I, Art. 249, c. 2. Article 249 of the Treaty Establishing EU states that "[i]n order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions." *Id.* Although the Treaty on the Functioning of the E U has not been ratified by all EU members, it would have amended pertinent sections or parts of Art. 249. Treaty on the Functioning of the EU, *supra* note 61, at 2007/C306/113. One amendment states that :

> 235) Article 249 shall be amended as follows:
>
> (a) the first paragraph shall be replaced by the following:
>
> 'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.';
>
> . . .

Treaty on the Functioning of the EU, *supra* note 61, at 2007/C306/113,

64. *See* Treaty Establishing EU, *supra* note 61, at Art 249; *see also* EU Guide, *supra* note 61; *and see* VAN GERVEN, *supra* note 19, at 12-18.

65. Treaty Establishing EU, *supra* note 61, at Art 249.

its policies.[66] EU directives set forth particular EU policies or public objectives that must be transposed into national law to become effective. Member states are obligated to take the necessary legislative actions to ensure that national law is in compliance with the mandates of the directive by the deadline specified in the directive.[67] Within the framework set forth in the directive, member states are, however, at liberty to exercise discretion and own judgment in determining how to implement the directive into national law. EU directives are often the approach of choice to harmonize conflicting national laws. EU regulations, by contrast, lead to a convergence of national laws towards one pan-European legal standard.

Third, EU decisions are particular mandates with the force of law addressed to member states or organizations and individuals.[68] Thus, like

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66. *Id.*

67. *Id.* If a member states fail to implement a directive into national law by the specified date, the European Commission will initiate legal proceedings against the member state before the European Court of Justice generally resulting in fines being imposed on the member state. *See* VAN GERVEN, *supra* note 19, at 27 & n.79 ("On the Community courts, and various procedures that can be initiated before them, see Articles 22-45 EC [Treaty] .... VAN GERVEN, *supra* note 19, at 27 n.79). In addition, the directive is frequently treated as having direct applicability after the transposition date has passed; i.e., citizens can claim rights conferred upon them by the directive even if their home state has failed to adopt it. In this respect, EU directives upon passage of the implementation deadline often become similar to EU regulations. *See also* VAN GERVEN, *supra* note 19, at 27-28 (discussing the powers of the European Court of Justice to resolve disputes between EU institutions and member states and EU citizens and national states). Details of the doctrine of direct applicability of EU directives are complex and beyond the scope of the brief summary that can be provided in this Article.

68. Treaty Establishing EU, *supra* note 61,, at Art 249; *see* Treaty Establishing EU, *supra* note 61, art. 256. Article 256 of the Treaty Establishing EU states that:

> Decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States, shall be enforceable. Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice.

Treaty Establishing EU, *supra* note 61, art. 256. The Treaty of the Functioning of the EU would have amended pertinent a part of Article 249 of the Treating Establishing EU., Treaty of the Functioning of the EU, *supra* note 61, at 2007/C360/113. The amendment states that:

> 235) Article 249 shall be amended as follows:
>
> (b) the fourth paragraph shall be replaced by the following:
>
> 'A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.'.
>
> ...

Treaty of the Functioning of the EU, *supra* note 61, at 2007/C360/113.

regulations, EU decisions are binding and do not require member states to engage in legislative actions. However, unlike regulations and directives, EU decisions lack general applicability and are only binding upon those to whom they are addressed. Moreover, the EU Parliament and Council can provide policy guidance[69] to member states by issuing EU recommendations and opinions. EU recommendations and opinions are not binding on member states but set forth policy objectives that member states should consider in developing national policies, objectives and priorities.[70] As recommendations and opinions reflect the EU's position on the subject, recommendations and opinions often serve as important indicators for the EU's future course of action. In concluding, the EU Commission and Parliament and Council impose mandates, set forth voluntary obligations and provide policy guidance to member states.[71] Part IV reviews the nature and force of major EU legislative regulation, directives, decisions and policy guidance to establish and implement EU policy and law for enhanced wireless emergency call services.

2. *U.S. Policy Guidance and Substantive Policy and Regulation*

The nature and types of U.S. legislative laws and policy guidance enacted by Congress and promulgated by federal agencies[72] reveal the nature and use of U.S. policy-making to establish and implement public safety and telecommunication policies.[73] The U.S. government is federalist, dividing power between states and federal or central government[74] and dividing the federal powers among branches of the central government.[75] U.S. federalism permits each state to develop a public policy that could be substantively different from federal policies and implemented at an entirely different pace.[76] In the Constitution, Congress is the federal legislature and enacts legislation

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69. *Id.* State policy guidance is provided by the legislative body of the EU and U.S. central governments. However, legislative or policy guidance is not binding or forceful and, thus, cannot be enforced by an executive agency or body. Policy guidance identifies a particular U.S. or EU policy, such as enhanced wireless emergency call services. This guidance often sets forth public needs, objectives, and benefits of a particular EU or U.S. state. *See* 47 U.S.C. § 615 (2006); Recommendation 2003/558/EC, *supra* note 12. However, policy guidance purposely encourages states to establish and implement a policy program. *See* 47 U.S.C. § 615 (2006); Recommendation 2003/558/EC, *supra* note 12. The EU and the United States pass policy guidance to encourage states to implement a central government policy when the EU or U.S. legislative body does not possess constitutional or governing authority to impose mandates on the states.

70. Treaty Establishing EU, *supra* note 61, art. 256.

71. *Id.*

72. *See* U.S. CONST. art. I (enumerating the powers Congress can exercise to make law and policy).

73. *See infra* Part IV and accompanying notes.

74. *See* U.S. CONST. amend. X.

75. *See* U.S. CONST. arts. I, II, & III (enumerating that the people of Congress to make law and public policy).

76. Treaty Establishing EU, *supra* note 61, at Art 249; U.S. CONST. amend. X.

establishing federal policies[77] and implementing federal policy by statutes, such as the Communications Act of 1934.[78] Congress uses specific legislative powers, such as the Commerce Clause,[79] to implement federal policies, such as telecommunication policy.[80] Congress also has standing legislative committees that conduct investigative hearings on public policy concerns and government matters within their authority, including telecommunications.[81] These committees prepare and issue hearing reports that often consist of findings, recommendations and proposals on legislations.[82] Committees often refer bills, proposed legislation, to the House of Representatives or Senate for floor debate and voting.[83] Legislative acts or statutes establish federal policy and impose obligations or mandates on corporations [84] and state governments when

77. *See* U.S. CONST. art. I.

78. *47* U.S.C. § 615 *et seq.* (2005).

79. U.S. CONST. art. VIII, cl. 1.

80. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064, 1064.

81. *See, e.g., The EU Constitution and U.S. and U.S.–EU Relations: The Recent Referenda in France and The Netherlands and the U.S.-E.U Summit: Hearing Before the Subcomm. on Europe and Emerging Threats of the Comm. on International Relations*, 100th Cong., 1st Sess., 1, (June 22, 2005)(hereinafter U.S.-E.U. Relations); *U.S.-E.U. Regulatory Cooperation on Emerging Technologies: Hearing before the Subcomm. on European Affairs of the Comm. on Foreign Relations*, 100th Cong., 1st Sess., 1, (May 1, 2005)(hereinafter U.S.-E.U Regulatory Cooperation).

82. *See* U.S.-E.U. Relations, *supra* note 81, at 2. A congressional hearing was conducted to assess the impact of the rejection of the EU Constitution by French and Dutch voters on US reliance on EU support of counterterrorism and peace initiatives. The Honorable Elton Gallegly, Representative from California and Chairman, Subcommittee on Europe and Emerging Threats, describes events leading up to the hearing. *Id.* Representative Gallegly states that:

> At the U.S.–EU Summit on Monday, European leaders sought to reassure the President that the recent constitutional turmoil would not stop the EU from playing a strong role on important issues such as Iraq, Iran, the Middle East peace process and counterterrorism.
>
> Considering all these issues, and all that has happened in the past month, the Subcommittee has invited our two distinguished witnesses, Ambassador Conzemius and Ambassador Bruton, to discuss these developments and to perhaps shed some light on what we expect the future may hold.
>
> . . .

Id.

83. See H.R. 3403, 110th Cong., 1st Sess. (2007), H.R. 3403 was introduced by Mr. Gordon of Tennessee and referred to the Committee on Energy and Commerce. *Id.* The objectives of H.R. 3403 are "to promote and enhance public safety by facilitating the rapid deployment of IP-enabled 911 and E–911 services, encouraging the nation's transition to a national IP enabled emergency network and improve 911 and E–911 access to those with disabilities." *Id.* This proposed legislation would be referred to as the "911 Modernization and Public Safety Act of 2007" *Id.*

84. 47 U.S.C. §§ 151 et seq. (2005). Congress enacted the Federal Communications Act to govern the telecommunication industry. *Id.*

constitutional authority permits Congress to impose obligations on the states.[85] Congress may choose to preempt state law in the same field as federal law, such as telecommunications.[86]

If Congress cannot or chooses not to impose mandates on state governments, then federal legislative acts or statutes merely encourage U.S. states to comply with federal policy and thus may be no more than federal policy guidance.[87] Moreover, U.S. legislative acts or statutes also create U.S. administrative agencies, such as the Federal Communications Commission[88] (FCC), that implement U.S. telecommunication and communications policies by conducting investigations, conducting hearings and making regulations.[89] Part IV reviews the nature and force of major U.S. legislative acts and administrative regulations establishing and implementing U.S. policy and law regulating enhanced wireless emergency call services and telecommunications.

B. Nature of Wireless Cellular Standards and Automatic Location Technologies

In the U.S. and EU, tens of millions of wireless subscribers make millions of wireless emergency calls.[90] Wireless carriers deploy different wireless cellular standards so that wireless subscribers do not use the same wireless cellular technology to call PSAPs that will need different equipment or technologies to receive emergency calls transmitted to it by LECs. PSAPs and LECs are public and private entities, respectively, in the enhanced wireless emergency services system. The PSAPs are public agencies operated by law enforcement or emergency personnel and contain communication and location equipment necessary to receive wireless emergency calls.[91] PSAPs provide

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85. *See* U.S. CONST. amend XI.

86. 47 U.S.C. § 414 (2006). The Federal Communications Act provides "except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." *See* 47 U.S.C. § 414

87. *See* 47 U.S.C. § 615 (2006).

88. 47 U.S.C. § 151 (2006). The Federal Communications Act creates the Federal Communications Commission (FCC). *Id.* The FCC shall "make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151 (1994).

89. 47 U.S.C. § 303 (1997). The FCC is also invested with rulemaking and other functions to implement federal telecommunications policies. *See* 47 U.S.C. § 303 (1997). The FCC has the authority to regulate mobile services. 47 U.S.C. § 332(a) (2002).

90. *Id.* In the United States, roughly 68 million Americans subscribed to a wireless telephone service in 1999. *Id.* at 57 (citing 145 Cong. Rec. H728, 732 (daily ed. Feb. 24, 1999) (statement of Rep. Green)). These subscribers placed 43 million wireless 911 calls that year — double the amount of similar calls made in 1996 — and in 2001. Moreover, the experts predict the total number of cellular calls placed in the United States will exceed all wireline calls. *Id.*

91. *Id.* "PSAPs are inundated with more than eighty calls per minute, and fueled by the explosion in the number of cellular subscribers, an exponentially increasing number of these calls are placed from wireless phones." *Id.* at 57 (citing 145 Cong. Rec. H728, 733 (daily ed. Feb. 24, 1999) (statement of Rep. Green; Comm'r Gloria Tristani, Address at the Association of

emergency assistance by dispatching and directing emergency services to the locations of the callers.[92] PSAPs need location information that may not be automatically provided by wireless carriers. Finally, PSAPs receive calls from the wireless subscribers whose calls are transmitted through the LECs. LECs are local wireline carriers that own switching and signaling equipment that recognizes and relays the emergency calls to the PSAPs.[93] LECs route emergency calls to the appropriate PSAPs.[94] Unlike emergency calls made from wireline telephones, the precise location of wireless subscribers or emergency callers who are using cellular and mobile telephones is not as readily known by PSAPs. [95] In retrieving location information, the PSAPs must ask wireless subscribers to give their specific location. [96] Asking for location information during an emergency may often cause PSAPs to lose extremely valuable or precious time in dispatching emergency services or assistance.[97]

1. Overview of Location and Cellular Technologies Available to the U.S. and EU

New ALI technology is capable of providing high accuracy location information for cellular or mobile telephones,[98] thus providing the technology to meet EU and U.S. enhanced wireless emergency call services mandates of wireless carriers.[99] In fact, ALI technology includes networks and handsets. [100] Hybrid systems also exist, such as Enhanced Observed Time Difference (E-OTD). They combine network and handset-based systems.[101] Handset-based location relies on the Global Positioning System (GPS). [102] GPS is a space-based radio navigation system consisting of twenty four earth-orbiting satellites that provide three-dimensional position and velocity.[103] The location coordinates are determined by satellite position relative to the center of the earth.[104] For optimal results, a user must have three or, preferably, four satellites within line of sight to ascertain location.[105] A chip embedded in the

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Pub. Safety Comm. Officials-Int'l (Aug. 14, 2000).

92. Ten Eyck, *supra* note 3, at 56-57. *See* Revision of the Comm'n's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking, 11 F.C.C.R. 18676, 18679 (FCC 1996) [hereinafter 1996 FCC Report].

93. Ten Eyck, *supra* note 3, at 56-57.

94. Implementation of 911 Act, 15 F.C.C.R. 17079 (Fed. Commc'n Comm. 2000) [hereinafter 911 Act Report and Order]; 1996 FCC Report, *supra* note 93, ¶ 3.

95. *See* CGALIES Report, *supra* note 11, at 7; Hatfield, *supra* note 11, at 3.

96. *See* 1996 FCC Report, *supra* note 95.

97. *See* CGALIES Report, *supra* note 11, at 7; Hatfield, *supra* note 11, at 3.

98. *See* CGALIES Report, *supra* note 11, at 28; Hatfield, *supra* note 11, at 11.

99. *See* CGALIES Report, *supra* note 11, at 28-29; Hatfield, *supra* note 11, at 11.

100. *See* CGALIES Report, *supra* note 11, at 28-29; Hatfield, *supra* note 11, at 10.

101. *See* CGALIES Report, *supra* note 11, at 28-29; Hatfield, *supra* note 11, at 11.

102. *See* CGALIES Report, *supra* note 11, at 28-29; Hatfield, *supra* note 11, at 10.

103. *See* CGALIES Report, *supra* note 11, at 28-29; Hatfield, *supra* note 11, at 10-11.

104. *See* CGALIES Report, supra note 11, at 28-29; Hatfield, *supra* note 11, at 3.

105. *See* CGALIES Report, *supra* note 11, at 28-29; Hatfield, *supra* note 11, at 3.

wireless phone receives signals from three or more satellites and calculates the location.[106]

Next, network-based techniques locate cell phone calls by not requiring handset modification.[107] Network-based location techniques typically use some type of triangulation.[108] Based on the known speed of radio signals, the distance from receivers can be calculated.[109] Several network-based location solutions are in use, under development or in testing. These include Cell of Origin, Angle of Arrival (AOA), Time Difference of Arrival (TDOA) and Radio Frequency (RF) Fingerprinting.[110] One of these location technologies must work with one or more wireless cellular standards to provide location information for a wireless subscriber.[111] However, the implementation of ALI for eventual use by PSAPs or emergency call services centers has been, and still is, a complex challenge to the wireless carriers or mobile telephone operators who must provide the location information to telecom operators or LECs who, in turn, must transmit the location information to PSAPs, which must receive and use the information to provide emergency services.[112]

The availability of several wireless cellular standards also complicates the implementation of enhanced wireless emergency call services systems because each PSAP must support the interface with the cellular standard and automatic location technologies.[113] The three major digital technologies are (1) Time Division Multiple Access (TDMA), (2) Code Division Multiple Access (CDMA) and (3) Global System for Mobile Communications (GSM).[114] First, TDMA divides each cellular channel into three time slots in order to increase the amount of data that can be carried. TDMA is used by multiple cellular telephone systems throughout the world; however, each of these systems implements TDMA in a somewhat different and often incompatible way.[115] Second, CDMA takes the entire allocated frequency range for a given service and multiplexes information for all users across the spectrum range at the same time. With CDMA, signals are broken into small, digitized segments and encoded to identify each call. CDMA allows numerous signals to occupy a single transmission channel thereby optimizing the available bandwidth.[116]

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106. *See* CGALIES Report, *supra* note 11, at 28-29; *see also* Hatfield, *supra* note 11, at 3; *and see* ERIC KNOR, M-BUSINESS GUIDE TO LOCATION, M-Business 66-79 (2001).

107. *See* CGALIES Report, *supra* note 11, at 28-29; Hatfield, *supra* note 11, at 10.

108. *See* CGALIES Report, *supra* note 11, at 28-29; Hatfield, *supra* note 11, at 10.

109. *See* CGALIES Report, *supra* note 11, at 28-29; Hatfield, *supra* note 11, at 10.

110. *See* CGALIES Report, *supra* note 11, at 28-29; Hatfield, *supra* note 11, at 3.

111. *See* GCALIES Report, *supra* note 11, at 28-29.

112. *See* Hatfield, *supra* note 11, at 19; GCALIES, *supra* note 11, at 28.

113. *See* GCALIES Report, *supra* note 11, at 29.

114. *See id.* at 28-29.

115. Ivy Yvonne Kelly, *The Multipath Fingerprint Method for Wireless E-911 Location Finding* 16 (May 2000), (unpublished doctoral dissertation, Univ. of Texas, Austin) (on file with author).

116. M. D. Milnes, *Wireless Telephony: Cellular, PCS, and MSS, in* COMMUNICATION TECHNOLOGY UPDATE, 51-84 (August E. Grant & Jennifer H. Meadows eds, 6th ed., 2000).

Third, GSM employs a form of time division access. Time Division Multiplexing (TDM) is used in GSM on each frequency channel to divide the channel into time slots.[117] GSM digitizes and compresses data, then sends it down a channel with two other streams of user data, each in its own time slot.[118] Presently, the dominant digital wireless technology in the cellular or mobile phone market is GSM.[119]

2. *Telecommunications Technologies, Business and Markets*

Wireless telephone and ALI technology manufacturers, distributors and sellers are a part of the telecommunications industry that includes business development and markets.[120] They also deploy new telecommunication technologies and equipment to increase their domestic and foreign competitiveness in geographic and product markets, such as cellular and location information-based services.[121] Emerging wireless technologies will speed the transmission of voice, data and other services by wireless carriers and location services operators.[122] As PSAPs interface with LECs to route several

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117. *Id.* at 51-84.

118. Christopher Drane, Malcolm Macnaughtan, & Craig Scott, *Positioning GSM Telephones*, IEEE COMM. MAG., at 46-54 (April 1998).

119. *Id.* at 46.

120. *See, e.g.*, United States Department of Labor, Telecommunications: Nature of the Industry, *at* http://www.bls.gov/oco/cg/cgs020.htm#outlook (last visited Apr. 15, 2008) [hereinafter USDOL-Nature of Telecommunications]. "The telecommunications industry is at the forefront of the information age—delivering voice, data, graphics and video at ever increasing speeds and in an increasing number of ways." *Id.*

121. *Id.* Although the United States Department of Labor provides the information for career or occupational purposes, this labor information shows the dynamics of the telecommunications industry, including wireless telecommunications:

> [w]ireless telecommunications carriers are deploying several new technologies to allow faster data transmission and better Internet access that should make them competitive with wireline carriers. One technology is called third generation (3G) wireless access. With this technology, wireless carriers plan to sell music, videos, and other exclusive content that can be downloaded and played on phones designed for 3G technology. Wireless carriers are developing the next generation of technologies that will surpass 3G with even faster data transmission. Another technology is called "fixed wireless service," which involves connecting the telephone and/or Internet wiring system in a home or business to an antenna, instead of a telephone line. The replacement of landlines with cellular service should become increasingly common because advances in wireless systems will provide data transmission speeds comparable to broadband landline systems.

Id.

122. *Id. See also* TELECOMMUNICATIONS INDUSTRY ASSOCIATION, 2005 ANNUAL REPORT (2005) [hereinafter TIA-Annual Report]. TIA "is a respected advocate for public policies that promote competition, innovation and investment, and that foster a climate conducive to the continued emergence of new communications technologies." *Id.* TIA also addresses public policy concerns directly and indirectly impacting emergency call services systems and their operations. *See id.* at 10-11. "TIA . . . focuse[s] on federal funding for interoperability of

wireless cellular standards, a technological policy concern may arise regarding the ability of new businesses to enter into wireless or cellular markets. In giving preference to the dominant cellular or ALI technology, both EU and U.S. policy-makers may impact the ability of new and old mobile operators or wireless carriers to develop, deploy and diffuse emerging technologies based on entry to new geographic and product markets where these organizations want to acquire a favorable market share and profits.[123] However, competition among competing cellular technologies forces PSAPs and LECs or telecom operators to interface at the state's expense.[124] Thus, EU and U.S. telecommunications policy-making for wireless cellular standards only becomes more complex with the addition of telecommunications policy-making for automatic location methods when both location information and wireless services are provided by two or more competing technologies, commercialized in one or more business markets, and impacted by one or more government policies, such as public safety and national security. Unraveling these complexities of government policies and their business and technological impacts requires analytics to find and examine similarities and differences between unique U.S. and EU policies and laws for establishing and implementing enhanced wireless emergency number call systems.

C. Analytics for Reviewing E112 and E911 under Telecommunications and Public Safety Policies of the EU and U.S.

Parts III and V point out the policy-making forces in the United States and the EU. Part VI includes the comparative review of implementing and establishing E112 and E911 systems underlying public safety, telecommunications, privacy and other policies. Against the backdrop of Parts III and V and a better understanding of Part VI, this section sets forth analytics for the comparative review conducted in Part VI. Readers may understand the policy-making breadth, business development and market complexities of public and private decision-making to establish and implement E112 and E911. The analytics of Part VI rely on legislative findings, objectives and laws that have resolved both public safety and other policy concerns and addressed business and market concerns among subscribers, industry and government. These analytics identify and examine dominant policy forces and then identify and weigh their most pertinent or influential force-specific interests in establishing and implementing E911 and E112.[125] EU and U.S. policy

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public safety equipment and networks, Enhanced 911 (E911) and homeland security/critical infrastructure protection/network security and reliability." *Id.*

123. Drane, Macnaughtan, & Scott, *supra* note 120, at 46.

124. *See* CGALIES Report, *supra* note 11, at 29. CGALIES also discussed the commercialization of information technology in EU. *See id.* at 31.

125. *See* Oliver Paul Morandini, *Urgent Need for Move to Political Agenda: 112: European Emergency Telecommunications*, EUR. J. OF NAVIGATION 1, 2-3 (2005) (finding the implementation of E112 to be quite erratic in examining "the challenges linked to communication between citizen and emergency service[s]" (internal citations omitted). *See,*

environments consist of politics (process), economics, social forces, technology and public policy (direction). These environmental or policy forces effect or shape the design of policy guidance, policy and regulation to address specific public and business interests in deciding the outcome of force-specific problems and concerns, such as providing emergency assistance to wireless subscribers. This comparative analytical framework of business, markets and policy and regulation contains macro and micro analytics to contrast and compare EU and U.S. policy guidance, policies and regulation.

1. Macro-Analytical Criteria of an Environmental Analysis of Forces Shaping Regulation and Effecting Commerce

Societal or environmental forces and their most pertinent interests are macro-analytic tools in conducting or performing a comparative analytical review of the design, creation and implementation of an enhanced wireless emergency number call system and its regulatory schemes. The macro-analysis relies primarily on legislative findings and substance,[126] business and industry information and findings,[127] and legal and public policy information and commentaries.[128] There are five societal and environmental policy-making forces that contain conflicting and competing interests and can substantially influence the design of legislative policies and regulation of government policy-making and impact business plans and market growth. These environmental forces include public and private interests that have had and still are having a varied impact on U.S. and EU legislative policies and regulation for E911 and E112, respectively.[129]

The environmental forces and their interests can be divided in several groups to show their impact within the society and on commerce and policy-making. The first grouping includes the nature of governmental efforts to protect public interests, govern private relationships and maintain continuity and stability in society. The political force and its interests include, among others, legislative policy-making to further public interests; the legal restrictions on market practices; addressing emerging public policy concerns; agency regulation of business relationships; and the legal protection of substantial business and other private interests.[130] Next, the public policy force and its

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e.g., James E. Holloway et al., *Regulation and Public Policy in the Full Deployment of the Enhanced Emergency Call System (E-911) and Their Influence on Wireless Cellular and Other Technologies*, 12 B. U. J. OF SCI. & TECH. L. 93 (2006) [hereinafter E-911 Regulation] (examining federal policies, statutes and regulations governing the implementation of E911).

126. *See infra* Parts IV, V and accompanying notes (discussing the findings, purposes, and substance of U.S. and EU policies and laws on E911 and E112).

127. *See supra* Part III.B and accompanying notes (discussing the types of cellular standards and automatic location technologies in the EU and the United States).

128. *See, e.g.*, Holloway, et al., *supra* note 127; Squeo, *supra* note 1; Ten Eyck, *supra* note 3; CGALIES, *supra* note 11.

129. *See supra* Part III and accompanying notes (discussing EU and U.S. policy-making processes and policies).

130. *See supra* Parts II.A, III.A and accompanying notes (discussing public interests and

interests include, among others, the state of protecting and furthering particular public interests; the consideration, weight and priority assigned to particular environmental or policy forces and their respective interests; the impact of cultural differences on regional policies; recognition and protection of a threatened public interest; responsiveness of policy-makers to the demand of public policy concerns; and the public recognition of commerce and its interests in the regulatory schemes.[131]

The second grouping includes the nature of commerce or business and markets and their influence and impact on the industrial and commercial development of technologies, products and services. The economic force and its interests include, among others, the nature of the industry and its markets; the diffusion and marketing of new technologies; the state of interstate domestic competition; the capability to compete in global technology and services; the state and development of current technology; the cost of developing and implementing new technology for public needs; the responsiveness of business decision-makers to new public obligations; the ability of key industries to sustain themselves in the global marketplace; and the state of current and future business and market conditions.[132] Next, the technology or industry force and its interests include, among others, the rate of the development of new technology; the development and deployment of new technologies; the interoperability of telecommunication technologies; compatible technology standards for telecommunication equipment; the utility of new technology in protecting public security; the state of current research and development; the use of advanced technology to benefit public safety; and the impact of providing safety and security benefits on new technology.[133] The economic and technology environments include efforts by business organizations and industry to diffuse existing technology; to develop, deploy and diffuse new technology for profits; to conform to public demands and to comply with public obligations.

The third grouping includes only one environmental force and its interests but justifies and precedes much of the activities and actions of the political and public policy environments. The social force and its interests include, among others, responding to changes in social norms; recognizing public safety, privacy and other interests; addressing regional cultural differences; and meeting important of social needs.[134] The social environment is often the driving force or impetus to creating public policy and making legislative policy,

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policy-making in the United States and EU).

131. *See supra* Part II and accompanying notes (examining the policy-making forces and public interests involved in establishing and implementing E112 and E911 emergency number call systems).

132. *See supra* Parts II.B and accompanying notes (recognizing telecommunications policy has substantial economic effects in domestic and global markets).

133. *See supra* Parts II.C, III.B and accompanying notes (identifying the technologies and how they are related to providing public needs).

134. *See supra* Parts II.B, II.C and accompanying notes (recognizing that E112 and E19 are public safety policies that further social welfare needs).

including E911 and E112.[135] These environmental forces interact, compete and conflict within society and policy-making. Unraveling and separating conflict and competition among environmental forces, such as social and economic concerns, and recognizing and weighing their competing interests, such as public safety and cost recovery, is necessary for compromise in deciding the direction and rate of change in establishing policies and regulation, namely E112 and E911.

The macro-analytical framework includes analytical qualities that explain the specific nature and dynamics of an environmental force and its impact on policy guidance, policies and regulation of a regional government. These qualities include (1) recognition of the intergovernmental nature of the force; (2) inherent conflict or competition between two or more forces; (3) the dominance of a force in a legislative policy-making scheme; (4) the governmental level of the force (state or regional); (5) the dynamics or growth of an environmental force under a regulatory scheme; (6) the impact of the force on regulation of commerce and industry; (7) the impact of a force on business and market stability and commercialization of technology; (8) the nature and level of conflict among interests within a force; and (9) the ability of a force to impact the direction or public policy of society.[136] The environmental or policy forces and their underlying interests show the interaction and intervention of dominant and influential public and private interests under policy-making processes and policies of the EU and U.S. The presence of force-specific interests in policy-making leads to or precedes government regulation of business practices and relationships. Primarily, the qualitative, post hoc macro-analytical review focuses on how public safety, business competition, deploying cellular and location technologies, recovering business cost and other forces-specific interests have had or will have a significant impact on E112 and E911 policy guidance, policies and regulation or law.[137]

A comparative analytical framework includes macro-analytical forces and their interests and micro-analytical criteria to contrast and compare EU and U.S. emergency number call system policies. This analytical framework examines policy forces of the policy-making environment and dominant force-specific interests and determines the impact of policy forces and force-specific interests on E112 and E911 policy guidance, policies and regulation. Parts IV and V illustrate how these forces and interests cause the need for particular provisions in U.S. and EU telecommunications and public safety policy guidance, policies and laws.

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135. *See supra* Parts II.B, II.C and accompanying notes.

136. *See infra* Part VI and accompanying notes (reviewing the impact of various business, public safety, and other interests under particular business market and public policy criteria).

137. *See infra* Part VI and accompanying notes.

2. *Micro-Analytical Criteria to Identify and Examine Significant Force-Specific Interests*

Environmental forces involve national, state or regional public and private needs. These regional or U.S. and EU needs contain narrow interests that are made up of smaller, active, influential elements, such as public safety, technology development and privacy. Weighing and examining these elements or interests underlying policy guidance, policies and regulation requires micro-analytics. A micro-analytical framework is necessary to ascertain the weight, impact and other characteristics of one or more force-specific interests in designing, establishing and implementing telecommunications, or E112 and E911, policies and regulation. A micro-analytical framework contains legal, policy and business analytical criteria to examine the impact of force-specific interests on the design of policy guidance, policies and regulation, such as EU recommendations and U.S. statutes. To illustrate, assessing the commercial use of ALI in the U.S. and EU brings into play social forces that explicitly involve, among others, public safety and privacy interests. Like other social interests, privacy interests have a weight and priority in regional and state policy-making.[138] In protecting the privacy interests of the public and emergency callers, E911 and E112 policies and legislation need to address the public nature, governmental importance, relative weight, social priority and other criteria influencing privacy interests in EU and U.S. policy-making. A micro-analytical framework contains and uses public policy, business, market, legal and other criteria to ascertain the impact and influence of one or more force-specific interests on designing, establishing and implementing E911 and E112 policy guidance, policy and regulation.

Examining one or more force-specific interests requires micro-analytics criteria to recognize and analyze any substantial influence or direct impact of one or more force-specific interests on the design and implementation of legislation, administrative regulations and policy guidance. This analytical framework includes policy, legal and market criteria setting forth the impact, importance, nature and role of a force-specific interest. In examining the impact and significant of force-specific interests, the criteria are as follows: (1) nature and significance; (2) governmental or public importance; (3) subject of an importance state policy concern; (4) domestic market important; (5) specific conflict with other interests; (6) impact on regional commerce; (7) a substantial or fundamental regional interest; and (8) any impact on global business and markets. The criteria apply to business, market and force-specific interests to determine their relevance, impact and significance on the designing, making and implementation of an E911 and E112 regulatory scheme.[139] The micro-

138. *See infra* Part VI.B.1 and accompanying text (discussing the impact of privacy concerns on EU and U.S. policies for emergency call number systems).

139. *See infra* Part VI and accompanying notes (discussing the application of business and policy criteria to determine the impact of a particular interest).

analytic criteria can be used to analyze findings and purposes of legislative policies and regulation, findings and analysis of business, industry and commerce, and findings and commentaries of business, technology and public policy.[140]

In summary, the macro- and micro-analytics give the comparative analytical framework the power to ascertain and examine what and how public and private force-specific interests, such as business and privacy, influence the design and implementation of E112 and E911 regulatory systems.[141] Equally important, this analytical framework also suggests that if legislative and agency policy-makers need to amend legislation and promulgate regulations of regional and state E112 and E911 regulatory schemes when technology, commerce or markets and other circumstances adversely affect public safety or another interest and thus undermine an important regional or state public policy, such as public safety, national security or privacy. These macro- and micro-analytics examine whether an environmental force or its interests have had or could have a substantial impact or influence on the design, enactment and implementation of enhanced wireless emergency call number systems or E112 and E911 policy guidance, legislative acts and agency regulations.

IV. EU POLICIES, LAWS AND GUIDANCE ON ESTABLISHING AND IMPLEMENTING E112 SERVICES

In the late 1980s, EU public safety with respect to travel among member states and the growth of digital technology for use in wireline and wireless telephones revitalized public policy concerns regarding the absence of a standard or uniform emergency call number for the European Community.[142]

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140. *See infra* Parts IV, V and accompanying notes (discussing the findings, purposes and substance of U.S. and EU emergency call number regulatory schemes).

141. *Communication from the Commission Concerning Coordination and Preparatory Work in the Telecommunications Field Toward the Introduction of a Standard Europe-Wide Emergency Call Number by 1992*, at 2, COM (88) 312 final (June 6, 1988) [hereinafter *Communication for the Commission*]. *See* Recommendation 2003/558/EC, *supra* note 12, ¶ 12. Paragraph 12 demonstrates the nature of EU policy guidance and its potential impact on commerce and public safety in stating:

> In the context of the continuous evolution of concepts and technologies, Member States are encouraged to foster and support the development of services for emergency assistance, for instance to tourists and travelers and for the transport of dangerous goods by road or rail, including handling procedures for forwarding location and other emergency or accident related information to public safety answering points; to support the development and implementation of common interface specifications in ensuring Europe-wide interoperability of such services; and to encourage the use of location technologies with high precision such as third generation cellular network location technologies and Global Navigation Satellite Systems.

Id.

142. *Communication from the Commission: Concerning Coordination and Preparatory Work in the Telecommunications Field Towards the Introduction of a Standard Europe-Wide*

Different emergency call numbers existed among the various member states of the EU.[143] In a few member states' emergency call systems, various emergency services and assistance programs had different emergency call numbers.[144] This EU public safety concern was heightened by sharp increases in private and business travel within the EU.[145] The EU initiated preparatory work and eventually enacted legislation to establish and implement 112 as a standard emergency call number for emergency assistance and services for EU citizens and tourists traveling in member states.[146]

A. EU Policy Guidance to Establish 112 or Emergency Call Number

The European Commission established 112 as the standard EU emergency call number under the 1991 EU Commission Proposal on the Introduction of a Standard Europe-Wide Emergency Call Number.[147] Notwithstanding technological, cultural and other differences, the eventual use of new digital technology triggered rapid changes in the telecommunications networks of all member states, hastening the creation of a standard EU emergency call number.[148]

1. Establishing a Single Number Emergency Call System for Europe

The EU Council adopted the EU Commission proposal and enacted the Council Decision-Single EU Number[149] on July 29, 1991,which was imposed only on EU member states.[150] Article 1 of the Council Decision reads:

> 1. Member States shall ensure that the number 112 is introduced in public telephone networks as well as in future integrated services digital networks and public mobile services, as the single European emergency call number.
>
> 2. The single European emergency call number shall be introduced in parallel with any other existing national

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Emergency Call Number by 1992, (COM (88) 312 Final) Jun. 6, 1998, § I (Introduction) [hereinafter COMM (88) 312-EU Standard Emergency Number].

143. *Id.*

144. *Id.*

145. *Id.* at 2.

146. *Id.* at 7.

147. *See* Decision, 91/396/EEC, *supra* note 6.

148. *Id.* art. 3.

149. Decision 91/396/EEC, *supra* note 6. For definitions of the various forms of EU laws and policies, see Part III.A.1 and accompanying notes (discussing the nature and enforceability of E112 regulation, policies and policy guidance).

150. *See* Decision 91/396/EEC, *supra* note 6, art. 1.

emergency call numbers, where this seems appropriate.[151]

The Council Decision required the implementation of 112 by December 31, 1992.[152] Member states were permitted an exception, however, "[w]here particular technical, financial, geographical or organizational difficulties in a Member State [made] the full introduction . . . impossible or too costly . . . ."[153]

2. *Creating Separate EU Policies for an Emergency Call Number*

The Council Decision did not mandate an EU standard or uniform emergency call number as a substitute for preexisting national numbers, but instead established 112 as an additional emergency call number.[154] The Council Decision establishes a broad EU public safety law and policy guidance for member states.[155] Yet within a decade or less, the EU Commission Parliament and Council needed to address another 112 public policy concern regarding the need of PSAPs and emergency service centers for location information on cellular and fixed callers who are injured but cannot give precise location information, thus establishing the need for E112 or enhanced wireless emergency call services.[156]

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151. *Id.*

152. *Id.*

153. *Id.* at arts. 2-3.

154. *Id.* art.1. Article 1 states "[m]ember states shall ensure that the number 112 is introduced in public telephone networks as well as in future integrated services digital networks and public mobile services, as the single European emergency call number." *Id.*

155. *See* Decision 91/396/EEC, *supra* note 6, art. 1.

156. *See* CGALIES Report, *supra* note 11, at 5. The Commission of the Communities (Commission) states that:

> In the 1999 Review Communication (citation omitted), the Commission considers that geographical location details should be provided by fixed and mobile operators to the emergency authorities when emergency calls are made. The Commission proposes that location information should be made available to emergency authorities by 1 January 2003. In addition, the *e*Europe Initiative highlights the possibility for all citizens on the move throughout Europe of having full access everywhere to multilingual support, call localisation and fully organised provision of emergency services through the 112 number. The industry is studying the necessary technical solutions.

Commission of the European Communities, *Sixth Report on the Implementation of the Telecommunications Regulatory Package*, at 34, COM (2000) 814 final. "The present Communication presents a Review of EU regulation in telecommunications, and proposes the main elements for a new framework for communications infrastructure and associated services." *Id.* at 42; *see also* European Commission, *Towards a New Framework for Electronic Communication Infrastructure and Associated Services The 1999 Communications Review*, at ii, COM (1999) 539 [hereinafter *New Framework*]. Thus, the EU was setting forth policy guidance, though extremely soft, on the need for location information in implementing an effective emergency call services system when the 1999 Communication Review, stated:

> Technological developments now allow the geographical location not only of fixed but also of mobile phones to be determined. It is feasible and in the public interest to set a date by which all fixed and mobile operators provide caller

B. *EU Preparatory Work for Establishing and Implementing E112*

The European Commission established two implementation committees to begin preparatory work on establishing and implementing E112 or enhanced wireless emergency call services.[157] The first EU implementation committee was created in 2000 to investigate the need for and use of location information by cellular users in establishing and implementing enhanced wireless emergency call services or E112.[158] The second committee was created to investigate the need and use of wireline and wireless location information in the EU.[159] The second EU implementation committee issued its initial report to fulfill one of its objectives was to introduce timely findings to the first EU investigative committee in order to help build consensus on the policy-making approach to be adopted for the establishment and implementation of enhanced wireless emergency services.[160]

> location details to the emergency authorities when emergency calls are made. In view of the sensitivity of location data to the privacy of mobile callers, appropriate safeguards for personal data and privacy protection must be established to ensure compliance with EU rules in this area. Given the importance of such a facility for the European citizen and the state of technological development, location information for emergency authorities should be made available by 1 January 2003. This would fit in with the timescale envisaged for implementation of the new regulatory framework.

Id. CGALIES notes that privacy is and will be a major legal issue in the information from location acquisition technologies. *See* CGALIES Report, *supra* note 11, at 6 (noting that work of CGALIES would be supported by several EU Commission research and development project).

157. *See* VAN GERVEN, *supra* note 19, at 17 (finding the EU Council will delegate implementation of legislation to the EU Commission, but this implementation is subject to certain EU Council requirements). One of the EU Council's typical requirements is to require the EU Commission to be assisted by a committee of civil servants or external experts in performing preparatory work for implementation of legislation. *Id. See also infra* Part IV.B and accompanying notes (discussing the two implementation committees created by the EU Commission in establishing and implementing E112).

158. CGALIES Report, *supra* note 11, at 6 (noting that work of CGALIES would be supported by several EU Commission research and development projects); *see infra* Part IV.B.1 and accompanying notes (explaining the purpose of the other implementation committee). The final CGALIES Report was issued on January 28, 2002. CGALIES Report, *supra* note 11, at 2.

159. *See* European Community Commission, *Location of Cellular Users for Emergency Services* (LOCUS), 1 (January 3, 2002) [hereinafter LOCUS Report]. LOCUS is an EU implementation committee that was established by the EU Commission to address the technology policy concerns of the 5th Research Framework Programme of the European Community. *Id.* LOCUS was initiated in June 2000 and concluded in December 2001; the final LOCUS Report was issued on March 1, 2002. *Id.* at 1. The implementation committee coordinator was Telematika e.K (DE) and other committee members of LOCUS; the authors of the LOCUS Report were "France Developpement Conseil SARL (FR), Max.mobil. Telekommunikation Servie GmbH, Motorola UK Ltd (UK), Telespazzio SpA (IT), and the Public University of Navarra (ES)." *Id.*

160. *Id.* at 4.

1. Investigating the Economic Impact of Implementing E112

The first EU Committee was the Location of Cellular Users for Emergency Services (LOCUS) that was created in 2000 and issued its final report on March 1, 2002.[161] LOCUS' focus was on the need for and use of cellular and wireless location information.[162] LOCUS recognized the commercial assistance services and value added location-based services that could be provided by the commercial development of automatic location technologies.[163] Explicitly, LOCUS focused on issues related to the need for location information technology by wireless or cellular systems, future commercial applications and foreseeable markets for location technologies, and two general implementation options.[164] Finally, another of LOCUS' objectives was "[t]he active support to consensus building by the timely introduction of findings to the Coordination Group on Location Services taking into account feedback."[165]

LOCUS recognized that the FCC had chosen a forceful regulatory approach that mandates wireless carriers to provide location information notwithstanding business circumstances and economic conditions.[166] However, LOCUS found two principal implementation options: EU regulation and EU market-driven approaches to member states and wireless carriers.[167] On one hand, the EU regulatory approach would require the EU Commission, Council and Parliament to jointly establish and implement accuracy requirements for different environments, dates for mandatory implementation, and general principles for financing.[168] On the other hand, the EU market-driven or policy guidance approach would rely on market forces to commercialize high-accuracy automatic location technologies (ALI) while simultaneously providing location-based services and information to enhance 112 emergency call services.[169] The market-driven approach obligated only the wireless carriers that had implemented automatic location technology to provide location information to the PSAPs.[170] The policy guidance approach would not mandate or establish minimum standards for data quality and location accuracy.[171] Thus the policy approach could create disparity in provision of location information by wireless carriers among PSAPs, wireless subscribers and location information users in that location information of a different quality and accuracy could be provided

161. *Id.* at 1.
162. *Id.* at 3.
163. *Id.* at 3.
164. *Id.* at 4.
165. *Id.*
166. *Id.* at 3.
167. *Id.* at 12.
168. *Id.*
169. *See id.*
170. *See id.*
171. *See id.*

to each group.

LOCUS applied particular criteria to examine and evaluate the advantages and disadvantages of the regulatory approach and market driven or mere policy guidance approach.[172] LOCUS considered in the implementation of an EU regulatory scheme the macro-economic benefits to EU and member state economies: the commercial development and market for location based services and assistance, availability of business models and plans for the commercialization of location based services, and implications of poor financial returns and expectations.[173] In contrasting regulatory and policy guidance approaches, LOCUS consider market or business cost of the various location technologies to estimate the likelihood of carriers achieving a return on their investment through commercial location based services.[174] LOCUS concluded that the policy guidance or market-driven approach that requires the commercialization of ALI technology was the more appropriate policy choice for the EU to impose on member states.[175] The rationale for establishing and implementing less forceful EU policy guidance or market driven policy-making was that less forceful regulation or policy guidance would permit technology manufacturers to develop ALI technologies for commercial purposes.[176] This would not require wireless carriers to deploy and diffuse costly or highly expensive ALI technology.[177] Moreover, LOCUS recognized that EU and member states did not have in place business models or financial recovery mechanisms to support the costly deployment and diffusion of ALI deployments for public benefits or purposes, namely E112.[178] LOCUS' findings would now be available for use by another EU implementation committee that was established to investigate the need and use of location information by PSAPs, wireless carriers and wireless subscribers in establishing and implementing E112.[179]

2. *Investigating the Nature of ALI Technology in Implementing E112*

In creating the second implementation committee, the European Commission sought to find "harmonized, timely and financial[ly] sound solutions."[180] The Coordination Group on Access to Location Information for Emergency Services (CGALIES) was established as a public service–private

172. *See id.* at 12-13.
173. *See id.*
174. *See id.* at 13.
175. *Id.* at 5 (implementing E112 but not minimizing the impact on the business development location-based services and markets).
176. *Id.* at 12-13.
177. *Id.*
178. *Id.* at 12-13.
179. *Id.* at 3.
180. CGALIES Report, *supra* note 11, at 5.

sector partnership in 2000.[181] CGALIES established work groups and focused on the identification of "[m]inimum 'standards' on location data accuracy, reliability and evolution path," "[m]inimum requirements for location reference system . . ., routing and networks . . ., databases and . . . PSAPs . . ., and [a]nalysis of financing and costs" [182] and the impact on the quality of services and implementation.[183] In January 2002, CGALIES issued its final report that considered technology, cost of implementation and requirements issues.[184] Its implementation options examined and found that existing location technologies are feasible,[185] concluded that telecom providers/operators and PSAPs must address cost issues[186] and that uncertainty and divergence of views existed in the implementation of commercial location services.[187] CGALIES proposed several scenarios to pay for the implementation of E112.[188] Moreover, CGALIES presented two implementation scenarios to implement E112: a market-driven regulatory scheme with little or no impact on the E112 situation[189] and an outcome-driven or mandatory regulatory scheme that would require network providers, member states and PSAPs to meet particular obligations.[190]

CGALIES noted that GSM is the dominant cellular technology for Europeans, who owned almost 250 million GSM cellular telephones in January 2002.[191] CGALIES also found that member states provided funds or established budgets for PSAP operations.[192] PSAPs, in turn, provided funding for LECs or Telecom Operators to interface with wireless carriers and operators and would also provide funding for the installation of software and hardware needed to receive location information.[193] CGALIES pointed out that some member states can own location databases and fixed lines.[194] Finally, CGALIES noted that the use of "GSM 112" had caused the budget in some member states to increase significantly between 1998 and 2002.[195] In addition, network providers and operators bore the cost for developing and installing network infrastructure and providing network or cellular services.[196] CGALIES

181. *Id.*
182. *Id.* at 6.
182. *Id.*
183. *Id.*
184. *Id.* at 27.
185. *Id.* at 28.
186. *Id.* at 30.
187. *Id.* at 31.
188. *Id.* at 32.
189. *Id.* at 33.
190. *Id.* at 34.
191. *Id.* at 8. One must conclude that GSM is the dominant if not the only cellular standard used in the EU. *See id.*
192. *Id.* at 29.
193. *Id.* at 29-30.
194. *Id.* at 29.
195. *Id.* at 29
196. *Id.*

made no mention of any cost recovery mechanism to offset the cost of network operators and providers. In initiating a market-driven approach for the time being, CGALIES found that a small amount of commercialization of location information services existed in EU and that more services were expected in the EU.[197]

C. *Establishing the E112 or Enhanced Wireless Emergency Services*

The European Parliament and Council relied on CGALIES and LOCUS to enact Directive 2002/22/EC on *Universal Service and Users' Rights Relating to Electronic Communications Networks and Services.*[198] Directive 2002/22/EC protects the rights and services of users who receive and use telecommunications services and devices.[199]

1. Establishing E112 in the EU

Specifically, Article 26, *Single European Emergency Call Number*, of the directive pertains to E112 and the need for automatic location information.[200] Article 26 states that:

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197. *Id.* at 32.

198. Directive 2002/22/EC, *supra* note 12, at, art. 26. The United States has established and implemented universal services for its telecommunication users. *See* 47 U.S.C. § 254 (2006). Universal services in the United States are evolving services that consider educational and other public needs, market choices, deployment by telecommunications carriers, public interests, and other policies. *See* 47 U.S.C. § 254(c)(1).

199. *See* Directive 2002/22/EC, *supra* note 12, art. 26.

200. *Id.* art. 1. Article 1 of Directive 2002/22/EC, contains the scope and aims of the directive which include:

> 1. Within the framework of Directive 2002/21/EC (Framework Directive), this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market.
>
> 2. This Directive establishes the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. This Directive also sets out obligations with regard to the provision of certain mandatory services such as the retail provision of leased lines.

Id.

Article 26

Single European Emergency Call Number

1. Member States shall ensure that, in addition to any other national emergency call numbers specified by the national regulatory authorities, all end-users of publicly available telephone services, including users of public pay telephones, are able to call the emergency services free of charge, by using the single European emergency call number '112'.

2. Member States shall ensure that calls to the single European emergency call number '112' are appropriately answered and handled in a manner best suited to the national organization of emergency systems and within the technological possibilities of the networks.

3. Member States shall ensure that undertakings which operate public telephone networks make caller location information available to authorities handling emergencies, to the extent technically feasible, for all calls to the single European emergency call number '112'.

4. Member States shall ensure that citizens are adequately informed about the existence and use of the single European emergency call number '112'.[201]

Article 26 is part of an EU Directive that member states must further or advance the objectives pertaining to E122 within a certain duration, but permits member states to choose the substantive means by which to implement EU objectives.[202] Member state legislatures implement directives by means of their own respective legislative procedures and practices.[203]

2. Implementing E112 in the EU

In further establishing and implementing wireless E112, the European

201. *Id.* art. 26.
202. Treaty Establishing the EU, *supra* note 61, art. 256.
203. *Id.*

Commission enacted a Recommendation on July 25 2003,[204] *Processing of Caller Location Information in Electronic Communication Networks for the Purpose of Location-Enhanced Emergency Call Services.*[205] While EU Recommendations are technically not binding, they are generally followed because they often serve as the predecessor of binding legislation.[206] The European Commission recommended that when member states were to integrate the Directive[207] into national law, they should apply a variety of harmonized conditions and principles to the provision of caller location information for all calls to the single European emergency call number 112.[208] The European Commission was silent on what remedies are available when transmission by wireless and other operators to PSAPs is inaccurate or incorrect location information of injured wireline and wireless subscribers is given, thus, member states must provide justice in these situations.[209] The European Commission also found that using location and telephone numbers could invade the privacy of emergency callers. Thus the European Commission permits emergency centers and personnel to use location information only for emergency purposes and imposed limits on the location information, unless the consent of wireless subscribers is given.[210] The European Commission recommendations to member states are technical standards and requirements.

The European Commission proposed several recommendations that greatly impacted the implementation of wireless E112. Foremost, the

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204. Recommendation 2003/558/EC, *supra* note 12.

205. *Id.*

206. Treaty Establishing the EU, *supra* note 61, art. 256.

207. Directive 2002/22/EC, *supra* note 12, art. 26.

208. Recommendation 2003/558/EC, *supra* note 12, at recommendation 1.

209. *See id.* ¶¶ 5-6 ("Whereas"). The European Commission recommends no immunity or exemption from liability for the transmission of inaccurate or incorrect location information by wireless or wireline operators. *Id.* CGALIES found incorrect and inaccurate location information would be transmitted because street and address location databases were not updated or revised frequently enough. CGALIES Report, *supra* note 11, at 10. However, the European Commission does not impose mandates on member states or wireless carriers when it requires only the "best effort to determine and forward the most reliable caller location information . . . ." Recommendation 2003/558/EC, *supra* note 12, ¶5 ("Whereas"). Further, the European Commission requires a very low standard of care unlikely to be breached other than in exceptional circumstances. CGALIES found a liability issue could arise if the position function failed to locate the wireless callers. CGALIES Report, *supra* note 11, at 14.

210. *See* Recommendation 2003/558/EC, *supra* note 12, ¶ 2 ("Whereas"). In making location information available to PSAPs and other emergency personnel, the European Commission states:

> Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (the 'Universal Service Directive') . . . [OJ L 108, 24.4.2002, p. 31], requires public telephone network operators (hereafter 'operators') to make caller location information available to authorities handling emergencies, to the extent technically feasible, for all calls made to the single European emergency call number 112. . . .

Id. The European Commission does not require emergency services to receive permission from the wireless subscribers. *Id.*

Commission recommended that wireless carriers or network operators that initiated the emergency call, should transmit or forward (push) to emergency centers and PSAPs "the best location information available as to the location of the caller, to the extent technically feasible."[211] In pushing location information to PSAPs and emergency centers, the transmission or provision of location information for an emergency caller on a specific request by emergency centers or PSAPs was no longer accepted after December 31, 2004, which was the conclusion of the review period for Recommendation 2003/558/EC.[212] Next, when the subscriber or user's number in an emergency call can be identified, public telephone network operators or LECs should provide the capability "to public safety answering points and emergency services of renewing the location information through a call back functionality (pulling) for the purpose of handling the emergency."[213] Finally, the scope and aims of the European Commission's recommendations are broad in order to facilitate data transfer between LECs or operators and PSAPs and allow member states to encourage the use of a common open interface standard, and in particular, a common EU data transfer protocol.[214]

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211. Recommendation 2003/558/EC, *supra* note 12, ¶2 ("Whereas").

212. *Id.* at Recommendation 13.

213. *Id.* at Recommendation 9.

214. *Id.* ¶¶ 3-7, ¶10. Recommendation 2003/558/EC lists EU policy considerations as follows:

> (3) Although this Recommendation is concerned with location-enhanced 112, it is understood that parallel national emergency call numbers will be enhanced with the same functionality and following the same principles. . . .
>
> (4) For the successful implementation of E112 services throughout the Community, implementation issues must be addressed and timescales for the introduction of new systems coordinated. The Coordination Group on Access to Location Information by Emergency Services (CGALIES) established by the Commission in May 2000 as a partnership of public service and private sector players has allowed players of different sectors to discuss and find agreement on the principles for harmonized and timely implementation.
>
> (5) Following on from the recommendation by CGALIES, providers of the public telephone network or service should use their best effort to determine and forward the most reliable caller location information available for all calls to the single European emergency call number 112.
>
> (6) During the introductory phase of E112 services, application of the best efforts principle is considered preferable to mandating specific performance characteristics for location determination. However, as public safety answering points and emergency services gain practical experiences with location information, their requirements will become more defined. Moreover, location technology will continue to evolve, both within mobile cellular networks and satellite location systems. Therefore, the best effort approach will need to be reviewed after the initial phase.
>
> (7) It is important for all Member States to develop common technical solutions and practices for the provision of E112. The elaboration of common technical solutions should be pursued through the European standardization organizations, in order to facilitate the introduction of E112, create interoperable solutions and decrease the costs of implementation to the European Union.

The EU enacted a telecommunications directive mandating that member states establish and implement E112 as the European single emergency call number but later chose a public safety recommendation to set forth substantive standards for wireless E112 that must now include location information, even if not requested by the PSAPs.

V. US POLICIES, LAWS AND POLICY GUIDANCE ON ESTABLISHING AND IMPLEMENTING E911

In the U.S. political system, Congress sets forth wireless communications and related public safety policy in two major pieces of federal legislation. Congress enacted the Wireless Communications and Public Safety Act of 1999[215] (Wireless Safety Act) and the Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004[216] (Enhanced 911 Act). Federal policy does not favor one cellular standard or one automatic location technology and has remained technologically and competitively neutral during the implementation of E911 by encouraging competition and product development.[217] The FCC also seeks to enhance the quality and reliability of 911 emergency call services by requiring wireless carriers to provide ALI to PSAPs. The FCC mandates that subscribers of wireless phone services receive the same quality of emergency call services as that available to wireline callers.

. . .

> (13) To achieve the objectives of this Recommendation, the need for a continued dialogue between public network operators and service providers and public authorities including emergency services becomes even stronger.

Id.

215. Pub. L. 106-81, 113 Stat. 1286 (1999) (codified as amended in scattered sections of 47 U.S.C.); 47 U.S.C § 222 (2005); 47 U.S.C § 251 (2005). For an analysis of the pertinent provisions of Wireless Safety Act and their effectiveness see Holloway, et al., *supra* note 127, at 106-10.

216. Pub. L. 108-494, 118 Stat. 3986 (2004) (codified as amended in scattered parts of 47 U.S.C). For an analysis of the pertinent provisions of Enhanced Act and their effectiveness see Holloway, et al., *supra* note 127, at 110-114.

217. *See In re Revision*, 12 FCC Rcd, *supra* note 52, ¶¶ 5, 123. The FCC has relied on technology-neutral standards to avoid interference with competition and, thus, has relied on general performance standards to encourage the deployment of technology. *See id.* ¶ 5. Specifically, the FCC states:

> We also reemphasize that our rules are intended to be technology-neutral, and to encourage the most efficient and effective technologies to report the location of wireless handsets, the most important E9-1-1 feature both for those seeking help in emergencies and for the public safety organizations that respond to emergency calls.

Id. ¶ 5. The FCC also states:

One further point deserves mention. In setting deadlines and benchmarks for ALI, our policy has been to be technologically and competitively neutral. As we indicated in the E9-1-1 First Report and Order, our intention was to adopt general performance criteria, rather than extensive technical standards, to guide the development of wireless 9-1-1 services. Our goal is to ensure the rapid, efficient, and effective deployment of ALI as part of E9-1-1 . . . .

Id. ¶ 123.

Federal communication policy includes providing universal services to US citizens and public. The United States has established and implemented universal services for its telecommunication users.[218] "Universal service is an evolving level of telecommunications services . . ."[219] and now considers educational and other public needs, market choices, deployment by telecommunications carriers, public interests, and other policies.[220] In establishing universal service, the FCC must consider the telecommunications and information technologies.[221]

A. Establishing E911 or Enhanced Wireless Emergency Call Services in the United States

The Wireless Safety Act "'promote[s] public safety' by making 9-1-1 the universal emergency assistance number, by furthering deployment of wireless 9-1-1 capabilities and related functions, and by encouraging construction and operation of seamless, ubiquitous, and reliable networks for wireless services."[222] The Wireless Safety Act designated 911 as the universal emergency number for all forms of U.S. telephone service.[223]

1. Authorizing the FCC to Encourage and Support the States

The Wireless Safety Act authorizes the FCC to encourage and support the states in establishing and implementing comprehensive end-to-end enhanced wireless emergency call systems.[224] Moreover, the Wireless Safety Act creates parity between wireline and wireless carriers for tort and other liabilities related to transmission mistakes and technical failures causing harm to subscribers and other parties.[225] Finally, the Wireless Safety Act prohibits wireless carriers from disclosing or using wireless subscribers' location information for purposes other than emergencies, except with authorization or permission of the subscriber.[226]

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218. *See* 47 U.S.C. § 254 (2006).

219. *See id.* § 254(c)(1).

220. *Id.*

221. *Id.*

222. 47 U.S.C. § 615 (2006) (providing the language of the Premable of the Wireless Safety Act). *See also* Holloway, et al., *supra* note 127 at 106-110 (examining the provisions of the Wireless Safety Act and its effectiveness in furthering E911 policies).

223. 47 U.S.C. § 251(e) (2006).

224. 47 U.S.C. § 615 (2006).

225. 47 U.S.C. § 615a (2006).

226. 47 U.S.C. § 222(f) (2006). Although E911 has great potential to reduce human suffering and save lives, the ALI technology of E911 could be equally as destructive in destroying the privacy of tens of millions of Americans and, thus, raises timely federal and state privacy issue. *See* Matthew Mickle Werdegar, Note, *Lost? The Government Knows Where You Are: Cellular Telephone Call Location Technology and the Expectation of Privacy*, 10 STAN. L. & POL'Y REV. 103 (1998). The ALI technology permits other parties to track and contact wireless subscribers for commercial purposes as they own or use their cellular telephones. *See*

2. *Substantive Obligations on the FCC but Not the States*

Sections II-V of the Wireless Safety Act contain the substantive provisions that impose obligations on the FCC to support and encourage the implementation of an effective and ubiquitous E911 system.[227] Section II proclaims the importance of establishing and maintaining an end-to-end communications infrastructure for emergency services.[228] Congress also determined that an end-to-end emergency communications infrastructure would reduce emergency response times and thus save both thousands of lives and billions of dollars in health care costs.[229] Congress also found that it was necessary to encourage statewide coordination among emergency service providers, establish funds for technology development and deployment, integrate emergency communications with traffic control and management systems, and charge the FCC with designating 911 as the nation's official emergency number.[230] The Wireless Safety Act requires the FCC to "encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs, based on coordinated statewide plan, including seamless, ubiquitous, reliable wireless telecommunications networks and enhanced wireless 9-1-1 service."[231]

B. Implementing E911 Policy and Regulation

The FCC has used federal telecommunications and communications policy to regulate emergency call services or 911 since 1967 when the President's Commission on Law Enforcement and Administration of Justice assigned the task of establishing a single emergency number to the FCC.[232] The FCC promotes safety of life through imposing and enforcing obligations on the uses of wire and radio communication for emergency services and assistance.[233]

CGALIES, *supra* note 11, at 33 (discussing a market-driven scenario that provides location based services and E112 services); *see also* Hatfield, *supra* note 11, at 43-44 (recognizing a symbiotic relationship between E911 and location-based services but noting that the FCC has shown no interest in commercialization); *See* Stanton Zeff, *A New Spin on Location Services*, TELECOMMUNICATIONS AMERCAS, Sep. 2004, at 36, 36-37 (recognizing the income producing potential of location-based services). The Wireless Safety Act sought to limit disclosure or use of location information for purposes that could interfere or intrude on the privacy interests of wireless subscribers. *See* 47 U.S.C. § 222(f). Of course, in making the technology available for commercial uses, the subscribers can give comment for use of this location information. *Id.*

227. 47 U.S.C. § 615(a).

228. *Id.* § 615(a)(1).

229. *Id.*

230. *Id.* § 615(a)(2).

231. *Id.* § 615 (Note).

232. *See* Press Release, FCC Wireless Telecommunications Bureau, FCC Acts to Promote Competition and Public Safety in Enhanced Wireless 911 Services, No. 99-32, (Sept. 15, 1999).

233. *See* Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004, Pub. L. No. .108-494, 118 Stat. 3986 (2004); Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81 (1999); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934).

In mid 1996, the FCC formally mandated that wireless 911 callers receive the same level of emergency call services as that available to wireline callers.[234] This emergency call service enables emergency dispatchers at PSAPs to locate callers from wireless phones.[235] Originally, the FCC order mandated a five-year plan for implementation of wireless E911 in two major phases to satisfy both public safety and wireless carrier feasibility perspectives.[236]

1. FCC Policy-Making to Implement E911

Phase I of FCC policy-making for the implementation of E911required mobile carriers to provide PSAPs with location information and callback number.[237] Phase I required that calls be routed to the operator at the appropriate PSAP based on serving cell/sector information.[238] Next, Phase I required carriers to have in place a system to convey to the PSAP the 911 caller's callback number information as well as the location of the cell tower or base station receiving the 911 call.[239] Phase II required carriers to provide ALI (the location of wireless callers).[240] This location was defined in two dimensions (longitude and latitude) within a radius of no more than 125 meters (410 feet) for at least 67 percent of all wireless E911 calls.[241]

Phase II required wireless carriers to provide PSAPs with the location of all 911 callers by longitude and latitude in accordance with specified accuracy requirements.[242] Such requirements were dependent on whether the carrier chose a network-based or handset-based solution.[243] However, Phase II had limited success implementing enhanced wireless emergency call services during the first five-year plan.[244] During Phase II, the FCC granted limited waivers to six wireless carriers, but imposed revised deployment schedules and quarterly reporting requirements.[245] Wireless carriers and PSAPs were not prepared to meet the FCC implementation plan or deployment schedule.[246] Many carriers failed to meet the deployment requirements of Phase II by the required date of

234. *See* 47 C.F.R. § 20.18(b) (2006).
235. *See id.* § 20.18(e).
236. *See id.* § 20.18(a)-(f).
237. *See id.* § 20.18(d).
238. *Id.*
239. *Id.*
240. *See id.* § 20.18(h).
241. *Id.* § 20.18(e).
242. *Id.*
243. *See id.* § 20.18(e), (h).
244. *See* Hatfield Report, *supra* note 11, at 17. More than seven thousand 911 call centers exist in the United States. *Id.* at 18. Wireless carriers are national or regional in scope and their service areas exceed the boundaries of any one call center. *Id.* at 18-19. In a typical region served by one LEC, there may be six or seven wireless carriers, using varying cellular technologies and their supporting location solutions, multiple PSAPs, and millions of consumers. *Id.*
245. *Id.* at 8.
246. *See id.*

October 1, 2001.[247] As of May 12, 2005, only six states had implemented Phase II.[248] In December 2005, two-thirds of the nation's citizens resided in areas compliant with Phase I and II.[249]

2. *State Policy-Making for Implementing E911*

Though the Wireless Safety Act requires the FCC to encourage and support states in implementing E911 call systems, the FCC does not regulate state entities, such as PSAPs.[250] The Wireless Safety Act states that "[n]othing in this section shall be construed to authorize or require the Commission [FCC] to impose obligations or costs on any person." [251] The FCC, however, can impose deadlines and fines on the communication industry for failure to procure location information even if state and local governments have not yet deployed adequate communication infrastructure and programs to receive such information.[252]

The FCC regulation permits states to place the costs of implementing E911, such as ALI technology development and location information, with the wireless carriers even though it is a public benefit neither required nor necessary to provide cellular telephone services.[253]

In *U.S. Cellular Corp. v. FCC*,[254] the United States Court of Appeals for the District of Columbia Circuit decided whether wireless carriers could be

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247. *See In re Revision* of the Comm'n Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 15 F.C.C.R. 17442, 17445 (FCC Sept. 8, 2000) (Fourth Memorandum Opinion and Order).

248. Squeo, *supra* note 1.

249. *See* Press Release, National Emergency Number Association, Two-thirds of Population Now Covered by Phase II Wireless E9-1-1: NENA Releases Current Wireless 9-1-1 Statistics, (Dec. 22, 2005), *available at* http://www.nena.org/Press_Room/releasesnew/12.20.05%20wireless%20statistics.pdf.

250. *See* 47 U.S.C. § 615 (2006).

251. *Id.*

252. *See* 47 U.S.C. §§ 158-159 (2002) (giving the FCC the regulatory authority to impose regulatory fees to cover the costs of operations and administration); *see* 47 U.S.C §§ 502-503 (2002) (authorizing forfeitures and fines on medial and wireless carriers).

253. *See In re* Revision of the Comm'n's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Memorandum and Order, 14 F.C.C.R 20850, 20885-86 (FCC Dec. 8, 1999) (Second Memorandum Opinion and Order) [hereinafter E911 FCC Second Memorandum and Order] (finding carrier cost recovery could become an obstacle to implementation of E-911); *See In re* of Revision of the Comm'n's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 12 F.C.C.R. 22665, 22734-35 (FCC Dec. 23, 1997) (First Memorandum Opinion and Order) [hereinafter E911 FCC First Memorandum and Order] (refusing to provide a cost recovery mechanism for carrier). The FCCs original position on cost recovery required a cost recovery mechanism to be in place for the implementation of E911. *See* 1996 FCC Report, *supra* note 93, at 18699 (requiring cost recovery mechanism to be in place but not requiring a specific mechanism and recognizing a negative impact on implementation of an inflexible federal mechanism).

254. U.S. Cellular Corp. v. FCC , 254 F.3d 78 (D.C. Cir. 2001).

forced or mandated to bear the cost of implementing wireless E911.[255] The court concluded that wireless carriers should bear the financial burden of implementing E911 emergency call services for wireless subscribers, rather than imposing this burden on government-owned PSAPs that provide public safety benefits but do not contribute to the cost of those benefits.[256] The D.C. Circuit held that the FCC's refusal to impose a cost recovery mechanism on municipal, county or state governments did not violate the cost causation principle.[257] The court found that although the FCC imposed the costs on wireless carriers, the carriers could in turn impose implementation cost on the wireless subscribers receiving the benefits of E911.[258] Consequently, the development, deployment and diffusion of cellular standard and location technologies depend on both the availability and abundance of private resources. However, wireless carriers are providing a public safety benefit for wireless subscribers and the public both exposed to national security and natural disaster threats.

C. Public Safety and Telecommunication Regulation to Implement E911

Congress enacted the ENHANCE 911 Act of 2004[259] to expand the E911 wireless emergency call services system policy, but it did not make state obligations more forceful.[260] The objectives of the ENHANCE 911 Act are to

> improve, enhance, and promote the Nation's homeland security, public safety, and citizen activated emergency response capabilities through the use of enhanced 911 services, to further upgrade [PSAP] capabilities and related functions in receiving E-911 calls, and to support in the construction and operation of a ubiquitous and reliable citizen activated system.[261]

1. Public Safety Policy to Encourage State and Local Participation

Section 102 of ENHANCE 911 outlines the congressional findings and finds that the 911 emergency call number system protects public safety and homeland security but needs public resources, state policy coordination and

255. *Id.* at 83.
256. *Id.* at 85.
257. *Id.* at 84.
258. *Id.* at 88.
259. *See* E-911 Regulation, *supra* note 127, at 110-14 (examining the Enhanced 911 Act of 2004, including its benefits and advantages).
260. *See* 47 U.S.C. § 151 (2006).
261. ENHANCE 911 Act of 2004, Pub. L. No. 108-494, 118 Stat. 3986, 3986 (codified in scattered sections of 47 U.S.C.).

management of E911 fees.[262] Section 102 finds that taxes and federal leadership are needed to implement E911.[263] Section 103 lists the act's purposes:

> (1) to coordinate 911 services and E-911 services, at the Federal, State, and local levels; and (2) to ensure that funds collected on telecommunications bills for enhancing emergency 911 services are used only for the purposes for which the funds are being collected. [264]

Section 104 amends the National Telecommunications and Information Administration Organization Act[265] providing for the coordination of E911 implementation by a federal office.[266] Section 104 also includes a termination provision, leading one to conclude that E911 problems could be corrected by 2009.[267] The conclusion of any near term correction, however, appears to be only wishful congressional thinking, as Congress chose not to fund the ENHANCE 911 Act.[268]

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262. *See* Pub.L. 108-494, Title I, § 103, Dec. 23, 2004, 118 Stat. 3986.

263. *See* id..

264. *Id.* § 103.

265. *Id.* § 104. The National Telecommunications and Information Administration Organization Act created the National Telecommunications and Information Administration (NTIA). 47 U.S.C. § 901(b)(6) (2006). Section 901 (b)(6) states NTIA is "principally responsible for advising the President on telecommunications and information policies, and for carrying out the related functions it currently performs, as reflected in Executive Order 12046." *Id.*

266. *See* 47 U.S.C. § 942(a)(1)(A).

267. *See id.* § 942(d)(2) (stating the authorization of funding for the ENHANCE Act under 47 U.S.C. § 942 (d)(1) will expire on Oct. 1, 2009).

268. *See* Squeo, *supra* note 1, at A1; Press Release, National Emergency Number Association, Over 35 National Organizations Request Full Funding for ENHANCE 911 Act In Letter to Congress, (Feb. 24, 2005), *available at* http://www.nena.org/UserFiles/File/ENHANCE%20911%20Act%20Funding%20Support%20Letter%20Release%202.24.pdf. NENA "foster[s] the technological advancement, availability and implementation of a universal emergency telephone number system (9-1-1)." NENA, What Is NENA?, http://www.nena.org/pages/Content.asp?CID=119&CTID=38 (last visited Apr. 4, 2008). "NENA promotes research, planning, training and education. The protection of human life, the preservation of property, and the maintenance of general community security are among NENA's objectives." *Id.* The EU counterpart to NENA is the European Emergency Number Association (EENA). EENA, Objectives, *available at* http://www.eena.org/view/en/activities/objectives.html;jsessionid=1C10DEA18C69172FF27AAD057A1D9984. (last visited on Apr. 23, 2008). EENA's "main objective is to promote the knowledge and efficient use of the 112, the single European Emergency Call Number, all over Europe . . . ." *Id.* EENA "act[s] as a discussion platform bringing together all the actors (organizations, emergency services, enterprises and individuals) involved with the development and implementation of the 112." *Id.*

2. *Unfunded Carrot Approach to Effect State Policy-Making for E911*

Congress uses financial incentives to encourage states to establish and implement an E911 emergency call system. Section 104 creates "Phase II E-911 Implementation Grants"[269] that permit "[t]he Assistant Secretary and the Administrator, after consultation with the Secretary of Homeland Security and the Chairman of the Federal Communications Commission, and acting through the Office, shall provide grants to eligible entities for the implementation and operation of Phase II E-911 services."[270] Section 105 requires the Government Accounting Office to study and report on the imposition and use of fees by political subdivisions.[271] While, Section 106 obligates the FCC to study and report the history and status of waivers that have been offered under Phase II to Congress.[272] Finally, Section 107 authorizes the FCC to grant waivers to a "provider of commercial mobile service (as defined in section 332(d) of the Communications Act of 1934[273]...) that had 500,000 or fewer subscribers as of December 31, 2001."[274] The U.S. E911 policies impose public safety and telecommunication obligations on wireless carriers and require connection to PSAPs when they are ready to receive location information, but U.S. E911 policies are primarily federal policy guidance for state and governments that must eventually provide hardware and software equipment to receive emergency calls requiring wireless carriers to transmit telephone numbers and location information from wireless subscribers.

VI. COMPARATIVE REVIEW OF EU AND U.S. ENHANCED WIRELESSS EMERGENCY CALL SERVICES POLICY-MAKING AND POLICIES AND REGULATION

The comparative review uses a business market-public policy approach analyzing environmental forces and their most pertinent interests.[275] The first level is a macro-analysis that examines the nature, dynamics and influence of policy forces on U.S. and EU public safety and communications policy-making and policies [276] shaping E112 and E911 policy guidance, policies and regulation. In recognizing the pertinent forces and dominant interests, we assume U.S. and EU policy-makers preserve domestic and global competition in a single market, assign different weights and priorities to similar policy-

269. 47 U.S.C. § 942 (b).
270. *Id.* § 942 (b)(1).
271. ENHANCE 911 Act of 2004, Pub. L. 108-494, 118 Stat. 3986, 3990 (2004).
272. *Id.* § 106.
273. 47 U.S.C. § 332(d) (2006).
274. Pub. L. 108-494, 118 Stat. 3986, 3991 § 107(a)-(b).
275. *See supra* Part III.C and accompanying notes.
276. *See supra* Part III.C.1 and accompanying notes (describing the nature of policy-forces likely to shape EU and U.S. policy-making for public safety and telecommunications).

making forces and interests, and show appropriate deference to state policies and interests in traditional areas of state and member state government. Moreover, analyzing the fullest impact of any environmental or policy force and its interests on policy-making for public safety and telecommunications is beyond the scope of this article.

On a deeper level, there is a need to analyze the impact of more pertinent force-specific interests. This is based on the public need, or attention given, to limiting government intervention and market restraints. Thus, the second level is a micro-analysis that examines business, government and policy criteria to ascertain the impact of force-specific interests on U.S. and EU policy to establish and implement E112 and E911 regulatory schemes.[277] These criteria apply to force-specific interests to determine their most likely prevalence, weight and relevance and their impact on policy guidance, policies and regulation to establish, implement and sustain E911 and E112 regulatory schemes.[278] In short, the comparative analytical review is a qualitative analysis of the influence of broad environmental forces, and the impact of narrow force-specific interests on E112 and E911 policy guidance, policies and regulations.

A. Politics and Social Forces underlying Public Safety and Telecommunications Policy-Making

Although the emergency call system began in Europe, our focus is on the European Union, which has had a shorter time to establish and implement a regional emergency call number system.[279] In the EU, it is not the passage of time alone that explains differences in the E112 policy-making responses, but the rapid development and diffusion of digital cellular and location technologies for wireless emergency call services.[280] Finally, tourism, telecommunication commerce and their development have some influence on the EU policy-making, or legislative efforts, to harmonize establishing and implementing E112 among uniquely different cultures in Europe.[281]

1. Industry and Political Forces in Public Safety Policy-Making

The EU Commission, Parliament and Council choose not to impose mandatory obligations on member states to protect public safety and privacy interests of its wireless subscribers and callers.[282] EU policy-makers also choose to resolve the conflict between economic and social forces, namely

277. *See supra* Part III.C.2 and accompanying notes (describing the nature of force-specific interests impacting EU and U.S. policy-making for public safety and telecommunications).

278. *See supra* Part III.C.2 and accompanying notes.

279. *See* EU Decisions, 91/396/EEC, *supra* note 6 (establishing 112 as the EU emergency call numbers by requiring member states to insure its implementation).

280. *See id.*

281. *See* Comm. (88) 312 EU-Standard Emergency Number, *supra* note 142, § I.

282. *See* Recommendation 2003/558/EC, *supra* note 12, ¶¶ 5-6.

economic growth and public safety, by giving greater weight to the protection of business or technology interests in establishing and implementing E112. The EU's policy choices recognize that the telecommunication industry would suffer an economic hardship by diverting funds and capital from business operations and commercial research and development.[283] In contrast, the LOCUS and CGALIES reports place great emphasis on funding a viable market solution to provide emergency call number services, recognizing that public safety concerns are resolved by regulating telecommunications markets.[284] Finally, the EU intervenes in provision of emergency call number services and weighs business and market consequences and public needs to arrive at mere policy guidance that leaves member states considerable flexibility in implementing E112 under only an EU Commission Recommendation.[285]

In U.S. policy-making, Congress weighs public policy, and market and business interests, charting a different policy course in the design and implementation of E911 subject to regulatory management by the FCC.[286] In intergovernmental relations, the fact that one national or regional government starts first can be meaningless. The Hatfield Report points out the shortcomings of U.S. E911 policy design and implementation, although its recommendations were not heeded in Congress, and that FCC policy-making focused on economic and public needs, not business concerns.[287] Moreover, American states and their PSAPs may choose to delay, or not implement, state or federal policies while wireless subscribers pay fees and taxes to fund the implementation of E911 policies under federal and state law.[288] These states can collect and spend these taxes and fees for purposes other than to implement public safety needs, such as E911.[289] Of course, conflict is apparent between social and economic policy-making forces in that American wireless carriers must fund the implementation of emergency number call services.[290] In *U.S. Cellular Corp. v. FCC*,[291] the D.C. Circuit agreed with the FCC that

283. *See* LOCUS, *supra* note 160, at 12 (finding a market-driven approach to regulating telecom operators/carriers, PSAPs, and member states could be effective in the EU).

284. *See id.* at 12-13 (discussing two implementation options for E112); CGALIES, *supra* note 11, at 33-35 (discussing two implementation scenarios for the E112).

285. *See generally* Recommendation, 2003/558/EC, *supra* note 12; *see supra* Part III.A.1 and accompanying notes (discussing the enforceability of an EU Recommendation among).

286. *See supra* Part V.B and accompanying notes.

287. *See* Hatfield, *supra* note 11, at i-v. In ENHANCE Act 2004, Congress attempted to coordinate the involvement of federal agencies, but it did not fund the ENHANCE Act of 2004, so little was done. *See* 47 U.S.C § 942(b)(3) (2006).

288. *See* The Wireless Safety Act of 1999, 47 U.S.C. § 615 (2006). The Act states "[t]he Federal Communications Commission shall encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs, based on coordinated statewide plans .... Nothing in this subsection shall be construed to authorize or require the Commission to impose obligations or costs on any person." *Id.*

289. *See* Squeo, *supra* note 1 at A1.

290. *See supra* Part V.C and accompanying notes (discussing the lack of a cost recovery mechanism on implementing ALI technology).

291. U.S. Cellular Corp. v. FCC , 254 F.3d 78, 78 (D.C. Cir. 2001).

subsidizing the deployment of ALI and other technologies would lead to a delay in implementing E911.[292]

In reviewing EU and U.S. policies, U.S. regulation of the telecommunications industry, establishing and implementing E911 policies, places less emphasis on business costs and investments provided American wireless carriers are subject to competitively neutral legislative and regulatory schemes. The U.S. public policy does not favor commercialization of telecommunications, rather it seeks immediate policy outcomes of business and markets to further public safety objectives. Unlike the United States, the EU favors a public policy that relies on less intervention in business development and commercial growth of emerging automatic location technologies. Neither U.S. nor EU policy-makers have established a legislative scheme that applies an appropriate balance of public safety and business interests forceful enough to induce or cause states to execute federal or regional policy objectives of E112 and E911. In recognizing that E911 and E112 policy-making is not one stage process, a macro-analytical comparative perspective finds that deference to state governments, and a prolonged reliance on market or legislative initiatives to implement an emergency call services policy must eventually give way to reasonable government mandates imposing public obligations on business organizations, technology manufacturers and state governments.

2. *Technology Costs and Emergency Call Number Interests of Public Safety Policies*

A micro-analytical review finds that EU and U.S. policy guidance, policies and regulation of E112 and E911, respectively, place different weights on emergency call number assistance interests and business costs interests. This different treatment gives states entirely different latitude in providing emergency call number services to their citizens. EU states may not make forceful demands on wireless carriers and operators only required to provide timely, accurate information based on existing technology.[293] EU policy-makers are quite clear on the importance of business development and cost recovery to the growth and competitiveness of the telecommunications industry in a single market and global economy.

The U.S.'s E911 policy appears to give less weight to financial interests, namely capital investments, cost recovery and business development. The United States, however, mandates technology development, deployment and diffusion of location and wireless technologies. The E911 policy imposes public obligations on wireless carriers to develop technology, but does not relate rate of commercialization to any level of public safety benefits. The lack

292. *See id.* at 87.

293. *See* Recommendation 2003/558/EC, *supra* note 12, Art 4 (wireless carriers or telecom operators must provide "best information available as to the location of the caller, to the extent technically feasible").

of commercialization and cost recovery are evidence of little reciprocity between public safety and technology costs, in particular business development and commercialization. U.S. policy-makers should not thwart business development by feigning that wireless subscription fees are sufficient to develop and commercialize new technology, notwithstanding immunity from civil lawsuits.[294]

U.S. and EU policy-makers and telecommunications industries must each find a regulatory scheme establishing appropriate incentives for commercial investment and timely provisions for public safety needs. Imposing financial costs on wireless subscribers and carriers leaves the states and PSAPs to move slowly and invest last. A micro-analytical review reveals an imbalance in the weights placed on commerce and social welfare interests in making E911 policies that threatens to undermine implementation of state and local E911 regulatory schemes. Global and domestic competition demands legislative and regulatory schemes to apply an appropriate balance between public safety and technology interests to further public safety.

B. Industry and Public Policy Forces underlying Public Safety and Telecommunications Policy-Making

U.S. and EU telecommunications policies have reflected genuine industrial needs and public policy concerns regarding the domestic and global market needs of the telecommunications industry. Yet, this industry must be regulated to provide emergency call number services. The U.S. and EU findings show that business competition and cost interests have been weighed in the provision of social needs, namely public safety services, under telecommunication policies and regulation.[295] Economic interests are not confined to regional telecommunication markets involving the survival of the regional or multi-state wireless carriers or operators that acquire and install location information and cellular standards technologies. The U.S. and EU economic environments include global markets and competition for the development, deployment and diffusion of telecommunication equipment, products and services.[296]

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294. *See* 47 U.S.C. § 615(a) (waiving liability for harm caused by the release or use of location information in emergency situation and thus creating parity among the users or parties involved in providing emergency call number services to the public).

295. *See* 47 U.S.C. § 251 (2006) (establishing "a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life . . . ." *Id.*); *see* Directive 2002/22/EC (indicating "the aim is to ensure the availability throughout the Community of good quality publicly available services through effective competition . . . ."). *Id.* art. 1.

296. *See generally* Communication on Regulatory Framework of Telecommunications, *supra* note 2 (discussing the need for convergence of markets in a single European market).

1. Social and Economic Forces of Public Safety Policy-Making

Both EU and U.S. telecommunications policies protect domestic telecommunications markets by encouraging competition, thereby encouraging development, deployment and diffusion of new technologies.[297] EU policies to further commercial or business interests are quite straightforward, and its market-driven policy approach prefers commercialization over restrictive regulatory mandates. U.S. public-safety interests simply outweigh economic policy forces and do not alleviate costs or other economic concerns placed on wireless carriers and their business operations in implementing E911 emergency call number services.[298]

The FCC leaves the economic policy force underpinning profitable business operations, stable marketing strategy of wireless carriers and location-based services providers at the mercy of PSAPs and other state agencies. When PSAPs request compliance with Phase II, they enforce an FCC mandate requiring wireless carriers to deploy and diffuse location technology causing LECs to install routing and other equipment to receive location and cellular data to transmit to PSAPs.[299] The FCC's neutral-market policy approach translates into a somewhat weak public policy approach on economic interests other than competition and thus excludes financial costs, return on investment, strategic market planning, research and development programs, meeting global competition, and finding commercial market opportunities for technology.[300] Under this U.S. market-neutral policy approach, Congress and the FCC have not created a wireless or telecommunications policy that encourages the rapid and broad development of public and private uses of ALI technology, notwithstanding the ubiquitous nature of E911 and cellular phones.

Commercial use is not entirely forgotten in the Wireless Safety Act, but Congress rightfully goes in the opposite direction by imposing restrictions on the use of ALI technology and disclosure of location information.[301] Although Congress was silent on encouraging or fostering legitimate commercial uses, Congress does permit wireless subscribers to consent to commercial uses of information obtained with ALI technology and permits wireless carriers to explore commercial uses.[302] The commercialization of technology in implementing the E911 emergency call number regulatory scheme is not new.

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297. *See supra* Parts IV.B, V.B and accompanying notes (discussing U.S. and EU public safety policy-making involving the telecommunications industry).

298. *See* U.S. Cellular Corp., 254 F.3d at 83-86 (not permitting cost recovery by wireless carriers for the implementation of the E911).

299. *See* 47 C.F.R. § 20.18(e) (2006).

300. *See* U.S. Cellular, 254 F.3d at 86. These carriers had requested the FCC to consider a proposed rule. E911 FCC First Memorandum and Order, *supra* note 23, at 22728-34.

301. *See* 47 U.S.C. § 222 (2006). Wireless carriers can provide location information "to providers of information or database management services solely for purposes of assisting in the delivery of emergency services in response to an emergency." *Id.* § 222(4)(C).

302. *See id.* § 222.

Wireline and wireless carriers have commercialized Automatic Number Identification (ANI) technology.[303] In many areas, wireline carriers charge subscription fees for the use of caller identification as a home or business telephone service.[304] From a macro-analytical perspective, the EU and U.S. responded differently under their respective industry and economic policy forces asserting commercial uses and business development of ALI technologies as a means to hasten implementation of E911.

2. *Commercial and Privacy Interests of Public Safety Policies*

Both EU and U.S. policy-makers recognize that the disclosure and use of location information raise policy concerns regarding the disclosure of private information for unintended purposes.[305] The United States and EU addressed privacy concerns by imposing restrictions on wireless carriers to limit disclosure and use other than for emergency services or other legitimate purposes.[306] But the United States and EU give subscribers the right to consensual disclosure. This consent furthers an already existing commercial use of GPS locator services in highway vehicles, which permits consumers to find their routes and locations for personal reasons. A similar use for wireless mobile telephones seems no less intrusive to provide location services for wireless subscribers who are walking, riding or sitting.[307] Therefore, using location information subject to subscribers' consent and their needs and wants offers opportunities for commercialization and overcomes privacy interests in the United States and EU. However, such consent does not offset other regulatory mandates.

The weight given by EU policy-makers to commercial or business interests in public safety policy-making surpasses that given by U.S. policy-makers to the commercialization of location information. EU employed research committees, namely LOCUS and CGALIES, to consider the commercial impact of establishing and implementing E112 on the business of wireless and location-based service companies.[308] EU policy-makers assigned substantially more weight and priority to business finance, business development and market interests. Little emphasis or weight on these interests can represent a substantial burden on paying for new location information technologies, installing new networking equipment by wireless carriers and

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303. Alexandra Alger, *How to Screen and Block Calls*, FORBES, July 29, 1996, at 105 (finding the cost of the service was $5.00 to $9.00 per month).

304. *Id.*

305. *See* 47 U.S.C. § 222(c); *See* Recommendation 2003/558/EC, *supra* note 12, ¶ 2.

306. *See* 47 U.S.C. § 222; *See* Recommendation 2005/558/EC, *supra* note 12, ¶ 2.

307. *See* Zeff, *supra* note 226. Mr. Zeff points out the impact of highly accurate location technology when he states: "[i]nstead of wondering 'where am I?' in relationship to 'where am I going?' we will ask 'who or what is within close proximity of my current location?' . . . ." *Id.*

308. *See supra* Part IV.B and accompanying notes (discussing the findings of the LOCUS and CGALIES committees).

finding new markets by location-based services companies. Obviously, the United States chose less emphasis or weight on commercialization.

In our micro-analysis of commercial and privacy interests, the EU and the United States obviously give similar weight to privacy interests but different weight to commercial interests in managing conflicting public safety and telecommunication policy concerns. EU and U.S. policy-makers design different policies and regulations for the provision of a social benefit with commercial potential. Still U.S. and EU public safety policies are not complete, and will not be provided the telecommunications industry continues to produce new technologies, such as VOIP, raising public safety concerns and the possibility of new markets.[309]

C. Industry and Economic Forces underlying Public Safety Policy-Making and Policies

Telecommunications, information and information management technologies and their domestic business development and regulation comprise the industry and economic forces.[310] Wireless cellular standard technologies include incompatible technologies that have economic impacts on wireless carriers and location-based services, such as business competition, service and product prices and market share. In the United States, the cellular phone market appears content with several cellular technologies, so the LECs and PSAPs are obligated to prepare and initiate, respectively, E911 services for all types of technologies. U.S. wireless market contentment may protect inefficient ALI technologies that are still considered accurate under business-neutral federal regulation but do not provide any private sector location-based services. Finally, LECs and PSAPs must prepare for any and all technologies. In the EU, the policy-makers' preference for the GSM cellular standard creates less need to consider competing cellular technologies. There remains the need for accurate and reliable location information, however, which creates the need to consider the development of automatic handset and network location technologies.[311] The EU and U.S. policy-making for the telecommunications industry recognizes competition among wireless carriers, and other telecommunication services and products provide a highly important economic or market interest in single EU and U.S. markets.[312] In short, economic and

309. *See* E-911 Regulation, *supra* note 127, at 125-26; Squeo, *supra* note 1, at A1; *see also* FCC, Voice-Over-Internet Protocol, http://www.fcc.gov/voip (last visited Apr. 23, 2008) (noting the FCC regulates VOIP to insure that E911 services are available).

310. *See supra* Part III.C.1 and accompanying notes (describing the policy-making forces of macro analytical framework to review EU and U.S. emergency call number policies).

311. *See* CGALIES, *supra* note 11, at 28 (discussing the feasibility of location technologies in the EU policy-making for E112).

312. *See* Communication on Regulatory Framework of Telecommunications, *supra* note 2, at 39 (citing COM (2005) 24 02.02.2005); Communication to the Spring European Council, Working Together for Growth and Jobs A New Start for the Lisbon Strategy, COM (2005) 24

industry forces play major roles in shaping the design and implementation of EU and U.S. emergency number call services policies.

1. Economic and Industry Forces of Public Safety Policy-Making

Economic and industry forces impact in some degree U.S. public safety policy requiring the development, deployment and diffusion of wireless standards, location information and other technologies to implement E911 regulatory schemes and emergency center and PSAP operations. These forces involve the capability of wireless carriers to comply with FCC location requirements, meet domestic competition in the diffusion of location-based, wireless and other information services, manage business operational and capital needs in complying with regulatory requirements, and perhaps, establish business development and operations to compete in global markets. Developing E112 and E911 policies and regulation has required U.S. and EU policy-makers to address industry and economic forces, such as technology and business, respectively. For example, the United States and EU have considered accuracy standards for location information technologies. When any ALI technology is not accurate enough under EU and U.S. standards, this technology must be replaced with more accurate technology.[313] For example, networked-based location technology determines the location of subscribers by triangulation. But, this technology cannot provide a subscriber's location by triangulation when wireless carriers place cellular towers in a straight line.[314] Similarly, it is well-settled that technology can become too costly and too inefficient, or will face logical obsolescence becoming inaccurate for government mandates or commercial uses. The EU focuses on commercialization of location information technology and commercialization should strongly favor the timely replacement of inaccurate ALI technologies, changing to more efficient technologies.[315] In fact, the EU's policy to "provide [the] best information available"[316] is flexible, and should encourage improvements in location information technology provided to PSAPs as telecom and network operators develop location-based services and other commercial applications. This impact of commercialization may not happen in the United States, though both the U.S. and EU expect PSAPs and LECs to interface or operate with accurate ALI technology under regional and state

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(Feb. 2, 2005) (describing communication from President Barroso in agreement with Vice-President Verheugen. EU legislative policy-makers recognized that creating a "competitive internal market is a challenge. . . .").

313. *See* 47 C.F.R. § 20.18.

314. *See supra* Part III.B.1 and accompanying notes (discussing the various kinds of location information technology).

315. *See supra* Part IV.B.2 and accompanying notes (explaining the CGALIES Report and its finding on business markets and public policy).

316. *See* Recommendation 2003/558/EC, *supra* note 12, Art. 4 (indicating wireless carriers or telecom operators must provide the "best information available as to the location of the caller, to the extent technically feasible").

regulations.[317]

Other location and accuracy mandates may greatly increase operating costs and diminish returns on capital investments in highly competitive markets. Business investments in cellular and location technologies solely for public safety needs may be less attractive operational and capital investments, even under FCC mandates. Moreover, network-based location methods will increase operating or capital costs when wireless carriers must relocate towers solely to comply with the FCC accuracy standards for location methods relying exclusively on triangulation.[318] Relocating these towers would likely yield no new profits but may decrease competitiveness of smaller carriers forced to compete with handset technology when more efficient network and handset technologies can offer location-based services. On one hand, U.S. industry and economic forces must respond to statutory and regulatory obligations. These mandates are an external priority on business and industry operations and objectives. This mandated business priority strongly influences the response of industrial and business organizations to new operational and market opportunities, such as finding uses and markets for location-based services.[319] On the other hand, the EU's market-driven approach weighs industry and its technology interests harmonizing business or economic and public needs to encourage wireless carriers and operators to provide emergency call number services and respond to business opportunities in establishing location-based services in a single market.

2. *Technology and Business Internets of Public Safety Policies*

Economic and industry forces and their underlying business and technology interests account for several differences in the EU and U.S. enhanced wireless call number policies. In the EU, the dominant industry and economic interests are business, markets, and ALI technology. In the EU, both LOCUS and CGALIES discuss economic and industry policy concerns regarding the impact of imposing regulation or public obligations on wireless carriers and location-based markets. These concerns involve business costs, capital investments, business development and other interests.[320] Next, another EU policy choice shows the positive impact of technology and business or market interests on E112 policy-making. The EU's preference for one

317. *See* 47 C.F.R. § 20.18; EU Commission Recommendation 2003/558/EC, *supra* note 12, Art. 4.

318. *See* U.S. Cellular Corp. v. FCC, 254 F.3d 78, 81-82 (D.C. Cir. 2001) (discussing the plight of small rural carriers that needed the cost recovery mechanism to sparsely populated rural markets).

319. *See supra* Part II.A.2 and accompanying notes (discussing the policy guidance or business-market approach to implementing enhanced emergency call services).

320. *See* LOCUS, *supra* note 160, at 12-13 (discussing market-driven option for implementing E112); CGALIES, *supra* note 11, at 33-35 (discussing market-driven scenarios for implementing E112).

dominant wireless standard, namely GSM, reduces business costs, interoperability problems and compatible standards in the interface of telecommunications equipment in transmitting E112 calls, such as relaying and routing various digital signals from wireless carriers through LECs to PSAPs.[321] A general micro-analytical review indicates that business and technology interests are significant, not normally in conflict and important in domestic markets.

Although the United States considers industry and economic forces, it places less emphasis on furthering business and technology interests in making E911 policies. The United States proffers competition-neutral FCC regulations that support multiple technologies, give consumer more choices and increase market competition. U.S. business and technology concerns receive less weight than public safety needs in E911 policy-making, thus subjecting business, technology and market interests to mandatory regulation. Although wireless carriers are given the authority to impose fees to provide E911 services, wireless carriers still must incur the business costs of developing, deploying, and diffusing wireless, location information and other technologies to provide E911 services to their subscribers.[322] Congress and the FCC do not favor the commercialization of ALI technologies as means to hasten the implementation E911, thus placing little legislative emphasis on making location-based services widely available in the U.S. A general micro-analytical review shows that business and technology interests are avoided by making neutral legislation and regulations and imposing mandates on the cellular phone and other industries, instead such interests are considered on a case-by-case basis in granting waivers in domestic markets.

VII. CONCLUSION

Establishing and implementing enhanced wireless emergency call systems under U.S. telecommunication policy preserves interstate competition and under EU telecommunication policy creates inter-European competition. Thereafter, U.S. and EU policy forces and underlying interests are accorded different weights or priorities in making and furthering public safety policies and harmonizing public safety needs with telecommunication interests and policies. Finally, EU and U.S. policy-makers show a deferential or reluctant comity to sovereign states that must eventually establish and implement

321. *See* CGALIES, *supra* note 11, at 29-32 (discussing the cost of implementing E112, including who will pay for the location services).

322. *See* U.S. Cellular Corp., 254 F.3d at 78 (declining to permit cost recovery by wireless carriers for the implementation of the E911). U.S. wireless carriers can also petition the FCC and request a waiver from compliance with FCC rules for implementation of E911. *See* ENHANCE 911 Act of 2004, Pub. L. No. 108-494, 106, 118 Stat. 3986, 3990 (2004) (recognizing that the FCC had been granting waiver and requiring the FCC to report these waivers to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate).

enhanced emergency call number services systems. These states must create and manage PSAPs, which connect with wireless carriers and LECs that must use telecommunications technology to transmit timely and accurate emergency calls by wireless subscribers.

U.S. and EU industry, political, economic, public policy and social forces and their underlying interests create differences in EU and U.S. policy guidance, policies and regulation. The United States favors strong industry competition, robust technology development and forceful private obligations. U.S. public safety policy or E911 depends on an effective telecommunications policy that imposes obligations or mandates on wireless carriers and LECs and encourages participation by state and local governments. Imposing private obligations on wireless carriers and LECs to enhance emergency call services, while leaving PSAPs and states to trigger these obligations leaves federal public policy at the mercy of state politics and interests. The U.S. regulatory scheme for E911 forces a narrow or particular policy outcome that is only subject to FCC waivers for business or technical grounds.

In contrast, EU public safety policy does not share the U.S. preference for public mandates and primarily leaves the authority to impose public obligations to the member states. The LOCUS and CGALIES reports show concern for the telecommunication industry that plays a quintessential role in developing, deploying and diffusing new wireless standard and ALI technologies. EU policies weigh the impact of implementing E112 on business and markets and support the commercialization of ALI technology. EU policy-making favors a single wireless standard, supports diverse location information technologies and provides flexible policies to its member states. EU policy-making is a business market approach that places weight on public policy, social and political needs, but gives substantially more weight to industry and economic concerns.

EU and U.S. policies and regulations establish and implement E112 and E911, respectively, but contain unique differences in their approaches to the provision of public safety benefits for their citizens and the impact on the telecommunications industry. United States policy does not favor one cellular standard, but preserves competition among several wireless carriers using one or more cellular standards. The EU accepts a single or dominant standard in transmitting location information. Next, the EU and United States take different approaches in their regulation of location information technology. EU policy-makers want location-based service companies to commercialize location information technology, while wireless carriers use their best efforts to provide accurate and timely location information to PSAPs. U.S. policy-makers do not show much, if any, interest in commercializing location-based technology and routinely settle to obligate wireless carriers to provide location information and incur the technology development, deployment and diffusion costs.[323] U.S. and EU policies for E911 and E112, respectively, assign different

323. *See supra* Parts IV, V and accompanying notes (discussing EU and U.S. legislative policies and regulation to implement E911).

weights and priorities to almost identical policy forces and nearly similar force-specific interests, such as public safety, commercialization, business development and industry competition.

COMPARING EMPLOYER SANCTIONS PROVISIONS AND EMPLOYMENT ELIGIBILITY VERIFICATION PROCEDURES IN THE UNITED STATES AND THE UNITED KINGDOM

Renée Suarez Congdon*

I. INTRODUCTION

The number of unauthorized migrants[1] in the United States and the United Kingdom has grown exponentially.[2] Recent estimates indicate there are 11.6 million illegal migrants in the United States and a minimum of 510,000 in the United Kingdom.[3] Not surprisingly, these huge increases have corresponded with a growing feeling of discontent about the situation in both countries.[4] Illegal aliens have been associated with artificially-low wages;[5]

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1. The words illegal migrants, illegal aliens, illegal workers, undocumented workers, and unauthorized migrants are used interchangeably throughout this Note. Because this Note only addresses economic migration, all of these words are used to indicate individuals who do not have authorization to work in a specified country. In the United States, this includes individuals who have entered the country illegally or remained in the country without authorization. In the United Kingdom, this includes individuals who have entered the country illegally, remained in the country beyond the period for which they were authorized, or accepted work in a field of employment in which the individual did not have permission to work.
The author is aware of the negative connotation associated with the word "illegal" and does not intend its use to in any way be derogatory and, instead, merely uses it as a way of describing the official immigration status of the group being described. The author is also aware "the term *illegal migrant* contradicts the spirit and letter of the Universal Declaration of Human Rights, which establishes in Article 6 that *every person* has the right to recognition before the law, and in Article 7, that every person has the right to due process." PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS, UNDOCUMENTED MIGRANT WORKERS IN EUROPE 14-15 (Michele LeVoy et al. eds., 2004) [hereinafter PICUM].

2. The Department of Homeland Security estimated 11.6 million unauthorized migrants resided in the United States in January 2006. MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006, (Aug. 2007), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf. It has been estimated the unauthorized migrant population in the United Kingdom at the end of March 2005 was in the range of 515,000 to 870,000 with a central estimate of roughly 670,000. Migration Watch UK, *The Illegal Migrant Population in the UK: Briefing Paper 9.15 Migration Trends,* (July 28, 2005), http://www.migrationwatchuk.com/pdfs/MigrationTrends/9_15_illegal_migrant_pop_in_uk.pdf [hereinafter Briefing Paper 9.15].

3. HOEFER, ET. AL, *supra* note 2; Briefing Paper 9.15, *supra* note 2, at 1.

4. *See* PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS ET AL., NO CONSENSUS ON

abuse of social-welfare programs, such as government-funded healthcare, education, and subsidized housing;[6] increased risks of terrorism;[7] the destruction of the landscape in border communities;[8] balkanization by culture;[9] and increased taxes.[10] These perceptions have bred public anger and resentment towards illegal migrants in both countries.[11]

Legislators have attempted to deal with the illegal worker "problem"[12] by proposing various types of new legislation.[13] One approach taken by both the United States and the United Kingdom is the imposition of employer sanctions.[14] The justification for imposing employer sanctions is the theory that the main incentive for illegal migration is the availability of employment in the destination country.[15] If destination countries penalize employers for employing illegal workers, they will stop hiring them.[16] If employers stop employing illegal workers, then there will be no incentive for illegal migration

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IMMIGRATION PROBLEM OR PROPOSED FIXES: AMERICA'S IMMIGRATION QUANDARY 11-18 (Mar. 30, 2006), *available at* http://pewhispanic.org/files/reports/63.pdf; PEW HISPANIC CTR., THE STATE OF AMERICAN PUBLIC OPINION ON IMMIGRATION IN SPRING 2006: A REVIEW OF MAJOR SURVEYS 4 (May 17, 2006), *available at* http://pewhispanic.org/files/factsheets/18.pdf (indicating "[t]he share of Americans who see immigration as a major problem has been increasing rapidly . . . . A significant majority of Americans see illegal immigration as a very serious problem and most others see it at least as a serious problem"); Sukhvinder Stubbs, *Time for a New Mantra on Migration*, THE GUARDIAN UNLIMITED (London), July 26, 2006, at 10, *available at* http://politics.guardian.co.uk/comment/story/0,,1830334,00.html (noting "[r]ecent . . . polls show that public concern over migration, and asylum in particular, has increased considerably over the last 10 years, despite the huge amount of political energy expended on passing draconian laws"); Andrew Green, *A Government Deaf to the Wishes of the Majority*, THE DAILY MAIL LONDON, Sept. 7, 2006, *available at* http://www.migrationwatch.org/papers/p_DailyMail_27sept_06.asp (indicating seventy-five percent "of British people . . . wish to see much tougher immigration rules and, indeed, a similar percentage who want to see an annual limit to immigration").

5. Donald L. Bartlett & James B. Steele, *Who Left the Door Open?*, TIME MAG., Mar. 30, 2006, at 51, *available at* http://www.time.com/time/magazine/article/0,9171,995145-1,00.html.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. MigrationWatch UK, *Outline of the Problem* (Jan. 2, 2007), http://www.migrationwatchuk.com/outline_of_the_problem.asp.

11. *Id.*; Bartlett & Steele, *supra* note 5.

12. For an interesting perspective on the underlying undocumented worker "problem," see generally Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1980-1981).

13. Eliot Turner & Marc R. Rosenblum, *Migration Policy Inst., Solving the Unauthorized Migrant Problem: Proposed Legislation in the US*, (Sept. 2005), http://www.migrationinformation.org/Feature/display.cfm?id=333.

14. The term "'[e]mployer sanctions' [is] shorthand for penalties against employers who knowingly hire, recruit, or refer for a fee aliens who are unauthorized to work . . . ." Sen. Alan K. Simpson, *U.S. Immigration Reform: Employer Sanctions and Antidiscrimination Provisions*, 9 U. ARK. LITTLE ROCK L. REV. 563, 564 n.2 (1986-87).

15. *Id.* at 564.

16. *Id.*

to the destination countries.[17] The idea of employer sanctions seems sound, assuming that the main incentive for illegal migration truly is employment, but in practice employer sanctions are not possible without an effective means of verifying employment eligibility.[18] Both the United States and the United Kingdom have attempted to implement effective verification procedures, yet both have somehow fallen short.[19]

This Note addresses the employer sanctions and employment eligibility verification procedures used in the United States and the United Kingdom and highlights the advantages and limitations of each system. Though both of these systems have been in existence for over a decade and are currently in a state of flux, this is the first comparison of this type. Part II explores the origins of the employer sanctions provisions in each country and the pressures that eventually led both countries to adopt such provisions. Part III explains the relevant provisions and enforcement methods of the legislation adopted by each country. This section also details modifications made to the legislation since its enactment while comparing the two systems. Part IV addresses proposed improvements to the systems and concludes by recommending which modifications will have the best overall impact.

II. ORIGINS OF EMPLOYER SANCTIONS

A. United States

The history of undocumented workers in the United States stretches as far back as the Treaty of Guadalupe-Hidalgo in 1848.[20] When Mexico turned territory[21] over to the United States under this treaty, individual Mexican landowners became displaced foreign nationals in their own homes.[22] Despite the long history of undocumented workers in the United States, the idea of imposing sanctions on employers who hired undocumented workers was not suggested until 1946.[23] The first proposal of employer sanctions in the United

17. *Id.*

18. Lawrence H. Fuchs, *Immigration Policy and the Rule of Law*, 44 U. Pitt. L. Rev. 433, 439 (1983).

19. *See infra* Part III.

20. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., May 30, 1848, 9 Stat 922.

21. In discussing illegal migrants in the United States, this Note will specifically focus on Mexican migrants, because Mexican Migrants make up the largest percentage of illegal migrants in the United States. Jeffrey S. Passel, Pew Hispanic Ctr., Unauthorized Migrants: Numbers and Characteristics 4 (June 14, 2005), *available at* http://pewhispanic.org/files/reports/46.pdf (stating 57 percent of unauthorized immigrants in 2004 were from Mexico and 24 percent were from other Latin American countries; all other counties combined, including Canada, made up the remaining 19 percent).

22. BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 117 (2004).

23. Philip Martin & Mark Miller, *Employer Sanctions: French, German and US*

States actually came from the Mexican government.[24]

The lead up to this suggestion began with the United States' entry into World War II.[25] The need for American troops caused a labor shortage felt especially by Southwestern agricultural employers.[26] The United States government officially indicated its approval of U.S. employers using Mexican labor in 1942 by entering into the Bracero Treaty with Mexico, which established a new guest worker program through which Mexican laborers ("braceros") would enter into temporary employment contracts with U.S. agricultural employers.[27] Despite this legal means of migration, evidence indicates a substantial increase in illegal migration occurred during this time.[28] Several factors examined in the aggregate appear to have encouraged employers to hire illegal Mexican migrants.[29] First, employers could save money and avoid employment restrictions placed on employers participating in the Bracero Program by hiring undocumented workers.[30] Second, illegal migration was attractive to Mexicans because the economy of Mexico could not support its population, American jobs paid better than Mexican jobs, and more Mexicans wanted to migrate than there were slots available in the Bracero Program.[31] Third, even though the U.S. government was aware of the increasing numbers of illegal migrants crossing the border, Congress reduced funding for the Border Patrol, thereby decreasing efforts to prevent illegal migrants from entering the country.[32] Finally, the U.S. government had no employer sanctions provisions to discourage U.S. employers from hiring undocumented workers.[33]

When the countries initially passed the treaty, and up until the expiration of the wartime provision in 1947, the U.S. government participated in the program in a supervisory role and as an aid to U.S. employers in their recruitment efforts.[34] However, after 1947, the U.S. government adopted a laissez-faire approach to the Bracero Program and allowed employers to self-

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Experiences 30 (Int'l Migration Branch of Int'l Labour Office, Working Paper No. 36, Sept. 2000), *available at* http://www.ilo.org/public/english/protection/migrant/download/imp/imp36.pdf.

24. *Id.*

25. OTIS L. GRAHAM JR., UNGUARDED GATES: A HISTORY OF AMERICA'S IMMIGRATION CRISIS 71 (2003) [hereinafter GRAHAM, UNGUARDED GATES].

26. *Id.*

27. Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1369 (2005).

28. HING, *supra* note 22, at 128. (noting "[a]ccording to the official statistics of the INS, apprehensions of deportable aliens averaged less than 10,000 per year from 1934 to 1943. From 1944 to 1954 apprehensions rose, averaging greater than 277,000 per year with a high of 1,089,538 in 1954").

29. López, *supra* note 12, at 667.

30. *Id.*

31. HING, *supra* note 22, at 128 (citing (in part) Eleanor Hadley, *A Critical Analysis of the Wetback Problem*, 21 LT. CONTEMP. PROB. 334, 344 (1956)).

32. López, *supra* note 12, at 668-69.

33. *Id.* at 669.

34. HING, *supra* note 22, at 126.

govern.[35] Though the Mexican government was disappointed with the choice of the U.S. government to abandon its supervisory role, it did not withdraw from the program because Mexican participation was necessary to ease the high rates of unemployment in Mexico.[36]

Despite its refusal to withdraw, the Mexican government wanted to discourage U.S. employers from undercutting the system by hiring illegal aliens; accordingly, it encouraged Mexican citizens to enter the United States legally.[37] Mexico suggested the U.S. government should impose sanctions on employers who did not adhere to the program.[38] In 1946, the Mexican Foreign Minister indicated the imposition of sanctions on employers who hired illegal immigrants would effectively end illegal migration.[39] The Mexican suggestion was not completely discarded; the U.S. President's Commission on Migratory Labor made the same proposal in 1951.[40] However, when the Immigration and Nationality Act of 1952 ("INA" or McCarren-Walter Act)[41] was passed, it did not include a provision for employer sanctions.[42] Rather than including the employer sanctions provision, Congress included the "Texas proviso," which imposed penalties for "the willful importation, transportation, or harboring of illegal aliens."[43] However, the provision specifically stated employment and the "normal practices incident to employment" would not constitute harboring.[44] Though President Harry Truman vetoed the Act, Congress overrode Truman's veto and passed the Act without an employer sanctions provision.[45] The defeat of the proposed employer sanctions provision has been attributed to resistance from politically powerful Southwestern employers and their supporters in the Senate and House of Representatives.[46]

Even though Congress refused to impose sanctions on employers in the INA, Congress dealt with illegal migration in a different way by passing the "Wetback Act" that same year.[47] "Operation Wetback" discouraged illegal migration in two ways: it imposed criminal sanctions on anyone caught smuggling or harboring immigrants who had not been inspected or legally

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35. *Id.*

36. *Id.*

37. Martin & Miller, *supra* note 23, at 30.

38. *Id.*

39. *Id.*

40. *Id.*

41. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (current version at 8 U.S.C. §1324 (2006)).

42. Martin & Miller, *supra* note 23, at 30.

43. *Id.*

44. HING, *supra* note 22, at 30; Martin & Miller, *supra* note 23, at 30; Michael Marinelli, Note, *INS Enforcement of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation Period*, 37 CATH. U. L. REV. 829, 830 n.10 (1988).

45. GRAHAM, UNGUARDED GATES, *supra* note 25, at 78-79.

46. HING, *supra* note 22, at 130.

47. James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L & POL'Y 227, 233 (1995) (citing Act of June 27, 1952, ch. 8, 66 Stat. 163, 228-29 (1952), codified at 8 U.S.C. § 1324(a) (1988)).

admitted[48] and it allowed U.S. Border Patrol to pursue illegal migrants on private property within twenty-five miles of the border.[49] Reports vary as to the actual number of illegal migrants deported under the Wetback Act, but the figures are significant.[50]

The juxtaposition of the 1952 INA and the Wetback Act appears to be conflicting policy, but legal scholars have suggested these policies represent the beginning of a shift in political power.[51] The intense feelings of xenophobia by the public[52] and the influence of Attorney General Herbert Brownell swayed Congress into confronting the illegal migration problem despite the resistance by large Southwestern employers.[53] But employers were not all together swept aside; they still had the Bracero Program from which to draw inexpensive labor.[54] The use of the Bracero Program increased dramatically in response to Operation Wetback; the number of workers entering under the Bracero Program increased from 200,000 in 1951 to 450,000 in 1956.[55]

Despite the increased use of the Bracero Program, there continued to be disapproval of employers hiring migrant workers.[56] Organized labor argued that the presence of workers under the Bracero Program negatively influenced wages and working conditions.[57] Government reports indicated that in regions where employers heavily used the Bracero Program, wages stagnated and were set by the Braceros.[58] In response, President John F. Kennedy, through the Secretary of Labor, established a minimum wage rate ("adverse effect" rate) that applied to the employment of Braceros in each state in which they were employed.[59] The intent behind the imposition of minimum wage rates was to prevent the previously lower Bracero wages from bringing down the pay rates for similarly -situated domestic workers.[60]

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48. Kiera LoBreglio, Note, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem?*, 78 ST. JOHN'S L. REV. 933, 937 (2004).

49. JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601, 605 (2002).

50. HING, *supra* note 22, at 130 ("over a million"); EYTAN MEYERS, INTERNATIONAL IMMIGRATION POLICY: A THEORETICAL AND COMPARATIVE ANALYSIS 40 (2004) ("over one million"); Spotts, *supra* note 49, at 605 (300,000); LeBreglio, *supra* note 48, at 937 (300,000).

51. *See* HING, *supra* note 22, at 130-31.

52. MEYERS, *supra* note 50, at 40.

53. HING, *supra* note 22, at 130. Attorney General Herbert Brownell toured the border in 1953 and was shocked by its openness. HERBERT BROWNELL, WITH JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL (1993). Brownell is best-known for his involvement in the civil rights movement, including his participation in the landmark case *Brown v. Board of Education* and his writing of the first draft of what would become the Civil Rights Act of 1957. *Id.*

54. HING, *supra* note 22, at 130.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 131.

59. *Id.* at 130-31.

60. *Id.* at 131.

The discord with the program did not affect the commitment of the U.S. government to keep it alive.[61] In 1954, after negotiations with Mexico to renew the Bracero Treaty failed, the United States decided to continue the program unilaterally despite opposition from the Mexican government.[62]

The Bracero Program continued until Congress allowed it to expire in 1964.[63] Scholars have cited many reasons as the cause of the end of the program.[64] Some assert public awareness of appalling working conditions coupled with the Kennedy Administration's focus on civil rights brought about the end.[65] Another reason cited for the termination of the program was increased opposition by labor unions and civil rights groups.[66] Some blame a reduction in demand for Braceros due to increased mechanization in cotton and sugar beet production along with intensified enforcement of program rules, including increased minimum wage rates.[67] Each of these factors may have played a role in the decision by Congress to discontinue the program.

Employers did not passively stand by as Congress eliminated their main source of labor.[68] Employers pushed Congress to allow Mexican workers temporary alien worker status under the 1952 INA.[69] Though the employers were politically powerful and had the support of several members of Congress, the efforts of employers were fruitless and Congress denied issuance of temporary alien worker status to Mexican workers.[70]

The end of the Bracero Program is significant because it signaled the end of legal migrant labor from Mexico.[71] When the program ended in 1964, the workers were supposed to return to Mexico, but many workers did not leave.[72] Those who remained in the United States automatically changed from legal migrant status to illegal migrant status.[73] Employers, who had depended on the Bracero Program for most of their workforce, now turned to illegal migrants to fill their need for cheap labor without fear of punishment, because Congress had never imposed employer sanctions.[74] Perhaps in spite of the U.S. policy, the Mexican government chose this time to abandon its former official

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61. Smith, *supra* note 47, at 244.

62. *Id.*

63. HING, *supra* note 22, at 131.

64. HING, *supra* note 22, at 131; Kitty Calavita, *U.S. Immigration Policy: Contradictions and Projections for the Future*, 2 Ind. J. Global Legal Stud. 143, 146 (1994); Spotts, *supra* note 49, at 605; *see also* LoBreglio, *supra* note 48, at 937.

65. Calavita, *supra* note 64, at 146.

66. Spotts, *supra* note 49, at 605; *see also* LoBreglio, *supra* note 48, at 937.

67. HING, *supra* note 22, at 131.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See id.*

72. Spotts, *supra* note 49, at 606.

73. *Id.*

74. HING, *supra* note 22, at 131; Calavita, *supra* note 64, at 146.

opposition to its citizens working in the United States.[75] The Mexican government understood its citizens were spending the money earned in the United States in Mexico.[76]

The end of the Bracero Program coincided with an important change in immigration policy.[77] By the middle of the 1960s, the Civil Rights Movement was in full swing in the United States.[78] As part of this movement away from racist ideologies, President Kennedy sent a message to Congress in 1963 asking for changes in the immigration policy.[79] Kennedy wanted Congress to abolish the policies that "discriminate among applicants for admission into the U.S. on the basis of the accident of birth."[80] Kennedy thought the National Origin quota was arbitrary and not based on logic or reason.[81] In 1964, Congress passed[82] the Civil Rights Act,[83] which specifically prohibited discrimination on the "basis of race, creed, religion, sex, or 'national origin.'"[84]

In legislative debates concerning immigration reform, legislators expressed concern that basing immigration admission on national origin was discriminatory, unfair, and contradictory to the United States' policy of equality as codified in the Civil Rights Act.[85] Though a few legislators made the same arguments that had been made in support of the quota system, namely that Anglo-Saxon immigrants assimilate better than other immigrants, these legislators did not have the support of the public or organized labor like their predecessors.[86] In fact, most of the American public was either unaware or indifferent to immigration policy changes, and organized labor was no longer concerned about immigrants infiltrating the workforce.[87] The only real resistance came from patriotic societies with concerns about communists and subversives, but these societies were willing to compromise on the quota system upon condition that the numbers of legally-entering immigrants did not substantially change.[88] They were also assuaged by the fact that the proposed preference system would allow immediate relatives admission priority and that likely meant the racial-ethnic composition of the country would probably

75. Spotts, *supra* note 49, at 606.

76. *Id.*

77. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1151 (2000)).

78. *See* Fuchs, *supra* note 18, at 435.

79. GRAHAM, UNGUARDED GATES, *supra* note 25, 87-88.

80. *Id.* at 88.

81. *Id.*

82. GRAHAM, UNGUARDED GATES, *supra* note 25, at 88.

83. Civil Rights Act 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000-2000h (2000)).

84. *Id.* at 88-89 (emphasis in original).

85. *See id.* at 89.

86. *Id.* at 90.

87. *Id.* at 90-91.

88. *Id.*

remain unchanged.[89]

Congress thus amended the INA, by enacting the Immigration and Nationality Act of 1965 (hereinafter "1965 INA"),[90] which abolished the inherently racist National Origins quota system and increased legal immigration from the Eastern Hemisphere.[91] Congress replaced the quota system with a system placing a per-country limit on the number of persons who could gain lawful entry each year.[92] Immigration from the Eastern Hemisphere was limited to 160,000 total immigrants with a limit of 20,000 immigrants per country.[93] Entry was granted to persons from the Eastern Hemisphere based on a preference system in which those individuals with family already living in the United States, skilled labor, and refugees were given priority over other immigrants.[94] The 1965 INA also set limits on immigration from within the Western Hemisphere, which were to take effect in 1968.[95] Immigration from Western Hemisphere countries was also limited to 20,000 people per country, with 120,000 per year for the entire hemisphere; however, admission of immigrants from this region was not based on the preference system.[96]

Placing caps on Western Hemisphere immigration was not initially part of the system, but Congress later added caps to appease congressional leaders who opposed ending the National Origins system.[97] Proponents of the bill had difficulty arguing the National Origins system was discriminatory and should be eliminated while simultaneously supporting a bill that gave preference to people from certain regions of the world.[98] Employers, who had relied on the cheap Mexican labor, did not oppose the bill as strongly as they had opposed previous government attempts to interfere with their labor supply.[99] The labor needs of employers could be satiated by entirely different sources; "the baby boom was pouring new workers into the economy" and, with the passing of the Civil Rights Act, millions of underemployed black workers would be looking for employment.[100] Additionally, the large Southwestern agricultural employers did not dissent, because civil rights groups, religious groups, and organized

89. *Id.* at 91.

90. Frei *supra* note 27, at 1371 (citing Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1151 (2000))).

91. *See* Catherine E. Halliday, Note, *Inheriting the Storied Pomp of Ancient Lands: An Analysis of the Application of Federal Immigration Law on the United States' Northern and Southern Borders*, 36 VAL. U. L. REV. 181, 196 (2001).

92. Smith, *supra* note 47, at 234.

93. *Id.*

94. HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 59-64 (2002) [hereinafter GRAHAM, COLLISION COURSE].

95. MEYER , *supra* note 50, at 43.

96. GRAHAM, COLLISION COURSE, *supra* note 94, at 62.

97. *Id.* at 61-62.

98. *Id.* at 62.

99. *Id.* at 63.

100. *Id.*

labor had aggressively attacked them for employment practices regarding foreign workers. Those employers were also aware that there would be an ample supply of illegal migrants existed to fill their labor needs.[101]

The change in immigration policy was significant for two reasons.[102] It was the first time in history the United States had imposed a ceiling on Mexican immigration[103] and effectively ended the open-door (or "Good Neighbor") policy of immigration from Mexico.[104] This led to huge increases in illegal migration, because the factors motivating Mexicans to migrate were still pertinent.[105] Second, the 1965 INA signified a huge unanticipated change in U.S. immigration policy.[106] By removing the strict quota system and placing a priority on family reunification, the 1965 INA was the first step in the liberalization of U.S. immigration policy.[107] "[T]he 1965 law, and subsequent policy, shifted the nation from a population-stabilization to a population-growth path . . . ."[108] The liberalization of the United States' immigration policies coupled with huge increases in illegal migration from Mexico forced the U.S. government to redirect its focus from preventing illegal migrants from entering the United States to dealing with illegal migrants after they had already entered the country.[109]

The 1965 INA policies created waiting periods as long as two-and-a-half years for Mexicans seeking visas for legal entry into the United States,[110] resulting in an increase in illegal border crossings.[111] In response, President Jimmy Carter proposed substantial immigration policy changes to Congress in 1977,[112] which included instituting employer sanctions, increasing the limit of immigrants allowed from Mexico, and granting temporary amnesty to Mexicans who had been in the United States illegally for over five years, as well as other changes.[113] Opponents of the employer sanctions proposal resisted because sanctions would increase the potential for discrimination against ethnic minorities and would impose an excessive burden on employers.[114] The

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101. *Id.*

102. GRAHAM, UNGUARDED GATES, *supra* note 25, at 96; LoBreglio *supra* note 48, at 938.

103. LoBreglio *supra* note 48, at 938.

104. Smith, *supra* note 47, at 234.

105. *Id.* at 235; Spotts, *supra* note 49, at 607; *see also* LoBreglio, *supra* note 48, at 938.

106. GRAHAM, UNGUARDED GATES, *supra* note 25, at 96.

107. *Id.*

108. *Id.*

109. Smith, *supra* note 47, at 235; Spotts, *supra* note 49, 607.

110. Spotts, *supra* note 49, at 606-07.

111. *Id.* at 607.

112. *Id.; See also* Cecilia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986,* 8 GEO. IMMIGR. L.J. 343, 359-60 (1994).

113. Spotts, *supra* note 49, at 607 (citing David M. Heer, Undocumented Mexicans in the United States 155 (1990)).

114. Marinelli, *supra* note 44, at 832 (citing H.R. Rep. No. 108, 93d Cong., 1st Sess. 5 (1973)); *see also* Martin & Miller, *supra* note 23, at 30 (Stating that the 1984 Democratic presidential candidates campaigned against employer sanctions on the ground that they would increase labor market discrimination.).

changes suggested by the President were not initially adopted, possibly because of the opposition.[115] Notably, the following year, Congress eliminated its country-specific limits and replaced country-specific limits with a worldwide limit.[116] Also, in 1978, Congress created the Select Committee on Immigration and Refugee Policy (SCIRP) to study existing immigration policy and to make recommendations for improvements.[117]

After two years of investigating the current system, collecting public opinion, and trying to balance the requirements of efficiency, fairness, due process protections, and humanitarian concerns,[118] SCIRP made over 100 recommendations to President Ronald Reagan and Congressional leaders on March 1, 1981.[119] One of the primary recommendations, *inter alia*, made by SCIRP was the imposition of sanctions on employers who knowingly hired illegal aliens.[120] In its report, SCIRP stated:

> Without an enforcement tool to make the hiring of undocumented workers unprofitable, efforts to prevent the participation of undocumented / illegal aliens in the labor market will continue to meet with failure. Indeed, the absence of such a law serves as an enticement for foreign workers. The Commission, therefore, believes some form of employer sanctions is necessary if illegal migration is to be curtailed.[121]

In order for employer sanctions to be effective, SCIRP also recommended the creation of a reliable means of verifying employment eligibility.[122] SCIRP had two related concerns regarding verification: preventing discrimination by employers and avoiding substantial burdens for employers.[123] Though disagreement existed within the Commission as to how to address these concerns, a faction of SCIRP supported the creation of a new employee identification system that was more secure than anything in existence at that

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115. Marinelli, *supra* note 44, at 832.

116. Spotts, *supra* note 49, at 607 (citing Heer, *supra* note 113, at 13).

117. Frei, *supra* note 27, at 1372 (citing David M. Turoff, Note, *Illegal Aliens: Can Monetary Damages be Recovered from Countries of Origin Under an Exception to the Foreign Sovereign Immunities Act?*, 28 Brook. J. Int'l L. 179, 183 (2002); Fuchs, *supra* note 18, at 436-37 (citing Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 908 (1978)); Spotts, *supra* note 49, at 607 (citing Heer, *supra* note 113, at 195).

118. Fuchs, *supra* note 18, at 438.

119. *Id.*; Espenoza, *supra* note 112, at 360; Spotts, *supra* note 49, at 608.

120. Martin & Miller, *supra* note 23, at 30; Frei, *supra* note 27, at 1372; Fuchs, *supra* note 18, at 439; Spotts, *supra* note 49, at 607 (citing Heer, *supra* note 113, at 155).

121. Espenoza, *supra* note 112, at 346 n.23 (quoting U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy to the Congress and the President of the United States 62 (1981)).

122. Fuchs, *supra* note 18, at 439-40.

123. *Id.* at 439.

time.[124] "Commissioners . . . [felt] that it would be less discriminatory than a system based on existing forms of identification and even would produce less discrimination than currently exist[ed] in the absence of an employer sanctions law."[125]

Due to the SCIRP recommendations, President Reagan formed a task force to examine current immigration policy and generate plausible reform proposals to recommend to Congress.[126] The task force was unsuccessful in creating concrete recommendations.[127] However, after several meetings with his Cabinet, Reagan's recommendations to Congress included imposing sanctions, in the form of civil fines, on employers who hire illegal workers and the creation of a worker eligibility verification system.[128] The Department of Justice and the Attorney General made the same recommendations to Congress.[129]

In March of 1982, a full year after the SCIRP recommendations were presented, Representative Romano L. Mazzoli (D-KY) and Senator Alan K. Simpson[130] (R-WY) sponsored an immigration reform bill, the Immigration Reform and Control Act (IRCA), which incorporated some of the earlier recommendations including employer sanctions.[131] Supporters of the sanctions provisions asserted that the sanctions would serve several purposes, including eliminating the temptation of American jobs for illegal workers[132] and the reduction of costs associated with border enforcement, because employers would act as *de facto* agents of the Immigration and Naturalization Service (INS).[133] The bill quickly passed in the Senate but stalled in the House.[134] The IRCA eventually passed in the House and President Reagan signed the bill into law in 1986, creating the first employer sanctions provisions in the United States.[135]

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124. *Id.*

125. *Id.* (citing SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, 97TH CONG., 1ST SESS., FINAL REPORT AND RECOMMENDATIONS (1981)).

126. Spotts, *supra* note 49, at 608 (citing NICHOLAS LAHAM, RONALD REAGAN AND THE POLITICS OF IMMIGRATION REFORM 6 (2000)).

127. Spotts, *supra* note 49, at 609 (citing LAHAM, *supra* note 126, at 124).

128. *Id.*(citing LAHAM, *supra* note 126, at 107).

129. *Id.* (citing LAHAM, *supra* note 126, at 107).

130. Senator Simpson was a member of SCIRP and Chairman of the Senate Immigration Subcommittee. *Id.* at 608.

131. Espenoza, *supra* note 112, at 360; Spotts, *supra* note 49, at 609.

132. Espenoza, *supra* note 112, at 360 (citing *Options for an Improved Employment Verification System, a Staff Report*, prepared for the Use of the Subcomm. on Immigration and Refugee Affairs of the Comm. on the Senate Judiciary, 102d Cong., 2d Sess. 1-2 (1992)).

133. Espenoza, *supra* note 112, at 360 (citing *Confirmation Hearing of Attorney General Designate Zoe Baird as Attorney General Before the Senate Judiciary Comm.*, 103d Cong., 1st Sess. (1993) (statement of Sen. Heflin (R-AL)), *available in* LEXIS, News Library, Script File).

134. Spotts, *supra* note 49, at 609.

135. *Id.*; 8 U.S.C.A. § 1324 (2006).

B. United Kingdom

The United Kingdom does not have the same long, rich history of employer sanctions found in the United States.[136] The United Kingdom did not even debate employer sanctions until the late 1970s when the European Community began pressuring the U.K. about the issue.[137] During that period, the international community "generally supported the introduction of sanctions, believing that, by minimizing illegal immigration, the status and legitimacy of authorized migrants would be improved."[138] International organizations, like the International Labour Office (ILO),[139] supported the theory, which focused on the importance of including employer sanctions as "an integral part of effective migration management."[140] The ILO approved a Convention in 1975, which included provisions requiring countries to create systems of detection and both civil and criminal punishment for illegal employment of migrant workers.[141] The following year, the European Commission proposed a similar directive, which after amended in 1978, required European Union (EU) Member States to enact laws sanctioning employers of illegal migrant workers.[142] The British government resisted the draft directive within the EU Council of Ministers, specifically because of the employer sanctions provision.[143]

This international push toward adopting employer sanctions coincided with President Carter's introduction of proposals supporting the imposition of employer sanctions in the United States.[144] But at this particular point in time, neither the United States nor the United Kingdom chose to follow the trend of adopting employer sanctions.[145]

The reasons for British opposition to employer sanctions were similar to

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136. *See supra* Part II(A).

137. Bernard Ryan, *The Evolving Legal Regime on Unauthorized Work by Migrants in Britain*, 27 COMP. LAB. L. & POL'Y J. 27, 35 (2005) [hereinafter Ryan 2005].

138. Martin & Miller, *supra* note 23, at 4.

139. PICUM, *supra* note 1, at 23.

> The [ILO] was established in 1919 to elaborate, promote and monitor implementation of international standards regarding treatment of labour [sic]; to provide orientation and technical assistance to its tripartite constituents; and to address contemporary issues affecting workers, employers and governments worldwide. ILO is a specialized agency of the United Nations system; it is unique in having civil society participation in its governance through its tri-partite structure in which representatives of national employer and worker organizations participate alongside representatives of government.

Id.

140. Martin & Miller, *supra* note 23, at 4.

141. *Id.* (citing ILO Convention 143, Article 6, 1 (Dec. 9, 1978)).

142. Martin & Miller, *supra* note 21, at 4; Ryan 2005, *supra* note 137, at 35.

143. Ryan 2005, *supra* note 137, at 35.

144. Spotts, *supra* note 49, at 607; *see also* Espenoza, *supra* note 112, at 359-60; *see supra* notes 112-115 and accompanying text.

145. Ryan 2005, *supra* note 137, at 35; Spotts, *supra* note 49, at 607.

the reasons given by opponents in the United States.[146] Fears that sanctions would encourage discrimination against ethnic minorities by potential employers and excessively burden employers who complied with the sanctions were common arguments by opposition in both the United States[147] and the United Kingdom.[148] One argument unique to the United Kingdom was that its position as an island puts it in a geographically distinct position[149] effectively allowing it to control immigration simply by controlling its ports of entry, thereby reducing the possibility that illegal migrants could enter the country and eliminating the need for after-entry enforcement efforts.[150]

At this point in history, the paths of the United Kingdom and the United States to the imposition of employer sanctions diverged.[151] While the United States formed a committee to study the issue,[152] the United Kingdom abandoned the idea of employer sanctions until the 1990s.[153] Scholars attribute silence on the issue to forces shaping economic migration, specifically the labor demands of the U.K. market.[154] The economy of the United Kingdom was flat in the 1970s and 1980s, and thus there was little to no demand for migrant labor.[155] This changed in the late 1980s when deregulation policies created a new business sector specifically catering to the growing global market.[156] Globalization affected the service and manufacturing sectors as well; the demand for goods and services increased to fulfill the growing needs of the global market, and at the same time, globalization forced U.K. businesses in these sectors to compete with companies from around the world.[157] In order to keep up with the competition, U.K. employers needed a low-cost, somewhat-expendable workforce.[158] The creation of the global economy and increased

146. *See supra* note 114 and accompanying text.

147. *Id.*

148. Ryan 2005, *supra* note 137, 35-36.

149. Bernard Ryan, Recent Legislation, *Employer Enforcement of Immigration Law after Section Eight of the Asylum and Immigration Act 1996,* 26 INDUS. L.J. 136, 147 (1997) [hereinafter Ryan 1997] ("The UK's island geography enables us to operate effective frontier controls, concentrated on a small number of ports and airports. Because of this, our overall system of immigration control has correspondingly less need for in-country enforcement.") (quoting Home Affairs Committee, *Migration Control at the External Borders of the European Community,* 1991-92 HC Papers 215, at 66-67). Whereas the United States shares a land border with Mexico, the origin of the majority of illegal migrants in the United States. *See supra* note 21 and accompanying text..

150. Ryan 2005, *supra* note 137, at 35-36.

151. Ryan 1997, *supra* note 149, at 147; *see supra* note 116 and accompanying text.

152. Frei, *supra* note 27, at 1372; Fuchs, *supra* note 18, at 436-37; Spotts, *supra* note 49, at 607 (citing HEER, *supra* note 113, at 195).

153. Ryan 1997, *supra* note 149, at 147.

154. Donn Flynn, *An Historical Note on Labour Migration Policy in the UK* 4, *in* LABOUR MIGRATION AND EMPLOYMENT RIGHTS (Bernard Ryan ed., 2005).

155. *Id.* at 3-4.

156. *Id.* at 4.

157. *Id.*

158. *Id.*

demand for labor coincided with an increase in refugees resulting from political upheaval in other parts of Europe.[159] This combination of factors set the stage for a dramatic increase in the number of illegal migrants entering the United Kingdom and finding illegal employment.[160] For example, "the Immigration Service detected only 4,000 persons engaged in illegal work in 1988, but that by 1994 this had risen to 10,000. That figure moreover represented 'only a small proportion of the total number working in the United Kingdom illegally.'"[161]

At about the same time, there were other pressures, both internal and external, on the United Kingdom.[162] The government expressed concern that the United Kingdom was "seen as a soft target in Western Europe" for illegal migrants seeking employment, because it was one of the only countries in the EU to not have employer sanctions provisions.[163] In 1995, the EU Member States agreed to a French proposal on European harmonization on the issue of employment of illegal migrants, which called for the adoption by Member States of "criminal and/or administrative penalties" for employers of illegal migrants.[164] The United Kingdom officially adopted the French recommendation in September 1996.[165]

Though the British government did not specifically refer to the harmonization recommendation, the culmination of these forces led to the enactment of the Asylum and Immigration Appeals Act of 1996,[166] which contained the United Kingdom's first employer sanctions provision.[167]

III. EMPLOYER SANCTIONS LEGISLATION

A. Relevant Provisions

1. United States

The IRCA has three interrelated provisions relevant to this Note:

159. *Id.* Such political upheaval included an armed conflict in southeastern Europe and the collapse of the Soviet Union. *Id.*

160. Ryan 1997, *supra* note 149, at 146.

161. *Id.* (citing *Consultation Document*, ¶. 3).

162. *Id.* at 147.

163. *Id.*

164. *Id.*

165. *Id.*

166. Asylum and Immigration Appeals Act, 1996, c. 49. (The Asylum and Immigration Appeals Act 1993 was also passed, but it did not specifically deal with the employment of illegal migrants, and as such is outside of the scope of this Note. Flynn, *supra* note 154, at 5.)

167. Ryan 1997, *supra* note 149, at 147 (citing Asylum and Immigration Appeals Act, 1996, c. 49, § 8).

employer sanctions for knowingly employing undocumented workers,[168] an anti-discrimination provision,[169] and a provision that authorizes the President to establish a new worker verification system.[170] The employer sanctions provisions make it unlawful: (1) to knowingly hire or continue to employ an illegal alien and (2) to hire an employee without verifying his or her employment eligibility.[171] Knowing not only means actual knowledge, but also includes constructive knowledge, which the statute defines as "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."[172] Both of these offenses subject an employer to civil fines (sanctions), unless the employer is found to have engaged in a pattern of hiring illegal workers, which will subject the employer to criminal penalties including six months imprisonment.[173] The statute defines "pattern" as "regular, repeated, and intentional activities."[174] Generally, an employer can escape liability by showing compliance with the verification procedure.[175] The employment eligibility verification requirement mandates employers fill out an Employment Eligibility Verification Form, or I-9 form, for each new employee hired. This process includes the inspection of a new employee's documentation to establish identity and authorization to work, the employer signing and attesting that they have inspected the documents, and the employee signing and attesting that he or she is eligible to work in the United States.[176] If an employer demonstrates the documents reasonably appeared genuine, then the employer has established an affirmative good faith defense relieving the employer of any potential liability for sanctions.[177] The government can rebut the good faith presumption upon "evidence that the documents did not reasonably appear to be facially valid, that the employer and employee colluded to avoid the requirements of the [IRCA], or that the verification procedure was a sham."[178] Initially, the IRCA allowed new employees to present any of twenty-nine different documents to prove eligibility and identity.[179] Currently,

168. 8 U.S.C. § 1324a(a) (2006).

169. 8 U.S.C. § 1324b.

170. 8 U.S.C. § 1324a(d)(1).

171. Espenoza, *supra* note 112, at 360-61; Smith, *supra* note 47, at 236-37; Martin & Miller, *supra* note 23, at 31.

172. 8 C.F.R. § 1247a.1(l)(1) (2006). *See* Martha J. Schoonover et al., American Law Institute—American Bar Association Continuing Legal Education, *Employment Authorization Regulations and I-9 Compliance,* SL010 A.L.I.-A.B.A. 9, 29 (2006).

173. 8 U.S.C. § 1324a(f)(1) (2006).

174. 8 C.F.R. § 1247a.1(k) (2006).

175. Marinelli, *supra* note 44, at 837.

176. Espenoza, *supra* note 112, at 361.

177. 8 U.S.C. § 1324a(b)(1) & (6).

178. Marinelli, *supra* note 44, at 837 (citing H.P. REP. NO. 99-682, pt. 1, at 57, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5661).

179. Martin & Miller, *supra* note 23, at 37.

fifteen acceptable forms of documentation exist.[180] Other than the types of acceptable forms of documentation, the employer sanctions provisions and the employment eligibility verification system laid out in the IRCA have generally remained unchanged since 1986.[181]

A major concern when the IRCA was passed was that the threat of employer sanctions would lead employers to discriminate against individuals seeking work on the basis of appearance.[182] As an effort to prevent this, the IRCA included an anti-discrimination provision.[183] The provision stipulates employers are required to ask all new hires for the same types of documentation and may not ask questions regarding an individual's place of origin.[184] Employers who discriminate in hiring, recruiting, or firing on the basis of national origin or citizenship status for individuals who are either citizens or are legally in the United States have committed an "unfair immigration-related employment practice."[185] The Act also created an Office of Special Counsel for Immigration Related Employment Practices in the Department of Justice to enforce the anti-discrimination provisions.[186] If the Special Counsel finds an employer has violated the anti-discrimination provisions, he may order the employer to cease and desist from further discrimination, to hire the discriminated-against individual with backpay, to pay a civil fine, and to keep records of all job applicants the employer has denied employment and make this available to the Special Counsel.[187]

2. *United Kingdom*

The employer sanction provision of the Asylum and Immigration Appeals Act 1996, better known as Section 8, created the criminal offense of employing anyone who is subject to immigration control unless the employee is otherwise eligible for employment.[188] Those individuals subject to immigration control, but otherwise eligible for employment, generally fall into one of two categories:

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180. Jeffery L. Ehrenpreis, *Controlling Our Borders Through Enhanced Employer Sanctions*, 79 S. CAL. L. REV. 1203, 1207-08 (2006) (citing 8 C.F.R. § 1274a.2(b)(1)(v) (2006)).

181. General Accounting Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, 1, GAO-06-895T, June 19, 2006, *available at* http://www.gao.gov/new.items/d06895t.pdf [hereinafter GAO, *Immigration Enforcement: Weaknesses*].

182. *See supra* Part II(A).

183. 8 U.S.C. § 1324b(a) (2006).

184. Martin & Miller, *supra* note 23, at 35.

185. 8 U.S.C. § 1324b(a)(1); *see also* Espenoza, *supra* note 112, at 364-68; Marinelli, *supra* note 44, at 837-38; Martin & Miller, *supra* note 23, at 35-36.

186. Marinelli, *supra* note 44, at 846; Martin & Miller, *supra* note 23, at 35.

187. Marinelli, *supra* note 44, at 846 (citing 8 U.S.C. § 1324b(g)(2)(B)(iv)) (2006) (the penalty for a first offense is no more than $1000 and the penalty for a second offense is $2000); Martin & Miller, *supra* note 23, at 35-36.

188. HOME OFFICE, COMPREHENSIVE GUIDANCE FOR UNITED KINGDOM EMPLOYERS ON CHANGES TO THE LAW ON PREVENTING ILLEGAL WORKING, 2004, at 3 [hereinafter HOME OFFICE, COMPREHENSIVE 2004]; *see* Ryan 2005, *supra* note 137, at 36.

they have been given valid and continuing permission to remain in the United Kingdom and are not restricted from accepting a position in their current employment field or the person falls into an immigration category in which employment is permitted.[189] Employers convicted of violating Section 8 are subject to fines up to £5000 (about $9,916.70)[190] per illegal employee.[191]

Section 8 also created a statutory defense for employers.[192] This defense allows employers to circumvent penalties by verifying the documentation papers of a potential employee appear "to relate to the employee" prior to hiring him or her and retaining a copy of the documentation.[193] A list of thirteen acceptable documents was set out in secondary legislation.[194] Initially, employers could accept evidence of National Insurance numbers,[195] British birth certificates, or a number of other forms of identification that do not contain a picture of the beholder.[196] Later, the list was modified by the Nationality, Immigration and Asylum Act 2002, which amended Section 8 to require employers to check more than one document if the document being proffered does not include a picture of the job candidate.[197] However, the defense is not available for employers who *knowingly* hire illegal workers, even if the employer retains copies of the worker's documentation.[198] "Knowingly" is defined as actual knowledge.[199]

In passing Section 8, the government changed its long-standing policy and found itself confronting the same concerns it had dealt with in the 1970s when Congress originally rejected employer sanctions.[200] Opponents of

189. HOME OFFICE, COMPREHENSIVE 2004, *supra* note 188, at 3.

190. As of June 2, 2008. GoCurrency.com, Currency Converter, http://www.gocurrency.com (last visited June 2, 2008).

191. HOME OFFICE, COMPREHENSIVE 2004, *supra* note 188 at 5; Asylum and Immigration Appeals Act, 1996, c. 49, § 8(4); Ryan 2005, *supra* note 137, at 41; Ryan 1997, *supra* note 149, at 137.

192. Asylum and Immigration Appeals Act, 1996, c. 49, § 8(2).

193. *Id.*

194. Ryan 1997, *supra* note 149, at 139-140 (citing Immigration (Restrictions on Employment) Order, 1996, S.I. 1996/3325).

195. The National Insurance number is similar to a Social Security number in the United States because contributions collected under the National Insurance system go toward benefits. Nic Cicutti, *National Insurance,* MSN UK MONEY, May 16, 2005, http://money.uk.msn.com/tax/taxguide/article.aspx?cp-documentid=4753989. The types of benefits provided for by National Insurance Contributions include: retirement pensions, sickness, unemployment, maternity, and widows' pensions. *Id.* United Kingdom residents under the age of sixteen are automatically issued National Insurance numbers, whereas non-citizens have to apply for them. HM Revenue & Customs, Your National Insurance Number, *at* http://www.hmrc.gov.uk/faqs/ynino.htm (last visited June 2, 2008).

196. Ryan 1997, *supra* note 149, at 139-40; Ryan 2005, *supra* note 137, at 48.

197. Ryan 2005, *supra* note 137, at 39 (citing Immigration (Restrictions on Employment) Order, 2004, S.I. 2004/755).

198. Asylum and Immigration Appeals Act, 1996, c. 49, § 8(3).

199. IMMIGRATION AND NATIONALITY DIRECTORATE, OPERATION MANUAL §55.4.1 (2006) [hereinafter IND, OPERATION MANUAL].

200. *See supra* Part II(B).

employer sanctions feared sanctions would increase the likelihood employers would discriminate against ethnic minorities when making hiring decisions to avoid the possibility of liability under the provision.[201] In an effort to prevent discrimination, the government released a parallel report with the legislation providing guidance for employers regarding how to comply with the new law without violating pre-existing anti-discrimination law, the Race Relations Act 1976 (and the Race Relations Order 1997 in Northern Ireland).[202] The Race Relations Act 1976 "prohibits discrimination against applicants on grounds of 'colour [sic], race, nationality or ethnic or national origin.'"[203]

3. Distinguishing the IRCA from Section 8

Although the provisions of the IRCA and Section 8 appear similar at first glance, some important differences exist. Both subject employers to civil sanctions for knowingly hiring individuals who are unauthorized to work due to immigration violations.[204] Both also include a statutory defense for employers who attempt to preempt violations by verifying an employee's employment eligibility documentation.[205] Despite these similarities, the legislation of the two countries is different in three important respects: the standard by which the countries define knowledge,[206] employment eligibility verification requirements,[207] and anti-discrimination provisions.[208]

The knowledge element in the United Kingdom is a subjective standard of actual knowledge;[209] whereas, in the United States, the knowledge requirement also includes constructive knowledge.[210] In the United States, knowing not only means actual knowledge "but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."[211] In the United Kingdom, knowledge requires that the defendant

201. Dallal Stevens, Legislation, *The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum*, 61 MOD. L. REV. 207, 217-18 (1998).

202. HOME OFFICE, COMPREHENSIVE 2004, *supra* note 188, at 6.

203. Ryan 1997, *supra* note 149, at 141-42.

204. *Compare* 8 U.S.C. § 1324a(a) (2006), *with* Asylum and Immigration Appeals Act, 1996, c. 49, § 8(1).

205. *Compare* 8 U.S.C. § 1324a(b)(1), *with* Asylum and Immigration Appeals Act, 1996, c. 49, § 8(2).

206. *Compare* 8 C.F.R. § 1247a.1(l)(1) (2006), *with* IND, OPERATION MANUAL, *supra* note 199, at § 55.4.1. *See* Winnie Chan & A.P. Simester, *Intention Thus Far*, CRIM. L. REV. 1997, OCT, 704, 716 (indicating "[k]nowledge requires a positive (and correct) belief on the part of the defendant that the relevant circumstance does indeed exist").

207. *Compare* 8 U.S.C. § 1324a(b)(2), *with* Asylum and Immigration Appeals Act, 1996, c. 49, § 8(2).

208. *Compare* 8 U.S.C. § 1324b, *with* HOME OFFICE, COMPREHENSIVE 2004, *supra* note 188, at 6.

209. IND, OPERATION MANUAL, *supra* note 199, at § 55.4.1.

210. 8 C.F.R. § 1247a.1(l)(1) (2006); *see* Schoonover et al., *supra* note 172, at 29.

211. 8 C.F.R. § 1247a.1(l)(1); *see* Schoonover et al., *supra* note 172, at 29.

either knew he was committing the offense or was convinced in his mind he was committing the crime.[212] Because the prosecution must show what was actually in the defendant's mind at the time the offense was committed, knowing is the most difficult mental state to prove.[213] However, in the United States, the prosecution does not have to prove what was actually in the defendant's mind at the time the crime was committed; the prosecution must only prove that knowledge could have been inferred from the surrounding circumstances by a reasonable person.[214] The task of proving an employer had actual knowledge of a new hire's immigration status is much more difficult than proving an employer *should have* known about the individual's immigration status based on the surrounding circumstances.[215] Thus, the United States has a much lower burden of proof than the United Kingdom with respect to proving an employer knowingly employed illegal workers.

Also, Section 8 does not include a specific provision prohibiting discrimination, but instead relies on pre-existing legislation to deter discriminatory employment practices.[216] On the other hand, the IRCA includes specific anti-discrimination provisions and methods of enforcement.[217] The fact that anti-discrimination offenses are not specifically included in the 2006 Act is not as significant as the other differences between the two acts because employers must still comply with the anti-discrimination laws included in pre-existing legislation.[218]

The United Kingdom does not require employers to verify employment eligibility;[219] whereas, employment eligibility verification is mandatory in the United States under the IRCA.[220] Interestingly, the United Kingdom passed legislation in 2006, the Immigration, Asylum and Nationality Act 2006 (2006 Act), [221] which was intended to remedy the problems of Section 8, and, on the surface, it appears to make the system almost identical to the U.S. system under the IRCA. The 2006 Act excuses employers from sanctions if they can prove compliance with requirements set out by the Secretary of State in a Code of

212. THE LAW COMMISSION, CRIMINAL LAW: REPORT ON THE MENTAL ELEMENT IN CRIME (LAW COM NO. 89), 1978, H.C. 499, at 10 (implementation rejected).

213. *Id.* at 9.

214. 8 C.F.R. § 1247a.1(l)(1) (2006); *see* Schoonover et al., *supra* note 172, at 29-30.

215. In the United States, knowledge can be proven through circumstantial evidence. 29 AM. JUR. 2D *Evidence* § 557 (2007).

216. Ryan 1997, *supra* note 149, at 141-42.

217. Marinelli, *supra* note 44, at 846 (citing 8 U.S.C. § 1324b(g)(2)(B) (Office of Special Counsel for Immigration Related Employment Practices)).

218. Race Relations Act, 1976, c. 74 (Eng.) and Race Relations (Northern Ireland) Order, 1997, SI 1997/869 (N. Ir. 6).

219. Ryan 1997, *supra* note 149, at 139; HOME OFFICE, COMPREHENSIVE 2004, *supra* note 188, at 30 (stating "[y]ou [meaning the employer] will not commit an offence [sic] if you fail to keep a record for your employee and that person is not subject to immigration control . . . or is permitted to work here").

220. 8 U.S.C. § 1324a(b)(2) (2006).

221. Immigration, Asylum and Nationality Act, 2006, c. 13, § 23.

Practice order.[222] The Code of Practice requirements include a process of employment eligibility verification similar to that required under the IRCA.[223] Employers must check and copy specific documents indicating the individual is authorized to work; employers must also take "reasonable steps to check the validity of the original document and that the person presenting the document is the rightful holder."[224] One difference between the U.K. and U.S. systems is re-verification.[225] In the United Kingdom, employers are required to re-verify the eligibility status of employees who only have temporary authorization to work in the United Kingdom every twelve months.[226] In contrast, United States employers are only required to re-verify an employee's eligibility on or before his or her documentation's expiration date.[227]

The 2006 Act also specifically requires the Secretary of State to issue a Code of Practice order providing employers information on how to avoid sanctions without engaging in discrimination.[228] The Code of Practice suggests U.K. employers "treat all applicants the same way at each stage of the recruitment process."[229] This recommendation is similar to the IRCA anti-discrimination provision, which requires employers to ask all new hires for the same types of documentation to verify employment eligibility in the United States.[230] Thus, the only real difference between the anti-discrimination measures in the United Kingdom and the United States is that the prohibition on discrimination in the United States has been specifically included in the IRCA and is an immigration offense, whereas, in the United Kingdom, discrimination is not an immigration offense, but is a violation of pre-existing legislation.[231]

While the two new provisions of the 2006 Act appear to remedy the discrepancies between the systems in the United States and the United Kingdom, further analysis reveals the 2006 Act has not significantly changed Section 8. As in the original Section 8 legislation, the actual requirements to verify employment eligibility through document checks and the requirement to

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222. HOME OFFICE, IMMIGRATION, ASYLUM AND NATIONALITY BILL: CIVIL PENALTIES FOR EMPLOYERS DRAFT AMOUNT OF PENALTY CODE OF PRACTICE, 2006, at 3 [hereinafter HOME OFFICE, CIVIL PENALTIES] (citing Immigration, Asylum and Nationality Act, 2006, c. 13, §15).

223. HOME OFFICE, CIVIL PENALTIES, *supra* note 222, at 5.

224. *Id.* at 9.

225. *Id.*; Dept. of Homeland Security, Employment Eligibility Verification, Form I-9, § 3, *available at* http://www.uscis.gov/files/form/i-9.pdf (last visited June 2, 2008) [hereinafter DHS, Form I-9].

226. HOME OFFICE, CIVIL PENALTIES, *supra* note 221, at 9.

227. DHS, Form I-9, *supra* note 225, at 1.

228. Immigration, Asylum and Nationality Act, 2006, c. 19.

229. HOME OFFICE, IMMIGRATION ASYLUM AND NATIONALITY BILL: DRAFT OF CODE OF PRACTICE FOR ALL EMPLOYERS ON THE AVOIDANCE OF RACE DISCRIMINATION IN RECRUITMENT PRACTICE WHILE SEEKING TO PREVENT ILLEGAL WORKING, 2005, at 13 [hereinafter HOME OFFICE, DISCRIMINATION].

230. Martin & Miller, *supra* note 23, at 35.

231. Race Relations Act, 1976, c. 74 (Eng.) and Race Relations (Northern Ireland) Order, 1997, SI 1997/869 (N. Ir. 6).

avoid discrimination in employment practices are not included in the primary legislation, but, instead, are in supporting reports issued by the government.[232] Unlike the IRCA, the supporting reports are not legally binding.[233] Thus, the employment eligibility verification process is not mandatory for employers.[234] The employment eligibility verification requirement in the United States is mandatory.[235] As part of the IRCA, all U.S. employers are required to verify employment eligibility by filling out I-9 forms for each newly-hired employee.[236] Though the completed I-9 forms provide employers with a statutory defense, complying with the eligibility verification requirement is compulsory in the United States.[237] By making the eligibility verification process mandatory and providing the forms on which employers must document the process, the United States' process of verification is standardized and ensures compliance by most U.S. employers. The system employed by the United Kingdom, on the other hand, relies heavily on the discretion of employers and is likely to lull some employers, especially those who do not feel as though they are at risk of prosecution for violations, into not verifying employment eligibility of new hires.

Other changes made by the 2006 Act, dealing with penalties, had more of an impact.[238] The maximum amount of civil sanctions dropped from £5000 pounds per illegal employee to £2000 (about $3966.68[239]) per illegal employee.[240] In assessing the amount of civil sanctions to impose, an Immigration Officer is to consider various factors to determine "the fairness of the financial penalty."[241] These factors include: the extent of document employment eligibility verification checks conducted; past violations and

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232. HOME OFFICE, CIVIL PENALTIES, *supra* note 222, at 3; HOME OFFICE, DISCRIMINATION, *supra* note 229, at 11.

233. HOME OFFICE, DISCRIMINATION, *supra* note 229, at 5 (indicating

> [t]he Code does not impose any legal obligations on employers, nor is it an authoritative statement of the law; only the courts and Employment Tribunals can provide this. However, the Code can be used as evidence in legal proceedings. Courts and Employment Tribunals must take account of any part of the Code that might be relevant on matters of racial discrimination in employment practices).

234. *See id.*; HOME OFFICE, COMPREHENSIVE 2004, *supra* note 188, at 30 (stating "[y]ou [the employer] will not commit an offence [sic] if you fail to keep a record for your employee and that person is not subject to immigration control . . . or is permitted to work here"). The Secretary of State has yet to release the final Civil Penalties Code of Practice; this point is inferred from the language in the draft of the anti-discrimination code of practice and the Comprehensive Guidance report for employers published by the Home Office regarding 2004 legislation. *Id.*

235. 8 U.S.C. § 1324a(b)(2) (2006).

236. *Id.*

237. *Id.*

238. Immigration, Asylum and Nationality Act, 2006, c. 19. § 15; Ryan 2005, *supra* note 137, at 41.

239. Value current as of March 3, 2008. Go Currency, Currency Converter, http://www.gocurrency.com (last visited June 2, 2008).

240. Ryan 2005, *supra* note 137, at 65.

241. HOME OFFICE, CIVIL PENALTIES, *supra* note 222, at 12.

whether improvements have since been made; whether the employer reported suspected illegal workers to Immigration Services; whether the employer cooperated with the investigation; and the proportionality of the penalty to the infraction.[242] The more remarkable addition to the penalties provisions is the possibility of prison sentences for offending employers.[243] If an employer is convicted of knowingly employing a person who is ineligible to work in the United Kingdom, the employer can be sentenced to up to two years imprisonment.[244] The length of the sentence depends on whether the employer is convicted on indictment or by summary conviction.[245] Under the 2006 Act, corporate officers can be held accountable, along with the corporate body, for the actions of the business if the individual is found to have "consent[ed] or connive[d]" in the violation.[246] This means corporate officers can serve time in prison if they personally have knowledge that the company is employing illegal workers.[247]

The changes to the penalty provisions of Section 8 make the possible penalties for employing ineligible workers in the United Kingdom much harsher than the penalties in the United States.[248] In the United States, employers who either hire an employee who is ineligible to work in the United States or fail to verify a new employee's eligibility are only subject to civil sanctions limited to fines.[249] Employers could face prison time if they are found to have engaged in a pattern of employing illegal workers.[250] If an employer is convicted of engaging in a pattern of employing illegal workers, he faces a maximum sentence of six month in prison.[251] The United Kingdom's system is much more severe because an employer can be sentenced to prison time exceeding six months, even if they are convicted of only employing one illegal worker, so long as evidence indicates the employer consented or connived to violate the law.[252] There does not need to be evidence demonstrating the employer has repeatedly violated the law in order for the maximum sentence to be imposed.[253]

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242. *Id.*; *see also* Ryan 2005, *supra* note 137, at 41.

243. Ryan 2005, *supra* note 137, at 42.

244. *Id.*; *see* Richard McKee, Legislative Comment, *The Immigration, Asylum and Nationality 2006 Act (and Other Developments)*, I.A.N.L. 2006, 20(2), 87-94, 92, 2006 WL 2088989 (Westlaw UK).

245. Ryan 2005, *supra* note 137, at 42; *see* J.R. Spencer, *Does Our Present Criminal Appeal System Make Sense*, Crim. L. Rev. 677-694 (2006) (significant differences exist between summary convictions and convictions on indictments, especially in the corresponding appellate procedures.).

246. Ryan 2005, *supra* note 137, at 42 (citing Immigration, Asylum and Nationality Act, 2006, c. 49, §22).

247. *Id.* at 42.

248. 8 U.S.C.A. § 1324a(f)(1) (2006); *see supra* Part III(A).

249. 8 U.S.C.A. § 1324a(f)(1).

250. *Id.* (defining pattern as "regular, repeated, and intentional activities").

251. *Id.*

252. Immigration, Asylum and Nationality Act, 2006, c. 13, §22.

253. *Id.*

B. Enforcement

1. United States

a. Worksite Enforcement

The INS was responsible for enforcing the employer sanctions provisions of the IRCA from 1986[254] until March of 2003, when INS was absorbed into the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE), a subdivision of DHS, became responsible for enforcing the provisions via worksite raids.[255]

Immigration-enforcement agents start an investigation of an employer if they receive information that the employer is employing undocumented workers.[256] If agents believe the employer hired the undocumented workers unknowingly, agents review the employer's employment records, including the I-9 forms, and hold a seminar for the employer to educate it on how to properly complete the I-9 forms and how to detect fraudulent documents.[257] Then agents provide the employer with a list of those employees believed to be undocumented and the employer is responsible for re-verifying their eligibility status or terminating their employment.[258] If agents believe the employer *knowingly* hired undocumented workers, agents arrest the employer prior to the other steps of the investigation.[259]

Between 1992 and 1998, the INS had a memorandum of understanding with the Department of Labor Employment Standards Administration (DOL) to assist in worksite enforcement of the IRCA.[260] The DOL agreed to collect information on employer compliance when engaging in standard labor investigations.[261] Despite the promise of the underlying arrangement, the DOL was ineffective in IRCA enforcement for two reasons. First, the DOL did not

254. General Accounting Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist*, 7, GGD-99-33 (1999) *available at* http://www.gao.gov/archive/1999/gg99033.pdf [hereinafter GAO, *Illegal Aliens: Significant Obstacles*].

255. GAO, *Immigration Enforcement: Weaknesses*, *supra* note 181, at n.3. As part of the merger, INS's immigration functions were divided between three subdivisions of DHS: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection. *Id.*

256. GAO, *Illegal Aliens: Significant Obstacles*, *supra* note 254, at 7. An employer may also be randomly selected. Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POL'Y INST., Sept. 1, 2005, http://www.migrationinformation.org/Feature/display.cfm?ID=332.

257. GAO, *Illegal Aliens: Significant Obstacles*, *supra* note 254, at 7.

258. *Id.*

259. *Id.*

260. Espenoza, *supra* note 112, at 378; Martin & Miller, *supra* note 23, at 34.

261. Espenoza, *supra* note 112, at 378.

provide employers with the statutorily-mandated, three-day notice of intent to inspect the I-9 forms, and as result, could not inspect the documents.[262] Second, the DOL was hesitant to provide INS with information about suspected undocumented workers because of concern individuals would be afraid to cooperate in labor law violation investigations.[263] The partnership between INS and DOL was relatively unsuccessful for IRCA enforcement.[264]

The next enforcement attempt developed by INS was the General Administrative Plan (GAP), a process that would randomly select employers for the INS to audit for IRCA compliance.[265] GAP had two parts: the General Inspections Program, which selected employers randomly from all geographic areas and industries, and the Special Emphasis Program, which selected employers randomly from industries known to have employed large numbers of undocumented workers.[266] The General Accounting Office (GAO) found both programs were ineffective in reliably measuring compliance levels by either region or industry.[267] The program left employer selection to regional offices, many of which had no selection guidelines, and those offices with guidelines were often so transparent that employers had implicit warning as to when they would be subject to I-9 inspections, thus giving employers time to prepare.[268] Some employers did not fit within either program[269] and, as a result, were not subject to any compliance review procedures.[270] Other flaws to the enforcement strategy included not assessing the sanctions articulated in the IRCA, negotiating with companies to reduce the amounts of sanctions imposed, and not conducting re-inspections after finding violations.[271] The GAO report recommended modifications to the INS enforcement strategy, including an automated system for maintaining compliance data.[272]

Worksite enforcement has been a low priority for immigration enforcement officials.[273] In fiscal year 1999, INS dedicated nine percent of its total investigative agents to worksite enforcement, and, in fiscal year 2003, ICE

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262. *Id.*

263. Martin & Miller, *supra* note 23, at 34-35.

264. *Id.* (noting "[o]f the 367,000 employer Form I-9 reviews that the Labour [sic] Department conducted between FY 1988 and 1998, only 236 employers were suspected of employing unauthorized aliens and were referred to INS").

265. Espenoza, *supra* note 112, at 379.

266. *Id.* (citing General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, 94, GAO-GGD-90-62 (1990) [hereinafter GAO, *Immigration Reform: Employer Sanctions*]).

267. Espenoza, *supra* note 112, at 379 (citing GAO, *Immigration Reform: Employer Sanctions*, *supra* note 266, at 95).

268. Espenoza, *supra* note 112, at 379.

269. *Id.* The INS strategy "focused on large employers or those with a history of hiring undocumented workers." *Id.* at 380.

270. *Id.* at 379.

271. *Id.*

272. *Id.* (citing GAO, *Immigration Reform: Employer Sanctions*, *supra* note 266, at 101).

273. GAO, *Immigration Enforcement: Weaknesses*, *supra* note 181, at 3.

allocated only four percent.[274] The number of worksite enforcement efforts dropped from 10,000 in fiscal year 1999 to 2200 in fiscal year 2003.[275] In 2001, after the terrorist attacks on the World Trade Center, the "INS shifted its [enforcement] focus to businesses related to the nation's critical infrastructure," including public and private businesses such as airports, military installations, nuclear power plants, federal buildings, and defense contractors.[276] When ICE took over enforcement responsibilities from INS, it continued to focus its efforts on industries where employment of undocumented workers presented the greatest threat to national security.[277]

Available information suggests enforcement efforts and fines declined over several years.[278] However, newer data indicates enforcement efforts have been on the rise in recent years.[279] The number of arrests for administrative immigration offenses resulting from worksite enforcement raids fell from 2849 in 1999 to 445 in 2003.[280] The number of notices of intent to fine[281] issued to employers dropped dramatically from 417 in 1999 to 3 in 2004.[282] Although, ICE reported significant increases in enforcement from 2004 to 2005;[283]

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274. *Id.* at 3-4.

275. Brownell, *supra* note 256, at 8.

276. GAO, *Immigration Enforcement: DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements*, 11, GAO-05-66, Oct. 2004 [hereinafter GAO, *Immigration Enforcement: DHS*]. "If these businesses were to be compromised by terrorists, this would pose a serious threat to domestic security." *Id.*

277. *Id.* at 12 (noting "ICE is pursuing this objective, now called critical infrastructure protection, by concentrating its enforcement resources on those industries where employment of illegal aliens poses the greatest potential threat to national security").

278. GAO, *Immigration Enforcement: Weaknesses*, *supra* note 181, at 16.

279. ICE, Worksite Enforcement Fact Sheets, http://www.ice.gov/pi/news/factsheets/worksite.htm (last visited June 2, 2008).

280. GAO, *Immigration Enforcement: Weaknesses*, *supra* note 181, at 16.

281. *Id.* at n.25 (indicating

> [i]f warranted as a result of a worksite enforcement operation, ICE may issue a notice of intent to fine to an employer that specifies the amount of the fine ICE is seeking to collect from the employer. This amount may be reduced after negotiations between ICE attorneys and the employer).

282. *Id.* at 16.

283. *Id.* at 18.

> Data from fiscal years 2004 and 2005 cannot be compared with data for previous fiscal years because the way INS agents entered data on investigations into the INS case management system differs from the way ICE agents enter such data into the ICE system. Following the creation of ICE in March 2003, the case management system used to enter and maintain information on immigration investigations changed. With the establishment of ICE, agents began using the legacy U.S. Customs Service's case management system, called the Treasury Enforcement Communications System, for entering and maintaining information on investigations, including worksite enforcement operations. Prior to the creation of ICE, the former INS entered and maintained information on investigative activities in the Performance Analysis System, which captured information on immigration investigations differently than the Treasury Enforcement Communications System.

criminal arrests increased from 160 to 165; criminal indictments increased from 67 to 140; and convictions increased from 46 to 127.[284] The number of individuals arrested as a result of worksite enforcement raids in 2005 for administrative immigration offenses increased to 980.[285] In 2007, ICE reported 863 criminal arrests and 4077 administrative immigration violation arrests.[286]

It should be noted that ICE lumps all criminal arrests together and does not publish statistics differentiating between employers and illegal workers.[287] ICE has also indicated those who are arrested for administrative immigration violations are generally undocumented workers who are in the United States illegally.[288] Therefore, it is difficult to ascertain the number of employers ICE has held accountable for violating IRCA's prohibition on employing undocumented workers.

In April of 2006, ICE announced a new interior immigration enforcement strategy.[289] A primary goal of the new strategy is to "build strong worksite enforcement and compliance procedures to deter illegal employment . . . ."[290] The strategy also includes plans to bring criminal charges against employers who knowingly hire undocumented workers[291] and to seize illegally-derived assets from violating employers.[292] An example of these stepped-up enforcement efforts was Operation Wagon Train, which occurred on December 12, 2006.[293] During this operation, ICE immigration officials raided Swift & Co. meatpacking plants in six states and arrested 1297 illegal workers.[294] According to ICE, this was their largest worksite enforcement operation ever.[295] However, ICE did not arrest or charge any company officials with IRCA

Id. at n.26.

284. *Id.* at 18.

285. *Id.* Up from 445 in 2003. *See supra* note 280 and corresponding text.

286. ICE, Worksite Enforcement Fact Sheets, *supra* note 279.

287. *Id.*

288. *Id.*

289. Press Release, Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation's Interior (Apr. 20, 2006), *available at* http://www.dhs.gov/xnews/releases/press_release_0890.shtm.

290. *Id.*

291. *Id*; GAO, *Immigration Enforcement: Weaknesses*, *supra* note 181, at 19 (stating "DHS has proposed increasing agent and support resources by 206 positions for all of its worksite enforcement efforts in 2007 to increase investigations of employers who hire significant numbers of unauthorized workers"). General Accounting Office, *Immigration Enforcement: Benefits and Limitations to Using Earnings Data to Identify Unauthorized Work*, 4, GAO-06-814R, July 11, 2006, *available at* http://www.gao.gov/new.items/d06814r.pdf [hereinafter GAO, *Immigration Enforcement: Using Earnings Data*].

292. Press Release, *supra* note 289.

293. Jennifer Talhelm, *Senators Meet on Recent Immigration Raid*, WASH. POST, Jan. 23, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/23/AR2007012300404.html.

294. *Id.*

295. Julie L. Myers, Assistant Secretary, ICE, Remarks at a News Conference Announcing a Worksite Enforcement Operation at a Nationwide Meat Processor (Dec. 13, 2006), *available at* http://www.ice.gov/doclib/pi/news/testimonies/061213wseo.pdf.

violations.[296] There are sixteen other examples of worksite enforcement operations listed on the ICE website and, in each of those cases, ICE either has brought criminal charges against the employers or has seized employer assets.[297] ICE carried out another worksite enforcement operation against a national company on February 22, 2007, which led to the arrest of company officials on several criminal charges in connection with their practice of knowingly employing illegal aliens.[298] While it is too early to tell whether these enforcement operations will have a deterrent effect on other employers there is some anecdotal evidence that suggests employers who contract with other companies to hire large numbers of workers may be more likely to take affirmative steps to independently verify the employment eligibility status of their employees.[299]

b. Employment Eligibility Verification

In order to comply with the verification requirements of the IRCA, and to avoid violating the anti-discrimination provisions, most employers do not request specific forms of identification and are often hesitant to assert that documentation appears to be fraudulent or unacceptable.[300] The standard to avoid liability under the verification requirements is that the documents reasonably appeared to be genuine.[301] This low threshold coupled with the large number of acceptable forms of identification[302] has led to widespread use of counterfeit or fraudulent documents.[303] The penalties for producing or selling counterfeit documents are minimal compared to the perceived gains.[304] Another by-product of this low threshold is identity theft.[305] According to data

296. Spenser S. Hsu & Krissah Williams, *Illegal Workers Arrested in 6-State ID Theft Sweep*, WASH. POST, Dec. 13, 2006, at A1 (noting the fact no company officials were cited has been associated with the company's participation in the Basic Pilot program). Spenser S. Hsu, *ICE Sweep Was Largest Ever Against One Firm*, WASH. POST, Dec. 14, 2006, at A9 [hereinafter Hsu, *ICE Sweep*]. *See infra* Part II(B)(1)(b).

297. ICE, Worksite Enforcement Cases, http://www.ice.gov/pi/news/factsheets/worksite_cases.htm (last visited June 2, 2008).

298. Julie L. Myers, Assistant Secretary, ICE, Remarks: RCI News Conference (Feb. 22, 2007).

299. *Id.*

300. *See generally* Martin & Miller, *supra* note 23, at 36-37.

301. Marinelli, *supra* note 44, at 837 (citing 8 U.S.C. § 1324a(b)(1) (Supp. IV 1986)).

302. 8 C.F.R. § 1274a.2(b)(1)(v) (2006). This provision lists fifteen acceptable forms of identification. *Id.*

303. Martin & Miller, *supra* note 23, at 37, 45-46; *see also* GAO, *Illegal Aliens: Significant Obstacles*, *supra* note 254, at 10-11. "According to a January 1997 Justice Office of Inspector General (OIG) audit report, on the basis of a review of 30 INS fraud cases in 5 INS district offices, INS confiscated nearly 300,000 counterfeit documents." *Id.*

304. *Id.* at 45. In 2000, "sentences for those convicted of forging documents generally range[d] from ten months to six years in prison." *Id.*

305. *See* John Leland, *Stolen Lives: The Crucial Number*, N.Y. TIMES, Sept. 4, 2006, at A1 (detailing the recent trend in identity theft by illegal aliens for the purpose of establishing employment eligibility and the consequences for those who have had their identification stolen);

from an INS employer sanctions database "from October 1996 through May 1998, about 50,000 unauthorized aliens used 78,000 fraudulent documents to obtain employment."[306]

When Congress passed the IRCA, it must have been aware of the potential for widespread document fraud under the new system, because one of the provisions included in the IRCA authorizes the President to monitor the current employment verification system and to implement improvements to the system if necessary to ensure that the system is secure.[307] The President's authority is limited because he or she must get congressional approval on all major changes,[308] and any changes must be counterfeit resistant,[309] comport with timing,[310] privacy,[311] and other requirements. President Reagan, who was in power when Congress passed the IRCA, refused to exercise the authority granted to him because he was concerned a new system would be too expensive and would result in privacy invasion.[312]

The U.S. Commission on Immigration Reform (CIR) echoed the concerns about fraudulent documentation in 1994.[313] CIR found the IRCA employer sanctions system had failed and recommended comprehensive reform including "measures designed to make it more difficult for illegal immigrants to obtain

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see also General Accounting Office, *Social Security Numbers: Ensuring the Integrity of the SSN*, 5, GAO-03-941T, July 10, 2003, *available at* http://www.gao.gov/new.items/d03941t.pdf [hereinafter GAO, *SSN*]. According to the SSA, over 80% of social security number misuse allegations are identity-crime related. *Id.*

306. General Accounting Office, *Illegal Aliens: Fraudulent Documents Undermining the Effectiveness of the Employment Verification System*, 2, GAO/T-GGD/HEHS-99-175, July 22, 1999, *available at* http://archive.gao.gov/f0902b/162489.pdf [hereinafter GAO, *Illegal Aliens: Fraudulent Documents*]. The GAO reports use the term "'fraudulent' . . . to refer to situations in which unauthorized aliens illegally used documents for the purposes of obtaining employment. . . . [F]raudulent documents include documents that were illegally manufactured as well as genuine documents used illegally (e.g., an unauthorized alien using another person's valid document)." GAO, *Illegal Aliens: Significant Obstacles*, *supra* note 254, at 4 n.5.

307. 8 U.S.C. § 1324a(d)(1) (2006).

308. 8 U.S.C. §1324a(d)(3)(D). "Major change" is defined as:

> (i) require[ing] an individual to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment or referral;
> (ii) provid[ing] for a telephone verification system under which an employer, recruiter, or referrer must transmit to a Federal official information concerning the immigration status of prospective employees and the official transmits to the person, and the person must record, a verification code; or
> (iii) require[ing] any change in any card used for accounting purposes under the Social Security Act [42 U.S.C.A. § 301 et.seq.]; including any change requiring that the only social security account number cards which may be presented in order to comply with subsection (b)(1)(C)(i) of this section are such cards as are in a counterfeit-resistant form consistent with the second sentence of the section 205(c)(2)(D) of the Social Security Act [42 U.S.C.A. § 405(c)(2)(D)].

Id.

309. 8 U.S.C. §1324a(d)(2)(B).

310. 8 U.S.C. §1324a(d)(3).

311. 8 U.S.C. §1324a(d)(2)(D).

312. Spotts, *supra* note 49, at 611 (citing LAHAM, *supra* note 126, at 162).

313. Martin & Miller, *supra* note 23, at 41.

work in the United States."[314] The commission found employers lacked the experience necessary to identify fraudulent documentation. [315] CIR recommended the government issue new Social Security cards with credit-card type features to individuals authorized to work in the United States.[316] The cards would allow for verification of employment eligibility by either swiping them through magnetic card readers or by calling a toll-free number.[317] CIR intended the proposed system to reduce the possibility that counterfeit documentation could be used in the employment eligibility verification process.[318] CIR estimated the cost of creating a national registry would be between $250 and $300 million and would take approximately five years.[319] In order to prevent large-scale problems that could cost more than initial estimates, CIR recommended the program be tested in a few states to work out any bugs before creating a national system.[320]

The cards proposed by CIR would contain personal information such as a birth date and fingerprint.[321] Upon verifying the eligibility of the cardholder, CIR would supply the employer with one or two personal questions to ask the new hire to confirm that the individual presenting the card was indeed the appropriate cardholder.[322] Civil liberties groups have attacked the proposed cards as a violation of privacy. [323]

As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[324] Congress required the Social Security Administration (SSA) to establish cost estimates for new social security cards incorporating counterfeit-resistant security features.[325] The SSA found that issuing tamper-resistant social security cards to the 277 million U.S. residents would cost between $3.9 billion and $9.2 billion.[326] The General Accounting Office found these cost estimates to be reasonable.[327]

IIRIRA also required the SSA and INS to work together to test three possible means of electronic employment verification.[328] The Basic Pilot, the

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314. *Id.* (citing U.S. Immigration Commission on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* xxi (1994)).

315. Francis Gabor & John B. Rosenquest IV, *The Unsettled Status of Economic Refugees from the American and International Legal Perspectives—A Proposal for Recognition Under Existing International Law*, 41 TEX. INT'L L.J. 275, 293 (2006).

316. Martin & Miller, *supra* note 23, at 46.

317. *Id.*

318. Gabor & Rosenquest, *supra* note 315, at 293.

319. Martin & Miller, *supra* note 23, at 46.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 47.

324. 8 U.S.C. § 1324a(b) (2006). IIRIRA was enacted as a piece of a larger bill, the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208.

325. GAO, *Illegal Aliens: Fraudulent Documents*, *supra* note 306, at 5.

326. *Id.* at 1, 5; *see also* Martin & Miller, *supra* note 23, at 34.

327. GAO, *Illegal Aliens: Fraudulent Documents*, *supra* note 306, at 6.

328. GAO, *Immigration Enforcement: Weaknesses*, *supra* note 181, at 5. In 2003, two of

most successful of the programs, is an automated system, which matches information voluntarily provided by employers about newly-hired employees[329] to the information stored by SSA.[330] If the employment eligibility cannot be verified by SSA information, then the data is compared to the DHS database.[331] If the information cannot be verified by the DHS database, then it is referred to DHS immigration status verifiers who search other DHS databases.[332] If an employee's employment eligibility cannot be verified via any of the aforementioned channels, then either SSA or DHS contacts the employer who then notifies the employee of the tentative non-confirmation.[333] The employee has an opportunity to contest the non-confirmation within eight days; if the employee is successful in his contest, the employee's eligibility is confirmed, and if not confirmed, he is to receive a final non-confirmation.[334] Employers are required to immediately dismiss employees whose work-eligibility status is not confirmed through this process or notify DHS of the continued employment of the non-confirmed individual.[335] The purpose of the Basic Pilot is to test whether an electronic employment verification system will improve the existing system by decreasing "(1) false claims of U.S. citizenship and document fraud; (2) discrimination against employees; (3) violations of civil liberties and privacy; and (4) the burden on employers to verify employees' work eligibility."[336] When the INS created the Basic Pilot in 1997, it aspired to have 16,000 employers enrolled by October 1, 1999.[337] As of June 2006, only 8600 employers, a small percentage of the total American employers, had become participants in the Basic Pilot program.[338] Of those only 4300 were active participants.[339]

Interestingly, the U.S. Citizenship and Immigration Services (USCIS) division of DHS is responsible for oversight of the Basic Pilot program, even though ICE is responsible for worksite enforcement.[340] The information shared through the Basic Pilot program could be used by ICE to locate employers who are not adhering to the provisions of the IRCA and could improve the worksite

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the programs, Citizen Attestation Verification Pilot Program and the Machine-Readable Document Pilot Program, were discontinued for "technical difficulties and unintended consequences." *Id.* at n.9.

329. *Id.* at 5 (information is matched within three days of the employee's hire date).

330. Francesca Jarosz, *Immigration: What's an Employer to Do?*, BUS. L. TODAY, Dec. 16, 2006, at 51.

331. GAO, *Immigration Enforcement: Weaknesses, supra* note 181, at 5-6.

332. *Id.* at 5-7.

333. *Id.* at 6-7

334. *Id.*

335. *Id.*

336. *Id.* at 5.

337. Martin & Miller, *supra* note 23, at 38.

338. GAO, *Immigration Enforcement: Weaknesses, supra* note 181, at 9-10. The most current data available as to the total number of firms in the United States is 5.6 million, which was calculated in 2002. *Id.* at n.18.

339. *Id.* at 10.

340. *Id.*

enforcement efforts of ICE.[341] But USCIS is reluctant to provide ICE with access to this data because employers will refuse to participate based on the fear that participation will open them to worksite enforcement efforts.[342] This is indicative of an interesting theme that carries throughout current U.S. immigration policy: the disconnect between employment eligibility verification and worksite enforcement.[343]

There has been debate in Congress about providing data collected by the SSA and other government agencies directly to ICE to aid in its enforcement efforts.[344] Employers are periodically required to gather information from employees and to submit the information to various government agencies.[345] This includes a duty to report tax information annually for each employee to the SSA, which corresponds with the individual employee's duty to file an income tax return with the IRS.[346] In order to process a tax return, the IRS requires a taxpayer identification number.[347] The taxpayer identification number is generally a social security number issued by SSA.[348] Social security numbers are usually only issued to individuals authorized to work in the United States (i.e. citizens, legal permanent residents, etc.), but, in some circumstances, the SSA will issue social security numbers to non-citizens for non-work purposes.[349] When the SSA does so, it is required to report to DHS any individual who has one of those numbers and who subsequently earns an income.[350] Non-citizens who are not authorized to work in the United States

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341. *Id.*

342. *Id.*; *see also* Thomas C. Green & Illeana M. Ciobanu, *Deputizing — and Then Prosecuting — America's Businesses in the Fight Against Illegal Immigration*, 43 AM. CRIM. L. REV. 1203, 1212, 1216-20 (2006) (citing Editorial, *Justice Department Fowl*, WALL ST. J., Mar. 28, 2003, at A12). Tyson Foods was not only one of the first companies to volunteer for Basic Pilot, but was also instrumental in working with federal investigators to shut down a fraudulent document ring at one of its plants. *Id.* at 1213. Despite Tyson's compliance, the DOJ undertook a private investigation of Tyson; the investigation included the use of undercover agents posing as illegal alien smugglers. *Id.* at 1212. As a result of the investigation, DOJ obtained a thirty-six count indictment against Tyson. *Id.* at 1223. The district judge dismissed twenty-four of those counts, and after a five-hour deliberation, the jury acquitted Tyson on all remaining accounts. *Id.* at 1213. *See also* Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking*, 9 HARV. LATINO L. REV. 59 (2006).

343. GAO, *Immigration Enforcement: Weaknesses*, *supra* note 181, at 10; *see generally* GAO, *Immigration Enforcement: Using Earnings Data*, *supra* note 291, at 1.

344. GAO, *Immigration Enforcement: Using Earnings Data*, *supra* note 291, at 1.

345. *Id.* at 2.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* Through the time the GAO report was published (July 2006), DHS made little use of this information. *Id.* at 4. Though Congress passed the law requiring SSA to share this information in 1996, the format in which it was transferred was incompatible with DHS systems until 2005. *Id.* at 2, 4. DHS claims this data would not be useful in locating employers who knowingly hire illegal workers, because all of the individuals have social security number. *Id.* at

will usually not be issued a social security number; however, they can get an Individual Taxpayer Identification Number (ITIN) from the IRS for tax-processing purposes.[351] The Treasury Office estimates the INS has issued hundreds of thousands of ITINs to illegal workers who have earned income in the United States.[352]

If the SSA finds a reported social security number does not match the corresponding name when it logs individual earnings, the SSA puts the earnings into an Earnings Suspension File (ESF).[353] The earnings remain in the ESF until the SSA can match them to a valid name and social security number.[354] When an employer submits a record that ends up in the ESF, the SSA sends an employer a no-match letter.[355] Evidence suggests that a small proportion of employers account for the largest percentage of the unidentified earnings reports.[356]

In accordance with its recent announcement indicating it plans to press criminal charges against more employers, DHS would like to focus more of its enforcement efforts on employers who submit large numbers of inaccurate records.[357] DHS has indicated it would benefit from having access to lists of employers who receive large numbers of no-match letters, regardless of whether the Basic Pilot program becomes compulsory.[358] The data could provide DHS with two potential tools to assist in its enforcement efforts: leads to employers employing illegal workers, and evidence (in the form of received no-match letters) the employers had knowingly violated IRCA by employing undocumented workers.[359]

Though data sharing would benefit DHS's enforcement efforts, there are limits to what information government agencies can share.[360] There are several laws aimed at protecting the privacy of individuals that limit the types and amounts of data that government agencies can share. "Because the confidentiality of tax data is considered crucial to voluntary taxpayer compliance, [the] IRS is restricted under Section 6103 of the Internal Revenue Code [(IRC)] from sharing taxpayer information with third parties, including

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351. *Id.*

352. *Id.*

353. Laura Fernandez Feitl, *Caring for the Elderly Undocumented Workers in the United States: Discretionary Reality or Undeniable Duty*, 13 ELDER L.J. 227, 235-36 (2005) (citing Jack E. Perkins, House Immigration Subcommittee Explores Social Security Totalization with Mexico, 80 No. 35 Interpreter Releases 1296, 1296 (Sept. 15, 2003)).

354. Feitl, *supra* note 353, at 235-36.

355. *Id.*; *see* Austin T. Fragomen, Jr. & Steven C. Bell, *Revisions to SSA "No-Match" Letter Program and Impact on Employers*, IMMIGR. BUS. NEWS & CMT., Apr. 1, 2003, at *1 (2003 WL 1560595).

356. GAO, *Immigration Enforcement: Using Earnings Data*, *supra* note 291, at 3.

357. *Id.* at 4.

358. *Id.*; Michael Chertoff, Secretary, DHS, Press Conference on Operation Wagon Train (Dec. 13, 2006), *available at* http://www.dhs.gov/xnews/releases/pr_1166047951514.shtm.

359. GAO, *Immigration Enforcement: Using Earnings Data*, *supra* note 291, at 3.

360. *Id.* at 5.

other government agencies, except in very limited circumstances."[361] Section 6103 imposes the same restrictions on the SSA.[362] Since worksite enforcement is not one of the limited circumstances allowed by Section 6103, Congress would have to enact a statutory exemption to provide DHS with access to taxpayer information.[363] DHS Secretary Michael Chertoff has asked Congress to enact such a statute authorizing SSA to share data with DHS.[364] A statutory exemption of this kind is likely to conflict with the Privacy Act, which stipulates data collected for one purpose cannot be used for a different purpose without either public notification or individual consent.[365]

2. United Kingdom

a. Worksite Enforcement

Prior to 1999, Immigration Officers (IO), agents of the Immigration and Nationality Directorate (IND), the government agency responsible for enforcing immigration policy in the United Kingdom, did not have as much authority as was necessary to enforce Section 8.[366] The Immigration and Asylum Act 1999[367] expanded the IOs' authority to include the right "to search persons and premises, to enter premises for the purpose of searching and for arresting persons and to seize and retain relevant material."[368] Initially, these powers were restricted to IOs operating within a pilot program, but the 1999 Act expanded these powers to include arrest teams that operate nationally.[369] Even with these expanded powers, enforcement efforts have been relatively ineffective.[370] Between 1998 and 2002, there were twenty-two prosecutions of employers for alleged violations of Section 8 and, of those, only eight resulted in convictions.[371]

Perhaps in response to those weak numbers, the Nationality, Immigration

361. GAO, *Immigration Enforcement: Using Earnings Data*, *supra* note 291, at 5.

362. Migration News, *DHS: No Match Enforcement*, http://migration.ucdavis.edu/mn/more.php?id=3315_0_2_0 (last visited June 2, 2008).

363. *Id.* The one exception to this would be information already allowed under the 1996 statutory exemption, which allows the SSA to share data concerning individuals who were issued social security numbers for non-work purposes but subsequently earned an income. *Id.* at 2.

364. Hsu, *ICE Sweep*, *supra* note 296.

365. GAO, *Immigration Enforcement: Using Earnings Data*, *supra* note 291, at 5 (citing Privacy Act of 1974, Pub. L. 93-579, Dec. 31, 1974, 88 Stat. 1896).

366. IND, OPERATION MANUAL, *supra* note 199, § E, c. 46.

367. Immigration and Asylum Act, 1999, c. 33, §§ 128-46.

368. IND, OPERATION MANUAL, *supra* note 199, § E, c. 46.

369. *Id.*

370. Dhananjayan Sriskandarajah & Francesca Hopwood Road Institute for Public Policy Research, *United Kingdom: Rising Numbers, Rising Anxieties*, MIGRATION POLICY INSTITUTE, May 2005, at 8, http://www.migrationinformation.org/Profiles/display.cfm?ID=306.

371. *Id.*

and Asylum Act 2002[372] made further changes to the enforcement powers granted to IOs.[373] The new powers granted under the 2002 legislation include the power to: (1) obtain a warrant to arrest an employer suspected of violating Section 8; (2) obtain a warrant to enter business premises to search for evidence of Section 8 violations; (3) enter and search business premises without a warrant to arrest immigration offenders if there are reasonable grounds to believe they are on the premise; and (4) search for and seize personnel records at business premises if there are reasonable grounds to believe Section 8 has been violated.[374] The changes in the powers granted to IOs coincided with a renewed emphasis on enforcement operations.[375]

> Between April and June 2003 the Immigration Service reported carrying out 79 illegal working operations, of which 27 were aimed at detecting significant numbers of illegal workers. Between July and September the number of reported operations increased by over 50% on the second quarter to 129 and those aimed at detecting a significant number of illegal workers rose by over 60% to 44.[376]

If IOs have been informed that a business is employing illegal migrants, the IND has set out specific procedures that must be followed in order to conduct worksite enforcement operations.[377] First, IOs are under a directive to ensure they "have exhausted all avenues for resolving a person's immigration status in the UK [sic]."[378] To aid IOs in their background research, the IND has established Joint Intelligence Units charged with the mission of supporting enforcement visits.[379] The Intelligence Units work together with police officers because of the highly-sensitive nature of these types of inquiries.[380] The actual procedures used in the inquiries vary depending on whether the enforcement visits are to take place in metropolitan or regional areas.[381] The metropolitan procedures generally include an initial visit request followed by local and police research.[382] Once these are completed, an intelligence summary is created

372. Nationality, Immigration and Asylum Act, 2002, c. 41.

373. IND, OPERATION MANUAL, *supra* note 199, at c. 55.2.

374. *Id.*

375. IMMIGRATION AND NATIONALITY DIRECTORATE, REGULATORY IMPACT ASSESSMENT §7 (June 22, 2005), *available at* http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/illegalworking/previouslypublished/ria2005.pdf?view=Binary [hereinafter IND, REGULATORY IMPACT ASSESS].

376. *Id.*

377. IND, OPERATION MANUAL, *supra* note 199, §§ 46, 55.

378. *Id.* § 46.3.

379. *Id.* § 46.3.1.

380. *Id.*

381. *Id.*

382. *Id.*

which highlights any potential safety and community concerns.[383] A "reconnaissance visit is then conducted and a risk assessment completed by the operational team . . . ."[384] The risk assessment is forwarded to the investigation unit where an Intelligent Manager approves it.[385] The investigation unit then seeks authorization for the local police inspector to conduct the enforcement visit.[386] IOs must also obtain authority, in written form, for enforcement visits from middle or upper-level ranking immigration officials during this investigation process.[387] Once officials give authorization, the information and clearance are given to the IO who initiated the process.[388] The IO then must complete a final status check to determine the immigration status of the targeted individuals within twenty-four hours of the intended visit.[389] IOs may only conduct enforcement visits after this entire process has been completed; if the IOs do not have the authority to arrest, they must seek police assistance in conducting the visit.[390]

IOs are instructed that enforcement operations should be planned with the goal of prosecuting the employer if possible.[391] If IOs believe there is a possibility of being able to prosecute the employer, then IOs should make sure to have the necessary warrants to arrest the offenders and to search the premises for evidence.[392] The IND operations manual instructs IOs to consider pursuing prosecution against employers even if the violation is the employer's first or is a minor offense, because the laws have been in place for over seven years.[393]

In recent years, the United Kingdom has appropriated more resources for enforcement efforts.[394] The number of Immigration Service staff involved in enforcement operations grew by fifty percent between 2002 and 2004.[395] In 2003 to 2004, the IND reported "700 enforcement raids took place — twice as many as the previous year."[396] In 2006, Home Secretary John Reid announced the enforcement budget would be doubled by an extra £100 million[397] (about

383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.* § 46.3.2.
388. *Id.* § 46.3.1.
389. *Id.* §§ 46.3, 46.3.1.
390. *Id.* § 46.3.1.
391. *Id.* § 55.7.
392. *Id.*
393. *Id.*
394. Immigration and Nationality Directorate, Press Release, *New Powers Boost Immigration Officers Power to Protect UK Borders*, Jan. 26, 2007, http://press.homeoffice.gov.uk/press-releases/441053?version=1.
395. Laura Dubinsky, *Unauthorised Working, Background Paper* 6, *in* LABOUR MIGRATION AND EMPLOYMENT RIGHTS (Bernard Ryan ed., 2005).
396. Home Office, Press Release, *New Figures Show Accession Workers Working for the UK*, Nov. 10, 2004, http://press.homeoffice.gov.uk/press-releases/New_Figures_Show_Accession_Worke.
397. Home Office, Press Release, *Immigration Charging Consultation Launched*, Oct. 30,

$198,333,994[398]), with the idea that this amount will allow enforcement efforts to also be doubled by 2009.[399] The IND announced it would add 800 new immigration officers to the Intelligence Units to aid in enforcement efforts at the beginning of 2007.[400]

b. Employment Eligibility Verification

Despite the increased enforcement efforts, the problem of employment eligibility verification, which as it stands, could undermine the whole system, remains. The parallel report released with the legislation by the government to assist employers with compliance makes it seem as though employment eligibility verification is a simple three-step process.[401] Upon further examination, however, it is clear that a variety of types of documentation are allowed, several of which come in a variety of forms or with various stamps or endorsements.[402] With the changes that came into effect in 2004, eight forms of identification could stand alone as proof of employment eligibility[403] and sixteen combinations of documents could be used if the employee could not produce any of the stand-alone documents.[404] The report also has eight pages describing the various stamps and approvals with which employers must be familiar to ensure a potential employee is authorized to do the type of work being offered.[405] Employers are only required to take "'reasonable steps' to satisfy themselves that the document produced actually relates to the person who has provided it and that it gives them permission to do the job being offered."[406] "Reasonable steps" have been described as checking to ensure the photograph on the document looks like the person presenting it, ensuring the age of the person presenting the document corresponds with the birth date on the document, verifying the document has not expired, confirming stamps and endorsements on passports do not prohibit the potential employee from taking the type of job being offered, and asking for a third document to describe the discrepancy if the two documents presented contain different names.[407] Because the penalties are assessed on the basis of various factors, including whether employers made checks of employment eligibility,[408] and the employer

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2006, http://press.homeoffice.gov.uk/press-releases/Immigration-Charging.

398. Accurate currency conversion as of March 3, 2008. Go Currency, Currency Converter, http://www.gocurrency.com (last visited June 2, 2008).

399. Home Office, Press Release, *supra* note 397.

400. Home Office, Press Release, *Smarter, Larger Intelligence Led Units Boost Immigration Enforcement*, Nov. 20, 2006, http://press.homeoffice.gov.uk/press-releases/intelligence-led-units.

401. HOME OFFICE, COMPREHENSIVE 2004, *supra* note 188, at 4-5.

402. *Id.* at 8-24.

403. *Id.* at 8-12.

404. *Id.* at 13-24.

405. *Id.* at 46-54.

406. IND, OPERATION MANUAL, *supra* note 199, § 55.4.

407. *Id.*

408. HOME OFFICE, CIVIL PENALTIES, *supra* note 222, at 4.

is only expected to take "reasonable steps,"[409] it is foreseeable that employers of illegal workers could easily avoid sanctions by claiming they made a good faith effort to take reasonable steps to verify employment status but were confused by the various types of identification allowed. This proposition is furthered by the fact that "[i]t has been made clear to employers that it is very unlikely that they will be taken to court if they establish a defence [sic]."[410]

Another problem with the employment verification process is the prevalent use of fraudulent documents by illegal workers to obtain employment.[411] When Parliament initially passed Section 8, an employer could verify a potential employee's employment eligibility status by examining either a British birth certificate or a document bearing a National Insurance number, neither of which contained a photograph of the bearer.[412] In its guidance for employers, the Home Office even stated employers did "not need to worry about whether National Insurance numbers [were] genuine or belong[ed] to the person if [the employer] ha[d] seen an appropriate document."[413] This left open the opportunity for individuals without proper authorization to use fraudulent documentation.[414] The government then modified the list of acceptable documents to eliminate this problem in the Nationality, Immigration and Asylum Act 2002, which came into effect in 2004.[415] With the modifications, an individual can only use identification containing a photograph of the beholder as stand-alone eligibility documentation.[416] Despite the changes, the British government indicated in 2005 that the use of forged documents continued to be the main reason why the number of prosecutions had remained low.[417] As recently as January 2007, the Minister for Nationality, Citizenship and Immigration, Liam Byrne MP, released a statement indicating over sixty forms of documents could be used to prove employment eligibility.[418] Minister Byrne suggested the large number of forms of acceptable documentation creates many opportunities for forgery, and as a result, employer sanctions have been virtually unenforceable.[419]

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409. IND, OPERATION MANUAL, *supra* note 199, § 55.4.

410. *Id.*

411. IND, REGULATORY IMPACT ASSESS, *supra* note 375, § 2(ii).

412. Ryan 1997, *supra* note 149, at 139-41.

413. *Id.* at 141 (quoting HOME OFFICE, PREVENTION OF ILLEGAL WORKING: COMPREHENSIVE GUIDANCE FOR EMPLOYERS 15 (1996)).

414. *Id.* at 141.

415. Ryan 2005, *supra* note 137, at 39. The Nationality, Immigration and Asylum Act 2002 also created a separate criminal offense for employers who employed A8 nationals who had not complied with their obligation to register within one month of starting new employment. *Id.* However, A8 workers cannot be removed from the country for this type of violation because A8 workers are EU citizens, and as such, it is highly unlikely this provision would be enforced. *Id.* at 40.

416. Ryan 2005, *supra* note 137, at 39.

417. IND, REGULATORY IMPACT ASSESS, *supra* note 375, §2(ii).

418. John Lettice, *Immigrant ID Card to Recruit Employers as UK Border Police*, THE REGISTER, Jan. 26, 2007, http://www.theregister.co.uk/2007/01/26/immigrant_id_card.

419. *Id.*

In order to deal with the employment eligibility verification problems inherent in the United Kingdom's current system, the Home Office passed the Identity Card Act 2006.[420] Under this Act, the British government launched the National Identity Scheme.[421] The idea is "to create a single UK identity system."[422] The program will provide identification including biometric data that can be used to verify a person's identity and eligibility to work.[423] The types of biometric data envisioned by the system are fingerprints, iris data, and facial data.[424] Another component of the program will be the National Identity Register, a government database that will hold the biometric information and link it to the biographical record of the cardholder.[425] A primary purpose in creating a national identification card with biometric data was to combat illegal migration into the United Kingdom.[426] Proponents of a biometric identification system claim it will improve efficiency in the efforts to prevent illegal working by allowing employers to verify a potential employee's identity and entitlement to work with one piece of identification as opposed to the complicated system currently in place.[427] The system also will help government enforcement operations in the same way.[428]

Despite its benefits, critics have met this new system with resistance.[429] In addition to complaints about the costs associated with the program and the possibility that the program will not solve the illegal working program,[430] there are serious concerns that this type of identification system has the potential to violate civil liberties.[431] The use of biometric data on mandatory identification

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420. Immigration and Nationality Directorate, *Terrorism, ID Cards and Immigration Bills Become Law*, Mar. 30, 2006, http://www.homeoffice.gov.uk/about-us/news/new-acts?version=2. The Identity Card Act 2006 was passed at the same time as a bill to combat terrorism and the Immigration, Asylum and Nationality Act 2006. *Id.* These measures are part of an overall effort to improve the immigration system and the Immigration and Nationality Directorate. *See generally* HOME OFFICE, FAIR, EFFECTIVE, TRANSPARENT AND TRUSTED: REBUILDING CONFIDENCE IN OUR IMMIGRATION SYSTEM (July 2006). Some have labled this new policy movement as "managed migration;" its aim is for the government to be able to control the flow of migration based on the labor needs of the economic market at any given time. *See* Flynn, *supra* note 154, at 5-6.

421. Immigration and Nationality Directorate, *supra* note 420.

422. HOME OFFICE, BORDERS, IMMIGRATION AND IDENTITY ACTION PLAN, 2006, at 4.

423. *Id.* at 5.

424. *Id.* at 6.

425. HOME OFFICE, STRATEGIC ACTION PLAN FOR THE NATIONAL IDENTITY SCHEME, 2006, at 10 [hereinafter HOME OFFICE, SAP].

426. Press Release, Home Office, *Combating Illegal Immigration at Center of ID Card Plans*, (Oct. 2, 2005), *available at* http://press.homeoffice.gov.uk/press-releases/illegal-immigration-id-card-plan?version=1.

427. HOME OFFICE, SAP, *supra* note 425, at 10.

428. *Id.*

429. Lettice, *supra* note 418.

430. *Id.*

431. Mark Ballard, *Conservatives Flesh Out ID Opposition*, THE REG., Feb. 6, 2007; *see also* Rebekah Thomas, Global Commission on International Migration, *Biometrics, Migrants, and Human Rights*, MIGRATION POL'Y INST., Mar. 1, 2005, *available at*

raises issues of information privacy.[432] Human rights conventions have declared the right to privacy a fundamental right internationally, as well as in Europe and the United States.[433] The United Kingdom has signed and ratified the UN International Covenant on Civil and Political Rights, in which Article 17 guarantees to protect *every* person from "arbitrary and unlawful interference with his privacy . . . ."[434] Article 14 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Their Families has assured the right to privacy to documented and undocumented migrant workers..[435] The aforementioned conventions share four principles: "[f]irst[], data must be obtained lawfully. Second, it also must be kept safely and securely. Third, it must be accurate and up-to-date, and finally, it must only be used for the original purpose specified."[436] These principles may be difficult to maintain for a variety of reasons:[437] the biometric data may be compromised due to the efforts of third parties, the data may become less reliable as the amount of it stored increases, and it is likely overtime data which was collected for one purpose may be used for entirely new purposes.[438]

Another argument is that the creation of a national identification system for preventing illegal working would be redundant; the same types of checks could be accomplished by cross-referencing the National Insurance numbers given by potential employees with the numbers retained by the Department of Works & Pensions (DWP) and the Inland Revenue National Insurance Office (NICO).[439] This proposal is similar to the proposal in the United States to link data from SSA and ICE to improve worksite enforcement efforts.[440] Both of these proposals violate the fourth principle of the right to information privacy; private data would be used for purposes not specified when it was collected.

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http://www.migrationinformation.org/Feature/display.cfm?ID=289.

432. Thomas, *supra* note 431, at 2.

433. *Id.* (referring to Article 12 of the Universal Declaration of Human Rights, Article 17 of the UN International Covenant on Civil and Political Rights). The UN International Covenant on Civil and Political Rights was signed and ratified by the United Kingdom, but not signed or ratified by the United States. Signatures to the United Nations Covenant on Civil and Political Rights, http://www.hrweb.org/legal/cprsigs.html (last visited June 2, 2008). For more information about the Universal Declaration of Human Rights see Universal Declaration of Human Rights 50th Anniversary, http://www.udhr.org (last visited June 2, 2008).

434. The United Nations International Covenant on Civil and Political Rights, Art. 17, ¶ 1, *available at* http://www.hrweb.org/legal/cpr.html (last visited June 2, 2008).

435. Thomas, *supra* note 431, at 2. However, neither the United Kingdom nor the United States has signed or ratified this convention. Office of the United Nations High Commissioner for Human Rights, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Ratifications and Reservations, *available at* http://www2.ohchr.org/english/bodies/ratification/13.htm (last visited June 2, 2008).

436. Thomas, *supra* note 431, at 2.

437. *Id.*

438. *Id.*

439. Lettice, *supra* note 418. DWP is the government agency that distributes the benefits associated with National Insurance Contributions; NICO ensures the security and accuracy of National Insurance accounts. HM Revenue & Customs, National Insurance Contributions Office—About Us, http://www.hmrc.gov.uk/nic/aboutus.htm (last visited June 2, 2008).

440. *See supra* Part II(B).

While the creation of a new identification instrument and corresponding database for identity and employment eligibility verification would not violate this principle, because the use is included in the purpose of collecting the data, a new identification system could be at risk of violating either the principle requiring data to be securely stored or the principle requiring the data to be kept accurate and up-to-date. However, these risks are inherent with any form of identification or identification data storage system. Even the current systems are at risk of violating these principles.

C. Comparing Enforcement Systems

Neither the United States nor the United Kingdom has a perfect system for preventing employers from hiring illegal workers. Both can learn from the other to create a more effective system than either system currently in place. The United Kingdom could benefit from creating a compulsory, standardized process of employment verification for each new employee hired, similar to the I-9 form process in the United States. The United States could learn from the United Kingdom's system that a standardized form of identification linked to an independent database with the sole purpose of verifying identity and employment eligibility status would eliminate the privacy concerns associated with using social security numbers to verify employment eligibility. It would also benefit the United States to follow the lead of the United Kingdom and add some type of biometric information to the standardized identification instrument and database; and if not biometric, then at least it must contain a photograph. The one benefit biometric data has over photographs is that biometric data is harder to forge and, thus, will reduce the number of illegal workers who will be able to use fraudulent documents to obtain illegal employment.[441]

Overall, both systems seem to have the same hole: the disconnect between the employment eligibility verification systems and the worksite enforcement efforts by immigration officials. Employers should be required to verify employment eligibility for each new employee hired and then provide evidence of the check to the government agency responsible for worksite enforcement. That agency would then be able to cross-reference the submitted information with a database that would indicate the individual's identity and whether he or she is eligible to work. At that point, if the government agency discovered the data submitted by the employer indicates the new employee is not eligible to work, then the agency could conduct a risk assessment of the situation and, if needed, a worksite enforcement operation. This would save resources and be the most efficient solution: one agency would be responsible for the two interrelated tasks eliminating the problems with data-sharing

441. HOME OFFICE, SAP, *supra* note 425, at 10 (indicating "[b]iometrics will tie an individual securely to a single unique identity. They are being used to prevent people using multiple or fraudulent identities").

between two agencies.

As it stands, in both the United States and the United Kingdom, there is a break at some point in the chain. In the United States the problem occurs because the government agency that receives the employee information from the employer (SSA) is not responsible for worksite enforcement efforts and does not have the authority to share information with the branch responsible for worksite enforcement (DHS or ICE). In the United Kingdom, the disconnect occurs at ground-level; employers are not required to verify employment eligibility of new employees. It is highly recommended that employers conduct eligibility checks; in fact, it is even rewarded because employers can use these checks to establish a defense for a violation.[442] However, in order for the system to work, the checks must be compulsory.

Even if employment eligibility checks were mandatory and the national identification scheme was fully integrated into the current system, there would still be a problem. Once an employer verifies the employment eligibility of a new employee, the employer is not required to do anything else with the documentation it has copied and retained. Employers are not required to submit the documentation to a government agency for verification or for any other reason. This puts the entire onus of the system on the shoulders of the employer, and leaves it to the discretion of the employer as to when and if to verify employment status. For the United Kingdom's system to be effective, there must be some governmental oversight at this stage in the process. If the employer were required to submit the collected information to a government agency, employers would be more likely to participate in the system for fear of being caught not complying with the law. It is naïve to expect employers to comply with a system that places an additional burden on them when there is no governmental oversight and a small likelihood of any consequence for noncompliance.

IV. RECOMMENDATIONS

In the United States, immigration reform is at the forefront of a national political debate.[443] President George W. Bush has asked for stronger employer sanctions and members of Congress and legal scholars have responded with various proposals.[444] One proposal is to remove the mental state requirement and make employing illegal aliens a strict liability offense.[445] This change would be advantageous in the areas of deterrence and enforcement.[446] Employers would likely be more careful in their hiring and employment

442. Asylum and Immigration Appeals Act, 1996, c. 49, § 8(2).

443. Turner & Rosenblum, *supra* note 13.

444. *Id.*; Jarosz, *supra* note 330; Gabor & Rosenquest, *supra* note 315, at 287.

445. Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 967-68 (2006).

446. *Id.*

eligibility verification practices in order to avoid liability.[447] Also, this would decrease the costs associated with enforcement by lessening the burden of proof for the prosecution.[448] However, at least two distinct disadvantages to a strict liability system exist: preemptive discrimination would likely increase and employers could be prosecuted even if they made every effort to comply with the law.[449]

Another proposal is to empower the DOL to have a larger role in employer sanctions enforcement.[450] Though the DOL's law enforcement efforts are focused solely on worker protection, DHS has attempted in the past to use DOL's assistance in enforcing immigration-related worksite enforcement.[451] Such previous efforts have been unsuccessful for two reasons.[452] First, in order for the DOL to effectively enforce labor laws, it conducts worksite enforcement operations without warning employers beforehand.[453] IRCA requires the government to give employers three days' notice before inspecting I-9 forms.[454] Thus, DOL's enforcement method is incompatible with the statutory mandates of IRCA. Also, the DOL relies heavily on cooperation with employees and is reluctant to share information regarding immigration status of employees with the DHS out of concern that the illegal migrant community would no longer help DOL in the future.[455] For these reasons, this proposal is not likely to work.

A third proposal is to create a system of employment eligibility verification based on the existing Basic Pilot.[456] The proposed Employment Eligibility Verification System (EEVS) would require all employers to verify the names and social security numbers of employees with the SSA database.[457] If SSA cannot verify an employee's authorization, then SSA will pass their information on to DHS for verification.[458] If DHS cannot verify the employee's employment eligibility status, then the employee will have ten days to provide proof of their right to work before the employer may discharge them for being unauthorized.[459] A potential problem with EEVS is that generally government databases have not been one hundred percent accurate.[460] However, such problems exist in any database used for the storage of large volumes of information.

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447. *Id.*
448. *Id.*
449. *Id.* at 968-69.
450. Turner & Rosenblum, *supra* note 13, at 7.
451. GAO, *Illegal Aliens: Significant Obstacles*, *supra* note 254, at 16.
452. *See supra* Part III(B)(1)(a).
453. *Id.*
454. *Id.*
455. GAO, *Illegal Aliens: Significant Obstacles*, *supra* note 254, at 16.
456. Jarosz, *supra* note 330, at *51.
457. *Id.*
458. *Id.*
459. *Id.*
460. *Id.* at 51-52.

Another proposal building on the idea of instating EEVS calls for the use of "computerized and counterfeit-proof technology."[461] The idea is to mandate EEVS and create a computerized registry, which stores identifiers unique to each individual authorized to work in the United States, similar to a social security number.[462] A computerized, counterfeit-proof system of technology would have to be created to store the employee's unique identifier.[463] Employers would be able to verify the employment eligibility status of a potential employee by checking the employee's identifier against a computerized registry.[464] Employers would establish a defense to the offense of hiring illegal workers by verifying each employee on the computerized registry.[465]

This last proposal is similar to the system recently installed in the United Kingdom.[466] The unique identifier in the United Kingdom's system will be biometric information, which is difficult, if not impossible, to forge.[467] The biometric information will be stored on identification cards and in a national registry.[468] Once the system is fully functional, employers will be able to verify the employment status of new employees by comparing the data on the identification cards with the national registry.[469] The proposals in the United States regarding identification cards do not call for the creation of a new form of identification.[470] Instead, they rely on the REAL ID Act of 2005.[471] The REAL ID Act sets national standards for state-issued drivers' licenses and identification cards and mandates that states must store information about cardholders.[472] The problem with the REAL ID Act is that it violates one of the primary privacy principles, because the information the states are required to share was not collected for the purpose of verifying employment eligibility status.[473]

The fundamental difference between the United Kingdom's system and the proposals in the United States is that the U.K. system is part of a comprehensive plan to overhaul immigration policy.[474] The United Kingdom identified that its former immigration policies were not working and decided to change its entire system.[475] Improving employer sanctions and the employment

461. Gabor & Rosenquest, *supra* note 315, at 294.
462. *Id.*
463. *Id.*
464. *Id.*
465. *Id.*
466. *See supra* Part III(B)(2)(b).
467. *Id.*
468. *Id.*
469. *Id.*
470. Gabor & Rosenquest, *supra* note 315, at 293.
471. *Id.*
472. *Id.*
473. *See supra* Part III(B)(2)(b).
474. *See supra* Part III(B)(2)(b), at note 420.
475. *Id.*

eligibility verification process are part of the comprehensive changes; however, these changes are only one piece of the puzzle.[476] The new approach to immigration recognizes there is a need for migrant labor to fill vacancies in the labor force of the United Kingdom.[477] The goal is to assess the migrant labor needs of the marketplace accurately and to accommodate them by adjusting the flow of migration accordingly.[478] In order to accomplish the goal of creating a system of immigration control, which is flexible enough to adapt to the changing needs of the labor market, the government must have the ability to track individual migrants.[479] To do this, the government must rely on improved surveillance technologies, including the creation of identification cards and a national registry containing biometric information, and increased cooperation between various agencies.[480] Though the task is sizeable, the United Kingdom has taken steps to begin the process and has a five-year implementation strategy.[481]

The proposals in the United States tend to focus on one aspect of the problem without attempting to address the whole system. Perhaps the idea of tracking all migrants and controlling the channels of migration to correspond with the needs of the labor market may be too large a task for the United States. Considering the number of illegal immigrants in the United States is twenty-one times the number of illegal immigrants in the United Kingdom,[482] the United States may not be able to manage migration like the United Kingdom. However, it is possible for the United States to create a new system that, in addition to improving employer sanctions, also deals with the 11.6 million illegal workers already in the United States[483] and the underlying factors that created and continue to perpetuate the problem. In creating changes, it is important for the United States to follow the the lead of the United Kingdom and overhaul the entire immigration system to create a new comprehensive policy instead of focusing its efforts on reforming specific parts of the existing system.

476. *See supra* Part III(B)(2)(b).
477. *See* Flynn, *supra* note 154, at 6.
478. *Id.*
479. *Id.*
480. *Id.*
481. *Id.*
482. *See supra* note 2 and accompanying text.
483. Briefing Paper 9.15, *supra* note 2.

HERE . . . FISHY, FISHY, PHYSICIAN: THE EFFECT OF EUROPEAN UNION MANDATES ON PHYSICIAN MOVEMENT IN THE EUROPEAN UNION

Thomas Donohoe*

I. INTRODUCTION

It is no secret that European nations have made great progress since World War II; a war that left many of them in shambles.[1] Shortly after the War, "[f]ew could have envisaged the way in which the creation of the European Coal and Steel Community (ECSC) in 1951, by the Treaty of Paris, would lead on to five decades of European institution building and European policy-making."[2] An essential policy allowing for the free movement of European workers between European countries was particularly important to this development.[3] The free movement of workers created a potentially potent labor force that would not only shape the organization of the European Community's economic structure, but also heavily affect the movement of health services among its countries.[4] Particularly, "[e]mployers and managers, in member state medical care systems, [were then] able to look beyond the boundaries of their own national labour markets and within the member states of the EU for the labour they need[ed]."[5] Although European Union (EU) mandates supporting the free movement of workers may allow physicians the freedom to seek education and employment in other Member States, the failure of the EU to establish a strong policy or legal solution to address the potentially negative outcomes of these mandates may damage the health care workforces of some of its Member States.[6]

This Note will discuss whether the EU's mutual recognition of physician

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1. *See* ED RANDALL, THE EUROPEAN UNION AND HEALTH POLICY 3 (2001).

2. *Id.*

3. Sallie Nicholas, *The Challenges of the Free Movement of Health Professionals*, *in* HEALTH POLICY AND EUROPEAN ENLARGEMENT 82, 83 (Martin McKee et al., eds., 2004).

4. RANDALL, *supra* note 1, at 53. *See also* Monika Strózik, *Poland*, *in* THE HEALTH CARE WORKFORCE IN EUROPE: LEARNING FROM EXPERIENCE 87, 97 (Bernd Rechel et al., eds., 2006) (indicating "[a] key issue in the chapter on the 'free movement of persons' was the mutual recognition of professional qualifications. In general, existing training programmes complied with EU regulations").

5. RANDALL, *supra* note 1, at 53.

6. Melanie Bourassa Forcier et al., *Impact, Regulation and Health Policy Implications of Physician Migration in OECD Countries*, 2 HUM. RESOURCES FOR HEALTH 12 (2004), *available at* http://www.human-resources-health.com/content/2/1/12 (last visited Jun. 10, 2008).

qualifications and the resulting physician movement in the EU poses enough of a threat to the health care workforces of EU Member States[7] to require the EU to legally address the potentially negative outcomes.[8] Section I of this Note will analyze the development of health policy in the EU and the different mandates that have affected and continue to affect its development. The latter part of this Section will explore some of the potentially damaging effects of these policies. Section II will discuss how Member States Spain and the United Kingdom (UK) implement EU laws allowing physicians from EU states to move freely in and out of their borders and how these laws affect their respective physician workforces. This Section will also demonstrate the effect EU laws allowing for physician movement have on the more underdeveloped countries of the EU, particularly those new Member States who acceded to the EU in 2004.[9] Section III will offer counterarguments regarding why laws allowing for potential physician movement, especially in the wake of the latest enlargement, pose no threat to the new and old Member States of the EU and why these laws may benefit the Member States of the EU. Section IV will then provide a number of legal solutions[10] to the problems that physician movement in the EU arguably creates.

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7. In to the early 21st Century, EU Member States included: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, France, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom. Gloria Moreno-Fontes Chammartin & Fernando Cantu-Bazaldua, *Migration Prospects After the 2004 Enlargement of the European Union*, 19 (International Migration Programme Working Paper No. 73), http://www.ilo.org/public/english/protection/migrant/download/imp/imp73.pdf (last visited Jan. 28, 2008). Bulgaria also recently acceded to the EU in 2007. Europa.eu, Bulgaria, http://europa.eu/abc/european _countries/eu_members/bulgaria/index_en.htm (last visited Mar. 18, 2008).

8. It is important to note the scope of this Note. Scholars have articulated many theories for explaining the shortcomings and strengths of the health care workforces of the Member States. Physician migration and the free movement of physicians is one of these theories. *See* Carl-Ardy Dubois et al., *Introduction: Critical Challenges Facing the Health Care Workforce in Europe*, *in* THE HEALTH CARE WORKFORCE IN EUROPE: LEARNING FROM EXPERIENCE 1, 11 (Bernd Rechel et al., eds., 2006) (noting "[f]undamental weaknesses in planning the workforce in the past are manifest through a legion of difficulties: cyclical shortages of many health professionals; widespread vacancies, especially in isolated rural areas; and maldistribution of the workforce, creating difficulties in ensuring an equitable provision of care"). This Note will seek only to discuss physician migration, its feared adverse effects on the workforce supplies of Member States, and some ways in which the EU and its Member States can mitigate those potential effects.

9. Ten countries acceded to the EU in 2004, including: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia. Chammartin & Cantu-Bazaldua, *supra* note 7, at 19.

10. This Note will propose a legal solution to the proposed problem as opposed to many policy solutions others have proposed. *E.g.*, James Buchan, *Migration of Health Workers in Europe: Policy Problem or Policy Solution*, *in* HUM. RESOURCES FOR HEALTH FOR IN EUROPE 41, 60 tbl. 3.5 (Carl-Ardy Dubois et al., eds., 2006), *available at* http://www.euro.who.int/Document/E87923.pdf.

A. The Development of Health Policy Towards Physicians in the EU

The Treaty of Rome, which a handful of western European countries signed in 1957, aimed specifically to prevent another war between European countries after the two World Wars had left the region in disarray.[11] Afterward, the signatories of the Treaty not only dedicated themselves to peace, but also to the free movement of goods and services.[12] Specifically, the "governments that signed the Treaty of Rome in 1957 committed themselves to the mutual recognition of qualifications, as it is of little use to professionals to be able to move if they [could not] work when they arrive[d in other Member States]."[13] To facilitate this policy, the European Union has implemented different means to simplify licensing requirements.[14] The EU "gives every European Union citizen a fundamental, personal right to move and reside freely within the territory of the Member States. No visas or work permits are required."[15]

Although the signatories of the Treaty of Rome placed a great emphasis on the free movement of goods and services, the signers failed to make any significant commitment to public health.[16] European countries referred to public health as merely a justification to block the movement of goods when such movement potentially threatened a given aspect of public health in one of the Member States.[17] At this time the "competence [of the EU] in the broader area of health was considered by most commentators to be extremely limited."[18]

Despite the EU's non-interventionist approach to its health policy in its treaties, the European Commission (EC) issued two Directives in 1975, known as the "Doctors Directives," to facilitate the free movement of physicians between the Member States.[19] The Directives primarily addressed the mutual recognition of qualifications for physicians who were licensed in one country, but sought to practice in another.[20] EU lawmakers supplemented these Directives in 1986 with other directives addressing the training of physicians.[21]

After the EC issued these directives, the EU showed more, but still passive, willingness to intervene into the health affairs of its Member States.[22]

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11. Martin McKee et al., *The Process of Enlargement, in* HEALTH POLICY AND EUROPEAN UNION ENLARGEMENT 6, 9 (Martin McKee et al., eds., 2004).

12. Nicholas, *supra* note 3, at 83.

13. *Id.*

14. Forcier et al., *supra* note 6.

15. *Id.*

16. McKee et al., *supra* note 11, at 9-10.

17. *Id.*

18. *Id.* at 10.

19. *Nicholas, supra note 3, at 83. See infra* notes 93-95.

20. *Id.*

21. *Id.*

22. *See generally* Ben Duncan, *Health policy in the European Union: How it's Made and How to Influence It*, 324 BRIT. MED. J. 1027 (2002), *available at* http://www.pubmedcentral.nih.gov/articlerender.fcsi?artid= 1122958.

In 1992, the EU affirmatively stated its health policy objectives in a provision of the Maastricht Treaty.[23] This provision, Article 129, held a "mandate of 'encouraging cooperation between member states' and 'if necessary, lending support to their actions' in public health."[24] Article 129 also gave the EU the power "to spend money on European level health projects but [it was] forbidden to pass law[s] harmonising public health measures in the member states."[25]

EU lawmakers enhanced these provisions and the health policy power of the EU, under the Amsterdam Treaty of 1997.[26] Under Article 152 of this treaty, "the EU was commanded to ensure 'a high level of human health protection' in the 'definition and implementation of all policies and activities' and to work with member states to improve public health, prevent illness[,] and 'obviate sources of danger to human health.'"[27] However, subsections four and five of the Article diluted the strength of the mandate, requiring the EU to "fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care."[28] Although these treaties lacked the strength to coerce countries to adopt certain measures, these treaties have set a general basis for the development of a health policy in the EU.

In the last decade, the Court of Justice of the European Communities (ECJ) has also played a role in the development of health policy in the EU.[29] The court has recently made specific rulings facilitating the development of an EU policy toward the free movement of workers as well as the free movement of health services.[30] Two 1998 decisions, *Decker v. Caisse de Maladie des Employes Prives*[31] and *Kohll v. Union des Caisses de Maladie*,[32] were of significant importance to this development.[33] Two other cases, decided in 2001, substantiated the principles set forth in 1998 and revealed the Court's belief that some regulation of health care in the EU should occur through the

23. *Id.* The EU traditionally failed to regulate state health care policies because the Member States governed their own health care systems. *Id.*

24. *Id.* (quoting Treaty on European Union, art. 129(1)(as in effect 1992)(now article 152), July 29, 1992, 1992 O.J. (C 191)).

25. *Id.* (quoting Treaty on European Union, art. 129(4)(as in effect 1992)(now article 152)).

26. *Id.*

27. Duncan, *supra* note 22, at 1027(quoting Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, art. 152(1), October 7, 1997 O.J. (C 340)).

28. Treaty of Amsterdam, art. 152(4-5).

29. Elias Mossialos & Martin McKee, *Is a European Healthcare Policy Emerging? Yes*, 323 BRIT. MED. J. 248 (2001), *available at* http://bmj.bmjjournals.com/cgi/content/full/323/7307/248.

30. *Id.*

31. Case C-120/95, Decker v. Caisse de Maladie des Employes Prives, 1998 E.C.R I-01831.

32. Case C-158/96, Kohll v. Union des Caisses de Maladie, 1998 E.C.R I-01931.

33. Mossialos & McKee, *supra* note 29.

EU itself.[34] The EU has shown a passive approach to the regulation of health care; however, it has also encouraged the free movement of health professionals and services among its member states. A deeper look at some EU mandates reveals this emphasis and its weaknesses.

B. EU Mandates Affecting Physician Movement in the EU

1. Treaties

One must understand the legal system of the EU to a certain degree to appreciate the effect different legal mandates may have on physician movement. EU lawmaking authority is primarily formed by a series of treaties.[35] "Once ratified, the Treaties determine the competence at EU level and what remains the responsibility of Member States."[36] The treaties tend to speak in generalities and require some interpretation, which the European Commission[37] offers through legislation it proposes to the Council of Ministers[38] and the European Parliament.[39] Both of these bodies must generally approve legislation.[40] In the event of a dispute, reconciliation measures exist to address the differences.[41]

EU treaties have shaped EU health policy in a weak fashion over the last two decades.[42] The Treaty of Maastricht was the first time the EU indicated it was willing to intervene in the health policies of its Member States in a treaty.[43] "Article 129 [of the Treaty] made provision for community action to prevent diseases, in particular major health scourges."[44] Moreover, the Article "provided the basis for a programme of action in health promotion, information, education and training in public health."[45] Although the Article took a broad approach to a narrow health issue (major health scourges) confronting the EU, "it specified that health protection should form a part of the Community's other policies . . . ."[46] Other provisions of the Article hampered any progressive

34. Case C-157/99, BSM Geraets-Smits v. Stichting Ziekensfonds VGZ and HTM Peerbooms v. Stichting CZ Groep Zorgverzekeringen, 2001 E.C.R I-05473.

35. McKee et al., *supra* note 11, at 10.

36. *Id.*

37. The European Commission may be defined as "a body of international civil servants [from the EU], headed by a president and commissioners appointed by the Member States." *Id.*

38. The Council of Ministers is composed of individuals who represent the governments of the Member States. *Id.*

39. The members of the European Parliament are "directly elected by the citizens of Europe." *Id.*

40. McKee et al., *supra* note 11, at 10.

41. *Id.*

42. *See id.* at 11-12.

43. *Id.* at 11.

44. *Id.*

45. *Id.*

46. McKee et al., *supra* note 11, at 11.

result, allowing Member States to coordinate the individual policies each chose to enact, but forbidding Member States to harmonize their legislation.[47]

The reception by the Member States of the new Article was lukewarm at best.[48] There was "concern about the ambiguous position of health services; with some arguing that policies to promote health that ignore the contribution of health services are untenable."[49] Yet, it was progress, considering "health care [traditionally] was an area into which many governments did not wish to stray, for various reasons."[50]

While the EU revisited its health policy position in the Treaty of Amsterdam,[51] the relevant Article in this treaty, Article 152, suffered from some of the same limitations as Article 129.[52] Article 152 "was inserted at the last moment, with minimal consultation, and as yet another compromise, it is in places confusing and almost self-contradictory, in marked contrast to, for example, articles on consumer protection or the environment."[53] Despite the apparent drawbacks of Article 152, "it is stated that Community action shall be directed towards improving public health, although what is meant by public health remains unclear."[54]

These treaties created many uncertainties regarding the EU's health policy.[55] The result of this uncertainty is a lack of much needed initiative to support or interfere in the health care systems of the Member States when it may be appropriate, such as when EU enlargement and potential physician migration may threaten other Member States.[56]

2. Courts

The ECJ will resolve any questions or disputes EU legislation may create.[57] The ECJ has three main purposes:

> to judge in disputes brought by the Commission or the Member States against the Member States concerning questions about the legality of action and non-compliance; judicial review of the actions and the failure to act by the

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* Jacques Delors, European Commission President at the time the Member States signed the Treaty of Maastricht, articulated this view, stating health policy "was an 'inappropriate area' for the EU." *Id.*
51. McKee et al., *supra* note 11, at 11.
52. *Id.* at 12.
53. *Id.*
54. *Id.*
55. Martin McKee & Elias Mossialos, *Health Policy and European law: Closing the Gaps*, 120 J. ROYAL INST. OF PUB. HEALTH 16, 18 (2006).
56. *Id.*
57. *Id.*

> European institutions; and to act as a preliminary reference procedure, in other words as a system whereby national courts can refer questions on European law to the Court.[58]

The Court had a limited role until 1963, when it developed three doctrines possibly defining its scope and power.[59] First, after the "Court decided that individuals had the right to invoke European Community law[,] . . . the principle of 'direct effect'" developed through which the Court could hold Member States liable for failing to implement treaty provisions into their national laws.[60] Second, "the Court developed the doctrine of 'state liability' whereby the state can be held liable for infringements of Directives."[61] Third, the Court may operate under the "supremacy doctrine," which allows the Court to apply European law when a conflict exists between the laws of two Member States.[62] The last doctrine gives the Court the authority to act against states who have not complied with different EU mandates.[63] In the absence of a strong health policy in EU treaties, the ECJ has recently become the legal entity to shape it.[64]

The decisions by the Court in *Decker*[65] and *Kohll*[66] demonstrated the willingness of the Court to address health-related disputes and remedy some of the vagaries of the EU's health policy.[67] Both cases involved citizens of Luxembourg who received care outside of their country and in another Member State.[68] Mr. Decker, who obtained spectacles, and Mr. Kohll who received orthodontic treatment, both prevailed in their arguments asserting the Luxembourg health insurance plan was accountable to reimburse them for their expenditures "even though it had not authorised their treatment abroad."[69] In these rulings, the Court established two important principles: 1) "the mutual recognition of qualifications precludes health authorities from arguing that care provided in one country is of lower quality than in another;"[70] and, although less clear, 2) "some saw [these cases] as establishing an important precedent—that health care should be subject to European laws on the free movement of

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58. *Id.*
59. *Id.*
60. *Id.*
61. McKee & Mossialos, *supra* note 55, at 19 (citing Case C-6/90 and C-9/90, Francovich & Bonifaci v. Italian Republic, 1991 E.C.R. I-5357).
62. *Id.* (citing Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. I-585).
63. *Id.*
64. Mossialos & McKee, *supra* note 29.
65. Case C-120/95, Decker v. Caisse de Maladie des Employes Prives, 1998 E.C.R I-01831.
66. Case C-158/96, Kohll v. Union des Caisses de Maladie, 1998 E.C.R I-01931.
67. Mossialos & McKee, *supra* note 29.
68. *Id.*
69. *Id.*
70. *Id.*

people and services."[71]

Another ECJ decision in 2001, *BSM Geraets-Smits v. Stichting Ziekensfonds VGZ* and *HTM Peerbooms v. Stichting CZ Groep Zorgverzekeringen*, substantiated the movement of the EU toward more EU control of health policy in the Member States.[72] In these cases, two Dutch citizens sought treatment in other Member States.[73] The ECJ addressed these cases after the defendant health insurance fund refused to reimburse the plaintiffs on the ground their situations did not require treatment from abroad or from an institution with which it had not contracted.[74] The Court ruled "that member states had the right to organise their health care systems as they chose, although they must comply with relevant European law."[75] Furthermore, "for the first time, and in the face of forceful arguments to the contrary, the court held that medical care provided in hospitals was subject to European law on free movement of services, regardless of how it is paid for."[76] The Court went so far as to add "demanding prior authorisation was an obstacle to free movement of patients but that this could, in certain circumstances, be justified."[77] This decision, coupled with the 1998 decisions of the ECJ, showed the ECJ was willing to shape an EU health policy; when different EU treaties have reserved authority over these areas to the Member States themselves, these rulings afforded greater authority to the EU to regulate the health policies of its

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71. *Id.*

72. Case C-157/99, BSM Geraets-Smits v. Stichting Ziekensfonds VGZ and HTM Peerbooms v. Stichting CZ Groep Zorgverzekeringen, 2001 E.C.R I-05473.

73. *Id.*

74. *Id.*

75. Mossialos & McKee, *supra* note 29.

76. *Id.*

77. *Id.* The circumstances the court discussed were lengthy and can be summarized accordingly:

> The first circumstance is when it prevents the national healthcare system from being undermined. The court argued that this could apply if large numbers of patients were involved but, by implication, was not relevant where numbers are small.
>
> A second is where the treatment is considered to be ineffective. The court held that decisions on effectiveness must be based on what is "sufficiently tried and tested by international medical science." Preauthorisation could be refused when the treatment had been deemed ineffective according to explicit criteria. This presupposes that there is a common medical paradigm in Europe, a view that pays little attention to the evidence of national diversity in health beliefs and treatment patterns.
>
> The third relates to the timeliness of treatment. The court confirmed that authorities could decline authorisation only if the patient could receive the same or equally effective treatment in their own country without undue delay; however, it did not define "undue delay." Surprisingly, although waiting lists have been cited in requests by British citizens seeking treatment abroad, so far none has mounted a legal challenge as a means of obtaining faster care elsewhere.

Id.

Member States.[78]

3. Legislation

Although EU treaties and ECJ decisions have helped shape EU health policy, the different Directives the EU has passed have facilitated the unrestrained flow of physicians through the different Member States.[79] The EU has the capacity to pass legislation governing the Member States; some of it effectively "takes priority over national legislation . . . ."[80] European legislation may take many forms including Regulations, Directives, Decisions, Recommendations, and Opinions.[81] "Regulations are specific measures that have immediate and direct force of law without adaptation to national circumstances, common in areas such as external trade."[82] The EU most commonly uses Directives as legislative mechanisms "setting out the goals to be achieved but leaving it to each Member State to determine how to achieve them."[83] Once the EU passes a Directive, the Member States must incorporate the Directive into their national laws within a given time period.[84] Decisions are also legally binding, but usually do not have a general effect, and Recommendations and Opinions have no legally binding effect whatsoever.[85]

The EU has used four different phases of Directives to affect the mutual recognition of qualifications for physicians: "transitional, sectoral, general and legal."[86] Under the Transitional Directives, European countries focused on "the recognition of professional experience rather than mutual recognition of diplomas."[87] Sectoral Directives "establish[ed] minimum periods for educational and training programmes and comprise lists of diplomas that meet those standards in the various Member States. A diploma listed in the directive is automatically recognized in another EU Member State."[88] The general directives apply to those who have already completed the necessary training, but do not have a diploma listed under a Sectoral Directive.[89] The general directives do not apply to those who "want to exercise their profession in another state but have not yet completed the required training in their state of

78. *Id.*

79. *See* Fitzhugh Mullan, *The Metrics of the Physician Brain Drain*, 353 NEW ENG. J. MED. 1810, 1812 tbl. 2 (2005).

80. McKee et al., *supra* note 11, at 10.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id. See also* Amsterdam Treaty, *supra* note 27, art. 249.

85. McKee et al., *supra* note 11, at 10.

86. Rita Baeten & Yves Jorens, *The Impact of EU Law and Policy*, *in* HUMAN RESOURCES FOR HEALTH IN EUROPE, 217 (Carl-Ardy Dubois, Martin McKee & Ellen Nolte eds., 2006).

87. *Id.*

88. *Id.*

89. *Id.* at 219.

origin."[90] The legal directives are those recent decisions coming out of the ECJ, such as those previously mentioned,[91] "which have moved from facilitat[ing] the freedom of establishment . . . to ensur[ing] the free movement of services."[92] The progression of these directives has laid a statutory framework to support the free movement of health professionals in the EU.

To loosen the barriers within the health services sector, in 1975, the EC passed two Sectoral Directives[93] pertaining specifically to doctors which are commonly known as the "Doctors' Directives."[94] These Directives entitled "any EU physician who has completed basic training in a member state and who holds a recognised qualification to be automatically registered in any other Member state."[95] In 1986, the EC passed another Directive dealing with specific training for general practitioners.[96] The EC combined all three of these Directives in 1993 in Council Directive 93/16/EEC (Directive 93/16), which it proposed, "to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications."[97]

The 1993 Directive applied to the nationals of all Member States[98] and provided:

> [e]ach Member State shall recognize the diplomas, certificates and other evidence of formal qualifications awarded to nationals of Member States by the other Member States in accordance with Article 23 and which are listed in Article 3, by giving such qualifications, as far as the right to take up and pursue the activities of a doctor is concerned, the same effect in its territory as those which the Member State itself awards.[99]

The majority of the Directive dealt with the manner in which the different Member States would translate their respective qualification systems,[100]

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90. *Id.* at 219-20.

91. *See infra* notes 65, 66, and 72.

92. Baeten & Jorens, *supra* note 86, at 217.

93. *See* Council Directive 75/363, 1975 O.J. (L 167)(EC); Council Directive 75/362, 1975 O.J. (L 167)(EC).

94. Nicholas, *supra* note 3, at 83.

95. Steven Simoens & Jeremy Hurst, *The Supply of Physician Services in OECD Countries* (OECD Health Working Papers No. 21, 2006), *available at* http://www.oecd.org/dataoecd/27/22/35987490.pdf.

96. Council Directive 86/457, 1986 O.J. (L 267)(EC).

97. Council Directive 93/16, 1993 O.J. (L 165)(EC).

98. *Id.* art. 2.

99. *Id.* Article 3 was deleted by Council Directive 2001/19 and replaced with a reference to "Annex A," which reorganized and relisted those qualifications a foreign physician must meet to practice in another Member State. Council Directive 2001/19, art. 14(1)-(2), 2001 O.J. (L 206)(EC).

100. *See generally* Council Directive 93/19.

concerning not only general medicine, but specialized medicine as well.[101] This Directive was the culmination of the various efforts of the EU to apply its principles of free movement of goods and services to physicians.

Most recently, the European Parliament consolidated the 1993 Directive and replaced it with Directive 2005/36 (Directive 2005/36).[102] The 2005 Directive consolidated the numerous Sectoral Directives applicable to various regulated professions in the EU, all of which established the mutual recognition of qualifications in each respective profession.[103] Similar to the 1993 Directive, the 2005 Directive stated:

> [e]ach Member State shall recognise evidence of formal qualifications as doctor giving access to the professional activities of doctor with basic training and specialised doctor . . . listed in Annex V, points 5.1.1, 5.1.2, . . . respectively, which satisfy the minimum training conditions referred to in Articles 24, 25, . . . respectively, and shall, for the purposes of access to and pursuit of the professional activities, give such evidence the same effect on its territory as the evidence of formal qualifications which it itself issues.[104]

Annex V lays out the different formal qualifications (diplomas) each host state should recognize from the physician's home state.[105] Articles 24 through 30 explain the specific minimal criteria general medicine and specialist physicians must meet.[106] The efforts of the EU Parliament to consolidate these Directives to establish a uniform health care principle, the mutual recognition of qualifications, throughout its various states indicates the EU Parliament is increasingly trying to improve the delivery of health care in the EU.

What is clear from the EU's approach to its health policy is that there is *no* clear policy or mandate to the Member States.[107] EU treaties have been reluctant to regulate the health systems of the Member States as a whole.[108] While the ECJ has more recently pushed for greater regulation from the EU, it can only act insomuch as the cases it receives allow it. EU legislation has

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101. Council Directive 93/16, art. 5.

102. Council Directive 2005/36, preamble, para. 9, 2005 O.J. (L 255)(EC). Directive 2005/36 is the latest Directive amending Directive 93/16, but it effectively replaces it; whereas, none of the previous amending Directives had this effect. For a full list of those Directives amending Directive 93/16, see Europa.eu, Medicine: Mutual Recognition of Qualifications, http://europa.eu/scadplus/leg/en/lvb/l23021.htm# AMENDINGACT (last visited Jun. 10, 2008).

103. Council Directive 2005/36, preamble, para. 9.

104. *Id.* art. 21.

105. *Id.* Annex V.

106. *Id.* arts. 24-30.

107. *See generally* Duncan, *supra* note 22; McKee & Mossialos, *supra* note 55; McKee et al., *supra* note 11.

108. McKee et al., *supra* note 11, at 10-11. *See also* McKee & Mossialos, *supra* note 55, at 18.

paved the way for health care professionals to move between the Member States; however, it has failed to go beyond that point and regulate against the potentially adverse effects these mandates may have on the health care systems of its Member States.

C. The Feared Effect

Although the EU has championed the free movement of its workers, including physicians, its mandates may pose serious threats to the health care workforces of some of its Member States.[109] The Directives would allow for what some have called "physician migration," where, under systems of mutual recognition and diplomas, physicians may move from one country and receive education or practice medicine in another country.[110] One scholar appropriately captured the problem, noting:

> the ongoing process of integration of EU countries and the removal of many barriers to professional mobility pose a direct challenge to the maintenance of an equitable workforce because of the real potential to deprive some regions and countries of key staff that can be attracted elsewhere by better paid jobs and enhanced working conditions.[111]

Physicians may choose to practice in other countries for various economic and professional reasons.[112] The economic incentives and the hope of a better lifestyle lure some physicians to practice in other countries where these goals can be realized.[113] Also, physicians may choose to move abroad because their home countries do not provide the high level of training or research opportunities they seek.[114] The prospect of unemployment in the home country of a physician may also drive him or her to seek employment in another country.[115] Furthermore, physicians may choose to return to practice abroad after returning home from their educational hiatus because another country has trained them to perform certain procedures the home country does not need or

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109. Forcier et al., *supra* note 6.

110. *Id.*

111. Dubois et al., *supra* note 8, at 11.

112. Peter E. Bundred & Cheryl Levitt, *Medical Migration: Who Are the Real Losers?*, 356 THE LANCET 225, 245-46 (2000). In this article, one Ugandan doctor characterized the sober reality of this proposition in her comments indicating she "was seeking employment locally because she felt that the UK offered her children a better life." *Id.*

113. *Id. See also* James Buchan & Alan Maynard, *United Kingdom*, *in* THE HEALTH CARE WORKFORCE IN EUROPE: LEARNING FROM EXPERIENCE 139 (Bernd Rechel et al., eds., 2006) (noting " [b]y sharply raising the salaries of consultants and general practitioners, recruitment and retention are likely to be enhanced, with the United Kingdom becoming even more attractive to doctors from abroad").

114. Bundred & Levitt, *supra* note 112, at 246.

115. Nicholas, *supra* note 3, at 91-92.

because the work they find themselves doing is "unstimulating."[116]

Physician migration affects the home country and the host country in very different ways.[117] The effect of physician migration on host countries is usually more beneficial than the effect on the home country.[118] An increased supply of physicians in one country resulting from hosting foreign physicians may benefit its consumers, allowing greater access to physicians and potentially lower costs.[119] This is particularly important in countries which heavily rely on foreign physicians, such as the United Kingdom, to meet health services demands.[120] Furthermore, "[i]ncreased competition between physicians may raise the quality of health care provided in the host country."[121]

Despite the benefits physician migration may provide host countries, the home countries of the physicians pay the heaviest price.[122] Some have referred to the flight of physicians to foreign countries as a depletion of human capital which results in "brain drain."[123] The effect of brain drain includes "deterioration in the working conditions of remaining physicians. Moreover, it may affect access to and quality of care, and impair the ability of the health care system to achieve health objectives for its population."[124] Brain drain "may also influence the capacity of the home country to provide quality training to new physicians and the research capacity of medical schools."[125] Moreover, home countries will suffer economic losses where they pay to educate citizens who leave after graduation to work in another country.[126] The broader implications of brain drain include that it occurs generally in poor countries

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116. Bundred & Levitt, *supra* note 112, at 246.

117. *See* Mullan, *supra* note 79.

118. *See id.*

119. Nicholas, *supra* note 3, at 92.

120. Mullan, *supra* note 79, at 1816. In this article, the author highlighted the UK's reliance on foreign physicians, alluding to the United Kingdom's policy in a recent year, "to achiev[e] a rapid increase of 9500 physicians by a combination of new medical schools and increased recruitment abroad." *Id.* The driving forces of this policy are evident when:

> between 1985 and 1994, the 27 countries that make up Organisation of Economic Co-operation and Development (OECD) increased the output from their medical schools by an average of 26%. (cite omitted). However, in the UK, USA, and Canada the increase was only 14%, 10%, and 18%, respectively, the shortfall being made up by physicians trained overseas. In the UK, many of the foreign doctors who now work in the National Health Service, initially came from higher level training in specialist subjects.

Bundred & Levitt, *supra* note 112, at 245.

121. Forcier et al., *supra* note 6.

122. Mullan, *supra* note 79, at 1816. The article articulates this effect clearly by stating, "[a]lthough there are undoubtedly benefits that accrue to source countries whose physicians move to high-income English-speaking nations, there can be little question that the emigration of these physicians is also a loss to the health systems of the source countries." *Id.*

123. Forcier et al., *supra* note 6; Mullan, *supra* note 79.

124. Forcier et al., *supra* note 6.

125. *Id.*

126. *Id.*

already facing physician shortages of their own.[127] The resulting "inadequacy and instability of the physician workforce in many lower-income countries are major impediments to disease-reduction initiatives sponsored by the Global Fund, the WHO, the World Bank, the U.S. government, and many others."[128]

As long as the EU fails to regulate the movement of its physicians, the physicians will most likely exercise their ability to move between the Member States at their discretion. The effect of physician migration will thus go untamed, potentially hampering the ability of developing countries of the EU to establish adequate health care delivery to their citizens, which could ultimately present a public health problem for the EU.[129] Regardless, it is still questioned whether the free movement of physicians in the EU threatens the health care systems of its Member States to the extent EU intervention and regulation is required.

II. ANALYSIS

Although there has been much discussion of the potential effect physician migration may have on developing EU countries, its actual effect remains unclear.[130] The second part of this Note will analyze the health care systems of two EU countries, England and Spain, and the manner in which these countries have implemented the EU Directives facilitating the free movement of physicians in and out of their countries. Ultimately, this portion of the Note will discuss the actual effect of the Directives on those countries and other EU countries, specifically those countries which have recently acceded to the EU.

A. The United Kingdom

1. The National Health Service

Whenever scholars discuss the topic of physician migration in the European context, the United Kingdom (UK) is a central focus of the debate because the UK continually suffers from physician shortages and has a great need for foreign physicians.[131] The NHS "covers everything from antenatal screening and routine treatments for coughs and colds to open heart surgery,

127. *Id.*

128. Mullan, *supra* note 79, at 1816.

129. *Id.*

130. Katka Krosnar, *Could Joining EU Club Spell Disaster for the New Members?*, 328 BRIT. MED. J. 310 (2004), *available at* http://www.bmj.com/cgi/reprint/328/7435/310.pdf.

131. Zurn et al., *Imbalances in the Health Workforce* (WHO Briefing Paper, Mar. 2002), 1-55, 5, *available at* http://www.who.int/hrh/documents/en/imbalances_briefing.pdf. *See also* Bob Pond & Barbara McPake, *The Health Migration Crisis: The Role of Four Organisation for Economic Cooperation and Development Countries*, 367 THE LANCET 1448, 1449 (2006).

accident and emergency treatment and end-of-life care."[132] With an estimated budget of 90 billion pounds in 2007 and over a million employees, the NHS is one of the largest employers in the world.[133]

The Department of Health is the governmental entity responsible for the administration of services, which the NHS manages.[134] It controls the administration of these services through entities called Strategic Health Authorities (SHAs), of which there are now ten.[135] The SHAs are responsible for 152 Primary Care Trusts (PCTs) that oversee England's 29,000 general practitioners and 18,000 NHS dentists.[136] PCTs purchase health care services from local providers and also support local NHS organizations.[137] PCTs ensure local providers administer services efficiently, and PCTs are responsible for "mak[ing] sure that the organisations providing health and social care services are working effectively."[138] Most general practitioners, dentists, opticians, and other local providers contract directly with PCTs to provide services.[139] On the other hand, the NHS owns and runs its own hospitals and employs those physicians and nurses who work in there.[140]

Public sources provide the primary means of funding for the NHS.[141] In 2004, public sources accounted for 86% of the total funding for health care services.[142] With these funds, the UK spent $2,545 per capita on health care.[143] This amount was slightly lower than the average of $2,550 spent in the same year by other OECD[144] countries; health indicators in the UK showed the UK

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132. National Health Service, About the NHS, http://www.nhs.uk/aboutnhs/pages/about.aspx (last visited Jul. 8, 2008).

133. *Id.*

134. *Id.*

135. *Id.*

136. National Health Service, NHS Structure, http://www.nhs.uk/aboutnhs/HowtheNHSworks/Pages/ NHSstructure.aspx (last visited Jul. 8, 2008).

137. National Health Service, NHS Authorities and Trusts, How the NHS Works, http://www.nhs.uk/ aboutnhs/howthenhsworks/authoritiesandtrusts/Pages/Authoritiesandtrusts.aspx (last visited Jul. 8, 2008). PCTs are the heart of the NHS and control 80% of its budget. *Id.*

138. National Health Service, *supra* note 132.

139. National Health Service, *supra* note 137.

140. *Id.*

141. Organisation of Economic Co-operation & Development, *Health Data 2006: How Does the United Kingdom Compare*, at 2, *available at* http://www.oecd.org/dataoecd/29/53/36959993.pdf [hereinafter OECD UK].

142. *Id.* Comparatively speaking, the OECD average level of public financing for a health care system in 2004 was 73% and the public funding of health care in the United States was 45%. *Id.*

143. *Id.* at 1.

144. Organisation for Economic Co-operation & Development, About OECD, at http://www.oecd.org/pages /0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Feb. 9, 2008).

> The OECD brings together the governments of countries committed to democracy and the market economy from around the world to:

was struggling to keep up with these countries as well.[145] In 2003, life expectancy was 79 years, just above the OECD average, but still lower than France, Italy, and Spain, among others.[146] Furthermore, although the UK's infant mortality rate has declined over the past decades and currently stands at 5.1 deaths per 1,000 citizens, its rate still lags behind most other European countries.[147] In light of these outcomes, "[t]here is evidence to suggest that higher densities of physicians tend to be associated with better health outcomes and responsiveness across countries . . . ."[148] Specifically, other academic work "has suggested that the number of physicians per capita is inversely associated with avoidable mortality. . . ."[149] Although the health care system of the UK may appear to have sound infrastructure and adequate capitalization, its shortage of physicians may greatly contribute to its deficient health care indicators.[150]

2. *The UK's Implementation of EU Mandates*

In the UK, the General Medical Council (GMC) governs and oversees the recognition of the professional qualifications of domestic and foreign physicians.[151] The Medical Act of 1858[152] established the GMC, which is

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- Support sustainable economic growth
- Boost employment
- Raise living standards
- Maintain financial stability
- Assist other countries' economic development
- Contribute to growth in world trade

The OECD also shares expertise and exchanges views with more than 100 other countries and economies, from Brazil, China, and Russia to the least developed countries in Africa.

Id.

145. OECD UK, *supra* note 141, at 2-3. OECD countries include: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. Organisation of Economic Co-operation & Development, OECD Members and Partners, http://www.oecd.org/pages/0,3417, en_36734052_36761800_1_1_1_1_1,00.html (last visited Jul. 3, 2008).

146. OECD UK, *supra* note 141. In 2005, France posted a life expectancy of 80.3 years; Italy of 80.4 years; and Spain of 80.7 years. Organisation of Economic Co-operation & Development, *Health Data 2007: Frequently Requested Data*, http://www.oecd.org/dataoecd/46/36/38979632.xls (last visited Jan. 19, 2007)[hereinafter OECD Data].

147. OECD Data, *supra* note 146. In 2005, France had an infant mortality rate of 3.6 infant deaths per 1,000 births; Germany, 3.9 infant deaths per 1,000 births; Italy, 4.7 infant deaths per 1,000 births; and Sweden, 2.4 infant deaths per 1,000 births. *Id.*

148. Simoens & Hurst, *supra* note 95, at 15. This paper also notes "the magnitudes of the effects cannot be estimated with any degree of reliability from international comparisons." *Id.*

149. *Id.*

150. *Id.* at Fig. 4.

151. General Medical Council, *The Role of the GMC*, http://www.gmc-uk.org/about/role/index.asp (last visited Jun. 10, 2008).

composed of thirty-five members.[153] Its official purpose is to "protect, promote and maintain the health and safety of the public by ensuring proper standards in the practice of medicine."[154] The Medical Act of 1983 most recently validated the existence and role of the GMC.[155] The UK has used the 1983 Act and its amendments as legislative vehicles to implement the major provisions of Directives 93/16, and now Directive 2005/36.[156]

In Section 3, the Act readily implements the provisions of Directive 2005/36, acknowledging:

> subject to the provisions of this Act any person whose fitness to practise is not impaired and who—
>
> (a) holds one or more primary United Kingdom qualifications and has satisfactorily completed an acceptable programme for provisionally registered doctors; or
>
> (b) being a national of any relevant European State, holds one or more primary European qualifications,

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152. Medical Act, 1858, 21 & 22 Vict., c. 90 (Eng.).

153. General Medical Council, *supra* note 151. The GMC is composed of: 19 doctors who registered doctors elect; 14 members of the public who the NHS Appointments Commission chooses; and 2 members that the universities and medical royal colleges elect. *Id.*

154. *Id.*

155. Medical Act, 1983, c. 54 (Eng.). The role of the GMC was specifically validated in Part I where it states "[t]here shall continue to be a body corporate known as the General Medical Council . . . having the functions assigned to them by this Act." Medical Act, ch. 54 § 1. One of these functions is immediately stated afterwards as registering and keeping a list of foreign practitioners. *Id.* § 2.

156. *See generally* Medical Act, c. 54. The UK has subsequently amended the Medical Act, which in 1983 could not have possibly reflected Directive 93/16, which the EU issued in 1993. The Acts that amended the Medical Act of 1983 are as follows:

> the Professional Performance Act 1995; the European Primary Medical Qualifications Regulations 1996; the NHS (Primary Care) Act 1997; the Medical Act (Amendment) Order 2000; the Medical Act 1983 (Provisional Registration) Regulations 2000; the Medical Act 1983 (Amendment) Order 2002; and the National Health Service Reform and Health Care Professionals Act 2002; The European Qualifications (Health Care professions) Regulations 2003 [and] the European Qualifications (Health & Social Care Professions and Accession of new Member States) Regulations 2004.

General Medical Council, Medical Act of 1983, http://www.gmc-uk.org/about/legislation/medical_act.asp (last visited Jan. 26, 2008). Most recently, the UK's Department of Health has issued regulations to amend the Medical Act and implement the provisions of Directive 2005/36. The European Qualifications (Health and Social Care Professions) Regulations, 2007, S.I. 2007/3101 (UK) [*hereinafter* Regulations]. However, the amendments from this regulation largely replace the groundwork laid by Directive 93/16. *E.g.* Regulations, Part 2, 5(c) (noting one of the places where the amendments are specifically replacing provisions set forth by Directive 93/16).

> is entitled to be registered under this section as a fully registered medical practitioner.[157]

The language is greatly similar to the purposes set forth for Directive 2005/36 itself, which state each Member State in the EU should recognize the qualifications of a physician who holds "specific professional qualifications" from another Member State.[158]

Section 17 clarifies these specific professional qualifications, defining what primary European qualifications mean for purposes of Section 3(b).[159] A physician satisfies the standard of a primary qualification as long as he/she holds the credentials from his/her home state listed in Annex 5.1.1 of Directive 2005/36 and meets any other applicable criteria in subsection(a).[160] Section 17 also requires the UK Registrar be satisfied the physician has met the general standards set forth in Article 24[161] of Directive 2005/36 and a competent authority from the physician's home state certify the physician "has effectively and lawfully been engaged in medical practice in that State for at least three

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157. Medical Act, c. 54 § 3.

158. Council Directive 2005/36, art. 1.

159. Medical Act, c.54 §17(1).

160. *Id.* § 17(1)(a).

161. Article 24 provides fundamental standards a physician from a relevant European state must meet to practice in another Member State:

> 1. Admission to basic medical training shall be contingentupon possession of a diploma or certificate providing access, for the studies in question, to universities.
>
> 2. Basic medical training shall comprise a total of at least sixyears of study or 5 500 hours of theoretical and practical training provided by, or under the supervision of, a university.
> For persons who began their studies before 1 January 1972, the course of training referred to in the first subparagraph may comprise six months of full-time practical training at university level under the supervision of the competent authorities.
> 3. Basic medical training shall provide an assurance that the person in question has acquired the following knowledge and skills:
> (a) adequate knowledge of the sciences on which medicine is based and a good understanding of the scientific methods including the principles of measuring biological functions, the evaluation of scientifically established facts and the analysis of data;
> (b) sufficient understanding of the structure, functions and behaviour of healthy and sick persons, as well as relations between the state of health and physical and social
> surroundings of the human being;
> (c) adequate knowledge of clinical disciplines and practices, providing him with a coherent picture of mental and physical diseases, of medicine from the points of view of
> prophylaxis, diagnosis and therapy and of human reproduction;
> (d) suitable clinical experience in hospitals under appropriate supervision.

Council Directive 2005/36, art. 24. *Cf.* Council Directive 93/16, art. 23.

consecutive years during the five years preceding the date of the certificate."[162]

Finally, Section 15A of the Act allows the GMC to provisionally register foreign physicians so foreign physicians may eventually achieve primary European qualification.[163] Under this Section, the GMC gives those who it has determined have adequate training[164] or level of education, meaning a medical degree meeting the standards set forth in Directive 2005/36,[165] the opportunity to attain the appropriate amount of clinical experience likely needed to meet the standard of primary European qualification the Act requires.[166] The Medical Act demonstrates how an EU country may implement a legislative scheme that an EU directive would propose. In this case, it allows for the free movement of physicians from other countries in the EU to potentially practice in the UK through the GMC's mutual recognition of their qualifications.

The Directives encouraging the mutual recognition of physician qualifications may not have posed any apparent problems when the EU initially implemented them in 1975; however, when ten new countries were set to enter the EU in 2004, and subject themselves to the EU laws allowing for the free movement of physicians, the UK became concerned with a potentially great influx of foreign physicians.[167] Nevertheless, an influx of physicians would invariably help the UK relieve its physician shortages. At the same time, it could end up costing other countries valuable medical human resources.[168]

3. The Effect of Physician Movement on the United Kingdom

The UK suffers from a shortage of physicians.[169] However, EU laws allowing for the free movement of physicians, which the UK has adopted through the Medical Act of 1983 that implements the provisions of Directives 93/16 and 2005/36, allow the UK to draw from the physician supplies of other countries. Statistics are particularly revealing of physician shortages in the UK.[170] As mentioned above, the UK has 2.3 practicing physicians per 1000 persons, which, although it is up from 1998 when it only supplied 1.9 physicians per 1000 persons, still lags behind the OECD average of 3.0 physicians per 1000 persons.[171] The shortage became apparent "[where]

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162. *Id.* § 17(2)(a)-(b).

163. Medical Act, c. 54 § 15A.

164. *Id.* § 15A(2).

165. *Id.* § 15A(5).

166. *Id.*

167. Rhona MacDonald, *What Will Happen in the United Kingdom When the 10 Accession States Join the European Union?*, 328 BRIT. MED. J. 89, 89 (2004), *available at* http://careerfocus.bmj.com/cgi/ reprint/328/7438/89.

168. Simoens & Hurst, *supra* note 95, at 50.

169. Buchan & Maynard, *supra* note 113, at 130 (indicating "[s]hortages of skilled staff have been highlighted as one of the main obstacles to achieving NHS targets. A report issued in 2002 stressed that 'the UK does not have enough doctors and nurses'").

170. *See* OECD UK, *supra* note 141.

171. *Id.*

physician shortages [could] be observed in three-month vacancy rates of 4.7% of all specialist physicians posts and 3.3% of all primary care physician posts in England in the year to March 2003."[172]

In response to this problem, the UK has engaged in various recruitment programs to attract foreign doctors to the UK.[173] EU laws make this particularly effortless by allowing other doctors from EU Member States instant opportunities for the UK to recognize their qualifications.[174] The NHS has used these laws to its advantage, professing "[t]o further boost NHS staff numbers in the short term, the Department of Health will work with the leaders of the professions and with other government departments to recruit additional suitably qualified staff from abroad where this is feasible, meets service priorities and complies with NHS quality standards."[175] The NHS has indicated, "[t]here will be targeted, nationally co-ordinated campaigns using short term contracts to boost the number of medical consultants and the overall number of doctors in the next three years."[176] These laws make it easier for the

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172. Simoens & Hurst, *supra* note 95, at 20.

173. *Id.* at 36. *See also* Mullan, *supra* note 79 (in the last decade, the United Kingdom has stated it would try to increase its physician supply by 9,500 doctors through recruitment and new medical schools). *See also* Pond & McPake, *supra* note 131, at 1449.

174. *See* Council Directive 2005/36, art. 21.

175. NATIONAL HEALTH SERVICE, THE NHS PLAN: A PLAN FOR INVESTMENT; A PLAN FOR REFORM, 1-144, 55, *available at* http://www.dh.gov.uk/assetRoot/04/05/57/83/04055783.pdf. *See also* Buchan & Maynard, *supra* note 113, at 131, 136-37. The policies the UK has sought to increase its physician supplies are as follows:

> 1. Entry to medical schools has been increased by 30% by creating new medical schools and increasing entries to existing schools.
> 2. Changes in skill mix. Nurses are being trained to take over doctors' roles and a new grade of "consultant nurse" is being developed in English hospitals. Outside hospitals, nurses are being trained to dispense pharmaceuticals. While such skill mix changes may compensate for shortages of doctors, they might increase nurse shortages.
> 3. Incentive systems to enhance recruitment and retention have been put in place.
> 4. International recruitment. Considerable efforts have been put into recruiting more doctors from overseas. The United Kingdom has traditionally recruited doctors from the Indian subcontinent and the Middle East and over 25% of the existing doctor stock has been trained overseas. The new recruitment drive has focused on countries with a surplus, such as Spain, but despite attempts to avoid recruitment from developing countries, it has also attracted many doctors from countries such as South Africa. A Code of Practice on international recruitment has now been enacted, although the private sector is not bound by it.
>
> These policies have facilitated an increase in the number of physicians. However, their effectiveness has been reduced by other developments. The EU Working Time Directive and NHS reforms creating a "consultant-led service" have reduced the number of hours worked, making supply deficiencies more evident. In addition, scandals related to medical practice, which have had wide circulation in the national media, appear to have encouraged much greater caution by practitioners, leading to slower processes of care.

Id.

176. NATIONAL HEALTH SERVICE, *supra* note 175, at 55. In light of the recruitment efforts of the NHS, it has also adopted an ethical code in its recruiting, pledging to abstain from

UK to promote employment in the NHS to other countries to sustain the proposed staff expansion growth of the NHS.[177] While these efforts may relieve the UK of its physician shortages, these efforts may come at the expense of exploiting the physician supplies of other countries and, ultimately, their public health predicaments.[178]

Although the UK may draw physicians from other EU countries, statistics show the UK does not necessarily draw a high percentage of physicians from these countries.[179] In 2001, 37.3% of the UK's physician workforce consisted of foreign physicians.[180] However, upon close examination, one would find the majority of the physicians who make up this 37.3% of foreign physicians in the UK are not from EU countries: 18.3% are from India; 15.2% are from Ireland; 7% are from South Africa; and 12.3% are from other parts of Africa.[181] In comparison, 4.0% of the physicians composing the 37% of foreign physicians in the UK are from Germany, 2.6% are from Spain, and 1.6% are from Poland.[182] Despite the efforts by the UK to remedy its shortages through relying on a low percentage of physicians trained in other EU countries, this percentage still represented 5,212 doctors from other EU countries - 5,212 doctors some underdeveloped countries of the EU probably valued very highly.[183]

EU laws facilitate the free movement of physicians between EU countries; the UK greatly benefits as a result. The UK has implemented the fundamental principles of Directive 2005/36 into its laws to ensure the recognition of the qualifications of EU physicians as long as the EU physicians meet certain requirements ultimately set out in the Directive.[184] As a result, the UK may take advantage of other physician pools in EU countries to relieve its shortages. While it does not primarily target EU physicians in its recruitment efforts it still recruits physicians from the EU, and it recruits them from less developed countries.[185] Across the English Channel, Spain faces an entirely different situation than the problem of physician shortages confronting the UK.

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recruiting from countries suffering from physician shortages. Pond & McPake, *supra* note 131, at 1453.

177. NATIONAL HEALTH SERVICE, *supra* note 175, at 55.

178. Pond & McPake, *supra* note 131, at 1453 (noting "[t]he small amount of analysis up to now comparing the volume of health worker flows suggests that the UK benefits more than other high-income countries from health worker emigration from the poorest countries").

179. Buchan, *supra* note 10, at 49.

180. Simoens & Hurst, *supra* note 95, at 33.

181. *Id.* at 34 tbl. 4.

182. *Id.*

183. NHS Hospital & Community Health Services, *Medical and Dentist Workforce Census*, at 13 tbl. 4, *available at* http://www.ic.nhs.uk/webfiles/publications/nhsstaff/Med%20and%20Den%20bulletin%201995%20to%202005.pdf (last visited Jul. 3, 2008).

184. *See* Medical Act, c. 54 § 17 (implementing the criteria of Council Directive 2005/36, arts. 21, 24).

185. Simoens & Hurst, *supra* note 95, at 34 tbl. 4.

B. Spain

1. Sistema Nacional de Salud

The health care problems of Spain are completely opposite of those in the UK; Spain suffers from physician surpluses, and it is very difficult for domestic and foreign physicians to practice medicine in Spain.[186] Furthermore, it does not appear Spain has implemented Directive 2005/36; therefore, the system of recognizing the qualifications of physicians in Spain abides by the standards set forth in Directive 93/16.[187] Although the EU's system may not relieve Spain's surpluses, its participation in the EU allows the doctors trained in Spain to move abroad, thereby relieving Spain from its physician surplus.

The health care system in Spain is called el Sistema Nacional de Salud (SNS), or in English, the "National Health System."[188] The Ley General de Sanidad de 1986 ("National Health Act of 1986" (NHA)) established the SNS as it fundamentally exists today. The NHA established the SNS hoping the SNS would achieve "universal coverage . . . and foster decentralization."[189] In Spain, the governmental entity that oversees health related matters is the Ministerio de Sanidad y Consumo (Health and Consumption Ministry), under which its central organ, INSALUD,[190] oversees the SNS.[191] The Spanish health care system depends not only the function of INSALUD, but also on the function of the various Comunidades Autonomas (Autonomous Communities) primarily managing the local delivery of health care.[192] Ideally, these Autonomous Communities would develop their own regional health plans and

186. Organisation for Economic Co-operation & Development, *OECD Health Data: How Does Spain Compare?*, at 2, *at* http://www.oecd.org/dataoecd/27/6/36972440.pdf (last visited Jun. 10, 2008) [hereinafter OECD Spain]; Elaine Duncan, *Working in Spain*, 316 BRIT. MED. J. 7145, 7145 (1998), *available at* http://www.bmj.com/cgi/content/full/316/7145/S2-7145. *But see* Beatriz González López-Valcárcel & Carmen Delia Dávila Quintana, *Spain*, *in* THE HEALTH CARE WORKFORCE IN EUROPE: LEARNING FROM EXPERIENCE 116 (Bernd Rechel et al. eds., 2006) (stating "[t]here is thus some contention about whether there are too many or too few doctors in Spain (citation omitted). While the emergence of unemployment since the 1980s in the medical profession points to an oversupply of physicians, Spain remains below the European average in terms of employment in the *health sector*"(emphasis added)).

187. Ministerio de Educacion y Ciencia, Estancias Formativas de Ciudadanos Extranjeros En Centros Espanoles Acreditados para la Docencia, http://www.msc.es/profesionales/formacion/estancias Formativas.htm (last visited Mar. 15, 2008).

188. MINISTERIO DE SANIDAD Y CONSUMO, SISTEMA NACIONAL DE SALUD, 1, *available at* http://www.msc.es /organizacion/sns/docs/LIBRO-BAJA.pdf.

189. Eunice Rodriguez et al., *The Spanish Health Care System: Lessons for Newly Industrialized Countries*, 14 HEALTH POL'Y & PLAN. 164, 166 (1999), *available at* http://www.ub.es/epp/salud/health.pdf# search=%22spanish%20care %20system%22.

190. INSALUD is an abbreviation for Insituto Nacional de Salud, which in English, means the "National Institute of Health."

191. MINISTERIO DE SANIDAD Y CONSUMO, *supra* note 188, at 17.

192. Rodriguez et al., *supra* note 189, at 167-68.

manage their administration to local Spaniards.[193] In actuality, only seven of the seventeen Autonomous Communities had accomplished this level of administration as of 1999. At this time, INSALUD still managed the regional administration of health care through the other ten Autonomous Communities.[194]

At the local level, health care providers deliver their services through two main centers.[195] The first is Atencion Primaria (Primary Care), where health care providers locally administer services in Centros de Salud (Health Centers).[196] Health Center providers seek to offer Spanish citizens a basic level of care and aim to situate themselves fifteen minutes from each Spanish citizen's residence.[197] Health Centers employ family physicians, pediatricians, nurses, and spaces for social workers and physical therapists.[198] The second set of centers through which health care providers deliver services are Centros de Especialdades y Hospitales (Specialist and Hospital Centers), where physicians render specialty outpatient and inpatient care.[199]

The SNS funds health care services through a mix of two sources: taxes and each Autonomous Community's budget.[200] Generally, taxes constitute 90% of the funding and social security supplies the remaining 10%.[201] SNS primarily pays Spanish physicians in the form of salaries the government formulates by taking into account the number of years SNS has employed a physician and if a physician has continually served in a full-time capacity.[202]

Whether Spain finds its health care desirable or not, the SNS is imploded with physicians.[203] In the early 1990's, the amount of practicing physicians doubled; consequently, it provided 4.8 physicians per 1,000 inhabitants, more than twice the number of physicians per 1,000 inhabitants in the UK in the early 1990's [204] Although these surpluses may have benefited the SNS, great unemployment existed among doctors in Spain in the late 1980's, exposing the beginnings of continuing physician surpluses.[205]

Despite high levels of physician unemployment, the SNS has performed well compared to other OECD countries.[206] It spent a total of 8.1% of its GDP on health care, which is slightly below the OECD average of 8.9%.[207] It also

193. *Id.*
194. *Id.*
195. *See* MINISTERIO DE SANIDAD Y CONSUMO, *supra* note 188, at 31-32.
196. *Id.* at 31-32.
197. *Id.* at 32.
198. *Id.*
199. *Id.*
200. *Id.* at 27.
201. Rodriguez et al., *supra* note 189, at 167.
202. *Id.* at 169.
203. *See id.*
204. *Id.*
205. *Id.* (noting physician unemployment levels of 20%).
206. *See* OECD Spain, *supra* note 186, at 2.
207. *Id.* at 1.

spent less per capita for health care than the OECD average, with expenditures in 2004 of $2,100, compared to the average OECD country expenditure of $2,550.[208] Despite indications of low spending on health care in Spain, it has steadily increased its health expenditures "by 5.6% per year on average" and boasts "more physicians per capita than . . . most other OECD countries."[209]

Spain's health indicators also demonstrate its apparent success: "In 2004, life expectancy at birth in Spain stood at 80.5 years, more than two years higher than the OECD average (78.3 years). Only Japan, Switzerland, Sweden and Australia registered a higher life expectancy than Spain in 2004."[210] Also, the infant mortality rate in Spain was significantly less than the OECD average of 3.5 deaths per 1,000 live births in 2004 and an average of 5.7 deaths per 1000 births on average across OECD countries.[211] Thus, the SNS spends less than the average OECD country on its health care, but Spain's indicators show its citizens do not suffer as a result.

2. *Spain's Implementation of EU Law*

While Spain does not appear to have implemented Directive 2005/36, it still heavily bases its system of mutual recognition of qualifications in the predecessor of Directive 2005/36, Directive 93/16.[212] The entity that recognizes, coordinates, and is in charge of the recognition of qualifications of foreign physicians is the Ministerio de Educacion y Ciencia (Ministry of Science and Education)(MECD).[213] Within the MECD, the Subdireccion General de Titulos, Convalidaciones, y Homologaciones is recognizes degrees from physicians from other EU nations in accordance with EU directives, such as Directive 93/16.[214] To practice in Spain, a foreign physician qualified in the EU must submit official documents through competent authorities in accordance with the jurisdictional policies of the foreign physician's home country.[215] However, one need not convert these documents to Spanish credentials or legalize them if these documents are sent from Member States of

208. *Id.* at 2.

209. *Id.* at 2.

210. *Id.* at 2.

211. OECD Spain, *supra* note 186, at 2.

212. Ministerio de Educacion y Ciencia, *supra* note 187 (noting licensed practitioners of Member States may practice in Spain if they have met those basic requirements set forth in Directive 93/16 and those Directives which subsequently amended it and were also transposed into law).

213. Ministerio de Educacion y Ciencia, Reconocimiento de Titulos Regulados por Directivas de la Union Europea a Efectos Profesionales, *at* http://www.mec.es/mecd/jsp/plantilla.jsp?id=81&area=titulos (last visited Jun. 10, 2008) [hereinafter Titles].

214. Ministerio de Educacion, Cultura y Deporte, La Subdirrecion General de Titulos, Convalidaciones y Homologaciones, http://www.mec.es/mecd/jsp/plantilla.jsp?id=99&area=titulos (last visited Jun. 10, 2008).

215. Titles, *supra* note 213.

the EU.[216] To satisfy these basic requirements, it is most likely a physician must present a certified copy of his/her academic and professional title, certified documents of nationality, and the official Spanish translation of his/her academic and professional title to the Subdireccion General de Titulos, Convalidaciones, y Homologaciones.[217]

Spain has implemented these requirements reflecting the provisions of Directive 93/16 through regulations named Real Decretos.[218] Real Decreto 1691/1989 instituted the Sectoral Directives preceding Directive 93/16,[219] and Real Decreto 2072/1995 amended Real Decreto 1691/1989 to implement the provisions of Directive 93/16, which still govern Spain's system of mutual recognition of qualifications for physicians.[220]

The system of mutual recognition of qualifications in Spain is based on the principle of mutual trust; professionals who are completely qualified to exercise a profession in their home state are deemed qualified to be recognized to practice that profession in Spain.[221] Such a policy reflects Directive 93/16 set out in Article 2 propogating this mutual trust.[222] However, some have observed Spain's system is lacking, indicating:

> there will come a point when you become extremely disoriented by the whole process. Senior males will suffer most, whereas women will more quickly recognize that 'glass ceiling' feeling, when nobody blatantly turns around and says 'forget it' but a distinct lack or progress is being made. Much has been written about EC directive 93/16/EEC and if David MacLachlan is right this seems to run smoothly in Germany.

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216. *Id.*

217. Ministro de Educacion y Ciencia, Documentacion Basica para el Reconocimiento, http://www.mec.es/ mecd/jsp/plantilla.jsp?id=86&area=titulos (last visited Jun. 10, 2008) (see bullet points under "Para las profesiones reguladas por Directivas Sectoriales").

218. Real Decreto 1691/1989, Por El que se Regulan el Reconocimiento de Diplomas, Cerfificados y Otros Titulos de Medico y de Medical Especialista de Estados Miembros de la Comunidad Economica Europea, El Ejercicio Efective del Derecho de Establecimiento y la Libre (R.D. 1989, 1691)..

219. *Id.*

220. Real Decreto 20072/1995, Por el que Se Modifica y Amplia el Real Decreto 1691/1989, de 29 de Diciembre, por el que Se Regula el Reconocimiento de Diplomas, Certificados y Otros Titulos de Medico y Medico Especialista de los Estados Miembros de la Union Europea, el Ejercicio Efectivo del Derecho de Establecimiento y la Libre Prestacion de Servicios (R.D. 1995, 2072). It should also be noted subsequent Directives were issued amending the requirements set forth in Directive 93/16 before Directive 2005/36, namely in Directives 2001/19, 98/63 and 99/46. However, these Directives did not modify the basic principles of Directive 93/16; rather, these Directives added specific requirements for specialist physicians and effected other minor changes. *See* Council Directive 2001/19; Council Directive 99/46, 1999 O.J. (L 139)(EC); Council Directive 98/63, 1998 O.J. (L 253)(EC). *See also* Ministerio de Educacion y Ciencia, *supra* note 187 (Spain's website acknowledging these amending Directives, which it has transposed into law).

221. *Id.*

222. *See* Council Directive 93/16, art. 2.

> However, Spain is not Germany, and the less assiduous, "So what are you going to do about it?" attitude to the application of EU norms, combined with a massive historical problem of medical unemployment, means that foreigners must expect obstacles.[223]

Despite the tedious process foreign physicians must endure for Spain to recognize their qualifications, Spain greatly benefits from EU laws allowing for the mutual recognition of qualifications because it allows the surpluses of physicians it trains to move to other EU countries and practice with relative ease.

3. The Effect of EU laws on Physician Movement in Spain

Spain's relationship with the UK may highlight the manner in which Spain benefits from EU laws allowing for the mutual recognition of physician qualifications. In 2000, a representative from the NHS visited Spain as part of the NHS' recruiting process to, in this instance, recruit more nurses.[224] However, "[t]he agreement also opened the door to recruit Spanish doctors . . . Spain is a fertile area for the recruitment of doctors because it has a surplus [of physicians]."[225] This is particularly beneficial to Spain which, at the time of these agreements, "showed that 22% of Spanish doctors were either unemployed or . . . without job security because the country had more doctors than it needed." Spanish physicians encourage the open recruiting in which the UK engages.[226] One physician noted he "welcomed the NHS move to recruit Spanish doctors, thinking that this might actually [be] . . . a solution for those doctors who were currently unemployed or working in insecure conditions."[227]

EU laws help solve the problems of physician supply faced by both the UK and Spain. In the UK, EU laws permit it to actively recruit abroad because laws allowing for the mutual recognition of qualifications make the transition of a foreign physician less problematic.[228] EU laws allowing for the free

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223. Duncan, *supra* note 186.

224. *See* Xavier Bosch, *Milburn Visits Spain for Doctors and Ideas*, 323 BRIT. MED. J. 7322 (2001), *available at* http://www.bmj.com/cgi/content/full/323/7322/1150/a. The article notes that since both countries signed the agreement they made during this visit, the NHS has recruited 400 nurses from Spain. *Id.*

225. *Id. See also* Lopez-Valcarcel & Davila Quintana, *supra* note 186, at 118 (indicating the migratory flow has changed and Spanish specialists are now emigrating to nearby countries such as Portugal. In 2000, an agreement facilitating employment was signed between Spain and the United Kingdom. In the United Kingdom, salaries are more than double those in Spain, but the exact extent of migration from Spain is unknown).

226. Bosch, *supra* note 221.

227. *Id.*

228. The levels of difficulty a physician may encounter in having another country recognize his/her qualifications will also depend heavily on the level of the physician's training in his/her home state. The process may be complicated if they have to pursue more training or have to

movement of physicians among EU countries permit Spanish doctors, who are not in high demand in Spain, to move abroad and find employment in countries, such as the UK, where their services are needed.[229] In the UK, Spanish doctors can "expect 'either to get a permanent job . . . or to come back to Spain with a chance of getting a non-precarious post."[230]

C. The Effect of EU Law on the Underdeveloped Countries of the EU

Despite the advantages EU laws grant countries such as the UK and Spain, some EU countries would argue these laws were not advantageous to the maintenance of their physician supplies.[231] This attitude recently surfaced while the EU anticipated the addition of ten new countries to its structure in 2004.[232] Many deemed this occurrence as "one of the most significant events in the economic and political life of the European continent."[233] The enlargement added "almost 75 million persons to a community already comprising 380 millions (an increase of 19.5%)."[234] Despite the significance of the event, and its potential positive implications, it provoked concerns that, given the EU's laws allowing for the free movement workers, workers from the acceding countries would emigrate "*en masse*."[235] It was believed such migration would "create pressure in the already dysfunctional markets and would potentially cause further unemployment and lower wages, among other harmful results."[236]

The health situations of the acceding countries also varied substantially from those of the previous fifteen Member States, which created further apprehension.[237] All of the "candidate countries of CEE [Central and Eastern Europe] . . . ha[d] levels of life expectancy that lag[ged] behind those in western Europe, although they at last were improving."[238] Furthermore, these countries suffered from deteriorating birth rates which, combined with the increasing aging of their populations, posed "important consequences [for] the

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take an additional test. Regardless of these inconveniences, Directive 93/16/EEC and the adoption of the measure by each country at least give each physician notice of what the physician will have to do to have a country recognize his/her qualifications.

229. *See* Duncan, *supra* note 22.

230. Bosch, *supra* note 224.

231. Ozren Polasek & Kolcic Ivana, *Croatia's Brain Drain*, 331 BRIT. MED. J. 1204, 1204 (2005), *available at* http://www. bmj.com/cgi/content/full/331/7526/1204.

232. *Id. See also* Chammartin & Cantu-Bazaldua, *supra* note 7, at 1.

233. Chammartin & Cantu-Bazaldua, *supra* note 7, at iii.

234. *Id.* at 1.

235. *Id.*

236. *Id.*

237. Martin McKee et al., *Health Status and Trends in Candidate Countries*, *in* HEALTH POLICY AND EUROPEAN UNION ENLARGEMENT 24, (Martin McKee et al. eds., 2004).

238. *Id.* Particularly, in 2001, the EU life expectancy average for males was about 75 years while the Czech Republic rate's measured about 72 years, Slovenia's rate about 71 years, Poland's rate about 70 years, Hungary's rate about 68 years, Romania's rate about 67 years, Lithuania's rate about 66 years, Estonia's rate about 65 years, and Latvia's rate about 64 years. *Id.* at 25.

future."[239] One study found "in 1988, about 25% of the mortality gap between east and west Europe between birth and age 75 could have been explained by medical care."[240]

While many underdeveloped nations of the EU's health care indicators were lacking, many of their youngest and most well educated population desired to move abroad.[241] "The potential youth drain is combined with a potential 'brain drain.' The sending countries are in danger of losing between 3% and 5% of people who have third-level education, and more than 10% of their students."[242] Of these, 2-3% of graduate students have a firm intent to move abroad after graduation.[243] These youngest and brightest students include physicians.[244]

One of these countries, Lithuania, indicated a third of its doctors would go abroad to other EU states when it joined the EU in 2004.[245] Speaking on a broader scale, Lithuania's health ministry, through is own research, found "61% of doctors in training and 27% of practicing doctors said they wanted to work abroad once the Baltic . . . join[ed] the European Union [and] . . . of those, 15% of doctors in training and 5% of practicing doctors *firmly* intend[ed] not to return."[246]

In Croatia,[247] 204 medical students in their last year at the University of Zagreb's Medical School were surveyed,[248] and the survey found "[e]ighty four students were considering immigrating, mostly to the EU (57 respondents), especially [those from] Slovenia."[249] These results revealed a 10% increase from the previous year of new graduates who would emigrate abroad.[250]

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239. *Id.* at 24.

240. *Id.* at 37. Other factors also indicate the struggling nature of the majority of the health systems of the acceding countries; the acceding countries have high rates of death attributable to cardiovascular disease and alcohol and more than 20 % of their women suffering from some long-term chronic illness, with a greater number of males suffering from the same category of ailment. *Id.* at 28-29.

241. European Foundation for the Improvement of Living and Working Conditions, Migration Trends in an Enlarged Europe, at 4 (2004), http://www.eurofound.europa.eu/pubdocs/2003/109/en/1/ef03109en.pdf [hereinafter Foundation].

242. *Id.* at 66.

243. *Id.*

244. Polasek & Ivana, *supra* note 231, at 310.

245. Krosnar, *supra* note 130.

246. *Id.* (emphasis added).

247. Croatia is currently a candidate country for the EU; nonetheless, its predicament is relevant to the discussion as many of its neighbors belong to the EU. Europa.eu, Candidate Countries, http://europa.eu/ abc/european_countries/candidate_countries/index_en.htm (last visited Jul. 4, 2008).

248. The survey yielded a response of 85% and ran its data through a regression analysis to achieve its numbers. Polasek & Ivana, *supra* note 231.

249. *Id.*

250. *Id.* In the previous year, 31% of those graduating said they would seek to practice abroad. *Id.* Of those graduating physicians in this survey, 41% said they would move abroad. *Id.*

Among those who indicated they were the most likely to leave were those at the top of their class; Croatia's best and brightest.[251] Thus, EU laws allowing physicians from Member States the ability to move freely and practice in other Member States could potentially debilitate Croatia's health care system, which already faces "[a] serious shortage of doctors [and] . . . faces substantial problems in healthcare provision."[252]

The problem of physician flight does not elude Poland either.[253] In 2001, Poland experienced its own shortage of physicians.[254] Regardless of this shortage, other countries experiencing shortages, including EU Member States, targeted Poland's physician workforce: " . . . there have been significant increases in offers of work from abroad . . . [a]dvertisements have been placed in local newspapers, web-services for health professionals, career opportunity sites and distributed by professional bodies of nurse and physicians. In a few cases even the Government was involved."[255] Despite the potential benefits the accession by Poland to the EU may afford both Poland and the EU, "[the] risk of brain drain could be the most important disadvantage of enlargement for the Polish health care system."[256] Furthermore, like Lithuania, the group mostly likely to migrate "would be the youngest and best qualified nurses and doctors."[257] Recent moves made by physicians to take advantage of opportunities to migrate to other countries with which Poland has existing agreements highlight the negative implications of Poland's accession, and the effective threat current EU laws allowing for the mutual recognition of qualifications may pose to its health care system.[258] Thus, EU laws allowing for the mutual recognition of qualifications, and facilitating physician migration, stand to adversely affect Poland.[259]

An independent commission, The Permanent Working Group of European Junior Doctors, confirmed the desires of soon-to-graduate physicians from those countries who entered the EU in 2004 to move to other EU states to practice once the physicians entered the EU.[260] It explained it "[e]xpected migration rates from most of these countries [except in the more wealthy ones, particularly Slovenia and Malta] to rise significantly once they join[ed] the European Union. Doctors, particularly junior doctors, will move not only for

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251. *Id.* In regard to Croatia's physician shortages, this article indicated "according to a new legislative scheme, a shortfall of 398 consultants in internal medicine and 340 consultants in surgery is predicted by 2007." *Id.*

252. *Id.*

253. *See generally* Monika Zajac, *Free Movement of Health Professionals: The Polish Experience*, *in* HEALTH POLICY AND EUROPEAN UNION ENLARGEMENT 109-29 (Martin McKee et al. eds., 2004).

254. *Id.* at 109-10.

255. *Id.* at 118-19.

256. *Id.* at 121.

257. *Id.*

258. *Id.*

259. Zajac, *supra* note 253, at 119.

260. Krosnar, *supra* note 130, at 310.

much higher pay but also better training opportunities and working conditions."[261] The President of the organization also noted the physicians from these states mostly wanted to emigrate to the UK.[262] Therefore, while EU laws allowing the free movement of physicians benefit some of the most developed nations in the EU, such as Spain and the UK, EU laws allowing the free movement of physicians are depriving many of its developing nations of valuable health care resources—their personnel—which ultimately decreases the level of health care the citizens of those countries may receive.[263]

III. COUNTERARGUMENTS

Although some countries may bear the burden of EU laws allowing their physicians to move abroad to practice medicine, the effect any physician migration may have on these states—mostly new Member States—may be insignificant; further, the various benefits laws allowing for the free movement of physicians bring may outweigh their costs.[264] One of the foremost arguments to fears of physician flight and brain drain has been that as the newer Member States transition into the EU community, regardless of EU laws such as Directives 96/13 and 2005/36, immigration levels will be modest.[265] A group of EU research institutes confirmed the level of immigration's "overall impact on the European labour market should be limited."[266] Other reports have noted migration will not initially overwhelm the Member States, but it will occur gradually over time.[267] And, even as immigration occurs over time, the European Foundation for the Improvement of Living and Working Conditions concluded a maximum of only 4.5 percent of the population in the new Member States may emigrate in the next five years.[268]

Past EU enlargement also helps to prove the expectation of large-scale emigration and its consequences is unfounded.[269] One group of authors noted similar fears of migration accompanied these expansions,[270] but "the feared

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261. *Id.*

262. *Id.*

263. *See generally* The Commonwealth, Commonwealth Code of Practice for the International Recruitment of Health Workers, 3-6, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7 B7BDD970B-53AE-441D-81DB-1B64C37E992A%7D_CommonwealthCodeofPractice.pdf (last visited Jul. 4, 2008) [hereinafter Code]. *See also* Mullan, *supra* note 79.

264. Chammarin & Cantu-Bazaldua, *supra* note 7, at iii.

265. Zajac, *supra* note 253, at 123.

266. *Id.* at 118.

267. Foundation, *supra* note 241, at 2.

268. *Id.* at 65.

269. Chammartin & Cantu-Bazaldua, *supra* note 7, at 9.

270. *Id.* "The EU had passed through four enlargements before the recent expansion of May 2004.
They occurred in 1973 (Denmark, Ireland and United Kingdom), 1981 (Greece though full labour mobility until 1986), 1986 (Portugal and Spain though full labour mobility until 1992) and 1995 (Austria, Finland and Sweden)." *Id.*

migration flow from these countries never materialized."[271] To the contrary, this group of authors argued EU enlargement deters the citizens of new Member States from immigrating:

> the EU experience has confirmed that countries with below-average GDP and a negative migration balance actually diminish and even invert their level of migration after their integration in the economic community. This happens because the new members benefit from big flows of investment from the richer members and from higher international trade, which generate growth and employment. The positive economic performance and the ensuing improvement in living standards attract migrants back to their home countries. In fact, the higher the level of integration of the economies, the lower the level of migration pressures. For this reason, it has been argued that the close level of integration of their members has actually deterred intra-EU migration flows.[272]

Furthermore, "labour mobility has ranked as the least used freedom in the Union."[273] Among the majority of existing Member States, "the level of intra-EU mobility has remained modest, never surpassing 50% of the total foreign population," and for six of the Member States, it has never risen above 25%.[274]

Not only does EU experience with past EU enlargement downplay its potential adverse consequences, but other natural barriers may constrain foreign physicians from emigrating to other Member States.[275] There are language barriers; although foreign physicians may desire to practice abroad, the inability of foreign physicians to speak the language of the country in which they may desire to practice greatly limits those desires.[276] Furthermore, foreign physicians may have to bear costs, including language differences, in adapting not only to a foreign culture, but to a foreign medical culture.[277] The "strong social and cultural ties" of a foreign physician with his/her country may initially discourage him or her from migrating as well.[278] Moreover, the prospect of receiving a reduced wage or receiving a position for which the physician is overqualified may also deter a foreign physician from migrating.[279] Lastly,

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271. *Id. See also* Zajac, *supra* note 253, at 118 (noting "[v]ery modest migration flows were recorded after the Spanish and Portuguese accessions").

272. *Id.*

273. *Id.*

274. *Id.*

275. Zajac, *supra* note 253, at 123.

276. *Id.*; Chammartin & Cantu-Bazaldua, *supra* note 7, at 12.

277. Zajac, *supra* note 253, at 123.

278. Chammartin & Cantu-Bazaldua, *supra* note 7, at 12.

279. Zajac, *supra* note 253, at 123.

some populations are more risk averse; thus, some populations may "wait and see" before making any moves to emigrate, stagnating any initial mass migration in the face of EU enlargement.[280]

Another argument, particularly against those who persist some EU countries heavily rely on foreign physicians, is that a majority of those foreign physicians are not citizens of the new Member States.[281] The WHO reported while

> about one in three of the 71,000 hospital medical staff working in the NHS . . . had obtained their primary medical qualification in another country[in 2002,] . . . [t]he main sources of recruits were not from within the EU but from [non-EU] countries, such as South Africa and India.[282]

Also, proposals for regional solutions may not be necessary as some countries have already implemented their own codes for ethical recruiting.[283] Recognizing the foreign recruiting practices of the UK may adversely affect those countries with lower physician supplies, it "issued a Code of International Recruitment . . . which requires that NHS employers do not recruit actively from developing countries, unless there is a bilateral agreement."[284]

Additionally, the free movement of physicians, which EU laws afford, may potentially benefit the old and new EU Member States.[285] Countries that stand to lose their physicians may improve their health care systems and potentially offer greater benefits and incentives to keep their physicians.[286] Migration, coupled with the mutual recognition of qualifications, would also allow physicians from less developed countries in the EU to develop an expertise abroad, then return to contribute that newfound ability to the health care systems of their home country.[287]

Moreover, EU laws allowing for the mutual recognition of qualifications would benefit the EU as a whole. Mutual recognition of qualifications would allow countries suffering from physician surpluses and high unemployment to aid other EU countries suffering from labor and physician shortages.[288] Poland suffers from the same unemployment problem as Spain, with levels as high as 16.1 percent in 2000.[289] However, Poland is not alone, as the new Member

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280. *Id.*

281. Buchan, *supra* note 10, at 48-49. *See also* Pond & McPake, *supra* note 131, at 1449-50 (noting the UK primarily relied on physicians from sub-Saharan Africa for newly registered physicians in 2003).

282. Buchan, *supra* note 10, at 53.

283. *Id.* at 54.

284. *Id.*

285. Chammartin & Cantu-Bazaldua, *supra* note 7, at iii.

286. Zajac, *supra* note 253, at 120.

287. *Id.*

288. Buchan, *supra* note 10, at 41.

289. Zajac, *supra* note 253, at 122.

States post higher unemployment levels than the average unemployment rates of those Member States existing before accession.[290] EU laws allowing for the recognition of the qualifications of physicians in other EU countries would permit unemployed physicians to seek employment in other EU Member States starving for medical human capital.[291]

The chief of the International Migration Programme summarized the net benefits of migration and the benefits thereof as follows:

> [t]he accession of the new members will improve their situation enormously and give a new stimulus to stagnant markets in Western Europe. Some migration will undeniably appear, particularly in the neighbouring countries in the EU-15 in the short-term. However in the long run, anticipated intra-EU migration will probably continue at limited levels, even after the restrictions are lifted.[292]

Thus, arguments exist asserting critics of physician movement are greatly overstating feared migration levels and EU laws allowing for the mutual recognition of physician qualifications, and the migration they encourage, actually benefit the health care systems of the EU Member States and the EU as a whole.[293]

IV. SOLUTIONS

Whether EU laws are the cause of physician supply disparities in different countries or whether apparent large amounts of migration will actually occur is unclear. However, the looming concern of their effect, particularly on the recently acceded EU countries, has generated different approaches to remedying the problem.[294] One of the foremost proposals is the International Code of Practice for the International Recruitment of Health Workers (Code).[295]

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290. Chammartin & Cantu-Bazaldua, *supra* note 7, at 5.
291. Buchan, *supra* note 10, at 41.
292. Chammartin & Cantu-Bazaldua, *supra* note 7, at iv.
293. *Id.*
294. *See generally* Buchan, *supra* note 10, at 56-60.
295. Code, *supra* note 263, at 3-6. Further,

> [t]he Commonwealth is an association of 53 independent states consulting and co-operating in the common interests of their peoples and in the promotion of international understanding and world peace. The Commonwealth's 1.8 billion citizens, about 30 per cent of the world's population, are drawn from the broadest range of faiths, races, cultures and traditions. The association does not have a written constitution, but it does have a series of agreements setting out its beliefs and objectives. These Declarations or Statements were issued at various Commonwealth Heads of Government Meetings. The first, fundamental statement of core beliefs is the Declaration of Commonwealth Principles which was issued at the 1971 summit in Singapore. Among other things, it stresses the need to foster international peace and security; democracy; liberty of the

Although the Commonwealth does not include many EU countries, but more African countries, it has sought to address the potential problems the free movement of physicians may cause, noting that "[m]any Commonwealth countries, both developed and developing, are experiencing shortages of skilled health workers."[296] The Code illuminates the dichotomy explained above indicating some countries have engaged in aggressive recruiting programs to fulfill their need for health workers; while "this is helping some recipient countries to overcome their staff and skills shortages, it deprives source countries of knowledge, skills, and expertise for which large amounts of resources have been expended."[297] The purpose of the Code is to "provide[] guidelines for the international recruitment of health workers in a manner that takes into account the potential impact of such recruitment on services in the source country."[298] The Code also seeks "to discourage the targeted recruitment of health workers from countries which are themselves experiencing shortages . . . [and to] safeguard the rights of recruits, and conditions relating to their profession in recruiting countries."[299]

The Code focuses on principles of transparency, fairness, mutuality of benefits, compensation, selection procedures, registration, and workforce planning to achieve its objectives.[300] Regarding transparency, the Code explains transparency should exist in "any activities to recruit health care workers from one country to another," which may involve home and host states forming agreements between the two.[301] Moreover, recruiters should be honest in their recruiting efforts "about the type of skills, expertise, the number of recruits, and grades being sought."[302]

To ensure fairness in the recruiting process, recruiting countries should not seek to recruit those individuals who have obligations to their home countries.[303] In many cases, home states providing the funding for the training of a physician require him or her to stay and practice for a designated amount of time; other countries should be respectful of these agreements.[304] One author argued host countries should honor contracts physicians have with their home

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individual and equal rights for all; the importance of eradicating poverty, ignorance and disease; and it opposes all forms of racial discrimination.

The Commonwealth, *About Us*, http://www.thecommonwealth.org/Internal/20596/about_us/ (last visited Jun. 10, 2008).

296. Code, *supra* note 263, at 3. The United Kingdom would fall into this category as mentioned many times throughout this Note and, consequently, is a member of the Commonwealth. The Commonwealth, *Members*, http://www.thecommonwealth.org/Internal/142227/members/ (last visited Jun. 10, 2008).

297. Code, *supra* note 263, at 3.

298. *Id.* at 4.

299. *Id.*

300. *Id.* at 4-6.

301. *Id.* at 4.

302. *Id.*

303. Code, *supra* note 263, at 4.

304. Tikki Pang, *Brain Drain and Health Professionals*, 324 BRIT. MED. J. 499 (2002), *available at* http://www.bmj.com/cgi/content/full/324/7336/499.

state and should not be allowed to advertise "'in developing countries unless that country has specifically invited the [host country] to undertake a recruitment programme'—that recruitment 'should only be undertaken as part of an inter-governmental cooperation agreement . . . encouraging the exchange of healthcare personnel, healthcare information, and guidelines.'"[305]

Recruiters should also "provide full and accurate information to potential recruits concerning: [1] the nature and requirements of the job that recruits are expected to perform; [2] countries to which they are being recruited; [3] administrative and contractual requirements; and [4] their rights."[306] Recruits should also have access to all information about the selection process; recruiters should assure recruits they will have the same opportunities and safeguards as other physicians practicing in the host state.[307]

The Code also desires that both countries, the home and host country, benefit through the recruitment process. Where the migration of physicians greatly affects a home country, the host country should find ways to assist the home country.[308] Host countries may wish to compensate home countries "through the transfer of technology, skills and technical and financial assistance to the country concerned."[309] Alternately, host countries could provide "training programmes to enable those who return to do so with enriched value" and could "arrange[] to facilitate the return of recruitees."[310]

Host countries should also ensure recruits understand their recruiting contracts and are willing to abide by them.[311] Additionally, host countries should inform potential recruits of the licensing requirements of the host country and take steps to ensure recruits have fully complied with all necessary educational training requirements or ensure the training deficiencies of the recruits are clearly conveyed to them.[312]

Lastly, the Code encourages Commonwealth countries to reform domestic and training programs so Commonwealth countries will have to do less recruiting abroad.[313] Those countries with physician shortages could accomplish this by allowing more students to attend medical school,[314] or as

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305. Vikram Patel, *Recruiting Doctors from Poor Countries: The Great Brain Robbery?*, 327 BRIT. J. 926 (2003), *available at* http://www.bmj.com/cgi/content/full/327/7420/926.

306. Code, *supra* note 263, at 4.

307. *Id.* at 5.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 5-6.

312. Code, *supra* note 263, at 6.

313. *Id.*

314. Krosnar, *supra* note 130. The United Kingdom implemented this policy in 1998 and "by 2002, the annual number of acceptances to medical school had increased by a third, four new medical schools were opened in 2002, and in 2003, medical school acceptance was 50% higher than in 1997." Pond & McPake, *supra* note 131, at 1449. Other countries have also initiated internal reforms around this principle. Germany is an example of a state which has failed to successfully limit those numbers of medical students who enter medical school, which

two scholars proposed, to encourage more women to move into the physician workforce.[315] Regardless of the method, countries suffering from physician shortages could help remedy these shortages without infringing on the physician supplies of other countries who cannot afford to lose their physicians.

The Code provides a good working framework encompassing many viable solutions.[316] However, although many countries adopted it at the Pre-WHA[317] Meeting of Commonwealth Health Ministers in 2003 in Geneva,[318] it holds no binding effect on nations who have not signed it, such as the UK.[319] Furthermore, its text exposes its own inherent weaknesses. It notes it "is not a legal document" and that "it is hoped that governments will subscribe to it."[320] Additionally, it explains it is not meant to "hinder" the ability of individuals to make their own career choices; it is a legal framework which Commonwealth governments may use to supplement their own policies and laws with depending on their particular situations.[321] Failures by the UK, Australia, and Canada, all developed countries who experience shortages, to adopt the Code, reveal its greatest weakness.[322] Thus, the language of the Code exposes the reality that the adoption of its solutions is at the mercy and discretion of the Commonwealth states who may freely choose to enforce it or not.[323]

Other scholars have focused on what home countries, which face the efforts of other countries recruiting their physicians, may do to keep their physicians.[324] To retain their trained physicians, home countries could delay

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has led to an oversupply of physicians. France, on the other hand, has been successful, under a centralized system, in limiting the amount of health care staff entering the workforce; but, this has led to a feared shortage of health care workers, including doctors. Dubois et al., *supra* note 8, at 5.

315. Simoens & Hurst, *supra* note 95, at 20-21. The authors of this article explain many countries will experience shortages and women may be an alternative source of human capital to fill that void as health care demands increase. *Id.* However, they are skeptical of this alternative, indicating "increasing female participation in the physician workforce can have important consequences for the supply of physicians, given that female physicians tend to differ from their male colleagues in how they participate in the workforce." *Id.* at 21. Women tend to prefer primary care, but "are less likely to work in rural areas, are more likely to leave the practice of medicine or practice at low activity levels during child-bearing age, tend to work fewer hours and are more likely to retire early." *Id. See also* Pond & McPake, *supra* note 131, at 1449.

316. *See* Buchan, *supra* note 10, at 58.

317. World Health Organization, *56th World Health Assembly*, http://www.who.int/mediacentre/news/ notes/2003/npwha/en/index.html (last visited Jul. 4, 2008). WHA stands for World Health Assembly, which is the annual meeting of the 192 states who are members of the World Health Organization. *Id.* This meeting takes place each year in Geneva, Switzerland. *Id.*

318. Code, *supra* note 263, at 6.

319. *See* Buchan, *supra* note 10, at 58.

320. Code, *supra* note 263, at 5.

321. *Id.* at 3.

322. Buchan, *supra* note 10, at 58.

323. *See id.*

324. *See* Pang, *supra* note 304; Zurn et al, *supra* note 131, at 6; Krosnar, *supra* note 130.

the departure of their physicians through compulsory service.[325] Home countries could also raise salaries for physicians who work in public health sectors.[326] Home countries may consider allowing their publicly paid physicians to supplement their public practices with private practices to pursue an additional specialty or interest for which the public health system may not provide an opportunity.[327] Additionally, home countries could provide better pensions, child care, educational opportunities, and better educational environments in which the children of physicians would have greater opportunities.[328] Other efforts home countries could make to improve the retention of the physicians they train include improving medical infrastructure[329] and making more bilateral agreements with countries seeking to recruit their physicians.[330] The latter may mandate that host countries train recruits from the home country primarily in methods of care that would benefit the home country.[331] Lastly, home countries may require recruiting countries to reimburse home countries for costs of training provided to a physician who seeks to migrate.[332]

All of these solutions may work toward allowing home countries to salvage their physician resources. Particularly where sovereign nations may bargain with recruiting countries to provide some mutual benefit, sovereign nations should do so because regional non-binding agreements, such as the Code, provide no binding effect to protect countries that can ill-afford to lose their physicians.

This Note proposes the EU take initial legislative action to implement some of the suggestions the Code mentions. The Code could serve as a basis over which the Member States could negotiate different provisions potentially regulating some aspects of the free movement of physicians in the EU. Currently, proposals to regulate physician movement, such as the Code, hold non-binding effect and rely on ethical constraint. The EU, however, has power to pass binding resolutions. As previously explained, the EU has shown a greater interest in addressing health care issues than in past decades and where it has allowed the free movement of physicians through Directive 96/13, and now Directive 2005/36, it should allow itself to place regulations on the negative effects this free movement may potentially cause.

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325. Pang, *supra* note 304.

326. *Id.*; Krosnar, *supra* note 130.

327. Pang, *supra* note 304.

328. *Id.*; Zurn et al., *supra* note 131, at 19.

329. Pang, *supra* note 304; Krosnar, *supra* note 130. According to these articles, infrastructure improvements would include better medical facilities with better technologies. Pang, *supra* note 304; Krosnar, *supra* note 130. It would also include more efficient management of health care, such as streamlining hospital care by shutting down unused hospitals, selling them, and contributing the proceeds back to the health care budget. Krosnar, *supra* note 130.

330. Pang, *supra* note 304.

331. *Id.*

332. *Id.*; Krosnar, *supra* note 130.

Ideally, the EU could solve the potential problem this Note identifies through issuing a Directive or set of Directives considering some of the solutions the Code and other academics have proposed. It could start gradually by requiring its Member States to respect the agreements other Member States make with the physicians they train. Then, it could implement greater measures requiring countries such as the UK to pay the training costs of the physicians it recruits. Another effective means by which the EU could gradually regulate physician migration would be through enacting temporary restrictions on the number of foreign physicians EU members may recruit, depending on the numbers of each home country's respective physician supply.[333]

If the EU chose to take legislative action, the ECJ could also provide support. This is likely given its recent indications that it would allow the EU to provide more regulation of health care than the Members States currently provide.[334] It could uphold any regulations the EU implements to stymie adverse effects of physician flow in the EU. Alternatively, it could affirm a home country's implementation of one of the aforementioned policies to protect its physician supplies. Lastly, the EU could propose language in future treaties amongst EU countries that would promote policies helping resolve potential problems of disparate physician supplies among EU countries.

Following its gradual intervention to regulate the potentially adverse outcomes of EU law allowing for the free movement of physicians, this Note proposes the EU legislatively requires its countries to implement a system of data collection allowing researchers to monitor the level of actual migration and physician depletion in EU countries as well as to investigate which gradual interventions work to balance the physician working force in the EU.[335] Scholars have suggested researchers and/or countries engage in more "data analysis" to fulfill a "need for a more detailed assessment of the actual impact of health workers moving to other countries compared to that caused by health workers leaving the health sector in-country."[336] This would allow the EU to determine whether health workers are migrating in a considerable manner and in what way this affects EU countries.

These are all legal mechanisms and institutions the EU could utilize to ensure the effect of EU laws on physician migration, especially with the recent accession of new Member States, will not produce adverse outcomes in any of the Member States. Where the EU sought initially that every EU country benefit through the mutual recognition of qualifications and the free movement of physicians, it should also seek that every country benefit through protective measures limiting the adverse effects of its former proposals. A gradual method of intervention would address the arguments of those who are skeptical of EU laws allowing for physician movement without immediately jeopardizing

333. Chammartin & Cantu-Bazaldua, *supra* note 7, at 7-8.
334. Mossialos & McKee, *supra* note 29.
335. Buchan, *supra* note 10, at 54.
336. *Id.* at 56.

the apparent benefits of these laws.[337] The EU needs this type of balance where, regardless of the counterarguments, the underdeveloped nations of the EU face health care problems and cannot afford to hope their physicians will not leave them and their health care systems impaired.[338]

V. CONCLUSION

The EU has made great strides in recent decades and has emerged as a formidable player in an international economy.[339] Its emphasis on the free movement of goods and services within the EU has allowed for its economic successes and it promoted such activity in the health care sector primarily through Directive 93/16 and now Directive 2005/36.[340] The latter Directive now sets standards for the mutual recognition of physician qualifications in EU countries.[341] This ultimately allows physicians to seek employment with relative clarity and ease in the different EU Member States.[342] However, the free movement of physicians may adversely affect those countries with low physician supplies from which larger countries with shortages recruit.[343] The UK is a country that has implemented the Directive and seeks physicians from other countries to satisfy its perpetual shortages. Its intercourse with Spain, which experiences physician surpluses, demonstrates the EU laws allowing for the free movement of physicians may be highly beneficial to the Member States of the EU. In light of these conflicting views, the EU must decide whether the problem exists to the extent the EU should intervene to resolve it.[344] Regardless of whether the EU decides to address the issue, it would ideally be the best equipped to do so as it can pass binding policies its Member States are compelled to recognize. The hope is that the EU chooses to do so to promote better health outcomes in its developed states as well as its more fledgling states, who are trying to survive in a global economy.

337. Buchan, *supra* note 10, at 41.
338. McKee et al., *supra* note 234, at 32.
339. RANDALL, *supra* note 1, at 3.
340. Council Directive 93/16, art. 2.
341. *Id.*
342. Nicholas, *supra* note 3, at 83.
343. Polasek & Kolcic, *supra* note 231; Chammartin & Cantu-Bazaldua, *supra* note 7, at 1.
344. Buchan, *supra* note 10, at 59.

THE PHENOMENON OF CYBERSUICIDE: AN EXAMINATION OF AUSTRALIA'S SOLUTION, THE CRIMINAL CODE AMENDMENT (SUICIDE RELATED MATERIAL OFFENSES) ACT 2005 AND THE DIFFICULTY OF INTERNATIONAL IMPLEMENTATION

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I. INTRODUCTION

The debate over the legalization of assisted suicide occurs in nearly every nation.[1] This debate increased in complexity and intensity with the development of internet websites promoting different methods of suicide and counseling internet users to commit suicide.[2] Now, legislators around the world and the public alike deliberate on whether to regulate these websites under

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1. Penney Lewis, Article, *Rights Discourse and Assisted Suicide*, 27 AM. J.L. AND MED. 45, 45. (2001). The American Medical Association has ethical concerns with assisted-suicide because it is "contrary to the traditional prohibition [of the medical community] against using the tools of medicine to cause a patient's death." American Medical Association, *Decisions Near the End of Life*, CEJA REPORTS, A-91 (1991), *available at* www.ama-assn.org/ama1/pub/upload/mm/369/ceja_ba91.pdf. A majority of states have laws criminalizing assisted suicide. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 280 (1990). In 1994, the State of Oregon enacted legislation legalizing physician-assisted suicide. *See* OR. REV. STAT. §§127.800-127.897 (1994). In January 2006, the United States Supreme Court upheld the statute. Gonzales v. Oregon, 546 U.S. 243, 274-75 (2006). Internationally, many have made assisted suicide illegal. *See* Suicide Act, 1961, c. 60, § 2 (Eng.); Crimes Act, 1900, § 31C (NSW); Criminal Code, R.S.C. ch. C-46, § 241 (1985); Gonzalo Casino, *Film Reopens Euthanasia Debate in Spain*, BRIT. MED. J., Oct. 9, 2004 (stating Spain deems assisted suicide and euthanasia as crimes); B.C. Civil Liberties Association, *Assisted Suicide and Active Voluntary Euthanasia*, BCCLA, (1988), *available at* http://www.bccla.org/positions/privateoff/88euthanasia.html (discussing the Italian Penal Code criminalizing assisted suicide, but indicating the action is more punishable if the suicide is successful). Assisted suicide is legal in the Netherlands, Belgium, and Switzerland. *Assisted Suicide: The Fight for the Right to Die*, CBC NEWS, June 11, 2007, *available at* http://www.cbc.ca/news/background/assistedsuicide/.

2. *See* Patrick Goodenough, *Websites Promoting Suicide Should be Outlawed, Some Say*, CNSNEWS.COM INT'L EDITOR, Sept. 12, 2006, *available at* http://www.cnsnews.com/news/viewstory.asp?Page=/ForeignBureaus/archive/200609/INT20060912a.html (stating a charity in Britain is pushing for the government to act against Internet websites promoting suicide); Greg Barnes, *New Law on Suicide Attacks Freedom*, THE CANBERRA TIMES, Jan. 6, 2006, *available at* http://www.onlineopinion.com.au/view.asp?article=4022 (attacking the Criminal Code Amendment (Suicide Related Material Offences) Act 2005 because it is "an attack on freedom of communication" and a "fundamental human right").

current assisted-suicide legislation or whether new regulation addressing the legality of these sites is required.[3]

Commentators refer to the relatively new phenomenon of pro-suicide websites as cybersuicide.[4] Cybersuicide websites include sites detailing specific ways of how to commit suicide,[5] which methods are most painless,[6] online content offering psychological guidance promoting suicide,[7] chat rooms and bulletin boards with messages of death wishes, suicide pacts, or advertisements looking for others with whom one can commit suicide.[8] Some websites even sell kits containing the necessities to commit suicide.[9]

Since the late 1990s, internet users around the world have used the internet to create suicide pacts.[10] This is a quickly expanding fad as evidenced by the plethora of websites found online.[11] There are tens of millions of websites available over the internet discussing suicide.[12] Various locations such as Holland, the United States and Japan host these websites.[13] Internet users can easily utilize popular internet search engines to find cybersuicide websites.[14] In a study published in the *Eubios Journal of Asian and International Bioethics*, a group conducted an internet search utilizing the search engine Google with the query "how to suicide" and received 179 sites, a number of which featured different ways to commit suicide.[15] In researching

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3. *See generally* Peter Dutton, *Criminal Code Amendment (Suicide Related Material Offences) Bill 2004: Second Reading*, Aug. 11, 2004, *available at* http://www.peterdutton.com.au/news/default.asp?action=article&ID=468; Letter from Jocelyn Head, President, Voluntary Euthanasia Society of Tasmania, to The Senate Legal and Constitutional Committee (Mar. 27, 2005) *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub06.pdf.

4. Calson Analytics, *Calson Analytics Note Cybersuicide*, (2005) http://www.caslon.com.au/cybersuicidenote.htm.

5. *Id.* An example includes an academic paper entitled, "Want to know how to behead yourself? Just go online." *Id.*

6. J. Sean Curtin, *Suicide in Japan: Part Sixteen-Suicide Websites*, JAPANESE INST. OF GLOBAL COMM., Oct. 20, 2004, http://www.glocom.org/special_topics/social_trends/20041020_trends_s89/index.html.

7. Calson Analytics, *supra* note 4.

8. Curtin, *supra* note 6.

9. *Id.* In 1998, authorities discovered a science teacher was dispensing cyanide pills to suicidal people who contacted him over the internet. *Id.* After authorities attributed several cyanide-related suicides to the website, authorities shut down the website. *Id.*

10. 430 PARL. DEB., H.C. (6th ser.)(2005) 278 (noting that known cases of suicide pacts have occurred internationally from Guam to the Netherlands).

11. *See, e.g. A Practical Guide to Suicide*, http://www.satanservice.org/coe/suicide/guide/ (last visited May 22, 2008); *see also* Michael Marsden, *Methods File*, http://www.ctrl-c.liu.se/~ingvar/methods/ (last visited May 22, 2008).

12. Press Association, *Charity in Suicide Websites Call*, Sept. 9, 2006, http://news.bbc.co.uk/2/hi/health/5327354.stm [hereinafter *Charity in Suicide Websites*].

13. *Id.*

14. Goodenough, *supra* note 2.

15. Vinod Scaria, Ph.D., *A Discussion on the Perspectives of Suicide Related Information on the Internet*, 13 EUBIOS J. OF ASIAN AND INT'L BIOETHICS 175 (2003), *available at* http://drvinod.netfirms.com/preprintejaib2.htm.

the Australian *Criminal Code Amendment (Suicide Related Material Offenses) Act 2005*, one Member of Parliament was able to access more than 7,230,000 hits in a tenth of a second after typing the query "how to kill yourself" into Google.[16] Many of these sites, however, have a disclaimer warning users of their dangerous content.[17]

Though research pertaining to the users of these sites is minimal, early findings indicate young people are frequent visitors.[18] Often, teenagers access the websites after suffering from bullying, emotional problems, or merely morbid curiosity.[19] Most of the call to action initiated in this field cites the protection of the young and vulnerable as its main aim, because these sites are "too easily accessible for these often unsupervised age groups."[20] The easy accessibility of these sites becomes even more dangerous when one considers teenagers in the age bracket of fifteen to nineteen have the highest internet usage of any age demographic.[21] When suffering from depression or other adolescent angst issues, vulnerable teenagers could be put in danger by viewing websites encouraging suicide[22] because teenagers in such susceptible situations are not "mentally mature and their judgments are easily affected by other things."[23] In fact, the only legislation regulating cybersuicide websites passed thus far, Australia's *Criminal Code Amendment (Suicide Related Material Offenses) Act 2005*, was created with the goal of protecting young and innocent

16. Legal and Constitutional Legislation Committee, Parliament, Provisions of the Criminal Code Amendment (Suicide Related Material Offenses) Bill 2005, (2005) 29, *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/report/report.pdf [hereinafter *Provisions of the Criminal Code Amendment*]. *But see* Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee (Apr. 3, 2005), *available at* http://www.efa.org.au/Publish/efasubm-slclc-suic2005.html (noting that "while a search using terms such as 'suicide how to' returns millions of results, this provides no indication" of the number of sites actually providing methods of committing suicide). "Web site providers intending to discourage people from committing suicide often use terms such as 'how to' in meta tags to attract at-risk people to their sites." *Id.*

17. Curtin, *supra* note 6. For example, one website listing several methods of suicide had a disclaimer indicating the website provided the file for "amusement" and the use of any of the methods was "not recommended without first considering other possibilities." Marsden, *supra* note 11. The site also warns its viewers to not pass the site on to those known to be "actively suicidal," because it could constitute assisted suicide. *Id.*

18. Curtin, *supra* note 6.

19. *Id.*

20. Dutton, *supra* note 3.

21. *Id.* Because of statistics demonstrating teenagers have the highest internet usage of any age group, Papyrus, a charity in Britain, is requesting the government to initiate legislation against cybersuicide sites to protect vulnerable teenagers. Goodenough, *supra* note 2. *But see* Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3 (noting that while young people do access the internet more frequently than those in the older demographics, adolescents use the internet for leisure pursuits. Older people use the internet to "search for usable information or to contact friends and family").

22. Dutton, *supra* note 3.

23. Alice Yan, *CHINA: Crackdown on internet 'suicide manuals,'* SOUTH CHINA MORNING POST, Apr. 1, 2005, *available at* 2005 WLNR 5051399.

individuals.[24] Those opposing who oppose the legislation in Australia find the goal of protecting the young and vulnerable discounts the elderly and terminally ill population who may benefit from the existence of cybersuicide websites.[25]

Specific cybersuicide websites are linked to suicides in several countries, including Britain, the United States, Japan, and South Korea.[26] In the United Kingdom, at least sixteen adolescent suicides since 2001 have been deemed internet-related suicides.[27] Japan reported at least fifty-four people killed themselves in 2004 through internet-linked group suicide pacts, even though police recognize the number is probably higher.[28] In 2006, Japanese police stated the number of people who committed suicide after creating suicide pacts over the internet had risen to ninety one in 2005.[29]

While these statistics demonstrate that cybersuicide websites have been the direct cause of several suicides, cybersuicide websites are difficult to shutdown.[30] First, the character of the internet allows information to pass freely from one segment of the world to another.[31] This gives legislatures and courts alike the challenge of determining who exactly has jurisdiction over the issue.[32] It is also questionable whether the law of one country will pertain to websites hosted in another country; this is evidenced by a United Kingdom Parliament spokesman who considered whether the current United Kingdom law on assisted-suicide, the *1961 Suicide Act*, is applicable to cybersuicide websites hosted in other countries.[33]

Secondly, many national laws on assisted-suicide, such as the *1961*

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24. Dutton, *supra* note 3. In creating this legislation for the protection of adolescents, the Australian government noted fifty-five percent of children between the ages of ten and fourteen use the internet. *Id.*

25. Goodenough, *supra* note 2. In response to an inquiry over Australia's Suicide Related Material Offenses Bill, Sandra Milne, of Voluntary Euthanasia Society of Queensland, responded in opposition to the Bill based on how it would affect the elderly population of Australia. Letter from Sandra Milne, for Voluntary Euthanasia Society of Queensland, to the Senate Legal and Constitutional Committee (Aug. 20, 2004), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub15.pdf. In her letter, Milne referred to statistics from the Australian Bureau of Statistics, stating each week three persons over the age of seventy-three commit suicide in the most horrendous ways possible. *Id.* It was her belief these people may have lived if they had discussed their intention through cybersuicide websites or other pro-euthanasia websites. *Id.* With Australia's new law, Milne feared more suicides from the elderly would occur. *Id.*

26. Goodenough, *supra* note 2.

27. *Charity in Suicide Websites*, *supra* note 12.

28. *Australian Government to Outlaw Suicide Websites*, NEW ZEALAND HERALD, Mar. 9, 2005, *available at* http://www.nzherald.co.nz/section/story.cfm?c_id=5&objectid=10114232.

29. Calson Analytics, *supra* note 4.

30. Curtin, *supra* note 6.

31. Steven M. Hanley, *International Internet Regulation: A Multinational Approach*, 16 J. MARSHALL J. COMPUTER & INFO. L. 997, 999-1000 (1998).

32. Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L.J. 531, 532 (2002).

33. *Call to Ban Pro-suicide Websites*, BBC NEWS, Sept. 9, 2006, *available at* http://news.bbc.co.uk/2/hi/health/5327354.stm [hereinafter *Call to Ban Pro-suicide Websites*].

Suicide Act, require a direct causal link between the information provided by the accused and the act of suicide.[34] In countries with laws requiring a causal link, it is not enough to show the victim received advice and encouragement to commit suicide.[35] Rather, the prosecution must be able to show a direct link between the encouragement given and the suicide.[36]

Third, regulation of the websites could also impinge on the rights of freedom of expression[37] and freedom of communication.[38] Fourth, when a website is shut down, the nature of the internet allows the site to simply move to another internet address until it is discovered again.[39] Lastly, neither discussing suicide nor discussing a desire to commit suicide is illegal.[40] In response to an inquiry on the *Suicide Related Material Offenses Act*, Jocelyn Head, of the Voluntary Euthanasia Society of Tasmania, Inc., stated such regulation makes illegal a formerly legal act.[41] Head stated, "suicide is not a crime and it is reasonable for any adult to seek information regarding any legal act."[42] She further expressed distaste for the illegality of providing information to a rational adult about a legal act, regardless of how the information is used.[43] These reasons place limits on the ability of governments to regulate such sites.[44]

This Note will examine constitutional difficulties and other legal battles standing in the way of an international solution to the phenomenon of cybersuicide. Part II of this Note will examine the *Criminal Code Amendment (Suicide Related Material Offenses) Act 2005*, the only current legislation that addresses cybersuicide websites and online counseling encouraging others to commit suicide.[45] This section will discuss how the Australian Parliament overcame many legal roadblocks in order to pass the legislation and the problems that still exist with the current version of the law.

Part III of this Note will detail the extreme problem of cybersuicide in the United Kingdom and the call for regulation on these websites by Papyrus, a suicide prevention group,[46] and the Members of Parliament.[47] This Note will also explore various options the government has considered in regulating this activity, such as following the Australian *Suicide Related Material Offenses*

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34. Goodenough, *supra* note 2. *See also* Suicide Act, 1961, c. 60, § 2 (Eng.).
35. *Charity in Suicide Websites*, *supra* note 12.
36. *Id.*
37. Curtin, *supra* note 6.
38. *See generally* Barnes, *supra* note 2.
39. Curtin, *supra* note 6.
40. *Id.*
41. Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3.
42. *Id.*
43. *Id.*
44. Curtin, *supra* note 6.
45. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.).
46. *See* Goodenough, *supra* note 2; *Charity in Suicide Websites*, *supra* note 12.
47. 430 PARL. DEB., H.C. (6th ser.)(2005) 276.

Bill[48] or amending the *1961 Suicide Act*.[49]

In providing a brief conclusion, Part V of the Note will discuss the need for international attention to the problem of internet suicide; however, this Note will also recognize an international solution may not exist because of the difficulty in regulating the internet internationally.

II. THE AUSTRALIAN SOLUTION TO CYBERSUICIDE: THE *SUICIDE RELATED MATERIAL OFFENSES BILL*

The *Suicide Related Material Offenses Act* is a controversial regulation introduced in Australia in January 2006.[50] Section A will discuss a brief history of assisted-suicide laws in Australia that form the basis of this regulation of assisted-suicide over the internet and other telecommunication devices. Section B will provide statistics of the suicide rates in Australia and the country's new problem with the phenomenon of cybersuicide. Section C will briefly describe the history of the Act from its birth to its enactment. Section D will provide an analysis of the Act, including statutory interpretation and the legal ramifications the Act has faced and will face.

A. A Brief History of Assisted-Suicide Laws in Australia

As the separate statutes of the Australian territories show, assisted suicide has historically been illegal in Australia for the past century.[51] An example of an Australian territory's law on assisted-suicide, New South Wales' *Crimes Act 1900* 31C, states a person who "aids or abets the suicide or attempted suicide of another person shall be liable to imprisonment for [ten] years."[52] Under this statute, when a person incites or counsels another person to commit suicide and the said person commits or attempts to commit suicide because of such counseling and incitement, the assisting individual faces up to ten years of imprisonment.[53]

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48. *Id.* at col. 281.

49. *Id.* at col. 282; *see also Charity in Suicide Websites*, *supra* note 12; *see generally* Calson Analytics, *supra* note 4 (noting one United Kingdom official's idea to lead internet users searching for cybersuicide websites to websites counseling him or her against committing suicide).

50. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.).

51. Crimes Act, 1900, § 31C (NSW); Crimes Act, 1900, § 17 (Austl. Cap. Terr.) *available at* http://www.austlii.edu.au//cgi-bin/disp.pl/au/legis/act/consol_act/ca190082/s17.html?query=suicide, (last visited May 22, 2008); Criminal Code, 1899, § 311 (Queensl.) *available at* http://www.austlii.edu.au//cgi-bin/disp.pl/au/legis/qld/consol_act/cc189994/s311.html?query=suicide, (last visited May 22, 2008); *Criminal Law Consolidation Act*, 1935, § 13A (S.A.) *available at* http://www.austlii.edu.au//cgi-bin/disp.pl/au/legis/sa/consol_act/clca1935262/s13a.html?query=suicide, (last visited May 22, 2008).

52. Crimes Act, 1900, § 31C (NSW).

53. Crimes Act s. 31C.

In 1995, the Northern Territory Parliament in Australia passed the *Rights of the Terminally Ill Act 1995*.[54] This law allowed terminally ill patients to end their lives with physician assistance as long as the parties followed strict guidelines.[55] These guidelines included examinations by two doctors, one who specialized in terminal illness to determine the patient was terminally ill and another doctor who specialized in mental illness to confirm the patient was not clinically depressed.[56] While the *Rights of the Terminally Ill Act 1995* was in effect, four patients received assistance in dying legally.[57]

In response to concerns over the *Rights of the Terminally Ill Act 1995*, the Australian Parliament exercised its plenary power under Section 122 of the Australian Constitution and repealed the Act.[58] The *Euthanasia Laws Bill 1997* passed with the purpose and effect of preventing the Northern Territory, the Australian Capital Territory, and Norfolk Island from passing legislation permitting euthanasia.[59] As a result, a physician who "prescribes medical treatment with the intention of aiding the patient's death may be subject to life imprisonment."[60] Today, assisting or attempting to assist another to commit suicide is an offense in all Australian States and Territories[61] with offenses including imprisonment from five years[62] to life.[63]

With the passage of the *Criminal Code Amendment (Suicide Related Material Offenses) Act 2005*, the Australian Parliament has made it illegal for anyone in any territory of Australia to incite, promote, or teach people how to commit suicide over a carriage service.[64]

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54. Christopher Zinn, *Australia Passes First Euthanasia Law*, THE GUARDIAN, June 3, 1995, *available at* http://www.bmj.com/cgi/content/full/310/6992/1427/a.

55. *Id.*

56. Andrew L. Plattner, Article, *Australia's Northern Territory: The First Jurisdiction to Legislate Voluntary Euthanasia, and the First to Repeal It*, 1 DEPAUL J. HEALTH CARE L. 645, 647-48 (1997).

57. *Id.*

58. Euthanasia Laws Bill, 1996 (Austl.). Section 122 of the Australian Constitution permits the Commonwealth to enact laws for the government of any territory. *Id.* "It may do so by means of paramount legislation passed by the Commonwealth Parliament, or by setting up a Territorial legislature with its own legislative power." *Id.* (quoting RD LUMB & GA MOENS, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA (5th ed., Butterworths 1995) (1867).

59. Euthanasia Laws Act, 1997 (Austl.). For example, Schedule 2 of this Act amending the *Australian Capital Territory Act 1988*, states Section 23(1A) shall read, "[t]he Assembly has no power to make laws permitting or having the effect of permitting . . . the form of intentional killing of another called euthanasia or the assisting of another person to terminate his or her life." Euthanasia Laws Act, Schedule 2.

60. Plattner, *supra* note 56, at 651.

61. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.).

62. Crimes Act, 1900, § 31C (NSW).

63. Criminal Code, 1899, § 311 (Queensl.) *available at* http://www.austlii.edu.au//cgi-bin/disp.pl/au/legis/qld/consol_act/cc189994/s311.html?query=suicide, (last visited May 17, 2008).

64. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.).

B. High Suicide Rates in Australia, Mixed with Cybersuicide, is a Deadly Combination.

The suicide rate in adolescents between the ages fifteen to twenty-four years of age is alarming, as demonstrated by an Australia Bureau of Statistics survey indicating approximately seventeen per one-hundred thousand people in this age demographic committing suicide between the years 1996-1998.[65] This rate for the adolescent demographic was significantly higher than the rate in England, Wales, and the Netherlands.[66] In 2002, Griffith University's Australian Institute for Suicide Research and Prevention found that at least 20% of Australians have considered life is not worth living, 10% have seriously considered committing suicide, and 3.1% have actually attempted suicide.[67] Further, suicide is the number one cause of death for males aged twenty-five to forty-four in Australia.[68] A 1999 suicide attempt study produced by the American Journal of Psychiatry and used by the Australian government in support of the *Suicide Related Material Offenses Act* showed access to online suicide methods increases the risk that those who contemplate suicide will commit suicide.[69]

Mr. John Graham Preston, Queensland coordinator of Right to Life Australia, presented the government's case in support of the bill and cited a specific Australian suicide directly tied to the use of cybersuicide websites.[70] In 2003, a seventeen-year-old hung himself.[71] Upon researching his death, police found graphic information from websites detailing suicide methods on his computer.[72] In further support, the government referred to an article by Baume, Cantor, and Rolfe on Internet chat rooms and the story of Nick W., who stated, "I'm going to do it any day now, really, I promise."[73] The trio found this

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65. Australian Bureau of Statistics, *Australian Social Trends, 2000: Mortality and Morbidity: Suicide*, Apr. 7, 2000, http://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/d2c9296f8d9c01b1ca2570ec000e2f5f!OpenDocument.

66. Letter from Festival of Light Australia to the Senate Legal and Constitutional Committee (Apr. 6, 2005), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub29.pdf (citing Dr. David Phillips, *Youth suicide-why the epidemic*, LIGHT, May 2002, at 9).

67. Legal and Constitutional Legislation Committee, Canberra, *Reference: Criminal Code Amendment (Suicide Related Material Offenses) Bill 2005*, (2005) L&C 9 [hereinafter *Reference: Criminal Code Amendment*].

68. *Id.*

69. Goodenough, *supra* note 2. It is important to note, in the time period starting with the availability of the internet in Australia and the date the *Suicide Related material Offenses Bill* was passed, the suicide rate actually decreased in Australia. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 6.

70. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 9.

71. *Id.*

72. *Id.*

73. *Provisions of the Criminal Code Amendment*, *supra* note 16, at 36 (quoting Baume et al., *Cybersuicide: the Role of Interactive Suicide Notes on the Internet*, 18(2) CRISIS: THE

statement suggested the exposure to internet participation and encouragement from cybersuicide websites may have caused Nick to follow through on his suicide, rather than finding a healthy way to handle his feelings.[74]

The advent of the internet as a worldwide forum made it possible for "'widely scattered suicidal youngsters to rapidly and directly interact.'"[75] In addition, the teenage demographic is more susceptible to the cybersuicide websites and chat rooms based on their prevalent use of the internet.[76] While Parliament conceded that no "detailed scientific study" or "extensive research project" prompted the creation of the *Suicide Related Material Offenses Act*,[77] it is apparent the Act was a response to community concern over the risks of the internet[78] coupled with public policy in protecting the vulnerable—mainly at-risk teenagers.[79]

In expressing his support for the Act, Dr. David M. Grawler noted that youth suicide rates are extremely high and he worried about the danger suicidal websites would have on "vulnerable, troubled youth and depressed people" in Australian society.[80] Research used in support of the Bill shows that 7% to 14% of worldwide adolescents will inflict self-harm at some point in their life, and 20% to 45% of older adolescents reported having suicidal thoughts.[81] The Australian Parliament fears vulnerable, young people "could be pushed over the edge to their deaths by individuals or groups promoting suicide."[82] Research has shown that cybersuicide websites containing encouraging comments from other users can have the effect of strengthening the resolve of those contemplating suicide and result in their deaths.[83] These readily accessible websites also have the potential to discourage others from seeking help.[84] As a result of the comments which encourage suicide and discourage seeking help, vulnerable people feel so strongly compelled to commit suicide that they feel

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JOURNAL OF CRISIS INTERVENTION AND SUICIDE PREVENTION 73 (1997)).

74. *Provisions of the Criminal Code Amendment*, *supra* note 16, at 36.

75. *Id.* at 35 (citing L. Mehlum, *The Internet, Suicide, and Suicide Prevention*, 21(4) CRISIS: THE JOURNAL OF CRISIS INTERVENTION AND SUICIDE PREVENTION 186, 186-88 (2000)).

76. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 4-5.

77. *Provisions of the Criminal Code Amendment*, *supra* note 16, at § 3.4

78. *Id.*

79. *Id.* at 3.12 (citing *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 2).

80. Letter from Dr. David M. Gawler, of Royal Darwin Hospital, to the Senate Legal and Constitutional Committee (Aug. 20, 2004), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub12.pdf.

81. *Provisions of the Criminal Code Amendment*, *supra* note 16, at 39 (citing K. Hawton and A. James, *Suicide and Deliberate Self Harm in Young People*, 330 BRIT. MED. J. 891 (2005)).

82. *Provisions of the Criminal Code Amendment*, *supra* note 16, at 39.

83. *Id.* (citing S. Thompson, *The Internet and its Potential Influence on Suicide*, 23 PSYCHIATRIC BULLETIN 449-451 (1999)).

84. *Provisions of the Criminal Code Amendment*, *supra* note 16, at 7 (citing Philip Ruddock, *Criminal Code Amendment (Suicide Related Material Offenses) Bill 2005: Second Reading*, 4-5 (2005), *available at* http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2413765&TABLE=HANSARDR).

backing out or seeking help could constitute losing face.[85]

Mr. Richard John Egan, Board Member, Treasurer, and Spokesman for the Coalition for the Defense of Human Life, noted the phrase "vulnerable" is applicable to more than just the teenage population.[86] The phrase should also encompass any person who has a suicidal predisposition,[87] because of either depression or other stressful events in life, and access to a carriage service.[88]

The government contends that the Bill is consistent with research showing that one of the most effective ways to reduce suicide is to limit people's access to suicide methods or pro-suicide counseling.[89]

C. The History of the Criminal Code Amendment (Suicide Related Material Offenses) Act 2005

The Criminal Code Amendment (Suicide Related Material Offenses) Act 2005 was originally contained within the Crimes Legislation Amendment (Telecommunications Offenses and Other Measures) Bill 2004.[90] This Bill was an omnibus of offenses, including offenses related to child pornography and internet grooming of minors for sexual purposes.[91] After introduction to the Senate, the Federal Government extracted the suicide-related offenses from that Bill[92] and reintroduced them, without changes, as the Criminal Code Amendment (Suicide Related Material Offenses) Bill 2004 in August 2004.[93] Parliament could not review the Bill before its prorogation; consequently, it postponed the Bill until 2005.[94]

Parliament created the Bill to work in conjunction with the Australian

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85. *Provisions of the Criminal Code Amendment, supra* note 16, at 39 (citing Thompson, *supra* note 83); *see also* Dutton, *supra* note 3.

86. *Reference: Criminal Code Amendment (Suicide Related Material Offenses) Bill, supra* note 67, at L&C 4. The Coalition for the Defense of Human Life is located in Perth, Australia. Letter from the Coalition for the Defense of Human Life to the Senate Legal and Constitutional Committee, *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub09.pdf, (last visited May 23, 2008). The Coalition submitted a response to Parliament in support of the Suicide Related Material Offenses Bill 2005. *Id.*

87. Carriage services include the internet, email, mobile and fixed telephones, faxes, radio, and television. Criminal Code Amendment (Suicide Related Material Offenses) Bill, 2005, (Austl).

88. *Reference: Criminal Code Amendment (Suicide Related Material Offenses) Bill, supra* note 67, at L&C 4.

89. *Provisions of the Criminal Code Amendment, supra* note 16, at 36 (citing D. Gunnell and S. Frankel, *Prevention of Suicide: Aspirations and Evidence*, 308 BRIT. MED. J. 1227 (1994)).

90. Criminal Code Amendment (Suicide Related Material Offenses) Bill, 2005 (Austl.). *See also Provisions of the Criminal Code Amendment, supra* note 16, § 1.2.

91. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.).

92. *Provisions of the Criminal Code Amendment, supra* note 16, § 1.2.

93. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.).; *see also Provisions of the Criminal Code Amendment, supra* note 16, § 1.3.

94. *Provisions of the Criminal Code Amendment, supra* note 16, § 1.3.

Customs (Prohibited Imports) Regulations 1956.[95] This regulation directly prohibits "the importation of a device designed or customized to be used by a person to commit suicide, or to be used by a person to assist another person to commit suicide."[96] Moreover, the regulation absolutely prohibits documents promoting suicide kits, counseling or inciting a person to use a suicide kit, or instructing a person to commit suicide using one of the suicide kits.[97] After the passage of the regulation and the birth of cyberspace, the Internet was used to post information on how to make suicide kits to circumvent the Customs (Prohibited Imports) Regulations.[98] The Suicide Related Material Offenses Act intends to criminalize the use of the Internet to inform others on methods of suicide inconsistent with Australia's regulations.[99]

In March 2005, Parliament called for submissions to inquiry of the Bill in a national newspaper, The Australian.[100] Parliament received thirty-one submissions, twenty-one of which were in response to the 2004 Bill but were allowed to be viewed as submissions for the 2005 Bill.[101]

The submissions came from a variety of places: the Voluntary Euthanasia Society of Tasmania,[102] Coalition for the Defense of Human Life,[103] Gilbert + Tobin Centre of Public Law,[104] the Australian Civil Liberties Union,[105] physicians,[106] a number of Australian citizens,[107] and many more. Even though some submissions expressed support for the Bill and others expressed disdain, the majority of the submissions objected to the Bill in its entirety.[108]

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95. *See id.* § 3.3(1); *see also* Calson Analytics, *supra* note 4.

96. Customs (Prohibited Imports) Regulations, 1956, § 3AA(1) (Cth).

97. Customs (Prohibited Imports) Regulations §§ 3AA(2)(a-c).

98. *Provisions of the Criminal Code Amendment*, *supra* note 16, § 3.3(1) (quoting *Submission 31* (the confidential submission) at 5).

99. *Provisions of the Criminal Code Amendment*, *supra* note 16, § 3.3(1).

100. *Id.* § 1.5.

101. *Id.* § 1.6.

102. Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3.

103. Letter from the Coalition for the Defense of Human Life to the Senate Legal and Constitutional Committee, *supra* note 86.

104. Letter from George Williams, Faculty of Law, Gilbert + Tobin Centre of Public Law, to the Senate Legal and Constitutional Committee, (Aug. 26, 2004), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub21.pdf.

105. Letter from Geoff Muirden, Research Officer, the Australian Civil Liberties Union, to the Senate Legal and Constitutional Committee, *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub24.pdf (last visited May 23, 2008).

106. *See* Letter from Dr. David M. Gawler to the Senate Legal and Constitutional Committee, *supra* note 80.

107. *See* Letter from Gillian Walker to the Senate Legal and Constitutional Committee, *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub03.pdf (last visited May 23, 2008).

108. *Provisions of the Criminal Code Amendment*, *supra* note 16, § 3.1.

To comply with the requests and substantive changes suggested by the public, Parliament made changes to two provisions of the original Bill and added two sections to the new Bill.[109] Under the 2004 Bill, a violation of Section 474.29A only occurred if a person used a carriage service to publish suicide related material which "directly or indirectly counsel[ed] or incite[d] suicide" and the person either intended the material, through his doing or another's, to incite or cause suicide.[110] The 2005 Bill recognizes such use of a carriage service with suicide related material does not need to cause an actual suicide; instead, a violation only occurs under Section 474.29A if such material "directly or indirectly counsels or incites committing or attempting to commit suicide."[111]

Similarly, the 2004 Bill made it a crime for a person to possess, produce, supply, or obtain material that directly or indirectly counsels or incites actual suicide under Section 474.29B.[112] The Suicide Related Material Offenses Bill 2005 now makes it illegal for a person to possess, produce, obtain or supply material that "directly or indirectly counsels or incites committing or attempting to commit suicide."[113]

The third change from the 2004 Bill to the 2005 Bill was the addition of Section 474.29(A)(3)-(4).[114] Both of these sections clarify a person is not guilty of an offense under Section 474.29(A)(1)-(2) merely because the person used a carriage device to:

> (a) engage in public discussion or debate about euthanasia or suicide; or
>
> (b) advocate reform of the law relating to euthanasia or suicide;
>
> If the person does not:
>
> (c) intend to use the material concerned to counsel or incite committing or attempting to commit suicide; or
>
> (d) intend that the material concerned be used by another person to counsel or incite committing or attempting to commit suicide.[115]

Parliament added this language into the *Suicide Related Materials Bill 2005* in response to complaints that the Bill impinged on freedom of expression.[116] In their submission to the inquiry, Festival of Light Australia noted that the *Commonwealth Constitution* contains an implicit right to

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109. Criminal Code Amendment (Suicide Related Material Offenses) Bill, 2005, (Austl).

110. Criminal Code Amendment (Suicide Related Material Offenses) Bill, 2004, (Austl.).

111. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.). (emphasis added).

112. Criminal Code Amendment (Suicide Related Material Offenses) Bill, 2004, § 474.31 (Austl.).

113. *Id.* § 474.29B(b)(i).

114. Criminal Code Amendment (Suicide Related Material Offenses) Bill, 2005 (Austl.)

115. *Id.*

116. *See Provisions of the Criminal Code Amendment, supra* note 16, § 3.26.

freedom of political expression.[117] Because the *Suicide Related Material Offenses Bill* allows for continued political debate on euthanasia,[118] and the Bill only criminalizes speech that incites or encourages others to commit or attempt to commit suicide, it does not impinge on freedom of expression because freedom of speech has never given an unqualified right to do harm.[119]

With these provisions accommodating as many inquiries as possible, the *Suicide Related Material Offenses Bill 2005* received Royal Assent[120] on July 6, 2005.[121] It became effective January 6, 2006.[122]

The *Suicide Related Material Offenses Bill 2005* is an amendment to Australia's *Criminal Code Act of 1995*.[123] Schedule 1 of the Bill states the Amendment should be inserted into the *Criminal Code* after Section 474.29,[124] the Telecommunications Offenses section of the *Criminal Code*.[125]

D. Analysis of the Criminal Code Amendment (Suicide Related Material Offenses) Act 2005

At its simplest, the *Suicide Related Material Offenses Bill* prohibits using carriage services such as the "internet, email, telephones, fax machines, radios, or television"[126] with the intention of counseling or inciting actual or attempted suicide and "promoting or providing instruction on a particular method of suicide."[127] Possessing, controlling, producing, supplying, or obtaining material for use on a carriage service that can either directly or indirectly counsel or incite actual or attempted suicide, or promote a particular method of suicide is also illegal under the new legislation.[128] The fines for these offenses

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117. Letter from Festival of Light to Senate Legal Constitutional Committee, *supra* note 66, at 1 (quoting Australian Capital Television v. Commonwealth (1992) 177 CLR 106, 135, per Mason CJ). Festival of Light is a Christian ministry in Australia; its main goal is to promote "true family values in the light of the wisdom of God." Festival of Light, *Welcome to Festival of Light*, http://www.fol.org.au/welcome/index.html (last visited May 23, 2008).

118. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005, § 474.29A(3) (Austl.). The Bill states a person is not guilty of an offense if one uses a carriage device to "(a) engage in public discussion or debate about euthanasia or suicide, or (b) advocate reform of the law relating to euthanasia or suicide." *Id.* This holds true as long as the person is not intending to use said material to counsel or incite suicide. *Id.*

119. Letter from Festival of Light Australia to Senate Legal and Constitutional Committee, *supra* note 66.

120. Royal assent is "the last stage in the process by which a Bill becomes an Act; the Governor, representing the Queen, gives it formal approval." Parliament of Victoria, *A Parliament Glossary*, http://www.parliament.vic.gov.au/gloss.html (last visited May 22, 2008).

121. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.).

122. *Id.*

123. *Id.*; *see also Provisions of the Criminal Code Amendment*, *supra* note 16, § 1.4.

124. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005, sched. 1 (Austl.).

125. Criminal Code Act, 1995, (Austr.)

126. *Provisions of the Criminal Code Amendment*, *supra* note 16, at 33.

127. *Id.*

128. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005, § 474.29B

are exorbitantly high: up to $110,000 AUD (Australian Dollars) for individuals and up to $500,000 AUD for organizations.[129]

However, much debate occurs regarding the statutory interpretation of this Act[130] and its legal ramifications for free speech, both for political communication[131] and personal communication.[132], [133] whether the Act will be able to achieve its aims,[134] and, finally, whether the Act is even necessary.[135]

i. Parliament's Power to Regulate the Internet

Parliament cannot subject a person to proposed offenses if it does not have the constitutional power to enact a law.[136] Consequently, the threshold question is whether the Commonwealth had power, derived from the Australian Constitution, to enact the *Suicide Related Material Offenses Act*. If there was no such power, then there can be no such law.

In one of their two submissions regarding the Act, Exit International actually questioned whether the regulations exceeded the Parliament's authority.[137] The submission points to Section 51 of the Australian Constitution.[138] Section 51 states that "[t]he Parliament shall . . . have power to make laws for the peace, order, and good government of the Commonwealth . . . ."[139] Exit International believes the Act goes farther than this limitation because it "will restrict and control the flow of information to many outside of

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(Austl.).

129. Barnes, *supra* note 2.

130. *See generally Reference: Criminal Code Amendment*, *supra* note 67 (noting that the Committee asked several witnesses if they felt the wording of the Act, including the use of the words "counsel," "incite," and "directly or indirectly," was too ambiguous or problematic).

131. Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3; Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, § 6, art. 23-30.

132. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, § 7, art. 31-34; *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 15-17.

133. Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3. Sandra Kanck, MLC, Address to South Australian Legislative Counsel (Aug. 30, 2006) (on file with the author).

134. *Provisions of the Criminal Code Amendment*, *supra* note 16, at 8.

135. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, § 12, art. 79. The Act may not be necessary because the Australian Criminal Code already contains a law imposing criminal penalties for the use of a carriage service to violate a serious offense under Australian law. *Id.*

136. Crimes Legislation Amendment (Telecommunications Offenses and Other Measures) Bill, 2004 (Austl.).

137. Letter from Exit International to the Senate Legal and Constitutional Committee (Aug. 19, 2004), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub16a.pdf. Exit International is a pro-choice voluntary euthanasia/assisted suicide organization led by Dr. Philip Nitschke. Exit International, http://www.exitinternational.net/ (last visited May 23, 2008).

138. Letter from Exit International to the Senate Legal and Constitutional Committee, *supra* note 137.

139. AUSTL. CONST. pt. V, § 51.

the jurisdiction" of Australia and affect their lives.[140]

The *Crimes Legislation Amendment (Telecommunications Offenses and Other Measures) Bill 2004* lays out the constitutionally derived power for the Commonwealth to regulate telecommunications, including electronic telecommunications such as the internet.[141] Section 51(5) of the Constitution gives Parliament the power to make laws for the Commonwealth with respect to "postal, telegraphic, telephonic, and other like services."[142] The High Court of Australia has interpreted the phrase "other like services" to include both radio and television, and in 1935, the High Court found that the common characteristic of these services is "they are . . . communication services."[143] The High Court also indicated the phrase "other like services" includes new forms of communication to be discovered in the future.[144] Therefore, new services, such as the internet, fall under the authority of Parliament to regulate.[145]

ii. Definitional Issues with the Act

In a hearing for the Senate Legal and Constitutional Legislation Committee in reference to the Act, Irene Graham, Executive Director of Electronic Frontiers Australia, Inc., stated that her organization was concerned the "actual wording of most of the offences is insufficiently defined for people to generally be able to understand where the line is drawn."[146] Therefore, it is important to analyze the actual meaning behind the words used, such as 'material,' 'incite,' 'counsel,' and 'indirectly,' to construct the regulation.

a. What constitutes "material" under the Act?

The name of the Act and Sections 474.29A and 474.29B all include the word "material" and the Act directly regulates the use of said material when

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140. Letter from Exit International to the Senate Legal and Constitutional Committee, *supra* note 137. However, Ms. Graham of Electronic Frontiers Australia, Inc. stated in the hearing for the Senate Legal and Constitutional Legislation Committee that this legislation would "not have any effect on international communication except to the extent of criminalising Australians that [sic] are participating in any such international communication." *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 30.

141. Crimes Legislation Amendment (Telecommunications Offenses and Other Measures) Bill, 2004 (Austl.)

Since the Suicide Related Material Offenses Act was originally included in this Bill, it is helpful to look to the Bills Digest in order to discover the groundwork for the regulation. *See* Suicide Related Material Offenses Bills Digest, *supra* note 87.

142. AUSTL. CONST. § 51(5).

143. Crimes Legislation Amendment (Telecommunications Offenses and Other Measures) Bill, 2004 (Austl.)

144. Crimes Legislation Amendment (Telecommunications Offenses and Other Measures) Bill.

145. *Id.*

146. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 30.

being transferred over a carriage service or possession of material with the intent to transfer the material over a carriage service.[147] In order to ensure compliance with the regulation, it is important to understand to what the word material refers.[148]

The word 'material' as defined in the *Criminal Code Act 1995* refers to "material in any form, or combination of forms, capable of constituting a communication."[149] 'Suicide promotion material' is defined in the *Criminal Code Act 1995* defines "suicide promotion material" as "material that, directly or indirectly: (a) promotes, counsels, or incites suicide, or (b) provides instruction on how to commit suicide."[150] Therefore, any material that constitutes communication that directly or indirectly counsels or incites suicide or provides instruction on suicide constitutes material which violates the Act.[151]

b. Interpretation of 'Counsel' and 'Incite'

Several times the *Suicide Related Material Offenses Act* refers to the use of material to 'counsel' or 'incite' committing or attempting to commit suicide.[152] Several critics of the Act have expressed disdain over the ambiguous definitions of both 'counsel' and 'incite.'[153]

In the submission by Electronic Frontiers Australia (EFA), Irene Graham noted the Model Criminal Code Committee has expressed concern over the use of 'incite' in criminal offenses.[154] This concern stems from the fear that courts will interpret 'incite' "'as only requiring causing rather than advocating the offence.'"[155] If this interpretation is adopted by the courts, then the Act could "criminalize journalists and ordinary individuals reporting on and discussing

147. *See* Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.).

148. *See Reference: Criminal Code Amendment*, *supra* note 67.

149. Criminal Code Act, 1995, § 473.1 (Austr.).

150. *Id.*

151. *See* Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3. Material that would fall under this provision includes material that would provide "advice and assistance in dying for terminally ill patients, at their request," a sentiment that greatly worries voluntary euthanasia programs all over Australia. *Id.*

152. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.).

153. *See* Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16. The EFA is a "non-profit national organisation [sic] representing Internet users concerned with on-line rights and freedoms." *Id.* § 14; *see also* Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3; Letter from South Australian Voluntary Euthanasia Society to the Senate Legal and Constitutional Committee, *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub10.pdf (last visited May 23, 2007).

154. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, § 8, art. 36.

155. *Id.*

suicide"[156] because research has shown even media discussion causes an increase in suicide rates.[157]

In response to such concerns, Geoffrey Gray, a representative for the Attorney-General's Department, pointed out that .[158] The *Criminal Code Act* states that to be guilty of incitement a person has to do more than just cause the offense; rather the person must "urge[] the commission of an offence" to be guilty of incitement.[159] Therefore, incitement requires intent for an event to be carried out instead of a mere coincidence.[160]

The use of 'counsels' was also troublesome because it was not defined in the Act.[161] The EFA found this phrase to be "dangerously broad."[162] The EFA submissions recognized that [163] For example, counseling may mean listening, giving advice, or providing direction.[164] Euthanasia societies across Australia worry this legislation will interfere with or criminalize the positive counseling which can discourage individuals from committing or attempting to commit suicide.[165]

In addressing these concerns, the Attorney General's office recognized that when one actively counsels another to commit suicide rather than dissuading one from committing suicide, then the counseling would be a violation under the regulation.[166] However, the Attorney General also recognized the term counseling is a "legally used concept which appears widely throughout Commonwealth law or Australian law."[167] It is not to be confused with counseling in the medical sense, but, instead, seen as "encouraging the person with an intent to bring about a result."[168]

Therefore, the term 'counsel' should be read narrowly and defined as the

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156. *Id.* § 10, art. 59.

157. *Id.* §. 10, art. 58. For example, "[h]igher rates of suicide by a particular method such as burning or anti-freeze poisoning" followed reports in newspapers documenting this particular method of suicide. *Id.*

158. *Reference: Criminal Code Amendment, supra* note 64, at L&C 36.

159. Criminal Code Act, 1995, § 11.4 (Austr.).

160. *See* Criminal Code Act § 11.4.

161. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, §10, art. 60.

162. *Id.* art. 61.

163. *Id.* art. 60.

164. *See id.*; *see also* Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3.

165. Letter from South Australian Voluntary Euthanasia Society to the Senate Legal and Constitutional Committee, *supra* note 153.

166. *See Reference: Criminal Code Amendment, supra* note 67, at L&C at 37-39.

167. *Id.* at 38. The submission notes that the phrase "counsels or incites" is used in the Customs Regulation that the Suicide Related Material Offenses Act compliments. *Id.* at L&C 29. Also, the phrase is used in State and Territory laws regulating assisted suicide. *Id.*

168. *Id.* at L&C 38. The Attorney General's Department noted this regulation would not criminalize the services provided by suicide helplines, such as Lifeline, when the aim is to counsel those out of committing suicide. Letter from the Attorney General's Department to the Senate Legal and Constitutional Legislation Committee (Apr. 14, 2005), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub32.pdf.

intent of urging another to commit suicide.[169] To dispel fears that the word 'counsel' may interfere with counseling in the medical sense, the Committee added the word 'committing' into the regulations;[170] the phrase now reads "counsels or incites committing or attempting to commit suicide."[171] The goal of this addition was to "put beyond doubt that counseling about suicide would not be captured unless the person encouraged or gave advice on the actual commission of a suicide."[172]

c. *What is meant by 'indirectly'?*

Voluntary euthanasia societies also complained that the use of the term 'indirectly' in the Act ran similar risks to the use of the term 'counsel.'[173] These societies feared they could face criminal prosecution for the dissemination of information that is not *intended* to promote suicide or incite people to commit suicide, but can, at times, have the reverse effect on those who read it.[174] Therefore, this phrasing has the possibility to criminalize valid information because it could be interpreted as indirectly counseling suicide.[175]

Legislators, however, did not write "indirectly" into the regulation to catch offenses about which the voluntary euthanasia societies are concerned.[176] The Attorney General's department explains the use of 'indirectly' as a "commonly used drafting device in criminal offenses that covers a situation where a person does not actually carry out the prescribed conduct in exact words but does so by necessary implication."[177] For an offense to occur indirectly under the *Suicide Related Materials Act*, the person in possession of material must still intend the material to be used to counsel or incite suicide, or to promote a method of suicide, or be used by another to instruct one how to commit suicide.[178] Those societies disseminating information with the intent to discourage suicide will not be found to have indirectly counseled, incited, or promoted suicide.[179]

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169. Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168.

170. *Id.*

171. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005, § 474.29A(1)(b)-474.29A(1)(b)(i) (Austl.).

172. Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168.

173. *See* Letter from South Australian Voluntary Euthanasia Society to the Senate Legal and Constitutional Committee, *supra* note 153.

174. *Id.*

175. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, § 10, art. 62.

176. Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168.

177. *Id.*

178. *Id.*

179. *See id.*

d. Fault Elements: Intention and Recklessness

Recklessness is the fault element regarding whether an offense has been committed.[180] The *Criminal Code Act* Section 5.4 defines the fault element.[181] A person is reckless if "he or she is aware of a substantial risk that the circumstance exists or will exist; and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk."[182] Even if the court finds one to have acted recklessly in his or her actions, however, he or she has not necessarily committed a criminal offense under the Act.[183]

The Act still requires a person to intend another to use the relevant material to commit or attempt to commit suicide, promote a particular method of suicide, or for another person to use the material to counsel or incite suicide.[184] "Without that intention, no offence would be committed."[185] This intent requirement also protects debate about law reform concerning euthanasia because such debate would not have the requisite intention.[186]

Intent, as defined by the *Criminal Code* Section 5.2, however, states, "a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events."[187] Arguably, an individual who posts information on the internet would be aware it could counsel or incite another to commit suicide.[188] Therefore, "an offence may be committed even if" the information is focused on law reform.[189] The difficulty in proving a person lacked the requisite intent to incite or counsel another to commit suicide because he or she was participating in public discussion on law reform would place a high burden on an innocent party.[190] Parliament must rely on the catch-all added to the *Suicide Related Material Offenses Act* Section 474.29A(3)-(4) that states material intended for public discussion or debate or to advocate law reform is not a violation of the Act.[191]

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180. Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3.

181. Criminal Code Act, 1995, § 5.4(1) (Austr.).

182. Criminal Code Act, 1995, § 5.4(1) (Austrl.)

183. Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168.

184. *Id.*

185. *Id.*

186. Letter from Voluntary Euthanaisa Society of Victoria to the Senate Legal and Constitutional Committee, *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub11.pdf (last visited May 23, 2008).

187. Criminal Code Act, 1995, § 5.2(3) (Austr.).

188. Letter from George Williams to the Senate Legal and Constitutional Committee, *supra* note 104.

189. *Id.*

190. Letter from Voluntary Euthanasia Society of Victoria to the Senate Legal and Constitutional Committee, *supra* note 186.

191. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.).

iii. Is the Act Unnecessary Because Existing Legislation Regulates the Activity Being Criminalized?

The EFA argued that this legislation was unnecessary because existing legislation already criminalizes using a carriage service in this manner.[192] The *Crimes Legislation Amendment (Telecommunications Offenses and Other Measures) Bill (No.2) 2004*, which went into effect on March 1, 2005, makes it a criminal offense to use a carriage service to commit a serious offense.[193] It defines a serious offense as "an offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment for a period of 5 or more years or for life."[194] The assisted-suicide laws of the Australian territories are included as serious offenses under this section.[195] Therefore, it is already a criminal offense to use a carriage service to aid or abet another to commit suicide.[196]

The EFA further points out that the penalty for violating Section 474.14 is "equal to the maximum penalty for the serious offence the person commits or is intending to commit."[197] The penalties for violating the *Suicide Related Material Offenses Act*, however, are monetary penalties.[198] The EFA expressed its concern over which offense the prosecution would charge a person who used a carriage service to counsel or incite suicide, and whether to charge that person with two Commonwealth offenses.[199]

While it is true legislation covering the use of carriage services to commit serious offenses in Australian States and Territories exists, the existing legislation does not cover lesser offenses contained in the Act.[200] Parliament and the Attorney General contend the *Suicide Related Material Offenses Act* "[goes] beyond the ambit of State and Territory offences in this area by covering material that promotes or provides instruction on a particular method of committing suicide."[201] Another difference between the two Acts is the

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There is much debate whether this catch-all will actually be successful in protecting debate on law reform. *See generally Reference: Criminal Code Amendment, supra* note 67.

192. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, § 4, art. 12-13.

193. *Id.* § 4, art. 14.

194. *Id.*

195. *Id.* Some of the assisted suicide statutes have penalties of up to life imprisonment. *E.g.* Criminal Code, 1899, § 311 (Queensl.). Some stipulate a penalty for five or ten years. *E.g.* Crimes Act, 1900, § 31C (NSW).

196. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 15, § 4, art. 16.

197. *Id.* § 4, art 17.

198. Criminal Code Amendment (Suicide Related Material Offenses) Act, 2005 (Austl.). The monetary penalties for an individual who violates the Act can be up to $110,000 (AUD) and up to $500,000 for businesses which violate the offense. Barnes, *supra* note 2.

199. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, § 4, art. 18.

200. *Reference: Criminal Code Amendment, supra* note 67, at L&C 3.

201. Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168.

Suicide Related Material Offenses Act criminalizes material put on the internet which encourages suicide, but has not yet counseled or incited a person to commit suicide.[202] Under the *Crimes Legislation Amendment (Telecommunications Offenses and Other Measures) Bill (No.2) 2004*, the prosecution would have to show the material had actually aided or abetted another to commit suicide.[203]

A third reason presented by the government in enacting a separate law is purely policy based. This policy based reason recognizes the difficulty in comprehending the *Crimes Legislation Amendment (Telecommunications Offenses and Other Measures) Bill (No.2) 2004*.[204] Therefore, if Parliament wants to make it illegal to use carriage services to counsel or incite suicide, share methods of suicide, or make material available for others to use to encourage suicide, then an Act that explicitly criminalizes such conduct should exist in the *Criminal Code*.[205]

iv. Imposition of Freedom of Communication

Another legal roadblock that the *Suicide Related Material Offenses Act* had to overcome was the effect on freedom of communication.[206] This freedom of communication covers three separate areas: freedom of political communication,[207] freedom of personal and private levels of communication,[208] and the impact on access to personal information.[209]

a. Freedom of Political Communication

Assisted-suicide is a major topic of debate in almost every civilization.[210] In Australia, seventy-five percent of the population polled in recent years approve of legalizing assisted suicide in their territories or nation.[211] Many critics fear this new law will chill debate on this topic and keep laws legalizing euthanasia from becoming a reality.[212] In an attempt to calm these fears,

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202. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 39.

203. *Id.* at L&C 29.

204. *Id.* at L&C 40.

205. *Id.*

206. *See generally id.*

207. *See generally id.*

208. *Id.* at L&C 15-17. *See also* Letter from George Williams to the Senate Legal and Constitutional Committee, *supra* note 104.

209. *See* Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16.

210. *See supra*, note 1 and accompanying text.

211. Letter from Anthony and Beryl Saclier to the Senate Legislation Senate Legal and Constitutional Legislation Committee, *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub08.pdf (last visited May 23, 2008).

212. Letter from New South Wales Council for Civil Liberties to the Senate Legal and Constitutional Committee (Apr. 4, 2004), *available at*

Parliament amended the 2004 Bill to include two sections which protected material used for public discussion of law reform.[213]

Australia's High Court has established an implied freedom of political communication in the Australian Constitution.[214] The High Court of Australia defined political communication as including "discussions of issues of public affairs, expressions critical of government policies and institutions, and criticism of candidates for election."[215] No one contends that debate over assisted-suicide and law reform over euthanasia fails to fall under political communication.[216] The question that remains is whether the *Suicide Related Materials Offenses Act* violates this implied freedom of communication.[217]

Even though the parliament added catchall provisions to the *Suicide Related Material Offenses Act*, the existence of such a criminal statute can still chill public debate because "advocates will not be certain when their speech is lawful and when it is not."[218] Some view these new clauses as "worthless" because these clauses still rely upon the intent of the person.[219] Therefore, if one can show an ulterior motive for the statement, such as incitement to commit suicide, then the defense of public debate on law reform would fail.[220] In addition, the catchall is worthless because it does not define "what may or may not be communicated without risking criminal prosecution."[221] If Parliament finds it necessary to explicitly spell out this offense to the public in the *Criminal Code*,[222] perhaps Parliment should consider spelling out what may or may not be communicated through the use of a carriage service.[223] Also, because the implied freedom of political communication has not been well-defined by the High Court, it is arguable whether the High Court cannot expect

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http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub27.pdf.

213. *Suicide Related Material Offenses Bills Digest*, *supra* note 87.

214. Katharine Gelber, *The Scope of the Implied Freedom of Political Communication in Australia*, Refereed paper presented to the Jubilee conference of the Australasian Political Studies Association Australian National University (Oct. 2002), *in* Papers from the Jubilee Conference of the Australasian Political Studies Association, *available at* http://www.arts.anu.edu.au/sss/apsa/Papers/gelber.pdf. The justices on the High Court established this implied freedom "because the Australian Constitution enshrined a system of representative government" and there is a need for freedom of communication over political matters. *Id.* at 2.

215. *Id.* at 3.

216. *See generally Reference: Criminal Code Amendment*, *supra* note 67.

217. *Id.* at L&C 15-17.

218. Letter from New South Wales Council for Civil Liberties to the Senate Legal and Constitutional Committee, *supra* note 212. This submission queries whether a question written by a euthanasia advocate stating "'[w]hy should we not be able to tell people that the most human euthanasia option is [some specified option]...'" would be caught under the Act or if the defense of political debate would save the advocate from prosecution. *Id.*

219. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, § 6, art. 25.

220. *Id.*

221. *Id.* § 6, art. 28.

222. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 40.

223. *See* Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, § 6, art. 30.

the public to know whether its communication is covered or whether it is a violation of the Act.[224]

In a speech made before the Southern Australian Legislative Council, Sandra Kanck, a Democrat Member of the Legislative Council in the South Australian Parliament,[225] attacked this "asinine law" because it encroached on freedom of speech.[226] She recognized that her speech, which should have been made part of the Hansard record,[227] would not be allowed to appear on Parliament's websites because of her references to particular methods of suicide.[228] In the end, the South Australian Parliament did move to have the speech banned from the website.[229] However, Exit International, a pro-euthanasia organization, posted the speech on its website that was hosted in New Zealand, and therefore, was not subject to the *Suicide Related Material Offenses Act*.[230]

In response to the concerns over freedom of political communication, the government relied heavily on the intent requirement in order for a crime to be committed.[231] The government contended that if a person was truly debating over euthanasia and law reform, then he or she would have lacked the requisite intent that the material be used to incite or counsel suicide or violate the Act in any other way.[232] Also, the government found that if there were any ambiguities in the provisions that the courts would read and construct the ambiguities in favor of the defendants, or those who made the speech.[233] Therefore, as the government sees it, the regulation did not affect political communication.[234]

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224. *Id.* § 6, art. 30.

225. Sandra Kanck: Leader SA Democrats, http://sa.democrats.org.au/people/Sandra%20Kanck/SKpolitical.htm (last visited May 22, 2008).

226. Kanck, *supra* note 133.

227. The Hansard record is the written record of parliamentary debates. Parliament of Victoria, *supra* note 120.

228. Kanck, *supra* note 133. The last half of her speech detailed specific methods of suicide, including the plastic bag method, the use of Nembutal and how to obtain it, and traveling to Switzerland to receive medication that will end one's life. *Id.*

229. Press Release, Exit International, Censored Kanck Speech to be Listed, Sept. 4, 2006, *available at* http://www.scoop.co.nz/stories/WO0609/S00061.htm.

230. *Id.*

231. *See* Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168. *See also Reference: Criminal Code Amendment*, *supra* note 67, at L&C 36-50.

232. Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168.

233. *Reference: Criminal Code Amendment*, *supra* note 67.

234. *Id.*

b. Freedom of Personal and Private Levels of Communication

The submissions also expressed concern regarding how the Act interferes with the personal and private communications over the telephone or email that may occur, for example, between doctors and patients or between family members.[235] This public policy argument called for a "reasonable right to be able to openly communicate with each other about what we would describe as end of life options."[236] Many worried about the impact this Act would have on those who were seriously or terminally ill and looking for solutions on how to end their pain.[237]

Parliament contended it did not create this legislation to interfere with personal and private conversations;[238] however, "[i]f a person was to incite another person to commit suicide, whether they were to do it by direct speech, by telephone or by email, that would be caught by the existing offences under state law."[239] Parliament instituted this Act to protect vulnerable people,[240] and one can consider those who are terminally ill and looking for help part of the vulnerable population.[241] Therefore, if a person uses a carriage service to have a personal communication with another, and then counsels or incites him or her to commit suicide, they have violated the Act.[242]

c. Impact on Access to Personal Information

The EFA further argued in its submission that its disdain for the Act also included its prohibition on possession of information that arguably violates the sections of the Act, such as promoting or providing instruction on a particular method of suicide.[243] The EFA expressed concern that the law would put a person at risk merely because the person could have intended the information for use by another, even though they had not yet shared the information.[244]

Once again, Parliament addressed this concern by stating an individual

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235. *Provisions of the Criminal Code Amendment*, *supra* note 16, at 19.

236. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 17.

237. Letter from George Williams to the Senate Legal and Constitutional Committee, *supra* note 104.

238. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 37 (noting that imposition on private communications was not part of the direct intention of the legislation).

239. *Id.*

240. Dutton, *supra* note 3.

241. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 4-5.

242. *See id.* at L&C 36.

243. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16, § 9, art. 54.

244. *Id.* § 9, art. 55. "We are of the view that such laws are too prone to selective use to victimise and harass people notwithstanding that the probability of a court finding intent and convicting may be low, that is, there may be no intention to actually prosecute." *Id.*

needed to possess the requisite intention in order to violate the act.[245] For example, possesion of a pamphlet produced with instructions on a particular method of suicide with the intent to place it on the internet or disseminate it through e-mail violates the Act.[246] Yet, Parliament maintains the law does not make it criminal to possess material if there is no intent to use it for a criminal purpose; therefore, possession of the same pamphlet with no intent to use a carriage device to disseminate it would be legal.[247]

v. Suicide Itself is not an Illegal Act

Suicide is no longer a criminal act in Australia.[248] It is unclear whether the Act will prevent one who has chosen to commit suicide from using a carriage service to prepare for his or her death.[249] For example, it is unclear whether a person has violated the Act if he plans to commit suicide and emails himself notes on the "best or quickest way to commit suicide," or even if he intended to email himself this kind of material.[250]

Apparently, Parliament did not contemplate this loophole,[251] but its existence could be possible. While some sections of the Act make reference to a person accessing material to intend the material to be used by another person,[252] there are certainly other possibilities that do not require "another person."[253] For example, under Section 474.29A(2), if a person gathered information off of the internet that directly or indirectly provided instruction on a particular method of suicide, and that person intended to use the material to instruct himself on that method, then the statute would arguably be violated.[254] From a public policy standpoint, the possibility of this prosecution seems wrong since suicide is not a criminal offense and "it is reasonable for any adult to seek information regarding any legal act."[255]

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245. Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168.

246. *Id.*

247. *Id.*

248. Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3. *See* Crimes Act, 1958, § 6A (Vict.), *available at* http://www.austlii.edu.au//cgi-bin/disp.pl/au/legis/vic/consol_act/ca195882/s6a.html?query=suicide. *See also* Crimes Act, 1900, § 31C (NSW).

249. Letter from New South Wales Council for Civil Liberties to the Senate Legal and Constitutional Committee, *supra* note 212.

250. *Id.*

251. *See generally* Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168.

252. Criminal Code Amendment (Suicide Related Material Offenses) Act, § 474.29A(1)(c), 2005 (Austl.).

253. *See* Criminal Code Amendment (Suicide Related Material Offenses) Act, § 474.29A, 2005 (Austl.).

254. Criminal Code Amendment (Suicide Related Material Offenses) Act § 474.29A(2).

255. Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3. Even if this hypothetical situation occurred, it is questionable whether Parliament would

Even though it is not illegal to commit suicide, the Senate still feels there is "great value in protecting the general public from people who assist suicide."[256] Therefore, the Senate argued that society could benefit from this Act.[257] In supporting this Act, Right to Life Australia submitted an analogy to support regulating information on suicide:

> Smoking is not illegal but it is generally accepted that because of the harm it causes it is appropriate not to allow it to be advertised. In the same way suicide is not illegal but, due to the harm that promotion of it can cause, we believe it is appropriate for this bill to prohibit promotion of it through carriage services, particularly the internet.[258]

This reasoning suggests that access to material through a carriage service by a person who has the intent to use material for himself or herself would not violate the Act.[259] If this type of action were a criminal offense, it would violate Parliament's intent in creating the Act.[260]

vi. Other Problems with the Act

Statutory interpretation and legal implications regarding restriction of expression seem to be the most debated issues with the *Suicide Related Material Offenses Act*;[261] however, several other criticisms exist.[262]

First, the Act lacks defenses, other than the political discussion on law reform.[263] Parliament omitted defenses from the Act because Parliament believes no defense should be available to a person if he or she intended to incite or counsel someone to commit suicide.[264]

Secondly, there is debate over whether the Act actually complements the *Customs Regulations*.[265] The *Customs Regulations* only prohibits material that promotes or incites the use of a particular device designed to assist a person in committing suicide.[266] The *Suicide Related Material Offenses Act*; however,

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actually prosecute the individual contemplating suicide. Australia decriminalized suicide because "there was little value in prosecuting someone who was dead or had attempted suicide. Suicidal people need help, not prosecution." *Provisions of the Criminal Code Amendment, supra* note 16, at 38.

256. *Provisions of the Criminal Code Amendment, supra* note 16, at 38.

257. *Id.* at 37.

258. *Reference: Criminal Code Amendment, supra* note 67, at L&C 10.

259. *See Provisions of the Criminal Code Amendment, supra* note 16, at 38.

260. *See generally id.* at 97.

261. *See Reference: Criminal Code Amendment, supra* note 67, L&C 34.

262. *See supra* Part (II)(C)(vi).

263. *Provisions of the Criminal Code Amendment, supra* note 16, at 5.

264. *Id.*

265. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16.

266. *Id.*

covers material which does not concern a particular device.[267] Thus, the Act prohibits "accessing and making available material by means of the Internet and other carriage services that would . . . remain lawful to import, export, access and distribute by other methods."[268]

Third, the offenses in this Act go beyond the state law offenses for assisted suicide.[269] Under state law, a person must actually aid or abet another in committing or attempting to commit suicide.[270] Under the *Suicide Related Material Offenses Act*, if a person intends to use material over a carriage service to counsel or incite another to commit suicide, then an offense has been committed.[271] Distributing material across the carriage services is unnecessary.[272]

Fourth, the Act has no international reach.[273] It cannot criminalize international communication encouraging suicide or describing methods of suicide; it will only keep Australians from participating in this communication.[274] Further, it will be difficult to block material from internationally hosted sites because the regulation did not properly define the type of material that violates the Act.[275]

Fifth, the penalties for the Act are monetary instead of penal.[276] The other provisions in the *Criminal Code* impose imprisonment.[277] It is unclear why the legislature made this choice.[278] One possibility is that the Act exists, not to protect the vulnerable, but to destroy voluntary euthanasia groups, a desire of conservative and religious organizations.[279]

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267. *Id.*

268. *Id.* In recognizing the Act does cover a broader range of material, Parliament stated the Act was meant to compliment the Regulations and to prevent circumvention of the Customs Regulations through the internet. Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168.

269. *Suicide Related Material Offenses Bills Digest*, *supra* note 87.

270. *Id.*

271. *Id.* For example, if a person obtained a book regarding how to commit suicide from the library with the intention of giving it to another person, then no offense has occurred under State law. *Id.* However, if a person obtained information on committing suicide with the intent to pass it to another over a carriage service, then there has been a violation of the Suicide Related Material Offenses Act. *Id.*

272. *Id. See also* Criminal Code Amendment (Suicide Related Material Offenses) Act, § 474.29B, 2005 (Austl.), *available at* http://www.austlii.edu.au/au/legis/cth/num_act/ccarmoa2005n922005479.

273. *Provisions of the Criminal Code Amendment*, *supra* note 16, at 29 (dissenting report of Senator Brian Grieg).

274. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 30.

275. *Id.* One option to keep these international websites out would be to institute the "great Australian firewall," but that is an impractical solution merely to block just this type of material. *Id.*

276. *Id.* at L&C 32. *See* Suicide Related Material Offenses Act.

277. *Reference: Criminal Code Amendment*, *supra* note 67, at L&C 32.

278. *See* Suicide Related Material Offenses Act.

279. *Provisions of the Criminal Code Amendment*, *supra* note 16, at 29 (Dissenting report of Senator Brian Grieg). The Voluntary Euthanasia Society of New South Wales (VESNSW)

Sixth, it is unclear on how to enforce the Act.[280] To enforce the Act properly, critics note, the government would have to double the police force.[281] "It is unrealistic to expect that the police will conduct a costly, comprehensive and concerted effort against discussion over a carriage service."[282] Judicial enforcement of assisted suicide cases is also not high, with juries hesitant to convict and judges sentencing minimal penalties.[283]

vii. Ways to Improve Bill

Even those submissions that supported the *Suicide Related Material Offenses Act* still found the Act needed improvements.[284] One proposal calls for stiffer penalties to exist when a person actually commits suicide because of another's offenses against the Act.[285] For example, if a suicide does occur, then the state could enforce a ten-year imprisonment upon the person who aided the deceased.[286]

A second addition suggested by supporters of the Act is liability for Internet Service Providers (ISPs).[287] Currently, the Act does not prevent access to international websites through Australian ISPs.[288] In turn, the state would not penalize ISPs for allowing access to these sites because the ISPs lack the requisite intent to counsel, incite, or violate any other offenses of the Act.[289] Therefore, supporters would like to amend the Act that makes ISPs liable in certain circumstances.[290] Once the person responsible for the ISP is aware of a

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recognized this legislation will "stifle, hamper and inhibit the work of [Voluntary Euthanasia Societies]" in Australia. Letter from Voluntary Euthanasia Society of New South Wales to the Senate Legal and Constitutional Committee, *available at* http://www.aph.gov.au/senate/committee/legcon_cttee/suicide/submissions/sub5.pdf (last visited Jan. 12, 2008). This society addressed the need for debate in a democratic Australia and the realization that the Suicide Related Material Offenses Act only benefits one side of the argument, those who are against euthanasia. *Id.* In its submission, the VESNSW pointed out that the creation of this legislation may have been to hinder the work of Dr. Philip Nitschke and his organization, Exit International, in fighting for the right to voluntary euthanasia. *Id.*

280. Kanck, *supra* note 133. In her speech, Kanck questions how the law enforcers will "check all the phone calls and e-mails." *Id.* She also questions the importance of finding these offenses because she assumes law enforcement has better things to do, like "policing real crime." *Id.*

281. Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3.

282. *Id.*

283. *Id.*

284. *See* Letter from the Coalition for the Defense of Human Life to the Senate Legal and Constitutional Committee, *supra* note 86. *See also Reference: Criminal Code Amendment*, *supra* note 67, at L&C 29.

285. Letter from Coalition for the Defense of Human Life Submission to the Senate Legal and Constitutional Committee, *supra* note 86.

286. *Id.*

287. *Id.*

288. Reference: Criminal Code Amendment, supra note 67, at L&C 30.

289. Letter from the Coalition for the Defense of Human Life to the Senate Legal and Constitutional Committee, *supra* note 86.

290. *Id.*

website containing material in violation of the Act, he must take reasonable measures to block the website.[291] The suggested penalty for this is $110,000 AUD.[292]

Should Parliament choose to add such a provision, more problems may arise concerning the freedom of political communication.[293] If an ISP could be liable for information that it was aware could violate the *Suicide Related Material Offenses Act* without having the intention to use the material to commit any of the offenses under the Act,[294] then one could say the same for those participating in freedom of political communication. This means those making statements under political discussion for law reform who are aware the statements could violate the Act, but do not have the intent for the material to commit an offense, could be held criminally liable for violating the Act.[295] Therefore, it would be unwise for Parliament to make a provision holding ISPs liable.[296]

E. Brief Conclusion of the Australian Suicide Related Material Offenses Act 2005.

After a careful examination, it appears the state has not yet convicted anyone under the *Suicide Related Material Offenses Act.*[297] Perhaps this is because of the difficulty in policing the listed offenses.[298] Another possibility could be the difficulty in showing the requisite intent to commit an offense.[299] Whatever the reason may be, it remains to be determined how this legislation will shape the phenomenon of cybersuicide in Australia and internationally. It certainly has made other nations give notice to this problem.[300]

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291. *Id.*

292. Letter from Jocelyn Head to the Senate Legal and Constitutional Committee, *supra* note 3.

293. *See supra* Part II (D)(iv)(a).

294. Letter from the Coalition for the Defense of Human Life to the Senate Legal and Constitutional Committee, *supra* note 86.

295. *But see* Letter from the Attorney General's Department to the Senate Legal and Constitutional Committee, *supra* note 168.

296. *See* Letter from Suzanne Shipard, Australian Broadcasting Authority, to the Senate Legal and Constitutional Committee (Aug. 23, 2004), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/suicide/submissions/sub20.pdf.

297. Research through Lexis, WestLaw, Australia FindLaw, and Australian Legal Information Institute did not yield results in case history for the *Suicide Related Material Offenses Act 2005.*

298. *See* Kanck, *supra* note 133.

299. *See supra* Part (II)(D)(ii)(d).

300. *See infra* Part III. *See also* Right to Die: Censorship Move in Germany, http://assistedsuicide.org/blog/2006/04/14/right-to-die-censorship-move-in-germany/ (Apr. 14, 2006) (discussing proposed legislation in Germany which would make it difficult to provide information on assisted suicide, in general and on the internet).

III. THE UNITED KINGDOM'S DESIRE TO DEAL WITH CYBERSUICIDE THROUGH LEGISLATION

Along with Australia, the United Kingdom has opened its eyes to the problem of cybersuicide inside its borders.[301] Part A of this section will detail the problem of cybersuicide in the United Kingdom. Part B will discuss the options the United Kingdom's Parliament considered and why they have failed—leaving the United Kingdom still searching for a solution.

A. The United Kingdom's Problem with Cybersuicide

Since 2001, the United Kingdom has lost at least fifteen teenagers to internet related suicide.[302] In 2004, Sarah Cherry purchased *Final Exit* from Amazon.com after discussing suicide in an internet chat room.[303] This book taught her how to commit suicide and she used its lessons to take her own life.[304] In 2005, two strangers committed suicide together in the parking lot of a shopping center after meeting in an internet chat room and discussing their desires to commit suicide.[305] Noticing this rapidly growing problem, the *Lancashire Evening Post* started a campaign entitled "Stop the peddlers of death."[306] Prime Minister Tony Blair joined the campaign in order to garner more support to fight this phenomenon.[307]

B. The Desire of the United Kingdom's Parliament to Protect the Public from Internet Suicide

The United Kingdom has recognized that websites and chat rooms encouraging the vulnerable to commit suicide are dangerous, but these websites are not illegal or controlled by another regulatory body.[308] Parliament has discussed at least two options to cover this field: using the *Suicide Related Material Offenses Act* as a model or amending the *1961 Suicide Act.*[309]

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301. *See Charity in Suicide Websites*, *supra* note 12.

302. *Id.*

303. 430 PARL. DEB., H.C. (6th ser.) (2005) 276.

304. *Id.*

305. Ian Cobain, *Clampdown on Chatrooms after Two Strangers Die in First Internet Death Pact*, THE GUARDIAN, Oct. 11, 2005, *available at* http://www.guardian.co.uk/uk_news/story/0,,1589260,00.html.

306. 430 PARL. DEB., H.C. (6th ser.) (2005) 276.

307. *I'll Fight Internet Suicide*, LANCASHIRE EVENING POST, Jan. 10, 2005, *available at* http://www.lep.co.uk/ViewArticle.aspx?sectionID=1789&ArticleID=917087.

308. Goodenough, *supra* note 2.

309. *See* 430 PARL. DEB., H.C. (6th ser.) (2005) 279.

i. The difference in United Kingdom law keeps Parliament from following Australia's legislation

Some have suggested to Parliament that the United Kingdom could attempt to adopt legislation similar to the *Suicide Related Material Offenses* in Australia.[310] Due to the manner in which UK law has developed, this option does not seem viable.[311]

The United Kingdom believes "actions are legal or illegal according to their merits, rather than according to the medium used."[312] Therefore, it stands whatever is considered illegal online would be illegal offline.[313] Therefore, if the United Kingdom followed Australia and made it illegal to post methods of suicide online, for example, then works of fiction that depicted methods of suicide would become illegal.[314]

ii. The difficulty in amending the 1961 Suicide Act to handle cybersuicide

Papyrus, a United Kingdom charity, urged Parliament to amend the *1961 Suicide Act*.[315] This Act makes a person criminally liable for "aid[ing], abet[ting], counsel[ing], or procure[ing] the suicide of another, or an attempt by another to commit suicide.[316] The punishment is imprisonment for a term not exceeding fourteen years.[317] The law requires that an individual have knowledge and have participated in the suicide for the state to prosecute them successfully.[318]

However, Parliament wrote the *1961 Suicide Act* before the advent of the internet;[319] therefore, the Act is "woefully inadequate to deal with the use of the internet for the promotion of suicide."[320] First, Parliament recognized that amending the Act might not provide adequate results because U.K. law would not apply to sites hosted abroad.[321] Second, the unique features of the internet allow the author or source of information to remain anonymous.[322] Lastly, the statutory interpretation of the Act would make it difficult to apply or adapt to cybersuicide. The Act requires a direct causal link between the information

310. *Id.*
311. *Id.* at 282.
312. *Id.* at 281.
313. *Id.* For example, the Obscene Publications Acts covers material both online and offline. *Id.*
314. *Id.* at 282.
315. *Call to Ban Pro-suicide Websites*, *supra* note 33.
316. Suicide Act, 1961, 1961, U.K. Stat. 1961, 9 & 10 Eliz. 2 c. 60, § 2 (Eng.).
317. *Id.*
318. *Call to Ban Pro-suicide Websites*, *supra* note 33.
319. *Charity in Suicide Websites*, *supra* note 12.
320. *See* 430 PARL. DEB., H.C. (6th ser.) (2005) 277.
321. *Call to Ban Pro-suicide Websites*, *supra* note 33.
322. 430 PARL. DEB., H.C. (6th ser.) (2005) 277.

provided or the procurement and the actual suicide.[323] Parliament finds it unlikely that participation in a suicide will occur by those producing cybersuicide websites.[324] In addition, it would be difficult to show that counseling in websites was sufficient for a direct causal link.[325] Providing information on suicide methods would not constitute an offense under the Act.[326]

C. *The United Kingdom's Current Solution to Cybersuicide*

The United Kingdom has acted to solve the problem of cybersuicide through a non-legislative capacity.[327] First, the Samaritans[328] are in negotiations with internet service providers, such as Yahoo! and AOL, to "reprioritise the results" retrieved during an internet search of suicide.[329] An official stated "[w]hen somebody keys in 'suicide' and 'UK' we would like them to be offered a link to the Samaritans long before they find a website showing them what they can do with a car exhaust and a hose pipe."[330] Papyrus has also suggested that the Department of Health should amen its National Suicide Strategy to warn on the dangers of the Internet.[331] Lastly, the government is encouraging internet service providers to provide filters to protect the vulnerable from such websites.[332]

IV. CONCLUSION

It is undeniable that cybersuicide has emerged as a real problem; however, it is a difficult phenomenon to regulate on an international level. First, assisted-suicide is not illegal in every country; therefore, the citizens in countries in which it is legal should be able to access this type of information over the internet.[333] Secondly, the nature of the internet blurs "conventional

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323. *Id.* at 282. "There must be participation in the act of suicide, as well as a knowledge of what is going to take place." *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Charity in Suicide Websites*, *supra* note 12.

328. Samaritans is a group which provides assistance twenty-four hours a day to those experiencing suicidal thoughts. Samaritans.org, *About Samaritans*, http://www.samaritans.org/about_samaritans.aspx (last visited May 23, 2008).

329. Cobain, *supra* note 305.

330. *Id.*

331. *Call to Ban Pro-suicide Websites*, *supra* note 33.

332. 430 PARL. DEB., H.C. (6th ser.) (2005) 277.

333. Assisted suicide is legal in Oregon, Switzerland, Belgium, and the Netherlands. Derek Humphry, *Tread Carefully When You Help to Die: Assisted Suicide Laws around the World*, ASSISTEDSUICIDE.ORG, Mar. 1, 2005, http://www.assistedsuicide.org/suicide_laws.html. Another concern is how countries deal with freedom of expression. For example, censoring cybersuicide websites in America would be difficult because it would potentially violate the First Amendment. 430 PARL. DEB., H.C. (6th ser.) (2005) 279.

methods of jurisdiction."[334] Accordingly, the internet presents legislatures worldwide with a global problem.[335]

In considering regulation of cybersuicide, legislatures need to consider the construction of assisted-suicide statutes.[336] As it has been shown, whether the regulation of cybersuicide is even possible depends on the construction of these statutes.[337] This does not mean it is impossible to inhibit cybersuicide. Internet service providers can provide filters and encourage use by the users to implement the filters to block as much of this type of content as possible.[338] Also, those websites which offer counseling services to those in need can ensure their meta tags include terms one would use while looking for cybersuicide websites.[339] These are just some of the options available to governments around the world to protect their citizens from the phenomenon of cybersuicide.

334. Hanley, *supra* note 31, at 998. Hanley's Note suggests a multi-national approach to regulating the internet. *Id.* First, the article suggests there should be a flexible regulatory structure to allow nations to choose their degree of regulation. *Id.* Second, the article discusses the relationship between ISPs and national governments and the need for governments to express control over ISPs. *Id.* at 999.

335. *See generally id.*

336. *See e.g.* 430 PARL. DEB., H.C. (6th ser.) (2005) 276-84.

337. *See e.g. id.*.

338. *See e.g.* 430 PARL. DEB., H.C. (6th ser.) (2005)276-84.

339. Letter from Electronic Frontiers Australia, Inc. to the Senate Legal and Constitutional Committee, *supra* note 16.

DIGITALIZING ITS LAND REGISTER: CROATIA'S E-TICKET TO THE EU

Kalin P. Schlueter*

I. INTRODUCTION

With its most recent 2007 expansion, the European Union ("EU") has grown to twenty-seven countries.[1] In 2003, Croatia applied to become the newest member of this conglomerate.[2] Following its application, the EU assessed Croatia's strengths, and, more importantly, its deficiencies as an EU candidate.[3] This is standard procedure for any EU applicant,[4] but Croatia found itself sorely in need of reforms and adjustments in a number of major categories.[5] Although at one point it appeared Croatia might join with the 2007 class of Romania and Bulgaria,[6] Croatia is not expected to gain membership status before the end of the decade.[7]

Among the most significant shortcomings cited by the EU were: an inefficient and undisciplined judicial system; human rights violations and regional hostilities lingering from its 1990s war for independence; political corruption; and a lagging market economy.[8] The EU made additional reference to Croatia's sorely deficient real property registration system.[9] As this Note will argue, an overhaul of this property registration scheme can either directly or indirectly rehabilitate each of the broad aforementioned issues.

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1. Europa – Overview of the European Union Activities, *The Accession Process for a New Member State*, http://europa.eu/scadplus/leg/en/lvb/l14536.htm (last visited Jun. 10, 2008) [hereinafter EUROPA – Accession Process].

2. COMMUNICATION FROM THE COMM'N – *Opinion on Croatia's Application for Membership of the European Union* (2004), *available at* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=504DC0257 [hereinafter EUR. COMM'N – OPINION].

3. *See generally id.*

4. *See* EUROPA – Accession Process, *supra* note 1, at 4.

5. *See generally* EUR. COMM'N – OPINION, *supra* note 2.

6. *See* VISNJA SAMARDZIJA, CROATIA'S PREPARATION FOR EU ACCESSION 6 (2003). *See also* Faith Glasgow, *Bathing in the Warm Adriatic Sun*, THE FIN. TIMES, May 15, 2004, at 6.

7. Euractiv.com EU News and Policy Positions, *Rhen: Croatia will not join EU before 2010*, http://www.euractiv.com/en/enlargement/rehn-croatia-join-eu-2010/article-156042 (last visited Jul. 16, 2008).

8. EUR. COMM'N – *Enlargement: Candidate Country: Croatia*, http://ec.europa.eu/enlargement/croatia/eu_croatia_relations_en.htm (last visited Jan. 24, 2008). [hereinafter EUR. COMM'N – ENLARGEMENT].

9. EUR. COMM'N – OPINION, *supra* note 2, at 64.

While it was applying for EU membership, Croatia also launched the "biggest change in the country's land management in over a century."[10] In assessing the venture, Croatian Prime Minister Dr. Ivo Sanader proclaimed "[f]or a successful EU integration . . . [t]he foundation of the future development of Croatia should rest on a modern State administration serving its citizens. . . . [This includes] precisely the establishment of a reliable and effective registration system for real property and its titles."[11] This property registration reform is a large part of what Dr. Sanader and other Croatian visionaries are calling the "e-Croatia" concept.[12]

Formal negotiations between the EU and Croatia did not begin until late 2005.[13] By then, Croatia's land reform was well underway, the country had cut property registration times by more than half, and benefits were beginning to surface on all fronts.[14] Analysts expect the primary leg of the reform to last throughout 2008.[15]

Part II of this Note begins with a discussion of the EU, including its general functions and the expectations of its members. Turning next to Croatia's application specifically, this Note cites what the European Commission believes to be Croatia's most significant flaws. Part III of this Note will explain the deficiencies of Croatia's land register and inform the reader what Croatia has done to address these issues. From there, this Note will turn to the precipitate effects of the property reform. Specifically, this Note will clarify the issues confronting the judiciary, rights of refugees, lack of foreign investment, and corruption in the political and administrative realms. Finally, this Note will acquaint the reader with how the reforms of the land register and cadastre have, in turn, served to repair each of these gross pitfalls in Croatia's EU membership application and speculate on the ascension of Croatia to the EU as a result thereof.

II. THE EU'S PAST AND CROATIA'S POTENTIAL

Since its inception in the wake of World War II, the EU has been continuously expanding—from six original members to a current collection of twenty-seven.[16] In its fifth expansion, the EU added ten new Member States in 2004 and completed its expansion in 2007 with two more—by far its largest

10. EUROPEAN COMMUNITIES, BUILDING UP CROATIA'S REAL ESTATE MARKET 2 (2004) http://ec.europa.eu/enlargement/pdf/financial_assistance/cards/cases/022_en.pdf (last visited Jun. 10, 2008) [hereinafter BUILDING UP CROATIA'S REAL ESTATE MARKET].

11. REP. OF CROAT., STATE GEODIC ADMIN., MINISTRY OF JUSTICE, THE REAL PROPERTY REGISTRATION AND CADASTRE PROJECT PROJECT MID-TERM REVIEW 3 (2006), *available at* http://www.uredjenazemlja.hr/UserFiles/File/Project%20Mid%20-Term%20Review.pdf [hereinafter MID-TERM REVIEW].

12. *Id.*

13. EUR. COMM'N – ENLARGEMENT, *supra* note 8.

14. *See generally* MID-TERM REVIEW, *supra* note 11.

15. *Id.* at 5.

16. EUROPA – Accession Process, *supra* note 1.

expansion to date.[17] This most recent expansion pushed northward; eastward into republics and satellites formerly belonging to the Soviet bloc; and southward to include Slovenia, the first addition of six countries formerly belonging to the Socialist Federal Republic of Yugoslavia ("Yugoslavia").[18]

To date, Slovenia remains the only former socialist Yugoslav republic in the EU.[19] With the introduction of the Stabilisation and Association Process ("SAP") in 1999, the EU took the first step toward the addition of six Western Balkan countries: Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Serbia, and Montenegro.[20] All but Albania are former Yugoslav states.[21] The SAP supports preparation for EU accession by combining three main elements: the Stabilisation and Association Agreements, autonomous trade measures, and ample financial assistance.[22] Despite the establishment of such an accession framework, each potential member may then adjust and implement those elements at its own pace.[23] Croatia is the only one of those six countries for which the European Commission has anything resembling a timetable; the Commission further expects the remaining nations to move toward EU membership only "once they are ready."[24]

The Stabilisation and Association Agreement ("SAA"), which Croatia signed in late 2001 and took effect in early 2005,[25] followed the SAP. The SAA is the first comprehensive arrangement between the candidate country and the Member States of the EU.[26] This contract regulates relations between the applicant and the EU until the former has fully ascended to EU Member State status.[27] The SAA governs free trade, regional cooperation, and political dialogue between the applicant and the EU.[28] Furthermore, the SAA requires the applicant to implement national legislation approximately similar to the EU *acquis communitaire* ("acquis"), or the total accumulated body of EU community law.[29]

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17. Europa: Activities of the European Union – Summaries of Legislation, *The 2004 Enlargement: The Challenge of a 25-member EU*, http://europa.eu/scadplus/leg/en/lvb/e50017.htm (last visited Jun. 10, 2008) [hereinafter *The 2004 Enlargement*].

18. *Id.*

19. *See id.*

20. EUR. COMM'N – ENLARGEMENT, *supra* note 8.

21. MSN Encarta – Yugoslavia, http://encarta.msn.com/encyclopedia_761567145/Yugoslavia.html (last visited Jun. 11, 2008).

22. EUR. COMM'N – ENLARGEMENT, *supra* note 8.

23. EUROPA – Overviews of the European Union activities – Consumers, http://europa.eu/pol/enlarg/overview_en.htm (last visited Jun. 10, 2008).

24. *Id.*

25. EUR. COMM'N – ENLARGEMENT, *supra* note 8.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

Croatia formally applied for EU membership on February 21, 2003.[30] Under the 1993 EU Treaty, commonly referred to as the Maastricht Treaty, the EU conditions a candidate country's accession on its respect for "principles of liberty, democracy, human rights and fundamental freedoms, and the rule of law."[31] The Copenhagen Convention, an EU Member State summit convened the same year as the Maastricht Treaty, further explained those requirements as the requirements relate specifically to Central and Eastern European countries ("CEECs"), indicating:

> [m]embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union . . . [and the] ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.[32]

In April 2004, fourteen months following Croatia's application, the European Commission issued its opinion on Croatia's status as a candidate.[33] While it noted Croatia was a functioning democracy and "could be regarded as a functioning market economy," it indulged in a number of deficiencies.[34] The 2001 SAA set forth by the Commission requires Croatia to make over 400 different changes or reforms,[35] but the Commission's 2004 opinion specifically ranked among its highest priorities "minority rights, refugee returns, judiciary reform, regional co-operation and the fight against corruption."[36]

The "rule of law" principle mentioned in the first imperative of the Copenhagen criteria above refers namely to the domain of the courts.[37] The European Commission has repeatedly found severe crippling deficiencies within numerous realms of the Croatian judicial system—in 2002 (before

30. Eur. Comm'n – Opinion, *supra* note 2.

31. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C. 224) art. 49.

32. European Council in Copenhagen, Conclusions of the Presidency 13 (June 21-22, 1993), *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf. The Copenhagen Convention did not list these requirements in the above bulleted form, but these requirements are almost always listed as three distinct requirements within any other source. *See, e.g.*, Eur. Comm'n – Opinion, *supra* note 2, at 3. The European Commission's Opinion further added CEEC candidates "must have a public administration capable of applying and managing EU laws in practice" as part of the third condition. EUROPA – Accession Process, *supra* note 1.

33. Eur. Comm'n - Enlargement, *supra* note 8.

34. *Id.*

35. Samardzija, *supra* note 6, at 7.

36. Eur. Comm'n – Opinion, *supra* note 2, at 97-98.

37. Tamara Capeta, Creating Interpretive Legal Culture in Eastern Europe 1 (2006).

Croatia's EU membership application),[38] 2004,[39] and 2006 (both since Croatia's application).[40] A more specific discussion of these shortcomings, including the progress of Croatia in addressing them, is forthcoming in Section IV.

The Commission cited numerous human rights issues to be addressed stemming from human rights violations during Croatia's war for independence from Yugoslavia from 1991 to 1995.[41] Specifically, hundreds of thousands of Croatian citizens, many of Serbian descent, had been displaced from their homes and had yet to return.[42] Backlog in the courts and delays with property registries prevented these refugees from returning to their homes.[43] Section V of this Note takes a closer look at this situation, along with the reforms Croatia is implementing to aid refugee return.

The Commission also took issue with the status of Croatia as a market economy.[44] The European Community Treaty places broad restrictions on limiting the free movement of goods, persons, services, and capital among EU members and third countries.[45] To align its market economy with the market economy of the acquis, the European Commission concluded Croatia needed to make "further efforts" toward EU standards for free movement of capital[46] and "considerable and sustained efforts" in the free movement of goods, persons, and services.[47] While it found direct investment to be unrestricted, save for some exceptions in disharmony with the acquis, the Commission noted inward investment by foreign residents and non-citizens was significantly handicapped by administrative restrictions and by Croatia's weak land registration system.[48] Only very recently, before the Commission issued its opinion, had the land registry begun its transition from handwritten logs to a computerized format.[49] This transformation is further evaluated in Section VI.

Finally, with regard to the ICTY, the Commission declared Croatia was fully cooperating with the Court's investigators in 2004,[50] though delays in locating war crimes suspect General Ante Gotovina led some international actors to accuse Croatia of dragging its feet or providing General Gotovina

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38. COMMISSION STAFF WORKING PAPER: CROATIA – STABILISATION AND ASS'N REP. (2002), *available at* http://www.southeasteurope.org/documents/EC_Report_HR.pdf [hereinafter STABILISATION AND ASS'N REP.].

39. EUR. COMM'N – OPINION, *supra* note 2, at 17.

40. COUNCIL OF THE EUROPEAN UNION, Council Decision 2006 O.J. (L 55) 30 [hereinafter "2006 Council Decision"].

41. EUR. COMM'N – OPINION, *supra* note 2, at 22.

42. *Id.*

43. *Id.*

44. *See generally id.* at 43-53.

45. *See* European Community Treaty, Mar. 25, 1957, arts. 23-31, 39-60.

46. EUR. COMM'N – OPINION, *supra* note 2, at 53.

47. *Id.* at 47-51.

48. *Id.* at 52.

49. *Id.* at 13.

50. *Id.* at 24.

sanctuary.[51] To emphasize the importance of this point, the EU intentionally delayed negotiations with Croatia in early 2005.[52] The credibility of Croatia received a boost when General Gotovina was located in Madrid later that year, affirming he was outside the reach of Croatian officials all along.[53] Following his arrest and extradition to The Hague, Daniel Fried, the Assistant Secretary of State for European and Eurasian affairs, proclaimed "no obstacles [and] no roadblocks" lingered for Croatia's accession to the EU or other Euro-Atlantic institutions.[54] Thus, cooperation with the ICTY no longer remains a major point of contention between the parties, and is thus the only major shortcoming cited by the Commission which will not be addressed in this Note.

III. THE PAST AND PRESENT STATE OF CROATIA'S REAL PROPERTY SYSTEM

Croatia's real property system belongs in the vein of the Austrian-Hungarian tradition, a parcel-based registration system relying on a physical land survey, or casdastral system.[55] The municipal courts of Croatia maintain the land register, and a party may only obtain legal rights in land through registration.[56] From a transactional standpoint, entry into the register serves the delivery function.[57] The register also serves a publicity function, thus providing protection for good faith, bona fide purchasers.[58] Rights are determined by application to the court.[59]

A. To Register or Not to Register

Why bother to opt for a property registration scheme in the first place? The United States is one of few nations with no registration system, as numerous attempts to implement anything of that sort have invariably failed.[60]

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51. *EU Delays Croatia Talks over War Suspect*, CNN.COM, Mar. 16, 2005, http://edition.cnn.com/2005/WORLD/europe/03/16/croatia.eu/index.html.

52. *Id.*

53. *Croatian War Suspect Flown to Hague*, CNN.COM, Dec. 12, 2005, http://www.cnn.com/2005/WORLD/europe/12/10/croatia.suspect/index.html.

54. U.S. DEP'T OF STATE, RELATIONS BETWEEN CROATIA AND THE UNITED STATES, Interview by Damir Hainski with Daniel Fried, Assistant Secretary of European and Eurasian Affairs, *available at* http://www.state.gov/p/eur/rls/rm/74038.htm (last visited Jun. 10, 2008).

55. Mario Blazevic, Harmonization of Land Registry and Cadastre in Croatia, Presentation at the Council of the International Federation of Surveyors (FIG) XXIII Congress, Oct. 8-13, 2006, *available at* http://www.fig.net/pub/fig2006/papers/ts85/ts85_05_blazevic_0565.pdf. Mr. Blazevic is an engineer for IGEA, a firm contracted to help harmonize Croatia's land register and cadastre. *Id.*

56. THE WORKING PARTY ON LAND ADMIN., STUDY ON KEY ASPECTS OF LAND REGISTRATION AND CADASTRAL LEGISLATION, PART 2 17 (2000) [hereinafter "Land Study Pt. 2"].

57. *Id.* at 36.

58. MID-TERM REVIEW, *supra* note 11.

59. Land Study Pt. 2, *supra* note 56, at 96.

60. John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61, 63 (1992). "The Torrens system [of property registration] is

The failure of such a registration system in favor of an alternate recording system is blamed on the initial high cost of registration as well as pressure asserted by the title assurance industry.[61] But, again, the United States is an anomaly in the context of title recording.[62]

Land title registration carries with it a smorgasbord of benefits, especially for states struggling to establish themselves economically.[63] A properly maintained cadastre clearly defines the borders of a parcel, while an updated register publicizes the correlative ownership rights.[64] Napoleon even used the system of property mapping and registering to finance his wars in Europe.[65]

While governments originally developed property rights to raise tax revenue, they have proven beneficial for entrepreneurism as well.[66] An efficient property registration system reduces transaction costs and maintains the formality and official status of titles, especially beneficial to entrepreneurial business.[67] Registered property can be used as collateral in allowing entrepreneurs to obtain mortgages or loans to begin or expand businesses.[68] According to the World Bank, "[l]and and buildings account for between half and three-quarters of country wealth in most economies."[69] Likewise, registration of property titling "significantly increases land values or investment."[70] The World Bank has further found property registration is twice as efficient in wealthier nations than in poorer ones.[71]

The World Bank also warned against disorganized registration systems;[72] hindrances on registering property tends to cause property markets to function inefficiently, especially harming entrepreneurs and hampering business generally.[73] "Unregistered property limits the financing opportunities for new businesses and expansion opportunities for existing ones."[74] These obstacles function as a deterrent to property owners, buyers, and sellers, who may then elect to exchange property titles "informally," or on the black market without

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used to a substantial extent today in only five states: Hawaii, Illinois, Massachusetts, Minnesota, and Ohio. In Hawaii and Massachusetts, Torrens is used statewide. In the other states, use is limited to a few localities." *Id.* at 73.

61. *Id.* at 64.

62. *Id.* at 63.

63. *See* THE WORLD BANK GROUP, DOING BUSINESS IN 2005 – REMOVING OBSTACLES TO GROWTH, 38, 39 (2005) [hereinafter REGISTERING PROPERTY].

64 *See id.* In the terms of the World Bank, "[p]roperty registries record legal ownership, and the cadastre records physical characteristics and identifies boundaries." *Id.* at 36.

65. *Id.* at 33.

66. The World Bank Group, Doing Business 2008 – Croatia, 23 (2008), *available at* http://www.doingbusiness.org/Documents/CountryProfiles/HRV.pdf (last visited Jun. 10, 2008) [hereinafter Doing Business 2008 – Croatia].

67. *Id.*

68. REGISTERING PROPERTY, *supra* note 63, at 33.

69. *Id.*

70. *Id.*

71. *Id.* at 36.

72. *See generally id.* at 33-40.

73. *Id.* at 33-34.

74. *Id.*

reporting such transfers.[75] The poor condition and lack of maintenance of the handwritten land register provides little security to owners, allowing once-registered property to go unregistered following the next transaction.[76] Furthermore, a separate land register and cadastre can lead to conflicting land records regarding a single piece of property.[77] A property registration system must run like a well-oiled machine if an economy hopes to benefit from prospective local business.

B. Croatia's Land Register & Cadastre

Registering property in Croatia involves five steps, the first four of which are rather mundane.[78] First, one must obtain a land registry extract from the relevant land register court.[79] This involves some due diligence on the part of the buyer to ensure there are no hindrances on the title, which the World Bank assumes to take only one day in Croatia—in some circumstances, a rather generous estimate.[80] The second procedure requires notarization of the sales contract, requiring another one to two days.[81] Step three involves submission of the sale contract for tax purposes, adding thirty more days to the process.[82] The fourth step includes payment of taxes and registration fees, which can realistically be performed in a day.[83] Theoretically, the process completes with the fifth step of entering the property into the land register, thereby securing title for the buyer.[84] The registration backlog and consequential delays, however, have stymied the Croatian real estate market for quite some time.[85]

In 2005, Croatia found itself ranked dead last on a global scale when it came to the length of time necessary to register property.[86] With an average land registration period of 956 days, or over two and one-half years, the system in Croatia lagged nearly a year behind the second-to-last system of Haiti.[87] In other words, it took more than nine months longer to secure legal title to real

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75. *See id.* at 33.

76. *Id.*

77. *See id.* at 36. In the terms of the World Bank, "[p]roperty registries record legal ownership, and the cadastre records physical characteristics and identifies boundaries." *Id.*

78. THE WORLD BANK GROUP, Doing Business, Registering Property in Croatia, 1 (2008), *available at* http://www.doingbusiness.org/ExploreTopics/RegisteringProperty/Details.aspx?economyid=52 (last visited Jun. 10, 2008) [hereinafter Registering Property in Croatia].

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 4.

85. *Id.*

86. *See generally* The World Bank Group – Doing Business, http://www.doingbusiness.org/CustomQuery/ (select "Registering property"; then "2005"; then click "Web Report.") (last visited Jun. 11, 2008) [hereinafter DOING BUSINESS 2005].

87. *Id.* Haiti's second-to-last land registration process averaged 683 days in 2005. *Id.*

property in Croatia than in any other country—and more than twice as long as every country but three.[88] In its 2005 survey for "Ease of Registering Property," the World Bank's evaluation of Croatia placed the country well below the international median,[89] despite the fact Croatia placed near the average for developed nations in the remaining categories.[90] This finding suggests Croatia's deficiencies were not a result of the registration concept itself, but rather in the time and manner necessary to complete the actual process.

Within Europe and Central Asia, the gap in time to register property between Croatia and more geographically analogous countries jumped even more.[91] Second from the bottom in this group, Slovenia, required nearly a third of the time to complete the process.[92] This is a particularly noteworthy result given Slovenia is also a former Yugoslavian republic, seceded from Yugoslavia at the same time as Croatia and, perhaps most significant, has been an EU member since 2004.[93]

The pitfalls of the land register and cadastre of Croatia are nothing new. "In some cases, [Croatian land] parcel maps date back to 1905, and few have been updated since the nationalization [into Yugoslavia] in 1945. . . . As in many other countries of Central and Eastern Europe, property registration and cadastre systems were poorly maintained [through privatization in the 1990s]."[94] Disorganized records during the communist era and increasing registration petitions since privatization in 1992 directly contributed to this administrative bottleneck.[95] The land register records were still hand-written

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88. *Id.*

89. Croatia's overall 2005 rank for "Ease of Registering Property" was 109th of 175 countries. REGISTERING PROPERTY, *supra* note 63, at 35. "The ease of registering property is a simple average of country rankings by the number of procedures, time, and cost, where higher values indicate more efficient property registration." *Id.*

90. Croatia required five procedures, costing 5.0% of the property value. DOING BUSINESS 2005, *supra* note 86. The 2005 OECD average was 4.7 procedures, at a cost of 4.3% of the property value. *Id.* The OECD is a collective of thirty developed nations "sharing a commitment to democratic government and the market economy." Organization for Economic Cooperation and Development, *About OECD*, http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html (last visited Jan. 28 2007).

91. The World Bank Group – Doing Business, http://www.doingbusiness.org/CustomQuery/ (select "selected economies"; then select "Europe & Central Asia" and "High-income OECD"; then select "2005"; then click "Web Report." (last visited Jun. 11, 2008).

92. *Id.* Even though selecting "High-income OECD" will include countries not within Europe and Central Asia, such as the United States, this is the only way to include core European countries such as Germany or France when isolating a particular geographical group of economies. *Id.* Merely selecting "Europe & Central Asia" will exclude countries such as these. *Id.* The geographically inapplicable countries do not skew the report's results, but merely make the results slightly more numerous. *Id.*

93. *The 2004 Enlargement*, *supra* note 17.

94. *Id.*

95. Blazevic, *supra* note 55, at 3.

into the twenty-first century,[96] and the cadastre and land register were two separate entities run by two separate administrative agencies, requiring harmony between the agencies for real property rights to be complete.[97]

With its 2005 assessment of Croatia's economy, the World Bank noted full property rights are not effective until the registration is complete, even though the official date of ownership on record is the date the registration application was filed.[98] Thus, in practice, a new purchaser of property is considered the owner once he applies for registration and as the application is being processed, even though his ownership has no legal effect until the registration is complete.[99] While this new quasi-owner/registration applicant has the right to dispose of the property to a third person (a second buyer), there is a risk the registration of the first buyer might be blocked or impeded for some reason arising after the second conveyance.[100] As a result, the first buyer would be liable for damages to the second buyer, because the property system seeks to protect the bona fide purchaser.[101] The ensuing litigation not only complicates matters for these purchasers and this particular parcel, essentially encumbering it as temporarily inalienable, but also adds yet another case on the local court's already crowded docket.

In April 2002, after the signing of the Stabilisation and Association Agreement, but before Croatia's formal application for EU membership, the European Commission commented on the severe deficiencies in the Croatian land registry system of the day.[102] In particular, the Commission noted in its Stabilisation and Association Report Croatia "still maintains restrictions on the acquisition of real estate by foreigners, including foreign companies," including establishment of businesses and acquisition of various permits.[103] While the World Bank found four-fifths of countries limit foreign ownership of land, including outright bans in some countries,[104] Croatia is obligated to lay these restrictions to rest if it hopes to become a member of the EU.[105] The European Court of Justice was clear in 1989 when it held real property to be a "corollary of freedom of establishment," thus requiring reciprocal acknowledgement or rights without restriction among member states under Article 44 of the EC

96. *See* REPUBLIC OF CROATIA, STATE GEODETIC ADMINISTRATION, MINISTRY OF JUSTICE, LAND REGISTRATION SYSTEM REFORM 8 (2006) [hereinafter LAND REGISTRATION SYSTEM REFORM].

97. RENEE GIOVARELLI & DAVID BLEDSOE, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO), LAND REFORM IN EASTERN EUROPE WESTERN CIS, TRANSCAUCUSES, BALKANS, AND EU ACCESSION COUNTRIES (2001) [hereinafter FAO REPORT], *available at* http://www.fao.org/DOCREP/007/AD878E/AD878E00.htm.

98. THE WORLD BANK, DOING BUSINESS 2005, PROPERTY TITLING – CROATIA.

99. *Id.*

100. *Id.*

101. *Id.*

102. *See* STABILISATION AND ASS'N REP., *supra* note 38.

103. *Id.* at 22.

104. REGISTERING PROPERTY, *supra* note 63, at 37.

105. *See* Capeta, *supra* note 37, at 7-8.

Treaty.[106] In its 2002 Report, the Commission further noted the SAA requires alignment with these provisions within four years of the date the SAA became effective, which was 2005.[107] Croatia thus has until 2009 to modify its real property laws, update its registry, and completely liberalize property rights.[108]

C. Croatia's Property Reform in a Global Context

The 2005 World Bank survey on registering property reported numerous countries were reforming their property registration systems.[109] This included rich and poor countries alike, from all reaches of the globe.[110] "Many countries are embracing new technologies in property registration. One in three have made registration electronic in the last five years, with rich countries leading the way."[111] The World Bank found introduction of technology in the property registration process to reduce time of registration by nearly two months, as well as entry into the cadastre by another thirty-eight days.[112] In another recommendation, the World bank singled out Croatia (and neighboring Slovenia) among its 175 subjects: "Countries like Croatia and Slovenia, where the property registry is in the courts and accounts for over half of the case backlog, may consider as a priority reform merging the registry with the cadastre . . . ."[113] According to the World Bank, linking the two systems "[saves] time in due diligence and [improves] the security of property rights. . . . [C]ountries with unified agencies score significantly higher on the ease of registering property."[114]

By the time the World Bank released its 2005 report, much-needed land registration reform was well underway in Croatia.[115] Croatia acknowledged its struggles to maintain a functioning land registry and adequate property laws in 2002,[116] and the Ministry of Justice, which oversees the smaller agencies instituting the conversion to the updated system, issued a plan in 2003 to

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106. Case C-305/87, Comm'n of the Eur. Communities v. Hellenic Rep., 1989 E.C.R. I-01461, par. 22. Some exceptions may be made, for example, for agricultural property, nationally protected property, property with a national security interest, etc. *See, e.g.*, Case C-423/98, Alfredo Albore v. Italy, 2000 E.C.R. I-05965. However, such restrictions are only allowed if the restrictions are imputed on both domestic as well as foreign nationals. *See id.*

107. EUR. COMM'N – ENLARGEMENT, *supra* note 8. The SAA was signed in 2002, but implemented in 2005. *Id.*

108. *Id.*

109. REGISTERING PROPERTY, *supra* note 63, at 38.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See generally* LAND REGISTRATION SYSTEM REFORM, *supra* note 96 (explaining the reform which had begun in 2003).

116. *See* REPUBLIC OF CROAT., MINISTRY OF JUSTICE, LOCAL, AND SELF GOV'T, THE REFORM OF THE SYSTEM OF JUSTICE (2002) [hereinafter REFORM OF JUSTICE].

reform its judiciary, land registry, and cadastre offices.[117] Within the 2003 plan was a proposal to hire more part-time Land and Cadastre officials, over 440 of whom had already been hired at the time the plan was formally released, in an effort to reduce or solve the national total of over 292,000 backlogged land register and cadastre claims.[118]

The judicial reform called for both an administrative and a technological reform.[119] In reforming its justice system into a unified computerized scheme, the purpose was to meet the international legal standards of the Information and Communications Technology applications, set forth by the European Community.[120] For Croatia to reach the *minimal* levels of those standards, it determined it would be necessary to reengineer the land registry and the land cadastre systems, as well as the justice and commercial court systems, making them digital and internet-ready as immediately as possible.[121] The Commission also suggested a computerized network should link the two systems.[122]

The effort to overhaul Croatia's land registry and cadastre and unify them into a single database initiated in early 2003.[123] The Real Property Registration and Cadastre Project ("Project"), largely funded by grants from the World Bank and EU (in addition to funds from Croatia itself),[124] encompasses four components and is expected to last into 2009.[125] In a nutshell,

> [t]he objective of the proposed project is to build an efficient land administration system with the purpose of contributing to the development of efficient real property markets. This will be achieved by addressing aspects of the supporting infrastructure, especially the real property registration system in the municipal courts [and] the cadastre system that is operated by the State Geodetic Administration . . . .[126]

Though Croatia expects the Project, or the main startup of the registration update process focusing on selected rural and urban areas, to be complete by

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117. *See* REPUBLIC OF CROAT., MINISTRY OF JUSTICE, LOCAL, AND SELF GOV'T, OPERATIONAL PLAN FOR THE IMPLEMENTATION OF THE JUSTICE REFORM (2003) [hereinafter OPERATIONAL PLAN]. Since the computerization of the land register and cadastre has coincided with or paralleled the computerization of the commercial courts and agencies, the two are often discussed in conjunction with one another. *See generally id.*

118. *Id.* at 10.

119. *Id.* at 11.

120. *Id.* at 14.

121. *Id.* at 17.

122. EUROPEAN COMM'N – OPINION, *supra* note 2, at 13.

123. MID-TERM REVIEW *supra* note 11, at 5.

124. *Id.*

125. *Id.*

126. REP. OF CROAT., MINISTRY OF JUSTICE, STATE GEODETIC ADMINISTRATION, REAL PROPERTY REGISTRATION AND CADASTRE PROJECT, http://www.uredjenazemlja.hr/projekt.do (last visited Jul. 17, 2008).

2008, the full switchover, covering the entire landscape of the country, will likely take upwards of fifteen years.[127] The harmonization process within the newly created Land Database works on a per-parcel basis and requires roughly two years per parcel—from the preliminary planning to the entry and verification.[128]

The first element of the Project, Component A, concentrates on the development of the land registration system.[129] Its basic objective is to "[a]dvance institutional capacity of the Ministry of Justice and 109 land registries within municipal courts for implementing an efficient real property registration system characterized by a predictable transaction timeframe and the reduction of transaction costs."[130] Another primary feature of this initial prong is to reduce backlogs within the registries, performed by implementing an improved administration, information technology, and establishing a new Registration Management System within the Ministry of Justice for monitoring land registrations.[131] Implementing Component A includes introducing new technology and transcribing the old, crumbling register into the new digitalized system, hiring new staff, and training new and old staff members.[132] This Component seeks to secure property rights within the system.[133]

Component B of the Project focuses on the cadastre and is broken into four subcomponents.[134] Specifically, the goal of B1 is a "new, integrated cadastre system," including introduction of new information technology to the current cadastre maps.[135] Additionally included is the goal to create customer friendly "help-desks."[136] Components B2 and B4 are oriented toward a new "Multipurpose Spatial Data System" for use in land planning, whereas Component B3 is for "maritime domain registration" of Croatia's long coastline and scattered islands of the Adriatic Sea.[137]

Component C is for "institutional cooperation and information technology," or, more simply, harmonization between the land register and the cadastre so the unified system reflects the actual situation in the field.[138] This is where the proverbial rubber meets the road. Contractors of the government will perform new surveys, including aerial photography, and update the cadastre accordingly.[139] Meanwhile, the government will work to ensure registration reflects actual ownership and actual ownership is aligned with the correct

127. *Id.*
128. *See* Blazevic, *supra* note 55, at 6-11.
129. MID-TERM REVIEW, *supra* note 11, at 8.
130. *Id.* at 9.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 10.
135. *Id.*
136. *Id.*
137. *Id.* at 11.
138. *Id.* at 12.
139. *See id.*

boundaries as determined by the new surveys.[140] Finally, the Geodetic Administration and Ministry of Justice will launch a unified, electronic system, linking first the cadastre with the register and, eventually, both with the right owner.[141] The final piece of Component C includes a publicity campaign including distribution of manuals making it easier to challenge disputed land.[142] The publication of an electronic land register is also intended to serve this function.[143]

The fourth and final Component includes "project management, training and implementation of research and activities directed at achieving the sustainability of Components A, B and C."[144] Thus, Component D involves more maintenance, administrative, and human resources capabilities geared toward "comprehensive removal of obstacles to the development of an efficient real property and cadastre registration infrastructure," with the intended goal of stabilizing the real estate market.[145] Publicity, public information, and customer service feedback play a larger role in this final leg than in Component C.[146] "Awareness of real property rights and registration requirements" is the stated goal of this Component, to better "incite participation as well as awareness of the importance of the real property registration . . . [through] project monitoring, evaluation, [and] reporting."[147] This public awareness campaign also seeks to build trust in the real estate system, and thus stimulate investment in the process—benefiting both the economy of Croatia as well as its desire to catch up with the market standards of the EU.[148]

Toward the end of 2003, Croatia released a governmental mandate for the upcoming four years in hopes of speeding (or initiating) negotiations with the EU, which at that time had not yet formally begun.[149] This governmental mandate further pushed the importance of a reworked land registration system, only this time in the explicit context of the EU rather than in a judicial context, indicating "[l]egal security in real estate trade is a prerequisite for stable economic development, investment and entry into the European Union."[150] The

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140. *Id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.* at 13.

145. *Id.*

146. *Id.*

147. REP. OF CROAT., MINISTRY OF JUSTICE, STATE GEODETIC ADMINISTRATION, COMPONENT D – PROJECT MANAGEMENT, TRAINING, AND MONITORING, http://www.uredjenazemlja.hr/projekt.do (last visited Jul.. 17, 2008).

148. BUILDING UP CROATIA'S REAL ESTATE MARKET, *supra* note 10.

149. *See* REP. OF CROAT., THE PROGRAM OF THE GOVERNMENT OF THE REPUBLIC OF CROATIA FOR THE 2003 – 2007 MANDATE 2, *available at* http://vlada.hr/en/preuzimanja/publikacije/program_vlade_republike_hrvatske_u_mandatnom_razdoblju_2003_2007 (last visited Jun. 11, 2008) [hereinafter MANDATE]. Negotiations between the EU and Croatia began in Oct. 2005. EUR. COMM'N – ENLARGEMENT, *supra* note 8.

150. MANDATE, *supra* note 149, at 19.

mandate announced "the government will modernise the cadastre and geodic system [and] launch a programme to bring the land registry into line with the cadastre and geodic register according to the standards of the European Union, with the aim of establishing an integrated system throughout the entire country."[151]

D. Charting Croatia's Progress

In March 2005, the 3rd Croatian Congress on Cadastre, an international fair of geodesy, was held to gauge and discuss Croatia's progress.[152] The conference specifically stressed the need for a functioning digital land registry and cadastre as a requirement for joining the EU.[153] Organized by the Croatian Geodetic Society and attended by over 800 professionals and experts on cadastre, geoinformatics, and land management, the Congress addressed laws on state survey, real estate cadastre, and land registry and property rights.[154] In pooling their knowledge and experience, the Congress and its visitors discussed other methods used by different countries and attempted to discern how to expedite Croatia's reform.[155] The Congress proclaimed the first phase of establishing a real estate cadastre was complete, and Croatia had passed laws in furtherance of the Project's goals.[156] The Ministers of Justice and Agriculture attended to lend their support, easing initial general concerns that the relevant political actors lacked interest in the venture.[157] The conference was considered a great success by the International Federation of Surveyors, and Croatia gained international recognition that it was making serious strides toward perfecting its land registry and cadastre in hopes of aligning it with the land registry and cadastre of the other EU Member States.[158]

On May 13, 2005, Croatia finally accomplished one of the major feats of the Project.[159] The Ministry of Justice launched its internet land registry, allowing the availability of land registry data online for the first time in Croatian history.[160] Bearing in mind the backlog within the judicial system of

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151. *Id.*

152. Andreas Dees, *3rd Croatian Congress on Cadastre and 2nd INTERGEO EAST Gathers about 800 participants*, INT'L FED'N OF SURVEYORS (Mar. 13, 2005), *available at* http://www.fig.net/news/news_2005/croatia_intergeoeast_2005.htm.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. LAND REGISTRATION SYSTEM REFORM, *supra* note 96, at 11.

160. *Id.* The new, digital Croatian land register is available at www.pravosudje.hr. MID-TERM REVIEW, *supra* note 11, at 27. The cadastre is available at www.katastar.hr. Real Property Registration and Cadastre Project Project Implementation Unit, *Report on Project Implementation for 2007*, 9 (2008), *available at* http://www.uredjenazemlja.hr/dokumenti.do (last visited Jun. 10, 2008) [hereinafter *Report on Project Implementation for 2007*].

land registry cases, the Ministry of Justice hoped to reduce the "great number of customers coming to land registries in order to establish their real property status."[161] The land registry gives Croatian citizens peace of mind and allows them to place more trust in their government when they can glance online and view their name as associated with a particular parcel.[162] The government successfully launched the e-cadastre and linked it with the register later that year.[163] By successfully linking the cadastre and register through the internet, land registry or cadastre offices may now share information with one another, further expediting the process.[164] Furthermore, the system backs up all data on a national scale.[165] The more technologically advanced the system gets, the quicker the reduction of backlogs proceeds.[166] In addition, the new, digital land register stimulated immediate interest: in the seven-and-one-half months between its unveiling and the end of 2005, the site received nearly 21 million visits—or just under 90,000 hits *per day*.[167]

In February 2006, four months after formal negotiations finally began with the EU, Croatia held another conference—this time with its principal financers of the nearly-€45 million Project.[168] This short list included the World Bank, which is underwriting more than half of the reform, as well as European Commission delegates, whose CARDS Programme (Community Assistance for Reconstruction, Development, and Stabilisation) contributes another quarter of the budget.[169] The 2006 Mid-term Review of the Real Property Registration and Cadastre Project was a comprehensive, up-to-date reflection initiated by the government and prime minister of Croatia.[170] Keeping in mind the objective of the Project was a new real property and cadastre system and improved real estate market, the conference touted that the

161. LAND REGISTRATION SYSTEM REFORM, *supra* note 96, at 11.

162. Press Release, The World Bank, Croatia Has Made Great Progress in Improving its Land Administration (2006), http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/0,,contentMDK:20823050~menuPK:258613~pagePK:2865106~piPK:2865128~theSitePK:258599,00.html [hereinafter Press Release].

163. MID-TERM REVIEW, *supra* note 11, at 17.

164. Press Release, *supra* note 162.

165. *Id.*

166. *Id.*

167. *See* LAND REGISTRATION SYSTEM REFORM, *supra* note 96, at 13.

168. MID-TERM REVIEW, *supra* note 11, at 5.

169. *Id.* The CARDS Programme is aimed particularly at the return of refugees in Croatia, by means of "reconstruction, rehabilitation of public, social, and economic infrastructure, de-mining, and support to small and medium-sized enterprises." European Commission – Enlargement – CARDS Programme – Croatia, http://ec.europa.eu/enlargement/financial_assistance/cards/bilateral_cooperation/croatia_en.htm (last visited Jun. 11, 2008). CARDS is particularly invested in the Land Registration and Cadastre Project because "special attention is . . . being given to the restitution of property" in the CARDS Programme. *Id.*

170. MID-TERM REVIEW, *supra* note 11, at 3.

World Bank had given the Project its highest rating five months earlier.[171]

By the end of 2007, the Project was finally taking shape. In Croatia's latest evaluation of its reform, Croatia estimated nearly all (98.19%) of the total number of land registry files had been transcribed to digital format, and verification of those entries within the cadastre was nearing half (40.46%).[172] Land registry data digitalization or transcription had already been completed in 101 municipal court land registry offices, and verification with the cadastre had been completed in sixteen of those offices.[173] Even more importantly, 100% of the land registry files had been transcribed and nearly every file had been verified in the Municipal Civil Court of Zagreb, the nation's capital.[174]

The advancements by Croatia earned it international recognition by the World Bank at the beginning of 2008.[175] Thanks to its Real Property Registration and Cadastre Project, which coupled with other advancements to make it easier to obtain credit[176] and start a business,[177] the World Bank ranked Croatia as the second-best reforming country in the world in 2007.[178] This was the second consecutive year the World Bank placed Croatia's reforms near the top.[179] By digitizing the land registry, Croatia reduced the time need to register land from 956 days in 2005 to 174 days in 2007[180]—a reduction of greater than 70%.[181]

While Croatia has made great strides in cutting the time necessary to register property, there is still room for improvement. Croatia's "Ease of Registering Property" rank[182] with the World Bank jumped eight spots from 2007 to 2008,[183] but Croatia is still ranked 99th of 178 economies in that

171. Press Release, *supra* note 162.

172. *Report on Project Implementation for 2007*, *supra* note 160, at 9.

173. *Id.*

174. *Id.*

175. *See* THE WORLD BANK GROUP, DOING BUSINESS 2008 1 (2008), *available at* http://www.doingbusiness.org/documents/FullReport/2008/DB08_Full_Report.pdf (last visited Jun. 11, 2008) [hereinafter Doing Business 2008].

176. *Id.* at 2.

177. *Id.* The advancements for starting a business also included digitalization, namely computerization of business registration records. *Id.* at 13.

178. *Id.* at 2.

179. *Id.* at 1.

180. *Id.* at 2.

181. *Id.* at 27.

182. As the World Bank's judge of international business practices, "Doing Business measures the ease of registering property based on a standard case of an entrepreneur who wants to purchase land and a building in the largest business city. It is assumed that the property is already registered and free of title dispute." Doing Business 2008 – Croatia, *supra* note 66, at 23.

183. The World Bank Group, Explore Economies, Doing Business in Croatia, http://www.doingbusiness.org/ExploreEconomies/?economyid=52 (last visited Jun. 11, 2008) [hereinafter Explore Economies]. Note the World Bank Reports reflect the previous year, so the 2008 Report reflects 2007 figures. There were no rankings for "Registering Property" in the 2006 Report, so 2007 Report figures are used. According to the 2007 figures, Croatia required 399 days to register property in 2006. Doing Business 2008, *supra* note 175, at 25.

category.[184] In 2007, the average number of days required for other countries in Croatia's region was roughly 92 days, or a little more than half as long as Croatia's figures.[185] The developed OECD nations averaged only four weeks to register property from application to final registration.[186]

The land registry offices in Croatia remain a part of the municipal courts, albeit with some independence.[187] One way to further reduce the backlog in Croatia might be to completely sever the land registry offices from the court system altogether. According to the World Bank, "[i]n countries where courts are involved in registering property, the process takes 70% longer on average."[188] The World Bank then notes the hindrance this has on the judiciary, taking time away from principal work of judges to resolve disputes.[189] As the next section will demonstrate, complete removal of the land registry offices from the judicial system may "kill two birds with one stone," efficiently leading to a reduction of the gross judicial backlog as well.

IV. AID TO CROATIA'S OVERBURDENED AND OUTDATED JUDICIARY

For Croatia to recognize legal rights in real property, an owner must register his name with his respective parcel in the land register, which is part of the local municipal court.[190] Each court of EU Member States serves as a court for the EU.[191] While the court system of Croatia is not yet within that judicial ring, the EU expects Croatia to act as if it were as a precondition to EU membership.[192] Thus, a discussion of the judicial woes of Croatia is necessary to convey the interplay between the land register and Croatia's pending EU application.

A. The Judicial Systems of the EU & Croatia

The judicial branch maintains a strong and significant influence within the EU, as it must both harmonize and somewhat generalize the interpretation and application of law and policy regarding scores of increasingly diverse cultures.[193] This includes not only the few courts at the apex of the EU judiciary, but trickles down to the national and municipal courts within each respective member state.[194] As courts of the EU, national courts within EU

184. Explore Economies, *supra* note 183, at 1.
185. *Id.*
186. *Id.*
187. *See Report on Project Implementation for 2007*, *supra* note 160, at 8-9.
188. Explore Economies, *supra* note 183, at 28.
189. *Id.*
190. *See* Dunja Kuecking & Milivoje Zugic, LLRX, *The Croatian Legal System*, http://www.llrx.com/features/croatia.htm at 10.
191. Capeta, *supra* note 37, at 1.
192. *See id.* at 2.
193. *See id.* at 1.
194. *Id.*

member states are obliged to interpret both national and EU law in conformity, or not inconsistent, with EU interpretation to achieve a uniform body of community law, or the acquis.[195] This is called the "principle of direct effect"[196] and has been spelled out through the holdings and dicta of the European Court of Justice.[197] The proposition also stems from the loyalty clause of Article 10 of the EC Treaty, requiring each member state to facilitate the objectives of the Community.[198]

The duty of "conform interpretation" is only binding on EU Member States, and not on candidate countries like Croatia.[199] Nevertheless, conformance to the acquis requires an alignment of a candidate country's legal system to the comprehensive body of EU law before accession—partly for the practical reason of uniformity of law, but also because deviations from Community law are easier to remedy before accession, while the EU still holds the bargaining chips, than after.[200] Thus, a given candidate country will have to adjust its legal system to align with the EU as a precursor to admission.[201] Law professor Tamara Capeta of Croatia's University of Zagreb observes how seriously the EU regards this initial stepping-stone: "if a candidate state does not start with legal adjustments, the political credibility of its membership commitment will fade, both internally as well as towards the EU."[202] This can be catastrophic, or at least counterproductive, for a candidate country such as Croatia.

Yet this adjustment has been one of the major Achilles' heels for Croatia, and it spurs from a variety of sources.[203] The 2002 Stabilisation and Association Report by the European Commission, a pre-application assessment of a particular country upon which that country's Stabilisation and Association Agreement to accession is based, termed the judiciary of Croatia as "one of the most problematic areas."[204] The Report cited inappropriate political influence, a backlog of 1.2 million cases, poorly qualified court personnel and staff (including judges), a disorganized administration system, and lack of budgetary

195. *Id.*

196. *Id.* at 2.

197. *See* Case C-106/77, Italian Finance Administration v. Simmenthal S.P.A., 1978 E.C.R. I-0629 (finding Community law prevails over prior and posterior national law); *see also* Case C-26/62, Van Gend & Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. I-003 (holding clear and precise provisions of Community law are directly applicable by authorities of Member States and create rights which national courts must protect); *see also* Case C-14/83, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, 1984 E.C.R. I-01891 (indicating national law, enacted prior or posterior to EU accession, must be interpreted in accordance with Community law).

198. Capeta, *supra* note 37, at 4.

199. *Id.* at 7.

200. *Id.* at 10.

201. *Id.* at 8.

202. *Id.*

203. *See generally* STABILISATION AND ASS'N REP., *supra* note 38.

204. *Id.* at 6.

efficiency.[205] The Commission called for "radical and urgent" reform,[206] but the situation would only get worse before it got better.

Recognizing these problems as it applied for membership, Croatia attempted to address the issues in November 2002[207] and again in 2003.[208] The government went so far as to say it was

> worried by the situation in the justice system . . . . The government is aware that the current situation in the overall justice system has a negative impact on the stability of the society, favours the stagnation of the economy and prolongs the intolerable political influence on the justice system. The Government is determined to implement a comprehensive and thorough reform of the justice system.[209]

Nevertheless, when the Commission released its formal opinion on the membership application of Croatia in 2004, the Commission acknowledged Croatia's proposals, but remained skeptical, indicating "a number of measures have been announced recently, [but] . . . it remains to be seen what the real impact will be."[210] On other proposals, the Commission reiterated "tangible results cannot be expected soon," and "the time frame [of Croatia's five-year plan, proposed in 2002, was] rather unrealistic."[211]

The Commission's 2004 opinion further pointed out "[i]n the second half of the 1990s, Croatia's judicial system lacked independence and efficiency, and . . . major challenges remain to be addressed."[212] Citing the increased backlog of what had by then grown to nearly 1.4 million cases (up 200,000 from two years earlier), as well as the manner or time in which lower courts execute the rulings of higher courts, the Commission concluded "[c]itizens' rights are therefore not fully protected by the judiciary in accordance with the provisions of [Croatia's] constitution."[213] Elaborating on this inefficiency and the backlog caused as a result, the Commission determined "the biggest part of the backlog of cases within the Croatian judiciary is connected with registration cases and the enforcement of civil judgments."[214]

As a result of its shortcomings in the judiciary, "[s]ince its accession in 1997, Croatia has been repeatedly sanctioned by the European Court of Human Rights (ECHR) for a variety of fair trial [and length of proceedings] violations

205. *Id.*
206. *Id.*
207. *See* REFORM OF JUSTICE, *supra* note 116.
208. *See* OPERATIONAL PLAN, *supra* note 117.
209. MANDATE, *supra* note 149, at 20.
210. EUR. COMM'N – OPINION, *supra* note 2, at 18.
211. *Id.* at 19.
212. *Id.* at 18.
213. *Id.*
214. *Id.* at 15.

that are widespread throughout its judicial system . . . ."[215] In 2007 alone, the ECHR issued thirty-one such judgments against Croatia for undue adjudicative delays, including a judgment finding a multi-year delay in returning private property granted by the state to third persons violated the owner's right to property.[216] The ECHR also ruled the judicial and administrative remedies for repossession of property as inadequate.[217] The June 2007 Accession Partnership, based on the simultaneously-released Commission's Progress Report on the accession of Croatia, again listed the reduction of the judicial case backlog and length of judicial proceedings among the top political priorities for Croatia to address.[218]

The flaws exemplified above include a widespread epidemic through a diverse range of the judicial sector;[219] consequently, a comprehensive reform of the judiciary (as well as substantive law) ranks among the top of Croatia's priorities before it enters into the EU.[220] One potential issue is whether Croatia can even complete such a reform. Professor Capeta notes that while judicial interpretation aligned with EU law not only advances Croatia toward EU membership, but also empowers the judicial role within the Croatian political community, there is lingering uncertainty as to whether such judges can or are willing to break from their deeply ingrained habitual patterns of straightforward, formalistic application of codified law.[221] On the other hand, in 2003 an inter-political consensus already found EU membership would benefit Croatia, and popular approval of potential membership hovered around three-quarters from 2000 to 2003.[222]

Croatia has made progress in addressing the judicial ailments, though much still remains to be done.[223] While the judicial reform in Croatia could itself be a topic for another law review note or article, it is not the narrow issue to be addressed here. Rather, this Note turns at this junction toward the effects of one particular judicial reform: the updating and computerization of the records systems, including and especially the land register and cadastre.

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215. ORG. FOR SECURITY AND CO-OPERATION IN EUR. MISSION TO CROATIA, Reforming the Judiciary, http://www.osce.org/croatia/13396.html (last visited Nov. 2, 2006).

216. COMM'N OF THE EUROPEAN CMTYS, Comm'n Staff Working Document, Croatia 2007 Progress Report, 10 (2007), *available at* http://www.delhrv.cec.eu.int/images/article/File/croatia_progress_reports_en.pdf (last visited Jun. 11, 2008).

217. *Id.*

218. COMM'N OF THE EUROPEAN CMTYS, Proposal for a Council Decision on the Principles, Priorities and Conditions Contained in the Accession Partnership with Croatia and Repealing Decision 2006/145/EC, 6 (2007), *available at* http://www.delhrv.cec.eu.int/images/article/File/croatia_accession_partnership_en.pdf (last visited Feb. 8, 2006) [hereinafter 2007 Council Decision].

219. EUR COMM'N – OPINION, *supra* note 2, at 16.

220. STABILISATION AND ASS'N REP., *supra* note 38, at 13.

221. Capeta, *supra* note 37, at 15.

222. Samardzija, *supra* note 6, at 1.

223. EUR. COMM'N – OPINION, *supra* note 2, at 18.

B. Reducing the Judicial Backlog

In its 2005 report on registering property, the World Bank offered its advice specifically to Croatia: "Much like new business registration, land registration is inherently an administrative, not adjudicative process, and does not require a judge's attention."224 By then Croatia had already put the wheels in motion to heed this advice, as legislation passed a year earlier significantly eased the workload of the courts:

> The Law on Amendments to the Land Registry Act (NN 100/04) stipulates that certified [land registry] clerks shall perform operations related to the land registration procedure independently. The transfer of authority over land registration procedures as well as the land registration decision-making process to certified land registration clerks have greatly unburdened land registry judges and increased the effectiveness of operations within land registries of municipal courts.[225]

In addition to providing legal training to the new land registry clerks, the education plan included drafting a certification exam as well.[226] Further education was to be provided to some 2000 or more employees among 109 offices.[227] In addition to legal and technical training, land register officials and administrative assistants are learning English, as well, perhaps in anticipation of (or to keep up with) increased foreign direct investment in the real property market.[228]

By the time of the Mid-Term Review, over fifty-five percent of the old register had been transcribed into electronic form.[229] Given that over fourteen and one-half million plots of land remained to be transcribed, the progress made was proclaimed a great success.[230] This was further evidenced by a thirty-seven percent reduction in backlogged claims from three years earlier, and a process that was accelerating on a national scale in settling such claims.[231]

However, transcribing the hand-written land register files is one thing, however; doing so accurately is quite another. As the World Bank bluntly noted, "[i]f paper records are inaccurate, putting them in a computer won't help."[232] That seems to be the next issue for the Project to deal with. As

224. REGISTERING PROPERTY, *supra* note 63, at 38.
225. LAND REGISTRATION SYSTEM REFORM, *supra* note 96, at 6.
226. MID-TERM REVIEW, *supra* note 11, at 14.
227. BUILDING UP CROATIA'S REAL ESTATE MARKET, *supra* note 10.
228. MID-TERM REVIEW, *supra* note 11, at 16.
229. LAND REGISTRATION SYSTEM REFORM, *supra* note 96, at 8.
230. Press Release, *supra* note 162.
231. *Id.* at 8.
232. REGISTERING PROPERTY, *supra* note 63, at 39.

mentioned in Section III of this Note, Croatia is in the process of verifying titles once they have been transcribed, though this process is proving to be painfully tedious and time-consuming.[233] While the land registry cases make up only a fraction of the backlog in the overall judicial system, Croatia's Ministry of Justice is implementing measures to reduce the land registry backlogs in individual courts.[234]

One such measure is a crackdown on careless or oblivious applicants.[235] Courts no longer accept incomplete or deficient applications, nor do they allow amendments to such applications; these applicants are instead shuffled to the back of the line.[236] The World Bank Group noted this more stringent practice has helped to alleviate the backlog within the courts.[237] By the end of 2007, the number of pending land registry cases in the municipal courts was 122,501, more than 2 ½ times lower than the backlog at the end of 2004;[238] despite the drastic reduction, the number of incoming land registry cases in 2007 increased by 39% over the 2004 figures.[239] The mere fact the land registry offices of Croatia were able to reduce the land registry backlog, despite a higher influx of cases, suggests Croatia is finally establishing a land registry system that is more efficient than ever. The Project is expected to be fully implemented by the end of September 2008.[240]

Despite the progress made, Croatia still lists the reduction of its judicial backlog as one of its top priorities, including within the land registry offices.[241] While the new land registry database will ease the pressures of the judicial backlog, much work remains before the judiciary is up to par.[242] Before the reform began, land register and property claims cases accounted for roughly half of the backlog;[243] this means Croatia must determine how to reduce the other half. Additionally, other problems in the judicial system remain, including high turnover of judges, a severe lack of efficiency and independence, and a lack of respect for the decisions of higher courts.[244] While the Croatian judiciary is not yet bound to follow EU law, it will be obligated to do so once Croatia rises to EU member status.[245] As the World Bank pointed

233. *See* E-mail from Professor Tatjana Josipovic, Professor of Law, University of Zagreb, to Kalin Schlueter, law student, Indiana University—Indianapolis (Jan. 16, 2007, 03:02:31 EST) (on file with author). Professor Josipovic noted the "[p]roblem is that most of [the] entries are still not accurate." *Id.*

234. *Report on Project Implementation for 2007*, *supra* note 160, at 11.

235. Registering Property in Croatia, *supra* note 78, at 3.

236. *Id.*

237. *Id.*

238. *Report on Project Implementation for 2007*, *supra* note 160, at 11.

239. *Id.*

240. *Id.* at 5.

241. *Id.* at 21.

242. *See* 2006 Council Decision, *supra* note 40, at 32.

243. *Id.* at 21.

244. *See* EUR. COMM'N – OPINION, *supra* note 2, at 18.

245. *See* Capeta, *supra* note 37, at 2-3.

out in September of 2006, "[a] sluggish judiciary continues to be the biggest problem, even though the most praise went to the computerization of land registers."[246] Thus, reforming the real property system can only do so much for the exceedingly troubled judiciary. Nevertheless, the reform has not only greatly benefited the judicial system, but has also played a key role in easing political, economical, and human rights tensions in Croatia, as will be seen in the following sections.

V. TYING REAL PROPERTY LAWS TO HUMAN RIGHTS VIOLATIONS

To understand why the real property system of Croatia was, and is, in complete disarray, one must consider the relatively recent emersion of Croatia from a socialist regime where nearly all property belonged to the state.[247] This issue splits into two equally significant yet inherently intertwined sub-issues: a half-century of totalitarian state ownership,[248] and a mass displacement of several different ethnic factions during both the socialist era of Yugoslavia[249] as well as the years following Croatia's 1991 declaration of independence.[250]

A. Ethnic Lines, Both Territorial and Ideological

Croatia's ties to Yugoslavia nearly predate the rise of communism in Central and Eastern Europe.[251] Following World War I, and until World War II, Croatia was a part of the Kingdom of Yugoslavia, for the most part a dictatorial monarchy.[252] Nevertheless, the Kingdom of Yugoslavia guaranteed property rights.[253] During World War II, Germany and Italy occupied Croatia and much of the Kingdom of Yugoslavia, declared Croatia an independent state, and installed a fascist Italian dictator.[254] A series of ethnic cleansings of Serbs, Jews, and anti-fascist Croats turned the political tide in Croatia completely away from fascism, and in 1945 the People's Republic of Croatia

246. The World Bank, *World Bank Study on Doing Business in Individual Countries, Croatia Far From Its European Competitors*, (Sept. 7, 2006), http://www.worldbank.hr/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/CROATIAEXTN/0,,contentMDK:21044096~pagePK:141137~piPK:141127~theSitePK:301245,00.html [hereinafter *Croatia Far From Its European Competitors*].

247. *See* Branko M. Peselj, *International Aspect of the Recent Yugoslav Nationalization Law*, 53 AM. J. INT'L L. 428, 428-29 (1959).

248. MSN Encarta, *supra* note 21.

249. Peselj, *supra* note 247, at 428-29.

250. ORG. FOR SEC. AND CO-OPERATION IN EUR., MISSION TO CROAT., STATUS REPORT NO. 15 ON CROATIA'S PROGRESS IN MEETING INTERNATIONAL COMMITMENTS SINCE JULY 2004, Nov. 21, 2004, *available at* http://www.osce.org/documents/mc/2004/11/3828_en.pdf [hereinafter MISSION TO CROAT.].

251. *History and Homeland War*, http://www.hr/croatia/history (last visited Jun. 11, 2008).

252. MSN Encarta, *supra* note 21.

253. THE CONST. OF THE KINGDOM OF YUGOSLAVIA art. 22.

254. MSN Encarta – CROATIA, http://encarta.msn.com/encyclopedia_761577939/Croatia.html (last visited Jun. 11, 2007).

became one of six republics to compose the Socialist Federal Republic of Yugoslavia ("Yugoslavia").[255]

As is common with socialist republics, real property rights were abolished under Yugoslav rule.[256] In the 1950s, one professor noted the main purpose of nationalizing all buildings with more than two apartments, as explained by Yugoslav officials, was to "eliminate the last traces of the capitalist economy."[257] Private ownership of registered property was abrogated by this law, and although the owners were deprived of their property immediately, they were not compensated until their lots were actually taken into possession, and often in a much weaker manner.[258]

Forfeiture of real property might have been the least of some citizens' worries. The condemnation process was often merely an instrument in a greater scheme to purge the countryside of ethnic groups now unwelcome in their own backyards.[259]

> [Property laws were] critical, particularly in refugee flows where genocide and ethnic cleansing has been involved. Property laws can be used as a key instrument in ethnic cleansing. By first forcing people to flee for their lives and then passing laws which designate the property left behind as abandoned, in effect, properties are expropriated without compensation. When these same properties are then turned over to members of one's own ethnic group who have fled the territory of the other side, or if displaced people from the other side simply move into vacated properties, squatter's rights for these homeless people now complicate the legal issues involved in obtaining the property back following a peace agreement.[260]

This continued for decades until Croatia, along with Slovenia, declared its independence from Yugoslavia in 1991.[261] Croatia soon found itself at war with the remaining republics of Serbia and Montenegro, which wished to keep the dissolving Yugoslavia together.[262]

Attacks within Croatia's own boarders exacerbated its War for

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255. *Id.*

256. Howard Adelman, Unpublished Bosnia book, http://www.yorku.ca/crs/Publications/OCEP%20PDFs/H%20A%20Property%20Laws.PDF (last visited Jun. 11, 2008).

257. Peselj, *supra* note 247, at 429.

258. *Id.*

259. Adelman, *supra* note 256.

260. *Id.*

261. MSN Encarta, *supra* note 21. It is worth mentioning the only two republics to secede from communist Yugoslavia are the only two of Yugoslavia's six former republics to either have gained EU Member State status or be making a noteworthy effort towards it. *Id.*

262. MSN Encarta, *supra* note 254.

Independence. Despite the genocides and displacements which had been commonplace for nearly a half-century, a significant portion of the Croatian population remained of Serbian descent.[263] The majority of these Serbs revolted, and Croatia soon found itself in a four-year battle for independence coming from outside and within its borders.[264] Although Croatia gained international recognition as an independent state on January 15, 1992,[265] the war persisted for another three years.[266] The result was hundreds of thousands of displaced refugees, of both Serbian and Croatian descents.[267] As recently as November of 2004,

> more than *200,000 Croatian Serbs* [Croatian citizens of Serbian descent] were still displaced in Serbia and Montenegro and Bosnia and Herzegovina. According to a report commissioned by the [Organization for Security and Co-operation in Europe], . . . *14 per cent* [sic] of the interviewed sample of Croatian Serb refugees [roughly 28,000] abroad manifested a certain intention to return to Croatia in the coming years.[268]

On Croatia's side, the war also resulted in indictments of numerous Croatian military officers for war crimes by the UN International Criminal Tribunal of the former Yugoslavia (ICTY), including General Gotovina.[269] Relations between displaced Croatian Serbs and Croats remained tense for years following the war's conclusion, with many in Croatia denying the displaced Serbs any right to return.[270]

Following a 2001 study of real property throughout the European margins, the United Nations' Food and Agriculture Organization ("FAO") reported "[o]ngoing war and political instability have left Croatia's economy and land market on rocky ground and, even by 1999, the Croatian population was still subject to serious human rights violations."[271] As a result of the conflict, many Serbs remain displaced either internally or beyond Croatia's borders.[272] A number of minority Serbs have either been unable to or have had

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263. *Id.*
264. *Id.*
265. Kuecking & Milivoje, *supra* note 190, at 1.
266. *Id.*
267. *Id.*
268. MISSION TO CROAT., *supra* note 250 (emphasis in original).
269. MSN Encarta, *supra* note 21.
270. FOR THE RECORD 1998: THE UN HUMAN RIGHTS SYSTEM, CROATIA—COMM'N ON HUMAN RIGHTS, http://www.hri.ca/forthereCord1998/vol5/croatiachr.htm (last visited Oct. 11, 2006).
271. FAO REPORT, *supra* note 97.
272. HUMAN RIGHTS WATCH, INT'L, *Croatia, Second Class Citizens: The Serbs of Croatia*, 11(3)(d) (1999), *available at* http://www.hrw.org/reports/1999/croatia.

difficulties with reclaiming their pre-war land or homes,[273] despite the 1991 Croatian Constitution's guarantee of property rights[274] and rights to equal treatment for both citizens[275] and foreigners.[276] Croatia also constitutionally guarantees freedoms of choice of residence, movement, departure from, and reentry into Croatia.[277]

The most Croatia would do to comply with international human rights laws around the turn of the century, however, was enact lame duck laws.[278] The FAO found "[c]ommissions [had] recently been established to facilitate the redistribution of land and property to pre-war owners, but in practice these commissions [did] little to remove the majority Croats from the property."[279] Furthermore, Croatia enacted a law in 1995 permitting the government to confiscate abandoned property and then assign temporary use to another person, followed by a second law in 1996 permitting ownership to squatters or assigned property after ten years; these laws were repealed in 1998 and 2000, respectively.[280] Nevertheless, "it is reported that requests can still be submitted for obtaining ownership after 10 years."[281] Practically speaking, both laws were applied to the explicit detriment of Croatian Serbs who had fled during the war.[282] The Serbs may submit a claim to the municipal housing commissions, but

> [m]unicipal commissions responsible for addressing property return claims have been biased, discriminatory, obstructionist, and slow. Accordingly, minority Serbs still residing in Croatia are typically unable to reclaim their pre-war land and homes, and they remain at risk of the temporary users being able to obtain full ownership rights after 10 years.[283]

As the following section will explain, Croatia reformulated its approach to refugee rights at the turn of the century, though results are only just beginning to emerge.

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273. *Id.*

274. CROAT. CONST. ch. III, pt. 3, art. 48. The Constitution is the "fundamental law," the highest law of the land in Croatia. Kuecking & Zugic, *supra* note 190, at 1.

275. CROAT. CONST., *supra* note 274, at ch. III, pt. 1, art. 14.

276. *Id.* at ch. III, pt. 1, art. 15.

277. *Id.* at ch. III, pt. 1, art. 32.

278. FAO REPORT, *supra* note 97.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* For more on the struggle of Croatian Serbs, *see generally* HUMAN RIGHTS WATCH, *supra* note 272.

B. Making Amends with Displaced Refugees

Overcoming this amplitude of social strife is not the sort of thing that occurs overnight. Croatia formally made amends with the remaining republics of Yugoslavia (today Serbia and Montenegro) in 2000[284] and 2002,[285] largely due to a change at the head of Croatia's executive branch and a shift towards a parliamentary government.[286] Nevertheless, the EU has repeatedly ranked refugee return and regional cooperation among Croatia's most problematic areas,[287] and Croatia has ranked refugee return and regional cooperation among its priorities in turn.[288] Discriminatory treatment toward the relatively few Serbian refugees who *have* returned to Croatia can still be witnessed today.[289]

In tandem with the European Union and its CARDS Programme,[290] the Organization for Security and Cooperation in Europe (OSCE),[291] and others, Croatia is working to support the return of refugees, which means restoration of property rights and homes.[292] In 1998, the UN Commission on Human Rights listed a number of reasons preventing Serbs from returning, including: bureaucratic and legal obstacles, occupation of their homes, delays in funding for reconstruction of destroyed homes, and lack of compensation for destroyed or damaged homes.[293] Since then, however, the government has repealed damaging laws and enacted others to foster return of refugees.[294]

These laws have been directed at remedying the three types of housing

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284. *Yugoslavia Welcomed Back into Balkan Fold*, CNN, Oct. 30, 2000, http://archives.cnn.com/WORLD/europe/10/29/zagreb.neighbours/index.html.

285. *Balkan Heads Vow to Rebuild Peace*, CNN, Jul. 15, 2002, http://archives.cnn.com/WORLD/europe/07/15/balkans.summit/index.html.

286. European Communities, CARDS, *Support for Returning Entrepreneurs*, http://ec.europa.eu/enlargement/pdf/financial_assistance/cards/cases/004_en.pdf (last visited Jun. 11, 2008).

287. *See, e.g.*, 2006 Council Decision, *supra* note 40, at 31.

288. MANDATE, *supra* note 149, at 21.

289. ORG. FOR SEC. AND CO-OPERATION IN EUR., MISSION TO CROAT., *News in Brief*, Jul. 12 – 25, 2006. This mid-2006 news article discusses four Croatian men who were arrested for verbal assaults, graffiti, and stoning and burning houses of Serbian refugees who had returned to Croatia. *Id.* Two of the men were veterans of the Homeland War, and another was a former Croatian police officer. *Id.* Since she returned to Croatia in 1998, one woman stated she had been physically assaulted six times, and this was the second time her house had been destroyed or damaged. *Id.*

290. *See generally* European Commission, CARDS Assistance Program to the Western Balkans Regional Strategy Paper 2002 – 2006 3 (2002) (explaining the aid strategy of the European Commission for the Western Balkans, and ranking return of refugees at the top of its four main objectives) [hereinafter Regional Strategy Paper].

291. *See generally* ORG. FOR SEC. AND CO-OPERATION IN EUR., MISSION TO CROAT., Second Expanded Edition (2005) (a pamphlet or bulletin explaining rights and procedures, and offering assistance, to refugees returning to Croatia) [hereinafter Guidance for Returnees].

292. *See* Rupert Bates, *Food for 101 Dalmations Agent Worldly Wise This Week: Croatia*, THE DAILY TELEGRAPH (London), Jul. 24, 2004, at 10.

293. *See* FOR THE RECORD, *supra* note 270, at 8.

294. *See* EUR. CMM'N – OPINION, *supra* note 2, at 22.

problems faced by Croatia: reconstruction, repossession of property, and provision of housing care for former tenancy right holders.[295] Reconstruction of roughly 200,000 damaged homes and apartments was completed by the end of 2006.[296] The second category involves repossession of homes occupied by Croatian Serbs until they fled during the mid-1990s, only to have their homes reoccupied by Croatian refugees, either from within Croatia or from Bosnia & Herzegovina.[297] Croatia has made substantial progress in repossessing these residences, but was sluggish in undertaking the task from the outset.[298] Its stuttering approach was largely contributable to the lack of alternative housing, the want of self-imposed motivation, and the failure to enforce repossession adjudications.[299] Finally, the lack of alternatives to those refugees who had formerly held occupancy/tenancy rights in formerly socially-owned apartments had yet to show visible results at the end of 2004,[300] but, with the help of OSCE alternatives, were beginning to become available in certain areas of high concern within Croatia.[301]

Most beneficial to these refugees has been the reform of the property registration system.[302] By requiring validation in land titles during the registration process, Croatia effectively prevents itself from registering the home of a refugee in the name of another or, if it does so, gives itself ample opportunity to correct its mistake.[303] Likewise, the new land surveys accompanying the reformed cadastre require Croatia to reassess land lot sizes, allowing it to determine precisely where it may rebuild if necessary.[304] The return of private property to the original owners was nearly complete by mid-2007, with less than one percent of such property remaining.[305] Nearly 350,000 refugees have returned to Croatia.[306]

Nevertheless, work remains to be done. There remain as many as 25,000 refugees who wish to return, and more than 2,100 reconstruction projects yet to commence.[307] "The main challenge is to accelerate the implementation of housing programmes for former tenancy-right holders wishing to return to Croatia. Around 8,500 applications from returnees for whom a housing

295. *Id.*
296. *Id.*
297. STABILISATION AND ASS'N REP., *supra* note 38, at 9.
298. EUR. CMM'N – OPINION, *supra* note 2, at 22.
299. *Id.*
300. MISSION TO CROAT., *supra* note 250.
301. *See* Guidance for Returnees, *supra* note 291, at 13.
302. *See* LAND REGISTRATION SYSTEM REFORM, *supra* note 96, at 9.
303. *Id.*
304. *See* Regional Strategy Paper, *supra* note 290, at 27.
305. Neven Ljubicic and Vladimir Spidla, *Joint Memorandum on Social Inclusion of the Republic of Croatia*, 43 (2007), *available at* http://www.delhrv.cec.eu.int/images/article/File/Microsoft%20Word%20-%20JIM-en_032007(1).pdf (last visited Jun. 11, 2008).
306. *Id.* at 42.
307. *Id.* at 42-43.

solution has to be provided upon their return to Croatia remain to be dealt with."[308] Thus, the European Commission continues to list refugee return, housing issues, and rights of former tenancy holders among Croatia's top priorities.[309]

While Croatia may not be able to change the minds of every last citizen, it does seem to be doing everything it can to promote the return of refugees, and this is due in large part to the reform and verification process of the land register.[310] Nonetheless, reconstruction, repossession, and housing care programs continue to be a top short-term priority as far as the European Council is concerned, and its opinion is the one that matters when it comes time for Croatia to accede.[311]

VI. STIMULATED FOREIGN INVESTMENT IN THE REAL PROPERTY MARKET

The recent reforms and digitalization of Croatia's land records, and the collateral effects they have had on starting a business and gaining credit, have led the World Bank to name Croatia among its top reformers for the last two years.[312] In addition to saving time, digitalization of land registries saves money and helps secure property rights, each of which are conducive to a fertile investment environment.[313] According to the World Bank, "[e]xpanding access to information in the property registry helps owners to be clearly identified, reducing the transaction costs to determine who owns what and cutting the need for time-consuming due diligence."[314] One commentator notes the enhanced potential for investment:

> The cadastre and registration systems — the land administration system for Croatia — are a basic infrastructure that supports the property market. Much of the wealth of any country is in its land and property . . . . Croatia wants increased investments and needs investments for higher growth . . . . This is the aim of intense efforts underway to help modernize the land registry and cadastre systems in Croatia.[315]

Croatia itself recognized the valuable link between reforming its real property market and the potential for increased foreign direct investment.[316] In

308. *Id.* at 43.
309. 2007 Council Decision, *supra* note 218, at 6.
310. Regional Strategy Paper, *supra* note 290, at 27.
311. 2006 Council Decision, *supra* note 40, at 33.
312. Doing Business 2008, *supra* note 66, at 1.
313. REGISTERING PROPERTY, *supra* note 63, at 38.
314. *Id.*
315. Press Release, *supra* note 162.
316. *See id.*

its 2006 Mid-Term Review of the Project, Croatia and the World Bank

> agreed that secure property rights and an efficient land administration system will reduce impediments and administrative barriers to foreign direct investment in Croatia, increase financial intermediation based on meaningful collateral (mortgaging), and streamline administrative and legal procedures to be in line with EU standards.[317]

Thus, not only do such investments benefit the Croatian economy, but they also push Croatia closer toward EU accession in the process.[318] The EU itself recognized that by simplifying the real property system, beneficial foreign investment is fostered simultaneously with bringing Croatia in alignment with EU norms.[319]

The word seems to be out on the Croatian real property market—or rather, it has been for some time.[320] In 1996, the Journal of Commerce referred to the real property market of Croatia as a potential "boom market;"[321] by 2003, London's Financial Times lamented anyone not already investing in Croatian property, which the Germans had been doing since 1998, had already missed the boat.[322] Investors have not been deterred, however, and Croatia's real property market remained (and remains) one of the hottest.[323] Investment is coming from every angle—from Greece[324] to Ireland[325] and particularly from the British,[326] who purchased fifteen percent more second homes in 2004 than in 2003. Prince Charles was believed to be interested in investing in one Croatian island,[327] and Robert DeNiro, Clint Eastwood, and Sharon Stone were also believed to be interested in investing in a part of Croatia some are calling the "New Tuscany."[328] Though the hype has managed to push prices

317. *Id.*

318. *See id.*

319. BUILDING UP CROATIA'S REAL ESTATE MARKET, *supra* note 10.

320. *See* Clare Dowdy, *Casting the Net Wider: Former Communist Eastern Europe has Possibilities But Don't Expect to Make a Killing*, THE FIN. TIMES, Nov. 15, 2003, at 13.

321. George Kleinfeld, *Doing Business in Croatia*, J. OF COM., Aug. 22, 1996, at 6A.

322. Dowdy, *supra* note 320.

323. Ian Traynor, *Property Boom: Location, Location – A Corner of Croatia Becomes 'New Tuscany': Resentment Grows Over Spiraling House Prices as Foreigners Move In*, THE GUARDIAN (London), Aug. 8, 2006, at 16.

324. Belinda Archer, *Joint Access to Up-and-Coming Places*, THE FIN. TIMES, Nov. 12, 2005, at 6.

325. *Investors See Promise in Central and Eastern Europe*, THE IRISH TIMES, Dec. 30, 2005, at 6.

326. Roger Blitz, *Second-home Owners Rise by 15%*, THE FIN. TIMES, Sep. 11, 2004, at 1.

327. John Flinn, *Balmy Days Along Croatian Riviera; Adriatic Isles have Flavor of Greece, Italy*, THE SAN FRANCISCO CHRON., Jun. 20, 2004, at D8.

328. Simona Rabinovitch, *Croatia Glows*, THE GLOBE AND MAIL (Canada), Jul. 8, 2006, at T1.

upward,[329] especially along the coast,[330] land prices in Croatia are still relatively low, given comparable land elsewhere in the EU.[331] The 12 million-plus hits on Croatia's electronic cadastre further testify as to the activity of the real estate market.[332]

Even the United States has taken notice of the reforms in Croatia.[333] In 2005, the U.S. Department of State remained skeptical in its overall evaluation of Croatia's investment climate, warning potential investors that "[w]hile foreign investors enjoy equality under the law with domestic investors, in practice foreign investors often face difficulties."[334] Further, while the State Department took an extensive look at the "bottleneck" in the Croatian judicial system, the most it said about Croatia's land registry reform was that Croatia had made "some progress."[335]

In the same evaluation a year later, the assessment of the investment climate and land register by the U.S. State Department seemed much more optimistic and significantly less cynical.[336] Opening with a proclamation indicating Croatia has recently emerged "as an attractive destination for investment," the State Department points to several reforms which finally "appear to be bearing fruit."[337] Admittedly, the State Department does point to the opening of official negotiations between Croatia and the EU in October of 2005 as a factor in Croatia's economic turnaround, but did not single it out as the only reason.[338] Among these reasons included both the judiciary and the land register:

> The Croatian government has set a goal of increasing foreign investment and has begun to undertake long overdue measures to improve the investment climate in the country. . . . Reform of the notoriously inefficient judicial system is . . . underway, as is reform of land registries, which includes the digitization of land records.[339]

The evaluation mentions the land management reform not once, but twice—once in a discussion of the judicial system and again in an overall

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329. Josephine Cumbo, *Search for Second Homes Moves Eastward*, THE FIN. TIMES, Feb. 5, 2005, at 22.

330. Christopher Condon, *Countries Feel the European Touch*, THE FIN. TIMES, Nov. 12, 2005, at 4.

331. Rabinovitch, *supra* note 328.

332. *Report on Project Implementation for 2007*, *supra* note 160, at 12.

333. *See* U.S. DEP'T OF STATE, 2006 INVESTMENT CLIMATE – CROAT., *available at* http://www.state.gov/e/eb/ifd/2006/61973.htm (last visited Jun. 11, 2006).

334. *Id.*

335. *Id.*

336. *See* U.S. DEP'T OF STATE, 2006 INVESTMENT CLIMATE – CROAT., *supra* note 333.

337. *Id.*

338. *Id.*

339. *Id.*

analysis of openness to foreign investment.[340] It seems even the U.S. Department of State has caught on—the real estate market in Croatia is finally friendly to the foreign investor.[341]

Despite the praise in recent years, issues remain to be addressed. While the land register tries to keep up with a booming property market—even if the register is digitized, and thus title is publicized—determining the accuracy of the register remains a separate issue.[342] Until 2006, foreign nationals still needed clearance from the Ministry of Foreign Affairs and the Ministry of Justice to purchase property, one of the major steps in the Croatian real estate waiting game.[343] Meanwhile, the most sought-after land is being purchased by foreigners at an astounding rate, leaving little untouched.[344] Local Croats did not seem to mind at first, as they believed their old, rustic properties to be worthless.[345] With EU membership on the horizon, however, and if neighboring Slovenia is any indication,[346] real property prices in Croatia can be expected to continue to rise.[347] As a result of trying to compete with wealthy British, Irish, Greek, American, and other investors, the local population is priced out of the real estate market.[348] The combination of greed from potential moneymaking property, as well as the dwindling amount of property remaining, has generated local resentment toward foreign investment in land.[349]

In efforts to preserve their patrimony,[350] or perhaps merely to prevent the sale of land which may rightfully belong to a displaced Croat or Serb,[351] many Croatians have attempted to halt or slow the sale of real property to foreigners.[352] Despite the local opposition, Croatia has been under pressure from numerous European countries to open its real estate market entirely.[353] More importantly, accession to the EU requires Croatia to abolish all restrictions on acquisition of land determined on the basis of national origin—that is, Croatia is prohibited from blocking foreigners from buying land where it could not already do so to its own citizens.[354] Although certain kinds of lands exist which individuals cannot purchase, such as agricultural land, Croatia universally applies this rule to all potential purchasers—foreign or nationals

340. *Id.*
341. *Id.*
342. Oliver Bennett, *Istria in the Making*, THE FIN. TIMES, Feb. 11, 2006, at 9.
343. *Id.*
344. Traynor, *supra* note 323.
345. *Id.*
346. Fionnvala Sweeney, *Leading Former Yugoslavia into EU*, CNN, Apr. 14, 2004, http://www.cnn.com/2004/WORLD/europe/04/14/eu.slovenia/index.html.
347. *Id.*
348. Traynor, *supra* note 323.
349. *Id.*
350. *Id.*
351. Neil MacDonald, *When the Shelling Stops*, THE FIN. TIMES, Jun. 24, 2006, at 6.
352. *Id.*
353. Traynor, *supra* note 323.
354. *See id.*

alike.[355] In spite of internal resistance, Croatia hopes to have all applicable roadblocks to the acquisition of land by foreigners eliminated by 2009, as required under its Stabilisation and Association Agreement with the EU.[356]

The real issue remains the determination of clear title. Even if a foreigner chooses to purchase property, such a purchase may become jeopardized or voided if it should be determined that the property in question did not really belong to the initial seller, but actually to a displaced Serb or Croat.[357] In fact, one real estate operation was revealed in 2005 to have dealt more than 10,000 properties belonging to displaced Croatian Serbs through forged documents, and much of this *kuna* greased the palms of Croatian officials.[358] Additionally, Croatian property tends to pass through families, so the possibility of multiple legitimate claims to a single piece of property, requiring all members of a family to agree to a sale of the property before it may become legitimate, is not uncommon.[359] Despite the presence of these issues, the real estate market remained largely unregulated until recently; only since 2004 have real estate agents been required to be registered with local Croatian Chambers of Commerce.[360]

VII. CLEANING UP CROATIA'S CORRUPTION

In evaluating Croatia's 2003 application for EU membership, the European Commission in 2004 cited corruption as yet another troubling issue and one in need of much attention.[361] This included not just political corruption generally, but the Commission also cited influence at the judicial level as well.[362]

Indeed, viewed closely, one can see just how interconnected the issues plaguing Croatia really are. In 2005 it was revealed corrupt state officials were cooperating with organized crime syndicates to forge purchases of homes abandoned by refugees and then reselling them to Croatian or foreign nationals, all while turning a huge profit.[363] Although it had been going on for years, it was only unearthed immediately before negotiations with the EU were set to begin, and thus many EU diplomats knew nothing of the scandal.[364] Because of

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355. *See* Bates, *supra* note 292.

356. Traynor, *supra* note 323.

357. *See* Bates, *supra* note 292.

358. Vesna Peric Zimonjic, *Croatia Tilts Toward EU Membership in Presidential Election*, THE INDEPENDENT (London), Jan. 3, 2005, at 17. The *kuna* is the national currency of Croatia. THE CIA FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/hr.html#Econ (last visited Aug. 5, 2008).

359. Glasgow, *supra* note 6.

360. *Id.*

361. *See* EUR. COMM'N – OPINION, *supra* note 2, at 15.

362. *Id.* at 14.

363. Vesna Peric Zimonjic, *Balkan Home Truths: How Croatia Swindled its Exiled Serbs*, THE INDEPENDENT (London), Feb. 4, 2005.

364. *Id.*

the length of the negotiation process, Croatian President Stjepan Mesic admitted this "cunning new variation on the theme of ethnic cleansing" could very well tarnish Croatia's image in the eyes of the EU.[365]

As the World Bank has found, the length of time necessary to register property in Croatia may have a correlation with the high rate of political dishonesty in Croatia.[366] "More procedures mean more delays and more chances for officials to demand bribes, as every encounter between the entrepreneur and official is an opportunity for corruption."[367] In addition to the length of time needed to register property in Croatia, the process also involves five steps and costs five percent of the property value.[368] While neither of these latter figures is extraordinary,[369] New Zealand stood out as a role model in 2005 by requiring only two days to register property, encompassing two steps and costing only 0.1 percent of the property value.[370] Norway required only one day.[371] These figures roughly reflect the goal of Croatia, which hopes to reduce the entire registration process to five days.[372]

The World Bank further added that cumbersome property registration entangled with too much bureaucracy leads to informal keeping of assets (i.e., not registering them) and increased levels of corruption.[373] "Simple procedures to register property are also associated with greater perceived security of property and less corruption."[374] In fact, private investors may well find it easier to form a company and acquire property in the name of the company, so the company may buy and sell property without having to go to the registry.[375] But this process also involves a number or permits, licenses, approvals, etc.—the incommodious red tape that accompanies a business formation.[376] Nevertheless, some may prefer informal transactions to the long delay of waiting for property registration, effectively circumventing the land register altogether.[377] For example, in Croatia, it took twelve steps to form a business in 2005, compared to five steps for registering property; but since the business formation procedure avoided the backlogged courts, and does not always

365. *Id.*
366. *See* REGISTERING PROPERTY, *supra* note 63, at 35.
367. *Id.*
368. DOING BUSINESS 2005, *supra* note 86.
369. *Id.*
370. *Id.*
371. *Id.*
372. BUILDING UP CROATIA'S REAL ESTATE MARKET, *supra* note 10.
373. REGISTERING PROPERTY, *supra* note 63, at 39.
374. Doing Business 2008 – Croatia, *supra* note 66, at 23.
375. DRESDNER BANK, INVESTING IN CENTRAL AND EASTERN EUROPE 7 (2004), *available at* http://www.herbertwalter.com/Dresdner-Bank/Economic-Research/publications/_downloads/_downloads-IG/13_ldk_kro_Croatia_2004.pdf (last visited Jun. 11, 2008).
376. *Id.*
377. *Id.*

concern real property, the average procedure took significantly less time.[378] One official report indicates, "[i]n many countries, firms also rate property registries as the most corrupt public organizations."[379]

It remains to be seen just how much Croatia's property reform can clean up the corruption in business and politics. As this Note has shown, land management reform in Croatia has had, or will have, trickle-down effects alleviating numerous other problems while simultaneously solving its own. As the Mid-Term Review of the Project observed, one large reason for digitalizing its land registry was to "fight against corruption and [provide an] incentive to real property owners to sort their real property status. The result has been fully accomplished."[380]

VIII. CONCLUSION

Croatia is not expected to join the EU until 2010.[381] The reader should bear in mind that merely having a slow registration system should not be enough to keep Croatia out of the EU—as evidenced by Slovenia, which shares a similar problem with backlogged courts.[382] Furthermore, other factors that have not been discussed here also secure property rights.[383] What makes Croatia unique (for all the wrong reasons), however, includes a laundry list of other problems, such as those explained above: namely, an inefficient judiciary, a corrupt political and administrative system, human rights violations, and market hindrances. Hopefully, this Note has explained why Croatia's land management reform continues to remedy each of those shortcomings, albeit to differing degrees.

So who stands to gain from this reform? Target beneficiaries for the land reform include:

> actual and potential real estate owners, private investors in agriculture, housing, and industry, commercial banks, public bodies such as municipalities and other users of land information, . . . individuals, private companies and government agencies . . . [seeking] more secure rights . . . .[384]

The European Community identifies perhaps the most important recipients: the

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378. The World Bank, Doing Business, Explore Economies, Croatia, http://www.doingbusiness.org/ExploreEconomies/Default.aspx?economy id=52 (last visited Jun. 11, 2008).

379. DRESDNER BANK, *supra* note 375.

380. MID-TERM REVIEW, *supra* note 11, at 17.

381. Euractiv.com, *supra* note 7.

382. REGISTERING PROPERTY, *supra* note 63, at 38.

383. *Id.* at 36.

384. Blazevic, *supra* note 55, at 4.

people and economy of Croatia.[385] As Croatia endeavors toward EU membership, the other twenty-seven member states stand to benefit from expanding potential capital in Croatia's increasingly efficient and user-friendly real estate market.

385. BUILDING UP CROATIA'S REAL ESTATE MARKET, *supra* note 10.