Indiana International & Comparative Law Review

Vol. 22 No. 2 2012

TABLE OF CONTENTS

BOOK REVIEW

ARTICLES

NOTES

Indiana
International
& Comparative
Law Review Vol. 22 No. 2 2012

ROBERT H. McKINNEY
SCHOOL OF LAW
INDIANA UNIVERSITY
Indianapolis

Indiana University
Robert H. McKinney
School of Law
Lawrence W. Inlow Hall, 530 West New York Street, Indianapolis, IN 46202

Cite this Publication as IND. INT'L & COMP. L. REV.

The *Indiana International and Comparative Law Review* publishes professional and student scholarly articles in fields of international or comparative law. The *Review* welcomes submissions of scholarly legal articles on those topics.

The ideas, views, opinions, and conclusions expressed in articles appearing in this publication are those of the authors and not those of the *Review* or of Indiana University Robert H. McKinney School of Law.

Currently, the *Review* is published twice per year. The cost of a single issue is $9.00, and subscription rate is $18.00 per volume. The annual subscription rate for a foreign subscriber is $21.00.

Inquiries regarding submission of articles and comments or subscription may be directed to:

Indiana International & Comparative Law Review
Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, IN 46202
(317) 274-1050
(317) 274-8825(fax)

COPYRIGHT AND FAIR USE

The *Review* is printed and distributed by Western Newspaper Publishing, Inc., 537 E. Ohio St., Indianapolis, IN 46204-2173.

Indiana International & Comparative Law Review

The *Indiana International & Comparative Law Review*, published by the Indiana University Robert H. McKinney School of Law since 1991, is a student-edited law journal that provides a forum for the discussion and analysis of contemporary issues in public and private international law. The *Review* publishes articles by prominent legal scholars, practitioners, and policy makers around the world, as well as student-written notes and comments.

The *Review* is published twice annually, with a symposium issue devoted to a specific topic of international or comparative law published intermittently. Past symposium topics have included political and social aspects of Italian law, various aspects of Chinese law, and international terrorism in the twenty-first century.

_____

Name

_____

School/Firm/Business

_____

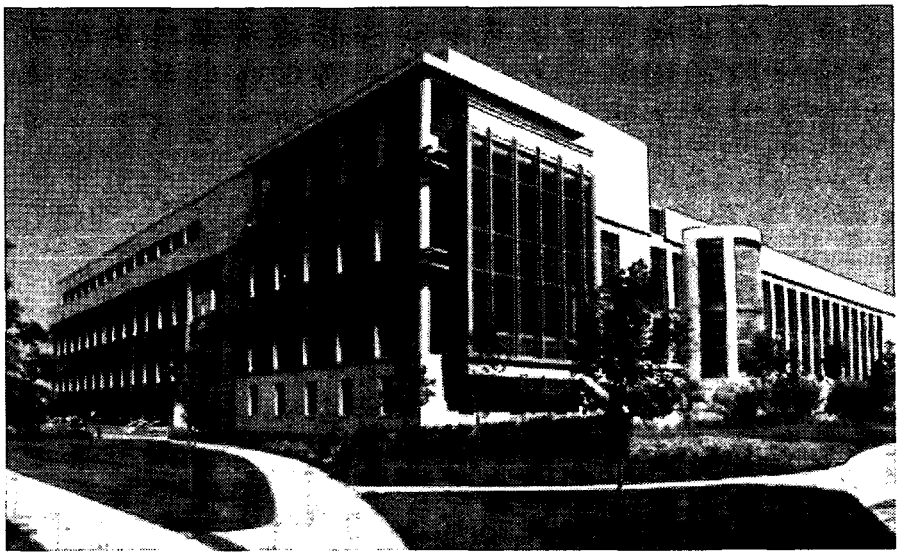
Address

_____

City, State, Zip Code

Subscriptions within the U.S. are $18.00 per year and outside the U.S. are $21.00 per year. I enclose $ _____ for _____ subscription(s) to the *Indiana International & Comparative Law Review*. Please make your check payable to the *Indiana International & Comparative Law Review*.

Mail to: Executive Production Editor
Indiana International & Comparative Law Review
Lawrence W. Inlow Hall
530 West Street
Indianapolis, IN 46202-3225



Please enter my subscription
to the
INDIANA LAW REVIEW

Name _____

Address _____

_____

_____

Enclosed is $_____ for _____ subscription(s)

Mail to: ATTN: Editorial Specialist
at
INDIANA LAW REVIEW
INDIANA UNIVERSITY ROBERT H. MCKINNEY
SCHOOL OF LAW
Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, Indiana 46202-3225

For an *academic* year, the subscription rate for four issues is:
Domestic, $30; Foreign, $35; Student, $20
Single Issue, $10; Survey Issue $20
Symposium Issue, $15

Indiana University Robert H. McKinney School of Law

2011-2012 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

MICHAEL A. MCROBBIE, *President of the University.* Ph.D., Australian National University.

CHARLES R. BANTZ, *Chancellor, Indiana University-Purdue University—Indianapolis.* B.A., M.A., University of Minnesota; Ph.D., The Ohio State University.

GARY R. ROBERTS, *Dean and Gerald L. Bepko Professor of Law.* B.A., Bradley University; J.D., Stanford University.

PAUL N. COX, *Vice Dean and Centennial Professor of Law.* B.S., Utah State University; J.D., University of Utah College of Law; LL.M., University of Virginia School of Law.

JAMES P. NEHF, *Associate Dean for Graduate Studies, Cleon H. Foust Fellow, and Professor of Law.* B.A., Knox College; J.D., University of North Carolina Law School.

JOHNNY D. PRYOR, *Assistant Dean for Student Affairs.* B.A., Wittenberg University; J.D., Indiana University Maurer School of Law.

JONNA KANE MACDOUGALL, *Assistant Dean for External Affairs and Alumni Relations; Adjunct Professor of Law.* B.A., M.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.

CHASTITY Q. THOMPSON, *Assistant Dean for Professional Development.* A.S., B.A., Alabama State University; M.B.A., Auburn University; J.D., Indiana University School of Law— Indianapolis.

MARK V. WUNDER, *Assistant Dean for Development.* B.S., J.D., University of Iowa.

ELIZABETH ALLINGTON, *Director of Communications and Creative Services.* B.A., Indiana University; M.A., M. Phil., New York University.

TERESA (TERRI) J. CUELLAR, *Director of Technology Services.* B.S., St. Bonaventure University, New York.

BRANDT HERSHMAN, *Director of Educational Outreach.* Purdue University.

AMANDA KAMMAN, *Director of Fundraising and Development Services.* B.A., Indiana University.

PATRICIA K. KINNEY, *Director of Admissions.* B.S., Purdue University; J.D., Indiana University School of Law—Indianapolis.

PRISCILLA D. KEITH, *Adjunct Professor and Director of Research and Projects for the Hall Center for Law and Health.* B.S., Spelman College; M.S., Atlanta University; J.D., Indiana University School of Law—Indianapolis.

VIRGINIA MARSCHAND, *Director of Administrative and Fiscal Affairs.* B.S., Indiana University—Kokomo; M.P.A., Indiana University Purdue University—Indianapolis; J.D., Indiana University School of Law—Indianapolis.

JOHN R. SCHAIBLEY, III, *Executive Director of the Center for Intellectual Property Law and Innovation and Adjunct Professor of Law.* B.A., Purdue University; J.D., Indiana University Maurer School of Law.

SONJA RICE, *Director of Special Projects.* B.A., Purdue University; J.D., Indiana University School of Law—Indianapolis.

LAWANDA W. WARD, *Director of Pro Bono and Public Interest Programs.* B.A., Murray State University; M.A., Illinois State University; M.S., Old Dominion University; J.D., Indiana University School of Law—Indianapolis.

JACOB J. MANALOOR, *Associate Director for Contracts, Grants & Fundraising.* B.S., Indiana University Purdue University—Indianapolis; J.D., Indiana University School of Law—Indianapolis.

SEAN SOUTHERN, *Associate Director, Office of Professional Development.* B.A., Ball State University; M.A., DePaul University; J.D., *cum laude*, Loyola University Chicago School of Law.

CARLOTA TOLEDO, *Associate Director of Student Affairs.* A.B., University of Chicago; J.D., DePaul University College of Law.

SUSAN K. AGNEW, *Assistant Director of Student Affairs.* Clark College.

WILLIAM J. BAKER, *Assistant Director of Technology Services.* B.S., Purdue University.

AMANDA GALLAGA, *Assistant Director of Recruitment.* B.A., Trinity University.

SUSAN BUSHUE-RUSSELL, *Assistant Business Manager.* A.A.S., Lakeland College; B.S., Eastern Illinois University.

KAREN H. MILLER, *Assistant Director for Admissions.* Midway College.

LISA SCHRAGE, *Assistant Director for Donor Relations.* B.S., Marian College.

MEL YILDIZ, *Assistant Director of Graduate Admissions.* LL.B., Istanbul Bilgi University Faculty of Law; LL.M., Indiana University School—Indianapolis; J.D. Candidate, Indiana University School of Law—Indianapolis.

Faculty

CYNTHIA M. ADAMS, *Clinical Professor of Law.* B.A., Kentucky Wesleyan College; J.D., Indiana University School of Law—Indianapolis.

JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library.* B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.

CYNTHIA A. BAKER, *Clinical Associate Professor of Law and Director, Program on Law and State Government.* B.A., J.D., Valparaiso University.

GERALD L. BEPKO, *Indiana University-Purdue University—Indianapolis Chancellor Emeritus, Indiana University Trustee Professor and Professor of Law.* B.S., Northern Illinois University; J.D., ITT/Chicago-Kent College of Law; LL.M., Yale Law School.

SHAWN BOYNE, *Associate Professor of Law, Dean's Fellow; Grimes Fellow.* B.A., Cornell University; M.B.A., University of Minnesota; J.D., University of Southern California's Gould School of Law, M.A., Ph.D., University of Wisconsin; LL.M., Justus-Liebig-Universität.

KAREN E. BRAVO, *Professor of Law, John S. Grimes Fellow; Dean's Fellow.* B.A., The University of the West Indies; J.D., Columbia University School of Law; LL.M., New York University School of Law.

ROBERT BROOKINS, *Professor of Law.* B.S., University of South Florida; J.D., Ph.D., Cornell University.

KENNETH D. CHESTEK, *Clinical Professor of Law.* B.A., Pennsylvania State University; J.D., University of Pittsburgh School of Law.

JEFFREY O. COOPER, *Associate Professor of Law.* A.B., Harvard University; J.D., University of Pennsylvania Law School.

ERIC R. DANNENMAIER, *Associate Professor of Law, Dean's Fellow; Grimes Fellow.* B.A., Drury College; J.D., Boston University; LL.M., Columbia University; M. St., Oxford University.

JAMES D. DIMITRI, *Professor of Law.* B.S., Indiana University; J.D., Valparaiso University School of Law.

JENNIFER A. DROBAC, *Professor of Law.* B.A., M.A., Stanford University; J.D., J.S.D., Stanford Law School.

GEORGE E. EDWARDS, *Carl M. Gray Professor of Law; Faculty Advisor to the LL.M. track in International Human Rights Law (LL.M. Faculty Advisor Term ending Spring 2011); Director, Program in International Human Rights Law; John S. Grimes Fellow.* B.A., North Carolina State University; J.D., Harvard Law School.

FRANK EMMERT, *John S. Grimes Professor of Law and Executive Director, Center for International and Comparative Law.* Erstes Juristisches Staatsexamen (J.D.), University of Munich Law School; LL.M., The University of Michigan Law School; Ph.D., University of Maastricht; Diploma, European University Institute.

NICHOLAS GEORGAKOPOULOS, *Harold R. Woodard Professor of Law.* Ptyhion Nomikis, Athens University School of Law; LL.M., S.J.D., Harvard Law School.

CARRIE HAGAN, *Clinical Associate Professor of Law.* B.A., University of Kansas; J.D., University of Cincinnati College of Law.

JOHN LAWRENCE HILL, *Professor of Law.* B.A., Northern Illinois University; J.D., Ph.D., Georgetown University.

LINDA KELLY HILL, *M. Dale Palmer Professor of Law.* B.A., J.D., University of Virginia.

MAX HUFFMAN, *Associate Professor of Law and Dean's Fellow.* B.A., Cornell University; J.D., University of Cincinnati College of Law.

LAWRENCE A. JEGEN, III, *Thomas F. Sheehan Professor of Tax Law and Policy.* B.A., Beloit College; J.D., M.B.A., University of Michigan; LL.M., New York University School of Law.

ROBERT A. KATZ, *Professor of Law.* A.B., Harvard College; J.D., University of Chicago Law School.

ANDREW R. KLEIN, *Paul E. Beam Professor of Law; Chief of Staff, Office of the Chancellor of IUPUI.* B.A., University of Wisconsin; J.D., Emory University School of Law.

NORMAN LEFSTEIN, *Professor of Law and Dean Emeritus.* LL.B., University of Illinois College of Law; LL.M., Georgetown University Law School.

GERARD N. MAGLIOCCA, *Samuel R. Rosen Professor of Law and Grimes Fellow.* B.A., Stanford University; J.D., Yale Law School.

ALLISON MARTIN, *Clinical Associate Professor of Law.* B.S., J.D., University of Illinois.

DEBORAH MCGREGOR, *Clinical Professor of Law and Assistant Director of Legal Analysis, Research and Communication.* B.A., University of Evansville; J.D., Georgetown University Law Center.

EMILY MORRIS, *Associate Professor of Law and Dean's Fellow.* A.B., Harvard University; J.D., University of Michigan Law School.

NOVELLA NEDEFF, *Clinical Associate Professor of Law.* B.A., J.D., Indiana University.

DAVID ORENTLICHER, *Samuel R. Rosen Professor of Law and Co-Director of the William S. and Christine S. Hall Center for Law and Health.* B.A., Brandeis University; J.D., M.D., Harvard University.

JOANNE ORR, *Clinical Professor of Law.* B.S., Indiana State University; J.D., California Western School of Law.

ANTONY PAGE, *Professor of Law and Dean's Fellow; Director, Central & Eastern European Law Summer Program.* B. Comm., McGill University; M.B.A., Simon Fraser University; J.D., Stanford Law School.

H. KATHLEEN PATCHEL, *Associate Professor of Law.* A.B., Huntington College; J.D., University of North Carolina Law School; LL.M., Yale Law School.

MICHAEL J. PITTS, *Associate Professor of Law; Dean's Fellow and John S. Grimes Fellow.* B.S.J., Northwestern University; J.D., Georgetown University Law Center.

PETER A. PRESCOTT, *Associate Professor of Law.* B.A., Augustana College; M.S., The University of Chicago; M.P.A., The University of Texas at Austin; J.D., The University of Houston Law Center.

FRAN QUIGLEY, *Clinical Professor of Law, Health and Human Rights Clinic, Indiana University School of Law—Indianapolis; Senior Advisor, Indiana University Center for Global Health.* B.A., Hanover College, *cum laude*; M.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.

FLORENCE WAGMAN ROISMAN, *William F. Harvey Professor of Law.* B.A., University of Connecticut; LL.B., Harvard Law School.

JOAN M. RUHTENBERG, *Clinical Professor of Law and Director of Legal Analysis, Research and Communication.* B.A., Mississippi University for Women; J.D., Indiana University School of Law—Indianapolis.

JOEL M. SCHUMM, *Clinical Professor of Law.* B.A., Ohio Wesleyan University; M.A., University of Cincinnati; J.D., Indiana University School of Law—Indianapolis.

LAHNY R. SILVA, *Associate Professor of Law.* B.A., M.A., Boston University; J.D., University of Connecticut School of Law; LL.M., University of Wisconsin Law School.

MARGARET C. TARKINGTON, *Associate Professor of Law.* B.A., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University.

CARLTON MARK WATERHOUSE, *Associate Professor of Law; Dean's Fellow.* B.S., Pennsylvania State University; J.D. with honors, Howard University School of Law; M.T.S., Emory University, Chandler School of Theology; Ph.D. with honors, Emory University.

FRANCES WATSON, *Clinical Professor of Law.* B.S., Ball State University; J.D., Indiana University School of Law—Indianapolis.

LLOYD T. WILSON, JR., *Professor of Law; Director, Joint Center for Asian Law Studies; Director, Chinese Law Summer Program; Director, American Law for Foreign Lawyers LL.M. Program.* B.A., Wabash College; M.A., Duke University; J.D., Indiana University School of Law—Bloomington.

R. GEORGE WRIGHT, *Lawrence A. Jegen III Professor of Law.* A.B., University of Virginia; Ph.D., Indiana University; J.D., Indiana University School of Law—Indianapolis.

Emeriti Faculty

THOMAS B. ALLINGTON, *Professor of Law Emeritus.* B.S., J.D., University of Nebraska; LL.M., New York University School of Law.

EDWARD P. ARCHER, *Professor of Law Emeritus.* B.M.E., Renesselaer Polytechnic Institute; J.D., LL.M., Georgetown University Law School.

JAMES F. BAILEY, III, *Professor of Law Emeritus.* A.B., J.D., M.A.L.S., The University of Michigan.

CLYDE HARRISON CROCKETT, *Professor of Law Emeritus.* A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).

DEBRA A. FALENDER, *Professor of Law Emerita.* A.B., Mount Holyoke College; J.D., Indiana University School of Law—Indianapolis.

DAVID A. FUNK, *Professor of Law Emeritus.* A.B., College of Wooster; J.D., Case Western Reserve University School of Law; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia Law School.

PAUL J. GALANTI, *Professor of Law Emeritus.* A.B., Bowdoin College; J.D., University of Chicago Law School.

HELEN P. GARFIELD, *Professor of Law Emerita.* B.S.J., Northwestern University; J.D., University of Colorado School of Law.

HAROLD GREENBERG, *Professor of Law Emeritus.* A.B., Temple University; J.D., University of Pennsylvania Law School.

JEFFREY W. GROVE, *Professor of Law Emeritus.* A.B., Juniata College; J.D., George Washington University Law School.

WILLIAM F. HARVEY, *Carl M. Gray Professor of Law & Advocacy Emeritus.* A.B., University of Missouri; J.D., LL.M., Georgetown University Law School.

W. WILLIAM HODES, *Professor of Law Emeritus,* A.B., Harvard College; J.D., Rutgers University School of Law—Newark.

WILLIAM ANDREW KERR, *Professor of Law Emeritus.* A.B., J.D., West Virginia University; B.D., Duke University; LL.M., Harvard Law School.

ELEANOR DEARMAN KINNEY, *Hall Render Professor of Law, Co-director of the William S. and Christine S. Hall Center for Law and Health Emerita.* B.A., Duke University; M.A., University of Chicago; J.D., Duke University School of Law; M.P.H., University of North Carolina.

WILLIAM E. MARSH, *Professor of Law Emeritus.* B.S., J.D., University of Nebraska.

SUSANAH M. MEAD, *Professor of Law Emerita.* B.A., Smith College; J.D., Indiana University School of Law—Indianapolis.

RONALD W. POLSTON, *Professor of Law Emeritus.* B.S., Eastern Illinois University; LL.B., University of Illinois College of Law.

KENNETH M. STROUD, *Professor of Law Emeritus.* A.B., J.D., Indiana University—Bloomington.

JAMES W. TORKE, *Carl M. Gray Professor of Law Emeritus.* B.S., J.D., University of Wisconsin.

JAMES PATRICK WHITE, *Professor of Law Emeritus.* A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

LAWRENCE P. WILKINS, *William R. Neale Professor of Law Emeritus.* B.A., The Ohio State University; J.D., Capitol University Law School; LL.M., University of Texas School of Law.

MARY THERESE WOLF, *Clinical Professor of Law Emerita.* B.A., Saint Xavier College; J.D., University of Iowa College of Law.

Ruth Lilly Law Library Faculty

JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library.* B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.

DEBRA DENSLAW, *Reference Librarian.* B.A., Franklin College; M.S., University of Illinois, Urbana-Champaign; J.D., Valparaiso School of Law.

RICHARD HUMPHREY, *Reference Librarian.* A.A., Brewton-Parker Junior College; B.A., Georgia Southwestern College; M.L.S., University of Kentucky.

WENDELL E. JOHNTING, *Cataloging and Government Documents Librarian.* A.B., Taylor University; M.L.S., Indiana University.

CATHERINE LEMMER, *Head of Information Services.* B.A., Lawrence University; J.D., University of Wisconsin; M.S., University of Illinois.

CHRIS E. LONG, *Cataloging Librarian.* B.A., Indiana University; M.A., Indiana University; M.L.S., Indiana University.

STEVEN R. MILLER, *Reference Librarian.* B.S., Lebanon Valley College of Pennsylvania; M.A., Dominican University; M.S., Northwestern University; J.D., The John Marshall Law School.

MAHNAZ K. MOSHFEGH, *Serials/Acquisitions Librarian.* B.A., National University of Iran; M.S., Tehran University; M.A., Ball State University; M.L.S., Ph.D., Indiana University.

MIRIAM A. MURPHY, *Associate Director.* B.A., Purdue University; J.D., M.L.S., Indiana University—Bloomington.

KIYOSHI OTSU, *Automated Services and Media Librarian.* A.A., Parkland College; A.B., M.S., C.A.S., University of Illinois.

ROBERT H. McKINNEY SCHOOL OF LAW
INDIANA UNIVERSITY
Indianapolis

Indiana International & Comparative Law Review, Volume XXII

BOOK REVIEW

INTERNATIONAL LL.M. STUDENTS: A GREAT RESOURCE FOR U.S. LAW SCHOOLS

LL.M. ROADMAP: AN INTERNATIONAL STUDENT'S GUIDE TO U.S. LAW SCHOOL PROGRAMS. BY GEORGE E. EDWARDS. NEW YORK, N.Y.: WOLTERS KLUWER LAW & BUSINESS. 2011. PP. LVII, 562. $38.95.

Reviewed by Frank Sullivan, Jr.*,**

The thousands of international students enrolled today in LL.M. and other degree-granting programs in American law schools reflect a decades-long increase in the number of American law schools offering such programs as well as the number of students attending them. To assist international students with selection, admission, immigration, financing, and other issues related to attending American law schools, George E. Edwards, a highly accomplished and energetic professor at Indiana University's Robert H. McKinney School of Law in Indianapolis, has written the encyclopedic *LL.M. Roadmap: An International Student's Guide to U.S. Law School Programs*.

LL.M. Roadmap is not a *Princeton Review*-type profile or *U.S. News*-type ranking of LL.M. programs. The author makes clear that he "does not endorse or criticize any particular law school or LL.M. program, and does not rank or comment on schools' reputations."[1] Instead, *LL.M. Roadmap* comprehensively examines a multitude of topics and issues broadly applicable to the "international LL.M. phenomenon" – my term for the growth in the number of American law schools offering degree programs to international students and the number of students enrolling in them.[2]

---

* Justice, Indiana Supreme Court (1993- 2012). LL.M., University of Virginia School of Law 2001); J.D., Indiana University Maurer School of Law (1982); A.B., Dartmouth College (1972).

** This book review is dedicated to Yi M. Fang, J.D., University of Notre Dame School of Law (2011), LL.B., Peking University (2008), who came here to learn from us but from whom we have learned much more. I appreciate the time and suggestions of Mark L. Adams, Mohamed Abd Elhamied Arafa, Yen-Chia Chen, Jay Conison, Yi Fang, Lisa A. Farnsworth, Hon. Margret G. Robb, Carole Silver, D.A. Jeremy Telman, James P. White, Ersin Yeşil, and Xu Fang. And I owe particular thanks to my law clerk, Emily Slaten, for her assistance on this project.

1. GEORGE E. EDWARDS, LL.M. ROADMAP: AN INTERNATIONAL STUDENT'S GUIDE TO U.S. LAW SCHOOL PROGRAMS xliv (2011) [hereinafter LL.M. ROADMAP].

2. Unless the context otherwise requires, I include within the meaning of "LL.M." and "international LL.M. phenomenon" degree programs of all kinds (including J.D. programs) offered by U.S. law schools to international students (including international students with

I am very pleased to be asked to write this review of Professor Edwards's excellent book and in doing so, make two fundamental points: 1) While LL.M. programs offer great potential benefits to international students, these students face a range of risks that they should carefully consider before enrolling. Scrupulous attention to the advice contained in *LL.M. Roadmap* will greatly help international students in minimizing these risks. 2) Law schools in the U.S. should recognize that their international LL.M. students are a great resource for helping prepare their J.D. students for globalization. These inspiring men and women, already well-educated in their own countries, have put their own careers on hold and traveled to the U.S. for graduate training in law. They have much to teach us – and we have much to learn from them.

This book review consists of four parts. First, I will discuss the great potential benefits to international students in seeking an LL.M. in the U.S., benefits that doubtlessly help explain the strong demand for study in U.S. law schools by international students. But in the face of that strong demand, I turn to a second discussion: risk factors faced by these students in LL.M. programs. Third, I will generally describe *LL.M. Roadmap*'s approach in helping international students select LL.M. programs; secure admission to them; negotiate the immigration, financial, and other prerequisites to enrolling; and deploy the knowledge acquired in these programs following graduation. Fourth, I will describe the great but underutilized value that international students bring to American legal education.

I. THERE ARE MANY GOOD REASONS FOR AN INTERNATIONAL STUDENT TO PURSUE AN LL.M. AT A U.S. LAW SCHOOL.

International students pursuing LL.M. degrees in U.S. law schools can be traced back to the end of World War II.[3] Since that time, various market and regulatory forces have combined with increased globalization to propel U.S. law schools to establish and grow LL.M. programs aimed at international students and, likewise, to increase international students' interest in them.[4]

Two basic reasons international students enroll in LL.M. programs are to become better lawyers in general and to learn about U.S. law in particular, including preparing to practice law here. U.S. law schools have vast resources, in many cases well beyond those available in law schools in other countries, providing spectacular opportunities for students to expand their general legal knowledge and to learn about U.S. law.[5] This undoubtedly benefits those

---

foreign law degrees).

3. Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*, 35 INT'L J. LEGAL INFO. 396, 407 (2007).

4. *Id.* at 408. *See also* Carole Silver, *Winners and Losers in the Globalization of Legal Services: Situating the Market for Foreign Lawyers*, 45 VA. J. INT'L L. 897, 897-907 (2005) [hereinafter *Winners and Losers*].

5. LL.M. ROADMAP, *supra* note 1, at 20, 10-11. German LL.M. graduates told Professor

foreign-trained lawyers who wish to practice here and who are in fact eligible with their LL.M. to do so in certain states, most notably New York, upon successful completion of the bar examination.[6] And some even use the LL.M. as a first step in pursuing a J.D.

Preparing to become a better lawyer and learning about U.S. law can improve the foreign-educated lawyer's marketability and increase his or her competitiveness for employment as a lawyer. International students seek degrees from U.S. law schools precisely because such credentials mean so much to employment prospects in their home countries.[7] Almost all of the international students I interviewed in connection with this project told me with certainty that they would be assured of good employment at home with a degree from a U.S. law school. Related to this, studying at a U.S. law school gives a foreign-educated lawyer an opportunity to upgrade his or her credentials.[8] This includes specializing in a particular area of law like intellectual property or tax;[9] studying to become a law professor or law faculty administrator (often by pursuing an S.J.D. degree);[10] or studying to become a domestic or international judge or government official.[11]

Many Americans use law degrees not as credentials to practice law but to pursue non-legal careers. For example, many lawyers use their legal training in business or government administrative or managerial positions, and a law degree often serves as a credential demonstrating experience that warrants a rise in the ranks of management.[12] In this regard, Professor Edwards makes the point that because it is easier for a foreign-educated lawyer to join an LL.M. program than to be admitted to a U.S. graduate degree program in virtually any other field, an LL.M. can be a much more efficient way of obtaining an advanced degree so as to enhance one's career prospects in a field other than law.[13] Professor Edwards also makes the point that an LL.M. can help international students wishing to take advantage of the "outsourcing" of legal services. In an effort to reduce expenses, some American enterprises are

---

Silver that they valued "the substantive law courses of an LL.M., either because an area of law is not covered in Germany . . . or because familiarity with U.S. concepts help lawyers explain German concepts to American clients and vice versa." Carole Silver, *The Variable Value of U.S. Legal Education in the Global Legal Services Market*, 24 GEO. J. LEGAL ETHICS 1, 31 (2011) [hereinafter *Variable Value*].

6. LL.M. ROADMAP, *supra* note 1, at 10-11, 426-27. International law firm hiring partners cite the route to the New York bar as the principal advantage that an LL.M. from a U.S. law school holds over a similar degree from other common law countries. *Variable Value*, *supra* note 5, at 29.

7. LL.M. ROADMAP, *supra* note 1, at 10.

8. *Id.* at 11-12.

9. *Id.* at 12-13.

10. *Id.* at 13-14.

11. *Id.* at 15-16.

12. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2012-13 EDITION, LAWYERS, SIMILAR OCCUPATIONS, *available at* http://www.bls.gov/ooh/legal/lawyers.htm [hereinafter OUTLOOK HANDBOOK].

13. LL.M. ROADMAP, *supra* note 1, at 17-18.

looking abroad for a portion of their legal work. A foreign-educated lawyer with an LL.M. might well be in a highly advantageous position to take advantage of the outsourcing trend.[14]

Another primary reason for obtaining an LL.M. in the U.S. is to improve one's English. In her extensive research on the LL.M. as a credential in the international market for legal services, Professor Carole Silver – whose work will be discussed throughout this book review, and indeed, has already been cited – studied in-depth the legal services markets in Germany and China. She observed the principal reason that law graduates from both of those countries seek LL.M.s is to improve their English. In fact, she reports that "75% of Chinese LL.M. graduates who responded to a survey about their U.S. education experience and 67% of German respondents indicated being motivated by a desire to improve their English language ability."[15]

Some reasons for seeking an LL.M. in the U.S. are more abstract. They are grounded in the fact that traveling internationally to study broadens one's professional network to include LL.M. graduates from around the world[16] (and, one would hope, U.S. law professors and law graduates) and enhances one's intercultural professional competence.[17] Professor Silver's research on Germany and China demonstrates these points. Several German LL.M. graduates "emphasize[d] that exposure to the legal profession in the United States was enlightening, both in terms of students in law school . . . and for purposes of career opportunities."[18] Professor Silver reports that in China, an LL.M. from a U.S. law school "is appreciated . . . as a mechanism for exposing students to another legal regime, to an international group of colleagues and to the United States itself. . . . These echo the value of the LL.M. in Germany."[19]

Finally, Professor Edwards is a great champion of international human rights. At the Indiana University Robert H. McKinney School of Law, he directs a remarkable summer internship program that sends law students on challenging human rights assignments around the world.[20] And so it comes as no surprise that he also advocates enrolling in an LL.M. program as an opportunity to promote global peace and security and fundamental freedoms and human rights.[21]

---

14. *Id.* at 19-20.

15. *Variable Value*, *supra* note 5, at 46.

16. LL.M. ROADMAP, *supra* note 1, at 14.

17. *Id.* at 17.

18. *Variable Value*, *supra* note 5, at 30.

19. *Id.* at 51. Professor Silver says that "one potential LL.M. student explained to me that he was interested in enrolling in a U.S. LL.M. program in order to join my law school's alumni network"! *Id.* at 38.

20. *Summer Internship*, INDIANA UNIVERSITY ROBERT H. MCKINNEY SCHOOL OF LAW PROGRAM IN INTERNATIONAL HUMAN RIGHTS LAW, http://indylaw.indiana.edu/humanrights/interns/ (last visited Mar. 31, 2012).

21. LL.M. ROADMAP, *supra* note 1, at 21.

II. DESPITE THEIR BENEFITS, LL.M. PROGRAMS AT U.S. LAW SCHOOLS CARRY PARTICULAR RISKS THAT INTERNATIONAL STUDENTS SHOULD CAREFULLY CONSIDER BEFORE ENROLLING.

It is heartening that thousands of men and women from around the world are willing, in Professor Edwards's words, to make the "dramatic commitment in time and energy, and financial, physical, and emotional resources" to come to the U.S. to study in our law schools. When they do so, they need to be aware (as do their U.S. counterparts) that they are enrolling in institutions subject to three extremely powerful external forces. First, American law schools' accreditation is dependent upon their compliance with rigorous standards promulgated by the American Bar Association's Council of the Section on Legal Education and Admission to the Bar.[22] Second, their relative rankings by *U.S. News & World Report Magazine* exert such pressure that some have struck Faustian bargains in an attempt to accommodate it.[23] Third, their performance in properly training and adequately preparing their graduates for a contracting legal labor market faces withering criticism from graduates and commentators alike.[24]

---

22. The Section's Council and Accreditation Committee are recognized by the U.S. Department of Education (DOE) as the national accrediting agency for programs leading to the J.D. In this function, the Council and the Section are independent of the ABA, as required by DOE regulations. *See* ABA SEC. OF L. EDUC. & ADMISSIONS TO THE BAR, THE LAW SCHOOL ACCREDITATION PROCESS (2010), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2010_aba_accreditation_brochure.authcheckdam.pdf (providing an overview of the accreditation process). Nevertheless, for ease of reference in this book review, the Section, Council, and Accreditation Committee will be referred to as the "ABA" unless the context otherwise requires.

23. Villanova University School of Law was censured on August 12, 2011, by the ABA for "intentional reporting of inaccurate admissions data to the ABA." *See* ABA SEC. OF L. EDUC. & ADMISSIONS TO THE BAR, PUBLIC CENSURE OF VILLANOVA UNIVERSITY SCHOOL OF LAW (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20110815_villanova_u_school_of_law_sanctions.authcheckdam.pdf [hereinafter VILLANOVA]. Additionally, a report from November, 2011, revealed that the University of Illinois School of Law's admissions dean had reported inaccurate data to the ABA by "'report[ing] and/or publicly disseminat[ing]' inflated grades and test scores for the class of 2008 and the classes of 2010 through 2014," and by manipulating the acceptance rate of four classes. Jodi S. Cohen, *A University of Illinois Law Dean Resigns After Report Details Manipulations of Admissions Data*, CHI. TRIB., Nov. 8, 2011, at 4.

24. "Criticizing law schools is the new national pastime." Jay Conison, *Value and Delivery in Law School Education*, INDIANA LAWYER, Feb. 17, 2012. One example of such criticism was set forth in a series of five articles in the NEW YORK TIMES last year by reporter David Segal: David Segal, *The Price to Play Its Way*, N.Y. TIMES, Dec. 18, 2011, at B1; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at B1; David Segal, *Behind the Curve*, N.Y. TIMES, May 1, 2011, at B1; and David Segal, *Is Law School a Losing Game?*, N.Y.

Each of these three forces buffeting American legal education today – ABA accreditation; *U.S. News* rankings; and pervasive criticism of performance – has a direct bearing and relationship on the international LL.M. phenomenon. The ABA does not accredit LL.M. programs; they are for all intents and purposes unregulated. Nor do the *U.S. News* rankings purport in any way to include LL.M. programs; there is no ranking system for them. The fact that LL.M. programs fall outside the purview of ABA accreditation and *U.S. News* rankings has several implications for international students, as I will discuss in a moment. Beyond that, international LL.M. graduates face challenges in the legal labor market just as their J.D. counterparts do.

As such, Professor Edwards's *LL.M. Roadmap* is far more than a "guide" for international students to U.S. law school programs: consider it a prospectus to be studied prior to an investment in an LL.M., identifying risk factors in the course of providing comprehensive information about such programs. I identify below what I view as the three most serious risks that international students face in these programs.

A. Risk Factor #1: LL.M. programs are neither accredited by any educational accrediting body nor ranked by any professional organization or popular publication.

> Neither the ABA nor any governmental or professional agency in the U.S. accredits LL.M. . . . or any other "post-J.D." or "graduate" law degree program. The ABA notes that LL.M. and similar programs are created by the law schools themselves and do not reflect any ABA judgment regarding the quality of the programs. The ABA does not evaluate LL.M. admission requirements, particularly for international students . . . .[25]

There are three implications for international students from Professor Edwards's plain statement of the absence of any professional accreditation for programs other than those leading to a J.D.

First, of course, is a straightforward *caveat emptor* to the prospective student: no governmental or professional entity has evaluated the program the student is considering for quality or even compliance with any minimum standards. Whereas the ABA has explicit "minimum requirements" for law schools designed "to promote high standards of professional competence,

---

TIMES, Jan. 9, 2011, at B1. For other recent examples of criticism of this nature, see Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now,* 45 CREIGHTON L. REV. (forthcoming Spring 2012) [hereinafter *Coming Crash*]; BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012).

25. LL.M. ROADMAP, *supra* note 1, at 59. The author makes clear that the Council, not the ABA, does the accrediting. *See* ABA SEC. OF L. EDUC, *supra* note 22.

responsibility and conduct,"[26] the ABA is just as explicit that "the content and requirements of those degrees, such as an LL.M., are created by the law school itself and do not reflect any judgment by the ABA accrediting bodies regarding the quality of the program."[27]

The same *caveat emptor* applies in respect to the most widely discussed system of ranking law schools, the annual league tables published by *U.S. News*. Each year the publication evaluates the ABA-accredited law schools according to criteria that it refers to as "quality assessment," "selectivity," "placement success," and "faculty resources."[28] It then rank-orders the top three-quarters of the schools.[29] The premium that law schools and students place upon their *U.S. News* rankings borders on the monomaniacal.[30] Whether that is justified is open to debate,[31] but regardless of how indicative the rankings actually are of law school quality, they only purport to measure the quality of the J.D. program – they say nothing of the quality of any LL.M. program. And although the most highly ranked law schools likely offer the strongest LL.M. programs, neither ABA accreditation nor *U.S. News* rankings should be taken as a proxy for the quality of LL.M. programs for schools not in the upper reaches of the rankings' spectrum.

Second, the absence of any accreditation or rankings of LL.M. programs means that there is no central repository of data on these programs. Indeed, I have felt this lack of transparency first-hand in working on this book review in being unable to locate precise enrollment statistics. This lack of transparency

---

26. *See* ABA SEC. OF L. EDUC. & ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS pmbl. (2011-2012), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_preamble.authcheckdam.pdf.

27. *Overview of LL.M. and Post J.D. Programs*, ABA, http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d.html (last visited Mar. 31, 2012) [hereinafter *Overview*]. Although the ABA currently disclaims accreditation of LL.M. programs, that could change in the future. While there do not appear to be any plans on the horizon for the ABA actually to accredit LL.M. programs – likely because of resistance from the law schools – the ABA has made a proposal that would likely have a similar effect. *See* ABA SEC. OF L. EDUC. & ADMISSIONS TO THE BAR, PROPOSED MODEL RULE ON ADMISSION OF FOREIGN EDUCATED LAWYERS, http://www2.americanbar.org/calendar/section-of-international-law-2011- spring-meeting/documents/friday/accreditation%20of%20foreign%20law%20schools/proposed%20model%20rule%20and%20criteria.pdf [hereinafter PROPOSED MODEL RULE].

28. Robert Morse & Sam Flanigan, *Methodology: Law School Rankings*, U.S. NEWS (Mar. 12, 2012), http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/03/12/methodology-law-school-rankings.

29. The remaining schools, or the bottom 25 percent of those that are ranked, are listed alphabetically as Rank Not Published. *Id.*

30. *See* VILLANOVA, *supra* note 23.

31. Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493 n.1 (2007) (collecting citations to articles, blogs, and other materials debating "whether law schools can or should be ranked" and the *U.S. News* rankings).

and uniformity is also in large part why students need a book like *LL.M. Roadmap*.

Third, to the extent the ABA does examine non-J.D. programs, it is to assure that "the additional degree program will not detract from a law school's ability to maintain a sound J.D. degree program."[32] The risk here is apparent. A law school may hold out to prospective international students that certain resources will be available to them if they enroll in its LL.M. program. But if the ABA finds that the allocation of those resources to the LL.M. program "detract" from the school's J.D. degree program, those resources will not be allocated to the LL.M. program when those students actually enroll. No one whom I interviewed in connection with this book review identified any specific circumstance where a law school had been advised that it was devoting resources to its LL.M. program to the extent that it detracted from its J.D. program, but virtually every person I talked to indicated that LL.M. programs – particularly LL.M. programs aimed at international students – were sufficiently profitable that they helped underwrite the J.D. program.[33] And, because financial resources available to a J.D. program directly improve a law school's *U.S. News* score, the profits generated by the LL.M. program also run the risk of being used to chase higher scores rather than being allocated to the LL.M. program.[34]

B. Risk Factor #2: The LL.M. degree does not guarantee legal employment in the U.S., and evidence suggests that it is not particularly helpful in securing legal employment in the offices of American law firms, either in the students' home countries or in the U.S.

The grim job market for lawyers in the U.S., at least since the onset of the economic collapse five years ago, has been the subject of much attention in the popular press.[35] According to the National Law Journal, the nation's 250 largest law firms reduced their combined total headcount by approximately 2,900 lawyers in 2010 on top of a reduction of 6,600 in 2009.[36] And seasonally adjusted U.S. Department of Labor statistics reveal that legal sector shed

32. *See Overview, supra* note 27.

33. Frequent reference was made to international LL.M. programs as being "cash cows." This is a matter of such significant concern to Professor Edwards that he devotes an entire section of *LL.M. Roadmap* to the topic of identifying and avoiding "cash cows" and "diploma mills." LL.M. ROADMAP, *supra note* 1, at 65.

34. "The [*U.S. News*] questionnaire tends to simply identify quality education with institutional wealth." *Coming Crash, supra* note 24, at 38.

35. *E.g.*, Segal, *Is Law School a Losing Game?, supra* note 24; Annie Lowrey, *How Law School Went From Being A Sure Thing To A Bum Deal*, WASH. POST, Oct. 31, 2010, at G4; Dan Margolies, *Tough Time For Law Grads*, KANSAS CITY STAR, May 2, 2009; Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1.

36. *THE NLJ 250*, NAT'L L.J., Apr. 25, 2011.

approximately 2,500 legal sector jobs in 2011.[37] If this is the situation for U.S. lawyers generally, then the challenges facing international LL.M. graduates attempting to find jobs in the U.S. are undoubtedly greater. And, even assuming labor market opportunities are no more limited for international LL.M. graduates than for U.S. lawyers, international LL.M. students face special barriers to entering the practice of law in the US.

First, of course, is the fact that the expression "practicing in the U.S." is a misnomer. A lawyer practices law in one or more U.S. states subject to the rules and regulations of the respective states. In many states, lawyers are not admitted to the bar unless they have earned a J.D. from a law school accredited by the ABA or at least a law school in the U.S.[38] I have been advised by some international students and by law school faculty and administrators who work with them that in many countries, the holding of a law degree without more is sufficient license to practice law. Students coming from these cultures need to be aware that in many U.S. states, their foreign law training, even if combined with an LL.M. from a U.S. law school, will not be sufficient to permit them to be admitted to the bar.

Professor Edwards begins his *LL.M. Roadmap* chapter on bar exams and practicing law in the U.S. with blunt warnings that neither LL.M. graduates nor foreign-educated lawyers have any automatic right to practice law in the U.S. and that licenses to practice law in the U.S. are granted on a state-by-state basis.[39] He correctly observes that a person with foreign law training, sometimes even without an LL.M. from a U.S. law school, can be admitted to practice law in some states, including New York.[40] But it is important for the

---

37. *See Market Trends, Facilities & Resources*, NORTHWESTERN LAW, http://www.law.northwestern.edu/career/markettrends/ (last visited Mar. 31, 2012). "Legal sector jobs" includes attorneys, paralegals, and other non-lawyer support workers. *Id.*

38. In all states, rules for admission to the bar are promulgated by the state's highest court including, in my own state of Indiana, the Indiana Supreme Court of which I am a member. In several states (not including Indiana), the court shares this authority with the legislature. NAT'L CONFERENCE OF BAR EXAMINERS & ABA SEC. OF L. EDUC. & ADMISSIONS TO THE BAR, BAR ADMISSION REQUIREMENTS 2012, Chart 1 at 1 (Erica Moeser & Claire Huismann eds., 2012) [hereinafter *BAR 2012*]. In 16 states (including Indiana), only J.D. graduates of ABA-accredited law schools are eligible for admission to the bar. *Id.* Chart 3 at 8-9. Another seven states permit graduates of law schools not accredited by the ABA to be admitted to the bar but not graduates of foreign law schools. *Id.* Chart 4 at 14-15.

39. LL.M. ROADMAP, *supra note* 1, at 419.

40. *Id.* at 423-27. In addition, an LL.M. may qualify an international student to sit for the bar in New York, among other U.S. jurisdictions, who might not otherwise qualify to do so. *Id.* at 426-27. The ABA proposed regulation to certify LL.M. programs mentioned in note 27, *supra*, is designed to expand this practice. Under the ABA's proposal, states would adopt uniform standards in this regard. These standards include a requirement that for a foreign-educated lawyer to sit for the bar examination, the lawyer must have received an LL.M. certified by the ABA as meeting criteria established by the Council to qualify. Adopting the ABA proposal would be highly desirable as it would introduce quality control to the current "Wild West" of LL.M. programs and consistency to foreign educated lawyers' examination and

international student to understand that that is the case only in **some** states – in at least 23 it is not – and that even in those states where it is the case, admission to the bar is conditioned upon passage of the state's rigorous bar examination. Passing the bar examination has proved to be a considerable hurdle to admission to practice for those international students who have been eligible to take it.[41]

The great number of international students who have planned from the outset of their American legal education to return to their home countries and deploy what they have learned in the U.S. also face employment challenges. One type of opportunity that we might expect would be available to a lawyer returning home with an LL.M. is employment in offices of U.S. law firms in the lawyer's home country.[42] Among other things, "LL.M. graduates have some understanding of U.S. law, facility with legal English, familiarity with U.S. culture."[43] Indeed, a foreign-educated lawyer has related to me that a number of her classmates from her home law school who subsequently graduated from LL.M. programs were employed in the offices of U.S. law firms in their home country. But she is quick to point out that they all graduated from a highly prestigious law school in their home country and then attended highly prestigious law schools here. Aside from such situations, this lawyer does not perceive many opportunities in offices of U.S. law firms in a lawyer's home country after returning home with an LL.M.

This lawyer's perception of the contemporary situation corresponds with the results of empirical research conducted by Professor Silver and several colleagues during 2006 and 2007.[44] Their research was based on a survey of 64 U.S. firms supporting a total of 386 offices in 55 cities located in 38 countries outside of the U.S.; approximately 8,700 lawyers worked in these offices.[45]

---

ultimate admission from state to state. However, implementing such a proposal would also diminish the value of non-certified LL.M. programs. PROPOSED MODEL RULE, *supra* note 27.

41. In 2010, three states reported more than 100 students educated at law schools outside the U.S. took their respective bar exams. The results were: California – 724 taking, 13% passing; New York – 4,596 taking, 34% passing; and Tennessee – 123 taking, 28% passing. Four other states and the District of Columbia reported between 20 and 100 students educated at foreign law schools taking their respective bar exams. Those states and their passage rates were: District of Columbia – 18%; Illinois – 17%; Louisiana – 15%; Massachusetts – 50%; Virginia – 23%. Nationally, 5,761 students educated at foreign law schools took the bar exam in 27 states and the District of Columbia; 31% passed. Nat'l Conference of Bar Examiners, *2010 Statistics*, 80 THE BAR EXAMINER 8 (2011).

42. *See* Carole Silver, Nicole De Bruin Phelan & Mikaela Rabinowitz, *Symposium: Empirical Research On The Legal Profession: Insights From Theory And Practice: Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Glocal*, 22 GEO. J. LEGAL ETHICS 1431, 1439-45 (2009) [hereinafter *Go Glocal*], for a general description of the international expansion of U.S. law firms through foreign offices.

43. *Winners and Losers*, *supra* note 4, at 925.

44. *Go Glocal*, *supra* note 42, at 1446-48.

45. These lawyers are heavily concentrated in EU countries with 35% of them practicing in England and 40% in other EU countries. Another 18% practice in Asian and Pacific countries. *Id.*

Relatively few lawyers in these offices held LL.M. degrees from U.S. law schools. Instead, the study showed that 68% of the lawyers working in these 386 offices had not completed any U.S. legal education at all – either J.D. or LL.M. Of the remainder, 18% had earned a J.D. degree in the U.S. and approximately 16% had earned an LL.M. in the U.S.[46] With respect to Professor Silver's study of the legal services markets in Germany and China in particular, while the LL.M. is a credential of only marginal importance in both countries,[47] elite U.S. law firms in China appear to value greatly a **J.D.** from a U.S. law school while Germany does not.[48]

C. Risk Factor #3: LL.M. programs vary greatly in the quality of their educational offerings and support and the degree of social interaction between J.D. and international LL.M. students.

International LL.M. programs, perhaps because of the absence of any accreditation or regulation, are not uniform or standardized in any way. This results in a number of problems.

First, there are a number of curricular matters that work to the detriment of international LL.M. students. While an international student may come to a U.S. law school expecting to take a particular course listed in the school's catalog, students sometimes discover that that particular course is not offered during the short one year of an LL.M. program. While some law schools permit LL.M. students to take J.D. classes without restriction, others do not. Again, these restrictions are sometimes not apparent until the student actually arrives on campus. International students who have taken J.D. classes have told me of several difficulties. Often professors assume basic knowledge of American law, American culture, and "legal English" that is simply impossible for someone who has not spent any time in this country to know. One Chinese lawyer told me an interesting story about how much help American students studying law in China get – because they are so noticeable! Here, she says, that with the large number of Asian-American students, it is often not apparent to professors who the international students are in their J.D. classes. Finally, I have heard complaints about grading from two entirely different perspectives. I have heard complaints about the grading of classes for LL.M. students being so easy as to not be meaningful.[49] And I have heard international students taking J.D. classes

46. *Variable Value, supra* note 5, at 16.

47. *Id.* at 32, 52.

48. *Id.* at 55. The statistics bear out this conclusion. Professor Silver's data shows that it is 20 times more common in China to find Chinese nationals working in elite U.S. law firms there having invested in a J.D. from the U.S. than to find similar connections in Germany. *Id.* at 40.

49. On this point, Professor Edwards writes, "Schools that hand out inflated high grades develop reputations as being 'easy,' and prospective employers discount the grades. This implicit devaluation penalizes students at those schools who legitimately earned high grades. Artificially high grades can also harm graduates whose grades are inflated because prospective

argue that the fact that English is their second language should be taken into account in their grades. In any event, Professor Edwards is undoubtedly right when he says that "[g]rading schemes differ at different LL.M. programs, and . . . [international students] will want to know whether grading policies at different schools are liberal, whether grades are based on a curve, and whether J.D. and LL.M. students are graded together on the same curve or graded separately."[50]

Second, law schools differ in the extent to which they support their international students with resources like legal writing programs and career services. There will likely be a writing component to any LL.M. program, but the way in which that component is supported will differ greatly from law school to law school. Not all schools have a legal writing infrastructure that utilizes professors with the training, experience, and cultural sensitivity needed for international students. And while there is a career services office at every law school, the availability to international students varies greatly. Professor Silver, for example, reports that most U.S. law schools do not invest in career services to help their LL.M. students search for jobs to the same extent as their J.D. students.[51] *LL.M. Roadmap* extensively probes the issue of the availability of career services,[52] concluding some law schools impose "second-class student citizenship" on their international LL.M. students by not providing career services.[53]

Third, many international LL.M. students find themselves isolated from J.D. students. This concern has been documented in a recent survey, the Law School Survey of Student Engagement, which reported generally limited interaction between J.D. students and international graduate law students enrolled in the same law school.[54] The international students I met with on this project were generally of the view that their own degree of initiative determines the extent of their interaction with U.S. law students. Neither the U.S. students nor the administration or faculty of their law schools made such interaction a priority. One student told me of her efforts to organize a social event combining international and U.S. students but U.S. student attendance was poor. Another told me that U.S. students don't think of their international counterparts as "real" law students. One professor called the international students "marginalized." Another who regularly teaches international LL.M. students was critical of American law schools' failure to introduce their international

---

employers might have higher expectations of them than will bear out. If the graduates do not perform at the high level that their high grades might predict or promise, the school's program loses credibility, and other graduates will not be taken seriously." LL.M. ROADMAP, *supra note* 1, at 110.

50. *Id.* at 251.

51. *Winners and Losers*, *supra* note 4, at 908.

52. LL.M. ROADMAP, *supra note* 1, at 116-20.

53. *Id.* at 117.

54. Law School Survey of Student Engagement, *Navigating Law School: Paths in Legal Education,* 2011 Annual Survey Results 14 (2011).

students to American cultural life while discussing some of his own impressive efforts in this regard. I will have more to say about the value of the interaction between international and U.S. law students later in the fourth section of this book review.

III. PROFESSOR EDWARDS'S *LL.M. ROADMAP* PROVIDES COMPREHENSIVE GUIDANCE TO INTERNATIONAL STUDENTS CONFRONTING THE INTERNATIONAL LL.M. PHENOMENON.

In the preceding section of this book review, I have laid down a broad range of cautions to international students contemplating LL.M. programs at U.S. law schools, quoting from and citing to *LL.M. Roadmap*. Recognizing that the book's candid assessment of the challenges that international students face in the U.S. is one of its great strengths, I turn now to a quick survey of *LL.M. Roadmap*'s wide-ranging advice to international LL.M. students on matters both great and small.

Part I of *LL.M. Roadmap* is an up-beat introduction,[55] including the catalog of reasons set forth in the first section of this book review for an international student to enroll in an LL.M. program in a U.S. law school.[56]

Part II considers selection of the "best" LL.M. program, emphasizing that this will differ for any particular international student.[57] Part II includes the caveats about accreditation, rankings, and "cash cows" – all matters set forth in the second section of this book review.[58] And this part also illustrates Professor Edwards's comprehensiveness when it comes to supplying information in the form of 218 – count 'em, 218 – criteria for use in choosing the "best" LL.M. program.[59] The list of considerations includes everything: school and LL.M. program size; campus facilities; location in the U.S.; academic requirements; non-classroom activities. It sets forth questions like: What is the student-to-faculty ratio? Is the school technologically up-to-date? Is the school in a large city or small town? Is the LL.M. program course-based or research-based? Can LL.M. students work on law journals? And while some of these 218 criteria overlap, the inventory is valuable for students who might not fully understand the context in which any particular consideration is presented. The bottom line here is that Professor Edwards presents an extremely thorough method for attacking the lack of transparency and uniformity in LL.M. programs.

Part III meticulously sets forth the steps required for the international student to comply with admission policies, including English proficiency requirements,[60] applications, personal statements, writing samples, and

---

55. LL.M. ROADMAP, *supra note* 1, at 1-52.
56. *See supra* notes 1-21 and accompanying text.
57. LL.M. ROADMAP, *supra note* 1, at 55-56.
58. *See supra* notes 25-34 and accompanying text.
59. LL.M. ROADMAP, *supra note* 1, at 71-150.
60. *Id.* at 207-16. In preparing this book review, I received widely varying comments about

recommendation letters.[61] Professor Edwards is persistent in this regard in emphasizing ethical considerations related to the admissions process – prohibitions on false or misleading information, plagiarism, and the use of others to prepare applications and personal statements.

Part IV discusses the next step in the LL.M. admission process – the school's response to a student's application[62] and format of classes in U.S. law schools.[63] In a chapter that many American J.D. students would benefit from reading before entering law school, Professor Edwards describes the Socratic Method, offers some advice on preparing for and participating in class, and discusses U.S. law school exams.[64] He concludes Part IV by encouraging international students to participate in law student organizations and extracurricular activities and even offers a list of dozens of organizations active on law school campuses around the country.[65]

Part V advises on the subject of student visas and other immigration issues.[66] Here Professor Edwards is at his best, breaking down each step of the process and explaining what things mean. He explains the types of visas, how to acquire them, and what students are authorized to do with each of them. *LL.M. Roadmap* includes charts comparing the two principal visa types for LL.M. students (the F-1 visa and J-1 visa)[67] and includes discussion of the student visa interview, what U.S. consular officers consider when deciding whether to issue a visa, and what students should bring with them to the interview.[68] Professor Edwards has provided a great service in compiling this essential information with such clarity and detail.

Part VI addresses financing issues – the cost of LL.M. programs; scholarships; tuition discounts; and student loans.[69] Here Professor Edwards makes the non-obvious point that generous tuition "discounts" can mask sub-standard academic programs[70] before admonishing students to avoid U.S.-based student loans.[71] Part VI also includes some great practical tips on how to save money on these expenses, applicable to any student on a budget.

English proficiency. U.S. law school administrators and faculty with whom I spoke expressed concern about inadequate English preparation on the part of international students. International students, on the other hand, were confident in their legal skills and attributed their difficulties more to a lack of understanding of basics of the American legal system than difficulties with English language per se. Several students said that the knowledge of English tested by TOEFL (Test of English as a Foreign Language), a test used by many international LL.M. programs, bore little relevance to a student's ability to understand and work with "legal English."

61. *Id.* at 151-206.
62. *Id.* at 229-40.
63. *Id.* at 241-304.
64. *Id.* at 263.
65. *Id.* at 331-40.
66. *Id.* at 305-340.
67. *Id.* at 329, 336-38.
68. *Id.* at 314-19.
69. *Id.* at 341-74.
70. *Id.* at 363-64.
71. *Id.* at 369-73.

Part VII discusses post-LL.M. employment opportunities. Given the attention to this subject in the previous section of this book review, I will not return to it here – except to say that Professor Edwards's commitment to comprehensiveness is again on display with "88 strategies for achieving your career goals."[72]

The book concludes with interesting and useful discussions of other U.S. law degrees (Part VIII) and "legalities, lifestyles, and leisure in the U.S." (Part IX). The former speaks primarily to students interested in pursuing either an S.J.D. or J.D. after earning an LL.M. In the latter, Professor Edwards speaks *in loco parentis*, warning international students about U.S. rules on alcohol consumption, drivers' licenses, seat belts, driving, discrimination, and sexual harassment. It is obvious that the last thing he wants is for the students he has advised in getting here to get in trouble for some reason that can easily be avoided.

In sum, while one LL.M. administrator expressed concern to me over *LL.M. Roadmap*'s accessibility to non-English speakers and its length, I congratulate Professor Edwards for addressing and providing helpful advice on virtually every material issue relevant to an international student studying at a U.S. law school.

IV. U.S. LAW SCHOOLS THAT DO RIGHT BY THEIR INTERNATIONAL LL.M. STUDENTS WILL REAP RICH REWARDS.

The maelstrom that engulfs American legal education today has yielded a pragmatic, not idealistic, response. To ward off the pressures of *U.S. News* rankings, law schools have shifted financial aid from those in need to those with high LSAT scores.[73] To deal with the bleak job market, schools have employed their own recent alums or given them scholarships for graduate study.[74] To generate cash for these needs, schools have launched LL.M. programs.

Perhaps if the purpose of American legal education were, as some of its fiercest critics seem to contend, mass-producing cogs and widgets for an assembly line called "the practice of law," such grubby pragmatism would be all that is warranted. But legal education is far more than vocational training.

Clients engage lawyers to vindicate their legal rights and to seek protection for their nearest and dearest interests. In vindicating and protecting these varied interests, a lawyer focuses on solving the problem or problems facing his or her client in a way that no other profession does or can.

Indeed, when we think of lawyers, we think not only of what they do for their clients; we also think of the unique skills they bring to their work. While a

72. *Id.* at 377-408.

73. Segal, *Behind the Curve*, *supra* note 24.

74. Segal, *Is Law School a Losing Game?*, *supra* note 24.

law degree is a license to practice a trade, a legal education is something far more. A legal education is writing and speaking; reading, researching, and analyzing. It is full immersion into an indeterminate world in which there are always two (and often more) sides to any issue; training that equips to analyze issues and problems – and not just legal issues and problems, but all sides of issues and problems of business and government and politics as well. Law students learn to organize facts to support principles and then to make reasoned exceptions to those principles. And this constant interplay of fact and principle, and exceptions therefrom, extends beyond law as well, enabling the businessman or government official or politician with legal training to infer policy from fact and decide when that policy should be modified. To borrow from Cardinal Newman, "[i]t is the education which gives a man a clear conscious view of his own opinions and judgments, a truth in developing them, an eloquence in expressing them and a force in urging them."[75]

This is why I think the breast-beating over contraction in the traditional market for practicing lawyers is overdrawn.[76] And it also explains why students continue to enroll in law school despite the bleak projections in the legal job market. These students are not dumb; they know how to evaluate the job market.[77] They know what commentators should know: that a legal education is preparation for a particular career but even more preparation for any career with its emphasis proficiency in writing and speaking, reading, researching, analyzing, and thinking logically.[78] And they want to develop that proficiency.

But there is another thing that law schools need to do. Law schools need to recognize that their students will be taking their place in a highly globalized world. There is no courtroom in this country into which international considerations do not enter, be they international child custody disputes or simply litigants from abroad bringing their different language and different

75. JOHN HENRY CARDINAL NEWMAN, THE IDEA OF A UNIVERSITY 178 (Frank M. Turner ed., 1907).

76. In point of fact, the Bureau of Labor Statistics projects that "[e]mployment of lawyers is expected to grow by 10 percent from 2010 to 2020, about as fast as the average for all occupations." OUTLOOK HANDBOOK, *supra* note 12. While this does not keep pace with law school enrollment trends in recent years, it is not nearly so gloomy a prediction as that of many critics.

77. David Segal, *For 2nd Year, a Sharp Drop in Law School Entrance Tests*, N.Y. TIMES, Mar. 20, 2012, at B1 (reporting a steep decline in the number of Law School Admissions Tests administered in the last two years in apparent response to the job market for lawyers).

78. Professor William Henderson has found that the most valuable associates at law firms possess certain qualities and skills like initiative, integrity, responsiveness, confidence, oral communication, analytical thinking, and the ability to continue to learn and that partners, in addition to possessing those previously mentioned, excel at business awareness, decision-making, innovation, problem solving, and customer focus. Professor Henderson has argued that law schools should do better to prepare its students in these areas. American Bar Foundation, *The Fellows CLE Research Seminar: "What defines Competence? A Debate on the Future(s) of Lawyering"*, 22 RESEARCHING LAW, no. 2, Spring 2011, at 5-6.

understanding of law to the courtroom with them. There is no county recorder's office that does not reflect foreign-owned real estate. There is no Chamber of Commerce without an internationally-owned member. As Valparaiso Law Dean Jay Conison told me, it will be fatal for a law school – any law school – not to have an international component in the 21st century.

Professor Silver has identified several ways in which U.S. law schools attempt to reflect an "international character." These include offering courses on international and comparative law; creating centers focused on international or foreign law; and supporting programs of study for their students in a foreign country.[79] I have no doubt that all of these contribute to law schools' preparing their J.D. students for globalization, be it in law or business or government.

But law schools are not valuing and utilizing the single greatest resource that they have for preparing their J.D. students for globalization – the thousands of international LL.M. students being educated at close quarters with those J.D. students. These are, as I have indicated at various points in this book review, inspiring men and women. They are well-educated in their own countries – excellent students; intelligent individuals – that have put their own careers on hold and traveled to the U.S. for graduate training in law. International LL.M. students are not science students here to do research; instead, as one international student told me, "they are law students here to learn." There has not been a single conversation that I have had with an international LL.M. student that hasn't taught me something about a part of the world of which I was ignorant; an aspect of law with which I was not acquainted; or a dimension of human nature that I hadn't considered. Yet how many J.D. students go through their entire three years without a single substantive conversation with an international LL.M. student?

Law schools and their faculties need to recognize their LL.M. students as far more than just revenue generators and seek out opportunities for their international students to enrich the educational experiences of their J.D. students. Strong administration of the LL.M. program is essential. Some suggestions that I received from both U.S. law school faculty members and international LL.M. students include: programs with both U.S. and international students comparing the law and life in this country and theirs; utilizing international students in U.S. law schools' foreign study programs; consciously arranging seating in classes so as to mix U.S. and international students; assigning group projects so that U.S. and international students must work together and depend upon each other; intervening in housing arrangements so that U.S. and international students are not segregated from one another.

As a member of the Indiana Supreme Court, I have had the great good fortune of dozens of law clerks – brand new lawyers who have put their careers on hold – assisting me in my work. Their differences from me in age and

79. *Winners and Losers, supra* note 4 at 904-05.

experience and gender and race have helped me see sides to issues I would not have otherwise seen; assisted me in analyzing issues and problems in ways I would not have otherwise done; and likewise guided me in organizing facts to support principles and then to make reasoned exceptions to those principles. They have helped me because their differences from me meant they saw things differently than I did. International LL.M. students can do for their classrooms and their classmates what my law clerks have done for me. American legal education cannot afford to waste the incredible resource of the international LL.M. students in its midst; U.S. law schools need to recognize their full value.

V. CONCLUSION

As U.S. legal education continues to welcome thousands of international LL.M. students to its classrooms, it needs to minimize the risks these students face in coming here. Professor Edwards's *LL.M. Roadmap* is an indispensable resource in this regard, providing information that LL.M. students require – and information law schools need to provide them. Above all, U.S. legal education needs to integrate international LL.M. students into the entire fabric of law school life so that U.S. and international students can learn from each other in our brave new globalized world.

ON THE FAILURE OF A LEGAL TRANSPLANT: THE CASE OF EGYPTIAN TAKEOVER LAW

Ahmad A. Alshorbagy*

Faculty of Law, Alexandria University

I. INTRODUCTION

In his seminal work on comparative law, Alan Watson outlined a theory of legal development based on the idea of legal transplants.[1] According to Watson, legal transplants are the source for most global legal developments because the majority of changes in legal systems are the result of borrowing.[2] Thus, the quality of legal rules is of little significance to the success of a transplant as the rules are not peculiarly designed for particular societies. Rather, the act of transplanting the rule is what really matters.[3]

This Article examines Egyptian takeover law derived from transplanted French law.[4] This Article provides context by comparing Egyptian takeover law to its counterparts in three different Middle Eastern jurisdictions: Saudi Arabia, Bahrain, and Kuwait.[5] These countries' securities markets are considered emerging markets in the Middle East, and they bear substantial resemblance to the Egyptian market in their corporate structure, political environments, and takeover regulations.

This Article's comparison sheds light on the role of legal transplants in takeover law by examining Egypt's takeover regulations as imported from France. While a transplant can be successful even if the borrowed rules are intended to serve a different purpose in the recipient jurisdiction than they did in the source jurisdiction, success depends on the existence of a functional legal and institutional infrastructure in the recipient jurisdiction that can amend the imported rules to make them compatible to their new legal environment. In this instance, Egypt did not have the necessary infrastructure to smoothly adopt the transplanted French takeover rules.

---

* S.J.D., LL.M., University of Virginia School of Law, Assistant Professor at Alexandria University School of Law in Egypt. This article is based on a portion of my doctoral thesis. I would like to thank Professor Julia Mahoney for her invaluable comments, Ms. Leslie Ashbrook and Ms. Sarah Withers for their editorial work, and my wife for her unconditional support. Of course, all errors remain mine. The author can be reached at aaa9f@virginia.edu or a_almoatassem@yahoo.com.

1. *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993).
2. *See id.*
3. *Id.* at 94-96.
4. *See infra* Part II.
5. *See infra* Part III.

Part Two defines legal transplants and draws guidelines for successful transplants.[6] The most important factor for measuring the success of a transplant is the extent to which the imported rule serves the purpose for which it is transplanted. Success depends on the compatibility of the imported rules to the legal environment in which they were transplanted. The institutional and legal infrastructures of the recipient jurisdiction are the most significant factors. Part Two also examines the relationship between French and Egyptian laws.[7] French law has been a key source for Egypt's legal development since the beginning of the codification of the Egyptian law. Thus, legal transplants have greatly contributed to Egyptian legal development not only on the individual rule level but also to the legal system in its entirety.

Part Three discusses the takeover rules of the European Union as the source of the French takeover regulations.[8] France has partially adopted the European takeover rules as outlined in the Thirteenth Directive on Takeover Bids.[9] This partial adoption, which negated the purpose of the Takeover Directive to encourage takeovers, is a result of the French desire to protect their national investments from takeover by international rivals. In contrast, the Egyptian takeover regulations seek to attract more investments and to encourage takeovers. Despite the fact that the objective of Egypt's takeover laws is starkly different from the French motivation, Egypt essentially copied the French takeover rules.

The Egyptian government failed to account for the varying motivations of French and Egyptian regulations. The Egyptian government should have anticipated the need for amendments necessary for the success of the takeover transplant. Egypt's institutional incompetence intensified the incompatibility of the transplant. This incompetence is evident in the dependency and inefficiency of the Egyptian Financial Supervisory Authority (EFSA), which is the main market regulator and supervisor in Egypt.[10] The EFSA's ineffectiveness extends to its judicial supervision of capital market disputes. Furthermore, the failure of the imported laws from France to achieve Egypt's goal may also be attributed to the newness of Egypt's capital market laws and the jurisdictional conflict between Egyptian courts over their competence to hear takeover disputes.

The ineffective transplanting of the French takeover rules was also caused by Egypt's lack of a robust legal infrastructure. The Egyptian takeover regulations took the form of executive regulations for the Capital Market law. This format assumes that the Capital Market law provides guidelines for the implementation of such regulations. This is incorrect with respect to the

---

6. *See infra* Part II.

7. *See infra* Part II.

8. *See infra* Part III.

9. Council Directive 2004/25, 2004 O.J. (L 142) 12 (EC).

10. *About EFSA*, EGYPTIAN FIN. SUPERVISORY AUTH., http://www.efsa.gov.eg/content/efsa2_en/efsa2_merge_about_en/efsa2_merge_efsa_en.htm (last visited Mar. 29, 2012).

Egyptian Capital Market law. Unlike the French law or the Kuwaiti law, the Egyptian Capital Market law lacks any rule regulating takeovers. This raises doubts concerning the validity of the Egyptian takeover regulations. This weak legal infrastructure has resulted in many drawbacks in the Egyptian takeover regulations. Weaknesses include vagueness and poor drafting in some provisions of the regulations such as the price determination provision of the mandatory tender offer.[11] Other examples of the regulations' shortcomings include the failure to add rules necessary to achieve the purpose of the regulations such as breakthrough and squeeze-out rules.

To further illustrate the inadequacy of the imported takeover regulations, Part Four examines the *Mobinil* case, the first takeover dispute raised in Egypt after the adoption of the new takeover regulations.[12] In conclusion, this Article argues that the success of legal transplantation lies less in the substance of the rules than in building effective regulatory states that are able to adjust the imported rules to make them serve their needs.[13]

II. THE LEGAL TRANSPLANT

Although the Egyptian legal system is derived from the French system, the transplantation of the French takeover law in Egypt has been unsuccessful. This Part examines the parameters of legal transplants in general. It then moves on to explain the transplanting of the French legal system in Egypt with a focus on the transplantation of the French takeover regulations. This Part concludes with a discussion of the reasons for the failure of the transplantation of the takeover regulations in Egypt.

A. Legal Transplant Parameters

Legal transplantation is the most fertile source of legal development.[14] Because so many laws are transplanted, it follows that "legal rules are not peculiarly devised for the particular society in which they operate and also that this is not a matter for great concern."[15] Transplantation provides accessible

11. Law No. 135 of 1993 (Executive Regulations of Capital Market Law), *Al-Waqa'i' al-Misriyah*, 8 Apr. 1993, Vol. 81 F., art. 354 (Egypt) [hereinafter ERCML].

12. Case no. 12149/2010/Supreme Administrative Court (Egypt).

13. *See infra* Part III.D.3.b.

14. WATSON, *supra* note 1, at 95 ("[T]he contract of sale in the whole Western world, Common law countries and Civil law countries alike, is fundamentally that which existed at Rome in the later Second century A.D.").

15. *Id.* at 96. *See also* Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 315-16 (1978) (arguing that it is the act of transplanting the law that matters most for the success of a transplantation). *But see* Hideki Kanda & Curtis Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 890 (2003) (citing Pierre Legrand, *What "Legal Transplants"?*, in ADAPTING LEGAL CULTURES 55 (David Nelken & Johannes Feest eds., 2001); Otto Kahn-Freund, *On Uses and*

and potentially fruitful sources of legal development. Such sources serve as an authority for practitioners involved with legal reform. Furthermore, legal transplanting is useful when a rule needs to be quickly developed. This form of transplantation, known as *blind copying,* is more common when the receiving country is less advanced legally. Because of the ease and speed with which they can be instituted, legal transplants are ubiquitous.[16]

The central question addressed in this Article is not related to the viability of legal transplants, but to the conditions for success of the transplant. Although there is no unified measurement to assess the success of transplants, a few conclusions can be drawn.[17] For example, the motivation behind the transplant determines its success to a great extent. The adoption of any legal rule must have certain purposes. Legal drafters should be consulted to know the original purpose of the regulation. Transplantation is successful insofar as it actually fulfills its intended purposes in the host jurisdiction.[18] Of course, the contemplated purposes of a legal transplant may be politically biased.[19] Thus, focus should be placed on purposes related to public interests rather than private interests. It is the responsibility of legal practitioners to help elucidate the considerations that should prevail among the competing interests to determine the main purposes of the transplanted rules. However, the motivation alone remains an inexact criterion to assess the success of a legal transplant.

Other factors contribute to the success of a legal transplant; most important is the legal environment in which the rule is transplanted. In particular, the success of transplantation depends on its compatibility with the receiving country's preexisting legal and institutional infrastructure.[20] A plant cannot properly grow unless it is transplanted in the right season and into soil

---

Misuses of Comparative Law, 37 MOD. L. REV. 1, 10-11 (1974); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3, 8 (1994). A competing model for Watson's suggests that "[n]othing in the law is autonomous; rather, law is a mirror of society, and every aspect of the law is molded by economy and society." William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 492 (1995) (explaining the "mirror theories" have two aspects: the first is that the law reflects not only one factor but a set of factors constituting from geographic, religious, political factors, etc.; the second aspect is that rules of law also vary according to the strength of these factors). *Id.* at 492-93.

16. Kanda & Milhaupt, *supra* note 15, at 889.

17. *Id.* at 890.

18. Motivation is, however, an ongoing issue that may change over time. An unsuccessful transplantation today may be successful several years in the future. *See id.* at 891.

19. For example, a monopolist businessman who is also politically influential may have a biased motivation that will affect the quality of the imported rules, if he is involved in regulating competition. In fact, this was the case with Egyptian competition law regulation. *See infra* note 88 and accompanying text.

20. *See* Kanda & Milhaupt, *supra* note 15, at 891 (describing these factors as the "fit" between the imported rule and the host environment. This "fit" has two components: (1) micro-fit refers to the relationship between the imported rule and the preexisting legal infrastructure in the host country; (2) macro-fit describes the relationship between the transplantation and the preexisting political economy institutions of the host country).

well suited to its needs; the same idea applies to a legal rule.

B. Transplanting the French Legal System in Egypt

Egyptian law belongs to the Romano-Germanic family of law.[21] The Romano-Germanic family includes countries whose legal systems are based on Roman *ius civile*,[22] which originated in Europe and "has evolved primarily for historical reasons as a means of regulating private relationships between individuals."[23] Other branches of law were later developed according to the principles of civil law. Codification of legislation has become a distinctive feature of this family since the nineteenth century, and this, in turn, established its worldwide ubiquity.[24]

Under Mohammad Ali's reign, which started in 1805 and lasted until 1849, Egypt began the modernization of its laws to become a civil law country.[25] The transformation from Shari'a law to civil law started with establishing specialized judicial councils in response to Egypt's gradually increasing subjection to international commerce constraints and Western imperialist influence. These judicial councils progressively limited the competence of Shari'a courts in most of the matters unrelated to personal status. The Mixed Courts were established in 1875 to handle disputes involving foreign nationals, while the National Courts heard disputes between Egyptians.[26]

Although Egypt was part of the Ottoman Empire at that time, strong Western influences persuaded Egypt not to adopt the Ottoman *Majallah (Mecelle)*.[27] Despite the existence of *Murshid Al-Hayran* as an Egyptian version of codified Shari'a law modeled after the Ottoman *Majallah,* which was originally intended to serve as an Egyptian civil code, Egypt's government implemented codes inspired by the Napoleonic code. Egypt's reliance on the

---

21. *See* RENÉ DAVID & JOHN BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 22-24 (3d ed. 1985) (The Romano-Germanic family is one of three main legal families besides the Socialist law family and the Common law family. This classification is based on the techniques of enunciation and the methods of reasoning in the interpretation of the rules rather than on the similarity of rules).

22. *Id.*

23. *Id.*

24. *Id. See also* BLACK'S LAW DICTIONARY 275 (9th ed. 2009) (defining codification as "the process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code." The codification of statutes makes laws easily accessible for other jurisdictions seeking legal authorities).

25. EGYPT: A COUNTRY STUDY (Helen Chapin Metz ed., 1990), *available at* http://countrystudies.us/egypt/21.htm.

26. *See* EGYPT AND ITS LAWS, XXIV-XXVII (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002).

27. The Ottoman *Majalla*, promulgated in 1876, is the first codified version of civil rule of Islamic Shari'a. Although Egypt was part of the Ottoman Empire, it did not incorporate the *Majalla* in its law. Rather, Egypt relied on the French Napoleonic code in forming its laws. *Id.*

French codes was partially due to its anticipation of the British occupation; the codification of the French law also provided easy access to its authorities.

"Whatever may have been the foreign influence on drafting of Egyptian codes, their adoption, at the same time as the Mixed and National Courts were created, most fundamentally and lastingly established the very principle of a codified legality decided upon and amended by a legislator."[28] After the abrogation of the Mixed Courts, a unified civil code prepared by *AlSanhuri* was put into force in 1949;[29] it still functions as the current Egyptian civil law. *AlSanhuri* is said to have attempted to *Islamize* the new code.[30] This did not impede a subsequent hunt for legal authority from French laws by Egyptian legal professionals.

C. Takeover Law Transplantation

Western political influence has led Egypt to become a civil law country, and the *corpus juris* of the French law inevitably inspired the Egyptian codes. The French legal system continues to steer the legal development in Egypt today. The Egyptian takeover regulation is an example.

The Egyptian government regulated takeovers in 2007 in response to the growing number of takeovers over the last few years.[31] Takeover regulations are supposedly part of the plan to integrate Egypt's capital market into the global market by developing its laws to conform to the latest international trends and complying with corporate governance standards. The advertised purpose of such regulation is to attract more investments to the Egyptian markets while observing the highest standards of corporate governance. As the Egyptian corporations are marked with high concentrations of ownership, takeover regulations were meant to encourage takeovers and also to protect the interests of minority shareholders.[32]

---

28. *Id.* at XXVI.

29. *AlSanhuri* is one of the most celebrated Arab jurists in the twentieth century. Espousing a comparative approach, he drafted many of the laws of the newly independent Arab States. In this sense, *AlSanhuri* is something of a vernacular Justinian in the Arab world. For more on *AlSanhori's* work, see Amr Shalakany, *Sanhuri and the Historical Origins of Comparative Law in the Arab World (Or How Sometimes Losing Your Asalah Can Be Good For You), in* RETHINKING THE MASTERS OF COMPARATIVE LAW 152, 152-65 (Annelise Riles ed., 2001).

30. *AlSanhuri's* work initially started as an Islamizing project of the Egyptian civil code, but he ended up reneging on this claim when Nasser came to power. *See* Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 ISLAMIC L. & SOC'Y 201 (2001).

31. *See generally* Shahira Abdel Shahid, *Does Ownership Structure Affect Firm Value? Evidence from the Egyptian Stock Market* 14 (Jan. 2003) (unpublished Working Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=378580; *see also* Ahmad A. Alshorbagy, *Orascom Telecom Versus France Telecom: A Case Study on Egyptian Takeover Law*, 20 INFO. & COMM. TECH. L. 157, 158 (2011).

32. ERCML, *supra* note 11, at art. 92 (outlining the purpose of the Egyptian takeover regulations as to, *inter alia*, establish full transparency in accordance to the laws and best

To this end, Egypt has fashioned its takeover regulations based on the French model. This Article argues that the Egyptian takeover transplantation, however, has not been successful in part because it failed to honor the motivation behind its implementation. The failure of the takeover regulation transplantation is not attributed to the quality of the imported rules themselves, but rather to their incompatibility with the declared motives of the regulations. The imported rules discourage takeovers by increasing their costs and empowering incumbent controlling shareholders with the authority to resist prospective takeovers, which in turn affects minority shareholder rights.

III. TAKEOVER REGULATIONS

This Part of the Article outlines the main features of the European takeover model, which inspired the French takeover regulations. It examines the extent to which the French regulations embraced the European Union Takeover Directive. It then discusses the Egyptian takeover regulations and concludes with an examination of the reasons for the failure of transplanting the French takeover regulations to Egypt.

A. The European Takeover Model

Although there are different jurisdictions within Europe, the European Thirteenth Directive establishes the terms for a common structure of takeover laws.[33] Contrary to the law of the United States,[34] the European Directive restricts both the raider and the target company. There are two basic features of European takeover law: (1) the mandatory tender offer; and (2) the limitations imposed on the adoption of defensive measures.[35]

The mandatory tender offer rule requires a raider to tender an offer for all the outstanding shares of the target once a defined ownership threshold is triggered.[36] The second feature appears in the limitations imposed on the adoption of any defensive measures by the target's board against a hostile bid. In addition to a board neutrality requirement, also referred to as the non-frustration rule,[37] limitations extend to any pre-bid measure interfering with shareholders' franchise or transferability of securities as required by the breakthrough rule.[38] Although adopted by most of the European Union

---

international practices, to secure impartiality and equal opportunities between all shareholders, and to protect the interests of the target company and its activities).

33. Council Directive 2004/25, ¶ 26, 2004 O.J. (L 142) 12 (EC).

34. The laws of the United States allow buyers to acquire any number of shares while permitting the target corporation to resist the bid by any reasonable defensive measures. *See generally* CHRISTIN M. FORSTINGER, TAKEOVER LAW IN THE EU AND THE USA: A COMPARATIVE ANALYSIS (2002).

35. Council Directive 2004/25, arts. 9, 11 ¶ 3, 2004 O.J. (L 142) 12 (EC).

36. *Id.* art. 5.

37. *See id.* art. 9.

38. *Id.* art. 11.

members, Article 12 of the Directive provides an opt-out provision for the members who do not wish to apply any of the previous provisions.[39] The Directive also only creates an outline for takeover rules and leaves the member States to determine the details.

B. The French Takeover Regulations

Following the Thirteenth European Directive on Takeover Bids, the French government decided to amend its executive regulations transposing the guidelines of the European Directive.[40] The amended regulations introduced the mandatory tender offer rule that requires the bidder to launch a mandatory offer – in line with Article 5 of the European Directive – to all the target's shareholders.[41] The mandatory tender offer is triggered at the threshold of 30 percent ownership of the voting securities of a company.[42] It also applies to holders of between 30 percent and 50 percent of the total number of equity securities or voting rights of a company and who increase such holding by at least 2 percent of the company's total equity securities or voting rights within a period of less than twelve consecutive months.[43] The *Autorité Des Marchés Financiers* (Financial Market Authority – AMF) has discretionary power to waive the mandatory offer requirement in certain cases.[44] The price of the mandatory offer must be at least equal to the highest price paid by the bidder, or any concert parties, during the twelve months before the event triggering the crossing of the threshold.[45] However, the AMF may request or authorize a price modification if either a manifest change in the characteristics of the target company or the market for its securities has occurred during the twelve months preceding the contemplated offer, or in the absence of transactions by the

39. *Id.* art. 12.

40. *Décision du 28 Septembre 2006 de règlement général de l'Autorité des Marchés Financiers* [Decision of September 28, 2006 concerning the Adaptation of the General Regulations of the Autorité des Marches Financiers], JOURNAL OFFICIEL DE LA RÉÇPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 28, 2006. The Act of 31 March 2006 transposed the legislative provisions of the European Directive into the French Commercial Code, but the AMF Regulation, published on 28 September 2006, finalized the transposition of the Directive into French law. *See* AUTORITÉ DES MARCHÉS FINANCIERS, AMF, 2006 ANNUAL REPORT: CHAPTER III- CORPORATE FINANCE AND THE QUALITY OF FINANCIAL DISCLOSURE 1 (2006) *available at* http://www.amf-france.org/documents/general/7944_1.pdf [hereinafter AMF].

41. General Regulation of the Autorité des Marchés Financier, Book II - Issuers and Financial Disclosure (last amended Jan. 31, 2011), art. 234-2 [hereinafter Issuers and Financial Disclosure].

42. *Id.* The 30 percent has been reduced from one-third on February 2011. The one-third threshold still applies in limited cases. *See also id.* art. 234-11.

43. *Id.* art. 234-5.

44. *Id.* arts. 234-7, -9.

45. AMF, *supra* note 40, at 8; *See also* Issuers and Financial Disclosure, *supra* note 41, art. 234-5.

offeror in the securities of the target company over the same twelve-month period.[46] In such situations, the price would be determined based on accepted valuation criteria.[47] The consideration offered to the target can be cash, securities, or a combination of both.[48]

The French takeover regulations have also opted into Article 9 of the European Directive regarding the non-frustration of a pending offer unless a shareholder meeting held after the filing of the bid approves the action of the board.[49] Reciprocity applies in this regard.[50] If the bidding company itself were not subject to equivalent restrictions, the target's board would be released from the restrictions of the non-frustration rule and would be able to employ defensive measures against a pending offer.[51] While France adopted the non-frustration (board passivity) rule of the European Directive, it opted out of the breakthrough rule stipulated by Article 11 of the Directive.[52] Reciprocity does not apply to Article 11.[53] In fact, the French takeover regulations increase the array of defensive measures available for target companies.[54] Shareholder warrants, similar to American poison pills, are the most significant example of the French defensive policy.[55] The change in the squeeze-out methods and the introduction of the automatic squeeze-out procedure that allows a bidder to buyout minority shareholders is another important feature of the French takeover regulations.[56]

The French takeover regulations thus require a bidder to launch a mandatory tender offer for all the shares of the target company while providing the target several means to resist a hostile offer.[57] The French regulations purportedly transposing the European Takeover Directive have violated the Directive's main goal to encourage free capital movement by facilitating takeovers. The French law has been widely criticized within the European

---

46. *See* AMF, *supra* note 40, at 9.

47. *See Id.*

48. Issuers and Financial Disclosure, *supra* note 41, art. 231-8.

49. *Id.*

50. *Id.* art. 233-33.

51. *See* Memorandum, Fried, Frank, Harris, Shriver & Jacobson LLP, Reforms to French Regulation of Takeover Bids 1 (2006), *available at* http://friedfrank.com/siteFiles/ffFiles/060929_reforms_to_french_regulation.pdf [hereinafter Fried Frank]; AMF, *supra* note 40, at 7.

52. Briefing, Freshfields Bruckhaus Deringer, The Takeover Directive: implementation in France 3 (2005), *available at* http://www.freshfields.com/publications/pdfs/2005/FrenchTakeover.pdf [hereinafter Freshfields].

53. *Id.* at 1.

54. Fried Frank, *supra* note 51, at 3.

55. *Id.* at 5.

56. Issuers and Financial Disclosure, *supra* note 41, at ch. VI.; *See also* Freshfields, *supra* note 52, at 4.

57. *See* Briefing, Freshfields Bruckhaus Deringer, Important Changes to French Takeover Regulations 4-5 (Oct. 2006), *available at* http://www.freshfields.com/publications/pdfs/2006/16513.pdf.

Union for this result.[58] The French Legislature was motivated to adopt anti-takeover policies because of the French desire to protect national businesses and industries from being overtaken by foreigners.[59]

France's determination to resist takeovers is the key to understanding the inadequacy of its takeover rules for the Egyptian capital market; the same rule cannot serve opposite purposes unless properly adjusted. The French takeover rules, which discourage takeovers, will not encourage takeovers when transplanted to Egypt.

C. The Egyptian Takeover Regulation

In 2007, Egypt created its first comprehensive takeover regime by adding a new Chapter regulating takeovers[60] in the executive regulations[61] of the Capital Market Law.[62] The Egyptian takeover scheme is modeled after the French scheme insofar that their rules are almost identical.[63] The Egyptian regulations require bidders seeking control to extend mandatory tender offers and restrict target companies' boards from frustrating pending offers, but the Egyptian regulations do not impose a breakthrough rule to prohibit pre-bid defenses against hostile takeovers.[64]

The new regulations deal with the mandatory tender offer requirements in three articles. Under Article 353, the mandatory tender offer rule is triggered in two situations. The first situation applies to any bidder whose ownership of the company's securities or voting rights exceeds one-third of a corporation's stocks or voting rights. The second situation applies to holders of one-third but less than one-half of a corporation's securities or voting rights who increase

---

58. *See* Adam Cohen, *EU Is Likely To Drop Its Fight With France on Takeover Law*, WALL ST. J., May 25, 2006, at A8.

59. *See* Serf, *French Takeover Law*, THE ROAD TO EURO SERFDOM (Jan. 4, 2006, 11:48 AM), http://eu-serf.blogspot.com/2006/01/french-takeover-law.html (describing the French takeover law as a "poison pill to stop takeover in certain sectors," and that this policy is derived from economic ignorance).

60. Minister of Investment Decree No. 12 of 2007 (Amending Some Provisions of the Executive Regulations of the Capital Market Law No. 95 of 1992 issued by Decree of the Minister of Economics and Foreign Trade No. 135 of 1993), *Al-Waqa'i' al-Misriyah*, 4 Feb. 2007, vol. 26 pp. 2-30 (Egypt).

61. ERCML, *supra* note 11.

62. Law No. 95 of 1992 (Capital Market Law), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, art. 25 (Egypt).

63. This Article describes the Egyptian takeover regime as one that embraced the European takeover approach to a great extent. It is, however, more accurate to describe the Egyptian takeover regime as one that adopted the French model rather than one that adopted the European model, considering that the French model, unlike the European model, discourage takeovers. *See* Radwa S. Elsaman & Ahmad A. Alshorbagy, *Doing Business in Egypt After the January Revolution: Capital Market and Investment Laws*, 11 RICH. J. GLOBAL L. & BUS. 43, 46 (2011).

64. Law No. 95 of 1992 (Capital Market Law), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, art. 8 (Egypt).

their ownership stake by more than 2 percent within twelve consecutive months or if their ownership exceeds one-half of the corporation's securities or voting rights at any time. The same provisions apply to holders of more than 50 percent but less than 75 percent of the corporation's stocks or voting rights who increase their ownership by more than 2 percent within twelve consecutive months or whose ownership exceeds the 75 percent threshold at anytime.[65] The price of the mandatory tender offer must be as high as the highest price paid by the acquiror, or any affiliated party in a previous tender offer during the twelve months preceding the tender offer in question.[66] Consideration may be cash, securities, or a blend of both. However, when the consideration contains securities, target shareholders must have a cash alternative available if they choose to withdraw from the new corporation.[67]

The Egyptian regulations further impose a non-frustration rule on the board of the target corporation. The rule prohibits the board of the target corporation from undertaking any action or procedure that is considered a "significant detrimental event" starting from the date of publishing the decision approving the tender offer by the competent authority and extending until the conclusion of the tender offer.[68] The regulations provide two examples of significant detrimental events. The first involves increasing the target capital or issuing new convertible bonds if such an increase would make the acquisition difficult or impossible.[69] The second is broad and includes any actions that would significantly affect the target's assets or increase its obligations.[70] Additionally, the target corporation cannot buy its own shares once the offer is published.[71]

Like the French takeover regulations, the Egyptian regulations are without a breakthrough rule that restricts the target from employing general pre-bid defensive measures. The omission of the breakthrough rule undermines the restriction of the board neutrality rule and empowers the controlling shareholder who would have absolute power to resist or accept an offer by duly adopting pre-bid defenses.

---

65. ERCML, *supra* note 11, art. 353.

66. *Id.* art. 354/1 ("The price of the mandatory tender offer may not be less than the price paid by the offeror, or any person affiliated with him, *in a previous tender offer* during the last twelve month preceding the tender offer in question") (emphasis added).

67. *Id.* art. 328/3.

68. *Id.* art. 343. *See also id.* art. 326 (defining a significant detrimental event as "any expected event arising after launching the offer that would have a negative effect on the target company, its business or the share value") (emphasis added).

69. *Id.* art. 343/1.

70. *Id.* art. 343/2.

71. *Id.* art. 351.

D. The Incompatibility of the French Model with the Egyptian Legal Environment

1. Different Motives

Takeover regulations are part of the economic policy of any state. The purpose of takeover regulations depends on the economic policy of each jurisdiction. Despite being a member state in the European Union, France has always been choleric about the integrity of its national investments. The French apply hostile policies to foreign investments as a result of constant concern over its industries falling into the hands of rivals. These same policies continue to apply in the regulation of takeovers.

This is best understood in light of the long history of the Thirteenth European Directive. The struggle between the European states over the rules of the European Directive on Takeovers resulted in several failed attempts to reach an agreement on reform proposals.[72] As a result, the rules of the Directive have been the subject of great compromises to gain the hard-won agreement of the member states of the European Union. The outcome of such compromises is a great margin of flexibility, which allows each member state to opt out or to apply reciprocity requirements to some substantial rules of the Directive.[73]

This flexibility led to a great deal of inconsistency in the transposed takeover rules of the member states. As the European Directive established the main guidelines for allowing member states to tailor their takeover laws according to their policies, the effect of transposing the Directive's rules is not the same in the different states. Indeed, the French takeover regulations negate the purpose of having a unified set of takeover rules, which is to secure free and easy transfer of capital across borders.

This makes it important to consider the individual state's policy as well as other factors that may determine the effect of the adopted rules of takeovers in a

---

72. *See generally* Philippe Lambrecht, *The 13th Directive on Takeover Bids – Formation and Principles, in* CAPITAL MARKETS IN THE AGE OF THE EURO 441 (G. Ferrarini et al. eds., 2002); ANDREA ANGELILLIS & CHIARA MOSCA, THE THIRTEENTH DIRECTIVE ON TAKEOVER BIDS: A FIRST ANALYSIS IN THE LIGHT OF THE INITIAL EXPERIENCES AFTER TRANSPOSITION BY MEMBER STATES AND THE POSITION EXPRESSED IN THE EUROPEAN COMMISSION DOCUMENT 4 (2007), *available at* http://www.side-isle.it/ocs/viewpaper.php?id=57&cf=1; John Armour & David Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1757-63 (2007) (discussing the historical development of takeover rules in the U.K. before their implementation in the Thirteenth European Directive); Marco Ventoruzzo, *Takeover Regulation as a Wolf in Sheep's Clothing: Taking U.K. Rules to Continental Europe*, 11 U. PA. J. BUS. & EMP. L. 135, 145 (2008) (highlighting the adoption of the U.K. approach in some European countries prior to the Thirteenth Directive).

73. *See, e.g.*, Council Directive 2004/25, ¶ 6, 8, art. 12, 2004 O.J. (L 142) 12 (EC).

certain state. These factors include the corporate ownership structure,[74] the strength of the financial markets, as well as other factors related to the legal and institutional infrastructure of each state. Proper attention was not paid to these factors upon the transplantation to Egypt of the French model of takeovers, which has diverged from the European model's purpose. As a developing country, Egypt strives to attract more investments by committing to reform its economic laws and developing its financial markets.[75] Transplanting an anti-investment takeover regime contradicts the Egyptian general policy of economic reform. This, combined with the lack of a developed infrastructure, contributes to the failure of the takeover rules transplanted to Egypt. The transplanted rules defeat some of the purposes stipulated in the very same regulations, such as guaranteeing equality between the target's shareholders and pursuing the interests of the company rather than private interests.[76]

2. Institutional Incompetence

Essential to the success of any legal system is a functional institutional infrastructure. This entails executive institutions that implement the rules of the law. In addition, an effective court system that provides ex-post judicial supervision over the work of the executive institutions is an important element in the institutional infrastructure.

In 2009, the Egyptian legislature established the Egyptian Financial Supervisory Authority (EFSA) to replace, *inter alia,* the Capital Market Authority (CMA).[77] The EFSA thus became the main regulator and supervisor of all non-banking financial markets.[78] Gathering the authorities of all non-

74. *See, e.g.*, Ventoruzzo, *supra* note 72, at 134, 141 (describing the application of the United Kingdom rules to Continental Europe as "a wolf in sheep's clothing," because it serves the opposite of its purpose in highly concentrated ownership structures by allowing the incumbent controller to entrench itself through increasing the costs of takeovers, and hence blocking efficient takeovers instead of protecting the minority shareholders).

75. *See generally* Shahira Abdel Shahid, *Corporate Governance Is Becoming a Global Pursuit: What Can Be Done in Egypt?* 42 (Cairo & Alexandria Stock Exch., Working Paper No. 1, 2001), *available at* http://papers.ssrn.com/abstract=286875; Shahira Abdel Shahid, *Institutional Reform: Privatization of the Egyptian Exchange* (unpublished Working Paper, 2004), *available at* http://ssrn.com/abstract=593365 (discussing the steps taken by the Egyptian government to revive the Egyptian capital markets and attract more investors to it).

76. ERCML, *supra* note 11, art. 327.

77. Law No. 10 of 2009 (Regulating Non-Banking Financial Markets and Instruments), *Al-Jarida Al-Rasmiyya,* 1 Mar. 2009, vol. 9, art. 3 (Egypt).

78. *Id.* ("The Authority shall replace the Egyptian Insurance Supervisory Authority, the Capital Market Authority, and the Mortgage Finance Authority in enforcing the provisions of the Insurance Supervision and Control Law no. 10 of 1981, the Capital Market Law no. 95 of 1992, the Depository and Central Registry Law no. 93 of 2000, the Mortgage Finance Law no. 148 of 2001, as well as any other related laws and decrees that are part of the mandates of the above authorities. The Authority shall be considered the competent administrative body entitled to enforce the financial leasing provisions promulgated by Law no. 95 of 1995.")

banking financial supervisors, the EFSA has wide authority aimed at harmonizing the regulation of the non-banking financial market.[79] Despite its wider authority and broader objectives, the EFSA resembles the former CMA in that it is a public authority reporting and attached to the Ministry of Investment as stipulated by the law.[80]

Being affiliated with the Minister of Investment undermines the EFSA's independence. The EFSA must obtain the Minister of Investment's approval for some decisions, despite having the power to decide many issue presented to it.[81] For example, the EFSA is the authority charged with inspecting corporations upon the request of their shareholders or if the EFSA suspects misconduct in any corporation. Despite this authority, the request is first submitted to the competent Minister who then forms an inspection committee to investigate the request.[82] The same applies to the case of evaluating in-kind shares during the formation of a new corporation. Upon the EFSA's Chairman referral, the Minister forms an evaluation committee.[83] "This limits the EFSA's role to . . . suggesting a course of action rather than actually" deciding such matters.[84]

Equally important, the political and governmental influence on the EFSA's board also threatens its independence. Before the January revolution in Egypt, a single party dominated all aspects of political life.[85] The EFSA's board consists of nine members: a chairman, two vice-chairmen, one deputy governor of the Central Bank of Egypt, and five experienced members.[86] The Egyptian Prime Minister, upon the advice of the Minister of Investment, issues a decree appointing members to the board for a four year, non-staggered renewable term and determines their compensation.[87] This method of appointing members to the board jeopardizes its independence. Board member may be appointed for reasons of partisan affiliation as opposed to competence. Coupled with the four-

79. *Id.* art. 4(a) ("The Authority shall maintain the safety, stability, organization and development of non-banking financial markets, and balance the market dealers rights. In addition, the Authority shall provide means and systems, and issue rules and regulations to guarantee the efficiency of non-banking financial markets and ensure transparency of activities undertaken").

80. *Id.* art. 1(a); Presidential Decree 192/2009 (Establishing the EFSA Charter), *Al-Jarida Al-Rasmiyya,* 14 June 2009, vol. 24, art. 1 (Egypt).

81. Elsaman & Alshorbagy, *supra* note 63, at 56.

82. Law No. 159 of 1981 (Companies Law), *Al-Jarida Al-Rasmiyya,* 1 Oct. 1981, vol. 40, art. 158 (Egypt).

83. Elsaman & Alshorbagy, *supra* note 63, at 56.

84. *Id.*

85. Id. at n.99. (discussing "[t]he National Democratic Party, controlled by some influential businessmen," completely monopolized Egyptian political life and economic policy until the January Revolution on January 25, 2011.)

86. Law No. 10 of 2009 (Regulating Non-Banking Financial Markets and Instruments), *Al-Jarida Al-Rasmiyya,* 1 Mar. 2009, vol. 9. art. 5(a) (Egypt).

87. *Id.* art. 5(c).

year renewable term, this may also "prejudice the judgment of board members who want to keep their positions."[88]

Lessons may be learned from the organization of the French AMF. Just like the EFSA, the French AMF is a public, independent authority, established in 2003 by the merger of three authorities.[89] AMF's board consists of "sixteen members, all of whom are nominated by different public authorities," including: the President of the Republic, the President of the Senate, two different judicial authorities, the Minister of Finance, and other authorities.[90] Not only does this dispersion in nominating board members guarantee their impartiality, but it also allows each authority to choose the most competent candidate. The larger number of board members permits better representation of the various constituencies involved in the industry, and the board benefits from the experience of members with different backgrounds. The AMF's board is staggered with officers partially replaced every thirty months;[91] this maintains the stability of boards and eases the transfer of power from one board to another.

The EFSA's board structure is better than some of its counterparts in other emerging Arab markets.[92] For instance, the newly established Capital Market Authority of Kuwait (KCMA) and the Saudi Arabian Capital Market Authority (SCMA) adopted the structure of the American Securities and Exchange Commission (SEC) but with a twist. As an independent federal agency, the SEC has a much larger managerial body and a significantly different structure than the AMF, the EFSA, the KCMA, or SCMA.[93] The SEC's board has five bipartisan Commissioners who are presidentially appointed with the advice and consent of the United States Senate for a term of five years.[94] The President also designates one of the Commissioners as a Chairman. To guarantee that the Commission remains non-partisan, no more

88. Elsaman & Alshorbagy, *supra* note 63, at 56.

89. These authorities were as follows: the Commission des opérations de Bourse (COB), the Conseil des marches financiers (CMF), and the Conseil de discipline de la gestion financière (CDGF). *See* AUTORITÉ DES MARCHÉS FINANCIERS (AMF), IN PROFILE 2 (2009), *available at* http://www.amf-france.org/documents/general/9013_1.pdf.

90. *The AMF Board*, AUTORITÉ DES MARCHÉS FINANCIERS (AMF), http://www.amf-france.org/affiche_page.asp?urldoc=college.htm&lang=en&Id_Tab=0 (last visited Mar. 30, 2012).

91. *Id.*

92. The board of the Central Bank of Bahrain, which is the Bahraini market regulator, is closely structured to the EFSA's board. It consists of 7 members, all of whom are appointed by a Royal Decree for a renewable term of four years. *See* Central Bank of Bahrain and Financial Institutions Law, art. 5 (2006) (Kingdom of Bahrain).

93. In addition to its five Commissioners, the SEC consists of four Divisions and nineteen Offices, encompassing over 3000 staff members. *See* U.S. SEC. EXCH. COMM'N, PERFORMANCE AND ACCOUNTABILITY REPORT 7 (2006) [hereinafter SEC], *available at* http://www.sec.gov/about/secpar/secpar2006.pdf#sec1.

94. *Id.*

than three Commissioners may be appointed from the same political party.[95] Commissioners' terms last for five years and are staggered so that one commissioner is replaced every year.[96]

In Kuwait, the KCMA likewise has a board of five commissioners appointed by a decree upon the recommendation of the competent Minister for a five-year term, which is renewable once.[97] The same applies to the SCMA except that the commissioners are called board members.[98] While the SEC's Commission is independent, staggered and supported by a huge managerial body, the KCMA and SCMA lack these characteristics.

Independence aside, the composition of the EFSA's board may be enhanced to improve its performance. Nine board members may be too few considering the wide authority of the EFSA. Although experience is a prerequisite in all board members,[99] the board's formation does not require or guarantee the representation of the various stakeholders affected by its decisions. For example, it was suggested that a justice from the Court of Cassation, who would be changed periodically, be appointed to the board of the former CMA, so that judges become engaged in what happens in practice.[100]

The structure of the EFSA also includes a body of employees drawn from staff members of the merged authorities.[101] Some of the members are vested with the powers of judicial officers that give them the authority to verify crimes falling under the EFSA's supervision.[102] Due to the complexity of laws and regulations concerning the capital market and its nascence, EFSA's staff may still lack the experience needed to become fully competent.[103]

---

95. *Id. See also* SEC *Organization and Management*, U.S. SEC. EXCH. COMM'N, http://www.sec.gov/about/offices/oia/secorg.htm (last visited Mar. 30, 2012).

96. *Id.*

97. Board of Commissioners of KCMA Decree No. 4-2 of 2011 (Regarding the Issuance of the Executive Regulations of Capital Market Law No. 7 of 2010), 3 Mar. 2011, art. 6, 10 (Kuwait).

98. Capital Market Law, Chapter 2: Capital Market Authority, art. 7 (Saudi Arabia), *available at* http://www.cma.org.sa/En/AboutCMA/CMALaw/Pages/Ch2Article7.aspx.

99. Presidential Decree 192 of 2009 (Establishing the EFSA Charter), *Al-Jarida Al-Rasmiyya,* 14 June 2009, vol. 24, art. 7-8 (Egypt).

100. MOHAMED TANWIR ALRAFIE, DOOR ALHYA'A AL'AMA LESOOK ALMAL FI HMAYT AKLYT ALMSHAHEMIN FI SHRKAT ALMOSAHAMA [ROLE OF THE CAPITAL MARKET AUTHORITY IN PROTECTING MINORITY SHAREHOLDERS IN CORPORATIONS] 23 (2006) (citing ABDUL-RAFIE'E MOUSA, ALHYA'A AL'AMA LESOOK ALMAL [CAPITAL MARKET AUTHORITY] 75 (1988)). Despite the irrelevance of this argument, engaging judges as legal experts in decision-making acts as an ex-ante screen of such decisions, decreases the likelihood of breaching the law and bringing a case to the court, and thus increases the competency and efficiency of the board.

101. Law No. 10 of 2009 (Regulating Non-Banking Financial Markets and Instruments), *Al-Jarida Al-Rasmiyya,* 1 Mar. 2009, vol. 9, art. 9 (Egypt).

102. *Id.* art. 15.

103. On July 8, 2010, a group of investors reported EFSA's Chairman along with former EGX Chairman to the Egyptian Public Prosecutor (General Attorney), accusing them of destroying the national economy and charging them with the deterioration of EGX. A week

Comparing the structures of the EFSA, the AMF, and the SEC highlights the importance of an independent authority. Both the AMF and the SEC employ different strategies to ensure and sustain this independence. The AMF does so by dispersing the appointing authority of the members. The SEC does so by assuring that the commission remains non-partisan. Additionally, the diverse candidacy of board members is an advantage because it allows for better representation and more experiences. Having a staggered board is also useful for easing the transfer of power without undermining the stability of the board. Absent such changes that guarantee its independence and efficiency, the EFSA's competence as the main financial market regulator in Egypt remains in question.

In an attempt to enhance judicial supervision over commercial disputes, Egypt created specialized courts called the Economic Courts (*AlMhakim AlIqtisadiya*).[104] Establishing specialized courts is a growing trend in Egypt, as well as in several other developing countries. The aim of these specialized courts is to improve the decision making process by allowing expert justices to handle specific cases. Specialized courts should be distinguished from commercial circuits within civil courts. Because of the large number of cases in civil courts, each court is divided into several specialized circuits that deal with certain types of cases such as civil, criminal, or commercial.[105] This division is merely an internal administrative division within the same court and has nothing to do with the general jurisdiction of courts. Thus, a different circuit within the same court may not deny hearing to a specific case based on its incompetence over such a case if it falls within the jurisdiction of the court.[106]

Established in 2008, economic courts are supposed to have jurisdiction over commercial disputes exceeding a certain value including commercial criminal cases.[107] Undoubtedly, the stated jurisdiction of economic courts was expected to extend to corporate disputes and disputes involving capital market

---

later, the latter was removed from his position after four years in service. *See* Ahmad Chalabi & Abdul Rahman Shalabi, *Prosecutor Begins to Investigate the Reports of Wasting Public Money in the Stock Market*, ALMASRY-ALYOUM (July 13, 2010), http://www.almasry-alyoum.com/article2.aspx?ArticleID=262362.

104. Law No. 120 of 2008 (Law on the Establishment of Economic Courts), *Al-Jarida Al-Rasmiyyah*, 22 May 2008, vol. 21 (Egypt).

105. Nathan Brown, *Arab Judicial Structures: A Study Presented to the United Nations Development Program*, UNITED NATIONS, http://www.undp-pogar.org/publications/judiciary/nbrown/egypt.html.

106. TALAAT DOWIDAR, ALMAHAKM ALIQTASDIA [THE ECONOMIC COURTS] 10 (2009); Law No. 120 of 2008 (Law on the Establishment of Economic Courts), *Al-Jarida Al-Rasmiyyah*, 22 May 2008, vol. 21 (Egypt) (The Explanatory Note, The Preparatory Works Thereof & The Complementary Statutes Thereto, Book 6: The Most Important Advantages and Criticism of the Economic Courts Law).

107. Law No. 120 of 2008 (Law on the Establishment of Economic Courts), *Al-Jarida Al-Rasmiyyah*, 22 May 2008, vol. 2, art. 4-6 (Egypt).

laws if they exceed the value threshold of the dispute.[108] Nevertheless, the first takeover dispute following the establishment of the Economic court triggered a jurisdictional conflict between the Economic courts and the Administrative courts known as the *"Conseil d'Etat"* or the "Council of the State."

The Administrative court's jurisdiction extends to all disputes involving the State as a sovereign authority. In the first takeover dispute, Administrative Courts claimed jurisdiction because the dispute resulted from appealing the EFSA's decision approving a mandatory tender offer. Economic courts, however, claimed jurisdiction based on the subject matter of the dispute which involved a takeover transaction valued at over 5 million EGP. Administrative courts won jurisdiction over the dispute. This undermines the role of the economic courts and poses questions concerning the reason for its establishment and the degree of its efficiency.

The jurisdictional conflict over that takeover dispute highlights the ineptitude of the Egyptian judicial system in handling capital market cases. The problems relate not only to the quality of judges, the clarity of the laws, and the methods of interpreting and implementing such laws, but also the preliminary matter of court jurisdiction. A legislative intervention is needed to solve this issue.

3. Weak Legal Infrastructure

a. Validity Doubts

An Egyptian legislative trend has been to rely heavily upon executive regulations rather than statutes when regulating capital markets. Capital market law provides general "guidelines to regulate the different areas of securities law and leave[s] the details" to executive regulations.[109] The flexibility of capital market law explains the large number of amendments to the executive regulations of the capital market law over the last decade.[110] This provides the government a quick and easy method to cope with market developments and to regulate a variety of activities by adding a few articles to the executive regulations without having to amend the statute itself via the parliament.[111]

---

108. *Id.* art.6 ("[W]ithout exception, appellate circuits of the court shall have original jurisdiction over the disputes previously mentioned in the article of value exceeding five millions EGP.").

109. Elsaman & Alshorbagy, *supra* note 63, at 54.

110. *See id.* at n.83 (The executive regulations have been amended over ten times in less than five years. These include amendments by Ministerial Decrees Nos. 46/2004, 192/2005, 1/2006, 14/2006, 139/2006, 140/2006, 141/2006, 301/2006, 314/2006, 84/2007, 12/2007, 126/2008 and others.); ALRAFIE, *supra* note 100, at 23-25 (discussing the flexibility of the Capital Market Law as one of its distinctive features).

111. Elsaman & Alshorbagy, *supra* note 63, at 55 ("For instance, several activities related to securities were added, such as regulating the buying securities with margin, borrowing securities

Despite the benefits of this approach, regulating through the executive regulations may impede important procedural and objective safeguards which may affect the quality of the regulations. Procedurally, as decrees issued by the competent Minister, executive regulations do not go through the law-making process that includes professional drafting, specialized committee review and revision, and parliamentary debate.[112] Objectively, any statute enacted by the Parliament comes with an explanatory memorandum that provides guidance for understanding the provisions of the statute and captures the intended interpretation of such provisions.[113] All these procedures result in a better drafted, clearer statute. As will be discussed below, the absence of this law-making process has greatly influenced the quality of the Egyptian takeover regulations.

More significantly, as the executive regulations are necessary for the implementation of a certain statute, they are only valid insofar as they do not violate or add to the statute. Thus, the Executive Authority may issue executive regulations as necessary for the application of the statues without amending the statute or disabling or exempting its application.[114] Conferring such legislative power upon the Executive Authority does not mean the Legislative Authority waives its power to legislate. Rather, the Executive Authority uses its power to promulgate the detailed rules necessary for the application of a statute without adding, amending, or disabling any of the statute's provisions.[115] Consequently, an executive regulation's scope is strictly limited to the piece of legislation it serves to implement. Therefore, an executive regulation cannot go beyond the four corners of the legislation.[116] Otherwise, the executive regulation is invalid.

Takeovers are not regulated in the capital market law.[117] Article 8 of the capital market law only imposes some disclosure requirements upon acquiring a certain percentage of the voting securities of a corporation.[118] Other than this instance, there is no mention of takeovers in the entire statute. The executive regulations have added to the law by requiring a mandatory tender offer, restricting the board of the target, and imposing several obligations on the bidder. This raises strong doubts concerning the validity of such a regulation.

The French transposition of the European takeover rules took place in two steps. First, the statute was amended to transpose the principles of the Directive (Act No. 2006-387 of 31 March 2006 amending the French Monetary and Financial Code), and then the details were put into the secondary statute of

---

for sale, and securitization. Executive regulations have also set forth rules banning the manipulation of prices and insider trading in its Eleventh Part.").

112. *Id.* at 54 n.84.

113. *Id.*

114. *Id.* at 54-55.

115. Case no. 528//1975/Court of Cassation, (Egypt).

116. Elsaman & Alshorbagy, *supra* note 63, at 55.

117. *Id.* at 64.

118. Law No. 95 of 1992 (Capital Market Law), *Al-Jarida Al-Rasmiyya,* 22 June 1992, vol. 25, art. 8 (Egypt).

the AMF regulations.[119] For example, Article L 433-3 of the French Monetary and Financial Code was amended to reflect the new rules for determining the price of the mandatory tender offer.[120] The AMF regulations then determined how to apply such rules and the cases where it may authorize a change in that price.[121]

The new Kuwaiti law also provides a good example. The Kuwaiti Capital Market Law No. 7 of 2010 sets forth guidelines for takeover transaction in five Articles.[122] These guidelines define, *inter alia,* important disclosure thresholds and levels triggering mandatory bid requirements.[123] The executive regulations of this law then implement these guidelines by adding the necessary details for its application.[124]

By regulating takeovers through executive regulations, the Egyptian government has put itself in the position of the legislator to combine the policy-making function and policy-implementing function. The lack of statutory basis for the Egyptian takeover regulations violates the principle of separation of powers and is indicative of a lack of a proper legal infrastructure. The Egyptian takeover regulations are tainted with invalidity due to the weak legal infrastructure they rest upon. It is essential that the Egyptian legislature amend the capital market law to reverse this issue and establish some basis for the takeover regulations.

b. Regulatory Shortcomings

The lack of proper legal infrastructure and clear policy upon which the Egyptian takeover law was developed has had a negative impact on the quality of its provisions. This impact is reflected in the blind copying of the French law even though the copied rule may negate the premeditated purpose of the regulations. It is also revealed in the poor drafting of the articles of the regulations, as well as in the vagueness of some provisions of the regulations.

The executive regulations of the capital market law introduced the mandatory tender offer requirement to the Egyptian capital market for the first time. This is considered an addition to the capital market law by its executive regulations which is enough of a violation to the hierarchy of the law to render this provision invalid. The mandatory tender offer rule is a clear example of the

119. *See* Issuers and Financial Disclosure, *supra* note 41.

120. *Id.* art. 231-13.

121. *Id.* art. 234-6.

122. *Impact of the New Kuwait Capital Markets Law and Regulations*, LINKLATERS (May 12, 2011), http://www.linklaters.com/Publications/GCC/May/Pages/Impact_New_Kuwait_Capital_Markets_Law_And_Regulations.aspx.

123. *Id.*

124. *Kuwait Capital Market Authority Successfully Ends First Phase of Transitional Period*, KUWAIT NEWS AGENCY (Sept. 19, 2011), *available at* http://www.kuna.net.kw/ArticleDetails.aspx?id=2191266&language=en.

lack of legislative guidelines and law-making due process.

The first issue with the Egyptian mandatory tender offer rule is its triggering threshold. The Egyptian regulations set a general threshold to trigger the mandatory tender offer rule at acquiring one-third of the voting securities of a corporation. This trigger is the presumed level of ownership that allows a shareholder to control a corporation. If the threshold is set at too high a percentage of ownership, an acquiror can obtain *de facto* control over a corporation without having to launch a mandatory bid, which undermines the purpose of the rule. The one-third Egyptian threshold was derived from the French regulations. France, however, has now lowered this threshold to 30 percent.[125] Bahrain and Kuwait takeover regulations set the mandatory bid thresholds at 30 percent, too, while Saudi Arabia has a higher threshold of 50 percent.[126]

Although Egyptian corporations have a significantly higher concentration in ownership,[127] which undermines the problem of *de facto* control over Egyptian corporations, it is unclear how the regulations determine the one-third threshold. It is most likely the result of copying a French regulation that was later amended to lower the threshold to 30 percent; an indication of the blind copying of the rules that will be affirmed with other incidents below.

The price of the mandatory tender offer represents one of the major problems in the Egyptian takeover regulations. Article 354 of the regulations reads, "[t]he price of the mandatory tender offer shall not be less than the highest price paid by the offeror, or any concert party, in a previous tender offer during the twelve months preceding the submission of the offer in question."[128] There are two issues with this provision: one regarding the twelve-month period of calculating the price; and two relates to the method of determining it.

The Egyptian regulations also followed the French regulations in requiring the price to be not less than the highest price paid by the offeror in the twelve months prior to the contemplated offer.[129] However, unlike the French regulations, the Egyptian takeover regulations did not adopt a price adjustment mechanism that allows the EFSA to adjust the price in certain cases where the price has been significantly changed.[130]

In the world of securities markets, twelve months is a very long time in which the value of securities may drastically change, whereas a very short

125. Issuers and Financial Disclosure, *supra* note 41, art. 234-6.

126. *See* Bahraini Takeovers, Merger, and Acquisitions Module, Central Bank of Bahrain, vol. 6, art. 3.1.1 (Bahr.); Board of Commissioners of KCMA (Law on the Issuance of the Executive Regulations of Capital Market Law No. 7 of 2010), 3 Mar. 2011, art. 271 (Kuwait); Royal Decree No. M/30 (Merger and Acquisition Regulation, Capital Market Authority), Board of Capital Market Authority 1-50-2007, Mar. 10, 2007, art. 12(a) (Saudi Arabia).

127. Shahid, *supra* note 31, at 10.

128. ERCML, *supra* note 11, art. 354/1 (emphasis added).

129. *See supra* Part III.C.

130. Issuers and Financial Disclosure, *supra* note 41, art. 234-6.

period of time is also unfavorable as securities' value may be subject to the effect of speculation bubbles. Arab takeover regulations provide some insights. While the Saudi regulations adopt a twelve-month interval with a possibility of modifying such price upon the authorization of the SCMA,[131] the Bahraini takeover module adopts a three-month interval,[132] and Kuwaiti rules adopt a six-month interval.[133] In determining the price of the offer, longer intervals of twelve months such as in France and Egypt are unfavorable compared to shorter intervals such as in Bahrain.[134] In cases where a twelve-month interval is applied, a price adjustment mechanism is necessary to guarantee reaching a fair value.

The real concern over the Egyptian provision of the mandatory tender offer price is in its method of determining such price. The provision requires the price to be as high as the highest price paid by the offeror in a previous tender offer over the twelve months prior to the commencement of the tender offer at hand.[135] It is unclear what would happen if the tender offer in question were the first offer from its offeror. The French provision, the assumed source of the Egyptian provision, requires the price of the mandatory bid to be "at least equivalent to the highest price paid by the offeror . . . in the twelve-month period preceding the event that gave rise to the obligation to file a proposed offer."[136]

Looking at the other Arab takeover regulations discussed in this Article, none have language similar to the Egyptian provision. The Saudi law requires the price of the offer to be "not less than the highest price paid by the offeror or any person acting in concert . . . during the offer period and within twelve months prior to its commencement."[137] The Bahraini Takeovers, Merger, and Acquisition Module provision reads, "highest price paid by the offeror . . .

131. Royal Decree No. M/30 (Merger and Acquisition Regulation, Capital Market Authority), Board of Capital Market Authority 1-50-2007, Mar. 10, 2007, art. 12(d)(1)-(3) (Saudi Arabia).

132. Bahraini Takeovers, Merger, and Acquisitions Module, Central Bank of Bahrain, vol.6, art. 3.1.10 (Bahr.).

133. Board of Commissioners of KCMA (Law on the Issuance of the Executive Regulations of Capital Market Law No. 7 of 2010), 3 Mar. 2011, art. 274 (Kuwait).

134. Marco Ventoruzzo, *Europe's Thirteenth Directive and U.S. Takeover Regulations: Regulatory Means and Political and Economic Ends*, 41 TEX. INT'L L.J. 171, 198-99 (2006) (mentioning that Germany also adopts a shorter interval of three months).

135. ERCML, *supra* note 11, art. 326 (defining the tender offer as "the offer presented to the owners of securities subject to the offer whether the consideration was cash, securities, or mixed, and whether the offer was optional or mandatory.") (emphasis added).

136. Decision (Arrêté) of September 28, 2006 concerning the adaptation of the General Regulations of the Autorité des Marché Fianciers (AMF) Act no. 2006-387 of March 31, 2006 concerning public acquisition of offers. art. 234-6 (Fr.).

137. Royal Decree No. M/30 (Merger and Acquisition Regulation, Capital Market Authority), Board of Capital Market Authority 1-50-2007, Mar. 10, 2007, art. 12(d) (Saudi Arabia).

during the offer period and within three months prior to its commencement."[138] Likewise, the Kuwaiti regulations stipulate that the price shall be equal to the "average price of shares in the six months prior to the commencement of the offer. The Exchange shall determine such a price."[139]

None of the previous provisions on their diversion use similar language to the Egyptian provision. It is highly unlikely that the Egyptian provision is intended to mean "previous tender offer;" rather, from reading the other provisions, the suggested meaning is "the highest price paid in a previous transaction." The latter interpretation, although inconsistent with the express stipulation of the article, is the most similar to counterpart provisions.

Unlike the four compared takeover regulations, the Egyptian takeover regulations apply a twelve-month interval to calculate the price without having any price adjustment mechanism. Furthermore, the Egyptian article requires the price to be not less than the price paid in a previous tender offer omitting the normal (and more likely) case where the offer is the first by its bidder. Undoubtedly, this article is poorly drafted, which highlights another consequence of regulating takeovers through executive regulations and ignoring the law-making process.[140]

France has opted out of Article 11 of the European Directive regarding the breakthrough rule, which restricts the target from applying general pre-bid defensive tactics against prospective takeovers.[141] Following in the French footsteps, the Egyptian takeover regulations came without a breakthrough rule. As noted earlier, the motives behind the French and the Egyptian regulations are different.[142] France wants to protect its industries against the threat of being raided by international investors; whereas Egypt wants to attract more investments to its markets.[143]

This is reflected more clearly in the organization of the non-frustration rule in both the French and the Egyptian jurisdictions. While both restrict the board of the target corporation from frustrating an outstanding offer, the French

---

138. Bahraini Takeovers, Merger, and Acquisitions Module, Central Bank of Bahrain, vol.6, art. 3.1.10 (Bahr.).

139. Board of Commissioners of KCMA (Law on the Issuance of the Executive Regulations of Capital Market Law No. 7 of 2010), 3 Mar. 2011, art. 274 (Kuwait).

140. Indeed, statutes can be badly drafted too. However, the law-making process provides minimum guarantees for drafting better statutes.

141. *See supra* Part III.C.

142. *See supra* Part III.D.

143. It is surprising that all three Arab jurisdictions subject to comparison are without a breakthrough rule considering they are emerging markets that need to encourage investments, whereas they all impose non-frustration rules. *See* Royal Decree No. M/30 (Merger and Acquisition Regulation, Capital Market Authority), Board of Capital Market Authority 1-50-2007, Mar. 10, 2007, art. 24 (Saudi Arabia); Bahraini Takeovers, Merger, and Acquisitions Module, Central Bank of Bahrain, vol.6, art. 2.4 (Bahr.); Board of Commissioners of KCMA (Law on the Issuance of the Executive Regulations of Capital Market Law No. 7 of 2010), 3 Mar. 2011, art. 281 (Kuwait).

use of antitakeover measures is more developed than in the Egyptian law, which hardly mentions defensive tactics. [144] In fact, the Egyptian omission of the breakthrough rule allows a great deal of latitude to the board of target companies, dominated by controlling shareholders, to resist takeover. This not only undermines the importance of the non-frustration rule, but it also makes it extremely hard for a hostile takeover to succeed, especially when coupled with the mandatory tender offer requirement that raises the price of the deal. This difficulty in executing a successful takeover reduces the market for corporate control and the protection it provides for shareholders.

Blind copying of the French rules offers one theory to explain the unfavorable outcome of the Egyptian takeover regulations. Another theory may be attributed to the hegemony of some powerful businessmen over the Egyptian government, a situation not uncommon in Egypt during the last decade. These businessmen, who had private interests in controlling the securities market, may have tailored the law to serve their interests at the expense of public policy.

As a matter of corporate law, Egyptian corporations are marked with a high concentration of ownership, which makes the protection of minority shareholder rights an important issue. The Egyptian takeover regulations have addressed this issue and made protecting minority shareholders one of the regulations' main objectives.[145] The regulations have a sub-section entitled "Protecting Minority Shareholder Rights Through Tender Offers".[146]

Article 375 of the regulations gives the EFSA discretionary power to force the new controlling shareholder to tender an offer to buy the shares of minority shareholders upon the success of his tender offer in two cases. First, a holder of at least 3 percent of the corporation's capital may request from the EFSA, within twelve months of the acquisition of at least 90 percent of the corporation's capital or voting rights by the raider, that the controlling shareholder extend a tender offer to buy the minority's shares. The EFSA then decides upon such a request in light of prevailing market conditions and available information. If the request is approved, the EFSA requires the controlling shareholder to extend a tender offer within a prescribed period. Second, the EFSA may oblige the controlling shareholder who intends to introduce a fundamental change to the certificate of incorporation or to enter

144. *See* Fried Frank, *supra* note 51, at 1-5 (discussing the defensive measures available to French target companies before and after the transposition of the European Directive on takeovers, and mentioning that the reforms have allowed French companies a wider variety of takeover defenses); *See also* Franck de Vita, *Understanding the Rules Governing Public Take Over Bids in France*, J. JAPANESE INST. INT'L BUS. L. (2003), *available at* http://www.whitecase.com/Publications/Detail.aspx?publication=17 (examining the defensive measures a French target can implement before the adoption of the new takeover regulations).

145. *See* ERCML, *supra* note 11, art. 327(c) ("Considering equality and equal opportunities between the owners of the securities subject to the tender offer as well as between the persons concerned with the tender offer.").

146. *Id.*

into a merger agreement with another company.[147] In both cases, the price of the offer must be as at least equal to the highest price paid in a tender offer during the twelve months prior to launching this offer, and the consideration must be paid in cash.[148]

Although this backend compulsory tender offer provides minority shareholders an exit from the corporation at a fair price, such protection is illusory. This mechanism increases the free-rider problem as it allows minority shareholders to exit the corporation after a year of the successful takeover of the corporation. In addition, the requirement that the consideration be in cash places a heavy burden on the acquiror, who may find it difficult to provide the amount of cash required to complete the deal.[149] This may generally discourage takeovers. Furthermore, the provisions only grant minority shareholders the right to "request" that the EFSA oblige the controlling shareholder to launch a compulsory tender offer. The discretionary power of the EFSA, which is neither entirely independent nor fully competent, is questionable.[150]

Because part of protecting minority shareholders is mitigating agency costs and balancing the interests of the different constituencies, it is reasonable to also give the controlling shareholder the right to squeeze-out minority shareholders in the wake of a successful takeover. Contrary to the compulsory tender offer of the previous case, this squeeze-out technique would encourage takeovers.

Following the implementation of the European Directive in France, the French regulations introduced this new squeeze-out procedure.[151] The squeeze-out provision allows the holder of 95 percent of the company's capital to buy out minority shareholders within three months of the lapse of the main offer and at the same price of that offer.[152] Moreover, unlike the former squeeze-out rules that required the consideration to be only in cash, the new squeeze-out

147. *Id.* art. 357.

148. *Id.* art. 358.

149. A liquidity problem is usually associated with the high concentration of corporate ownership. *See* Frank Heflin & Kenneth W. Shaw, *Blockholder Ownership and Market Liquidity*, 35 J. FIN. & QUANTITATIVE ANALYSIS 621 (2000).

150. *See supra* Part III.D.2.

151. The Bahraini Takeover Module has adopted a close approach to the Egyptian compulsory offer under which a holder of 95 percent of the company's capital has to offer to buy out minority shareholders within three months of the main offer and at the higher price paid during the offer period or within three months prior to its commencement. *See* Bahraini Takeovers, Merger, and Acquisitions Module, Central Bank of Bahrain, vol.6, art. 3.4 (Bahr.).

152. *Décision du 28 Septembre 2006 de règlement général de l'Autorité des Marchés Financiers* [Decision of September 28, 2006 concerning the Adaptation of the General Regulations of the Autorité des Marches Financiers], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 28, 2006, art. 237-14 & -15. *See also* HERBERT SMITH LLP, IMPLEMENTATION OF THE EU TAKEOVERS DIRECTIVE IN FRANCE 2-3 (2006), *available at* http://www.herbertsmith.com/NR/rdonlyres/0507455E-0862-4A43-ACD4-34E595EF5B79/2828/5770FrenchBriefingD3.pdf.

provisions provide that the bidder may offer securities with a full cash alternative in consideration for the minority shares.[153]

To summarize, the Egyptian takeover regulations have been unsuccessful because they negate the purpose for which they were enacted: to encourage takeovers.[154] In addition to the reasons related to the difference in motivation and the lack of competent institutional framework, the failure may also be attributed to the following reasons: 1) the mandatory tender offer increases the cost of takeovers; 2) the omission of the breakthrough rule undermines the effect of the non-frustration rule and empowers the incumbent controlling shareholder; 3) as they empower the incumbent shareholders, the regulations do not provide proper protection to minority shareholders.[155] Thus, the primary beneficiaries of the current takeover regulations are the incumbent controlling shareholders, while minority shareholders are inadequately protected and acquirors are poorly positioned.

4. The Mobinil Case: A Practical Example on the Failure of the Transplant

The *Mobinil* case was the first application of the new Egyptian takeover regulations in the Egyptian courts. The case involved a long dispute between France Telecom (FT) and Orascom Telecom (Orascom) over the control of Mobinil Telecommunications (Mobinil), a privately held corporation established solely for the control of the Egyptian Company for Mobile Services (ECMS.) Upon enforcing an arbitration award to acquire Mobinil, FT triggered the mandatory tender offer rule that required it to launch an offer to all the outstanding shareholders of the ECMS. Eventually, FT failed to take over ECMS in part due to blurred interpretations of the regulations and in part due to the EFSA's failures.

a. Institutional Incompetence: Court Jurisdiction and the EFSA's Behavior

The *Mobinil* case drew attention to the conflict of jurisdiction between the administrative courts and the economic courts, which was eventually settled in favor of the administrative courts.[156] Without questioning the capacity of the administrative courts to hear this kind of disputes,[157] the nature of the court – as

153. Issuers and Financial Disclosure, *supra* note 41, art. 237-14 & -15; *See also* HERBERT SMITH LLP, *supra* note 152, at 2-3.

154. *See supra* Part III.

155. *See supra* Part III.

156. *See* Case no. 12149/2010/Supreme Administrative Court (Egypt).

157. The Egyptian Council of States is a well-established institution that is known for the aptitude of its justices. As a public law court, the way the judges handle cases may be affected, which may not fit the peculiar nature of commercial disputes.

a public law court inexperienced in commercial transactions – undoubtedly impacted its decisions. For example, to nullify FT's tender offer the court rested, *inter alia*, upon the EFSA's failure to comply with the requirements of Article 366,[158] which required the EFSA to promptly notify the Egyptian Exchange upon its approval of the filing of any tender offer and its prospectus. This procedure allows the shareholders enough time to make up their minds about the offer by making information available to the public even before the EFSA announces its approval of the offer. Despite the fact that the regulations do not specifically provide for a remedy for such a violation, the court found that nullifying the offer is the proper remedy.[159] However, the court ignored the fact that by nullifying the offer in this case, the court would punish the offeror (FT) for the EFSA's mistake. As a court of public law, the court tends to protect the public interest even though the dispute involves private parties. This is especially true given the fact that shareholders would have at least twenty days to examine the offer and decide upon it,[160] which is more than enough time to ensure they are well informed.

Aside from the court's decision, the EFSA's negligence and failure to comply with the law underscores its incompetence. The main inconvenience in this case was caused by the EFSA's paradoxical behavior throughout the dispute. Over the course of the dispute, FT and its affiliates presented four tender offers. Three of which were rejected by the EFSA on basis of breaching the principles of equality and equal opportunities for the target's shareholders and because the EFSA did not find a plausible reason to accept a lower price for the mandatory tender offer for the ECMS shareholders than the price determined by the arbitration award for the Mobinil shares.[161] However, the EFSA had approved the fourth tender offer although its price was still lower than the price determined by the arbitration award. The EFSA based its approval of the fourth offer on an excess cash flow in Mobinil resulting from the accumulation of dividends, which are only paid to Mobinil shareholders. In addition, ECMS had an agreement to pay Mobinil one and a half percent of its total revenues against the latter's managerial services. Combined, these made up the difference in price between the mandatory tender offer and the arbitration award price.[162]

The EFSA's justifications for its change in position are justifiable because even though Mobinil is an empty shell corporation established to

158. ERCML, *supra* note 11, art. 366.

159. Case no. 12149/2010/Supreme Administrative Court 53 (Egypt).

160. *See* ERCML, *supra* note 11, art. 341; The term of the tender offer should not be less than twenty days in cases where the board of the target corporation is bound to consult an independent advisor and ten days otherwise. ERCML, *supra* note 11, art. 341.

161. Case no. 12149/2010/Supreme Administrative Court 5 (Egypt) (an arbitration award was given before the case was brought to court, which determined that the fair price of Mobinil shares was 273 EGP).

162. Case no. 12149/2010/Supreme Administrative Court 5-6 (Egypt).

control ECMS, it is a separate entity that may acquire its own assets or liabilities independently from ECMS. These assets may cause its share value to diverge from ECMS's share value. Given this, the EFSA's earlier insistence that FT submits a mandatory tender offer at the same price of the arbitration award price appraising Mobinil's shares is not reasonable. If the EFSA understood this hypothesis, its decisions to reject the three previous offers requiring that the price of FT's mandatory offers be the same as the arbitration price are not justified. Instead, the EFSA could have rejected the offers on the basis of unfair price requiring FT only to increase the price of its mandatory offers.

The EFSA's inconsistent behavior went beyond a mere lack of comprehension of the takeover regulations provisions. Defending its rejection of FT's third offer, the EFSA partially rested its decision upon the prohibition of submitting tender offers from the same bidder within a prescribed period as stipulated by the Egyptian takeover regulations. Indeed, Article 355 prohibits the same bidder from submitting another offer within six months from the date of submitting the original tender offer, unless otherwise permitted by the EFSA.[163] Despite the fact that the EFSA had expressly used this Article to reject FT's third offer, it approved the fourth offer only five days after rejecting the third offer. Arguably, the EFSA did not violate the provisions of the law by approving the submission of the fourth offer.[164] Rather, it is the inconsistency in its behavior that is questionable in this specific instance.

The EFSA's misconstruction of the provisions of the Egyptian takeover regulations, along with its non-compliance and paradoxical decisions throughout the case are all too apparent. In part this owes to the inexperience of the EFSA's staff and in part to the nascence of the takeover regulations themselves and their vagueness.

b. Legal Debacles Triggered by the Case

The *Mobinil* case highlights several problems with Egyptian takeover law. Two examples were already discussed. Whether the takeover procedures and the terms of such procedures are binding on the EFSA, and, if so, the lack of a specified remedy for the EFSA's nonconformity with such terms as in the

163. ERCML, *supra* note 11, art. 355.

164. According to the court, this provision had been repeatedly violated by FT's second, third, and fourth offers. Moreover, the court explains that the prohibition of this provision applies to the mere filing of a subsequent offer. The court may have misinterpreted the provision, nevertheless. The provision prohibits the submission of a new offer from the same bidder within six months from the "original" offer. This means that the six months period applies to FT's first mandatory tender offer only, especially that all the subsequent offers should be considered invalid because they were presented within six months of the first offer. If this is true, FT's fourth mandatory tender offer should have been considered not violating the prohibition period because it was presented after more than six months from the first and only valid offer. *See* Alshorbagy, *supra* note 31, at 34.

case of Article 366 of the ERCML is one example. The second example involves the correct interpretations of Article 355 regarding the six-month prohibition period on the launching of a mandatory tender offer from the same bidder.

On top of the legal issues tackled in this case, there was the price of the mandatory tender offer that FT had to present to ECMS shareholders. This was a central question in the dispute and the main reason for the rejection of FT's first three offers as well as a major reason to strike down the EFSA's approval of the fourth offer. The regulations stipulate that the price of the mandatory tender offer must be at least equal to the price paid by the acquiror in a previous tender offer during the twelve months prior to the commencement of the tender offer.[165]

In the *Mobinil* case, there was no previous tender offer to follow in determining the mandatory tender offer price for the ECMS shares. This renders the provision useless. To solve the problem, the EFSA and the court had to look for assistance somewhere else. They found inspiration in the predetermined price of the Mobinil shares as appraised by the arbitration award that gave FT the right to acquire Mobinil in March 2009. There are several issues with relying on the arbitration award price.

While the regulations set forth different requirements, the court in *Mobinil* determined that the arbitration price was the fair price for the ECMS shares. Relying on this predetermined price creates a predicament for the EFSA and the court if ECMS's value significantly changed; it also raises the question on what basis would FT legally have to pay a price that was unfair to the acquiror or the target. The arbitration price would violate law as it is not the price of a previous tender offer and does not promote the purpose of the law of reaching a fair price for the shares. Alternatively, it is also possible that there would be no predetermined price. In all these scenarios, the EFSA and the court would need to find leeway to bend the provisions of the law in order to apply it as initially intended.[166]

The court's reliance on a predetermined acquisition price is not the only issue. The twelve-month window established by the regulations is too long for determining the tender offer price.[167] This time period is much too long as

---

165. ERCML, *supra* note 11, art. 354.

166. "In a civil law country like Egypt, courts do not have a legislative role. In other words, courts only apply the law but do not make it. Therefore, a vague provision of law that forces the court to improvise ways to apply the law is deemed inept." *See* Alshorbagy, *supra* note 31, at 33 n.97.

167. *See* Alshorbagy, *supra* note 31, at 33 n.98 ("The facts of this case took place over three years, far more than the twelve months period. The arbitration award determining the allegedly fair price of the share at 273 EGP in March 2009 may have depended on a previous three, six or even twelve months projections of the company's performance, which clearly makes the 273 EGP an outdated estimation of the fair price in April 2010, when the court rendered its final decision").

things can drastically change in a year. In the *Mobinil* case, this is exemplified by the court's reliance on the arbitration award price and its refusal to consider the accumulated dividends because the price it was using was determined before the creation of the dividends. The court forgot or ignored that the price it used was determined in March 2009, more than a year before it rendered its judgment. It is clear that things can change significantly in a twelve-month period, which is why the period should be shortened.

IV. CONCLUSION

Legal transplants are common and have been a major source of legal development throughout the world. Watson's premise that legal transplants are socially easy and that the act of copying the law is more important than the legal rule itself is not entirely true. Blind copying of legal rules without adapting them to the legal environment in which they are transplanted may cause the failure of the transplant.

For a legal transplant to be successful, it must serve its purported function. Transplantation is easier when the imported rules have the same motivation in both jurisdictions. When the motivations diverge, a successful transplant is more likely to take place only when the host jurisdiction is equipped with adequate institutions and legal infrastructure that can accommodate the imported rules to serve their new purpose.

Although the modern Egyptian legal system is inspired by the French legal system, the transplantation of French takeover regulations in Egypt has not been successful. This failure is due to the incompatibility of the French regulations with the Egyptian legal environment and economic policy. It also is due to the failure of the Egyptian authorities to amend the regulations to match their needs. Subject to certain amendments, the Egyptian takeover transplant may be sustained.

THE ABOLITION OF THE MANDATORY DEATH PENALTY IN AFRICA: A COMPARATIVE CONSTITUTIONAL ANALYSIS

Andrew Novak*

I. INTRODUCTION

The mandatory death penalty for the crime of murder is in rapid retreat worldwide. Originally diffused to the common law countries of the Caribbean, Africa, and South and Southeast Asia by way of the British Empire, the penalty has been found unconstitutional and incompatible with human rights norms in at least ten Caribbean nations since the year 2000. A new wave of litigation has appeared in the postcolonial common law nations of East and Southern Africa, and courts in Malawi, Uganda, and now Kenya have found an automatic sentence of death unconstitutional and have replaced mandatory schemes with discretionary ones that allow consideration of mitigating factors in the capital sentencing process.[1] The resulting criminal justice regimes operate in closer conformity with international human rights norms and explicitly adopt these norms in their domestic legal systems.

This harmonization of death penalty regimes across borders is no accident: it was the deliberate intention of a small network of international anti-death penalty advocates to create a body of transnational jurisprudence from which to draw in bringing incremental challenges in national courts.[2] By initially petitioning the United Nations Human Rights Committee and the Inter-American Human Rights System to find the mandatory death penalty incompatible with human rights treaty obligations, this core of advocates succeeded in developing a corpus of persuasive reasoning on which they could

---

* Adjunct Professor of African Law, American University Washington College of Law. The author has a Juris Doctor, Boston University School of Law, and a Master of Science (Hons.), African Politics, London School of Oriental and African Studies. He is currently Associate Counsel at the United States Board of Veterans' Appeals. He appreciates the assistance of Dr. Jesse Fecker, Ph.D., J.D., on an earlier draft of this Article and the support of the Death Penalty Project UK to attend a litigation strategy session in Nairobi, Kenya, in March 2011. The views expressed in the Article, however, reflect those of the author alone.

1. Andrew Novak, *Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya*, 45 SUFFOLK U. L. REV. 285 (2012) [hereinafter Novak, *Kenya*]; Andrew Novak, *The Decline of the Mandatory Death Penalty in Common Law Africa: Constitutional Challenges and Comparative Jurisprudence in Malawi and Uganda*, 11 LOY. J. PUB. INT. L. 19 (2009) [hereinafter Novak, *Malawi Uganda*].

2. This strategy is driven by the Death Penalty Project UK and its executive directors Saul Lehrfreund and Parvais Jabbar as well as their partners on the ground. Interview, *Litigating Against the Death Penalty for Drug Offences: An Interview with Saul Lehrfreund and Parvais Jabbar*, 1 INT'L J. HUM. RTS. & DRUG POL'Y 53, 54-55 (2010).

rely in challenges before binding national courts of appeal in the Caribbean as well as the Eastern Caribbean Court of Appeal, the Privy Council in London, and eventually the Caribbean Court of Justice. The strategy had worked before. A decision of the European Court of Human Rights in 1989 found that undue delay and conditions of death row could eventually render an otherwise constitutional sentence cruel and degrading.[3] It was followed over the next decade by decisions arising out of such diverse jurisdictions as Canada, Jamaica, India, and Zimbabwe.[4]

The constitutions of former British colonies in the Caribbean and Africa are in *pari materia* with one another, created from a template used by departing colonial officials at Lancaster House in London where most constitutional negotiations hurriedly took place on the eve of independence.[5] The fundamental rights portions of the constitutions are heavily based on the European Convention of Human Rights, which applied to Britain's colonies when the Convention went into force in 1953 and lapsed at independence.[6] Almost all of these constitutions contain a right to life provision that is clawed back by a subclause specifically saving the death penalty.[7] In addition, every constitution contains a clause prohibiting torture and cruel, inhuman, or degrading treatment and punishment.[8] A constitutional challenge to the mandatory death penalty rests on the interplay between these two clauses. Anti-death penalty advocates argued that the constitutions only prevent challenge to the death penalty *per se*, and not textually to the mandatory nature of the death penalty. As a result, courts could find that a mandatory death penalty qualifies as cruel and inhuman punishment since it could be disproportionately harsh; classifying all murders the same even though all are not equally heinous.[9]

Anti-death penalty advocates succeeded on another track as well. Because the mandatory death penalty provides for an automatic sentence of death upon

---

3. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989), *reprinted in* 28 I.L.M. 1063 (1989).

4. Catholic Comm'n for Justice & Peace v. Attorney-Gen. (1993) L.R.C. 277 (Zimb. S.C.); Triveniben v. State of Gujarat (1989) 1 S.C.J. 383 (India); United States v. Burns [2001] 1 S.C.R. 283 (Can.); Pratt and Morgan v. Attorney-Gen. of Jam. (1993) UKPC 1, [1994] 2 A.C. 1 (P.C.).

5. William Dale, *The Making and Remaking of Commonwealth Constitutions*, 42 INT'L & COMP. L.Q. 67 (1993).

6. JENNIFER WIDNER, BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA 161 (2001).

7. *See, e.g.*, BAHAMAS CONST. art. 16(1); BOTSWANA CONST. art. 4(1); JAMAICA CONST. art. 14(1); GHANA CONST. art. 13(1); NIGERIA CONST. art. 33(1); ZIMBABWE CONST. art. 12(1); *c.f.* NAMIBIA CONST. art. 6; SOUTH AFR. CONST. art. 11.

8. *See, e.g.*, BAHAMAS CONST. art. 17(2); BOTSWANA CONST. art. 7(1); JAMAICA CONST. art. 17(2); GHANA CONST. art. 15(2); NAMIBIA CONST. art. 8(2); NIGERIA CONST. art. 34(1)(a); SOUTH AFR. CONST. art. 12(1); ZIMBABWE CONST. art. 15.

9. *See, e.g.*, Reyes v. The Queen, [2002] UKPC 11, [2002] 2 A.C. 235 (P.C.) (appeal taken from Belize).

conviction of murder, no sentencing hearing takes place. Courts have interpreted this as a violation of the right to a fair trial, another right that appears in every common law constitution in the Caribbean and Sub-Saharan Africa, which should include the right to present mitigating evidence on a defendant's behalf in a sentencing hearing.[10] The United Nations Human Rights Committee, the Inter-American Commission on Human Rights, and the Privy Council in London, then the highest court for most Commonwealth Caribbean nations, accepted this argument in a series of challenges.[11] Both lines of jurisprudence have the same two holdouts: Malaysia and Singapore, which are also former British colonies. The constitutions of these two countries do not include the right to a fair trial or protections against cruel, inhuman, or degrading punishment.[12] Although the mandatory death penalty has been extinguished in most of the Caribbean, it still survives in Southeast Asia.

This Article will turn first to the two major common law retentionist powers that have invalidated the mandatory death penalty: the United States and India. These decisions provided legal groundwork for launching a series of challenges in the Caribbean. This Article then distinguishes the jurisprudence arising from Malaysia and Singapore, which have resisted challenges for reasons that are peculiar to their constitutional regimes. Finally, this Article analyzes the three most recent decisions invalidating the mandatory death penalty, arising from the Constitutional Court of Malawi, the Supreme Court of Uganda, and the Court of Appeal of Kenya. Each of these three decisions has made a unique contribution to the body of global common law death penalty jurisprudence. As mandatory death penalty challenges advance in half a dozen more African countries, these three decisions will become especially important as persuasive authority. The result will be a death penalty regime harmonized across borders, in which the death penalty is confined only to the rarest and most serious cases, incorporating international human rights norms in sentencing proceedings.

II. PROLOGUE: THE UNITED STATES AND INDIA

The first coordinated challenge to the mandatory nature of the death penalty began in the United States. The Eighth Amendment of the United States Constitution forbids "cruel and unusual punishments."[13] In two five-to-four Supreme Court decisions in 1976, the United States abolished the common law mandatory death penalty in *Woodson v. North Carolina* and a more limited

10. *See infra* note 30.

11. *Id.*

12. *See* SINGAPORE CONST. arts. 9-16; MALAYSIA CONST. arts. 5-13.

13. Although the Eighth Amendment originally applied only to the Federal Government, it was applied to the states via the Incorporation Clause of the Fourteenth Amendment in the 1962 case *Robinson v. California*, triggering a long series of challenges to state death penalty schemes throughout the 1970s. *See* Robinson v. California, 370 U.S. 660 (1962).

statutory mandatory death penalty in *Roberts v. Louisiana*.[14] Although North Carolina's death penalty scheme was in constitutional danger because it included the common law offenses of accomplice liability and felony murder, thus automatically dispensing a death sentence for defendants who did not possess actual intention to kill, observers had predicted that Louisiana's more narrowly-tailored statute requiring actual rather than constructive intent would survive.[15] However, the same five Justices that struck down the North Carolina statute in *Woodson* voted to strike down Louisiana's statute in *Roberts*.[16] Eleven years later in *Sumner v. Shuman*, the U.S. Supreme Court invalidated a Nevada statute mandating the death penalty for prisoners who committed first degree murder while already under a sentence of life imprisonment, the narrowest and most defensible class of cases.[17] Through these cases, the Supreme Court made clear that any non-discretionary death sentence was unconstitutional.

In all three decisions, the Court's reasoning was the same: the mandatory death penalty simultaneously permitted too little discretion in the sentencing process, and too much.[18] A mandatory death sentence exacerbated the problem of jury nullification because juries acquit defendants at higher rates in mandatory regimes in order to avoid death sentences.[19] When fact-finders decide guilt and sentence simultaneously, they risk merging the two decisions, acquitting a guilty defendant in order to avoid a death sentence. As a result, the sentencing discretion ordinarily granted to the fact-finder is transferred to other, less transparent, actors. For example, if prosecutors believe the death penalty is not warranted, they can prosecute for manslaughter or non-capital murder. Similarly, appellate courts review more robustly in sentencing inquiries, and executive clemency bodies grant clemency at high rates. A trial judge, after weighing evidence and interpreting witness candor and demeanor, is especially well-placed to determine a defendant's sentence. By constraining a judge's sentencing discretion at trial, a mandatory death penalty makes sentencing more arbitrary and opaque.

A closely related factor from the Court's reasoning in the three decisions was that a mandatory death penalty failed to appropriately individualize a sentence to the relevant aspects of the character and record of the defendant.[20] A mandatory sentence treats all individuals as "a faceless, undifferentiated mass

14. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

15. John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 187-88 (1986).

16. Roberts v. Louisiana, 428 U.S. 325 (1976).

17. Sumner v. Shuman, 483 U.S. 66 (1987).

18. *Woodson*, 428 U.S. at 303; *Roberts*, 428 U.S. at 335; *Sumner*, 483 U.S. at 74-75.

19. *Woodson*, 428 U.S. at 303.

20. *Woodson*, 428 U.S. at 304; *Roberts*, 428 U.S. at 333; *Sumner*, 483 U.S. at 75.

to be subjected to the blind infliction of the penalty of death."[21] Because death was qualitatively different from other criminal sentences, it required special care: the "fundamental respect for humanity" underlying the Eighth Amendment required consideration of the person of the offender and the circumstances of the crime.[22] Other safeguards notwithstanding, the clear concern was that a defendant could receive a disproportionately harsh sentence for a crime, a violation of the Eighth Amendment.

In 1983, the Supreme Court of India followed the *Woodson* Court's lead. In *Mithu v. State of Punjab*, the Indian court found that the mandatory sentence offended constitutional rights on grounds similar to the American court.[23] In addition, the *Mithu* Court found that the legislature could not remove sentencing discretion from judges and require them to inflict death sentences in all murder cases.[24] This was the origin of a separation of powers argument against the mandatory sentence. A legislature cannot delegate criminal sentencing discretion, a traditional judicial function, to legislative or executive actors.[25] *Mithu*, the functional equivalent of *Sumner v. Shuman* because it involved the constitutionality of the mandatory death penalty for homicide for life-term prisoners, foreordained a shift in Indian criminal sentencing policy. Beginning with *Singh (Macchi) v. State of Punjab*, the Court required judges to balance aggravating and mitigating circumstances in determining a criminal sentence.[26] With the *Woodson* and *Mithu* lines of cases, the mandatory death penalty retreated from the major retentionist common law powers.

III. SUCCESSFUL EXPERIMENT: THE COMMONWEALTH CARIBBEAN

In the past decade, the mandatory death penalty has been overturned in nearly every common law Caribbean nation.[27] The near-extinction of the penalty is the result of a coordinated series of challenges brought initially before the United Nations Human Rights Committee and the Inter-American Human Rights System with the intention of forming a body of persuasive jurisprudence that could be used in binding national court systems.[28] These early challenges were based on Articles 6.1 and 6.2 of the International Covenant on Civil and Political Rights and the mirror clauses in the American Convention on Human Rights, which uphold the right to life and limit the death

21. *Woodson*, 428 U.S. at 304.
22. *Id.*
23. Mithu v. State of Punjab, 2 S.C.R. 690 (1983) (India).
24. *Id.* at 692.
25. *Id.* at 692-93.
26. Singh (Macchi) v. State of Punjab, 3 S.C.R. 413 (1983) (India).
27. Novak, *Kenya*, *supra* note 1, at 293.
28. *Id.*

penalty to only "the most serious crimes."[29] In both challenges, the fatal factor was that the mandatory death penalty was not individually tailored to fit the crime and could result in the execution of those without actual intent to kill through felony-murder or accomplice liability. These were not considered to be "most serious crimes" within the scope of the treaties.[30] In the seminal case *Edwards v. Bahamas*, the Inter-American Commission on Human Rights found that the mandatory death penalty violated the right to fair trial in addition to the right to life under the American Declaration of the Rights and Duties of Man.[31] Within several years, these challenges produced settled law in the Commonwealth Caribbean.[32]

This early, non-binding jurisprudence developed a body of persuasive law available to national constitutional courts. As with the international treaties, every Caribbean constitution contains a provision upholding the right to life with a death penalty exception, or savings clause, a provision prohibiting cruel and inhuman punishment, and a provision upholding the right to a fair trial.[33] Through the interplay of these three clauses, anti-death penalty advocates could challenge the mandatory death penalty for murder. Caribbean constitutions contain an added layer of complexity: a clause forbidding constitutional challenges to forms of punishment in existence at the time of independence from Great Britain on the grounds that these punishments violated the

29. International Covenant on Civil and Political Rights, arts. 6.1-6.2, Dec. 19, 1966, 999 U.N.T.S. 85; Organization of American States, American Convention on Human Rights, art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36.

30. Thompson v. St. Vincent and the Grenadines, Comm. No. 806/1988, U.N. Doc. CCPR/C/70/D/806/1998 (2000) (UNHRC); Kennedy v. Trinidad and Tobago, Comm. No. 845/1999, U.N. Doc. CCPR/C/67/D/845/1999 (2002) (UNHRC); Baptiste v. Grenada, Inter-Am. C.H.R., Report No. 38/00 (2000); McKenzie v. Jamaica, Case 12.023 Inter-Am. C.H.R., Report No. 41/00 (2000); Hilaire, Constantine & Benjamin v. Trinidad & Tobago, Inter-Am. Ct. H.R. (ser. C) No. 94/02 (June 21, 2002); Boyce & Joseph v. Barbados, Inter-Am. Ct. H.R. (ser. C) No. 169/07 (Nov. 20, 2007).

31. Edwards v. Bahamas, Case 12.067 Inter-Am. Comm'n H.R., Report No. 48/01 (2001), *citing* American Declaration on Rights and Duties of Man, *adopted at* Ninth Annual International Conference of American States, Bogotá Colombia, 1948, art. 1.

32. *See also* Chan v. Guyana, Comm. No. 913/2000, U.N. Doc. CCPR/C/85/D/913/2000 (2006) (UNHRC); Lamey v. Jamaica, Case 11.826, Inter-Am. Comm'n H.R., Report No. 49/01 (2001); Knights v. Grenada, Case 12.028, Inter-Am. C.H.R., Report No. 47/01 (2001); Thomas v. Jamaica, Case 12.183, Inter-Am. C.H.R., Report No. 127/01 (2001); Cadogan v. Barbados, Inter-Am. Ct. H.R. (ser. C) No. 204/09 (Sept. 29, 2009).

33. A non-exhaustive sampling of these provisions follows: for death penalty savings clauses, *see, e.g.* ANTIGUA & BARBUDA CONST. art. 4(1); BAHAMAS CONST. art. 16(1); BELIZE CONST. art. 4(1); DOMINICA CONST. art. 2(1); ST. KITTS & NEVIS CONST. art. 4(1); ST. LUCIA CONST. art. 2(1); for cruel and inhuman punishment provisions, *see, e.g.* BARBADOS CONST. art. 15(1); GUYANA CONST. art. 141(1); GRENADA CONST. art. 5(1); ST. VINCENT & GRENADINES CONST. art. 5; TRINIDAD & TOBAGO CONST. art. 5(2)(b); for fair trial provisions, *see, e.g.* BAHAMAS CONST. art. 20; DOMINICA CONST. art. 8; JAMAICA CONST. art. 20; ST. KITTS & NEVIS CONST. art. 10; ST. LUCIA CONST. art. 8.

fundamental rights provisions of the constitutions.[34] Of the twelve Commonwealth constitutions, eight possess a "partial" savings clause limited solely to judicial punishments while three possess a "general" savings clause preventing constitutional challenge to any law in force at the time of independence.[35] Only Belize, the last to receive independence in 1981, had a clause that expired five years after independence.[36] By then, broad savings clauses were perceived to be constitutional anachronisms—constraints on developing notions of constitutionalism.[37]

In early 2000, the Judicial Committee of the Privy Council in London (then the court of final resort for most of the Commonwealth Caribbean) accepted a petition from the Belize Court of Appeal, which had upheld the mandatory death penalty in a constitutional challenge.[38] The Privy Council combined it with a petition from the Eastern Caribbean Court of Appeal arising from Saint Kitts and Nevis, Saint Vincent and the Grenadines, and Saint Lucia, which had invalidated the penalty.[39] The Privy Council did not distinguish among the countries; it found all of the mandatory death penalty provisions to be unconstitutional, holding that a sentence that did not permit mitigating evidence could be disproportionately harsh and thus, cruel and inhuman.[40] The Privy Council also found that executive clemency discretion could not save a mandatory death penalty, as trial judges were in a better position to assess evidence and witness credibility.[41] The Belizean case *Reyes v. Queen* remains the seminal Privy Council decision on the mandatory death penalty and has since been extended to most of the Caribbean.

For the three countries that possessed "general" savings clauses – Barbados, Jamaica, and Trinidad – the question was closer. In 2003, although two five-judge panels of the Privy Council had invalidated the mandatory death

34. Many African independence constitutions contained similar clauses, but unlike Caribbean constitutions, few of these constitutions survive. In most countries, they have been replaced by more modern constitutions. Dale, *supra* note 5, at 80. However, the Kenyan constitution had a partial savings clause until 2010. KENYA CONST. art. 74(2) (1969, as amended to 1997).

35. *See, e.g.*, ANTIGUA & BARBUDA CONST. art. 7(2); BAHAMAS CONST. art. 17(2); GRENADA CONST. art. 5(2); GUYANA CONST. art. 141(2) (partial savings clauses); *c.f.* BARBADOS CONST. art. 26(1); JAMAICA CONST. art. 26(8); TRINIDAD & TOBAGO CONST. art. 6(1) (general savings clauses).

36. BELIZE CONST. art. 21.

37. *See generally* Saul Lehrfreund, *International Legal Trends and the 'Mandatory' Death Penalty in the Commonwealth Caribbean*, 1 OXFORD UNIV. COMMW. L.J. 171, 185 (2001).

38. Reyes v. The Queen, [2002] UKPC 11, [2002] 2 A.C. 235 (appeal taken from Belize).

39. The Queen v. Hughes, [2002] UKPC 12, [2002] 2 A.C. 259 (appeal taken from St. Lucia); Fox v. The Queen, [2002] UKPC 13, [2002] 2 A.C. 284 (appeal taken from St. Kitts & Nevis).

40. *Reyes*, [2002] UKPC 11, [2002] 2 A.C. 235.

41. *Id.*

penalty for ordinary murder in Trinidad and Tobago[42] and for felony murder in Barbados,[43] both decisions were reversed by the full Council. According to the Council, although a "partial" savings clause preventing challenge to judicial punishments did not prevent challenge to the mandatory death penalty because it was only a manner of sentencing and not a "punishment" per se, the mandatory death penalty was saved under "general" savings clauses that preserved all laws in existence at the time of independence.[44] Consequently, the Privy Council upheld the mandatory death penalty for Barbados and Trinidad and Tobago. However, the Council found that Jamaica's mandatory death statute postdated independence because it was revised to narrow the scope of the sentence and, consequently, it was not saved.[45] Barbados has discussed the possibility of making the death penalty non-mandatory, and the penalty continues to survive in Trinidad and Tobago.[46]

As part of a broader campaign against the mandatory death penalty in Trinidad and Tobago, the London-based Death Penalty Project and the University of the West Indies commissioned a survey of public opinion, to discern the level of public support commanded by a mandatory death penalty as opposed to a discretionary death penalty.[47] The survey authors commissioned a representative sample of 1,000 residents, a large sample for the country's size, and asked them three hypothetical questions about a felony murder, a domestic murder, and a drug murder, each with two examples. One example included a possible mitigating factor and the other did not include the mitigating factor.[48] The results were unsurprising. Although 89% of Trinidadians favored the death penalty, only 26% favored the current mandatory death penalty law.[49] The survey results suggested that the mandatory death penalty obscured problems of policing and investigations by over-punishing the small proportion of cases successfully won by the prosecution (often domestic murder in which the

42. Khan v. Trinidad & Tobago, [2003] UKPC 79, [2005] 1 A.C. 374, *rev'd by* Griffith v. Trinidad & Tobago, [2004] UKPC 58, [2005] 2 A.C. 235.

43. Roodal v. Trinidad & Tobago, [2003] UKPC 78, [2005] 1 A.C. 328, *rev'd by* Boyce v. The Queen, [2004] UKPC 32, [2005] 1 A.C. 400 (appeal taken from Barb.) and Matthew v. Trinidad & Tobago, [2004] UKPC 33, [2005] 1 A.C. 433.

44. *See Boyce*, [2004] UKPC 32, [2005] 1 A.C. 400; *see also Matthew*, [2004] UKPC 33, [2005] 1 A.C. 433.

45. Watson v. The Queen, [2004] UKPC 34, [2005] 1 A.C. 472 (appeal taken from Jam.).

46. *Barbados Death Penalty: Will There Be an Amendment or Abolition*, TRIVESTER NEWS (May 4, 2010), http://www.trivester.com/world/americas/caribbean/barbados/news/inter-american-court-human-rights/abolition-of-death-penalty/100504/.

47. *See generally* ROGER HOOD & FLORENCE SEEMUNGAL, PUBLIC OPINION ON THE MANDATORY DEATH PENALTY IN TRINIDAD: A REPORT TO THE DEATH PENALTY PROJECT AND THE RIGHTS ADVOCACY PROJECT OF THE UNIVERSITY OF THE WEST INDIES FACULTY OF LAW (Death Penalty Project: 2011).

48. *Id.* at vii.

49. *Id.* at vii-viii.

perpetrator was known, and usually related, to the victim).[50] Indeed, because the most brutal murders such as drug or gang-related murders often went unpunished, a mandatory death penalty did not necessarily correlate with the most serious crimes.[51] Sixty-three percent of respondents favored a discretionary death penalty, and 73% believed that the abolition of the death penalty would bring about more murder convictions because a jury would not be forced to choose between manslaughter and death.[52] All of these findings reflect well-known weaknesses of mandatory death penalty regimes and have important implications for other jurisdictions in the developing world.

IV. THE HOLDOUTS: MALAYSIA AND SINGAPORE

Uniquely in the common law world, Malaysia and Singapore have upheld their mandatory death penalty regimes from constitutional challenge.[53] Both countries have historically high rates of execution, particularly for higher-income countries as wealth is generally correlated to abolition.[54] The political culture in both countries contributes to this phenomenon: a strong executive balanced with a relatively weak judicial power, a law and order ethos on the part of the government, and an intolerance of political dissent.[55] Although the constitutions of both countries delineate fundamental rights, these rights do not include the right to be free from cruel, inhuman, or degrading treatment or punishment, or the right to a fair trial in broad form, despite the presence of limited components of these rights such as a ban on double jeopardy and arbitrary arrest.[56] Both countries allow broad derogations and suspensions of certain civil liberties to a much broader degree than elsewhere in the common law world if "necessary or expedient in the interest of security."[57] This constitutional structure is different from the bulk of former British colonies in Africa and the Caribbean, and has failed to provide a basis for bringing a challenge to the mandatory death sentence.

Malaysia and Singapore are also unique in the common law world

---

50. *Id.* at 3 (indicating that domestic-related murders accounted for 36% of all persons convicted of murder and sentenced to death). By contrast, gang-related murders or murders where the body was "dumped" accounted for 33% of the recorded killings but accounted for only 2% of the convictions for murder and manslaughter. *Id.* at 2. The report also undermined a proposed policy of creating a new, statutorily limited class of murder subject to the mandatory death penalty, such as violent felonies. *Id.* at 35.

51. *Id.* at 2.

52. *Id.* at viii.

53. DAVID T. JOHNSON & FRANKLIN E. ZIMRING, THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA 306 (2009).

54. *Id.* at 413.

55. *Id.* at 420.

56. *See* SINGAPORE CONST. arts. 9-16; MALAYSIA CONST. arts. 5-13; Michael Hor, *The Death Penalty in Singapore and International Law*, 8 SINGAPORE Y.B. INT'L L. 105, 113 (2004).

57. SINGAPORE CONST. arts. 149-51; MALAYSIA CONST. arts. 149-50.

because they possess the mandatory death penalty for drug trafficking, which accounts for a disproportionately high percentage of actual executions in both countries.[58] The penalty has been criticized by both the legal community and the medical community as falling too heavily on foreign nationals, especially migrant workers, and on drug runners and "mules" rather than drug lords.[59] Although the mandatory death sentence for drug trafficking was originally upheld by the Privy Council in the 1981 case, *Ong Ah Chuan v. Public Prosecutor*, the case was overruled by *Reyes v. Queen* and its progeny.[60] Nonetheless, the decision forms the bedrock of Malaysian and Singaporean constitutional defenses to the mandatory death penalty. Malaysian courts upheld the constitutionality of the mandatory death penalty for drug trafficking in *Public Prosecutor v. Lau Kee Hoo* (1983),[61] and Singapore did so in *Nguyen Tuong Van v. Public Prosecutor* (2004).[62] In the latter case, the Singapore Court of Appeal found that customary international law did not import a ban on inhuman punishment into Singaporean constitutional law, and the Court rejected a separation of powers challenge to the penalty.[63]

In 2010, the Singapore Court of Appeal revisited the constitutionality of mandatory death for drug trafficking in *Yong Vui Kong v. Public Prosecutor*. The Court interpreted *Woodson*, *Mithu*, and the Caribbean jurisprudence in great detail and distinguished them on the basis of Singapore's different constitutional structure.[64] As in *Nguyen Tuong Van*, the Court found that although the European Convention of Human Rights applied to Singapore for ten years prior to independence, the rights delineated in the Convention were not applicable to Singapore after independence and were disavowed in the independence constitution.[65] The Court also rejected an equal protection of the law argument, in which the appellant argued that the schedule of penalties based on the quantity of the drugs being trafficked was arbitrary, including

58. Rick Lines, The Death Penalty for Drug Offences: A Violation of International Human Rights Law, Powerpoint Presentation to the Commission on Narcotic Drugs (Mar. 10, 2008), *available at* http://www.ihra.net/files/2010/06/21/Lines-DeathPenaltyCND2008.pdf.

59. Yvonne McDermott, *Yong Vui Kong v Public Prosecutor and the Mandatory Death Penalty in Singapore: A Dead End for Constitutional Challenge?*, 1 INT'L J. HUM. RTS. & DRUG POL'Y 35, 50-51 (2010); Griffith Edwards et al., *Drug Trafficking: Time to Abolish the Death Penalty*, 8 INT'L J. MENTAL HEALTH ADDICTION 616, 618 (2010).

60. Ong An Chuan v. Public Prosecutor, [1981] A.C. 648 (appeal taken from Sing.).

61. Public Prosecutor v. Lau Kee Hoo, MALAYAN L. J. 157 (1983) (F.C.). In *Lau Kee Hoo*, the Federal Court of Kuala Lumpur refused to follow the Indian case of *Mithu v. State of Punjab* and instead relied on the Privy Council in *Ong An Chuan* and an earlier precedent, *Runyowa v. The Queen*, an appeal arising from the Federal Court of Rhodesia and Nyasaland upholding the mandatory nature of the death penalty for politically-motivated arson. *Id.* at 160-63. *See also* Runyowa v. The Queen, [1967] 1 A.C. 26 (appeal taken from Fed. of Rhodesia & Nyasaland).

62. Nguyen Tuong Van v. Public Prosecutor, 1 S.L.R. 103 (2005) (Sing. C.A.).

63. *Id.* at ¶¶86-87, 95-98.

64. Yong Vui Kong v. Public Prosecutor, [2010] SGCA 20 (Sing. C.A.).

65. *Id.* at 36-38.

penalties up to the mandatory sentence of death for a person carrying 15 grams of heroin, 30 grams of cocaine, 250 grams of methamphetamines, or 500 grams of cannabis.[66] According to the Court, despite similar mental states, traffickers carrying different quantities of narcotics were *not* equal and the law properly distinguished among them.[67]

Consequently, the mandatory death sentence in both countries is a slippery target for anti-death penalty advocates because the reasoning of the constitutional challenges is circular. The appellant argued that the mandatory death penalty was an inhuman punishment under international customary law even though Singapore specifically disavowed the existence of such customary law and failed to incorporate such a prohibition into the constitution. The same is true of the due process challenge to the mandatory death penalty. The Singapore Court of Appeal has rejected analogies to the constitutional protections of fair trial rights in other Commonwealth countries because such rights are specifically excluded in Singapore's constitution.[68] The Court is one of the few national courts to have rejected outright constitutional challenges on the basis of delay or conditions on death row. Of the two countries, Singapore is likely the more unyielding in its defense of the mandatory death penalty, but the sentence looks to remain legal and active in both countries for the foreseeable future. Nonetheless, the impact of this jurisprudence is limited given the unique constitutional structures in both countries—strong executives, weak fundamental rights protections, and isolation from human rights treaties—that make these countries clearly distinguishable from the Caribbean and African lines of cases.

V. THE NEW FRONTIER: COMMON LAW AFRICA

With the contraction of the mandatory death penalty in the Caribbean, and despite the holdouts in Southeast Asia, an international network of lawyers and experts led by the London-based Death Penalty Project and their partners launched a series of challenges to the mandatory death penalty in African common law nations with the explicit goal of incrementally working toward total abolition of capital punishment. These challenges have been successful so far in Malawi,[69] Uganda,[70] and now Kenya.[71] Similar litigation is pending or

66. JOHNSON & ZIMRING, *supra* note 53, at 411.

67. *Yong Vui Kong*, [2010] SGCA 20 at 65.

68. *See* Jabar v. Public Prosecutor, 1 S.L.R. 617 (1995) (Sing. C.A.) (rejecting analogies to recent case law in India and Jamaica based on the differing wording of their constitutional texts).

69. *See* Novak, *Malawi Uganda*, *supra* note 1.

70. *See id.*

71. *See* Novak, *Kenya*, *supra* note 1.

planned in at least six other common law African countries.[72] Each of these decisions relied heavily on foreign and international precedent, including the Caribbean case law, and each has made an important contribution in their own right to the corpus of global death penalty jurisprudence.

As in the Caribbean, these challenges are premised on the similarity among common law African constitutional structures. British officials working with African nationalist leaders meticulously drafted at least thirty-three complete and final constitutions with varying levels of public input.[73] Within a decade, most of these constitutions had been abrogated, amended, or replaced, but fundamental rights provisions tended not to be heavily altered. Currently, every common law African constitution other than South Africa and Namibia contains a death penalty savings clause on the model of the European Convention on Human Rights: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided in law."[74] This savings clause model is intended to prevent direct legal challenge to the death penalty. African constitutions possess similar provisions prohibiting inhuman punishment and supporting the right to a fair trial as well as constitutional procedures for seeking clemency or pardon from the executive.

This sharing occurred with substantive law as well. Former British colonies in Africa received similar penal and criminal procedure codes, based on the 1899 Queensland, Australia penal code and the 1877 Gold Coast procedure code, with improvements mediated through the legal system of British India.[75] Consequently, the mandatory death penalty passed intact to British Africa without any benefit from the legal reforms that swept Great Britain itself in the 1950s and 1960s. The mandatory death penalty, however, was always too harsh for post-colonial African legal culture, particularly as many African countries outside of the Islamic zone had a spotty tradition of capital punishment prior to the colonial era.[76] Many common law African countries send enormous numbers of men to death row, but far fewer to the gallows. Hundreds of criminals are placed on death row each year in common law Africa while these same countries average only two to three judicial

72. Death Penalty Project UK, *Human Rights Litigation in African Countries*, http://www.deathpenaltyproject.org/content_pages/31 (last visited Mar. 29, 2012).

73. William Dale, *The Making and Remaking of Commonwealth Constitutions*, 42 INT'L & COMP. L.Q. 67 (1993).

74. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. No. 5.

75. Simon Coldham, *Criminal Justice Policies in Commonwealth Africa: Trends and Prospects*, 44 J. AFR. L. 218, 219 (2000).

76. *See* LILLIAN CHENWI, TOWARD THE ABOLITION OF THE DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE 19 (2007); Novak, *Malawi Uganda*, *supra* note 1, at 39-43; Novak, *Kenya*, *supra* note 1, at 313-14.

executions per year combined.[77] The result is a near-uniform constitutional vulnerability that could transform the way that the death penalty is applied throughout the region.

A. The Constitutional Court of Malawi: Kafantayeni

The Constitutional Court of Malawi invalidated the mandatory death penalty in 2007 in *Kafantayeni v. Attorney General.*[78] In a targeted challenge, the Court found the penalty violated 1) the right to be free from cruel, inhuman punishment because the sentence was not individually tailored to the crime; 2) the right to a fair trial because a defendant did not have an opportunity in a judicial proceeding to present mitigating evidence on her behalf; and 3) the right of access to the court system because the defendant did not have a venue through which to appeal guilt and sentence separately. Although the state did not appeal in *Kafantayeni*, the Supreme Court of Appeal, Malawi's highest court, confirmed the judgment in *Jacob (Twoboy) v. State* when it found that Malawi's death penalty was no longer mandatory.[79] The plaintiff in *Jacob* claimed that he had been acting in a state of temporary insanity induced by a narcotic, which could have qualified as a mitigating circumstance in a discretionary death penalty regime.[80]

As in Uganda and Kenya, the Malawian constitution enshrines the right to life with a specific exception for the death penalty.[81] According to Malawi's Penal Code, dating from 1930, five crimes carried the death penalty, including treason, rape, murder, armed robbery, and burglary.[82] However, the penalty was only mandatory for murder.[83] In deciding that the mandatory death penalty qualified as cruel and inhuman punishment and was not specifically saved, the Constitutional Court found the Belizean case of *Reyes v. Queen* to be particularly persuasive.[84] Like the *Woodson* Court, the Malawian Constitutional Court determined that the lack of individualized sentencing discretion could result in the infliction of capital punishment on a defendant whose crime did not warrant the penalty.[85] In addition to *Reyes*, the decision cited other

77. *See, e.g.*, Mutiso v. Republic, Crim. App. No. 17/2008 (July 30, 2010) (Kenya C.A.), at ¶ 14.

78. Kafantayeni v. Attorney-Gen., [2007] MWHC 1 (Malawi).

79. Jacob v. Republic, MSCA Crim. App. No. 16/2006 (July 19, 2007) (Malawi S.C.A.) (unrep.).

80. *Id.*

81. MALAWI CONST. art. 16.

82. MALAWI LAW COMMISSION, DISCUSSION PAPER NO. 1, HUMAN RIGHTS UNDER THE CONSTITUTION OF THE REPUBLIC OF MALAWI 2 (2006), *available at www.lawcom.mw/docs/discussion_paper1_human_rights.pdf.*

83. Mwiza Jo Nkhata, *Bidding Farewell to Mandatory Capital Punishment: Francis Kafantayeni and Others v Attorney General*, 2007 MALAWI L.J. 103, 110.

84. *Kafantayeni*, [2007] MWHC 1 at 6.

85. *Id.* at 9.

Caribbean jurisprudence extensively, as well as the South African case *Makwanyane*, in which the Constitutional Court of South Africa found the death penalty unconstitutional.[86]

As an additional ground for invalidating the mandatory death penalty, the Constitutional Court found that the penalty violated the right to a fair trial and that an accused person has a right to an individualized sentencing determination based on all the evidence presented.[87] The Court specifically held that the International Covenant on Civil and Political Rights states that every person convicted of a crime must be permitted effective appellate review, and because a mandatory death penalty determines guilt and sentence simultaneously, the penalty precludes a higher court from reviewing a sentence on its own merits.[88] For this, the judges cited the seminal case *Edwards v. Bahamas*.[89] The Court also found that a mandatory death penalty violated the right of access to justice as enshrined in Malawi's constitution, constituting a third ground for invalidating the penalty.[90] Interpreting the right more broadly than the right to a fair trial, the Court found that because the mandatory death penalty does not permit a sentencing hearing and precludes appellate review of a sentence, it effectively denies an accused person's right to access the judicial system for resolving legal disputes.[91] Unlike the inhuman punishment and fair trial grounds, the Court raised the right of access to justice *sua sponte*; the issue was not raised by the parties themselves.[92]

Several months later, the Supreme Court of Appeal confirmed the result in a separate case, *Jacob v. Republic*, an appeal against sentence.[93] The Supreme Court affirmed *Kafantayeni* in its entirety and indicated that it was "largely persuaded" by the jurisprudence of the Privy Council.[94] Using a more textual approach than the Constitutional Court, the Supreme Court interpreted Article 42 of the constitution, the "right to adduce and challenge evidence," as a basis for finding that the mandatory death penalty violated an accused's right to a fair trial by not permitting consideration of mitigating circumstances.[95] The result of the two cases, according to the Court, was that every prisoner on death row in Malawi was entitled to an individualized sentencing hearing.[96]

Even though the Malawi Constitutional Court avoided reliance on the

---

86. *Id.* at 10.

87. *Id.* at 12.

88. *Id.* at 12-13.

89. *Kafantayeni*, [2007] MWHC 1 at 13, *citing* Edwards v. Bahamas, Case 12.067, Inter-Am. Comm'n H.R., Report No. 48/01, OEA/Ser.L/V/II.111, doc. 20 (2001).

90. *Id.* at 14, *citing* MALAWI CONST. art. 41(2).

91. *Id.* at 12.

92. *Id.* at 6.

93. *See* Jacob v. Republic, MSCA Crim. App. No. 16/2006 (July 19, 2007) (Malawi S.C.A.) (unrep.).

94. *Id.* at 3-5.

95. *Id.* at 6.

96. *Id.*

right to life provision of the Malawi Constitution in *Kafantayeni*, the decision has been interpreted by lower courts as standing for the proposition that the right to life is inviolable except in the application of a discretionary death penalty.[97] In *Republic v. Cheuka*, the Malawi High Court (a trial-level court) convicted a police officer of manslaughter due to police brutality, holding that extrajudicial police killing was a violation of the right to life.[98] According to the High Court, the right to life is inviolable except for the death penalty, and even that exception was narrowly construed by the Constitutional Court in *Kafantayeni*.[99] In partial reliance on *Kafantayeni*, the High Court judge wrote that "the right to life ranks supreme to all other rights guaranteed by [the] Constitution," the "most fundamental of all rights in that it is a prerequisite for the enjoyment or exercise of all other rights."[100] The judge analyzed the jurisprudence of the European Court of Human Rights and the United Nations Code of Conduct for Law Enforcement, and concluded that the extrajudicial killing at the hands of a police officer fell below international law enforcement standards.[101] This case strongly suggests that lower courts in Malawi will view the decision broadly and apply the rationale to other contexts.

Progress in resentencing death row prisoners after *Kafantayeni*, however, has been minimal. As of 2010, of the nearly 200 persons on death row in Malawi, only a handful had even consulted a lawyer, and not a single resentencing hearing had taken place.[102] While many common law African countries suffer from a shortage of legal representation, the shortage in Malawi is particularly acute.[103] Malawi's legal aid system is overwhelmed, as only a handful of legal aid lawyers serve the entire country.[104] Although the Malawian constitution contemplates legal aid at state expense, the provision is in danger of becoming a platitude.[105] As in many other countries in Sub-Saharan Africa, Malawi is experimenting with allowing non-lawyers such as paralegals and law

97. *See* MALAWI CONST. art. 16 (right to life provision).

98. Republic v. Cheuka et al., Crim. Case No. 73/2008 (Apr. 2, 2009) (Malawi H.C.).

99. *Id.*

100. *Id.*

101. *Id.*

102. Chesa Boudin, *Making an Impact in Malawi*, CHICAGO LAWYER MAGAZINE, May 27, 2010, *available at* http://www.chicagolawyermagazine.com/Archives/2010/06/01/7530.aspx.

103. For statistics on the legal aid shortage in Africa, see David McQuoid-Mason, *Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council*, 47 J. AFR. L. 107, 108 n.6 (2003). *See also* Harri Englund, *Towards a Critique of Rights Talk in New Democracies: The Case of Legal Aid in Malawi*, 15 DISCOURSE & SOC'Y 527, 532 (2004) (noting that because of Malawi's traditional status as a source of labor employment for Southern African mines, much of the legal aid shortage is in labor and employment disputes, which could be mitigated through stronger trade unions and alternative dispute resolution).

104. Hillery Andersen, *Justice Delayed in Malawi's Criminal Justice System: Paralegals v. Lawyers*, 1 INT'L J. CRIM. JUST. SCI. 1, 2 (2006).

105. MALAWI CONST. art. 42(1)(c).

students to shoulder some of the burden in representing defendants who are entitled to review of their sentences.[106]

B. The Supreme Court of Uganda: Kigula

Unlike the targeted appeal in Malawi, the Ugandan challenge was an omnibus challenge to the death penalty. The appellants argued that 1) the death penalty was an inhumane punishment and alternatively, that the mandatory sentence of death was unconstitutional; 2) hanging was impermissible as a mode of execution; and 3) a long delay on death row could make an otherwise constitutional sentence unconstitutional.[107] The decision of the Ugandan Constitutional Court in *Kigula v. Attorney General* essentially split the difference and found that the mandatory death penalty and inordinate delay were unconstitutional, while upholding a discretionary death penalty and hanging as a method of execution.[108] Unlike the Malawian court, the Ugandan majority opinion interpreted Ugandan law much more closely and engaged in a more textual-based constitutional analysis. The concurrences used a range of constitutional interpretive methods, including culturalist arguments,[109] framers' intent,[110] and popular opinion.[111] A dissenting opinion argued that the criminal justice system provided sufficient safeguards against arbitrariness, including legal aid for indigent defendants,[112] the right of automatic appeal,[113] and the right to petition for clemency.[114]

Both parties cross-appealed the Constitutional Court decision before the Supreme Court of Uganda in *Attorney General v. Kigula*. The Supreme Court voted unanimously to uphold the death penalty *per se*, but to strike down the mandatory death sentence for murder and unconstitutional delay and conditions on death row.[115] The Court also voted six to one to turn away the challenge to hanging as a method of execution.[116] As with the Constitutional Court, the

106. Boudin, *supra* note 102. This would require loosening unauthorized practice of law restrictions. For more on the topic of limited practice for non-lawyers in the African context, see Andrew Novak, *The Globalization of the Student Lawyer: A Law Student Practice Rule for Indigent Criminal Defense in Sub-Saharan Africa*, 3 HUM. RTS. & GLOBALIZATION L. REV. 33 (2009).

107. Kigula et al. v. Attorney Gen., Constitutional Petition No. 6/2003 at 2 (2005) (Uganda C.C.).

108. *Id.* at 61-63.

109. *Id.* at 116.

110. *Id.* at 68-69.

111. *Id.* at 117-18 (Twinomujuni, J., concurring); 17-23 (Byamugisha, J., concurring).

112. *Id.* at 159-64.

113. *Id.* at 169-73.

114. *Id.* at 159-164, 169-173 (Mpagi-Bahigeine, J., dissenting); 179 (Kavuma, J., dissenting).

115. Attorney Gen. v. Kigula et al., [2009] UGSC 6 at 63-64 (Uganda).

116. *Id.* at 62-63, 65.

Supreme Court engaged in a variety of constitutional interpretive methods. The Court particularly emphasized the conclusions of the Constitutional Review Commission more than ten years earlier to determine the drafters' intent, finding that the "inclusion of the death penalty in the Constitution was therefore not accidental or a mere afterthought. It was carefully deliberated upon."[117] Textually, the Constitution favored a finding upholding the death penalty *per se* since it not only included a death penalty savings clause, but also a right to legal representation for capital defendants at the expense of the state and the right to seek clemency.[118] These provisions did not bear on the specific issue of the mandatory death penalty, however, and the Constitutional Review Commission conclusions could be read as favoring a discretionary death penalty.[119]

The Supreme Court agreed with the lower court's finding that a fair trial included both conviction and sentencing stages and that a defendant is entitled to present mitigating evidence and have the sentence subject to appellate review.[120] The Court also reached the separation of powers argument that the Malawian court did not reach and found that the penalty was unconstitutional because a mandatory death penalty ties the hands of judges in their inherent constitutional power to determine both conviction and sentence.[121] Regarding the argument that the mandatory death penalty constituted cruel and inhuman punishment, the Supreme Court took a slightly different approach than the lower court though both interpreted domestic precedent much more extensively than the Malawian court did. The Constitutional Court heavily relied on *Kyamanywa*, which invalidated adult corporal punishment as inhuman and degrading.[122] The Supreme Court relied instead on *Abuki*, in which the Court had struck down banishment as a penalty for witchcraft.[123]

Considering delay and conditions of death row, the Supreme Court looked in detail at the "demeaning" conditions at Luzira Prison.[124] The Court held that a prisoner has a right to sufficient time in which to exercise all avenues of appeal before execution, but cannot be unduly kept in prison for an indefinite period and essentially serve a lengthy prison sentence before a death sentence.[125] Finally, the Court upheld hanging as a method of execution from

117. *Id.* at 77.

118. UGANDA CONST. arts. 22(1), 28(3)(e), 121(5).

119. *Kigula*, [2009] UGSC 6 at 32-33.

120. *Id.* at 41, 43-44.

121. *Id.* at 45.

122. Kyamanywa v. Uganda, Const. Ref. No. 10 of 2000 (Dec. 14, 2001) (Uganda C.C.) (referred from Uganda Supreme Court in Crim. App. No. 16 of 1999, dated July 4, 2000). *Kyamanywa* was later confirmed by the Supreme Court in Oryem Richard & Another v. Uganda, [2003] UGSC 30.

123. Abuki v. Attorney Gen., [1997] UGCC 5, *aff'd by* Attorney Gen. v. Abuki, [2001] 1 L.R.C. 63 (Uganda S.C.).

124. *Kigula*, [2009] UGSC 6 at 48.

125. *Id.* at 56-57.

constitutional challenge.[126] This may have been the weakest part of the decision. The Court found that the mandatory death penalty was a sentence in itself and consequently fell within the scope of *Abuki*, which laid out guidelines for determining whether a sentence constituted cruel and inhuman punishment. On the issue of hanging, however, the Court found that it was only the *manner* of executing a sentence and not a sentence in itself and consequently fell outside the scope of *Abuki*.[127] This distinction is, at best, a fine one. In fact, it conflicts with the long line of Privy Council jurisprudence holding that the mandatory death penalty is not a judicial punishment subject to the partial savings clause in many Caribbean constitutions, but rather simply a method of sentencing.[128] The dissent by Justice Egonda-Ntende laid out in detail the harsh effects of hanging and argued that, like the mandatory death penalty, hanging was not specifically saved under the constitution and could be found unconstitutional.[129] Given the tension in the majority opinion, hanging as a method of execution in common law countries continues to be constitutionally vulnerable even though the argument did not win support from the Ugandan courts.

Kigula has led to a revolution in Ugandan sentencing law, despite some inconsistencies in the landmark decision's real-world application. In April 2010, the Ugandan Court of Appeal upheld two death sentences after considering mitigating factors such as a three-year delay in prison before trial, remorse for the murder of a relative, and dependents of the defendants.[130] According to the Court, however, "considering the injuries received and the weapon used, the conduct of the appellants before and after commission of the offence, [irresistibly] point to premeditated murder."[131] In that case, the testimony showed that the defendants lay in wait for the victim and attacked her with pangas six times. These were circumstances that the justices felt outweighed the mitigating factors. In a similar case, the Court ruled that aggravating factors outweighed mitigating factors where the defendant violently murdered his seventy-year-old step-grandmother.[132] In mitigation, the defendant-appellant argued that he was a first-time offender, that he was on remand for four years before conviction, and that he had a wife and five children.[133] The defendant also argued a defense that he was protected by the

126. *Id.* at 59.

127. *Id.* at 60.

128. *See, e.g.*, Reyes v. The Queen, [2002] UKPC 11, [2002] 2 A.C. 235 (appeal arising from Belize).

129. *Kigula*, [2009] UGSC 6 at 70, 80, 91, 96.

130. Omasige Calvin & Okia James v. Uganda, Crim. App. No. 179 of 2003 (Apr. 6, 2010) (Uganda C.A.).

131. *Id.*

132. Feni Yasin v. Uganda, Crim. App. No. 51 of 2006 (June 28, 2010) (Uganda C.A.).

133. Judges in a number of the cases consider the defendant's age as a mitigating factor. In *Feni Yasin*, the defendant was 48 years old, but it is not clear whether the age is being offered because the defendant was young or old. *Id.*

defenses of intoxication and provocation, which the Court specifically rejected.[134] Interestingly, the Court treated the defenses of intoxication and provocation as legal defenses and not in the same way as the other factors offered in mitigation.[135] Although the case was not an ideal one, a later case may present the opportunity to more carefully delineate how a judge should weigh legal defenses and mitigating factors where both are raised.[136]

The Ugandan Court of Appeal reversed a death sentence in June 2010 where mitigating factors outweighed aggravating factors in the case of *Jino Adama v. Uganda*.[137] In that case, the defendant-appellant was convicted of armed robbery, a capital crime. He was not convicted of murder, and pleaded in his defense that he was a first-time offender, that he had been in prison for over three years before conviction, and that he had a wife and four children.[138] The Court found that the trial judge had properly convicted the defendant of armed robbery, but determined that a death sentence was inappropriate because even though three gunshots were fired, no life was lost.[139] In addition, the defendant appeared remorseful.[140] Consequently, the Court sentenced the defendant to fifteen years imprisonment retroactive to 2006 when he was convicted.[141] Because this case presented fairly strong facts for armed robbery, the emphasis of the justices on the fact that no one was killed suggests that the Court will be skeptical of death sentences for armed robbery in the future. In October 2011, the Ugandan newspaper *The Monitor* reported that the Ugandan High Court reduced three death sentences for convicts in aggravated robbery trials to imprisonment of fifteen and twenty years, respectively.[142] This supports the hypothesis that, now freed of the mandatory death requirement, judges in Uganda will be skeptical of death sentences in non-murder cases.[143]

In a series of cases, the Ugandan Court of Appeals reversed the murder convictions of defendants who had been sentenced to death. In June 2010, the Court of Appeal reversed not only a death sentence, but a murder conviction, where the prosecution failed to prove malice aforethought when the defendant used the handle, rather than the blade, of a weapon to hit the victim, a young

134. *Id.*

135. *Id.* at 3.

136. In particular, the case left open the question of whether a failed defense could be a mitigating factor even if it does not exculpate the defendant.

137. Adama Jino v. Uganda, Crim. App. No. 50 of 2006 (June 23, 2010) (Uganda C.A.).

138. *Id.* at 3.

139. *Id.* at 8.

140. *Id.*

141. *Id.*

142. Anthony Wesaka, *Three Convicts on Death Row Survive Hangman*, THE MONITOR, Oct. 20, 2011.

143. On the other hand, the Ugandan High Court handed out discretionary death sentences after consideration of mitigating circumstances. *See, e.g.*, Uganda v. Aurien James Peter, Crim. Case No. 12/2010 (Nov. 28, 2010), [2010] UGHC 102.

child.[144] Although the Court addressed the mitigating factors of the defendant as a first-time offender and a young father, it reversed the murder charge and convicted him of manslaughter given the parts of the body affected and the number and nature of the injuries on the victim, which underscored a lack of intent to kill.[145] The Court was also troubled by the fact that the assessors in the trial unanimously recommended a manslaughter sentence to the trial judge, and consequently sentenced the defendant to fifteen years in prison, retroactive to when the defendant was first convicted.[146] In another case, the Ugandan Court of Appeal reversed the conviction outright and acquitted and freed the defendant due to contradictions in testimony and the failure of a proper initial investigation.[147] Although the Court noted several factors in mitigation of a death sentence, emphasizing the defendant as a first-time offender, the Court ultimately excluded some hearsay evidence and found that "the learned trial judge erred in convicting the appellant on scanty circumstantial evidence adduced by prosecution," which fell far short of the standard of proof required.[148] While a practitioner often appeals both guilt and sentence in murder cases, judges do not have a chance to reach the sentencing issue when the guilt inquiry leads to reversal.

By ruling that all prisoners on death row for longer than three years should have their sentences commuted to life imprisonment "without remission," the Ugandan Supreme Court in *Kigula* created an interpretive problem since the Prisons Act states that "imprisonment for life" should be construed as twenty years imprisonment rather than "whole life" imprisonment.[149] In addition to the twenty-year rule under the Prisons Act, prison officials retained some discretion to shorten the sentence for good behavior.[150] After the Ugandan Court of Appeal upheld a conviction of child rape and a sentence of life imprisonment in *Stephen Tigo v. Uganda*, the Supreme Court squarely confronted the issue of the meaning of life imprisonment under Section 47(6) of the Prisons Act, which states that a sentence of life imprisonment should be deemed to be twenty years.[151] In *Tigo*, the Supreme Court clarified *Kigula* by indicating that whole life or natural life imprisonment was warranted for those prisoners who were spared the death

144. Patrick Abicopongo v. Uganda, Crim. App. No. 86 of 2005 at 5 (June 23, 2010) (Uganda C.A.).

145. *Id.* at 6.

146. *Id.*

147. Geoffrey Ongune Kasule v. Uganda, Crim. App. No. 19 of 2004 (June 28, 2010) (Uganda C.A.).

148. *Id.* at 5.

149. Jamil Ddamulira Mujuzi, Life Imprisonment in International Criminal Tribunals and Selected African Jurisdictions—Mauritius, South Africa and Uganda 272-75 (May 13, 2009) (LL.D. Thesis, University of the Western Cape).

150. Prisons Act, Act 17 of 2006 §§84-86 (Uganda).

151. Stephen Tigo v. Uganda, [2009] UGCA 6, *appeal dismissed*; Tigo v. Uganda, Crim. App. No. 170 of 2003 (Mar. 23, 2009) (Uganda S.C.).

penalty, rather than imprisonment for twenty years, because *Kigula* intended to impose the next most severe sentence and specific prison sentences for *longer than* twenty years are not uncommon in the country.[152] Although the Court ruled that Stephen Tigo's imprisonment should be twenty years based on other grounds, the Court was clear that it would be an absurd result if life imprisonment were construed to be a lesser sentence than terms of imprisonment for longer than twenty years.[153] As Mujuzi writes, however, the decision conflicts with a growing international trend to limit life imprisonment terms.[154]

The legal systems of both Uganda and Malawi have recently come under intense international scrutiny because of the criminalization of homosexuality. In Malawi, a homosexual couple was sentenced to fourteen years imprisonment with hard labor for engaging in sodomy.[155] After the sentence was upheld on appeal, international pressure forced President Bingu wa Mutharika to pardon the couple.[156] In Uganda, the Anti-Homosexuality Bill of 2009 authorized a mandatory death sentence for persons convicted of "aggravated" sodomy or HIV transmission, eliciting worldwide condemnation despite the mandatory death provision's facial unconstitutionality after *Kigula*.[157] While it is unlikely that either country will increase criminal penalties of this nature, particularly given each country's international HIV donor networks, both cases underscore the extent to which harsh criminal punishments for homosexuality retain popular support. Like Malawi, Uganda has also faced legal aid shortages in post-*Kigula* challenges. A new initiative, developed in October 2011 and funded by the Uganda-based Foundation for Human Rights Initiatives and the British government, will provide free legal assistance to fifteen inmates on death row who are challenging their sentences.[158]

C. The Court of Appeal of Kenya: Mutiso

On July 30, 2010, the Kenyan Court of Appeal handed down *Mutiso v. Republic*, invalidating the mandatory death sentence for murder.[159] Godfrey

152. Tigo v. Uganda, Crim. App. No. 170 of 2003 (Mar. 23, 2009) (Uganda S.C.).

153. *Id.*

154. Mujuzi, *supra* note 149, at 283-290.

155. Jamil Ddamulira Mujuzi, *Discrimination Against Homosexuals in Malawi: Lessons from the Recent Developments*, 11 INT'L J. DISCRIMINATION & L. 150, 156 (2011).

156. *Malawi Gay Couple Released After Presidential Pardon*, BBC NEWS, May 30, 2011, *available at* http://www.bbc.co.uk/news/10194057.

157. Anti-Homosexuality Bill, No. 18 of 2009, Uganda Gazette No. 47, Sept. 25, 2009. *See also* Cecilia Strand, *Kill Bill! Ugandan Human Rights Organizations' Attempts to Influence the Media's Coverage of the Anti-Homosexuality Bill*, 13 CULTURE, HEALTH & SEXUALITY 917, 917-19 (2011).

158. Ephraim Kasozi & Betty Ndagire, *Death Sentence Inmates to Get Free Legal Services*, THE MONITOR, Oct. 15, 2011.

159. Mutiso v. Republic, Crim. App. No. 17/2008 (July 30, 2010) (Kenya C.A.).

Mutiso was convicted of a premeditated murder involving a dispute over petty larceny.[160] With four highly corroborative fact witnesses against only Mutiso's unsworn statement in his defense, the trial court judge found him guilty of murder with intent to cause bodily harm and gave him the only sentence permitted under the Penal Code: death by hanging.[161] In August 2009, Kenyan President Mwai Kibaki commuted the sentences of all death row prisoners in Kenya, including Mutiso.[162] In addition, the attorney general conceded that the mandatory death penalty was not constitutional.[163] Nonetheless, the Court found that Mutiso had standing and that the case was ripe for adjudication.[164]

The Court of Appeal invalidated the mandatory death penalty for murder on the grounds that the sentence violated the right to life, that it constituted cruel, inhuman, and degrading punishment, and that it violated the right to a fair trial.[165] Like the courts in Malawi and Uganda, the Court cited the seminal case *Reyes v. Queen* for the inhuman punishment ground.[166] The Kenyan court's framing of the right to life violation was unique. The Malawian court did not reach the issue,[167] and the Ugandan court avoided it by finding that the death penalty was saved and thus could not violate the right to life.[168] According to the Kenyan court, where the mandatory death penalty fell on defendants who did not necessarily merit the special penalty of death, a right to life violation would occur.[169] Constitutional litigation over the right to life is particularly prolific in Kenya, and a number of seminal legal debates concerning abortion access, domestic violence, and environmental rights have arisen out of the Court of Appeal and constitutional reform process.[170] A week after the decision in *Mutiso*, Kenyan voters went to the polls and overwhelmingly ratified a new constitution.[171] The scope of the right to life provision, particularly concerning abortion access, proved to be one of the most contentious aspects of the new constitutional draft.[172] The new constitution contains a death penalty savings clause, although it is arguably vaguer than the former constitution and will no doubt lead to continued incremental death

160. Republic v. Mutiso, Crim. Case No 55/2004 (Feb. 29, 2008) (Kenya H.C.).

161. *Id.* In total, nine witnesses testified for the prosecution, including an expert witness.

162. *Mutiso*, Crim. App. No. 17/2008, at ¶ 10.

163. *Id.*

164. *Id.* at ¶ 11.

165. *Id.* at ¶¶ 32-34.

166. *Id.* at ¶ 32.

167. *C.f.* Kafantayeni v. Attorney-Gen., [2007] MWHC 1 at 6-7 (Malawi).

168. Attorney Gen. v. Kigula et al., [2009] UGSC 6 at 36-37 (Uganda).

169. *Mutiso*, Crim. App. No. 17/2008 at ¶ 34.

170. *See, e.g.*, Waweru v. Republic, (2006) 1 K.L.R. 677, 677, 681, 684 (H.C.K) (Kenya); Eunice Brookman-Amissah & Josephine Banda Moyo, *Abortion Law Reform in Sub-Saharan Africa: No Turning Back*, 12 REPRODUCTIVE HEALTH MATTERS 227, 231 (2004).

171. *See* Jeffrey Gettleman, *Kenyan Constitution Opens New Front in Culture Wars*, N.Y. TIMES, May 14, 2010, at A6.

172. *Id.*

penalty challenges.[173]

The decision had other similarities to those arising from Uganda and Malawi as well. Although the Court did not explicitly follow Uganda in finding that the mandatory death penalty violated the separation of powers because of legislative constraints on judicial sentencing discretion, it did note the argument in appellant's submissions and quoted this holding from *Kigula*.[174] Perhaps the Court's caution was warranted because the separation of powers was drastically altered under Kenya's new constitution. The Court did dismiss the argument that sentencing discretion was unnecessary because of executive pardon and clemency power, in accordance with *Reyes v. The Queen* and most other courts, including the Ugandan court.[175] Like *Kigula* and *Kafantayeni*, the Kenyan Court of Appeal cited a wide array of foreign jurisprudence. The Court noted it was "satisfied" that the foreign case law was "persuasive in our jurisdiction and we make no apology for applying" it.[176] Like the Ugandan court, the Kenyan court issued strong dicta indicating that the mandatory death penalty for crimes other than murder was also unconstitutional, including treason, robbery with violence, and attempted robbery with violence—three crimes that have a long history of political prosecutions in Kenya.[177] The Court also provided strong dicta receptive to a death row syndrome challenge in the future, on the model of the Zimbabwean case *Catholic Commission*, a challenge that also proved successful in *Kigula*.[178]

Finally, the Court successfully bridged the gap between Kenya's independence constitution and the 2010 constitution. Unlike Malawi and Uganda, which have more modern constitutions, Kenya's original constitution possessed a Caribbean-style partial savings clause.[179] The Court interpreted the clause in accordance with the Caribbean cases *Reyes*, *Fox*, and *Hughes*, holding that the mandatory death penalty was a matter of sentencing, not a judicial punishment, and thus was not saved.[180] Although the Court resisted an omnibus South African-style death penalty challenge, it was satisfied that the mandatory death penalty would not be resurrected under the new constitution.[181] To this end, the Court based its decision on three fundamental rights that had nearly exact parallels in both constitutions.[182] Like the Ugandan Supreme Court, the Kenyan court looked to drafters' intent, noting that the new constitution "was

173. *C.f.* CONSTITUTION, art. 71(1) (1969), art. 29(f) (2010) (Kenya).

174. *Mutiso*, Crim. App. No. 17/2008 at ¶¶ 34-35.

175. *Id.* at ¶ 14.

176. *Id.* at ¶ 32.

177. *Id.* at ¶ 36.

178. *Id.* at ¶¶ 16-18.

179. CONSTITUTION, art. 74(2) (1969) (Kenya) (there is no equivalent in the 2010 constitution).

180. *Mutiso*, Crim. App. No. 17/2008 at ¶ 32.

181. *Id.* at ¶ 26.

182. CONSTITUTION, arts. 71(1), 74(1), 77(1) (1969) (Kenya); CONSTITUTION, arts. 23(1), 29(f), 50(1) (2010) (Kenya).

arrived at through a consultative and public process," and consequently one could assume "that the people of Kenya, owing to their own philosophy and circumstances, have resolved to qualify the right to life and retain the death penalty in the statute books."[183] The Court appeared to close the door on a direct challenge to the constitutionality of the death penalty even under the new constitution.

The High Court, the trial-level court in Kenya that possesses original jurisdiction over murder cases, clarified *Mutiso* in *Evanson Muiruri Gichane v. Republic* in which the defendant was sentenced to death for attempted robbery with violence.[184] Although the trial court based its decision overturning the death sentence in part on an apparent contradiction in the penal code in which attempted robbery with violence triggered a mandatory death sentence under one provision and only seven years imprisonment under another, the trial court also rested its decision on the *Mutiso* holding.[185] To that end, the trial court extended the ban on mandatory death sentences to attempted robbery with violence. Although in *Mutiso* the Court of Appeal had claimed to close the door on a direct challenge to the constitutionality of the death penalty under the new constitution, it did not engage a searching comparison between the old constitution and the new one. The death penalty under the old constitution was clearly saved: "71(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted."[186]

In comparison, however, the new constitution is ambiguous:

> 26(1) Every person has the right to life. 26(2) The life of a person begins at conception. 26(3) A person shall not be deprived of life intentionally, except to the extent authorised by this constitution or other written law. 26(4) Abortion is not permitted [with exceptions omitted].[187]

The right to life provision under the new constitution contains two ambiguities. First, the clause that could be construed as "saving" the death penalty is a separate clause from, and not a modifying subclause of, the grammatically absolute right to life. Second, 26(3) appears to be circular, because it states that a person shall not be deprived of life except where constitutionally authorized, and provides no constitutional authorization except for abortion exceptions. According to one of the experts on the Constitutional Review Commission, this ambiguity was intentional, to reconcile Kenyan

183. *Mutiso*, Crim. App. No. 17/2008 at ¶¶ 23-24.

184. Evanson Muiruri Gichane v. Republic, Crim. App. No. 277 of 2007 (Dec. 10, 2010) (Kenya H.C.).

185. *Id.*, slip op. at 4-6.

186. CONSTITUTION, art. 71(1) (1969) (Kenya).

187. CONSTITUTION, art. 26 (2010) (Kenya).

popular opinion with global trends toward the death penalty.[188]

On June 10, 2011, High Court Judge John Matthew Anyara Emukule found the death penalty unconstitutional under the new constitution.[189] After finding the accused guilty of murder, Judge Emukule turned to the sentencing. Although his decision is inelegant, he highlighted both of the ambiguities in Article 26 of the new constitution.[190] In accepting the mitigating factors of the case, including the defendant's young age (he was twenty at the time of his arrest) and the ethnic and political dimension of the murder, Judge Emukule held "that Article 26(2) (on deprivation of life) is inconsistent with the right to life preserved under Article 26(1) of the Constitution . . . ."[191] Consequently, he sentenced the accused to thirty years imprisonment with an option of parole after twenty years.[192] The case remains on appeal.

In December 2011, High Court Judge M. Warsame came to the opposite decision of Judge Emukule, not only upholding the constitutionality of the death penalty, but also rejecting *Mutiso* and finding that the new constitution authorizes a mandatory death penalty.[193] Judge Warsame compared the wording of the old constitution to the new constitution and found that the new constitution actually expanded the application of the death penalty because the phrase "the extent authorized by this constitution or other written law" in article 26(3) of the new constitution was broader than "save in execution of the sentence of a court" in article 71(1) of the former constitution.[194] His decision went further, rejecting the belief that the death penalty was cruel and inhuman punishment and holding that the death sentence was the only punishment available to a conviction of murder. He made his disagreement with Judge Emukule explicit:

> It is also alleged that death penalty is a cruel and inhuman punishment but what about the loss of life, as a result of the unlawful act of the accused. In my view loss of someone's life is equal and amounts inhuman treatment. The person who is

188. E-mail from member of Committee of Experts, to author (June 21, 2011) (on file with author).

189. Republic v. John Kimita Mwaniki, Crim. Case No. 116 of 2007 (June 10, 2011) (Kenya H.C.).

190. He also noted an additional one, which is that the right to life is *not* among the rights that may not be limited under Article 25 (rights to freedom from torture and cruel, inhuman, and degrading treatment; freedom from slavery; right to a fair trial; and right to habeas corpus). *See* CONSTITUTION, art. 25 (2010) (Kenya).

191. *Mwaniki*, Crim. Case No. 116 of 2007 at 26.

192. *Id.* Judge Emukule again reiterated his opposition to the death penalty under the new constitution in dicta in Republic v. Milton Kabulit et al., Crim. Case No. 115/2008 (Jan. 26, 2012) (Kenya H.C.).

193. Republic v. Dickson Mwangi Munene, Crim. Case No. 11 of 2009 (Dec. 10, 2011) (Kenya H.C.).

194. *Id.*

> responsible for the loss must pay for it in equal measure or commensurate to the suffering of the victim or his family. . . . I also think the recent decision of the Court of Appeal [*Mutiso*] and that of my brother Justice Emukule is a significant step in the wrong direction. My position, is that, the law as currently in existence provides for death penalty notwithstanding the noble view of my brother Justice Emukule. . . . The mandatory use of the word 'shall' gives me no option or route other than to impose death penalty. Consequently I sentence the two accused person to suffer death as prescribed by law.[195]

This decision is highly aberrational. In nearly all other capital sentencing cases at the High Court, including both murder cases in which the High Court sits as a trial court and in robbery with violence cases in which the High Court sits as an appellate court, the accused was permitted to offer mitigating evidence.[196]

Despite this split among High Court judges, guidance from the Kenya Court of Appeal thus far has been limited. In March 2012, the Kenya Court of Appeal upheld two discretionary death sentences that were imposed on defendants after they had the opportunity to present mitigating evidence.[197] This is in keeping with the spirit of *Mutiso* that the death penalty should remain a lawful sentence so long as it was not mandatory. Nonetheless, the Court of Appeal has not yet received a clear constitutional challenge to the death penalty per se based on the wording of the new constitution, so opportunity still exists to expand *Mutiso*.

Kenya's 2010 constitution established the Supreme Court of Kenya, an additional level of appeal from the current Court of Appeal, as part of a sweeping program of judicial reform including reducing case backlogs, improving rural court access, ensuring impartiality of judicial officers, and

---

195. *Id.*

196. *See, e.g.*, Vincent Jared Ogutu v. Republic, Crim. App. No. 89/2010 (Nov. 1, 2011) (Kenya H.C.); Boaz Onyango et al. v. Republic, Crim. App. 53 & 55/2010 (Sept. 23, 2011) (Kenya H.C.). In *Ogutu* and *Boaz,* the High Court received appeals from magistrate's courts because these cases concerned the death penalty for robbery with violence. The High Court is the court of first instance in murder cases, but not in robbery with violence cases, which is why they are designated "Crim. App." instead of "Crim. Case." As a consequence, both *Ogutu* and *Boaz* were remanded to the lower courts. For murder cases at the High Court, see Republic v. Jacob Juma Msituni, Crim. Case No. 10/2008 (Mar. 12, 2012) (Kenya H.C.) and Republic v. Mbaruk Mwangeti, Crim. Case No. 15/2008 (Mar. 16, 2012) (Kenya H.C.). In both of those cases, the High Court judges weighed the evidence in the first instance and then proceeded to a sentencing phase where the defendant was permitted to offer mitigating evidence in accordance with *Mutiso*.

197. Benard Mutua Matheka v. Republic, Crim. App. No. 155/2009 (Mar. 15, 2012) (Kenya C.A.); James Maina Magare et al. v. Republic, Crim. App. No. 224/2010 (Mar. 16, 2012) (Kenya C.A.). Interestingly, the Court of Appeal noted at the end of the *Magare* judgment that one of the judges on the three judge panel refused to sign the decision.

implementing paperless appeals.[198] Currently, the Supreme Court is composed of Chief Justice Willy Mutunga, Deputy Chief Justice Nancy Baraza, and five other justices. Several candidates before the Judicial Services Commission, which is vetting candidates for vacancies in the Kenyan court system, have included judges who explicitly told the panel that they oppose the death penalty based on the wording of the new constitution.[199] Perhaps the long tradition of political executions in late colonial Kenya, the abuse of due process under the Daniel arap Moi regime, the weakness of a pre-colonial death penalty tradition in Kenya, and the attitudes of the political elites tending toward abolition represent a broader ambivalent public attitude.[200] If that is the case, and if Justice Emukule's decision is indicative of the attitudes of the current judiciary, then the death penalty may well be struck down in Kenya by the future Supreme Court.

VI. CONCLUSION: THE AFRICAN CONTRIBUTION TO COMPARATIVE DEATH PENALTY JURISPRUDENCE

The abolition of the mandatory death penalty in the common law world is a case study of how international human rights norms are being installed in domestic constitutional jurisprudence intentionally by a small network of lawyers. Although the challenges are incremental, the stated goal is much larger: to end the death penalty worldwide by fundamentally making it more difficult for prisoners to be placed on death row. African countries appear to be following the emerging global consensus that not all murders are equally heinous and deserving of death, that the right to a fair trial includes a sentencing hearing, and that a sentence disproportionate to a crime is cruel and degrading punishment. African courts have increasingly followed the lead of the Privy Council's Caribbean jurisprudence on the scope of executive clemency and appellate review, on delay and conditions on death row, and on the right to appeal to international and regional human rights tribunals. The settled law of the Caribbean, formed over the course of a decade by challenges to supranational tribunals, national courts, the Privy Council in London, and later the Caribbean Court of Justice, has almost entirely dispensed with the mandatory death sentence in the region. Common law African constitutions are in *pari materia* with Caribbean constitutions, and the weight of this

198. Protus Onyango, *Kenya's Two Female Supreme Court Justices Set to Work*, INTER-PRESS SERVICE, Nov. 10, 2011, http://ipsnews.net/news.asp?idnews=105789.

199. *Death Penalty Cruel, JSC Told*, DAILY NATION, July 6, 2011 (noting that magistrate judge seeking elevation to judge told the Commission that the death penalty was unconstitutional and not discretionary); *Magistrates Push for Repeal of Death Penalty*, DAILY NATION, Aug. 4, 2011 (noting that three additional candidates for High Court judges indicated that the death penalty was unconstitutional).

200. For a summary of the pre-colonial, colonial, and post-colonial history of the death penalty in Kenya, see Novak, *Kenya*, *supra* note 1.

jurisprudence is being imported to the African continent.

At the same time, African countries have made their own contributions to the global body of death penalty jurisprudence, and will likely be cited in later constitutional challenges to the mandatory death sentence. Just as *Edwards v. Bahamas* stands for the proposition that the mandatory death penalty violates the right to a fair trial, and *Reyes v. The Queen* (Belize) is the seminal case finding that the death penalty is cruel and inhuman punishment, so too will the decisions arising from Kenya, Malawi, and Uganda be cited for their original holdings. *Kafantayeni* is the first case to hold that the mandatory death penalty violates the right of access to the court system for the resolution of disputes because it does not permit true appellate review of a sentence. *Kigula* was the first case to explicitly hold that the mandatory death penalty violates the constitutional separation of powers because the legislature was constraining judicial sentencing discretion. *Mutiso* is the first case to find that because the mandatory death penalty is not specifically saved in the constitution, it violates the right to life. In each of these cases, the courts followed the emerging international consensus on the mandatory death penalty but adopted the international norms to their own domestic contexts.

On February 1, 2012, the Supreme Court of India invalidated the mandatory death penalty for an aggravated homicide provision that was intended to reach terrorist groups operating in India.[201] This decision, *State of Punjab v. Singh (Dalbir)*, cited global precedent for the proposition that the mandatory death penalty violates the right to a fair trial because it precludes a sentencing hearing for a defendant convicted of murder.[202] Among the international authorities cited by the Indian Supreme Court were the decisions in *Kafantayeni*, *Kigula*, and *Mutiso*.[203] The "sharing" of constitutional doctrines, particularly in common law developing countries formerly colonized by Britain, is not a new phenomenon. Many of these countries had expatriate judges and underdeveloped legal doctrines in the decades after independence, and the constitutions drawn up after independence were broadly similar.[204] The constitution of India, however, was older than those in Africa and did not follow the template precisely, lacking an explicit ban on cruel, inhuman, and degrading punishment.[205] As a consequence, the Indian Supreme Court in *Singh (Dalbir)* did more than simply quote case law from Africa, the Caribbean, and elsewhere; the judges performed a searching analysis of the reasoning of other common law courts in order to reach a novel holding based on due process and fair trial rights rather than on the "inhuman punishment" clause. Like the

201. State of Punjab v. Singh (Dalbir), [2012] INSC 84, [2012] 3 S.C.C. 346 (India S.C.).

202. *Id.*

203. *Id.* at ¶¶ 75-82.

204. WIDNER, *supra* note 6, at 61.

205. Based on the due process provisions of the Indian constitution, the Supreme Court of India has found an implicit ban on cruel and unusual punishment similar to the Eighth Amendment of the United States Constitution. *Singh (Dalbir)*, [2012] INSC 84 at ¶ 47.

African and Caribbean Courts before it, the Indian Supreme Court expanded the boundaries of global death penalty jurisprudence.

The consequences of decisions such as *Kafantayeni*, *Kigula*, and *Mutiso* extend far beyond death penalty cases. Capital sentencing regimes in Malawi, Uganda, and Kenya will require the creation of sentencing standards and a definitive list of aggravating and mitigating factors, and post-mandatory death penalty sentencing litigation has already begun.[206] In addition, the Privy Council in London has suggested a willingness to strike down mandatory life imprisonment for murder based on the same reasoning as death penalty cases.[207] The decisions are important statements of judicial independence from the courts that have issued them, particularly in countries that do not have extensive records of invalidating laws that do not comply with international human rights norms. Again, the results are broader. The line of mandatory death challenges shows how a relatively small group of lawyers can take advantage of increasing interdependence among legal systems to help professionalize the legal community in the developing world, to share legal resources and transfer knowledge across borders, and ultimately help ground emerging notions of constitutionalism in postcolonial legal systems.

206. *See, e.g.*, Uganda v. Bwenge Patrick, HCT-03-CR-SC 190/1996 (Nov. 11, 2009) (Uganda H.C.); White v. Queen, [2010] UKPC 22 (appeal taken from Belize).

207. Boucherville v. Mauritius, [2008] UKPC 37 (appeal taken from Mauritius).

THE CULTURE OF LAW: UNDERSTANDING THE INFLUENCE OF LEGAL TRADITION ON TRANSITIONAL JUSTICE IN POST-CONFLICT SOCIETIES

Dana Zartner*

I. INTRODUCTION

When discussing issues of transitional justice, it is easy for those steeped in the Western tradition to assume that the best form of justice in the aftermath of a crisis is a trial before a judge and punishment handed down by a court according to the law. Our cultural understandings of law and the role that law and legal institutions play in the judicial process and punishment of one's peer are centered on formal proceedings and a decision as to whether an individual is guilty or innocent. This belief in, and reliance on, the court system is something which stems from our own legal cultural and experience with the law. Western legal traditions such as the common law and civil law are based on well-defined judicial institutions, written law, and the presence of legal professionals to determine what is the appropriate punishment in any situation. Not all legal traditions are grounded in these same understandings of the law and the role of law in society. There are other legal traditions in the world, where the focus has historically centered on rebuilding community harmony and trust, or reconciling the opposing parties in a conflict to restore balance.[1] Some of these legal traditions find the basis for the laws and concepts of justice in religious principles,[2] and some find it in longstanding customs of the community.[3] In many of these communities, these traditional views of the law and justice have been mixed over time with Western, more institutionalized forms of law.[4] Even in those states, however, it is often the case that society still perceives law and justice in the traditional manner of the community rather than in the Western notion of arrest, trial, and punishment for the individual.

Given the importance of legal tradition in shaping cultural perceptions about justice, this Article seeks to better understand this relationship through a study of the legal traditions of communities that have experienced conflict and

---

* Dr. Zartner serves as an Assistant Professor of Political Science at Tulane University and as an Adjunct Law Professor at Tulane University Law School. The author may be contacted at zartner@tulane.edu.

1. Marek Kaminski et al., *Normative and Strategic Aspects of Transitional Justice*, 50 J. CONFLICT RESOL. 295 (2006).

2. *Id.*

3. *Id.*

4. *See* Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RES. 427, 435 (2007).

are moving into the transitional justice phase. This Article argues that instituting more effective post-conflict transitional justice requires that closer attention be paid to the local understandings of law in making assessments about justice and the best way to achieve peace and harmony in post-conflict societies. For those who work to assist these communities as they rebuild, understanding the local community's perspective on law and justice and the appropriate mechanisms for achieving peace and reconciliation post-conflict will be more effective than simply imposing Western ideals about justice being handed down with a judicial decision.

This Article examines these concepts in the context of Uganda and how the state's legal tradition shapes societal perceptions about justice, peace, and appropriate actions in the aftermath of a crisis.[5] Specifically, this Article considers what local communities, steeped in their own histories and legal traditions, believe are the best solutions in post-conflict societies.[6] This Article explores the role that a state's legal tradition may play in shaping successful transitional justice solutions in the aftermath of crisis.[7] It argues that traditional legal mechanisms such as customary law and religious law must be considered in addition to Western-style codes and courts in order to have a more effective system of transitional justice.[8]

However, it is not just the actual mechanisms of justice that must be considered. Cultural understandings of justice and what is most important to those societies which have suffered must also be taken into account.[9] All societies have their own legal cultures and ideas, born from their own legal traditions, which may, in turn, create different understandings about justice, peace, and other concepts which are so commonly debated among those working in the transitional justice community. Given this reality, close attention needs to be paid to the local culture and society in making assessments about justice and the best way to achieve harmony within the community.[10]

Part II of this Article highlights some of the existing literature on

---

5. *See* PHUONG PHAM ET AL., WHEN THE WAR ENDS: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN NORTHERN UGANDA (University of California Press) (2007).

6. *See* James Ojera Latigo, *Northern Uganda: Tradition-Based Practices in the Acholi Region*, *in* TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 85 (Luc Huyse & Mark Salter eds., 2008).

7. PHAM ET AL., *supra* note 5, at 43.

8. *See* Luc Huyse, *Introduction: Tradition-Based Approaches in Peacemaking, Transitional Justice and Reconciliation Policies*, *in* TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 1, 3 (Luc Huyse & Mark Salter eds., 2008).

9. *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, S/2004/616 (Aug. 23, 2004), *available at* http://daccess-ods.un.org/TMP/6569926.73873901.html.

10. James Meernik, *Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. PEACE RES. 271, 278 (2005).

transitional justice in post-conflict societies.[11] Building on those who argue for a culturally sensitive approach, Part III discusses the importance of considering legal tradition – a combination of the legal history, culture, and accepted institutions within a society – when assisting communities in post-conflict rebuilding.[12] Part IV turns to Uganda as a case study, examining the Ugandan legal tradition and traditional concepts of justice.[13] In the context of the Ugandan conflict and efforts to rebuild, Part V discusses public preferences in terms of justice, peace, and how these are reflective of Uganda's legal tradition.[14] To understand peoples' attitudes about transitional justice, peace, and law post-conflict, this Article uses survey data collected through a joint project of the Payson Center for International Development at Tulane University, the Human Rights Center at the University of California, Berkeley, and the International Center for Transitional Justice. The survey on Uganda asked participants about their attitudes towards a number of different transitional justice concepts and peace-building efforts. The use of these surveys is crucial because they give a first-hand account of what people who have experienced the conflict believe would be most effective for their own community. Initial research on Uganda shows that a community method of transitional justice, stemming from the Ugandan legal tradition, is more aligned with the desires of Ugandans for their future than Western style courts and laws. Finally, Part VI concludes with a discussion of the impact of considering legal tradition in transitional justice work and avenues for further research.[15]

II. THE STATE OF TRANSITIONAL JUSTICE

Transitional justice has been defined as procedures, whether formal or informal, which are implemented by a group or institution that is accepted as legitimate in order to deal with perpetrators and provide justice to victims.[16] There are numerous forms of transitional justice mechanisms ranging from international criminal proceedings such as those at the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda and the International Criminal Court,[17] domestic or hybrid trials as in Cambodia,[18] truth and reconciliation commissions as in South Africa,[19] amnesties,[20] and local

11. *See* Kaminski, *supra* note 1.
12. U.N. Secretary-General, *supra* note 9, at 12.
13. *See* Huyse, *supra* note 8.
14. Patrick Vinck et al., *Exposure to War Crimes and Implications for Peace Building in Northern Uganda*, 298 J. AM. MED. ASS'N 543, 553 (2007).
15. *Id.* at 548-50.
16. Kaminski, *supra* note 1, at 300-01.
17. Sikkink & Walling, *supra* note 4.
18. *Id.*
19. *Id.*
20. *Id.* at 435.

procedures like the gacaca courts in Rwanda.[21] While the term "transitional justice" has been used to encompass the development of judicial institutions and the rule of law in any state in transition,[22] this Article focuses on the narrower area of transitional justice in post-conflict situations.

The body of research on transitional justice has increased significantly since the end of the Cold War.[23] It is an interdisciplinary subject that crosses the lines of political science, law, sociology, and psychology. Transitional justice and the rebuilding of post-conflict societies will continue to be extremely important as long as societies continue to suffer conflict. In the past two decades, the concept of transitional justice for post-conflict societies has become much more institutionalized and now forms a part of the United Nations mandate.[24] While institutionalization is important because it focuses international attention and resources on those situations needing external assistance in order to rebuild in the aftermath of conflict, this centralization at the international level can contribute to the Westernization of transitional justice projects. This is not necessarily the result of an imperialistic intent; it is often Western states, Western advocacy groups, or Western NGOs that have the resources and personnel to assist with transitional justice activities in the aftermath of a conflict. As a result, diplomats, lawyers, advocates, and others who work in this area turn to the forms of justice they are most familiar with, such as legal rules, judges, courts, and punishment as mechanisms of justice.

There has been much debate as to whether transitional justice is best achieved through a top-down manner, stemming from international organizations like the United Nations, or whether it is best left to individual states and communities.[25] Some scholars have classified this duality as exogenous transitional justice and endogenous transitional justice.[26] In the exogenous case, transitional justice mechanisms are created from the outside, often by neutral parties not engaged in the conflict.[27] International institutions are currently the largest purveyors of exogenous transitional justice.[28] Endogenous transitional justice is when the justice mechanisms are developed and administered by the post-conflict society-in-transition.[29] Some scholars argue that addressing transitional justice from the top-down through international institutions is necessary because there are more resources

21. Kaminski, *supra* note 1, at 301.

22. *See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 7 (2d ed. 2010); Sikkink & Walling, *supra* note 4.

23. Kaminski, *supra* note 1, at 296.

24. *See* U.N. Secretary-General, *supra* note 9.

25. Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'*, 3 INT'L J. TRANSITIONAL JUST. 5, 10 (2009); Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275, 275-76 (2008).

26. Kaminski, *supra* note 1, at 295-96.

27. *Id.*

28. *Id.*

29. *Id.* at 295.

available, there are already institutions in place, and the international tribunals are removed from the immediate local tensions.[30] Those in favor of a more localized approach argue that the extraordinary range of national experiences and cultures make the possibility of a universally relevant formula for transitional justice untenable.[31] Others supporting this position argue that international institutions like the ICTY have no real impact and do nothing to improve peace and harmony in the long run.[32]

Arguments on both sides remain largely focused on the institutional mechanisms of achieving justice, of placing blame, and seeking retribution or apology. Some argue about the "moral obligation to prosecute and punish perpetrators."[33] These arguments raise questions about morality generally, and whether or not a universal sense of right and wrong exists. While most can universally agree that certain actions, like genocide, are wrong, there may not be an agreement on the moral obligations that stem from such actions. Universal agreement that certain actions are wrong does not automatically result in agreement on how to respond to the actions. Responses will be culturally grounded, and therefore, the entire notion of what constitutes justice in post-conflict societies must be considered.

In order to be effective, transitional justice must take into account "indigenous and informal traditions for administering justice or settling disputes" because this is the only way to do so in conformance with local traditions.[34] Since cultural beliefs about law and justice are grounded in such traditions, they must be taken into account during the peacemaking process – even if it means not achieving "justice" in a way recognized by Western states.

While consideration of whether alternative mechanisms of justice grounded in local tradition are better suited to different societies is certainly a

---

30. *See* GERRY J. SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 12 (2004); David Wippman, *The International Criminal Court*, *in* THE POLITICS OF INTERNATIONAL LAW 151 (Christian Reus-Smit ed., 2004); M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 55 (1995); M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443, 466 (1999); Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 101 AM. POL. SCI. REV. 573, 575 (2007); Jack Donnelly, *State Sovereignty and Human Rights*, 16 n. 2 (Denver Graduate School of Int'l Studies, Working Paper No. 21, 2004), *available at* http://www.du.edu/korbel/hrhw/workingpapers/2004/21-donnelly-2004.pdf; Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF. 150 (2001).

31. Diane Orentlicher, *'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency*, 1 INT'L J. TRANSITIONAL JUST. 10, 18 (2007).

32. Meernik, *supra* note 10, at 278. *See also* TRADITIONAL CURES FOR MODERN CONFLICTS: AFRICAN CONFLICT 'MEDICINE' (William Zartman ed., 2000); A.J. MCADAMS, JUDGING THE PAST IN UNIFIED GERMANY (2001); Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 12 (2003/2004).

33. *See* Huyse, *supra* note 8.

34. U.N. Secretary-General, *supra* note 9 at 12.

welcome shift in transitional justice thinking, it is not enough by itself. It is also necessary to consider different cultural views about peace and justice and what is truly required in the aftermath of a crisis. This is why it is important to consider a state's legal tradition when focusing on transitional justice in a particular place because legal tradition encompasses both institutional structure and culture.[35] Taking cultural preferences into account is the only way to truly achieve peace and justice in the aftermath of a crisis.

III. LEGAL TRADITION

> *[L]ocal cultures, beliefs, and social factors play a role in shaping attitudes and opinions toward peace. Efforts to establish peace and accountability mechanisms must be informed by population-based data that reflect the opinions, attitudes, and needs of all sectors of a society.*[36]

Legal tradition is a key factor to consider when thinking about issues of post-conflict peace and reconciliation because law is a cornerstone of society. Legal tradition is the set of deeply-rooted, historically-conditioned attitudes about the nature of law, the role of law in society and the polity, and the proper organization and operation of a legal system in existence within a state or community.[37] Depending on the historical origins and development of law within a particular community, legal tradition may be based on codes such as those in the civil law tradition[38] or based on judicial decisions such as those in the common law tradition.[39] Legal tradition may also be based on the moral precepts of religion, as with the Islamic law tradition,[40] or on long-standing communal practices designed to ensure harmony and balance, as in many of the Asian and African traditions.[41] Each of these different traditions shapes the perceptions of law and justice within their own communities, and these perceptions, in turn, shape beliefs about the best course of action in post-conflict situations. It is therefore important to take legal tradition and historical understandings of law and justice into account when seeking effective

35. Dana Zartner Falstrom, *Thought Versus Action: The Influence of Legal Tradition on French and American Approaches to International Law*, 58 ME. L. REV. 337, 344 (2006).

36. *See* Vinck et al., *supra* note 14.

37. JOHN H. MERRYMAN, THE CIVIL LAW TRADITION 1-2 (3d ed. 2007); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677 (2000).

38. Emilia Justyna Powell & Sara McLaughlin Mitchell, *The International Court of Justice and the World's Three Legal Systems*, 69 J. POL. 397, 398-99 (2007).

39. *Id.*

40. *Id.*

41. Huyse, *supra* note 8, at 14; *see also* Shali Wu & Boaz Keysar, *The Effect of Culture on Perspective Taking*, 18 PSYCHOL. SCI. 600 (2007).

transitional justice mechanisms in a post-conflict situation because this will provide more stability, success, and ultimately peace in that community.

Legal tradition is more than simply the legal institutions and processes, which make up a state's legal system. It also encompasses the legal culture, which develops within a state based on the historical foundations of the law and the society's perceptions about the appropriate role of the rule of law.[42] Cultural attributes include societal attitudes about law, such as the understanding of the purpose of law within a society and the role that law plays in daily life.[43] The purpose of law can be broken down into two categories: individualist and communal.[44] In an individualist society, the purpose of law is focused on the protection of the rights of the individual.[45] Correspondingly, legal institutions in individualist societies often focus on adversarial trial procedures where individuals can bring claims if their rights are violated.[46] A communal purpose of law, in contrast, is focused on maintaining harmony for the greater good.[47] Rights of individuals are replaced by the good of the community.[48] For example, even if an individual is wronged because something was stolen from him or her, redress is focused on making the community whole and restoring harmony, rather than providing restitution for the victim and punishment for the perpetrator.[49] Whether a society maintains an individualist or communal approach to the law influences what is considered appropriate behavior, both under the law and in response to violations of the communal norms.

Legal culture may also encompass a number of other characteristics that play a role in preferred methods of transitional justice. The sources of law may be of cultural importance. For example, if legal rules are seen as ancient norms handed down through the generations or grounded in religion, this will have a different impact on legal culture than if legal rules are passed by a democratic majority in parliament or through authoritarian decree. Methods of punishment stem from legal culture as well. In those communal cultures where the most important thing is restoration of communal harmony, punishments are more likely to be focused on forgiveness.[50] In individual legal cultures, punishment is more likely to focus on punitive measures such as fines or jail.[51] Finally, some legal cultures believe that the behavior of the community transcends the present.[52] Whether tied to ancestors and heirs, or whether grounded in

42. Falstrom, *supra* note 35, at 342.
43. *Id.* at 347.
44. This has also been described in literature as independent versus interdependent. *See* Wu & Keysar, *supra* note 41.
45. Falstrom, *supra* note 35, at 361.
46. *Id.* at 362.
47. *Id.* at 351.
48. *Id.*
49. *Id.* at 351-52.
50. Huyse, *supra* note 8, at 68.
51. *Id.* at 4.
52. *Id.* at 11-12.

spirituality, some legal cultures encompass not just one's behavior in the present, but what this might mean for past or future generations.[53] This, again, is quite different from the major Western legal traditions of the common and civil law, which are secular in nature and grounded firmly in the present.

Institutional attributes of a legal tradition are those institutions and mechanisms in place within a state or society charged with making, applying, and enforcing the law. Legal institutions can include community councils, religious tribunals, civil or criminal courts, as well as numerous other mechanisms for ensuring that the law is followed.[54] In the common and civil law traditions, legal institutions usually encompass the legislative, executive, and judicial branches of the state or local government.[55] Law is usually grounded in a constitution or code. In religious and customary legal traditions, by contrast, institutions are often more localized and less formal.[56] Both cultural and institutional attributes draw from and reflect on the other, and each is socially constructed by the historical development and unique culture of a particular society.

Law is a foundational component of society and evolves as society develops. Law not only creates the rules that govern everyday action, but also provides the shared understandings by which people are able to live together in a society.[57] There can be no society without a system of law to regulate the relations of its members with one another.[58] Legal tradition is the embodiment of this set of beliefs. The unique cultural and institutional characteristics of a state's legal tradition thus create certain beliefs about law and appropriate actions under the law that should guide transitional justice efforts. The legal traditions of the common and civil law will seek different forms of justice than the legal traditions of religious or customary law traditions. Identifying the cultural and institutional attributes present in a given state or among a given population, and tailoring transitional justice mechanisms to a particular legal culture will increase the chances of cultural acceptance.

Legal tradition as an important explanatory factor for behavior has long been recognized within the field of comparative law, but the study of legal tradition in the field of political science is more recent. Current scholarly work on legal tradition supports the idea that the attributes found in a domestic legal tradition shape attitudes about the appropriate course of action.[59] For example,

---

53. *Id.*

54. *See* RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (2d ed. 1978).

55. *Id.*

56. *Id.*

57. *See* LOUIS HENKIN, HOW NATIONS BEHAVE 330 (2d ed. 1979).

58. *See* J.L. BRIERLY, THE LAW OF NATIONS (Sir Humphrey Waldock 6th ed. 1963).

59. Recent works that consider the role that legal tradition include: BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); SARA MCLAUGHLIN MITCHELL & EMILIA JUSTYNA POWELL, DOMESTIC LAW GOES GLOBAL: LEGAL

these studies have all found that the more closely a domestic legal tradition aligns with international law, the more open a state is to accepting the jurisdiction of an international court[60] or ratifying an international treaty.[61] This same alignment affects transitional justice mechanisms. States in which the legal tradition already encompasses acceptance of judges, courts and trials may be more open and accepting of international (or exogenous) forms of transitional justice.[62] Conversely, states in which the legal tradition is very different from the general rules of international tribunals, which dominate global transitional justice efforts, may be less receptive to these types of top-down mechanisms.[63] Instead, legal traditions focused on community and harmony may prefer local solutions attuned to the individual attributes of the group's legal tradition.

IV. A CASE STUDY: UGANDA

Since its independence from Britain in October 1962, Uganda has seen almost a quarter century of conflict.[64] During this time period, Uganda has had six presidents and suffered severe political instability and turmoil.[65] The current president, Yoweri Kaguta Museveni, came into power in 1986 after an armed struggle against the regime of the late General Tito Okello.[66] Conflict and humanitarian disaster, however, increased dramatically in Uganda in the late 1990s and early 2000s as the Lord's Resistance Army (LRA), led by Joseph Kony, began committing widespread atrocities in its fight with the Ugandan government.[67] While their goals are somewhat unclear, the LRA claims to seek

---

TRADITIONS AND INTERNATIONAL COURTS (2011); Dana Zartner Falstrom, *Thought Versus Action: the Influence of Legal Tradition on French and American Approaches to International Law*, 58 ME. L. REV. 337 (2006); Sara McLaughlin Mitchell & Emilia Justyna Powell, *The International Court of Justice and the World's Three Legal Systems*, 69 J. POL. 397 (2007) [hereinafter *Three Legal Systems*]; Emilia Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violations*, 53 INT'L. STUDIES Q. 149 (2009); Emilia Justyna Powell & Krista E. Wiegand, *Legal Systems and the Peaceful Resolution of Territorial Disputes*, 27 CONFLICT MGMT. AND PEACE SCI. 128 (2010).

60. *See Three Legal Systems*, *supra* note 59.

61. *See* SIMMONS, *supra* note 59.

62. An example of this can be seen in the case of the International Criminal Tribunal for the Former Yugoslavia. The states which emerged from the Yugoslav War – Bosnia, Croatia, Serbia, etc. – all have legal traditions grounded in civil law. This tradition focuses on detailed written codes to outline the law and courts to resolve legal disputes. This coupled with a legal culture that was largely secular and moderately individualistic made an international criminal tribunal a recognizable and palatable option for transitional justice.

63. Huyse, *supra* note 8, at 3-6.

64. *Background Note: Uganda*, U.S. DEP'T. STATE (Feb. 3, 2012), http://www.state.gov/r/pa/ei/bgn/2963.htm.

65. *Id.*

66. *Id.*

67. *Uganda Profile*, BBC NEWS (Nov. 25, 2011), http://www.bbc.co.uk/news/world-africa-14107906 (last visited Feb. 5, 2012).

to overthrow the Ugandan government in order to run the country along the framework of the Ten Commandments.[68]

The war between the Ugandan government and the LRA is considered "one of the worst humanitarian crises in the world."[69] The conflict has resulted in an untold number of deaths, a displacement of an estimated eighty to ninety percent of the Acholi population in the northern part of the country,[70] and the abduction of tens of thousands of children to serve as soldiers and slaves.[71] People in the northern parts of Uganda – Acholi, Lango, and Teso – have lived in fear of the LRA and have also suffered at the hands of the government, whose movement of people into protective camps has resulted in more death and abuse.[72]

In 2005, the LRA was largely pushed out of northern Uganda, but continues to operate from neighboring Democratic Republic of Congo.[73] The LRA and the Ugandan government made efforts to craft a peace agreement. However, after two and a half years, Kony ultimately refused to sign the Final Peace Agreement in April 2008.[74] While LRA atrocities in Northern Uganda have diminished, the fighting continues.

Also in 2005, at the referral of the Ugandan government, the International Criminal Court (ICC) issued indictments for five of the top leaders of the LRA, including Joseph Kony.[75] In response to the ICC indictment, the LRA offered to negotiate a peace deal in exchange for the dismissal of the ICC charges.[76] While the international response to this offer was one of outrage, the local response in Uganda was a bit different. A number of tribal elders and traditional leaders in Uganda believed that the ICC indictments interfered with the process of peace and that it would be better to find a solution internally.[77] With the LRA largely

---

68. *Id.*

69. Alex Moorehead & Jemera Ron, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, 17 HUM. RTS. WATCH 12(A) 13 (Sept. 2005) *available at* http://www.hrw.org/sites/default/files/reports/uganda0905.pdf.

70. Estimates for the number displaced range from 1.5 – 1.8 million. *Id.*

71. TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY 64 (2006).

72. Moorehead & Ron, *supra* note 69, at 33.

73. *Background Note: Uganda*, *supra* note 64.

74. *Id.*

75. The others indicted included the following: Joseph Kony's deputy Vincent Otti (now deceased) and LRA commanders Raska Lukwiya (now deceased), Okot Odhiambo, and Dominic Ongwen. The five LRA leaders were charged with crimes against humanity and war crimes, including murder, rape, sexual slavery, and enlisting of children as combatants. Ernest Harsch, *Seeking Peace with Justice in Uganda*, AFRICA RENEWAL, Jan. 2006, at 20 *available at* http://www.un.org/ecosocdev/geninfo/afrec/vol19no4/194uganda.html.

76. Joseph Wasonga, *Rediscovering Mato Oput: The Acholi Justice System and the Conflict in Northern Uganda*, 2 AFRICA PEACE AND CONFLICT J. 27 (2009).

77. Barney Afako, *Reconciliation and Justice: 'Mato Oput' and the Amnesty Act*, CONCILIATION RESOURCES (2002), http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php.

out of Uganda, thousands of displaced persons and former soldiers will be returning to their communities, and questions about transitional justice will emerge with increasing frequency. The best mechanism of transitional justice for Uganda will consider the Ugandan legal tradition in forming a post-conflict plan.

Western notions of law and justice are very different from the legal tradition that has developed on the African continent. Western-style trial and punishment "does not fit with traditional African jurisprudence."[78] The African legal tradition, rather, maintains a view of justice that "is aimed at 'the healing of breaches, the redressing of imbalances, [and] the restoration of broken relations.'"[79] This legal tradition focuses on rehabilitation of both the victim and the perpetrator, as well as the reintegration of the perpetrator into the community in order to restore balance and harmony.[80] While there are numerous differences among the African states, many states, including Uganda, share a heritage in the legal tradition of Africa, commonly described as a customary legal tradition. While each distinct country within the African continent has developed its own legal tradition, there are certain general commonalities among the countries of Africa that form part of the early development of the individual legal traditions.

Those areas of Africa south of the Sahara were ruled for centuries by ancestral customary laws.[81] The basic tenet of this customary tradition is that conceptions of law stem from respect for the traditions of one's ancestors and fear and respect of the supernatural.[82] The binding nature of law in these societies comes from the pressure of the group, and not wanting to act against the group for fear of shame and banishment.[83] The African customary tradition has historically been a social system of law centered in each community with communal methods for dispute resolution and the creation of new laws as needed by changing circumstances.[84]

Therefore, in terms of purpose of law, customary legal traditions are generally collectivist or communalist in nature.[85] The whole community is involved in decisions such as the meting out of justice and punishment, and an impersonal decision by a court does not reflect communal preferences.[86] Also in customary legal traditions, every person in the community is considered to be

78. Huyse, *supra* note 8, at 5 (quoting DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 51 (1999)).

79. *Id.*

80. *Id.*

81. DAVID & BRIERLEY, *supra* note 54, at 548.

82. *Id.*

83. *Id.* at 551. Alternatively, communal pressure and action can also lead members of the community to commit legal violations.

84. *Id.* at 548.

85. *See id.* at 551.

86. *See id.*

part of a larger group of living, deceased, and not-yet-born members.[87] These are communal groups, where a crime committed by one individual against another is seen as a crime by one clan or community against another.[88] Spirits of ancestors are very strong and are called on to assist in remedying wrongs and facilitating communal harmony.[89] Therefore, a "justice" imposed by the state government or an international institution does not encompass the appropriate mechanisms for true resolution to a wrong.

The legal institutions of the African legal tradition also center on social groupings such as tribes, castes, villages, and bloodlines.[90] These social groupings are thought to endure through time; therefore, no laws can be considered which adversely affect either past or future generations.[91] Because of this, certain Western-style legal mechanisms focused on individuals such as the adversarial trial system do not have corresponding provisions or protections in the African tradition.[92] The group is the basic unit in the historical African legal tradition and the group is responsible for addressing wrongs and deciding remedies.[93] Corresponding to this focus on the group, the law is ordered primarily based on individual obligations to the community rather than individual rights for oneself. This is contrary to the way law functions in the Western traditions.[94] Legal obligations are not necessarily distinguished from communal and moral obligations.[95]

A final facet which must be considered when examining the states of Africa is the effect that colonialism had on the legal traditions of the states. Whether France, England, Belgium, Italy, Germany or others, the colonizing states brought their own legal cultures and institutions to Africa with them. The effects of colonialism on the historical legal traditions in Africa have varied.[96] For example, the French in Africa followed a policy called "assimilation" which was centered on maintaining a single legal tradition within each state.[97] Because French law was considered superior, if there was a conflict between more than one legal tradition in those areas that the French colonized, the French legal tradition was adopted and French law applied.[98] Moreover, the French relied only on French judges to resolve legal disputes, even in rural

87. Wasonga, *supra* note 76, at 31-32.
88. *Id.*
89. *Id.* at 31
90. DAVID & BRIERLEY, *supra* note 54, at 550.
91. *See id.* at 550-51
92. *Id.* at 551. For example, land belongs to one's ancestors and descendants just as much as it does to oneself during one's lifetime. Therefore, an individual does not have an inherent right to dispose of the land on his or her own.
93. *Id.* at 550.
94. *Id.*
95. *Id.*
96. *Id.* at 556.
97. *Id.* at 555.
98. *Id.*

areas.[99] Therefore, even in those cases where local and traditional rules would apply, the French judges often distorted the law due to their misunderstandings of the native legal tradition.[100] This resulted in a blending of the indigenous legal tradition with the French tradition, although in most cases the French tradition remained in place and the native tradition was largely lost.[101]

In English Africa, on the other hand, the English colonizers had very little interest in the local legal traditions.[102] Following English tradition, English common law applied to the English colonizers themselves, local legal traditions remained in place for the indigenous populations, and the only instances in which the two intersected was when there was not a local law to cover a given situation.[103] This policy of "indirect rule" allowed the original peoples to continue to apply their own legal traditions, according to their own customs.[104] This left a legacy in former English colonies which resulted in greater continuity of the local legal traditions.[105]

However, whatever the tradition of the colonizer, the result for the legal traditions of Africa has been mixed. Often, the Western-style courts were set up only in the major cities, leaving much of the African population to continue developing their own legal cultures.[106] In many instances, components of the common or civil law traditions would blend with the customary traditions, incorporating new rules, new language, or new ideas.[107] This, of course, is part of any legal tradition. Legal culture adopts and changes as society develops. These changes can come from within, or be imposed or imported from the outside. In many instances though, such changes are superficial and limited to legal institutions. The true belief of the people as to the purpose of law and how justice should be done remains culturally distinct.[108] When the colonial powers removed themselves from Africa, the legal order they imposed on their colonies often went with them.

This colonial history has had a lasting effect on all the individual states created within Africa. Uganda's legal tradition is grounded in African customary law with some influences of the English Common law.[109] In Uganda,

---

99. *Id.*
100. *Id.* at 562.
101. *Id.*
102. *Id.* at 555.
103. *Id.*
104. *Id.*
105. *Id.*
106. *See id.* at 559.
107. *See id.*
108. *Id.* at 520 ("The imposition of the European common and civil law traditions imposed a new social order on the traditional African societies; a 'rigid and formalistic one, incomprehensible'" compared to the traditional culture.).
109. *The World Factbook: Uganda*, CENT. INTELLIGENCE AGENCY (2011), https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html (last visited Feb. 5, 2012).

under English colonial rule, traditional practices were officially prohibited in 1962, but this did not mean that traditional practices disappeared.[110] Like many African states, what ultimately developed was a dual system; a traditional one largely utilized in rural areas and a hybrid one drawn from the legal system of the colonial power used in the major cities.[111] The creation of a new legal system at independence and the outlawing of the traditional practices were also primarily institutional changes. They did not necessarily change the legal culture that existed in Uganda, a culture steeped in the customary traditions. Legal culture takes much longer to change – as does any major cultural shift – so attitudes about law did not necessarily change just because there was an official ban on traditional practices.

V. THE UGANDAN LEGAL TRADITION AND TRANSITIONAL JUSTICE

The legal tradition of Uganda and ideas about the purpose of law and the best mechanisms for achieving this purpose shape public perceptions about transitional justice. This is born out in the results of a survey of the Ugandan people on their attitudes about peace, justice, and social reconstruction.[112] First, in response to the question of what their main priorities are in the aftermath of the conflict, the largest percentage of respondents (45%) listed health care as their number one priority.[113] The second most common response (44%) was peace,[114] with 72% of these respondents defining peace simply as an absence of violence with no mention of punishment or even justice.[115] In fact only 3% of the respondents listed justice as their top priority.[116] In order of importance, the remaining responses were as followes: livelihood concerns, including food (43%),[117] agricultural land (37%),[118] money and finances (35%),[119] and education for the children (31%).[120] These priorities in the aftermath of conflict

110. Joanna Quinn, *The Thing Behind the Thing: Christian Responses to Traditional Practices of Acknowledgement in Uganda*, REV. FAITH AND INT'L AFF., Spring 2010, at 3, 4.

111. *Id.*

112. PHAM ET AL., *supra* note 5. The Tulane University Payson Center for International Development, the University of California, Berkeley Human Rights Center, and the International Center for Transitional Justice conducted the population-based survey, from April to June 2007 in eight districts in northern Uganda. *Id.* at 2. The districts included in the survey were those most affected by the conflict, including both Acholi and non-Acholi districts. *Id.* Teams of eight to sixteen men and women fluent in the local languages interviewed a total of 2,875 people using a standard questionnaire. *Id.* All data provided in this Article stems from the report issued from this survey.

113. *Id.* at 23.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

suggest that the respondents were primarily concerned with basic human survival, and second, the ability to achieve the peace and well-being necessary to live. Focus on ideas of retribution and justice was not foremost on the minds of the respondents.

The participants were then asked more detailed questions about transitional justice issues.[121] First, they were asked how they would define justice.[122] In response to this question, 41% of respondents simply said "being fair."[123] Only 29% of the respondents mentioned trials in conjunction with justice,[124] and fewer than 8% equated justice and peace when asked to define justice.[125] This, coupled with the responses to overall priorities described above, implies that the primary concern among respondents in the aftermath of crisis does not have anything to do with seeing perpetrators tried and imprisoned. The focus of the community is elsewhere – rebuilding, fairness, and restoring community harmony. These responses are all in line with the legal culture stemming from the Ugandan legal tradition. This view is seconded by the report issued post-survey, which states: "This may mean that many respondents do not strongly associate justice with current institutions such as the courts, but more with a general notion of fairness."[126]

Next, participants were asked what the best mechanism would be to achieve justice.[127] Nearly half the respondents (49%) said local customs and rituals should be used.[128] In addition, two-thirds of the respondents (67%) said that to achieve justice it would be necessary to chase away bad spirits to first establish peace.[129] Again, these ideas derive directly from the Ugandan legal tradition.[130] Respondents were also asked about accountability for the perpetrators, and over two-thirds stated that it was important to hold those responsible for committing human rights violations accountable.[131] Accountability, however, was viewed in a specific way, with 65% of the respondents saying that apologizing to the community before being allowed to return was the first important step.[132] Emphasis was also placed on truth-seeking (over 90% supported the establishment of a truth commission),[133] amnesties,[134] and pardons as a way to both provide victims with closure and

121. *Id.* at 35.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 43.
128. *Id.*
129. *Id.*
130. *See id.*
131. *Id.* at 35.
132. *Id.* at 4.
133. *Id.*
134. *Id.*

provide peace.[135] Eighty percent of the respondents, when given the choice of peace with amnesty or peace with trials, chose peace with amnesty.[136] Fifty-four percent of respondents supported forgiveness, reconciliation, and reintegration of LRA members.[137]

In relation to traditional forms of justice, 49% of respondents said local customs would be a good way to address the LRA actions,[138] and 57% of respondents said returning LRA members should participate in traditional ceremonies.[139] Of the various forms of traditional ceremony, *Mato Oput* received the most support (48%).[140]

In terms of international transitional justice institutions like the ICC, responses were mixed.[141] Overall the survey finds that "many respondents may see the ICC as a useful source of pressure on the LRA to participate in peace negotiations but do not want the court to hinder a settlement."[142] Knowledge of the existence of the ICC had increased in 2007 to 60% of respondents (as compared to 27% in 2005).[143] Only 29% of respondents, however, identified the ICC as the most appropriate mechanism for achieving justice.[144]

As these numbers show, there are significantly different ideas about the conceptions of peace and justice among the Ugandan respondents than one would likely see in a survey of respondents in the United States. Given this, it is important to consider what the best mechanism for rebuilding post-conflict societies is. By understanding the legal tradition of Uganda and cultural understandings of law – such as the preference for rituals banning spirits and local customs – the peace-building efforts will ultimately be more successful.

As is evident from these survey responses, there is little support for Western-style trials and punishment of incarceration. Moreover, the primary concern of a majority of respondents doesn't even focus on "justice" in the way it is thought of in the United States. Rather, the focus is on peace, forgiveness, and rebuilding the community.[145] These ideas reflect the communal nature of the Ugandan legal tradition.

The preference for an alternative form of transitional justice, steeped in the culture of Uganda, has emerged to some extent in the post-conflict efforts. Both the Ugandan government and the LRA have conducted surveys of the people to determine what they think is the most appropriate post-conflict

---

135. *Id.*
136. *Id.* at 37.
137. *Id.* at 36. In the Lwo language, widely spoken in Uganda, "'amnesty' and 'forgiveness' are not distinct – the same word (*timo-kica*) is used for both." ALLEN, *supra* note 71, at 76-77.
138. PHAM ET AL., *supra* note 5, at 43.
139. *Id.*
140. *Id.*
141. *Id.* at 5.
142. *Id.*
143. *Id.*
144. *Id.* at 36.
145. *Id.* at 23.

process.[146] A preliminary pact on accountability and reconciliation signed by the government of Uganda and the LRA in 2007 states: "Traditional justice mechanisms, such as *Culo Kwor, Mato Oput, Kayo Cuk, Ailuc,* and *Tonu ci Koka* and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation."[147]

There are a number of traditional legal practices reflective of Ugandan legal culture that have been proposed as alternatives to Western-style courts. The most widely supported is the *Mato Oput*.[148] *Mato Oput* means to drink "the bitter root" and is based on the Acholi understanding of life.[149] There are no courts in *Mato Oput*, but rather the process is based on apology, remorse, and the acceptance of responsibility for one's actions.[150] The whole community partakes of the bitter drink, which is believed to symbolize the bitterness of the past and a promise to never taste such bitterness in the future.[151] The perpetrator and victim or the relatives of the victim drink together first, and then the whole community.[152] This process is followed by a meal together.[153] This is followed by forgiveness, which is considered essential.[154] The *Mato Oput* process is a cleansing ritual for the victim in order to remove any vengeful spirits (which again, a majority of survey respondents think is important).[155] This process cleanses the victim, the perpetrator, and the whole community.[156] *Mato Oput* is representative of the main cultural and institutional characteristics of the Ugandan legal tradition, with its focus on the community, one's ancestors and spirits, and recreating harmony among all parties.

Other traditional options include *Moyo kum*, which is a "cleansing the body" ritual.[157] In this practice, during a meeting of the elders, men and women who have returned from captivity have their guilt washed away so they may live together in harmony with the community again.[158] Another traditional practice is *nyono tong gweno* ("stepping on the egg").[159] This practice has been used for the return of over 12,000 LRA soldiers in order to reintegrate them into their communities and cleanse them of their deeds and any unwelcome spirits.[160]

146. *Id.* at 2.
147. HUYSE, *supra* note 8, art. 3.1.
148. PHAM ET AL., *supra* note 5, at 43.
149. *Id.* at n.50
150. *Id.* at 36.
151. *See* Latigo, *supra* note 6.
152. *Id.* at 103.
153. Wasonga, *supra* note 76, at 35.
154. Latigo, *supra* note 6, at 107.
155. *Id.* at 103.
156. *Id.*
157. *Id.* at 106.
158. HUYSE, *supra* note 8, at 11.
159. Latigo, *supra* note 6, at 106.
160. *Id.*

Whichever of these traditional practices might be chosen, all have a greater chance for creating lasting peace and harmony than do international, or even state courts. The legal culture of Uganda, based on the customary legal tradition, does not focus on the individual punishment and retribution that trials and courts provide. The culturally-grounded beliefs about law focus rather on apology, forgiveness, and rebuilding communal harmony. Based on the responses given in the survey, this is exactly what the people of northern Uganda wish for as a mechanism of transitional justice.

Successful transitional justice is not just about finding the right mechanism for redressing wrongs. It is also important to consider what the people involved truly desire. If faced with a similar situation, people in the United States would likely want justice in the form of trial and punishment in a court of law. This is due to the fact that the legal tradition of the United States is steeped in individual rights based on a constitution which provides for due process. But that is not the legal tradition of Uganda, which is reflected in the survey responses. "Justice" is not even what concerns most respondents (only 3% mention it as their top priority).[161] Peace is a top priority followed by rebuilding lives and livelihood.[162] This is also reflective of the Ugandan legal tradition and is something that should be taken into account. Transitional justice may, in fact, not necessarily mean "justice" at all.

VI. CONCLUSION

Rebuilding states like Uganda in the aftermath of a conflict often calls for outside assistance in the form of money, food, or personnel. War is devastating, and it is the global community's responsibility to assist those who are struggling to regain their lives in the aftermath of such crises. But needing outside assistance is not the same as needing outside ways of doing things. So often, the debate over transitional justice centers on whether international courts, regional courts, or state courts are most appropriate to administer justice.[163] The reality is that not utilizing courts may be better.

This is where understanding the legal tradition of a state can be of use. Legal tradition provides a window into the cultural and institutional histories and understandings of a society when it comes to the rule of law and appropriate standards of behavior. When looking at the responses of the Ugandan survey participants, the Ugandan legal culture is reflected. When providing assistance and support in the aftermath of the crisis, the existing culture should be respected. Only if the result is supported by and supportive of local cultural beliefs about the law can peace be achieved. This does not mean no one should be tried in a court of law. The Ugandan government has

161. PHAM ET AL., *supra* note 5, at 23.
162. *Id.*
163. Latigo, *supra* note 6, at 193.

repeatedly indicated that it intends to have the leaders of massacres tried either at the ICC or in the Ugandan court system.[164] This is supported by the survey respondents, 59% of which said "it is important to have trials for LRA leaders".[165] But sentiments are different for the thousands of LRA members who were not in leadership positions.[166]

Understanding the legal traditions of individual societies has the potential to provide useful, practical information to those engaged in the process of peace-building in post-conflict societies, as well as rule-of-law building programs. Western conceptions of justice and law should not be imposed on post-conflict societies. By taking into account historical, cultural, institutional, and societal factors that exist in a given society and understanding how legal tradition shapes societal perceptions of issues such as justice, peace, and societal harmony, significantly more targeted and ultimately more successful assistance to societies emerging from conflict can be provided. The survey responses highlighted in this Article support the thesis that transitional justice does not mean the same thing for everyone. Therefore, those studying peace-building and seeking to assist with the process would be more helpful if these cultural factors were taken into account.

164. PHAM ET AL., *supra* note 5, at 9-10.
165. *Id.* at 4-5.
166. *Id.*

KEEPING SECRETS: A CONSTITUTIONAL EXAMINATION OF ENCRYPTION REGULATION IN THE UNITED STATES AND INDIA

Scott Brady*

I. INTRODUCTION

In July 2010 the Indian Ministry of Telecommunications revived a standing threat to ban BlackBerry services within the country.[1] Concerned that the BlackBerry messaging system could serve as a method of communication for dissidents, the Ministry demanded that mobile phone developer Research in Motion (RIM) provide government officials with access to encrypted corporate emails.[2] India's Ministry of Home Affairs and the Department of Telecommunications threatened, "If they don't follow our guidelines, we will have no option but to ask them to stop their operations in India."[3] "[RIM has] so far denied data on the excuse of encryption."[4]

The July threat was predicated upon a series of terrorist attacks that occurred in India two years prior.[5] In 2008 Lashkar-e-Taiba, a Pakistan-based militant organization, executed violent terror attacks in Mumbai, India, leaving at least 173 people dead and hundreds more wounded.[6] "Mobile phones, including BlackBerry smartphones . . . were used to coordinate the assault."[7] The horrific Mumbai attacks confirmed apprehensions expressed by India's security services more than a year before the assault.[8] Indian officials had long been lobbying against the BlackBerry smartphone, claiming "that criminals, militants, and terrorists could use BlackBerrys to send encrypted messages[, which government] agencies could neither intercept, trace, nor decode."[9] The

---

* J.D., 2012, Indiana University Robert H. McKinney School of Law.

1. Sahil Makkar & Shauvik Ghosh, *India Renews Threat to Ban BlackBerry Services*, WALL ST. J. (as partner) (July 29, 2010), http://www.livemint.com/2010/07/28200607/India-renews-threat-to-ban-Bla.html.

2. Yousif Abdullah, *RIM and the Middle East – An Analysis*, CRACKBERRY.COM (Sept. 22, 2010), http://crackberry.com/rim-and-middle-east-analysis; Tim Conneally, *RIM: No Back Door into Encrypted BlackBerry Messages for Any Government*, WORLDTECH24 (Aug. 3, 2010), http://www.worldtech24.com/business/rim-no-back-door-encrypted-blackberry-messages-any-government.

3. Conneally, *supra* note 2.

4. Makkar & Ghosh, *supra* note 1.

5. Abdullah, *supra* note 2.

6. *Id.*

7. *Id.*

8. ALASTAIR SWEENY, BLACKBERRY PLANET: THE STORY OF RESEARCH IN MOTION AND THE LITTLE DEVICE THAT TOOK THE WORLD BY STORM 195 (2009).

9. *Id.* at 195-96.

Indian government proposed to require that RIM install servers in India so that the nation's security services could monitor and intercept smartphone traffic.[10]

The problem: data encryption. Indian intelligence agencies are unable to decipher encrypted data sent across BlackBerry corporate servers.[11] The BlackBerry security architecture is based on a symmetric system of encryption, whereby the customer creates an individualized access key, enabling only that user to decode messages received.[12] Although the government can legally intercept smartphone communications, because the information received is coded, government agents are unable to convert these messages into a readable plaintext without RIM's cooperation.[13]

India's threat to ban encrypted BlackBerry communications evokes a re-examination of the long-standing debate surrounding the constitutionality of encryption, a debate that pervades many nations.[14] In the United States, the constitutionality of encryption has been examined for more than twenty years.[15] In both India and the United States, government requests to compel the production of an encryption key trigger the constitutional protections of privacy and due process.[16] However, the composition and interpretation of the U.S. and Indian Constitutions differ, yielding slightly different results.[17] Although both nations have sought to compel decryption, their approaches, and ultimately their outcomes, reflect this difference.[18]

This Note offers a comparative examination of the U.S. and Indian approaches to compel decryption from a constitutional perspective. It is presented in six parts. Part II provides a brief explanation and history of cryptography, including an introduction to modern data encryption technology. Part III presents the U.S. approach to compel decryption. This Part examines constitutional encryption protection under the Fourth and Fifth Amendments and the contemporary government attempts at decryption compulsion. Part IV explores the parallel approach to compel decryption in India, examining constitutional encryption protection under Article 21 and contemporary government attempts to compel decryption. Within this comparative analysis, this Note reveals important distinctions between the U.S. and Indian Constitutions with respect to the protection of fundamental human rights. Part V presents recommendations for striking a balance between civil liberties and

10. *Id.* at 196.

11. Makkar & Ghosh, *supra* note 1.

12. Conneally, *supra* note 2.

13. Joel C. Mandelman, *Lest We Walk into the Well: Guarding the Keys – Encrypting the Constitution: To Speak, Search & Seize in Cyberspace*, 8 ALB. L.J. SCI. & TECH. 227, 272 (1998).

14. *See infra* Parts III-V.

15. *See infra* Part III.E.2.

16. *See infra* Parts III, IV.

17. *See id.*

18. *See id.*

national security. The sixth part concludes this Note.

II. HISTORY OF CRYPTOGRAPHY

A. Early Encryption

Cryptography, the science of writing in secret code, enables a person to safeguard sensitive information by preventing unauthorized access to the content of a message.[19] Society has employed cryptography to protect important correspondence throughout history.[20] One of the earliest reported examples of the practice involved tattooing a message on the scalp of a slave.[21] Once the slave's hair grew back, the slave would be sent to the message's recipient, who would re-shave the slave's head, thus revealing the secret communication.[22]

Early American colonists employed cryptography at the onset of the country's independence.[23] Because the British government frequently opened the colonists' private mail, and because mail was easily stolen, "there was a substantial risk of exposure in colonial America."[24] As a result, the young nation's leaders used codes and ciphers to preserve the confidentiality of their communications.[25] Given its historical context, it has been argued that the privilege of encryption is an "ancient liberty": "Constitutional analysis of issues arising from encryption technology must proceed from the understanding that the generation of actors that framed the Constitution and the Bill of Rights were sophisticated users of secret communications."[26]

B. Modern Encryption Technology

Although primitive forms of encryption have existed for thousands of years, modern technological advances have transformed encryption into a complex process.[27] Similar to its rudimentary methods, modern-day encryption still involves the transformation of plaintext communication into ciphered text

---

19. Brendan M. Palfreyman, Note, *Lessons from the British and American Approaches to Compelled Decryption*, 75 BROOK. L. REV. 345, 348 (2009).

20. *Id.* at 349.

21. *Id.*

22. *Id.*

23. John A. Fraser, III, *The Use of Encrypted, Coded and Secret Communications Is an "Ancient Liberty" Protected by the United States Constitution*, 2 VA. J. L. & TECH. 2, para 20 (1997).

24. *Id.*

25. *Id.* paras. 21-40.

26. *Id.* para 2. Fraser offers an extensive examination of encryption throughout American history, including colonial, revolutionary, constitutional, nineteenth century, twentieth century, and modern day encryption. *See generally id.*

27. Palfreyman, *supra* note 19, at 350.

messages.[28] However, the contemporary encryption process uses sophisticated digital algorithms to cipher the communications.[29] This process creates a highly secured encrypted text, which is readable only by a recipient possessing the proper key.[30]

Present-day digital encryption requires the employment of an "encryption key."[31] In its simplest terms, an encryption key is a digital code that corresponds with an encryption cipher to "unlock" a message, converting the communication into readable plaintext.[32] These keys usually consist of long strings of numbers stored within a personal electronic device.[33] Typically, the recipient of a message does not need to memorize this code but may enter a simple password, created by the user, to access the embedded encryption key.[34]

There are two primary encryption key systems: private key and public key.[35] A private key encryption involves the employment of only one key, which is used for both encrypting and decrypting a coded message.[36] In this system, the sender uses a private key to encrypt a message, and the receiver uses that same private key to decode the message.[37] In contrast, public key encryption (also referred to as asymmetric encryption) employs two keys, a public key for encryption and a private key for decryption.[38] In this system, the public encryption code is available for all users, but the private key is unique to the receiver.[39] Although messages may be easily encrypted with the public key, private key access is essential for decryption.[40] Today, public key encryption is the most common system of digital encryption.[41] Private key access is the strength of this system, as it is "computationally infeasible" to acquire a private key from the public key.[42] "[I]t is virtually impossible to break strong public key encryption without compelling, or otherwise obtaining, direct access to the private key."[43]

---

28. *See* Ashwin Satyanarayana, *Fundamentals of Network Security: Understanding Encryption and Decryption*, BRIGHT HUB (Sept. 17, 2009), http://www.brighthub.com/computing/enterprise-security/articles/7732.aspx (last updated July 14, 2011).

29. *See id.*; *Cryptography*, THEFREEDICTIONARY.COM, http://encyclopedia2.thefreedictionary.com/Cryptography (last visited May 14, 2012).

30. *See* Satyanarayana, *supra* note 28; *Crytography*, *supra* note 29.

31. *Cryptography*, *supra* note 29.

32. *Id.*

33. *Id.*

34. Conneally, *supra* note 2.

35. Palfreyman, *supra* note 19, at 351.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 350.

42. Palfreyman, *supra* note 19, at 351.

43. *Id.* at 352.

III. THE UNITED STATES APPROACH

The modern constitutions of the United States and India were "constructed and forged in two very distinct and unique political and cultural settings."[44] They have in common, however, one important context: each country chartered its Constitution after gaining independence from the British Raj.[45] The Supreme Courts of these former British colonies have developed "doctrines of due process and jurisprudential traditions of activism that [have] expanded the scope [and understanding] of fundamental rights."[46]

A. Constitutional Foundation

The U.S. Constitution is "animated by and premised on" a desire to limit the strength of the federal government through the separation of powers.[47] Before drafting the Constitution, the young nation was "held together by the tenuous threads of the Articles of Confederation."[48] Desiring a divergence from this confederate structure, the Constitutional Assembly advocated the necessity of both horizontal and vertical separation of powers.[49] Exemplifying this ideal, James Madison declared:

> [B]y so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places . . . . But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary.[50]

---

44. Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT'L L. 216, 216 (2010).

45. *Id.*

46. *Id.* at 216-17.

47. *Id.* at 224.

48. *Constitutional Topic: The Constitutional Convention*, USCONSTITUTION.NET, http://www.usconstitution.net/consttop_ccon.html (last visited Mar. 23, 2012) [hereinafter *The Constitutional Convention*]. Drafted in 1777 by the Continental Congress, the Articles of Confederation served as the first constitution of the United States. *The Articles of Confederation*, USCONSTITUTION.NET, http://www.usconstitution.net/articles.html (last visited Mar. 23, 2012). The Articles established a "firm league of friendship" between and among the thirteen American States. *Id.* Created during the turmoil of the Revolutionary War, the Articles reflected a distrust of strong central government: a philosophy that remained steadfast throughout the drafting of the Constitution. *See id.* Although the Articles effectuated a united nation, the Articles denied Congress the power to collect taxes, regulate interstate commerce, and enforce laws. *Id.* These shortcomings eventually led to the adoption of the Constitution. *See id.*; *see also* ARTICLES OF CONFEDERATION, in 19 JCC 214 (Mar. 1, 1781).

49. *See* Mate, *supra* note 44, at 224.

50. THE FEDERALIST NO. 51, at 314 (James Madison) (Clinton Rossiter ed., 1961).

In addition to the composition of a separated, limited government, the U.S. Constitution is saturated with provisions protecting the value of privacy.[51] Preceding its interpretation into the U.S. Constitution, the right of privacy was fundamental in the minds and hearts of Americans.[52] American colonists "believed a man's home was his castle," to which any without entry invitation constituted a trespass.[53] When drafting the Bill of Rights, the Constitutional Assembly discussed which fundamental values to preserve within the Constitution.[54] Of these, "[p]rivacy was a central concern."[55] In American minds, the right to privacy is a "right most valued by civilized people [sic]."[56]

B. Fourth Amendment Analysis

An examination of encryption under the U.S. Constitution begins with the Fourth Amendment. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[57]

This Amendment initially served to protect the privacy of an individual's home or business and everything that occurred within its walls.[58] However, as technology has advanced, Fourth Amendment jurisprudence has evolved to encompass new privacy issues.[59]

The Supreme Court has expanded the scope of individual privacy rights to include constitutionally protected electronic communications.[60] Assurance against the government's unlawful seizure of an individual's encryption key

---

51. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that penumbras from other constitutional rights establish the right to privacy, which is protected by the Constitution).

52. Hillary Victor, Comment, *Big Brother Is at Your Back Door: An Examination of the Effect of Encryption Regulation on Privacy and Crime*, 18 J. MARSHALL J. COMPUTER & INFO. L. 825, 835-36 (2000).

53. *Id.* at 836.

54. *Id.*

55. *Id.*

56. Nan Hunter et al., *Contemporary Challenges to Privacy Rights*, 43 N.Y.L. SCH. L. REV. 195, 197 (1999) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

57. U.S. CONST. amend. IV.

58. Victor, *supra* note 52, at 836.

59. *Id.* at 836-37.

60. *Id.* at 837.

arguably is granted by these Fourth Amendment protections.[61] The foundation for this premise was developed through a series of Supreme Court cases examining the legality of non-physical invasions of privacy.[62] The first of these, *Olmstead v. United States*, began the constitutional debate of wiretapping in the United States.[63]

1. Olmstead v. United States

In *Olmstead v. United States*, the leading conspirator of an alcohol bootlegging campaign, Roy Olmstead, was the subject of government surveillance.[64] Federal prohibition officers discovered the conspiracy primarily through the interception of Olmstead's telephone conversations.[65] To accomplish this, small wires were inserted along the telephone lines of the conspirators' homes and those leading from Olmstead's chief office.[66] Olmstead was convicted notwithstanding his argument that the unwarranted wiretap search violated his Fourth Amendment rights.[67]

In a narrow decision, the Supreme Court held that the federal government had the authority to wiretap without a warrant under the Fourth Amendment because no physical intrusion occurred.[68] However, in a dissenting opinion, Justice Brandeis argued that wiretaps, even without physical invasion, were subject to Fourth Amendment protections.[69] Brandeis proclaimed,

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.[70]

Brandeis's dissent foreshadowed the conclusion of the Court's later decision in *Katz v. United States*, and typifies the contemporary argument for encryption protection under the Fourth Amendment.[71]

---

61. *Id.*
62. *See infra* Part III.B.1-4.
63. Olmstead v. United States, 277 U.S. 438 (1928).
64. *Id.* at 456.
65. *Id.*
66. *Id.* at 456-57.
67. *Id.* at 455.
68. *Id.* at 465-66.
69. *Id.* at 474.
70. *Id.*
71. *See* Katz v. United States, 389 U.S. 347, 353 (1967).

2. Katz v. United States

In *Katz v. United States*, a majority of the Supreme Court embraced Justice Brandeis's *Olmstead* dissent and specifically recognized the concept of privacy as implicit in the Fourth Amendment.[72] Charles Katz was charged with transmitting gambling wagers by telephone across state lines, in violation of federal law.[73] Incriminating evidence was obtained when Federal Bureau of Investigation (FBI) agents "attached an electronic listening and recording device to the outside of the public telephone booth from which . . . [Katz] placed his calls."[74] Ultimately, the Court held that the government's activities constituted a search and seizure within the meaning of the Fourth Amendment because the recording of conversations transmitted from the phone booth violated the privacy upon which Katz justifiably relied.[75] In a concurring opinion, Justice Harlan set forth a "reasonable expectation of privacy" test that was later adopted by the Supreme Court in *Terry v. Ohio*.[76]

The *Katz* decision has subsequently been codified and superseded by various federal and state laws. For example, concluding that the *Katz* standard was vague and inadequate,[77] Congress enacted legislation that added substantial requirements to the minimal constitutional protection outlined in *Katz*.[78] In contrast, the New York State Congress codified the standards crafted by the Supreme Court.[79] In compliance with the Fourth Amendment mandates outlined in *Katz*, the New York statute "contains detailed requirements regulating every aspect of wiretapping, as well as a procedure to suppress evidence when those requirements are not met."[80]

3. Contemporary Cases

To date, no cases have specifically resolved the issue of unwarranted encryption key production under a Fourth Amendment analysis. One federal district court, however, recently examined the constitutional validity of an unwarranted government seizure of cell phone data retrieved from a third party cell-site.[81] In *United States v. Benford*, the United States District for the Northern District of Indiana decided that the government's acquisition of a

72. *Id.*
73. *Id.* at 348.
74. *Id.*
75. *Id.* at 353.
76. *Id.* at 360-61; *see* Terry v. Ohio, 392 U.S. 1, 9 (1968).
77. United States v. Koyomejian, 946 F.2d 1450, 1455 (9th Cir. 1991).
78. *Id.*; *see* Communications Assistance for Law Enforcement Act, 18 U.S.C. §§ 2510-22.
79. N.Y. C.P.L. LAW § 700 (2010); *see* People v. Darling, 742 N.E.2d 596, 599 (N.Y. 2000).
80. *Darling*, 742 N.E.2d at 599.
81. United States v. Benford, 2010 U.S. Dist. LEXIS 29453, at *5 (N.D. Ind. 2010).

defendant's cell-site data does not violate the Fourth Amendment.[82] The court concluded that a person has no legitimate expectation of privacy in a third-party cell phone company's records identifying which cell phone towers communicated with that individual's cell phone.[83]

4. Criticism

The extension of constitutional protection to encryption, specifically the protection against unlawful search and seizure under the Fourth Amendment, is not without opposition. Some legal scholars argue that the debate is misplaced. Joel Mandelman, Vice President and General Counsel of Nutech H20, claims that the mandatory escrowing of encryption code keys from a Trusted Third Party (TTP) does not amount to a warrantless search and seizure,[84] as escrowing a TTP produces nothing of meaningful value.[85] The encryption key has no communicative or incriminating content of its own but is merely a tool for deciphering the intercepted communication.[86] In fact, more of a search and seizure occurs when the government intercepts the suspect's communication.[87] As long as the communication was intercepted pursuant to a warrant or subpoena, the encryption key will not be used to search anything but only to decipher that which the government lawfully has in its possession.[88] Articulating a "time is of the essence" policy argument for obtaining encryption keys, Mandelman believes it "wholly unrealistic to suggest that the government could get a warrant to seize the code key after the fact."[89]

C. Fifth Amendment Analysis

In addition to protection against unlawful search and seizure, compelled encryption production also invokes the privilege against self-incrimination guaranteed by the Fifth Amendment to the U.S. Constitution. The Fifth Amendment provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself."[90] This right, however, is not absolute. In order to trigger Fifth Amendment protection, three requirements must be met: (1) the disclosure must be testimonial, (2) the disclosure must be

82. *Id.* at *8 (adopting the logic expressed by the Supreme Court in Smith v. Maryland, 422 U.S. 735 (1979), and United States v. Miller, 425 U.S. 435 (1976)).

83. *Id.*

84. Mandelman, *supra* note 13, at 268.

85. *Id.* at 273.

86. *Id.* at 272-73.

87. *Id.* at 272.

88. *Id.* at 272-73.

89. *Id.* at 273.

90. U.S. CONST. amend. V.

compelled, and (3) criminal liability must be a possible result.[91] In certain circumstances, a government request to compel the production of an encryption key could satisfy these requirements, and the Fifth Amendment right against self-incrimination will be triggered.[92]

The first case to address compelled decryption under the Fifth Amendment was *In re Boucher (Boucher I)*.[93] In fact, "[t]his case forms the basis of the [U.S.] approach to compelled decryption under Fifth Amendment jurisprudence."[94] Sebastien Boucher was arrested during a U.S. customs inspection at the Canadian border for knowingly transporting child pornography.[95] The government seized a laptop computer from Boucher's vehicle, but the contents of the computer were password-protected and the government's forensics expert could not gain access.[96] Boucher was subpoenaed to surrender the password, but he refused to comply.[97] Boucher instead moved to quash the subpoena, arguing that the production of his password would violate his Fifth Amendment right against self-incrimination.[98]

In *Boucher I*, the United States District Court for the District of Vermont concluded that the production of a password has communicative aspects and is considered "testimonial" under the Fifth Amendment.[99] Citing *United States v. Doe*, the court reiterated, "'Although the contents of a document may not be privileged, the act of producing the document may be.'[100] By entering the password[,] Boucher would be disclosing the fact that he knows the password and has control over the files . . . ."[101] Thus, the court held that the surrender of an encryption password violated the Fifth Amendment privilege against self-incrimination, and Boucher's motion to quash the subpoena was granted.[102]

The decision in *Boucher I* was subsequently reversed in *In re Boucher (Boucher II)* by an application of the "foregone conclusion doctrine."[103] Under this doctrine, if "the government is already aware of the existence and location of a particular document or file, and if producing the document or file would not 'implicitly authenticate' it, then any evidence gained would be a foregone

91. Palfreyman, *supra* note 19, at 353 (citing Fisher v. United States, 425 U.S. 391, 408 (1976)) ("Fifth Amendment . . . applies only when the accused is compelled to make a testimonial communication that is incriminating.").

92. *See id.* at 361.

93. In re Boucher (Boucher I), No. 2:06-mj-91, 2007 WL 4246473 (D. Vt. Nov. 29, 2007).

94. Palfreyman, *supra* note 19, at 353.

95. *Boucher I*, 2007 WL 4246473, at *2.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at *3.

100. *Id.* (citing United States v. Doe, 465 U.S. 605, 612 (1984)).

101. *Id.*

102. *Id.* at *6.

103. In re Boucher (Boucher II), No. 2:06-mj-91, 2009 WL 424718, at *4 (D. Vt. Feb. 19, 2009).

conclusion, and the suspect would not be entitled to Fifth Amendment protection."[104] In reversing its original holding, the court determined that because government agents were able to view Boucher's files before they were encrypted, and because Boucher admitted that the computer was his, the foregone conclusion doctrine applied.[105] Thus, Boucher was directed to comply with the subpoena and surrender an unencrypted version of his computer drive.[106] Despite its technical reversal in *Boucher II*, the holding of *Boucher I* exemplifies the U.S. approach to encryption regulation under the Fifth Amendment: compelled password disclosure may have testimonial aspects, and the privilege against self-incrimination may be invoked to avoid involuntary compliance with a government request for surrender.[107]

D. Act-of-Production Doctrine

A constitutional analysis of encryption regulation also implicates the "act-of-production doctrine," a derivative of the Fifth Amendment privilege against self-incrimination.[108] "Judges have handled compelled data decryption under the umbrella of this doctrine largely because they have analogized an encrypted hard drive to a virtual wall safe from which the accused is asked to remove incriminating papers."[109]

1. Boyd v. United States

The act-of-production doctrine was first introduced in *Boyd v. United States*.[110] In *Boyd*, the government subpoenaed business invoices from E. A. Boyd & Sons (Boyd) during a smuggling investigation of the company.[111] Against Boyd's objections, the documents were later admitted at trial, which resulted in Boyd's conviction.[112] Reversing the lower court's order of production, the United States Supreme Court interpreted the Fifth Amendment broadly, holding that the compulsory production of private books and papers is tantamount to self-incrimination.[113] The Court stated, "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a

104. Palfreyman, *supra* note 19, at 360.
105. *Boucher II*, 2009 WL 424718, at *3-4.
106. *Id.* at *4.
107. Palfreyman, *supra* note 19, at 361.
108. Andrew J. Ungberg, Note, *Protecting Privacy Through a Responsible Decryption Policy*, 22 HARV. J. L. & TECH. 537, 542 (2009).
109. *Id.*
110. Boyd v. United States, 116 U.S. 616, 622 (1886).
111. *Id.* at 618.
112. *Id.*
113. *Id.* at 634-35.

witness against himself."[114]

2. Fisher v. United States

The *Boyd* decision guided the act-of-production doctrine well into the twentieth century. However, the Supreme Court eventually overruled it in *Fisher v. United States*, establishing the modern act-of-production doctrine.[115] In *Fisher*, the Internal Revenue Service had summoned the attorneys of Solomon Fisher and C.D. Kashmir, two clients accused of tax crimes, and directed them to produce their clients' tax documents.[116] Each attorney declined to comply with the production request, claiming that enforcement would compel self-incrimination in violation of the Fifth Amendment.[117]

The Court held "that the *Fifth Amendment* does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating."[118] Because the clients' tax documents had been prepared voluntarily, the Court found that they could not be considered compelled testimony.[119] Although the Court foreclosed any claim to the privilege for voluntarily prepared documents, *Fisher* did not eliminate the privilege for an individual facing a subpoena *duces tecum*.[120] "The Court recognized that while the content of the incriminating documents was not privileged, the act of producing the documents itself might communicate facts."[121] It is under this facet of document production that the compelled decryption examination falls.

3. Contemporary Cases

The modern act-of-production doctrine has been critically developed through a variety of contemporary cases. With the *Fisher* decision as its foundation, the Supreme Court has often distinguished circumstances in which production may be non-testimonial, such as when the government has specific knowledge of the information contained in a document.[122] Where the government is fishing for information, however, the Fifth Amendment privilege

114. *Id.* at 633.

115. Ungberg, *supra* note 108, at 542; *see also* Fisher v. United States, 425 U.S. 391, 414 (1976).

116. *Fisher*, 425 U.S. at 394.

117. *Id.* at 395.

118. *Id.* at 408 (emphasis added).

119. *Id.* at 409-10.

120. Ungberg, *supra* note 108, at 543.

121. *Id.*

122. *Id.* at 544-45.

prevents production.[123]

E. Attempts to Compel Decryption

Prior to 1960 there is no evidence that the U.S. government wished to regulate the private use of encryption technology.[124] In 1977, in conjunction with the National Security Agency (NSA), the National Bureau of Standards certified an encryption chip known as the Data Encryption Standard (DES).[125] By 1987, however, the NSA developed a policy opposing private encryption research and development and decided it would no longer guarantee DES security.[126] Thereafter the U.S. government has continually attempted to compel decryption through executive and administrative action.[127]

1. The Clipper Chip

In the late 1980s, DES became "an international standard for cryptography."[128] By 1993 it was of such widespread use that the standard key was at risk of being compromised by intelligent interceptors.[129] This vulnerability provided the U.S. government with the "opportune moment to launch its campaign for the adoption of a new government-provided encryption product": the Clipper Chip (the "Clipper").[130]

Concerned that new communication technology would "frustrate lawful government electronic surveillance," the Executive Administration launched the Clipper campaign to protect national security interests.[131] President Clinton especially feared that sophisticated encryption technology would be used to "thwart foreign intelligence activities critical to our national interests."[132] Under the Clipper Chip proposal, the government sought to serve as its own escrow

123. *Id.* Ungberg discusses the development of the modern act of production doctrine through an examination of contemporary case law. *See generally id.*

124. Fraser, *supra* note 23, para. 50.

125. *Id.* para. 63.

126. *Id.*

127. The U.S. Congress has almost annually introduced an act that has, in some form, addressed encryption regulation. Often, the purpose of the proposed legislation is not directed at compelled decryption, but House Committees will attempt to earmark the bill with a provision to either reduce or improve the freedom of encryption. Much of the proposed legislation did not pass. This article does not have the capacity to highlight all related congressional activity, but aims to frame the current debate with the most significant legislative action.

128. Fraser, *supra* note 23, para. 64.

129. *Id.*

130. *Id.*

131. OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, FACT SHEET: PUBLIC ENCRYPTION MANAGEMENT (Apr. 16, 1993), *available at* http://epic.org/crypto/clipper/white_house_factsheet.html.

132. *Id.*

agent for the encryption keys of all private citizens.[133] The Clipper thereby would enable the government to access all encrypted private communications.[134]

Upon its release and publication, the Clipper campaign was immediately criticized by the United States public.[135] On June 9, 1993, then-Director of Computer Professionals for Social Responsibility Marc Rotenberg best articulated these critical sentiments in his testimony against the Clipper before the House of Representatives.[136] Rotenberg argued that the Clipper Chip undermined the central purpose of the Computer Security Act and did not reflect public goals.[137] Moreover, he emphasized to Congress, "there is one point about the law that should be made very clear: currently there is no legal basis – in statute, the Constitution or anywhere else – that supports the premise which underlies the Clipper proposal."[138] Elaborating on his constitutional argument, Rotenberg claimed that "[t]he Fourth Amendment and the federal wiretap statute do not so much balance competing interests as they erect barriers against government excess and define the proper scope of criminal investigation."[139]

Echoing Rotenberg's opposition, congressional committees continued to attack the validity of the Clipper campaign for the next three years.[140] The Clipper proposal was initially postponed and eventually abandoned in 1996.[141] Finally, in 1998 Skipjack, the encryption algorithm developed for the Clipper Chip, was declassified.[142]

2. Comprehensive Counter-Terrorism Act of 1991

By the end of the 1980s, the United States had a strong standing federal law protecting electronic privacy, the Electronic Communications Privacy Act (ECPA).[143] However, this law had no particular effect on the analog transmission standard used by cellular communication technology at that

---

133. *Id.*

134. *The Clipper Chip*, EPIC, http://epic.org/crypto/clipper/ (last visited May 11, 2012).

135. *See id.*

136. *Encryption Technology and Policy, Hearing Before the S. Comm. on Telecomm. & Fin. and the Comm. on Energy & Commerce*, 103d Cong. (1993) (testimony and statement of Marc Rotenberg, Dir. CPSR Wash. Office), *available at* http://cpsr.org/prevsite/program/clipper/cpsr-markey-testimony-6-9.html/.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See The Clipper Chip*, *supra* note 134.

141. Lawrence Wright, *The Spymaster*, NEW YORKER (Jan. 21, 2008), http://www.newyorker.com/reporting/2008/01/21/080121fa_fact_wright?printable=true.

142. *Skipjack Encryption*, TROPICAL SOFTWARE, http://www.tropsoft.com/strongenc/skipjack.htm (last visited Mar. 24, 2012).

143. *See* Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-22 (1986).

time.[144] Soon after the enactment of the ECPA, law enforcement officials began to express apprehension about the newly developed, more secure system of cellular encryption technology.[145] In particular, the FBI began a campaign "to see that robust electronic privacy protection systems [did not] become generally available to the public."[146]

Alarmed by the task of deciphering encrypted communications, in 1991 the FBI encouraged then-Senator Joe Biden[147] to introduce language in the proposed Comprehensive Counter-Terrorism Act (CCTA) that directed electronic service providers to allow government access to encrypted communications.[148] In January of that year, Senator Biden introduced the CCTA, including a subtitle addressing electronic communications, on the Senate floor.[149] The relevant provision on compelled decryption stated, "[P]roviders of electronic communications services and manufacturers of electronic communications service equipment shall ensure that communications systems permit the government to obtain the plain text contents of voice, data, and other communications when appropriately authorized by law."[150]

The CCTA provision raised widespread concern in the computer community, and by August 1991 the Electronic Frontier Foundation, in cooperation with Computer Professionals for Social Responsibility and other industry groups, successfully lobbied to have it removed from the bill.[151] The bill encountered further opposition associated with the encryption provision as well as other contested portions, failed to obtain the necessary congressional support, and was never adopted.[152]

Despite its rejection, the CCTA foreshadowed the FBI's anti-encryption legislation that followed.[153] Shortly thereafter, the FBI promoted the Violent Crime Control Act (VCCA) and the Communications Assistance for Law Enforcement Act (CALEA).[154] In the VCCA, once again through Senator

144. John Perry Barlow, *Decrypting the Puzzle Palace*, EFFECTOR ONLINE (July 29, 1992), http://w2.eff.org/effector/effect03.01.

145. *Id.*

146. *Id.*

147. In the 1990s Joe Biden served as the Senate Chairman of the Judiciary Committee. *Vice President Joe Biden*, WHITE HOUSE, http://www.whitehouse.gov/administration/vice-president-biden (last visited May 15, 2012). Joe Biden is the current Vice President for the Barack Obama Administration. *Id.*

148. *Id.*; *see* Comprehensive Counter-Terrorism Act of 1991, S. 266, 102d Cong. (1st Sess. 1991).

149. S. 266, § 2201.

150. *Id.* Biden introduced identical language in the Violent Crime Control Act of 1991. *See* Violent Crime Control Act of 1991, S. 618, § 545, 102d Cong. (1st Sess. 1991).

151. Barlow, *supra* note 144.

152. *Id.*

153. Declan McCullagh, *Joe Biden's pro-RIAA, pro-FBI Tech Voting Record*, CNET NEWS (Aug. 23, 2008), http://news.cnet.com/8301-13578_3-10024163-38.html?tag=mncol;txt.

154. *See* Violent Crime Control Act of 1991, S. 618, 102d Cong. (1st Sess. 1991); *and see* Communications Assistance for Law Enforcement Act, H.R. 4922, 103d Cong. (1994).

Biden's recommendations, the FBI made a second attempt to promote a statutory provision directing providers of electronic communications services to implement only such encryption methods as would assure governmental ability to extract from the data stream the plain text of any voice or data communications.[155] The language of the provision was identical to that proposed in the CCTA,[156] and like its predecessor, the bill faced immediate opposition and was not adopted into law.[157]

3. Communications Assistance for Law Enforcement Act of 1994

CALEA took a different approach than its predecessors; it attempted to restrict encryption without backdoors.[158] The purpose of the Act was "to make clear a telecommunications carrier's duty to cooperate in the interception of communications for law enforcement purposes, and for other purposes."[159] The legislation sought to enable law enforcement to legally conduct electronic surveillance while protecting the right of privacy.[160] The law clarifies the statutory obligation of telecommunication service providers to assist law enforcement in the execution of electronic surveillance court orders.[161] CALEA requires that telecommunication service providers have the necessary technical capabilities to comply with surveillance requests;[162] specifically, carriers must be capable of "delivering intercepted communications and call-identifying information to the government, pursuant to a court order or other lawful authorization, in a format such that they may be transmitted by means of equipment, facilities, or services procured by the government."[163] Carriers must also facilitate the interception "unobtrusively and with minimum interference" to the subscriber's service.[164]

Although CALEA grants law enforcement broad authority to intercept communications and procure the necessary facilities to transmit information, the Act imposes limitations to protect reasonable expectations of privacy.[165] Of these limitations, the statute defines encryption as a specific exception to the

155. *See* S. 618, § 545.

156. *Compare id. with* Comprehensive Counter-Terrorism Act of 1991, S. 266, 102d Cong. § 2201 (1st Sess. 1991).

157. McCullagh, *supra* note 153.

158. *Id.*

159. Communications Assistance for Law Enforcement Act, P.L. 103-414, pmbl., 108 Stat. 4279 (1994).

160. ASK CALEA, http://www.askcalea.net/ (last updated June 22, 2011).

161. *Communications Assistance for Law Enforcement Act – CALEA*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/intell/systems/calea.htm (last visited Mar. 24, 2012).

162. *Id.*

163. 47 U.S.C. § 1002(a)(3).

164. *Id.* § 1002(a)(4).

165. *Id.* § 1002(b).

rule.[166] CALEA provides, "A telecommunications carrier shall not be responsible for decrypting, or ensuring the government's ability to decrypt, any communication encrypted by a subscriber or customer, unless the encryption was provided by the carrier and the carrier possesses the information necessary to decrypt the communication."[167] Although the FBI conceded to the encryption exception, the bureau has sought ever since to discard the provision and has proposed the inclusion of mandatory encryption key recovery.[168]

Almost two decades after its enactment, CALEA has yet to be fully implemented.[169] The telecommunications industry has resisted the adoption of electronic surveillance capabilities as a basic element of its service through a series of litigation, extension requests, and other means.[170] In response, the Federal Communications Commission (FCC) "has undertaken a comprehensive review of issues relating to CALEA implementation . . . ."[171] The FBI has countered by continuing to monitor industry compliance efforts and seeking to expand the jurisdiction of the statute to include encryption regulation.[172] Although Congress made specific concessions for encryption in the 1994 bill, FBI officials argue that the mandatory imposition of encryption key recovery is comparable to CALEA's telecommunication requirements.[173] "[E]xperts have concluded that the FBI's demands for key recovery are not within the competence of the field, and would impose high degrees of risk of computer security."[174]

4. Pending Legislation

The U.S. government continues its attempt to compel decryption. The Obama administration is currently seeking the implementation of a new federal law that would compel encryption service providers to allow the government unrestricted surveillance access.[175] This law would compel communications providers to configure their systems such that law enforcement would be guaranteed access to deciphered information.[176] A supporter once again, the

166. *Id.* § 1002(b)(3).

167. *Id.*

168. *CALEA: A Precedent for Domestic Encryption Controls?*, CENTER FOR DEMOCRACY & TECH. http://www.cdt.org/digi_tele/cryptovscalea.html (last visited Feb. 4, 2011).

169. *See id.*; *see also Communications Assistance for Law Enforcement Act* – CALEA, *supra* note 161.

170. *Communications Assistance for Law Enforcement Act* – CALEA, *supra* note 161.

171. *Id.*

172. *CALEA: A Precedent for Domestic Encryption Controls*, *supra* note 168.

173. *Id.*

174. *Id.*

175. Declan McCullagh, *Report: Feds to Push for Net Encryption Backdoors*, CNET NEWS (Sept. 27, 2010), http://news.cnet.com/8301-31921_3-20017671-281.html [hereinafter *Net Encryption Backdoors*].

176. *Id.*

FBI contends that this legislation is "reasonable and necessary to prevent the erosion of their investigative powers."[177] With this proposal, the FBI stresses the importance of lawfully authorized interception of communications.[178] Valerie Caproni, general counsel for the bureau, stated, "We're not talking expanding authority. We're talking about preserving our ability to execute our existing authority in order to protect the public safety and national security."[179] This legislation represents the FBI's official attempt to extend CALEA's requirements to all digital communication providers and to dispose of the exception for encryption.[180]

When the administration's proposal is presented to Congress, it is expected to face a variety of obstacles, "including opposition from civil libertarian and business groups and concerns about its practicality and constitutionality."[181] Familiar critics are already expressing their concern with the reality of implementing a law of this nature.[182] Michael Sussmann, a former attorney for the Department of Justice (DOJ) commented, "It would be an enormous change for newly covered companies. Implementation would be a huge technology and security headache, and the investigative burden and costs will shift to providers."[183] Additionally, it has been argued that requiring service providers to permit interception would weaken the system and "inevitably be exploited by hackers."[184] Put simply by Steven Bellovin, a Columbia University computer science professor, "[I]t's a disaster waiting to happen."[185]

IV. THE INDIAN APPROACH

A. Constitutional Foundation

The Indian Constitution fundamentally differs from the U.S. Constitution in one significant manner—the Indian Constitution was authored considering the "'humanitarian socialist precepts[...]' at the heart '[...]of the Indian social revolution.'"[186] Unlike the limited government system created by the U.S. Constitution, the Indian Constitution establishes a strong government, modeled

177. Charlie Savage, *U.S. Tries to Make It Easier to Wiretap the Internet*, N.Y. TIMES (Sept. 27, 2010), http://www.nytimes.com/2010/09/27/us/27wiretap.html.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Net Encryption Backdoors*, *supra* note 175.

182. Savage, *supra* note 177.

183. *Id.*

184. *Id.*

185. *Id*

186. Mate, *supra* note 44, at 219.

on the strength of the British parliamentary system.[187] Although there are elements of limited government embodied in the Constitution's Fundamental Rights section, the removal of a due process clause greatly weakened the power of Indian courts to challenge governmental actions.[188] With this, "the [Indian] Constitutional Assembly . . . subordinate[d] key provisions . . . [of] fundamental rights to larger social goals of preserving order and morality."[189]

"[T]he Indian Constitution was also shaped and influenced by a distinctly socialist ideology and worldview that had been championed by [Prime Minister] Nehru and other leaders of the Congress party."[190] As amended in 1976, the Indian Constitution opens with the inaugurate statement: "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] . . . ."[191] This preamble evidences that "[t]he foundation of [India's] social philosophy was the evolution of a secular socialist democracy . . . ."[192]

The socialist philosophy of India has been a consistent obstacle for advocates of freedom and fundamental rights. Influenced by a tradition of "positivist jurisprudence in England," the framers of the Indian Constitution established a subservient judiciary.[193] Constitutional authors "envisioned a Court that would not interfere with Parliament's power to enact policies that would effect a collectivist, socialist transformation."[194] Although the Indian Constitution established a Supreme Court with the power of judicial review, the Constituent Assembly prevented judicial activism in the realm of civil liberties by omitting a due process clause.[195]

---

187. *Id.* at 224.

188. *Id.*

189. *Id.* at 219.

190. *Id.* at 226. Prime Minister Nehru once remarked that "[socialism] is a vital creed which I hold with all my head and heart." Jawaharlal Nehru, *Presidential Address to the National Congress, 1936*, *in* INDIA AND THE WORLD: ESSAYS 83 (H.G.A. ed., 1936).

191. INDIA CONST. pmbl., *amended by* The Constitution (Forty-Second Amendment) Act, 1976. Passed by the Indian Parliament on November 2, 1976 (during the Emergency Era), the Forty-Second Amendment "changed the characterization of India to [a] 'sovereign, socialist secular democratic republic' from [a] 'sovereign democratic republic.'" Prateek Deol, *42nd Constitutional Amendment: A Draconian Parliament*, LEGAL SERVICE INDIA (Oct. 9, 2007), http://www.legalserviceindia.com/articles/editorial.htm. This Amendment greatly reflects Indian ideology and its effect on the composition of the Constitution. *Id.* The Amendment served four major purposes: 1) to "[e]xclude the courts entirely from election disputes;" 2) "[t]o strengthen the central government vis-à-vis the state governments and its Compatibility to rule the country as a unitary, not a federal, system;" 3) "[t]o give maximum protection from judicial challenge to social revolutionary legislation;" and 4) "to trim the judiciary, so as to "make it difficult for the court to upset parliament's policy in regard to many matters." *Id.*

192. V.R. Krishna Iyer, *Nehru Revisited*, THE HINDU (Nov. 18, 2001), *available at* http://www.hinduonnet.com/thehindu/mag/2001/11/18/stories/2001111800070400.htm.

193. Mate, *supra* note 44, at 254.

194. *Id.*

195. *Id.* at 219.

B. Article 21 Analysis

Article 21 of the Indian Constitution establishes the civil liberty derivative found in the Fifth Amendment of the U.S. Constitution.[196] The Article states, "No person shall be deprived of his life or personal liberty except according to procedure established by law."[197] Although the Indian Constituent Assembly initially provided for due process in Article 21, the framers deliberately omitted "due process" from the Article's final draft, replacing this clause with "procedure established by law."[198] "The omission of the word[,] 'due,' the limitation imposed by the word[,] 'procedure[,]' and the insertion of the word[,] 'established[,]' [clearly reveals the] idea of legislative prescription."[199] By incorporating the phrase, "procedure established by law," the Indian Constitution grants final authority to the legislature.[200]

C. Emergence of Due Process

Despite the omission, the Indian judiciary adopted an activist approach to interpreting fundamental rights and effectively created new doctrines of due process and nonarbitrariness.[201] A series of ground breaking Indian Supreme Court cases have played a "significant role" in the development of certain enumerated rights,[202] including the right to privacy.

1. A.K. Gopalan v. State of Madras

In *A.K. Gopalan v. State of Madras*, the Indian Supreme Court meaningfully examined the Fundamental Rights provisions of the Constitution for the first time.[203] The important issue raised in *Gopalan* was whether the Preventive Detention Act of 1950 violated a citizen's fundamental rights under the Constitution.[204] This issue was unprecedented in post-revolutionary India;[205] thus, in order to affect a judgment, the Supreme Court considered alternative approaches to determine the scope of personal liberty provided by Article 21.[206]

Ultimately, Chief Justice Kania restricted the scope of fundamental rights

196. INDIA CONST. art. 21.
197. *Id.*
198. Mate, *supra* note 44, at 221-22.
199. *Id.* at 233.
200. *Id.*
201. Mate, *supra* note 44, at 217.
202. Nehaluddin Ahmad, *Privacy and the Indian Constitution: A Case Study of Encryption*, 7 COMM. IBIMA 8, 11 (2009).
203. A.K. Gopalan v. State of Madras, (1950) 1 S.C.R. 88, 95 (India).
204. *Id.* at 88.
205. Mate, *supra* note 44, at 226.
206. *Gopalan*, 1 S.C.R. at 89-92.

by reading these liberties in isolation from Article 21.[207] The Court interpreted "procedure established by law" to mean the law established by the State, that is to say, the Union Parliament or the Legislatures of the States.[208] "It is not proper to construe this expression in the light of the meaning given to the expression 'due process of law' in the [U.S.] Constitution by the [United States Supreme Court] . . . ."[209] Additionally, the Court explained that the word, "law," in the context of Article 21, did not mean the *jus naturale* of civil law but rather that of positive or state-enacted law.[210]

Although the *Gopalan* majority composed a restricted view of Article 21, in a dissenting opinion, Justice Fazl Ali considered a broader interpretation.[211] Justice Ali construed "procedure established by law" to encompass higher principles of natural law and justice.[212] In his opinion, Ali highlighted a series of decisions by the U.S. Supreme Court, in which that Court recognized the word, "law," to include fundamental principles of justice.[213] Despite Justice Ali's argument to incorporate procedural due process into the Indian Constitution, however, the majority asserted that Article 21 was not intended to incorporate principles of natural law and justice.[214] The *Gopalan* Court, though adopting a restricted view of fundamental rights, was the first panel to begin a discussion of the infusion of due process into the Indian Constitution.[215]

2. Kharak Singh v. State of Uttar Pradesh

In *Kharak Singh v. State of Uttar Pradesh*, the Indian Supreme Court first examined the right of privacy under the Indian Constitution.[216] The Court determined that, although the right to privacy was not expressly guaranteed in the Constitution, it was implicit in the fundamental rights of life and personal liberty under Article 21 and cannot be curtailed except according to a procedure established by law.[217] In *Singh*, the Court examined the constitutionality of a police surveillance regulation that addressed the practice of police shadowing.[218] Through this procedure of surveillance, police would supervise

207. *Id.* at 89.
208. *Id.* at 90.
209. *Id.*
210. *Id.* at 90-91.
211. *Id.* at 91.
212. *Id.* at 160-163.
213. *Id.*
214. *Id.* at 108.
215. Mate, *supra* note 44, at 226.
216. Kharak Singh v. State of Uttar Pradesh, (1964) 1 S.C.R. 332 (India); Rajagopal v. State of Tamil Nadu, (1994) 6 S.C.C. 632, 639 (India).
217. *Id.* at 359; *see also* Govind v. State of Madhya Pradesh, (1975) 3 S.C.R. 946, para. 14 (India) and *Rajagopal*, 6 S.C.C. at 639 (discussing *Singh*'s recognition of the right).
218. *Singh*, 1 S.C.R. at 333.

the actions and movements of citizens possessing criminal records.[219] Among the techniques permitted by the regulation, police were allowed to approach the houses of suspects and to make domiciliary visits at night.[220] Kharak Singh had a "class A" criminal history and was therefore subject to the gamut of police surveillance.[221] To determine whether Singh was at home one evening, police entered his house and disturbed his rest.[222] Singh brought suit to enjoin the police from intrusive surveillance techniques permitted by U.P. Police Regulation 236.[223]

The Court held the police regulation to be unconstitutional because it violated the fundamental rights guaranteed by Articles 19 and 21 of the Indian Constitution.[224] Coming to this conclusion, the Court examined the U.S. Supreme Court decision in *Wolf v. Colorado*.[225] There, Justice Frankfurter observed that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society" and, therefore, "implicit in the concept of ordered liberty" under the Due Process Clause of the U.S. Constitution.[226] Echoing Justice Frankfurter's analysis, the *Singh* Court found: "It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty."[227]

3. Maneka Gandhi v. Union of India

The most significant development in the emergence of due process in India was the Court's decision in *Maneka Gandhi v. Union of India*.[228] In *Gandhi*, the Indian government impounded the passport of Maneka Gandhi pursuant to the Passport Act of 1967.[229] Having surrendered her passport, Gandhi was disabled from traveling outside the country.[230] When she requested the reason for the order, the Ministry of External Affairs responded that it was "in the interest of the general public."[231] Gandhi filed suit alleging that "[t]he right to [travel] abroad is part of 'personal liberty' within the meaning of . . . Article 21 and [that] no one can be deprived of this right except according to

219. *Id.*
220. *Id.* at 332.
221. *Id.* at 334.
222. *Id.*
223. *Id.* at 332.
224. *Id.* at 334.
225. *Id.* at 348; *see generally* Wolf v. Colorado, 338 U.S. 25 (1949).
226. *Singh*, 1 S.C.R. at 348 (quoting *Wolf*, 338 U.S. at 27).
227. *Id.* at 359.
228. Maneka Gandhi v. Union of India, (1978) 2 S.R.C. 621 (India). "In doctrinal terms, the *Maneka Gandhi* decision was ground-breaking . . . ." Mate, *supra* note 44, at 246.
229. *Gandhi*, 2 S.C.R. at 621.
230. *Id.*
231. *Id.*

the procedure prescribed by law."[232]

In its decision, the Court examined the scope of Article 21 and the constitutional meaning of "procedure established by law."[233] A six-judge majority expanded the scope of Article 21, holding that there was not a substantial difference between the phrase, "procedure established by law," under the Indian Constitution and the phrase, "due process of law," under the U.S. Constitution.[234] In so holding, the *Gandhi* Court decided that any procedure implicating the rights to life and liberty in Article 21 must be "right and just and fair."[235] In one of the most famous passages in Indian constitutional law, Justice Bhagwati references U.S. Supreme Court Justice Holmes in articulating the doctrine of nonarbitrariness:

> The principle of reasonableness[,] which legally as well as philosophically, is an essential element of equality or non-arbitrariness[,] pervades Article 14 like a brooding omni-presence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful, or oppressive; otherwise it would be no procedure at all and the requirements of Article 21 would not be satisfied.[236]

The *Gandhi* opinion is revolutionary because it unites the particularist conception of Indian law with a "universalist legal aspiration of foreign precedent and transitional norms."[237]

D. Attempts to Compel Decryption

There is currently no law regulating encryption in India.[238] Although action has been taken to protect privacy in the digital age, encryption regulation "largely remains in the development stage."[239] During the inception of cyber-law legislation, the Indian Parliament "largely neglected the issue of privacy of personally identifiable information."[240] Encryption regulation remains primarily within the domain of defense.[241]

---

232. *Id.* at 622.
233. *See id.*
234. Mate, *supra* note 44, at 246.
235. *Gandhi*, 2 S.C.R. at 674.
236. *Id.*
237. Mate, *supra* note 44, at 249.
238. Ahmad, *supra* note 202, at 10.
239. *Id.* at 10-11.
240. *Id.* at 13.
241. *Id.* at 14.

1. Information Technology Act (2000)

On June 9, 2000, the Indian Parliament adopted the Information Technology Act of 2000 (ITA).[242] The purpose of this legislation was

> to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as 'electronic commerce', which involve the use of alternatives to paper-based methods of communication and storage of information, [and] to facilitate electronic filing of documents with the Government agencies.[243]

With this Act, the Indian Parliament sought to keep pace with international regulation of electronic commerce.[244] Recognizing that international e-commerce regulation had begun decades prior, at least one commentator has remarked that "it's better late than never."[245]

The ITA introduced the first legislative control of encryption communication in India.[246] The Act establishes a system of regulation for the recording and authentication of encryption certificates.[247] The ITA imposes stringent duties on digital signature subscribers.[248] Encryption users must surrender their public encryption key to a certifying authority and apply for a digital signature certificate.[249] Additionally, every subscriber is directed to exercise reasonable care to retain control of their private encryption key and must report if the code has been compromised.[250]

With the adoption of the ITA, the Indian government created the office of the Controller of Certifying Authorities (Controller).[251] The Controller is appointed by the central government and exercises broad discretionary authority over encryption certification agencies.[252] Included in this authority, is the power

242. Information Technology Act, No. 21 of 2000, INDIA CODE (2000).

243. *Id.* pmbl.

244. Aashit Shah, *The Information Technology Act, 2000: A Legal Framework for E-Governance*, SUDHIRLAW.COM, http://www.sudhirlaw.com/cyberlaw-itact.htm (last visited Mar. 25, 2012).

245. *Id.*

246. Ahmad, *supra* note 202, at 14.

247. *Id.*

248. Information Technology Act, No. 21 of 2000, INDIA CODE (2000), §§ 40-42. A "subscriber" is the "person in whose name the Digital Signature Certificate is issued." *Id.* § 2(1)(zg). Digital Signature Certificates are issued by Certifying Authorities verifying that a subscriber's encryption key is secure and authentic. *See Id.* § 36.

249. *Id.* §§ 40, 41.

250. *Id.* § 42.

251. *Id.* § 17(1).

252. *Id.* §§ 17, 18.

to direct a government agency to intercept any encrypted communication.[253] The Act provides:

> If the Controller is satisfied that it is necessary or expedient so to do in the interest of the sovereignty or integrity of India, the security of the State, friendly relations with foreign [States] or public order or for preventing incitement to the commission of any cognizable offence . . . direct any agency of the Government to intercept any information transmitted through any computer resource.[254]

Once a subscriber's communication has been intercepted, he is called upon to "extend all facilities and technical assistance to decrypt the information."[255] If the person fails to comply with this order, he may be punished with imprisonment for up to seven years.[256]

By prohibiting the Controller direct access to private encryption keys, the Indian government sought to preserve the integral right of privacy "flowing from Article 21 of the Constitution."[257] However, the Controller is granted broad discretionary authority to determine when a transmission may be intercepted.[258] It has been argued that this procedural safeguard is not adequate to protect the right of privacy.[259] By requiring mandatory cooperation for the submission of private encryption keys (without the guarantee of due process), Parliament has functionally removed the freedom of encrypted communication.

2. Prevention of Terrorism Act (2002)

"In March 2002 the Indian Parliament . . . passed the Prevention of Terrorism Act (POTA) over the objections of several [o]pposition parties and in the face of considerable public criticism."[260] The regulation codifies the Prevention of Terrorism Ordinance, which was built upon the Terrorists And Disruptive Activities (Prevention) Act.[261] POTA gives law enforcement sweeping powers to arrest suspected terrorists, intercept communications, and

253. *Id.* § 69(1).
254. *Id.*
255. *Id.* § 69(2).
256. *Id.* § 69(3).
257. Ahmad, *supra* note 202, at 14.
258. Information Technology Act, No. 21 of 2000, INDIA CODE (2000), § 69(1).
259. Ahmad, *supra* note 202, at 14-15.
260. *The Republic of India*, PRIVACY INT'L (Nov. 16, 2004), *available at* https://www.privacyinternational.org/reports/india.
261. *Id.*; *see generally* The Prevention of Terrorism Ordinance, No. 9 of 2001, INDIA CODE (2001); The Terrorists And Disruptive Activities (Prevention) Act, No. 28 of 1987, INDIA CODE (1987).

curtail free expression.[262]

Chapter Five of POTA enables a police officer (not below the rank of Superintendent) supervising the investigation of a terrorist to intercept any wire, electronic, or oral communication if he believes that such communication may provide evidence of an offense involving terrorism.[263] Although the necessity of interception is determined at the discretion of the supervising officer, the interception must be approved by a government-appointed Competent Authority through the authorization of an application.[264] Similar to a search warrant in the United States, the application must contain "a statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued," including specific details and description of the offense.[265] As an additional measure of accountability, every application is subject to review by the central government.[266] If the Review Committee disapproves an application for interception, the intercepted communication shall be destroyed and the information shall not be admissible against the accused at trial.[267] However, critics of the system of judicial review and parliamentary oversight believe that it remains to be seen how effective such mechanisms will be in practice.[268]

Upon the authorization of an application for interception, the investigating officer is authorized to direct the provider of an electronic communication service to furnish "all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference . . . ."[269] If the intercepted electronic communication is encrypted, cooperation with the Act would require the submission of an encryption code. Additionally, information intercepted pursuant to the requirements of the Act shall be admissible as evidence against the accused at trial.[270]

Notwithstanding the customary application requirements, POTA authorizes an unwarranted interception in emergency situations.[271] Recognized emergency situations include the "immediate danger of death or serious physical injury to any person" and "conspiratorial activities threatening the security or interest of the State."[272] Furthermore, "[i]n certain high-risk states

262. *See* The Prevention of Terrorism Act, No. 15 of 2002, INDIA CODE (2002).
263. *Id.* § 38(1).
264. *Id.* §§ 37, 38.
265. *Id.* § 38(2)(b).
266. *Id.* § 46.
267. *Id.* § 46(4).
268. Tariq Ahmad Bhat, *Kashmir: Booth Capture Ban on Long Distance Calls Affects Business,* THE WEEK (Mar. 17, 2002), http://www.theweek.com/22mar17/events9.htm.
269. The Prevention of Terrorism Act, No. 15 of 2002, INDIA CODE (2002), § 40(2).
270. *Id.* § 45.
271. *Id.* § 43.
272. *Id.* § 43(1)(a)(i), (ii).

such as Jammu and Kashmir, search warrants are not required."[273] These local governments can also indiscriminately ban the use of cell phones and cybercafés.[274]

POTA represents an effective example of non-arbitrary legislation addressing, among other things, the interception of electronic communications.[275] Encryption regulation is implicit in the compliance provision of Chapter Five.[276] The Act is specific in its purpose and establishes a system of parliamentary supervision and judicial review of the powers granted within.[277] On its face, the Act effectively authorizes necessary state action for the protection against terrorism while maintaining the constitutional guarantees of liberty and privacy. This legislation represents a "procedure established by law," which, if determined to be non-arbitrary, is a constitutional exercise of the regulation of electronic communication in India. However, as evidenced by the exceptions, the Act does not have universal application.[278] The Indian government has allowed the unwarranted seizure of suspect communications only in times of emergency or areas of high risk.[279]

V. RECOMMENDATIONS

A. Non-Arbitrary Legislation

As evidenced by continuous legislative activity, encryption regulation, like all other forms of technology-driven legislation, is an ongoing process. Undoubtedly, keeping pace with a quickly evolving market of electronic communications is a daunting task. It may be for this reason that the U.S. Congress and the Indian Parliament have proposed broad legislation intended to flexibly accommodate those changing needs. However, overly broad and vague legislation will almost certainly face constitutional scrutiny upon judicial review. Additionally, it is procedurally and politically difficult to adopt sweeping legislation that seeks to achieve a broad legislative purpose. Encryption regulation is especially subject to these complications.

In lieu of this legislative challenge, effective encryption regulation must be direct, specific, and non-arbitrary. In both the United States and India, provisions regulating the use of encryption have generally been included in broader regulatory schemes.[280] To ensure constitutional validity, Congress and

273. *The Republic of India*, *supra* note 260.
274. *Id.*
275. *See* The Prevention of Terrorism Act, No. 15 of 2002, INDIA CODE (2002), ch. 5.
276. *See id.* § 40.
277. *See id.* § 46(4).
278. *The Republic of India*, *supra* note 260.
279. *Id.*
280. *See supra* Parts III.E, IV.D.

Parliament must examine encryption control in isolation. A strong example of directed legislation is China's Regulations on the Administration of Commercial Cipher Codes.[281] The Chinese government enacted these rules to "strengthen the administration of commercial encryption, to protect the security of information, to protect the lawful rights and interests of citizens and organizations and to safeguard State security and interests."[282] Combined, these constitute a clear and specific purpose that may effectively support directed legislation.[283] "China's approach to encryption differs markedly from the international practice, by handling encryption as a unified policy, under the direct supervision of Chinese leadership, encompassing both state and commercial security applications."[284]

"'China really has an enthusiasm for regulation and standardization that is unmatched anywhere else in the world.'"[285] With this legislation the Chinese government set standards for the research, manufacture, distribution, import and export, use, security, and storage of encryption products.[286] Admittedly, the stringent approach adopted by the Chinese is not a model structure, but rather it serves as an example of an overly restrictive approach against which the U.S. and Indian governments should measure their efforts.

B. Password Management Agencies

As evidenced by the U.S. telecommunications industry's noncompliant response to CALEA, legislation alone, whether arbitrary or not, has been insufficient to achieve effective encryption control.[287] Some critics believe the problem results from an abuse of discretion by law enforcement,[288] while others argue for the necessity of judicial review.[289] Addressing these concerns may assist in resolving procedural concerns, but successful regulation will not be accomplished without industry compliance. When CALEA was adopted, it was primarily industry associations and consumer-rights organizations that

281. Shangyong Mima Guanli Tiaoli (商用密码管理条例) [Regulations on the Administration of Commercial Cipher Codes] (promulgated by the State Council, Oct. 7, 1999, effective Oct. 7, 1999) (China).

282. *Id.* art. 1.

283. *See* Part IV.C.3.

284. *IT Security - Chinese Standards Deviating from Existing International Standards and Global Practices*, MARKET ACCESS DATABASE, http://madb.europa.eu/madb_barriers/barriers_details.htm?barrier_id=085196&version=2 (last updated Nov. 15, 2011).

285. Ellen Messmer, *Encryption Restrictions*, NETWORKWORLD (Mar. 14, 2004), http://www.networkworld.com/careers/2004/0315man.html?page=1.

286. *IT Security - Chinese Standards Deviating from Existing International Standards and Global Practices*, *supra* note 284.

287. *See supra* Part III.E.3.

288. *See* Palfreyman, *supra* note 19, at 375.

289. *See* Ungberg, *supra* note 108, at 556.

vigorously opposed the law.[290] This resulted from the industry's technical inability to alter its operating systems without substantial cost.[291] Therefore, the success of new legislation seeking similar objectives cannot be the result of a technical solution. Requiring the industry to change the design and performance of its products will result in unwanted consequences. First, it has the potential to stifle innovation. Designers would have to operate within the parameters of the regulation and will be limited in creativity and innovation. Second, it has potential to harm Internet functionality. A rule requiring a technical change may substantially alter the architecture of the system. Last, any success will be short-lived. If the government restricts the operation and performance of digital encryption devices, tech-savvy engineers will inevitably find a way around it, creating a black market of encryption technology that the government will have more difficulty controlling.

The solution is the development of password management agencies. These agencies should be similar to the certified authorities created in India's Information Technology Act[292] or the agencies established in China's Regulations for the Administration of Commercial Cipher Codes.[293] Under this system, when a digital encryption device is imported or manufactured, the private encryption codes must be surrendered to a certified password management agency. Therefore, by the time an encryption product is sold to a business or consumer, the password agency will have already archived the encryption key. Password management agencies will have a stringent obligation to protect the archived encryption codes with the utmost security, perhaps even through further encryption.

Retrieval of an individual's encryption key must be accomplished by obtaining a warrant. Traditional search warrant requirements should apply to ensure the protection of citizens' constitutional rights. However, the traditional warrant exceptions should not apply. The implementation of exceptions will render the warrant requirement arbitrary. Moreover, the safety and preservation policy concerns that support traditional search warrant exceptions do not exist in the recovery of encryption keys.

VI. CONCLUSION

The U.S. Constitution guarantees the fundamental right of liberty for all its citizens. The freedom of encryption is implicated by this unalienable right.

290. Jared Bazzy, *CALEA Deep in Court Quagmire*, 35 TELECOMM. 16 (2001). Among the CALEA challengers are USTA (United States Telephone Association), CTIA (Cellular Telecommunications and Internet Association), PCIA (Personal Communications Industry Association), ACLU (American Civil Liberties Union), and EFF (Electronic Frontier Foundation). *Id.*

291. *Id.*

292. *See supra* Part IV.D.1.

293. *See supra* Part V.A.

The Fourth and Fifth Amendments articulate freedom against compelled decryption: the Fourth Amendment protects individuals from the unwarranted seizure of an encryption code,[294] while the Fifth Amendment privilege against self-incrimination prevents the mandatory production of an encryption key when production would be testimonial.[295] Although attempts have been made, compelled decryption in the United States has ultimately failed.[296] This result is not a product of constitutional protections alone, but rather it reflects the implicit U.S. philosophy of freedom.[297]

Similar to the civil liberties established in the U.S. Constitution's Bill of Rights, the Indian Constitution promulgated fundamental rights for its citizens.[298] Article 21 articulates individual protections against the central government.[299] The constitutional examination of encryption regulation in India begins with this Article. Although the Indian Supreme Court has advocated for individual freedom under Article 21, the judiciary has continually supported the concept that individual privacy must remain subservient to national interests and national security.[300] Exemplifying this ideology, Dr. Nehaluddin Ahmad asserts that, although the right to privacy has been recognized as inherent in the right to life with dignity under Article 21, this right "should [not] be allowed to stand as an impediment in curbing activities prejudicial to national security interests."[301] Nevertheless, compelled decryption in India has been unsuccessful.[302] As in the United States, however, this failure is not a result of constitutional objection; the challenges have originated in non-constitutional matters, such as third-party negotiations. But because India reveres the power of central government, mandatory encryption production may eventually become a reality.

294. *See supra* Part III.B.
295. *See supra* Part III.C.
296. *See supra* Part III.D.
297. *See supra* Part III.A.
298. *See* INDIA CONST. art. 21.
299. *Id.*
300. Ahmad, *supra* note 202, at 15.
301. *Id.* at 15.
302. *See supra* Part IV.D.

REVISITING THE VALUE ADDED TAX: A CLEAR SOLUTION TO THE MURKY UNITED STATES CORPORATE TAX STRUCTURE

Charles C. Engel, II*

I. INTRODUCTION

The United States has the second highest combined federal-state corporate tax rate in the world.[1] With an average combined rate of 39.3 percent, the U.S. effective corporate tax rate is fifty percent higher than the average of all States party to the Organisation for Economic Co-operation and Development (OECD).[2] And while the United States maintains its high corporate tax rates, other industrialized nations are cutting theirs.[3] Of the OECD's thirty Member States, nine cut their corporate tax rates between 2007 and 2008,[4] and the OECD Member with the highest corporate tax rate, Japan, has considered a rate cut as well.[5]

A high corporate tax rate can stunt a nation's economic growth and harm its economy.[6] A study of fifty thousand companies in the European Union (EU) found that, when countries raise the marginal corporate tax rate by 1 percent, real wages decrease by 0.92 percent.[7] Further, studies suggest that the United States government loses one dollar in revenue for each dollar collected from the corporate tax as a result of the country's sluggish economy.[8] In reaction to these corporate tax-created problems, many U.S. corporations use creative accounting methods to move their profits overseas, thereby taking advantage of the

---

* J.D., 2012, Indiana University Robert H. McKinney School of Law, Indianapolis, Indiana; B.S., B.A., 2008, Indiana University, Bloomington, Indiana.

1. Scott A. Hodge, *U.S. Corporate Taxes Now 50 Percent Higher than OECD Average*, TAX FOUNDATION (Aug. 13, 2008), http://www.taxfoundation.org/publications/show/23470.html.

2. *Id.*

3. James Pethokoukis, *20 Reasons to Kill Corporate Taxes*, U.S. NEWS & WORLD REP. (Aug. 22, 2008), http://money.usnews.com/money/blogs/capital-commerce/2008/8/22/20-reasons-to-kill-corporate-taxes.html.

4. *Id.* They are: Canada, Germany, New Zealand, Spain, the United Kingdom, Italy, Switzerland, the Czech Republic, and Iceland. *Id.*

5. *Id.*

6. *See generally* Åsa Johansson et al., *Tax and Economic Growth* (Org. for Econ. Co-operation and Dev.: Econ. Dep't Working Paper No. 620, 2008), *available at* http://www.oecd.org/dataoecd/58/3/41000592.pdf.

7. Pethokoukis, *supra* note 3.

8. *Id.*

comparatively low tax rates of other nations.[9] These income-shifting strategies cost the United States government approximately $60 billion per year.[10]

The United States cannot afford for companies to save billions of dollars at the expense of the American taxpayer—the government's fiscal gap is growing by the hour.[11] The 2009 U.S. budget deficit was $1.4 trillion and is expected to be $1.6 trillion in 2010.[12] On October 25, 2010, the U.S. national debt was $13.6 trillion[13] and is expected to reach $13.8 trillion by the end of 2010.[14] This already bleak financial outlook has been aggravated by "the worst financial crisis [in the United States] since the Great Depression."[15] The mortgage meltdown of 2007 and the subsequent financial crisis resulted in massive spending by the United States government, including the Trouble Assets Relief Program (TARP), a $787 billion stimulus, bailouts for General Motors and Chrysler, and increased unemployment benefits.[16] The financial crisis also decreased the nation's economic output between 2008 and 2010, resulting in fewer tax revenues for the government.[17]

While the financial crisis took a toll on the United States Budget, the looming liabilities of U.S. entitlement programs pose greater and longer-lasting

---

9. Jesse Drucker, *Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes*, BLOOMBERG (Oct. 21, 2010), http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html.

10. *Id.*

11. *See* U.S. DEBT CLOCK, http://www.usdebtclock.org/ (last visited Aug. 1, 2012). A country's fiscal gap is the "present-value measure of the country's fiscal imbalance." *Calculating the Fiscal Gap*, CONG. BUDGET OFF. (June 26, 2009), http://www.cbo.gov/publication/24929. The fiscal gap represents the amount the government would need to raise in order to make its debt the same size at the end of a given year as it was at the beginning of that year. *See id.*

12. Cait Murphy, *VAT: Will the U.S. Adopt a Value-Added Tax?*, CBS MONEY WATCH (Apr. 7, 2010), http://www.cbsnews.com/8301-503983_162-20001918-503983.html. A budget deficit "occurs when [a government] has more money going out than coming in." *Budget Deficit Definition,* INVESTOPEDIA, http://www.investopedia.com/terms/b/budget-deficit.asp (last visited Aug. 1, 2012).

13. *U.S. National Debt by Day*, U.S. DEBT CLOCK, http://www.usadebtclock.com/us-national-debt-by-day.php (last updated May 29, 2012). The national debt is "the total amount of money that the United States federal government owes to creditors." *Federal Debt Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/f/federaldebt.asp#axzz1wTGSW3QH (last visited Aug. 1, 2012).

14. Murphy, *supra* note 12.

15. Jon Hilsenrath et al., *Worst Crisis Since '30s, With No End Yet in Sight*, WALL ST. J. (Sept. 18, 2008), http://online.wsj.com/article/SB122169431617549947.html.

16. *Economic Crisis and Market Upheavals*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/index.html (last updated Oct. 3, 2011).

17. *See United States GDP Growth Rate*, TRADING ECON., http://www.tradingeconomics.com/Economics/GDP-Growth.aspx?Symbol=USD (last visited Aug. 1, 2012).

challenges.[18] Over the next few decades, as the "Baby Boomer" generation becomes eligible for Social Security and Medicare, the cost of these programs will rise from 8.4 percent of Gross National Product (GDP)[19] to 18.6 percent.[20] Using only the federal income tax to pay for the proposed benefits "would require raising the 35 percent income tax bracket to at least 77 percent and raising the 25 percent tax bracket to at least 55 percent."[21] Although sensible proposals for entitlement reform exist,[22] it is likely that other sources of revenue will be needed to pay for the tsunami of Baby Boomers who will eventually draw from Social Security and Medicare.[23]

Alarmingly, the United States spends billions of dollars each year to finance its deficit consumption.[24] The 2010 U.S. Budget's projected expenditures were $3.8 trillion,[25] and the cost to finance that spending was approximately $1.4 trillion.[26] This equates to roughly forty cents borrowed for every dollar spent by the government.[27] Continued deficit spending at this rate is unsustainable;[28] it is "like a cancer that will truly destroy th[e] country from within if [it is not fixed]."[29] One of many proposed legislative solutions is the enactment of massive spending cuts,[30] but, even with changes to the nation's entitlement programs, spending cuts will not be sufficient.[31] The United States government must increase revenue to resolve the country's fiscal problems.[32]

---

18. *See Policy Basics: Where Do Our Federal Tax Dollars Go?*, CENTER ON BUDGET & POL'Y PRIORITIES, http://www.cbpp.org/cms/index.cfm?fa=view&id=1258 (last updated July 12, 2012).

19. A nation's Gross National Product is defined as "[t]he monetary value of all the finished goods and services produced within a country's borders in a specific time period." *Gross Domestic Product (GDP) Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/g/gdp.asp (last visited Aug. 1, 2012).

20. Brian Riedl, *A Guide to Fixing Social Security, Medicare, and Medicaid*, HERITAGE FOUND. (Mar. 11, 2008), http://www.heritage.org/research/ reports/2008/03/a-guide-to-fixing-social-security-medicare-and-medicaid.

21. *Id.*

22. *See id.*

23. *Id.*

24. *See* Joshua Miller, *Senator: Deficit Commission Is 'Shock Therapy'*, ABC NEWS (Nov. 14, 2010), http://abcnews.go.com/ThisWeek/senator-deficit-commission-shock-therapy/story?id=12144658.

25. OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010, at 314 (2009), *available at http://www.gpo.gov/fdsys/pkg/BUDGET-2010-TAB/pdf/BUDGET-2010-TAB.pdf.*

26. *Id.*

27. Miller, *supra* note 24.

28. Riedl, *supra* note 20.

29. Andrew Taylor, *Commission Leaders Say Cutting Deficit Will Hurt*, THE DAILY NEWS (Nov. 12, 2010), http://www.memphisdailynews.com/ editorial/Article.aspx?id=54176.

30. David Rogers, *Rand Paul Unveils $500B in Cuts*, POLITICO (Jan. 25, 2011), http://www.politico.com/news/stories/0111/48178.html.

31. Riedl, *supra* note 20.

32. *See id.*

In order to increase tax revenue, some economists, including several of President Barack Obama's top economic advisors, recommend that the federal government implement a value-added tax (VAT).[33] A VAT is a "type of consumption tax that is placed on a product whenever value is added at a stage of production and at final sale."[34] The VAT due on any sale is a percentage of the sales price, but the taxable person is entitled to deduct from this percentage all tax paid at the preceding stage.[35] Therefore, there is no double taxation; a tax is paid only on the value added at each stage. The VAT is already a popular method for increasing tax revenue in many EU Member Nations.[36] And with the United States facing unsustainable deficits and a shrinking tax base, there has been renewed support for implementing a VAT from the Obama administration and economists at large.[37]

As a preliminary issue, this Note examines the complicated and disadvantageous corporate tax structure currently employed in the United States.[38] It then discusses the value-added tax, both in a theoretical sense[39] and through its practical application in the European Union.[40] Though the VAT's use is not complicated, the concept is foreign to many Americans. This Note concludes by recommending that the United States: (1) abolish the corporate income tax and replace it with a VAT, and (2) use the increased revenue to pay down the current national debt.[41] Implementing these recommendations will encourage businesses to locate and remain in the United States, and will incentivize companies not to shift profits overseas to take advantage of lower tax rates. Ultimately, this will keep more tax revenue in the country and will help reduce the national debt.

II. CURRENT UNITED STATES CORPORATE TAX POLICY

A. Corporate Taxation Under the Internal Revenue Code

The United States corporate tax system is based on profits.[42] U.S. corporations are taxed on their worldwide income,[43] defined as gross income

33. Murphy, *supra* note 12.

34. *Value-Added Tax (VAT) Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/v/valueaddedtax.asp (last visited Aug. 1, 2012).

35. Murphy, *supra* note 12.

36. *Id.*

37. *See id.*

38. *See infra* Part II.

39. *See infra* Part III.

40. *See infra* Part IV.

41. *See infra* Part V.

42. J. ECON. COMM., 105TH CONG., REFORMING THE U.S. CORPORATE TAX SYSTEM TO INCREASE TAX COMPETITIVENESS 2 (2005).

43. 26 U.S.C. § 11 (2010).

minus various tax deductions.[44] A corporation can limit its tax liability by subtracting from its taxable income the corporation's net capital loss[45] as well as other deductions,[46] most notably the business interest deduction.[47] Corporations can also reduce their tax liability through various credits.[48] The foreign tax credit is the largest, allowing corporations to deduct "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States."[49] In theory, corporate taxation in the United States is simple: a corporation pays a certain percentage of its taxable income to the government.[50] However, the use of deductions and creative accounting methods complicates this system and allows U.S. companies to lower their tax liability at the expense of the American taxpayer.[51]

B. Results of the Complex Corporate Tax Code

The United States tax code is "a patchwork of overly complex, inefficient, and unfair provisions that impose large costs on corporate business."[52] This complexity has created a corporate tax system where corporations make "business decisions based not on what [is] good or bad for their employees, customers, and shareholders, but rather on what would have the best tax implications."[53] Specifically, the U.S. corporate tax system has four "significant flaws":

> (1) it provides artificial tax incentives for firms to locate real economic activity and report profits in low-tax countries; (2) it places U.S.-headquartered firms at a competitive disadvantage; (3) it is unworkably complex; and (4) it raises relatively little revenue, even though the U.S. corporate tax rate exceeds that in most other advanced industrial countries.[54]

---

44. *Id.* § 63.
45. *Id.* § 1211.
46. *See, e.g., id.* §§ 243, 246, 248.
47. *Id.* § 163.
48. *See generally id.* §§ 21-54.
49. *Id.* § 901.
50. *See id.* §§11-12.
51. Ezra Klein, *Our Dumb Corporate Tax System*, WASH. POST (Sept. 27, 2010), http://voices.washingtonpost.com/ezra-klein/2010/09/our_dumb_corporate_tax_system.html; *see supra* notes 15-18 and accompanying text.
52. J. ECON. COMM., *supra* note 42, at 1.
53. NEAL BOORTZ & JOHN LINDER, FAIRTAX: THE TRUTH, at x (2008).
54. Kimberly Clausing, *International Taxation: What Are the Options for Reform?*, *in* TAX POLICY BRIEFING BOOK, II-15-13 (last updated Oct. 17, 2007), *available at*

Unless "tax reforms are enacted[,] it is likely that U.S. tax competitiveness will continue to suffer. The results of inaction are undesirable: potential loss of American jobs, foreign outsourcing of economic content, sale of U.S. companies to foreign multinational firms, and general erosion of the corporate tax base."[55]

1. Incentives to Locate Economic Activity and Report Profits in Low-Tax Countries

The current U.S. corporate tax system provides artificial incentives for corporations to relocate real economic activity to other countries.[56] Since 2000 over two million manufacturing jobs have been outsourced from the United States,[57] and the next wave of outsourcing is expected to come from the white-collar sector.[58] Boston-based consulting firm Forrester estimates that about twelve thousand to fifteen thousand service jobs per month have been outsourced since 2000,[59] and the McKinsey Global Institute predicts a 30 percent to 40 percent increase over the next five years.[60] Forrester further predicts that "roughly 3.3 million service jobs will have moved offshore" by 2015.[61] Combined with the recent economic crisis, this outsourcing led to an 8.5 percent unemployment rate in the United States as of January 2012.[62] This figure must be lowered in order to restore the U.S. economy and reduce the country's national debt.[63] However, under the current tax framework, the unemployment rate is expected to stay above 6 percent until 2015.[64]

The complex corporate tax system employed in the United States also encourages companies to shift profits to countries with lower corporate tax rates.[65] For example, in October 2010 it came to light that Google Inc. lowered its tax liability by $3.1 billion over the three previous years by shifting overseas profits to Bermuda through Ireland and the Netherlands.[66] By employing

---

http://www.taxpolicycenter.org/briefing-book/key-elements/international/reform.cfm (numeration added).

55. J. ECON. COMM., *supra* note 42, at 1.

56. *Id.*

57. Liza Porteus, *States Tackle Outsourcing*, FOXNEWS.COM (Apr. 19, 2004), http://www.foxnews.com/story/0,2933,117432,00.html.

58. *Id.*

59. Sharon Otterman, *TRADE: Outsourcing Jobs*, COUNCIL ON FOREIGN REL. (Feb. 20, 2004), http://www.cfr.org/publication/7749/trade.html#p6.

60. *Id.*

61. *Id.*

62. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Situation Summary (Jan. 6, 2012).

63. *See* Sewell Chan, *Obama Advisers Predict Unemployment of 8.2% by 2012*, N.Y. TIMES, Feb. 11, 2010, at B3, *available at* http://www.nytimes.com/2010/ 02/12/ business/economy/12usecon.html.

64. *Id.*

65. *See* Clausing, *supra* note 54.

66. Drucker, *supra* note 9.

creative accounting techniques, Google achieved an effective tax rate of 2.4 percent in 2009, while the corporate tax rates of the United States and Great Britain, Google's two largest markets by revenue, were 35 percent and 28 percent, respectively.[67] "'It's remarkable that Google's effective rate is that low,' said Martin A. Sullivan, a tax economist and former employee of the U.S. Treasury Department. 'We know this company operates throughout the world mostly in high-tax countries where the average corporate rate is well over 20 percent.'"[68]

Google achieved its reduced tax liabilities primarily through two creative accounting techniques, known as the "Double Irish" and the "Dutch Sandwich."[69] The Double Irish structure calls for a U.S. corporation to establish two subsidiaries in Ireland ("Sub-1" and "Sub-2").[70] Sub-1 is established under Irish law but is controlled and managed from a low-tax nation such as Bermuda.[71] Sub-2 is owned by Sub-1 and is controlled from Ireland.[72] Because Ireland determines tax residency from the location of a company's control activities, Sub-1 will be treated as a Bermuda company under Irish tax law.[73] In contrast, the United States bases tax consequences on a company's jurisdiction of incorporation.[74] Accordingly, Sub-1 will be treated as an Irish company under U.S. tax law, despite having its control activities in Bermuda.[75]

A hybrid structure is created by Sub-2's election to become a separate entity from Sub-1.[76] Sub-1 and Sub-2 "will be combined and treated as a single Irish corporation for U.S. federal tax purposes, but will continue to be treated for Irish tax purposes as two distinct corporations—a Bermuda resident corporation and its Irish subsidiary."[77] To complete the Double Irish, Sub-1 "will enter into a cost sharing arrangement with its U.S. parent for the co-development of the applicable intellectual property (e.g., the software code)."[78] Sub-1 will license the intellectual property to Sub-2, which will produce

---

67. *Id.*

68. *Id.*

69. *'Double Irish With a Dutch Sandwich'*, N.Y. TIMES (Apr. 28, 2012), http://www.nytimes.com/interactive/2012/04/28/business/Double-Irish-With-A-Dutch-Sandwich.html.

70. Joseph Darby III & Kelsey Lemaster, *Double Irish More Than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRAC. INT'L TAX STRATEGIES, May 15, 2007, at 2, 13, *available at* http://www.gowlings.com/resources/PublicationPDFs/Hejazi_Hill_IntTaxMay07.pdf.

71. *Id.*

72. *Id.*

73. *Id.* Under Irish tax law, a company will be treated "as a non-resident if that company (1) 'controls' an Irish company that conducts an active business in Ireland and (2) is 'controlled' by one or more residents of a country with which Ireland has a double taxation treaty." *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

software products in Ireland and sell those products in other countries.[79] This arrangement creates a situation where transactions between Sub-1 and Sub-2 will have no effect under the U.S. corporate tax system.[80] The United States will disregard the license payments, and Ireland will treat the payments as royalties paid to the Bermuda corporation.[81] The result is that "little or no tax will be paid on the income earned in Bermuda, and only a 12.5 percent tax will be paid on income earned in Ireland."[82] The Dutch Sandwich is an additional step in the process that allows companies to further reduce the tax liabilities decreased under the Double Irish strategy.[83]

Google is not the only corporation that uses the Double Irish and Dutch Sandwich to reduce its tax liability. Microsoft Corp., Facebook Inc., Forest Laboratories, and many other technology and pharmaceutical companies have used these techniques as part of their business operations.[84] Combined, these corporations cost governments much-needed tax revenues. "Companies that use the Double Irish arrangement avoid taxes at home and abroad as the U.S. government struggles to close a projected $1.4 trillion budget gap and European Union countries face a collective projected deficit of 868 billion euros."[85] The Obama administration and the United States Treasury Department have proposed measures to limit the use of the Double Irish and Dutch Sandwich, but so far, there has been little progress in passing legislation to curb these exotic income-shifting strategies.[86]

2. The United States Corporate Tax Code Creates Disadvantages for United States-Headquartered Companies

The current United States tax law "encourages U.S. multinationals to locate assets and economic activity, and earn and realize profit, in other countries where taxes are lower."[87] Companies that locate assets and conduct economic activity within the United States are at a comparative disadvantage to those operating outside the country.[88] As explained above, companies can save billions of dollars in taxes by shifting income to another country with lower tax

79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 14.
83. *Id.*
84. Drucker, *supra* note 9.
85. *Id.*
86. *Id.*
87. Kimberly Clausing, *International Taxation: How Does The Tax System Impact U.S. Competitiveness?*, *in* TAX POLICY BRIEFING BOOK, II-15-8 (last updated Oct. 17, 2007), *available at* http://www.taxpolicycenter.org/briefing-book/key-elements/international/competition.cfm.
88. *Id.*

rates.[89] These tax strategies also have a great impact on a company's valuation since the company will have more capital to reinvest in business operations.[90] For example, analysts estimate that without shifting income through the Double Irish and Dutch Sandwich, Google's stock price might be reduced by $100 per share.[91] For companies that do not shift income outside the United States and do not outsource labor, "these undesirable consequences of the tax system may indirectly contribute to weaker U.S. competitiveness."[92]

In 2003 the National Association of Manufacturers (NAM) released a report summarizing the important economic factors facing U.S. manufacturers.[93] Excessive taxation was listed as number one, ranking ahead of the escalating costs of health and pension plans, increasing tort litigation costs, compliance costs for regulatory mandates, and rising energy costs.[94] NAM calculated that the U.S. tax system gives foreign companies a 5.6 percent advantage in raw costs compared to domestic companies,[95] and it recommended that the United States "[r]educe the corporate tax burden and reform the treatment of foreign-source income."[96]

3. The United States Tax Code is Unworkably Complex

The Internal Revenue Code (IRC) is very long and complex.[97] Since its enactment in 1913, the IRC has grown from 400 to 67,204 pages, increasing in length by forty-three percent from 2000 to 2006.[98] Because of the complexity of the IRC and the reporting requirements public companies face, companies must hire accountants and auditors to prepare their taxes and financial statements. Additionally, as a result of corporate scandals in the late 1990s and early 2000s, Congress passed the Sarbanes-Oxley Act to "enhance corporate responsibility, enhance financial disclosures and combat corporate and accounting fraud."[99] Despite these good intentions, the Sarbanes-Oxley Act has drawn a great deal

89. *See supra* Part II.B.1.

90. Drucker, *supra* note 9.

91. *Id.*

92. Clausing, *supra* note 87.

93. JEREMY A. LEONARD, NAT'L ASS'N OF MFRS., HOW STRUCTURAL COSTS IMPOSED ON U.S. MANUFACTURERS HARM WORKERS AND THREATEN COMPETITIVENESS (2003), *available at* http://www.themanufacturinginstitute.org/~/media/5469DAC833E344E8925AB9681EAEB167.ashx.

94. *Id.* at 1.

95. *Id.* at 12.

96. *Id.* at 3.

97. *See* AMERICANS FOR FAIR TAXATION, WHAT THE FEDERAL TAX SYSTEM IS COSTING YOU—BESIDES YOUR TAXES! 2 (2007), *available at* www.fairtax.org/PDF/WhatTheFederalTaxSystemIsCostingYou.pdf.

98. *Id.*

99. U.S. Sec. & Exch. Comm'n, *The Laws that Govern the Securities Industry*, http://www.sec.gov/about/laws.shtml#sox2002 (last updated June 27, 2012).

of criticism for the heavy burden it places on companies.[100]

Companies spend a significant amount of money to comply with the Sarbanes-Oxley Act in addition to the cost of filing their taxes. Section 404 of the Act is one of its most "onerous" aspects.[101] It requires companies to annually produce "an internal control report" that

> (1) state[s] the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and (2) contain[s] an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.[102]

It is estimated that § 404 costs companies about $2.3 million each year in direct compliance costs.[103] Problematically, the benefits from § 404 do not seem to be worth these costs.[104] Only nineteen percent of companies surveyed said that the benefits from § 404 outweigh the enormous costs of compliance.[105] Furthermore, preparing tax returns and complying with other IRC provisions are also expensive for companies.[106] In 2005 United States companies paid $147.7 billion to comply with the IRC,[107] and these compliance costs are projected to be $268.9 billion by 2015.[108]

The complexities of the IRC have had a negative effect on government revenues from corporate taxes.[109] Corporate tax receipts have been on a downward trend over the past few decades, as the IRC has become more complex and as more loopholes have become available for corporations to exploit.[110] During fiscal year 1960, corporate tax receipts totaled 4.2 percent of GDP, while in 2004 corporate tax receipts totaled only 1.6 percent—a decrease of 2.6 percent.[111] As the list of companies using tax loopholes gets longer, less and less tax revenue is generated for the United States Treasury.

With a deteriorating fiscal situation in the United States, the government

---

100. *See* James Freeman, *The Supreme Case Against Sarbanes-Oxley*, WALL ST. J. (Dec. 15, 2009), http://online.wsj.com/article/SB10001424052748704431804574539921864252380.html.

101. *Id.*

102. 5 U.S.C. § 7262(a) (2010).

103. *Id.*

104. *Id.*

105. *Id.*

106. AMERICANS FOR FAIR TAXATION, *supra* note 97, at 3.

107. *Id.* ("Business pays 55.7 percent of [estimated $265.1 billion in total] compliance costs . . . .").

108. *Id.* (55.7 percent of estimated $482.7 billion total).

109. J. ECON. COMM., *supra* note 42, at 6.

110. *Id.*

111. Drucker, *supra* note 9.

has recognized the revenue problem stemming from the complex corporate tax structure and is looking toward the corporate tax system to increase revenues. In his 2011 State of the Union Address, President Obama announced that his administration wanted to close corporate tax loopholes in order to help reduce the corporate tax rate.[112] "'Those with accountants or lawyers to work the system can end up paying no taxes at all. But all the rest are hit with one of the highest corporate tax rates in the world. It makes no sense. It has to change,'" the President said.[113] Recognition of the problem is important; however, the government needs to take action.[114]

4. The United States Corporate Tax Raises Relatively Little Income

Although corporations pay taxes, individuals shoulder the ultimate tax burden.[115] Economist Larry Summers opines, "'Although unsophisticated observers focus on the distinction between tax relief for business and for individuals, all taxes are ultimately borne by individuals in their role as labor suppliers, consumers, or suppliers of capital.'"[116] The United States corporate tax system greatly impacts the allocation of capital investment and is biased against savings and investment in three significant ways.[117]

First, "the U.S. tax system favors non-corporate investment over corporate investment."[118] Under the IRC, companies are subject to complex depreciation rules and inflation adjustments.[119] Moreover, corporate income distributed to shareholders, usually in the form of dividends, is taxed twice: once when a corporation earns the income and once when dividends are paid to a shareholder.[120] All other income is taxed only once under the IRC.[121] This causes corporate income to be taxed more heavily than other sources of income, making the United States less attractive to potential investors.[122]

A numerical example illustrates this disparity. For a corporation in the 35 percent corporate tax bracket, each $100 in profit results in $35 of federal corporate income tax.[123] The corporation now has $65 of remaining profit either

112. Stephen Ohlemacher, *Obama: Lower Corporate Tax Rates, Close Loopholes*, BLOOMBERG BUSINESSWEEK (Jan. 26, 2011), http://www.businessweek.com/ap/financialnews/D9L03HN03.htm.

113. *Id.*

114. Drucker, *supra* note 9.

115. J. ECON. COMM., *supra* note 42, at 9.

116. *Id.* at 2.

117. *Id.* at 4.

118. *Id.*

119. *Id.* at 5.

120. Jeffrey L. Kwall, *The Uncertain Case Against the Double Taxation of Corporate Income*, 68 N.C. L. REV. 613, 614-15 (1990).

121. *Id.*

122. *Id.* at 615.

123. J. ECON. COMM., *supra* note 42, at 5.

to re-invest in the corporation or to distribute to shareholders as dividends.[124] If the corporation distributes the remaining $65 profit, the shareholders will be taxed on those dividends at the individual level.[125] Individuals in the 15 percent dividend tax bracket, the highest current rate, will pay $9.75 in dividend taxes on the distribution of the remaining $65 profit.[126] Thus, the effective tax rate of this transaction is 44.75 percent.[127] This higher tax rate does not include any additional state and local taxes at both the corporate and individual level.[128] By contrast, most other capital gains from non-corporate investments are taxed only once, at the 15 percent dividend rate.[129]

Double-taxation causes corporate investments to be significantly more expensive than non-corporate investments.[130] According to the United States Treasury Department, the average tax burden on a new corporate investment is 24 percent, whereas the average tax burden on a new non-corporate investment is 17 percent.[131] This disparity goes against "the tax policy goals of equality and efficiency."[132] Furthermore, the double-taxation scheme affects business decisions on how much dividends to pay out to shareholders, regardless of what the most efficient use of the money would be.[133] This potential conflict of interest makes corporate investments even less favorable than non-corporate investments. Changing the corporate tax system could eliminate many of these problems[134] and level the playing field between corporate and non-corporate investment.[135]

The second way the current U.S. corporate tax system is biased against savings and investment is by favoring corporate debt over corporate equity investment.[136] This occurs because business interest payments are tax deductible under the IRC.[137] Further, when corporations take on debt, the corporation only has to pay back the principal of the debt and the interest incurred.[138] Debt financing allows the owners of the corporation to keep a

---

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* (($35 + $9.75)/$100).
128. *Id.*
129. *Id.*
130. N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 258 (5th ed. 2008).
131. *Id.*
132. Kwall, *supra* note 120.
133. Joseph J. Cordes, *Double Taxation of Dividends*, *in* THE ENCYCLOPEDIA OF TAXATION & TAX POLICY 83 (Joseph J. Cordes et al. eds., 2d ed. 2005).
134. J. ECON. COMM., *supra* note 42, at 5.
135. *Id.* at 12.
136. *Id.* at 4.
137. *Id.*
138. *Debt vs. Equity—Advantages and Disadvantages*, FINDLAW.COM, http://smallbusiness.findlaw.com/banking_financing/be1_5debtvsequity.html (last visited Aug. 1, 2012).

larger portion of the profits of a company because equity financing dilutes the ownership of the corporation.[139] In recent years, however, equity financing has become relatively more popular by individuals because dividend tax rates are lower and capital gain taxes can be deferred until an individual sells its stock.[140]

The third manifestation of the tax system's bias against savings and investment is that "foreign-owned firms have a competitive tax advantage over domestic firms."[141] "No country has rules for the immediate taxation of foreign-source income that are comparable to the U.S. rules in terms of breadth and complexity,"[142] and the U.S. effective corporate tax rate is fifty percent higher than the average of OECD member states.[143] In response to the increased competitiveness of the global marketplace, U.S. corporations have lowered costs by reducing tax liabilities.[144] And as capital has moved more freely across international borders, naturally, it has left nations with higher tax rates in favor of those with lower tax rates.[145] Studies show that profits earned by U.S. corporations in lower-tax jurisdictions outside the United States increased by sixty-four percent in recent years.[146] This translates to $33 billion in profits that could have been taxed by the United States government.[147]

C. A Call for Change in the Corporate Tax System

As a result of the IRC's unworkably complex corporate section,[148] the United States economy has been hindered by high compliance costs and the loss of business overseas.[149] Not only does the complexity of the U.S. corporate tax system negatively affect domestic business, it generates less money than alternatives could.[150] Every year, legislation is proposed to change the tax code.[151] However, a mere changing of the marginal rates or deduction rules will be insufficient to deal with the systematic problem caused by the arcane IRC. To promote efficiency, fairness, and international competitiveness, a complete

---

139. *Id.*

140. J. ECON. COMM., *supra* note 42, at 5-6.

141. *Id.* at 4.

142. *Id.*

143. Hodge, *supra* note 1.

144. J. ECON. COMM., *supra* note 42, at 6.

145. Jeffrey L. Rubinger & William B. Sherman, *Holding Intangibles Offshore May Produce Tangible Tax Benefits*, 106 TAX NOTES 938, 938 (2005), *available at* http://www.lawprofessorblogs.com/taxprof/linkdocs/2005-2977-1.pdf.

146. *Id.*

147. *Id.* Intangible assets held outside the United States earned most of these profits. *Id.*

148. J. ECON. COMM., *supra* note 42, at 9.

149. *Id.*

150. *See generally id.*

151. *Federal Tax*, DUKE LAW, http://www.law.duke.edu/lib/researchguides/fedtax (last updated Aug. 2011).

overhaul of the system is needed.[152] While there have been several proposed IRC overhauls, these bills have not made it very far through the legislative process.[153]

Despite a history of legislative roadblocks, the United States government is once again realizing that tax reform must be enacted.[154] The poor condition of the country's economy, combined with the negative results and corresponding criticism of its complex IRC, have led the Obama administration to consider overhauling the IRC for the first time since 1986.[155] The administration hopes an overhaul of the corporate tax system could eliminate the IRC's misguided incentives while lowering the corporate tax rate in an effort to attract more capital to the United States.[156] According to a senior Obama administration official, "We need to test the true appetite of business for reform that simplifies the system and lowers rates without making the deficit worse."[157]

III. VALUE ADDED TAX

A. Theory of the Value-Added Tax

Economists and legislators have proposed many theories and plans for overhauling the corporate tax system (and the United States tax system as a whole); however, this Note argues that any viable proposal should begin with the enactment of a value added tax. "A VAT is a multistage tax imposed on the 'value added' to goods as they proceed through the stages of production and distribution and to services as they are rendered. The 'value added' consists of the four economic factors of production—wages, profit, rent and interest."[158] Importantly, a company is able to offset the tax it already paid against the tax liability that will arise from the company's sale of a good or service.[159]

In levying a VAT, there are four basic forms that can be used: (1) the

---

152. J. ECON. COMM., *supra* note 42, at 9, 15.

153. *See generally* JAMES M. BICKLEY, FLAT TAX PROPOSALS AND FUNDAMENTAL TAX REFORM: AN OVERVIEW (2006), *available at www.policyarchive.org/handle/10207/bitstreams/2840.pdf [hereinafter FLAT TAX PROPOSALS]; see also JAMES M. BICKLEY, A VALUE-ADDED TAX CONTRASTED WITH A NATIONAL SALES TAX (2003), available at http://crs.ncseonline.org/ nle/crsreports/03May/IB92069.pdf.*

154. *See* Peter Cohn, *Obama Looks to Congress and Vice Versa to Kick Off U.S. Tax Code Overhaul*, BLOOMBERG (Feb. 3, 2011), http://www.bloomberg.com/news/ 2011-02-03/obama-looks-to-congress-and-vice-versa-to-kick-off-u-s-tax-code-overhaul.html.

155. *Id.*; Tim Fernholz, *Obama Eyes Corporate Tax Reform*, ATLANTIC (Jan. 24, 2011), http://www.theatlantic.com/politics/archive/2011/01/obama-eyes-corporate-tax-reform/70056/.

156. Fernholz, *supra* note 155.

157. *Id.*

158. Alan Schenk, *Value Added Tax: Does this Consumption Tax Have a Place in the Federal Tax System?*, 7 VA. TAX REV. 207, 225-26 (1987).

159. LIAM EBRILL ET AL., THE MODERN VAT 1 (2001).

additive-direct or accounts method, (2) the additive-indirect method, (3) the subtractive-direct or accounts method, and (4) the subtractive-indirect or invoice method.[160] In practice, most countries use the invoice method to collect VAT from businesses.[161] Under the invoice method, a seller charges the VAT rate on his output and gives a buyer an invoice detailing the amount of tax charged to that product.[162] This multi-step process has the benefits of helping corporations police themselves, taxing only the value added at each stage of production and distribution, and avoiding double taxation.[163] "In this way, as the final price of the product is equal to the sum of the values added at each preceding stage, the final VAT paid is made up of the sum of the VAT paid at each stage."[164]

While the other three VAT methods are seemingly less complicated, the invoice method is preferred because it attaches the tax liability to the transaction.[165] It can also accommodate multiple VAT rates, unlike the two additive methods.[166] Additionally, companies find the invoice method to be more convenient than the month-by-month calculation of value added under the subtractive-direct method, because "purchases, sales, and inventories can fluctuate greatly."[167] Furthermore, "[i]nvoices are an essential part of the VAT system since they constitute the evidence on the basis of which the purchaser can deduct VAT that has been charged to him."[168] This makes the invoice method easier to audit.[169]

B. Example Value-Added Tax Calculation

The following VAT calculation has been modified from an example provided by the Taxation and Customs Union of the European Commission:[170]

Stage 1: An auto parts supplier sells parts to General Motors. The sale of the parts is worth $40,000 to the auto parts supplier and, if the VAT rate is 20 percent, the auto parts supplier charges General Motors $48,000. The auto parts supplier should pay $8,000 to the government, but, because the auto parts

160. ALAN TAIT, VALUE ADDED TAX: INTERNATIONAL PRACTICE AND PROBLEMS 4 (1988).

161. *See id.*

162. Taxation & Customs Union, *How VAT Works?*, EUR. COMM'N, http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/index_en.htm (last updated Nov. 11, 2010).

163. *Id.*

164. *Id.*

165. TAIT, *supra* note 160, at 4-5.

166. *Id.*

167. *Id.*

168. Taxation & Customs Union, *VAT Invoicing Rules*, EUR. COMM'N, http://ec.europa.eu/taxation_customs/taxation/vat/traders/invoicing_rules/index_en.htm (last updated Feb. 13, 2012).

169. *Id.*

170. *See id.*

supplier purchased $20,000 worth of tools and supplies in the same accounting period, including $3,000 VAT, the auto parts supplier is only required to pay $5,000[171] to the government as a VAT. The government also receives the $3,000 paid by the suppliers from whom the auto parts supplier purchased its tools and supplies. As a result of this transaction, the government receives $8,000—the correct amount of VAT the auto parts supplier should owe from the sale of the vehicle.

SUMMARY OF STAGE 1
Parts: $40,000
VAT on parts: $8,000
VAT on purchases: $3,000
Net VAT of supplier: $5,000

Stage 2: General Motors has paid $8,000 VAT to the auto parts supplier and, say, another $2,000 VAT on other purchases for seat belts, electronics, etc. So when General Motors sells a vehicle for $80,000, it charges $96,000 including $16,000 VAT. General Motors deducts the $10,000 already paid on its inputs and pays $6,000 to the government. The government receives this $6,000 from General Motors, $5,000 from the auto parts supplier, $3,000 paid by the supplier of tools, and $2,000 paid by additional suppliers (seat belts, electronics, etc.) to General Motors.

SUMMARY OF STAGE 2
Vehicle: $80,000
VAT on vehicle: $16,000
VAT on purchases: $10,000
Net VAT to be paid: $6,000
$6,000 (paid by General Motors) + $5,000 (paid auto parts supplier) + $3,000 (paid by the suppliers to the auto parts supplier) + $2,000 (paid by the other suppliers to General Motors) = $16,000, or the correct amount of VAT on a sale worth $80,000.

171. $8,000 less $3,000.

IV. HISTORICAL BACKGROUND AND MODERN POLICY OF THE VAT

A. European VAT History

The VAT is a relatively modern tax; it was first discussed in academic settings in the early twentieth century.[172] "After World War II, progressive income taxes became widespread. During this period, general consumption taxes, especially in Europe, tended to be cascading turnover taxes that were levied at each stage of production and distribution."[173] While some countries enacted variations of the VAT before the 1960s, its widespread use emerged during that decade.[174]

The modern European Union developed from the European Economic Community (EEC), which was founded by the Treaty of Rome in 1957.[175] This Treaty set out a political vision to eliminate "the barriers which divide Europe" and based that vision heavily on economic co-operation between Member States.[176] The Treaty of Rome made it easier for capital, people, and ideas to move between Members,[177] and this was achieved in part by providing incentives for the harmonization of business taxes.[178] Without harmonization, it would have been difficult for the Member States to achieve economic co-operation and to take advantage of the ECC.[179]

In 1962 the ECC's Fiscal and Financial Committee issued the *Neumark Report*, a study of how the "tax systems of the Member States conflicted with the establishment of a common market."[180] The *Report* was influential in the eventual harmonization of ECC tax policy,[181] primarily because of its recommended adoption of the VAT as the Community's sales tax.[182] For harmonization to work, ECC Member States had to adopt a VAT and abandon, "for intra-Community transactions, the taxation of products in the country of destination in favour of taxation in the country of origin, since this would help

172. EBRILL ET AL., *supra* note 159, at 4.

173. Alan Schenk, *The Plethora of Consumption Tax Proposals: Putting the Value Added Tax, Flat Tax, Retail Sales Tax, and USA Tax into Perspective*, 33 SAN DIEGO L. REV. 1281, 1292 (1996).

174. EBRILL ET AL., *supra* note 159, at 4-5.

175. *Treaty of Rome*, CIVITAS.ORG, http://www.civitas.org.uk/eufacts/ FSTREAT/TR1.htm (last updated July 27, 2011).

176. *Id.*

177. *Id.*

178. INT'L VAT ASS'N, COMBATING VAT FRAUD IN THE EU: THE WAY FORWARD 11 (2007), *available at* www.iva-online.org/documents/IVA_Paper_FINAL.pdf.

179. *See id.*

180. B. J. M. TERRA & PETER JACOB WATTEL, EUROPEAN TAX LAW 122 (2008).

181. PETER ROBSON, THE ECONOMICS OF INTERNATIONAL INTEGRATION 181 (4th ed. 1998).

182. *Id.*

abolish tax barriers without distorting competition."[183] With the *Report* as its foundation, the European Community ushered the VAT into the mainstream by adopting the first two VAT Directives on April 11, 1967.[184] These Directives "establish[ed] a general, multi-stage but non-cumulative turnover tax to replace all other turnover taxes in the Member States."[185] They also outlined a general structure for the VAT system and allowed Community Members to determine the rate and coverage of the tax.[186] The VAT, however, did not become uniform in the European Community until the enactment of the Sixth VAT Directive on May 17, 1977.[187]

The Sixth VAT Directive of 1977 standardized the VAT's application between EU Member Nations, but it was not until the 1985 Single European Act that the internal EU market was completed.[188] The Single European Act allowed people to cross between EU Member States with any amount of tax-paid goods.[189] Then, to further "limit tax competition and the revenue losses associated with cross-border shopping, [another] significant move toward rate harmonization . . . [was] accepted."[190] On January 1, 1993, EU Member States agreed to a standard VAT rate of 15 percent, with some limited exceptions.[191] This standard rate was imposed to abolish tax frontiers and further promote harmonization between Member States.[192] This Sixth VAT Directive was amended many times prior its repeal on January 1, 2007[193] and its replacement by Council Directive 2006/112/EC.[194] This Directive harmonized various VAT provisions into one source with the intent to "eliminate, as far as possible, factors which may distort conditions of competition" between European Union member nations.[195]

B. European VAT Policy

The VAT Directives codify the VAT rules that EU Member States must follow.[196] The EU VAT applies to goods and services bought within the EU

183. INT'L VAT ASS'N, *supra* note 178, at 11.

184. *Id.*; *History of VAT in the EU*, EXPORTVAT, http://www.exportvat.com/vat_info/vat_eu.htm (last visited July 31, 2012).

185. *Id.*

186. *Id.*

187. *Id.*

188. INT'L VAT ASS'N, *supra* note 178, at 12.

189. ROBSON, *supra* note 181, at 183.

190. *Id.*

191. *Id.*

192. INT'L VAT ASS'N, *supra* note 178, at 12.

193. Taxation & Customs Union, *supra* note 162.

194. *Id.*

195. *Id.*; Council Directive 2006/112, *whereas* 4, 2006 O.J. (L 347) 1 (EC).

196. Ina Dimireva, *Common system of VAT (the 'VAT Directive')*, EUBUSINESS (Dec. 21, 2009), http://www.eubusiness.com/topics/finance/vat-directive.

and "is calculated on the basis of the value added to goods and services at each stage of production and of the distribution chain."[197] According to the Directives, a taxable person is one "who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."[198] Economic activity includes the production of any goods and services.[199] When the good is sold or the service is rendered, a chargeable event triggering a VAT takes place.[200] There are a number of specified exceptions where a transaction is not a chargeable event.[201]

When goods are sold or services are rendered, the taxable amount "includes everything which constitutes consideration obtained by the supplier for transactions by the customer."[202] This includes subsidies linked to the transaction and all applicable taxes.[203] Although the standard European VAT rate is 15 percent, Member States are permitted to apply one or two reduced rates.[204] The EU, however, has set a 5 percent floor on these reductions.[205] In addition, some goods and services are exempt from taxation and are sold or rendered to the customer with no added VAT.[206] These include "certain activities of general interest (such as hospital and medical care, goods and services linked to welfare and social security work, school and university education and certain cultural services or the provision of foodstuffs)."[207] "[C]ertain transactions including insurance, the granting of credit, certain banking services, supplies of postage stamps, lotteries and gambling and certain supplies of immovable property" are also exempt.[208] When these goods or services are sold or rendered, the supplier cannot deduct the VAT on the purchases as it normally could.[209]

Under the VAT system, businesses are tax collectors, not tax payers.[210] Businesses need to "pay over VAT collected from customers and get a refund of any VAT paid to vendors or on imports."[211] When businesses do pay a VAT, the VAT should be recoverable if the business follows the proper procedures.[212]

---

197. *Id.*; *see supra* Part III.B (example VAT calculation).
198. Dimireva, *supra* note 196.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. Roger Bevan, *VAT in Europe: 7 Steps to Success*, EWEEK (Jan. 4, 2008), http://www.eweek.com/c/a/IT-Management/VAT-in-Europe-7-Steps-to-Success/.
211. *Id.*
212. *Id.*

Unfortunately, like many tax procedures, the VAT rules can be complex if a business is unfamiliar with them.[213] There also are severe penalties under the European VAT system for noncompliance.[214] To avoid non-compliance, all businesses dealing in Europe should get a VAT registration, which gives businesses European VAT privileges and makes recordkeeping easier.[215] Still, it is important for businesses to know local VAT rules as well as the common VAT rules among Member States.[216] Staying informed about the changes in VAT rules can save companies money from penalties and unclaimed refunds.[217]

European Union Member States are able to generate substantial revenue with the VAT, but the VAT also has presented Members with many challenges.[218] First, the VAT has become a vehicle of greater public spending for Member States.[219] When the VAT first appeared in Europe in the 1960s, average government spending was about 30.2 percent of GDP.[220] Today, European Union Member States spend on average 47.1 percent.[221] In that same time period, the United States government spending rose from 28.3 percent to 35.3 percent.[222] Additionally, average deficits have been higher in the European Union than in the United States since 1980.[223] The increased debt and government spending has resulted in less job creation and lower levels of income for Europe.[224] Over the last two decades, the U.S. economy grew one-third faster than that of the European Union Member States.[225] Finally, European Union Member States have struggled with VAT fraud,[226] resulting in an estimated loss of €60-€100 billion per year.[227]

C. *United States VAT History*

The VAT has been present in American political discourse since the

213. *See id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. Shawn Tully, *A European-style tax?*, CNNMONEY (Dec. 2, 2008), http://money.cnn.com/2008/12/01/news/economy/tully_vat.fortune/index.htm.
219. Editorial, *Europe's VAT Lessons*, WALL ST. J. (Apr. 15, 2010), http://online.wsj.com/article/SB10001424052702304198004575172190620528592.html.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *See* INT'L VAT ASS'N, *supra* note 178, at 4.
227. *Id.*

1920s.[228] Thomas Adams, a prominent U.S. tax economist in the early 1900s, first introduced the VAT to the United States when he proposed its implementation as a replacement for existing corporate taxes.[229] At the time, business taxes had "grown up in ad hoc fashion as a response to political pressure and fiscal necessity."[230] Struggling to rationalize these taxes, many leaders pressured their repeal at both the state and national level.[231] Adams, however, argued that business taxes were "morally necessary":

> Surveyed from one point of view, business ought to be taxed because it costs money to maintain a market and those costs should in some way be distributed over all the beneficiaries of that market. Looking at the same question from another viewpoint, a market is a valuable asset to the social group which maintains it and communities ought to charge for the use of community assets.[232]

Initially, Adams thought a net income tax would be easier to implement and more politically acceptable.[233] But as the tax laws became increasingly complex, Adams began promoting an early form of the VAT because of its simplicity.[234]

Adams's VAT proposal had no impact on state or national tax policy, but it did spark scholarly interest.[235] The VAT continued to be a favorite policy topic among economists[236] and remained on the fringes of United States tax policy discourse until the 1970s.[237] President Richard Nixon considered a VAT proposal during his term in office, but he and other conservatives were concerned by its ability to raise revenue efficiently.[238] They feared that this could too easily expand the government's power and ability to grow—ideals with which conservatives traditionally disagree.[239]

Various VAT tax proposals have been introduced to Congress during the

---

228. Joseph J. Thorndike, *Early Proposals for an American VAT*, TAX ANALYSTS (June 30, 2009), http://www.taxhistory.org/thp/readings.nsf/ArtWeb/6F4B8EADA426FDCE852575F600464B81?OpenDocument.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* (quoting Thomas S. Adams, *The Taxation of Business*, 1917 PROC. NAT'L TAX ASS'N 185, 187).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. Bruce Bartlett, *VAT Time?*, FORBES.COM (June 5, 2009), http://www.forbes.com/2009/06/04/value-added-tax-opinions-columnists-bartlett.html.

238. *Id.*

239. *Id.*

past decade.[240] The most prominent was the Tax Simplification Act,[241] which Senator Richard Shelby referred to the Senate Finance Committee in 2005.[242] Senator Shelby's bill was influenced by the 1981 VAT proposal by scholars Robert Hall and Alan Rabushka[243] and was

> essentially a modified VAT, with wages and pensions subtracted from the VAT base and taxed at the individual level. Under this proposal, some wage income would not be included in the tax base because of deductions, while under a VAT all wage income would be included in the tax base.[244]

> Initially the individual wage tax would be levied at a 19[percent] rate, but when the tax was fully phased in, this rate would decline to 17[percent]. The individual wage tax would be levied on all wages, salaries, pensions, and unemployment compensation. In addition, government employees and employees of nonprofit organizations would have to add to their wage tax base the imputed value of their fringe benefits.[245]

Representative Phil English made a similar proposal in 2006,[246] under which a cash-flow business tax, a VAT variation, could replace the corporate income tax, and the individual income tax would be repealed in favor of a consumption tax.[247] These plans did not gain much traction in Congress and ultimately failed.[248] Tax reform was subsequently neglected from 2007 to 2010, as the United States government focused on saving the U.S. economy and reforming the country's healthcare system.[249]

The 112th Congress, led by a newly elected Republican majority in the House of Representatives, considered one new tax proposal[250] submitted by Representative Paul Ryan.[251] Representative Ryan's plan replaces the corporate

240. *See generally* FLAT TAX PROPOSALS, *supra* note 153.

241. Tax Simplification Act of 2005, S. 1099, 109th Cong. (2005).

242. FLAT TAX PROPOSALS, *supra* note 153, at 5-6.

243. *Id.*; *see generally* William Gale, *Flat Tax*, *in* THE ENCYCLOPEDIA OF TAXATION & TAX POLICY 155 (Joseph J. Cordes et al. eds., 1st ed. 1999), *available at* www.urban.org/uploadedPDF/1000530.pdf.

244. FLAT TAX PROPOSALS, *supra* note 153, at 6.

245. *Id.*

246. The Simplified USA Tax Act of 2006, H.R. 4707, 109th Cong. (2006).

247. FLAT TAX PROPOSALS, *supra* note 153, at 7.

248. *Id.*

249. *Id.*

250. Roadmap for America's Future Act of 2010, H.R. 4529, 111th Cong. (2010).

251. JAMES M. BICKLEY, TAX REFORM: AN OVERVIEW OF PROPOSALS IN THE 112TH CONGRESS 6 (2011).

tax with a subtraction-method VAT referred to as a "Business Consumption Tax" (BCT).[252] The BCT would be 8.5 percent and would have a broad base, which is much lower than the current 35 percent corporate rate.[253] Under the Ryan Plan, individual taxes would still be levied on income, but the system would be simplified.[254]

D. United States VAT Policy

1. Benefits of the Value-Added Tax

While Republicans and Democrats differ in their opinions of what constitutes an ideal tax system, members in both parties agree that the current tax system needs changing. The IRC encompasses several types of taxes,[255] but this Note focuses on changes the United States corporate tax. As both parties determine what corporate tax system best fits the U.S. economy,[256] they should look to the VAT as a solution to the murky corporate tax code.

Implementing a VAT will improve the United States' competitive position in the international marketplace.[257] According to Procter & Gamble CEO Robert McDonald, "[i]f [U.S. companies] are handicapped by an uncompetitive corporate tax system, [it] will slow the growth of the U.S. economy to the benefit of our competitors."[258] In the short term, assuming that the VAT is at a lower rate than the current 35 percent corporate tax rate, American products would become cheaper and, thus, more desirable to consumers around the world.[259] Additionally, a lower corporate tax rate will entice businesses to relocate to the United States and discourage current U.S. companies from relocating or from using exotic accounting methods to avoid paying a relatively higher corporate tax.[260] Furthermore, the United States had a trade deficit of $38.3 billion in November 2010.[261] Implementing a VAT would likely lower the deficit and create positive effects on international competition.

Implementing a VAT would also greatly simplify the U.S. corporate tax system.[262] Tax systems are evaluated by their efficiency, equity, and

---

252. *Id.* at 7.

253. *Id.*

254. *Id.*

255. *See generally* 26 U.S.C. § 11 (2010).

256. *See* Cohn, *supra* note 154.

257. Schenk, *supra* note 173, at 1285-86.

258. *P&G, Big U.S. Firms Seek Lower Corporate Rate*, FOX BUSINESS (Jan. 20, 2011), http://www.foxbusiness.com/markets/2011/01/20/pg-big-firms-seek-lower-corporate-rate/.

259. *See* Schenk, *supra* note 173, at 1323.

260. *See* Drucker, *supra* note 9.

261. Sara Murray, *U.S. Trade Deficit Narrows*, WALL ST. J. (Jan. 14, 2011), http://online.wsj.com/article/SB10001424052748703583404576079600579354700.html.

262. J. ECON. COMM., *supra* note 42, at 5.

simplicity,[263] and the current United States corporate tax policy is not simple.[264] Under a VAT system, "complex depreciation rules, inflation adjustments and the allocation of undistributed corporate income would disappear since all forms of saving are removed from the tax base under a consumption-based income tax system."[265] Furthermore, because the VAT rate would be lower than the current 35 percent corporate rate, companies would have less of an incentive to spend money hiring accountants and lawyers to comply with the tax code and to find tax loopholes in order to lower their tax liabilities.[266] This would help companies manage the $268.9 billion in compliance costs projected for 2015.[267]

Another benefit of a VAT system would be increased revenue for the United States Treasury.[268] "[A] U.S. VAT could realistically tax about a third of the gross domestic product (GDP), which would raise close to $50 billion per percentage point. If [the United States] adopted Europe's average VAT rate of 20[percent, the Treasury] could raise $1 trillion per year in 2009 dollars."[269] Other studies show that implementing a VAT would result in a net tax revenue increase of $258.6 billion over the current tax system.[270] That extra revenue could be used to help close the current budget deficit and eventually pay down the heavy national debt. Furthermore, implementing a VAT would increase economic output in the United States.[271] If a VAT were implemented, studies show that the United States economic output would increase between two and four percent.[272] In the long run, implementing a VAT would raise economic output in the United States an estimated four to six percent.[273] Raising economic output would increase the tax base, which would result in more tax revenues for the United States government.

2. *Criticisms of the Value-Added Tax*

Although the VAT would simplify the IRC and generate more revenue for the United States government, it is not a perfect tax system. It is commonly

263. *Id.* at 9.

264. AMERICANS FOR FAIR TAXATION, *supra* note 97, at 2.

265. *Id.*

266. *See id.* at 1.

267. *See supra* note 116 and accompanying text.

268. Bruce Bartlett, *Support the VAT*, FORBES.COM (Oct. 10, 2009), http://www.forbes.com/2009/10/22/republicans-value-added-tax-opinions-columnists-bruce-bartlett.html.

269. *Id.*

270. ERIC TODER & JOSEPH ROSENBERG, TAX POLICY CTR., EFFECTS OF IMPOSING A VALUE-ADDED TAX TO REPLACE PAYROLL TAXES OR CORPORATE TAXES 13, tbl.6 (2010), *available at* http://www.taxpolicycenter.org/UploadedPDF/412062_VAT.pdf.

271. Gale, *supra* note 243, at 156.

272. *Id.*

273. *Id.*

criticized as a regressive tax,[274] "tak[ing] a larger percentage from low-income people than from high-income people."[275] Currently, the United States tax system is progressive, meaning that high-income people and businesses pay a larger percentage of the tax than low-income people and businesses.[276] Switching from a progressive tax system to a regressive tax system would change the balance of equities currently in place.[277] Changing to a regressive tax system would likely have substantial political ramifications because forty-seven percent of tax filers do not pay federal income tax.[278] Washington politicians, Democrats and Republicans alike, will be hesitant to implement a tax system that will make them vulnerable in the next election.[279]

Historically, the VAT has been very unpopular, and foreign leaders who have enacted it experienced a backlash from their citizens.[280] Most notably, Japanese Prime Minister Yasuhiro Nakasone was defeated in his 1986 re-election bid months after he successfully implemented a VAT.[281] The 1993 electoral defeat of Canadian Prime Minister Brian Mulroney is also credited to his passage of a VAT in 1991.[282] "Since the poor consume a higher percentage of their income than the well-to-do, they are necessarily going to pay more VAT as a percentage of their income than the well-to-do. There just isn't any getting around that fact."[283]

The VAT is also criticized because its tax rate can be easily raised.[284] Proponents of small government are concerned by the ease with which revenue with a low dead-weight cost can be raised under a VAT system.[285] These critics argue that taxes will be easy to increase if they are insufficiently burdensome and that, to incentivize economic growth, rates need to be easily kept in check.[286] Because many nations that have enacted a VAT continue to have budget deficits,[287] this argument has credence. "The deficits that remain year after year would lead to continuous calls for even higher taxes, which would

---

274. Bruce Bartlett, *The Case Against the VAT*, FORBES.COM (Apr. 23, 2010), http://www.forbes.com/2010/04/22/vat-taxes-economy-opinions-columnists-bruce-bartlett.html.

275. *Regressive Tax Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/r/regressivetax.asp#axzz1mHb26Ari (last visited Aug. 1, 2012).

276. *Progressive Tax Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/p/progressivetax.asp#axzz1mHb26Ari (last visited Aug. 1, 2012).

277. Bartlett, *supra* note 274.

278. *Id.*

279. *See id.*

280. Bartlett, *supra* note 237.

281. *Id.*

282. *Id.*

283. Bartlett, *supra* note 274.

284. *Id.*

285. *Id.*

286. *Id.*

287. CURTIS S. DUBAY, VALUE-ADDED TAX: NO EASY FIX FOR THE DEFICIT 1 (2010), *available at* http://www.heritage.org/research/reports/2010/01/value-added-tax-no-easy-fix-for-the-deficit.

lead to more fraud and bigger deficits."[288] However, the fact that the VAT can easily raise revenue alone should not prevent its enactment. "Congress should end this cycle by simply restraining spending to historical levels and scrapping higher taxes, including the VAT."[289]

Taxpayer fraud is another problem faced by nations that have enacted a VAT.[290] Theoretically, the VAT is designed as a self-policing tax.[291] Because the total tax the government ultimately collects is the same, businesses have an incentive to make sure the previous businesses pay the correct tax so they do not get stuck with a higher tax bill.[292] However, fraud still persists.[293] In the European Union, Member states lose an estimated €60-€100 billion per year due to fraud, primarily arising from the black economy, insolvencies, and missing traders.[294]

The black economy represents economic transactions that occur with cash and go unreported.[295] Accordingly, tax revenue is not collected on these transactions.[296] The black economy accounts for up to thirty percent of GDP in some EU Member States, and some studies show that enacting a VAT will drive more activities underground.[297]Another source of fraud, insolvencies, results when a "supplier of the goods/services never accounts for the tax he has collected from his customer (due to his insolvency) and which the VAT identified customer then recovers."[298] Missing transfer fraud occurs when "taxpayer A charges VAT to taxpayer B and A never accounts for the VAT paid to it by B. B recovers the VAT paid to A on its VAT return."[299] Other types of fraud exist as well, including invalid deductions of input tax and non-payment of output tax.[300] These frauds will cost the United States money and could possibly lead to increased budget deficits.[301]

Opponents of the VAT are also quick to point out that nations that have enacted the tax continue to have budget deficits.[302] "If it passed a VAT, Congress would undoubtedly budget based on the expectation of receiving all the revenue it anticipates the tax raising."[303] However, it is unrealistic that the

288. *Id.* at 3.
289. *Id.*
290. *Id.* at 1.
291. *Id.*
292. *Id.*
293. *Id.*
294. INT'L VAT ASS'N, *supra* note 178, at 4, 6.
295. *Id.* at 7.
296. *Id.*
297. Johansson et al., *supra* note 6, at 19; INT'L VAT ASS'N, *supra* note 178, at 7.
298. INT'L VAT ASS'N, *supra* note 178, at 7.
299. *Id.*
300. *Id.* at 10.
301. DUBAY, *supra* note 287, at 2.
302. *Id.* at 1.
303. *Id.* at 2-3.

government will be able to collect all the money that is budgeted.[304] According to the Heritage Foundation, "When the revenue comes in short, as it surely would, the deficit would increase by the amount of the gap, and a substantial deficit would persist."[305] Although the average annual revenue shortfall of all Member States is 12 percent, some EU Members have a shortfall of up to 30 percent.[306] By contrast, in 2005 the United States had a twelve percent revenue shortfall.[307]

Many supporters of a VAT in the United States propose a 20 percent rate.[308] Applying this VAT to the 2005 U.S. tax information, the United States would have generated $1.26 trillion in tax revenues, which would be a fifty percent tax increase for that year.[309] However, using the shortfall data from the European Union, the United States would have had a tax receipt shortfall of $156 billion (under the European Union average) and $390 billion (the percent amount that many nations faced).[310] "Annual shortfalls of these magnitudes would prevent a VAT from eliminating the deficit and lowering the debt."[311] Furthermore, it takes a country several years to enforce properly the VAT after implementing the new system.[312]

V. RECOMMENDATIONS

Although time has distanced the United States from the 2008-2009 recession, the country's economy continues to struggle,[313] and the job market is still lagging behind the technical recovery.[314] Overhauling the complex United States corporate tax system along with increasing the fiscal responsibility of Congress will help the United States close the projected budget deficits and begin repaying the national debt. This Note recommends that the United States should look to the European Union VAT as a template for the new system, but with certain improvements to better promote economic growth and development.

---

304. *Id.* at 3.
305. *Id.*
306. *Id.* at 2.
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *See* RECKON LLP, STUDY TO QUANTIFY AND ANALYSE THE VAT GAP IN THE EU-25 MEMBER STATES (2009), *available at* http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_cooperation/ combating_tax_fraud/reckon_report_sep2009.pdf.
313. Don Lee, *Recession's Over, Economists Say to a Skeptical Public*, L.A. TIMES (Sept. 21, 2010), http://articles.latimes.com/2010/sep/21/business/la-fi-recession-over-20100921.
314. Jijo Jacob, *Top Five Reasons for High Unemployment in US*, INT'L BUS. TIMES (Feb. 9, 2011), http://www.ibtimes.com/articles/110575/20110209/us-jobs-unemployment-top-five-reasons.htm.

The first measure in this Note's proposed system is to abolish the corporate income tax. Practically, the United States government cannot tax a corporation—it can only tax individuals.[315] And although a corporate tax is levied against corporations, ultimately all the money from a corporation ends up going to a person.[316] However, the current United States corporate tax structure incentivizes companies to spend money to avoid taxes, which provides little economic benefit to the nation as a whole.[317] Under a VAT structure, compliance costs will be lower than the money companies currently spend to exploit loopholes in the IRC and to comply with the Sarbanes-Oxley Act.[318] Further, abolishing this high corporate tax rate would make the United States a more attractive place to conduct business. If more businesses and capital come to the United States, job creation would most certainly improve, further stimulating the economy.

This Note proposes a VAT system that shares many of the same characteristics as the tax overhaul plan Representative Paul Ryan has submitted to the 112th Congress.[319] First, the corporate tax would be abolished and replaced with a subtraction-method VAT or Business Consumption Tax.[320] Instead of an 8.5 percent VAT under the Ryan plan, however, the proposed VAT would follow the European Union's 15 percent VAT. This Note's proposed VAT system also would be broad-based, "includ[ing] all domestic consumption, except for education, government-financed health care . . . services of charitable organizations, and services performed by sub-national governments."[321] Imposing a broad-based VAT and eliminating the corporate tax would increase tax liability by about $600 billion, which represents 3.7 percent of United States GDP.[322]

Enacting a VAT will likely be politically unpopular, especially in the early stages of implementation.[323] But every tax policy needs to consider equity, efficiency, and simplicity.[324] Implementing a VAT will be more efficient, both in collection and economic terms, and will be simpler. Moreover, the VAT will be equally administered, whereas both the current income tax and corporate tax systems are progressive. However, there will be a great deal of backlash from citizens because the effective individual tax rate will increase because the price

315. Megan McArdle, *Why We Should Eliminate the Corporate Income Tax*, ATLANTIC (Oct. 28, 2010), http://www.theatlantic.com/business/archive/2010/10/why-we-should-eliminate-the-corporate-income-tax/65351/.

316. *Id.*

317. *Id.*

318. *See supra* Part II.B (discussing corporate loopholes and compliance costs).

319. *See supra* Part IV.C (discussing Rep. Paul Ryan's proposal to Congress).

320. BICKLEY, *supra* note 251, at 7; *see supra* note 202 and accompanying text.

321. TODER & ROSENBERG, *supra* note 270, at 12.

322. *See id.*

323. *See supra* Part IV.D.2. (discussing political fallout in countries that have enacted a VAT).

324. J. ECON. COMM., *supra* note 42, at 9.

of goods and services will increase. While some of this effective tax rate increase will be mitigated with a lowering of the personal income tax,[325] it is likely that individuals will experience a higher tax burden than they currently have. This is especially true for the forty-seven percent of American households that do not pay federal income taxes.[326] However, this effective increase is necessary if the United States is going to pay down its national debt to a sustainable level.

Congress and the President will need to thoroughly outline how a VAT will increase tax revenues in order to pay down the nation's unsustainable debt. The government also will need to make a serious effort to reign in government spending, including reforming and improving the nation's entitlement programs. With more revenue coming into the United States Treasury Department, the government will be tempted to use the money to increase spending to provide more "benefits" to the public. Many analysts say the European VAT has been a failure because European countries continue to run major deficits.[327] The European deficit problem is a result of too much spending, not a lack of revenue.[328] To combat this inherent temptation, Congress should pass a law earmarking a certain percentage of the increased tax revenue for paying down the nation's outstanding debt. The government can further make the VAT plan appealing to the American public by explaining how lower corporate taxes should result in increased capital inflow to the nation, which in turn would create new jobs. Finally, Congress should pledge not to raise the VAT rate from 15 percent and pledge to lower the VAT to 7.5 percent once spending and debt are down to sustainable levels.

VI. CONCLUSION

Most Americans have felt the effects of the financial crisis and recent economic woes of the United States. While the past two years have been difficult for the nation, things will only get worse if the government does not become financially solvent and lower the national debt. The United States is racking on debt to the point where soon the debt load will greatly hinder the nation's ability to achieve maximum economic output. A lower economic output will only accelerate the nation's financial problem in a never-ending cycle unless the government takes action. While many economists agree that a complete overhaul of the tax system would be best,[329] it is not politically feasible to enact such an overhaul overnight. "This is more like a warm-up drill,

325. *See* BICKLEY, *supra* note 251, at 7.

326. David Leonhardt, *Yes, 47% of Households Owe No Taxes. Look Closer*, N.Y. TIMES (Apr. 13, 2010), http://www.nytimes.com/2010/04/14/business/economy/ 14leonhardt.html.

327. *Europe's VAT Lessons*, *supra* note 219.

328. *Id.*

329. Kim Dixon, *Panel Offers Obama Ideas on U.S. Tax Overhaul*, REUTERS (Aug. 27, 2010), http://www.reuters.com/article/idUSTRE67Q5GH20100827.

not the game itself," said William Gale, co-director of the Tax Policy Center, a think tank located in Washington, D.C.[330] "Congress has to actually want to take these issues seriously rather than use them as sound bites and campaign material. And I don't see any interest right now in doing the hard work."[331]

A change in tax policy will not be beneficial unless the United States government uses the increased revenue to tackle the rising deficit. The European Union and other nations are onto a good idea by implementing a VAT, but unfortunately these governments have not utilized the VAT revenue wisely. Instead, these governments have stereotypically spent more and more money, using the VAT as a way to generate revenue to fund various social programs and wasteful spending. The United States needs to learn from the European Union and other countries and implement a VAT to increase revenue in order to close the budget deficit and pay down the national debt to sustainable levels. The United States national debt is growing by the hour;[332] immediate action to reduce this debt is needed.[333] In addressing the White House Debt Commission, Federal Reserve Chairman Ben Bernanke said, "given the significant costs and risks associated with a rapidly rising federal debt, our nation should soon put in place a credible plan for reducing deficits to sustainable levels over time."[334] Once the United States implements a VAT, the government needs to refrain from wasting the new revenue by creating new entitlements or implementing new programs. Instead, the VAT money should be earmarked for paying down the national debt or making the already insolvent entitlements of Social Security and Medicaid solvent again.

330. Roger Runningen & Mike Dorning, *Volcker Panel Outlines Options for Tax Code Overhaul*, BLOOMBERG (Aug. 28, 2010), http://www.bloomberg.com/news/2010-08-27/volcker-panel-to-give-obama-options-for-simplifying-taxes-broadening-base.html.

331. *Id.*

332. U.S. DEBT CLOCK, *supra* note 11.

333. Luca Di Leo, *Bernanke: U.S. Needs Deficit Reduction Plan*, WALL ST. J. (Apr. 27, 2010), *available at* http://blogs.wsj.com/economics/2010/04/27/bernanke-us-needs-deficit-reduction-plan/.

334. *Id.*

RECONCILING CALIFORNIA'S PRE, POST, AND PER MORTEM RIGHTS OF PUBLICITY

Keenan C. Fennimore*

I. INTRODUCTION

In May 2010 the California legislature passed AB 585, an assembly bill extending the state's *post* mortem right of publicity to people whose identities have commercial value *because of* their death.[1] The bill amended California Civil Code section 3344.1, which previously protected only people whose identities had commercial value *at the time of* their death.[2] AB 585 was proposed in response to the then-recent controversy surrounding the sale of t-shirts protesting the war in Iraq and featuring the names of American soldiers who died while serving there.[3] The law now entitles families of deceased soldiers to compensation for such unauthorized commercial use.[4] At least five other U.S. states statutorily recognize publicity rights for deceased soldiers;[5] however, AB 585 was unique in that it extended protection to the non-military deceased as well.[6]

In general, the U.S. right of publicity is "the inherent right of every human being to control the commercial use of his or her identity."[7] Although nearly two-thirds of all U.S. states recognize some form of publicity protection, either by statute or common law,[8] a sufficient justification for how and why the law provides such a right remains in dispute.[9] Despite some initial disinclination among courts and commentators toward categorizing the right of publicity,[10] what was once considered only a proprietary interest in the

---

* J.D., 2012, Indiana University Robert H. McKinney School of Law; B.A., 2004, Indiana University.

1. 2010 Cal. Stat. ch. 20, § 1. (emphasis added) (codified at CAL. CIV. CODE § 3344.1(h) (2011)).

2. CAL. CIV. CODE § 3344.1(h) (2009) (emphasis added), *amended by* 2010 Cal. Stat. ch. 20, § 1.

3. 2009 Legis. B. Hist. Cal. A.B. 585 (Bill Analysis, Assembly Floor), May 3, 2010; *see infra* Part III.B.3.

4. CAL. CIV. CODE § 3344.1(h) (2011).

5. Arizona, ARIZ. REV. STAT. § 13-3726 (2009); Florida, FL. STAT. § 540.08 (2009); Louisiana, LA. REV. STAT. ANN. § 14:102:21 (2009); Oklahoma, OKLA. STAT. tit. 21, § 839.1A (2009); and Texas, TEX BUS. & COM. CODE ANN. § 721.002 (2009).

6. 2010 Cal. Stat. ch. 20, § 1 (defining "deceased personality" as "any natural person") (codified at CAL. CIV. CODE § 3344.1(h) (2011)).

7. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2010).

8. *Id.* § 6:3.

9. *See infra* Part IV.B; Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 247 (2005).

10. *See infra* notes 173-76 and accompanying text.

commercial value of identity is now widely regarded as a bona fide property right.[11] As a result of this foundational shift, the right of publicity has been commonly justified post hoc by the traditional theories associated with property protection in the United States: labor theory, unjust enrichment, and economic incentives.[12] These justifications have been met with postmodern criticism by some commentators, who have examined the cultural process by which commercial value in identity is created and have concluded that exclusive entitlement to this value is unwarranted and its rationale, unpersuasive.[13]

This Note argues that California's newly spawned *per* mortem[14] right of publicity lacks even the weak property justifications asserted for its *pre* mortem[15] and *post* mortem[16] counterparts.[17] As a legal remedy aimed at protecting personal interests, AB 585 extended the state's statutory right of publicity regime beyond any formal property rationale and provided a new arena in which to revive the right's unsettled theoretical debate.[18] This Note offers a comparative perspective of identity rights in the United States and Germany,[19] and it suggests the concept of economic self-determination as a means of theoretically reconciling California's disparate statutes in the face of an incoherency that has plagued the property-based right of publicity in the United States for nearly three decades.[20]

Part II of this Note traces the history of common law identity appropriation claims in the United States, highlighting the right of publicity's emergence from the personal right of privacy and its evolution into a

---

11. *See infra* Part IV.A.

12. *See infra* Part IV.B; 1 MCCARTHY, *supra* note 7, §§ 2:1, 2:6; Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 178 (1993). Protection from consumer deception is another rationale asserted for the U.S. right of publicity, which is not addressed in this Note. *See id.* at 228-38.

13. *See infra* Part IV.B; Madow, *supra* note 12, at 178-228; Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 430-41 (1999); McKenna, *supra* note 9, at 245-75; David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 117-23 (2005).

14. This Note uses the term "*per* mortem" to describe the right of publicity as established for identities with commercial value *because of their death*. To the author's knowledge, this prefix has never before been applied in the right of publicity context.

15. This Note uses the term "*pre* mortem" to easily identify the right of publicity in a living personality, as distinguished from that in deceased *per* and *post* mortem personalities. To the author's knowledge, this term has never before been applied in the right of publicity context. *Pre* mortem publicity rights are typically referred to by courts and commentators as the general "right of publicity."

16. This Note uses the term "*post* mortem" to describe the right of publicity as recognized for identities with commercial value *at the time of their death*. This term is commonly applied in the right of publicity context by courts and commentators.

17. *See infra* Part III.A.

18. *See infra* Part. III B.

19. *See infra* Parts III, V.

20. *See infra* Part IV.

commercial property right. Part III examines the social motivations behind California's three-piece, statutory right of publicity regime and the practical effect of its *per* mortem right in light of the commercial value requirement of publicity protection. Part IV analyzes *per* mortem publicity rights according to the traditional justifications and modern critiques of the publicity-as-property model. Part V provides a basic overview of German personality rights and the autonomy theory that underlies their protection. This Part also highlights the functional application of economic self-determination by German courts. Part VI offers a brief comparative perspective of autonomy-based law in Germany and the United States and identifies a potential source of compatibility for personality-based identity protection in California.

II. IDENTITY APPROPRIATION IN THE UNITED STATES

In order to appreciate California's statutory contradiction, it is important first to examine generally the U.S. right of publicity's origins in privacy law, its evolution into a pure property right, and several resulting distinctions between privacy and publicity as they relate to California's addition of a *per* mortem statute.

A. The Right of Privacy

The right of privacy was first conceptualized in 1890 by Samuel Warren and Louis Brandeis.[21] Concerned by the rising practice of gossip journalism in the United States and the technological innovations that afforded it,[22] Warren and Brandeis sought to extract from existing case law an independent claim against the unauthorized publication of private facts and photographs, for which the law at time offered no protection.[23] As published in their seminal article, *The Right to Privacy*, Warren and Brandeis found a remedy, primarily in the law of copyright, by extending authorial control of intentional creations to the incidental.[24] Their proposed "right to privacy" was aimed famously at protecting "the right to enjoy life" and "the right to be let alone."[25]

1. Protection of Emotional Interests

Despite wide scholastic recognition of *The Right to Privacy*, the alleged

---

21. McKenna, *supra* note 9, at 234; *see* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

22. Warren & Brandeis, *supra* note 21, at 195. "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" *Id.*

23. McKenna, *supra* note 9, at 234; Warren & Brandeis, *supra* note 21, at 197.

24. McKenna, *supra* note 9, at 234; Warren & Brandeis, *supra* note 21, at 198-200.

25. Warren & Brandeis, *supra* note 21, at 193.

right lost its first battle in court.[26] In *Roberson v. Rochester Folding Box Co.*, a young girl named Abigail Roberson sought an injunction against and compensation for emotional injuries caused by a milling company's use of her likeness to promote the sale of flour without her consent.[27] The Franklin Mills Company published prints featuring Roberson's image encircled by the company's name and slogan,[28] and when Roberson was recognized by others in public, she was scoffed at and jeered, resulting in her mental anguish.[29]

Although acknowledging Warren and Brandeis's "clever article,"[30] the New York Court of Appeals rejected Roberson's pioneering privacy claim.[31] The court majority concluded that the right of privacy had not yet received recognition at law[32] and that such recognition was a concern for the state legislature.[33] Further, the majority emphasized that the law protects people's body, reputation, and property but not their "peace of mind," "feelings," or "happiness."[34] Four dissenting judges, however, embraced the Warren and Brandeis article, finding the right of privacy to be the complement of everyone's longstanding right to an inviolate person.[35] These dissenters dismissed the absence of exact precedent in favor of equity,[36] whether the remedy was to be found in an analogical extension of common-law principles or the application of natural justice.[37]

Three years after *Roberson*, the right of privacy received its first recognition at common law.[38] In *Pavesich v. New England Life Ins. Co.*, a man named Paolo Pavesich brought suit against the New England Mutual Life Insurance Company for the emotional damages he suffered as a result of the company's unauthorized use of his recognizable image in a newspaper

---

26. *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).

27. *Id.* at 442.

28. *Id.*

29. *Id.* Roberson alleged that she was "greatly humiliated . . . causing her great distress and suffering both in body and mind; that she was made sick and suffered a severe nervous shock, was confined to her bed and compelled to employ a physician," resulting in $15,000 in damages. *Id.*

30. *Id.* at 444.

31. *Id.* at 447.

32. *Id.*

33. *Id.* at 443, 447.

34. *Id.* at 446.

35. *Id.* at 449.

36. *Id.* at 451. "It would be . . . an extraordinary view which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet, would deny the same protection to a person, whose portrait was unauthorizedly obtained, and made use of, for commercial purposes." *Id.*

37. *Id.* at 449. "It would be a reproach to equitable jurisprudence, if equity were powerless . . . in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social, or commercial conditions." *Id.*

38. 1 MCCARTHY, *supra* note 7, § 1:17; *see* Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

advertisement.[39] The advertisement depicted Pavesich and attributed to him several lines of text endorsing New England Mutual and praising his use of the company's services.[40] Pavesich, who had never used the company's services and had never made any such statements, found the use of his image offensive and successfully sued the company for invasion of privacy.[41] The Supreme Court of Georgia adopted the *Roberson* dissenting opinion in its entirety,[42] establishing the common law right of privacy as the personal right of every individual "to be let alone."[43]

As privacy law developed across the United States, not all people found themselves within the ambit of its protection. Specifically, celebrity plaintiffs found it difficult to recover for the unauthorized appropriation of their names and likenesses because of the right's emotional focus.[44] In one famous case,[45] *O'Brien v. Pabst Sales Co.*, the United States Court of Appeals for the Fifth Circuit rejected an invasion of privacy claim brought by a professional football player named Davey O'Brien.[46] The well-known player sought damages from a distributor of "Pabst Famous Blue Ribbon Beer" for the company's use of his photograph in its advertising calendar.[47] O'Brien argued that he suffered damage to his name by its commercial association with beer[48] and that the advertisement falsely indicated that he endorsed the company's product.[49] The court concluded, however, that the publicity O'Brien received "was only that which he had been constantly seeking and receiving" as a public figure.[50] Because O'Brien was not a "private person," he had no claim for invasion of the right of privacy.[51]

---

39. *Pavesich*, 50 S.E. at 68.

40. *Id.* at 68-69. The text of the advertisement read, "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies." *Id.* at 69.

41. *Id.*

42. *Id.* at 78 (quoting *Roberson* 64 N.E. at 448-51).

43. *Id.* (quoting *Roberson*, 64 N.E. at 449). *Accord* Melvin v. Reid, 297 P. 91, 92 (Cal. Dist. Ct. App. 1931).

44. 1 MCCARTHY, *supra* note 7, § 1:25.

45. *Id.*

46. O'Brien v. Pabst Sales Co., 125 F.2d 167, 168, 170 (5th Cir. 1941).

47. *Id.* at 168.

48. *Id.* at 170. The athlete testified "that he was a member of the Allied Youth of America, the main theme of which was the diong [sic] away with alcohol among young people; that he had had opportunities to sell his endorsement for beer . . . and had refused it; and that he was greatly embarrassed and humiliated when he saw the calendar and realized that his face and name was associated with publicity for the sale of beer." *Id.* at 168-69.

49. *Id.* at 170.

50. *Id.* The athlete was "perhaps the most publicized football player of the year 1938-39." *Id.* at 169.

51. *Id.* at 170. *Accord* Cohen v. Marx, 211 P.2d 320, 321 (Cal. Dist. Ct. App. 1949).

2. Privacy's Inalienability

Privacy's inalienability was another challenge that celebrities faced as a result of the right's emotional focus. In *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, a longtime baseball bat manufacturer, Hillerich & Bradsby, sought to enjoin a newcomer to the business, Hanna Manufacturing, from imprinting bats with the names of famous baseball players.[52] Because Hillerich & Bradsby maintained exclusive contracts with many players for the use of their names, autographs, and photographs in connection with the sale of baseball bats, the company argued that the players had assigned to it their property rights in their names.[53] The United States Court of Appeals for the Fifth Circuit, however, denied the manufacturer's injunction.[54] Finding the contracts simply to be a waiver of the players' right of privacy rather than an assignment of that right to Hillerich & Bradsby, the court emphatically stated, "Fame is not merchandise. It would help neither sportsmanship nor business to uphold the sale of a famous name to the highest bidder as property."[55]

3. Privacy's Terminability

The personal, emotional nature of the right of privacy also rendered it incapable of surviving the death of the right's holder. In *Jesse James, Jr. v. Screen Gems Inc.*, the wife of Jesse James, Jr., son of the infamous outlaw Jesse James, sought compensation from a production company for its commercial exploitation of her deceased husband's name and personality in a biographical film titled, *Bitter Heritage*.[56] By her designation as "Mrs. Jesse James, Jr.," the wife claimed an interest in her deceased husband's right of privacy.[57] Yet, the court found the alleged wrong to be directed toward the decedent, not his wife, and therefore, concluded the facts of her complaint to be insufficient to constitute an invasion of privacy.[58] The wife's asserted cause of action for an invasion of privacy was personal to Jesse James, Jr. and was not capable of surviving his death.[59]

---

52. Hanna Mfg. Co. v. Hillerich & Bradsby Co., 78 F.2d 763, 763-64 (5th Cir. 1935).

53. *Id.* at 764, 765-66.

54. *Id.* at 768.

55. *Id.* at 766-67. *Accord* Strickler v. Nat'l Broadcasting Co., 167 F. Supp. 68 (S.D. Cal. 1958).

56. Jesse James, Jr. v. Screen Gems, Inc., 344 P.2d 799, 800 (Cal. Ct. App. 1959). The wife also claimed personally to have suffered emotional injuries as a result of the film. *Id.* at 799-800.

57. *Id.* at 800.

58. *Id.* at 801.

59. Lugosi v. Universal Pictures, 603 P.2d 425, 430 (Cal. 1979) (discussing *Jesse James, Jr.*, 344 P.2d 799). "When the right invaded was more strictly the privilege 'to be let alone,' the courts in this state have refused to extend to the heirs of the (potential) plaintiff the right to recover for the invasion of that right: 'It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been

B. The Right of Publicity

Celebrity struggles to recovery under claims for invasion of privacy by commercial appropriation, magnified by the rise of celebrity culture in the United States,[60] set the stage for the evolution of property-based publicity protection.[61] In this light, it has been stated that "[t]he right of publicity was created not so much from the right of privacy as from frustration with it."[62]

1. Protection of Economic Interests

Fifteen years after Hanna Manufacturing struck out in the Fifth Circuit, and on an almost identical set of facts, the United States Court of Appeals for the Second Circuit explicitly rejected the holding of that case and gave life to the common law right of publicity.[63] In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, rival chewing gum manufacturers were competing for the rights to use baseball players' names and photographs on baseball cards.[64] Haelan Laboratories had exclusive agreements with certain players whose names and photographs were used by Topps Chewing Gum without Haelan's authorization.[65] Topps claimed that privacy was a personal and non-assignable right and that Haelan merely retained a waiver of the players' rights of privacy.[66] In rejecting this defense, the court concluded that, "in addition to and independent of th[e] right of privacy . . . a man has a right in the publicity value of his photograph . . . . This right might be called a 'right of publicity.'"[67]

2. Publicity's Alienability

Although rightfully celebrated as the foundation of the property-based right of publicity, *Haelan Laboratories, Inc.* had the practical effect simply of making one's likeness alienable via assignment.[68] As such, the decision reflects an "eminently functionalist" approach to commercial identity appropriation.[69] In establishing the right of publicity as protecting an entirely different interest from the right of privacy, one focusing uniquely on economic injury rather than

---

invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded. Further, the right does not survive but dies with the person.'" *Id. Accord* Metter v. Los Angeles Examiner, 95 P.2d 491 (Cal. Dist. Ct. App. 1939).

60. Michael Madow offers a thorough account of the rise of celebrity culture in America. *See* Madow, *supra* note 12, at 147-67.

61. *Id.* at 167.

62. *Id.*

63. 1 MCCARTHY, *supra* note 7, § 1:26.

64. Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953).

65. *Id.*

66. *Id.*; *see* 1 MCCARTHY, *supra* note 7, §1:26.

67. *Haelan Labs., Inc.*, 202 F.2d at 868. *Accord* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).

68. Westfall & Landau, *supra* note 13, at 76-77.

69. *Id.* at 77.

hurt feelings and mental anguish,[70] Judge Frank was merely responding to pre-existing business practices.[71] The judge explained:

> [I]t is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[72]

3. Publicity's Descendibility

Despite its economic focus, the right of publicity's roots in privacy law made it difficult for some courts to shake the "personal" label.[73] In *Lugosi v. Universal Pictures*, the Supreme Court of California rejected the notion that the right of publicity was descendible.[74] The claimants in *Lugosi* were the heirs of actor Béla Lugosi, known for his role in the 1931 film, *Dracula*.[75] Lugosi's heirs brought suit against Universal Studios, the movie studio for which Lugosi had worked, seeking to recover profits made by the studio's licensing of the Lugosi's image, as the Dracula character, for merchandising purposes.[76] The court recognized that Lugosi had a proprietary interest in his identity[77] but ruled that this interest had not passed to Lugosi's heirs on his death.[78] Problematically,[79] the court concluded, "[T]he right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him *during his lifetime*."[80]

In dissent, Chief Justice Bird challenged the *Lugosi* majority's rejection

---

70. Ben C. Adams, Recent Development, *Inheritability of the Right of Publicity Upon the Death of the Famous*, 33 VAND. L. REV. 1251, 1252 (1980).

71. Westfall & Landau, *supra* note 13, at 77-78. "[B]aseball card companies had been signing exclusive contracts with players for some time prior to the decision," and "[s]imilar practices were occurring in other areas of the entertainment industry." *Id.*

72. *Haelan Labs., Inc.*, 202 F.2d at 868.

73. 1 MCCARTHY, *supra* note 7, § 1:32.

74. Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979).

75. *Id.* at 426-27.

76. *Id.* at 427.

77. *Id.* at 428.

78. *Id.* at 427, 431 (reversing the lower court's finding of a descendible right of publicity).

79. *See infra* Part III.B.2.

80. *Lugosi*, 603 P.2d at 431 (emphasis added).

of a descendible right of publicity.[81] Distinguishing the right of publicity's proprietary nature from the personal right of privacy, Chief Justice Bird found no persuasive policy that suggested the right of publicity "should not descend at death like any other intangible property right."[82] This dissenting opinion "became the inspiration" for the enactment of California's statutory descendible right of publicity only five years later.[83]

III. CALIFORNIA AB 585 IN PERSPECTIVE

California has maintained two statutory approaches to the right of publicity since 1984.[84] The state's *pre* and *post* mortem statutes were developed as supplementary protection to its common law right of publicity,[85] and they represent legislative responses to two similar sociolegal events. The enactment of AB 585 added a third approach—the *per* mortem right of publicity.[86] But the social motivations for California's *per* mortem protection and the statute's practical effect within the state's existing statutory regime reveal AB 585 as a contradictory application of the publicity-as-property model.

A. California's Statutory Regime

California's *pre* mortem right of publicity statute is codified in section 3344 of the California Civil Code.[87] The state's *post* mortem statute, originally enacted as section 990,[88] is found in section 3344.1.[89] This section also provides for California's *per* mortem right of publicity, as established by AB 585.[90]

1. Pre Mortem Protection

Section 3344 was legislated in response to a complaint about computer-generated solicitation letters mailed by *Reader's Digest* to a series of

---

81. *Id.* at 434 (Bird, C.J., dissenting).

82. *Id.* at 445-46 (Bird, C.J., dissenting) (quoting Factors Etc. Inc. v. Creative Card Co., 444 F. Supp. 279, 284 (S.D.N.Y. 1977)).

83. Steven Andreacola, *Trademark's Neighbors: History of California Civil Code 3344.1*, 12 J. CONTEMP. LEGAL ISSUES 592, 594 (2001).

84. 1 MCCARTHY, *supra* note 7, § 6:24; *see* 1971 Cal. Stat. ch. 1595, § 1 (enacting *pre* mortem statute); *see also* 1984 Cal. Stat. ch. 1704, § 1 (enacting *post* mortem statute).

85. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 (Cal. 2001) (citing *Lugosi*, 603 P.2d at 428 n.6).

86. *See supra* note 14.

87. CAL. CIV. CODE § 3344 (2011).

88. 1984 Cal. Stat. ch. 1704, § 1; CAL. CIV. CODE § 990 (1988), *renumbered by* 1999 Cal. Stat. ch. 998, § 1.

89. CAL. CIV. CODE § 3344.1 (2011).

90. *See* 2010 Cal. Stat. ch. 20, § 1.

neighboring individuals.[91] Each form letter stated that its recipient and his or her neighbor had been selected as sweepstakes contestants by the magazine.[92] The neighbor was identified by name, and each recipient was named as a "neighbor" in solicitation of another resident in the neighborhood.[93] In an ensuing lawsuit, *Stilson v. Reader's Digest Assn., Inc.*, the neighbors complained that these letters were a misappropriation of their names to sell magazine subscriptions in violation of their rights to privacy.[94] In order to recover damages, however, California's privacy law required each recipient to prove mental suffering, a burden that ultimately defeated the neighbors' certification as a class.[95]

In response to and during this litigation, the California legislature added section 3344 to the state's Civil Code.[96] The statute was designed to resolve the neighbors' need to prove damages by providing a minimum statutory recovery of $300[97] for any invasion of privacy by commercial appropriation.[98] As originally enacted in 1971,[99] California's *pre* mortem right of publicity statute provided:

> Any person who knowingly uses another's name, photograph, or likeness, in any manner, for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation of purchases of products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount no less than three hundred dollars ($300).[100]

Judgment was issued against the recipients in *Stilson* with no discussion

---

91. 1 MCCARTHY, *supra* note 7, § 6:23 (citing Jerome E. Weinstein, *Commercial Appropriation of Name or Likeness: Section 3344 and the Common Law*, 52 L.A.B.J. 430, 432 (1977)); Stilson v. Reader's Digest Assn., Inc., 28 Cal. App. 3d 270, 272 (1972).

92. 1 MCCARTHY, *supra* note 7, § 6:23; *Stilson*, 28 Cal. App. 3d at 272.

93. 1 MCCARTHY, *supra* note 7, § 6:23; *Stilson*, 28 Cal. App. 3d at 272.

94. *Stilson*, 28 Cal. App. 3d at 273.

95. *Id.* at 273-74.

96. 1971 Cal. Stat. ch. 1595, § 1 (now codified at CAL. CIV. CODE 3344.1 (2011)).

97. In 1984 the statutory minimum recovery was raised to $750. 1984 Cal. Stat. ch. 1704, § 2 (now codified at CAL. CIV. CODE § 3344(a) (2011)).

98. 1 MCCARTHY, *supra* note 7, at § 6:23. "The use is without the consent of such persons, and, unless their name has an ascertainable commercial value, they are without effective legal remedy." *Id.* § 6:23 n.6 (quoting Summary of Legislation, AB 826, at 3 (1971)).

99. 1971 Cal. Stat. ch. 1595, § 1.

100. CAL. CIV. CODE § 3344(a) (1972); *see* Weinstein, *supra* note 91, at 433 n.17.

of section 3344.[101] But as a known catalyst for the statute, the case's underlying facts illustrate that California's *pre* mortem right of publicity was initially motivated by emotion-based, privacy concerns rather than proprietary interests in commercial value.[102] Although the broad language of section 3344 seemed to allow for the inclusion of both types of identity protection,[103] Chief Justice Bird prompted a narrower reading of the statute in his *Lugosi* dissent:

> The legislative history of section 3344 strongly suggests that the Legislature was concerned with an individual's right to privacy, not an individual's proprietary interest in his or her name and likeness . . . . In contrast to these numerous references to the right of privacy, there is no mention in the legislative documents of the right of publicity or the economic interest protected thereunder.[104]

In 1985 the California legislature passed the *Celebrity Rights Act*, amending section 3344 to provide for the additional recovery of "any profits from the unauthorized use that *are attributable to* the use and are not taken into account in computing the actual damages."[105] In contrast to the privacy motives of the original statute's enactment, the language added by the amendment evokes the economic focus of the now-recognized right of publicity.[106] The California Court of Appeals has since clarified that the statutory minimum can only be recovered as a measure of damages for mental distress,[107] while a defendant's "attributable" profits are only recoverable for injury to the commercial value of identity.[108] Section 3344 therefore provides hybrid privacy-publicity protection for commercial appropriation of identity.[109] The nature of the right asserted under the *pre* mortem statute—privacy or publicity—depends on the type of damages a claimant seeks.

2. Post Mortem Protection

In addition to its *pre* mortem amendments, the *Celebrity Rights Act* also

---

101. 1 MCCARTHY, *supra* note 7, § 6:23.

102. *Id.*

103. *Id.* ("Recoverable damages under the statute included both kinds of injury within the phrase 'shall be liable for any damages sustained by the person or persons injured as a result thereof.'").

104. Lugosi v. Universal Pictures, 603 P.2d 425, 442 (Cal. 1979) (Bird, C.J., dissenting).

105. 1984 Cal. Stat ch. 1704, § 1 (emphasis added) (now codified at CAL. CIV. CODE § 3344(a) (2011)).

106. 1 MCCARTHY, *supra* note 7, § 6:23.

107. Miller v. Collectors Universe, Inc. 159 Cal. App. 4th 988, 1006 (2008); *see* 1 MCCARTHY, *supra* note 7, § 6:46.

108. 1 MCCARTHY, *supra* note 7, § 6:46.

109. Baugh v. CBS, Inc., 828 F.Supp. 745, 753 (N.D. Cal. 1993).

enacted California Civil Code section 990 (now section 3344.1),[110] which established *post* mortem publicity protection for deceased personalities.[111] Section 3344.1 provides remedies for infringement that are similar to California's *pre* mortem statute.[112] However, unlike the hybrid protection offered by section 3344, section 3344.1 is solely concerned with a person's proprietary interest in the commercial value of identity.[113] Subsection (b) clearly provides, "The rights recognized under this section are *property* rights, freely transferable or descendible . . . ."[114]

It is widely accepted that California Civil Code section 990 was enacted to legislatively overrule the California Supreme Court's holding in *Lugosi*,[115] that California's common law right of publicity was not descendible.[116] Inspired by Chief Justice Bird's dissenting opinion, lobbied for by the Screen Actors Guild, and supported by numerous celebrities and celebrity heirs,[117] section 990 (now section 3344.1) established a claim for the successors-in-interest of "deceased personalities,"[118] meaning people whose identities had commercial value *at the time of* their death.[119]

3. Per Mortem Protection

Unlike like with its *pre* and *post* mortem statutes, the California legislature went beyond state lines to find its motivation for establishing *per* mortem protection. AB 585 was proposed in response to nationwide controversy surrounding an Arizona peace activist named Dan Frazier.[120] Frazier owns and operates a website[121] from which he sells merchandise expressing various political views, including several disputed anti-war t-

110. 1984 Cal. Stat. ch. 1704, § 1; CAL. CIV. CODE § 990 (1988), *renumbered by* 1999 Cal. Stat. ch. 998, § 1 (now codified at CAL. CIV. CODE § 3344.1 (2011)).

111. CAL. CIV. CODE § 3344.1(a) (2009), *amended by* 2010 Cal. Stat. ch. 20, § 1. "Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof." *Id.*

112. *Compare* CAL. CIV. CODE § 3344.1(b) (2009), *amended by* 2010 Cal. Stat. ch. 20, § 1, *with* CAL. CIV. CODE § 3344(a) (2011).

113. *See* CAL. CIV. CODE § 3344.1(b) (2009), *amended by* 2010 Cal. Stat. ch. 20, § 1.

114. *Id.*

115. Andreacola, *supra* note 83, at 593.

116. 1 MCCARTHY, *supra* note 7, § 6:24.

117. Andreacola, *supra* note 83, at 593 n.11.

118. CAL. CIV. CODE § 990(b)-(d) (1988), *renumbered by* 1999 Cal. Stat. ch. 998, § 1 (now codified at CAL. CIV. CODE § 3344.1(b)-(d) (2011)).

119. CAL. CIV. CODE § 990(h) (1988) (emphasis added), *renumbered by* 1999 Cal. Stat. ch. 998, § 1 (now codified at CAL. CIV. CODE § 3344.1(h) (2011)).

120. 2009 Legis. B. Hist. Cal. A.B. 585 (Bill Analysis, Assembly Floor), May 3, 2010.

121. *See* CARRYABIGSTICKER, http://www.carryabigsticker.com/ (last visited Aug. 31, 2012).

shirts.[122] One specific t-shirt displays the words, "Bush Lied" and "They Died," printed over a background of the names of 3,461 deceased soldiers.[123] Additional text on the shirt indicates that these names represent "U.S. troops who died in Iraq from March 20, 2003 to October 23, 2006."[124]

Throughout the United States, numerous family members of deceased soldiers publicly objected to Frazier's shirt, some threatening to sue Frazier if he did not cease and desist his use of the soldiers' names.[125] Additionally, several Arizona families complained to the state legislature and governor in an effort to prevent future sales of the shirt.[126] These complaints resulted in the enactment of an Arizona criminal statute[127] that protects against knowing use of a deceased soldier's name or image for commercial purposes without the prior consent of the decedent's next of kin.[128] Violators of this law are guilty of a Class 1 misdemeanor[129] and subject to civil liability under Arizona's right of publicity statute.[130]

One of the asserted purposes for Arizona's deceased soldier statute is "to protect military families in mourning for their sons and daughters killed in the war."[131] Similarly, the author of AB 585 described his motivation behind California's *per* mortem right of publicity amendment, stating, "[O]ut of *respect* to both the soldiers and their families, the names of fallen soldiers should not be exploited for commercial gain."[132] The California Senate's analysis of AB 585 echoed this sentiment, adding, "[P]arents of soldiers who had been lost in the war in Iraq, state that 'exploitation because of death solely for monetary gain is *reprehensible* and in complete disregard for the parents' *well-being*.'"[133] These emotion-based statements stand in stark contrast to the economic motivations for the state's *pre* and *post* mortem statutes. And in this light, AB 585 misapplied California's publicity-as-property model in order to protect the personal interests of the deceased—interests that are fundamentally

122. Frazier v. Boomsma, 2007 U.S. Dist LEXIS 72427, *2 (D. Ariz. 2007).

123. *Id.* Two additional shirts containing different anti-war messages printed over these same names are also sold. *Id.* at *2-3.

124. *Id.* at *2.

125. *Id.* at *5.

126. *Id.*

127. *Id.*

128. ARIZ. REV. STAT. § 13-3726(A) (2011).

129. *Id.* § 13-3726(D).

130. *Id.* § 13-3726(B) (incorporating ARIZ. REV. STAT. § 12-761 (2010)). Frazier eventually obtained an injunction against his potential prosecution under these statutes on the grounds that it would violate his First Amendment rights. *Frazier*, 2007 U.S. LEXIS 72427, at *53-55.

131. *Id.* at *40.

132. 2009 Legis. B. Hist. Cal. A.B. 585 (Bill Analysis, Assembly Floor), May 3, 2010 (emphasis added).

133. 2009 Legis. B. Hist. Cal. A.B. 585 (Bill Analysis, Senate Floor), April 23, 2010 (emphasis added).

incompatible with privacy law.[134]

B. Statutory Contradiction

Motivational interests aside, California's right of publicity statutes are functionally designed to protect people's proprietary interests in the commercial value of their identities.[135] It follows that individual recognition of these rights must depend on whether a person's identity possesses commercial value.[136] Compounding interpretations of this commercial value requirement, set forth below, have established the prevailing view, at least academically, that all people—whether famous or anonymous—have rights of publicity in California's *pre* and *post* mortem context.[137] But the statutory addition of *per* mortem protection renders this conclusion ripe for reconsideration.

1. Pre Mortem Attachment

Pre mortem right of publicity claimants generally have little trouble proving the commercial value of their identities.[138] This is primarily because most section 3344 claims are brought by celebrities,[139] who generally make a living exploiting their personalities in one way or another.[140] Courts in California, however, have consistently voiced that non-celebrity claimants too are able to assert *pre* mortem right of publicity claims.[141] The argument goes: "The appropriation of the identity of a relatively unknown person may result in

---

134. *See supra* Part II.A.1.

135. Lugosi v. Universal Pictures, 603 P.2d 425, 445 (Cal. 1979); Christoff v. Nestlé USA, Inc., 62 Cal. Rptr. 3d 122, 143 (Cal. Ct. App. 2007); Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1202 (9th Cir. 1988). "California has an overriding interest in safeguarding its citizens from the diminution in value of their names and likenesses, enhanced by California's status as the center of the entertainment industry." *Id.*

136. In the *pre* mortem context, the commercial value requirement is implied by the hybrid nature of section 3344. *See supra* Part III.A.1; Miller v. Collectors Universe, Inc., 72 Cal. Rptr. 3d 194, 207-08 (Cal. Ct. App. 2008); *Christoff*, 62 Cal. Rptr. 3d at 141 (citing Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983)). A claimant must prove economic injury in order to recover under the statute's right of publicity arm; otherwise the claimant effectively is limited to recovering statutory damages for invasion of privacy by commercial appropriation. *Id.* California's post mortem right of publicity statute explicitly requires a commercially valuable identity for the right's recognition. CAL. CIV. CODE § 3344.1(h) (2009) *amended by* 2010 Cal. Stat. ch. 20, § 1.

137. *See supra* Parts III.B.1, B.2.

138. *See* 1 MCCARTHY, *supra* note 7, §§ 4:2, 4:16.

139. *See Id.*

140. *The Celebrity 100*, FORBES.COM (June 28, 2010), http://www.forbes.com/lists/2010/53/celeb-100-10_The-Celebrity-100.html (ranking U.S. celebrities by categorical income).

141. Motschenbacher v. R.J. Reynolds Tobacco, Co., 498 F.2d 821, 824-25 n.11 (9th Cir. 1974); Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 542 (1993); Knb Enters. v. Matthews, 78 Cal. App. 4th 362, 367 (2000); Christoff v. Nestlé USA, Inc., 62 Cal. Rptr. 3d 122, 143 (Cal. Ct. App. 2007).

economic injury or may itself create economic value in what was previously valueless."[142] Employing a principle native to trademark law,[143] many commentators have interpreted this proposition to mean commercial value can be presumed from the defendant's unauthorized commercial use of a claimant's identity.[144] Others have extended this presumption to conclude that all people have a *pre* mortem right of publicity[145] as an innate right of personhood.[146]

2. Post Mortem Attachment

Commentators have similarly interpreted section 3344.1 as innately providing *post* mortem publicity rights to all people.[147] The presumption of commercial value principle, however, has been much more contentious in this context.[148] When the California Supreme Court first considered extending the right of publicity beyond a person's death, the court seemingly considered a person's *pre* mortem exploitation of his or her identity as a pre-requisite for *post* mortem protection.[149] But as described above,[150] the *Lugosi* majority was unclear as to whether "lifetime exploitation" was required for *post* mortem protection, or whether the court rejected the right of publicity's descendibility altogether.[151]

In overruling *Lugosi* and creating the statutorily descendible right of publicity, the California legislature only added to the *Lugosi* decision's

---

142. *Christoff*, 62 Cal. Rptr. 3d at 141 (citing *Motschenbacher*, 498 F.2d at 824-25 n.11); *see* 1 MCCARTHY, *supra* note 7, § 4:19-20.

143. *See* AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 354 (9th Cir. 1979). A defendant's intentional appropriation of a person's identity without their consent implies that the defendant believed that the identity was commercially valuable. 1 MCCARTHY, *supra* note 7, § 4:17.

144. 1 MCCARTHY, *supra* note 7, § 3:2. "Some damage to the commercial value of identity is presumed once it is proved that defendant has made an unpermitted use of some identifiable aspect of identity in such a commercial context that one can state that such damage is likely. If plaintiff seeks the recovery of damages, then the commercial damage must be proved and quantified." *Id.* Del Amo v. Baccash, 2008 WL 4414514, *6 (C.D. Cal. 2008). "[S]o long as a plaintiff has demonstrated (1) use of plaintiff's identity, (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise, and (3) a lack of consent, a plaintiff need not demonstrate injury." *Id.*

145. 1 MCCARTHY, *supra* note 7, §§ 4:19-20, 6:39.

146. *Id.* §§ 1:3, 6:39. "*[E]veryone's* persona and identity has *some* 'commercial value' during life and at the time of death. That value may be large or small, but it cannot be said to be nonexistent, no matter how 'obscure' the person." *Id.* § 6:39.

147. *Id.*

148. 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, §§ 9:11-15 (2d ed. 2010).

149. *See supra* Part II.B.3.

150. *See id.*

151. Lugosi v. Universal Pictures, 603 P.2d 425, 429 (Cal. 1979). "It seems to us rather novel to urge that because one's immediate ancestor did not exploit the flood of publicity and/or other evidence of public acceptance he received in his lifetime for commercial purposes, the opportunity to have done so is property which descends to his heirs." *Id.*

ambiguity.[152] Section 3344.1 provides *post* mortem protection for any person whose identity "*has commercial value at the time of his or her death*";[153] yet, the statute also states that *post* mortem protection exists "*whether or not during [his or her] lifetime*" the person used his or her identity for commercial purposes.[154] Seemingly contradictory, California's *post* mortem right of publicity statute explicitly requires the existence of commercial value while rejecting the lifetime exploitation requirement.

Naturally, this contradiction has caused academic debate.[155] Some commentators have viewed section 3344.1 as invalidating the commercial value presumption,[156] concluding that every person must *not* have a descendible right of publicity.[157] Others have interpreted the statute's language as broadening the right's *post* mortem scope.[158] Those favoring an expansive view of section 3344.1 point to plausible reasons why a person might not exploit his her identity during life that have nothing to do with the non-existence of commercial value.[159] To date, the California courts have not addressed section 3344.1's commercial exploitation ambiguity. The majority of commentators, however, continue to simply extend the commercial value presumption exercised under California's *pre* mortem right of publicity statute to its *post* mortem statutory counterpart.[160] Again, the conclusion is that every person has a *post* mortem right of publicity as an innate right of personhood.[161]

3. Per Mortem Attachment

The notion that all people innately have *pre* and *post* mortem rights of

---

152. 1 MCCARTHY, *supra* note 7, § 6:39.

153. CAL. CIV. CODE § 3344.1(h) (2009) (emphasis added), *amended by* 2010 Cal. Stat. ch. 20, § 1.

154. *Id.*

155. 1 MCCARTHY, *supra* note 7, § 6:39.

156. Stephen F. Rohde, *Dracula: Still Undead*, 5 CAL. LAW. 51, 53 (April 1985).

157. *Id.*; *see generally* Peter L. Felcher & Edward L. Rubin, Comment, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980).

158. Evie K. Rubin, Note, *Right of Publicity "Survives" in California: Cal. Civ. Code Section 990*, 12 W. ST. U. L. REV. 299, 302 (1985); *see generally* Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703 (1983); *see* 2 MCCARTHY, *supra* note 148, § 9.14 n.12.

159. Rubin, *supra* note 158, at 302. These include "1) waiting until an appropriate medium for exploitation comes along, 2) personal sensitivities, 3) business judgment, 4) waiting until fame is at its peak, 50 death occurs before opportunity to exploit, 6) to specifically create a legacy for heirs, 7) where value could attach to name, likeness, etc. only after death, and 8) where the type of exploitation chosen might not be available during personality's lifetime." *Id.* at 302-03.

160. 1 MCCARTHY, *supra* note 7, § 6:39 ("It is submitted that to read § 990(h) (§ 3344.1(h)) as a sensible whole, it must be concluded that everyone's identity has 'commercial value' at the time of death.").

161. *Id.*

publicity is compromised by the passage of AB 585. Read within the state's three-piece statutory regime, the language of California's *per* mortem right of publicity statute necessarily implies that a commercially valuable identity *is not* an innate right of personhood. As amended by AB 585, section 3344.1 now defines "deceased personality" as any person whose identity "has commercial value at the time of his or her death, *or because of his or her death* . . . ."[162] This Note argues that California's addition of *per* mortem protection would have been unnecessary if every person's identity is truly considered to have an innate *pre* mortem commercial value, as all identities would thereby be considered commercially valuable *at the time of death.*

If credence is given to the established commercial value principles set forth above, something more than mere personhood but less than lifetime commercial exploitation is needed to endow an identity with commercial value. Presuming commercial value from a defendant's commercial use, this Note recognizes that any commercial use of a person's identity in the *per* mortem context necessarily occurs after that person's death. And because property rights transfer "on death,"[163] a person whose identity is without commercial value at the time of death cannot be said to have transferred any property rights in that identity to his or her heirs. As such, California's *per* mortem publicity rights cannot be descendible—they are a posthumous creation.

IV. JUSTIFYING PUBLICITY-AS-PROPERTY

Even assuming that *per* mortem economic injury is possible under California's statutory right of publicity regime and that it is indeed the injury sought to be remedied by AB 585, a working policy justification eludes California's *per* mortem publicity-as-property model. This problem has "plagued the right of publicity" since its inception.[164]

A. The Property Syllogism

In endowing the right of publicity with the proprietary characteristic of assignability in *Haelan Laboratories, Inc.*,[165] Judge Frank adamantly dismissed the inquiry into whether the right should be labeled a form of "property" as well as whether it maintained any other traditional property characteristics.[166] In a sentiment that was shared by several early commentators on the right of publicity,[167] Judge Frank stated, "[T]he tag 'property' simply symbolizes the

162. CAL. CIV. CODE § 3344.1(h) (2011) (emphasis added).

163. CAL. PROB. CODE § 5507 (2010).

164. McKenna, *supra* note 9, at 247.

165. *See supra* Part II.B.2.

166. Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953); *see* Westfall & Landau, *supra* note 13, at 77-78.

167. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 406 (1960). "It seems quite pointless

fact that courts enforce a claim which has pecuniary worth."[168]

During the right of publicity's emerging years, courts in the United States remained hostile toward the right's development and largely followed Judge Frank's functionalist position.[169] Commentators, however, quickly latched onto the label debate and continued to develop the notion of publicity-as-property.[170] By the time California Civil Code section 990 was enacted in 1984, the right of publicity was widely considered a bona fide property right by courts and commentators alike.[171] The statute explicitly adopts this trend by providing, "The rights recognized under this section are *property rights*, freely transferable or descendible . . . ."[172]

The right of publicity's expansion beyond Judge Frank's functional assignability was driven largely by a form of reasoning that commentators call the "property syllogism."[173] Starting with the simple, but misleading,[174] premise that the right of publicity's assignability necessarily rendered it a form of property, many commentators jumped drastically to the conclusion that, because publicity is property, it must share all of the traditional characteristics of property, namely descendibility.[175] This "formalistic" shift in reasoning has resulted in "a Frankenstein bearing little resemblance to [Judge Frank's] carefully considered functionalist purposes."[176]

The property syllogism was highly influential on the courts that initially considered the right of publicity's descendibility,[177] and most court decisions that followed blindly applied the preceding courts' reasoning.[178] Thus, a descendible right of publicity was created with little consideration given to any policy supporting it.[179] And once most states codified the descendibility of their right of publicity, the property-based approach became an unshakable legal certainty.[180]

---

to dispute over whether such a right is to be classified as property." *Id.* (discussing the appropriation form of privacy invasion).

168. *Haelan Labs., Inc.*, 202 F.2d at 868.

169. Westfall & Landau, *supra* note 13, at 80.

170. *Id.*

171. *Id.*

172. CAL. CIV. CODE § 990 (1988) (emphasis added), *renumbered by* 1999 Cal. Stat. ch. 998, § 1 (now codified at CAL. Civ. CODE § 3344.1 (2011)).

173. Westfall & Landau, *supra* note 13, at 74.

174. McKenna, *supra* note 9, at 245-46. "There is nothing inherent in the notion of property that logically requires that all of the constitutive rights in the bundle be marshaled in favor of identity, and the law could easily provide only some, and even entirely different, protections." *Id.*

175. Westfall & Landau, *supra* note 13, at 83-84.

176. *Id.* at 123.

177. *Id.* at 84-86.

178. *Id.* at 87. "Many . . . simply noted that descendibility had become the majority rule in American jurisdictions and therefore should be followed." *Id.*

179. *Id.*

180. *Id.* at 88-89.

B. Theory and Policy

Since the right of publicity's haphazard emergence as a form of intellectual property, courts and commentators have retrospectively attempted to justify exclusive ownership of the commercial value in identity according to traditional U.S. property theories. Although these approaches may be appropriate in isolated circumstances, none are suitable to comprehensively justify California's *pre*, *post*, and *per* mortem rights of publicity as property.

1. Labor Theory

The most common theoretical justification for granting exclusive property rights in identity is based on John Locke's natural rights labor theory.[181] According to Locke, "When a person 'mixe[s]' his labor with a thing in its natural state, he 'join[s] to it something that is his own' and 'thereby makes it his property . . . .'"[182] Courts and commentators have frequently justified the *pre* mortem right of publicity in this manner.[183] Chief Justice Bird argued in his *Lugosi* dissent, "A celebrity *must* be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity . . . is the fruit of his labors and is a type of property."[184] As a *post* mortem justification, Chief Justice Bird similarly claimed, "If the right is descendible, the individual is able to transfer the benefits of his labor to his immediate successors and is assured that control over the exercise of the right can be vested in a suitable beneficiary."[185]

Although the labor theory justification for a property-based right of publicity is initially appealing, postmodern critics of the right have found it to be a gross oversimplification of the cultural process by which commercially valuable identities are created.[186] Celebrities derive their economic value from their individual power "to carry and provoke meanings,"[187] and "the media and the public always play a substantial part in the [meaning]-making process."[188] The media promote celebrities selectively, primarily through news and

181. Madow, *supra* note 12, at 181; McKenna, *supra* note 9, at 250.

182. Madow, *supra* note 12, at 175 n.239 (quoting JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 17, 19 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1952) (1690)).

183. *Id.* at 181. "'[A] person who has 'long and laboriously nurtured the fruit of publicity values,' who has expended 'time, effort, skill, and even money' in their creation, is presumptively entitled to enjoy them himself.'" *Id.* (quoting Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954)).

184. Lugosi v. Universal Pictures, 603 P.2d 425, 441 n.17 (Cal. 1979) (citing Uhlaender v. Hendricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970)).

185. *Id.* at 446.

186. McKenna, *supra* note 9, at 252; Madow, *supra* note 12, at 181-82. "Fame is a 'relational' phenomenon, something that is *conferred by others*." *Id.* at 188.

187. Madow, *supra* note 12, at 185.

188. *Id.* at 193.

advertising, based on their need to tell dramatic, compelling, and entertaining stories that capture and hold the public's attention.[189] In turn, the public's reaction to or consumption of these personifications is what creates market value in particular identities.[190] Therefore, no matter how much labor a person expends creating, monitoring, or shaping his or her image, the value of that person's identity always depends on whether the audience ultimately accepts it.[191] Unlike with traditional labor, a celebrity cannot exclusively say, "*I* made it," of his or her commercially valuable identify, and as a result, any claim of exclusive entitlement to its associated economic value is unwarranted.[192]

The labor justification for publicity rights is even less persuasive when applied to posthumous identity protection.[193] Whatever involvement a *post* mortem personality may have had in the creation of a valuable public image, the creative labor provided by that celebrity's heirs must have played a more tenuous role;[194] otherwise, the celebrity's *pre* mortem labor-based claim would be further undermined. Additionally, this Note argues, a non-celebrity cannot be said to have expended time, effort, skill, and money in pursuit of the death that prompted his or her *per* mortem publicity value. And because the commercial value of a *per* mortem identity is necessarily created after death,[195] the decedent is entirely removed from the meaning-making process.

2. Unjust Enrichment

The prevention of unjust enrichment is another common justification for the property-based right of publicity.[196] As the inverse of the labor rationale, the focus of unjust enrichment theory is on the defendant's "free riding" rather than the claimant's just desserts.[197] This theory was asserted for *pre* mortem publicity protection by the United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting*, the Court's only decision recognizing the right of publicity.[198] There, the Court proposed that a defendant should not get for free

189. *Id.* at 190. As a case study of the media's influence on public perception, Michael Madow provides an interesting account of Albert Einstein's rise to fame in the United States—from "mad scientist" to cultural icon. *Id.* at 185-88 (citing Marshall Missner, *Why Einstein Became Famous in America*, 15 SOC. STUD. SCI. 267 (1985)).

190. McKenna, *supra* note 9, at 254.

191. Madow, *supra* note 12, at 193-94.

192. *Id.* at 196.

193. Michael Decker, Note and Recent Development, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity's Transformation at Death*, 27 CARDOZO ARTS & ENT. L.J. 243, 259 (2009).

194. *Id.*

195. *See supra* Part III.B.3.

196. McKenna, *supra* note 9, at 247-48; Madow, *supra* note 12, at 196.

197. McKenna, *supra* note 9, at 247-48.

198. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576-77 (1977). In *Zacchini*, the Court held that a television news broadcast of an entertainer's entire fifteen-second "human

something of value from plaintiff for which the defendant would normally pay.[199] In his *Lugosi* dissent, Chief Justice Bird similarly applied unjust enrichment theory in the *post* mortem context:

> "There is no reason why, upon a celebrity's death, advertisers should receive a windfall in the form of freedom to use with impunity the name or likeness of the deceased celebrity who may have worked his or her entire life to attain celebrity status. The financial benefits of that labor should go to the celebrity's heirs . . . ."[200]

But the application of unjust enrichment theory to California's property-based right of publicity is yet another extension of the property syllogism; "it assumes an entitlement on behalf of the plaintiff to prove such an entitlement should exist."[201] In order for a defendant's free riding to be unjust, a right of publicity claimant must first have exclusive moral entitlement to the commercial value of his or her personality.[202] Without a working justification for the initial ownership, the unjust enrichment theory fails.[203] Moreover, the *post* mortem right of publicity effectively authorizes the heirs of the deceased personality to free ride on that personality's economic value, regardless of the heirs' involvement in generating that value.[204] For this same reason, unjust enrichment theory is an even more tenuous justification for *per* mortem personalities, who have even less of a moral claim, if any, to the commercial value of their identities.

3. Economic Incentives

Another policy justification asserted for *pre* mortem publicity rights is that exclusive ownership provides an economic incentive for artistic creation.[205] Analogous to the primary theory behind copyright and patent law,[206] this argument claims that *pre* mortem exclusivity incentivizes people to expend the time, money, and energy necessary to develop valuable identities that ultimately

---

cannonball" performance violated the entertainer's right of publicity. *Id.* at 578. The court rejected the broadcaster's *First Amendment* defense of newsworthiness. *Id.*

199. *Id.* at 576.

200. Lugosi v. Universal Pictures, 603 P.2d 425, 446 (quoting Note, *The Right of Publicity – Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 547 (1976)).

201. McKenna, *supra* note 9, at 248

202. *Id.*

203. *Id.*

204. Decker, *supra* note 193, at 263.

205. Madow, *supra* note 12, at 206.

206. U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

produce socially beneficial works.[207] The United States Supreme Court also asserted this theory in *Zacchini*,[208] as did Chief Justice Bird, dissenting in *Lugosi*:

> [P]roviding legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition . . . . While the immediate beneficiaries are those who establish professions or identities which are commercially valuable, the products of their enterprise are often beneficial to society generally.[209]

Chief Justice Bird further alleged economic incentives as a justification for *post* mortem publicity protection,[210] claiming the assurance that an individual's heirs will continue to benefit from the investment in publicity value provides additional encouragement for the individual to make such an investment.[211]

Critics of the economic incentives theory claim that it fails realistically to justify exclusive ownership of *pre* mortem publicity value. There is little evidence that modern celebrities would refuse to exercise their socially valuable talents or expertise without such ownership,[212] and it is equally possible that the wealth generated by a celebrity's publicity rights disincentivizes further exercise of that celebrity's talents.[213] Further, publicity value is a collateral source of income for most celebrities; thus, most would still be able to profit from the activities that generate their commercial value without exclusively exploiting their rights of publicity.[214] This is unlike an author's copyright or an inventor's patent, which is much more necessary to secure a financial benefit in the author's or inventor's works.[215]

---

207. Madow, *supra* note 12, at 206.

208. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977). "[Publicity] protection provides an economic incentive for [a person] to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court." *Id.*

209. Lugosi v. Universal Pictures, 603 P.2d 425, 441 (Cal. 1979) (citing *Zacchini*, 433 U.S. at 573).

210. *Lugosi*, 603 P.2d at 446. "[A]s with copyright protection, granting protection after death provides an increased incentive for the investment of resources in one's profession, which may augment the value of one's right of publicity." *Id.*

211. *Id.*; *see* Richard B. Hoffman, *The Right of Publicity – Heirs' Right, Advertisers' Windfall, or Courts' Nightmare?*, 31 DEPAUL L. REV. 1, 27-28 (1981); Felcher & Rubin, *supra* note 157, at 1130.

212. Madow, *supra* note 12, at 207; McKenna, *supra* note 9, at 261.

213. Madow, *supra* note 12, at 211-12.

214. *Id.* at 209.

215. *Id.*

Economic incentives theory is even more unrealistic in the posthumous context. In all likelihood, the *post* mortem right of publicity has a disincentivizing effect on a celebrity's heirs. Allowing heirs to inherit exclusive property rights in a deceased celebrity's identity provides them with no incentive to develop their own talents or identities and to offer them for society's benefit.[216] "[T]he celebrity already gathered fame and its attendant wealth, and the [heirs] may idly enjoy its benefits."[217] Moreover, economic incentives completely fails to justify *per* mortem right of publicity protection. It is inconceivable that an individual can be incentivized to die, especially in any manner conceivably suitable for later commercial use. And it is unlikely that social and moral norms would tolerate a law that rewards such a practice. The *per* mortem context, therefore, allows a decedent no possibility of anticipating or reaping the potential benefits of his commercially valuable identity.

V. IDENTITY APPROPRIATION IN GERMANY

In response to the theoretical challenges asserted above, several commentators have recently proposed non-traditional, non-property justifications for the U.S. right of publicity. Notably, Kantian autonomy, as manifested through Germany's right of personality, has been suggested as an alternative rationale for protecting both the moral and economic interests people maintain in their identities. This Note extends this proposition as a means of reconciling California's *pre*, *post*, and *per* mortem rights of publicity.

A. The Right of Personality

German identity protection is comprised of statutory rights in a person's name and image and a judicially created general right of personality.[218] Most judgments concerning unauthorized identity appropriation arise under the specific statutes;[219] however, when they prove inapplicable or insufficient, the general right of personality serves as a "catch-all" or "gap filler" for other appropriation of identity claims.[220]

1. The Right to Image

Section 22 of Germany's Law on Artistic Creations (KUG) recognizes

---

216. Decker, *supra* note 193, at 263.

217. *Id.*

218. 1 MCCARTHY, *supra* note 7, § 6:163.

219. Ellen S. Bass, Comment, *A Right in Search of a Coherent Rationale – Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights*, 42 U.S.F. L. REV. 799, 829 (2008).

220. *Id.* at 831; Susanne Bergmann, *Publicity Rights in the United States and in Germany: A Comparative Analysis*, 19 LOY. L.A. ENT. L. REV. 479, 503 (1999).

the right to one's image.[221] It provides that a person's picture "may only be circulated or displayed with the consent of the [person] pictured."[222] Section 22 KUG also provides for post mortem protection, stating, "After the death of the [person] pictured the consent of his relatives is required up to the expiration of [ten] years."[223] A claim under 22 KUG requires that the depicted person be recognizable from the unauthorized portrayal,[224] but recognition is not limited to the individual's face.[225] Likeness has also been found in characteristic features, including clothing, hairstyle, gestures, silhouette, and backside.[226] Further, German courts and commentators define the term "picture" broadly, covering "all techniques and types for displaying a person."[227]

2. The Right to Name

Section 12 of the German Civil Code (BGB) prohibits unauthorized use of another person's name.[228] It provides, "if the rights of the person entitled to use a name [are] injured because of another's unauthorized use of the same name, the person entitled to use the name has the right to claim to restrain disturbance by the other person."[229] The right to one's name includes an individual's surname and family name, as well as publicly known stage names, pseudonyms, and nicknames.[230] An action arises under section 12 BGB only if "the use of the name causes a likelihood of confusion among the public."[231] If there is no such likelihood of confusion, as is likely the case with most non-celebrities, the general right to personality provides supplementary protection for the right to name.[232] Germany's Federal Supreme Court has held the right to name to be inalienable and not descendible.[233] The general right of personality, however, provides supplementary protection in this regard as well.[234]

---

221. Kunsturhebergesetz [KUG] [Law on Artistic Creations], 1907, BUNDESGESETZBLATT, Teil III [BGBL. III] § 22 (Ger.), *translated in* 1 MCCARTHY, *supra* note 7, § 6:172.

222. *Id.*

223. *Id.* ("Relatives in terms of this Act are his surviving spouse and children, or failing these, the parents.").

224. 1 MCCARTHY, *supra* note 7, § 6:164.

225. *Id.*

226. Bergmann, *supra* note 220, at 504.

227. 1 MCCARTHY, *supra* note 7, § 6:164.

228. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], 1900, REICHGESETZBLATT, Teil II [RGBL. II] § 12, *translated in* 1 MCCARTHY, *supra* note 7, § 6:172.

229. *Id.*

230. 1 MCCARTHY, *supra* note 7, § 6:165.

231. *Id.*; *see* Bergmann, *supra* note 220, at 511.

232. 1 MCCARTHY, *supra* note 7, § 6:165.

233. EUROPEAN TORT AND INSURANCE LAW YEARBOOK: EUROPEAN TORT LAW 2007 291-92 (Helmut Koziol & Barbara C. Steininger, eds., 2007).

234. *Id.*

3. The General Right of Personality

In 1954 the Federal Supreme Court created supplemental protection for the rights to name and image by recognizing a "general right of personality."[235] This right protects against all other infringements of an individual's personality.[236] The Court has established no conclusive definition of the right; rather, its scope is determined on a case-by-case basis.[237] Factual circumstances in which the general right of personality has been applied include intrusion into the private sphere; the publication of personal information; defamation; portrayal in false light; and most importantly, for the purposes of this Note, unauthorized commercial appropriation.[238] German courts have employed the inter-related concepts of dignity, autonomy, and self-determination in varying degrees to justify the scope of personality rights within these particular contexts.[239]

B. Theory and Policy

Unlike the U.S. right of publicity, Germany's right of personality is not an intellectual property right; it is a personal right grounded in the country's constitutional guarantee of human dignity.[240] Drafted amid national defeat and humiliation following the collapse of the Third Reich in 1945,[241] the German Constitution (Basic Law) reflects a "conscious intention to elevate modern Germany beyond the inhumanity of Naziism . . . ."[242] This is evident in Article 1(1), which states emphatically, "Human dignity shall be inviolable."[243] Article 1(2) strengthens this guarantee by emphasizing human rights as dignity's practical focus.[244] It provides, "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."[245] With human dignity at its core, the Basic Law establishes a constitutional order for Germany in which human values "are

---

235. Bass, *supra* note 219, at 830.

236. *Id.*

237. Bergmann, *supra* note 220, at 502.

238. HUW BEVERLEY-SMITH ET AL., PRIVACY, PROPERTY AND PERSONALITY: CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION 114-15 (2005).

239. *Id.* at 114-19.

240. Bass, *supra* note 219, at 828-29.

241. Ernst Benda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 SMU L. REV. 443, 445 (2000).

242. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 971 (1997).

243. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1(1) (Ger), *translated in* EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES, app. B (2002).

244. Eberle, *supra* note 242, at 971.

245. GRUNDGESETZ [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1(2) (Ger), *translated in* EBERLE, *supra* note 243, app. B.

not to be sacrificed for the exigencies of the day," as had occurred under the Nazi regime.[246]

"The concept of human dignity in the Basic Law reflects the influence of . . . Christian natural law, Kantian moral philosophy, and more individualistic, or existential, theories of personal autonomy and self-determination."[247] Although its drafters did not intend for the Basic Law to be strictly associated with any one of these philosophies,[248] Germany's Federal Constitutional Court has mainly followed Immanuel Kant's theory of moral autonomy in interpreting dignity's meaning.[249]

1. Kantian Autonomy

Kantian moral and political philosophy is founded on Kant's conception of human dignity.[250] Kant viewed dignity as deriving from the innate freedom required to exercise human reason in pursuit of autonomy,[251] with moral autonomy being "the highest goal of organized society."[252] Kantian autonomy, therefore, is considered the "universal" and "unconditional" human capacity for moral legislation.[253] It is self-governance, "free from moral determinism, and not motivated by sensuous desires."[254] Simplified, moral autonomy reflects the process of choosing that which is good because it is good.[255]

Under this model, people can self-legislate only if they are free from external constraints.[256] Therefore, individual liberty must presuppose autonomy.[257] According to Kant, liberty is the "'one sole and original right that belongs to every human being by virtue of his humanity,' and it comprises 'the attribute of a human being's being his own master.'"[258] Outside interference with one's person necessarily violates this innate right, and as such, autonomy

246. EBERLE, *supra* note 243, at 19; *see* Eberle, *supra* note 242, at 967.

247. EBERLE, *supra* note 243, at 42-43. "Under Christian natural law theories, dignity is a gift from God and, therefore, an inalienable aspect of humanity, beyond human tampering." *Id.* at 43. "[The third] theory seems the one most in accord with American views, notably present in free-speech law." *Id.*

248. *Id.* at 42.

249. *Id.* at 43.

250. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS, ix (John Ladd trans. 1965) (1797).

251. Haemmerli, *supra* note 13, at 415-16.

252. McKenna, *supra* note 9, at 276 n.217.

253. Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1097 (2008).

254. *Id.* at 1095.

255. H.J. PATON, THE MORAL LAW 60 (1947).

256. KANT, *supra* note 250, xi; Haemmerli, *supra* note 13, at 414-15. Kant refers to liberty, freedom from external constraints, as "negative freedom," and autonomy, freedom from internal constraints, as "positive freedom." *Id.*

257. KANT, *supra* note 250, xi.

258. Haemmerli, *supra* note 13, at 414 (quoting KANT, *supra* note 250, at 44).

requires that humans be treated "always as ends in themselves [and] never as means."[259]

2. Moral Self-Determination

Further rooted in Kantian conceptions of dignity and autonomy is Article 2(1) of the Basic Law, which provides, "Everyone shall have the right to the free development of his personality . . . ."[260] This constitutional principle facilitates the full development within society of everyone's individual capabilities, allowing all people to realize their inner persons.[261] For Kant, the development of the inner self is a right of moral-self determination, as is illustrated by Kant's view of authorial expression.[262]

Kant considered an author's expression to be "an action of the will," a continuation of the author's inner self.[263] As such, a human being is considered to have a "'natural purposiveness' . . . to fulfill the speaker's capacity to 'communicate his thoughts.'"[264] An author's right in his communicative acts is therefore an innate right of self-ownership.[265] In this sense, only the author may decide to disclose his or her work and in what form such disclosure will occur.[266] The dissemination of an author's words without consent forces the author to speak against his or her will and is a violation of the author's freedom and autonomy.[267]

3. Economic Self-Determination

Kant's conception of authorial rights has found expression in German Copyright Law.[268] German copyright protects both an author's personal interest in his work and his commercial interest in the exploitation of that work.[269] As a

259. Eberle, *supra* note 242, at 974.

260. GRUNDGESETZ [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 2(1) (Ger), *translated in* EBERLE, *supra* note 243, at app. B.

261. Edward J. Eberle, *The German Idea of Freedom*, 10 OR. REV. INT'L L. 1, 23 (2008).

262. Treiger-Bar-Am, *supra* note 253, at 1073.

263. Bass, *supra* note 219, at 836.

264. Treiger-Bar-Am, *supra* note 253, at 1076 (quoting IMMANUEL KANT, THE METAPHYSICS OF MORALS 182 (Mary Gregor ed., 1996) (1797)).

265. Bass, *supra* note 219, at 836.

266. Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 375 (1993).

267. *Id.* at 374-75; Bass, *supra* note 219, at 836.

268. Netanel, *supra* note 266, at 378-79. Kant's conception of author's rights is reflected in the monist school of copyright theory, which was adopted by the German Copyright Act. *Id.*; *see generally* Urheberrechtsgesetz [UrhG] [Copyright Law], 1965, BUNDESGESETZBLATT, Teil I [BGBL. I]. The monist theory views authorial rights as a "fundamentally personal right to determine when, in what form, and for what purpose his creative work is to be communicated to the public." Bass, *supra* note 219, at 833.

269. Netanel, *supra* note 266, at 379.

personality right, copyright is part of an author's ownership of the inner-self, and "economic interests are necessarily subsumed within [this] personal sphere."[270] This Note refers to the latter principle as "economic self-determination."[271]

Significantly, for the purposes of this Note, German courts have interpreted 22 KUG, the right to image, in accordance with these German copyright principles.[272] "Just as the author has the inherent right to determine the communication of the author's thoughts to the public, the individual has the inherent right to determine whether and how his image will be displayed in the world."[273] In this light, 22 KUG constitutes a hybrid right, protecting both the moral and the economic interests in a person's image.[274]

C. Commercial Appropriation Cases

The suitability of Kantian autonomy as an alternative, reconciliatory approach to California's property-based rights of publicity is evident in Germany's application of the right of personality in commercial appropriation cases. There, German courts have generalized the principle of economic self-determination to extend 22 KUG's hybrid protection to the general right of personality.[275] As is illustrated by the case law below, this broad application allows for an assignable and descendible commercial interest in a person's identity, similar to the U.S. right of publicity. It also affords posthumous protection of a person's moral interests against unauthorized commercial appropriation, comparable to the privacy motives of AB 585.

1. Assignable Economic Interests

In the case of *Nena*, a merchandising company brought suit to recover a licensing fee from a manufacturer of products featuring the likeness of a German singer performing under the stage name, "Nena."[276] The merchandising

---

270. Bass, *supra* note 219, at 833.

271. *See* Alice Farmer, *Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries*, 39 N.Y.U. J. INT'L L. & POL. 417, 418 (2006) (defining "economic self-determination" politically as "a people's capacity to dispose freely of natural resources in accordance with democratically-taken decisions). *See infra* note 276.

272. Bass, *supra* note 219, at 833.

273. *Id.* at 836.

274. *Id.* at 833.

275. BEVERLY-SMITH ET AL., *supra* note 238, at 118. "It is well established that . . . the general personality right grants a right of self-determination concerning the commercial use of all aspects of personality." *Id.*

276. Bundesgerichtshof [BGH] [Federal Court of Justice] October 14, 1986, VI ZR 10/86 (Nena), *translated in* 19 INT'L REV. INDUS. PROP. & COPYRIGHT L. 269 (1988). "The plaintiff claims that the licensing fees range between DM 5,000 and DM 20,000." *Id.* at 270.

company had an exclusive license to use all of Nena's "commercially exploitable rights, including the right to her own likeness,"[277] which the manufacturer did not have consent to use.[278] In its defense, the manufacturer claimed that, "as an extension of the general personality right," the right to image is inalienable.[279] The Federal Supreme Court agreed, but concluded that the merchandising company was entitled to recover a fee regardless.[280] The Court stated,

> [T]he plaintiff's claim is not . . . defeated by the fact that the contract . . . due to the nonassignability of the right in one's own likeness, did not confer rights upon the plaintiff, which the plaintiff could claim against third parties in its own name. At issue here is not the right to an injunction order but the right to recover a fee which plaintiff demands for the commercial exploitation of the vocalist Nena's likeness. The decision whether to award this recovery does not require a decision on the controversial question of whether or not the right to one's own likeness, due to its legal nature as a general personality right, is transferable. The defendant's use of Nena's likeness gave rise to the plaintiff's right to recover the usual fee for permission to utilize the likeness . . . and does not require that Nena's right in her own likeness had been transferred to the plaintiff.[281]

2. Descendible Economic Interests

In the case of *Marlene Dietrich*, a theater production company authorized the use of Marlene Dietrich's name and image in conjunction with the sale of automobiles, cosmetics, and other merchandise to promote the company's musical on the life of the late actress.[282] Dietrich's sole heir sought an injunction against and compensation for this commercial use, claiming posthumous infringement of Marlene's personality rights.[283] The company argued that posthumous personality rights protected only the non-material

277. *Id.* at 260-70.
278. *Id.*
279. *Id.*
280. *Id.* at 271.
281. *Id.*
282. Bundesgerichtshof [BGH] [Federal Court of Justice] December 1, 1999, 1 ZP 49/97 (Marlene Dietrich), *translated at* http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=726.
283. *Id.*

interests of the deceased, but the Federal Supreme Court disagreed.[284] Based on the recognized ability to exploit one's personality during life, the Court concluded that the inheritability of the elements of the right of personality having financial value was necessary to protect those same interests after death:[285]

> An effective posthumous protection of the elements of the right of personality which are of financial value is only guaranteed if the heir can step into the role of the holder of the right of personality and can, in defending the presumed interests of the deceased, proceed in the same way as that person could have done against an unauthorised exploitation.[286]

3. Posthumous Moral Interests

In the case of *Heinz Erhardt*, the son of a well-known comedian sought an injunction against, not compensation for, the posthumous use of his deceased father's voice imitation in a radio advertisement.[287] The Hamburg Court of Appeals (OLG Hamburg) held that "an artist's personality could not be subjected to commercial exploitation immediately after his death" because of the deceased's "claim to dignity" and "the necessity to reserve the commercial exploitation to the artist's heirs."[288] The court emphasized that, because the general right of personality would have protected Erhardt's likeness during life, it would be constitutionally unacceptable if his personality could be freely imitated immediately after his death.[289] This holds true "regardless of whether the imitation compromises the dignity and integrity of a person or their heir's right of exploitation."[290]

VI. RECOMMENDATIONS

This Note advocates California's adoption of a personality rights regime as a means of reconciling the compounding disparities among the state's current *pre*, *post*, and *per* mortem right of publicity statutes. The German cases

---

284. *Id.*
285. *Id.*
286. *Id.*
287. OBERLANDESGERICHT HAMBURG [OLG HAMBURG] [Hamburg Court of Appeals] May 8, 1989, 3 W 45/89 (Heinz Erhardt), *translated in* 21 INT'L REV. INDUS. PROP. & COPYRIGHT L. 881 (1990).
288. *Id.* at 882.
289. *Id.* at 881.
290. *Id.*

discussed above illustrate how the application of economic self-determination can serve as a comprehensive theoretical justification for California's statutory rights of publicity, which have proven incompatible with its property-based regime.[291] Economic self-determination accounts for the alienability and descendibility characteristics that have come to define California's *pre* and *post* mortem rights of publicity,[292] while simultaneously providing for the personal, posthumous interests served by the state's *pre* mortem protection.[293] Thus, individuals in California would be able to recover profits for the unauthorized use of their commercially valuable identities, but commercial value would not be a pre-requisite for all posthumous protection.[294] Moreover, economic self-determination rationalizes the prevailing principle that all people have a right of publicity as an innate characteristic of personhood,[295] which better addresses the critiques of granting exclusive ownership in the cultural product of fame.[296]

Admittedly, the Kantian foundation of Germany's right of personality does not exactly square-up with the law of the United States.[297] Although both U.S. and German law rest on the duality of liberty and autonomy,[298] in the United States, there is no designated moral value organizing this self-governance.[299] "Americans [instead] see themselves as autonomous people who themselves determine the norms and values that infuse the social order."[300] But despite this disparity, personality ideals are not entirely unrecognized in the United States,[301] especially in California.

Over the last thirty years, moral rights[302] legislation has emerged in the United States as a form of limited personality protection.[303] As historically found in European law, this bundle of rights protects an artist's interest in his or her work as an expression of the artist's personality and the foundation of his or her artistic reputation.[304] In order to protect this reputation, an artist is typically

---

291. *See supra* Parts III, IV.

292. *See supra* Parts V.C.1, 2.

293. *See supra* Part V.C.3.

294. *See supra* Part III.A.

295. *See id.*

296. *See supra* Part IV.B.

297. EBERLE, *supra* note 243, at 127. German autonomy law is focused on dignity, not privacy. *Id.*

298. *Id.* at 131.

299. *Id.* at 47-48, 131. There is no reference to dignity in the U.S. Constitution. *Id.* at 47.

300. *Id.* at 48.

301. *Id.* at 47. "Instead, the idea of dignity and personality must be implied from the promise of liberty in the due process clause or other textual authority." *Id.* "The self-realization component to dignity is well represented in American law, especially in substantive due process and free speech law." *Id.* at 46.

302. "The most popular name identifying this bundle of personal rights is the French term *droit moral*, loosely translated as 'moral rights.'" John G. Petrovich, *Artists' Statutory* Droit Moral *in California: A Critical Appraisal*, 15 LOY. L.A. ENT. L. Rev. 29, 29 (1981).

303. *See* CAL. CIV. CODE § 987 (2010).

304. Petrovich, *supra* note 302, at 29.

granted the rights to creation, disclosure, paternity, and integrity in his or her work.[305]

In 1981 the California legislature enacted the *California Art Preservation Act*,[306] statutorily recognizing the moral rights of artists in certain visual arts.[307] Notably, subsection (a) of the Act states, "The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is *an expression of the artist's personality*, is detrimental to the *artist's reputation*, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction."[308] Although the Act only provides for the rights of paternity[309] and integrity,[310] it is speculated that the right of disclosure was omitted due to legislative concerns over federal copyright preemption.[311]

An infringement of an artist's moral rights under the Act entitles the artist to injunctive relief, actual and punitive damages, reasonable attorneys' and expert witness fees, and "any other relief which the court deems proper."[312] More importantly, for the purposes of this Note, the Act provides for posthumous protection of these personal interests.[313] Subsection (g) of the Act states, "The rights and duties created under this section: (1) Shall, with respect to the artist, or if any artist is deceased, his or her heir, beneficiary, devisee, or personal representative, exist until the 50th anniversary of the death of the artist."[314]

This Note does not suggest that the proposed personality-based identity protection is capable of integration with California's moral rights law. Rather, this law illustrates California's recognition of personality rights as a means of protecting a person's innate interest in the moral and economic self-determination of his or her personality—both during life and after death.

---

305. *Id.*

306. 1979 Cal. Stat. ch. 409, § 1.

307. Petrovich, *supra* note 302, at 30 ("California [was] the first state to provide specific statutory protection for the moral rights of visual artists.").

308. CAL. CIV. CODE § 987(a) (2010) (emphasis added). "'Fine art' means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser." *Id.* § 987(b)(2).

309. *Id.* § 987(d) ("The artist shall retain at all times the right to claim authorship, or, for a just and valid reason, to disclaim authorship of his or her work of fine art.").

310. *Id.* § 987(c)(1) ("No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.").

311. Peter H. Karlen, *Moral Rights in California*, 19 SAN DIEGO L. REV. 675, 685 (1982).

312. CAL. CIV. CODE § 987(e) (2010).

313. *Id.* § 987(g).

314. *Id.*

VII. CONCLUSION

California's *per* mortem right of publicity compromises the state's pre-existing publicity-as-property statutory regime. AB 585 was motivated by the emotional concerns found at the heart of privacy law, and its ability to address the economic injuries that define publicity rights is incompatible with the commercial value principles of California's *pre* and *post* mortem statutes. Moreover, the state's *pre* mortem protection overextends the theoretical justifications commonly purported for the state's property-based publicity rights. Germany's right of personality, however, presents a comparative model for reconciling California's incompatible right of publicity statutes. As justified by the Kantian-inspired theory of economic self-determination, the right of personality accounts for an assignable and descendible identity without requiring economic value or emotional injury. In this regard, California's protection against commercial appropriation could rightfully be considered an innate right of personhood.

GLOBAL GREEN: WHY A GLOBAL DIESEL REGULATION FOR MOBILE SOURCES MIGHT BE A GOOD IDEA

Joseph E. Sawin * **

I. INTRODUCTION

Air pollution knows no borders.[1] Prevailing winds have been found to carry particulates from Asian sources across the Pacific Ocean to the western United States, and likewise, from eastern U.S. sources across the Atlantic to Europe.[2] A primary source of this air pollution is diesel exhaust emissions.[3] Diesel exhaust emitted from mobile sources creates health and environmental concerns because it contains both particulate matter and gases that contribute to ozone (a component of smog), acid rain, and global climate change.[4] According to the United States Environmental Protection Agency (EPA), particulate matter alone causes 15,000 premature deaths each year in the United States.[5] Generally, regulated diesel exhaust emission gases include nitrous oxides (NO_x), hydrocarbons (HC), carbon monoxide (CO), and particulate matter (PM).[6] Beginning in 2014 the EPA will regulate an additional gas, carbon dioxide (CO_2), a common greenhouse gas found in the exhaust of hydrocarbon-burning combustion systems such as diesel engines.[7]

Although air pollution travels internationally, global diesel engine and

---

* J.D., 2012, Indiana University Robert H. McKinney School of Law, Indianapolis, Indiana; M.S., 2004, Automotive Engineering, University of Michigan, Ann Arbor, Michigan; B.S., 2000, Mechanical Engineering, Purdue University, West Lafayette, Indiana. I would like to thank my wife, Jenny, and my mother, Mary, for all of their support, feedback, and encouragement without which this Note would not have been possible.

** Recipient of the 2011 Henry B. Blackwell II Prize for best student note or article on an international law topic in the Indiana International & Comparative Law Review.

1. U.S. ENVTL. PROT. AGENCY, THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT 10-11 (2007), *available at* http://www.epa.gov/airquality/peg_caa/pdfs/peg.pdf.

2. Robert Lee Hotz, *Asian Air Pollution Affects Our Weather*, L.A. TIMES (Mar. 6, 2007), http://articles.latimes.com/2007/mar/06/science/sci-asiapollute6.

3. *See* U.S. ENVTL. PROT. AGENCY, DIESEL EXHAUST IN THE UNITED STATES (2003), *available at* http://epa.gov/cleandiesel/documents/420f03022.pdf.

4. *Id.*

5. *Id.*

6. *How Emissions Are Regulated*, DIESELNET, http://www.dieselnet.com/standards/intro.html (last visited April 14, 2012).

7. Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57106 (Sept. 15, 2011); Press Release, U.S. Envtl. Prot. Agency, DOT, EPA Propose the Nation's First Greenhouse Gas and Fuel Efficiency Standards for Trucks and Buses (Oct. 25, 2010), *available at* http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/9b3706622f4ac560852577c7005ea140!OpenDocument.

equipment manufacturers are regulated only by the local laws of the countries in which they conduct business.[8] Regulating entities can be divided into three subsets: (1) entities that set their own diesel exhaust emission standards ("first adopters"), (2) entities that accept products into their respective countries from a first adopter ("second adopters"), and (3) entities that do not have regulations because their governments have not enacted any or because a governing body simply does not exist ("unregulated" countries).[9]

For many years, a balance has existed in the world between environmental and economic interests. Developed countries have placed greater emphasis on reducing pollution, whereas developing countries have focused primarily on economic development.[10] This Note proposes the adoption of an international diesel exhaust emission standard by weighing both the environmental and economic costs and benefits of a global mobile-source diesel regulation. The following discussion illustrates that, with the proper balance of regulations, it is possible to achieve economic growth through trade while also protecting the environment. Part II of this Note provides a brief technical background on diesel exhaust emissions and discusses existing regulations among first and second adopters. Part III outlines the environmental issues surrounding air pollution from diesel exhaust emissions and discusses the environmental impacts of unregulated or under-regulated countries. Part IV discusses the barriers that have prevented the adoption of a global diesel emission regulation, and Part V analyzes the economic costs associated with the current structure of multiple diesel regulations. Finally, Parts VI and VII suggest that a global regulation may be the most economically efficient solution to the diesel exhaust emission problem, offering a roadmap for the adoption of an international standard.

II. A BACKGROUND ON DIESEL EMISSIONS

"The single most important reason that diesel engines are used in most applications is their superior energy efficiency."[11] Compared to spark-ignited engines of similar power outputs, diesel engines perform the same amount of work while consuming less fuel.[12] This advantage is the result of several

8. U.N. Dep't of Econ. & Soc. Affairs, Global Overview on Fuel Efficiency and Motor Vehicle Emission Standards: Policy Options and Perspectives for International Cooperation, secs. 13-15, CSD19/2011/BP3 (2012), *available at* http://www.un.org/esa/dsd/resources/res_pdfs/csd-19/Background-paper3-transport.pdf.

9. Interview with Robert Jorgensen, Exec. Dir., Cummins Inc. Prod. Envtl. Mgmt., in Columbus, Ind. (Jan. 5, 2011).

10. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 10 (1994); *see generally* GREENING INTERNATIONAL LAW (Philippe Sands ed., 1994).

11. CHARLES RIVER ASSOCS., DIESEL TECHNOLOGY AND THE AMERICAN ECONOMY 2 (Oct. 2000), *available at* http://www.dieselforum.org/index.cfm?objectid=93C6F9F0-9381-11E0-98E9000C296BA163.

12. *Id.*

characteristics, "including reduced pumping losses due to lack of (or greatly reduced) throttling, and a combustion cycle that operates at a higher compression ratio and with a very lean air/fuel mixture relative to an equivalent-performance gasoline engine."[13] Typical efficiency improvements range between twenty-five and thirty-five percent depending on the application,[14] of which there is a wide variety. Diesel engines are used in light-duty passenger cars,[15] heavy-duty trucks,[16] buses,[17] construction and farm equipment,[18] electrical power generators,[19] maritime vessels,[20] and locomotives.[21]

A. Diesel Exhaust Emissions

Diesel emissions are created from the combustion process of an internal combustion engine.[22] Because of stringent standards imposed by the EPA in the 1990s, diesel engine manufacturers began employing technologies such as injection timing retard and intake air cooling in order to reduce NO_x emissions.[23] The EPA also placed a major emphasis during this period on reducing particulate matter from heavy-duty engines.[24] As a result, diesel manufacturers achieved significant PM reductions "through improvements in air management, combustion, oil consumption control, and fuel injection."[25] "When compared to emissions from unregulated engines in the early 1970s, today's on-highway diesel engines emit [ninety-nine] percent less PM and NO_x."[26]

13. *See* U.S. ENVTL. PROT. AGENCY ET AL., INTERIM JOINT TECHNICAL ASSESSMENT REPORT: LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSION STANDARDS AND CORPORATE AVERAGE FUEL ECONOMY STANDARDS FOR MODEL YEARS 2017-2025 ch. 3 at 1, 21 (2010), *available at* www.epa.gov/otaq/climate/regulations/ldv-ghg-tar.pdf.

14. CHARLES RIVER ASSOCS., *supra* note 11, at 2.

15. *Id.* at 31-33.

16. *Id.* at 9-11.

17. *Id.* at 36-40.

18. *Id.* at 22-28.

19. *Id.* at 80.

20. *Id.* at 15-18.

21. *Id.* at 12-15.

22. *Technology Guide: Paper Abstracts*, DIESELNET, http://www.dieselnet.com/tginfo/abstracts.html (last visited Apr. 10, 2012).

23. *Id.*

24. *Id.*

25. *Id.*

26. CUMMINS INC., SUSTAINABILITY REPORT 22 (2010), *available at* http://www.cummins.com/cmiweb/attachments/public/About%20Cummins/Sustainability%20Report/Cummins_2010_SustainabilityReport_FULL.pdf.zip.

B. How Diesels Are Regulated

Diesel engine regulations for mobile sources can be divided into three categories: those of first adopters, second adopters, and unregulated countries.[27] First adopters set their own emission standards and consist of the United States of America, the European Union, Japan, and the International Maritime Organization (IMO), a division of the United Nations.[28] The world's remaining countries are either second adopters or unregulated countries.[29] Second adopters accept a first adopter's products into their respective countries and generally implement first adopter regulations in whole or in part.[30] This practice can be a cost-effective means of obtaining regulated products in a given market.[31] Second adopter countries include Australia, Brazil, China, India, Mexico, and South Korea.[32] An unregulated country accepts any diesel product, without regard to the amount of pollution it emits,[33] and diesel exhaust emissions are highest in these nations.[34]

1. First Adopters

First adopters have been regulating mobile sources for several decades, but the regulation of diesel emissions has increased sharply over the past ten years. The United States began regulating mobile sources with the passage of the Clean Air Act of 1970.[35] The EPA next began regulating diesel mobile sources for on-highway trucks in 1985.[36] After twenty years of highway mobile source regulation and increasingly costly controls on the automotive industry, Congress recognized that a considerable amount of pollution comes from

27. *See supra* note 9 and accompanying text.

28. Interview with Rich S. Wagner, Emissions Certification & Compliance Director, Cummins Inc., in Columbus, Ind. (Oct. 18, 2010); U.N. Dep't of Econ. & Soc. Affairs, *supra* note 8, sec. 64; *see infra* notes 48-55 and accompanying text (discussing IMO standards).

29. Interview with Robert Jorgensen, *supra* note 9.

30. *Id.*

31. *See Technical Information on Technical Barriers to Trade*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm (last visited May 4, 2012).

32. Interview with Rich S. Wagner, *supra* note 28. This is not an exhaustive list and serves as an illustration for the increase in countries adopting their own unique requirements for certified products. *See Emission Standards*, DIESELNET, http://www.dieselnet.com/standards/ (last visited May 21, 2012) (providing a summary of worldwide diesel emissions standards).

33. Interview with Rich S. Wagner, *supra* note 28.

34. *Id.*

35. U.S. ENVTL. PROT. AGENCY, MILESTONES IN AUTO EMISSIONS CONTROL 1 (1994), *available at* www.epa.gov/oms/consumer/12-miles.pdf; Clean Air Act of 1970, 42 U.S.C. § 7401.

36. U.S. ENVTL. PROT. AGENCY, *supra* note 35, at 2; Emission Standards for 1991 and Later Model Year Diesel Heavy-Duty Engines, 50 Fed. Reg. 10,653 (Mar. 15, 1985) (codified at 40 C.F.R. pt. 86); Emission Standards for 1994 and Later Model Year Diesel Heavy-Duty Engines and Vehicles, 50 Fed. Reg. 10,654 (Mar. 15, 1985) (codified at 40 C.F.R. pt. 86).

nonroad sources and asked the EPA to quantify those unregulated emissions.[37] The EPA adopted nonroad source regulation in 1994[38] and, by 2000, had turned its attention to regulating marine[39] and locomotive engines.[40]

The European Union began regulating mobile sources in 1988,[41] followed by heavy-duty trucks in 1992[42] and non-road engines in 1997.[43] Unlike EPA regulations, "[European Union] regulations introduce different emission limits for *compression ignition* (diesel) and *positive ignition* (gasoline, NG, LPG, ethanol, [...]) vehicles. Diesels have more stringent CO standards but are allowed higher NO_x."[44]

Japan began regulating diesel passenger cars in 1986.[45] These regulations, however, did not become stringent until 2005, when off-road engine regulations were added.[46] Japan also has regulations to reduce emissions from older vehicles currently in-use, either through requirements for fleets to upgrade to newer model vehicles or requirements to retrofit vehicles with devices to reduce emissions.[47]

The IMO is a relative newcomer to the first adopter group for diesel exhaust emissions but has made a significant impact on reducing pollution from marine vessels throughout the globe.[48] "Oil pollution of the seas was recognized

---

37. U.S. ENVTL. PROT. AGENCY, NONROAD ENGINE AND VEHICLE EMISSION STUDY—REPORT, at v (1991) *available at* www.epa.gov/nonroad/nrstudy.pdf.

38. Determination of Significance for Nonroad Sources and Emission Standards for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts, 59 Fed. Reg. 31,306 (June 17, 1994) (codified at 40 C.F.R. pt. 89).

39. *Emission Standards, United States, Marine Diesel Engines*, DIESELNET, http://www.dieselnet.com/standards/us/marine.php (last updated Aug. 2011); Control of Emissions from Marine Compression-Ignition Engines, 64 Fed. Reg. 73,331 (Dec. 29, 1999) (codified at 40 C.F.R. pt. 94).

40. *Emission Standards, United States, Locomotives*, DIESELNET, http://www.dieselnet.com/standards/us/loco.php (last updated April 2008). Control of Air Pollution from Locomotives and Locomotive Engines, 63 Fed. Reg. 18,998 (Apr. 16, 1998) (codified in 40 C.F.R. pt. 92).

41. Council Directive 88/76/EEC, art. 2, 1987 O.J. (L 36) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31988L0076:en:NOT.

42. *Emission Standards, Europe, Heavy-Duty Diesel Truck and Bus Engines*, DIESELNET, http://dieselnet.com/standards/eu/hd.php (last visited May 8, 2012).

43. *Emission Standards, Europe, Nonraod Diesel Engines*, DIESELNET, http://dieselnet.com/standards/eu/nonroad.php (last visited May 8, 2012).

44. *Emission Standards, Europe, Cars and Light Trucks*, DIESELNET, http://www.dieselnet.com/standards/eu/ld.php#stds (last visited Apr. 10, 2012); *see Emission Standards, Europe, Nonroad Diesel Engines*, DIESELNET, http://www.dieselnet.com/standards/eu/nonroad.php (last visited May 8, 2012).

45. *Emission Standards, Japan*, DIESELNET, http://www.dieselnet.com/standards/jp/ (last visited May 8, 2012).

46. *Id.*

47. *Id.*

48. In the case of U.S. commercial marine products, IMO is a second adopter because the EPA has had its own regulations for commercial marine products since 2004. *Diesel Boats and*

as a problem in the first half of the 20th century[,] and various countries introduced national regulations to control discharges of oil within their territorial waters."[49] Realizing that oil pollution was an international concern, the United Kingdom organized a conference on oil pollution in 1954.[50] The conference culminated in the adoption of the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL),[51] which was transferred to the IMO in 1958.[52]

The IMO has since developed regulations, known as "annexes,"[53] that address various types of pollution.[54] Most notably, in September 1997 the IMO adopted *MARPOL Annex VI: Prevention of Air Pollution from Ships*.[55] This regulation establishes limits on sulfur oxide and nitrogen oxide emissions from ship exhausts and prohibits deliberate emissions of ozone depleting substances.[56] The IMO is unique from other first adopters in that it does not implement its regulations.[57] Rather, a country may choose to adopt and enforce an IMO regulation under that country's sovereign laws.[58] Of the one hundred sixty-three IMO member countries,[59] sixty-one have ratified *MARPOL Annex VI*, representing almost eighty-five percent of the world's shipping tonnage.[60]

Ships, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/oms/marine.htm (last updated June 29, 2011); *see* Control of Emissions from Marine Compression-Ignition Engines, 40 C.F.R. § 94.8(a)(1) (2007).

49. OSPAR COMM'N, BACKGROUND DOCUMENT ON THE ECOLOGICAL QUALITY OBJECTIVE ON OILED GUILLEMOTS 6 (2005).

50. *Id.*

51. *Id.*

52. *Id.*; *The Origins of the International Maritime Organization*, INT'L MAR. ORG., http://www.imo.org/KnowledgeCentre/ReferencesAndArchives/Pages/TheOriginsOfIMO.aspx (last visited Apr. 15, 2012) ("The conference agreed that IMO would assume responsibilities for the convention as soon as the IMO Convention entered into force.").

53. *See International Convention for the Prevention of Pollution from Ships (MARPOL)*, INT'L MAR. ORG., http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx (last visited Apr. 15, 2012).

54. *See Conventions*, INT'L MAR. ORG., http://www.imo.org/About/Conventions/Pages/Home.aspx (last visited Apr. 14, 2012).

55. Int'l Mar. Org., Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto, Sept. 26, 1997, *available at* http://www.admiraltylawguide.com/conven/protomarpol1997.html.

56. *Prevention of Air Pollution from Ships*, INT'L MAR. ORG., http://www.imo.org/blast/mainframe.asp?topic_id=233 (last visited Apr. 10, 2012). In October 2008 the IMO added a Tier III standard, which further regulates harmful emissions from ships. *Id.*

57. *Frequently Asked Questions, How Does IMO Implement Legislation?*, INT'L MAR. ORG., http://www.imo.org/About/Pages/FAQs.aspx (last visited Apr. 10, 2012).

58. *Id.*

59. *See Status of Conventions*, INT'L MAR. ORG., http://www.imo.org/About/Conventions/StatusOfConventions/Documents/status-x.xls (last updated Mar. 31, 2012).

60. *See id.* The United States ratified *MARPOL Annex VI* in October 2008. *See* Press Briefing 44, Int'l Mar. Org., USA Ratifies International Rules on Air Pollution from Ships (Oct.

2. Second Adopters

Second adopters present the most significant challenge to a global company wanting to offer its products worldwide. Some second adopters accept a first adopter's certified product without modifying the first adopter's regulatory requirements;[61] others create additional requirements, such as product modifications and supplementary reporting or testing.[62] For comparison: Australia indiscriminately accepts U.S., European Union, or Japanese certified engines;[63] China, on the other hand, has adopted European Union-type regulations but requires that engines undergo independent Chinese testing and certification procedures.[64] China also has different regulatory standards for different areas within the country.[65] "Large metropolitan areas, including Beijing and Shanghai, have adopted more stringent regulations on an accelerated schedule . . . ."[66]

Similarly, South Korea implements European Union-type regulations but requires that engines be tested locally.[67] Thus, a product already certified by a European Union-approved testing agency and accepted into European Union countries must be re-tested.[68] Because of engine and test cell variability, seemingly identical engine tests may produce dissimilar results when conducted at different facilities.[69] As a consequence, previously tested products that certify close to the EU regulatory emissions limit may be barred from South Korean importation.[70]

Compliance with the unique regulatory requirements of each second adopter country can result in expensive burdens on global manufacturers.[71]

9, 2008), *available at* http://www.imo.org/MediaCentre/PressBriefings/Archives/Pages/2008.aspx (select "15" hyperlink to expand archive).

61. ASIF FAIZ, AIR POLLUTION FROM MOTOR VEHICLES: STANDARDS AND TECHNOLOGIES FOR CONTROLLING EMISSIONS 1, 9-21 (1996).

62. *Id.*

63. *See Vehicle Standard (Australian Design Rule 80/03 – Emission Control for Heavy Vehicles) 2006* (Cth) ss 5.1-5.2 (Austl.).

64. Interview with Rich S. Wagner, *supra* note 28; *Emissions Standards, China*, DIESELNET, http://www.dieselnet.com/standards/cn/ (last updated Nov. 2011); *see* Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution (promulgated by the President of the People's Republic of China, Apr. 29, 2000, effective Sept. 1, 2000), *available at* http://english.mep.gov.cn/Policies_Regulations/laws/environmental_laws/200710/t20071009_109943.htm.

65. *Emissions Standards, China*, *supra* note 64. "In addition to National Standards, which are mandatory nationwide, Environmental Standards may apply to industries that have an impact on the quality of the environment, and Local Standards may be issued by local governments." *Id.*

66. *Id.*

67. Interview with Rich S. Wagner, *supra* note 28.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Technical Information on Technical Barriers to Trade*, *supra* note 31.

These requirements serve as an effective trade barrier[72] and, frustratingly, do not lead to a commensurate reduction in diesel exhaust emissions.[73] In some cases, a second adopter's added requirements may even cause more environmental harm by increasing transaction costs to the point of preventing a global company with superior emission technology from competitively entering that second adopter market.[74] Ironically, the transaction costs to tailor a product for compliance with varying second adopter standards may be so high that an unregulated country, which does not require diesel products with any emission standard, could achieve more cost-effective pollution control than a second adopter.[75]

III. THE ENVIRONMENTAL PROBLEM

"The World Health Organization estimates that urban air pollution contributes to approximately 800,000 deaths and 6.4 million lost life-years worldwide each year . . . ."[76]

> Air pollution from combustion sources is associated with a broad spectrum of acute and chronic health effects, that may vary with the pollutant constituents. Particulate air pollution (i.e. particles small enough to be inhaled into the lung,) is consistently and independently related to the most serious effects, including lung cancer and other cardiopulmonary mortality. Other constituents, such as lead and ozone, are also associated with serious health effects, and contribute to the burden of disease attributable to urban air pollution.[77]

Worse yet, children may suffer more than adults from the effects of diesel

---

72. *Id.*; *see also* Mark Drajem, *U.S. Said to Ask Korea to Accept Auto Standards to Advance Free-Trade Pact*, BLOOMBERG (Oct. 29, 2010), http://www.bloomberg.com/news/2010-10-29/u-s-said-to-ask-korea-to-accept-auto-standards-to-advance-free-trade-pact.html?cmpid=yhoo.

73. Interview with Robert Jorgensen, *supra* note 9.

74. *See Technical Information on Technical Barriers to Trade*, *supra* note 31.

75. For example, suppose a second adopter's added requirements create $100 USD in added product costs but do not reduce the emissions output of the engine. Contrast this with an unregulated country that accepts any diesel product, including the same product for which the second adopter added $100 to the product cost. Thus, the unregulated country is receiving the same emissions output without the added $100 in product costs and has achieved a more cost-effective solution.

76. Sumi Mehta et al., Commentary, *Public Health and Air Pollution in Chinese Cities: Local Research with Global Relevance*, 10 CHINA ENV'T SERIES 65, 65 (2009), *available at* http://www.healtheffects.org/International/CES10.pdf#HEI%20Commentary.

77. WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2002, at 68-69 (2002), *available at* http://www.who.int/entity/whr/2002/en/whr02_en.pdf.

exhaust pollution. An increased frequency of childhood illness has been associated with air pollution, likely because "[children] breathe [fifty] percent more air per pound of body weight than do adults."[78]

In addition to its negative health consequences, air pollution specifically from diesel powered engines or equipment has negative environmental effects. Ozone reduces yield for both commercial and noncommercial vegetation and is a contributing factor of acid rain.[79] NO_x deposits also stimulate algae growth in fragile coastal ecosystems.[80]

A. Air Pollution Is a Global Problem Addressed Regionally

The social and environmental burdens resulting from diesel exhaust emissions "predominantly occur[] in developing countries."[81] Diesels used as construction equipment and electric generators often are higher polluters than those used in on-highway trucks and buses,[82] and they are more prevalent in developing countries than in developed ones.[83] Developed countries typically have fewer construction projects and more established power generation facilities.[84]

Those countries without diesel exhaust emission standards, or those with ineffective regulations, must absorb the high social costs of poor air quality.[85] Examining the current status of air quality in some second adopter countries indicates that the incremental costs of added regulatory requirements may not outweigh the benefits of modifying a first adopter's regulation. In fact, despite having air pollution regulations, many second adopter countries still have poor air quality.[86] Consider the following information on China, India, and Mexico.

1. China

Urban air pollution accounts for over 500,000 deaths and 4.2 million lost

78. *See* U.S. ENVTL. PROT. AGENCY, WHAT YOU SHOULD KNOW ABOUT DIESEL EXHAUST AND SCHOOL BUS IDLING (2003), *available at* www.epa.gov/cleandiesel/documents/420f03021.pdf.

79. *Id.*

80. U.S. ENVTL. PROT. AGENCY, FINAL REGULATORY IMPACT ANALYSIS: CONTROL OF EMISSIONS FROM MARINE DIESEL ENGINES 98 (1999), *available at* www.epa.gov/oms/regs/nonroad/marine/ci/fr/ria.pdf.

81. WORLD HEALTH ORG., *supra* note 77, at 69.

82. *Id.*

83. Interview with Rich S. Wagner, *supra* note 28.

84. *Id.*

85. *Id.*

86. OECD, ENVIRONMENTAL PERFORMANCE REVIEW OF CHINA 4 (2006), *available at* www.oecd.org/dataoecd/58/23/37657409.pdf. [hereinafter OECD, CHINA]; OECD, ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN INDIA: RAPID ASSESSMENT 7 (2006), *available at* www.oecd.org/dataoecd/39/27/37838061.pdf [hereinafter OECD, INDIA].

life-years annually in China and other "rapidly urbanizing" Asian countries.[87] With its growing economy, China continues to experience increased industrialization, urbanization, and vehicularization.[88] "[M]otor vehicle traffic already represents the [country's] largest source of urban air pollution," and "vehicle numbers doubled in the five years up to 2000."[89] In addition, urban transportation and bicycle use are on the decline.[90] Add in the high sulfur content of China's available vehicle fuels[91] and it is easy to understand why "air quality in some Chinese cities remains among the worst in the world[,]"[92] and China shows no signs of scaling back its economic expansion.[93]

Fortunately, an increasing number of government decision-makers, businesses, and citizens are raising concerns about the health impacts of urban air pollution from the rapid development of many Asian cities and industrial areas.[94] Intergovernmental organizations are also speaking out. In 2006 the Organisation for Economic Co-operation and Development (OECD), a forum of thirty democratic countries that "work together to address the economic, social, and environmental challenges of globalisation,"[95] recognized that, in some cases, China's environmental laws and regulations are inconsistent, concealed, and discriminatory.[96] To address these issues, the OECD offered China the following recommendations:

> The Chinese authorities should launch a review of environmental legislation to eliminate important discrepancies

87. Mehta et al., *supra* note 76, at 65.

88. *Id.*

89. OECD, CHINA, *supra* note 86, at 5 (emphasis omitted).

90. *Id.*

91. *Id.*

92. *Id.* at 4.

93. Kong Chiu et al., Commentary, *Breathing Better: Linking Energy and GHG Reduction to Health Benefits in China*, 9 CHINA ENV'T SERIES 117, 122 (2007), *available at* http://www.wilsoncenter.org/topics/pubs/ces9.pdf. "China's rapid expansion is expected to continue in the immediate future, with the National Congress establishing a goal of fourfold economic growth between 2000 and 2020. While the economy remains heavily industrialized and dependent on fossil fuels, China's GHG emissions also will continue to grow." *Id.*

94. Mehta et al., *supra* note 76, at 65-66.

95. OECD, ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN CHINA 2 (2006), *available at* www.oecd.org/dataoecd/33/5/37867511.pdf. The OECD "help[s] governments respond to new developments and concerns, such as corporate governance, the information economy, and the challenges of an ageing population." *Id.* The OECD also "provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice, and work to co-ordinate domestic and international policies." *Id.* "The OECD Member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States." *Id.*

96. *Id.* at 7.

> and gaps between the principal laws and executive regulations. The legislative and rule-making processes should be made more transparent to build better relations between regulating entities, the regulated community and the public. Allowing more public participation in the regulatory process at all stages, from drafting environmental legislation to enforcement activities, can help improve policy effectiveness and address potential inconsistencies early in the legislative process.[97]

This Note argues that these changes might not be necessary if global regulations were adopted for diesel exhaust emissions.

2. India

In India, industrial growth, economic development, and urbanization are "causing severe environmental problems that have local, regional and global significance."[98] "[A]mbient levels of air pollutants [in India's major cities] exceed both the World Health Organization and Indian standards, particularly for particulate matter. Of the total air pollution load nationwide, vehicular sources contribute 64 percent, thermal power plants 16 percent, industries 13 percent, and the domestic sector 7 percent."[99] Further, "[i]t is estimated that over 96 percent of India's total demand for commercial energy is met by fossil fuel with coal contributing 60 percent and petroleum products providing the remaining 36 percent."[100] Empirical evidence also shows that India's urban areas are still trending upward in PM and NO_x levels because of economic growth.[101] Despite a strong policy and an institutional framework,[102] environmental degradation continues in many areas, resulting in growing dissatisfaction among the Indian public.[103]

One environmental study conducted in Hyderabad, India, found mobile source emissions to be "the largest sector of GHG and air pollutants in [the city]," accounting for "approximately [63 percent] of total emissions in 2001."[104] If the Indian government fails to address this issue, the study

---

97. *Id.*

98. OECD, INDIA, *supra* note 86, at 7.

99. *Id.*

100. *Id.*

101. THE WORLD BANK, INDIA: STRENGTHENING INSTITUTIONS FOR SUSTAINABLE GROWTH 10 (2006), *available at* http://siteresources.worldbank.org/INDIAEXTN/Resources/295583-1169456822314/India_CEA_Report_FINAL_Dec.pdf.

102. *Id.* at 31.

103. *Id.* at 12.

104. ENV'T PROT. TRAINING & RESEARCH INST., INTEGRATED ENVIRONMENTAL STRATEGIES (IES) STUDY FOR CITY OF HYDERABAD, INDIA 4 (2005), *available at* http://eptri.com/files/INTEGRATED-ENV-STRATEGIES.pdf.

predicted, mobile source emissions would contribute up to 75 percent by 2021.[105] The study concluded that "implementing reduction measures within [India's] transportation sector would prevent an estimated 2,000 to 20,000 deaths from long-term exposure to PM_{10} concentrations and 1,500 to 7,500 deaths from short-term exposure to PM_{10} concentration in 2011 and 2021 respectively."[106] The study also considered the financial savings that could result from a reduction in mobile source pollution and found that implementing effective transportation solutions could save up to $1,208 million (US) a year from avoided mortality by 2021, and up to $506 million (US) a year from avoided cardiovascular and respiratory diseases.[107]

3. Mexico

Mexico also faces difficult challenges with air pollution. "Due to complex socio-political, economic and geographical realities, Mexico City suffers from one of the worst air pollution problems in the world."[108] "With nearly 20 million inhabitants, 3.5 million vehicles, and 35,000 industries, Mexico City consumes more than 40 million liters of fuel each day."[109] Complicating matters, the city has poor ventilation because of its location in a closed basin high above sea level.[110] "The combination of these and other factors has led to a serious air quality problem. In 2002, Mexico City air quality exceeded local standards for ozone (110 ppb for 1 hour) on 80% of the days of the year."[111] Mexico City's greenhouse gas emissions are also troublesome.[112] In 1998 Mexico was the thirteenth largest GHG producing nation in the world,[113] and Mexico City alone accounted for approximately 13 percent of the country's total.[114]

Like China and India, however, Mexico is not without opportunities to improve its air quality. The OECD has offered several suggestions. Mexico must strengthen the implementation and enforcement of its air emissions regulatory system as well as its "integration of air quality concerns in the

105. *Id.*

106. *Id.* at 7.

107. *Id.*

108. GALEN MCKINLEY ET AL., THE LOCAL BENEFITS OF GLOBAL AIR POLLUTION CONTROL IN MEXICO CITY 6 (2003), *available at* http://www.globalcitizen.net/Data/Pages/2929/papers/20100201109473 02.pdf.

109. *Id.*

110. Sergio Bernal-Salazar et al., *Impact of Air Pollution on Ring Width and Tracheid Dimensions in* Abies Religiosa *in the Mexico City Basin*, 25 INT'L ASSOC. WOOD ANATOMISTS J. 205, 205 (2004).

111. MCKINLEY ET AL, *supra* note 108.

112. *Id.*

113. *Id.*

114. *Id.*

industry, transport[ation] and energy sectors."[115] This can be accomplished both by adopting certain "economic instruments [and by] eliminat[ing] . . . subsidies with harmful environmental effects."[116] Mexico also must continue to improve fuel quality, focusing particularly on the reduction of sulfur in diesel and gasoline products.[117]

In response to developing nations' struggles to obtain clean air without stifling their growing economies, the EPA created the Integrated Environmental Strategies (IES) program.[118] "The program encourages developing countries to analyze and implement policy, technology, and infrastructure measures with multiple public health, economic, and environmental benefits."[119] It focuses on helping developing countries reduce air pollution through economic analysis and the creation of programs that reduce the production of greenhouse gases.[120] Thus far, Argentina, Brazil, Chile, China, India, Mexico, the Philippines, and the Republic of Korea have benefitted from IES;[121] however, scant evidence exists to support the notion that these countries consider the benefits of a more international approach to regulation for diesel exhaust emissions.[122] In conjunction with these second adopter countries, the EPA has conducted significant studies of air pollution in major cities across the globe, but in order to achieve significant improvements in air quality, its international work must continue. A global diesel exhaust emission regulation could simplify and propel these efforts.

B. Countries Can Address Global Warming Before Addressing Air Quality

With the world moving toward the regulation of greenhouse gas emissions,[123] another environmental concern has developed as a result of the inverse relationship between CO_2 and NO_x emissions.[124] Over the past several

---

115. OECD, ENVIRONMENTAL PERFORMANCE REVIEW OF MEXICO 4 (2003), *available at* www.oecd.org/dataoecd/33/33/18385233.pdf.

116. *Id.*

117. *Id.*

118. *Integrated Environmental Strategies*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/ies/basicinfo.htm (last updated June 3, 2009).

119. *Id.*

120. *Id*

121. *Id.*

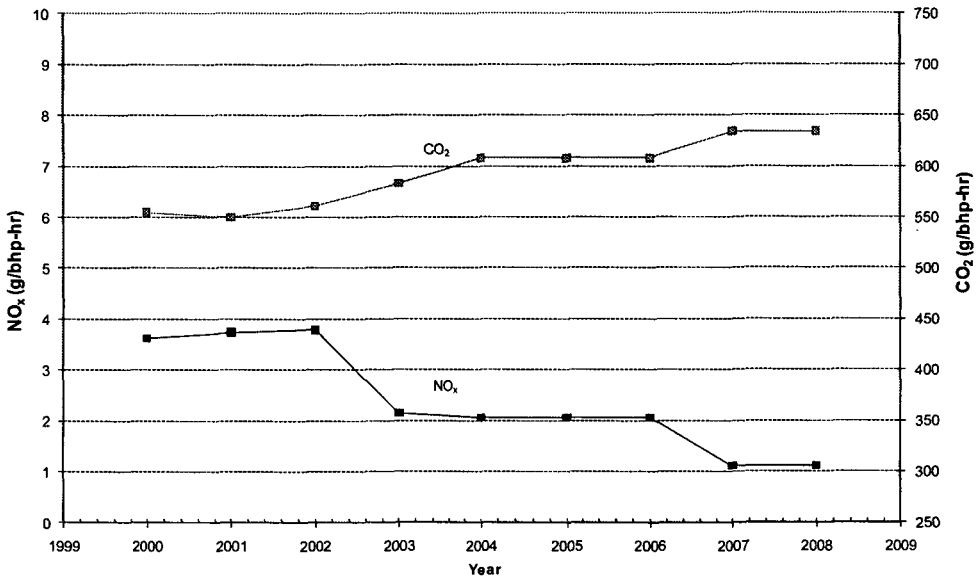
122. Peter H. Sand, *Lessons Learned in Global Environmental Governance*, 18 B.C. ENVTL. AFF. L. REV. 213, 256 (1991).

123. *See, e.g.*, Press Release, *supra* note 7; *see also, e.g.*, *Proposal for a Regulation of the European Parliament and of the Council Setting Emission Performance Standards for New Passenger Cars as Part of the Community's Integrated Approach to Reduce CO2 Emissions from Light-duty Vehicles*, COM (2007) 856 final (Dec. 19, 2007), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007PC0856:EN:NOT.

124. PHILIPPE CRIST, OECD, GREENHOUSE GAS EMISSIONS REDUCTION POTENTIAL FROM INTERNATIONAL SHIPPING 24 (2009) (discussing CO2 and NOx in the context of marine vessel engines).

decades, diesel engine and equipment manufacturers have been retarding engine injection timing in order to meet the EPA's NO_x emission standards.[125] This process reduces NO_x but also reduces an engine's fuel efficiency.[126] Conversely, as an engine's fuel efficiency improves, CO_2 emissions are reduced.[127] Because CO_2 production is proportional to an engine's fuel efficiency, the reduction in NO_x emissions has caused unregulated CO_2 production to increase over time (see Table 1). Thus, when CO_2 is regulated, global automotive companies will strive to maximize engine efficiency in order to reduce CO_2 emissions.[128] Just as retarding injection timing reduces NO_x emissions, advancing an engine's timing so that fuel is injected sooner in the engine's compression stroke improves fuel efficiency; which, consequently, produces higher NO_x emissions.[129]

Table 1: Interaction Between Reduced NO_x and CO_2[130]



The interplay between NO_x and CO_2 emissions will become critical as more countries consider adopting greenhouse emission regulations. If a country

125. Interview with Robert Jorgensen, *supra* note 9.

126. *Id.*

127. *Id.*

128. Interview with Rich S. Wagner, *supra* note 28; U.S. ENVTL. PROT. AGENCY, LIGHT-DUTY AUTOMOTIVE TECHNOLOGY, CARBON DIOXIDE EMISSIONS, AND FUEL ECONOMY TRENDS: 1975 THROUGH 2011, at iv (2012), *available at* http://www.epa.gov/otaq/cert/mpg/fetrends/2012/420s12001a.pdf.

129. Interview with Robert Jorgensen, *supra* note 9; Interview with Rich S. Wagner, *supra* note 28.

130. Graph is for representational purposes; data are available at http://www.epa.gov/otaq/certdata.htm#largeng.

adopts a CO_2 standard but does not adopt a NO_x standard, global companies may make product line changes to increase fuel efficiency, and the trade-off could be an increase in higher NO_x-emitting engines.[131] Diesel engine manufacturers already focus on fuel economy because of customer demand, particularly manufacturers of on-highway truck engines.[132] Diesel technology is the dominant power choice in the U.S. trucking industry because fuel costs go directly to a trucking company's bottom line, and the use of light duty diesels may soon follow suit.[133] As of Model Year 2010, relatively few diesel powered light duty vehicles existed in North America.[134] However, in its 2010 *Technical Assessment Report* on greenhouse gasses, the EPA noted that a few automotive companies believe diesel technology will be an important addition to their future U.S. product offerings, and that these companies are pursuing the use of diesel in the 2017 to 2025 timeframe to improve fuel economy and reduce CO_2 emissions.[135] Thus, the use of higher NO_x-emitting diesel engines is likely to grow in the near future with companies relying on diesel aftertreatment devices to meet current NO_x emission levels.[136]

A diesel engine's increased NO_x output may not be an issue in first or second adopter countries that currently regulate NO_x emissions because, there, engine manufactures would be forced to "clean up" the increased NO_x through the use of diesel aftertreatment technology.[137] Emissions can be treated with a NO_x adsorption catalyst system or a urea/ammonia selective catalytic reduction (SCR) system.[138] These methods can control NO_x emissions during lean (excess air) operation to achieve the low NO_x emission levels while allowing a diesel engine manufacturer to advance an engine's timing and maximize its fuel efficiency.[139] The stringent NO_x emission standards in the United States and Europe mandate the use of such diesel technology enablers.[140] All U.S. on-

131. *See supra* notes 123-27 and accompanying text.

132. Interview with Rich S. Wagner, *supra* note 28.

133. *Id.*

134. *The Consumer Guide to 2010 Diesel Vehicles, 2010 Diesel-Powered Vehicle Lineup*, CONSUMER GUIDE, http://consumerguideauto.howstuffworks.com/2010-diesel-vehicle-buying-guide1.htm (last visited Apr. 20, 2012). Eleven diesel-powered light-duty passenger vehicles were available in 2010 from only four companies: Volkswagen, BMW, Mercedes, and Audi. *Id.* They are the Audi A3 and Q7; BMW 3 series and X5; Mercedes-Benz E-Class, M-Class, R-Class, and GL; and Volkswagen Golf, Jetta, and Touareg. *Id.* Note that all manufacturers are German.

135. *See* U.S. ENVTL. PROT. AGENCY ET AL., *supra* note 13, ch. 3 at 1, 21.

136. Interview with Robert Jorgensen, *supra* note 9.

137. *Worldwide Emissions Regulations*, CUMMINS INC., http://cumminsemissionsolutions.com/ces/navigationAction.do?url=SiteContent+en+HTML+EmissionsTechnology+Worldwide_Emissions_Regualtions (last visited May 21, 2012).

138. U.S. ENVTL. PROT. AGENCY ET AL., *supra* note 13, ch. 3 at 21.

139. *How Selective Catalytic Reduction (SCR) Works*, DISCOVERDEF.COM, http://www.discoverdef.com/def-overview/selective-catalytic-reduction/ (last visited Apr. 15, 2012).

140. *Worldwide Emissions Regulations*, *supra* note 137.

highway truck and engine manufacturers, with one exception, have chosen SCR as their emissions solution,[141] and most Model Year 2010 or newer on-highway trucks employ SCR as a means to chemically treat the exhaust emissions of an engine after the combustion process.[142]

One of the drawbacks of SCR technology is that it costs up to $12,000 per system.[143] Because of this additional cost, manufacturers may put fuel efficiency design improvements in place for unregulated countries without including aftertreatment technology.[144] Another disadvantage of SCR is the requirement that urea must be injected into the exhaust for the purpose of creating a chemical reaction to reduce NO_x.[145] Thus, a global solution that uses urea would require a global infrastructure in which urea can be made readily available. In other words, a company could offer two identical fuel efficient engine systems: one with an aftertreatment catalyst for a regulated market and another without the aftertreatment catalyst for an unregulated market. Consequently, without a global diesel exhaust emission regulation, the global NO_x level can be expected to increase.[146]

IV. BARRIERS PREVENTING A GLOBAL DIESEL EXHAUST EMISSION REGULATION

Recognizing that no international governing agency exists to create a binding global regulation,[147] a global diesel exhaust emissions standard would need to be created and adopted voluntarily by independent countries, much like IMO's *Annex VI*.[148] Competing concerns exist, however, which have so far prevented the adoption of an international regulation.

A. Trade Barrier Protection

One reason that a global diesel emission standard has not yet been adopted is that regulations are an effective means to achieve trade barrier

141. Steve Sturgess, *EPA, CARB Workshop Examines Driver Defeat of SCR Engines*, TRUCKINGINFO (July 22, 2010), http://www.truckinginfo.com/news/news-detail.asp?news_id=71106.

142. *Frequently Asked Questions*, DISCOVERDEF.COM, http://www.discoverdef.com/def-overview/faq/ (last visited Apr. 15, 2012).

143. Sean Kilcarr, *Price Point*, FLEETOWNER (Aug. 1, 2009), http://fleetowner.com/trucking_regulations/price_point_0809/.

144. *See supra* notes 123-27 and accompanying text.

145. Steve Sturgess, *supra* note 141.

146. *See supra* Part III.B.

147. *See International Law*, WORLD HEALTH ORG., http://www.who.int/trade/glossary/story061/en/index.html (last visited May 21, 2012).

148. *See supra* notes 52-60 and accompanying text.

protection.[149] Although most environmental regulations are enacted to protect the health and welfare of the public, this is not considered their main purpose under a public choice theory of economics.[150] Public choice theory holds that "legislatures represent the interests of other parties, not [the interests] of the public."[151] Thus, politicians in a given country primarily respond to the concerns of existing engine manufacturers. These concerns typically arise in two scenarios. First, situations could exist where manufacturers already doing business in a country do not want a new regulation because it will increase production costs.[152] If production costs increase, and the manufacturer cannot pass those costs on to the consumer, then the company's profit will suffer.[153] This theory presumes that manufacturers want to avoid all regulations because of product cost increases; however, it should be noted that a regulation may benefit those manufacturers that find themselves already in compliance with a newly imposed standard.[154]

The second situation occurs where a manufacturer already doing business in a market wants the country to adopt a regulation as a form of trade barrier protection, making it cost-prohibitive for potential competitors to enter that market.[155] In this scenario, a country could adopt a regulation tailored to keep business profitable for the existing manufacturer and cost-prohibitive for the newcomer.[156] Trade barrier protection is evidenced by other regulated industries.

> Extensive pre-clearance inspection requirements of shelled walnuts and significant delays in reviewing U.S. documentation of pest mitigation for cherries and apples exported to the Republic of Korea, has effectively precluded market access for such products. Korea has also tended to prohibit certain food ingredients, additives (e.g., food colors and dyes) and manufacturing processes that are generally recognized as safe by international standards bodies . . . .[157]

---

149. Fahmida Khatun, *Environment Related Trade Barriers and the WTO* 12, (Ctr. for Pol'y Dialogue Working Paper No. 77, 2009), *available at* www.cpd.org.bd/pub_attach/OP77.pdf.

150. *See* DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS 60-61 (1st ed. 2005).

151. Jan G. Laitos, *The Strange Career of Private Property and the Police Power*, 40A ROCKY MTN. MIN. L. INST. (SPECIAL ISSUE) 1, 14 (1995).

152. Interview with Robert Jorgensen, *supra* note 9.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. LAWRENCE A. KOGAN, NAT'L FOREIGN TRADE COUNCIL, INC., LOOKING BEHIND THE CURTAIN: THE GROWTH OF TRADE BARRIERS THAT IGNORE SOUND SCIENCE 12-13 (2003), *available at* www.wto.org/english/forums_e/ngo_e/posp47_nftc_looking_behind_e.pdf.

First and second adopters are especially concerned that a global standard could erode their nations' sovereign ability to create and modify their own regulations to address these manufacturer interests.[158]

B. Technology and Infrastructure

Technology and infrastructure issues also may prevent certain countries from adopting an international diesel emission regulation. One of the most significant challenges to lowering diesel exhaust pollution is the wide range of diesel fuel quality available throughout the world. In particular, "lower diesel fuel sulphur results in a direct reduction of the emissions of both sulphate particles and SO_x emissions."[159] Higher sulfur content also prevents the use of modern clean-diesel technology by reducing the technology's life cycle.[160] Particulate traps or diesel particulate filters (DPFs) "collect particulate matter as the exhaust gases pass through and can reduce particulate emissions by 80 [to] 90 percent using a catalytic reaction or an auxiliary heating element."[161] High sulfur fuel, however, can quickly clog a DPF,[162] making this technology impracticable for regions of the world with higher sulfur content fuel. As a result, diesel particulate matter cannot be lowered until the sulfur content in fuel is lowered.[163]

Most of the world does not currently employ diesel fuel with the low levels of sulfur found in fuel in the United States and European Union.[164] Fortunately, the United Nations Environment Programme (UNEP) is addressing fuel quality issues through the Partnership for Clean Fuels and Vehicles as a means to achieve lower global emission pollution.[165] Most Asian countries now impose stringent diesel fuel sulfur limits because of the direct reduction in PM pollution and because advanced diesel pollution reduction technologies require

158. Interview with Robert Jorgensen, *supra* note 9.

159. ENSTRAT INT'L LTD., COST OF DIESEL FUEL DESULPHURISATION FOR DIFFERENT REFINERY STRUCTURES TYPICAL OF THE ASIAN REFINING INDUSTRY 4 (2003), *available at* www.unep.org/pcfv/PDF/PubADBSulphurReport.pdf.

160. Press Release, Natural Res. Def. Council, New Diesel Fuel Hitting Pumps Nationwide on October 15 Cuts Pollution, Enables New Low-Emission Engine Technology (Oct. 10, 2006), *available at* http://www.nrdc.org/media/pressreleases/061010.asp.

161. *About Clean Diesel*, DIESEL TECH. FORUM, http://www.dieselforum.org/index.cfm?objectid=607A6EA0-8153-11E0-89D2000C296BA163 (last visited Apr. 10, 2012); Interview with Rich S. Wagner, *supra* note 28.

162. *See* Press Release, *supra* note 160.

163. *See* U.S. Envtl. Prot. Agency, *Heavy-Duty Highway Diesel Program*, http://www.epa.gov/otaq/highway-diesel/ (last updated Aug. 18, 2009).

164. U.N. Envtl. Programme, *Diesel Fuel Sulphur Levels: Global Status March 2012*, http://www.unep.org/transport/pcfv/PDF/Maps_Matrices/world/sulphur/MapWorldSulphur_March2012.pdf (last visited May 8, 2012).

165. U.N. Envtl. Programme, *Partnership for Clean Fuels and Vehicles*, UNEP.ORG, http://www.unep.org/transport/pcfv/ (last visited Apr. 15, 2012).

it.[166] This is also why the EPA's 2007 on-highway diesel emission standards required reduced sulfur content in step with emission changes.[167]

Catalytic converters also face challenges to their widespread implementation. This technology "use[s] a chemical reaction to convert emissions into harmless substances. Some catalysts—such as selective catalytic reduction (SCR) devices and NO_x absorbers—focus on nitrogen oxides and can reduce these emissions by 25 [to] 50 percent."[168] However, SCR devices require urea to treat the diesel exhaust and reduce NO_x.[169] This requires an adopting country to have the infrastructure for urea production and distribution,[170] which even the United States lacked as late as 2010.[171]

Modern diesels also use sophisticated electronic technology to control engine fueling and timing parameters,[172] but developing countries are not capable of diagnosing and repairing these advanced-technology engines.[173] Moreover, countries rarely experience infrastructure and technology challenges in isolation. The EPA's most stringent diesel regulation, the 2010 standard for on-highway trucks, requires additional infrastructure to support ultra-low sulfur diesel fuel, urea availability, *and* a service network capable of servicing diesel products with advanced electronic technology.[174] Thus, a stringent standard, even with existing technology, could be costly to develop and unattainable by developing countries.

Despite the challenges of new technology implementation, unregulated countries can benefit from prior technological improvements as diesel manufacturers retire outdated, cost-prohibitive diesel technology. Unregulated countries are often secondary markets for manufacturers' phased out products.[175] While these engines never represent the most modern diesel technology, they inevitably emit less pollution than the even older models currently in use. Unfortunately, phasing out older products can take a very long time. For example, Indiana-based Cummins Inc.,[176] a leader in diesel engine

166. ENSTRAT INT'L LTD., *supra* note 159, at 4. These technologies "are essential to achieve reductions of NOx and particulate matter above 70% to 80%, and hence reverse the growing pollution trend due to the continuing growth of the vehicle fleets in Asia." *Id.*

167. *See id.*

168. *About Clean Diesel*, *supra* note 161.

169. U.S. ENVTL. PROT. AGENCY ET AL., *supra* note 13, ch. 3, at 21.

170. Interview with Rich S. Wagner, *supra* note 28; *see generally* SCOTT FABLE & MICHAEL D. JACKSON, UREA INFRASTRUCTURE HURDLES: REPORT ON TIAX SELECTIVE CATALYTIC REDUCTION UREA INFRASTRUCTURE STUDY (2002).

171. Interview with Rich S. Wagner, *supra* note 28; *see generally* RAYMOND SCHUBERT ET AL., EXECUTIVE SUMMARY FOR: SCR-UREA IMPLEMENTATION STRATEGIES UPDATE—FINAL REPORT (2006).

172. *About Clean Diesel*, *supra* note 161.

173. Interview with Rich S. Wagner, *supra* note 28.

174. U.S. ENVTL. PROT. AGENCY ET AL., *supra* note 13, ch. 3, at 21.

175. Interview with Rich S. Wagner, *supra* note 28.

176. Formerly Cummins Engine Co.

manufacturing,[177] no longer offers its outdated N-14 model engine in the United States market but continues to manufacture the engine to be sold in other countries.[178] Thus, waiting on engine phase-out cannot be considered a strategy for reducing air pollution from diesel exhaust emissions.

V. THE ECONOMIC COSTS ASSOCIATED WITH MULTIPLE REGULATIONS

The problems that arise from diesel exhaust pollution create competing interests among environmentalists, health organizations, industrialists, manufacturers, equipment users, and the general public. One obvious concern is the impact of ineffective regulations or unregulated pollutants on the global population's health.[179] Under theories of welfare economics, these "costs must be internalized to the producers in order to ensure allocative efficiency."[180] Accordingly, diesel manufacturers should bear the burden of the air pollution their products create.[181]

The ideal solution for achieving allocative efficiency is simple: First, a country with a pollution problem adopts a regulation; second, the country enforces that regulation against engine manufacturers; and third, the public enjoys clean air.[182] Unfortunately, the realities of the market complicate this process. Although diesel manufacturers bear the costs of compliance with a newly imposed regulation,[183] they pass these costs on to the consumer by factoring them into the price of their products.[184] The public also bears the costs incurred by the government in enforcing the regulation[185] as well as the increased prices charged for services provided by the more expensive diesel-powered equipment.[186]

In the context of a single country adopting its own regulation and forcing companies selling products into its local market to comply, it is possible that these economic externalities do not inhibit the cost-effectiveness of pollution regulation. In fact, this microeconomic model has been accepted in the United States because the benefit of creating products for the U.S. market has outweighed the costs of doing so. However, because most manufacturers of

177. *About Cummins*, CUMMINS INC., http://www.cummins.com/cmi/navigationAction.do?nodeId=1000&siteId=1&nodeName=About+Cummins&menuId=1000 (last visited Apr. 10, 2012).

178. *See Worldwide Manufacturing Locations*, CUMMINS INC., http://www.cummins.com/cmi/navigationAction.do?nodeId=9&siteId=1&nodeName=Worldwide+Manufacturing+Locations&menuId=1002 (last visited Apr. 10, 2012).

179. *See supra* Part III.

180. COLE & GROSSMAN, *supra* note 150, at 233.

181. *See id.*

182. *See id.* at 19.

183. *See infra* Part V.B.

184. COLE & GROSSMAN, *supra* note 150, at 318.

185. *See infra* Part V.C.

186. Interview with Rich S. Wagner, *supra* note 28

diesel-powered equipment are global companies, a macroeconomic analysis is more appropriate.

From this perspective, the same economic externalities suggest that a regulation is not always the most economically efficient solution to the pollution problem—especially when multiple regulations exist that address the same environmental concerns.

In 1991 the EPA issued one of the most comprehensive studies on the costs and benefits of a pollution regulation, *The Benefits and Costs of the Clean Air Act, 1970 to 1990.*[187] The study reported that, in complying with U.S. air pollution regulations,

> businesses, consumers, and government entities all incurred higher costs for many goods and services. The costs of providing goods and services to the economy were higher primarily due to requirements to install, operate, and maintain pollution abatement equipment. In addition, costs were incurred to design and implement regulations, monitor and report regulatory compliance, and invest in research and development. Ultimately, these higher costs of production were borne by stockholders, business owners, consumers, and taxpayers.[188]

Over the study's twenty-year span, the United States spent approximately $523 billion implementing the Clean Air Act.[189]

A. Adoption Costs

The regulatory agencies of first adopting countries incur costs to develop, adopt, and implement their regulatory standards.[190] Likewise, second adopter countries incur development costs in modifying first adopter regulations. Countries also perform economic impact analyses to ensure that the benefits of a new regulatory standard outweigh the added costs.[191] The expense of adopting a regulation would be even higher for unregulated countries, as they would be starting from scratch.[192]

187. U.S. ENVTL. PROT. AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT, 1970 TO 1990: EXECUTIVE SUMMARY 2 (1997), *available at* http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0295-2.pdf/$file/EE-0295-2.pdf.

188. *Id.*

189. *Id.*

190. *See id.*

191. Sand, *supra* note 122, at 256-57; *e.g.*, Exec. Order No. 12,866, 3 C.F.R. § 638 (1993).

192. *See generally supra* notes 169-70 and accompanying text.

B. Compliance Costs

Designing and developing new technology to meet emission requirements is also expensive.[193] Even with compliance costs, however, manufacturers continue to invest in technology for sale in first adopter markets because the practice is economically beneficial.[194] In first adopter countries, governmental agencies work closely with manufacturers when creating regulatory requirements;[195] thus, the standards are more easily found and understood.[196] In second adopter countries, global companies in today's market face a significant challenge in achieving compliance with pollution regulations.[197] Diesel engine and equipment manufacturers suffer from the added costs of tailoring their product designs for compliance with the unique regulatory requirements of each foreign market.[198]

Cummins provides a good example of a global company trying to manage varying regulations. Cummins continues to report increased sales because of its strong performance in international markets,[199] but the company faces challenges and added costs in navigating through multiple diesel exhaust regulations.[200]

> As nations address emissions and regulate air pollutants, fuel efficiency and greenhouse gas emissions from our products, we must understand and comply fully with these regulations. Our challenge is to improve our global emissions compliance processes – from the point when a regulation is considered to

193. *See* Cummins Inc., United States Securities and Exchange Commission Form 10-K at 12 (2010), *available at* http://www.sec.gov/Archives/edgar/data/26172/000104746910001435/a2196405z10-k.htm; Deere & Company, United States Securities and Exchange Commission Form 10-K at 18 (2009), *available at* http://www.sec.gov/Archives/edgar/data/315189/000110465909070344/a09-32005_110k.htm.

194. *See generally* COLE & GROSSMAN, *supra* note 150 (As a general principle, if it is not economically beneficial for a company to do business in a market, the company would not be selling products in that market).

195. Interview with Robert Jorgensen, *supra* note 9.

196. *Id.*

197. *Id.*

198. *Id.*

199. Press Release, Cummins Inc., Cummins Reports Sharply Higher Sales and Profits in the Third Quarter Led by Continued Strength in International Markets (Oct. 26, 2010), *available at* http://www.cummins.com/cmi/displayMoreNewsAction.do?strTitle=Cummins+reports+sharply+higher+sales+and+profits+in+the+third+quarter+led+by+continued+strength+in+i&strNewsSummary=Cummins+reports+sharply+higher+sales+and+profits+in+the+third+quarter+led+by+continued+strength+in+i&strId=%2Ftemplatedata%2FContent%2FNews%2Fdata%2Fen%2FInvestorsAndMedia%2FPressReleases%2F2010%2F26Oct2010_CumminsReportsSharplyHigherSalesProfits&dtPublishDate= 2010-10-26.

200. Interview with Robert Jorgensen, *supra* note 9.

> when we design and make a product and then the sales and service of that product in the market.[201]

Cummins also faces challenges due to the increasing global focus on greenhouse gas regulation of its products.[202]

In addition to design and production costs, diesel engine and equipment manufacturers must be concerned with the potential risks of noncompliance, such as financial penalties for failing to test a certain number of engines each year.[203] Further, unique regulatory requirements effectively can ban a product that pollutes so closely to the standard that it could be considered non-compliant.[204] As explained above, because South Korea requires an additional certification test, engines certified to European Union standards are not initially acceptable for sale in South Korea.[205] Adding to the complexities and costs, a global corporation now has to prohibit the sale of this *one* product that does not comply with this *one* country's unique regulatory requirement. If every country were to create unique requirements similar to South Korea's, the cost of a manufacturer's total global product line could increase significantly.

The added costs to achieve individualized compliance could make it cost-prohibitive for a diesel manufacturer to offer products in second adopter countries with additional requirements.[206] Unregulated countries, however, provide the opposite end of the spectrum.[207] Companies have minimal, if any, investment cost to develop a product for the unregulated market because they can ship any product to one of these countries without fear of failing to meet regulatory requirements or being subjected to regulatory penalties.[208] Therefore, a manufacturer is likely to participate in either a heavily regulated market or a regulation-free market if participation will create a profit.[209]

C. Enforcement Costs

Environmental regulations also require enforcement. China and India are two examples of second adopter countries that have poor air quality despite their enacted air pollution regulations.[210] Chinese environmental policies are

---

201. CUMMINS INC., *supra* note 26, at 21.

202. *Id.*

203. Interview with Robert Jorgensen, *supra* note 9.

204. Interview with Rich S. Wagner, *supra* note 28; *see also supra* notes 48-51 and accompanying text.

205. Interview with Rich S. Wagner, *supra* note 28; *see also supra* notes 48-51 and accompanying text.

206. Interview with Robert Jorgensen, *supra* note 9.

207. *Id.*

208. *Id.*

209. *See id.*; *see supra* notes 193-98 and accompanying text.

210. *See supra* Part III.A.

often "declarative and unrealistic"[211] and "inadequate enforcement [is] one of the key factors in China's deteriorating environmental situation."[212] This regulatory ineffectiveness also has been influenced "by a lack of coherence among environmental regulations, conflicting interests at different levels of the administration, and insufficient technical capacity and resources available to environmental institutions to carry out their duties."[213] Additionally, China's general policy framework has "favored [economic] development over the environment," resulting in "widespread non-compliance with [the country's] environmental requirements."[214] Enforcement is so lax that "approved and installed air . . . pollution control equipment is put in operation only at times when inspectors' visits are expected, as polluters are more interested in saving on operation costs" than protecting the environment.[215] China's compliance performance is also poor because the Chinese government has limited tools to promote compliance and does not actively inform regulated entities of developments in environmental regulations. [216]

The costs and benefits related to environmental pollution and the regulations designed to fix them are difficult to quantify.[217] "[C]osts are borne by industry and are reflected in reduced production and higher costs of goods and services. The value of benefits of environmental regulations, however, tends to be far more nebulous."[218] Proponents of the unique regulations in China and South Korea might consider those additional requirements as a benefit for those nations, but secondary testing adds to an engine's expense without reducing its emissions.[219] Thus, China, South Korea, and other second adopter markets would benefit more by achieving the next most stringent standard, improving fuel quality, or improving enforcement rather than spending their resources creating unique regulatory requirements for vehicles already certified for operation in Europe. Another recommendation is for these countries to accelerate their vehicle retirement program[220] by creating incentives for equipment purchasers to invest in more modern, lower-polluting equipment.[221]

---

211. OECD, CHINA, *supra* note 95, at 6.
212. *Id.* at 5.
213. *Id.* at 6.
214. *Id.*
215. *Id.*
216. *Id.* at 6-7.
217. COLE & GROSSMAN, *supra* note 150, at 318.
218. *Id.*
219. *Id.*
220. U.S. ENVTL. PROT. AGENCY, THE INTEGRATED ENVIRONMENTAL STRATEGIES (IES) COST-BENEFIT ANALYSIS IN SEOUL, SOUTH KOREA, T.1 (2009).
221. *See* COLE & GROSSMAN, *supra* note 150, at 332.

VI. THE BENEFITS OF HARMONIZATION

A global diesel exhaust emission regulation might be the most economically efficient solution to the global diesel pollution problem.[222] "Harmonized programs can avoid costly multiple design configurations to meet varying requirements, with associated cost savings to ultimate purchasers. In addition, with regard to international trade, harmonization reduces the cost of introducing a product into another country."[223] The relative harmonization in 1997 of EPA and European Union nonroad mobile source emission standards was an important success for diesel engine and equipment manufacturers.[224] "[I]n order to streamline engine development and emission type approval/certification for different markets . . . [EU] Stage I/II limits were in part harmonized with US regulations[and] [EU] Stage III/IV limits are harmonized with the US Tier 3/4 standards."[225]

A. European Union

Trade regulations in the European Union provide another powerful example of the benefits of harmonization. The European Union began with six countries in the 1950s and expanded to twenty-seven countries by 2007.[226]

> One of the EU's main aims is economic progress. Over the past 50 years, and especially since the 1980s, much has been done to break down the barriers between the EU's national economies and to create a single market where goods, people, money and services can move around freely. Trade between EU countries has greatly increased and, at the same time, the EU has become a major world trading power.[227]

In 1985 the European Union launched a broad initiative, the Internal Market, to remove trade barriers among participating countries by the end of 1992.[228] Ten years after implementation, the European Union conducted a study

---

222. FAIZ, *supra* note 61, at 1.

223. Control of Emissions of Air Pollution from Nonroad Diesel Engines, 62 Fed. Reg. 50152, 50158 (proposed Sept. 24, 1997) (codified at 40 C.F.R. pts. 9, 86, 89), *available at* http://www.gpo.gov/fdsys/pkg/FR-1997-09-24/pdf/97-24237.pdf.

224. Interview with Robert Jorgensen, *supra* note 9.

225. *Emission Standards, Europe, Nonroad Diesel Engines*, *supra* note 44.

226. EUROPEAN UNION, KEY FACTS AND FIGURES ABOUT EUROPE AND THE EUROPEANS 4 (2007), *available at* http://ec.europa.eu/publications/booklets/eu_glance/66/en.pdf.

227. *Id.* at 45.

228. EUROPEAN COMM'N, THE INTERNAL MARKET—TEN YEARS WITHOUT FRONTIERS 4 (2003), *available at* http://ec.europa.eu/internal_market/10years/docs/workingdoc/workingdoc_en.pdf.

to understand the economic impact of the Internal Market,[229] and the results reveal that the Internal Market was an overall success.[230] Economically, the Internal Market delivered almost a two percent increase in the European Union's gross domestic product.[231] Since 1992, the Internal Market created about 2.5 million jobs for European Union member countries that would not have been created without removing the trade barriers.[232] The Internal Market enhanced the ability of companies within European Union member countries to compete in global markets and resulted in increased European exports to non-member countries, from 6.9 percent of the European Union's gross domestic product in 1992 to 11.2 percent in 2001.[233] Direct investment into the European Union from foreign investors has also more than doubled as a percentage of gross domestic product over this same timeframe.[234]

Citizens and consumers of the European Union have also benefitted from having one market.[235] The study performed by the European Commission found that 80 percent of European Union citizens believe the Internal Market created a wider choice of products, and that 67 percent believed the Internal Market created higher quality products.[236] Prices for goods have also decreased as a result of expanding national markets and increased competition.[237]

Businesses have also benefited from the European Union's Internal Market because trade within the European Union has become much easier.[238] "The absence of border bureaucracy has cut delivery times and reduced costs. Before the [creation of the Internal Market], the tax system alone required 60 million customs clearance documents annually . . . ."[239] Over 60 percent of companies that export to more than five European Union member countries believe that the Internal Market helped their cross-border sales.[240] Small and medium-sized enterprises have been able to expand markets because costs and logistics to export goods no longer are prohibitive.[241] New directives and regulations "replace[d] a large number of complex and different national laws with a single framework, often reducing compliance costs for businesses, who pass those savings on to consumers."[242]

---

229. *See id.*
230. *See generally id.*
231. *Id.* at 2.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 3.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*

B. United Nations

In the realm of vehicle safety, the Economic Commission for Europe, a division of the United Nations, has achieved great success through its harmonization work.[243] Established in 1952, the Working Party on the Construction of Vehicles (Party) played a vital role in the development of standardized regulations within Europe.[244] The Party was created in response to the United Nations' Convention on Road Traffic, which "identified vehicle characteristics as a major cause of road traffic crashes, deaths and injuries."[245] The Party gathered technical experts in order to establish standardized technical requirements for vehicles, such as a uniform standard for taillight configurations.[246] The Party's first significant achievement was the *Rome Agreement of 1956*.[247] This agreement was significant because

> it was the first step towards the official recognition of the need within Europe for an Agreement that not only addresse[d] the safety concerns posed by road traffic but also tackle[d] the problems of diverse state regulations which [disrupted] the free flow of commerce across state borders. Trade considerations were important at a time when Europe was in the process of reconstructing itself. The facilitation of safe and efficient transportation systems within Europe, which was the primary focus of the ITC, played an important role in that endeavour.[248]

In March 2000 the Party changed its official name to World Forum for Harmonization of Vehicle Regulations (WP.29).[249] "The growth of the world vehicle population and its impact on society, and the evolution of engine-powered vehicle markets from regional to global have focused [WP.29's] attention on . . . [the] need to provide higher levels of vehicle safety, environmental protection, energy efficiency and vehicle security."[250] These developments also highlighted "[the] need *to reduce the diversity of regulatory requirements* regarding vehicle safety and environmental performance in order to facilitate global commerce in these products."[251]

---

243. *See generally* U.N. ECON. COMM'N FOR EUR., WORLD FORUM FOR HARMONIZATION OF VEHICLE REGULATIONS (2d ed. 2002), *available at* http://www.unece.org/trans/main/wp29/wp29wgs/wp29gen/wp29pub/wp29pub2002e.pdf.

244. *Id.* at 5.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 6.

250. *Id.* at 1.

251. *Id.* at 1 (emphasis added).

C. U.S. Coast Guard

Other regulatory fields have also recognized the benefits of a more international approach to regulation. In 1996 the U.S. Coast Guard acknowledged the need for aligning its safety standards to those of international vessels and "amend[ed] its regulations for both inspected and uninspected vessels by removing obsolete, unnecessary, and excessive provisions and harmoniz[ed] regulations with international safety standards."[252] The amendments were intended to "reduce the regulatory burden to industry by removing differences between requirements that apply to U.S. vessels in international trade and those that apply to similar vessels in international trade that fly the flag of responsible foreign nations."[253]

Alternatives to a global diesel regulation are available, but they often are unrealistic. One possibility is for a global company to be a leader in global environmental policy by voluntarily phasing out its higher polluting products.[254] But because emission control technology increases costs and often fuel consumption, this approach could make a volunteering manufacturer's products uncompetitive in the market if other manufacturers do not take the same voluntary step. Another possible alternative could be that diesel engine manufacturers band together to "clean the air" by creating an effective environmental monopoly. For example, diesel manufacturers could agree to phase out older products and offer only the products the collective group believes are the lowest emitting engines for the products suitable to the region. This would advance an enhanced public image for diesel manufacturers and diesel technology, but it is unrealistic. Trying to get competing companies to agree on a collective strategy is difficult. Further, one company could initially agree on the collective action and then back out of the agreement after other companies have phased out their older products, giving the "holdout" company a significant economic advantage.[255]

VII. A GLOBAL REGULATION AS THE MOST ECONOMICALLY EFFICIENT SOLUTION

When the total cost of providing a product for a particular market outweighs the benefits, companies will cease to supply to that market.[256] Conversely, unique regulations by one country could prevent a global company

252. Harmonization with International Safety Standards, 61 Fed. Reg 58804 (proposed Nov. 19, 1996), *available at* http://federalregister.gov/a/96-28407.

253. *Id.*

254. *See supra* notes 175-78 and accompanying text.

255. *See* COLE & GROSSMAN, *supra* note 150, at 16; *see infra* note 280 and accompanying text.

256. *See* COLE & GROSSMAN, *supra* note 150, at 17-18.

from entering that market altogether.[257] Manufacturers design and produce new products primarily to meet the demands of first adopter regulatory requirements, and a global manufacturer's best choice for a second adopter is one that has implemented a first adopter's regulation without modification.[258] Unfortunately, this has proven difficult to achieve.[259] Therefore, a global regulation may be the most efficient solution to achieve the best possible emission reduction for the lowest possible cost.[260]

Pollution is a social problem created by a company bringing its polluting products to the market.[261] Under a classic nuisance law approach, the organization that brings the nuisance should bear its costs.[262] Of course, any incremental costs in regulations supposedly addressing air pollution will be factored into the price of the equipment and passed on to the end consumer.[263] Thus, when each second adopter country adopts its own version of a regulation, the country increases the consumer's costs.[264] While the end consumer pays more, does the public benefit from cleaner air? Considering the air quality in China and India, the answer is probably no.[265] The public could receive the same benefits if the country adopted and enforced an "off the shelf" regulated product rather than implementing its unique, additional requirements. A second adopter country could spend the money it would have spent modifying a first adopter's regulation and apply it toward enforcement against pollution violations in that country.[266]

Traditionally, international environmental standards have not proven to provide the highest social gain for the lowest total cost. This is because previous international standards have been established through treaties,[267] an

257. *See supra* note 198.

258. Interview with Robert Jorgensen, *supra* note 9.

259. *See supra* Part IV.

260. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (explaining that the goal of any regulation should be to provide the highest social gain for the lowest total cost). "It would clearly be desirable if the only actions performed were those in which what was gained was worth more than what was lost. But in choosing between social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others. Furthermore we have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department), as well as the costs involved in moving to a new system. In devising and choosing between social arrangements we should have regard for the total effect." *Id.* at 23.

261. *See* COLE & GROSSMAN, *supra* note 150, at 314.

262. *Id.* at 117.

263. *See id.* at 318.

264. *See id.*

265. *See supra* Part III.A.

266. *See supra* Part V.C.

267. Sand, *supra* note 122, at 218.

approach that is highly inefficient.[268] Specifically, environmental treaties suffer from two inherent problems[269]:

> First, they are based on the consensus or unanimity of all participants because no sovereign state is obliged to sign or ratify any treaty. Unlike decisions by a national legislature, which normally result in a median standard that is determined by majority vote but also binds the outvoted minority, internationally agreed-upon standards thus tend to reflect the lowest common denominator, or the "bottomline." Second, parliamentary ratification takes time, so the effectiveness of international agreements is deliberately delayed. Unlike national laws—which can fix their own dates of application, even allowing for immediate applicability or amendment—multilateral treaties can be brought into force, or amended, only after a specified number of signatories ratifies them. The purpose, of course, is to ensure a measure of reciprocity and to avoid situations in which initial compliance by a few diligent parties creates disproportionate benefits to the "free-riders" remaining outside the treaty. Setting a threshold number, however, also delays implementation to the speed of the slowest boat in the convoy.[270]

Consider the WTO and Article XX of its *General Agreement on Tariffs and Trade* (GATT).[271] The WTO's primary function is liberalizing trade, but Article XX "allows WTO member countries to use trade measures to protect the environment even when the measures are inconsistent with GATT."[272] This exception provides an avenue for a country to create an environmental regulation that may function as an unnecessary trade barrier.[273] Article XX also promotes many regional trade agreements, which can lead to economic trade inefficiencies in a global economy.[274]

While treaty negotiating between two countries is inefficient and

---

268. *Id.* at 219-20.

269. *Id.*

270. *Id.* at 219.

271. General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

272. Khatun, *supra* note 149, at 12.

273. *See id.*

274. *See* Peter Gallagher & Ysé Serret, *Environment and Regional Trade Agreements: Developments in 2009*, (OECD Trade & Env't Working Paper No. 2010/01), *available at* http://www.oecd-ilibrary.org/environment-and-regional-trade-agreements_5km7jf84x4vk.pdf?contentType=/ns/WorkingPaper&itemId=/content/workingpaper/5km7jf84x4vken&containerItemId=/content/workingpaperseries/18166881&accessItemIds=&mimeType=application/pdf.

multilateral treaties do not achieve the lowest pollution results, the current system, which lacks regulation, is also not the best possible outcome. A reasonable global regulation would allow for economies of scale, which in turn could lower a company's costs by reducing design and manufacturing complexity.[275] If a global company knew that it could ship the same engine or equipment to any country without worrying about unique regulatory requirements, including something as simple as product labeling, it could reduce production costs.[276] This practice could increase the net social benefit of lower pollution by introducing lower-polluting products into a market without additional costs for a company to enter that market.[277]

Improved public health would be an additional benefit of a global regulation. While difficult to quantify economically, public health could improve through reduced diesel exhaust pollutants if clean-diesel products were more readily available. It follows that adopting a global diesel emission standard could create a more efficient means of lowering regulated pollutant levels and making clean-diesel products more available. This aspect will become particularly important as the world begins regulating greenhouse gases.[278] If, for example, the international community wishes to lower the limits of CO_2, which may impact NO_x output, the problem would be better resolved through an international forum such as the United Nations or World Trade Organization rather than through each individual country.[279]

A global regulation also could improve compliance because second adopter countries currently assess their own penalties for different infractions.[280] Consistent regulations, clearly understood by regulated entities, would increase the likelihood that a company would remain in compliance with known regulations and reduce its risk of financial penalties.[281] In addition, a global regulation may help phase out older products or reduce the number of products created for second adopter countries because the volumes demanded for these unique products may diminish to the point where it no longer makes financial sense for a company to offer the product.[282] For instance, assume that ninety-five percent of countries adopt the global standard. Unless the volume is considerably high, the diesel manufacturers in the remaining five percent may not wish to produce products custom-tailored for the remaining market.[283]

In order for a global diesel regulation to be accepted, an appropriate

275. *See* COLE & GROSSMAN, *supra* note 150, at 305-06.
276. *See supra* Part V.B.
277. *See supra* Part V.A.; *see supra* note 75 and accompanying text.
278. *See* Interview with Robert Jorgensen, *supra* note 9.
279. *See id.*
280. *See id.*
281. *See id.*
282. *See id.*
283. *See id.*

regulated standard is required.[284] However it would be unwise for a country with no fuel infrastructure to support the most stringent emission levels.[285] This would be cost-prohibitive for end consumers as well as a disaster in terms of reliability and emissions performance of the diesel products.[286] Opponents of international regulations fear that there will be a "lowest common denominator problem," where the adopted international standard would be the least stringent available because it is all poorer countries can afford.[287] However, this approach may not be a bad starting point—regulations must begin somewhere.[288] Creating an emission standard to the lowest common denominator could develop and eventually reduce future emission levels more efficiently.[289]

An international regulation would not require all countries to adopt the *same* standard; it would require only that countries adopt *one* standard consistent with the fuel and service infrastructure available.[290] If a country wishes to impose only the lowest possible regulated emission level, other countries are free to adopt more stringent emission levels as long as the regulations implementing the more stringent levels are also standardized.[291] First adopters have several standards which could be applied in all markets.[292] An international standard could require only that a country choose and accept a standard which works best for its society.[293]

A reasonable approach to create an infant international standard would be to adopt a regulation similar to the IMO's NO_x Technical Code.[294] This approach allows countries that require further reduction standards to achieve those goals.[295] Under Tiers II and III and the provision for Emission Control Areas (ECA),[296] the IMO requires all participating parties to have at least IMO Tier I requirements.[297] For the countries wanting to reduce emissions even further, a country can adopt the lower standards of IMO Tier II or can petition the IMO to create ECAs which are certain coastal boundaries that require compliance with IMO Tier III.[298]

---

284. *See id.*
285. *See id.*
286. *See id.*
287. *See id.*
288. *See id.*
289. *See id.*
290. *See id.*
291. *See id.*
292. *See id.*
293. *See id.*
294. Int'l Mar. Org., Amendments to the Technical Code on Control of Emission of Nitrogen Oxides from Marine Diesel Engines (NOx Technical Code 2008), Res MEPC.177(58) (Oct. 10, 2008).
295. *See* Interview with Robert Jorgensen, *supra* note 9.
296. *See id.*
297. *See id.*
298. *See id.*

Enforcement also plays a significant role in pollution control.[299] Without enforcement, a company faces little risk in not complying with existing regulations.[300] A global diesel regulation would provide an affordable way to achieve enforcement.[301] Rather than a country spending money creating a regulation, it can spend money enforcing an existing regulation.[302] Countries that do not have enforcement agencies have found that by adopting the IMO standards, they can generate revenue through compliance enforcement by fining vessels that do not comply with IMO standards.[303] These fines eventually could trickle down to the end consumers through higher shipping costs.[304] However, if companies consistently fail to follow the regulations, they most likely will price themselves out of the market because their services could not compete with companies that do follow the regulations.[305] This would be beneficial to the public because society wants to discourage companies from polluting.

VIII. CONCLUSION

The world will benefit both economically and socially if it adopts a global diesel regulation for diesel exhaust emissions. Reducing the number of ineffective and/or redundant diesel exhaust emission regulations will allow higher quality products with lower diesel exhaust emissions to be delivered to the markets at lower costs. Successes can be achieved like those of the European Union's Internal Market and other harmonized regulatory systems.[306]

While an international agreement will be difficult to achieve,[307] the alternative of uncontrolled pollution in the wake of new regulations for greenhouse gas emissions could prove more problematic.[308] Although the United Nations has no power to enforce a global regulation, it could propose an infant, harmonized regulation where countries could voluntarily adopt and enforce the provisions of the regulation. An example is shown in Table 2 below. The regulation can be arranged by considering both the fuel quality and service infrastructure available, and a country can adopt and enforce the regulation which best suits its needs. This approach could reduce the difficulties that global companies have with complex regulations, provide a cost-effective means for a country to reduce its pollution levels, allow countries to spend their resources on enforcement rather than the creation of additional

299. *See id.*
300. *See id.*
301. *See id.*
302. *See id.*
303. Interview with Rich S. Wagner, *supra* note 28.
304. *Id.*
305. *Id.*
306. *See supra* Part V.
307. *See generally* Sand, *supra* note 122.
308. Interview with Robert Jorgensen, *supra* note 9.

regulation requirements, and serve as a stepping stone for an global CO_2 regulation. Countries also would be free to choose the timing for which the international standard is adopted. The United Nations should create a global diesel exhaust regulation similar to the International Maritime Organization's NO_x Technical Code in order to create a more efficient and sustainable global economy.

Table 2: Proposed International Global Regulation[309]

International Standard - Level I				
Application	Accepted Regulation(s)	Allowable Fuel Sulfur Levels	Infrastructure	Examples
On-highway	EPA 1990 or E-91	2500 ppm	Developing	Any unregulated countries
Nonroad	EPA Tier 1 or EU Stage I	Any	Developing	
Marine	EPA Tier 1	Any	Developing	
Locomotive	EPA Tier 0	Any	Developing	
International Standard - Level II				
Application	Accepted Regulation(s)	Allowable Fuel Sulfur Levels	Infrastructure	Examples
On-highway[1]	EPA 1991, Euro II or Euro III	< 500 ppm	Moderate	Second adopters such as China, India, Mexico, and South Korea
Nonroad	EPA Tiers 2 or 3, EU Stage II or Stage III A	< 500 ppm	Moderate	
Marine	EPA Tiers 2 or 3, EU Stage III A	< 500 ppm	Moderate	
Locomotive	EPA Tiers 2 or 3, EU Stage III A	< 500 ppm	Moderate	
International Standard - Level III				
Application	Accepted Regulation(s)	Allowable Fuel Sulfur Levels	Infrastructure	Examples
On-highway	EPA 2007 or 2010, Euro V or VI	< 15 ppm	Sophisticated	First adopters such as United States, European Union member countries, and Japan
Nonroad	EPA Tier 4i or Tier 4, EU Stage III B or EU Stage IV	< 15 ppm	Sophisticated	
Marine	EPA Tier 4	< 15 ppm	Sophisticated	
Locomotive	EPA Tier 4, EU Stage III B	< 15 ppm	Sophisticated	

Note 1: Possible use of EU Stage IV if fuel sulfur level less than 50 ppm

309. *See id.*