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NOTES

SHOULD THE UNITED STATES INTERVENE IN INTERNATIONAL CONFLICTS: WHY, WHEN, AND HOW?

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"When you approach a city to attack it, offer its people a peaceful way to surrender."[1]

I. INTRODUCTION

This comment analyzes the state of international interventions that are often couched in terms of protecting humanity, specifically the civilian population of a state.[2] In many instances, interventions are undertaken as a result of internal conflict, which is generally the impetus for regime change. The global community is concerned not only about intervention but also failure to intervene, which often leads to critiques about the underlying rationale and effects of either decision. These concerns are couched under various rubrics, but the "rule of law" is often cited as a guiding light that determines the rights and duties based on: customary international law, treaty law, jus cogens[3] concepts, and the evolving nature of international law.[4] The questions often come to, are we our brothers' and sisters' keepers?[5] The legal and moral bases for intervention are inherently part of

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1. *Deuteronomy* 20:10 (God's Word Translation) (emphasis added).

2. FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY, 23-24 (Transnat'l Publishers, Inc. 2d ed. 1997) (discussing humanitarian intervention and the models of intervention: absolute noninterventionism (where force is only justified in response to self-defense); limited interventionism (only in cases where extreme human rights violations exist, e.g., genocide, etc.); and, broad interventionism (humanitarian intervention is acceptable in cases of serious human rights violations, which need not reach the genocide level).

3. "Latin for 'cogent law.' A principle or norm of international law that is based on values taken to be fundamental to the international community that cannot be disregarded." *Jus cogens*, NOLO'S PLAIN-ENGLISH LAW DICTIONARY, http://www.nolo.com/dictionary/jus-cogens-term.html (last visited Apr. 19, 2013).

4. *See, e.g.* Euan MacDonald & Philip Alston, *Sovereignty, Human Rights, Security: Armed Intervention and the Foundational Problems of International Law*, *in* HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 1 (Euan MacDonald & Philip Alston, eds., 2008).

5. Henry A. Kissinger & James A. Baker III, *The Grounds for U.S. Intervention*, THE WASH. POST, Apr. 10, 2011, at A17, *available at* http://www.henryakissinger.com/articles/wp041011.html (discussing ongoing confrontations in the Arab world and their belief that the United States should always support democracy and human rights

that query, which allows us to determine whether we are in fact keepers of the global citizenry; and, if we are the keepers, then what are our duties and responsibilities both legally and morally? Intervention or failure to intervene often results in far reaching consequences, which may have direct effects on civilian populations and often direct or indirect effects on external forces, often economic and political. Therefore, in all instances, we must carefully consider what level of intervention would least likely cause harm to those we desire to assist, especially when this assistance includes effects that, more often than not, will be wholly felt within another sovereign's territory. Inherent in all interventions are questions of audience and commitment, i.e., the citizens' views, assurance for the country where the intervention may take place that the intervention is for the right reasons, and, perhaps most crucial, support after the intervention is complete.[6]

After this brief introduction, part two of this Comment provides an overview of several recent interventions. Part three examines the "why"; part four develops the "when"; and part five discusses the "how." Finally, part six covers the conclusion and recommendation, highlighting an existing, volatile situation with recommendations of how it and other percolating conflicts should be undertaken by the community of civilized nations. The conclusion supports just interventions when they "are waged in defense of the only currency we all have: our basic rights and the individual autonomy from which we all derive."[7] People deserve to live without fear; interventions should start with the offer of peaceful settlements, if at all possible. If not, interventions should be undertaken with the interest of peace as the ultimate goal, even though war may be the only option to obtain that goal.

II. OVERVIEW – RECENT INTERVENTIONS

From the last decade of the twentieth century to the present, the United States and its allies have engaged in several interventions of various types. Interventions included humanitarian, "regime change" and "democracy promotion," as well as counterinsurgency strategies.[8] The US

politically, economically and diplomatically, just as we championed freedom for the captive peoples of the Soviet empire during the Cold War. Our values impel us to alleviate human suffering. But as a general principle, our country should do so militarily only when a national interest is also at stake.).

6. *See NATO's Risky Afghan Endgame*, ECONOMIST, May 20, 2012, at 60, *available at* http://www.economist.com/node/21555893. *See* e.g., S.C. Res. 2022, U.N. Doc. S/RES/2022 (Dec. 2, 2011) (establishing a transitional Government of Libya, and reaffirming its commitment to the sovereignty, independence, and territorial integrity of the nation).

7. TESÓN, *supra* note 2, at 317.

8. James Traub, *The End of American Intervention*, N.Y. TIMES, Feb. 19, 2012, at Sec. SR, p. 4, *available at* http://www.nytimes.com/2012/02/19/opinion/sunday/the-end-of-american-intervention.html?pagewanted=all (discussing President Obama's national security strategy and its core objectives: "defeat Al Qaeda, deter traditional aggressors, counter the

government has taken the position that certain action may warrant US intervention.[9] The global community has engaged in interventions under the auspices of regional and multinational organizations for various reasons and in various situations. To secure "compliance with customs, principles, and norms that function as rules to regulated conduct"[10] by persons and states, sometimes force, punishment, or other methods must be employed.[11] On one hand, such regulating efforts by the United States and its allies have been exercised in places like Afghanistan,[12] Rwanda,[13] Bosnia-Herzegovina,[14] Iran (US rescue intervention),[15] Kosovo,[16] and Libya,[17] as

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threat from unconventional weapons.").

9. *Id.*

10. Jasper Doomen, *The Meaning of 'International Law,'* 45 INT'L LAW 881, 887-888 (2011).

11. *Id.* at 888.

12. "Following the 9/11 terrorist attacks in the USA, the USA and the UK pledged to take action against all states harbouring or supporting terrorist activities. [In 2001,] [a]fter a significant military build-up and an unsuccessful ultimatum to hand over prime suspect Osama bin Laden, US and UK forces invaded Afghanistan." NIKOLAS STURCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW 308 app. § 434 (John S. Bell & James Crawford, eds., Cambridge Univ. Press 2007) (discussing the evolution and developments in the threat of force before 1919 and the threat and use of force from 1945-2003).

13. OLIVIER CORTEN, HUMAN RIGHTS AND COLLECTIVE SECURITY: IS THERE AN EMERGING RIGHT OF HUMANITARIAN INTERVENTION?, *in* HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 90 (Euan MacDonald & Philip Alston, eds., 2008). *See also* TESÓN, *supra* note 2, at 258 (discussing collective humanitarian intervention in Rwanda after the UN approved a French proposal to intervene, i.e., "use military force ('all necessary means') to protect civilians in a very violent civil war that had erupted in Rwanda.").

14. CORTEN, *supra* note 13, at 91(discussing categories of humanitarian intervention, including Operation Resolute Force in Bosnia, August 1995).

15. Here, the United States attempted, unsuccessfully, to rescue American hostages [Operation Eagle Claw]. *Timeline of United States Military Operations: 1980 - 1989*, WIKIPEDIA, http://en.wikipedia.org/wiki/Timeline_of_United_States_military_operations (last visited Dec. 14, 2012) (highlighting U.S. military operations where military units participated).

16. CORTEN, *supra* note 13, at 108-23 (discussing NATO member states intervention in 1999 under human rights and humanitarian rubrics and the interwoven ambiguity of defined legal authority over political aspects in its efforts to allegedly avoid a humanitarian catastrophe). *See also Kosovo: A Moral Crusade Reconsidered*, http://www.amprpress.com/Kosovo.htm (last visited Apr. 19, 2013) (discussing the error of US intervention, which was an imposition of the American will in a new world order, "Pax Americana." The author wrote:

> Americans had better rethink their support for such "moral crusades" as we conducted in Kosovo. Are Americans prepared for the day when the shoe will be on the other foot and other nations impose their definition of morality on them? Are Americans prepared to overthrow historic concepts of international law with its recognition of national sovereignty? If so that will indeed be a new world order.

Id.

17. Traub, *supra* note 8 (discussing interventions during the 1990s as well as NATO's recent air campaign in Libya, which clarifies that humanitarian intervention are still viable

well as other parts of Africa.[18] On the other hand, the global community has remained silent in other situations, e.g., Sudan, where it has failed to intervene despite cries for intervention. By way of example, Africa exhibits many of the reasons why interventions are on the rise globally; oppression, corruption, lack of enforcement of women's rights, gender violence, poverty among the masses, and instability led to many of the internal coups, riots, and other acts of self determination throughout that part of the world.[19]

In fact, "The UN Security Council rarely acts effectively in crises, not only because of the veto power of its leading members but also because its members do not have a strong sense of responsibility for global security,

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and are not doomed to fail). *See also* Scott Wilson and Karen DeYoung, *Limited Intervention Contrasts Obama with Bush*, THE WASH. POST, Oct. 21, 2011, at A-01. President Barack Obama's intervention was limited, with no "boots on the ground," and emphasized global burden-sharing.

18. HERMAN J. COHEN, INTERVENING IN AFRICA: SUPERPOWER PEACEMAKING IN A TROUBLED CONTINENT 17 – 59 (McMillan Press Ltd. 2000) (discussing US intervention in Africa, here specifically Ethiopia and the US position, based on political pressure, to assure the safe departure of 20,000 Ethiopian Jews and to relieve hunger in the Horn of Africa). See CORTEN, *supra* note 13, at 90 (discussing the 1990 humanitarian justification for intervening in Liberia as well as Somalia - Restore Hope operation in December 1992). See TESÓN, *supra* note 2, at 234 (discussing collective humanitarian intervention in Somalia (1992-1993) as a result of UN Resolution 794, which authorized a U.S.-led military force to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief . . . ."). *See* ALEXANDER DE WAAL, WHO FIGHTS? WHO CARES? WAR AND HUMANITARIAN ACTION IN AFRICA 25 (Africa World Press 2000). Author posits the view that the international humanitarian interventions in Africa:

> was not an attempt by the UN to usurp the powers of major states, or a project for recolonisation. Instead it was an attempt by major states to use the UN and other 'humanitarian' institutions to impose particular supposed solutions on Africa. The humanitarian international is practicing a new form of imperial control . . . .This aggressive multilateral interventionist policy was spearheaded by the United Nations and large humanitarian agencies through the driving forces were the US Government (initially) and the French and Belgian governments (more consistently) . . . .[T]he prospects of future large scale international interventions in Africa, instigated by a western power, are remote. But it is remarkable that very similar 'humanitarian' rationalizations have since been cited by NATO for its intervention in Kosovo.

See also John Tirman, *Do We Care When Civilians Die in War?*, THE WASH. POST, Jan. 8, 2012, at B1, B5. The author describes how the United States uses cultural tropes to explain the US action as well as how "the news media and politicians frequently portraying Islamic terrorists a frontier savages. By framing each of these wars [Iraq and Afghanistan] as a battle to civilize a lawless culture, we essentially typecast the local populations as the Indians of our North American conquest."

19. Roland Aveng, Sajalieu Bah, David Bamlango, Edna Udobong, Elizabeth Barad, & James Feroli, *Africa*, 41 Int'l LAW, 691 (2007) (discussing the issues that affect progress as well as major accomplishments that have taken place in many African nations, such as Charles Taylors' transfer to the Hague; Ellen Johnson Sirleaf's Presidency in Liberia; and political changes/participation of women in the process).

[or] the survival of minority people . . . ."[20] Members of the Security Council "pursue their own national interests while the world burns,"[21] especially the permanent members with an unbridled right to veto.[22] A recent veto by two permanent members, China and Russia, illustrates the point.[23] "Council practice . . . exhibit[s] the promise and the danger of a more activist Organization tied to a legal framework still subject to the will of member states."[24]

Iraq is a great example of the international community's continued responses to hostile acts against neighbors. The UN Security Council authorized "Operation Desert Storm," an intervention against Iraq in order to protect the Kurds.[25] The operation allowed intervening member states to use force "to terminate Iraq's occupation of Kuwait."[26]

The Security Council buttresses its resolutions for intervention under the UN Charter mandates.[27] The United States has supported UN Security Council resolutions that "authorize the use of force [intervention] unequivocally."[28] The Resolution authorized the use of all "necessary means."[29] In 1991, the United States and five of its allies intervened into the

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20. Michael Walzer, *On Humanitarianism – Is Helping Others Charity, or Duty, or Both?* 90 FOREIGN AFF. 69, 75 (July/Aug. 2011) (discussing the importance of humanitarianism generally and more specifically the case of humanitarian intervention).

21. *Id.* at 75.

22. U.N. Charter, art. 27, para. 3.

23. CNN Wire Staff, *Russia, China Veto U.N. Action on Syria; Opposition Group Calls for Strike*, CNN (Feb. 4, 2012), http://www.cnn.com/2012/02/04/world/meast/syria-unrest/index.html?iphoneemail (discussing growing international anger about the carnage taking place in Syria; China and Russia successfully wielded their veto power and voted against the resolution, which condemned Syria).

24. SIMON CHESTERMAN, JUST WAR OR JUST PEACE? 162 (Oxford Univ. Press 2002) (discussing intervention and the use of force).

25. TESÓN, *supra* note 2, at 234 (discussing collective humanitarian intervention in Iraq, "the first, historic, instance of humanitarian intervention.").

26. *Id.* at 235.

27. U.N. Charter, Ch. VII, art. 39. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security." *Id.* To prevent an aggravation of the situation, the Security Council may call upon the concerned parties to comply with provisional measures. *Id.* at art. 40. "The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the *severance of diplomatic relations*." *Id.* at art. 41 (emphasis added).

28. MICHAEL BYERS, WAR LAW: INTERNATIONAL LAW AND ARMED CONFLICT 41 (Grove Press 2006), (discussing the developments and the recent constraints to "use of force").

29. *Id*; *E.g.*, UN Security Council Resolution 678 authorized Member States cooperating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international

sovereign territory of Iraq to protect civilians when it conducted "Operation Provide Comfort."[30] Other resolutions are not as clear,[31] which opens the door for broad interpretation and may lead to premature or unilateral interventions.

More recently, in 2003, the U.S.-led intervention into Iraq was interpreted as justified based on a conclusion by the United States and its allies that Iraq had materially breached "its ceasefire and disarmament obligations."[32] After the United States repeatedly warned "Saddam Hussein to disarm and give up control of Iraq," [33] the country was invaded in the

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peace and security in the areas. S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/575/28/IMG/NR057528.pdf?OpenElement.

30. BYERS, *supra* note 28, at 40 (discussing the developments and the recent constraints to "use of force"). *See also* S.C. Res. 0688, U.N. Doc. S/RES/0688 (April 5, 1991):

> [M]indful of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security, Recalling of Article 2, paragraph 7, of the Charter of the United Nations, Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region, Deeply disturbed by the magnitude of the human suffering involved . . . 1. Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region; 2. Demands that Iraq, as a contribution to remove the threat to international peace and security in the region, immediately end this repression and express the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected; 3. Insists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations; 4. Requests the Secretary-General to pursue his humanitarian efforts in Iraq and to report forthwith, if appropriate on the basis of a further mission to the region, on the plight of the Iraqi civilian population, and in particular the Kurdish population, suffering from the repression in all its forms inflicted by the Iraqi authorities; 5. Requests further the Secretary-General to use all the resources at his disposal, including those of the relevant United Nations agencies, to address urgently the critical needs of the refugees and displaced Iraqi population; 6. Appeals to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts.

31. BYERS, *supra* note 28, at 40 (discussing how Security Council resolutions are sometimes worded ambiguously as a result of deliberate compromise).

32. *Id.* at 43 (discussing the military intervention in Iraq as interpreted to be authorized not only by UN Resolution 678, but also 1441, which was unanimously adopted after a finding that Iraq was in breach). *Cf.* Edieth Y. Wu, *Saddam Hussein as Hostes Humani Generis? Should The U.S. Intervene*, 26 SYRACUSE J. OF INT'L L. & COM. 55, 94 (1998) (discussing why the US should not intervene in spite of its view, and perhaps others, that Saddam Hussein may be classified as hostes humani generis).

33. STURCHLER, *supra* note 12, at 309-10 app. § 441 (highlighting threats of force from 1945-2003).

U.S.-led "Operation Iraqi Freedom" (OIF). OIF included troops from the United States, Britain, Australia, Spain, as well as other countries.[34] The mission was to "disarm Iraq in pursuit of peace, stability, and security both in the Gulf region and in the United States."[35]

After almost a decade, US soldiers finally left Iraq. One critic said the war was "launched under false pretenses" by President George W. Bush, and the death toll on both sides left a "destabilized Middle East, a newly emboldened and empowered Iran, and 'widespread hatred of the U.S.'"[36] Nevertheless, "a government has been formed."[37] "Iraq still has a long way to go before it becomes a stable, sovereign, and self-reliant country. Continued engagement by the United States [and the global community] can help bring Iraq closer to the American vision of a nation that is at peace with itself, a participant in the global market of goods and ideas, and an ally against violent extremists."[38]

The United States intervenes in many instances in hopes that its presence will affect "the postconflict process of recovery and rehabilitation"[39] in regions that are entrenched in internal conflict. Humanitarian assistance has been realized as a result of the ravaging devastation that civilian populations experience during and after wars and internal conflicts. Collective intervention in humanitarian situations is emerging as an exception to the absolute state sovereignty rule, which basically acted as a shield to prevent interference in internal affairs. "It is

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34. STEPHEN A. CARNEY, CENTER OF MILITARY HISTORY, ALLIED PARTICIPATION IN OPERATION IRAQI FREEDOM CMH Pub 59-3-1 (2011), *available at* http://www.history.army.mil/html/books/059/59-3-1/CMH_59-3-1.pdf (discussing the participation and achievements of the thirty-seven countries that provided military support in OIF).

35. RICHARD F. GRIMMETT, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2001, Congressional Research Service (CRS Web) Rep. No. RL30172 (Feb. 5, 2002), *available at* http://www.fas.org/man/crs/RL30172.pdf (highlighting U.S. military operations where military units participated). On February 17, 2010, the US Secretary of Defense Robert Gates announced that as of September 1, 2010, the name "Operation Iraqi Freedom" would be replaced by "Operation New Dawn." Secretary of Defense, Memorandum for the Commander, U.S. Central Command (Feb. 17, 2010), *available at* http://a.abcnews.go.com/images/Politics/08144-09.pdf.

36. *Controversy of the Week – Iraq: What Was Gained, What Was Lost*, THE WK, Dec. 30-Jan. 6, 2012, at 6, (quoting Gary Kamiya, Salon.com, discussing US involvement in Iraq and the US soldiers who were sacrificed, which ultimately resulted in an uncertain and dark future for the country). On the other hand, others have said "Iraq needs continued U.S. support . . . . Otherwise we face a power vacuum and maybe more war." *How They See Us: Iraq Says Good-bye to U.S. Troops*, THE WK, Dec. 30-Jan. 6, 2012, at 16.

37. Emma Sky, *Iraq, From Surge to Sovereignty – Winding Down the War in Iraq*, 90 FOREIGN. AFF. 117, 126, (March/April 2011) (discussing the United States' attempt to reduce violence prior to its withdrawal of American troops and the shift of duties to the Iraqi officials).

38. *Id.* at 127.

39. COHEN, *supra* note 18, at 59 (discussing America's political and social objectives for intervening in Ethiopia).

now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity."[40] Hence, it appears that customary international law is adapting to the needs of the global society because of the belief that "[s]tates sovereignty must, on occasion, yield to human rights concerns."[41] For instance, the "duty to protect" women, children, and the general civilian population are inescapable reasons to intervene; this author argues it must be done, though, only with the smallest military footprint.

III. THE WHY

Nations should intervene because they have an inherent duty to protect human rights. "[P]rotecting the population"[42] is a primary reason to intervene. When the major world organizations and the majority of nations agree that intervention is the correct option, interventions should also be undertaken. The global community of nations, after consulting and determining that no other avenue exists, should intervene because human rights are rights that all world citizens should enjoy. Intervention should never take place if the intervention is based on "political objectives,"[43] or nation-building, or to chase warlords. The North Atlantic Treaty Organization ("NATO") has been criticized for not listening even though the situation indicates that the approach may not be correct.[44] Adjustments must be made and better strategies have to be considered. But a major organization or a single nation cannot be prevented from intervening solely because of "fears that the absence of a substantial number of NATO [or UN] members ... [may signal] a lack of solidarity . . . ."[45] Nations should intervene to ensure that citizens who rise up against their leaders--especially those who are oppressing and committing heinous acts-- in an effort to bring about change against oppressive regimes are supported and protected. Nations must call upon sister nations to share the burden that was

40. TESÓN, *supra* note 2, at 239 (discussing humanitarian intervention and the models of intervention) (citing Report of the Secretary-General on the Work of the Organization, U.N. GAOR., 46th Sess., No. 1, U.N. Doc. A/46/1, at 5, (1991)).

41. TESÓN, *supra* note 2, at 239 (quoting Javier Perez de Cuellar).

42. *Western Aims in Afghanistan: Played for Fools*, ECONOMIST, Feb. 27, 2010, at 48, *available at* http://www.economist.com/node/15580253.

43. Christopher B. Hynes, Carrie Newton-Lyons & Andrew Weber, *National Security*, 41 INT'L LAW 683, 684 (Summer 2007) (discussing challenges placed on the United States as a result of the Iraq War, and the ongoing situation with the Taliban in Afghanistan and the resulting impact on security).

44. Lally Weymouth, *Mahmoud Ahmadinejad 'Bombs Are a Wrong Thing to Have'*, NEWSWEEK, Oct. 5, 2009, at 45.

45. Ivo H. Daalder & James G. Stavridis, *NATO's Victory in Libya*, 91.2 FOREIGN. AFF. 2, 4 (Mar./Apr. 2012).

evinced in the Libyan intervention, so that burden sharing "becomes the rule, not the exception;"[46] then, when other situations arise, as they are sure to, "the international community [will] respond[ ] swiftly"[47] and effectively to protect civilians.

IV. THE WHEN

Interventions should only take place after the whole panoply of options has been exhausted: political/diplomatic, economic, and the effective use of the international rule of law. They should be undertaken after the global community of nations, especially the United States and its allies determine "exactly what and whom we are supporting."[48] Unintended consequences,[49] backlash from prior interventions,[50] and objectors' views[51] must also be considered and heavily weighed. Governance and follow-up after an intervention must be determined because it is essential to the nation's stability. The duty to protect must be balanced against the sovereign's rights. Some ask if the United States would allow a foreign sovereign to intervene in its territory. However, this query is not legitimate in determining whether to intervene because any nation, including the United States, could be placed in a situation where the community of

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46. *Id.* at 7.

47. *Id.* at 2 (discussing the necessity of rapid response).

48. Kissinger & Baker III, *supra* note 5 (discussing how interventions should be approached).

49. According to Taliban members, who boasted that Arabs and Iraqis transferred IED technology and other legal methods of destruction to them, "The American invasion of Iraq was very positive for us. It distracted the United States from Afghanistan." Sami Yousafzai & Ron Moreau, *The Taliban in Their Own Words*, NEWSWEEK, Oct. 5, 2009, at 39-40, *available at* http://www.thedailybeast.com/newsweek/2009/09/25/the-taliban-in-their-own-words.html.

50. Arab Mujahedin assisted the Afghan Taliban with its resistance movement, and "American operations that harassed villagers, bombings that killed civilians, and Karzai's corrupt police and officials were alienating villagers and turning them into our favor. *Id.* at 40.

51. Weymouth, *supra* note 44, at 45 (discussing nuclear ambitions and world events with Iranian President Ahmadinejad). Ahmadinejad stated:

> Since NATO entered Afghanistan, terrorism has increased tenfold and the production of illicit drugs has increased fivefold. Let me remind you of a historical event. . . . About 100 years ago, the British forces entered Afghanistan full on and left with a heavy defeat. Thirty years ago, Soviet troops entered Afghanistan and left in defeat. What sort of supernatural force did Mr. Bush envision he possessed that would allow him to win a war that the Soviets and the British could never win? . . . The wealth of the European and American people is being used there without any result except defeat. This wealth can be used to build friendships or to reconstruct a place, so it worries us.

Id.

nations would have to decide when to intervene.

Intervention should definitely take place after a UN Resolution is passed.[52] Additionally, if the United Nations refuses to act and conditions change to imminent breaches of human rights, widespread systematic attacks on civilians, and severe breaches of the peace that affect the civilian population, then intervention should occur. President Barack Obama's decision to "[carry] out the raid that killed Osama bin Laden"[53] demonstrates that one or more nations may have to take up the mantle in order to protect. Interventions should happen when all other options, including diplomacy and sanctions, have been exhausted, and the duty to prevent civilian carnage is imminent.[54] Until then, intervention should be the "last resort, not a first choice."[55] To illustrate, some of the strictest sanctions have been leveled against Iran for its buildup of nuclear capabilities, which threatens the global peace; in some ways they appear to be ineffective as a deterrent.[56] Some think an intervention or a war should be declared to protect humanity. "Iran is a decade into a determined effort to become a nuclear power. If U.S. sanctions don't force Iran's leaders to comply with international demands to prove their program is peaceful, Israel [unilaterally] has said it will take military action to destroy it."[57]

The situation currently brewing in Syria is very similar to the Libyan crisis. Again, citizens around the world are asking whether an intervention is necessary. The question is extremely difficult to answer. Military action is always an option, but the Libyan model is instructive. Nations that are willing to intervene may take the position that "[t]he only sure way to quickly stop the killing and replace the Assad regime with something better would be to do what few have been willing to advocate so far: start a serious military operation to topple the government."[58] However, this is not

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52. U.N. Security Council approved a 'No-Fly Zone' over Libya (allowing all necessary measures to protect civilians; demanding an immediate ceasefire in Libya, including an end to the current attacks against civilians, which it said might constitute crimes against humanity; imposing a ban on all flights in the country's airspace – a no-fly zone; and tightening sanctions on the Qadhafi regime and its supporters). S.C. Res. 1973, U.N.Doc. S/Reg/1973 (Mar. 17, 2011).

53. Colin H. Kahl, *Not Time to Attack Iran*, 91.2 FOREIGN. AFF. 166, 173 (Mar./Apr. 2012) (discussing why war should be a last resort in the growing Iranian situation, in a manner similar to arguments against intervention).

54. *Id.*

55. *Id.*

56. Jay Newton, *One Nation Under Sanctions*, TIME, Sept. 24, 2012, at 42, *available at* www.usiranaffairs.com/?p=4127 (discussing how economic sanctions have, in spite of Iran's holdout, affected Iran: its currency has been devalued by 50%, with a possible 50% inflation rate, and oil exports have decreased by 45%).

57. *Id.*

58. Jonathan Tepperman, Op-Ed., *The Perils of Piecemeal Intervention*, N.Y. TIMES, Mar. 9, 2012, *available at* http://www.nytimes.com/2012/03/09/opinion/the-perils-of-piecemeal-intervention-in-syria.html (discussing the war in Syria, the death toll that continues to

the correct approach. The German government has stated that the approach should be a political/diplomatic approach, which was evinced by the German and French governments' expelling Syrian ambassadors.[59] The level of disconnect also may not be the same in Syria as it was in Libya; reports say "high-level dissent"[60] is absent in Syria, and even though "regime change is overdue . . . a slow squeeze is a smarter solution than war."[61] But for many, the "brutal crackdown on mostly peaceful pro-democracy protests and Assad's tanks shelling civilians,"[62] are examples of sufficient reasons to intervene. Such actions caused one Syrian colonel to defect "to take responsibility for protecting civilians" and made a desperate plea calling on "people of conscience, on people of humanity: please help the Syrian people."[63]

A critical part of the analysis, which works in tandem with the political approach, is the economic approach.[64] The UN Charter provides that economic measures may be used in cases where acts of aggression and other breaches of the peace are occurring.[65] These measures should be stringently used prior to a decision to intervene. Even though the United States acknowledges that the economic and diplomatic approach is an option, it readily posits, "[w]hen it comes to military options ... at the end of the day, we in the Department of Defense have a responsibility to look at the full spectrum of options and to make them available if they are requested."[66]

Another option to consider before intervention is using international law effectively. "From the U.S. perspective, the 'rule of law' offers a powerful mechanism to end violence . . . ."[67] Some critics do not accept

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increase as a result of the rebel action, the divided country, which includes hostile religious groups and ethnicities, as well as the global response, or lack thereof, to finding solutions).

59. Nicholas Kulish & Melissa Eddy, *Putin Sees Worsening Conflict in Syria but Rejects Outside Intervention*, N.Y. TIMES, June 2, 2012, http://www.nytimes.com/2012/06/02/world/europe/germany-likely-to-press-russia-on-syrian-crisis.html (discussing why the global community should avoid military intervention in Syria).

60. Fareed Zakaria, *The Case Against Intervention in Syria*, TIME, June 11, 2012, at 16 (discussing reasons why a military intervention will not work in Syria: geography and the inability for the opposition to unify).

61. *Id.*

62. Rania Abouzeid, *Cracks in the Armor*, TIME, June 27, 2011, at 40-41.

63. *Id.*

64. Walter Pincus, *Big Risks, and No Easy Solutions, in Syrian Intervention*, THE WASH. POST, May 31, 2012 (discussing how the Americans have been pressing for military intervention in Syria, but, obviously, failing to see that Syria is not a video game).

65. UN Charter, Ch. VII, art. 41 (which authorizes the United Nations to partially or completely severe economic relations).

66. Pincus, *supra* note 64.

67. Dr. Gregory P. Noone, *Lawfare or Strategic Communication?*, 43 CASE W. RES. J. INT'L L.73, 78 (2010) (discussing Major General Dunlap's construct of "Lawfare" and the two divergent paths it has now taken on). "[L]awfare" was a way to apply legal pressure on the other side of a conflict, often times, but not always, in conjunction with military

"lawfare" as a legitimate tool to effectuate legitimate changes in modern wars.[68] They view "lawfare" as a malignant weapon of war, with a strategy that uses law to "gain negative publicity for the enemy country."[69] "Lawfare is an assault on the people of free nations to exercise their constitutional rights to free speech under both international and domestic laws."[70]

> The weapon they use is the rule of law that was originally created not to quiet the speech of the innocent, but more to subdue dictators and tyrants. Ironically, it is this very same rule of law that is being misused to empower these tyrants and to thwart free speech about national security and other public concerns. "Lawfare" is an attack on the sovereignty of democratic States. "Lawfare" is a pun, a not so funny play on words based on the shared power of the law that is as strong as the power of military might, especially when it is misused and abused. Continued use of lawfare will erode the integrity of the national and international legal systems and result in the unfortunate and increased use of warfare to resolve disputes.[71]

An example of the correct use of "lawfare" is Charles Taylor's indictment in the Special Court of Sierra Leone, as well as successes in the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). The country in crisis should ask for assistance; after these questions are answered and a global consensus has been reached, then and only then should sovereigns intervene in another sovereign's internal affairs. This intervention must be based on humanitarian concerns that do not lend themselves to the aforementioned process.

Currently, the sentiment from Syria's leadership is that "[t]he Syrian problem is one that can be resolved only by Syrians."[72] At this point, if the

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operations, which then potentially forced the enemy to defend themselves in multiple arenas." *Id.* at 74.

68. Susan W. Tiefenbrun, *Semiotic Definition of "Lawfare,"* 43 CASE W. RES. J. INT'L L. 29 (2010) (arguing that "Lawfare is a weapon designed to destroy the enemy by using, misusing, and abusing the legal system and the media in order to raise a public outcry against that enemy.").

69. *Id.* at 59.

70. *Id.*

71. *Id.* at 59-60.

72. Nada Bakri, *U.N. Human Rights Official Calls for Intervention in Syria*, N.Y. TIMES, Dec. 3, 2011, at Sec. A, *available at* http://www.nytimes.com/2011/12/03/world/middleeast/un-says-action-needed-to-prevent-civil-war-in-syria.html (quoting Faysal Khabbaz Hamoui, Syria's ambassador to the U.N.) (discussing the high commissioner for the UN's human rights' call for international intervention in Syria to protect civilians from the government's crackdown, and warning that Syria was headed toward a civil war.).

global community's position is similar to its position on Libya's Moammar Gaddafi, intervention may be proper. In Libya, NATO and several European allies were involved; President Obama, rightly, allowed the Europeans to take the lead,[73] which showed the international community that "support of at least the absence of opposition of a majority of UN members states"[74] had been verified. Syria is not getting the attention that Libya received. The outrage over civilian casualties, urgent calls for aid, and a cry to protect those who are rising up against Syria's leader, Bashar al-Assad, beg the international community to consider all options.[75] Some believe intervention should be imminent; others "preferred tighter and more coordinated sanctions."[76] "Our strong preference is not to fuel what has the potential to become a full-blown civil war," and there is no desire to arm the opposition either.[77]

The international community responded quickly in Libya. The UN Security Council placed serious sanctions against the country and "referred Qaddafi's crimes against humanity to the International Criminal Court." [78] The international community joined in and took measures to ensure proper pressure was exerted, including persuading the United Nations to pass a resolution so that the international community could protect Libyan civilians from imminent danger.[79] "[A]ll UN members [and participating non-members must] respect the sovereignty and territorial integrity" ... of all nations as much as practicable. [80]

Nevertheless, in situations like Syria where a minimum of one member has "blocked potentially the last effort to resolve [internal issues

73. Wilson & DeYoung, *supra* note 17 (discussing the seven months that it took to capture Gaddafi as well as President Obama's approach, which included working closely with allies in an intervention that highlighted his technocratic approach, which bolsters his foreign policy capabilities).

74. CORTEN, *supra* note 13, at 135-136 (discussing obstacles relating to legal policy and several of Antonio Cassesse's conditions for humanitarian interventions), quoting A. Cassesse, '*Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*', 10 EUR J. INT'L L. 23 (1999).

75. Tim Lister, *No Libya Play for the West in Syria*, CNN, Feb. 8, 2012, http://www.cnn.com/2012/02/07/world/meast/syria-analysis/index.html?hpt=hp_bn2. The United States "should consider all options, including arming the opposition. The blood-letting has got to stop." *Id.* (quoting Sen. John McCain, R-Arizona).

76. *Id.* (quoting U.S. Ambassador to the U.N. Susan Rice).

77. *Id.*

78. Daalder & Stavridis, *supra* note 45, at 2 (discussing NATO's success in the Libyan intervention and the lessons nations should learn from that intervention).

79. *Id.*

80. *The Iraq Effect: Play on the Brink*, ECONOMIST, Feb. 28, 1998, at 25 (discussing how America and Iraq have stepped away from conflict in spite of Hussein's vacillating about UNSCOM's inspectors' visit to his country).

diplomatically and] peacefully,"[81] then actions must be taken. This veto represents the UN Security Council and the international community's abandonment of a people in crisis.[82] Intervention should take place when all options "to halt the violence"[83] and other abuses have been exhausted. Sometimes this will include instances when the UN Security Council fails to take diplomatic and other opportunities to resolve conflicts, or, when diplomatic approaches fail.[84] The United Nations has tried, through former Secretary General Kofi Annan, to negotiate with Syria's ruler, Bashar Assad.[85] "Mr. Assad needs to know that unless he rapidly adheres to Mr. Annan's proposal, diplomatic and logistical backing will be given to establish humanitarian safe zones-- on the Syrian side of the border."[86] Intervention should be inevitable, when it is "time to get tougher,"[87] especially when the regime's counterattacks against dissent rebels employ heavy weapons, powerful weaponry that may include chemical weapons.[88] "President Barack Obama declared on August 20th that use of chemical weapons could trigger an American intervention."[89]

V. THE HOW

After the "Why" and "When" have been evaluated, the "How" must then be determined. The United States and its allies should first approach the situation by "building partner capacity."[90] In other words, help the state defend itself, if at all possible, by providing it "with equipment, training," security intelligence, consulting, and strategic support.[91] Improving the way the United States comes to the decision to intervene is critical, because the outcome and the impact on the country's reputation is a critical "key and enduring test of U.S. global leadership and a critical part of protecting U.S. security as well."[92] Intervention "is an imperfect duty."[93] The why and

81. *Russia, China Veto U.N. Action on Syria*, *supra* note 23.

82. *Id.* (quoting U.S. Ambassador Susan Rice).

83. *Id.* (quoting U.N. Secretary-General Ban Ki-moon).

84. *Id.*

85. *The Syrian Conundrum: Time to Get Tougher*, ECONOMIST, Apr. 28, 2012, at 16, *available at* http://www.economist.com/node/21553443.

86. *Id.*

87. *Id.*

88. *Syria's Rebels: More Than They Can Chew*, ECONOMIST, Aug. 25, 2012, at 39, *available at* www.economist.com/node/21560919.

89. *Id.*

90. Robert M. Gates, *Helping Others Defend Themselves*, 89 FOREIGN. AFF. 2 (May/June 2010) (discussing changes that have affected international security and how the United States should prepare a different strategy to ensure that US and global security issues are addressed effectively to deal with the imminent challenges to global safety and security).

91. *Id.* at 2.

92. *Id.* at 6.

93. Walzer, *supra* note 20, at 78.

when analysis will lead to the second part of the how, which will reveal that "different states are capable of acting,"[94] if military intervention is warranted. Nevertheless, "no single state is the designated actor."[95] As discussed earlier, the United Nations should take the lead; if it does not, the "capable states" should seek support. When "the outside world, to its shame, has shown no such resolve" to intervene and provide relief to internal atrocities, some states must respond.[96]

Like the international citizenry, in some instances, the UN Security Council may not respond:

> [i]f the Council were to be fully faced with the issue, I am not sure whether there would be vetoes on the table or not. But we have to understand in recent history that wherever there have been compelling humanitarian situations, where the international community collectively has not acted, some neighbours have acted.[97]

In the event that support is not forthcoming, then the "capable states" should act in such a manner that would leave the smallest military footprint in their effort to provide "relief."[98] A commitment to a smaller military footprint would reduce civilian casualties, and lend credibility to the states that decided to intervene with or without UN support.[99] Additionally, if the United States is to be regarded as a serious advocate for human rights,[100] it should insist that all operations are undertaken with civilians' safety as a seminal goal.

Member states should pressure the United Nations to act, but if it does not, as suggested when UN sanctions have been deemed ineffective, "pressure from member states [should] become so great that [failure to act] will cease to be relevant,"[101] and the capable states will take the lead. The Syria situation[102] exemplifies an occasion that may lead to such action by "capable states." Even though thirteen Security Council members voted in

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94. *Id.*

95. *Id.*

96. *Leaders – How to Set Syria Free*, ECONOMIST, Feb. 11, 2012, at 11, *available at* http://www.economist.com/node/21547243.

97. CHESTERMAN, *supra* note 24, at 217 (discussing intervention and the use of force; quoting Kofi Annan, Jan. 1999 (UN Press Release SG/SM/6875 (26 Jan. 1999))).

98. *Id.* at 79.

99. Tirman, *supra* note 18 (discussing the total disregard, dismissal, and most of all the "forgetting" about civilian casualties).

100. *Id.*

101. Terence Duffy, *Sanctions and Human Rights: Humanitarian Dilemmas*, 2 GLOBAL DIALOGUE (2000) (discussing the morality of economic sanctions as well as emerging global opposition to their use).

102. *Russia, China Veto U.N. Action on Syria*, *supra* note 23.

favor of a resolution to condemn the Syrian regime, the majority's position was thwarted by two members' unfettered veto power.[103]

> The action must have a reasonable chance of success and do more good than harm. This may be considered in both the short and long term: an intervention that imperils the long-term political independence and territorial integrity of a state may fail[104] [but should be undertaken if the internal activities are "shocking to the conscience of mankind.][105]

If at all possible, internal forces should be persuaded to unite. Safe havens should be "create[d] and defend[ed]"[106] in the most strategic locations inside the nation's border; if not possible, then safe havens should be created in neighboring states. This can be accomplished with the assistance of regional organizations. The UN Charter authorizes the collaboration and the use of "regional arrangements or agencies for dealing with . . . the maintenance of international peace and security."[107] For example, the United Nations has worked with or allowed regional organizations like the Economic Community of West African States,[108] the Organization of American States,[109] and the Organization of Eastern Caribbean States[110] to deal with regional security issues. Clearly,

> some problems handled initially at the regional level cannot be resolved at that level, but will require the greater

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103. *Id.*

104. CHESTERMAN, *supra* note 24, at 229.

105. *Id.* at 228.

106. *Leaders – How to Set Syria Free*, *supra* note 96, at 11 (discussing the international community's failure to assist the Syrian people in spite of state violence, which at that time had lead to a death toll of more than 7,000.). The current death toll in Syria at the time of publication is estimated to be more than 70,000. Michelle Nichols, *Syria Death Toll Likely Near 70,000, Says U.N. Rights Chief*, REUTERS (Feb. 12, 2013), http://www.reuters.com/article/2013/02/12/us-syria-crisis-un-idUSBRE91B19C20130212.

107. U.N. Charter, Ch. VIII, Art. 52(1). "The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council. Art. 51(2).

108. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 206-207 (Oxford Univ. Press 2000) (At its creation, it did not include direct power for peacekeeping action. "But recently, as awareness of the possibilities of regional action has increased" many of the regional organizations "have made new agreements expressly providing for peacekeeping powers.").

109. *Id.* at 200, 202-203 (discussing regional peacekeeping and enforcement action as well as the significant increase in cooperation between such regional organizations and the United Nations).

110. *Id.*

> authority and resources of the UN. Regional organizations were the first to become involved in Liberia, Sierra Leone, Tajikistan, and Georgia, but later were supplemented by the UN, partly to guarantee their impartiality and to remove fears of sphere of influence peacekeeping.[111]

"Relief comes before repair, but repair, despite the risks it brings with it, should always be the long-term goal-- so that the crises do not become recurrent and routine."[112] In other words, the goal should be to promote the state's independence.[113] Economic and political dependency must be avoided.[114] The main objective is to create "self-determination"[115] for the affected nation based on the underpinning of why the intervention was undertaken. In "the face of atrocity, one cannot simply do nothing."[116] The moral imperative dictates intervention in this manner; even though "varied capacity"[117] exists, if the United Nations, the international community, or regional organizations fail to act, "capable states" have to act on their moral imperative.

VI. CONCLUSION AND RECOMMENDATIONS

The international community is currently faced with the situation in Syria,[118] and other Syrian types of uprising and threats to world peace may be looming on the horizon. Thus, the United States, its allies, and others in the global community should adopt the "Why, When, and How," or a similar protocol to decide when an intervention is unavoidably necessary. This Comment was intended to supplement the important dialogue about international interventions, which is critical dialogue that must continue. Current rules, processes, and protocols are only a starting point, but the international community must also employ new approaches to address the changing global environment, especially the recurring internal conflicts,

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111. *Id.* at 237.

112. Walzer, *supra* note 20, at 79.

113. *Id.*

114. *Id.*

115. *Id.*

116. CHESTERMAN, *supra* note 24, at 236 (2002) (discussing intervention and the use of force).

117. GRAY, *supra* note 108, at 236.

118. "The United States [and the much of the global community] has strategic as well as humanitarian reasons to favor the fall of Assad [in Syria] and to encourage international diplomacy to that end. On the other hand, not every strategic interest rises to a cause of war; were it otherwise, no room would be left for diplomacy." Henry A. Kissinger, *Syrian Intervention Risks Upsetting Global Order*, THE WASH. POST, June 1, 2012, *available at* http://articles.washingtonpost.com/2012-06-01/opinions/35460488_1_intervention-regime-change-national-interest.

instability, and threats to humanity that have become extremely commonplace. Internal turmoil is constantly percolating or actually exploding at an increasing rate around the world. A modern intervention analysis must consider that militants, dissidents, and peaceful protesters have access to new technologies, and many have had prior military training. These factors must be considered and integrated into an intervention analysis because resources are not only available to the good guys-- the potential interveners-- but are also available to the militants as well, which often results in devastating impacts on the local civilian population, especially when civil war or other internal conflicts break out.

In the United States, there is a growing resentment that the threat of terror has resulted in costly interventions in foreign places, resulting in billions of dollars spent both internally and externally defending and protecting other nations. Many Americans are not pleased with internal wiretapping endeavors, surveillance of civilians, and intrusive body searches at security points that have resulted in the aftermath of interventions and terror threats.[119] Internal efforts have resulted in the United States becoming "a national security state."[120]

Moving forward, the global community cannot avoid its responsibility. As the global citizenry, in various and sometimes obscure parts of the world, react as a result of their governments failing them and continue to assert their right to "self-determination," their desire for needed regime changes, their right to have equality in treatment, and their right to be safe, world leaders and their allies will be called on directly or indirectly to protect such inalienable rights.

International norms relating to intervention often result from the hue and cry of many around the world. Nations and international organizations are expected to heed the call and offer assistance during and after intervention.[121] A model for help beyond interventions is the suggestion that the United States retain its influence in Afghanistan by carefully disbursing foreign aid and continuing its relationship with the Afghan National

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119. *Terrorism: Too Much Vigilance?*, THE WK, Sept. 23, 2011 at 21, (discussing why Americans should not give up liberties under the hollow threat of terrorism, as well as the need for the United States not to continue to overreact to the often unwarranted reports from the government that plots abound).

120. *See, e.g.* Frederick A. O. Schwartz, Jr., *Secrecy, Fear, and the National Security State: A Lecture on American Democracy*, THE BRENNAN CENTER FOR JUSTICE (Nov. 22, 2010), http://www.brennancenter.org/analysis/secrecy-fear-and-national-security-state-lecture-american-democracy.

121. *Afghanistan and the United States: Agreement, at Last*, ECONOMIST, Apr. 28, 2012, at 43, *available at* http://www.economist.com/node/21553467 (The United States and Afghanistan agreed to the "Strategic Partnership Agreement (SPA), which outlines how America will stand by Afghanistan after 2014, when most NATO troops are due to pull out.").

Security Forces.[122] To ensure that the balance of power continues, "[t]he United States and its NATO allies would need to pay constant attention," to prevent "unrestrained warlordism and civil war."[123] A mixed sovereign model would ensure ongoing Western engagement.[124] "[I]t would require not only continued aid flows but also sustained political and military engagement. Regional diplomacy would be particularly important" to ensure that Afghanistan would not become "a magnet for foreign interference and a source of regional instability."[125] The United States, Afghanistan, and NATO signed a partnership agreement to work with the International Security Assistance Force to transfer security and to establish a framework for future cooperation.[126] This cooperation, which could be replicated in other countries, would include support with the political transition, redoubling of efforts by the United States and its partners' civilian and military officials "to establish a road map for negotiations that include not only the United States [other nations] and some combination of the Taliban [the opposition] and the Karzai [the affected country's administration] but also other stakeholders, such as the parliament, domestic opposition groups, and women's and civilian organizations."[127] Most important, prior to ending an intervention, the interveners must establish negotiations and processes that "will gain traction only through sustained engagement by all the relevant parties."[128] Once intervention has happened, the international community must ensure that "hard-earned gains and countless sacrifices"[129] by both the affected countries' citizens and the interveners' citizens are not squandered.[130]

The bottom line is that decisions to intervene or not to intervene will also be judged by the international community's interest. The author, in the words of Henry Kissinger, recommends the following caveat when the global community in a collective venture decides to intervene, "[i]n reacting to one human tragedy [which may be based on the hue and cry of global citizens], we must be careful not to facilitate another."[131] Accordingly, as important, the United States must ensure that all protocols are followed so that the United States will not be regarded as the "unilateral, international

122. Stephen Biddle, Fortini Christia, & J. Alexander Thier, *Defining Success in Afghanistan*, 89.4, FOREIGN. AFF. 48, 57 (July/Aug. 2010).

123. *Id.* at 48.

124. *Id.*

125. *Id.*

126. Stephen Hadley & John Podesta, *The Right Way Out of Afghanistan*, 91.4, FOREIGN. AFF. 41 (July/Aug. 2012).

127. *Id.* at 48.

128. *Id.* at 48, 49.

129. *Id.* at 53.

130. *Id.* at 53.

131. Kissinger, *supra* note 118.

interventionalist"[132] that routinely fails to secure the global community's assistance and moves forward at its whim based on its "uncontested military superiority" and its "military hegemony."[133] One observer aptly noted:

> those of us who have championed an idealistic foreign policy have been deeply chastened by the failure of so many fine hopes and have been forced to recognize both how much harm the United States can do with the best of intentions and how very hard it is to shape good outcomes inside other countries. So we must accept, if uneasily, the future which now seems to lie before us: We will do less good in the world, but also less harm.[134]

132. Edieth Y. Wu, Professor of Law, coins the phrase.

133. Afzaal Mahmood, *The Bush Doctrine*, DAWN, Sept. 28, 2002 (Karachi, Pak.) *in*, WORLD PRESS REVIEW 8 (Dec. 2002) (discussing the Bush Doctrine, namely the use of unilateral military action).

134. Traub, *supra* note 8.

TO THE RESCUE: LIABILITY IN NEGLIGENCE FOR THIRD PARTY CRIMINAL ACTS IN THE UNITED STATES AND AUSTRALIA

Stephen Tuck

I. INTRODUCTION

The lawyer's maxim *de minimis non curat lex* (the law does not concern itself with trifles) has two problems. First, it is a cliché. Second, it is inaccurate. The case of *Donoghue v. Stevenson*, which unbottled the jurisprudential genie of the tort of negligence for much of the common law world, arose from a minor incident in a Scottish café.[1] Despite this unremarkable origin, one might perhaps say that nearly all subsequent jurisprudence in the law of negligence has attempted to identify the limits of the doctrines laid down in that case.[2] The intricacy of this search for the limits is generated by the tension between a duty to avoid negligence or foreseeable harm and the "non-intervention principle" that one person is generally not obliged to take steps to protect another person.[3]

The tension between the duty and the non-intervention principle is raised in a marked form by claims in negligence arising out of criminal acts committed by third parties. In the common law of both the United States and Australia, the initial premise can be summarized by stating that one party is not obliged to protect another from a third party's criminal act.[4] However, in both countries, the law has developed to reflect the following jurisprudential norm: liability attaches where a defendant has allowed a plaintiff to suffer harm through a criminal act when the defendant (a) can reasonably foresee that harm would occur and (b) is capable of acting to prevent it. This principle is hereinafter called the "foreseeability/capacity analysis" in which the degree of foreseeability is balanced against the level of capacity to act in assessing the likelihood of liability being found.

Australia and the United States represent largely unconnected outgrowths of the same philosophical tree.[5] Such similarities are validated

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1. JUSTIN FLEMING, BARBARISM TO VERDICT 158-59 (Angus & Robertson 1994) (describing the incident as recorded in Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) (appeal taken from Scot.)).

2. *Cf. Modbury Triangle Shopping Crt. Pty. Ltd. v Anzil* [2000] 205 CLR 254, 274-75 (Austl.) (Kirby, J.).

3. *See McKinnon v Burtatowski* (Sup. Ct. Vic) [1969] VR 899, 903-04 (Austl.), *available at* http://www.austlii.edu.au/au/cases/vic/VicRp/1969/111.html (last visited Apr. 14, 2013).

4. Nivens v. 7-11 Hoagy's Corner, 943 P.2d. 286, 290 (Wash. 1997); *Smith v Leurs* [1945] 70 CLR 256, 262 (Austl.) (Dixion, J.).

5. HUGH BICHENO, REBELS AND REDCOATS xxxiii (Harper Collins 2003) (see diagram of related traditions).

by the American and English courts drawing insight from each other during the development of the law of negligence; although this is perhaps more controversial today.[6] As Lord Atkin commented in *Donoghue v. Stevenson*, "It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States."[7] In the landmark American decision of *MacPherson v. Buick Motor Company,* both the majority and dissenting opinions saw merit in reviewing English case law[8] in a fashion similar to the approach long taken by Australian courts.[9] Therefore, a comparative analysis of their common law should shed light on the necessary and natural developments of the common law negligence for criminal acts of third parties.

II. CLAIMS AGAINST PRIVATE DEFENDANTS

A. Modbury Triangle Shopping Centre Pty. Ltd. v Anzil *and What Happened Next: The Australian Experience*

Claims against private defendants for negligently failing to prevent criminal acts of third parties tend to be brought against the owners or managers of the premises where or arising out of which offenses have occurred. In Australian law these claims represent an outgrowth of the law related to occupiers' liability. The classic cases on occupiers' liability are both appeals to the Privy Council from the High Court of Australia. In

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6. See Justice Scalia's robust defense of American jurisprudential independence: "The Court should either profess its willingness to reconsider [rules relating to criminal evidence, disestablishmentarianism, abortion and double jeopardy] in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.". Roper v. Simmons, 543 U.S. 551, 627 (2005) (Scalia, J. dissenting) (Rehnquist, CJ. and Thomas, J. join the dissent). His Honor wrote in dissent, but one notes the majority made little attempt to disagree: "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.". *Id.* at 578 (Kennedy, J.) (Stevens, Souter, Ginsburg and Breyer, JJ. concurring).

7. Donoghue v. Stevenson [1932] A.C. 562, 598 (H.L.) 598 (appeal taken from Scot.)., *available at* http://www.bailii.org/uk/cases/UKHL/1932/100.html (last visited Apr. 14, 2013).

8. MacPherson v. Buick, 217 N.Y. 382, 392-93 (N.Y. 1916) (Cardozo, J.); *see also id.* at 397 (Bartlett, CJ. dissenting).

9. For instance, one notes that within a year of *Donoghue v Stevenson* being reported, it formed part of the arguments in Australia on compensation for sale of defective goods: *Australian Knitting Mills Ltd v Grant* [1933] 50 CLR 387, 409 (Austl.) (Starke, J.); *id.* at 412 (Dixon, J.); *id.* at 440 (Evatt, J.). There is a powerful line of argument that Australian courts should continue to bear in mind the decisions of English and other foreign courts. *See Cook v Cook* [1986] 162 CLR 376, 390 (Austl.) (Mason, Wilson, Deane and Dawson, JJ.); *see also id.* at 394 (Brennan, J.); *see also Modbury Triangle* [2000] 205 CLR 276 (Austl.) (Kirby, J.); *see also Imbree v McNeilly* [2008] 236 CLR 510, 549 (Austl.) (Kirby, J.).

Rickards v Lothian, an unknown person blocked a drain on a property of which the defendant was a lessee.[10] The unknown person then turned the tap on over the drain overnight that caused a flood, which damaged the plaintiff's goods. The Privy Council held that the law does not impose liability on an occupier of premises for damage caused by the wrongful act of a third party.[11] This principle was clarified in the later case of *Goldman v Hargrave.*[12] In that case, a tree on the defendant's property caught on fire. He took some steps to control the fire but ultimately left it to burn itself out. Some days later, the fire flared up following a change in the weather thus causing it to spread from the defendant's to the plaintiff's property, which caused significant damage. After the Supreme Court of Western Australia and High Court of Australia dealt with the matter, it was placed before the Privy Council. Their Lordships found that while (consistently with *Rickards v. Lothian*) an occupier is not generally liable for a third party's wrongful act, there is a duty to remove a hazard to a person arising from one's premises where there is knowledge of the danger, the ability to foresee the consequences of not inspecting or removing it, and the ability to abate it.[13]

These concepts of knowledge, foreseeabililty, and capacity received a particularly precise restatement in the context of liability for criminal acts of third parties in the leading Australian case of *Modbury Triangle Shopping Centre Pty. Ltd. v Anzil.*[14] This case took Australian common law closer to reflecting the foreseeability/capacity analysis discussed earlier. In this case, the employee of a video store tenant of a shopping center left the premises after dark one evening. Due to the Center management's failure to keep the lighting in the parking lot illuminated, he was assaulted and badly injured. The offenders were not located and the employee initiated proceedings against the shopping center. The matter was ultimately placed on appeal before the High Court of Australia. The Court found that, as a general rule, the existence of a risk of harm to a person lawfully on premises from criminal behavior was insufficient to impose a duty of care on the occupier of the premises in the absence of a special relationship between the parties.[15] The leading judgment was delivered by Chief Justice Gleeson (with whom Justices Gaudron and Hayne agreed)[16] who noted:

> [T]here are circumstances where the relationship between two parties may mean that one has a duty to take

10. *Rickards v. Lothian*, [1913] A.C. 263 (P. C.) (appeal taken from Austl.).

11. *Id.*

12. *See generally Goldman v. Hargrave*, [1967] 1 A.C. 645 (P. C.) (appeal taken from Austl.).

13. *Id.*

14. *See Modbury Triangle*, 205 CLR at 267-68.

15. *Id.* at 267.

16. *Id.* at 270 (Gaudron, J.); *id.* at 288 (Hayne, J.).

> reasonable care to protect the other from the criminal behaviour of third parties, random and unpredictable as such behaviour may be. Such relationships may include those between employer and employee, school and pupil, or bailor and bailee. But, the general rule that there is no duty to prevent a third party from harming another is based in part upon a more fundamental principle, which is that the common law does not ordinarily impose liability for omissions.[17] (Internal citations omitted).

Justice Gaudron made a similar assessment. Her Honor observed that:

> There are situations in which there is a duty of care to warn or take other positive steps to protect another against harm from third parties. Usually, a duty of care of that kind arises because of special vulnerability, on the one hand, and on the other, special knowledge, the assumption of a responsibility or a combination of both. Those situations aside, however, the law is, and in my view should be, slow to impose a duty of care on a person with respect to the actions of third parties over whom he or she has no control.[18]

The power to control third parties was also significant in the judgment of Justice Hayne who observed that:

> If the appellant owed the first respondent a relevant duty of care, it was to take whatever steps were reasonable in all the circumstances to hinder or prevent any criminal conduct of third persons which injured the first respondent or any person lawfully on the premises. But the acts of those third parties resulted from the choices which they made. Moreover, they were choices which were . . . not necessarily dictated by reason or prudential considerations. It was, therefore, a duty to take reasonable steps to attempt to affect the conduct of persons whom it had no power to control. No such duty has been or should be recognized. . .In those cases where a duty to control the conduct of a third party has been held to exist, the party who owed the duty has had power to assert control over that third party. A gaoler may owe a prisoner a duty to take reasonable care to

17. *Id.* at 265 (footnotes omitted).
18. *Id.* at 270.

> prevent assault by fellow prisoners. . . . Similarly, a parent may be liable to another for the misconduct of a child because the parent is expected to be able to control the child.[19]

However, Chief Justice Gleeson did offer a qualification, which has been critical to the subsequent development of the law in Australia:

> The unpredictability of criminal behaviour is one of the reasons why, as a general rule, and in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable. There may be circumstances in which, not only is there a foreseeable risk of harm from criminal conduct by a third party, but, in addition, the criminal conduct is attended by such a high degree of forseeability, and predictability, that it is possible to argue that the case would be taken out of the operation of the general principle and the law may impose a duty to take reasonable steps to prevent it.[20]

It must be conceded that Chief Justice Gleeson did tend to doubt that a duty could be created through these means:

> It is unnecessary to express a concluded opinion as to whether foreseeability and predictability of criminal behaviour could ever exist in such a degree that, even in the absence of some special relationship, Australian law would impose a duty to take reasonable care to prevent harm to another from such behaviour . . . . It suffices to say two things: first, as a matter of principle, such a result would be difficult to reconcile with the general rule that one person has no legal duty to rescue another; and secondly, as a matter of fact, the present case is nowhere near the situation postulated.[21]

Justice Hayne also left open for later consideration the approach to take in situations where it involved an occupier of land having a high degree of certainty that harm would follow from a lack of action.[22] Justice Callinan

19. *Id.* at 291-92 (footnotes omitted).
20. *Id.* at 267.
21. *Id.* at 268 (footnote omitted).
22. *Id.* at 293-94.

similarly concluded that in this case, the appellant's duty to Mr. Anzil did not extend to keeping the lights on.[23] However, he also stated:

> That does not mean that there can never be a duty, whether dischargeable by turning lights on, or otherwise to take precautions to prevent or reduce the chances of criminally inflicted injury or loss by third parties. However, . . . for such a duty to arise, there must be something special in the circumstances, or the nature of the relationship between the plaintiff and the defendant.[24]

Despite Chief Justice Gleeson's doubts as to the possible existence of a duty to prevent harm regardless of the relationship between the parties, the ruling in *Modbury Triangle* fits securely within the earlier developed law. The decision accepts in *Modbury* as a general rule the absence of a duty of care identified in *Rickards*.[25] However, it is difficult not to see that the high likelihood of criminal behavior, which Chief Justice Gleeson and Justices Gaudron, Hayne and (seemingly) Callinan felt might conceivably give rise to a duty as conceptually anything other than the knowledge of the hazard giving rise to a duty in *Goldman*. This duty, however, would only operate where the occupier of land had the capacity to prevent the harm. As Justice Gaudron observed, "I agree . . . with the remarks of Hayne J, *particularly his Honour's emphasis on the significance of control over third parties before the law imposes a duty of care* to prevent foreseeable damage from their actions."[26] Therefore, this case represents a rendering down of the requirements for identifying a duty of care to foreseeability of harm and the capacity to prevent it.

The powerful dissent of Justice Kirby in *Modbury Triangle* seems to accept an underlying foreseeability/capacity analysis, which indicates that the Court was indeed drawing from a single set of legal concepts in considering the existence of a duty. His Honor pointed out that:

> Proving a breach of a duty of care of a given scope will usually depend, in a case such as the present, on whether the landlord had actual or constructive knowledge of risks faced by the particular entrant. Whilst entrants as a class, and particular entrants, cannot impose liability simply by giving notice to the landlord of some real or imagined danger, the fact of notice is at least an answer to a

23. *Id.* at 302
24. *Id.*
25. *Modbury Triangle*, 205 CLR at 265.
26. *Id.* at 270 (emphasis added).

> suggestion that subsequent damage and loss was unforeseeable. The more notice that is given, and the more often, the more likely will it be that legal liability will be imposed for the failure to respond to such notice where doing so would have been simple and reasonable in the circumstances and protective of the claimant.[27]

Justice Kirby found that a duty is created where there is sufficient foreseeability and where the occupier was capable of responding to the threat perceived.[28] It is difficult to perceive a difference between this analysis and the circumstance where a duty of care might perhaps exist as identified by the majority. Based on the evidence, Justice Kirby duly proceeded to find a duty of care existed in leaving the lights on to protect Mr. Anzil from criminal harm.[29]

Notwithstanding Chief Justice Gleeson's doubts about whether criminal behavior could be so probable that a duty of care could be found, lower courts have since directed their energies to considering when the necessary certainty of a criminal offence might exist in conjunction with the necessary level of control.[30] In *Ashrafi Persian Trading Co Pty. Ltd. v Ashrafinia*, a young woman was struck on the head by an iron bar that was sticking out from a small gap in the window of a motel where she was staying.[31] Justice (of Appeal) Heydon (as he then was) delivered the lead judgment, with whom President (of the Court of Appeal) Mason and Justice (of Appeal) Handley agreed.[32] His Honor noted that in the following special relationships, a person has a duty to protect another from a third party's criminal act and that such duty to protect these relationships was related to the existence of control: employers to employees, schools to pupils, bailees

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27. *Id.* at 283-84.

28. *Id.*

29. *Id.* at 285-86.

30. The legitimacy of such consideration has been questioned: "When judges of the High Court decide to leave matters open for consideration in future cases, they do so because of a consciousness that to create an exception to the principle precluding recovery for the criminal acts of third parties is to take an important step not to be embarked on without careful consideration in a particular case requiring the step. The making of significant changes in the law by taking steps of that kind is, if not beyond the competence of intermediate appellate courts, something not to be done lightly. It is better for these matters to be left open for the consideration of the High Court." *Proprietors of Strata Plan 17226 v Drakulic* [2002] 55 NSWLR 659, 684 (Heydon, JA.) (Austl.). With the greatest of respect to his Honor, such an approach is an abdication of judicial responsibility: "The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of new law to meet the justice of the case." McLoughlin v. O'Brian [1983] 1 A.C. 410, 430 (H.L.) 430 (Lord Scarman).

31. Ashrafi *Persian Trading Co Pty. Ltd. v Ashrafinia* [2002] Aust Torts Report ¶¶81-636 (Austl.).

32. *Id.* at 68.315.

to bailors, parents to third parties for acts of their children, and sometimes goalers to prisoners and civilians.[33] He then noted that:

> The category of "special circumstances" or "a special relationship" can obviously overlap with cases where liability is found because of "a high degree of certainty that harm will follow from lack of action". Frequently recurring crimes might establish a high degree of certainty that harm will follow, and also evidence special circumstances . . . .[34]

The plaintiff had argued that a duty of care was owed due to the high foreseeability of the conduct, which injured her.[35] The motel's history included a "pattern of criminal conduct involving attempted or actual thefts and burglaries."[36] His Honor responded that:

> Whether or not there was a reasonably foreseeable risk of injury, or even a reasonably foreseeable risk of the injury which in fact happened, the risk was not such as to answer the description employed by Hayne J ('a high degree of certainty that harm will follow from lack of action') or Gleeson CJ ('a high degree of foreseeability, and predictability').[37]

His Honor further concluded that had a duty existed, it was discharged by having provided a lock on the door, which the plaintiff could have used if she wished.[38] Special leave to appeal to the High Court of Australia was refused.[39]

Another ruling sheds further light on the norm reflected in earlier case law. The finding in *Brown v Drummoyne Sports Club Ltd.* not only reflects the foreseeability/capacity analysis, but confirms that it fits within the principles of the common law established in *Rickards* and *Goldman.*[40] A test for such consistency is that, if the harm is foreseeable, there would be a duty to prevent it even in the absence of a long history of criminal

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33. *Id.* at 68,335.

34. *Id.* at 68,336.

35. *Id.* at 68,322 (Heydon, JA.).

36. *Id.*

37. *Id.* at 68,337. The plaintiff's alternative argument that she was in a special relationship with the defendant was also rejected. *Id.* at 68,339.

38. *Id.* at 68,339.

39. *Ashrafinia v Ashrafi Persian Trading Co. Pty Ltd.* (Unreported, High Ct. of Austl., 19 Apr. 2002) (Gleeson, CJ. and McHugh, J.).

40. *Brown v Drummoyne Sports Club Ltd.* [2007] 5 DCLR (NSW) 98 (NSW Dist. Ct.). *Cf.* Rickards v. Lothian [1913] A.C. 263 (P.C.) (appeal taken from Austl.); Goldman v. Hargrave, [1967] 1 A.C. 645 (P.C.) (appeal taken from Austl.).

offending, if the consequences of the harm would be severe or the means of preventing it are straightforward. Such was the finding in *Brown*.[41] In this case, three prior offenses were sufficient to establish the necessary risk of injury where the steps to prevent such injury were not excessively onerous.[42] District Court Judge Phegan defined the "*Modbury* rule" as the following: an occupier has no duty of care to take steps to protect another (even if that other is lawfully on the premises) from injury caused by the criminal conduct of people over whom the occupier lacks immediate control or has no other reason in law for having any control arising from a special relationship between the parties.[43] He stated that "for an exception to the *Modbury* rule to be made, there must be a high degree of risk and that the imposition of a duty must not be unduly onerous on the defendant in the face of such a risk."[44] In the event, his Honor found:

> [t]hat there was a breach of duty of care on the part of the defendant club in failing to secure the entrance doors between 8pm and 9pm on the night on which the plaintiff was injured. Such a precaution . . . would have significantly reduced the risk of injury to the plaintiff.. . . The finding of a breach of duty is also reinforced by the history which I have recorded earlier in the judgment. This was not an incident which occurred in isolation. It is not a case driven entirely with the benefit of hindsight. It is a case in which forced entry occurred within two months of a sequence of other events which, combined with the general knowledge which should have been available to the club of the rise in robberies of premises such as those occupied by the defendant, should have galvanized the defendant's mind to consider additional security measures, particularly measures which would have cost nothing.[45]

Therefore, it can be inferred that a duty will likely exist when the remedial action is amply within the defendant's capacity and the level of foreseeability is low.

Justice (of Appeal) Heydon made a different assessment in the

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41. *Brown, supra* note 40, ¶ 81.

42. *See infra* note 45.

43. *Brown, supra* note 40, ¶ 79.

44. *Id.* ¶ 81.

45. *Id.* ¶¶ 101-102. On the relevance of robberies in the area. *Cf.* the California Court of Appeal's observation that "in any analysis of foreseeability, the emphasis must be on the specific, rather than more general, facts of which a defendant was or should have been aware. That is, there is little utility in evidence that, for example, the Pacific Beach area of San Diego is a 'high crime area.'" Pamela W v. Millsom, 25 Cal. App. 4th 950, 957 (1994).

leading judgment in *Proprietors of Strata Plan 17226 v Drakulic*.[46] His Honor doubted the significance of capacity as a basis for imposing a duty:

> The question is whether there is a duty to provide a locked door. The proffered answer is affirmative, because there is control. But whence does control come? From the ability to provide a locked door. It cannot be right to infer a duty to do something merely from the fact that it is possible to do it.[47]

He also tended to doubt highly predictable crime of the sort imagined by Chief Justice Gleeson and Justice Hayne in *Modbury Triangle v Anzil* could give rise to a duty of care.[48] He did not concede in any event that the likelihood of criminal offending was sufficiently high in this matter to establish a duty.[49] Justice Heydon noted that there had been litigation in the United States against landlords and similar persons by tenants in relation to criminal injuries in which the test for a duty of care was reasonable foreseeability, which may arise from knowledge of prior crimes even if they were different from the crime sued on.[50] He then reviewed the High Court's analysis of the American cases and concluded that it was not open to the Court of Appeal to apply "even if it considered them sound in principle."[51] With the utmost respect to His Honor, his analysis is excessively restrictive. There is a viable argument that the reasonable foreseeability test in the American cases is not too far short of the level of foreseeability that *Modbury Triangle v Anzil* requires. His Honor had observed that "[t]hat which is 'foreseeable' is not to be confused with that which is 'reasonably foreseeable' . . .. Whether or not the test of reasonable foreseeability is a demanding test, it is a test with some content."[52] Moreover, in identifying a duty of care the question of foreseeability cannot be looked at in isolation from that of capacity. As Justice Heath observed "it is both 'naïve' and 'absurd and dangerous' to assert existence of a prima facie duty of care whenever harm is reasonably foreseeable."[53] In assessing what may convert reasonable foreseeability into a duty of care, it is proper to consider what would be a reasonable response to that foreseeable harm and what capacity

46. *See Proprietors of Strata Plan 17226 v Drakulic* [2002] 55 NSWLR 659 (Austl.).
47. *Id.* ¶ 77. (emphasis added).
48. *Id.* ¶ 92.
49. *Id.* ¶ 93.
50. *Id.* ¶ 127.
51. *Id.*
52. *Ashrafi Persian Trading Co. Pty. Ltd. v Ashrafinia* [2002] Aust Torts Report ¶¶ 81-636, 68, 317 (Austl.).
53. *Hobson v Att'y Gen.* [2005] 2 NZLR 220, 237 (HC).

the defendant was in.[54] This is consistent with the other cases discussed in this Article and with the approaches in *Modbury Triangle v Anzil*. One must therefore respectfully submit that His Honor's doubts are out of step with the trend of jurisprudence.

If the posited foreseeability/capacity analysis does indeed underpin the common law in cases of civil liability for third party criminal acts, it should be capable of explaining the imposition of a duty to prevent criminal offences in cases of special relationships. It would also be expected that eventually the concepts of duties arising from a special relationship and duties arising from highly-foreseeable offenses would draw more closely together or merge (this would itself arguably point the way towards liability by private citizens not being tied to occupation of premises.) Such a case arose in *Club Italia (Geelong) Inc. v Ritchie*.[55] In this matter the plaintiff, a police officer, was called to a disturbance at a social club. The Club allowed a violent situation to develop and failed to eject the troublemaker (Holton) who subsequently attacked and caused significant injury to the plaintiff. The Court noted that the club operators realized that they may attract troublemakers and that they should take steps to deal with the danger of violence or disorder.[56] If someone becomes drunk or criminally disorderly on the premises, then it is the venue operators who have invited him to be there and created the environment where the activity has occurred.[57] They are then under a statutory duty to remove the drunk and disorderly person and to maintain order on the premises.[58] The Court further stated that:

> [e]ach of the majority judgments in *Modbury* makes it clear that the basis of the 'special relationship' exception is . . . the existence of 'control'. Where the defendant is in a position to control the offender, a special relationship may be held to exist. The club was in a position to control Holton; a special relationship, and prima facie a relevant duty of care, existed.[59]

Interestingly, the Court did not see the need to consider whether a duty was created by reason of the degree of foreseeability and predictability of criminal conduct. After the Court found a duty existed, it agreed that the club had breached it and proceeded to assess damages.[60]

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54. *See Caledonian Collieries Ltd v Speirs* [1957] 97 CLR 202, 221-225 (Dixon, CJ., McTiernan, Kitto and Taylor, JJ. (Austl.).

55. *Club Italia (Geelong) Inc. v Ritchie* [2001] 3 VR 437 (Vic Ct. App.) (Austl.).

56. *Id.* ¶ 36.

57. *Id.*

58. *Id.*

59. *Id.* ¶ 45.

60. *Id.* ¶¶ 51-54.

The Court of Appeal in the *Club Italia* ruling based the special relationship on the control of the offender, which must logically be coterminous with capacity. A range of factors is used to determine the action that is required to discharge the duty created by the special relationship.[61] Preventing a crime is more likely to be part of the duty as the likelihood of a criminal offense increases.[62] It is not easy, then, to see how the creation of the duty of care in *Club Italia* differed from that arising from the exception to the *Modbury* principle discussed above.

Consistently, the *Club Italia* ruling also seems to extend the duty to prevent harm by making the capacity to control an offender the basis of a special relationship between an injured plaintiff and a defendant thus creating a duty of care to prevent reasonably foreseeable harm arising from inaction.[63] Australian law recognizes a right to use force to defend a stranger. After a magisterial survey of the law, Justice Crawford stated:

> I take the law to be that a person is entitled to use force to prevent a stranger from being assaulted if he has reasonable grounds for believing that an assault upon that stranger is about to take place. In considering what force may be used, I hold that it must be reasonably proportioned to the degree of injury to be expected from the assault upon the stranger . . . . The time factor must also be considered and if it is possible gently to restrain the would-be assailant then this should be the manner of dealing with him.[64]

It would follow that a person with suitable skill and training may find themselves both entitled in law and able in fact to control an offender and therefore in a special relationship with a person in danger where he or she can foresee injury to that person from a lack of action. One could infer that if an elderly person was being menaced in a suburban street by a young delinquent as part of a robbery,[65] and a reasonably fit twenty-year old citizen with a hobby in recreational martial arts witness this, the rule in *Goss* would permit the person to intervene to aid the victim as he has the likely capacity to do so.[66] Moreover, failure by them to do so, followed by

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61. *Richards v Victoria* [1969] VR 136, 142 (Sup. Ct. Vic) (Austl.) (Full Court).

62. *See Doe* v. Holy, 557 F.3d 1066, 1093-94 (9th Cir. 2009) (Beron, J., dissenting).

63. *Id.*

64. *Goss v Nicholas* [1960] Tas SR 133, 144 (Sup. Ct. Tas) (Austl.); *Crimes Act 1958* (Vic.), s 462A (Austl.).

65. I have in mind a number of compensation claims I have encountered in my practice that involved this basic scenario.

66. *See generally Rozsa v Samuels* [1969] SASR 205, 210 (Sup. Ct. of S. Austl.) (presumably using the same degree of force as the victim themselves might use, including using all reasonable non-forceful means of warding off violence before applying force).

injury to the hypothetical geriatric, could potentially be compensable in negligence if the said negligent person could be identified. Noting that both the "special relationship" and "*Modbury* exception" draw on the same foreseeability/capacity analysis, it follows that there is no necessary reason why a duty might not fall on one person to an unrelated third person where the danger is sufficiently high or the means of averting it sufficiently basic. The ramifications of this decision remain unexplored in Australian law; the only reported decision referring to *Club Italia v. Ritchie* is a 2002 decision of the New South Wales Court of Appeal in which the Court noted that the case dealt with as one involving a special relationship between the club and the plaintiff but did not explore the principles underlying the relationship.[67]

B. The American Experience

American law in this area draws from the same underlying foreseeability/capacity analysis. It is beyond this article's scope to analyze the law for each of the United States' many jurisdictions. However, it seems reasonable to consider certain declaratory cases for the fundamental jurisprudential norms.

American law seemingly has no *a priori* objection to finding liability for criminal acts of third parties. In *Lillie v. Thompson,* the plaintiff (a twenty-two year old woman) was required to the work night shift alone as a telegraph operator in a one-room building in an isolated area.[68] The area was known to be frequented by "dangerous characters"; despite this, the building was neither well lit nor guarded or patrolled.[69] The plaintiff was required to open the door to pass messages to other employees throughout the night, and there was no means for her to identify a person at the door without unlocking it.[70] On the night at issue, a third party forced the door after it was opened and assaulted the plaintiff thus causing injuries.[71] The Supreme Court of the United States held:

> We are of the opinion that the allegations in the complaint, if supported by evidence, will warrant submission to a jury. Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal

67. *Strata Plan 17226 v Drakulic* [2002] 55 NSWLR 659, 692 (¶114) (Ct. App. NSW) (Austl.).

68. Lillie v. Thompson, 332 U.S. 459 (1947).

69. *Id.*

70. *Id.* at 460.

71. *Id.*

> misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence.[72]

There is no indication that the employment relationship (recognized in Australian law as a "special relationship" imposing a duty on the employer to prevent injuries caused by third parties[73]) was the controlling factor in a duty being imposed.[74] Subsequent American case law appears to have accepted this principle as applying generally to the question of liability for injuries caused by the criminal acts of third parties.[75]

One of the leading cases in American law on this point is *Ann M. v. Pacific Plaza Shopping Center.*[76] Similar to *Anzil*, this case concerned the employee of a tenant of a shopping center. In the morning of June 17, 1985, the plaintiff was the only employee on duty when a person entered the store and raped her.[77] She alleged the center was negligent in failing to provide adequate security to protect her from harm.[78] The California Supreme Court was clear:

> It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition. . . . In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against [reasonably] foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.[79]

The court said that the scope of the landlord's duty to protect against crime was determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed.[80] In cases where the burden of

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72. *Id.* at 461-62 (footnote omitted).

73. *Ashrafi Persian Trading Co. Pty. Ltd. v Ashrafinia* [2002] Aust Torts Report ¶¶ 81-636 at 68,335.

74. Lillie, 332 U.S. at 462.

75. *See Modbury Triangle Shopping Ctr. Pty. Ltd. v Anzil* [2000] 205 CLR 254, 278 (Austl.).

76. Ann M. v. Pacific Plaza Shopping Center, 863 P.2d 207 (Cal. 1993).

77. *Id.* at 210.

78. *Id.* at 211.

79. *Id.* at 212.

80. *Id.*

preventing harm was significant, a high degree of foreseeability may be needed. Equally, less foreseeability may be required if the harm could be prevented by simple means.[81]

The court further held that for the duty of care to involve hiring private security guards, it would require a degree of foreseeability almost only demonstrable by prior similar incidents of violence on the landowner's premises.[82] A subsequent case held that the burdensomeness of the remedial measures could be assessed against the capacity of the individual landlord.[83] Hence, if a high degree of foreseeability was required to find a shopping center was obliged to hire security guards, a similarly high degree of foreseeability would be needed to find that either the individual landlord or condominium association had a duty of care to making rented premises essentially entry-proof.[84] It can be observed that this line of analysis is also the position in Australian law post-*Anzil* and is evidently drawn from the same foreseeability/capacity analysis.

The Californian approach to the law is consistent with the law elsewhere. The Supreme Court of Georgia, for example, has laid down that:

> The general rule regarding premises liability is that a landlord does not insure tenants' safety against third-party criminal attacks, and that any liability from such attacks must be predicated on a breach of duty to "exercise ordinary care in keeping the premises and approaches safe" . . . A landlord's duty to exercise ordinary care to protect tenants against third-party criminal attacks extends only to foreseeable criminal acts.[85]

It seems entirely plausible to assume that "ordinary care" reflects the different levels of foreseeability and the burden such care would place on the landlord. This case required that the incident which causes the injury be substantially similar in type to the previous criminal activities occurring on or in the vicinity of the premises so that a reasonable person would take ordinary precautions to protect his or her tenants or customers against the risk.[86] The *Modbury* Court took a very similar approach.

The foreseeability/capacity analysis allows us to explain American common law where duties to business invitees are concerned. One can note first that such a duty to prevent injuries from criminal offending exists. For example, in *Borne v. Bourg,* the plaintiff was blinded in one eye by an

81. *Id.* at 215.
82. *Id.*
83. Pamela W. v. Millsom, 25 Cal. App. 4th 950, 959 (1994)
84. *Id.*
85. Sturbridge Partners Ltd. v. Walker, 482 S.E.2d 339, 340 (Ga. 1997).
86. *Id.* at 341.

offender in the course of a confrontation after a period of harassment of him by the offender.[87] The bartender of the establishment had recognized that a confrontation was brewing and made a wholly inadequate (and unsuccessful) effort to call the police at a time when an intervention by them was possible.[88] At the last moment he ordered the offender to leave the bar.[89] The Court found that the bartender's failure to call police when one customer began harassing another who was ultimately injured in the confrontation was a breach of the bar's duty to secure its customers' safety.[90] The plaintiff's injuries were held to be the direct result of that failure.[91]

The legal principles which underpin this liability were elucidated in another case arising from Louisiana, in which a patron of a motel was in the process of checking in and was assaulted by another resident who had been acting in a suspicious manner.[92] The Court noted that the least standard of care applying to the operators of the motel was as follows:

> [T]he duty to protect business patrons does not extend to the unforeseeable or unanticipated criminal acts of an independent third person. Only when the owner or management of a business has knowledge, or can be imputed with knowledge, of a third person's intended criminal conduct which is about to occur, and which is within the power of the owner or management to protect against, does such a duty of care towards a guest arise.[93]

It would be difficult to imagine a statement of law more clearly reflecting the foreseeability/capacity analysis. The principle's enduring effect is reflected in a 1997 decision by the Supreme Court of Washington. In *Nivens v. 7-11 Hoagy's Corner,* the patron of a convenience store was assaulted by one or more youths who were gathered outside the store.[94] The plaintiff alleged negligence by the operators of the store in failing to hire security staff.[95] The court explained that:

> [t]he common law recognizes an exception to the general rule, however; there is a duty to protect another from the

87. Borne v. Bourg, 327 So. 2d 607, 609 (La. Ct. App. 1976).
88. *Id.*
89. *Id.*
90. *Id.* at 610.
91. *Id.*
92. Davenport v. Nixon, 434 So. 2d 1203, 1204 (La. Ct. App. 1983).
93. *Id.* at 1205.
94. Nivens, 943 P. 2d at 287-88.
95. *Id.* at 288.

> criminal acts of third persons when a special relationship is present. A special relationship exists between a business and its invitees so that the business has a duty to take reasonable steps to prevent harm to its invitees from the acts of third parties on the premises, if such acts involve imminent criminal conduct or reasonably foreseeable criminal behaviour.[96]

Although the classification of business and invitee as a "special relationship" must involve a certain amount of question-begging, the requirement for knowledge and the requirement of 'reasonable' steps are indistinguishable from the principles in *Davenport v. Nixon*.[97]

III. GAPS AND WHAT LIES BENEATH

The exceptions to imposition of liability lend support to the existence of an underlying jurisprudential norm of "foreseeability + capacity = duty."[98] Two exceptions are particularly enlightening: in Australia, the general absence of liability of government agencies for criminal offending; in the United States, the "fireman's rule."

A. The State and the Offenders

The common law world outside the United States has taken its bearings on the liability of state agencies for criminal offenders from English law. The general rule is set out in *Hill v. Chief Constable of West Yorkshire*.[99] The plaintiff sought compensation for the death of a victim of the "Yorkshire Ripper."[100] The matter was eventually appealed to the House of Lords. Lord Keith reviewed the case of *Dorset Yacht Co. Ltd. v. Home Office*[101] and stated:

> The alleged negligence of the police consists in a failure to discover [the wanted criminal's] identity. But if there is no general duty of care owed to individual members of the public by the responsible authorities to prevent the escape of a known criminal or to recapture him, there cannot

96. *Id.* at 293-94.

97. *See* Davenport, 434 So. 2d at 1205.

98. *See supra* Part II.A-B.

99. Hill v. Chief Constable of West Yorkshire, [1989] 1 A.C. 53 (H.L.) (appeal taken from Eng.).

100. *Id.* at 64.

101. Dorset Yacht Co. Ltd. v. Home Office, [1970] A.C. 1004 (H.L.) (appeal taken from Eng.).

> reasonably be imposed upon any police force a duty of care similarly owed to identify or apprehend an unknown one.[102]

The decision has been considered a number of times in both Britain and the other common law countries. The British had some minor concerns regarding the decision in 2005[103] but the decision has since been firmly upheld.[104] It has been followed in New Zealand.[105] On the other hand, the Supreme Court of Canada has doubted its correctness,[106] and the Supreme Court of Appeal of South Africa did not follow it.[107] There has been no authoritative ruling on the applicability of *Hill*'s case in Australia,[108] but the indications are that the courts will follow it. The High Court of Australia[109] and the Master of the Supreme Court of Tasmania[110] have viewed this as good law.

The exclusion of a duty of care is explained by the relationship of the type of claim posited to the foreseeability/capacity rule. In a case of the type raised in *Hill v. Chief Constable of West Yorkshire,* the concept of foreseeability itself is probably inapplicable. Foreseeability would lose much of its analytical utility if liability for negligence by a state agency could be imposed. In other words, if harm to a significant percentage of society was foreseeable and it generated a duty to each member of that society, the bounds of the relevant agency's duties would potentially be limitless. Moreover, the capacity of a police force to discharge its duty might well be very questionable; arresting, charging or convicting an offender does not guarantee the police will not cause harm. An offender might escape from a prison post conviction,[111] or from the police custody while awaiting charges,[112] or be convicted and then mistakenly released too early.[113] Moreover, operational and societal realities may make effective or successful policing impossible. Reviewing a book on the present state of

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102. *Hill,* [1989] 1 A.C. at 62 (Lord Brandon of Oakbrook, Lord Oliver of Aylmerton, and Lord Goff of Chieveley concurring).

103. Brooks v. Comm'r of Police for the Metropolis [2005] UKHL 24 (H.L.) 493-94 (¶ 3)(appeal taken from Eng.) (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead).

104. Smith v. Chief Constable of Sussex Police, [2008] EWCA (Civ) 39 (Eng.).

105. Hobson v. Att'y-Gen. [2005] 2 NZLR 220 (HC) 239.

106. Hill v. Hamilton-Wentworth Reg'l Police Servs. Bd. (2007) 285 D.L.R. 4th 620, 642-44 (¶142) (S.C.C.) (McLahlin, CJC., Binnie, LeBel, Deschamps, Fish and Abella, JJ. concurring).

107. *Van Eeden v. Minister of Safety & Sec.* 2002 (1) SA 389 (A) at 399-400 (¶20) (S. Afr.).

108. *New South Wales v Spearpoint* [2009] NSWCA 233, ¶9 (Austl.).

109. *Sullivan v Moody* [2001] 207 CLR 562, 581 (Austl.).

110. *Courtney v Tasmania* [2001] TASSC 83 (Sup. Ct. Tas) (Austl.).

111. *Thorne & Rowe v Western Australia* [1964] WAR 147 (Sup. Ct. WA) (Austl.).

112. *Van Eeden,* [2003] (1) SA 389 (A) (S. Afr.).

113. *L v South Australia* (Unreported, Dist. Ct. SA, 6 Aug. 2004) (Austl.).

Britain's criminal justice system, Theodore Dalrymple comments bitterly:

> The police . . . are like a nearly defeated occupying colonial force that, while mayhem reigns everywhere else, has retreated to safe enclaves, there to shuffle paper and produce bogus information to propitiate their political masters. Their first line of defense is to refuse to record half the crime that comes to their attention, which itself is less than half the crime committed. Then they refuse to investigate recorded crime, or to arrest the culprits even when it is easy to do so and the evidence against them is overwhelming, because the prosecuting authorities will either decline to prosecute, or else the resultant sentence will be so trivial as to make the whole procedure (at least 19 forms to fill in after a single arrest) pointless.
>
> In any case, the authorities want the police to use a sanction known as the caution—a mere verbal warning. Indeed, . . . the Home Office even reprimanded the West Midlands Police Force for bringing too many apprehended offenders to court, instead of merely giving them a caution. In the official version, only minor crimes are dealt with in this fashion: but . . . in the year 2000 alone, 600 cases of robbery, 4,300 cases of car theft, 6,600 offenses of burglary, 13,400 offenses against public order, 35,400 cases of violence against the person, and 67,600 cases of other kinds of theft were dealt with in this fashion—in effect, letting these 127,900 offenders off scot-free.[114]

In such circumstances the House of Lords' reluctance to overlay police operational decisions with a duty of care to the public at large seems to reflect the reality that, even where a crime might be foreseeable, the police may have little or no capacity to prevent it. These concerns, the almost unlimited foreseeability of harm from offending and questionable capacity, have been reflected in Australian jurisprudence in this area.

In *Peat v Lin*, the plaintiff alleged that three off-duty police officers were negligent in failing to prevent a breach of the peace in which he was assaulted.[115] Justice Atkinson accepted that the police did not have a blanket immunity from suit in negligence.[116] However, he concluded that, "[t]o

114. Theodore Dalrymple, *Real Crime, Fake Justice,* CITY JOURNAL, Summer 2006, *available at* http://www.city-journal.org/16_3_oh_to_be.html.

115. Peat v Lin [2005] 1 Qd R 40 (Sup. Ct. Qld) (Austl.).

116. *Id.* at 47-48.

impose upon an ill-equipped, unarmed, off-duty police officer a duty in tort to act to endeavor to prevent a possible or potential breach of the peace in this situation would be to impose too onerous a duty on such a person."[117]

> His Honor went to some lengths to explain his reluctance to impose liability:
>
> Any duty owed was to the public at large and there are strong policy reasons to deny the existence of a duty of care to the plaintiff as an individual. As I have observed, the common law has shown a marked reluctance to impose liability on police officers in this situation. One reason is because the class of persons to whom the duty is owed is too indeterminate; where, one may ask rhetorically, would it stop: is a duty owed to staff and people inside the nightclub; patrons outside the nightclub and passers by; pedestrians and other drivers whom the potential offender might encounter; persons who live with, or a family member of, the potential offender whom he might assault? Secondly, police officers owe a number of duties and the satisfaction of the duty towards or interests of one member of the public may interfere with duties owed to other members of the public or, more importantly, the public at large; the duty is owed to the public at large and not to an individual. Thirdly, the court is reluctant to intervene in what are primarily operational decisions as to what reaction is appropriate in the given situation. Further, to impose a duty in a case such as this is to impermissibly interfere in the operational decisions of the police service. It is a matter for the administration of the police service when to roster police on duty and when to roster them off-duty. If police were expected to be ever vigilant to prevent breaches of the peace whilst off-duty, as if they were on duty, this would be likely to impact on rostering decisions and procedural instructions given to police officers as to how they may or may not spend their leisure hours.[118]

In *X v South Australia (No. 3)*, the Full Court of the Supreme Court of South Australia considered the duty of a Parole Board.[119] The claim concerned a plaintiff who was sexually assaulted by a paroled offender and

117. *Id.* at 50.
118. *Id.*
119. *X v South Australia* [2007] 97 SASR 180 (Sup. Ct. SA) (Austl.) (Full Court).

who brought proceedings based on the board's alleged negligence. Justice Duggan noted, *inter alia*, the Board's limited capacity to monitor or restrain parolees along with the evidence available to the board, and concluded that it did not at any time owe a duty of care to the plaintiff.[120] Justice Debelle reviewed the statutory scheme applying to the Board, the potentially counterproductive effect of imposing a duty of care, the limited powers of the Board, and the very large number of people vulnerable to harm if the Board erred in its tasks. He concluded that:

> [T]he Parole Board is not subject to a duty of care generally to the community. Such a duty of care would be inconsistent with its function and the statutory scheme. The Board would be exposed to an indeterminate liability in circumstances where it has quite limited control over a person released on licence.[121]

His Honor proceeded to consider whether a duty of care might exist if the Board had information suggesting the possibility of harm to an individual or group of individuals. He noted that the Board is a body with a statutory discretion and concluded that:

> it is inconsistent with the exercise of a statutory discretion to impose a duty of care on a decision made within the ambit of that statutory discretion. To impose a duty of care upon the exercise by the Board of its discretion as to how to deal with a report concerning a person released on licence would be to cut directly across the principle of public law relating to the grounds on which the exercise of a discretion may be reviewed. For this reason, the Board is not subject to a duty of care when it makes a decision concerning information even where there is a specific risk of harm to a personal class of persons. Although the Board will in those circumstances be subject to a duty of care to act in the sense of considering whether to act or not, and might be liable for a failure to consider the portion . . . it will not be subject to a duty of care if it has acted and in the exercise of its discretion made a decision. In short, once it has discharged its statutory duty and in the exercise of its discretion has decided whether or not to act, the Board might be subject to public law remedies but is not subject

120. *Id.* at 188 & 191.
121. *Id.* at 230 (¶187).

to a duty of care.[122]

Leave to appeal the question of the existence of a duty of care to the High Court of Australia in this case was refused.[123]

The decision in *Peat v Lin*[124] could have been justified in the absence of policy considerations by His Honor's references to the burdensomeness of requiring an off-duty police officer to take steps to prevent a breach of the peace when manifestly ill-equipped to do so. That is, where the defendant was clearly without capacity to protect the plaintiff. Capacity (or lack thereof) to exercise control over parolees was cited as a reason for denying a duty of care in *X v State of South Australia (No. 3).*[125] In both *Peat* and *X,* foreseeability also loomed as a concern for identifying a duty of care. The policy concerns cited in *Peat* reflect a lack of meaningful foreseeability of harm standard: to require an off-duty police officer to take reasonable care to protect every person with whom an aggressive drunk might come in contact would expand the range of foreseeability to the point where the concept becomes meaningless. A similar concern with indeterminate liability is also evident in *X v State of South Australia (No. 3):* if foreseeability were to have a role in establishing the bounds of a public body's responsibility, the public law remedies referred to by Justice Debelle would become effectively meaningless.[126]

In the case of *Thorne and Rowe v. State of Western Australia,* the plaintiffs alleged negligence by prison authorities in allowing Thorne to escape who then proceeded to assault the plaintiffs (including the offender's wife).[127] The offender had previously threatened Mrs. Thorne with a firearm, was arrested, and found to be carrying a dagger, a length of string, and a bottle of sulphuric acid.[128] He stated to the arresting officer that he had intended to tie his wife up and throw the acid in her eyes.[129] Thorne pled guilty to a number of charges and was sentenced to twelve months imprisonment.[130] After sentencing, he stated to a police officer: "this will not stop me; I will get out and fix her."[131] The officer passed this warning to the prison wardens. About two weeks later, Thorne did indeed escape and went to his wife's dwelling and attacked her and her partner (Rowe)

122. *Id.* at 234-35 (¶196).

123. *X v South Australia* (Unreported, High Ct. of Austl., 16 Nov. 2007) (Gleeson, CJ. & Heydon, J.).

124. *Peat v Lin* [2005] 1 Qd R 40 (Sup. Ct. Qld) (Austl.).

125. *X* [2007] 97 SASR 180.

126. *Id.*

127. *Thorne & Rowe v Western Australia* [1964] WAR 147, 149 (Sup. Ct. WA) (Austl.).

128. *Id.* at 148.

129. *Id.*

130. *Id.*

131. *Id.*

with a tomahawk thus causing significant injuries.[132] Justice Negus held that:

> [A] mere breach of [the wardens'] duty to the Crown to keep prisoners in safe custody could not give the plaintiffs a right of action. The plaintiffs must establish they had a special duty to Mrs. Thorne and failed in that duty. The existence of such a special duty, assuming the facts of this case provide an exception to the general rule, that one man is under no duty of controlling another to prevent his doing damage to a third . . . depends on their knowledge that Thorne had a propensity or intention or was likely to attack his wife. They knew of the threat, but it cannot be inferred from the fact of the threat having been made that Thorne had that propensity and intention. He must have had many opportunities of attacking and injuring his wife. There was no evidence that he had ever done more than poke a pistol in her back: but he did not press the trigger--though he could have done so.[133]

With the greatest of respect to His Honor, in light of the history, it is difficult to imagine what more proof by Thorne could have been offered for a propensity, intention, or likelihood to attack his wife.[134]

Liability was found to be arguable in *Swan v South Australia,* in which the plaintiff was an infant who suffered sexual abuse at the hands of a pedophile then on parole.[135] The Parole Board and parole officers of the Department of Correctional Services had been aware of allegations that the offender was in breach of his parole conditions but made inadequate efforts to follow up. Justice Bollen (Justice Mohr agreeing) found that the defendant's knowledge of a breach of a parole condition that could cause

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132. *Id.* at 150.

133. *Id.* at 151.

134. *Cf.* Williams v. New York, 127 N.E.2d 545 (N.Y. 1955) (William Kennedy, an inmate of a prison farm in New York State, escaped due to the negligence of prison officers. He armed himself and subsequently hijacked a truck driven by one Albert Williams. The fear engendered by Kennedy caused Williams to suffer a brain hemorrhage and die. Proceedings were brought by the widow of the deceased. The claim was dismissed on the grounds that the injury was not foreseeable: "[a]s to Williams, the State's claimed carelessness was 'negligence in the air' or 'in the abstract,' ... and was not joined to his death by the element of foreseeability. His death therefore may not be included within the class of consequences of the State's negligence for which it must answer in damages.") *Id.* at 550. One notes that the Court reviewed Kennedy's criminal record and (if asked) would probably have had difficulty finding the foreseeability of injury required by *Modbury Triangle Shopping Ctr. Pty. Ltd. v Anzil* [2000] 205 CLR 254, 267 (Austl.).

135. *Swan v South Australia* [1994] 62 SASR 532 (Sup. Ct. SA) (Austl.) (Full Court).

harm to foreseeable persons created a relationship of proximity between the plaintiff and the defendant.[136] Foreseeability and causation were also established by the facts of this case. Therefore, a duty of care arose for the defendant to take reasonable steps to protect the plaintiff once the defendant, through his officers, knew or had reason to suspect failure to comply with the conditions of parole would cause harm.[137] Unfortunately, this decision is now questionable following the High Court of Australia's rejection of "proximity" as a test for the existence of a duty of care.[138] However, at least one commentator seems to hold the factors establishing a duty of care as doing so even after proximity is barred as an analytical concept.[139] This suggests liability in this case was established by foreseeability alone, although one can assume the capacity of the appropriate state agencies to protect the plaintiff's wellbeing in the given circumstances.

Foreseeability was the critical factor in *Thorne and Rowe v State of Western Australia*[140] and *Swan v State of South Australia.*[141] In *Thorne* the cause of action was rejected on the grounds that the harm caused was not foreseeable. While one could argue that *Thorne* was wrongly decided, the line of reasoning supporting the outcome squarely reflects the foreseeability/capacity analysis.[142] *Swan* represents the other end of the outcome spectrum: perhaps because of the Court's use of proximity, the decision found liability based on foreseeable harm to an identifiable person.[143]

B. Bad Things Happen to Firemen: The American Exception

The "fireman's rule" in American common law can be explained by the acceptance of the foreseeability/capacity analysis as the basis for imposing a duty of care. The fireman's rule has been explained as follows:

> It is quite generally agreed the owner or occupier is not liable to a paid fireman for negligence with respect to the creation of a fire. . . . The rationale of the prevailing rule is sometimes stated in terms of "assumption of risk," used

136. *Id.* ¶ 33(Bollen & Mohr, JJ.).

137. *Id.*

138. *Sullivan v Moody*, [2001] 207 CLR 562, 578-79 (Austl.).

139. Martin Cuerden, *He Should Have Been in Prison*, 72 PRECEDENT 28, 31-32 (2008). *See also Imbree v McNeilly* [2008] 236 CLR 510, 660, (Austl.) (Gummow, Hayne and Kiefel, JJ.) (Gleeson, CJ. & Crennan, J. concurring).

140. *Thorne & Rowe v Western Australia* [1964] WAR 147, 149 (Sup. Ct. WA) (Austl.).

141. *Swan*, 62 SASR, ¶ 33.

142. *Thorne & Rowe*, WAR at 149.

143. *Swan*, 62 SASR , ¶ 33. *Cf.* Peat v Lin [2005] 1 Qd R 40, ¶19 (Sup. Ct. Qld) (Austl.).

> doubtless in the so-called "primary" sense of the term and meaning that the defendant did not breach a duty owed, rather than that the fireman was guilty of contributory fault in responding to his public duty. . . . Stated affirmatively, what is meant is that it is the fireman's business to deal with that very hazard and hence, perhaps by analogy to the contractor engaged as an expert to remedy dangerous situations, he cannot complain of negligence in the creation of the very occasion for his engagement. In terms of duty, it may be said there is none owed the fireman to exercise care so as not to require the special services for which he is trained and paid.[144]

This principle has been accepted as applying equally to the police as to the fireman.[145]

The rule tends to be justified in policy terms. The Supreme Court of New Jersey has explained that:

> [I]n the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences. Hence, for that risk, the fireman should receive appropriate compensation from the public he serves, both in pay which reflects the hazard and in workmen's compensation benefits for the consequences of the inherent risks of the calling.[146]

Denying the equal application of the rule would lead to some rather confusing pleadings before the courts. In one matter, where a police officer was injured after trying to quell a disturbance in a bar and duly sought compensation from the (inter alia) bar owner, the court said:

> Plaintiff's contention puts a bartender in the position of being responsible to patrons for injuries he does not prevent by, among other means, calling the police and to the police if he calls them and one is injured. We therefore hold that the ambit of protection owed by the bartender does not

144. Krauth v. Geller, 157 A.2d 129, 130-31 (N.J. 1960).

145. Holdsworth v. Renegades of Louisiana Inc., 516 So. 2d 1299, 1302 (La. Ct. App. 1987). *Cf.* Orth v. Cole, 955 P.2d 47, 49 (Ariz. Ct. App. 1998) (holding that the rule does not apply in non-emergency, non-rescue situations.).

146. Krauth, 157 A.2d at 130-31.

> extend to the policeman acting as such.[147]

A later Court's comment on that case gives an insight into how the fireman's rule reflects the foreseeability/capacity analysis such that being justified in policy terms alone would render the principle open to rejection.[148] Commenting on *Weaver v. O'Banion,* the Louisiana Court of Appeal explained:

> In effect, the court refused to burden a business proprietor with a similar liability standard first to patrons on the premises and second to those summoned in their professional capacity to aid the patrons in time of danger. This policy encourages a proprietor to call for professional help and discourages dangerous attempts at self-help.[149]

Courts are indeed generally unwilling to encourage self-help. As Justice (of Court of the Appeal) Edmund Davies noted that, "the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances."[150] This reflects a deeper reluctance to encourage voluntary election as to what legal obligations one considers binding: one recalls Viscount Haldane's ringing statement that "by the law of this country no man can be restrained of his liberty without authority in law,"[151] after which the Court accepted that such a restraint could be maintained if it was agreed upon.[152] This legal trend against self-help options might also be part of the approach by governmental authorities: in an age where the legitimacy of the law making process is contested,[153] it is hard to imagine a more corrosive tendency than to encourage the legal process to be bypassed by self-help measures. The Courts have reciprocated their reluctance to outsource policing functions to

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147. Weaver v. O'Banion, 359 So. 2d 706, 708 (La. Ct. App. 978).

148. *E.g., Club Italia (Geelong) Inc v Ritchie* [2001] 3 VR 437,¶¶50 -51(Vic Ct. App.) (Austl.) (noting that the rule had also been rejected in Britain. Ogwo v. Taylor [1988] 1 A.C. 431(H.L.) 448-49 (appeal taken from Eng.)).

149. Solis v. Civic Ctr. Site Dev. Co. Inc., 385 So. 2d 1229, 1232 (La. Ct. App. 1980).

150. Southwark London Borough Council v. Williams, [1971] 1 Ch 734, 745 (Eng.).

151. Herd v. Weardale Steel, Coal & Coke Co. Ltd., [1915] A.C. 67 (H.L.) 71 (Eng).

152. *Id.* at 72-73 (Viscount Haldane LC); *id.* at 75 (Lord Shaw of Dunfermline); *id.* at 77-78 (Lord Moulton). Intriguingly, this case can also be read as an instance of the parallel tortious concept of voluntary assumption of risk. 28 HALSBURY'S LAWS OF ENGLAND 82 (3d ed. 1959).

153. *See* Randy E. Barnett, *Foreword: Guns, Militias and Oklahoma City*, 62 TENN. L. REV. 443, 457-58 (1995); *see also* Allen Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53, 55 (1995) and James M. Buchanan, *Federalism and Individual Sovereignty*, 15 CATO J. 259, 265 (1995); but see Leslie Green, *Un-American Liberalism: Raz's 'Morality of Freedom'*, 38 U. TORONTO L.J. 317, 318-19 (1988).

the public.[154]

The fireman's rule, by reflecting a policy against self help, can be justified as a reflection of the foreseeability/capacity analysis. It can be fairly assumed that harm befalling a police officer in the course of preventing a crime will almost always be foreseeable to a person responsible for the offender. However, a lack of capacity must be assumed by the court to sustain a policy against self-help. If it is presumed that a person will obey the law at least in the absence of actual evidence they will not do so,[155] and if they are capable of preventing a crime by their own efforts, it is not logical to presume that there would be any societal harm flowing from self-help measures. The rule can therefore be justified when interpreted to discourage self-help by its consistency with the underlying foreseeability/capacity analysis.

IV. SO FAR, SO GOOD. SO WHAT?

The foreseeability/capacity analysis provides a means of deconstructing the common law on liability for injuries caused by third parties. Working lawyers, however, would be entitled to respond by asking what practical value this analytical tool adds. An answer is suggested by a somewhat unusual case of liability for a criminal act: the curious English matter of Christopher Meah.[156]

Christopher Meah was a passenger in a car driven by Kenneth McCreamer on August 9, 1978. Both men had been drinking. McCreamer lost control of the vehicle. In the resulting accident, Meah suffered serious head injuries including brain damage, which caused a significant personality change in him.[157] He subsequently sexually assaulted and wounded three women, resulting in a sentence of life imprisonment.[158] He sued McCreamer for his injuries and for the sentence of imprisonment to which he was subject.[159] Following the accident, McCreamer disappeared

154. Nivens, 943 P.2d at 293 ("Nivens ... [argued that] a business generally owes a duty to provide security personnel to prevent criminal behavior on the business premises. We decline to find such a duty. To do so would unfairly shift the responsibility for policing, and the attendant costs, from government to the private sector."); *cf. Modbury Triangle Shopping Ctr. Pty. Ltd. v Anzil* [2000] 205 CLR 254, 292-93 (Austl.) (Hayne, J.).

155. *See Gollan v Nugent* [1988] 166 CLR 18, 48 (Austl.) (appeal taken from New South Wales) (Deane, Dawson, Toohey & Gaudron, JJ.) "The law does not penalize intention. On the contrary, it recognizes a locus poenitentiae and assumes that the opportunity for repentance may be exercised." *Id.*

156. Meah v. McCreamer (No 1), [1985] 1 All E.R. 367 (Q.B.) (Eng.); W v. Meah, [1986] 1 All E.R. 935 (Q.B.) (Eng.); Meah v. McCreamer (No 2), [1986] 1 All E.R. 943 (Q.B.) (Eng.).

157. Meah v. McCreamer (No. 1) [1985] 1 All ER 367 (Queens Bench Div.).

158. *Id.*

159. *Id.*

and the solicitors and barristers acting in his name were instructed by his insurers to make the matter a slight variation from the theme of claims for criminal acts of third parties. Justice Woolf approached the matter on the basis that:

> [I]f it can be shown on the balance of probabilities that but for the accident and the injuries the plaintiff suffered as a result, he would not have committed the crimes referred to in the amended statement of claim and, therefore, would not be now serving a sentence of life imprisonment, it was not argued on behalf of the defendant that the plaintiff is not entitled to be compensated for that and, indeed, entitled to receive substantial damages in respect of that matter.[160]

His Honor concluded that but for the head injury the plaintiff would not have committed the relevant attacks and "that to some extent he is not to be blamed . . . because but for an unfortunate road accident he would not have been turned into the sort of individual who could commit those attacks."[161] Justice Woolf proceeded to award compensation for both the injuries and the imprisonment.[162]

Later, two of Meah's victims successfully sued him in proceedings which were presided over by Justice Woolf.[163] Meah then sued McCreamer and his insurers to recover the amounts awarded to the two women.[164] Justice Woolf this time held that

> if an action had been brought by the two victims against the driver, in respect of the sexual attacks which were inflicted on them by the plaintiff, the courts would have held that that damage was remote, and that no duty was owed by the driver to the victims of the plaintiff's sexual assaults.[165]

He proceeded to find that the liability in damages was not foreseeable to the driver or his insurers.[166]

His Honor's rulings in the two actions against McCreamer are not easy to reconcile: if the chain of events leading to criminal liability was

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160. *Id.* at 371.

161. *Id.* at 382.

162. *Id.* at 383.

163. W & D v. Meah [1986] 1 All ER 935 (Queens Bench Div.).

164. Meah v. McCreamer (No. 2) [1986] 1 All ER 943 (Queens Bench Div.).

165. *Id.* at 950 (In the proceedings by the victims "D" did in fact issue proceedings against both Meah and McCreamer but did not proceed at trial against the latter. *W & D,* [1986] 1 All ER at 935-936.).

166. *Meah (No 2),* 1 All ER at 950.

foreseeable and compensable, it is difficult to see why the events leading to civil liability were not. A legal practitioner advising a client as to his or her prospects of successful litigation would struggle to draw guidance from the two cases. However, assessing the two judgments' compatibility with the foreseeability/capacity analysis could accurately shape the advice given. This would reveal that while McCreamer was arguably able to prevent the eventual assaults (by driving more safely on the night in question), they were not in fact foreseeable (as was in fact found in *Meah v. McCreamer (No 2)*). The first decision critically failed to recognize that Meah retained the capacity to appreciate the crime involved in the assaults and the (unexercised) capacity to resist temptation.[167] That he retained this ability should logically have reduced the scope of things, which Mr McCreamer should have foreseen, to the point where no duty could be found. As a result, it would be better for the practitioner to base their advice on the judgment in the second action against McCreamer and to advise a plaintiff against litigation.[168]

V. CONCLUSION

Australian and American common law on liability for criminal acts of third parties can be explained as an articulation of an underlying jurisprudential foreseeability/capacity analysis. This basic principle is reflected in the now leading Australian case of *Modbury Triangle Shopping Centre Pt.y Ltd. v Anzil* and its effects have been worked through in subsequent cases. The same principle supports the imposition of liability in "special relationship" cases and the decision in *Club Italia (Geelong) Inc. v Ritchie* gives some indication of the extent to which the principle may allow liability to be imposed on third parties. The foreseeability/capacity analysis is even more clearly reflected in the American cases on premises liability and in the exemption from liability available to government instrumentalities in Australia.

The value of the foreseeability/capacity analysis in considering third party criminal liability lies in its capacity to render uneven legal doctrine coherent. The "fireman's rule" of American law may well be justifiable in policy terms; however it can more respectably be said to reflect a defendant's presumptive lack of capacity to prevent harm which must, ultimately, be the justification for the courts' policy of discouraging self-help measures. Further, it offers a means for preferring one line of authority

167. *See* HAROLD LUNTZ, ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH 208-209 (4th ed. 2002).

168. Such a decision would to some extent be validated by the subsequent disapproval of *Meah v McCreamer (No. 1)* on the grounds that issues of legal policy were not considered at the hearing. The *Meah v McCreamer (No. 1)* decision may now be regarded as discredited. *E.g.*, Clunis v. Camden & Islington Health Auth., [1998] Q.B. 978, 989-990 (Eng.).

over another according to how closely the cases reflect the underlying norm (as in the matter of Mr. Meah). In a field where the injured party will almost always have been the victim of harsh, arbitrary and high-handed conduct by an offender, a significant step to restoring their confidence in the world around him or her should be the provision of legal advice which is clear, sound, and consistent with established doctrine. Recognition of the foreseeability/capacity analysis as an analytical tool goes some way towards meeting this need.

PROVIDING A PATHWAY TO ASYLUM: RE-INTERPRETING "SOCIAL GROUP" TO INCLUDE GENDER

Aimee Heitz*

"The United States may soon stand alone among industrialized nations in its refusal to fully acknowledge that women who suffer serious gender-based violations of their fundamental human rights are entitled to protection as refugees."[1]

"[B]eing a woman is a sufficiently political statement in itself, so far as violence against women, domestic, sexual or public, is part of the process of oppression."[2]

RODY'S STORY

Rody Alvarado's husband told her, "If you want to die, go ahead. But from here, you are not going to leave."[3] Rody Alvarado, a Guatemalan woman, was married at the age of sixteen to her then twenty-one year-old husband.[4] "From the beginning of the marriage, her husband engaged in acts of physical and sexual abuse against [Rody]."[5] Rody's husband repeatedly raped and beat her before, during, and after unwanted sex.[6] When Rody attempted to leave her husband, he came after her.[7] When she went to the Guatemalan police, they refused to help.[8] It was not until Rody came to the United States that she was able to escape,[9] but this is more than many women in Rody's situation in Guatemala can hope.[10] She sought

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1. T.S. Twibell, *The Development of Gender as a Basis for Asylum in United States Immigration Law and Under the United Nations Refugee Convention: Case Studies of Female Asylum Seekers from Cameroon, Eritrea, Iraq and Somalia*, 24 GEO. IMMIGR. L.J. 189 (2010) (quoting Karen Musalo & Stephen Knight, *Unequal Protection: When Women Are Persecuted, It's Often Described as a Cultural Norm Rather Than a Reason to Grant Asylum*, 58 BULL. ATOMIC SCI., 56-57 (2002)).

2. *Id.* at 212 (quoting Guy S. Goodwin-Gill, THE REFUGEE IN INTERNATIONAL LAW (1983)).

3. *In re* R-A-, 22 I. & N. Dec. 906 (B.I.A. 2001)

4. *Id.* at 908.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 909.

9. *Id.*

10. Karen Musalo, et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L. J. 161, 162 (2010), [hereinafter Musalo, *Crimes*

asylum on the basis of her membership in the social group comprised of women who are victims of extreme domestic violence.[11] The Board of Immigration Appeals (BIA), the "highest administrative body for interpreting and applying immigration laws,"[12] denied her petition for asylum, finding that she did not meet the requirements for a "social group" for asylum purposes.[13] In 2009, Rody was eventually granted asylum after spending approximately fifteen years away from her two children waiting for the decision.[14]

I. INTRODUCTION

As Rody Alvarado's case demonstrates, meeting the standard for asylum is often an extremely difficult, if not impossible, task.[15] Asylum seekers must establish that they cannot or will not return to their native country because they have been persecuted or fear they will be persecuted if they return.[16] However, the requirement does not end there. More importantly, asylum seekers must link the established persecution to one of the enumerated categories found within the definition of refugee—race, nationality, religion, political opinion, or-- as was the basis for Rody and the focal point of this Note-- membership in a particular social group.[17] Establishing persecution alone is insufficient if the nexus to one of the enumerated categories is not met.[18]

What qualifies as a "social group" is a contested issue and is viewed differently by the United Nations High Commissioner for Refugees (UNHCR) and the United States' Immigration and Nationality Act (INA).[19]

Without Punishment] *available at* http://cgrs.uchastings.edu/law/articles.php.

11. *Id.*

12. *Board of Immigration Appeals*, U.S. DEP'T OF JUST., http://www.justice.gov/eoir/biainfo.htm (last updated Nov. 2011).

13. *R-A-*, 22 I. & N. Dec. at 927.

14. Musalo, *Crimes Without Punishment, supra* note 10. Rody was entitled to asylum only after two remands to the BIA. This decision was decided around the same time as *Matter of L-R-*, found in Brief of Dep't of Homeland Security (Apr. 13, 2009) (redacted) [hereinafter DHS Brief], *available at* http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf., which required that an amicus brief be filed by the Attorney General on behalf of the female asylum seeker. She, too, sought asylum on the possibility of domestic abuse. The matter of L-R- opened the asylum door to "Mexican women in domestic relationships. . ." Blake, *infra* note 61 at 73.

15. The Obama Administration recently began to allow claims for asylum based on extreme cases of domestic violence, provided that the applicant meets all parts of the asylum definition. *See* Karen Musalo, *Toward Full Recognition of Domestic Violence as a Basis for Asylum*, AMERICAN CONSTITUTION SOCIETY BLOG (Aug. 20, 2010), http://www.acslaw.org/acsblog/toward-full-recognition-of-domestic-violence-as-a-basis-for-asylum.

16. 8 U.S.C. § 1101(a)(42)(A)(2012).

17. *Id.*

18. *Id.*

19. *See* Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's*

In fact, the "evolution of the definition of 'particular social group' is one of the primary issues in both US asylum law and comparative international asylum law under the United Nations Convention Related to Refugees."[20]

In the United States, the category of "social group" has been very narrowly construed. While the "membership in a particular social group" category was originally created to provide a basis for relief for groups which did not fit into the other categories, it has been internationally interpreted to exclude large numbers of persecuted individuals because they do not neatly fit into a "social group."[21] Its limitations create an under-inclusive effect denying status for individuals seeking to escape persecution on account of many factors, especially on the basis of gender. However, persecution based on gender is a widespread problem throughout the world. Problems of forced marriages, rape, female genital mutilation, honor killings, and forced abortions are just a few examples of this type of persecution.

This Note proposes that the gaps in existing US asylum law have created a need for the re-interpretation and re-structuring of the meaning of "membership in a particular social group" to provide a uniform pathway to asylum for victims of gender-based persecution. This re-interpretation should be based on criteria outlined in existing international conventions, other countries' domestic laws, and a widening of the idea of "immutable characteristic" as seen in earlier immigration opinions.

Specifically, Part I of this Note provides a brief introduction to the scope and purposes of this work. Part II provides background information on the widespread phenomenon of gender-based violence as it occurs throughout the world and how restrictive US asylum policies are unable to remedy or alleviate this problem. Part III explains how the international community defines and interprets "membership in a particular social group." This section focuses on the United Nations' approach, as well as approaches used in Canada, Great Britain, and Australia. Part IV of this Note explains the United States' standard for "membership in a social group" and its various inconsistencies and inadequacies. Principally, this section focuses on the "social visibility" test, the current standard used by Immigration Officers, Immigration Courts, the Board of Immigration Appeals (BIA), and the majority of United States Circuit Courts of Appeals. Part IV also focuses on new positive trends in social group interpretation and why they, too, are still inadequate to combat gender-based persecution.

Part V of this Note will advocate a new means for interpreting and accessing US asylum claims for gender-based persecution. This section will explain the proposed re-interpretation of the United States' definition of "social group," relying on international standards, approaches from other

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Claims, 29:2 REFUGEE SURV. Q. 46, 62-63 (2010).

20. Twibell, *supra* note 1, at 199.

21. *See id.*

countries, and ideas of self-identification, immutability, and equal protection. Additionally, this section will address the reasons why the current administration has failed to include gender-based persecution within the definition of social group and explain why the uniform pathway approach is the best. Finally, Part VI of the Note will explain how expanding the idea of "membership in a particular social group" to include gender will allow for greater protection to women.[22]

II. BACKGROUND: GENDER-BASED VIOLENCE

A. Gender-Based Violence Is an International Problem

Violence against women is a pervasive problem throughout the world.[23] It "cuts across lines of income, class and culture."[24] "While rates of women exposed to violence vary from one region to the other, statistics indicate that violence against women is a universal phenomenon and women are subjected to different forms of violence – physical, sexual, psychological and economic – both within and outside of their homes."[25] This presents an almost insurmountable obstacle to achieving gender equality, economic and social development, and peace.

Gender-based violence was not universally recognized as a human rights violation until very recently. "It was only in June 2008, that the United Nations Security Council voted unanimously 'that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide.'" [26] The Security Council went on to note that women and girls are particularly targeted in military tactics, in which sexual violence is used as a means "to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members

22. This Note will be limited to a small portion of the asylum definition, "membership in a particular social group." It will not address, at least directly, asylum claims based on race, nationality, religion, or political opinion. Furthermore, the Note will not address the entire standard required to qualify as a refugee: past persecution and/or well-founded fear of future persecution based on one of the enumerated reasons. While meeting the entire standard is necessary to apply for asylum or refugee status in the United States, the scope of this Note is limited to meeting and expanding the preexisting standard for membership in a particular social group. This Note will not address the other hurdles asylum seekers must jump, such as meeting the persecution requirement and the credibility requirement.

23. U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE WORLD'S WOMEN 2010 TRENDS AND STATISTICS, (2010) [hereinafter U.N. WORLD'S WOMEN 2010 TRENDS].

24. *Id.* at 127.

25. *Id.* at x.

26. U.N. High Comm'n for Refugees, *Age, Gender and Diversity Policy: Working with People and Communities for Equality and Protection*, at 194 (June 2011), *available at* http://www.unhcr.org/4e7757449.html (citing S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008)) [hereinafter U.N. *Age, Gender, and Diversity Policy*].

of a community or ethnic group."[27]

As both a cause and consequence to this gender-based violence, "[women] often have fewer opportunities and resources, lower socio-economic status, [and] less power and influence" than their male counterparts.[28] Women who suffer from gender-based violence "face enormous challenges providing for their families and themselves."[29] This gender disparity is further amplified by displacement, which leads to exposure, "exploitation, enslavement, rape and other forms of abuse and Sexual and Gender Based Violence (SGBV)."[30]

According to the UNHCR, among the "approximately 50 million uprooted people around the world," including refugees and displaced peoples, "[b]etween 75-80 percent of them are women and children."[31] Furthermore, the United States General Accounting Office (GAO) has found that female refugees are "among the world's most vulnerable populations."[32] Despite comprising such a large segment of the displaced persons globally, and despite the vulnerability women face at home and as refugees, women represent a disproportionately low percentage of asylum seekers, and an even lower percentage of those women gain relief through residency.[33]

B. Inability to Escape Gender-Based Persecution Through Asylum

This dire reality of females' inability to qualify for asylum "is constituent of continued female oppression."[34] Particularly in the United States, the difficulty in meeting the standard for asylum perpetuates continued oppression on the basis of gender. This problem is exemplified through the notable cases of Rody Alvarado, Aruna Vallabhaneni, and Elizabeth Ngengwe.[35]

In *In re R-A-*, the BIA held that Rody Alvarado, a victim of extreme

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27. S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008).

28. U.N. *Age, Gender, and Diversity Policy*, *supra* note 26, at 17.

29. *Id.*

30. *Id.*

31. Twibell, *supra* note 1, at 194 (quoting *The World of Refugee Women at a Glance,* REFUGEE MAGAZINE, Issue 126, *available at* http://www.unhcr.org/publ/PUBL/3cb6ea290.html.).

32. *Id.* (quoting U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE RANKING MINORITY MEMBER, COMMITTEE ON FOREIGN RELATIONS, U.S. SENATE, HUMANITARIAN ASSISTANCE: PROTECTING REFUGEE WOMEN AND GIRLS REMAINS A SIGNIFICANT CHALLENGE 1 (2003), *available at* http://www.gao.gov/new.items/d03663.pdf).

33. *See* UNHCR, DIVISION OF OPERATIONAL SERVICES, FIELD INFORMATION AND COORDINATION SUPPORT SECTION, 2006 GLOBAL TRENDS: REFUGEES, ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 9 (July 16, 2007), *available at* http://unhcr.org/statistics/STATISTICS/4676a71d4.pdf.

34. S.C. Res. 1820, *supra* note 27, ¶ 4.

35. Ngengwe v. Mukasey, 543 F.3d 1029 (8th Cir. 2008).

and brutal domestic violence, failed to qualify for asylum due to the lack of "membership in a particular social group."[36] Rody did not "introduce meaningful evidence that her husband's behavior was influenced by his perception of her opinion," [37] that she should not be subjected to rudimentary beatings by her husband, and that she should be able to leave the marriage. The BIA went on to note that simply because the applicant "shared descriptive characteristics" with other women who were victims of domestic violence in Guatemala, the evidence was insufficient to qualify the applicant as a member of a particular social group under the Immigration and Nationality Act (INA).[38] Despite the Court's acknowledgment of the horrific instances of abuse Rody suffered, the Court was bound by precedent and Rody was barred from immigration relief because she could not meet the narrow definition promulgated by Congress.[39]

In the case of Aruna Vallabhaneni, Aruna was a young woman who fled India to escape her abusive husband.[40] She came to the United States seeking asylum.[41] Through an arranged marriage, Aruna married her husband at the young age of seventeen.[42] Her husband regularly beat her if she refused to give him money for his gambling problem.[43] On one occasion, Aruna lost her sense of smell as a result of a particularly unforgiving beating.[44] On another occasion, she was hospitalized for two days.[45] Neither complaint to the police nor to her family offered her any respite from these abuses.[46] Aruna came to the United States with the hope of gaining asylum for herself and a safe home for her children. Aruna's claim for asylum was denied.[47] She has been awaiting a final decision for over ten years while her children wait without their mother in India.[48]

In the third case, Elizabeth Ngengwe was a Cameroonian woman who sought asylum on the basis of membership in the social group of Cameroonian widows.[49] When her husband passed away in 2000, her

36. R-A-, 22 I & N Dec. at 927.

37. *Id.* at 906.

38. *Id.* at 919 (citing 8 U.S.C. § 1101 (a)(42)(A) (1994)).

39. *Id.* at 927.

40. Alex Kotlowitz, *Asylum for the World's Battered Women,* N.Y. TIMES (Feb. 11, 2007), http://www.nytimes.com/2007/02/11/magazine/11wwlnidealab.t.html.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Kotlowitz, *supra* note 40.

46. *Id.*.

47. *Id.*

48. *Id.*

49. Twibell, *supra* note 1, at 213-16.

husband's parents inexplicably blamed her for his death.[50] Elizabeth's in-laws came into her home following her husband's death and took all of her and her husband's material possessions.[51] As part of an "exaggerated mourning period," Elizabeth was forced to sleep on the floor and to have her head shaved with a broken bottle; she was not allowed to bathe or greet people with her hands; and her children were not allowed to leave the home.[52] Facing threats of being forced to marry her deceased husband's uncle or never seeing her children again, Elizabeth fled Cameroon and made her way to the United States.[53]

When Elizabeth arrived in United States in 2001, she filed for asylum on the basis of being a part of a protected social group, defined as "widowed Cameroonian females of the Bamileki tribe ...who are falsely accused of causing her husband's death" or more generally, "Cameroonian widows."[54] Elizabeth's claim for asylum was denied by both the Immigration Judge and the BIA, each court finding that Elizabeth had not met the standard for a recognizable social group.[55] While both courts agreed that Elizabeth's plight was tragic, she had not established a social group based on an immutable characteristic.[56] The Eighth Circuit granted Elizabeth's petition for appeal in 2008 and remanded the case to the BIA;[57] however, Elizabeth is still awaiting a decision on her asylum claim.[58]

The previous examples suggest that it is often difficult to articulate the precise grounds on which a woman faced with persecution qualifies for asylum purposes. In fact, defining the social group by a specific and recognized characteristic, whether it is immutability or social perception, is not an easy task. While the United States has recognized a few limited exceptions to this rule, i.e., women who refuse to undergo the procedure of female genital mutilation[59] and certain victims of domestic violence

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50. *Id.* at 213 (citing Opening Brief at 3, Appeal of the Decision of the Immigration Judge, In the Matter of Elizabeth Ngengwe (July 26, 2003)). Elizabeth's parents thought that her race and family history brought bad luck to the family, eventually causing her husband's death.

51. *Id.* at 214.

52. *Id.* The typical mourning period in Cameroon at the time was two weeks. However, Elizabeth's in-laws forced her to endure two month of physical and emotional turmoil. *Id.*

53. *Id.* at 214-15.

54. *Id.* at 216.

55. *Id.* at 221.

56. *Id.* at 221.

57. *Id.* at 225. *See also* Ngengwe v. Mukasey, 543 F.3d 1029, 1031 (8th Cir. 2008).

58. Twibell, *supra* note 1, at 225. At the time Twibell's work was published in 2010, Elizabeth's claim was still pending before the BIA.

59. *In re* Kasinga, (B.I.A. 1996) ("Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a 'particular social group' within the definition of the term "refugee" under section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1994)."

inflicted by immediate relatives,[60] there are still large gaps that can only be remediated by broadening the definition of social group to include gender.

III. EXISTING STANDARDS FOR "SOCIAL GROUP" IN INTERNATIONAL LAW

In order to address how the United States views "membership in a particular social group," it is appropriate to first look to the original and existing standard for refugee status and its application in international law. The United States relied heavily on preexisting international law, principally international laws articulated by the United Nations General Assembly and the United Nations High Commissioner on Refugees (UNHCR), in drafting its current immigration laws and standards.[61]

Established in 1951, the UNHCR was created primarily for the "international protection" of refugees.[62] The UNHCR seeks to meet this goal by assisting governments in reaching permanent and lasting solutions to remedy problems faced by refugees and by promoting the "ratification of international conventions for the protection of refugees."[63] The powers and purposes of the UNHCR are outlined in the United Nations Convention Relating to the Status of Refugees (Refugee Convention),[64] one of the most widely used refugee conventions in the world.[65] Under this Convention, the UNHCR continues to provide international protection for refugees and guidance for states.

A. UNHCR's Standard for Refugee and Social Group

Membership in a particular social group is only one factor to meeting the UNHCR's definition of refugee,[66] which in itself is constantly changing and nearly always in dispute under international and domestic laws. The Refugee Convention, Article 1, defines who qualifies as a "refugee."[67] The

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Id.).

60. Twibell, *supra* note 2, at 213-21.

61. Jillian Blake, Commentary, *Welcoming Women: Recent Changes in U.S. Asylum Law*, 108 MICH. L. REV. FIRST IMPRESSIONS 71, 72 (2010).

62. United Nations Convention Relating to the Status of Refugees, Geneva, July 28, 1951, UNITED NATIONS [hereinafter U.N. REFUGEE CONVENTION], *available at* http://www.unhcr.org/3b66c2aa10.html; *see also* ENABLING UN RESOL. 428(V) (1950).

63. Statute of the Office of the United Nations High Comm. for Refugees, G.A. res. 428 (V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950).

64. *See generally* U.N. REFUGEE CONVENTION, *supra* note 62.

65. *Id.*

66. *E.g.*, Twibell, *supra* note 2, at 246; U.N. REFUGEE CONVENTION, *supra* note 62. Under international and national immigration law, refugees and asylees are subject to the same standard. The only practical difference between the two categories is that refugees petition for asylum while they are outside of the country from which they are seeking asylum and asylees apply once they are already within the country from which they are seeking asylum.

67. U.N. REFUGEE CONVENTION, *supra* note 62, at 14.

Refugee Convention's definition and applications operate as model standards for states' asylum laws; the Convention is not binding on a state unless it is ratified by a state who is party to the Convention. Nevertheless, it has been ratified by 145 countries.[68] The United States, however, has not acceded to the Convention.[69]

1. United Nations' Definition of Refugee

In 1951, the United Nations set out the standard for defining a refugee under international law during the Refugee Convention.[70] Pursuant to Article 1 of the Convention:

> The term "refugee" shall apply to any person who ... [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; ....[71]

In summary, a refugee is a person who fears returning to their native country because of persecution, past or future, on the basis of race, religion, nationality, social group, or political opinion. However, the ambiguity of the definition has led to countless interpretations of "refugee" under the Convention. Indeed, this section of the Refugee Convention is viewed as one of the most controversial Articles in international asylum law.[72]

2. United Nations' Definition of Social Group

The Refugee Convention further defines what it means to be a member of a "particular social group." According to the UNHCR, a social group is "a group of persons who share a *common characteristic* other than the risk of being persecuted, or who are perceived as a group by society."[73]

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68. U.N. TREATY COLLECTION, CONVENTION RELATING TO THE STATUS OF REFUGEES, UNITED NATIONS, *Treaty Series,* vol. 189, p. 137, *available at* http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en.

69. *Id.*

70. U.N. REFUGEE CONVENTION, *supra* note 62, at 14.

71. *Id.*

72. *See e.g.,* U.N. High Comm. for Refugees, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees (Apr. 2001), *available at* http://www.unhcr.org/refworld/docid/3b20a3914.html.

73. Blake, *supra* note 61, at 72 (quoting United Nations High Commissioner for Refugees, Guidelines on International Protection, "Membership of a particular social group,"

This common "characteristic will often be one that is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."[74]

3. United Nations' Interpretation of Social Group

More importantly, the concept of social group under the Refugee Convention maintains two essential "characterizations of a particular social group: immutability - members of the group share a trait that is innate; and social perception - society views members of the group as such."[75]

In addition to the definition found in the Convention, the UNHCR has provided several subsequent guidelines offering further insight on how "social group" should be interpreted by states.[76] In 2002, the UNHCR issued guidelines that further define the "protected characteristic" and "social perception" approaches as alternative ways of establishing a particular social group, instructing ratifying states to determine first if there is a protected characteristic. Then, only if no such characteristic exists, a state can determine whether the group is recognized by society.[77]

These two characterizations of membership in a particular social group are widely incorporated into domestic laws.[78] In fact, "among the major common law countries ... Canada, New Zealand, and the United Kingdom follow the principled 'protected characteristic' approach."[79] Australia has emphasized the "social perceptions" approach, "while also taking immutable characteristics into account."[80] The United States in the past followed the social perception approach, but now is following the "social visibility"[81] approach, representing a "significant departure" from international precedent.[82]

HCR/GIP/02/02 (May 7, 2002), *available at* http://www.unhcr.org/3d58de2da.html).

74. *Id.*

75. *Id.*

76. Heaven Crawley, *Gender-Related Persecution and Women's Claims to Asylum,* FAHAMU REFUGEE LEGAL AID, http://www.frlan.org/content/gender-related-persecution-and-women%E2%80%99s-claims-asylum (last visited Apr. 11, 2013); *See e.g.,* UNHCR, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees.* ¶ 6, U.N. DOC. HCR/GIP/02/01(May 7, 2002) [hereinafter UNHCR *Guidelines*].

77. Fatma Marouf, *The Emerging Importance of "Social Visibility" in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Pol'y Rev. 47 (2008), *available at* http://scholars.law.unlv.edu/facpub/419.

78. *See generally, id.*

79. *Id.* at 48-49.

80. *Id.*

81. The social visibility approach is the current, *de facto* standard for social group characterizations in the United States. While the States also rely on the concept of immutability, social visibility works in conjunction with the aforementioned social perception approach.

82. *See e.g.,* Marouf, *supra* note 77, at 49.

4. Gender Is Treated as a "Social Group"

Under the Refugee Convention's definition of refugee, gender is not included as an enumerated ground used to meet the persecution nexus requirement.[83] However, the two-step process provided in the UNHCR guidelines can and has been interpreted to apply to gender-based asylum petitions.[84] First, under these guidelines, gender, as interpreted within its social or political context, is designated as a protected social group. Second, gender is arguably socially perceptible—female and male gender identities are perceived by the greater society.[85] Under either of these interpretations of the international definition, gender can be treated as an underlying basis for a social group. Accordingly, the asylum seeker would need to prove that she was persecuted on account of her social group of "female."

As one scholar suggests, "[i]t is important to understand that women's claims for asylum can, more often than not, be properly recognised within the meaning of the [Refugee] Convention if their experiences are properly understood within the social and political context within which they occur."[86]

In addition, the UNHCR guidelines have been proactive in the move toward including gender as either an individual enumerated class or under the social group category.[87] Specifically, in relation to gender-based persecution claims for asylum, the UNHCR guidelines state that while gender is "not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment."[88] Therefore, the guidelines can be properly interpreted to include "gender-related claims."[89] "As such, there is no need to add an additional ground to the 1951 Convention definition."[90] The UNHCR has made clear that "women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic."[91] Therefore, the UNHCR does not need to amend the rules.[92]

Despite this argument, critics contend that the Refugee Convention's definition of refugee is ineffective and requires modification.[93] While

83. *Id.* at 70; *see also* Blake, *supra* note 61, at 71.
84. *Id.* at 49.
85. *Id.* at 74.
86. Crawley, *supra* note 76.
87. *Id.*
88. *Id.*
89. *Id.*
90. UNHCR, *GUIDELINES, supra* note 73, at ¶ 6.
91. Perdomo v. Holder, 611 F.3d 662, 667 (9th Cir. 2010).
92. Additional practical considerations lay at the heart of this decision.
93. *Definition of a Refugee Needs Updating, Report Tells United Nations,* University of

substantial guidelines offer additional protection to gender-based persecution in interpreting the Refugee Convention's definition of refugee, "the definition is more of an issue for individual asylees seeking to qualify as a 'refugee' under the more detailed asylum laws of the respective state in which they find themselves."[94] Therefore, the domestic laws of the nation in which the asylee is seeking safety offers the definition in which the asylee must meet.

B. Other Domestic Standards Utilizing the UNHCR Approach

Specifically, the UNHCR Committee has urged "states to develop and implement domestic criteria and guidelines regarding protection for women who claim refugee status based on a well-founded fear of gender-related persecution."[95] In fact, the approach has a basis in the UN Refugee Convention, subsequent UNHCR guidelines, and other countries' definitions of refugee.[96] Countries such as Australia,[97] Canada,[98] and Great Britain[99] now recognize "social groups defined by gender," but the "United States has been reluctant to follow suit."[100] The remainder of this section will focus on how Canada, Great Britain, and Australia articulate their standards for asylum and include gender-based persecution as a means to asylum for a particular social group.

1. Canada – A Precedent

Canada was the first county to "recognize that women suffer from gender-specific forms of persecution that should be recognized" under the UN Refugee Convention.[101] The core body of law that governs Canada's

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Oxford, June 25, 2009, *available at* http://www.ox.ac.uk/media/news_releases_for_journalists/090625_2.html.

94. Twibell *supra* note 1, at 207.

95. *Gender Guidelines.* CENTER FOR GENDER & REFUGEE STUDIES, http://cgrs.uchastings.edu/law/gender_guidelines.php#_ednref3 (last visited Apr. 11, 2013) (citing UNHCR Exec. Comm., Conclusion No. 73 Refugee Protection and Sexual Violence, ¶ e., (1993), reprinted in UNHCR, A Thematic Compilation of Executive Committee Conclusions on International Protection 430-32 (2nd ed. 2005), available at http://www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf; UNHCR Exec. Comm., Conclusion No. 77 (1995)) [hereinafter *Gender Guidelines*].

96. Marouf, *supra* note 77, at 49.

97. *See* Minister for Immigration & Multicultural Affairs v. Khawar [2002] HCA 14, 210 CLR 1, 13-14 (Austl.).

98. *See* Ward v. Att'y Gen. of Can., [1993] 2 S.C.R. 689, 739. (Can.), *available at*: http://www.unhcr.org/refworld/docid/3ae6b673c.html (last visited Apr. 11, 2013).

99. *See* Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.).

100. Marouf, *supra* note 77, at 90.

101. Twibell *supra* note 1, at 197 n. 23. "There is increasing international support for the application of the particular social group ground to the claims of women who allege a fear of persecution solely by reason of their gender, within the meaning of Article 1 A(2) of the

immigration and refugee programs is found in the Immigration and Refugee Protection Act.[102] While this Act does not refer to gender-based persecution itself, Canada issued national guidelines "regarding gender-based persecution in 1993."[103] In 1993 and again in 2003, Canada updated the guidelines to include gender-based persecution claims, allowing gender as a social group.[104]

Canadian Guideline Four—Women Refugee Claimants Fearing Gender-Related Persecution (Guideline Four), issued in 2003, states that persecution resulting from certain circumstances of severe discrimination based on gender could be seen as reasonable grounds for persecution.[105] Guideline Four went on to note that a "gender-defined particular social group" may be a solid basis for asylum when two necessary considerations are met.[106] First, the idea that most "gender-specific claims involving fear of persecution for transgressing religious or social norms may be determined on the grounds of religion or political opinion."[107] Second, the consideration is that women may establish a well-founded fear of persecution "by reason of her membership in a gender-defined particular social group," a group "defined by an innate or unchangeable characteristic."[108] Guideline Four went on to note that the fact that a social group is comprised of a large number of people is irrelevant because "race, religion, nationality and political opinion are also characteristics that are shared by a large number of people."[109] Rather, "[t]he relevant assessment is whether the claimant, as a woman, has a well-founded fear of persecution in her country of nationality by reason of her membership in this group."[110]

While these guidelines are not binding on Canadian Courts, "the Federal Court of Canada determined that Canadian courts should follow the guidelines unless circumstances are such that a different analysis is appropriate."[111]

1951 United Nations Refugee Convention." Immigration and Refugee Board of Canada, *Compendium of Decisions: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (Update)* 13, (Feb. 2003), *available at* http://www.unhcr.org/refworld/docid/4713831e2.html.

102. *Gender Guidelines, supra* note 95 (citing Immigration and Refugee Board of Canada website, http://www.irb-cisr.gc.ca/Eng/Pages/index.aspx).

103. *Id.*

104. *Id.*

105. Immigration and Refugee Board of Canada, *Compendium of Decisions: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (Update)*, (Feb. 2003), *available at*: http://www.unhcr.org/refworld/docid/4713831e2.html, at 14. [hereinafter Canadian Immigration Guideline 4].

106. *Id.* at 12.

107. *Id.*

108. *Id.* at 15.

109. *Id.*

110. *Id.*

111. *Gender Guidelines, supra* note 95 (citing Amy K. Arnett, *One Step Forward, Two Steps Back: Women Asylum-Seekers in the United States and Canada Stand to Lose Human*

i. Attorney General of Canada v. Ward

Canada's approach to gender-based persecution claims began in 1993 with the case *Attorney General of Canada v. Ward.*[112] *Ward* was an unlikely case to be the basis for gender-based claims of asylum in Canada because the asylum seeker, Patrick Ward, sought asylum on the basis of political opinion.[113] Patrick was a member of the Irish National Liberation Army (INLA).[114] He was assigned to guard, and then ordered to kill, a group of hostages, but he allowed them to escape.[115] When his deeds were discovered, he was tortured and sentenced to death.[116] He eventually escaped, but was later caught and sent to jail because of his initial involvement with the kidnapping.[117] Patrick eventually escaped to Canada and claimed refugee status. He was denied asylum by both lower courts and appealed to the Supreme Court of Canada.[118]

The Supreme Court of Canada, drawing on the preamble to the United Nations' Refugee Convention, which states that "human beings shall enjoy fundamental rights and freedoms without discrimination,"[119] found there to be an inherent limit to cases under the United Nations' Refugee Convention.[120] "Accordingly, '[t]he manner in which groups are distinguished for the purposes of discrimination law can . . . appropriately be imported into this area of refugee law.'"[121] Following this reasoning, the Court found three possible avenues for establishing a particular social group, the first being "groups defined by an innate or unchangeable characteristic."[122] Under this first avenue, the *Ward* court explained that a social group would include, "individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists."[123] Thus, in dicta, the Supreme Court of Canada recognized explicitly, for the first time, that

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Rights Under the Safe Third Country Agreement, 9 LEWIS & CLARK L. REV. 951, 969 (2005) (citing *Narvaez v. Canada*, [1995] 2 F.C. 55, 62 (Can.)).

112. Ward v. Att'y Gen. of Can., [1993] 2 S.C.R. 689, 736 (Can.) (recognizing non-State persecution for the purpose of refugee status).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Ward,* S.C.R. 689 (Can.).

119. *Id.*

120. *Id.*; Marouf, *supra* note 77, at 54.

121. Marouf, *supra* note 77, at 55 (citing *Ward,* S.C.R. 689 (Can.).

122. *Id.*; *see Ward,* S.C.R. 689 (Can.) (the second two possibilities are "groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and...groups associated by a former voluntary status, unalterable due to its historical permanence.") *Id.*

123. *Ward,* S.C.R. 689.

gender-related persecution could be an acceptable basis for asylum.[124]

ii. Narvaez v. Canada

Canada went beyond the scope of *Ward* to specifically include gender-based persecution as a basis for "social group" within the asylum definition in *Narvaez v. Canada.*[125] In *Narvaez*, an Ecuadorian woman sought asylum in Canada because she feared violence at the hands of her ex-husband.[126] She had suffered seven years of abuse, and the police in Ecuador failed to offer her protection.[127] Basing its reasoning on the Canadian Guidelines and the *Ward* decision, the Court found that "women in Ecuador subject to domestic violence belong to a particular social group."[128] "The past experience of the claimant and the experiences of similarly-situated women were evidence of the lack of protection available."[129] Thus, Ms. Narvaez was granted asylum on the basis of her membership in a particular social group, one of gender.

2. Great Britain

Canada was not alone in pioneering the expanding concept of social group to include gender as an acceptable basis for asylum. "On March 25, 1999, the House of Lords of the United Kingdom issued an historic decision granting asylum protection to two Pakistani women fleeing violence by their husbands and related retaliatory abuse tolerated, and to some extent sanctioned, under Pakistani law."[130]

In *Islam (AP) v. Secretary of State for the Home Department; R. v. Immigration Appeal Tribunal ex parte Shah (AP),* ["*ex parte Shah*"], the majority of the House of Lords found that "gender can define a 'particular social group,' one of the five grounds of persecution in the definitional criteria for refugee status or asylum eligibility."[131] In this case, two married Pakistani women sought asylum in Great Britain after they were victims of domestic violence and forced to leave their homes.[132] Each woman was at risk of being falsely accused of committing adultery,[133] a crime under

124. *Id.*

125. Narvaez v. Canada (Minister of Citizenship and Immigration), [1995] 2 F.C. 55 (T.D.).

126. *Id.*

127. *Id.*

128. *Id.*

129. Canadian Immigration Guideline 4, *supra* note 105.

130. Twibell, *supra* note 1, at 208 n.112.

131. Deborah E. Anker, et al., *Defining "Particular Social Group" in Terms of Gender: The Shah Decision and U.S. Law*, 76 IR 1005 (1999).

132. Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.).

133. *Id.*

Islamic law.[134] The Pakistani women claimed that if they were forced to return to Pakistan, they could be criminally punished for sexual immorality, a crime punishable by flogging or stoning to death.[135] Both women sought refugee status as members of a particular social group under the United Nation's definition, claiming a well-founded fear of being persecuted for such membership.[136] The principal issue faced by the court was "whether the appellants [were] members of a particular social group within the meaning of article 1A(2) of the [United Nations' Refugee] Convention.[137]

In reaching the ultimate conclusion to grant the appellants' asylum, the *ex parte Shah* court made several findings of fact. The Court found that domestic violence and abuse of women was prevalent in Pakistan, but that the "distinctive feature in these cases [was] that discrimination against women in Pakistan is partly tolerated and partly sanctioned by the state."[138] The Court accepted that each appellant had a well-founded fear of persecution, but found the case turned on whether they qualified as members of a particular social group.[139] The court found the reasoning behind the persecution covered Pakistani women because "they are discriminated against and as a group they are unprotected by the state."[140] Ultimately the House of Lords granted both the women's appeals, finding that "it would be contrary to the United Kingdom's obligations" to force the appellants to leave the country.[141]

What is interesting about the *ex parte Shah* case is that the House of Lords could have chosen, much like the United States' courts have done,[142] a more limited definition of "social group;" it could have limited its opinion to Pakistani women fleeing domestic violence and being accused of adultery. However, the House of Lords specifically mentioned that the women were persecuted because they were women, thus qualifying gender as a social group.

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134. SAINT GROUP, PSO LANGUAGE & CULTURE, ISLAMIC LAW: SHARIA AND FIQH, http://www.saint-claire.org/resources/Islamic%20Law%20-%20SHARIA%20AND%20FIQH.pdf (last visited Apr. 11, 2013).

135. *Islam,* 2 A.C. 629 (H.L.).

136. U.N. REFUGEE CONVENTION, *supra* note 62, Art. 1 A(2) (articulating the definition of refugee). *Islam,* 2 A.C. 629 (H.L.).

137. *Islam*, 2 A.C. 629 (H.L.)

138. *Id.*

139. *Id.*

140. *Id.* at 9. The Court went on to note that even if the women in the case did not qualify under a particular social group, the women were "members of a more narrowly circumscribed group" based on "[t]he unifying characteristics of gender, suspicion of adultery and lack of state protection . . . ." *Id.* at 10.

141. *Id.* at 12.

142. *See e.g., In re* R-A-, 22 I. & N. Dec. 906 (BIA 2001).

3. Australia

As early as 1994, Australia recognized the unique characteristics of gender-based persecution in relation to the United Nations' Refugee Convention.[143] Specifically, in the 1994 case of a Filipina woman who was "systematically and sexually abused over the course of a 27-year marriage,"[144] the Australian Refugee Review Tribunal (RRT) found that women share both immutable and social characteristics which make them a recognizable social group and consequently subjects them to persecution.[145] The RRT went on to mention the social characteristics that bind women together into a social group of gender: "ability to give birth," "role of principal child-rearers," inability to make the same wages as men, and "fear of being subjected to male violence . . . ."[146] Thus, the RRT saw no reason not to recognize the particular social group of "women" as defined and conceptualized by their gender.

Australia's interpretation of gender-based social groups is articulated in *Minister for Immigration & Multicultural Affairs v. Khawar,* where a Pakistani woman came to Australia with her three daughters after being a victim to repeated violence at the hands of her husband and his family.[147] In *Khawar*, Ms. Khawar claimed asylum on the basis that the Pakistani police had systematically discriminated against her by failing to provide her protection and that this was tolerated and sanctioned by the state.[148] Accordingly, the applicant argued that her persecution was based on the state's failure to protect a particular social group—"women in Pakistan."[149]

Ms. Khawar's petition for asylum was initially denied by Australia's Department of Immigration, Multiculturalism and Ethnic Affairs[150] and Australia's appellate body, the Refugee Review Tribunal. Both courts found that Ms. Khawar could not establish the needed nexus between the persecution she faced and the United Nations' Refugee Convention's

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143. The Committee on Immigration and Nationality Law Assoc. of the Bar of City of New York, *Gender-Related Asylum Claims and the Social Group Calculus: Recognizing Women as a "Particular Social Group"* Per Se, 5 (Mar. 27, 2003) *available at* http://www.nycbar.org/pdf/report/FINAL%20%20Gender%20Related%20Asylum%20Claims.pdf.

144. *Id.* at 11.

145. *Id.* (citing N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994) (Hunt) (emphasis added)).

146. *Id.*

147. *A Compilation of Australian Refugee Law Jurisprudence*, AUSTL. REFUGEE L. JURIS. COMPILATION, 141 (Feb. 2006), *available at* http://www.unhcr.org/refworld/docid/3f5c5fff2.html (last visited Apr. 11, 2013).

148. *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 5-6 (Austl), *available at* http://www.unhcr.org/refworld/pdfid/3deb326b8.pdf.

149. *Id.*

150. Australia's equivalent to United States' Citizenship and Immigration Services ("USCIS").

standard for asylum. Specifically, the RRT found that Ms. Khawar "was harmed for personal reasons" in relationship to her marriage and that the Refugee Convention was "not intended to provide protection to people involved in personal disputes."[151]

On appeal to Australia's Federal Court, the Court considered two issues. The first was "whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Art 1A(2) of the [Refugee] Convention." The second was whether "women or, for the present purposes, women in Pakistan may constitute a particular social group within the meaning of the Convention."[152] The Court answered both questions in the affirmative.

Specifically, the Australia Federal Court found that the RRT erred in not making any findings "in relation to any particular social group of which Ms. Khawar might be a member." [153] As a result, the RRT had also erred in failing to make a finding in relation to the lack of police protection for Mr. Khawar's social group, women in Pakistan.[154]

As illustrated in the cases highlighted from Canada, Great Britain, and Australia, it is not a new or novel idea to include "gender" as an acceptable basis for defining a social group. In fact, women are commonly grouped together based on their need for protection under international law.[155]

IV. UNITED STATES' DEFINITIONS OF REFUGEE, SOCIAL GROUP, AND THEIR CONSTRUCTIONS

The United States is not alone in failing to include gender as an acceptable "social group" under the definition of refugee. From a policy standpoint, "gender-based asylum faces many obstacles against its implementation." [156] First, countries such as the United States are "seeking more restrictions on the ability to obtain asylum generally."[157] In other words, immigration is viewed as a problem of scope, and countries feel the need to heighten restrictions to limit the number of people coming into that particular country. Expanding the definition to include gender is seen as

151. *Khawar* (2002), 210 CLR at 5-6.

152. *Id.*

153. *Id.*

154. *Family Violence in Refugee Law,* AUSTRALIAN LAW REFORM COMMISSION (Mar. 11, 2011), *available at* http://www.alrc.gov.au/publications/family-violence-and-commonwealth-laws%E2%80%94immigration-law/family-violence-refugee-law.

155. *See* United Nations Convention of the Elimination of All Forms of Violence Against Women [CEDAW], New York, December 18 1979, *available at* http://www2.ohchr.org/english/law/cedaw.htm.

156. Twibell, *supra* note 1, at 279.

157. *Id.* at 284.

"opening the floodgates" to countless complaints.[158] Furthermore, "the [United Nations'] Refugee Convention does not directly address female protection because of immigration and asylum restrictionists and those who believe females do not deserve asylum protection on the basis of gender."[159] These obstacles "can be observed to converge and interact with individual cases in published appellate decisions."[160] Overall, the obstacles hinder the international acceptance of gender-based asylum in some countries, particularly in the United States.[161]

A. The United States' Standard for Refugee

Immigration law in the United States is highly complex. In 1952, the Immigration and Nationality Act (INA) was created as a means to collect and codify preexisting statutes and provisions governing immigration law, and thus "reorganized the structure of immigration law" in the United States.[162] In immigration practice, the INA is cited as, and stands alone as, a body of law, but it is also "contained within the United States Code (U.S.C.)."[163] Citations can be made directly to the INA or its U.S.C. equivalent.[164]

The term "refugee" in the INA is defined, at least in the text of the Act, in substantially the same manner as its United Nations' counterpart in the Refugee Convention.[165] Section 101(a)(42)[166] of the INA defines refugee as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the

158. *Id.* at 279.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See* U.S. CITIZEN AND IMMIGRATION SERVICES, IMMIGRATION AND NATIONALITY ACT, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Apr. 11, 2013). The INA was created by the McCarran-Walter bill of 1952, Public Law No. 82-414. The Act has been amended many times over the years but is still the basic body of immigration law. *Id.*

163. *Id.*

164. For the purposes of this Note, the INA and the USC provisions will be used interchangeably. However, their overall format and section breakdown tend to mimic each other. Either provision generally includes a reference to the corresponding provision in the other.

165. *See* U.N. REFUGEE CONVENTION, *supra* note 62, at 14.

166. 8 U.S.C. § 1101(a)(42) (2012).

> protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion....[167]

While this definition does not specifically mention gender in the guise of social group or as one of the enumerated categories, it goes on to include a few specific gender related categories:

> For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.[168]

From this definition, subsequent Immigration Court and Board of Immigration Appeals (BIA) decisions have noted that[169] persecution against females in certain contexts will be allowed, i.e. in the case of forced abortion, forced sterilization, and forced female genital mutilation.[170]

While these allowances work to the advantage of female asylum seekers, they are limited in their applicability because they are based on a woman's sex as opposed to a gender determination. "Sex" as a concept is defined biologically.[171] Yet, "'[g]ender' is a concept which is used to refer to those characteristics of men and women which are *socially rather [than] biologically determined.*"[172] The concept of gender is not a static concept but "can and does change over time and according to changing and varied political, economic, social, and cultural factors."[173] These exceptions are based on a woman's sexual functions, to offer protection to the type of persecution that women face as determined by their socially defined gender

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167. *Id.* (also cited as INA § (a)(42) (2012)).

168. *Id.*

169. *See* In re L-R-, Brief of Dep't of Homeland Security, 8 (Apr. 13, 2009) (redacted) [hereinafter DHS Brief], *available at* http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf.

170. *Id.*

171. Crawley, *supra* note 76.

172. *Id.*

173. *Id.*

role. Thus, these few exceptions, although good, are not enough.

B. The United States' Approach – "Social Visibility"

The definition of refugee under the INA is nearly identical to that in the United Nations' Refugee Convention. Until recently, the United States' approach mimicked that of the international community.[174] Even the *Acosta*[175] standard focused on the existence of an immutable characteristic: "one that an individual either cannot change or should not be required to change because it is fundamental to their identities or consciences."[176] However, the United States' approach has subsequently changed, and it now focuses on whether the social group is distinguishable and visible in the community.[177] It emphasizes external rather than internal attributes. This characterization has accordingly been named the "social visibility" approach.[178]

The "social visibility test" is most clearly articulated in the 2006 BIA decision of *In re C-A-*.[179] In this case, the BIA "diverged from the international community's understanding of 'social perception'" and instead focused on whether the group members were visible in their community.[180] The BIA stressed a very "subjective standard rather than an objective standard."[181]

In *C-A-*, the respondents sought asylum on the basis of "membership in a particular social group composed of noncriminal informants" who had been government informants against the Cali drug cartel.[182] The BIA took this case on remand from the Eleventh Circuit Court of Appeals to determine if this classification met the standard for social group.[183] The Court began with *Acosta*'s formulation: persecution "that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."[184]

However, the BIA went on to state that the "social visibility of the members of a claimed social group is an important consideration in identifying the existence of a 'particular social group' for the purposes of

174. Marouf, *supra* note 77, at 48-49.

175. In re *Acosta,* 19 I & N Dec. 211 (B.I.A. 1985). For purposes of this Note, the *Acosta* case stands for the immutable characteristic approach to membership in a particular case.

176. Marouf, *supra* note 77, at 48; *See Acosta,* 19 I. & N. Dec. at 233.

177. *See generally* Marouf, *supra* note 77.

178. *Id.*

179. *In re* C-A-, 23 I. & N. Dec. 951 (BIA 2006).

180. Marouf, *supra* note 77, at 49.

181. *Id.*

182. *C-A-*, 23 I & N Dec 951.

183. *Id.*

184. *Id.* at 951 (citing *Matter of Acosta,* 19 I&N Dec. 211 (BIA 1985)).

determining whether a person qualifies as a refugee."[185] The BIA argued that inherent in the immutable characteristic standard is high visibility and social recognition as a member of the given group.[186] Finally, the BIA determined that, given the "voluntary nature" of the decision to be a government informant and "the lack of social visibility of the members of the purported social group," the respondents failed to demonstrate that "noncriminal drug informants" could constitute a particular social group "as the term is used in the definition of a 'refugee' in section 101(a)(42)(A) of the [INA]."[187]

This opinion represents a significant departure from both the international "social perception" test and the "immutable characteristics" approach.[188] The "social visibility" test suggests that a social group has to be visually recognizable by the general public.[189] This approach implies that a complete stranger would have to recognize an individual as a member of the social group based on visual impression alone.[190] It is no longer enough that a group itself is recognized in the general sense. Moreover, the *C-A-* court's decision "seems to indicate that the visibility of some group members is not sufficient to satisfy the 'social visibility' test."[191] Rather, the majority of the group needs to be subjectively perceivable by a majority of the public, begging the question of whether many of the already accepted classifications of social group would cease to exist under this new standard.[192]

While not all Circuits have officially adopted this standard – indeed, Judge Posner on the Seventh Circuit Court of Appeals has adamantly refused to follow this approach[193]– the social visibility test is generally

185. *Id.*
186. *Id.* at 960.
187. *Id.* at 961.
188. Marouf, *supra* note 77, at 64.
189. *Id.*
190. *See* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).
191. Marouf, *supra* note 77, at 64.
192. *Id.*
193. *Benitez Ramos*, 589 F.3d at 430. In this case, Judge Posner highlights what he believes to be the ridiculousness in the social visibility approach. To him, the social visibility approach means "you can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait, speech pattern, behavior or other discernible characteristic." *Id.* Posner continues:

> If society recognizes a set of people having certain common characteristics as a group, this is an indication that being in the set might expose one to special treatment, whether friendly or unfriendly. *In our society, for example, redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can't be.* "Visibility" in the literal sense in which the Board has sometimes used the term might be relevant to the likelihood of persecution, but it is irrelevant to whether if there is persecution

accepted as the current United States' approach to membership in a particular social group.[194]

1. "Social Visibility" Approach Is Inadequate to Account for Gender-Based Persecution

The "social visibility" test does not provide a workable standard under current US immigration law. Based on this approach, it is unclear whether "social visibility" means something based on external criteria, such as hair color, or whether it means social visibility in a more literal sense, such as being accepted as a group within society.[195]

Furthermore, the "social visibility" test effectively gives decision-makers total discretion to decide whether or not a particular social group exists. Because the test is not law-based and social perceptions are so fluid, adjudicators will be able to freely deny the existence of a particular social group, despite the existence of a protected characteristic, based on a finding that the group is not socially visible.[196] Since the BIA has not adequately defined social visibility, the amount of discretion remains virtually unlimited. "Embracing the BIA's new approach not only will lead to chaotic case law" but could also "cause the legal community to reject the refugee status determination as a serious, principled process."[197]

This social visibility approach is unworkable for a wide variety of groups. However, when viewing it under the auspices of gender-based persecution, the effects of this approach are staggering. In *Kante v. Holder,* a native of Guinea sought asylum in the United States on the basis of membership in a particular social group.[198] The Guinean woman had been subjected to rape at the hands of government soldiers.[199] The applicant sought to distinguish the social group as "women subjected to rape as a method of government control."[200] Despite acknowledging that the applicant had suffered greatly, the Court found that this group was not a particular social group warranting relief under the INA.[201] The Court found that the group had been "circularly defined by the fact that it suffer[ed] persecution and the group [did] not share any narrowing characteristic other

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> it will be on the ground of group membership. Often it is unclear whether the Board is using the term "social visibility" in the literal sense or in the "external criterion" sense, or even whether it understands the difference.

Id. (emphasis added).

194. Marouf, *supra* note 77, at 63.

195. *Benitez Ramos*, 589 F.3d at 430.

196. Marouf, *supra* note 77, at 106.

197. *Id.*

198. Kante v. Holder, 634 F.3d 321, 324 (6th Cir. 2011).

199. *Id.* at 322.

200. *Id.* at 326.

201. *Id.* at 327.

than the risk of being persecuted."[202] Furthermore, the applicant did not demonstrate that the overall "Guinean society viewed females as a group specifically targeted for mistreatment."[203]

In *Kante,* the persecution that the woman faced was real, and she was not offered protection from her government because they allowed and even sanctioned the sexual abuse and misconduct. Accordingly, the applicant was in need of protection through asylum. Nevertheless, due in part to the fact that women were not socially viewed as being "targeted for mistreatment,"[204] she was denied protection. The "socially visibility" test prevented relief to a person so entitled.

2. "Social Visibility" Approach Is Inadequate in Other Contexts: Sexual Orientation-Based Persecution

Not only does the "social visibility" test create a nearly insurmountable hurdle for gender-based asylum claims, it also acts as a bar to asylum for other less visible social groups. To demonstrate, consider sexual orientation-based persecution. The United States has historically treated sexual orientation as socially unidentifiable or non-distinct, and, in many cases, as a not readily-identifiable trait. "Unlike some characteristics or traits, sexual orientation is not externally visible, and sexual minorities often feel compelled to hide their orientation for various reasons."[205]

Nevertheless, persecution based on sexual orientation is a global phenomenon. Lesbian, Gay, Bisexual, and Transgendered (LGBT) individuals are often exposed to discrimination and abuse linked to their sexual orientation and gender identity.[206] This risk of abuse is compounded by situations of displacement, profound isolation from family and community, and strong and often violent abuse.[207] While immigration courts have started to accept the asylum claims of LGBT individuals, the "social visibility" approach makes it "difficult to prevail in asylum claims based on sexual orientation, particularly where the claimants are women."[208]

Thus, the "social visibility" approach harms not only women, but also disproportionately affects groups that are not easily identifiable or visible in a community. Instead of focusing on why the persecution is occurring, the

202. *Id.*
203. *Id.*
204. *Id.*
205. Marouf, *supra* note 77, at 79.
206. U.N. High Comm'r for Refugees Prot. Policy and Legal Advice Section, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity 4.* (Nov. 21, 2008), *available at* http://www.unhcr.org/refworld/docid/48abd5660.html.
207. *Id.* at 9.
208. Marouf, *supra* note 77, at 79.

"social visibility" approach unfairly limits asylum to subjective and external criteria. Such a standard cannot and should not be where the United States rests its hat on at the end of the day.

C. Recent Trends Toward the International Standard of Social Group

Based on recent case law in the United States, it appears that a new, more internationally accepted framework allowing for gender-based claims may be possible in the United States. In fact, international "[w]omen's rights advocates have reason to be hopeful" because immigration courts across the United States have been "more open to accepting asylum claims from battered women."[209] While these petitions have not considered "women" or "gender" to be a social group *per se,* they have begun to recognize the unique vulnerability that women face in the domestic violence context.

1. Perdomo v. Holder

In *Perdomo v. Holder*, the Ninth Circuit Court of Appeals remanded a BIA decision denying a Guatemalan woman's claim for asylum based on membership in a particular social group.[210] Lesly Yajayra Perdomo "sought asylum based on her fear of persecution as a young woman in Guatemala."[211] The Immigration Judge denied Perdomo's application, and the BIA affirmed, "finding that a social group consisting of 'all women in Guatemala' is over-broad and 'a mere demographic division of the population rather than a particular social group.'"[212]

In remanding the case, the Ninth Circuit Court of Appeals went through a detailed analysis of the evolving notion of social group under US asylum law, citing both the immutable characteristics and social visibility tests. [213] The Ninth Circuit noted that it had not "held expressly that females, without other defining characteristics, constitute a particular social group," but it concluded that "females, or young girls of a particular clan" have met the "definition of a particular social group." [214] The Court went on cite the Third Circuit's decision from *Fatin v. INS,*[215] the USCIS "Gender Guidelines," and the UNHCR Guidelines as a basis for determining that

209. Blake, *supra* note 61, at 75.

210. Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010).

211. *Id.* at 663.

212. *Id.*

213. *Id.* at 665-67.

214. *Id.* at 667 (citing Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir.2005)).

215. *See* Fatin v. INS, 12 F.3d 1233, 1239 (3rd Cir.1993) (recognizing gender as a basis for social group under the *Acosta* standard).

gender alone can be a basis for asylum.[216] While the court implicated gender as an acceptable basis for social group, it limited its decision to remanding the decision to the BIA.[217]

2. Guidelines and Recommendations

In addition to cases such as *Perdomo*, *Fatin*, and *Acosta*, the Immigration and Naturalization Service (INS) has issued recommendations and guidelines that specifically consider female asylum seekers. For example, INS issued "Considerations for Asylum Officers Adjudicating Asylum Claims for Women" in 1995.[218] This internal document seeks to give immigration officers a summary of gender-based asylum issues and international developments regarding gender-based claims,[219] and provides guidelines for adjudicating these types of claims.[220] In particular, the memorandum identifies forms of persecution that are common to women, including domestic violence, rape, and sexual abuse.[221] While the guidelines do not state that gender could be a basis for asylum, they do provide specific recommendations for providing greater protection and allowances for women.[222] Nevertheless, they do not recognize gender as an acceptable basis for asylum.[223]

3. Trend Is Insufficient to Meet Growing Problems

While *Perdomo* and the various INS guidelines mark a beginning to accepting gender as an appropriate basis for asylum, an approach similar to what this Note proposes, it is not enough to remedy the under-inclusive effect US asylum policies have against women or to change the standard as it is today. First, the Immigration Judge's opinion and, subsequently, the BIA's ruling are appealable to the federal circuit which has "jurisdiction over the geographical area where the case was originally brought."[224] Yet, because the federal circuit is limited to its respective geographic region, it

216. Perdomo v. Holder, 611 F.3d at 667.

217. *Id.*

218. Memorandum from Phyllis Coven, OFFICE OF INT'L AFFAIRS, *U.S. Dept. of Justice to All INS Asylum Officers RE Considerations for Asylum Officers Adjudicating Asylum Claims for Women*, (May 26, 1995).

219. *Id.* at 1.

220. *Id.*

221. *Id.* at 4.

222. *Id.*

223. *Id.* at 13.

224. Jesse Imbriano, Note, *Opening the Floodgates or Filling the Gap?: Perdomo v. Holder Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims*, 56 VILL. L. REV. 327, 331-32 (2011).

will only have precedential effect within the circuit.[225] The Supreme Court has the ultimate jurisdiction, and the parties are free to appeal to the United States' highest judicial organ. However, in practice the Supreme Court rarely grants certiorari to hear immigration cases.[226] It chooses, for the most part, to defer to the decisions of the Executive Branch. Trends in immigration law are established by the BIA and a majority of circuits and, in turn, become *de facto* standards.

Furthermore, the statements and guidelines issued by INS and the Department of Homeland Security ("DHS"), while drawing specific attention to gender-based claims, are not legally binding to Immigration Judges or Asylum Officers.[227] The considerations may be persuasive, but judges are still free to make decisions that diverge from the recommendations, which "results in judges making ad hoc decisions which are not uniform across the country."[228] Without "clear and binding guidance" the result will be "inconsistent and incoherent decision-making across the country."[229] Therefore, binding legal standards defining "social group" need to be re-interpreted to maintain and provide equal protection for women suffering from gender-based persecution.

V. PROPOSAL – A NEW STANDARD FOR "MEMBERSHIP IN A SOCIAL GROUP"

A. An Innovative Standard

Generally speaking, the international community accepts two characterizations for a particular social group: "immutability—members of the group share a trait that is innate; and social perception—society views members of the group as such."[230] The former view is based in part on the concept of *ejusdem generis.*[231] *Ejusdem generis,* meaning "of the same kind, class, or nature," is a basic principle of statutory construction.[232] *Ejusdem generis* stands for the proposition that general words in a statute should be interpreted in accordance with the specific words in the statute or that the general terms should be viewed in a manner consistent with the specific

225. *Id.* (citing 8 U.S.C. § 1252 (2012)).

226. *Id.* at 332.

227. Leonard Birdsong, *Recognizing Gender-Based Persecution as a Grounds for Asylum,* Birdsong's Law Blog (Oct. 6, 2010) http://birdsongslaw.com/2010/10/06/recognizing-genderbased-persecution-grounds-asylum/.

228. *Id.*

229. *Id.*

230. Blake, *supra* note 61, at 72.

231. *Id.*

232. *What Is Ejusdem Generis?,* THE LAW DICTIONARY, http://thelawdictionary.org/ejusdem-generis/ (last visited Apr. 11, 2013).

terms.[233]

The designation of "social group" is placed in the same category as race, nationality, religion, and political opinion in both the United Nations' Refugee Convention and the INA, Section 101(a)(42). The other designations outside of social group are based on either immutability or on "traits so fundamental that a person should not be required to change them."[234] Utilizing the principle of *ejusdem generis,* the designation of social group should also be seen under at least one of these views. Viewing social group under the principle of *ejusdem generis* shows the justification for a specific characterization of membership in a particular social group based on a quasi-immutability concept, an aspect so close to a particular social group that it cannot or should not be changed.

Thus, one cannot change his or her membership in a quasi-immutable social group because the social group is comprised of members of the same gender. Persecution for being a member of a social group under this interpretation, much like one would view race or nationality, would undoubtedly meet the requirements of the INA. Indeed, a preliminary basis for this interpretation of social group has already been demonstrated in immigration opinions.[235]

This Note advocates a new standard that begins with the rationale set forth in *Acosta* and *Mohammad* and expands the refugee definition to include "gender" as a set classification of a particular social group. Gender is already a social group identified in society because it is based on a distinct characteristic that cannot and should not be changed. A re-interpretation of social group to include gender would not focus on the individual woman or man, or even small designated groups, but would instead focus "on the system which determines gender roles and responsibilities[;]" a system that provides "access to and control over resources[;]" and a system that allows for decision-making potentials."[236]

This Note's proposed re-interpretation would reflect the social reality women face in their home country, and therefore cover women most in need of international protection. It would create a uniform and fair approach to asylum claims, remedy current problems, and create a standardized framework to prevent the so-called "Refugee Roulette."[237] While the

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233. *Id.* For more information on the evolution of *ejusdem generis* as a means of statutory contruction, *see* Glanville Williams, *The Origins and Logical Implications of the Ejusdem Generis Rule*, 7 Conv. (NS) 119.

234. Blake, *supra* note 61, at 72.

235. *See generally* Matter of Acosta in Deportation Proceedings, 19 I & N Dec. 211 (BIA 1985); Mohammed v. Gonzalez, 400 F.3d 785, 797 (9th Cir.2005) (deciding the gender issue within the context of sexual orientation and gender identity). This decision is only applicable to the Ninth Circuit and not to general immigration law in the United States.

236. Crawley, *supra* note 76, at 1.

237. Jaya Ramji-Nogales, et. al, *Refugee Roulette: Disparities in Asylum Adjudication.*

current standard for asylum appears to be gender-neutral, applying to both women and men in the same manner, "the refugee definition has been applied more liberally to persecution commonly affecting men to persecution unique to, or concentrated against, women."[238] This Note's approach would eliminate the social hierarchy of asylum claims between men and women, and perpetuate a fair, inclusive system for asylum.[239]

B. Criticisms to Expanding the Concept of Social Group to Include Gender

Including gender-based claims for asylum is an uphill battle. According to the Central Intelligence Agency's World Factbook, there are an estimated 15.1 million refugees in the world.[240] Of those refugees seeking asylum, women make up roughly fifty percent.[241] Due to the large number of potential applicants, critics claim that including gender as an acceptable *per se* classification would overload or destroy the already struggling immigration system in the United States.[242]

Immigration courts in the United States are already "inundated with a very large caseload of complex cases."[243] The courts already struggle "to properly assess the credibility of asylum applications" with limited resources and large lines of applicants waiting for hearings.[244] Critics claim that the immigration system would further deteriorate if gender is accepted as a basis for asylum.[245] This would, in effect, take attention away from protecting United States' citizens from potential criminals or terrorists.[246]

Furthermore, other critics maintain that gender-based asylum claims demonstrate a system "structured by ethnocentric and racialized gendered

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60 STAN. L. REV. 295, 378 (2007).

> Whether an asylum applicant is able to live safely in the United States or is deported to a country in which he claims to fear persecution is very seriously influenced by a *spin of the wheel of chance*; that is, by a clerk's random assignment of an applicant's case to one asylum officer rather than another, or one immigration judge rather than another.

Id. (emphasis added).

238. Imbriano, *supra* note 224, at 352 ("Adjudicators have been unwilling to recognize rape and other sexual assaults as persecution even when used explicitly to subjugate women, instead referring to them as personal attacks.").

239. *See generally,* Imbriano, *supra* note 224, at 352.

240. CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/2194.html#xx (last visited Apr. 11, 2013).

241. *Refugee Women,* UNHCR, THE UN REFUGEE AGENCY, http://www.unhcr.org/pages/49c3646c1d9.html (last visited Apr. 11, 2013).

242. Twibell, *supra* note 1, at 197.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 197-98.

ideals" rooted in Western ideologies.[247] The argument suggests that the underlying premise of granting asylum puts asylum-seekers in a position of valuing "the United States as being a 'more enlightened' place (whether they believe it or not) than their country of origin."[248] Thus, gender-based asylum claims could perpetuate the idea of the United States' superiority.[249]

C. Response to Criticism

While critics highlight problems that consistently plague the US immigration system, a re-interpretation of social group to include gender would *not* automatically lead to an overflow of asylum claims. In addition to meeting one of the enumerated bases of the INA "refugee" definition, asylum seekers must still present a credible claim and must establish a well-founded fear of returning to their native country on account of one of thosee enumerated classifications. A woman will not automatically be granted asylum because she is a woman. She must establish that she and other members of her gender-based social group are persecuted on account of their membership in that group.

Even if gender-based persecution would increase the amount of asylum claims due to the large number of people found in a gender-based social group, the size of the group is no different from the size of groups listed in the other sections of the INA definition. The fact that a social group is comprised of a large number of people is irrelevant because "race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people."[250]

Rather, "[t]he relevant assessment is whether the claimant, as a woman, has a well-founded fear of persecution in her country of nationality by reason of her membership in this group."[251] "[The] size and breadth of a group alone does not preclude a group from qualifying as a social group."[252] The nature of the problem is not changed by the potential number of people that are affected and should not be considered when determining an acceptable social group.

Furthermore, almost any system of asylum can be viewed in an ethnocentric manner; asylum is, for the most part, a scheme to provide

247. Midori Takagi, *Orientals Need Apply: Gender-based Asylum in the U.S.*, ETHNIC STUD. REV., Vol. 33, No. 1, June 2010, *available at* http://www.thefreelibrary.com/Orientals+need+apply%3A+gender-based+asylum+in+the+U.S.-a0271665071 (last visited Apr. 11, 2013).

248. *Id.*

249. *Id.*

250. Canadian Immigration Guideline 4, *supra* note 105, at 15.

251. *Id.*

252. Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010).

persecuted individuals with protection that they cannot receive in their native countries. More often than not, the countries granting asylum are more developed than the countries the asylum seekers emigrate from. However, asylum is not the "West" imposing its societal standards and beliefs on other cultures. It is a means by which countries open their doors to individuals who desire to but cannot escape from violence in their respective countries. Casting asylum in a negative light does not change the problem that there are millions of refugee women seeking asylum. If more developed countries shut their doors due to a fear of ethnocentrism, where will these women go? Asylum relief is needed internationally, and this relief should be available to women who seek it.

VI. CONCLUSION

Re-structuring the current standard of "social group" to include gender-based persecution claims for asylum will not only give women additional protection, but it may also lead to protection for other groups excluded from the current refugee definition. Re-structuring the social group definition could provide additional protection to groups persecuted on the basis of sexual orientation or other less socially visible grounds.

A new approach to membership in a particular social group would bring US asylum law closer to the international standard and closer to the more inclusive and uniform approaches seen in Canada, Great Britain, and Australia. The United States should not continue to delay re-interpretation of social group based on bureaucratic pressures. While positive strides have been made in the way of recommendations, memoranda, and judicial opinions, the re-interpretation of "social group" is necessary to remedy the existing dichotomy between men and women in asylum law. Legislative action must be taken to ensure greater protection for women persecuted worldwide.

In the wake of global social movements aimed toward democracy and equality, now is the time to change the image of the refugee—the image of a male figure fleeing persecution for holding a different political opinion or religious belief. It is time to remember that women, too, need to be adequately represented in immigration law. By re-structuring membership in a particular social group to include gender, women can, and indeed will, find their rightful place in US asylum proceedings.

HEAD OUT OF THE CLOUDS: WHAT THE UNITED STATES MAY LEARN FROM THE EUROPEAN UNION'S TREATMENT OF DATA IN THE CLOUD

Jenna Gerber*

I. INTRODUCTION

"Every cloud has its silver lining but it is sometimes a little difficult to get it to the mint."[1]

An attorney is awakened at 3:00 a.m. by a phone call from police. There has been a break-in at his firm, and a laptop filled with hundreds of client files containing sensitive data of payment records, client addresses and phone numbers, and trial strategies was stolen. Fortunately, the attorney has back-up files, knows what is missing, and who potentially has been affected. Later that morning, the hundreds of clients who have sought confidential advice from that attorney are alerted that their information has been stolen. It is a nightmare for many of the firm's attorneys, but the physical evidence immediately alerted the staff that there had been a security breach, and the office was able to respond to the situation quickly and effectively. The attorney decides that the solution to preventing the risk of having sensitive data stolen off the hardware from the office is to move all client data "to the cloud." Only those with authority would be able to access the data on the remote server, so even if a laptop were to go missing, nothing would be compromised. The problem, though, is that there may not be the same physical evidence of a breach, and an attorney or client may never know of a security threat because the information is stored on a remote server. The paradox of moving to the cloud is that personal data is, in many ways, more secure and less secure than it has ever been.

Cloud computing has been growing in size and momentum in informational technology's collective conscience ever since the phrase was first used in its current context in 1997.[2] The concept itself, though, is not really new, dating back at least to the 1960s.[3] The name derived from telecommunication companies who changed their services from point-to-point circuits to Virtual Private Networks in the 1990s, and subsequently

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1. Don Marquis, *available at* http://quotationsbook.com/quote/10933/.

2. Sourya Biswas, *A History of Cloud Computing*, CLOUD TWEAKS (Feb. 9, 2011 6:40 AM), http://www.cloudtweaks.com/2011/02/a-history-of-cloud-computing/ (Ramnath Chellappa defined cloud computing as a new "computing paradigm where the boundaries of computing will be determined by economic rationale rather than technical limits alone.").

3. *Id.*

the Internet was visualized as diagrams of clouds in textbooks.[4] Thus, the phrase "cloud computing" was born. Still, cloud computing is quite undefined for many common users of the Internet, nothing more than a buzzword and a vague concept.[5] Others emphasize that cloud computing is a "buzzword almost designed to be vague, but. . .is more than just a lot of fog."[6] The National Institute of Standards and Technology (NIST) defines cloud computing as:

> a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.[7]

In layman's terms, cloud computing allows users (be it an individual or a multi-national corporation) to gain access to resources, such as remote hosting and storage, so the burden is off the user to provide an infrastructure or support for such an infrastructure. The infrastructure is hosted at a remote location and can be shared by multiple users to increase efficiency.[8] Though marketing campaigns advertise "the cloud" as a seemingly singular entity,[9] cloud networks are diverse in size, shape, and complexity, and more are created each day. For the attorney in the example above, instead of having to pay thousands of dollars to purchase and maintain an internal server for the firm, a simple move to the cloud[10] would increase storage and efficiency while decreasing costs and reducing the need for extensive internal IT support and maintenance.

This Note will first explain cloud computing on a basic level and highlight the challenges in regulating overseas transmission of data from both a technological and legal standpoint. Second, this Note will examine the current and proposed legislation in the United States that regulate the

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4. *Id.*

5. PHILIP KOEHLER ET AL., CLOUD SERVICES FROM A CONSUMER PERSPECTIVE 2 (2010) *available at* http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.174.6121.

6. *Id.*

7. PETER MELL & TIMOTHY GRANCE, NAT'L. INST. OF STANDARDS AND TECH., THE NIST DEFINITION OF CLOUD COMPUTING 2 (Sept. 2011), *available at* csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf [hereinafter NIST].

8. *The Benefits of Cloud Computing*, DELL, http://content.dell.com/us/en/enterprise/cloud-computing-value-benefits (last visited Oct. 6, 2012).

9. For specific examples, see a selection of Microsoft's Windows 7 commercials with the tag line "to the cloud,. "Family Photo" – To the Cloud – Windows 7, Microsoft Windows (last visited Nov. 25, 2012), *available at* http://www.youtube.com/watch?v=mjtqoQE_ezA.

10. For purposes of this Note, when "the cloud" is mentioned, it refers to a cloud computing infrastructure generally, and not a specific product or nebulous public cloud.

cloud and significant cases that render most current law inapplicable. Third, this Note will engage in a comparative analysis of the European Union's current legislation and pending changes compared to policy in the United States. Finally, this Note will argue that the United States should move quickly to enact legislation regulating the use of the cloud before it becomes too late, and adopt several policies already in place in the European Union to protect user privacy stateside.

II. CLOUD COMPUTING BASICS

A. The Three Service Model Types of Cloud Computing

Clouds take on many different forms and functions depending on the needs of the end users, the provider's framework, and the goal of the service exchange.[11] The three service models upon which clouds are built are Software-as-a-Service, Platform-as-a-Service, and Infrastructure-as-a-Service.[12]

Among the first cloud computing services offered to the public was Webmail, an Internet-based interface that offered email services.[13] The consumer embrace of such technology led to "rapid development of other cloud-based applications, including calendars, contact management, word processing, and digital photo applications."[14]These types of services, known as Software-as-a-Service (SaaS) or "on-demand software," have been heralded as the model that reduces costs considerably and simplifies technical support and maintenance.[15] Payment for SaaS is flexible, as it may be billed by usage, on a subscription basis, or free if advertisements cover the cost.[16] Some, however, are critical of SaaS and encourage users to beware of buying into the hype.[17] The NIST defines SaaS as:

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11. *See generally* THE FUTURE OF CLOUD COMPUTING: OPPORTUNITIES FOR EUROPEAN CLOUD COMPUTING BEYOND, EUROPEAN COMMISSION ON INFORMATION SOCIETY AND MEDIA (Keith Jeffery & Burkhard Neidecker-Lutz eds., 2010), *available at* http://cordis.europa.eu/fp7/ict/ssai/docs/cloud-report-final.pdf (last visited Oct. 6, 2012).

12. *Id.* at 9-10.

13. William Jeremy Robison, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 Geo. L.J. 1195, 1203 (April 2010).

14. *Id.*

15. Steve Lohr, *Wal-Mart Plans to Market Digital Health Records System*, N.Y. TIMES (Mar. 10, 2009), http://www.nytimes.com/2009/03/11/business/11record.html.

16. Sourya Biswas, *Cloud Computing for Dummies: SaaS, PaaS, IaaS, and All That Was*, CLOUDTWEAKS (Mar. 20, 2012), http://www.cloudtweaks.com/2011/02/cloud-computing-for-dummies-saas-paas-iaas-and-all-that-was/.

17. *See generally* Galen Gruman, *The Truth about Software as a Service (SaaS)*, CIO (May 21, 2007), http://www.cio.com/article/109706/The_Truth_About_Software_as_a_Service_SaaS_?page=3&taxonomyId=3000; Gene Marks, *Beware the Hype for Software as a Service*, BLOOMBERG BUSINESSWEEK (July 24, 2008), http://www.businessweek.com/technology/content/jul2008/tc20080723_506811.htm.

> The capability provided to the consumer is to use the provider's applications running on a cloud infrastructure. The applications are accessible from various client devices through either a thin client interface, such as a web browser (e.g., web-based email), or a program interface. The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, storage, or even individual application capabilities, with the possible exception of limited user-specific application configuration settings.[18]

Popular forms of these services attract millions of unique users each month, such as Facebook (2,569,233 unique visitors per month),[19] Twitter (2,446,305 unique visitors per month),[20] Yahoo! Mail (445,539 unique visitors per month),[21] and Shutterfly (258,907 unique visitors per month).[22] Despite the popularity of SaaS frameworks, "[m]any providers are shifting away from designing their own applications. . .and instead [are] opening up their systems to third-party developers who create applications that run on the cloud provider's platform."[23] Some are dissatisfied with SaaS providers because "they might allow you to export your data, but they usually [do not] allow you to export their underlying code. . ..[T]hey have a lot more in common with proprietary software vendors than Open Source projects or companies."[24]

The second model, Platform-as-a-Service (PaaS), allows programmers the flexibility to combine the capabilities of multiple cloud applications into one.[25] Users have "limited control over the software so long as it does not interfere with the physical infrastructure of the provider's network."[26] NIST defines PaaS as:

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18. NIST, *supra* note 7.

19. Facebook Statistics, SITEANALYTICS.COMPLETE.COM (Mar. 20, 2012), http://siteanalytics.compete.com/facebook.com/October2011Data.

20. Twitter Statistics, SITEANALYTICS.COMPLETE.COM (Mar. 20, 2012), http://siteanalytics.compete.com/twitter.com/October2011Data.

21. Yahoo! Mail Statistics, SITEANALYTICS.COMPLETE.COM, (Mar. 20, 2012), http://siteanalytics.compete.com/mail.yahoo.com/October2011Data.

22. Shutterfly Statistics, SITEANALYTICS.COMPLETE.COM (Mar. 20, 2012), http://siteanalytics.compete.com/shutterfly.com/October2011Data.

23. Robison, *supra* note 13, at 1203.

24. Alex Williams, *Drupal Founder Critical of SaaS and its Proprietary Nature*, READWRITEWEB/ ENTERPRISE (Mar. 2, 2010), http://www.readwriteweb.com/enterprise/2010/03/drupas-founder-says-the-saas-m.php.

25. Robison, *supra* note 13.

26. Shahid Khan, *"Apps.gov": Assessing Privacy in the Cloud Computing Era*, 11 N.C. J.L. & Tech. On. 259, 266 (2010).

> The capability provided to the consumer is to deploy onto the cloud infrastructure consumer-created or acquired applications created using programming languages, libraries, services, and tools supported by the provider. The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, or storage, but has control over the deployed applications and possibly configuration settings for the application-hosting environment.[27]

PaaS infrastructures are rarer for the common user to interact with, but popular examples are Google's App Engine, Microsoft's Azure, and Salesforce.com's Force.com.[28] Salesforce.com advocates the use of PaaS because it "provides all the infrastructure needed to run applications over the Internet."[29] Additionally, PaaS works as a utility; users "tap in" and use only what they need, no more, no less, and the service is delivered without the consumer having to worry about what is going on behind the scenes.[30] Also, like a utility, PaaS consumers simply pay for what they use based on a metering rate.[31]

The third type of service model available for cloud users is an Infrastructure-as-a-Service (IaaS), or Hardware-as-a-Service, model. Using IaaS, cloud providers sell data storage, processing power, and other raw computer resources.[32] The consumer decides the type of operating system and how to allocate resources, though the provider controls the physical network.[33] NIST defines IaaS as:

> The capability provided to the consumer is to provision processing, storage, networks, and other fundamental computing resources where the consumer is able to deploy and run arbitrary software, which can include operating systems and applications. The consumer does not manage or control the underlying cloud infrastructure but has control over operating systems, storage, and deployed applications; and possibly limited control of select

27. NIST, *supra* note 7.

28. Biswas, *supra* note 16.

29. *What Is Platform as a Service*, SALESFORCE.COM, http://www.salesforce.com/paas/ (last visited Jan. 2, 2013).

30. *Id.*

31. *Id.*

32. Robison, *supra* note 13, at 1204.

33. Khan, *supra* note 26, at 266.

networking components (e.g., host firewalls).[34]

Perhaps the most successful and most pervasive form of an IaaS is Amazon's Elasic Compute Cloud (Amazon EC2). Amazon advertises EC2 as being able to "provide[] . . . complete control of your computing resources and lets you run on Amazon's proven computing environment. Amazon EC2 reduces the time required to obtain and boot new server instances to minutes, allowing you to quickly scale capacity, both up and down, as your computing requirements change."[35]

Each service model provides varying levels of flexibility and control for the user and different benefits may be derived from each, depending on unique needs.[36]

B. Four Deployment Models of the Cloud

While many of the common users may not have an interest in what type of service-model is used, one privacy aspect that users may want to take note of is the deployment model their cloud is using. The four models – the private cloud, the community cloud, the public cloud, and the hybrid cloud – offer varying access and privacy to users.[37]

The private cloud is structured for the smallest group of users, as its infrastructure is used by one organization with multiple consumers.[38] "Strictly speaking such infrastructure does not form part of the cloud and the 'private cloud' is really a description of a highly virtualized, local data centre that is behaving as if it was delivered by a public cloud provider."[39] Private clouds offer more control over access to data and the physical location of the servers but may come at a higher cost.[40] Critics are skeptical of this model, however, because "IT departments still have to buy, build, and manage them" which goes against the premise of hands-off maintenance,[41] and private clouds "lack[] the economic model that makes cloud computing such an intriguing concept in the first place."[42]

A community cloud is an infrastructure that allows a community of

34. NIST, *supra* note 7.

35. *Amazon Elastic Compute Cloud,* AMAZON.COM, http://aws.amazon.com/ec2/ (last visited Mar. 20, 2012).

36. *See* THE FUTURE OF CLOUD COMPUTING, *supra* note 11, at 10-11.

37. NIST, *supra* note 7.

38. *Id.*

39. *Cloud Deployment Models,* JISC INFONET, http://www.jiscinfonet.ac.uk/infokits/cloud-computing/deployment-models (last visited Jan. 2, 2013).

40. *Id.*

41. John Foley, *Private Clouds Take Shape,* INFORMATIONWEEK (Aug. 9, 2008, 12:00 AM), http://www.informationweek.com/news/services/business/209904474.

42. Gordon Haff, *Just Don't Call Them Private Clouds,* CNET (Jan. 27, 2009 9:12 AM), http://news.cnet.com/8301-13556_3-10150841-61.html.

organizations to share cloud space while striving for similar objectives, such as common security requirements or compliance obligations.[43] The organizations themselves may manage the infrastructure, or the task may be assumed by a third party.[44] The United States government, for instance, uses a community cloud that is managed by Google.[45] Similarly, many law firms, for example, are looking at using community clouds to solve technology issues and share costs while still complying with confidentiality rules.[46] Like the private cloud, the community cloud offers heightened control over access to data, but again may come at a higher cost than a public or hybrid cloud.[47]

The third deployment type is the public cloud. The general public has access to the public cloud for a variety of uses, and it may be owned or managed by any combination of businesses, academic institutions, and government institutions.[48] The physical infrastructure of a pubic cloud is located on the cloud provider's premises.[49] Most concerns raised about the public cloud are held by policy-leaders and industry leaders[50] as they try to regulate the public's use of the cloud. In particular, this model comes at more of a heightened security risk than private or community clouds.[51] The benefit to public clouds is that they may have more state-of-the-art technology since large organizations operating the public cloud have more resources to invest.[52]

The final deployment model is the hybrid cloud, which can exist in any combination of two or three of the models (private, community, or public) but "remain unique entities. . .bound together by standardized or proprietary technology that enables data and application portability."[53]

Among the three service models and four deployment models of the cloud, there are many combinations that can be specifically tailored to meet the needs of each user, or groups of users, in order to provide the best

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43. *Cloud Deployment Models, supra* note 39.

44. *Id.*

45. *Id.*

46. *See* LEGAL CLOUD COMPUTING ASSOCIATION, http://www.legalcloudcomputing association.org/ (last visited Jan. 2, 2013). Indeed, the market for law-related clouds have only begun to grow. The Legal Cloud Computing Association is a consortium of "leading cloud computing providers" who work together to establish practices and expectations in the legal cloud, collaborating with bar associations and other rule-making bodies to adapt clouds to specific legal-field needs. *Id.*

47. *Id.*

48. NIST, *supra* note 7.

49. *Id.*

50. Timothy D. Martin, *Hey! You! Get Off of My Cloud: Defining and Protecting the Metes and Bounds of Privacy, Security, and Property in Cloud Computing*, 92 J. PAT. & TRADEMARK OFF. SOC'Y 283 (2010).

51. *Cloud Deployment Models, supra* note 39.

52. *Id.*

53. NIST, *supra* note 7.

security while reducing the cost of infrastructure and enjoying the other benefits cloud computing has to offer.

C. Personal Jurisdiction and Fourth Amendment Concerns

Now that is it understood where and how data in the cloud may be stored and accessed by consumers and providers alike, an important question comes to mind: who owns data in the cloud? Because different networks of clouds may span across many states or even across nations, conflicting laws may govern the data and those who interact with it.[54] This Note does not attempt to wade through the complexities of all relevant ownership laws that may govern data in the cloud; instead, it examines and highlights the current issues in data jurisdiction laws to provide context regarding overall cloud computing regulations.

In at least one jurisdiction, an interaction through the cloud created sufficient "minimum contact" with a state to give a court personal jurisdiction over a defendant who otherwise may not have had sufficient minimum contact.[55] In *Forward Foods LLC v. Next Proteins, Inc.*, a New York trial court addressed the role of cloud computing in determining personal jurisdiction:

> In its personal jurisdiction analysis, the court made note of the fact that there was a virtual data room where Defendants uploaded documents for Emigrant to review in New York[.] This proved to be a significant factor in finding that defendants had maintained sufficient contacts with New York to be subject to personal jurisdiction.[56]

The New York court is not alone in recognizing a paradigm shift in how to treat data and property stored in the cloud.[57] In *State v. Bellar*, Judge Sercombe's dissent noted the drastic shift in privacy expectations and how the courts should respond:

> [A] person's privacy rights in electronically stored personal information [are not] lost because that data is retained in a medium owned by another. Again, in a practical sense, our social norms are evolving away from the storage of

54. *Privacy in the Cloud Computing Era: A Microsoft Perspective*, MICROSOFT (Nov. 2009), http://www.microsoft.com/download/en/details.aspx?id=24413.

55. Forward Foods LLC v. Next Proteins, Inc., 2008 NY Slip Op 52058U, 1 (N.Y. Sup. Ct. 2008).

56. Fernando M. Pinguelo & Bradford W. Muller, *Avoid the Rainy Day: Survey of U.S. Cloud Computing Caselaw*, 2011 B.C. INTELL. PROP. & TECH. F. 11101, 3 (2011).

57. *See generally* State v. Bellar, 231 Or.App. 80 (Or. Ct. App. 2009).

> personal data on computer hard drives to retention of that information in the "cloud" of servers owned by internet service providers. That information can then be generated and accessed by hand-carried personal computing devices. I suspect that most citizens would regard that data as no less confidential or private because it was stored on a server owned by someone else.[58]

The controlling law on cloud computing is patchwork at best, but the laws regulating the cloud and data jurisdiction are not the only aspect that are out-of-step with the digital age.[59] The Supreme Court has recently referenced the need for heightened protection for users in the digital age across the spectrum, especially with regard to Fourth Amendment concerns.[60] In *United States v. Jones*, police attached a GPS tracking device to defendant Jones' car without a warrant. The Court unanimously held that it was a search pursuant to the Fourth Amendment.[61] Notable, though, was Justice Sotomayor's concurrence, in which she rejected the notion that users have no reasonable expectation of privacy when they voluntarily give information:

> More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties . . . This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice Alito notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," *post,* at 10, and perhaps not.[62]

These Fourth Amendment issues presented in data tracking and collecting

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58. *Id.* at 110.

59. *Supreme Court Rules: Congress Needs to Bring Privacy Law into 21st Century*, DIGITAL DUE PROCESS (Jan. 29, 2012), http://www.digitaldueprocess.org/index.cfm?objectid=F6721970-4D0A-11E1-9791000C296BA163; United States v. Jones, 132 S.Ct. 945 (2012).

60. United States v. Jones, 132 S.Ct. 945 (2012) (Sotomayor, J., concurring).

61. *Id.* at 1, 3, 12.

62. *Id.* at 5. (Sotomayor, J., concurring).

cases are fascinating and complex, and certainly must be addressed by the legislature and courts in the future. Although the issue here is not discussed at length, an introduction helps to understand the scope of privacy and how it may intertwine with cloud computing in the future.

III. CURRENT UNITED STATES LAW

A. Electronic Communications Privacy Act of 1986

The law that currently governs cloud usage and data storage is the Electronic Communications Privacy Act of 1986 (ECPA).[63] The ECPA is broken down into three parts: Title I protects wire, oral, and electronic communications while in transit and amends the Wiretap Act; Title II covers the Stored Communications Act (SCA) which protects communications held in electronic storage (discussed in further detail below); and Title III restricts the use of devices that record dialed telephone numbers.[64] The ECPA was amended in 1996 to heighten privacy protection and place a higher standard on law enforcement.[65] The ECPA was also amended by the Communications Assistance to Law Enforcement Act (CALEA), the USA PATRIOT Act in 2001, the USA PATRIOT reauthorization act in 2006, and the FISM Amendments Act of 2008,[66] but none of these revisions applied to the Stored Communications Act. The main problem with the ECPA is that it relies on language rooted in an outdated understanding of the word "communication."[67] Courts are split as to when the ECPA applies and when it does not, creating a fragmented, patchwork application of privacy laws.[68] For instance, the First Circuit held that copying emails from storage was a prohibited interception, but a federal district court ruled that because the government's keystroke logger was not used while the computer was connected to the Internet, the information captured was not an electronic communication.[69]

In *United States v. Councilman*, defendant Councilman ran a website for out-of-print books and also offered email accounts to book dealer customers.[70] Councilman instructed his employees to copy incoming emails from Amazon.com before they were routed to the user's mailbox so Councilman's business could read the message and have a competitive

63. Martin, *supra* note 50, at 305-307.

64. *Electronic Communications Privacy Act of 1986*, U.S. DEPT. OF JUST., OFF. OF JUST. PROGRAMS, http://it.ojp.gov/default.aspx?area=privacy&page=1285 (last updated Apr. 7, 2010).

65. Martin, *supra* note 50, at 305.

66. *Electronic Communications Privacy Act of 1986*, *supra* note 64.

67. Martin, *supra* note 50, at 301 (internal citation omitted).

68. *Id.* at 304-308.

69. *Id.* at 305-306.

70. United States v. Councilman, 418 F.3d 67, 70-71 (1st Cir. 2005).

advantage.[71] "Councilman contend[ed] that the e-mail messages he obtained were not, when procmail copied them, "electronic communication[s]," and moreover the method by which they were copied was not "intercept[ion]" under the Act."[72] The court looked to the legislative history of the ECPA to determine whether or not messages in transit, such as these, would fall into the 'interception' portion of the statute.[73] Ultimately, the court concluded "that the term 'electronic communication' includes transient electronic storage that is intrinsic to the communication process, and hence that interception of an e-mail message in such storage is an offense under the Wiretap Act."[74]

The Ninth Circuit has also recently applied the ECPA, holding that the statute applied to non-citizens of the United States as well when their data was stored in the United States.[75] In *Suzlon Energy Ltd. v. Microsoft Corp.*, Microsoft was sued to produce emails for use against an Indian citizen in a civil lawsuit pending in Australia.[76] The Ninth Circuit held that the statute, on its face, precluded Microsoft's disclosure of the emails because protection of the ECPA strictly precluded disclosures for civil suits.[77] However, the court explicitly left open the question of what would happen if the data were stored on servers outside the United States.[78]

When drafting the ECPA, Congressional intent was to afford greater privacy protection to stored e-mails than subscriber information, and to regulate more heavily those services available to the public than services that have a more restricted audience.[79] The general intent was to afford greater privacy protection for greater privacy interests.[80] Today, though, Congress faces heavy criticism for failing to update the ECPA.[81] As the

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71. *Id.* at 70-71.

72. *Id.* at 72.

73. *Id.* at 76.

74. *Id.* at 78.

75. Suzion Energy Ltd. v. Microsoft Corp., 671 F.3d 726, 729 (9th Cir. 2011); *see also* Venkat Balasubramani, *9th Cir.: ECPA Protects Non-Citizen Communications Stored in the US – Suzlon Energy v. Microsoft*, TECH. & MARKETING L. BLOG (Oct. 4, 2011), http://blog.ericgoldman.org/archives/2011/10/9th_cir_ecpa_pr.htm.

76. *Suzion*, 671 F.3d at 731.

77. *Id.* at 730.

78. *Id.* at 729.

79. *Electronic Communications Privacy Act of 1986, supra* note 64.

80. *Id.*

81. Mark Gibbs, *While We Wait for Cold Fusion, Let's Update the ECPA*, NETWORK WORLD (Oct. 24, 2011 12:05 AM), http://www.networkworld.com/columnists/2011/102411-backspin.html?page=1; Alex Howard, *Senate Considers update to Electronic Communications Privacy Act*, GOVFRESH (Sept. 22, 2010 7:07 PM), http://gov20.govfresh.com/senate-considers-update-to-electronic-communications-privacy-act/; *The Electronic Communications Privacy Act: Promoting Security And Protecting Privacy In The Digital Age Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (testimony of Brad Smith, General Counsel, Microsoft Corp.), *available at* http://www.judiciary.senate.gov/hearings/

American Civil Liberties Union points out, at the time the ECPA was adopted, "there was no World Wide Web, nobody carried a cell phone, and the only 'social networking' two-year-old Mark Zuckerberg was doing was at pre-school or on play dates."[82] It is ironic that the law regulating Facebook is nearly older than Facebook's creator.

Another concern with the ECPA relates to the argument the Justice Department is making for the law to remain static and its interpretation of the current law:

> Last year. . . the Justice Department argued in court that cellphone users had given up the expectation of privacy about their location by voluntarily giving that information to carriers. In April, it argued in a federal court in Colorado that it ought to have access to some e-mails without a search warrant. And federal law enforcement officials, citing technology advances, plan to ask for new regulations that would smooth their ability to perform legal wiretaps of various Internet communications.[83]

Justice Sotomayor's concurrence in *Jones* rejects many of these arguments,[84] but until the entire court addresses these issues or the law is changed, some lower courts still may be persuaded by these arguments.

Several proposals to update the ECPA have been made, but there have been no significant revisions to the statute since its enactment.[85] Recently, the Senate Committee on the Judiciary heard testimony from many witnesses proposing change in the law.[86] Senator Patrick Leahy, who

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testimony.cfm?id=e655f9e2809e5476862f735da16302cc&wit_id=e655f9e2809e5476862f735da16302cc-0-0; *The Electronic Communications Privacy Act: Promoting Security And Protecting Privacy In The Digital Age Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary) *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da16302cc&wit_id=e655f9e2809e5476862f735da16302cc-0-0; *About the Issue*, DIGITAL DUE PROCESS, http://digitaldueprocess.org/index.cfm?objectid=37940370-2551-11DF-8E02000C296BA163 (last visited Jan. 2, 2013).

82. *Modernizing the Electronic Communications Privacy Act*, ACLU, http://www.aclu.org/technology-and-liberty/modernizing-electronic-communications-privacy-act-ecpa (last visited Jan. 2, 2013).

83. Miguel Helft & Claire Cain Miller, *1986 Privacy Law is Outrun by the Web*, N.Y. TIMES(Jan. 9, 2011), http://www.nytimes.com/2011/01/10/technology/10privacy.html?hp.

84. *See generally* United States v. Jones, 132 S.Ct. 945 (2012).

85. *About the Issue*, *supra* note 81; Sen. Patrick Leahy, *Leahy Introduces Benchmark Bill to Update Key Digital Privacy Law (Press Release)*, SENATE.GOV (May 17, 2011), http://www.leahy.senate.gov/press/press_releases/release/?id=b6d1f687-f2f7-48a4-80bc-29e3c5f758f2.

86. *The Electronic Communications Privacy Act: Promoting Security And Protecting Privacy In The Digital Age Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (testimony of the Hon. Cameron F. Kerry, General Counsel, U.S. Dept. of Commerce), *available at*

drafted the original ECPA, sponsored the legislation entitled the Electronic Communications Privacy Act Amendments Act of 2011.[87] The updated legislation would improve privacy protections for electronic communications and clarify legal standards by which the government could obtain this data. [88] Additionally, the proposal included enhanced privacy protections for emails and electronic communications which are searchable subject to warrants for probable cause.[89] Furthermore, in line with the *Jones* decision, the legislation included proposals for how to treat user location information collected through electronic devices.[90] Senator Leahy testified before the Senate Committee on the Judiciary saying:

> Since the Electronic Communications Privacy Act was first enacted in 1986, ECPA has been one of our nation's premiere privacy laws. But, today, this law is significantly outdated and out-paced by rapid changes in technology and the changing mission of our law enforcement agencies after September 11. Updating this law to reflect the realities of our time is essential to ensuring that our federal privacy laws keep pace with new technologies and the new threats to our security.[91]

While Congress has started to take notice of the need for change, perhaps the largest and most diverse group pushing for change of the ECPA

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http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da16302cc&wit_id=e655f9e2809e5476862f735da16302cc-0-0; *The Electronic Communications Privacy Act: Promoting Security And Protecting Privacy In The Digital Age Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (testimony of the Hon. James A. Baker, Associate Deputy Att'y Gen.), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da16302cc&wit_id=e655f9e2809e5476862f735da16302cc-0-0; *Testimony of Brad Smith*, *supra* note 81; *The Electronic Communications Privacy Act: Promoting Security And Protecting Privacy In The Digital Age Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (testimony of Jamil N. Jaffer), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da16302cc&wit_id=e655f9e2809e5476862f735da16302cc-0-0; *The Electronic Communications Privacy Act: Promoting Security And Protecting Privacy In The Digital Age Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (testimony of James X. Dempsey, Vice President for Public Policy, Center for Democracy & Technology), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da16302cc&wit_id=e655f9e2809e5476862f735da16302cc-0-0; *Testimony of the Honorable Patrick Leahy*, *supra* note 85.

87. *Bill Summary and Status, 112th Congress (2011-2012)*, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.1011: (last visited Jan. 2, 2013); Berin Szoka & Charlie Kennedy, *Supremes to Congress: Bring Privacy Law into 21st Century*, CNET (Jan. 29, 2012 8:01 PM), news.cnet.com/8301-13578_3-57368025-38/supremes-to-congress-bring-privacy-law-into-21st-century/?tag=cnetRiver; Sen. Leahy, *supra* note 85.

88. Sen. Leahy, *supra* note 85.

89. *Id.*

90. *Id.*

91. *Id.*

is Digital Due Process Coalition, "a diverse coalition of privacy advocates, major companies and think tanks, working together."[92] Notable members of the coalition include: Adobe, Amazon.com, the American Civil Liberties Union, Apple, the Distributed Computer Industry Association, Dropbox, the Electronic Frontier Foundation, Facebook, Hewlett-Packard, Google, Intel, the Liberty Coalition, LinkedIn, Microsoft, Salesforce.com, and TRUSTe.[93] Several individuals from around the country, including many from the legal field, are involved as well.[94] In their push for change, the coalition has a goal

> [t]o simplify, clarify, and unify the ECPA standards, providing stronger privacy protections for communications and associated data in response to changes in technology and new services and usage patterns, while preserving the legal tools necessary for government agencies to enforce the laws, respond to emergency circumstances and protect the public.[95]

The relevant changes that need to be made to the ECPA noted above are generally revisions applicable to Title II regarding the Stored Communications Act.

B. The Stored Communications Act

Title II of the ECPA, known as the Stored Communications Act (SCA) has been applied most regularly to issues regarding cloud computing. The SCA "protects the privacy of the contents of files stored by service providers and of records held about the subscriber by service providers, such as subscriber name, billing records, or IP addresses."[96] Interpretation of the SCA is difficult and confusing because its application to cloud computing hinges on the definitions of "electronic communication service" (ECS) and "remote computing service" (RCS), despite the definitions' outdated meaning in current contexts.[97] The SCA prohibits providers of ECS and RCS from disclosing electronic communications

92. *Who We Are*, DIGITAL DUE PROCESS, http://digitaldueprocess.org/index.cfm?objectid=DF652CE0-2552-11DF-B455000C296BA163 (last visited Jan. 2, 2013).

93. *Id.*

94. *Id.*

95. *Our Principles*, DIGITAL DUE PROCESS, http://digitaldueprocess.org/index.cfm?objectid=99629E40-2551-11DF-8E02000C296BA163 (last visited Jan. 2, 2013).

96. 18 U.S.C.A. §§ 2701-12 (West 2012); *see also Electronic Communications Privacy Act of 1986*, *supra* note 64.

97. Martin, *supra* note 50, at 306-307.

without consent, even to the government.[98]

Congress, in drafting the statute, sought to regulate two different types of computing functions: "1) electronic communication services (ECS) designed to handle 'data transmissions and electronic mail' and (2) remote computing services (RCS) intended to provide outsourced computer processing and data storage."[99] Data stored by RCS providers receives fewer privacy protections than communications held by ECS providers, but both ECS and RCS providers may voluntarily provide "personal identifying information about the user, such as her name, physical or e-mail addresses, and IP address. . .to any non-governmental entity or provide it directly to the government upon receipt of an administrative subpoena."[100] A user's information is generally protected from disclosure to private litigants in civil cases.[101] However, as seen in *Suzlon Energy Ltd.,* the question still is not fully resolved in the courts as to whether this privilege is absolute.[102]

By definition, the SCA requires that electronic communication services provide "the ability to send or receive wire or electronic communications."[103] Unfortunately, many cloud computing services today lack send and receive capabilities,[104] putting them outside the purview of this section's protections. The definition of "electronic storage" also is inapplicable to cloud storage.[105] The statute defines electronic storage as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication."[106] Due to these narrow definitions, the provisions of the SCA that protect ECS are inapplicable to cloud storage.[107]

Courts nonetheless have attempted to stretch the definitions provided in the ECPA. In *Quon v. Arch Wireless Operating Company*, the Ninth Circuit held that a pager-service was entitled to ECS protections despite the

98. *Id.* at 306.

99. Robison, *supra* note 13, at 1231-1232; 18 U.S.C.A. § 2510 (West 2012) (Defines electronic communication service as "any service which provides to users thereof the ability to send or receive wire or electronic communications").

100. Robison, *supra* note 13, at 1208.

101. *Id.* at 1208-1209.

102. Suzion Energy Ltd. v. Microsoft Corp., 671 F.3d 726, 729 (9th Cir. 2011).

103. 18 U.S.C.A. § 2510 (West 2012).

104. Robison, *supra* note 13, at 1209.

105. 18 U.S.C.A. § 2510 (West 2012) ((17) "electronic storage" means-- (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication).

106. 18 U.S.C.A. § 2510 (West 2012).

107. Robison, *supra* note 13, at 1210.

fact that it did not fit into the statutory definitions.[108]

> The Ninth Circuit's reasoning in that case was tortured by a resort to legislative history from the 1980s that relied on the operation of outdated and obsolete technology. The court tried to distinguish between storage and communication services, but under the cloud computing model, those types of services are utterly indistinguishable.[109]

Without the types of revisions that Senator Leahy and the Digital Due Process Coalition are suggesting, courts will be forced to stretch the outdated laws, as the Ninth Circuit did, in a way that could apply even remotely to today's technology. For these reasons, it is time for Congress to update the controlling laws.

C. Computer Fraud and Abuse Act

The same year the ECPA was enacted, Congress enacted the Computer Fraud and Abuse Act (CFAA).[110] The CFAA makes it a crime to (1) knowingly commit computer espionage (against the United States government); (2) intentionally hack a computer for the purpose to obtain bank records; (3) intentionally access a United States government department or agency computer without authorization; (4) knowingly access a protected computer with an intent to defraud by obtaining something of value; (5) knowingly transmit a computer virus or worm to another computer that causes damage; (6) knowingly traffic passwords with the intent to defraud; or (7) threaten to damage another computer via extortion.[111] An attempt to do any of the above is also a crime.[112] When someone "accesses a computer used in or affecting interstate commerce without authorization or when that person exceed[s] authorized access" the CFFA is triggered.[113] The law is applicable to cloud computing when someone's information is stolen from the cloud, but fails to apply to or solve many of the difficulties surrounding cloud computing generally.

IV. PROPOSED AND RECENTLY-ENACTED UNITED STATES LEGISLATION

The 111th Congress Second Session introduced more than fifty pieces

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108. Quon v. Arch Wireless Operating Company, 529 F.3d 892 (9th Circ. 2008).
109. Martin, *supra* note 50, at 307.
110. 18 U.S.C.A. § 1030(a) (West 2012), 18 U.S.C.A. § 2510 (West 2012).
111. 18 U.S.C.A. § 1030(a) (West 2012).
112. *Id.*
113. Mark H. Wittow, Daniel J. Buller, *Cloud Computing: Emerging Legal Issues for Access to Data, Anywhere, Anytime*, 14 J. Internet L. 1, 9 (2010).

of legislation that were cyber-related.[114] In response, the White House issued a legislative proposal in 2011 that focused on improving cyber security, infrastructure, and the federal government's own networks and computers.[115] The proposal opened up a line of communication between the White House and Congress relating to cyber issues, and focused Congress on issues needing to be addressed.[116] It also emphasized the critical need to address cyber-security vulnerabilities regarding national security, public safety, and economic prosperity.[117]

A. Chief Information Officer's Guidelines and Suggestions

The United States government has shown, through the Chief Information Officer's Guidelines and suggestions that regulating a large, multi-faceted cloud is possible, and indeed, large corporations are more than willing to adapt to the stringent security regulations if it means access to a particular consumer base. As such, the federal government has embarked upon moving over to a community-based cloud storage solution, partnering with Google for support.[118] Google has earned the Federal Information Security Management Act[119] certification necessary to handle government customer data, and the customer data is stored within the United States only.[120] In February 2010, the federal government implemented the Federal Data Center Consolidation Initiative (FDCCI) to reduce the number of storage facilities across the nation in favor of cloud computing.[121] Within the next four years, the government plans to have eliminated, reduced, or consolidated at least 800 data storage facilities as it moves to the cloud.[122]

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114. Press Release, The White House, Fact Sheet: Cybersecurity Legislative Proposal (May 12, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/05/12/fact-sheet-cybersecurity-legislative-proposal.

115. *Id.*

116. *Id.* at 5.

117. *Id.*

118. *FISMA-Certified Cloud Applications for Government*, GOOGLE, http://www.google.com/apps/intl/en/government/trust.html (last visited Jan. 2, 2013).

119. The Federal Information Security Management Act (FISMA) is Title III of the E-Government Act (PL 107-347), enacted December 2002. "FISMA requires each federal agency to develop, document, and implement an agency-wide program to provide information security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source." FISMA Detailed Overview, NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, http://csrc.nist.gov/groups/SMA/fisma/overview.html (last visited Jan. 2, 2013).

120. *FISMA-Certified Cloud Applications for Government*, *supra* note 119.

121. Vivek Kundra, *Federal Cloud Computing Strategy*, CIO.Gov 8 (Feb. 8, 2011), *www.cio.gov/documents/federal-cloud-computing-strategy.pdf.*

122. *Id.*

The government has, for itself, taken several steps to ensure that any and all data it puts in its community cloud will be transparent between cloud providers and cloud consumers.[123] In 2010, the Federal Risk and Authorization Management Program (FedRAMP) established requirements for cloud computing security, "including vulnerability scanning, and incident monitoring, logging and reporting."[124] The goal along the way is to ensure that the shift to the cloud is met with confidence, trust, and security.[125] The NIST will "generate, assess, and revise a cloud computing roadmap on a periodic basis," and continue to develop and refine standards as innovation and technology evolve.[126]

This Note argues that how the federal government envisions the shift to, and privacy for, the cloud is also how the government should regulate all cloud users in the United States. The government recognizes the risks and benefits of using the cloud system for data, especially sensitive data, and has installed internal protections for its own. Congress should insist on nothing less than the same rigid standards the government employs to ensure compliance and protection of a user's data. Google's adaptations and willingness to receive accreditation is evidence that, if demanded, the industry can and will comply with security regulations.

B. Personal Data Protection and Breach Accountability Act of 2011

In addition to the proposed ECPA amendments previously discussed, Senator Richard Blumenthal introduced a bill entitled the Personal Data Protection and Breach Accountability Act of 2011.[127] The regulation would apply to companies who provide data storage to ten thousand or more customers.[128] Qualifying companies must adhere to strict storage guidelines and ensure that sensitive data is stored and protected; stiff penalties and fines could be levied against companies that do not comply.[129] Though the bill was proposed before Sony's massive data breach in the summer of 2011 that put the data of seventy-seven million consumers at risk, the Senator used the breach as further proof of why the law is needed.[130] Under the regulation, customers would be able to sue companies, such as Sony, that do not take adequate measures to prevent data breaches.[131] Much of this bill

123. *Id.* at 26.
124. *Id.*
125. *Id.*
126. *Id.* at 29.
127. Nick Bilton, *Senator Introduces Online Privacy Bill,* N.Y. TIMES (Sept. 8, 2011 7:27 PM), http://bits.blogs.nytimes.com/2011/09/08/senator-introduces-new-online-privacy-bill/.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

was incorporated into the Data Breach Notification Act of 2011.

C. *Data Breach Notification Act of 2011*

Senator Dianne Feinstein proposed the Data Breach Notification Act of 2011 "to require Federal agencies, and persons engaged in interstate commerce, in possession of data containing sensitive personally identifiable information, to disclose any breach of such information."[132] If a breach occurs, the government body or the business that engages in interstate commerce is required to notify any user that may have been affected as well as the owner of the information that may have been collected.[133] In addition, businesses engaging in activities that violate the Act would be subject to a civil suit by the United States Attorney General in federal court with civil penalties.[134] State attorneys general would also be authorized to bring actions in state court to enforce the Act.[135] The bill died after being referred to the Senate Committee on the Judiciary in September 2011, necessitating a new proposal next session to advance the bill.[136]

D. *Microsoft's Cloud Computing Advancement Act*

In 2010, Microsoft's senior vice president and general counsel Brad Smith announced a proposal to both Congress and the information technology industry to adopt new standards for cloud computing.[137] The proposal was based on a survey conducted by Microsoft which found that fifty-eight percent of the general public and eighty-six percent of business leaders were excited about cloud computing, but ninety percent of those surveyed had concerns about security, access, and privacy of data in the cloud.[138] A majority of those surveyed also felt the government should enact rules regulating cloud computing.[139] The proposal called for improving privacy and data access rules, starting with the ECPA; modernizing the CFAA to allow law enforcement to deter and prosecute online-based crimes; establishing clear regulations that inform businesses and consumers on how information is collected and used online; and

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132. S. 1408, 112th Cong. (2011), *available at* http://www.opencongress.org/bill/112-s1408/show.

133. *Id.*

134. *Id.* at Section 8.

135. *Id.*

136. *S. 1408: Data Breach Notification Act of 2011*, *supra* note 132.

137. *Microsoft Urges Government and Industry to Work Together to Build Confidence in the Cloud,* Microsoft (Jan. 20, 2010), http://www.microsoft.com/presspass/press/2010/jan10/1-20brookingspr.mspx [hereinafter Microsoft Urges].

138. *Id.*

139. *Id.*

building a new framework to encompass data access issues globally.[140] Microsoft's proposal also stresses the need for an updated ECPA to unify the ECS and RCS definitions since there is no longer a technological difference; and the proposal advocates for the elimination of unequal treatment of e-mails based on how long they have been stored.[141] Although nothing significant has happened with this proposal Brad Smith, Microsoft's general counsel, has been an advocate before the Senate petitioning for change.[142]

E. IBM and the Open Cloud Manifesto

International Business Machines Corporation (IBM) issued its own proposal on how to regulate the cloud in Spring 2009,[143] which Amazon.com and Microsoft flat-out rejected.[144] IBM's Open Cloud Manifesto is based on the premise that "[t]he industry needs an objective, straightforward conversation about how this new computing paradigm will impact organizations, how it can be used with existing technologies, and the potential pitfalls of proprietary technologies that can lead to lock-in and limited choice."[145] Supporters applauded IBM's step toward openness and early action to implement standards for the industry.[146] Microsoft, on the other hand, said "there were some things it agreed with in the [M]anifesto, but others that were either too vague or did not reflect its interests."[147] Ultimately, the Manifesto was drafted to begin the conversation about cloud computing, not to define cloud computing. The Manifesto now serves as a discussion point for corporations and industry experts.[148] As Microsoft has shown, though, the industry is unlikely to regulate itself unless it is in each of the companies' best interest;[149] government action would therefore be needed to regulate cloud providers for the sake of public interest.

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140. *Id.*

141. *Id.*

142. *Testimony of Brad Smith*, *supra* note 81.

143. *Introduction*, OPEN CLOUD MANIFESTO, http://www.opencloudmanifesto.org/opencloudmanifesto1.htm (last visited Jan. 2, 2013).

144. Ina Fried, *Amazon, Microsoft Reject 'Open Cloud Manifesto,'* CNET (Mar. 27, 2009), http://news.cnet.com/8301-13860_3-10206077-56.html; Steve Hamm, *Meet the Open Cloud Manifesto*, BLOOMBERG BUSINESSWEEK (Mar. 30, 2009 12:01 AM), http://www.businessweek.com/technology/content/mar2009/tc20090329_463505_page_2.htm.

145. *Introduction*, *supra* note 143.

146. Fried *supra* note 144.

147. *Id.*

148. *Id.*

149. *Id.*

F. Cloud Computing Research Enhancement

Effective January 4, 2011, Congress enacted legislation directing the Nation Science Foundation (NSF) to research areas that affect public and private cloud computing, such as:

> (1) new approaches, techniques, technologies, and tools for-- (A) optimizing the effectiveness and efficiency of cloud computing environments, and (B) mitigating security, identity, privacy, reliability, and manageability risks in cloud-based environments, including as they differ from traditional data centers; (2) new algorithms and technologies to define, assess, and establish large-scale, trustworthy, cloud-based infrastructures; (3) models and advanced technologies to measure, assess, report, and understand the performance, reliability, energy consumption, and other characteristics of complex cloud environments; and (4) advanced security technologies to protect sensitive or proprietary information in global-scale cloud environments.[150]

This legislation will allow for the growth of both public and private clouds with government oversight. The NSF Director, in conjunction with the NIST, will also review companies' management of data to see that they comply with federal laws and regulations of cloud environments and the issues of piracy and misappropriation of cloud services.[151] These measures are steps in the right direction, but researching the issue in depth before acting perhaps will prove ineffective, as the technology may again change, advance, and take on new characteristics that may need to be addressed because they fall outside the purview of the NST's studies.

V. CURRENT EUROPEAN UNION LAWS REGARDING CLOUD COMPUTING

A. Global Industry Compliance with Local Laws, Generally

This Note argues that if nothing less is expected of cloud providers than stringent security and protection of users' privacy and data, then that is what a nation will receive. How other nations have demanded the industry adapt to the nation's laws, so should the United States. Amazon.com adapted their cloud services for the European Union by bringing storage systems to Ireland specifically in compliance with the European Union's

150. 42 U.S.C.A. § 1862p-12 (West 2012).
151. *Id.*

strict privacy laws.[152] Because the European Union requires physical data centers to be located within the borders of one of its member nations (with a few exceptions) companies must adapt to access the market.[153] Hewlett-Packard (HP) has followed Amazon.com's lead in adapting to the European Union's laws.[154] HP recognized that the benefits and impact of the cloud are so great that it was worth working within the existing framework and privacy laws in order to enter the market.[155] Outside the European Union and United States, companies are also complying with local laws. In Canada, for instance, IBM built a $42 million Compute Cloud Centre for Canadian businesses to develop, host, and test applications securely.[156] "Confidential information is protected and kept securely resident in Canada in accordance with Canadian privacy laws."[157] If the United States would act quickly, it too would reap the benefits of building a cloud infrastructure from the ground up, and have a say in how companies adapt to its laws.

B. Privacy Acts and Directives

In general, the European Union takes a more firm and protective stance for users' privacy than the United States. The European Union Data Privacy Directive controls the protection of personal data. The goal of Directive 95/46/EC is to strike a balance between high protection of individual privacy and free movement of data among those within the European Union.[158] "To do so, the Directive sets strict limits on the collection and use of personal data and demands that each Member State set up an independent national body responsible for the protection of these data."[159]

The Directive, enacted in 1995, creates rights for those individuals who have had personal information collected about them.[160] The individual must be notified with an explanation about who is collecting her information, who will have access to it, and why it is being collected.[161] If the data is used in marketing, the individual must have the opportunity to

152. *Amazon EC2 Crosses the Atlantic,* AMAZON.COM (Dec. 9, 2008), http://aws.typepad.com/aws/2008/12/amazon-ec2-crosses-the-atlantic.html.

153. Kevin J. O'Brien, *Cloud Computing Hits Snag in Europe*, N.Y. TIMES (Sept. 19, 2010), http://www.nytimes.com/2010/09/20/technology/20cloud.html?pagewanted=all.

154. *Id.*

155. *Id.*

156. *IBM Launches $42 Million Cloud Computing Centre in Canada, IBM (Jan. 31, 2011),* http://www.ibm.com/news/ca/en/2011/01/31/w431220f88404v59.html.

157. *Id.*

158. *Protection of Personal Data*, EUROPA, http://europa.eu/legislation_summaries/information_society/data_protection/l14012_en.htm (last updated Jan. 2, 2011).

159. *Id.*

160. *Id.*

161. *Id.*

correct the information and object to the usage.[162] Stricter rules also govern sensitive information relating to racial and ethnic background, political affiliation, religious or philosophical beliefs, trade-union membership, sexual preferences, and health.[163] Before this information may be collected, the individual must give explicit consent.[164] There are exceptions to this rule for employment contracts, non-profit organizations, and the legal system, among other things.[165] The Data Privacy Directive created a basic legal framework, "including the default requirement of 'opt-in' consent to data sharing and the 'adequacy requirement' for data-sharing with non-EU companies. In response to this latter requirement, the U. S. negotiated a 'safe harbor' framework for U. S. companies doing business in Europe or with European companies."[166]

Critics of this directive are quick to describe it as a "top-down, bureaucratic model [that] imposes heavy costs and inconveniences on European businesses compared to the American system in which information flows freely and only harmful uses of information are prevented or punished. The Directive is also inconsistent in many respects with free speech."[167] Others also identified several weaknesses of the Directive, such as: links between personal data and real privacy risks are unclear; the methods used to provide data processing transparency are inconsistent and ineffective; data export and transfer rules controlling countries outside the European Union are outdated; accountability and enforcement of the Directive is inconsistent; definitions throughout the directive are too simple and static.[168] Still, some do find strengths in the Directive: it harmonizes data protection principles; it is technology neutral; and it improves awareness of data protection concerns.[169]

In 2002, the Directive on Privacy and Electronic Communications increased the strength of European Union privacy laws by putting further restrictions on the use of cookies.[170] This directive was again updated in 2009 "to strengthen the existing legal requirements concerning the 'clear and comprehensive' information that must be given to users."[171] However,

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162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *The European Legal Context: the EU Privacy Directives,* LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/inbox/european_legal_context_privacy_directives (last visited Jan. 2, 2013).

167. *The EU Data Privacy Directive,* PRIVACILLA.ORG, http://www.privacilla.org/business/eudirective.html (last visited Jan. 2, 2013).

168. NEIL ROBINSON ET AL., Review of the European Data Protection Directive (RAND CORP. 2009), *available at* http://www.rand.org/pubs/technical_reports/TR710.html.

169. *Id.*

170. Paul Lanois, *Privacy in the Age of the Cloud,* 15 J. Internet L. 3, 6 (2011).

171. *Id.* at 7.

neither update specifically addressed the issues surrounding cloud computing.

The European Commission ran a public consultation poll from May 16, 2011 through August 2011 about cloud computing in Europe.[172] Five hundred and thirty-eight responses were received, including 230 from companies, 182 from individuals, 42 from academics, 33 from public administrators, and 51 from respondents claiming "other."[173] Of these respondents, 86 individuals believed that an update to the EU Data Privacy Directive would be helpful to facilitate growth while protecting privacy, while 66 said it would not be helpful.[174] Responses from businesses were only marginally better, with 114 companies answering in the affirmative, and 89 answering in the negative.[175]

VI. PROPOSED EUROPEAN UNION LEGISLATION

A. European Cloud Computing Strategy

Neelie Kroes, Vice-President of the European Commission responsible for the Digital Agenda, has been very involved over the last few years in working to provide a comprehensive and actionable plan to grow and develop cloud computing in the European Union.[176] In setting an agenda to make Europe more cloud-friendly, the European Commission is developing a European Cloud Strategy (the Strategy), to be detailed specifically in mid-2012.[177] Part of the Strategy is to create a "European Cloud Partnership between public [entities] and private industries. . . to agree [on] common requirements for public Cloud procurement and thus harness the buying power of the public sector. So the Cloud can support

172. European Commission, Information Society and Media Directorate-General, *Cloud Computing: Public Consultation Report* (Dec. 5, 2011), *available at* http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=7663.

173. *Id.*

174. *Id.*

175. *Id.*

176. *See generally*, Press Release, Neelie Kroes, Vice-President of the European Commission responsible for the Digital Agenda EU Data protection reform and Cloud Computing "Fuelling the European Economy" event, *Microsoft Executive Briefing Centre Brussels* (Jan. 30, 2012), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/40&format=HTML&aged=0&language=EN&guiLanguage=en [hereinafter Kroes: *Fuelling the European Economy*]; Neelie Kroes, *Vice President of the European Commission*, EUROPA, http://ec.europa.eu/commission_2010-2014/kroes/ (last visited Oct. 4, 2012); *Cloud Computing: A Legal Maze for Europe*, EURACTIV (Feb. 11, 2011), http://www.euractiv.com/innovation/cloud-computing-legal-maze-europe-linksdossier-502073; Jack Clark, *Kroes Calls for Better EU Cloud Security*, ZD NET (Nov. 25, 2010 5:16 PM), http://www.zdnet.co.uk/news/cloud/2010/11/25/kroes-calls-for-better-eu-cloud-security-40090987/.

177. Kroes: *Fuelling the European Economy*, *supra* note 176.

public administrations and public administrations can support the Cloud."[178] The European Commission also has proposed a unified Regulation, as opposed to further Directives,[179] that would impose a single set of rules for Europe and a single enforcement agency across all 27 member states.[180] This would allow companies based in Germany hosting servers in England, Ireland, and France to have one moderating agency; it would also apply consistent rules to providers based outside of the European Union.[181] The focus would be on the data, not on the location of the server, recognizing the fact that it is a very interconnected world and clouds cross borders.[182]

In addition, "[t]he plan includes fines of as much of 2 percent of annual global sales for companies mishandling or losing personal data, as well as a requirement to report serious data breaches within 24 hours."[183] However, companies are balking at the 24-hour notice requirement because many companies do not find out about breaches within such a short amount of time.[184] Companies applaud the efforts to make the laws balanced, but they would like to have some input in designing the regulations as well.[185]

The European Cloud Partnership (the Partnership) that Vice President Krose proposed will have €10 million ($13 million) of initial funding.[186] Set out in three phases, the Partnership will first develop common requirements for cloud procurement, focusing on standards, security, and competition; next, it will provide solutions for the requirements imposed; and then it will build the actual structure of the new cloud.[187] Interestingly, this model is

178. *Id.*

179. Directives specify certain end-results that must be achieved by every member state and each member state is free to decide how this will be done. *Application of EU Law – What are EU Directives?,* EUROPEAN COMMISSION, http://ec.europa.eu/eu_law/introduction/what_directive_en.htm (last visited Jan. 2, 2013). EU regulations are binding upon each member state; nothing must be done to have them further implemented and applied. *Application of EU Law – What are EU Regulations?,* EUROPEAN COMMISSION, http://ec.europa.eu/eu_law/introduction/what_regulation_en.htm (last visited Jan. 2, 2013).

180. Kroes: *Fuelling the European Economy, supra* note 176.

181. *Id.*

182. *Id.*

183. Cornelius Rahn, *EU Seeks Joint National Cloud-Computing Purchase for Growth,* BLOOMBERG BUSINESSWEEK (Jan. 27, 2012 1:43 PM), http://www.businessweek.com/news/2012-01-27/eu-seeks-joint-national-cloud-computing-purchases-for-growth.html.

184. *Id.*

185. *Id.*

186. Jennifer Baker, *Europe Stumps up £8 Million for Cloud Computing Strategy,* COMPUTERWORLD (Jan. 27, 2012 3:30 PM), http://www.computerworlduk.com/news/public-sector/3333257/europe-stumps-up-8-million-for-cloud-computing-strategy.

187. Press Release, Neelie Kroes Vice-President of the European Commission responsible for the Digital Agenda Setting up the European Cloud Partnership World Economic Forum Davos, Switzerland (Jan. 26, 2012), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/38&format=HTML&aged=0&language=EN&guiLanguage=en [hereinafter Kroes: Davos, Switzerland].

based on the United States federal government's shift to the cloud.[188] To quell fears of the European Union creating a super-cloud, Vice President Kroes made the point very clear: the need for cloud suppliers and publicly-run data centers should be determined by the efficiency considerations in the market; cloud infrastructures would not be built outright or by forcing more integration of current cloud infrastructures without market demand.[189] The large-scale announcement of the Partnership and further regulations to be promulgated from the European Commission will be released in mid-2012, with the first visible results sometime in 2013.[190]

B. European Economic and Social Committee on Cloud Computing in Europe

Though Europe has been more proactive in updating regulations of the cloud, it still has a long way to go.[191] The European Economic and Social Committee (EESC) wrote an opinion on its own initiative about cloud computing in Europe.[192] The purpose of the opinion was twofold:

> Using the Europe 2020 strategy and in particular its Digital Agenda as a starting point, the Committee has set out to examine an IT solution that is still undergoing significant, rapid development, holding out great promise for the future: cloud computing . . . . This opinion firstly aims to gather and share the concrete experiences of stakeholders and the [cloud computing] market. Secondly, it seeks to put forward a list of recommendations as to how to encourage Europe to position itself at the forefront of this promising sector, helped by leading companies in the sector.[193]

In drafting the opinion, the EESC noted that there are many flaws and weaknesses of the current cloud atmosphere: there are a number of standards designed to regulate and control cloud computing; there is no unified, identifiable, governing authority to enforce regulations; there is a lack of information available to users to understand the risks and benefits of

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188. *Id.*

189. *See id.*

190. *Id.*

191. *Cloud Computing: A Legal Maze for Europe*, *supra* note 176.

192. Opinion of the European Economic and Social Committee on 'Cloud computing in Europe' (own-initiative opinion) 24/40, 2012 O.J. (C 24/08), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:024:0040:0047:EN:PDF [hereinafter *Own-Initiative Opinion*].

193. *Id.* (footnote omitted).

cloud computing at various levels; there exists an "intrinsically fragile nature of the Internet (interrupted service due to incidents, cyber attacks etc.);" there are outsourcing risks inherent to data processing by a third party and outsourcing risks to nations that have another system of law; and the rights and obligations both of users and providers are still unclear in many respects.[194]

Despite these identified weaknesses, the EESC also identified many strengths of the cloud in the European Union and provided a number of recommendations to grow the cloud.[195] In particular, the EESC recommended: encouraging or subsidizing larger server farms in the European Union; public partnerships to encourage research centers in Europe to coordinate their developments; including public and private players in developmental rules and regulations; and "capitalizing on the EU's competitive advantage in the field of data security and privacy protection to ensure their strict application in the area of [cloud computing]."[196]

C. European Network and Information Security Agency Recommendations

The European Network and Information Security Agency (ENISA) was created by the European Union to "advance the functioning of the internal market."[197] In 2009, ENISA completed a Cloud Computing Security Risk Assessment, which concluded, "the cloud's economies of scale and flexibility are both a friend and a foe from a security point of view. The massive concentrations of resources and data present a more attractive target to attackers, but cloud-based defences [sic] can be more robust, scalable and cost-effective."[198] In the report, ENISA also recommended steps that users could take when choosing a cloud provider, including:

> inquiring about (1) personnel security (background checks, etc.); (2) supply-chain management (subcontractor arrangements); (3) operational security (change control procedure, updates, and network architecture controls); (4) authorization and authentication; (5) asset management; (6) continuity management (disaster recovery, incident management, and escalation); (7) physical security; and (8)

194. *Id.*
195. *Id.*
196. *Id.*
197. *Cloud Computing Benefits, Risks, and Recommendations for Information Security,* ENSIA, 2 (Nov. 2009), http://www.enisa.europa.eu/act/rm/files/deliverables/cloud-computing-risk-assessment/at_download/fullReport.
198. *Id.*, at 3.

> legal requirements (location of data, governing jurisdiction, data recovery upon termination, subcontracts, and the like).[199]

The ENISA report focused its legal recommendations on issues that will arise through contract evaluation or contract negotiations between different providers. It sees many issues in cloud computing being resolved through contracts, but standard contract clauses may be unworkable due to the nature of cloud computing.[200] The report stresses that contract negotiators pay particular attention to rights and obligations of each party when there is a security breach, or what access should be granted to law enforcement authorities. Additionally, standard limitations of liability need to be revisited to properly reflect the role of each party in the usage of the cloud.[201]

D. Slow Growth of the Cloud Due to Strict Privacy Laws

Because of all the proposed legislation and action that the European Union is contemplating regarding cloud computing, the emerging clouds throughout the 27 member European Union have developed slower than those in the United States.[202] The existing EU regulations are cumbersome enough that an AT&T spokesperson warned that the European Union should not attempt to "over-regulate" due to the constantly changing nature of the cloud computing market.[203] Indeed, the privacy laws are so stringent that a law to be proposed in January 2012 would make it difficult for SaaS social media sites such as Facebook to operate in compliance with European Union law without significant changes on the company's part.[204] With this in mind, the European Union must strike a balance to both effectively protect user's privacy while not restricting the free flow of data that epitomizes cloud computing. The right balance has yet to be struck.[205]

Bob Lindsay, HP's European privacy director, stressed that "[t]here are restrictions on cloud computing in Europe . . . slowing its evolution, compared with what is taking place in the United States."[206] Users in the European Union also face a restricted network of clouds because the

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199. Martin, *supra* note 50, at 39.

200. *See Id.*

201. *Id.*

202. O'Brien, *supra* note 154.

203. Valentina Pop, *Cloud Providers Warn Against EU 'Over Regulation'*, EUOBSERVER (Nov. 10, 2011 6:11 PM), http://euobserver.com/1018/113871.

204. *See* Anna Leach, *Upcoming EU Data Law Will Make Europe Tricky for Facebook*, THE REGISTER (Nov. 8, 2011), http://www.theregister.co.uk/2011/11/08/eu_new_data_protection_proposals/.

205. *See generally*, O'Brien, *supra* note 154.

206. *Id.*

European Commission refuses to allow the physical location of servers to be outside member nations, except for a few exceptions.[207] The United States, Argentina, and Canada are all approved to provide cloud computing services to the European Union; other nations such as Israel and Andorra have applied for approval.[208] If a company does not apply for approval, or if it is denied, that nation must negotiate and enter into a binding service level agreement with data processors to ensure that the personal information of European Union citizens will be handled in accordance with European Union regulations.[209]

VII. RECOMMENDATIONS

The current problems facing cloud computing are: jurisdictional control of data; Fourth Amendment concerns; outdated laws that are inapplicable to modern technology; and the ever-pervasive problem that technology will always outpace the laws. This Note argues that the United States should follow the European Union's lead and act quickly to influence cloud providers from the start; that Congress should update the ECPA; that Congress should update the CFAA; that Congress should update other outdated and rigid laws that are applied clumsily by courts around the country with more fluid guidelines adaptable to changing technology; and that Congress should allow enforcement acts to be brought in federal court exclusively to allow a more uniform system of enforcement.

It is evident that the United States and the European Union have taken different approaches in trying to regulate cloud computing. Despite this, in September 2011, some of the information technology players from the United States and European Union participated in a joint conference, sponsored by the European Commission Information Society and Media, the Network of European CIOs, EuroCloud, and NIST to "[d]rill down the issues of standards for cloud computing from [three] major angles: [p]olicy[,] [i]ndustry and markets (supply and demand side)[;] [s]tandards and interoperability; [and] [g]ather elements to devise a standards roadmap for [the European Union], including priorities, players, and processes."[210]

With international interest to streamline the cloud, this would be an ideal time for the United States government to enact regulations regarding cloud computing, while it is still blossoming. Like the European Union has done, the United States government would be able to dictate to corporations how to build a safe, secure cloud for users.

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207. *Id.*

208. *Id.*

209. *Id.*

210. ETSI, *Standards in the Cloud: A Transatlantic Mindshare*, http://www.etsi.org/WebSite/NewsandEvents/2011_09_STANDARDSINTHECLOUD.aspx (last visited Jan. 2, 2013).

One study polling 127 cloud service providers across the United States and European Union found some disturbing trends: the majority of cloud providers believe it is their customer's responsibility to secure the cloud, not their own; on average, less than ten percent of the provider's operational resources were dedicated to security; providers feel that users flock to the cloud because of the low cost and faster application deployment; users do not choose the cloud based on security; and the majority of providers do not have dedicated security personnel.[211] The most concerning finding, though, was that the majority of cloud providers did not believe security is one of their most important responsibilities and they do not believe their products or services protect consumer's information, but are pondering the option of charging an additional fee for "security" of information at a later point in time.[212]

By updating the ECPA, the United States could prevent users from having to pay a service charge for security from cloud storage providers by making it an inherent part of the service. By amending the controlling laws, Congress could assure users that providers would make security a priority, not an add-on that could be charged as an extra fee and be simply an additional source of revenue for the provider. Additionally, modernization of the ECPA could protect against seizures of hardware from cloud providers that contain data from multiple users, except in rare circumstances. It is almost unthinkable to Jane Doe in Indiana that, because Joe Smith in California stored information in Amazon.com's cloud storage, the government's legal collection of Smith's data would include collection of any of Doe's unrelated information stored on the same server.

Congress should also update the CFAA to ensure consumers are protected in case of a security breach and provide explicit civil penalties for companies who fail to protect user privacy. The justification is two-fold: the money collected would provide remedial damages payable to those users who have been affected, and the damages would also act as a deterrent to companies who might otherwise keep their security systems lax.

If the United States were to act now while the metaphorical iron is hot, instead of waiting years for various departmental investigational reports to come back, the advantages would be huge. It is easier to shape an emerging technology from inception than try to change it later on. If it is understood from the beginning that providers must comply with data privacy laws, perhaps we will not have to face the possibility of an unsecure cloud.

Additionally, if the United States steps up now to encourage

211. Ponemon Institute, *Security of Cloud Computing Providers Study* 1, (2011), *available at* http://www.ca.com/~/media/Files/IndustryResearch/security-of-cloud-computing-providers-final-april-2011.pdf.

212. *Id.*

protection of users' privacy, privacy acts could become uniform throughout jurisdictions across the world. Patchwork security is unacceptable, unstable, and confusing. Arguments that it is simply too expensive or impractical to ensure security in public clouds fail, because such security measures have been implemented successfully in moving the United States federal government to a community cloud backed by Google. Uniform privacy laws would allow servers to be located throughout the world, in nations that agree to uniform standards and help regulate the jurisdictional and ownership issues that arise. It would ease strain on courts, reduce international disagreements, and foster better security for users, regardless of where they, or their data, are located.

This Note proposes that Congress should allow enforcement actions in violation of the ECPA, CFAA, and any other legislation dealing with cloud computing to be brought exclusively in federal court to allow a more uniform system of interpretation and enforcement. Additionally, due to the redundant nature of data storage, the same information uploaded in New York could be copied on host servers not only within the same state, but also in North Carolina, California, and Illinois, all unbeknownst to the user. Exclusive jurisdiction in federal courts would be consistent with enforcement of patents, trademarks, and copyright – other highly fluid, nuanced, and technical fields. Exclusive jurisdiction in federal courts would also reduce the ability of companies to bury forum clauses in End User License Agreements or Terms of Service that work strictly to the company's advantage. Congress should reject concurrent jurisdiction in favor of uniform interpretation of the federal statutes and for sensitivities to federal policies in an area that is likely to have impact on users and companies on a global level.

Finally, the largest advantage that the United States would gain in adapting new laws of the cloud is replacing the old, outdated, fragmented laws that currently govern. Although courts strive to adapt laws to modern situations, most laws simply were not written to address many issues that arise today. Technology has, and always will, progress faster than laws. Common technologies now were not even considered twenty years ago when the laws were written. By adopting a modern, updated, forward-thinking approach, users may feel secure while stability may flow from courts in applying laws that are written to fit the technology. Justices and judges no longer will have to write concurrences hinting to Congress to update outdated laws. Several interest groups comprised of industry leaders, legal scholars, and real-world users have all expressed interest and enthusiasm in helping to update the laws, and they will prove to be valuable resources to Congress in updating the ECPA, CFAA, and drafting any other legislation that will be necessary to regulate the cloud, if Congress is willing to accept the help.

VIII. CONCLUSION

Cloud computing is an evolving technology that has outgrown and outpaced modern laws across the world regarding data storage, jurisdiction, and ownership. The United States' controlling law over clouds, and data in the cloud, was enacted more than two decades ago and has created a fragmented, patchwork law across the nation as courts try to apply outdated laws with modern technology. While efforts have been made to update the ECPA and other related laws, none yet have been passed or enacted. There is large support from legal scholars, industry leaders, and technology interest groups to update the legislation to provide a clearer framework not only for providers, but for users of the cloud as well. The United States government has implemented a strategy to shift much of itself to its own community cloud in partnership with Google, showing that it is possible to have a large, secure cloud that is available to users nationwide. Proposed strategies on how to handle the transition to the cloud are in the works, but none are nearly close enough, nor workable yet, to implement into law.

The European Union, on the other hand, already has a large framework requiring companies' strict adherence in protecting user privacy. Based on this, the European Union has been able to develop policies yet to be implemented, that have privacy at the forefront. The European Union is working on implementing regulations across all twenty-seven member states that would provide one centralized, unified regulatory body that regulates providers and users under one standardized regulation for operation. Both the United States' and European Union's proposals have merit, but action should be taken now, in the budding stages of growth, to establish a framework of regulations to support the cloud, instead of trying to add them in later.

DID INDIANA DELIVER IN ITS FIGHT AGAINST HUMAN TRAFFICKING?: A COMPARATIVE ANALYSIS BETWEEN INDIANA'S HUMAN TRAFFICKING LAWS AND THE INTERNATIONAL LEGAL FRAMEWORK

May Li*

INTRODUCTION

The victims of modern slavery have many faces. They are men and women, adults and children. Yet, all are denied basic human dignity and freedom . . . .We must join together as a Nation and global community to provide that safe haven by protecting victims and prosecuting traffickers. With improved victim identification, medical and social services, training for first responders, and increased public awareness, the men, women, and children who have suffered this scourge can overcome the bonds of modern slavery, receive protection and justice, and successfully reclaim their rightful independence. Fighting modern slavery and human trafficking is a shared responsibility.[1]

A. Human Trafficking: The Numbers

"Human trafficking, or 'trafficking in persons,' is an affront to human dignity that links communities across the world in a web of money, exploitation and victimization."[2] It is a multi-dimensional issue that "violates human rights, endangers economic growth, thrives on corruption, and poses a real threat to the well-being and human development of men, women, and children, be it committed across or within national borders."[3]

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1. Press Release, President of the United States of America, Barack Obama, Presidential Proclamation – National Slavery and Human Trafficking Prevention Month (Jan. 4, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-proclamation-national-slavery-and-human-trafficking-prevention-month.

2. *Out of the Shadows: The Global Fight Against Human Trafficking Before the H.R. Comm. on Foreign Affairs,* 111th Cong. 1 (2010) (statement of Rep. Howard L. Berman, Chairman, H.R. Comm. on Foreign Affairs), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg61518/html/CHRG-111hhrg61518.htm.

3. MARIA GRAZIA GIAMMARINARO, ORG. FOR SECURITY AND CO-OPERATION IN EUROPE

The International Labor Organization (ILO) reports that there are approximately 21 million people worldwide who are trapped in forced labor, debt bondage, and forced prostitution.[4] The United States government estimates that approximately 600,000 to 800,000 people are trafficked across international borders each year.[5] Human trafficking is considered to be one of the most profitable and fastest growing criminal enterprises in the world.[6] "Current estimates by the United Nations Office of Drug and Crime place human trafficking as the second most profitable form of transnational crime after the sale of drugs and rank it more profitable than the sale of arms."[7] The United Nations Global Initiative to Fight Human Trafficking (UNGIFT) reported an estimate of $31.6 billion global annual profits made from the exploitation of all trafficked forced labor.[8]

The US Department of State's 2011 Trafficking in Persons Report documented that the United States is a source, transit, and destination country for human trafficking.[9] Human trafficking occurs in every state in the United States, and persons trafficked include US citizens and noncitizens.[10] In 2005, the US Department of Justice reported that between 14,500 and 17,500 victims are trafficked into the United States each year.[11]

(OSCE), COMBATING TRAFFICKING AS MODERN-DAY SLAVERY: A MATTER OF RIGHT, FREEDOM, AND SECURITY, 2010 ANNUAL REPORT OF THE SPECIAL REPRESENTATIVE AND CO-ORDINATOR FOR COMBATING TRAFFICKING IN HUMAN BEINGS, 20 (Dec. 9, 2010), *available at* http://www.osce.org/cthb/74730 [hereinafter OSCE, *2010 Annual Report*].

4. *Forced Labor,* INT'L LABOUR ORG., http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm (last visited Mar. 18, 2013).

5. ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL 34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 3 (2010), *available at* http://www.fas.org/sgp/crs/misc/RL34317.pdf. Due to the hidden nature of human trafficking, gaps in data, and methodological weaknesses, it is difficult to estimate the exact number of trafficked persons across international borders. This estimate is from 2003 and references to this estimate have since been used in subsequent US Department of State's *Trafficking in Persons* reports. *Id.*; SILVA SCARPA, TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY 8-10 (2008).

6. Helga Konrad, *The OSCE and the Struggle against Human Trafficking: The Argument for a Comprehensive, Mutli-Pronged Approach,* 1 INTERCULTURAL HUM. RTS. L. REV. 79 (2006); *See also* SCARPA, *supra* note 5, at 16.

7. LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE 7 (2010).

8. HUMAN TRAFFICKING: THE FACTS, U.N. GIFT GLOBAL INITIATIVE TO FIGHT HUMAN TRAFFICKING, *available at* http://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_THE_FACTS_-_final.pdf (last visited Mar. 18, 2013).

9. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 372 (2011), *available at* http://www.state.gov/j/tip/rls/tiprpt/2011/index.htm [hereinafter 2011 TIP REPORT].

10. SISKIN & WYLER, *supra* note 5, at 20.

11. *Id.* at 22. As of January 2011, this remains the most recent estimate of trafficked victims into the United States by the US government. *Id.* Initial estimates cited in the Trafficking Victims Protection Act of 2000 indicated that approximately 50,000 women and children were trafficked into the United States each year. Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2000). However, this estimate was reduced to 18,000 – 20,000 in the US Department of State's 2003 Trafficking in Persons Report. HEATHER J. CLAWSON ET AL., U.S. DEP'T OF HEALTH & HUMAN SERV., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED

Although no current estimate is available, US citizens also fall victim to human trafficking.[12] In recognition of the growing problem of human trafficking both domestically and internationally, Congress passed the Trafficking Victims Protection Act (TVPA) in 2000.[13] The TVPA was the first federal law to criminalize human trafficking in the United States.[14] It was subsequently reauthorized as the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, 2005, and 2008.[15] The TVPRA of 2008 expired on September 30, 2011; the TVPRA of 2011 is currently under consideration in the US Senate and House of Representatives for reauthorization.[16]

B. The Need for State Anti-Trafficking Law

In addition to the federal laws that are currently in place to combat human trafficking, state legislation is also vital to eradicating this form of modern day slavery.[17] State anti-trafficking laws are crucial to combating human trafficking for several reasons: (1) law enforcement is a local issue, and state and local law authorities are generally the first to come in contact with the victim;[18] (2) state laws would supplement federal law and provide for an additional avenue of prosecution;[19] (3) local authorities are more familiar with the local area and can spot smaller trafficking rings such as "mom-and-pop" operations;[20] (4) states can tailor their laws to specifically

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STATES: A REVIEW OF THE LITERATURE (Aug. 2009), http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/. In 2004, the US government reported an estimate of 14,500 to 17, 500 victims trafficked annually into the United States. SISKIN & WYLER, *supra* note 5, at 22. However, this estimate remains uncertain due to methodological weaknesses. *Id.*

12. SISKIN & WYLER, *supra* note 5, at 22 n.54. A possible explanation is that there is a lack of consensus among law enforcement officials and service providers in defining what it means to be a US citizen trafficked within the United States. *Id.*; CLAWSON ET AL., *supra* note 11, at 6.

13. Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2000).

14. *State and Federal Laws*, POLARIS PROJECT, http://www.polarisproject.org/resources/state-and-federal-laws (last visited Mar. 18, 2013).

15. *Id.*

16. *See* Trafficking Victims Protection Reauthorization Act of 2011, S. 1301, 112th Cong. (2011), GOVTRACK.US, *available at* http://www.govtrack.us/congress/bill.xpd?bill=s112-1301 (last updated Mar. 9, 2012); *See also* Trafficking Victims Protection Reauthorization Act of 2011, H.R. 2830, 112th Cong. (2011), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h112-2830 (last updated Nov. 29, 2011).

17. S. Res. 414, 108th Cong. (2004) (enacted).

18. Vanessa B. M. Vergara, *Looking Beneath the Surface: Illinois' Response to Human Trafficking and Modern-Day Slavery*, 38 U. TOL. L. REV. 991, 998 (2007); 2009 ATT'Y GEN. ANN. REP. 10, *available at* http://www.justice.gov/archive/ag/annualreports/tr2009/agreport humantrafficking2009.pdf [hereinafter *Attorney General's 2009 Annual Report*].

19. Stephanie L. Mariconda, *Breaking the Chains: Combating Human Trafficking at the State Level*, 29 B.C. THIRD WORLD L. J. 151, 176 (2009).

20. Jessica E. Ozalp, *Halting Modern Slavery in the Midwest: The Potential of Wisconsin Act 116 to Improve the State and Federal Response to Human Trafficking*, 2009

address their unique needs;[21] and most importantly, (5) to ensure that no state is a haven for such activity.[22] Until 2003, state anti-trafficking laws were non-existent.[23] In recognition of the need for state legislation, many states passed anti-trafficking laws.[24] As of this date, West Virginia and Wyoming are the only two states that have not enacted human trafficking laws.[25]

C. Human Trafficking on the Rise in Indiana?

On January 30, 2012, Indiana passed new human trafficking legislation to amend its existing human trafficking laws in preparation for the NFL's Super Bowl event on February 5, 2012.[26] Recent history indicates that human trafficking crime follows large sporting events and conventions.[27] Indiana is notable for its major sporting and convention

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WIS. L. REV. 1391, 1401 (2009); *Dying to Leave: Business of Human Trafficking; Business Structures,* PBS.ORG (Sept. 25, 2003), http://www.pbs.org/wnet/wideangle/episodes/dying-to-leave/business-of-human-trafficking/business-structures/1420/.

21. John Tanagho, *New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law with its Federal and State Counterparts,* 38 LOY. U. CHI. L.J. 895, 919 (2007).

22. Kathleen A. McKee, *Domestic Human Trafficking Series: "It's 10:00 P.M. Do You Know Where Your Children Are?,"* 23 REGENT U.L. REV. 311, 326 (2010/2011).

23. Vergara, *supra* note 18, at 998. In 2004, the Department of Justice released the Model State Anti-Trafficking Criminal Statute as a guide for state legislatures to use in constructing their anti-trafficking statute. Tanagho, *supra* note 21, at 899. In the same year, the US Senate also passed a bi-partisan senate resolution that strongly encouraged the states to adopt anti-trafficking statutes similar to the Model. *See* S. Res. 414, *supra* note 17.

24. Chuck Neubauer, *Nine States Lag in Laws to Stop Human Trafficking,* THE WASHINGTON TIMES (Aug. 25, 2011), http://www.washingtontimes.com/news/2011/aug/25/nine-states-lag-in-laws-to-stop-human-trafficking/.

25. *Id.* The other states referenced in this article (Alaska, Arkansas, Colorado, Montana, South Carolina, and South Dakota) have weak human trafficking laws. *Id.* The article listed Massachusetts as one of the three remaining states that do not have any human trafficking laws. *Id.* However, this is no longer the case because on November 21, 2011, Massachusetts Governor Deval Patrick signed the state's first anti-human trafficking legislation. Press Release, Governor of Massachusetts, Governor Patricks Signs Anti-Human Trafficking Legislation (Nov. 21, 2011), *available at* http://www.mass.gov/governor/pressoffice/pressreleases/2011/111121-antihuman-trafficking-bill.html.

26. Amanda Rakes, *Gov. Daniels Signs Bill to Toughen Human Trafficking Laws Ahead of Super Bowl,* FOX59.COM, (Jan. 30, 2012, 11:35 AM), http://www.fox59.com/news/wxin-daniels-human-trafficking-law-gov-daniels-signs-bill-to-toughen-human-trafficking-laws-ahead-of-super-bowl-20120130,0,1275073.column; Press Release, Bryan Corbin, Indiana Attorney General's Office, Attorney General's Statement on Signing of New Human Trafficking Law (Jan. 30, 2012), *available at* http://www.in.gov/portal/news_events/74079.htm.

27. Troy Kehoe, *Lawmakers Look to Toughen Human Trafficking Laws Ahead of Super Bowl,* WISHTV.COM (July 20, 2011, 8:44 PM), http://www.wishtv.com/dpp/news/local/marion_county/lawmakers-look-to-toughen-human-trafficking-laws-ahead-of-super-bowl; Jenny Montgomery, *Efforts Begin to Toughen Human Trafficking Laws Before the Super Bowl,* THE INDIANA LAWYER (Oct. 26, 2011), http://www.theindianalawyer.com/ag-says-stricter-stance-needed/PARAMS/article/27406.

events such as the Brickyard 400, Indianapolis 500, and the National Collegiate Athletic Association (NCAA) Men's Collegiate Basketball Final Four Tournament.[28] The Super Bowl is widely known to attract large crowds and generate millions of dollars in revenue, whether from ticket sales or increased revenues for local businesses.[29] Human traffickers also view the Super Bowl as the perfect event from which to profit given the crowds and the demand that come with it.[30] In 2011, Texas Attorney General Greg Abbott commented that the Super Bowl "is the biggest human trafficking event in the United States."[31] The State of Florida estimated "tens of thousands of people," mostly young girls, were sold as sex slaves during the Miami Super Bowl in 2010.[32]

Indiana Attorney General Greg Zoeller acknowledged that "human trafficking is a problem that has been ignored until recently."[33] He further stated, "It's one that is growing . . . ."[34] At a news conference at the Indiana Statehouse, Indiana Governor Mitch Daniels also stated that he had "only recently learned the extent of the human trafficking problem and called it 'heinous.'"[35] Unfortunately, this is the grim reality of human trafficking: it is a silent crime that remains underneath the radar until a major event occurs that awakens the need for increased awareness of the issue or until it is considered ripe for attention.

Human trafficking is an issue from which the midwestern United States is not immune.[36] It is increasingly becoming a problem even in non-border states and in those states that do not have deeply-rooted international communities.[37] In a two-part news series investigation on human trafficking

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28. Kehoe, *supra* note 27. The Indiana Convention Center's website provides a list of upcoming events held between 2011 and 2013 and also the number of attendees. *Upcoming Events in the Indiana Convention Center: December 30, 2011 – December 29, 2013*, INDIANA CONVENTION CENTER, http://www.icclos.com/upcoming-events.aspx (last visited Mar. 18, 2013). Both the Brickyard 400 and Indianapolis 500 are popular car racing events in the United States. *See Brickyard 400*, INDIANAPOLIS MOTOR SPEEDWAY, http://www.indianapolismotorspeedway.com/brickyard400/ (last visited Mar. 18, 2012).

29. Rick Horrow & Karla Swatek, *The Super Bowl Is a Money Bowl*, BUSINESSWEEK.COM (Feb. 4, 2010), http://www.businessweek.com/lifestyle/content/feb2010/bw2010023_998169.htm.

30. Press Release, Erin Reece, Ind. Att'y Gen. Office, Zoeller Part of State, National Effort to Combat Human Trafficking Threat (Sept. 30, 2011).

31. Kehoe, *supra* note 27.

32. *Id.*

33. *Indiana AG Warns Sex Trafficking Ahead of Super Bowl*, WISHTV.COM (Sept. 30, 2011), http://www.wishtv.com/dpp/super_bowl_xlvi/indiana-ag-warns-sex-trafficking-ahead-of-super-bowl [hereinafter *Indiana AG*].

34. *Id.*

35. John Tuohy, *With Eye on Super Bowl, Lawmakers Target Trafficking*, INDYSTAR.COM (Dec. 17, 2011, 12:51 AM), http://www.indystar.com/apps/pbcs.dll/article?AID=2011112170324.

36. Ozalp, *supra* note 20, at 1393.

37. *Id.*; Tanagho, *supra* note 21, at 900. Border states such as California, Texas, New

in Indiana, law enforcement officials confirmed occurrences of human trafficking in the Midwest and in Indianapolis.[38] The city of Toledo, Ohio was named as one of the nation's biggest hubs for teen prostitution and human trafficking subsequent to a federal investigation that resulted in a 100-page indictment of thirty-one people involved in a nationwide trafficking ring that bought, sold, and transported women and girls as young as twelve years old around the country.[39] Indianapolis was linked to this federal indictment when women and girls were transported from Toledo to Indianapolis for prostitution purposes.[40] Thus, even Indiana is not impervious to the mobile business of human trafficking.

The Department of Justice has identified Indianapolis as a potential destination for traffickers.[41] Domestic violence victims' advocates, human rights attorneys, and immigration lawyers report an increasing number of victims each year in Indiana.[42] On May 20, 2008, the Sunshine Spa and the Apple Studio Spa of Richmond, Indiana, were among the nineteen massage parlors in Indiana, Kentucky, and Ohio that were raided by local and federal authorities.[43] The federal government suspected that the parlors illegally transported women from Korea and forced them to be sex slaves in order to "earn their way into the country."[44]

Furthermore, on May 4, 2011, a human trafficking ring was discovered on the northwest side of Indianapolis.[45] It was a multi-state human trafficking ring in which women were transported from Central

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York, and Florida have higher occurrences of human trafficking. *Id.* at n. 39; Veronica Lewin, *Bill Would Extend Human Trafficking Task Force*, LEGISLATIVE GAZETTE (Apr. 25, 2011), http://www.legislativegazette.com/Articles-c-2011-04-25-76750.113122-Bill-would-extend-human-trafficking-task-force.html.

38. Sandra Chapman, *Part One: Against Their Will*, WTHR.COM, http://www.wthr.com/Global/story.asp?S=4945355 (last visited Mar. 18, 2013); *See also* Celia Williamson, et al., Ohio Trafficking in Persons Study Commission Research and Analysis Sub-Committee Report on the Prevalence of Human Trafficking in Ohio to Attorney General Richard Corday 13 (Feb. 10, 2010), *available at* http://www.ohioattorneygeneral.gov/TraffickingReport.

39. Chapman, *supra* note 38.

40. *Id.*

41. *Id.*

42. Rebecca Berfanger, *Human Trafficking Concerns: Cases on the Rise in Indiana*, THE INDIANA LAWYER, Nov. 10, 2010, at 1.

43. Kathryn Burcham, *Human Trafficking Suspected at Two Richmond Massage Parlors*, WHIOTV.COM (May 20, 2008), http://www.whiotv.com/news/news/human-trafficking-suspected-at-two-richmond-massag/nFCn3/. Massage parlors in Richmond, Lawrenceburg, New Albany, Northern Kentucky, Cincinnati, and Indianapolis were shut down. *Federal Sex Trafficking Cases in the United States 2000 – 2008*, POLARIS PROJECT (2009), http://logolite-ent.com/Federal_Sex_Trafficking_Cases_in_the_United_States_2000-2008.pdf.

44. Burcham, *supra* note 43.

45. Russ McQuaid, *Human Trafficking Ring Busted on Indianapolis Northwest Side*, FOX59.COM (May 4, 2011, 4:07 PM), http://www.fox59.com/wxin-human-trafficking-human-trafficking-ring-busted-on-indianapolis-northwest-side-20110504,0,6448763.story.

America to work as prostitutes in four midwestern states.[46] Investigators suspect that the ring had existed for as long as ten years.[47] The traffickers used intimidation and beatings to control their victims.[48] There were multiple houses operating in several states each day of the week.[49] On October 3, 2011, the Indianapolis police served search warrants on massage parlors for suspected human trafficking and other criminal activity.[50] The investigation consisted of searches in Marion County and also at an undisclosed business in Fishers, Hamilton County.[51]

On December. 1, 2011, Shared Hope International, a non-profit organization seeking to eradicate sex trafficking, released the Protective Innocence Initiative report cards, which assessed each state's child sex trafficking laws.[52] Indiana received a letter "D," and more than half the states received an "F."[53] In response to the potential increase of underage prostitution in connection with the Super Bowl and in recognition of the weaknesses in the state's human trafficking laws, Indiana's new law sought to tighten the prosecution for sex trafficking of minors.[54] However, now that the Super Bowl has ended, the question becomes, "Will Indiana continue to seek ways to improve its human trafficking laws, or will the issue of human trafficking fall behind the scenes and require another event to trigger such attention again?"

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Police Raid Massage Parlors in Human Trafficking Probe: Several Agencies Involved in Raid*, THE INDYCHANNEL.COM (Oct. 3, 2011), http://www.theindychannel.com/news/29373408/detail.html [hereinafter *Police Raid Massage Parlors*]. US Highway 31 is a north-south highway that connects Michigan to Alabama. Robert V. Droz, *U.S. Highways: From U.S. 1 to U.S. 830*, http://www.us-highways.com/usbt.htm (last updated Oct. 5, 2007). Fishers is a town in Hamilton County, Indiana. *Police Raid Massage Parlors*. As of 2010, Fishers has a population of 76,794 and a median household income of $75, 638. TOWN OF FISHERS, *Quick Facts*, http://www.fishers.in.us/egov/docs/1314216280330.htm (last visited Mar. 18, 2013).

51. *Police Raid Massage Parlors*, *supra* note 50.

52. Renee Blair, *The Protected Innocence Challenge Report Card Release: On the Ground in San Antonio!*, SHARED HOPE INT'L (Nov. 30, 2011), http://sharedhope.org.gravitatehosting.com/SHIBlog/tabid/75/PostID/81/Default.aspx. To access each state's report card, see PROTECTED INNOCENCE CHALLENGE: STATE REPORT CARDS ON THE LEGAL FRAMEWORK OF PROTECTION FOR THE NATION'S CHILDREN, SHARED HOPE INT'L (2011), *available at* http://sharedhope.org/wp-content/uploads/2012/10/PIC_ChallengeReport_2011.pdf.

53. Barb Berggoetz, *New Indiana Law Will Strengthen Penalties Against Child Sex Trafficking*, INDYSTAR.COM (Jan. 31, 2012, 7:55 AM), http://www.indystar.com/article/20120131/NEWS02/201310320/New-Indiana-law-will-strengthen-penalties-against-child-sex-trafficking.

54. *Super Bowl Attracts Human Trafficking*, WLFI.COM (Dec. 20, 2011), http://www.wlfi.com/dpp/news/local/super-bowl-attracts-human-trafficking; *See infra* Part II. B.

D. How Indiana Can Take a Stronger Stance Against Human Trafficking

This Note addresses the issue of how Indiana can further strengthen its human trafficking laws by examining the international legal framework regarding human trafficking. Part I of this Note introduces background information about human trafficking. Specifically, it will discuss the definitions of human trafficking, the causes of human trafficking, the different forms of human trafficking, and the consequences of human trafficking. Part II examines the current federal and state laws in place to combat human trafficking. Part III discusses the international legal framework for combating human trafficking. Specifically, Part III explores and compares the conventions and legislation passed by the United Nations, the European Union, and the Council of Europe to combat human trafficking. Part III analyzes each organization's legal documents with respect to their protection and asset forfeiture measures. Finally, Part IV discusses the recommendations of this Note. Specifically, this Note concludes with recommendations as to how Indiana can further strengthen its trafficking laws by creating an asset forfeiture provision in which seized assets would provide for a state human trafficking victims fund. The seized assets could fund legal and social services for victims of human trafficking and also provide training to law enforcement.

I. BACKGROUND ON HUMAN TRAFFICKING

A. Definition of Human Trafficking

The term "human trafficking" was first defined in 2000.[55] The United

55. Anne T. Gallagher, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 12 (Cambridge Univ. Press 2010); *Attorney General's 2009 Annual Report, supra* note 18, at 2. However, human smuggling should not be confused with human trafficking, although they share common aspects. SCARPA, *supra* note 5, at 68. Primarily, human smuggling is a crime against the States, while human trafficking is a crime against the individual. *Id.* "Human smuggling typically involves the provision of a service, generally procurement or transport, to people who knowingly consent to that service in order to gain illegal entry into a foreign country." SISKIN & WYLER, *supra* note 5, at 2. Thus, human smuggling is always transnational and the smuggled individual consents to being smuggled. U.S. Dep't of Health and Human Serv., *Fact Sheet: Human Trafficking*, ADMINISTRATION FOR CHILDREN & FAMILIES, http://www.acf.hhs.gov/trafficking/about/fact_human.html (Aug. 2, 2012). Second, the relationship between the smuggled individual and the smuggler is that of a client and service provider. SCARPA, *supra* note 5, at 68. The smuggler agrees to illegally transport the smuggled individual in exchange for a fee and, the "contract" terminates upon arrival at the destination. *Id.* "[H]uman trafficking involves the ongoing exploitation of victims in order to generate illicit profits for the criminals." Konrad, *supra* note 6, at 87. Nevertheless, it is important to be aware that while a person may have consented to being smuggled, he or she could become a trafficked person if circumstances give rise to exploitative conditions. SISKIN & WYLER, *supra* note 5, at 2; SCARPA, *supra* note 5, at 69.

Nations provided the first internationally recognized definition of human trafficking under Article 3(a) of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (the "UN Protocol"). It states:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[56]

Article 3(b) of the UN Protocol further provides that it is irrelevant whether or not the victim gave consent if any of the means set forth in the Article 3(a) definition are used to exploit the victim.[57] The methods of exploitation provided by the UN definition are not exhaustive. Exploitation may include additional forms, whether known or unknown.[58]

Six weeks prior to the adoption of the UN Protocol, the TVPA was enacted in the United States.[59] The TVPA does not define "human trafficking," but it does define "severe forms of human trafficking" as:

> (a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or which the person induced to perform such act has not attained 18 years of age; or
> (b) the recruitment, harboring, transportation, provision, or

56. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, 2237 U.N.T.S. 319, at 42 (entered into force Dec. 25, 2003), *available at* http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf [hereinafter U.N. Protocol]; SCARPA, *supra* note 5, at 60.

57. U.N. Protocol, *supra* note 56, at 43.

58. SCARPA, *supra* note 5, at 5. The United Nations has included forced begging, illicit adoptions, and child soldiers as additional forms of exploitation. SISKIN & WYLER, *supra* note 5, at 1.

59. 2011 TIP REPORT, *supra* note 9, at 16.

> obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.[60]

The term "sex trafficking" is further defined as "the recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act."[61] The UN and US definitions have their commonalities and differences. For example, both definitions recognize that "trafficking," in relation to child trafficking, applies whether the child was taken forcefully or voluntarily.[62] The definitions do not distinguish between domestic trafficking and cross-border trafficking.[63] However, the definitions differ in that the US definition does not include organ removal as a form of exploitation.[64]

Both the UN and US definitions of trafficking can be broken down into three elements: the act, the means, and the purpose.[65] All three elements must be established to constitute trafficking in adult persons.[66] The three elements as a whole can be viewed as a process[67] that begins with the "act" of recruiting, harboring, transporting, or obtaining the victim[68] by "means" including but not limited to, threat, use of force or coercion, or fraud[69] for the final "purpose" of exploitation, including but not limited to commercial sex acts, labor services, involuntary servitude, or peonage.[70]

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60. Trafficking Victims Protection Act, 22 U.S.C. § 7102 (2000).

61. *Id.* "Commercial sex act" means any sex act on account of which anything of value is given to or received by any person. *Id.*

62. SISKIN & WYLER, *supra* note 5, at 2; SCARPA, *supra* note 5, at 5.

63. SISKIN & WYLER, *supra* note 5, at 2.

64. *Id.*

65. *Human Trafficking,* U.N. OFFICE ON DRUG AND CRIME, http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html (last visited Mar. 18, 2013); *The AMP Model: Elements of the Crime of "Severe Forms" of Trafficking in Persons,* POLARIS PROJECT, http://www.polarisproject.org/resources/resources-by-topic/human-trafficking (last visited Mar. 18, 2013) [hereinafter *The AMP Model*].

66. SCARPA, *supra* note 5, at 60; *The AMP Model, supra* note 65.

67. SCARPA, *supra* note 5, at 60.

68. *Id.*; *The AMP Model, supra* note 65. This element could be established by a variety of activities besides the listed ones. Gallagher, *supra* note 55, at 29.

69. SCARPA, *supra* note 5, at 60; Under the TVPA, "coercion" means threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process. Trafficking Victims Protection Act, 22 U.S.C. § 7102 (2000).

70. *See supra* notes 66, 68 and accompanying text; 22 U.S.C. § 7102.

B. Causes of Human Trafficking

The causes of human trafficking vary transnationally and domestically. Transnationally, the causes of human trafficking can be explained by examining the relationship between the push and pull factors.[71] The push factors are the factors that push the individuals out of their country of origin, thus producing the supply of potentially trafficked persons.[72] Lack of employment and educational opportunities, poverty, and economic instability are the main push factors in countries of origin.[73] Other factors such as gender and ethnic discrimination, natural disasters, political instability, globalization of the world economy, new communication channels, and improved transportation systems and routes may also account for human trafficking.[74] The pull factors that draw these individuals from countries of origin into countries of destination are the "demand for [their services], the possibilities of higher standards of living, and the perceptions of many in poor communities that better opportunities exist in larger cities or abroad."[75] Primarily, it is the demand for the goods produced by the trafficked workers and the resulting profitability that permit human trafficking to continue to flourish.[76] Therefore, in order to effectively combat human trafficking, the solution does not necessarily lie in prosecution alone, but should also take into account the demand element.[77]

Domestically, children are the most at risk for domestic sex trafficking.[78] Age, poverty, history of childhood sexual abuse, familial substance or physical abuse, learning disabilities, loss of a parent by abandonment or death, running away, homelessness, lack of a support system, and sexual identity issues have all been identified as factors that place youth at risk for sex trafficking.[79] Therefore, these underlying causes should be considered if we are to effectively fight human trafficking on a domestic level.

C. Different Forms of Human Trafficking

This section will discuss the major forms of exploitation related to

71. SCARPA, *supra* note 5, at 12.

72. KATHRYN CULLEN-DUPONT, HUMAN TRAFFICKING 23 (2009).

73. SCARPA, *supra* note 5, at 13.

74. SISKIN & WYLER, *supra* note 5, at 4.

75. SHELLEY, *supra* note 7, at 37. The United Nations has indicated that Belgium, Germany, Greece, Israel, Italy, Japan, the Netherlands, Thailand, Turkey and the United States are popular destination countries. CULLEN-DUPONT, *supra* note 72, at 25.

76. 2011 TIP REPORT, *supra* note 9, at 19.

77. *Id.*

78. CLAWSON ET AL., *supra* note 11, at 8.

79. *Id.* at 8-11; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, §2, 119 Stat. 3558 (2006).

human trafficking: sexual exploitation, labor exploitation and organ trafficking.[80]

1. Sexual Exploitation

The United Nations Office of Drugs and Crime's Global Report on Trafficking in Persons (UNODC's Global Report) identifies sexual exploitation as the most common form of human trafficking (79%).[81] Victims of sexual exploitation are mainly women and young girls.[82] Profits from sexual exploitation are estimated at $28 billion per year.[83]

A large number of the women trafficked are recruited by means of deception.[84] The traffickers can be relatives, friends, or unknown persons.[85] There is evidence that even women sometimes play the role of trafficker; some of these women are former victims.[86] Traffickers often use the bait and switch method when recruiting women. The women are promised educational or job opportunities as nannies, maids, factory workers, restaurant workers, sales clerk, or as models.[87] Upon their arrival at the work destination, the women are forced into commercial sex industries such as prostitution, pornography, stripping, live-sex shows, mail-order brides, military prostitution, and sex tourism.[88]

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80. SCARPA, *supra* note 5, at 22. Other forms of human trafficking include illegal adoptions and child soldiers. *Id.*

81. U.N. Office of Drug and Crime, *Global Report on Trafficking in Persons,* 6 (Feb. 2009), *available at* http://www.unodc.org/documents/Global_Report_on_TIP.pdf [hereinafter *Global Report*].

82. U.N. Office of Drug and Crime, *UNODC Report on Human Trafficking Exposes Modern Form of Slavery,* http://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html (last visited Mar. 18, 2013); CULLEN-DUPONT, *supra* note 72, at 48.

83. Financial Action Task Force (FATF), *Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants,* 16 (July 2011), *available at* http://www.fatf-gafi.org/dataoecd/28/34/48412278.pdf [hereinafter FATF].

84. CULLEN-DUPONT; *supra* note 72, at 10; Trafficking Victims Protection Act, 22 U.S.C.S. § 7101(b)(2) (LexisNexis 2012).

85. SCARPA, *supra* note 5, at 17.

86. *See supra* notes 81-82.

87. 22 U.S.C.S. § 7101(b)(4) (LexisNexis 2012); CULLEN-DUPONT, *supra* note 72, at 10.

88. 22 U.S.C.S. § 7101(b)(2) (LexisNexis 2012); CLAWSON ET AL., *supra* note 11, at 3. "Sex tourism is the travel by buyers of sexual services for the purpose of procuring sexual services from another person in exchange for money and/or goods. . . . Sex tourists create a demand which drives the recruitment of more victims to be trafficked to commercial sex markets to meet their demands." Shared Hope Int'l, *Demand: A Comparative Examination of Sex Tourism and Trafficking in Jamaica, Japan, The Netherlands, and the United States* 1 (2007), *available at* http://sharedhope.org/wp-content/uploads/2012/09/DEMAND.pdf. Child sex tourists "travel to foreign countries to engage in sexual activity with children." SOWMIA NAIR, U.S. DEP'T OF JUSTICE, CHILD SEX TOURISM, http://www.webcitation.org/5oSAQaLZT

Traffickers maintain control over their victims by using multiple methods such as loss of identity, isolation, psychological and physical abuse, and debt bondage.[89] "Many of the dehumanizing practices that were used during the Holocaust to produce passive victims are replicated by the traffickers."[90] Upon the victim's arrival at the destination, the trafficker will confiscate their identification documents, such as passports, thus rendering them captive and vulnerable.[91] Without identification documents, the victim has no identity and no legal status.[92] Furthermore, the victim cannot seek protection in his or her country's embassy since he or she lacks proof of citizenship.[93]

Traffickers will often disorient their victims by moving them away from their families to an unfamiliar location.[94] Because the victims are unfamiliar with the language and the culture of such location, the victim is further rendered helpless.[95] Traffickers also use physical abuse and psychological threats to induce compliance.[96] Individual victims who resist compliance are tortured, raped, and beaten in front of other victims to demonstrate the futility of resistance.[97] The trafficker may also threaten the victim with death or serious harm to a family member to gain control.[98]

Financially, the trafficker could also maintain control over the victim through debt bondage.[99] "[W]omen and girls are forced to continue in prostitution through the use of unlawful 'debt' purportedly incurred through their transportation, recruitment, or even their crude 'sale' – which exploiters insist they must pay off before they can be free."[100] It is an endless debt in which the victims are repaying the trafficker for the costs incurred from their own 'sale' and the costs incurred subsequent to their sale.[101] Rarely is a victim able to pay off the entire debt.[102] Initially, a victim

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(last visited Mar. 18, 2013). "Many nations with thriving sex tourism industries are nations that suffer from widespread poverty resulting from turbulent politics and unstable economies. Poverty often correlates with illiteracy, limited employment opportunities, and bleak financial circumstances for families." *Id.* As a result, recruiters easily lure their future victims by promising them with job or education opportunities when in fact they will be prostituted. *Id.* Furthermore, in desperation for money, some poor families have prostituted their own children or sold them into prostitution. *Id.;* For US law against sex tourism, *see* 18 U.S.C.A. § 2423(a)-(g) (West 2012).

89. SISKIN & WYLER, *supra* note 5, at 6.
90. SHELLEY, *supra* note 7, at 107.
91. CULLEN-DUPONT, *supra* note 72, at 11.
92. SHELLEY, *supra* note 7, at 107.
93. *Id.*
94. Trafficking Victims Protection Act, 22 U.S.C.S. § 7101(b)(5) (LexisNexis 2012).
95. *Id.*
96. 2011 TIP REPORT, *supra* note 9, at 7.
97. *See* SHELLEY, *supra* note 7; *See* CULLEN-DUPONT, *supra* note 72.
98. *See* CULLEN-DUPONT, *supra* note 72.
99. *Id.*
100. 2011 TIP REPORT, *supra* note 9, at 7.
101. *See* CULLEN-DUPONT, *supra* note 72. Subsequent costs include food, medicine,

may have hope in paying off the debt and will work based on this hope, but in reality, it is an impossible task that the trafficker knows will seldom be accomplished.

2. Labor exploitation

While sex trafficking is more widely known and publicized, labor trafficking tends to be overlooked and is rarely given the attention that it deserves. UNDOC's Global Report reveals forced labor is the second most reported form of human trafficking (18%).[103] Victims of labor trafficking are forced to work in a variety of labor sectors including, but not limited to: domestic services, restaurants, hospitality, janitorial work, sweatshops, agriculture, construction, and forced begging.[104] The following sections will shed light on two industries of forced labor that often remain hidden from the public eye: domestic services and agriculture.

Domestic slavery is one of the "most invisible forms of exploitation."[105] Domestic workers generally work and live within a private home in which they provide domestic services such as cooking, cleaning, and caring for children or a family.[106] Because domestic workers live and work within the privacy of a home, much of their inhumane living and working conditions are shielded from public visibility.[107] In many instances, domestic workers work extremely long hours, are deprived of their identification documents, isolated and prohibited from having outside contact, underpaid or not paid, malnourished, and subjected to sexual and psychological abuse.[108] Furthermore, a domestic worker is not afforded the basic labor protections provided by the National Labor Relations Act because he or she is not considered an "employee."[109]

Domestic workers have been found to work in the homes of doctors, lawyers, businessmen, and diplomats.[110] In the past and the present, there have been many reported instances in the United States of foreign diplomats

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condoms, and rent. *Id.*

102. *Id.* at 11.

103. *Global Report, supra* note 81.

104. CLAWSON ET AL., *supra* note 11, at 3; OSCE, *2010 Annual Report, supra* note 3, at 9. Other forms of labor exploitation include use of child camel jockeys in illegal camel races in the Gulf States and involvement in drug trafficking and petty theft. SCARPA, *supra* note 5, at 29-30.

105. OSCE, *2010 Annual Report, supra* note 3, at 11.

106. Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1286 (2011).

107. 2011 TIP REPORT, *supra* note 9, at 8.

108. OSCE, *2010 Annual Report, supra* note 3, at 12; SCARPA, *supra* note 5, at 31.

109. CULLEN-DUPONT, *supra* note 72, at 49.

110. *Id.*

exploiting and abusing domestic workers.[111] Currently, foreign diplomats such as ambassadors or other diplomatic officers are immune from civil and criminal prosecution in the United States.[112] In January 2008, a federal judge awarded more than $1 million in damages to Zipora Mazengo, a domestic worker for the Tanzanian diplomat, Alan Mzengi, Minister of Consular Affairs at the Tanzania embassy in Washington, DC.[113] Mazengo claimed the following mistreatment: she was forced to work 112 hours per week with no pay, her passport was taken from her, the diplomat's wife beat her, she was denied medical treatment for an infected ingrown toenail for two years, and she could not leave the home to see her dying sister without someone accompanying her.[114] Three months after the judge awarded damages to Mazengo, Mzengi returned to Tanzania and is currently an adviser to the President of Tanzania.[115] To date, Mazengo has only been able to obtain $2,000 through garnishments from Mzengi's US bank account.[116]

Agriculture is another industry in which a significant level of human trafficking occurs.[117] "Victims of labor trafficking have been found among the nation's migrant and seasonal farm workers, including men, women, families, or children as young as five or six years old who harvest crops and raise animals in fields, packing plants, orchards, and nurseries."[118] These victims could be US citizens, legal permanent residents, foreign nationals with H-2A temporary agricultural work visas, or undocumented immigrants.[119] Trafficked farm workers usually work in distant and isolated areas, which hide their poor living and working conditions from the public.[120] Trafficked farm workers typically have language barriers that further prevent them from reporting their mistreatment or seeking assistance.[121] Similar to domestic workers, trafficked farm workers are not afforded the protections provided under the National Labor Relations Act

111. Janie Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV 1627, 1641-42 (2010).

112. *Id.* at 1644-45.

113. E. Benjamin Skinner, *Modern-Day Slavery on D.C.'s Embassy Row?*, TIME (June 14, 2010), http://www.time.com/time/nation/article/0,8599,1996402,00.html?artId=1996402?contType=article?chn=us.

114. *Id.*

115. *Id.*

116. *Id.*

117. Shelley Cavalieri, *The Eye That Blinds Us: The Overlooked Phenomenon of Trafficking into the Agricultural Sector*, 31 N. ILL. U. L. REV 501, 513 (2011) (an estimated 10.4% of all trafficking cases are in agriculture).

118. *Labor Trafficking in Agriculture*, POLARIS PROJECT, http://www.polarisproject.org/human-trafficking/labor-trafficking-in-the-us/agriculture-a-farms (last visited Mar. 18, 2013).

119. *Id.*

120. Cavalieri, *supra* note 117, at 514.

121. *Id.*

thus rendering them even more vulnerable to exploitation.[122] Even if the worker entered into the United States with a H-2A work visa, the visa is valid only if the worker remains with the employer who sponsored his or her visa.[123] Therefore, the worker is caught in a no-win situation in which he or she has to choose between continuing with the current employer and enduring the exploitative conditions or having their visa invalidated and becoming an undocumented immigrant.[124]

On April 20, 2011, the US Equal Employment Opportunity Commission (the EEOC) filed its largest agricultural labor trafficking lawsuit to date in Hawaii and Washington against Global Horizons, Inc.[125] The EEOC alleges that Global Horizons trafficked over 200 Thai male victims to work on eight farms located in Washington and Hawaii, subjecting them to discriminatory and exploitative conditions.[126] Similar to other human trafficking cases, these trafficked workers were promised high salaries and temporary work visas.[127] However, these were empty promises that Global Horizons had no intention of fulfilling. The trafficked workers had their passports taken away and were placed in debt bondage as a result of the exorbitant recruitment fees.[128] They also lived in rat and insect infested housing conditions and were subjected to retaliatory threats.[129] Labor trafficking is a reality, and it should not be considered secondary in terms of importance.

3. Trafficking in Human Organs

Organ trafficking is another form of human trafficking that is gaining momentum due to its lucrative nature, especially for kidneys.[130] To date, there are over 100,000 waiting list candidates in the United States for an organ, of which over 95,000 are waiting for a kidney.[131] The United Network for Organ Sharing reported that in 2010, approximately 4,540

122. CULLEN-DUPONT, *supra* note 72, at 50.

123. Cavalieri, *supra* note 117, at 515.

124. *Id.*

125. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Files Its Largest Farm Worker Human Trafficking Suit Against Global Horizon Farms (Apr. 20, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-20-11b.cfm.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. David Glovin, Michael Smith, & David Voreacos, *Kidney Broker Pleads Guilty in First U.S. Organ-Traffic Case,* BLOOMBERG (Oct. 27, 2011), http://www.bloomberg.com/news/2011-10-27/kidney-broker-pleads-guilty-in-first-u-s-organ-trafficking-prosecution.html.

131. U.S. Dep't of Health and Human Servs., *Data: Waiting List Candidates*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, http://optn.transplant.hrsa.gov/data/ (last visited Mar. 18, 2013).

people in the United States died while waiting for a kidney.[132] The shortage of kidneys in relation to the demand has created a black market for kidneys around the world. Current US law prohibits the selling and buying of organs, but has not prevented people from resorting to the black market in desperate times.[133]

On October 24, 2011, the United States had its first organ trafficking case when "kidney broker," Levy Izhak Rosenbaum, pled guilty to three counts of organ trafficking in federal court in Trenton, New Jersey.[134] The defendant alleged that three people paid him a total of $410,000 to broker the sale of kidneys.[135] The defendant acknowledged that he "woodshed" the donor and the client by fabricating a story that deceived hospital personnel into believing the kidney donation was a voluntary act.[136] Reputable hospitals, including Johns Hopkins Hospital, were identified as sites where black market transplant surgeries were performed.[137] Hospitals have been criticized for lack of procedure to ascertain the source of the donated organs.[138]

There are serious ethical implications involved when "the organ becomes a commodity and financial considerations become the priority for the involved parties instead of the health and well-being of the donors and recipients."[139] Therefore, before any hospital or transplant center accepts a "donated" organ, it should consider whether the "donated" organ came from a selfless voluntary act of a donor or whether it was offered at the expense of the donor's well-being by means of threat, fraud, or coercion.

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132. David W. Freeman, *Organ Theft? Guilty Plea Spotlights Illegal Organ Trade*, CBS NEWS (Oct. 28, 2011), http://www.cbsnews.com/8301-504763_162-20126993-10391704/organ-theft-guilty-plea-spotlights-illegal-organ-trade/.

133. National Organ Transplant Act of 1984, 42 U.S.C. § 274(e) (2011). Transplant tourism is when "people from wealthier countries register for transplant surgeries in poorer countries." CULLEN-DUPONT, *supra* note 72, at 23. "Nancy Scheper-Hughes, founding director of Organ Watch, estimates that approximately 15,000 kidneys are taken from involuntary donors every year." *Id.* However, transplant tourism does not include a recipient and the donor who is a relative traveling across borders because their country lacks the medical services to perform the surgery or if it is through "official regulated bilateral or multilateral organ sharing program." D.A. Budiani-Saberi & F.L. Delmonico, *Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities*, 8 AM. J. OF TRANSPLANTATION 925, 926 (2008), *available at* http://www.cofs.org/Publications/Budiani_and_Delmonico-AJT_April_2008.pdf.

134. Glovin, *supra* note 130.

135. *Id.*

136. *Id.*

137. *Id.*

138. *See* Freeman, *supra* note 132.

139. Budiani-Saberi & Delmonico, *supra* note 133, at 926.

D. Consequences of Human Trafficking

The ramifications of human trafficking greatly affect society and the individual.[140] On the societal level, human trafficking feeds organized crime which threatens state security, promotes the breakdown of social structures within communities and families, undermines the democratic values of life and liberty, and hinders upward social mobility.[141] On the individual level, trafficked persons suffer physical and psychological effects.[142] Victims of forced labor suffer from "chronic back, hearing, cardiovascular or respiratory problems."[143] Victims of sexual exploitation run a high risk of contracting sexually transmitted diseases, HIV/AIDS, and other reproductive related illnesses, especially when contraceptives are not provided.[144] Those that survive the sexual exploitation often suffer from psychological issues and substance abuse and have difficulty reintegrating back into society.[145] These are scars that do not go away overnight, but instead leave a lasting impression of the trauma suffered and will deeply affect their outlook in life.[146] The remnants of the past will have an impact on their trust in society, especially if a friend or family member committed the trafficking. Therefore, these costs to society and to the individual should be considered when the question of whether to adopt a stronger stance against human trafficking is raised.

II. CURRENT LAWS IN THE UNITED STATES

Recognizing the prevalent nature of human trafficking and the serious human rights violations associated with it, both federal and state anti-trafficking laws were enacted. This section explores the current federal and state human trafficking laws in the United States. The TVPA was the first federal law to combat human trafficking and Congress reauthorized it in 2003, 2005, and 2008.[147] Indiana's human trafficking laws are codified at

140. SHELLY, *supra* note 7, at 60.

141. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT, June 2005, at 13 -15 (June 2005) [hereinafter 2005 TIP REPORT].

142. *Id.* at 14.

143. Mariconda, *supra* note 19, at 165-66.

144. SHELLY, *supra* note 7, at 63.

145. *Id.*; Psychological illnesses include "posttraumatic stress, painful flashbacks, anxiety, fear, incapacitating insomnia, depression, sleep disorders, and panic attacks . . . ." *Id.* Others may suffer from a "loss of appetite, uncontrolled aggression, self-blame, thoughts of suicide, self-harm, and constant crying . . . ." *Id.* Social stigmatism of prostitution in some societies further compounds the victim's difficulty in reintegrating. SCARPA, *supra* note 5, at 21; 2005 TIP REPORT, *supra* note 141, at 13.

146. SHELLY, *supra* note 7, at 60.

147. *See* Polaris Project, *supra* note 14.

Ind. Code § 35-42-3.5-1-4 and Ind. Code § 5-2-1-9(a)(10).[148]

A. The Trafficking Victims Protection Act

The TVPA symbolized the first of many responses by the United States in its fight against human trafficking. "[T]he fundamental international framework used by the United States and the world to combat contemporary forms of slavery" is the "3P" framework – Prevention, Protection, and Prosecution.[149] In 2009, Secretary of State Hillary Rodham Clinton added the "fourth P" – Partnership, which is "building new partnerships with governments and [non-government organizations] around the world" to combat human trafficking collectively.[150] The following sections will discuss the TVPA and its subsequent reauthorizations.

Prior to the TVPA, the United States prosecuted many human trafficking cases under the Mann Act and other involuntary servitude and labor statutes.[151] However, these laws were ineffective in fighting modern day slavery.[152] The TVPA established a definition for "severe forms of trafficking in persons."[153] It increased the penalties for peonage, forced labor, and sale into involuntary servitude.[154] It mandated restitution and forfeiture.[155] The TVPRA of 2003 enhanced the prosecution of traffickers by making human trafficking a predicate offense for RICO (Racketeer Influenced Corruption Organization Act) charges.[156] It additionally created a federal civil remedy for trafficking victims, which allowed them

148. IND. CODE ANN. § 35-42-3.5-1 – 4 (West 2012); IND. CODE. ANN. § 5-2-1-9(a)(10) (West 2012).

149. U.S. Dep't of State, *Four "Ps": Prevention, Protection, Prosecution, Partnerships*, http://www.state.gov/g/tip/4p/partner/index.htm (last visited Mar. 18, 2013).

150. *Id.*

151. *Attorney General's 2009 Annual Report, supra* note 18, at 2. The Mann Act, also known as the White Slave Traffic Act, makes it a federal crime to knowingly transport any person (including persons under the age of eighteen) in interstate or foreign commerce for the purpose of prostitution or to engage in any sexual activity. The Mann Act, 18 U.S.C.S. §§ 2421-28 (LexisNexis 2011). The act also makes it a crime to knowingly persuade, induce, entice, or coerce an individual to travel in interstate or foreign commerce to engage in prostitution or in any sexual activity. *Id.*

152. *See generally Attorney General's 2009 Annual Report, supra* note 18, at 2.

153. *See* Trafficking Victims Protection Act, 22 U.S.C.S § 7102 (LexisNexis 2012).

154. SISKIN &WYLER, *supra* note 5, at 45. Penalties increased from ten to twenty years of imprisonment and potentially life in imprisonment if aggravating factors are found. *Id.* Aggravating factors include death during the commission of such violations, kidnapping, aggravating sexual abuse, or attempted murder. *Id.*

155. 18 U.S.C.A. § 1594(d) – (e) (West 2012). Forfeiture includes any property used in the commission of the crime or any property derived from the commission of the crime.

156. *Federal Legislation,* NORTHEASTERN UNIV., http://www.northeastern.edu/human trafficking/federal-state-responses-to-human-trafficking/federal-legislation/ (last visited Mar. 18, 2013).

pursuance of a civil action against the trafficker(s) in federal court.[157] Further, the TVPRA of 2008 expanded the prosecution of human trafficking by creating new criminal offenses,[158] modifying the standard of proof for sex trafficking,[159] widening the crime of labor trafficking and sex trafficking of a minor,[160] imposing criminal liability on those who use fraud to recruit workers abroad for employment in the United States,[161] and punishing those who benefit financially from their participation in a venture that is engaged in peonage or in the furtherance of human trafficking.[162]

The TVPA also established preventative measures to combat human trafficking.[163] For example, it required the President to establish international initiatives to increase economic opportunities for the potential victims and programs to increase public awareness of human trafficking.[164] The TVPA also authorized the President to provide assistance to foreign countries to combat human trafficking, while sanctioning those that failed to comply adequately.[165] The TVPRA of 2003 further inhibited human

157. *Attorney General's 2009 Annual Report, supra* note 18, at 2.

158. *Id.* at 3. The new offenses included imposing penalties on those who obstruct, attempt to obstruct, or in any way interfere with the investigation and prosecution of trafficking crimes. *See* 18 U.S.C.A §§ 1583(a)(3), 1584(b), 1590(b), 1591(d), 1592(c) (West 2012).

159. 18 U.S.C.A. § 1594(d) – (e) (West 2012). It lowered the standard of proof for the crime of sex trafficking of children by requiring the government to only show that the defendant acted in reckless disregard of the fact that the means of force, threat of force, fraud, or coercion would be used to cause the person to engage in a commercial sex act (previously, it required the government to show that the defendant knew that force, fraud, or coercion would be used). 18 U.S.C.A. § 1591(a)(2) (West 2012); *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5044, 5069 (2008), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-110publ457/pdf/PLAW-110publ457.pdf [hereinafter TVPRA 2008].

160. *Attorney General's 2009 Annual Report, supra* note 18, at 3. For labor trafficking, it "expanded the crime of forced labor by providing that "force" is a means of violating the law." *Id.*; *See also* 18 U.S.C.A. § 1589(a)(1) (West 2012). For sex trafficking of a minor, the government no longer has to demonstrate that the defendant knew that the person engaged in commercial sex was under the age of eighteen. 18 U.S.C.A. § 1591(c) (West 2012). It requires the government to only prove that the defendant had a reasonable opportunity to observe the minor. *Id.*; *See also* TVPRA 2008 § 222.

161. *Attorney General's 2009 Annual Report, supra* note 18, at 4; *See also* 18 U.S.C.A. § 1351 (West 2012).

162. 18 U.S.C.A. § 1593A (West 2012); *See also* TVPRA 2008 § 222.

163. Trafficking Victims Protection Act, 22 U.S.C. § 7104 (a) – (c)(2000).

164. *See id.* § 7104 (a) – (b); Examples of economic initiatives may include microcredit lending programs, skills training, programs to keep children in elementary and secondary schools, educational programs to inform about the danger of trafficking, and grants to nongovernmental organizations to foster and promote the political, economic, social, and educational roles of women in their countries. *Id.* at § 7104 (a).

165. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, §§ 109 - 110, 114 Stat. 1464, 1481 (2000), *available at* http://www.gpo.gov:80/fdsys/pkg/PLAW-106publ386/pdf/PLAW-106publ386.pdf. The President is authorized to provide assistance to foreign

trafficking by requiring federal departments or agencies to terminate contracts with overseas contractors who engaged in sex or labor trafficking.[166] Additionally, the TVPRA of 2005 created "extraterritorial jurisdiction over trafficking offenses committed overseas by persons employed by or accompanying the federal government."[167] Moreover, the TVPRA of 2008 authorized the Secretary of State to implement measures to protect domestic servants from abuse and to suspend the issuance of A-3 and G-5 worker visas for a diplomatic mission or international organization with a history of exploitation and trafficking.[168]

Lastly, the TVPA and its reauthorizations provided protection to victims of human trafficking. Primarily, the TVPA created two special immigrant statuses for international victims (continued presence and T nonimmigrant status, or "T-visa") in order to provide immigration relief and to facilitate the investigation and prosecution of the trafficker.[169] A US Immigration and Customs Enforcement official grants continued presence to "an individual identified as a victim of human trafficking who is a potential witness in the investigation or prosecution of the trafficker."[170] A victim with continued presence is generally permitted to stay in the United States for a discretionary period of time determined by the Department of Homeland Security.[171] However, a T-visa permits the victim temporary residency for up to four years, and the victim can petition for permanent residency afterwards.[172] If the victim is granted continued presence or a T-

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countries directly or through nongovernmental organizations for programs or projects that are designed to help them meet the minimum standards for eliminating trafficking (as defined in § 103). *See Id.* §109. For foreign countries that fail to comply with the minimum standards, sanctions may include withholding non-humanitarian and non-trade assistance. *See Id.* § 110. For FY 2011, President Obama fully withheld non-humanitarian and non-trade related foreign assistance to Eritrea and North Korea. SISKIN &WYLER, *supra* note 5, at 15. Partial waivers were granted to Burma, Cuba, Iran, and Zimbabwe. *Id.* Full waivers were granted to the Democratic Republic of Congo, the Dominican Republic, Kuwait, Mauritania, Papua New Guinea, Saudi Arabia, and Sudan on the basis of national interest reasons. *Id.*

166. *See* 22 U.S.C.A. §7104(g); *see also* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 3, 117 Stat. 2875, 2876-77 (2003), *available at* http://www.gpo.gov:80/fdsys/pkg/PLAW-108publ193/pdf/PLAW-108publ193.pdf.

167. *Attorney General's 2009 Annual Report, supra* note 18, at 3; *See also* Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 103, 119 Stat. 3558, 3562 (2006), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-109publ164/pdf/PLAW-109publ164.pdf.

168. SISKIN &WYLER, *supra* note 5, at 48-49; *see also* TVPRA 2008 §§ 202 – 203, 122 Stat. at 5055-59. Measures include requiring employers to provide their employees with pamphlets informing them of their rights and setting interview guidelines for consular offices. *See id* § 202.

169. CLAWSON ET AL., *supra* note 11, at 16; SISKIN &WYLER, *supra* note 5, at 24.

170. U.S. DEP'T OF HOMELAND SEC., CONTINUED PRESENCE: TEMP. IMMIGRATION STATUS FOR VICTIMS OF HUMAN TRAFFICKING 2 (2010), *available at* http://www.dhs.gov/xlibrary/assets/ht-uscis-continued-presence.pdf.

171. CLAWSON ET AL., *supra* note 11, at 16.

172. SISKIN &WYLER, *supra* note 5, at 24-25. To be eligible for a T-visa, the following

visa, he or she is eligible for refugee benefits and services that are not available to US citizens and permanent residents.[173] International victims of trafficking who are under the age of eighteen are eligible for benefits and services upon receipt of an eligibility letter from the Department of Health and Human Services, and can also apply for the Unaccompanied Refugee Minor Program.[174]

Additionally, the TVPA required that while a victim is held in the

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criteria must be met: the trafficking victim must (1) be a victim of a severe form of trafficking as defined under the TVPA; (2) be physically present in the United States due to the trafficking; (3) has complied with reasonable requests for assistance in the investigation or prosecution of the trafficking (unless under the age of eighteen); (4) demonstrated extreme hardship involving unusual and severe harm upon removal; and (5) be admissible to the United States or obtain a waiver for inadmissibility. *Id.* at 25. *See also* U.S DEP'T OF HOMELAND SEC., *Instructions for Form I-914, Application for T Nonimmigrant Status, www.uscis.gov/files/form/i-914instr.pdf* (last visited Mar. 18, 2012). "A waiver of inadmissibility is available for health related grounds, public charge grounds, or criminal grounds if the activities rendering the alien inadmissible were [due to their] victimization." SISKIN &WYLER, *supra* note 5, at 25. Under the TVPA, the victim must also obtain certification from a federal law enforcement officer that he or she is a victim of trafficking and has complied with reasonable request to cooperate in the investigation and prosecution of the trafficker. *Id.* at n. 68. The TVPRA of 2003 revised this requirement and authorized the Secretary of Health and Human Services to consider statements from state and local enforcement officers for certification since they are generally the first to come in contact with the victim. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4, 117 Stat. 2875, 2877 (2003), *available at* http://www.gpo.gov:80/fdsys/pkg/PLAW-108publ193/pdf/PLAW-108publ193.pdf. The TVPRA of 2008 additionally modified the T-visa qualifications by "amending the physical presence provision to include presence on account of an investigation or prosecution" and "exempting adults unable to cooperate with reasonable requests for assistance in the investigation or prosecution due to physical or psychological trauma." *Attorney General's 2009 Annual Report, supra* note 18, at 37. *See also* TVPRA 2008 § 201.

173. CLAWSON ET AL., *supra* note 11, at 16. "Some of the refugee-specific services that victims of trafficking are eligible to receive through HHS and NGOs are Refugee Cash and Medical Assistance, housing or shelter assistance, food assistance, income assistance, employment assistance, English language training, health care assistance, mental health services, and assistance for victims of torture." *Id.* Other benefit programs that certified victims may apply for are TANF and Medicaid. *Id.*; *see also* Trafficking Victims Protection Act of 2000, 22.U.S.C.A §7105(b)(1) (West 2012). Certified victims are also eligible for employment assistance from the Department of Labor's One-Stop Career Center System. CLAWSON ET AL., *supra* note 11, at 16. US citizens who are victims of trafficking are eligible for mainstream benefits such as Temporary Assistance for Needy Families (TANF), Medicaid, and the Supplemental Nutrition Assistance Program (also known as the Food Stamp Program). *Id.* "However, anyone applying for mainstream benefits must do so through the State in which they reside and must meet the eligibility requirements for each program. Variations in State application processes, documentation requirements..., and the movement of victims once they are rescued may make it difficult for victims to access these services." *Id.* (citing from Holcomb, et al., *The Application Process for TANF, Food Stamps, Medicaid and SCHIP: Issues for Agencies and Applicants, Including Immigrants and Limited English Speakers*, THE URBAN INSTITUTE (2003), http://www.urban.org/url.cfm?ID=410640).

174. CLAWSON ET AL., *supra* note 11, at 17.

custody of the federal government, he or she cannot be detained in a facility inappropriate to their status as a crime victim.[175] The victim should receive necessary medical care, information about his or her rights and translations services, and protection if his or her safety is at risk.[176] The TVPA and TVPRA of 2005 also authorized appropriations for state and local government and nongovernmental organizations to provide victim service programs at the local level.[177] Finally, the TVPRA of 2008 created and authorized appropriations for new grant programs for US citizen victims.[178]

B. Indiana's Human Trafficking Laws

Indiana State Representative Terri Austin authored the state's first human trafficking law in 2006 in response to the discovery of two teenagers who were trafficked from Vietnam and Mexico into the city of Anderson, Indiana.[179] One situation involved a captor promising a family that their thirteen-year-old daughter would have educational opportunities, while the second situation involved an eighteen-year-old who was brought over as a mail-order bride.[180] For months subsequent to their arrival, both victims suffered physical, mental, and emotional abuse as sex slaves.[181] The trauma suffered by both victims did not surface until one victim was thrown out into the street when a new girl arrived and neighbors heard the cries of the other victim and called the police.[182]

Indiana's anti-trafficking law took effect on July 1, 2007 notwithstanding its near defeat in the Indiana legislature. However, since the passage of the statute, there has only been one conviction.[183] On January

175. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 107, 114 Stat. 1464, 1477 (2000), *available at* http://www.gpo.gov:80/fdsys/pkg/PLAW-106publ386/pdf/PLAW-106publ386.pdf [hereinafter TVPA 2000].

176. *Id.*

177. *Id.*; *See* Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 204, 119 Stat. 3558, 3571 (2006), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-109publ164/content-detail.html.

178. SISKIN & WYLER, *supra* note 5, at 50. For a detailed breakdown of the appropriations made for the fiscal years of 2001 till 2011, see *id.* at 51-53.

179. Sandra Chapman, *Part Two: Against Their Will*, WTHR.COM, http://www.wthr.com/global/Story.asp?s=4945370 (last visited Mar. 16, 2012) [hereinafter Chapman, *Part Two*]; *See also House Bill 1414*, INDIANA GENERAL ASSEMBLY, http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2006&session=1&request=getBill&docno=1414 (last updated Feb. 27, 2006, 5:13PM).

180. Chapman, *Part Two*, *supra* note 179.

181. *Id.*

182. *Id.*

183. Press Release, Marion County Prosecuting Attorney, Terry R. Curry, The Marion County Prosecutor's Office Files First Charges Under Amended Human Trafficking Statute (Mar. 15, 2012), *available at* http://www.indy.gov/eGov/County/Pros/NewsCenter/Documents/03-15%20Human%20Trafficking%20Charge%20Under%20Amended%20Law.pdf.

25, 2011, Indiana secured its first state conviction on human trafficking charges.[184] The defendant, Chris Smiley, was convicted of human trafficking, promoting prostitution, battery, intimidation, and strangulation.[185] On February 9, 2011, Smiley was sentenced to ten years on the human trafficking charge.[186] The Chris Smiley case was the first case in the state and in Marion County to go to trial.[187] The human trafficking charge is rarely prosecuted due to the difficulty involved in obtaining a conviction.[188] For example, in prior Marion County cases, there were instances when "the defendant(s) fled the country, or the victim(s) chose not to be witnesses, or the defendant(s) agreed to plea to other charges that carried the same weight as the human trafficking charge."[189] These circumstances created either an additional barrier for the prosecution to overcome or rendered the human trafficking charge irrelevant in light of other charges. On January 30, 2012, Indiana's Governor Mitch Daniels signed the new human trafficking legislation, Senate Enrolled Act 4, which amended Indiana's existing human trafficking laws.[190]

Currently, Ind. Code § 35-42-3.5-1 through Ind. Code § 35-42-3.5-4 as well as Ind. Code § 5-2-1-9 are Indiana's human trafficking laws.[191] Ind. Code § 35-42-3.5-1(a) – (d) provides the prosecution measures.[192] Ind. Code § 35-42-3.5-1(a) states that a person commits a Class B felony of promoting human trafficking when he or she, "by force, threat of force, or fraud, knowingly or intentionally recruits, harbors, or transports another person to engage the other person in forced labor or involuntary servitude; or to force the other person into marriage, or prostitution."[193] The new

184. *Id.;* Rebecca Berfanger, *Prosecution Raises Awareness of Human Trafficking*, THE INDIANA LAWYER, Mar. 2, 2011.

185. Press Release, Lara Beck, Marion County Prosecutor's Office, Marion County's Prosecutor's Office Secures First Conviction on Human Trafficking Charges (Jan. 25, 2011).

186. Berfanger, *supra* note 184. In addition to the human trafficking sentence, the defendant was sentenced to four years for the battery conviction, four years for the intimidation conviction, and 545 days on a strangulation conviction. *Id.* These sentences will run concurrently. *Id.* The defendant will also serve five years for possession of cocaine conviction that will run consecutively. *Id.*

187. *Id.*

188. Kehoe, *supra* note 27.

189. Berfanger, *supra* note 184.

190. *See Gov. Daniels Signs Bill to Toughen Human Trafficking Laws Ahead of Super Bowl, supra* note 26.

191. IND. CODE ANN. § 35-42-3.5-1 - 4 (West 2012); IND. CODE. ANN. § 5-2-1-9 (West 2012).

192. IND. CODE ANN. § 35-42-3.5-1(a) – (d) (West 2012), *amended by* Act of Jan. 30, 2012, Senate Enrolled Act No. 4, *available at* http://www.in.gov/legislative/bills/2012/PDF/SE/SE0004.1.pdf. Effective July 1, 2012, IND. CODE ANN. § 35-42-3.5-1(e) provides a defense to a prosecution under IND. CODE ANN. § 35-42-3.5-1(b)(2)(B) (West 2012).

193. IND. CODE ANN. § 35-42-3.5-1(a) (West 2012). "A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the

legislation expanded the list of punishable offenses to include forced participation in sexual conduct as defined by Ind. Code § 35-42-4-4.[194] As a result, Indiana's current statute now criminalizes several forms of human trafficking, including forced labor, involuntary servitude, forced marriage, forced prostitution, and forced participation in sexual conduct.[195]

The new legislation also strengthened Indiana's existing regulation on the trafficking of a minor.[196] Primarily, it created a new provision, Ind. Code § 35-42-3.5-1(b), which provides that a person commits a Class B felony of promotion of human trafficking of a minor when he or she "recruits, harbors, or transports a child less than sixteen years of age with the intent of engaging the child in forced labor or involuntary servitude or inducing or causing the child to engage in prostitution or participate in sexual conduct as defined by Ind. Code § 35-42-4-4."[197] When the case involves the human trafficking of a minor in contrast to an adult, the prosecutor has a lower burden of proof and is not required to prove the element of force, threat of force, or fraud.[198]

The new law also modified existing legislation on the sex trafficking of a minor. Prior to the enactment of the new law, a parent, guardian, or custodian of a child (under the age of eighteen) commits a Class A felony of sex trafficking of a minor under Ind. Code § 35-42-3.5-1(c) when he or she sells or transfers custody of the child for the purposes of prostitution.[199]

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advisory sentence being ten (10) years. In addition, the person may be fined not more than ten thousand dollars ($10,000)." IND. CODE ANN. § 35-50-2-5 (West 2012).

194. IND. CODE ANN. § 35-42-3.5-1(a) (West 2012), *amended by* Act of Jan. 30, 2012, Senate Enrolled Act No. 4, at 5, *available at* http://www.in.gov/legislative/bills/2012/PDF/SE/SE0004.1.pdf. "Sexual conduct" means sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, sadomasochistic abuse, sexual intercourse or deviate sexual conduct with an animal, or any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person. IND. CODE ANN. § 35-42-4-4 (West 2012).

195. *See* IND. CODE ANN. § 35-42-3.5-1(a) – (d) (West 2012), *amended by* Act of Jan. 30, 2012, Senate Enrolled Act No. 4, *available at* http://www.in.gov/legislative/bills/2012/PDF/SE/SE0004.1.pdf. Effective July 1, 2012, IND. CODE ANN. § 35-42-3.5-1(e) provides a defense to a prosecution under IND. CODE ANN. § 35-42-3.5-1(b)(2)(B).

196. *See Gov. Daniels Signs Bill to Toughen Human Trafficking Laws Ahead of Super Bowl, supra* note 26.

197. Act of Jan. 30, 2012, Senate Enrolled Act No. 4, at 6, *available at* http://www.in.gov/legislative/bills/2012/PDF/SE/SE0004.1.pdf.

198. IND. CODE ANN. § 35-42-3.5-1(a) – (b), *amended by* Act of Jan. 30, 2012, Senate Enrolled Act No. 4, at 6, *available at* http://www.in.gov/legislative/bills/2012/PDF/SE/SE0004.1.pdf; Michael Puente, *Indiana Governor Signs Human Trafficking Bill*, WBEZ (Jan. 30, 2012), http://www.wbez.org/story/human-trafficking-bill-heads-indiana-governor-95922; Elizabeth Prann, *Indiana Passes Human Trafficking Law in Time for Super Bowl*, FOXNEWS (Feb. 2, 2012), http://www.foxnews.com/us/2012/02/02/human-trafficking-law-passes-before-super-bowl/.

199. Act of Jan. 30, 2012, Senate Enrolled Act No. 4, at 6, *available at* http://www.in.gov/legislative/bills/2012/PDF/SE/SE0004.1.pdf. "A person who commits a

However, upon a critical review of this section, the law failed to consider individuals other than a parent, guardian or a custodian of a child who could also commit such acts.[200] Recognizing this loophole, Indiana amended the existing statute by replacing "parent, guardian, or a custodian" with "a person who is at least eighteen years of age."[201] It also lowered the age requirement of a child from under the age of eighteen to under the age of sixteen.[202] Therefore, current Indiana law prohibits any individual from selling or otherwise transferring custody of a minor under the age of sixteen for the purposes of prostitution.

Additionally, a person commits a Class C felony under Ind. Code § 35-42-3.5-1(d) when he or she offers to pay money or other property to another person for an individual that the person knows has been coerced into forced labor, involuntary servitude, or forced prostitution.[203] Thus, Indiana's human trafficking laws proscribe the promotion of human trafficking, sex trafficking of a minor, and the acceptance of services from a trafficked person.

Ind. Code §35-42-3.5-2 through Ind. Code § 35-42-3.5-4 provides the protective measures for the victim.[204] For example, Ind. Code § 35-42-3.5-2 establishes restitution to the victim.[205] Thus, in addition to the penalties set forth under Ind. Code § 35-42-3.5-1, it requires the court to order the convicted offender to make restitution to the victim pursuant to Ind. Code § 35-50-5-3.[206] Indiana also provides the victim with a civil cause of action against the convicted offender pursuant to Ind. Code § 35-42-3.5-3.[207] Under the aforementioned section, the victim may also recover from such person actual damages, court costs (including fees), punitive damages determined by the court, and reasonable attorney's fees.[208] The statute of limitations for such claims is two years after conviction of the trafficking offense.[209]

Similar to federal law, Ind. Code §35-42-3.5-4 (a)-(b) delineates the

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Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years. In addition, the person may be fined not more than ten thousand dollars ($10,000)." IND. CODE ANN. § 35-50-2-4 (West 2012).

200. Puente, *supra* note 198.

201. Act of Jan. 30, 2012, Senate Enrolled Act No. 4, at 6, *available at* http://www.in.gov/legislative/bills/2012/PDF/SE/SE0004.1.pdf.

202. *Id.*

203. *Id.*; "A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years. In addition, the person may be fined not more than ten thousand dollars ($10,000)." IND. CODE ANN. § 35-50-2-6 (West 2012).

204. IND. CODE ANN. § 35-42-3.5-2 - 4 (West 2012).

205. IND. CODE ANN. § 35-42-3.5-2 (West 2012).

206. *Id.*; IND. CODE ANN. § 35-50-5-3 (West 2012).

207. IND. CODE ANN. § 35-42-3.5-3 (West 2012).

208. *Id.*

209. *Id.*

treatment of a victim of trafficking and the issuance of the Law Enforcement Agency Declaration (the "LEA Declaration").[210] Specifically, Ind. Code §35-42-3.5-4 (a) provides that a victim of trafficking may not be detained in a facility that is inappropriate to their status as a crime victim.[211] It also prohibits penalizing the victim with jail time and fines.[212] It further requires protection for the victim if their safety is at risk or if there is a danger of being recaptured by the trafficker.[213] This includes taking measures to protect the victim and family members from intimidation and retaliatory threats and ensuring that the victim and family members' names are not disclosed to the public.[214] Additionally, Ind. Code §35-42-3.5-4(b) requires a law enforcement agency to provide the victim with a completed Declaration of Law Enforcement Officer for Victim of Trafficking in Persons (LEA Declaration, Form I-914 Supplement B) pursuant to 8 C.F.R. § 214.11(f)(1) within fifteen days of the agency's first contact with the victim.[215] This declaration serves as the primary evidence that he or she is a victim and has complied with the reasonable request for assistance in the investigation and the prosecution of the trafficker(s),[216] thus satisfying certain eligibility requirements for a T-1 nonimmigrant status visa.[217] If the law enforcement agency denies the victim a LEA Declaration, the agency must provide the victim with an explanation of the reasons for the denial within fifteen days.[218] The alleged victim may provide additional evidence for reconsideration, and the agency has seven days from the receipt of the additional evidence to reconsider the denial.[219]

Lastly, Ind. Code § 5-2-1-9(a)(10) establishes the standards for law enforcement training in human and sex trafficking.[220] It outlines the minimum standards for a course of study on human and sex trafficking, which is required for "each person accepted for training at a law enforcement training school or academy and for in-service training program

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210. IND. CODE ANN. § 35-42-3.5-4 (a)-(b) (West 2012).

211. IND. CODE ANN. § 35-42-3.5-4 (a) (West 2012).

212. *Id.*

213. *Id.*

214. *Id.*

215. IND. CODE ANN. § 35-42-3.5-4(b) (West 2012); 8 C.F.R. § 214.11 (2011).

216. *See* CLAWSON ET AL., *supra* note 11; *See also* U.S. CITIZENSHIP & IMMIGR. SERVICES, *Instructions for Form I-914, Application for T Nonimmigrant Status*, at 5, *available at www.uscis.gov/files/form/i-914instr.pdf* (last updated Apr. 11, 2011); For a copy of the Form I-914 and the Form I-914, Supplement B, *see also* U.S DEP'T OF HOMELAND SEC., *I-914 Application for T Nonimmigrant Status*, http://www.uscis.gov/i-914 (last updated July 25, 2012).

217. *See supra* note 171; *See also* U.S. CITIZENSHIP & IMMIGR. SERVICES, *Instructions for Form I-914, Application for T Nonimmigrant Status*, at 5, www.uscis.gov/files/form/i-914instr.pdf (last updated May 4, 2012).

218. IND. CODE ANN. § 35-42-3.5-4(b) (West 2012).

219. *Id.*

220. IND. CODE. ANN. § 5-2-1-9(a)(10) (West 2012).

for law enforcement officers."[221] The course of study must cover these topics:

> (A) Examination of the human and sexual trafficking laws (IC 35-42-3.5)[;]
> (B) Identification of human and sexual trafficking [;]
> (C) Communicating with the traumatized persons [;]
> (D) Therapeutically appropriate investigative techniques [;]
> (E) Collaboration with federal law enforcement officials [;]
> (F) Rights of and protections afforded to the victim [;]
> (G) Providing documentation that satisfies the Declaration of the Law Enforcement Officer for Victim for Trafficking In Persons (Form I-914, Supplement B) requirements established under federal law [; and]
> (H) The availability of community resources to assist the [victim].[222]

Thus, Indiana law currently requires training for law enforcement to better understand and recognize the human trafficking crime.[223]

Human trafficking is an issue that still requires Indiana's attention even though the Super Bowl is a past event. While the new legislation primarily tightened prosecution in regards to sex trafficking of a minor, it temporarily cured only one aspect of the human trafficking problem. Linda Smith, president and founder of Shared Hope International, reported that her organization's tracking of several US cities' activity indicates that Indianapolis has an aggressive trafficking market.[224] Therefore, recognizing that human trafficking is an issue that will continue to exist in Indiana, additional countermeasures must be taken to inhibit its growth. The Ohio Trafficking in Persons Study Commission confirms that traffickers are strategic in choosing a place to set up business.

> State laws do play a role in the decision making of human trafficking organizations that are sophisticated and networked. Those more sophisticated trafficking rings are aware of the laws and potential risk of doing business in a particular US state. In a quote from Raymond and Hugh's (2001) report, it is apparent that traffickers look for states with more lenient laws.[225]

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221. *Id.*
222. *Id.*
223. *Id.*
224. Berggoetz, *supra* note 53.
225. Williamson et al., *supra* note 38. "In the Midwest, women are trafficked around the

If Indiana has a weaker human trafficking statute in comparison to its bordering states, traffickers will potentially choose Indiana to establish their businesses.[226] Human trafficking is a problem that could easily fester into a larger problem if left unattended. A larger problem equates to more time and resources needed to untangle and combat the problem. While additional countermeasures are taken to fight human trafficking, we must not neglect care and support for the victim. Such care and support is essential to the victim's recovery and reintegration as a productive member of society.[227] Lastly, "[j]ustice . . . is the crowning glory of the virtues . . . ."[228] Justice demands Indiana continue to seek ways to protect present and future victims of human trafficking.

III. INTERNATIONAL LEGAL FRAMEWORK

Slavery is no relic of the past, but instead an institution that has been allowed to slip through the cracks of justice to repeat itself in history again.[229] The United States and the international community have condemned slavery and involuntary servitude for its encroachment on an individual's unalienable right to life, liberty, and the pursuit of happiness.[230]

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region, as well as to the East and West Coast: from Minneapolis to Tampa, Memphis, New York, Chicago, Seattle, Denver, St. Louis and Las Vegas. Law enforcement officials in this region reported that large numbers of US women are domestically trafficked to other states, because Minnesota laws are stricter than in these states, and the sex businesses move to more permissive regions." JANICE G. RAYMOND & DONNA M. HUGHES, COAL. AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES 56 (2001), *available at* http://www.uri.edu/artsci/wms/hughes/sex_traff_us.pdf.

226. *Id.*

227. CLAWSON ET AL., *supra* note 11, at 36.

228. MARCUS TILLIUS CICERO: DE OFFICIIS (Walter Miller trans., London: Heinemann 1913), *available at* http://www.archive.org/stream/deofficiiswithen00ciceuoft#page/20/mode/2up/search/crowning+glory.

229. David R. Hodge & Cynthia A. Lietz, *The International Sex Trafficking of Women and Children: A Review of the Literature*, 22 AFFILIA: J. WOMEN & SOC. WORK 163 (2007); *See also* Trafficking Victims Protection Act, 22 U.S.C. § 7101(b)(1) (2000).

230. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1468 (2000), *available at* http://www.gpo.gov:80/fdsys/pkg/PLAW-106publ386/pdf/PLAW-106publ386.pdf. The international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports, including the Universal Declaration of Human Rights; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the [International Labor Organization]1957 Abolition of Forced Labor Convention; the International Covenant on Civil and Political Rights; the [United Nations] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations General Assembly Resolutions 50/167, 51/66, and 52/98 [Traffic in Women and Girls]; the Final Report of the World Congress against Sexual Exploitation of Children (Stockholm, 1996); the Fourth World Conference on Women (Beijing, 1995); and the 1991 Moscow Document of the Organization for Security and Cooperation in Europe. *Id.*

Today, both communities abhor slavery in its modern form as it runs afoul of these well-established principles.[231] However, in order to effectively combat human trafficking, due to its transnational nature, cooperation and partnership among countries is required.[232] Thus, both the United States and the international community respectively enacted anti-trafficking legislation to jointly curb human trafficking.[233] For example, in 2000 the United States passed the TVPA and reauthorized it in subsequent years.[234] Internationally, the United Nations, the European Union, and the Council of Europe also passed measures to combat human trafficking.[235] Other international, regional, and sub-regional organizations have also undertaken initiatives to fight trafficking in persons.[236]

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231. *Id.*; For a detailed table of international treaties and instruments from the year of 1814 to 2010, see GALLAGHER, *supra* note 55, at xxiii – lvi.

232. *Partnerships*, U.S. DEP'T OF STATE, http://www.state.gov/j/tip/4p/partner/ (last visited Mar. 18, 2013); *See also* U.N. OFFICE ON DRUGS AND CRIME, INTERNATIONAL FRAMEWORK FOR ACTION: TO IMPLEMENT THE TRAFFICKING IN PERSONS PROTOCOL 9 (2009), *available at* http://www.unodc.org/documents/human-trafficking/Framework_for_Action_TIP.pdf [hereinafter UNODC, INTERNATIONAL FRAMEWORK FOR ACTION].

233. *International, Regional, and Sub-Regional Organizations Combating Trafficking in Persons*, U.S. DEP'T OF STATE, http://www.state.gov/j/tip/rls/tiprpt/2011/166862.htm (last visited Mar. 18, 2013) [hereinafter U.S. Dep't of State, *International*].

234. *See supra* Part II.A.

235. U.S. Dep't of State, *International*, *supra* note 233.

236. *See* African Union (Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children (2006)(being updated for 2011-2013)); Association of Southeast Nations (ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children (2004)); Commonwealth of Independent States (Agreement on the Cooperation of the CIS Member States in Combating Trafficking in Persons, Human Organs and Tissues (2005), Programme of Cooperation of the Member States of the Commonwealth of Independent States in Combating Human Trafficking (2011-2013); Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT Memorandum of Understanding on Cooperation Against Trafficking in Greater Mekong Sub-Region (2004), Second COMMIT Sub-Regional Plan of Action (2008-2010)); International Labour Organization (ILO Convention No. 29 on Forced Labour, ILO Convention No. 105 on Abolition of Forced Labour, ILO Convention No. 182 On the Worst Forms of Child Labour); Economic Community of West African States (ECWAS Declaration on Fight against Trafficking in Persons (2001), ECOWAS Initial Plan of Action against Trafficking in Persons (2002-2003), extended until 2011), Joint ECOWAS/ECCAS Regional Plan of Action to Combat Trafficking in Persons, especially Women and Children (2006-2008)); League of Arab States (Arab Framework Act on Combating Trafficking in Persons (2008), Arab Initiative to Combat Trafficking in Persons (2010)); Organization of American States (Work Plan to Combat Trafficking in Persons in the Western Hemisphere 2010-2012); Organization for Security and Cooperation in Europe (OSCE Action Plan to Combat Trafficking in Human Beings (2003), Platform for Action Against Human Trafficking (2007)); Regional Conference on Migration (Regional Conference on Migration Plan of Action); Southern African Development Community (SADC Regional Plan of Action on Trafficking in Persons (2009-2019); and the South Asian Association for Regional Cooperation (SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002)). U.S. Dep't of State, *International*, *supra* note 233; *See also* U.N. Office

The US Department of State acknowledged that while the Trafficking Victims Protection Act] "meaningfully affects the Thirteenth Amendment to the US Constitution, [it] also reflects the norms of international anti-slavery law."[237] In the 2009 US Attorney General's Annual Report to Congress and Assessment of US Government Activities to Combat Trafficking in Persons, the US government recommended "increase[d] efforts to exchange best practices, lessons learned, and research with UN agencies and international organizations ... that provide technical assistance to combat human trafficking."[238] Through these exchanges of information and lessons learned, the United States and the international community can discover new and effective methods to fight human trafficking and also learn from each other the pitfalls to avoid. The United States, the United Nations, the European Union, and the Council of Europe have coordinated efforts to effectively combat human trafficking.[239] The following sections of this Note will examine these measures taken by the United Nations, the European Union, and the Council of Europe to inhibit human trafficking.

A. The United Nations, the European Union, and the Council of Europe

1. The United Nations

"The United Nations is an international organization founded in 1945 after the Second World War by 51 countries committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights."[240] The UN General Assembly adopted the Protocol to Prevent,

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of the High Comm'r for Human Rights, *Summary of Regional and Sub-Regional Structures and Initiatives to Counter Trafficking in Persons*, (Dec. 2010), *available at* http://www.ohchr.org/Documents/Issues/Trafficking/Dakar_summary_structures_en.pdf [hereinafter OHCHR, *Summary of Regional*], for a detailed description of each organization and their initiatives. Some of these regional legal instruments including, but not limited to, the Ouagadougou Action Plan, ECOWAS Initial Plan, OSCE Action Plan, ECWAS Declaration, ASEAN Declaration are considered "soft" laws of trafficking. Gallagher, *supra* note 55, at 141 n.567-570. "Soft" law on trafficking has two meanings: "[it] can refer to principles contained in treaties [that] do not prescribe precise rights or obligations or otherwise provide precise directives as to which behaviors its authors are committed to" or it can "refer to nontreaty instruments that, despite often employing the 'hard' language of obligation, do not, of themselves bind States." *Id.* at 139.

237. 2011 TIP REPORT, *supra* note 9, at 16.

238. *Attorney General's 2009 Annual Report, supra* note 18, at 13.

239. SISKIN &WYLER, *supra* note 5, at 24; Caroline O'Reilly, *Coordination Between International Agencies to Combat Trafficking in Human Beings*, ILO (Sept. 13, 2010), http://www.ilo.org/sapfl/Informationresources/Speeches/WCMS_144758/lang--en/index.htm.

240. *UN at a Glance,* UNITED NATIONS, http://www.un.org/en/aboutun/index.shtml (last visited Mar. 18, 2013). To date, there are a total of 193 members in the United Nations, with South Sudan as the most recent addition in 2011. *Growth in United Nations membership, 1945 – present,* UNITED NATIONS, http://www.un.org/en/members/growth.shtml (last visited

Suppress, and Punish Trafficking in Persons, especially Women and Children (the "UN Protocol"), supplementing the Convention against Transnational Organized Crime (the "UN Convention") on November 15, 2000.[241] To date, 154 countries are party to the UN Protocol and of the 154 countries, 117 have signed it.[242] The UN Protocol is the "first globally legally binding instrument with an agreed definition on trafficking in persons."[243] It requires ratifying States to criminalize the conduct set forth in Article 3 of the UN Protocol and to adopt anti-trafficking measures.[244] To ensure that the ratifying States are complying with the UN Protocol, Article 32(3)(d)-(e) of the UN Convention establishes a Conference of Parties whose duties include a periodical review and examination of the implementation of the UN Convention and the UN Protocol and making recommendations when necessary.[245] Reciprocally, each State is required to provide the Conference of Parties with information on the national measures adopted in implementing the Convention and the UN Protocol.[246] Lastly, and most importantly, the UN Protocol adopts a human rights approach in which "the human rights of trafficked persons shall be at the centre of all efforts to combat trafficking and to protect, assist and provide

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Mar. 18, 2013).

241. United Nations, UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO (2004), http://www.unodc.org/unodc/en/treaties/CTOC/ [hereinafter U.N. TOC Protocol]. The convention was supplemented with a total of three protocols. The two other protocols were the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms. It is important to note that before a State could become a party to the UN Protocol, the State must ratify the Convention. Gallagher, *supra* note 55, at 73. "A State Party to the Convention is not bound by a Protocol unless it also becomes party to that Protocol." *Id.* The Convention and the UN Protocol are interpreted together. *Id.*; *See also* U.N. Protocol, *supra* note 56, at art. 1.

242. UNITED NATIONS TREATY COLLECTION, CHAPTER XVIII PENAL MATTERS: 12. A. PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (Nov. 15, 2000) http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en. The United States signed the UN Protocol on December 13, 2000, and ratified it on December 3, 2005 following the Senate's advice and consent on October 7, 2005. SISKIN &WYLER, *supra* note 5, at 17. "Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act." *Glossary of Terms Relating to Treaty Actions*, UNITED NATIONS, http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#entry (last visited Mar. 18, 2013). Acceptance, approval, and accession have the same legal effect as ratification. *Id.*

243. U.N. TOC Protocol, *supra* note 241. *See* Part I.A. for the UN definition of trafficking in persons. *Id.*

244. *Id. See also* U.N. Protocol, *supra* note 56, at art. 3 & 5.

245. SCARPA, *supra* note 5, at 70; *See also* U.N. GENERAL ASSEMBLY, UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME: RESOLUTION / ADOPTED BY THE GENERAL ASSEMBLY, (2001), A/RES/55/25, art. 32, *available at* http://www.unhcr.org/refworld/docid/3b00f55b0.html (last visited Mar. 18, 2013] [hereinafter U.N. Convention].

246. U.N. Convention, *supra* note 245, at art. 32(5).

redress to those affected by trafficking."[247]

2. The European Union

The European Union is an economic and political partnership of twenty-seven countries.[248] "It [delivered] half a century of peace, stability, and prosperity, helped raise living standards, launched a single European currency [Euro]," and is progressively building a single Europe-wide market in which people, goods, services, and capital move among Member States as freely as within one country.[249] Although the European Union was primarily formed for an economic purpose, it has evolved into an organization that promotes human rights and democracy as well.[250] The three main pillars of the European Union are economic harmonization, a common security and foreign policy, and justice and home affairs.[251] On July 19, 2002, the Council of European Union adopted the Council Framework Decision on Combating Trafficking in Human Beings (the "EU Decision"), a legally binding instrument to combat human trafficking.[252] It required all the Member States to "harmonize their domestic criminal

247. Roza Pati, *States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia,* 29 B.U. INT'L L.J. 79, 125 (2011).

248. *How the EU Works*, EUROPEAN UNION, http://europa.eu/about-eu/basic-information/index_en.htm (last visited Mar. 18, 2013). The twenty-seven countries or Members are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden, and United Kingdom. *How the EU Works: Countries,* EUROPEAN UNION, http://europa.eu/about-eu/countries/index_en.htm (last visited Mar. 18, 2013).

249. *How the EU Works, supra* note 248.

250. *Id.*

251. OHCHR, *supra* note 236, at 17.

252. European Union: Council of the European Union, *Council Framework Decision 2002/629 on Combating Trafficking in Human Beings*, 19 July 2002, 2002/629/JHA, 2002 O.J. (L203), [hereinafter EU, *Council Framework Decision*], *available at* http://www.unhcr.org/refworld/docid/3ddcfb7b2.html (last visited Mar. 18, 2013) The Council of European Union "is where national ministers from each EU country meet to adopt law and coordinate policies." *See also* European Union, COUNCIL OF EUROPEAN UNION, http://europa.eu/about-eu/institutions-bodies/council-eu/index_en.htm (last visited Mar. 18, 2013). The Council of European Union "passes EU laws, coordinates the broad economic policies of EU member countries, signs agreements between the EU and other countries, approves the annual EU budget, develops the EU's foreign and defence policies, and coordinates cooperation between courts and police forces of member countries" *Id.* However, the Council of European Union should not be confused with another European Union institution called the European Commission. *Id.* "The European Commission is the [European Union's] executive body and represents the interests of Europe as a whole (as opposed to the interests of individual countries)." *About the European Commission,* EUROPEAN COMM'N, http://ec.europa.eu/about/index_en.htm (last updated Nov. 16, 2012).

legislation" with the EU Decision before August 1, 2004.[253] To ensure compliance, it obliged the Council to assess each Member State's implementation of the EU Decision and to prepare a report detailing the assessment for the Commission.[254] Furthermore, on June 4, 2009, the Council invited all Member States to participate in an informal EU network of National Rapporteurs or equivalent mechanisms, which had "the task of ...monitoring the implementation of measures envisaged in the Framework Decision."[255]

Although the EU Decision represented a major step for the European Union in its fight against human trafficking, it has been criticized for primarily being a criminal justice response instead of being victim-centered.[256] Thus, on April 5, 2011, the European Union adopted a new Directive (the "2011 Directive") on preventing and combating trafficking in human beings and protecting victims, which replaced the 2002 Council Framework Decision.[257] The 2011 Directive "takes a victim centered

253. Connie Rijken & Eefje de Volder, *The European Union's Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings: A Call on the EU to Take THB-Sensitive Action in Relevant Areas of Law*, 25 CONN. J. INT'L L. 49, 55 (2009); *See also Council Framework Decision*, *supra* note 252, at art. 10. Member States are also required to provide "the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision" to the General Secretariat of the Council by August 1, 2004. *Id.*

254. EU, COUNCIL OF FRAMEWORK DECISION, *supra* note 252, at art. 10.

255. Gallagher, *supra* note 55, at 109.; *See also National Rapporteurs*, EUROPEAN COMM'N, http://ec.europa.eu/anti-trafficking/section.action?sectionPath=National+Rapporteurs (last updated Nov. 1, 2012); *See also* European Comm'n Fight Against Trafficking in Human Beings, *Council Conclusions on Establishing an Informal EU Network of National Rapporteurs* (June 4, 2009), *available at* http://ec.europa.eu/anti-trafficking/download.action?nodePath=%2FEU+Policy%2FCouncil+Conclusions+on+National+Rapporteur+Network+2009_en.pdf&fileName=Council+Conclusions+on+National+Rapporteur+Network+2009_en.pdf&fileType=pdf. In the 2011 EU Directive, it mandated Member States to take necessary measures to establish national rapporteurs or equivalent mechanisms to monitor the implementation of the Directive at the national level. *See infra* note 257, at art. 19.

256. Rijken & de Volder, *supra* note 253, at 49. Article 7 of the EU Decision only "outline[d] minimum protection measures for trafficking victims, establishing that the investigations and prosecutions of the offences covered by the Framework Decision should not be dependent on their report or accusation of the traffickers." SCARPA, *supra* note 5, at 181. Thus, the lack of protection for victims of trafficking became one of the biggest criticisms for the EU Decision and also one of the primary reasons for the passage of the 2011 Directive, which repealed the EU Decision. Gallagher, *supra* note 55, at 99 & 106.

257. The European Parliament and the Council of the European Union, Directive 2011/36/EU, of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing, Council Framework Decision 2002/629/JHA, 2011 O.J. (L 101/1), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF (last visited Mar. 18, 2013) "EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so." *Application of EU Law: What Are EU Directives?*, EUROPEAN COMM'N,

approach, including a gender perspective, to cover actions in different areas such as criminal law provisions, prosecution of offenders, victims' support and victims' rights in criminal proceedings, prevention and monitoring of the implementation."[258] Member States are required to "transpose [the Directive] into national legislation by April 6, 2013."[259]

3. The Council of Europe

The Council of Europe is an international organization comprised of forty-seven countries of Europe.[260] "The primary aim of the Council of Europe is to create a common democratic and legal area throughout the whole of the continent, ensuring respect for its fundamental values: human rights, democracy and the rule of law."[261] Since the 1980s, the Council has actively fought trafficking in human beings.[262] On May 16, 2005, the Council of Europe adopted the Council of Europe Convention on Action against Trafficking in Human Beings (the "CoE Convention").[263] The CoE Convention is the "only regional international treaty in this area that primarily focuses on the protection of the rights of the victim."[264] Article 1

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http://ec.europa.eu/eu_law/introduction/what_directive_en.htm (last updated June 25, 2012).

258. *Directive 2011/36/EU,* EUROPEAN COMM'N FIGHT AGAINST TRAFFICKING IN HUMAN BEINGS, NEW EU DIRECTIVE TO FIGHT HUMAN TRAFFICKING, http://ec.europa.eu/anti-trafficking/entity.action?id=77172b8d-5d04-4cf0-b276-49f733ab93c8 (last updated Dec. 19, 2011); The UN agencies also acknowledge and value the European Union for stepping up its efforts in terms of strengthening victim protection and focusing on prevention in the new Directive. UNODC, ET AL., Joint UN Commentary on the EU Directive: A Human Rights-Based Approach 16 (2011), *available at* http://www.unwomen.org/wp-content/uploads/2011/12/UN-Commentary-EU-Trafficking-Directive-2011.pdf [hereinafter UNODC, JOINT UN COMMENTARY ON THE EU DIRECTIVE].

259. 2011 EU Directive, *supra* note 257, at art. 22. The 2011 EU Directive also contains implementation and reporting procedures. *Id.* at art. 22-23.

260. The forty-seven countries are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom. *The Council of Europe in Brief: 47 Countries, one Europe*, COUNCIL OF EUROPE, http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en (last visited Mar. 18, 2013).

261. *The Council of Europe in Brief: Our Objectives*, COUNCIL OF EUROPE, http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en (last visited Mar. 18, 2013).

262. OHCHR, *supra* note 236, at 14.

263. COUNCIL OF EUROPE, COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS, May 16, 2005, C.E.T.S 197, [hereinafter CoE Convention]. *available at* http://www.unhcr.org/refworld/docid/43fded544.html (last visited Mar. 18, 2013).

264. *See* OHCHR, *supra* note 236, at 14. The CoE Convention adopted the same definition of "trafficking in persons" and "trafficking in children" as the UN Protocol.

of the CoE Convention provides that the purposes of the CoE Convention are "to prevent and combat trafficking in human beings, while guaranteeing gender equality; to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution . . . ."[265] To date, thirty-four of the forty-seven Member States have ratified the CoE Convention and an additional nine Member States have signed it.[266] It is also open to ratification by the European Union and by States who are not members of the Council of Europe.[267]

Article 1(2) of the CoE Convention provides that "[i]n order to ensure effective implementation of its provisions by the Parties, this Convention sets up a specific monitoring mechanism."[268] Article 36 of the CoE Convention creates a monitoring mechanism composed of two bodies: (1) the Group of Experts on Action against Trafficking in Human Beings (GRETA), which consists of ten to thirty-five highly qualified experts; and (2) the Committees of the Parties, a political body consisting of representatives from all the parties to the CoE Convention.[269] Further, Article 38 sets out the rules and procedure for evaluating the

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SCARPA, *supra* note 5, at 163; *See also* CoE Convention, *supra* note 263, at 37. The Council of Europe acknowledges in their Explanatory Report on the CoE Convention that in order to effectively combat human trafficking and help its victim, it is important to adopt an internationally recognized definition for the term, "trafficking in human beings." *Id.* However, unlike the UN Protocol, the CoE Convention "applies to trafficking cases irrespective of whether they involve organized crime or are transnational in nature." Pati, *supra* note 247, at 122.

265. CoE Convention, *supra* note 263, at art. 1. "Trafficking in human beings can be seen as both a violation of human rights and a form of gender discrimination and violence against women and girls." UNODC, JOINT UN COMMENTARY ON THE EU DIRECTIVE, *supra* note 258, at 20.

266. The thirty-four States that ratified the CoE Convention are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, France, Georgia, Ireland, Italy, Latvia, Luxembourg, Malta, Moldova, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, The former Yugoslav Republic of Macedonia, Ukraine, and United Kingdom. *Council of Europe Convention on Action Against Trafficking in Human Beings C.E.T.S No. 197*, COUNCIL OF EUROPE TREATY OFFICE, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=04/11/2011&CL=ENG (last updated Apr. 11, 2011) [hereinafter Council of Europe Treaty Office]. "Ratification is an act by which the State expresses its definitive consent to be bound by the treaty. Then, the State Party must respect the provisions of the treaty and implement it." *Glossary of the Treaties*, COUNCIL OF EUROPE, http://conventions.coe.int/?pg=/Treaty/Glossary_en.asp (last visited Mar. 18, 2013).

267. *See* OHCHR, *supra* note 236, at 14. To date, neither the European Union nor any non-member State (Belarus, Canada, Holy See, Japan, Mexico, United States of America) has signed the CoE Convention. *See also* Council of Europe Treaty Office, *supra* note 266.

268. CoE Convention, *supra* note 263, at art. 1(2).

269. *Id.* at art. 36-37. See also SCARPA, *supra* note 5, at 158.

implementation of the CoE Convention.[270] Specifically, it requires GRETA to evaluate the Parties' implementation of the CoE Convention by "conducting . . . an evaluation procedure divided into rounds, so that each round can be dedicated to the in-depth analysis of the implementation by States Parties of some specific provisions of the Convention."[271] It further granted GRETA the discretion to determine the length of each round.[272] For example, in February 2010, GRETA commenced its first evaluation round by sending the first ten countries that became Parties to the CoE Convention a questionnaire for information.[273] The first round evaluation lasts four years and is currently scheduled to end in 2013.[274]

B. A Comparative Analysis of the Un Protocol, the 2011 Directive, and The CoE Convention

The following sections will compare and contrast the UN Protocol, the 2011 Directive, and the CoE Convention in two aspects: protection of the victim and prosecution.

1. Protection

"Victims who break free from their traffickers' control generally find themselves in a position of great insecurity and vulnerability."[275] The UN Human Rights - Office of the High Commissioner of Human Rights released a Commentary for the Recommended Principles and Guidelines on Human Rights and Human Trafficking, which provides that the "[s]tates

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270. CoE Convention, *supra* note 263, at art. 38.

271. *Id. See also* SCARPA, *supra* note 5, at 158.

272. CoE Convention, *supra* note 263, at art. 38.

273. *Action Against Trafficking in Human Beings: 1st Evaluation Round: Timetable 2010 – 2013*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Monitoring/Timetable_en.asp#TopOfPage (last visited Mar. 18, 2013). The first ten countries were Republic of Moldova, Romania, Austria, Albania, Georgia, Slovak Republic, Bulgaria, Croatia, Denmark, and Cyprus. *Id.* The deadline for the first group to reply by was September 1, 2010. *Id.* In February 2011, the first evaluation round questionnaire was sent to a second group consisting of the next ten parties to the CoE Convention. *Id.* The second group of countries was France, Bosnia and Herzegovina, Norway, Malta, Portugal, Latvia, Armenia, Montenegro, Poland, and United Kingdom. *Id.* The deadline for the second group to reply by was September 1, 2011. In February 2012, the first evaluation round questionnaire was sent to the third group of the next ten parties to the CoE Convention. *Id.* The third group of countries was Spain, Luxembourg, Serbia, Belgium, the Former Yugoslav Republic of Macedona, Slovenia, The Netherlands, Sweden, Azerbaijan, and Ireland. *Id.* The deadline for the third group to reply by was June 1, 2012. *Id.* Tentatively, in February of 2013, the first evaluation round questionnaire was scheduled to be sent to the fourth and last group of countries (Italy, San Marino, Ukraine, Andorra, Iceland, and Finland). *Id.*

274. *Id.*

275. Gallagher, *supra* note 55, at 297.

shall ensure that trafficked persons are protected from further exploitation and harm and to have access to adequate physical and psychological care."[276] One author notes that

> [t]he nature of the obligation on States to provide care and support of victims of trafficking is inextricably tied up with their status as victims of crime and victims of human rights violations – a status that, as noted above, provides such victims with a right to be treated with humanity and with respect for their dignity and human rights, as well as with an entitlement to measures that ensure their well-being and avoid re-victimization.[277]

The UN Protocol, the 2011 Directive, and the CoE Convention respectively contain provisions that protect and assist victims of trafficking. Examples of these provisions include prohibition against prosecution and detention of the victim,[278] better identification of the victim,[279] and protecting the privacy and identity of the victim.[280] The following sections will focus on the physical and psychological care and access to legal counsel provisions to highlight the victim-centered aspect of the UN Protocol, the 2011 Directive, and the CoE Convention.

First, "[r]ecovery is a crucial form of reparation for trafficked persons, which includes medical and psychological care, as well as legal and social services."[281] The UN Protocol, the 2011 Directive, and the CoE Convention each provide for victim care and support. For example, while Article 6 of the UN Protocol does not obligate State Parties to provide any specific care, it does require the State Parties to "consider implementing

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276. U.N. HUMAN RIGHTS, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING: COMMENTARY 142 (2010), [hereinafter OHCHR, RECOMMENDED PRINCIPLES AND GUIDELINES], *available at* http://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf.

277. Gallagher, *supra* note 55, at 305.

278. 2011 EU Directive, *supra* note 257, at art. 8. *See also* CoE Convention, *supra* note 263, at art. 12 & 26.

279. 2011 EU Directive, *supra* note 257, at art. 11(4) & 18(3). *See also* CoE Convention, *supra* note 263, at art. 10. *See also* Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, Human Rights Council, ¶ 64, U.N. Doc. A/HRC/17/35 (Apr. 13, 2011), [hereinafter *Report of the Special Rapporteur*], *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-35.pdf. States should ensure that relevant authorities are trained in the identification of the trafficked person in order to ensure that trafficked persons have the opportunity to seek remedies as victims of human rights violations.

280. U.N. Protocol, *supra* note 56, at art. 6(1); 2011 EU Directive, *supra* note 257, at art. 12(3); CoE Convention, *supra* note 263, at art. 11.

281. *Report of the Special Rapporteur, supra* note 279, at ¶ 24.

measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society."[282] It suggested the following measures be provided while requiring the State Parties to also take into account the age, gender, and special needs of the victim, especially the special needs of children: appropriate housing; legal advice in the victim's language; medical, psychological and material assistance; and employment, educational, and training opportunities.[283]

Article 11(5) of the 2011 Directive, unlike the UN Protocol, obligates Member States to provide assistance and support services on a consensual and informed basis.[284] A human rights approach, which the 2011 Directive adopted, requires that provision of care and support to the victim be informed and non-coercive.[285] Article 11(5) of the 2011 Directive mandated Member States to ensure that victims of trafficking, "including persons provisionally identified as victims of trafficking or at risk of being trafficked" be provided with the following assistance and support: appropriate and safe accommodation, material assistance such as food and clothing, medical and psychological treatment, counseling and information related to health care and their legal rights, and translation and interpretation services.[286]

Similar to the UN Protocol, the 2011 Directive further requires Member States to attend to victims with special needs under Article 11(7).[287] However, the 2011 Directive provides, more specifically than the UN Protocol, that victims with special needs includes those who are pregnant, disabled, have a mental or psychological disorder, or are suffering from a serious form of psychological, physical or sexual violence. [288] Moreover, Member States are to ensure that the assistance and support for the victim is not made conditional on his or her willingness to cooperate in a criminal investigation or prosecution.[289] However, this is qualified with the additional language "without prejudice to Directive 2004/81/EC or similar national rules."[290] Therefore, access to support and assistance under

282. U.N. Protocol, *supra* note 56, at art. 6(3).

283. *Id.* at art. 6(4).

284. 2011 EU Directive, *supra* note 257, at art. 11(5).

285. UNODC, JOINT UN COMMENTARY ON THE EU DIRECTIVE, *supra* note 258, at 54.See also 2011 EU Directive, *supra* note 257, at pmbl. ¶ 7.

286. UNODC, JOINT UN COMMENTARY ON THE EU DIRECTIVE, *supra* note 258, at 54. *See also* 2011 EU Directive, *supra* note 257, at art. 11(5).

287. 2011 EU Directive, *supra* note 257, at art. 11(7).

288. *Id.*

289. *Id.* at art. 11(3).

290. *Id.* Directive 2004/81/EC provides victims with temporary residence but conditional on their cooperation with the authorities. However, the Joint UN Commentary on the EU Directive has stated that such conditions "not only compromise[s] trafficked persons' rights,

the 2011 Directive is not entirely unconditional.

Similar to the 2011 Directive, Article 12 of the CoE Convention mandates each Party to provide on a consensual and informed basis the following assistance and support measures for victims of trafficking, including those who have been "provisionally identified as such[, that]. . . cannot be reserved only for those agreeing to act as witnesses[:]"[291]

> [A]ppropriate and secure accommodation, psychological and material assistance . . . ; access to emergency medical treatment; translation and interpretation services, when appropriate; counseling and information, in particular as regards to their legal rights and the services available to them, in a language that they can understand; assistance to enable their rights and interest to be presented and considered at appropriate stages of criminal proceedings against offenders; [and] access to education for children.[292]

Requiring State Parties to provide assistance on an unconditional basis is a critical distinction that separates the CoE Convention from the 2011 Directive.[293] Placing conditions on victim assistance runs contrary to a victim-centered or human rights based approach.[294] It "denies the legal nature of both the [victim's] entitlement [to receive assistance as a victim of a human rights violation] and [a reciprocal] obligation [of the State to provide such assistance]."[295]

The Explanatory Report of the CoE Convention (the "Explanatory Report") provides the rationale for the aforementioned assistance measures.[296] For example, it recommends special protected shelters for victims of trafficking when appropriate and secure accommodation.[297] Such

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including to full recovery, but may also be counterproductive from a law enforcement perspective since it is often unclear what 'cooperation' is expected from trafficked persons." UNODC, JOINT UN COMMENTARY ON THE EU DIRECTIVE, *supra* note 258, at 46-47.

291. Gallagher, *supra* note 55, at 116.

292. CoE Convention, *supra* note 263, at art. 12(1).

293. *Id.* at art. 12(6). While the UN Protocol does not make any reference to this, the Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council does state that "protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings." Office of High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Addendum*, at 3, U.N. Doc. E/2002/68/Add.1 (May 20, 2002), *available at* http://www.un.org/ga/president/62/ThematicDebates/humantrafficking/N0240168.pdf. [hereinafter U.N. Economic and Social Council, *Recommended Principles*]. Therefore, it can be inferred that the United Nations is supportive of this principle of separating protection and support from legal cooperation. Gallagher, *supra* note 55, at 299.

294. UNODC, JOINT UN COMMENTARY ON THE EU DIRECTIVE, *supra* note 258, at 47.

295. Gallagher, *supra* note 55, at 298.

296. *See generally* COUNCIL OF EUROPE, EXPLANATORY REPORT, *supra* note 264.

297. *Id.* at ¶ 152; *See also* Organization for Security and Co-operation in Europe, *OSCE*

shelters would provide stability and security to the victim, round-the-clock victim reception, immediate response to emergencies, and qualified personnel who can assist the victim.[298] It also highlights the importance of language assistance for victims who do not speak the language of the destination country in order to minimize the feeling of isolation and to ensure that they are able to understand their legal rights.[299] Moreover, it acknowledges the significance of providing psychological assistance to help the victim overcome trauma and reintegrate into society.[300] Therefore, in comparison to the 2011 Directive and the UN Protocol, the CoE Convention is more explicit and substantive in terms of assisting the victim's recovery. Overall, providing comprehensive care and support is essential to an effective recovery for the victim and an obligation to the victim.

Second, access to legal assistance is critical in "ensur[ing] that victims are able to participate in legal proceedings freely, safely, and on the basis of full information."[301] Both the 2011 Directive and the CoE Convention contain a provision for free legal counseling and information for victims of human trafficking. For example, Article 12 of the 2011 Directive requires Member States to ensure that victims of trafficking have access without delay to legal counseling regarding legal representation and for claiming compensation.[302] Having access "without delay" to legal counseling is a key element that distinguishes the 2011 Directive from the UN Protocol and the CoE Convention. It serves as a "safeguard against undue delays" and ensures that "legal aid and legal counseling are to be granted without delay, including before a decision is reached regarding the financial means of the victim."[303] The 2011 Directive further obligates free legal counseling and legal representation when the victim does not have sufficient financial resources.[304] Often, trafficked persons will not be able to afford legal counsel; the 2011 Directive takes this into account.[305]

Action Plan to Combat Trafficking in Human Beings, July 24, 2003, Decision No. 557; PC.DEC/557, *available at*: http://www.unhcr.org/refworld/docid/4a54bc2dd.html (last visited Mar. 18, 2013). It also explained that shelters can "provide safety, access to independent advice and counseling in a language known by the victim, first hand medical assistance and an opportunity for reflection delay after the experienced trauma." *Id.* § 4.1. It further stated that access to shelters for all victims of trafficking should be provided regardless of their "readiness to co-operate with authorities in investigations." *Id.* § 4.2. The Organization for Security and Cooperation in Europe is comprised of fifty-six countries and is the "world's largest regional security organization." Org. for Sec. & Cooperation in Europe, *Who We Are*, http://www.osce.org/who (last visited Mar. 18, 2013).

298. COUNCIL OF EUROPE, EXPLANATORY REPORT, *supra* note 264, at ¶ 154.

299. *Id.* at ¶158.

300. *Id.* at ¶156.

301. UNODC, JOINT UN COMMENTARY ON THE EU DIRECTIVE, *supra* note 258, at 66.

302. 2011 EU Directive, *supra* note 257, at art. 12.

303. *See supra* note 301.

304. 2011 EU Directive, *supra* note 257, at art. 12.

305. *Report of the Special Rapporteur, supra* note 279, ¶ 47. *See also supra* notes 99-

Article 15(2) of the CoE Convention, while similar to Article 12 of the 2011 Directive in mandating each Party to provide legal assistance and free legal aid to victims, differs in one aspect.[306] The Explanatory Report clarifies that Article 15(2) "does not give the victim an automatic right to free legal aid. It is for each Party to decide the requirements for obtaining such aid."[307] However, it also states that Parties must additionally consider Article 6 of the Council of Europe's European Convention on Human Rights (the "ECHR") when implementing Article 15(2).[308] Article 6 of the ECHR provides for the right to a fair trial.[309] The Explanatory Report provides that "[e]ven though Article 6(3)(c) of the ECHR provides for free assistance from an officially appointed lawyer only in criminal proceedings," the European Court of Human Rights case law also recognizes the right to free legal assistance in a civil matter provided by Article 6(1) of ECHR is determined by the Court.[310] The Court recognizes that "effective access to a court may necessitate free legal assistance."[311] Therefore, in determining whether to grant free legal assistance, the Court considers the "complexity of the procedure" and the "emotional character of a situation" to discern a person's ability to present their case.[312] The Explanatory Report concludes that "even in the absence of legislation granting free legal assistance in civil matters, it is for the courts to assess whether, in the interest of justice, an applicant who is without financial means should be granted legal assistance if unable to afford a lawyer."[313] Thus, while the CoE Convention requires State Parties to provide legal

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306. CoE Convention, *supra* note 263, at art. 15(2).

307. COUNCIL OF EUROPE, EXPLANATORY REPORT, *supra* note 264, at 53.

308. *Id.* The European Convention on Human Rights was opened for signature in Rome on 4 November 1950; it entered into force on 3 September 1953. The Convention gave effect to certain of the rights stated in the Universal Declaration of Human Rights and established an international judicial organ [European Court of Human Rights] with jurisdiction to find against States that do not fulfill their undertakings. COUNCIL OF EUROPE, EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 5 (2012), *available at* http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_JANV2012.pdf. The European Convention on Human Rights is applicable at the national level. It has been incorporated into the legislation of the States Parties, which have undertaken to protect the rights defined in the Convention. Domestic courts therefore have to apply the Convention. Otherwise, the European Court of Human Rights would find against the State in the event of complaints by individuals about failure to protect their rights. *Id.* "States that have ratified the Convention, also known as 'States Parties,' have undertaken to secure and guarantee to everyone within their jurisdiction, not only their nationals, the fundamental civil and political rights defined in the Convention." *Id.*

309. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUROPE, (1950), available at http://www.unhcr.org/refworld/docid/3ae6b3b04.html (last visited Mar. 18, 2013).

310. COUNCIL OF EUROPE, EXPLANATORY REPORT, *supra* note 264, at ¶196.

311. *Id.*

312. *Id.*

313. *Id.*

assistance and free legal aid to its victims, such access still depends on the conditions set by State Parties and the standards of Article 6 of the ECHR.

Unlike the 2011 Directive and the CoE Convention, the UN Protocol does not specifically contain a provision for free legal assistance to victims of trafficking. The UN Protocol does at least require each State Party to ensure that their domestic legal or administrative system contain measures that provide victims of trafficking with information on relevant court and administrative proceedings and assistance to enable them to testify in criminal proceedings against the trafficker.[314] However, on April 13, 2011, Joy Ngozi Ezeilo, the UN Special Rapporteur on trafficking in persons, especially women and children, submitted a report to the UN Human Rights Council in which she recommended that States Parties provide victims of trafficking with free legal assistance because it is an "essential pre-condition for all trafficked persons to exercise their right to an effective remedy."[315] Furthermore, she recommended that State Parties ensure that the lawyers who are providing such assistance are adequately trained in the rights of trafficked persons and able to effectively communicate with victims of human rights violations.[316] Overall, legal assistance provided should be timely, free, and effective to ensure that the victim is meaningfully represented.

2. Prosecution

"A criminal justice response to trafficking . . . seeks both to end impunity for traffickers and to secure justice for victims . . . ."[317] To effectively combat human trafficking, criminalization is an essential component to punish the trafficker and secure justice for the victim.[318] However, even if the trafficker is arrested or punished, the illegally procured proceeds of the trafficking crime are often still within the control of the trafficking network, thus sustaining the criminal enterprise's activities.[319] Part of securing justice for the victim includes seizing the proceeds of the trafficking crime in order to ensure that the trafficker is not rewarded for his or her unjust activities.[320]

> [A]ssets and proceeds of trafficking could include property and monies such as: profits from the services and exploitation of the victim; costs paid by victims (including

314. U.N. Convention, *supra* note 245, at art. 25(1)-(3).
315. *Report of the Special Rapporteur, supra* note 279, ¶ 74.
316. *Id.*
317. Gallagher, *supra* note 55, at 370.
318. *Id.* at 371.
319. *Id.* at 400
320. *Id.*

> for passports, visas, or transport), for example where the victim has paid for illegally facilitated migration and subsequently became a victim of trafficking; vehicles used to transport victims; factories, brothels, boats and farms where the exploitation took place; profits from the sale or resale of a person from one trafficker to another; and the value of unpaid services and salaries that would otherwise have been paid to the persons exploited.[321]

Thus, the following sections will focus on the asset confiscation aspect of the UN Protocol, the 2011 Directive, and the CoE Convention. State Parties that ratified both the UN Convention and the UN Protocol are required, under Article 12 of the UN Convention, to adopt measures in their respective legal systems for the confiscation of proceeds derived from the trafficking crime and the instrumentalities that were used in the commission of such crime.[322] The UN Convention also establishes "a number of mechanisms to enhance international cooperation with respect to confiscation in order to eliminate advantages to criminals presented by national borders and differences in legal systems."[323] These mechanisms ensure that traffickers do not have a safe haven to hide their illegal gains.[324] While the UN Convention does not specifically mandate how State Parties are to deal with the confiscated proceeds or property, it does provide that they are to "give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime . . . ."[325] The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking (the "UN Recommended Principles and Guidelines") further supports this principle by encouraging State Parties to make legislative provisions that specifically provide for the confiscated proceeds to be used to benefit the victim.[326] More importantly, it recommends the use of confiscated assets to finance a victim compensation fund.[327] The compensation fund would make

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321. *Id.* at 400-401.

322. U.N. Convention, *supra* note 245, at art. 12. "A State that is a party to the Convention and not the [UN] Protocol would be required to establish that trafficking, is under its law, a 'serious crime' as defined in the Convention for the provisions to apply to trafficking offences." OHCHR, RECOMMENDED PRINCIPLES AND GUIDELINES, *supra* note 276, at 221.

323. OHCHR, RECOMMENDED PRINCIPLES AND GUIDELINES, *supra* note 276, at 221. These mechanisms "enable countries to give effect to foreign freezing and confiscation orders and [allow] countries [to] work together in recovering criminal assets . . . ." Gallagher, *supra* note 55, at 400. *See* U.N. Convention, *supra* note 245, at art. 13.

324. Gallagher, *supra* note 55, at 400.

325. U.N. Convention, *supra* note 245, at art. 14(2).

326. U.N. Economic and Social Council, *Recommended Principles, supra* note 293, at 8.

327. *Id.*

the trafficker pay for the crime and provide reparations to the victim.

Similarly, Article 7 of the 2011 Directive also mandates its Member States to take necessary measures to ensure their local authorities are equipped to seize and confiscate the instrumentalities and proceeds from the trafficking offenses.[328] The Preamble of the 2011 Directive also emphasizes that the Member States should make full use of existing international legal instruments on asset confiscation in combating human trafficking.[329] Thus, it can be inferred that the 2011 Directive endorses the use of supplementary legislative tools to fortify the Member States' ability to confiscate the proceeds from traffickers. More importantly, the 2011 Directive takes a step further than the UN Recommended Principles and Guidelines and encourages Member States to use the confiscated instrumentalities and proceeds from the offenses under this Directive to "support victims' assistance and protection, including compensation of victims and Union trans-border law enforcement counter-trafficking activities . . . ."[330] Therefore, in addition to providing compensation for the victim, the confiscated proceeds and instrumentalities can also fund other victim assistance and law enforcement programs.

Article 23(3) of the CoE Convention also requires State Parties to adopt legislative or other measures to allow confiscation of instrumentalities and proceeds derived from the trafficking offenses.[331] The

328. 2011 EU Directive, *supra* note 257, at art. 7.

329. *Id.* at pmbl.¶ 13. The existing instruments are (1) Council of Europe, *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, Nov. 8, 1990, C.E.T.S 141, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm (last visited Mar. 2, 2012) [hereinafter *Convention on Laundering*]; (2) Council Framework Decision 2001/500/JHA, of the Council of European Union of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and Proceeds of Crime, 2001 O.J. (L182) 1 - 2, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:182:0001:0002:EN:PDF [hereinafter Council Framework Decision 2001], and (3) Council Framework Decision 2005/212/JHA, of the Council of European Union of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, 2005 O.J. (L68) 49, 51, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:EN:PDF [hereinafter Council Framework Decision 2005]. Article 3 of the Council Framework Decision 2005 extended the powers of confiscation to an offense committed within the Council Framework Decision 2001 and also the Council Framework Decision 2002 on combating trafficking in human beings. *Id.* at art. 3. See Council Framework Decision, *supra* note 252 on combat trafficking in human beings.

330. 2011 EU Directive, *supra* note 257, at pmbl. ¶ 13.

331. CoE Convention, *supra* note 263 at art. 23(3). The Explanatory Report provides that this provision correlates with the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [ETS No. 141] in that "confiscating the proceeds of crime is an effective anti-crime weapon." COUNCIL OF EUROPE, EXPLANATORY REPORT, *supra* note 263, at 61. Article 1 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provides the definitions for the following terms: proceeds, property, instrumentalities, and confiscation. *Convention on Laundering, supra* note 329, at art. 1(a)-(d).

CoE Convention recognizes that trafficking in human beings is primarily for financial profit. Therefore, measures depriving the traffickers of such assets are necessary to successfully combat human trafficking.[332] Similar to the 2011 Directive and the UN Recommended Principles and Guidelines, the CoE Convention suggests that the confiscated assets could be used to establish a "fund for victim compensation . . . ."[333] The Explanatory Report explains that even though a court may order a trafficker to compensate the victim, victims are rarely compensated because the trafficker has disappeared or has declared bankruptcy.[334] Thus, Article 15 the CoE Convention requires State Parties to guarantee compensation for the victim, and proposes the compensation fund as a possible means to facilitate that guarantee.[335]

Furthermore, similar to the 2011 Directive, the CoE Convention also suggests that the confiscated assets could finance "measures or programmes for social assistance to and social integration of victims."[336] However, upon a closer examination, the CoE Convention in contrast to the 2011 Directive, does not suggest that the confiscated assets be used for law enforcement counter-trafficking activities.[337] Therefore, it can be inferred that the 2011 Directive takes a broader approach to include funding for law enforcement activities from the confiscated assets, while the CoE Convention focuses more on victim compensation and recovery. Overall, asset confiscation can potentially serve as an effective method in disabling the trafficker's criminal enterprise, and provide funding for victim and law enforcement assistance.

IV. RECOMMENDATIONS

While Indiana toughened its stance against sex trafficking of a minor with increased penalties and jail time, the question remains, "What happens to the instrumentalities and profits derived from the trafficking crime?" This Note recommends that Indiana create an asset forfeiture provision in its human trafficking laws which would permit the forfeiture of instrumentalities and proceeds derived from the trafficking crime. Such deprivation decreases the profits that sustain the trafficker's criminal activity and provides the state with revenue to finance a human trafficking victims' fund. Assets from the trafficking victims fund can finance victim services and law enforcement activities. The following sections discuss in

332. COUNCIL OF EUROPE, EXPLANATORY REPORT, *supra* note 264, at 61.

333. CoE Convention, *supra* note 263, at art. 15(4).

334. COUNCIL OF EUROPE, EXPLANATORY REPORT, *supra* note 264, at 53.

335. CoE Convention, *supra* note 263, at art. 15(4); *See also* COUNCIL OF EUROPE, EXPLANATORY REPORT, *supra* note 264, at 53.

336. COUNCIL OF EUROPE, EXPLANATORY REPORT, *supra* note 264, at 53.

337. *Id.*

greater detail why Indiana should adopt an asset forfeiture provision into their human trafficking law.

A. Cutting the Lifeblood of the Trafficker

Indiana should adopt an asset forfeiture provision into their human trafficking laws as a way to undermine the human trafficking enterprises. By confiscating the illicit profits and removing the instrumentalities of the crime from circulation, asset forfeiture "strikes at the very core of criminal organizations."[338] For example, asset forfeiture has been instrumental in the fight against drug trafficking.[339] Profits are the driving force behind drug trafficking and racketeering.[340] International drug trafficking syndicates generate millions of US dollars from the smuggling and selling of illegal drugs in the United States.[341] These illicit profits fuel and sustain the drug trafficking enterprise.[342] Asset forfeiture allows law enforcement to remove the profits of the crime and "to ensure that 'crime does not pay.'"[343]

Similarly, asset forfeiture is integral to the fight against human trafficking.[344] Primarily, human trafficking is a profit-driven, low-risk crime.[345] In 2005, the ILO estimated that trafficked persons forced into or subject to economic exploitation generated $4 billion in annual profits.[346] It also estimated $28 billion in annual profits from forced commercial sexual exploitation, with $13.3 billion generated within industrialized countries.[347]

> When individuals are willing to buy commercial sex, they create a market and make it profitable for traffickers to sexually exploit children and adults. When consumers are willing to buy goods and services from industries that rely on forced labor, they create a profit incentive for labor traffickers to maximize revenue with minimal production

338. *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime Before the Subcomm. on Criminal Justice Oversight of the Comm. on the Judiciary*, 106TH CONG. 31 (1999) (statement of Sen. Patrick Leahy) *available at* http://www.gpo.gov/fdsys/pkg/CHRG-106shrg66959/pdf/CHRG-106shrg66959.pdf [hereinafter *Oversight of Federal Asset Forfeiture*].

339. *Id.* at 1.

340. *Id.*

341. *Id.* at 39.

342. *Id.* at 35.

343. *Id.*

344. Gallagher, *supra* note 55, at 400.

345. *Id.*

346. FATF, *supra* note 83, at 16.

347. *Id.*

costs.[348]

In addition, unlike drug trafficking where the trafficker has to "constantly restock their product as their commodity may be sold only once," the human trafficker can repeatedly exploit the trafficked person.[349] In other words, the human trafficker can sell and resell the trafficked person, while a drug trafficker has to expend time and resources in manufacturing the illegal drug again and run the risk of law enforcement discovering their illicit activities. Therefore, while drug trafficking may be very profitable, there are substantial risks.[350] Alternatively, human trafficking is a low-risk crime.[351] Factors such as lack of public awareness of the issue, law enforcement not adequately trained to respond, ineffective laws, lack of prosecution or investigation of the crime, and victims fearing reprisal against themselves and their families distinguish human trafficking as a low-risk crime.[352] Therefore, the combination of substantial profits and low risks makes human trafficking an appealing crime to a trafficker. Asset forfeiture raises the risks and lowers the profits and incentive for a criminal to either get involved with or continue the trafficking activity.[353]

Moreover, the illicit profits derived from the sale and resale of a person not only sustains the trafficking enterprise, but it also fuels other related crimes.[354]

> Criminal groups develop "horizontal interdependencies" . . . "which refers to the connections established among different activities by the same criminal organization and indicates a pattern of diversification. Criminal enterprises make use of the skills, routes, existing contacts and corrupt networks developed in certain markets in specific countries and expand into other illicit markets."[355]

The criminal enterprises involved in human trafficking are often linked to migrant smuggling, extortion, document fraud and forgery, money laundering, auto theft and drug trafficking.[356] Traffickers have also been

348. *Why Trafficking Exists*, POLARIS PROJECT, http://www.polarisproject.org/human-trafficking/overview/why-trafficking-exists (last visited Mar. 18, 2013).

349. SHELLEY, *supra* note 7, at 87.

350. *Id.* at 88.

351. *Id.* at 89.

352. *See generally, Why Trafficking Exists*, *supra* note 348.

353. Gallagher, *supra* note 55, at 400.

354. 2005 TIP REPORT, *supra* note 141, at 13-14.

355. ALEXIS ARONOWITZ ET AL., ORG. FOR SECURITY AND CO-OPERATION IN EUROPE, ANALYSING THE BUSINESS MODEL OF TRAFFICKING IN HUMAN BEINGS TO BETTER PREVENT THE CRIME 27 (2010) [hereinafter OSCE, ANALYSING THE BUSINESS MODEL].

356. *Id.* Konrad, *supra* note 6, at 80.

known to force their victims to commit illegal activities such as stealing and drug trafficking.[357] Therefore, criminal fines and imprisonment are inadequate to fight human trafficking unless the proceeds of the trafficking crime are removed and the trafficking enterprise is disabled.[358] Asset forfeiture ensures that the proceeds from the trafficking offense are not used to perpetuate related criminal activities in addition to the trafficking offense.

Additionally, asset forfeiture could take the instrumentalities of crime out of circulation.[359] For example, if a drug dealer uses a house to sell drugs to children as they pass by on the way to school, the removal of the residence as a drug source deters the crime and helps ensure the safety of the community.[360] Similarly, the forfeiture of real property prevents the trafficker's enterprise from continuing with illegal activities such as prostitution.[361] Furthermore, forfeiture of a vehicle, aircraft, or vessel denies the trafficker the ability to transport victims to different locations for the purposes of exploitation.[362] Therefore, asset forfeiture removes the instrumentalities of crime and impedes the trafficker from expanding criminal activities.

The removal of financial assets is also important in the fight against human trafficking. Financial assets are the lifeblood of the human trafficking enterprise and could serve as alternative evidence of criminal activity.[363] For example, the financial assets can "substantiate or corroborate a case of human trafficking . . . by demonstrating to the court that the income of an individual or of a legal person far exceeds that which can be explained by legitimate sources."[364] Therefore, asset forfeiture not only ensures that the trafficker is not benefiting from their illegal gain, but also serves as evidence to support the criminal conviction of the trafficker.[365]

Lastly, asset forfeiture has proven an effective tool in confiscating the proceeds and instrumentalities of the trafficking enterprise in the United States and internationally.[366] For example, in *United States v. Maksimenko*, Michail Aronov forfeited $641,500 and paid over $1 million in restitution after a jury convicted him for operating a human trafficking ring in which he forced Eastern European women to work as exotic dancers in Detroit-

357. OSCE, ANALYSING THE BUSINESS MODEL, *supra* note 355, at 27.

358. Gallagher, *supra* note 55, at 400. *See also* 2005 TIP REPORT, *supra* note 141, at 13-14.

359. *Oversight of Federal Asset Forfeiture, supra* note 338, at 18.

360. *Id.*

361. *See supra* notes 46-49.

362. *See supra* note 39.

363. Konrad, *supra* note 6, at 84.

364. Gallagher, *supra* note 55, at 400.

365. *Id.*

366. *See infra* notes 367-79. *See also* Dep't of Homeland Security, *Asset Forfeiture Branch*, http://www.ice.gov/asset-forfeiture/ (last visited Mar. 18, 2013).

area strip clubs.[367] The court also ordered another defendant, Aleksandr Maksimenko, to forfeit $957,050 in cash.[368] In *United States v. Zavala and Ibanez*, Defendants Mariluz Zavala and Jorge Ibanez forfeited a residence valued at $175,000 and bank accounts containing $30,000 generated from their criminal activities after pleading guilty to conspiracy to commit forced labor, document servitude, engaging in extortionate credit transactions and transferring false alien registration cards.[369]

Internationally, asset forfeiture has also been a successful measure in confiscating the proceeds and instrumentalities of the trafficking enterprise. For example, Romania, in accordance with the UN Protocol and the EU Decision, criminalized all forms of human trafficking through Law No. 678/2001 on Preventing and Combating Trafficking in Human Beings.[370] Article 19 of Law No. 678/2001 "regulates the seizure of assets used for committing trafficking in human beings and the proceeds from such crime."[371] In 2007, the officers from the Organized Crime Squad of Pitesti, Romania, investigated and discovered that the Oancea Clan, a well-known clan in the criminal community, operated a sex trafficking ring from 2003 to 2007 in Romania, Spain, and Italy.[372] As a result of an indictment, seventeen defendants appeared before the court in criminal proceedings.[373] In addition, the prosecutor of Pitesti, Romania, ordered the seizure of six apartments and lands in Pitesti, two villas in communes, and gold and money, which in total had a total value of 1,350,000 Euros (≈ $1,766,829. 74 USD).[374]

Furthermore, in evaluating each country's implementation of the CoE Convention, on December 20, 2011 GRETA released a report that acknowledged Denmark's compliance with the asset confiscation provision of the CoE Convention.[375] Article 75 and 76 of the Danish Criminal Code

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367. *Case Updates*, ANTI-TRAFFICKING NEWS BULLETIN (U.S. Dep't of Justice- Civil Rights Div.), Summer/Fall 2007, at 7, *available at* http://www.humantrafficking.org/uploads/publications/ATNB_Sept07.pdf. Defendant Aranov was charged with conspiring to violate the civil rights of the dancers through involuntary servitude, immigrant and money laundering conspiracies. *Id.*

368. *Id.* at 7-8.

369. 2005 ATT'Y GEN. REP. 19, *available at* http://www.justice.gov/archive/ag/annualreports/tr2005/agreporthumantrafficing2005.pdf.

370. VERONIKA BILGER ET AL, INT'L CTR. FOR MIGRATION POLICY DEV., STUDY ON THE ASSESSMENT OF THE EXTENT OF DIFFERENT TYPES OF TRAFFICKING IN HUMAN BEINGS IN EU COUNTRIES, 225 (2010), *available at* http://research.icmpd.org/1465.html.

371. *Id.*

372. DUMITRU LICSANDRU ET AL, ROMANIA: MINISTRY OF THE INTERIOR AND ADMIN. REFORM, REPORT ON TRAFFICKING IN PERSONS IN ROMANIA: 2007, 77 (2008), http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Romania pdf.

373. *Id.*

374. *Id.*; XE, *Currency Converter* (Mar. 12, 2012), *available at* http://www.xe.com/ucc/convert/?Amount=1350000&From=EUR&To=USD.

375. *See* GROUP OF EXPERTS ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS

"provide for the confiscation of proceeds from criminal activities. Confiscation may concern any person to whom the proceeds of a criminal act have passed directly as well as those on whose behalf such a person has acted."[376] The report provides three instances of asset confiscation: (1) December 2008, the City Court of Copenhagen convicted two persons of trafficking in human beings and confiscated 20,000 DKK (Danish Krone)(≈ $3,538.42 USD);[377] (2) March 2010, the City Court of Copenhagen convicted two persons for trafficking in human beings and confiscated 130,000 DKK (≈ $22,999.95 USD) from each defendant;[378] and (3) January 2011, the Court of Frederiksberg convicted three persons of trafficking in human beings and confiscated 50,000 DKK (≈ $8,845.62 USD) from two defendants and 497,500 DKK (≈ $88,009.18 USD) from a third defendant.[379]

The continued success of asset forfeiture in the fight against human trafficking on the domestic and international levels provides a compelling basis for Indiana to adopt an asset forfeiture provision. Indiana should adopt an asset forfeiture provision that provides for the removal of proceeds and instrumentalities of crime from the hands of the trafficking organization. Asset forfeiture provisions deprive the trafficking enterprise of the financial means to continue their trafficking and other illicit activities. Further, the confiscated assets can potentially serve as alternative evidence to support a criminal conviction of the trafficker in a human trafficking case.

B. Make the Trafficker Pay: Creation of a Human Trafficking Victims Fund

In addition to an asset forfeiture provision, Indiana should take one additional step and create a human trafficking victims fund from the forfeited assets. This Note proposes that Indiana appropriate the forfeited assets to fund law enforcement anti-trafficking programs and victim services similar to the 2011 Directive's recommendations. The following sections will discuss the importance of using the forfeited assets to finance a human trafficking fund.

(GRETA), COUNCIL OF EUROPE, REPORT CONCERNING THE IMPLEMENTATION OF THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS BY DEN.: FIRST EVALUATION ROUND, 40 (2011), [hereinafter GRETA, DENMARK], *available at* http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2011_21_FGR_DNK_en.pdf.

376. *Id.*

377. *Id.*; XE, *Currency Converter* (Mar. 12, 2012), *available at* http://www.xe.com/ucc/convert/?Amount=20000&From=DKK&To=USD.

378. GRETA, DENMARK, *supra* note 375; XE, *Currency Converter* (Mar. 12, 2012), *available at* http://www.xe.com/ucc/convert/?Amount=130000&From=DKK&To=USD.

379. GRETA, DENMARK, *supra* note 375; XE, *Currency Converter* (Mar. 12, 2012), *available at* http://www.xe.com/ucc/convert/?Amount=50000&From=DKK&To=USD; XE, *Currency Converter* (Mar. 12, 2012), *available at* http://www.xe.com/ucc/convert/?Amount=497500&From=DKK&To=USD.

Asset forfeiture is a powerful tool because it removes the proceeds and instrumentalities of crime from the criminal organization, but more importantly, it provides funding for community and law enforcement programs.[380] For example, the US federal government promotes asset forfeiture as an "invaluable tool for law enforcement to implement productive drug interdiction programs and purchase equipment for anti-drug programs."[381] The Comprehensive Crime Control Act of 1984 created the Department of Justice Assets Forfeiture Fund and the Treasury Department Appropriations Act, P.L. 192-393 established the Treasury Forfeiture Fund.[382] Both of these Funds receive proceeds from forfeiture and have allocated some of the forfeited assets to state and local agencies to provide for community programs, victim restitution and law enforcement programs combating drug trafficking.[383] Furthermore, forfeited real property from the Department of Justice Asset Forfeiture Fund has been transferred to community action groups to be used as community centers.[384] Therefore, asset forfeiture ensures that the forfeited proceeds of the crime are not channeled back into criminal organizations, but instead are used for the betterment of society.

Similar to drug trafficking, the forfeited proceeds of the human trafficking crime could provide funding for victim services and law enforcement programs designed to educate law enforcement personnel in recognizing human trafficking and assessing the needs of the trafficked victims. For example, on November 21, 2011, Governor Deval Patrick of Massachusetts signed into law a bill against human trafficking (the "MA Bill").[385] The MA Bill created a Victims of Human Trafficking Fund (the "Fund"), which consists of assets forfeited and seized and fines from the crimes established under the MA Bill.[386] The MA bill designates the state treasurer as the custodian of the Fund, and directs the state treasurer to transfer funds from the Fund to the victim and witness assistance board pursuant to section 4 of Chapter 258B of the Massachusetts General Laws.[387] The board administers Fund grants to public, private non-profit, or community-based programs to provide services to victims of human

380. *Oversight of Federal Asset Forfeiture, supra* note 338, at 41.

381. *Id.* at 76.

382. Dep't of Justice, *The Fund*, http://www.justice.gov/jmd/afp/02fundreport/02_2.html (last updated Aug. 2011). *See also* Nat'l Criminal Justice Reference Serv., *Treasury Forfeiture Fund, available at* https://www.ncjrs.gov/htm/tff.htm (last visited Mar. 18, 2013).

383. *Oversight of Federal Asset Forfeiture, supra* note 338, at 32-33. For example, forfeiture monies were used to build a new forensic laboratory for the New York State Police, educational programs for children to resist drugs and gangs, and law enforcement training. *Id.*

384. *Id.* at 43.

385. *See* Press Release, *supra* note 25.

386. *Id. See also* MASS. GEN. LAWS ANN. ch. 10, § 66A (2012).

387. MASS. GEN. LAWS ANN. ch. 10, § 66A (2012).

trafficking.[388]

The creation of a fund from the forfeited proceeds, to provide for victim services and law enforcement programs, has also been implemented at the international level. For example, in compliance with the asset confiscation provision of the CoE Convention, GRETA reports that Albania passed Law No. 10/192 on the Prevention of and Fight against Organised Crime and Trafficking through Preventive Measures against Assets on December 3, 2009, which replaced the 2004 law that covered only confiscated proceeds from organized crime.[389] The law entered into force in January 2010, but "the new mechanism for administering confiscated assets was not introduced until July 2010."[390] This law "[sets] up . . . a 'Special State Fund for Preventing Criminality,' [which is] sourced from property and assets sequestered and confiscated by decision of the First Instance Court for Serious Crimes . . . ."[391] During the 2009-2010 fiscal year, 50% of the confiscated proceeds were allocated to this fund.[392] The purpose of the fund is to "finance projects aimed at improving the exercise of justice, but must also serve social purposes, such as the rehabilitation and reintegration of victims of trafficking."[393] Article 37(3)(b) of Law No. 10/192 provides that non-profiting organizations, including shelters for victims of trafficking and rehabilitative centers, are some of the beneficiaries of the fund.[394] GRETA reported that the first set of confiscated properties is currently being sold and all the proceeds could go towards the fund.[395]

Similar to its domestic and international counterparts, Indiana should create a human trafficking victims fund from the forfeited proceeds of the crime. To effectively combat human trafficking, it is simply not enough to

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388. *Id.*

389. GROUP OF EXPERTS ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS (GRETA), COUNCIL OF EUROPE, REPORT CONCERNING THE IMPLEMENTATION OF THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS BY ALB: FIRST EVALUATION ROUND 39 (2011), *available at* http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2011_22_FGR_ALB_en.pdf [hereinafter GRETA, ALBANIA].

390. *Id.* at 39.

391. *Id.* at 33.

392. *Id.*

393. *Id.*

394. *Id. See also* Parliament on the Republic of Alb., Law No. 10.192, On Preventing and Combating the Organized Crime and Trafficking Through Preventive Measures Against Property, art. 37(3)(b), *available at* http://www.minfin.gov.al/minfin/pub/28_ligji_nr_10192_english_1297_1. pdf.

395. *See* GRETA, ALBANIA, *supra* note 389, at 33. Law No.10/192 replaced Albania's 2004 law by extending the seizure and confiscation of assets to the human trafficking crime. It also "gives greater powers to the agency tasked with administering confiscated assets with a view to [ensure] that these yield income . . . can be divided between victims to compensate them and [the Special State Fund]." *Id.* Further, Law No. 10/192 "provides for a reversal of the burden of proof, i.e. it is for the person whose assets are sequestered or confiscated to prove that they are not the proceeds of crime." *Id.*

criminalize the behavior by increasing the criminal sanctions of fines and imprisonment.[396] It requires a multi-disciplinary approach. The "more comprehensive a state's legislation, the more likely that state will be successful in the fight against human trafficking . . . ."[397] Thus, the forfeited proceeds of the crime would provide Indiana the financial means to adopt a multi-disciplinary approach in combating human trafficking.

The forfeited proceeds could be used to provide law enforcement with the necessary training to identify victims of human trafficking.[398] Often, law enforcement officials are the first to encounter victims of human trafficking.[399] However, factors such as the hidden nature of the crime, the trafficker's constant guard of the victim, lack of immigration documentation, and the invisibleness of trafficked domestic servants make it difficult to identify the victim.[400] Additionally, there have been instances where law enforcement officials have treated victims of sex trafficking as criminals and arrested them for prostitution.[401] Other instances also involve law enforcement arresting and deporting undocumented immigrants even though the undocumented immigrants may have been victims of human trafficking.[402] Furthermore, there is a risk that domestic, child victims of sex trafficking "will be perceived as runaways, throwaways, and delinquents rather than as victims of trafficking."[403] Therefore, it is crucial for law enforcement to "have the proper training and tools . . . to be able to correctly apply the trafficking law, make the proper distinctions, and refer trafficking victims for health and human services."[404]

Law enforcement should also receive training in communicating with international victims of human trafficking who fear law enforcement.[405] In many instances, international victims fear law enforcement due to personal experiences with corrupt government officials, or because the trafficker has told the victims that if they are caught by law enforcement, they will be arrested and deported.[406] Thus, the forfeited proceeds can be used to provide law enforcement with the necessary training in victim identification and

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396. *See* Konrad, *supra* note 6, at 85.

397. Vanessa Bouche & Dana Wittmer, *Human Trafficking Legislation Across the States: The Determinants of Comprehensiveness*, U. OF NEB.-LINCOLN (Oct. 1, 2009), *available at* http://digitalcommons.unl.edu/humtraffconf/6/; *See also* Konrad, *supra* note 6, at 85.

398. CLAWSON ET AL., *supra* note 11, at 15.

399. Ozalp, *supra* note 20, at 1401.

400. CLAWSON ET AL., *supra* note 11, at 6.

401. *Id.* at 15.

402. *Id.*

403. McKee, *supra* note 22, at 1.

404. *See supra* note 398.

405. Heather J. Clawson et al., STUDY OF HHS PROGRAMS SERVING HUMAN TRAFFICKING VICTIMS: FINAL REPORT, U.S. DEP'T OF HEALTH & HUMAN SERV., 20 (Dec. 2009), *available at* http://aspe.hhs.gov/hsp/07/humantrafficking/Final/index.pdf.

406. *Id.*

assistance to ensure more victims are rescued and provided with the necessary care and support.

The forfeited proceeds can also be used for victim services. After the victim has been identified and rescued, it is essential to rehabilitate and reintegrate the victim as a productive member of society.[407] "Recovery is a crucial form of reparation for trafficked persons, which includes medical and psychological care, as well as legal and social services."[408] However, to provide effective recovery, it is important to recognize that the needs of international victims may differ from the needs of domestic victims of human trafficking.[409] Both international and domestic victims of human trafficking generally require safety, housing, food, clothing, and medical and psychological care.[410] Law enforcement and service providers both reported that housing for victims of trafficking is limited.[411] Forfeited assets can be used to build shelters exclusively for victims of trafficking, thus providing them with the safety and care that they need. Alternatively, forfeited property can be renovated and used as shelters for human trafficking victims or as victim assistance centers.

Unlike domestic victims, international victims often require legal assistance and language assistance in addition to housing, food, and medical care.[412] International victims have an "immediate need for legal assistance/representation to handle issues related to immigrant status, provide legal representation that may be required in an ongoing investigation and prosecution of the trafficking case, or provide counsel in a civil lawsuit against the trafficker or in a potential custody case."[413] Frequently, victims of trafficking do not have the financial means to afford legal counsel.[414] Thus, the forfeited assets can be used to provide victims of trafficking with free legal assistance to ensure that they are advised of their rights and adequately represented.

International victims also often need language assistance, such as an interpreter or a translator, to facilitate communication between the victim and those who are providing assistance.[415] However, while language assistance may aid in the communication process, the victim may not talk

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407. *See* SISKIN &WYLER, *supra* note 5, at 10.

408. *Report of the Special Rapporteur, supra* note 279, ¶ 24, at 7.

409. CLAWSON ET AL., *supra* note 11, at 11-13.

410. *Id.*

411. Heather J. Clawson & Nicole Dutch, ADDRESSING THE NEEDS OF VICTIMS OF HUMAN TRAFFICKING: CHALLENGES, BARRIERS AND PROMISING PRACTICES, U.S. DEP'T OF HEALTH & HUMAN SERV., 6 (Aug. 2008), *available at* http://aspe.hhs.gov/hsp/07/humantrafficking/Needs/ib.pdf.

412. CLAWSON ET AL., *supra* note 11, at 11-12.

413. *Id.* at 11, 34.

414. *See Report of the Special Rapporteur, supra* note 279, at 13.

415. CLAWSON ET AL., *supra* note 11, at 12.

about their trafficking experience.[416] Victims of sex trafficking may not be comfortable discussing their experiences with someone of the same culture because of the associated shame and stigma.[417] A person's cultural background is more than just the language itself; it also embodies customs, values, and traditions. Forfeited assets can be used for language skills training and cultural awareness programs.

Lastly, Indiana should create a human trafficking fund using forfeited assets of the crime to increase funding for victim services.[418] As the public becomes more aware of human trafficking, and more victims are identified, additional funding will be required to provide services to trafficking victims.[419] Initially, the US Department of Health and Human Services and the Office of Refugee Resettlement handled all victim assistance by providing grants to non-governmental organizations (NGOs).[420] Once the victim received certification (or was granted a T-visa or continued presence), he or she was eligible for services and refugee benefits.[421] However, pre-certified victims or victims waiting for certification were not eligible for these benefits.[422] As a result, the US Department of Justice's Office of Victims of Crime (the "OVC") created funding to provide additional support to NGOs providing assistance to trafficking victims prior to certification.[423] For example, in the 2010 fiscal year, the OVC granted the City of Indianapolis/Julian Center $60,000 to "provide comprehensive services to pre-certified foreign national victims of human trafficking as well as case management support and legal assistance to certified victims."[424] However, absent these federal grants, "NGOs lack funding . . .

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416. Clawson & Dutch, *supra* note 411, at 7.

417. *Id.*

418. *See generally Human Trafficking: Recent Trends: Hearing Before the Subcomm. on Border, Maritime, & Global Counterterrorism of the Comm. on Homeland Sec.*, 111th Cong. 23 (2009) (statement of Anastasia K. Brown), *available at* https://www.hsdl.org/?view&did=10574.

419. *Id.*

420. Dina Francesca Haynes, *Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, 6 U. ST. THOMAS L.J. 77, 88 (2008).

421. *See supra* notes 171-72.

422. Haynes, *supra* note 420. *See also* LAUDAN Y. ARON ET AL., URBAN INSTITUTE, COMPREHENSIVE SERVICES FOR SURVIVORS OF HUMAN TRAFFICKING: FINDINGS FROM CLIENTS IN THREE COMMUNITIES: FINAL REPORT 6 (2006), [hereinafter ARON], *available at* http://www.urban.org/UploadedPDF/411507_human_trafficking.pdf.

423. Haynes, *supra* note 420. *See also* ARON, *supra* note 422.

424. 2010 ATT'Y GEN. ANN. REP. 129 (Dec. 2011), *available at* http://www.justice.gov/ag/annualreports/tr2010/agreporthumantrafficking2010.pdf. This funding is also to:

> [c]ontinue to build effective community service networks to respond to victims' need; and provide training to increase awareness among criminal justice entities, social service providers, and the public of the rights and needs of trafficking victims until the end of the current grant period. Grantee may use up to 5% of the total grant award to support "prevention" in the area of

for work that is costly: providing shelter and legal, medical, language, and job training services to victims."[425] If there is a lack of funding, victims of human trafficking will not have access to these services. Therefore, the forfeited assets should supplement existing funding to provide a greater provision of care and support to victims of human trafficking.

Overall, by adopting an asset forfeiture provision, the forfeited proceeds will provide Indiana with the financial means to support greater law enforcement anti-trafficking training and comprehensive victim services. More importantly, such a provision secures justice for victims of human trafficking.

V. CONCLUSION

Indiana's new human trafficking legislation is insufficient to combat human trafficking.

While the new legislation strengthened Indiana's existing human trafficking laws and tightened the prosecution for the sex trafficking of a minor, it does not effectively impede the human trafficking activity. Human trafficking continues to thrive because of the substantial profits that result from the repeated exploitation of human beings. These illicit profits are the financial underpinnings of the trafficker's enterprise. Recognizing that fines and imprisonment are inadequate to fight human trafficking, the United Nations, the European Union, and the Council of Europe mandated their respective members to enact asset forfeiture provisions to "cut[] to the heart and motivation behind [human trafficking]."[426] Furthermore, they also advocated for the creation of a fund from the forfeited assets to provide funding for victim services and law enforcement programs. Similar to the

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awareness-raising and 5% of the total grant award to conduct a program evaluation. *Id.*

During the fiscal year of 2010, the TVPA provided the City of Indianapolis with a $100,000 grant for:

Continued enhancement and operation of a multi-disciplinary and multi-jurisdictional victim-centered task force with the primary goal being the identification and rescue of foreign victims of trafficking in persons through pro-active investigation; and the secondary goal being the successful prosecution of traffickers. Continued coordination with the Office of Victims of Crime (OVC) –funded victim services provider and the local Office of the U.S. Attorney to identify and rescue victims of all forms of human trafficking and to work with the OVC-funded victim service provider to assist the provider in securing requests for continued presence of T visas for foreign victims. In coordination with victim service providers and task force partners, train law enforcement line officers and persons likely to come into contact with victims of trafficking to be able to recognize the signs of trafficking and its victims.

Id. at 146.

425. Haynes, *supra* note 420, at 89.

426. *Oversight of Federal Asset Forfeiture, supra* note 338, at 39.

international community, Indiana should take a stronger stance against human trafficking by establishing an asset forfeiture provision within its existing human trafficking laws. More importantly, it should create a trafficking victims fund from the forfeited assets to provide funding for victim services that will rehabilitate and reintegrate the victim and provide funding for law enforcement programs to better identify victims of trafficking because one victim of trafficking is one too many.

AN ENVIRONMENTALLY HAZARDOUS PROCESS: WHY THE UNITED STATES SHOULD FOLLOW FRANCE'S LEAD AND BAN HYDRAULIC FRACTURING

Morgan R. Whitacre*

I. INTRODUCTION

The process known today as hydraulic fracturing ("fracking," "hydro-fracing," or "fracing") began as early as the 1940s.[1] Essentially, the fracking process was developed as a way for gas and oil companies to "extract hydrocarbons from 'low-permeability reservoirs,' or natural underground gas chambers that require massive amounts of hydraulic stimulation to recover cost-effective amount[s] of gas and/or oil."[2] The process of fracking involves several steps. First, a deep well (up to 8,000 feet)[3] is drilled into the earth at a location deemed by a company to have substantial amounts of oil or gas located in the shale of the underlying crust.[4] Second, a combination of millions of gallons of water, sand,[5] and highly pressurized fluids and solvents are injected into the well where the fracturing site is located.[6] There, the chemicals and fluids are discharged at great speeds towards a subterranean reservoir.[7] The fluid combination is injected against the underground well until at least one fracture appears in the surface of the earth or an existing fracture widens.[8] After the fractures are created or widened, sand is injected into the seams of the fracture to ensure that the cracks remain open during the extraction process.[9] This

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1. Angela C. Cupas, *The Not-So-Safe Drinking Water Act: Why We Must Regulate Hydraulic Fracturing at the Federal Level*, 33 WM. & MARY ENVTL. L. POL'Y REV. 605, 609 (2009).

2. *Id.* at 610.

3. *Hydraulic Fracturing FAQs*, GASLANDTHEMOVIE.COM, http://www.gaslandthemovie.com/whats-fracking (last visited Feb. 19, 2013) [hereinafter *Fracking FAQs*].

4. *Id.*

5. *Id.*

6. Cupas, *supra* note 1, at 610.

7. *Id.*

8. *Id.*

9. *Id.*

allows the gas and oil to flow freely from the shale.[10] The injected fluid ("frac fluid") is drained, to be stored and disposed of later, and gas and oil are captured at the surface.[11]

This Note provides details of the process of hydraulic fracturing, current legislation applicable to fracking in the United States, and reasons supporting an outright ban against hydraulic fracturing throughout the country. Although fracking is a process that has been in use for over sixty years,[12] it has become a topic of harsh criticism from environmental groups within the last ten years.[13] The process of drilling into the earth and injecting chemicals has itself faced criticism from leading experts in environmental science,[14] but other ramifications from the process are now being contemplated.[15] There are supporting reports that it causes ground water contamination, air pollution, and even seismic disruptions.[16] In 2010, the Emmy Award winning movie-documentary *Gasland* was written and produced in Pennsylvania by Josh Fox, a concerned environmental activist, detailing some of the most egregious examples of groundwater contamination resulting from companies conducting fracking around the United States.[17] The concern has been so great that many states are looking at implementing moratoriums on the process while more studies are conducted or, in some cases, passing legislation that would fully ban the practice.[18] Worldwide, France is the only European country heeding the environmental concerns, and thus far has become the leader in

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10. *Fracking FAQs*, *supra* note 3.

11. Cupas, *supra* note 1, at 610.

12. Seamus McGraw, *Is Fracking Safe? The Top 10 Controversial Claims About Natural Gas Drilling*, POPULAR MECHANICS, (Nov. 9, 2012), http://www.popularmechanics.com/science/energy/coal-oil-gas/top-10-myths-about-natural-gas-drilling-6386593#slide-1 (citing statement of Sen. John Kerry in May 2010).

13. *See generally* NEW YORKERS AGAINST FRACKING, http://nyagainstfracking.org/ (last visited Mar. 11, 2013) and STUDENTS AGAINST FRACKING, http://studentsagainstfracking.blogspot.com/ (last visited Mar. 11, 2013).

14. *See generally* NATURAL GAS WATCH, http://www.naturalgaswatch.org/?cat=59 (last visited Mar. 11, 2013) (click "Fracking" then see the vast amounts of articles written criticizing fracking).

15. McGraw, *supra* note 12 (referencing Claim Two from Green Party of Pennsylvania that fracking squanders natural resources).

16. *See infra* note 48, note 73, and note 58.

17. GASLAND. (New Video Group 2010).

18. Sean Hargreaves, *NY Set to Lift Fracking Ban*, CNNMONEY (July 1, 2011, 2:33 PM), http://money.cnn.com/2011/07/01/news/economy/fracking_new_york/index.htm (noting that currently there is a moratorium on fracking and deep gas exploration in New York although lobbying is currently underway to lift it). *See also* Angela Delli Santi and Josh Lederman, *Chris Christie Fracking Ban: New Jersey Governor Proposes 1 Year Gas Drilling Moratorium*, HUFFPOST GREEN (Aug. 25, 2011, 6:21 PM), http://www.huffingtonpost.com/2011/08/25/chris-christie-fracking-ban_n_936822.html (explaining that after the New Jersey governor failed to sign the legislature's bill banning fracking in New Jersey the state adopted a one-year moratorium).

environmental protectionism by passing a total countrywide ban against fracking in the summer of 2011.[19] This Note discusses the various statutory and regulatory approaches the United States and individual states within the United States have taken. Additionally, this Note highlights the failure to adequately address the severe environmental consequences related to hydraulic fracturing at both the state and federal levels. Furthermore, in Part V, this Note details the legislative and public policy reasons supporting a French-style ban being legislated federally in the United States. Finally, after conducting a thorough comparative analysis, this Note recommends that the United States adopt a federal ban on hydraulic fracturing.

II. DETAILS OF FRACKING

A. Description of Fracking Fluid and the Fracking Process

Each time the fracking process is conducted in an area, between eighty and 300 tons of chemicals are used.[20] This "frac fluid" is comprised of hundreds of different types of chemicals, in addition to ninety-nine percent water and one half percent sand. Some of the most controversial chemicals include, but are not limited to: acids (dissolves minerals in the pre-fracked rock); glutaraldehyde (kills bacteria located in the water); N, n-Dimethyl formamide (prevents corrosion of the pipe); polyacrylamide (minimizes friction between the fluid and the pipe); petroleum distillates ("slicks" the water to minimize friction); guar gum (thickens water to suspend the sand); proppant or sand (allows fissures in the earth to remain open so the gas can escape); and isopropanol (increases the viscosity of the fracture fluid).[21] After the chemicals are injected into the well and the

19. Tara Patel, *France Vote Outlaws 'Fracking' Shale for Natural Gas and Oil Extraction*, BLOOMBERG (July 1, 2011, 6:22 AM), http://www.bloomberg.com/news/2011-07-01/france-vote-outlaws-fracking-shale-for-natural-gas-oil-extraction.html.

20. *Fracking FAQs*, *supra* note 3. *See also* Jay Kimball, *Congress Releases Report on Toxic Chemicals Used In Fracking*, 8020 VISION (Apr. 17, 2001), http://8020vision.com/2011/04/17/congress-releases-report-on-toxic-chemicals-used-in-fracking/ ("[H]orizontal fracking uses up to 300 tons of a mixture of 750 chemicals, many of them proprietary, and millions of gallons of water per frack.").

21. *A Fluid Situation: Typical Solution Used In Hydraulic Fracturing*, *available at* http://justbeneaththesurfacewv.com/Resources/Docs/1362-10-IOGA-EID-Fact-Sheet-V.pdf (of the above listed chemicals, the common uses for them include, respectively: swimming pool cleaner; disinfectant and sterilizer for medical equipment; used in pharmaceuticals, acrylic fibers and plastics; used in water treatments and as a soil conditioner; make-up remover and used in laxatives; thickener used in cosmetics, baked goods, ice cream, tooth-paste, sauces, and salad dressing; used for water filtration and in play sand; used as glass cleaner, antiperspirant, and hair color). For a more comprehensive list and effects, *see* MINORITY STAFF OF H. COMM. ON ENERGY AND COMMERCE, 111th CONG. REPORT ON CHEMICALS USED IN HYDRAULIC FRACTURING (Apr. 18, 2011) *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Hydraulic%20Fracturing%20Report%204.18.11.pdf.

fissure is opened, natural gas emerges wet in produced water. It then has to be separated from the wastewater at the surface.[22] Typically, only thirty to fifty percent of the water is recovered from a well, and many experts say this wastewater can be highly toxic.[23] Usually, the water is then placed into a holding pond located next to the drilling well where the water evaporates.[24] Sometimes, the water is placed into a holding tank where it is stored long-term for later use by deep injection in oil and gas waste wells.[25]

B. Places Fracking is Conducted

Currently, fracking is conducted throughout many areas of the United States.[26] The areas with the most natural fracking characteristics are shale-concentrated areas.[27] Hydrocarbon shale is rich in natural gas deposits.[28] Natural gas located in shale is produced from shale formations that usually act as the reservoir, and is known as a dry gas composed of at least ninety percent methane.[29] Natural gas, located in large shale deposits, exists across much of the United States.[30] Some of the most prominent areas where natural gas fracking is conducted include these large shale areas.[31] Such areas include, but are not limited to: the Barnett Shale in Texas, the Bossler Shale in Louisiana, the Haynesville Shale in Texas and Louisiana, and the Marcellus Shale in New York, Ohio, Pennsylvania, and West Virginia.[32] The Barnett Shale is the most prominent shale in the United States, covering approximately 5,000 square miles.[33] Most of the fracking in contention today involves the Marcellus Shale, which, considering only the portion containing natural gas and petroleum liquids, is approximately,

22. *Fracking FAQs*, *supra* note 3; *see also* Kimball, *supra* note 20.

23. *Fracking FAQs, supra* note 3.

24. *Id. See also* GASLAND, *supra* note 17.

25. Clean Water Action, *Fracking: The Process*, http://www.cleanwater.org/page/fracking-process (last visited Mar. 8, 2013).

26. For a map identifying all the locations where fracking is conducted in the United States *see Fracking Across the United States*, EARTH JUSTICE, http://earthjustice.org/features/campaigns/fracking-across-the-united-states (last visited Mar. 8, 2013).

27. Marc Lallanilla, *A Brief Chat About Fracking*, http://greenliving.about.com/od/scienceandtechnology/a/Hydraulic-Fracturing-Fracking.htm (last visited Mar. 7, 2013) (scroll down to "Where does hydrofracking take place?").

28. Terry W. Roberson, *Feature: The State of Texas Versus the EPA Regulation of Hydraulic Fracturing*, 48 HOUSTON LAWYER 24 (2011).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Hydraulic Fracturing Facts*, HYDRAULICFRACTURING.COM http://www.hydraulicfracturing.com/Pages/information.aspx (last visited Dec. 27, 2012)[hereinafter *Fracturing Facts*].

33. Roberson, *supra* note 28, at 24.

95,000 square miles.[34]

III. ENVIRONMENTAL CONCERNS WITH FRACKING

A. Water Usage as a Negative Consequence

One of the most disturbing statistics regarding the fracking process is the amount of water that is consumed. Generally, anywhere from one to eight million gallons of water may be used to frack a well.[35] Some experts have estimated that each well drilled in the Barnett Shale consumes approximately three million gallons of fresh water through production and completion, and roughly sixty percent of that water is groundwater.[36] Some estimates suggest that as much as ninety percent of water used in fracking across the United States is groundwater.[37] Experts in the fracking process acknowledge that surface water will soon become the primary source of fresh water used for fracking because it is the main water source in shale areas.[38] One of the greatest concerns among environmental experts is aquifer depletion as a result of water removal, which could affect public and private water supply wells.[39] For example, when considering total water usage in the Barnett Shale region of the United States, fracking constituted one half percent of all water usage in 2005, but as drilling increased some experts conservatively estimated that the total water usage could have exceeded 1.7% by the end of 2010.[40] This amount of water usage creates concern especially in those areas in the western part of the United States where water is scarce,[41] and the removal of large volumes of water could stress drinking water supplies.[42] Eventually, this could lead to harmful, unintended consequences including the lowering of water tables or the dewatering of drinking water aquifers, decreased stream flows, and reduced volumes of water in surface water reservoirs; these activities could have a

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34. *What Is the Marcellus Shale Formation?*, OILSHALEGAS.COM, http://oilshalegas.com/marcellusshale.html (last visited Mar. 11, 2013) (the shale extends over 575 miles and has a thickness of up to 900 feet).

35. *Fracking FAQs*, *supra* note 3 (noting that "individual wells may be fracked up to eighteen times").

36. Brian J. Smith, *Fracing the Environment?: An Examination of the Effects and Regulation of Hydraulic Fracturing*, 18 TEX. WESLEYAN L. REV. 129, 132 (2011).

37. *Id.*

38. *Id.* at 133.

39. *Id.* at 139.

40. *Id.* at 133.

41. GASLAND, *supra* note 17.

42. U.S. ENVTL. PROT. AGENCY, PLAN TO STUDY THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES (2011), *available at* http://www.epa.gov/hfstudy/HF_Study__Plan_110211_FINAL_508.pdf [hereinafter EPA'S PLAN TO STUDY].

long-term negative impact on available drinking water in areas where hydraulic fracturing is occurring.[43]

B. Ground Water Contamination as a Consequence

Some of the greatest concerns regarding fracking are centered on the ability of frac fluids and gas to migrate into the groundwater, contaminating the drinking water once they are released underground. These concerns are based on several factors.[44] These include: the fluid flow; the toxicity and radioactivity of produced water from a mixture of fracturing fluids and deep saline formation waters that can discharge; the potential explosion and asphyxiation hazard of natural gas; and the large number of private wells in rural areas that rely on shallow groundwater for household and agricultural uses that are typically unregulated and untested.[45] One result of surface and groundwater contamination that can occur from fracking is due to fracking additives being released into groundwater because of the failure of drilling companies to have proper storm controls at the well site.[46] Furthermore, ineffective site management, ineffective subsurface and fluid contaminant practices, poor well construction, and accidental spills may also result in groundwater contamination.[47] A recent study conducted by the Center For Global Change at Duke University of sixty-eight private wells located in the Marcellus Shale showed evidence of methane contamination of shallow drinking water systems located near hydraulic fracturing well sites.[48] The study compared groundwater quality from areas currently exploited for gas by hydraulic fracturing to those that are not currently associated with gas drilling.[49] The study concluded that the water extracted from shallow well

43. *Id.*

44. Stephen G. Osborna, et. al., *Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing* , 108 NAT'L ACAD. OF SCI. PROC. NO. 20 8172-76 (May 17, 2011)., *available at* http://www.pnas.org/content/early/2011/05/02/1100682108.full.pdf?with-ds=yes.

45. *Id.* ("[u]p to one million wells in Pennsylvania alone.").

46. Smith, *supra* note 36, at 139 ("storm water has a great potential to carry contaminates from drilling operations to lakes, streams, and groundwater . . . drilling and fracking operations can alter the natural flow of storm water and allow contaminates to be introduced to ordinary storm-water runoff."). *But see* CHARLES G. GROAT AND THOMAS W. GRIMSHAW, ENERGY INSTITUTE AT UNIVERSITY OF TEXAS AT AUSTIN, FACT-BASED REGULATION FOR ENVIRONMENTAL PROTECTION IN SHALE GAS DEVELOPMENT 18 (2012) *available at* http://energy.utexas.edu/images/ei_shale_gas_regulation120215.pdf ("[T]here is. . . little or no evidence of groundwater contamination from hydraulic fracturing of shales at normal depths.").

47. Smith, *supra* note 36, at 140.

48. Osborna, *supra* note 44 ("[A]lthough dissolved methane in drinking water is not currently classified as a health hazard for ingestion, it is an asphyxiant in enclosed spaces and an explosion and fire hazard.").

49. *Id.*

areas near active drilling had a methane concentration seventeen times higher than the water samples from shallow wells that were not near active drilling sites.[50] In *Gasland*, Josh Fox documents several other stories of likely methane contamination in ground water as a result of fracking.[51] After Mr. Fox received an offer from a natural gas company to lease his family's land in Milanville, Pennsylvania for $100,000, he decided to seek more information about the fracking process and gas drilling that was being conducted underneath the land in Pennsylvania's Marcellus Shale.[52] During his quest, he discovered evidence of groundwater contamination related to hydraulic fracturing wells that were near the homes of many people he visited around the country.[53] One family he visited in Dimock, Pennsylvania, complained of health issues related to potential groundwater contamination.[54] More shockingly, he was able to light their tap water on fire by simply holding a flame underneath a stream of water from their kitchen sink.[55] Mr. Fox also visited Lisa Bracken in Garfield County, Colorado. There he documented evidence of natural gas seeping into her land as a result of hydraulic fracturing from EnCana Oil & Gas in the nearby West Divide Creek wetland area.[56] Furthermore, the Natural Resources Defense Council ("NRDC") has documented dozens of other incidents from people across the United States complaining of groundwater contamination resulting from nearby fracking drill sites.[57]

C. Seismic Interruption as a Consequence

There are some studies suggesting that the high-pressure fluid injection process involved in fracking may destabilize underground formations and cause earthquakes.[58] In general, a link has been shown between fracking and induced seismicity, or earthquakes caused by human activities, as well as the development of hydrocarbon, mineral, and geothermal resources; other causes include waste injection, water filling

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50. *Id.* (Generally, the wells that tested higher for methane concentration were located 1000 meters or less from the drilling site while those that tested much lower for methane concentration were between 4000 and 6000 meters away from a drilling site).

51. GASLAND, *supra* note 17.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *See generally* Amy Mall, *Incidents Where Hydraulic Fracturing Is a Suspected Cause of Drinking Water Contamination*, NRDC.ORG (Dec. 19, 2011), http://switchboard.nrdc.org/blogs/amall/incidents_where_hydraulic_frac.html.

58. *See generally* CRAIG NICHOLSON AND R.L. WESSON, EARTHQUAKE HAZARD ASSOCIATED WITH DEEP WELL INJECTION - A REPORT TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY (U.S. Geological Survey Bulletin 1951).

large surface reservoirs, underground nuclear explosions, and large-scale construction projects.[59] Scientists have documented through studies that hydraulic fracturing induces microearthquakes.[60] Furthermore, scientists are continuing to investigate tremors potentially linked to fracking.[61] Recently, seismic disruptions in Ohio made national news with links to hydraulic fracturing.[62] John Armbruster, a renowned seismologist with Lamont-Doherty Earth Observatory, part of Columbia University, stated that the 2.7 magnitude earthquake that struck Youngstown, Ohio on Christmas Eve 2011 was located one kilometer from the bottom of a fracking well. He suggested that there was sufficient evidence that the pumping of frac fluid into the well caused the earthquake.[63] A week after the first earthquake, a second 4.0 magnitude earthquake struck the area, resulting in the Ohio Department of Natural Resources shutting down the fracking and injection well sites.[64]

D. Wastewater Deposits, Air Pollution, and Other Concerns

Many pro-industry studies cite that the chemicals used in the hydraulic fracturing process are in "items that people encounter in their daily lives" such as swimming pools, cosmetics, preservatives, and household cleaners.[65] On the contrary, the average United States citizen does not encounter the vast amounts of the chemicals necessary in widespread fracking development, nor does the average citizen "consider mixing them with water and injecting them into the ground."[66] Furthermore, according to the Environmental Protection Agency ("EPA"), some of the chemicals used in extraction, in their pure form, contain carcinogens and could be fatal if swallowed.[67] At the end of the fracking process, consideration should be given to uses of the left over water.

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59. Vitaly V. Adushkin, et. al., *Seismicity in the Oilfield* (Summer 2000), *available at* http://www.slb.com/~/media/Files/resources/oilfield_review/ors00/sum00/p2_17.ashx.

60. *See generally,* Ying-Ping Li, *Microearthquake Analysis for Hydraulic Fracture Process*, 9 ACTA SEISMOLOGICA SINICA, 377, 377-87 (1996).

61. *Earthquakes Could Be Linked to B.C. Gas Drilling: Seismologist Says 'Seismic Swarm' Should Be Investigated,* CBS NEWS, Sept. 29, 2011, http://www.cbc.ca/news/canada/british-columbia/story/2011/09/28/bc-fracking-gas-earthquakes.html.

62. *All Things Considered: Fracking Byproducts May Be Linked to Ohio Quakes* (NPR radio broadcast Jan. 3, 2012) (transcript on file with Indiana International and Comparative Law Review).

63. *Id.* (pointing out that the earthquake was probably not caused from the fracking site itself, but was caused from the pumping of used fracking fluid into a deep-injection disposal well located a few miles from the fracking site).

64. *Id.*

65. Adam J. Bailey, *The Fayetteville Shale Play and the Need to Rethink Environmental Regulation of Oil and Gas Development in Arkansas*, 63 ARK. L. REV. 815, 824 (2010).

66. *Id.*

67. *Id.*

Fracking for gas yields an enormous amount of wastewater.[68] The frac fluid that swells back to the surface of the earth at the end of the fracking cycle is known as "flow-back water."[69] The flow-back water is waste, and it is contaminated with a variety of highly toxic chemicals used in the initial frac fluid.[70] It is estimated that approximately twenty to forty percent of the water used for fracking returns to the surface as flow-back water within two to three weeks of the frack, which accounts for approximately 900,000 to 2.1 million gallons of water from each well.[71] This water has to go somewhere, so most of it is eventually dumped into injection wells (also called holding ponds) that are often adjacent to the drill site and which are often lined with tarps.[72] The biggest concern for flow-back water sitting in holding ponds is the surface evaporation of volatile organic compounds (VOCs) which can affect air quality and produce ground level ozone.[73] Some of the wastewater is placed in metal canisters and is hauled away from the frack site – usually along busy roads, across crowded intersections, and through residential neighborhoods.[74] This can greatly increase the risk of an accidental spill, which would be catastrophic for the areas in which the spill could occur.[75] It is also not uncommon for the injection well tarps to leak, causing groundwater contamination of flow-back water.[76] Finally, some of the contaminated flow-back water is taken to water treatment plants that are not designed to process the chemicals and radiation found in fracking fluids.[77]

In addition to water contamination, the negative impact of hydraulic fracturing on air quality is so serious that the EPA is proposing new regulations to address the impacts on air quality from oil and gas drilling with a specific emphasis on hydraulic fracturing at gas wells.[78] Specifically, the rules revise New Source Performance Standards (NSPS) for VOCs, sulfur dioxide (SO_2), and controls on toxic air pollutants released at oil and

68. Smith, *supra* note 36, at 134.
69. *Id.*
70. *Id.*
71. *Id.* at 135.
72. *Id.*
73. Kimball, *supra* note 20.
74. *Id. See also* GASLAND, *supra* note 17.
75. GASLAND, *supra* note 17.
76. Smith, *supra* note 36, at 135.
77. Kimball, *supra* note 20.
78. Adam Orford, *Hydaulic Fracturing: Legislative and Regulatory Trends*, 279 ENV. COUNS. NL. 2 (2011) ("[A]ccording to the EPA, the oil and gas industry accounts for 40% of the nation's methane emissions, and EPA's VOC NSPS proposal would also capture, burn off, or otherwise significantly limit methane emissions...."). *See also* Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 76 Fed. Reg. 52738 (August 23, 2011) (to be codified at 40 C.F.R. pts. 60 and 63) [hereinafter Oil and Natural Gas].

gas wells.[79] Most industry experts agree that the highlight of this rule is a projected twenty-five percent decrease in VOCs industry-wide by requiring that new or refractured wells capture methane and other gases typically released during the flow-back period by fitting the wells with gas capturing equipment.[80] Furthermore, a study released from Cornell University concluded that "methane venting during flow-back recovery could offset any greenhouse gas (GHG) gains . . . and render fracking gas even dirtier than coal."[81] Before this study, it was generally accepted by most scientists in the field that natural gas contained significantly lower levels of greenhouse gases than coal and other fossil fuels.[82] This development seriously undermines the arguments from many pro-industry advocates that hydraulic fracturing is "greener" for the environment in terms of its lasting carbon footprint.

IV. CURRENT REGULATIONS OF FRACKING

A. Safe Drinking Water Act

Congress passed the Safe Drinking Water Act (SDWA) in 1974 as a way to regulate the nation's drinking water supplies and protect the public health.[83] The SDWA requires the EPA to establish regulations and minimum standards to protect tap water and requires all owners or operators of public water systems to comply with these primary (health-related) standards.[84] Furthermore, the SDWA requires the EPA to develop regulations for the underground injection of fluids in order to protect underground sources of drinking water (USDWs).[85] The SDWA sets the standards for an underground injection control (UIC) program, and the states are granted the authority to develop their own UIC programs as long as they comply with the standards set under the SDWA.[86] At 40 C.F.R. §144.1, the EPA has set forth specific requirements for the UIC programs

79. Orford, *supra* note 78, at 4.

80. *Id.*

81. *Id. See also* Robert W. Howarth et. al., Methane and the Greenhouse-Gas Footprint of Natural Gas from Shale Formations (2010), *available at* http://www.sustainablefuture.cornell.edu/news/attachments/Howarth-EtAl-2011.pdf.

82. Orford, *supra* note 78, at 4.

83. Wes Deweese, *Fracturing Misconceptions: A History of Effective State Regulation, Ground-Water Protection, and the Ill-Conceived FRAC Act*, 6 OKLA. J. L. & TECH. 49, 9 (2010). *See also* EPA, *Safe Drinking Water Act Basic Information*, *available at* http://www.epa.gov/lawsregs/laws/sdwa.html.

84. 42 U.S.C § 300g-3 (1974). *See also*, EPA, *Safe Drinking Water Act Basic Information*, *available at* http://www.epa.gov/lawsregs/laws/sdwa.html.

85. Deweese, *supra* note 83, at 9.

86. *Id. See also* EPA, *Underground Injection Control Program Federal UIC Regulations*, *available at* http://water.epa.gov/type/groundwater/uic/index.cfm.

through the authority granted by the SDWA.[87] The SDWA, under §300-1, also requires the EPA to:

> establish a maximum level for a given contaminant and create a 'national primary drinking water regulation . . . if the Administration determines that-' (1) the contaminant may adversely affect human health; (2) there is a 'substantial likelihood' that the contaminant will permeate the public water systems at a rate and quantity that stimulates concerns; and (3) 'in the sole judgment of the Administrator, regulation of' the contaminant presents an opportunity to reduce the risks to human health.[88]

If the EPA seeks to adopt a regulation of a contaminant that it determines meets these three permissive elements, it must first conduct research and present analysis on the "health risk reduction benefits."[89]

1. Problems with the Lax Regulation

There are serious concerns pertaining to the EPA's regulations regarding UICs and what regulations it adopts protecting USDWs. First, the SDWA did attempt to safeguard capricious research efforts on the EPA's part by requiring the Administrator to base agency decisions on the "'best available, peer-reviewed science' and other relevant public information."[90] However, this standard is seriously inadequate because it allows the Administrator to simply rely on data collected by "accepted methods or best available methods" without ever defining what "accepted" or "best available" means.[91] Further, it allows the Administrator essentially free range in accepting whatever research it wants by allowing the Administrator to "engage in a circular process of assessment; it is free to select 'accepted' research that supports its hypothesis, while discarding the rest" that it deems to contradict its desired outcome.[92] This assertion is evidenced in the EPA's 2004 UIC of coalbed methane program study.[93] During the study, the EPA "conducted minimal amounts of original research, and selected only those reports that catered to the conclusion that the administration sought to reach – that hydraulic fracturing 'poses little or no threat to

87. 40 C.F.R. § 144.1 (2009). *See also* Deweese, *supra* note 83, at 9.
88. Cupas, *supra* note 1, at 612. (quoting 42 U.S.C. § 300g-1(b)(1)(A)(i)-(iii)(2000)).
89. Cupas, *supra* note 1, at 612.
90. *Id.* (quoting 42 U.S.C. § 300g-1(b)(2)(A)-(B)(2000)).
91. Cupas, *supra* note 1, at 612. (quoting 42 U.S.C. § 300g-1(b)(3)(A)(ii)(2000)).
92. Cupas, *supra* note 1, at 612-13.
93. *Id.* at 613.

USDWs and does not justify additional study. . .'"[94] Moreover, the EPA "conveniently refrained from including reports from nationally-renowned scientific laboratories, such as the Argonne National Laboratory... [which] concluded that several chemicals frequently used in the extraction process 'can be lethal at levels as low as 0.1 parts per million,' a statistic never cited in the EPA's 2004 UIC program study."[95] Furthermore, Congress expressly left ambiguities in the SDWA regarding the UIC programs and instead relied on the EPA to fill in these areas with greater regulations.[96] Under §300g-1, the "EPA has the sole discretion under section 300h of the SDWA to...authorize state UIC program proposals."[97] However, the statute prohibits the EPA from interfering with the "'underground injection of . . . fluids which are brought to the surface in connection with oil or natural gas storage . . .'" unless such regulation is "essential" to protecting the safety of USDWs.[98] However, under this portion of the statute, the EPA has broad discretion in determining what is essential because the statute specifies that underground injection will "'endanger' USDWs when it can 'reasonably be expected' to expose a public water system to 'any contaminant.'"[99] In 2004, the EPA, under the Bush Administration, interpreted this part of the statute as prohibiting it from further exploration regarding the regulation of hydraulic fracturing, and it stated that hydraulic fracturing presented no "'significant potential threat to USDWs.'"[100]

2. LEAF (I) and (II)

The EPA's failure to take action on hydraulic fracturing and UIC programs and the agency's arbitrary action toward them is further shown in the cases *Legal Environmental Assistance Foundation v. EPA* (*I*) and (*II*) (*LEAF I* and *LEAF II*).[101] These are two of the most widely cited appellate

94. *Id.* (quoting *U.S. Envtl, Prot. Agency, Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs*, ES-4, ES-12 (2004), *available at* http://www.epa.gov/OGWDW/uic/wells_coalbedmethanestudy.html).

95. *Id.* at 613-14. (quoting J.A. Veil et. al., *Argonne Nat'l Lab., A White Paper Describing Produced Water from Production of Crude Oil, Natural Gas and Coalbed Methane* 7-8 (2004), *available at* http://www.ead.anl.gov/pub/doc/ProducedWatersWP0401.pdf). *See also* Lisa Sumi, *Oil and Gas Accountability Project, Our Drinking Water at Risk: What EPA and the Oil and Gas Industry Don't Want Us to Know about Hydraulic Fracturing* 3, *available at* http://www.earthworksaction.org/pubs/DrinkingWaterAtRisk.pdf.

96. Cupas, *supra* note 1, at 614.

97. *Id.* at 615.

98. *Id.* (quoting 42 U.S.C. § 300h(b)(2) (2000)).

99. Cupas, *supra* note 1, at 615. (quoting 42 U.S.C. § 300h(d)(2) (2000)).

100. Cupas, *supra* note 1, at 616 (quoting *U.S. Envtl. Pro. Agency, Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs*, Executive Summary, ES-17 (2004), *available at* http://www.epa.gov/OGWDW/uic/wells_coalbedmethanestudy.html).

101. *See generally* Legal Envt'l Assist. Found., Inc. v. United States Envt'l Protection

cases regarding the fracking process.[102] Both were decided by theEleventh Circuit Court of Appeals and have never been heard or decided by the Supreme Court.[103] Therefore, although the holdings only apply within the Eleventh Circuit, the Court's reasoning is influential in other jurisdictions. *LEAF I* involved the Legal Environmental Assistance Foundation (LEAF), an environmental group who petitioned to rescind the EPA's approval of an Alabama UIC program, which engaged in unregulated methane gas hydraulic fracturing activities on at least eight separate occasions.[104] The environmental group contended that EPA's interpretation of the regulation was inconsistent with the plain language of the SDWA because the EPA claimed that the methane fracturing processes were left properly unregulated because their principal purpose was not that of "underground injection," or extraction processes that primarily involve the underground "emplacement" of fluids.[105] The EPA's main contention was that methane gas production wells, which are used for hydraulic fracturing, did not need to be regulated because the principal function of those types of wells was solely methane gas production rather than the underground emplacement of fluids.[106] In contrast, "LEAF contended that the EPA's narrow interpretation...involving 'underground injection' was inconsistent with the regulatory requirements under the SDWA, and that hydraulic fracturing must be regulated under every valid state UIC program."[107]

The Eleventh Circuit sided with LEAF and found that the methane extraction processes being used by Alabama were "underground injections" for the purposes of regulation.[108] The court stressed in its opinion that there was clear intent from Congress that "all underground injection be regulated under the UIC programs" and that hydraulic fracturing fit within the statutory definition of "underground injection."[109] More importantly, the court differentiated the hydraulic fracturing process' use of injection against other purposes of injection and the importance of regulation of UIC

Agency (*LEAF I*), 118 F.3d 1467 (11th Cir. 1997). *See generally* Legal Envt'l Assist. Found., Inc. v. United States Envt'l Protection Agency (*LEAF II*), 276 F.3d 1254 (11th Cir. 2001).

102. *See generally* EPA, *Hydraulic Fracturing Background Information*, *available at* http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm.

103. *Id.*

104. *LEAF I*, 118 F.3d 1467 (11th Cir. 1997). *See also*, Cupas, *supra* note 1, at 617.

105. *LEAF I*, 118 F.3d at 1471 (arguing that hydraulic fracturing fell within the regulatory definition of "underground injection" under this portion of the statute.). *See also*, Cupas, *supra* note 1, at 618.

106. *LEAF II*, 276 F.3d 1254 (11th Cir. 2001). *See LEAF I*, 118 F.3d at 1471.

107. Cupas, *supra* note 1, at 618 (quoting *LEAF I*, 118 F.3d at 1471).

108. *LEAF I*, 118 F.3d at 1477.

109. *Id.* at 1475. *See* Cupas, *supra* note 1, at 618 n.88 (noting that "the court further held that '[n]othing in the statutory definition suggests that the EPA has the authority to exclude from the reach of the regulation on an activity (i.e. hydraulic fracturing) which unquestionably falls within the plain meaning of the definition . . .'"*Id* at 1475.).

programs when it stated "[regulation] is not limited to the injection of wastes or to the injection for disposal purposes; it is intended also to cover, among other contaminants, the injection of brines and the injection of contaminants for extraction or other purposes."[110] The court's decision had little time to take effect because "before the court could carry out a writ of mandamus to enforce its holding in *LEAF I*, Alabama threw a monkey wrench into the equation: a revised UIC program, in which the state purported to have implemented restrictions upon hydraulic fracturing."[111]

The state of Alabama cleverly revised their UIC program to coincide with a second statutory method of UIC approval by the EPA under the SDWA.[112] Alabama sought approval for their UIC under §1425 of the SDWA, which warrants approval by the EPA where the state demonstrates that its UIC program meets the requirements of SDWA sections 1421(b)(1)(A)-(D), and it represents an effective program to prevent contamination of underground drinking water.[113] Essentially, the practical difference between this method of approval and the first method, which Alabama failed according to the decision in *LEAF I*, is that the latter requirement is much more flexible.[114] This allowed the EPA to continue to ignore its duties because it could approve the revised UIC program under §1425 of the SDWA because it is less restrictive.[115] Further, since §1425 of the SDWA does not explicitly include hydraulic fracturing in the activities eligible for alternative approval, the EPA classified Alabama's refined definition of wells under their modified UIC as Class II type wells which allowed them to fall outside the classification requiring regulation.[116]

Fundamentally, the EPA perceived absence of hydraulic fracturing from §1425 as a gap in the statutory scheme, which allowed the EPA to construe this section as applying not only to specific processes used during secondary or tertiary recovery of natural gas, but also generally to techniques and processes, like hydraulic fracturing, broadly related to

110. *LEAF I*, 118 F.3d at 1475. *See* Cupas, *supra* note 1, at 618. *See also* H.R. Rep. No. 93-1185, at 31 (1974) *reprinted in* 1974 U.S.C.C.A.N. 6454 (discussing the definition of underground injection and its intended scope).

111. Cupas, *supra* note 1, at 619 (summarizing *LEAF II*, 276 F,3d at 1256 that the revised Alabama UIC program would regulate hydraulic fracturing as a "Class II-like underground injection activity").

112. *LEAF II*, 276 F.3d at 1257 .

113. *Id.* at 1257.

114. *Id.*

115. Cupas, *supra* note 1, at 619. *See also* 42 U.S.C. § 300h-4 (2000) (defining Class II wells as "wells which inject fluids: (1) which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste waters from gas plants . . . unless those waters are classified as hazardous at the time of injection.").

116. Cupas, *supra* note 1, at 619-20.

secondary or tertiary recovery.[117] This allowed the EPA to side-step the ruling of *LEAF I* and conclude that the process of hydraulic fracturing, while not technically identical to secondary or tertiary recovery of natural gas, is an "analogous" process, and therefore is covered and approved by the alternate approval set forth under §1425.[118]

The Legal Environmental Assistance Foundation once again brought suit challenging the EPA's interpretation of the statutory language, claiming the EPA's interpretation of §1425 was contrary to the statute's plain meaning and therefore not in accordance with law.[119] Further, LEAF claimed that Alabama's revised UIC program had to be rejected until hydraulic fracturing was properly classified and regulated.[120] LEAF likewise argued that the EPA's statutory interpretation and classification of the Alabama wells as "Class II-like underground injection activities" was contrary to congressional intent.[121] The Eleventh Circuit, after reviewing all of LEAF's arguments, ruled against LEAF and concluded that none of LEAF's arguments would support setting aside the EPA's determination in the case.[122] Moreover, the court, conducting a *Chevron* analysis, found that the EPA's interpretation of §1425 was more compelling than LEAF's.[123] Using statutory construction analysis, the court found that in §1425 the phrase "relates to" "does not 'directly' and 'unambiguously' speak to whether a state's program regulating hydraulic fracturing may be approved under §1425."[124] Under step two of the *Chevron* analysis, the court had little trouble concluding that the EPA's decision to subject hydraulic fracturing to approval under §1425 was a permissible construction of the statute.[125]

Although this might have seemed like a set-back for LEAF at first, the agency persisted and argued that the EPA's classification of hydraulic fracturing of all coalbeds (indirectly including Alabama's) as Class II-

117. *LEAF II*, 276 F.3d at 1256.

118. *Id.*

119. *Id.*

120. Cupas, *supra* note 1, at 619-20. *See LEAF II*, 276 F.3d 1253, 1263 (11th Cir. 2001).

121. *LEAF II*, 276 F.3d at 1262.

122. *Id.* at 1265 n. 13.

123. *LEAF II*, 276 F.3d at 1259. The *Chevron* test was formulated by the Supreme Court in Chevron U.S.A. Inc. v. Natural Resources Defense Council , Inc., 467 U.S. 837 (1984), where the Court set forth a legal test for determining whether to grant deference to a government agency's interpretation of a statute it administers. The court will first look to see if Congress has directly spoken on the issue in the statute, and if not, and the statute is ambiguous, the court will determine whether the agency's interpretation is permissible.

124. *Id.* ("[T]hat portion of any State underground injection control program which *relates to* . . . any underground injection for the secondary or tertiary recovery of oil or natural gas.") (emphasis added).

125. *Id.* at 1260.

like[126] underground injection activity was not in accordance with law as set out in 40 C.F.R. §144.6.[127]LEAF scored a victory with the court in this aspect of the case because the court agreed that the EPA's decision to classify hydraulic fracturing of coalbeds to produce methane as a Class II-like underground injection activity was inconsistent with the plain language of 40 C.F.R. §144.6.[128] Therefore, the EPA's classification was set aside and remanded for the EPA to determine whether Alabama's revised UIC program complied with the requirement for full Class II wells.[129] However, the EPA made only minimal efforts to comply with the Eleventh Circuit Court of Appeals ruling and instead conducted a perfunctory "study" from 2000 to 2004.[130] At the end of the study, the EPA concluded that the injection and extraction of materials into coalbed methane wells posed a small threat to underground drinking water sources.[131]

In June 2004, almost three years after the Eleventh Circuit Court of Appeals remanded *LEAF II* to the EPA, the agency issued its final determination of Alabama's UIC program and concluded that it complied with the Class II well requirements.[132] The ruling was announced after the agency performed the 2004 perfunctory study whereby the agency claimed that the injection of hydraulic fracturing fluids into coalbed methane gas wells poses "little threat to drinking water."[133] Since 2004, numerous studies and scholarly critiques have shown that the EPA's 2004 conclusion was an extremely lackadaisical approach to a critically important environmental issue.[134]

B. The 2005 Energy Policy Act and the Halliburton Loophole

In 2005, in response to the *LEAF II* ruling, Congress passed the Energy Policy Act of 2005.[135] Then-Vice President Dick Cheney, the former CEO of the frac-heavy company Halliburton, was extremely influential in successfully getting the Energy Act passed through Congress,

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126. *Id.* at 1262 (noting the distinction between class II-like and class II wells because class II-like wells do not have to comply with all the regulatory requirements of full class II wells).

127. *Id.*. (class II wells are "wells which inject fluids: (1) which are brought to the surface in connection with . . . conventional oil or natural gas production . . .; (2) for enhanced recovery of oil or natural gas; and (3) for storage of hydrocarbons."). *See* 40 C.F.R. § 144.6(b)(2009).

128. *Id.* at 1264.

129. *Id.* at 1265.

130. Cupas, *supra* note 1, at 621.

131. *Id.*

132. Roberson, *supra* note 28, at 25.

133. *Id.*

134. Cupas, *supra* note 1, at 608.

135. Roberson, *supra* note 28, at 25.

which would preclude the EPA from having jurisdiction over the chemicals injected into the ground by companies conducting the fracking process.[136] Moreover, the passage of section 322 of the Energy Policy Act of 2005 resulted in two consequences with potentially disastrous effects on the environment relating to hydraulic fracturing. First, the legislation exempts companies from having to disclose the exact chemicals used in their "fracking fluids."[137] Specifically, this exemption eliminates lawsuits by western ranchers who find that drilling for methane gas pollutes groundwater by injecting contaminated fluids underground.[138] Sixteen companies significantly benefit from this exemption from clean water laws: Anadarko, BP, Burlington Resources, ChevronTexaco, ConocoPhillips, Devon Energy, Dominion Resources, EOG Resources, Evergreen Resources, Halliburton, Marathon Oil, Oxbow (Gunnison Energy), Tom Brown, Western Gas Resources, Williams Cos, and XTO.[139] Interestingly, these companies gave nearly fifteen million dollars to federal candidates—with more than three-quarters of that total going to Republicans.[140] Moreover, these sixteen companies spent more than seventy million dollars lobbying Congress to obtain this exemption from the SDWA.[141] Second, the 2005 Energy Policy Act amended Paragraph (1) of §1421(d) of the Safe Drinking Water Act[142] to redefine the term "underground injection."[143] The amended portion of the Act excludes from the definition of underground injection two items: 1) the underground injection of natural gas for purposes of storage, and 2) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.[144] As stated previously, this policy was a huge benefit to the "big business" type companies listed. Due to the absence of disclosure and jurisdiction for the EPA, these businesses stood to gain substantially from the economic impact of the deregulation.[145] Sadly, "the view that exemption[s][146] from federal oversight of oil and gas

136. GASLAND, *supra* note 17.

137. *Id.*

138. *Id.*

139. *Energy Policy Act of 2005, or "The Halliburton Loophole,"* http://www.dunkardcreekkill.com/?p=94 (last visited Feb. 27, 2012).

140. *Id.*

141. *Id.*

142. *See also* 42 U.S.C. § 300h(d).

143. Energy Policy Act of 2005 § 322, 42 U.S.C. § 15801 (2005).

144. Energy Policy Act of 2005 § 322, *see also* 42 U.S.C. § 300h(d)(1)(B)(i)-(ii).

145. *See generally* Joshua Dorner, *Cheney's Culture of Deregulation: How Bush Administration Inaction Created the BP Disaster*, Center for American Progress (June 9, 2010), http://www.americanprogress.org/issues/green/news/2010/06/09/7900/cheneys-culture-of-deregulation-and-corruption/.

146. These exemptions have been coined the phrase "Halliburton Loophole" because under the leadership of former Chief Executive Officer Dick Cheney Halliburton introduced

development would lead to increased energy independence and development . . . of bridge fuels, like natural gas, prevailed in Congress."[147]

C. State Regulations

1. New York's Moratorium

Despite the EPA's apparent lack of concern, several states have taken the initiative to develop their own regulations. Currently, New York has a moratorium on fracking.[148] In December 2010, Governor Patterson issued an executive order prohibiting high-volume hydraulic fracturing of horizontally drilled wells, such as those in the Marcellus Shale region of southern New York.[149] The moratorium was in place until the New York State Department of Environmental Conservation (NYSDEC) completed a long-delayed Supplemental Environmental Impacts Statement.[150] Governor Andrew Cuomo indicated in the summer of 2011 that he was considering lifting the temporary ban after the state's Department of Environmental Conservation released a draft of proposed regulations governing fracking, and during the summer of 2012, he firmly established that he was actively seeking to lift the ban.[151] Prior to Governor Cuomo's summer 2012 press conference establishing his intent to lift the ban, members of the New York legislature proposed several bills to limit or ban fracking entirely.[152] In January 2012, one New York legislator, Senator Tony Avella, a sponsor of a bill banning hydraulic fracturing, spoke of the imminent necessity of a ban, "[F]racking is the most important environmental issue this state has faced in the past 100 years . . . there is no possible regulation or series of regulations that can stop the one incident that pollutes our water supply for

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much of the fracking technology into the fracking industry and further lobbied to have the exemptions placed in the Energy Policy Act of 2005. *See* Dorner, *supra* note 145, n. 161.

147. Emily C. Powers, *Fracking and Federalism: Support for an Adaptive Approach That Avoids the Tragedy of the Regulatory Commons*, 19 J.L. & POL'Y913, 938-39 (2011).

148. Jon Campbell, *New York State Assembly Passes One-Year Fracking Moratorium*, GANNETT ALBANY BUREAU (June 7, 2011, 8:59 AM), http://www.wgrz.com/news/article/123804/37/Assembly-Passes-One-Year-Fracking-Moratorium.

149. Mary Esch, *NY 'Fracking' Ban: Governor David Paterson Orders Natural Gas Hydraulic Fracturing Moratorium For Seven Months in New York*, HUFFPOST GREEN (Dec. 12, 2010, 3:34 PM), http://www.huffingtonpost.com/2010/12/13/ny-fracking-ban-david-paterson_n_795730.html.

150. Orford, *supra* note 78.

151. Danny Hakim and Nicholas Confessore, *Cuomo Will Seek to Lift Ban on Hydraulic Fracturing*, HUFFPOST GREEN (June 30, 2012), http://www.nytimes.com/2011/07/01/nyregion/cuomo-will-seek-to-lift-drilling-ban.html?pagewanted=all&_r=0.

152. Orford, *supra* note 78 at n. 14. (Assembly Bill 5547 would prohibit fracking in New York until the EPA releases its nationwide study on fracking; Assembly Bill 6541 would place a moratorium on fracking for five years until the state conducts its own study; Assembly Bill 5677 would ban fracking permanently within state parklands; and Assembly Bill 7218 and Senate Bill 4220 would ban fracking entirely.).

1,000 years."[153] After Governor Cuomo indicated he would seek to lift the ban, experts advised that it would be several months before fracking would resume in the state.[154]

2. New Jersey's Legislatively Passed Ban

The New Jersey legislature passed a bill, via super majorities, in June 2011, to permanently ban fracking throughout the state.[155] However, the governor issued a conditional veto and instead recommended a one-year ban (moratorium) instead of banning it completely.[156] Experts say that the legislation is largely symbolic because there is not enough natural gas under New Jersey worth obtaining by drilling. Opponents, however, say New Jersey could send a strong message about the importance of ensuring water quality by enacting a full ban.[157] The legislature, in early 2012 was faced with considering whether to accept the governor's proposed alternative or to proceed with a veto override.[158]

V. FRANCE'S COMPLETE BAN ON FRACKING

A. Legislative History and Background

The rising public concern over hydraulic fracturing in France, as well as the concern among elected officials, compelled the French government to place a moratorium on the exploration of gas and oil shale (mainly in the Paris Basin) in February 2011 until the findings of a joint mission of the General Council of Industry, Energy, and Technology (CGIET) and the General Council of the Environment and Sustainable Development (CGEDD) was conducted and released in April 2011 assessing the environmental and social impacts of fracking.[159] However, before the study

153. *Environmental Groups Rally for a NY Ban on Fracking,* ASSOCIATED PRESS (Jan. 23, 2012, 7:23 PM), http://www.syracuse.com/news/index.ssf/2012/01/environmental_groups_rally_in.html.

154. Hakim and Confessore, *supra* note 151.

155. Andrew Restuccia,

NJ Gov. Christie Vetoes 'Fracking' Ban Proposal, Calls for Moratorium, THE HILL (Aug. 25, 2011, 2:24 PM), http://thehill.com/blogs/e2-wire/e2-wire/178257-gov-christie-vetoes-fracking-ban-proposes-one-year-moratorium. *See also* A.B. 3653, 214th Legis. (N.J. 2011) *available at* http://www.njleg.state.nj.us/2010/Bills/A4000/3653_I1.PDF and S.B. 2576, 214th Legis. (N.J. 2011) *available at* http://www.njleg.state.nj.us/2010/Bills/S3000/2576_I2.PDF.

156. *Id.*

157. *Id.*

158. Orford, *supra* note 78, at 6.

159. Nat'l Assy. Rep. No. 3392 (2011), *available at* http://www.assemblee-nationale.fr/13/rapports/r3392.asp. *See also* 2011 Nat'l. Assembly Bill Nos. 3283, 3301, and 3283 and 2011 Senate Bill Nos. 377 and 417.

was even released, there were three bills introduced in the National Assembly and two bills introduced in the Senate, which would have effectively banned hydraulic fracturing, and exploration of oil and gas while repealing the exclusive licenses for those companies already licensed to conduct such research.[160] A report conducted by MM. Michael Harvard and Jean-Paul Chanteguet, members of the National Assembly, which was recorded at the Presidency of the National Assembly on May 4, 2011, indicated that the most serious concerns regarding fracking that the members of parliament should consider are the fracture itself and the rise of the fracking fluid to the surface.[161] The report stresses that the fracture, created in order to reach the well located in the shale, may extend over a distance that is greater than originally planned. The tiny crevices could even reach more porous upper level aquifers, which can be dangerous since the chemicals in the fracking fluid could seep through the crevices and contaminate the aquifers.[162]

Secondly, the report expressed skepticism over the testimony of pro-fracking industry advocates that the flow-back fluid, extracted at the end of the fracking process, would not leak out of the borehole (the porosity of the sleeve casing and cement) on its way to the surface.[163] The report states, "During the ascent, a deficiency in the protection of the borehole may allow some substances to pass through the casing and thus *directly* pollute aquifers or join porous and permeable layers."[164] One of the most interesting arguments advanced in the report was a brief discussion of, and citation to, the April 18, 2011 report of the U.S. House Committee on Energy and Commerce, which listed the findings that of the fluids used in fracking, up to "twenty-nine are known to be carcinogenic or likely to present risks to human health and are considered pollutants capable of damaging air quality."[165]

Another major concern the report focused on was the marked disturbance in the initial phase of production; notably, the seemingly "endless stream of trucks and footprints."[166] The French CGIET and CGEDD estimated that a successful fracking well requires between 900 and 1,300 truck trips, to bring/transfer fluids and other necessary equipment.

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160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (emphasis added).

165. *Id. See also*, MINORITY STAFF OF H. COMM. ON ENERGY AND COMMERCE, 111th CONG. REPORT ON CHEMICALS USED IN HYDRAULIC FRACTURING (April 18, 2011) *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Hydraulic%20Fracturing%20Report%204.18.11.pdf.

166. Nat'l Assy. Rep. No. 3392 (2011), *available at* http://www.assemblee-nationale.fr/13/rapports/r3392.asp.

This causes a major nuisance for residents, destroys local ecosystems through the repeated passage of heavy vehicles, widening of roads at the expense of local authorities, damage to existing routes, and increased erosion through the creation of new tracks.[167]

Lastly, the report stressed the inability of France to effectively reduce carbon emissions. The report stated:

> A study of a teacher of Cornell University, published April 11, 2011, warned against the impact of oil development by hydraulic fracturing on global warming. The study points out that natural gas is mostly methane [and its] effect on global warming is 105 times greater than carbon dioxide over a period of twenty years. Due to the mining used, gas leaks are more numerous than for hydrocarbons operated by simple drilling. Thus, over a period of twenty years, the production of unconventional gas (due to fracking) is *more harmful* than natural gas, oil, or coal . . . France, like all members of the European Union, pledged in 2008 to achieve the Climate Action Plan developed by the European Commission. This plan, known as the name of "three times twenty" provides for a 20% reduction in emissions of greenhouse gases by 2020 compared to 1990 levels.[168]

This area of the report emphasized that France had a commitment to reduce carbon emissions, and engaging in hydraulic fracturing would not only undermine the commitment but also give the country a black mark in the eyes of the global community.[169] During the first reading and debate of the bill in the National Assembly, MM. Jean-Paul Chanteguet noted that the balance of greenhouse gas emitted from the fracturing of natural gas is close to or even higher than that of coal.[170]

Various bills to regulate and ban hydraulic fracturing were introduced in the French National Assembly and Senate. Then they were debated in committees in each house and a conference committee consisting of members of each house, and were finally reconciled into one bill and voted on between March 2011 and June 2011.[171] During the first reading and

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167. *Id.*

168. *Id. See also*, R. Howarth, et. al., *supra* note 81 (emphasis added).

169. Nat'l Assy. Rep. No. 3392 (2011), *available at* http://www.assemblee-nationale.fr/13/rapports/r3392.asp.

170. 13th Legislature, Regular Session 2010-2011 (May 10, 2011) (statement of MM. Jean-Paul Chanteguet), *available at* http://www.assemblee-nationale.fr/13/cri/2010-2011/20110174.asp.

171. Nat. Assy. Rep. No. 3392 (2011), *available at* http://www.assemblee-nationale.fr/

debate of the bill in the National Assembly, the Minister for Ecology, Sustainable Development, Transportation, and Housing, Nathalie Kosciusko-Morizet, gave testimony stressing that members of the National Assembly should vote for the bill because France does not want the devastated landscapes and contaminated ground water that the United States was experiencing from hydraulic fracturing.[172] During the hearing, MM. Michel Harvard also stressed that the introduced bills were a means for Parliament to debate the issue because he realized how unclear the issue of fracking was for many members. [173] MM. Harvard emphasized that the purpose of the bill before the National Assembly was threefold.[174] First, it aimed to ensure environmental protection and safety against the risks posed by technology that is only slightly improved and consistent with sustainable development.[175] Second, it intended to address the concern of the French citizens.[176] Third, it was a first step towards the establishment of an information source for Parliament on the techniques of exploration and exploitation of the subsoil and knowledge of France's energy reserves, which paved a way for the broader debate on the modernization of the Mining Code.[177] He also referenced the movie *Gasland* to the Assembly, indicating that the movie encouraged the mobilization of elected officials and residents associations throughout the country, showcasing the challenge that fracking had become for the country.[178] Most importantly, MM. Harvard noted the three most egregious risks of hydraulic fracturing that warranted a total ban: the copious amounts of clean water that is used with the risk of groundwater pollution at the time of fracturing and hauling the frac fluid to the surface, the chemical additives which comprised one half percent of the composition of the fluid, amounting to a volume of several tens of cubic meters per well, and finally, the fact that France demonstrated "through the Grenelle Environment Forum and the charter of the environment . . . a strong commitment to protecting [the] environment and human health."[179]

After a second lengthy debate over mark-ups and sending the bill back to committee, the National Assembly voted to approve the adoption of the bill as it was initially introduced, with 287 votes for passage and 186

13/rapports/r3392.asp.

172. 13th Legislature, Regular Session 2010-2011 (May 10, 2011) (statement of Min. Kosciusko-Morizet), *available at* http://www.assemblee-nationale.fr/13/cri/2010-2011/20110173.asp.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. 13th Legislature, Regular Session 2010-2011 (May 10, 2011) (statement of MM. Michel Harvard), *available at* http://www.assemblee-nationale.fr/13/cri/2010-2011/20110173.asp.

178. *Id.*

179. *Id.*

votes against. It then sent the bill to the Senate for consideration.[180] After the Senate accepted the bill, it was sent to the Committee on Economy, Sustainable Development and Spatial Planning for consideration and mark-ups. [181] During the Senate committee hearings, the main arguments that were advanced in the National Assembly were addressed: the amount of pressure required for hydraulic fracturing, the dangerousness and toxicity of the products used in fracing fluid, the disadvantages caused by the endless stream of trucks and heavy machinery, and the impact on the landscape.[182] The committee adopted four of the five major provisions of the bill that the National Assembly had adopted with amendments.[183] After a review and mark-up of the bill's provisions in a joint National Assembly and Senate committee on June 15, 2011,[184] the final bill was sent to the National Assembly where it was adopted on June 21, 2011,[185] and to the Senate where it was adopted on June 30, 2011, by a vote of 176 to 151.[186]

After the passage in the Senate, France officially became the first country to pass an outright ban on hydraulic fracturing countrywide.[187] The French ban on fracking not only made the process illegal in the country, but it also revoked the standing permits that oil and gas companies had in the country to conduct fracking.[188] France's Environment Minister Nathalie Kosciusko-Morizet said upon the bill's passage, "We are at the end of a legislative marathon that stirred emotion from lawmakers and the public. Hydraulic fracturing will be illegal, and [P]arliament would have to vote for

180. 13th Legislature, Regular Session 2010-2011 (May 11, 2011), *available at* http://www.assemblee-nationale.fr/13/cri/2010-2011/20110175.asp. For a full discussion and mark-up during the second meeting of the National Assembly *see* http://www.assemblee-nationale.fr/13/cri/2010-2011/20110174.asp.

181. 13th Legislature, Regular Session 2010-2011 (May 11, 2011), *available at* http://www.senat.fr/leg/ppl10-510.html.

182. Min. of the Comm. on Economic, Sustainable Development, *available at* http://www.senat.fr/compte-rendu-commissions/20110523/eco.html#toc4.

183. *Id.*

184. Joint Comm. Report for the week of June 15, 2011, *available at* http://www.senat.fr/compte-rendu-commissions/20110614/cmp.html.

185. 13th Legislature, Regular Session 2010-2011(June 21, 2011), *available at* http://www.assemblee-nationale.fr/13/ta/ta0691.asp.

186. 13th Legislature, Regular Session 2010-2011 (June 30, 2011), *available at* http://www.senat.fr/leg/tas10-155.html, *see also* Tara Patel, *France to Keep Fracking Ban to Protect Environment, Sarkozy Says*, BLOOMBERG BUSINESS WEEK (Oct. 4, 2011), http://www.businessweek.com/news/2011-10-04/france-to-keep-fracking-ban-to-protect-environment-sarkozy-says.html.

187. Tara Patel, *France to Keep Fracking Ban to Protect Environment, Sarkozy Says*, BLOOMBERG BUSINESS WEEK (Oct. 4, 2011), http://www.businessweek.com/news/2011-10-04/france-to-keep-fracking-ban-to-protect-environment-sarkozy-says.html.

188. Law No. 2011-835 of July 13, 2011, Journal Officiel de la République Fran□aise [J.O.][Official Gazette of France], July 13, 2011, p. 658 *available at* http://www.martindale.com/environmental-law/article_Jones-Day_1443058.htm.

a new law to allow research using the technique." [189] The actual text of the law reads, under Article I, "Under the Environmental Chapter and the principle of prevention and correction provided for in Article L. 110-1 of the Code of the environment, exploration and mining of oil and gas drilling followed by hydraulic fracturing of the rock are prohibited *in this country*."[190] Within two months of the enactment of the statute, all permits held by companies conducting fracking were revoked.[191]

B. Public policy rationale, public perception, and what it means for Europe

During the close of the first debate of the bill in the National Assembly, MM. Jean-Paul Chanteguet, and Min. Nathalie Kosciusko-Morizet cited strong public policy rationale for a complete ban on fracking.[192] MM. Jean-Paul Chanteguet stated to his fellow members that banning fracking would send a clear policy message that France intends to be a leader in energy independence and keep its commitment to mitigating climate change.[193] Chanteguet stressed that investing heavily in improving energy efficiency and renewable energy would lead France "toward a society of sobriety."[194] Min. Koscuisko-Morizet closed the debate with statements mirroring the importance of MM. Chanteguet's statements by stressing to her fellow members"[w]hat is the economy, if not to live better, live well, on a planet whose climate is stabilized, in a protected environment and a peaceful social climate? . . . the exploitation of unconventional oil is an activity that is problematic . . . it is about groundwater pollution, soil pollution, [and] landscape impact."[195]

Furthermore, a recent speech given by French President Nicolas Sarkozy exemplifies the policy rationale offered in the National Assembly and Senate debates that was overwhelmingly persuasive for many parliamentarians in their vote to ban hydraulic fracturing. Sarkozy stated that France will maintain a ban on fracking until there is proof that shale

189. *Id.*

190. *Id.* (emphasis added).

191. *Id.*

192. 13th Legislature, Regular Session 2010-2011 (May 10, 2011) (statements of MM. Jean-Paul Chanteguet and Min. Kosciusko-Morizet), *available at* http://www.assemblee-nationale.fr/13/cri/2010-2011/20110173.asp.

193. 13th Legislature, Regular Session 2010-2011 (May 10, 2011) (statement of MM. Jean-Paul Chanteguet), *available at* http://www.assemblee-nationale.fr/13/cri/2010-2011/20110173.asp.

194. *Id.*

195. 13th Legislature, Regular Session 2010-2011 (May 10, 2011) (statement of Min. Kosciusko-Morizet), *available at* http://www.assemblee-nationale.fr/13/cri/2010-2011/20110173.asp (Min. Kosciusko-Morizet also referenced similar arguments offered at the beginning of the debate, notably, that there would be increased traffic on pristine landscape and that fracking itself requires an extraordinary amount of water.).

gas exploration will not harm the environment or "massacre" the landscape.[196] Sarkozy also stated during an October 2011 visit to Ales in southern France "[d]evelopment of hydrocarbon resources underground is strategic for our country but not at any price . . . this won't be done until it has been shown that technologies used for development respect the environment, the complex nature of soil and water networks."[197]

What is important to note about the fracking that was conducted in France is the fact that "according to the EIA, France has shale gas resources only slightly below those of Poland, and more importantly many of those resources in the Paris Basin are more oil, essentially a field analogous to the Bakken Field which has been a primary cause of the twenty dollar-plus gap between Brent and WTI oil prices."[198] This is significant because France is seen in many ways as a leader in environmental affairs in Europe.[199] The fact that the country has such a significant amount of natural gas that could be extracted from the shale by fracking shows that the country took the environmental concerns of scientists and its citizens over the potentially economic benefits of the process. Finally, the American-made documentary *Gasland* and its depictions of the monstrous consequences of hydraulic fracturing on average citizens, proved to be incredibly persuasive and determinative for many French legislators during the numerous full-body National Assembly, Senate, committee, and joint committee debates.[200]

VI. THE UNITED STATES' INSUBSTANTIAL APPROACHES TO MANAGE HYDRAULIC FRACTURING

A. The EPA is not an Appropriate Regulator

As previously discussed in this Note, the EPA's approach to dealing with the environmental consequences related to fracking has been anemic at best. Moreover, many environmentalists are skeptical towards the EPA's willingness to even address hydraulic fracturing.[201] First, the EPA made minimal efforts to comply with the Eleventh Circuit Court of Appeals

196. Patel, *supra* note 186.

197. *Id.*

198. Nick Grealy, *Shale Gas and Oil in France*, NO HOT AIR (Sept. 27, 2011), http://www.nohotair.co.uk/2011/63-shale-gas/2144-shale-gas-and-oil-in-france.html.

199. *See generally*, Le Kama, Alain Along, et. al., *France and International Environmental Policy*, INTERNATIONAL ECONOMICS, (2006), http://www.cepii.fr/anglaisgraph/publications/economieinter/rev108/rev108g.htm.

200. 13th Legislature, Regular Session 2010-2011 (May 10, 2011) (statement of MM. Michel Harvard), *available at* http://www.assemblee-nationale.fr/13/cri/2010-2011/20110173.asp. *See also* 13th Legislature, Regular Session 2010-2011 (June 1, 2011) (statement of Min. Kosciusko-Morizet), *available at* http://www.senat.fr.seances/s201106/s20110601/s20110601006.html (when speaking in front of the Senate committee).

201. Cupas, *supra* note 1, at 625.

remand of *LEAF I*, which appeared to compel the EPA towards frac regulation.[202] Second, most environmentalists agree that the EPA's 2004 study regarding the effects of coalbed methane hydraulic fracturing on the environment was shoddy and wholly inadequate.[203] The study failed to refer to public comments or incorporate insights from valuable SDWA affiliates, and the study blatantly disregarded "multiple states' complaints of water contamination as inconclusive proof of a direct relationship between the fracturing and water damage."[204] Third, in an attempt to assuage the fears of some environmentalists, the EPA entered an agreement with *only* ninety-five percent of oil and gas operators that engaged in hydraulic fracturing, which asked the industry to *voluntarily* remove diesel fuel and other toxic substances from some of the frac fluid injected into USDWs.[205] Predictably, the permissive language of the agreement stunted its potential for becoming a new regulatory control over hydraulic fracturing, in part, because the agreement allowed the companies to resume utilizing the use of diesel fuel additives in hydraulic fracturing fluids injected into USDWs if the oil companies notified the EPA within thirty days after a decision to abandon the agreement.[206] Companies seized on the weakness of the agreement, and after congressional inquiry into hydraulic fracturing in 2010, it was discovered that twelve of the fourteen companies surveyed injected more than thirty-two million gallons of diesel fuel into fracking wells between 2005 and 2009.[207] Finally, it seems that "despite numerous complaints from residents of multiple hydraulic fracturing states, related litigation and settlements, legislative proposals, and even federal circuit holdings, the EPA is steadfast in its belief that hydraulic fracturing should remain virtually unregulated under the SDWA."[208] Furthermore, most of the published literature pertaining to frac fluids discloses nothing regarding the potential environmental or human health impacts of the fluids, and "there is very little documented research on the environmental impacts that result from the injection and migration of these fluids into subsurface

202. *Id.* at 621.

203. *See generally, id.*

204. Cupas, *supra* note 1, at 621-2.

205. Cupas, *supra* note 1, at 621 (emphasis added). This agreement was memorialized in the 2003 Memorandum of Agreement (MOA) and established a voluntary agreement among the EPA and three major oil companies. The EPA indicated that these three companies performed ninety-five percent of the hydraulic fracturing operations in the United States, *see id.*

206. Cupas, *supra* note 1, at 621.

207. James E. Goddard, *Recent Developments in Texas, United States, and International Law*, 6 TEX. J. OIL GAS & ENERGY L. 423, 442-43 (2010-2011) (noting that democratic Congressmen Henry Waxman of California and Ed Markey of Massachusetts launched the inquiry).

208. Cupas, *supra* note 1, at 626.

formations, soils, and the like."[209]

Recently, however, under the Obama Administration, the EPA is taking a somewhat more thorough approach by deciding to conduct a new study regarding the environmental and human health effects of hydraulic fracturing.[210] In June 2010, the EPA submitted a comprehensive study plan on hydraulic fracturing for public comment.[211] On November 3, 2011, the EPA released the outlines of the plan, which included an emphasis on the impact of large-scale water withdrawals, aboveground spills of drilling fluids, and the impact the fracturing process itself has had on water quality and quantity in states where tens of thousands of wells have been drilled in recent years.[212] Unlike the EPA's 2004 cursory study of hydraulic fracturing used in coalbed methane deposits, this study will "look at the entire water lifecycle of hydraulic fracturing in *shale deposits*, beginning with the industry's withdrawal of huge volumes of water from rivers and streams and ending with the treatment and disposal of the tainted wastewater that comes back out of the wells after fracking."[213] The study should be completed in 2014.[214]

Despite the EPA's sudden "change of heart" to issue a new study, which was mandated by Congress, the agency's history and inability to proactively address the serious environmental issues related to hydraulic fracturing should make many environmental groups and their activists skeptical.[215] The EPA's inconsistencies under different administrations showcase why the agency cannot be trusted to successfully address the problem.

B. Why the States Are Equally Incapable of Regulating Fracking as is the EPA

There are currently twenty-seven states that have laws in place to govern oil and gas drilling production operations.[216] However, states have

209. *Id.* at 626-27.

210. Terry W. Roberson, *supra* note 28, at 25. *See* U.S. Envtl. Prot. Agency, Hydraulic Fracturing Research Study, (2010), *available at* http://www.epa.gov/safewater/uic/pdfs/hfresearchstudyfs.pdf.

211. U.S. Envtl. Prot. Agency Hydrauliuc Fracturing Research Study, (2010), *available at* http://www.epa.gov/safewater/uic/pdfs/hfresearchstudyfs.pdf..

212. Dina Cappiello, *EPA to Probe Gas Drilling's Toll on Drinking Water*, THE COLORADO SPRINGS GAZETTE (Nov. 3, 2011), http://www.gazette.com/articles/epa-127870-gas-probe.html. *See generally* Plan to Study, *supra* note 42.

213. *Id.* (emphasis added).

214. *Id.*

215. *Id.*

216. Goddard, *supra* note 204 at 443. These states are the only ones where shale formations with potential natural gas deposits are located, *see id.*

not always regulated oil and gas development aimed at protection.[217] In fact, until about 1939, a majority of well production regulation was aimed at protecting the asset, namely the oil and gas reservoir, not the environment.[218] While states have since realized that regulation for purposes of protecting the environment and critical water sources is necessary, the regulation has been far from uniform across states, with most regulations tailored to the specific needs and political environment of each individual state.[219] Moreover, it has become increasingly apparent that many states have not taken seriously the possibility that fracturing itself might cause groundwater contamination.[220]

The spectrum of states' policies regarding fracking fall between little regulation ("pro-fracking") on one end to consideration of banning the practice on the other end ("pro-environment").[221] New York and New Jersey, by far the most environmental and human health conscious states, lie on the pro-environment end of the spectrum because their legislatures are seriously considering complete bans on fracking statewide.[222] Some states have taken restrictive approaches without banning, or temporarily pausing, the process.[223] For example, Colorado's Oil and Gas Conservation Commission (COGCC), which regulates oil and gas drilling in the state, has issued regulations requiring operators who conduct hydraulic fracturing operations to maintain material safety data sheets (MSDS) for each chemical brought to a well site for use during hydraulic fracturing operations.[224] In contrast to many pro-fracking states that do not require any disclosure of "trade secret" chemical compositions, the COGCC requires companies to maintain the identity of the trade secret chemical product but not the information regarding the individual chemical components of the composition, unless it is necessary to respond to a spill or alleged release of frac fluid into the environment.[225] States in the middle of the spectrum, including Wyoming and Michigan, have more stringent than average regulations at the onset of the fracking process.[226] For example, they require companies who drill for oil and gas to identify and keep accurate records of geologic strata that is being penetrated, including formation by name and depth, and the types of cement and casing used for the shell of the

217. Deweese, *supra* note 83, at 21.

218. *Id.*

219. *Id. See generally*, Bob Sheak, *Opponents of Fracking Deal with Corporate and Political Obstacles*, THE FREE PRESS (Sept. 7, 2011), http://freepress.org/departments/display/3/2011/4284.

220. Orford, *supra* note 78, at 4.

221. *See generally,* Deweese, *supra* note 83.

222. *See supra* notes 148-150, 155 and accompanying text.

223. *See generally*, Goddard, *supra* note 204.

224. *Id.* at 439.

225. *Id.*

226. *Id.*

well.[227]

Currently, only two states have implemented regulations regarding air quality control connected with hydraulic fracturing.[228] Wyoming and Colorado have implemented so called "green completions" which require new and refractured wells to be fitted with equipment that captures methane and other gases released during the flow-back period when the frac fluid is pumped out of the well after injection.[229]

Unfortunately, at the other end of the fracking spectrum lie extremely lax regulations with potentially catastrophic consequences.[230] Last year, after a lack of a pressure gauge in fracking operations from Chesapeake Energy Corporations caused contamination of drinking water in Pennsylvania, the state refused to mandate pressure gauges for all corporations involved in fracking similar wells.[231] This is despite requiring such a gauge for Chesapeake and a call from environmental groups to have them required industry-wide.[232] Conversely, Pennsylvania's next-door neighbor, Ohio, requires that all industries involved in fracking operations place pressure gauges on fracking wells.[233] Regulations also vary from state to state regarding the type of cement used for wells, how close to drinking-water sources companies can drill, and how companies can dispose of frac fluid.[234] Most disturbingly, of all states where fracking is conducted, Pennsylvania is the only state that lets companies dump fracking wastewater into state waterways.[235] Equally perplexing, Ohio does not require companies to disclose what fracking chemicals are injected into particular wells.[236]

Other factors exemplify the inability of states to effectively and impartially regulate fracking activities. In the most pro-fracking states, lobbying on behalf of the fracking industry outperformed the lobbying industry promoting stricter regulation.[237] In Ohio, the fracking industry

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227. *Id.*

228. Orford, *supra* note 78, at 4.

229. *Id.* (these are very similar, if not identical, to the new regulations the EPA has proposed). *See also* Oil and Natural Gas, *supra* note 78.

230. *See generally*, Jim Efstathiou Jr. and Mark Niquette, *Fracking Opens Fissures Among States as Drillers Face Many Rules*, BLOOMBERG (Dec. 23, 2011), http://www.bloomberg.com/news/print/2011-12-23/fracking-opens-fissures-among-states-as-drillers-face-many-rules.html.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* For a comprehensive list of regulations by state *see FracFocus: Regulation By State*, http://fracfocus.org/regulations-state (last visited Mar. 11, 2013). (Click on the individual state of interest and follow the prompt to see the state's regulations).

235. *Fracking for Influence*, *available at* http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/FRACKING%20WEBINAR%20SLIDES%20120711.PDF.

236. *Id.*

237. *Id.*

gave almost three million dollars to candidates and political parties from 2001-2011.[238] In Michigan, a state with a moderate record of regulating fracking, the fracking industry gave over two million dollars to political candidates and parties while spending another three million dollars on individual lobbying.[239] One of the most shocking examples comes from Ohio where wealthy executives of companies connected to hydraulic fracturing contributed thousands of dollars to the election of Governor John Kasich.[240] Billionaire brothers William "Bill" Koch and David Koch funneled almost $130,000 in personal contributions through a political action committee (PAC) to support Governor Kasich's election in the fall of 2010.[241]

VII. SOLUTIONS TO THE PROBLEM: TWO HALF MEASURES THAT FAIL

A. Illusory Half-Measure: Have States Adopt Uniform Standards

One potential solution for dealing with the inadequacies of the state-by-state approach and do-nothing EPA approach is to have states adopt regulations at least as strict as those required under the SDWA in order to obtain federal authorization to control their own underground injection activities.[242] The SDWA, as a result of being amended by the Energy Policy Act of 2005, exempts the "underground injection of fluids or propping agents (*other than diesel fuels*) pursuant to hydraulic fracturing operations."[243] This is only a half measure because the only uniform measure states could be forced to adopt would be regulations regarding hydraulic fracturing conducted with diesel fuel.[244] As a result of this failure to guide the states, companies are still using diesel fuel to conduct their fracking operations.[245] Between 2005 and 2009, approximately thirty-two million gallons of diesel fuel have been injected into fracking wells

238. *Id.* (This is estimated to be only a portion of the money spent by the pro-fracking lobbying groups because Ohio's weak lobbying laws failed to capture almost ninety percent of what was spent). *See id.*

239. *Id.*

240. Mike Ludwig, *Kasich, Koch and Big-Industry Bucks: Why Ohio is the Next Fracking Frontier* (Nov. 29, 2011), http://www.truth-out.org/kasich-and-big-industry-bucks-why-ohio-next-fracking-frontier/1322500816.

241. *Id.* It is interesting to note that after Governor Kasich was elected he signed a law passed by Ohio's Republican-controlled legislature allowing drilling companies to conduct fracking in state parks. *See id.*

242. Cupas, *supra* note 1, at 627. *See* 42 U.S.C. § 300h-(b) (2000).

243. Orford, *supra* note 78, at 2.

244. *Id.*

245. Letter from Henry Waxman, Edward Markey, and Diana DeGette, U.S. Representatives, to Lisa Jackson, Administrator, Environmental Protection Agency (Jan. 31, 2011), *available at* http://democrats.energycommerce.house.gov/index.php?q=news/waxman-markey-and-degette-investigation-finds-continued-use-of-diesel-in-hydraulic-fracturing-f [hereinafter Letter].

throughout nineteen states.[246] Therefore, this uniform approach is illusory and allows states to individually, under their traditional authority, regulate oil and gas production within their borders.[247]

B. Another Half-Measure: The FRAC Act

Since 2009, legislation has been introduced repeatedly in both houses of Congress to amend the SDWA specifically to include the underground injection of fluids for hydraulic fracturing for oil and gas production[248] and to compel companies to disclose the chemical constituents of its hydraulic fracturing fluid.[249] Unfortunately, the 111th Congress was unsuccessful in passing this necessary legislation.[250] Stand-alone bills in both the U.S. House of Representatives and the U.S. Senate were introduced on June 9, 2009 for the Fracturing Responsibility and Awareness of Chemicals ("FRAC") Act.[251] More recently, this legislation was proposed as the FRAC Act of 2011.[252] The proposed law, introduced in Congress for the third time, is similar to the bill introduced in 2009; it would require energy companies to disclose chemicals used in hydraulic fracturing and, importantly, close a loophole that exempts drilling operators from drinking water regulations.[253] Furthermore, rather than removing the existing exemption, the bill would actually require the EPA to promulgate nationwide minimum requirements for hydraulic fracturing activities conducted at oil and gas wells.[254] Reps. Jared Polis and Diana DeGette, both from Colorado, and New York's Rep. Maurice Hinchey introduced the measure while calling for more transparency from the energy industry. [255] The bill is expected to face a similar fate as the previous measures introduced in the 111th Congress that were defeated due to heavy lobbying pressure by the energy industry, which has spent millions of dollars to fight the common-sense rules.[256] Upon introduction of the FRAC Act of 2011, Representative Polis stated:

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246. *Id.*

247. Orford, *supra* note 78, at 2.

248. *Id.* at 3.

249. Roberson, *supra* note 28, at 25.

250. *Id.*

251. *Id.* (noting that the bills that were introduced in the U.S. House of Representatives and U.S. Senate were H.R. 2766 and S. 1215, respectively).

252. Bob Berwyn, *Energy: The FRAC ACT is Back in Congress*, SUMMIT COUNTY CITIZENS VOICE (Mar. 16, 2011), http://summitcountyvoice.com/2011/03/16/energy-the-frac-act-is-back-in-congress/. *See* H.R. 1084, 112th Cong. (2011).

253. Berwyn, *supra* note 252.

254. Orford, *supra* note 78, at 3.

255. Berwyn, *supra* note 252.

256. *Id.*

> The FRAC Act is a simple, common sense way to answer the serious concerns that accompany the rapid growth of drilling across the country. Our bill restores a basic, national safety-net that will ensure transparency within the industry and safeguard our communities. If there is truly nothing to worry about, then this bill will lay the public's concern to rest through science and sunlight.[257]

Representative Polis' statement reflects a moderate approach to the hydraulic fracturing process. The main problem with his stance, and that of some of his other colleagues in Congress, is that the FRAC Act will not go far enough. This was indicative in the statement released by his colleague Diana DeGette when she said that "[t]he FRAC Act takes necessary but reasonable steps to ensure our nation's drinking water is protected, and that *as fracking operations continue to expand*, communities can be assured that the economic benefits of natural gas are not coming at the expense of the health of their families."[258] The FRAC Act takes a short-sighted approach to the regulation of hydraulic fracturing. Full disclosure of the chemical composition of fracking fluid and new regulations on the contents and composition of the fluids are certainly a good start – albeit small.[259] During the introduction of the bill, RepresentativeHinchey's comments alluded to the fact that he regarded the FRAC Act as a stepping stone to additional, stricter regulation when he stated that "[t]he FRAC Act is an important *first step* toward ensuring that people are protected from the risks of hydraulic fracturing." [260] The companion bill in the United States. Senate, sponsored by Sens. Bob Casey from Pennsylvania and Chuck Schumer from New York, was equally weak. Specifically, the Senate version would require disclosure of the chemical constituents used in the fracturing process, but it would allow companies to skirt the disclosure process for proprietary chemical formulas.[261] In an attempt to appease some concerned environmentalists and health field professionals, the Senate version did include an emergency provision that requires proprietary chemical formulas to be disclosed to a treating physician, the State, or the EPA in emergency situations where the information is needed to provide medical treatment.[262] Although it is commendable that current congressional leaders are recognizing the increased public unrest and need for regulation related to fracking, the proprietary chemical formula exemption proposed in the House and Senate bills only encourages companies that do not wish to

257. *Id.*
258. *Id.* (emphasis added).
259. Smith, *supra* note 36, at 145.
260. Berwyn, *supra* note 252. (emphasis added).
261. *Id.*
262. *Id.*

disclose potentially harmful chemicals to create "chemical formulas" and label them as proprietary. In theory, the FRAC Act would do much to mitigate some current problems related to the hydraulic fracturing process. In fact, the increased regulation and requirement of non-proprietary chemical disclosure would greatly improve current loopholes in the process that have led to harmful environmental and human health consequences. However, the proposed FRAC Act, in its current form, does not go far enough.

VIII. RECOMMENDATIONS

This Note advocates for the adoption of a complete ban on hydraulic fracturing in the likeness of the ban passed in France through a federally enacted statute. Additionally, this Note calls for greater environmental interest group[263] involvement in educating the public and lobbying members of Congress regarding the harmful effects of hydraulic fracturing and why a complete ban is necessary.

After weighing all the evidence related to the hydraulic fracturing process, it should become clear to United Statescongressional leaders and others concerned with the health and well-being of humans and the environment that there is only one viable solution to the hydraulic fracturing problem – a complete ban on the practice. The United States, which has long been a leader in environmental affairs, needs to recognize, just as leaders in France have, that the deleterious effects that stem from fracking are simply too great, and the attempts to regulate and curb some of the harmful effects of the process are too inadequate, to allow the continued use of hydraulic fracturing processes.[264] The fracking study conducted at the request of legislative leaders in France was skeptical of the pro-fracking industry advocates' message that fracking fluids do not contaminate groundwater.[265] Similarly, United States congressional leaders should be skeptical of pro-fracking industry advocates, especially in light of the Halliburton Loophole and the millions of dollars the pro-fracking industry has spent on election campaigns of United States politicians. It is increasingly clear that the hydraulic fracturing industry would like the public to believe that there is sufficient regulation to maintain a safe

263. Examples of these interest groups include groups like the Sierra Club and individuals like Josh Fox who directed *Gasland*. *See* Oregon Sierra Club Blog, Environmental Groups Continue Fight against LNG Fracking: Ask Federal Environmental Agencies to Protest Export Facilities, http://orsierraclub.wordpress.com/2012/03/01/environmental-groups-continue-fight-against-lng-fracking-ask-federal-environmental-agencies-to-protest-export-facilities/ (last visited Mar. 14, 2012).

264. *See generally* GASLAND, *supra* note 17.

265. Nat'l Assy. Rep. No. 3392 (2011), *available at* http://www.assemblee-nationale.fr/13/rapports/r3392.asp

environment and that fracking has no harmful effects on human health. However, just as Representative Polis stated when he introduced the FRAC Act of 2011, "there is a growing discrepancy between the natural gas industry's claim that nothing ever goes wrong and the drumbeat of investigations and personal tragedies which demonstrate a very different reality."[266] His message echoes the statements of French Environment Minister, Nathalie Kosciusko-Morizet, who stated upon passage of France's ban that the realities of hydraulic fracturing are much different from what pro-fracking industry leaders suggest, and contamination of the environment is a reality that is too great a risk for the French people.[267] The reality is that human health and environmental contamination and destruction are taking place.[268] Illnesses traced to fracking have been documented in Colorado, Pennsylvania, Arkansas, Wyoming, Alabama, and Ohio.[269] Furthermore, "disturbing evidence has been revealed to the public demonstrating that millions of gallons of diesel fuel have been pumped into the ground in fracking operations across the country, and that the inability to properly process wastewater from fracking may [be causing the leaching of] radioactive materials into rivers, streams, and the drinking water supply."[270] Therefore, it is time for Congress to introduce, debate, and successfully pass a ban that would eliminate all types of hydraulic fracturing throughout the United States. Many pro-fracking proponents argue that hydraulic fracturing is a "necessary component of a 'clean energy future[,]'" and that it is needed for the United States to maintain energy independence.[271] However, recent scientific evidence has repudiated such claims.[272] Furthermore, the leaders of the United States should take heed just as the legislative and executive leaders in France did in realizing that fracking for natural gas resources should not come at any price to the country, especially when the harmful environmental impacts and documented human illnesses related to fracking outweigh the economic benefit that hydraulic fracturing provided for the country.[273] France passed a ban on hydraulic fracturing despite testimony during legislative debates that France's economy would benefit significantly from the removal of natural gas from the Paris Basin.[274] In the French fracking study, MMs.

266. Berwyn, *supra* note 252.

267. *See supra* note 195, and accompanying text.

268. *Id.*

269. *Id.*

270. *Id. See generally* GASLAND, *supra* note 17.

271. Deweese, *supra* note 83, at 32.

272. R. Howarth, et. al., *supra* note 81.

273. Patel, *supra* note 186.

274. 13th Legislature, Regular Session 2010-2011 (May 10, 2011) (statement of Min. Kosciusko-Morizet), *available at* http://www.assemblee-nationalefr/13/cri/2010-2011/20110173.asp.

Havard and Chanteguet stated that sacrificing environmental values for the sake of securing the economy and energy supplies through fracking was not a gamble the French government should be willing to take.[275] It is time for the United States government to adopt the same approach as the French.

The legislative leaders in France were greatly persuaded to pass the hydraulic fracturing ban by environmental interest groups rallying and protesting against the use of hydraulic fracturing in the country.[276] During the legislative debates, the American-made documentary *Gasland* was mentioned several times when French legislators were debating the necessity of a fracking ban to protect French citizens.[277] Overall, the environmental interest groups led a successful campaign in France in persuading their legislative leaders to adopt a countrywide ban on fracking. Similarly, environmental interest groups in the United States should learn from the same groups' successes in France and try to replicate the success in the United States. These interest groups can be successful by holding more public protests and continuing to lobby individual members of Congress to pass a ban.[278]

Finally, history has indicated that piecemeal and overly lenient regulation of the hydraulic fracturing process by the states, federal legislation, and the EPA has been seriously deficient in addressing the destructive consequences hydraulic fracturing has caused. Tighter regulation will not solve the problem. The process itself is the problem. Therefore, to truly protect the health of the citizens of the United States and the country's cherished environment, a complete federal ban on hydraulic fracturing, mirrored in the form of the French statute, must be enacted.

IX. CONCLUSION

Although hydraulic fracturing has been in use for several decades, it is only recently that the process has been closely scrutinized. New advances in technology have made the process easier to extract natural gas deposits located deep within the earth's shale deposits – but not without serious harmful side effects on the environment. France has led the way in the environmental skepticism of hydraulic fracturing by passing a ban prohibiting the process in any area of the country. The United States has taken smaller, less effective approaches to the harmful effects of hydraulic fracturing mostly by leaving the regulation of fracking to the states. This

275. *Id.*

276. *See generally* 13th Legislature, Regular Session 2010-2011(June 21, 2011), *available at* http://www.assemblee-nationale.fr/13/ta/ta0691.asp.

277. *See supra* note 176.

278. For an example of how such groups are being successful on the state level *see* Mary Esch, *Groups in Albany Rally against Fracking*, WIVB (Apr. 11, 2011), http://www.wivb.com/dpp/news/new_york/Groups-in-Albany-rally-against-fracking.

approach has led to severe harmful effects throughout the United States including air pollution, ground water contamination, and even small earthquakes. The United States could limit or even stop completely the harmful environmental side effects resulting from hydraulic fracturing if the country's political leaders would pass a ban on hydraulic fracturing.