INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW

VOLUME 4

1993-1994

INDIANA
INTERNATIONAL & COMPARATIVE
LAW REVIEW

VOLUME 4 | 1993 | NUMBER 1

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Can Practice Do Without Theory: Differing Answers in Western Legal Education*

*by Richard Stith***

The demise of the Soviet bureaucratic state and the rebirth of laissez-faire economics worldwide—as well as the scholarship of people such as Richard Rorty[1]—have created a crisis not only for planning but for theory itself. Is it still desirable to think thoroughly about what we see and do?

With regard to the study of law, two of the most powerful world cultures provide sharply different answers to this question. Legal education in the United States of America is far less theoretical[2] than it is in European nations. The aim of this paper is two-fold: first, to summarize briefly some of the more salient differences between the American "Common Law" educational system and the Romano-Germanic "Civil Law" educational systems, and, second, to offer reasons which can help account for these differences.

Let me begin with a translation of an actual dialogue that took place between a young woman about to receive her doctorate in law in Spain and this author. These few sentences depict both the sharp contrast between these two legal cultures and the resulting lack of mutual comprehension.

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* Paper presented at the First International Conference on Comparative Law, Peking University, People's Republic of China, 7-10 April 1992. Footnotes have been added and a few textual clarifications have been made. Earlier versions of this article appear in ASIA PACIFIC LAW REVIEW and ARCHIV FUR RECHTS- UND SOZIALPHILOSOPHIE. It is being published contemporaneously in COMPARATIVE JURIDICAL REVIEW (with a Spanish translation).

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1. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

2. An American reader will better understand this paper if the word "doctrinal" is here and elsewhere joined to the word "theoretical." I will contend, for example, that certain forms of legal practice require legal theory in the sense of principled legal doctrine. I do not deny that many American law scholars are engaged in theory of a non-doctrinal sort. For further discussion, see *infra* note 24 and accompanying text. See *infra* note 27 for the broader claim that non-doctrinal forms of theory are also generated by certain concrete concerns.

Spanish doctoral candidate: "Here in Spain we have begun to use American-style practical training. After a semester of theory, students must take a semester of practice in which they apply theory to the solution of particular cases."

American professor: "That's not our method. From the first day of law school, we begin by applying legal theory to particular cases—though we never consider them 'solved'."

Spanish doctoral candidate: "How can you begin with application and only later have something to apply? Do you mean that you begin with simple cases and move gradually, by induction, to more general theory of law?"

American professor: "No, we begin with application and stay there. We rarely ascend to, or descend from, legal theory, except in the context of particular cases."

Spanish doctoral candidate: "But then you're not doing *science!*"

American professor: "Our students never even hear that word."

As can be seen from this interchange, law in Europe is considered an academic field of study. Students of law, like students throughout the university, aspire to "scientific" understanding—not in the sense of experimental science but in the older sense of systematic knowledge *(Wissenschaft* in German). Practice is not neglected; in addition to practically-oriented courses at the universities, law graduates must ordinarily spend considerable time as interns before they can be considered full jurists. But, as in all other academic fields—from medicine to historical research—it is thought that theory must precede practice.

So it is that the European law student is first introduced broadly, by means of treatises and lectures, to the basic concepts, scope, and history of the field of law and of its various subfields. The novice curriculum will include systematic survey courses such as "Introduction to Law" or "Theory of Law," which will focus on the civil law code as archetype. Even apparently more specialized courses, such as "Penal Law," will begin with an overview of fundamental doctrinal theory, with some attention to major schools of thought and historical context. Only after the student has begun to master relevant legal principles and rules will he or she be asked, in a practical course, to apply these rules to "solve" cases.[3] The word "solve" has a flavor of mathematics,

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3. Wilhelm Karl Geck, in *The Reform of Legal Education in the Federal Republic of Germany*, 25 AM. J. COMP. L. 86, 87 (1977), notes that German students have traditionally had to participate successfully in "practical courses, solving cases."

with the accompanying implication that there exist correct solutions to cases—or at least that the search for such solutions is to animate the student's endeavors.[4]

The professorate in Europe, too, is deeply imbued with an academic ethos. A lengthy dissertation-based doctorate is virtually always regarded as a prerequisite to full-time professorial appointment. Sub-disciplinary specializations, likewise, are jealously guarded, as they are elsewhere in the academy.

The American law school world is strikingly different. Although usually joined to a university, legal study is often called "professional" rather than strictly "academic." While the word "vocational" is resisted, most law professors are quite willing to say they teach an "art" or a "craft"[5]—words which conjure up the apprenticeships with which legal education in the United States began. We like to say that our emphasis is on process, on "how to think like a lawyer," on legal skills rather than on abstract legal doctrine. We do not speak of "legal science" at all, except in courses on comparative law or, perhaps, on legal history.

Although our "case method" (focusing on written appellate court opinions) was initiated in the nineteenth century as a means of introducing students, inductively, to theoretical "legal science," today we use cases more for the destruction of theory than for its construction.[6] The majority and the dissenting opinions in cases assigned to students often seem to have equal cogency or to contain internal contradictions. Textbooks may carefully select related cases which come to opposite conclusions. And our so-called "Socratic" method of teaching in pure form requires that the professor always ask further questions, never providing "the answer" nor endorsing one particular student response.

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4. Mirjan Damaška's classic *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363, 1369 (1968), indicates that in Europe the "moving spirit of analysis is . . . the quest for the 'right' answer to the problem at hand."

5. At the small number of high prestige American law schools, many professors would consider themselves to be "academics" doing "theory," but they would mean almost exclusively the non-doctrinal types of theory discussed toward the end of this paper.

6. Professor Harold J. Berman (then of Harvard Law School) has written; "We go on using cases as the primary material of instruction, but we hardly even teach the doctrine of precedent. We go on offering basic courses in contracts and torts in the first year, but many teachers of these subjects spend a good deal of time proving that there really is no such thing as a 'law of contracts' or a 'law of torts'." *The Crisis of Legal Education in America*, 26 B.C. L. REV. 347, 350 (1985).

Most good reasons seem to the student finally to entail highly arguable and even absurd conclusions. Students emerge from this multi-front assault with a mistrust of generalization[7] and often of reason itself. They learn to be adept at legal argument but not to take it very seriously.

Rather than a European-style introduction to the scope and theory of law, in addition to more specialized courses, the American beginner is more likely to take a course with "Legal Writing," and, perhaps, "Oral Argument" in its title—implying that the law is held together by techniques rather than by principles, and that these techniques can be used without much prior substantive study. In recent decades American students have insisted that even the traditional case method, with its factual focus, is insufficiently practical. New curricular offerings have been introduced which move the law school somewhat back toward apprenticeship education, such as client counselling, externships with public agencies or private lawyers, and legal aid clinical work.

American law professors are highly unlikely to have obtained any advanced law degree at all, not even a master's, much less a doctorate, unless for some reason they wished to supplement a first degree at a lesser school with another degree at a more prestigious school. The standard academic doctorate, the Ph.D., is not even offered in law in America. Only the S.J.D. (or J.S.D.) is awarded, which may require as little as one more year beyond a one-year LL.M., with neither a preliminary examination, nor a foreign language, nor an oral defense required. Few are willing to make even this much effort; in 1990-91 only sixteen of these doctoral degrees were granted in the whole country.[8] Nearly all American professors, especially at the most prestigious schools, will have only one degree in law, the J.D. (formerly called LL.B.), which is the same three-year degree possessed by almost every lawyer. Nor will most professors have spent years in specialized research after appointment. Books are rare, though articles are common, while pro-

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7. MARY ANN GLENDON, COMPARATIVE LEGAL TRADITIONS 124 (1985).

8. Telephone Interview with the Office of the Consultant on Legal Education to the American Bar Association in Indianapolis, IN (Oct. 14, 1992). In 1991-92, there were seventeen doctoral degrees awarded. A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, Fall 1993 A.B.A Sec. Legal Education and Admissions to the Bar 66. I would suspect that most of these doctoral degree recipients are not U.S. nationals and that few plan to teach law in America.

Yale Law School's S.J.D. appears among the easiest to obtain, at least formally. By contrast, Harvard Law School's S.J.D. requirements approach those of the typical Ph.D., in that both an oral preliminary examination and an oral dissertation defense normally must take place.

motions are relatively rapid—requiring as few as three to five years for the achievement of full rank with tenure. What most distinguishes professors at the best schools is not wide or profound academic understanding acquired through graduate or postgraduate study, but brilliance. They were at or near first rank in their law school classes, served as editors of the school's law review, and, probably, clerked for a year for a justice of the United States Supreme Court. They possess not knowledge but intelligence and, often, wit.

I just mentioned that our best students edit our legal scholarship. Students, not faculty, decide what will be printed in university law journals. Students who have studied law for only a couple of years sit in judgment over the work of professors of thirty years. Of course, faculty advisors are available and are regularly consulted by student editors, but Europeans are nevertheless incredulous when they learn that our students are entrusted with so much power over the future of legal research. Clearly we are far from the ordinary academic outlook, dominant in European law schools, that only experienced specialists have sufficient knowledge to be able to judge the quality of scholarly work. We think, rather, that a good legal mind can recognize well-researched and well-argued legal writing without much need for prior understanding of the deep theoretical structures of the field in question.[9]

In the remainder of this paper I suggest two reasons which may help explain the extraordinary educational distance between the two sides of the Atlantic Ocean. My initial thesis is this: European law professors are more theoretical because they seek to guide and train judges. American law teachers are less theoretical because they need not guide and cannot train judges. Of course, neither this reason nor the one I shall append to it later are intended to explain fully the

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9. In support of the American law review, one law school dean has claimed that "once a person of superior intelligence learns to read the cases, acquires the vocabulary and becomes acquainted with legal materials, he is in a position to deal effectively with legal theory in almost any field, provided that he will devote to it the requisite amount of time." Harold C. Havighurst, *Law Reviews and Legal Education*, 51 NW. U. L. REV. 22 (1956). For a thorough recounting of the emergence of American law reviews, see Michael I. Swygert and Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L. J. 739 (1985). These authors argue that the disintegration of natural law doctrinal assumptions encouraged the more reportorial style of the new student reviews. *Id.* at 747, 790. The rise of non-doctrinal theory in the more prestigious law schools has resulted in some recent movement toward professor-controlled journals. *See, e.g.*, Roger C. Cramton, *"The Most Remarkable Institution": The American Law Review*, 36 J. LEGAL EDUC. 1 (1986) and accompanying responses.

American-European difference in educational methods and goals. For example, it may well be that in a single national European jurisdiction it is simply much easier than in the American federal context to discover systematic unity of doctrine. But I do think that the thesis stated above and developed below would have to be part of any complete understanding.

Throughout the history of the Civil Law in Europe, judges have rarely held positions of independent political power or prestige. Consequently, they have often turned to legal scholars for advice and legitimation. In ancient Rome, the untrained judge (*iudex*) relied on the wisdom of the jurisconsult. There were times and places in the late medieval period in which judges could even be punished for wrong interpretations of the law; naturally, they sought the protection of scholarly doctrine. The great Commentators, who elaborated the theoretical structure of the rediscovered Roman law, were also judicial consultants.[10] Indeed, in what was the medieval university law school at Bologna engaged, if not in the presentation of a supplementary basis for judging? The Italian exponents of Romanist theory did not see any need to follow the law applied by the weak and disparate courts of their day. They were promoting a higher kind of justice and, through the process called "reception," judges all over Europe came gradually to acquiesce in this newly common law (*jus commune*).

The relatively greater role of scholars and lesser role of judges continued. The story of the *Aktenversendung* has often been told: how at one time German courts would send off their entire case dossiers to university law faculties for a decision, which would then be applied by the courts. The great nineteenth century codifications were the work of scholars attempting to provide, as nearly as possible, a complete and sufficient theoretical basis for case decisions—thus minimizing judicial discretion and creativity.[11]

Turning to the world today, we see that the European judge is a respected civil servant but has by no means the prestige of the law

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10. "Many of their theories and dogmatic constructions were born out of the pressures of actual cases." MAURO CAPPELLETTI ET AL., THE ITALIAN LEGAL SYSTEM 22 (1967).

11. GLENDON, *supra* note 7, at 160, comments upon European developments this way: "The idea of the judge as a legal actor without inherent law-making power, who applies the will of the sovereign and looks outside for advice, is thus quite deeply rooted. When French judges . . . began to break out of this traditional judicial role and behave more like English judges, . . . they became the targets of revolutionary fury and post-revolutionary reaction."

professor. Each pays attention to the other, to be sure, but when a German speaks of "the dominant opinion" on a point of law, the majority of scholars is referred to. In America, the same phrase would always be taken to refer to the majority of courts.

In the European university classroom, the professorial duty to promote good judging is especially clear. A substantial minority of law students in Germany and other European countries plan to become judges.[12] Immediately after leaving law school, they will enter upon a step-by-step career of advancement first to lower and then to higher courts, depending on seniority and ability. In Germany, the legal system with perhaps the greatest prestige and influence in the Civil Law world, even public prosecutors and private attorneys must first be qualified to be a judge.[13]

European scholarship and teaching, therefore, have always had to keep in mind their usefulness for judging. Paradoxically, the very weakness of judges, their dependence on scholars for advice and training, has put the needs of judges in the center of European legal thought.

What, then, does a conscientious judge need? Certainly not the mistrust of reason, the arguability of every point, taught by the American law school. A judge needs to learn more than "how to think like a lawyer." She needs to know "how to think like a judge." She needs to know how to do justice, how to reach the most nearly right answer in a case.[14] Granted that good arguments could be made both for

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12. According to Richard Abel, "the ratio [of judges to private practitioners is] . . . generally many times higher [in the civil law world than in the common law world]." Abel, *Lawyers in the Civil Law World*, *in* LAWYERS IN SOCIETY 1, 6 (Richard L. Abel & Philip S. C. Lewis, eds., 1988). Germany has the highest *per capita* number of judges among countries with developed formal legal systems. Erhard Blankenburg & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, *in* LAWYERS IN SOCIETY 124, 133. Private practitioners do not constitute the core of any civil law legal profession. Abel, *Lawyers in the Civil Law World*, at 4. It should also be noted that many law students in Europe after graduation become notaries, bailiffs, police chiefs, and other civil servants who, like judges, are called upon to act as impartial law appliers rather than as advocates.

13. "All German lawyers have to earn the '*Befähigung zum Richteramt.*'" Jutta Brunnée, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEGAL EDUC. 399, 400 (1992). Objections to the centrality of the judicial role model are currently being pressed in Germany. *Id.* at 419.

14. "While the case method of North American law schools encourages the development of argumentation and rhetoric, German students are always asked to render impartial opinions on 'the legal situation' presented. From the very beginning of their university course, they are trained in the demeanor of the judge rather than that of the advocate or private practitioner." *Id.* at 403.

plaintiff and for defendant, who should win? Which argument will be perceived as correct by the judge's superiors, on whom a future promotion may depend, and by the judge herself?

As Ronald Dworkin has well shown, a "serious" attempt to judge people's rights correctly can be a task of Herculean legal theory.[15] I would put the matter this way: A judge's authority rests on the law which supposedly speaks through her mouth. Hence both conscience and convenience lead the judge to search the law for the solution to each case. But no body of law can be followed if it is internally inconsistent. A judge cannot obey contradictory commands. Apparent contradictions in the law must be overcome by discovering some additional legally-approved principle which tells the judge how to choose among them. Moreover, if the law is to provide solutions to new fact patterns, it must contain hidden principles beyond the specifics already contemplated by the legislator. For both these reasons a judge must use theory and, unless she is Judge Hercules, she turns naturally for interpretive assistance to the scholarly traditions of her legal culture.

Thus we can offer an initial answer to the question posed by the title of this paper: "Can Practice Do Without Theory?" At least one kind of practice, the practice of judging, requires theory. The Commentators at Bologna were theorists because of, not despite, their concern for practice. Because they viewed Roman law as living, binding authority, they had to interpret it in ways that would resolve its contradictions and uncover its principles. Otherwise, it would have remained useless in practice for the resolution of concrete cases. So, too, the European teacher-scholar of today: as long as his work is relied upon by an audience of judges or of potential judges, he cannot just make and destroy arguments. He must provide the doctrinal theories which make it possible to see through the jungle of rules to a unified interpretation of what the law requires.

The American judge possesses a pedigree far different from that of the European judge. Anglo-American judicial history can be seen to add constantly increasing weight to the claim "the law is whatever the judges say it is." Moreover, to the degree to which this claim is accepted, it would be futile for a professor to preach the law to them. In other words, the ever-increasing discretionary power of judges has removed the problem of good judging from the law school classroom, and with it has gone the need for serious legal theory.

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15. Dworkin, *Hard Cases, in* TAKING RIGHTS SERIOUSLY 81, 105-30 (1978). Dworkin is here referring to Anglo-American judges.

The Norman kings' judges after Henry II were protected by centralized political power and by the claim to express what was "common" in the myriad customs of medieval England. Consequently, they had little need for the high Romanist scholarship coming from Bologna[16] and, later, from Oxford. They were "oracles" of the law, in Blackstone's phrase, rather than mere appliers of law elaborated by university theorists. And English judges supervised the education of their own successors, in cooperation with the practicing bar, eliminating any practical dependence on academics.

The development, from customary law, of the English doctrine of *stare decisis* (formally absent on the European continent) added a normative force to the earlier political claims of judges. What a judge has decided in a case is now law itself, no longer merely evidence thereof, and so it must be followed by subordinates and successors. How can a professor presume to teach judges how to avoid mistakes, if all their decisions become *ex post facto* infallible? How can theory ever be finished or coherent if it must treat every new misapplication as correct?

The American practice of judicial review of statutes made the judiciary superior even to the legislature. According to Tocqueville's early analysis,[17] it is above all because of her power to strike down unconstitutional legislation that the American judge is more powerful than the European judge. Because of the difficulty of amendment to the U.S. Constitution, Supreme Court assertions of unconstitutionality are virtually unanswerable. Masters through both the lower law and the higher law, through both the case and the Constitution, judges in the New World attained power and prestige unimagined in the Old.

Yet, until the twentieth century, there still remained the possibility that judges could be mistaken, that they could interpret the law incorrectly. Scholars of the Constitution could still tell the justices what that document in theory required, even if the latter were free in practice to ignore that advice with impunity and success. The twentieth century ascendancy of the American school of thought called "Legal Realism" eliminated this last way to hold judges accountable to some higher legal standard.

"Realism" is, ironically, a kind of nominalism. It teaches, fundamentally, that concepts cannot be true or false. Words are only labels. They do not express anything real. Since there is no correct

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16. GLENDON, *supra* note 7, at 160, calls "the existence of a powerful English legal profession an important, perhaps the crucial, factor in preventing an English reception of the Roman law brought back by English scholars from Bologna . . . ."

17. ALEXIS DE TOCQUEVILLE, I DEMOCRACY IN AMERICA 98-103 (1984).

meaning for the concepts used in legal rules, it is fallacious to assume that any particular set of facts comes necessarily under a given rule. Moreover, in a mature legal system, the rules will often or always be so vague and contradictory that a judge can easily rationalize a judgment for either side. The judge's own conscious or unconscious personal or political biases, and not the law, determine the outcome of cases.

But if legal texts have no inherent meaning—if what they say is, even in theory, up to the reader—then the very idea of legal interpretation collapses. It is impossible for a law to be misinterpreted if it has no meaning to begin with. It is impossible to tell a judge what the law requires, and a scholar's attempt to do so is likely to be perceived as amusing at best and as laughable at worst. In America today, "the law means whatever the judges say it means," because of their political power, because of *stare decisis*, because of judicial review, and above all because it cannot mean anything else according to Legal Realism and its contemporary heirs.

While the weakness of the European judge makes appropriate a vertically ascending judicial career along civil service lines, the power of the American judge means that a horizontal shift from other legal professions makes more sense. Only after proving herself as a lawyer or as a law professor will someone be appointed (or sometimes elected) to an important American judgeship. Only those politically well-connected or otherwise well-regarded are likely to be made judges. Thus neither in the eyes of the public nor, especially, in her own eyes, is a judge's opinion legitimated only by being an expression of preexisting legislatively-approved law. Judges are respected in part because they are proven leaders or scholars, not just because they are said to speak the law.

Most important for our purposes here is the effect the American method of choosing judges has on legal education. There is no way to enter upon a rising judicial career right out of law school.[18] There is no way to aim specifically at a life of judging. All early hope to become an important judge, if it exists, depends upon first becoming a well-known lawyer or professor[19] and then being lucky. The vast majority

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18. Minor, often specialized, judgeships can be obtained by recent American law graduates. But because the ordinary entry to higher positions in the judiciary is lateral, these low-ranked judgeships are rarely seen as the first steps of an aspiring judicial career. *See generally* Robert P. Davidnow, *Law Student Attitudes Towards Judicial Careers*, 50 U. CIN. L. REV. 247 (1981).

19. "[O]f course, all common law judges have been private practitioners, government lawyers, or law professors . . . ." Abel, *supra* note 12, at 8.

of students in an American law school plan to be lawyers, a few plan to be law teachers, and virtually no one thinks seriously about learning to be a judge. Therefore, their professors rarely teach law from a judicial point of view.[20] The very strength of the American judge, her lack of dependence on scholars for legitimation, advice, and training, tends to remove the need to find the right answer from legal education and research in America.

Without the need for cognitive closure provided by the presence of would-be judges, legal argument easily becomes an end in itself. An excellent student is one who can argue either side of a case with equal facility, who is trained to be a "hired gun"—to use the common term of (self-critical?) caricature. Surely the word "Socratic" is inappropriate for this rhetorical training for success, since it more nearly approximates the methods of Socrates' great opponents, the Sophists. Once the need to judge with justice is removed from law, what but sophistry remains? The teaching of advocacy seems to do well without taking doctrinal theory seriously.[21]

And yet, can a good advocate do without any theory? How can a lawyer respond coherently to the challenges of her opponent, or of the judge, if she has no sense of the text and texture of the law surrounding her case? How could law teaching, even for advocacy, ever be more than a miscellaneous assortment of facts and anecdotes if it were not informed by theory to some degree? Furthermore, few American lawyers are only advocates, though almost all are partisans. Would not theoretical mastery of legal rules and principles help the client counsellor to predict the decisions at least of many judges? Oliver Wendell Holmes, Jr. (no friend of authoritative theory) once recommended the casebook of his opponent, the nineteenth-century U.S. legal scientist Christopher Columbus Langdell, by pointing out that a "professor must start with a system as an arbitrary fact, and the most which

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20. Robert Stevens' comprehensive book LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s (1983) would appear to say nothing about the education of judges. Nor does the recent, lengthy American Bar Association study seem to say anything about judicial training. *Legal Education and Professional Development - An Educational Continuum* (July 1992). Past, present and future American legal education is assumed to be lawyer education, not judge education.

21. Richard Abel has, in passing, put forward a thesis similar to that stated above. He notes that "paradoxically, the full-time academics in common law faculties offer a fairly vocational training, whereas [even] the full-time practitioners who teach part time in civil law faculties are intensely theoretical (perhaps because the former see themselves as preparing for private practice, whereas the latter educate students for the magistracy and civil service)." Abel, *supra* note 12, at 13.

can be hoped for is to make the student see how it hangs together, and thus to send him into practice with something more than a rag-bag of details."[22]

It seems to me, therefore, that the surprising lack of doctrinal theory in American legal education cannot be fully explained by the absence of potential judges and the presence of potential lawyers in the law school classroom. Among other factors must be included, paradoxically, the fact that since the rise of Legal Realism, our better law schools have been dominated by a peculiar brand of academics, namely, amateur social scientists.

Many of the Realists were impressed by the newly-conceived sciences of society.[23] They sought to describe the "real" (whence their name) behavioral operations and effects of law, rather than the internal interrelations of concepts and rules. Although often also advocates for progressive legislation and court decisions under Roosevelt's New Deal, they sought first and foremost, as "value-free" social scientists, impartially to describe the actual workings of legal institutions. They were not really against theory, but they wanted theory "about" law, not theory "of" law.[24] They and their successors have wanted not legal science, but social science: sociology of law, psychology of law, economic analysis of law, behavioral analysis of judges, and the like.

Unfortunately, the Realists' drive to make the law school into another social science department has been both a great failure and a great success. It has failed in that few law students are graduated with anything more than a smattering of sociology or of economics, nor do most of today's law professors have more than a smattering to impart. But if the Realists have largely failed to bring serious social theory into American law schools, they have succeeded in driving out most serious legal theory.

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22. Book Review, 14 AM. L. REV. 233, 235 (1880). See also his *The Path of the Law*, 10 HARV. L. REV. 457, 474-75 (1897) for similar remarks favoring "clear ideas" about basic jurisprudential concepts.

23. EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 78-79 (1973). Purcell's book contains extensive descriptions of the new Realists, and of the crisis of theory and of legitimacy provoked by them, in chapters five and nine. *See also* STEVENS, *supra* note 20, at 131-71.

24. "[T]heories *about* law . . . facilitate comparisons through time and across community boundaries . . . ." HAROLD LASSWELL & MYRES MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY 5 (1992). "Theories *of* law are those that are employed for guidance and justification by participants in the process of decision." *Id.*, at 5 n.7 (emphasis in original).

The reason for the departure of doctrinal theory is not hard to discern. The very adoption of a disinterested, value-free social scientific point of view excludes legal theory and, indeed, all statements about legal obligations. For the law is a normative discipline. As H.L.A. Hart has demonstrated,[25] only those "internal" to law, only those willing to speak as though they were bound by it, can talk of its rights and duties. Any lawyer's brief can say what the Constitution demands, but no amount of social science research can ever do so.[26]

Consequently, the assumption of a social scientific perspective by law teachers makes doctrinal theory seem unfounded. From a sociological viewpoint, contradictions in the law can only be reported, not resolved. Thus all attempts by judges to find hidden harmonizing principles seem fraught with delusion or pretense. American students and professors alike make the mistake of thinking that radical skepticism about the claims of judges and legal theorists has been somehow proven, whereas in fact such skepticism is simply an appropriate accompaniment to the stance of a social scientist. There is no reason to think it appropriate for someone, such as a judge, who must remain internal to the legal system. If a judge thinks the law binding, she must think it principled. If a Realist chooses not to be bound by the law, neither will he discern the hidden ways it binds itself together. Because many of today's leading law teachers have chosen to be unconcerned with the practical viewpoint even of lawyers, much less of judges, they have cut themselves off from doctrinal theory. By contrast, at many less prestigious American law schools, the social scientific perspective is less present, and the purpose of training lawyers is greater. The result is that legal rules and arguments are taken more seriously and attempts are made to find and teach doctrinal principles.[27]

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25. THE CONCEPT OF LAW 55-56, 99 (2d ed., 1972).

26. I mean here that social science cannot generate normative premises. It can, of course, often be helpful in developing factual premises within normative arguments. Thus it merits a place in legal education, but only a subordinate one if the law is to remain principled and coherent.

27. STEVENS, *supra* note 20, at 273. The metatheory behind this paragraph and this article can be stated briefly as follows: Insofar as only one concrete reality can exist at a given point, contradictory prescriptions or descriptions regarding that reality cannot be admitted. Contradictory legal imperatives must be resolved by legal theory because only plaintiff or defendant, not both, can win. Contradictory sociological data must likewise be harmonized by social theory, insofar as nothing can both be and not be in the same way at a concrete point. Thus, I submit, it is the singularity of the real (or, if you will, the singularity of our discourse regarding the real) that engenders both doctrinal and social theory, not the assumption of a single commander or creator

Once before, in Europe, something similar happened to law teaching. Adherents of the French "Humanist" school of legal education (the *mos jura docendi gallicus*) adopted a purely historical, descriptive approach to the study of the rediscovered Roman law. Consequently, they saw it merely as a collection of often incoherent and inconsistent statements expressed over a thousand years of Roman civilization. They ridiculed the anterior Italian law teaching (the *mos jura docendi italicus*) for supposing that legal theory could and must discover a principled unity in Justinian's sixth century compilation. But of what possible use could the French perspective have been to the professors at Bologna, who were attempting to provide living authority for judging? A set of unprincipled and possibly contradictory opinions cannot tell a judge how to decide cases. It is worth noting both that the advent of the French approach was an important step toward the eventual dissolution of the systematically-developed *jus commune*,[28] and that the new approach was resisted by the French courts. Concerned as they were with practical ends, the French judges remained long faithful to Italian legal theory.[29]

What of American judges? Bereft of law school education in the achievement of justice, without any training except in advocacy and, possibly, in social scientific description, they find themselves called upon to decide cases according to law. Many, I think, want to respond to this call, for reasons of conscience as well as of legitimacy and public acceptance. What do they do? For the most part, they do theory. They try seriously to resolve contradictions and to find overriding harmonies in the law. A well-written opinion by an American appellate judge is a mini-treatise of legal theory. It is limited, to be sure, by the time available and by the case at hand, and so it cannot approach the systematic quality of European doctrinal scholarship, but it pushes in that direction.[30] Because American judges care about legal practice, they, too, cannot do without legal theory.

(who could, after all, decide to be inconsistent). By contrast, theory is not essential to human imagination or desire. Poetry and other forms of fiction need have no theoretical unity. Instrumentalist advocacy can use means based on contradictory theories, provided that the resulting desired experience is thereby made more likely.

28. GLENDON, *supra* note 7, at 48.

29. K. W. RYAN, AN INTRODUCTION TO THE CIVIL LAW 19 (1962).

30. For further reflection on this point, see Ronald Dworkin's later LAW'S EMPIRE (1986), in which he challenges the Realist sociologist to take a seat on the judicial bench and discover, often after diligent theoretical inquiry, that there is indeed a right answer for nearly every case. See also the criticism of Dworkin found in Richard Stith, *Will There Be a Science of Law in the Twenty-First Century?*, 22 REVUE GÉNÉRALE DE DROIT 373 (1991).

Separated by a Common Law: American and Scottish Legal Education

*by Alexander J. Black**

I. INTRODUCTION

Law school education reflects the scope of the legal landscape. This paper is an impressionistic discussion of legal education in the United States, Britain, and, in particular, Scotland. The Scottish legal system is a mixed system that borrows heavily from England yet retains residual civilian characteristics and fundamental procedural law differences. While the function of legal education is to produce lawyers,[1] this paper acknowledges the social differences between Britain and the United States by contrasting the Scottish situation. Indeed, George Bernard Shaw quipped that Americans and the English were two peoples separated by a common language. Likewise, legal education in the United States and Britain is separated by a common law.

In Britain, much debate has been generated concerning decreased university funding coupled with an increase in student numbers. While England and Wales constitute a legal system influencing approximately 57 million people, Scotland comprises approximately 5 million people governed under a different, albeit minority system. Because of the relative numbers, little has been said recently about Scottish law school education. This does not mean that all is well in advocates' academe. In fact, Scottish law schools face a challenge with finances and enrollment as well as changes in the legal profession. This article attempts to discuss some of the salient issues from the perspectives of common law theory and my personal experience.

Common law theory is merely a buzz-word to describe those jurisdictions that follow or are influenced by the system of judicially

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1. *Non schola sed vita discimus* ("we learn not for school but for life"). On the other hand, arguably, the function of legal education is to provide cushy jobs for sherry-swilling law teachers! If the function of legal education is to produce lawyers, why are law schools allowed onto a university campus?

declared (judge-made) law developed in England. Most of the English-speaking world, such as the United States, Canada, Australia, and New Zealand received and modified the common law to accommodate each state's respective social and political ethos. Part of the so-called English-speaking world included territories which subjugated linguistic minorities, yet attempted the political palliative of appeasement by granting them "mixed jurisdiction" status. The primary examples include: Québec, (still) in Canada, following the British defeat of Imperial France in 1753; Louisiana, sold to the U.S. in 1803 by a cash-strapped Napoleon Bonaparte; and Dutch (Boer) civil law's influence on South Africa. These jurisdictions received common and retained civil law antecedents. Although Scotland was not linguistically different (aside from marked dialect differences and the Highland Gaelic language), it also shares a civilian influence due to the "Auld Alliance." Before 1707, England and Scotland had separate Parliaments. Before 1603 and James I (VI of Scotland), both countries had separate monarchies.

Brought into a modern context, education in all legal systems is being influenced by the technological miracles of the communications age and the concurrent collapse of Marxism in the former Soviet Bloc. Just as ontogeny recapitulates phylogeny,[2] the experience of the main actors in any legal system is accentuated by the fast pace of the "global village."[3] Like the "Wizard of Oz," reality is not always apparent. Lawyers in Scotland, as elsewhere, know more about their own "Kingdom of Oz" although the validity and utility of this information is controversial.

Global and domestic pressures are influencing change, including the increasing readiness of some western jurisdictions to entertain persuasive "foreign" authority. One possibility is that these pressures are inducing legal systems to imitate Oz so that lawyers appear to be "with it." More likely is the probability that these pressures revolve around the fast-paced change in global greed patterns. Competition is euphemistically said to create wealth, yet often results in negative interest group behavior.[4] Thus, the pressure to change a legal system invariably

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2. That is, the life of any species is molded by the genetic parameter of that species.

3. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964). The Canadian communications guru of the 1960s coined this term after perceiving that quantitative and qualitative increases in the dissemination of information would radically alter society(ies).

4. "Competition, like other therapeutic forms of hardship, is by wide and age-long consent, highly beneficial to society when imposed upon - other people. Every

follows the impetus to increase trade across boundaries. The evolution and vitality of a legal system is determined by the allocation of resources, an incremental process that is not centralized nor proactive.

In Scotland, law practice attitudes[5] are slow to change because of tradition. Nevertheless, these staid attitudes are stirring like the bagpipers who play during weddings in Professor's Square at Glasgow University. For instance, the Law Society and Faculty of Advocates have made the study of European law compulsory for entry into either branch of the bifurcated legal profession in Scotland.[6] But bagpipe music is akin to changes in legal practice and legal education attitudes since they are not widely welcomed.

II. SCOTTISH LEGAL PHILOSOPHY: HISTORICAL BACKGROUND

Scotland is a mixed legal system, part civil law, part common law, as is the nominal classification in Québec, Louisiana, or South Africa. Bellicose encounters with the English following the death of Alexander III in 1286 are one reason why Scotland looked to the continent for guidance in matters of law.[7] The expatriation of Scottish law students to the continent soon became common practice, in part also because of the paucity of legal education in Scotland. As a consequence, the independent development of Scottish law was stunted, and Roman law, popular on the mainland, began filtering into Scottish courts. The assimilation of Roman law into the Scottish legal system still influences the theoretical bent of Scots law and contrasts sharply with the theoretical approach to the law south of the River Tweed, although co-habitation with England has brought the two systems closer together in practice.

The Anglo-American practice is to derive a few ideas from close attention to the facts presented via induction, empirically building up

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industry that can afford a spokesman has emphasized both its devotion to the general principle and the over-riding need for reducing competition within its own markets because this [is] the one area in which competition works poorly." George Stigler, *in* STIGLER AND COHEN, CAN REGULATORY AGENCIES PROTECT CONSUMERS? 9 (American Enterprise Institute for Public Policy Research, 1971).

5. For instance, the absence of pretrial depositions in Britain (as opposed to Canada or the United States) arguably has an inhibiting impact on the substantive outcome of litigation. *See* A. J. Black, *Pretrial Discovery in Scotland, England and Canada*, 37 NETH. INT'L L.J. 267-90 (1992).

6. Christine Boch, *Using EC Law Before Scottish Courts*, 36 JOURNAL OF THE LAW SOCIETY OF SCOTLAND 6-9 (1991).

7. For the analysis of a former Cornell Law graduate, now a law professor, see Donald W. Large, *The Land Law of Scotland - A Comparison with American and English Concepts*, 17 ENVTL. L. 1 (1986).

a coherent body of case-law jurisprudence. Scotland supposedly proceeds by the so-called "rational" civil law method of deduction from *a priori* first principles, usually set out in "institutional" writings. For the seventeenth century institutional writer Viscount Stair, Roman law displayed the same sort of logical, crystalline purity that geometry did.[8] Stair believed that in law, as in geometry, one should be able to establish principles from which legal conclusions can be drawn using the art of deductive inference. The rationalist method attempts to increase predictability by simply applying a principle to a particular case and deducing the result, thereby theoretically avoiding the potentially contradictory reasoning-by-analogy approach employed by the common law.

In keeping with the continental/civil perspective which buttresses Scots law, it is to be expected that Scots, in theory at least, prefer principle to precedent. In this respect the Treaty of Union has brought England and Scotland into greater accord, partially as the result of the establishment of binding appellate jurisdiction in the House of Lords. Nevertheless, mainland vestiges remain, and Scots law differs in several important and substantive ways from English law.

Unlike the multiple federal-state (or provincial) jurisdictions in North America, the unitary form of British government coupled with the cultural island-orientated psychology[9] foists suspicions on "other" legal systems. Not surprisingly, there has been an attitude of paternalism from England towards Scotland. "One of the reasons why it is difficult to take seriously the claims of legal scholarship to be scholarship in any real sense is its very Englishness, even to the extent of excluding Scotland."[10]

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8. *Cf.* Blackstone, who in Perrin v. Blake, conservatively said: "The Law of real property in this country, wherever its materials were gathered, is now formed into a fine artificial system, full of unseen connections and nice dependencies: and he that breaks one link of the chain, endangers the dissolution of the whole." I.F. HARGRAVE, TRACTS RELATIVE TO THE LAW OF ENGLAND 489, 498 (1787).

9. British folk typically talk about going to "Europe" for holidays, etc. This suggests a separate geographical and cultural perception.

10. Geoffrey Wilson, *English Legal Scholarship*, 50 MOD. L. REV. 818, 829 (1989). Prof. Wilson says:

> "The character of English law and the English legal system, judge led, pragmatic, and undoctrinal, may mean both that there is little scope for legal scholars to contribute to the world of affairs in the way that legal scholars in other countries or scholars in other disciplines do and that it does not provide an adequate basis for an independent scholarship that can take its place by the side of other forms of scholarship. It is in other

However, Scots law retains distinct characteristics. For instance, its land law is fundamentally different from Anglo-American English-based land law. Unlike England, it is difficult to disentangle "equity" from law in Scotland.[11] Both these concepts have always been administered under general principles of Scots law using the same set of remedies existing in the Court of Session or Sheriff Court. Thus, while Scots law recognizes the substantive English law of judicial review, it procedurally uses general remedies and not the prerogative writs of certiorari or mandamus. Borrowing Professor Ashburner's fluvial metaphor, there is no separate channel of law called equity which does not commingle with common law waters.

Contract theory differs as between Scotland and England as well. Unlike English law, Scots law does not have a doctrine of consideration; contracts can be gratuitous; unilateral contracts are enforceable; and third parties may acquire rights under contracts. Conversely, "English law knows no *jus quaesitum tertio*."[12] Another difference is that Acts of the pre-1707 Scottish Parliament remain part of the law yet are subject to the challenge that they have fallen into "desuetude" or disuse and are no longer observed.[13] Although unlikely, the challenge of desuetude is possible and reflects the divergent etiology of Scotland's legal system. This difference is a result of a different cultural ethos. Although Scotland is politically unified with England, it has, according to the landmark work of George Elder Davie, been historically separate in ethics. In the seventeenth century, legal and educational development differed between the two countries. By around 1700, Scottish efforts had to some extent succeeded in reorganizing law and education on a rational basis. Conversely, Professor Davie argued that the English utilitarian reforms of law and education failed.

> This superior state of Scottish institutional arrangements presumably accounted for the remarkable reservations introduced

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words neither sufficiently scholarly to be attractive to scholars nor sufficiently legal to be attractive to lawyers."

Id. at 819. But is it not a function of law schools to empower teachers to make law?

11. "It might be said that Scotland has never known equity but has long had equity in her legal system." David M. Walker, *Equity in Scots Law*, 66 JURID. REV. 103, 105 (1954).

12. Dunlop Pneumatic Tyre v. Selfridge, 1915 App. Cas. 847, 853 (H.L.) (per Viscount Haldane)("only a person who is a party to a contract can sue on it . . . only a person who has given consideration may enforce a contract not under seal."). There are, of course, many exceptions to this inconvenient rule, such as trusts, agency and statutory provisions like the Bills of Exchange Act.

13. HECTOR L. MACQUEEN, STUDYING SCOTS LAW 6 (1993).

> into the Treaty of Union, and throughout the eighteenth century, the Scots, at the same time as they congratulated themselves on the advantage of a common market with England, equally congratulated themselves on the advantage of their well-ordered progressive system of law and education (and of religion too) as compared with the stagnant and ill-ordered state of affairs in the South. In this way, submergence in the political-economic system of England was combined with a flourishing, distinctive life in what Marxists conveniently, if not perhaps aptly, call the social superstructure, and a Scotland, which was still national, though no longer nationalist, continued to preserve its European influence as a spiritual force, more than a century after its political identity had disappeared.[14]

In Davie's THE DEMOCRATIC INTELLECT, mention is made of the 1854 Report of the Faculty of Advocates on "the qualification of entrants":

> [N]o circumstance has indeed tended so much to the formation of the single and intelligible system of Scotch law, as the liberal training of Judges who in former days made it. The Institutions of Lord Stair are largely indebted to the circumstance, that its author was once a professor of philosophy.[15]

The report cited Lord Woodhouselee, who said: "This profession, more than any other, requires an enlarged acquaintance with human nature - a knowledge not to be got but by philosophical study, etc., etc."[16] But this cultural difference, an arguable advantage, has been whittled down following political union with England.

III. CONTEMPORARY BRITAIN

A large part of the legal superstructure in Britain stems from the constitutional settlement (or "unsettlement" as might be said). A written constitution with entrenched civil rights would stimulate the systematic development of legal principles. This would provide a "Charter of Rights and Freedoms," as in Canada, which has notionally ended the doctrine of Parliamentary Sovereignty and replaced it with Constitu-

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14. GEORGE ELDER DAVIE, THE DEMOCRATIC INTELLECT: SCOTLAND AND HER UNIVERSITIES IN THE NINETEENTH CENTURY 25 (2d ed. 1964).

15. *Id.* at 53.

16. *Id. See also* James Lorimer, *Scottish Universities* 4-5.

tional Sovereignty.[17] Instead of individual liberties being residual, after we have subtracted from the limitations imposed by statute, certain laws would be identified and could not be changed in the same manner as ordinary laws. Whether this would make judges "sovereign" is a vexed question which brings to mind the Wizard of Oz who was really a man pulling levers and bellowing through a loudspeaker.

Constitutional sovereignty concerns conceptions of democracy. It would spell out the distribution of powers between England and Scotland and provide an amending formula. Limited devolution of legislative powers could arguably better advance Scottish interests. Despite minority Scottish Nationalist Party support, the paradox of modern Scotland is its vibrant national identity yet popular political acceptance of central government located at Westminster. Yet Scots are not bloody-minded like modern day Serbs or the neutral Irish republic in World War II; instead, they are pragmatic and prefer to "get on with things."

At the same time, a written constitution would retain political conventions, as is the case in Canada's Parliamentary based system, including the rules of parliamentary procedure and debate. Judges would have a wider law-making role and be able, in appropriate cases, to invalidate otherwise valid Acts of Parliament which offend constitutionally enshrined rights.[18] Conversely, less scope is afforded British

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17. However, Canada's "Charter" was concluded following an important political compromise. It enables Parliament or a Legislature to "override" § 2 or §§ 7-15 of the Charter if the statute contains an express declaration that it is to operate notwithstanding the civil liberties "enshrined" in the Charter. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33.

18. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), is seminal American authority asserting federal court power to refuse to give effect to congressional legislation inconsistent with the Court's interpretation of the Constitution. In Canada, imposing a new constitution has proven difficult. "The Constitution Act of 1982, signed by every Canadian province except Québec, which protested date-rape, did manage to abolish the embarrassing power of the Parliament of Westminster to legislate for Canada. However its Charter of Rights and Freedoms guaranteed us no more, come to think of it, than we have always taken for granted: the right to freedom of thought, belief, opinion and expression, including freedom of the press and other media communication.' " MORDECAI RICHLER, OH CANADA, OH QUÉBEC: REQUIEM FOR A DIVIDED COUNTRY 11 (1992) (quoting CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms) § 2(b)). As part of the Canadian constitution repatriation compromise, the so-called "notwithstanding clause" (§ 33) was inserted in the Canadian Charter of Rights and Freedoms allowing the legislature of a province to declare that its legislation operates notwithstanding provisions in §§ 2, 7-15 of the Charter. Despite the federal enshrinement of English and French as the two official languages, Québec utilized the notwithstanding clause to prolong its "visage linguistique," the unilingual promotion of French.

judges. While judges do make law,[19] the scope of judicial activism is less in the United Kingdom. They are obliged to follow all unequivocal legislation such as provisions of the Official Secrets Act and attendant "gag orders," regardless of their effect on civil liberties.

Constitutionally enshrined rights that promote principled judicial activism might possibly reduce the potential for miscarriages of justice such as the infamous Birmingham six and Guildford four. Even so, Canada has its own shameful share such as the Donald Marshall case. Prisoners' rights appear to be more systematically elaborated by the judges who interpret the criminal law subject to the "Charter." With the foundation of a codified criminal law, Canadian courts use "Charter" principles to protect personal liberty by elaborating upon search, seizure, and arrest rules. This is not to say that miscarriages of justice will never happen again; this is shown by the United States Supreme Court prior to *Brown v. Board of Education*,[20] when it construed the Constitution and endorsed the provision of "equal but separate accommodations for the white and colored races" in *Plessey v. Ferguson*.[21]

In Britain, Charter 88 and other lobby groups have persuasively supported the creation of a written British constitution which would enshrine civil rights with the aim of lessening the frequency of miscarriages of justice. A 1989 conference at the University of Glasgow brought together leading lawyers and judges, including Justice William Brennan, formerly of the U.S. Supreme Court (pro) and Lord McCluskey of the Court of Session (contra). Much to the chagrin of proponents, the status quo prevails. Their spokespersons ask why "civil rights" merit a shrine and whether this will help poor people or liberal middle class types. Inertia seems to have set in under the old adage: "If it ain't broke, then don't fix it." The debate continues, in muted terms, concerning the performance of the legal machinery. Although not a panacea, this is an idea whose time has come despite the forces of inertia which inhibit it. Here, things are often done a particular way because they have always been done that way.

Framing a proper Bill of Rights would necessarily mean addressing thorny constitutional arrangements involving the apportionment of gov-

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19. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 456, 461 (1897). While this may sound like simplistic positivism, the scope of legal prophecy in Britain is arguably diminished by the lack of an omnibus-written constitution.

20. 347 U.S. 483 (1954).

21. 163 U.S. 537, 540 (1896).

ernmental power. A controversial constitutional interpretation is that, long ago, Scotland delegated its legislature to Westminster. The 1706 Treaty of Union entrenched Scots Law, the Church of Scotland, a different university system, and assured that laws affecting private rights would only be enacted for the vague-sounding "evident utility" of the people. Presumably, this assignment could be revoked by popular Scottish consent and replaced with a new mode of political representation. However, the present constitutional settlement is fuzzy. Unlike the federal system in Canada, there exists no "recognized" tier of government with whom Westminster is willing to speak.

IV. COMPARATIVE EDUCATIONAL REQUIREMENTS

In Scotland, the present initiation rites requirement is a three-year ordinary or a four-year Honors LL.B, coupled with a one-year diploma in legal practice, followed by two, or so, years "traineeship." Although the process is different in England, it is safe to say that the training of a British (that is, Scottish or English) lawyer takes six to seven years. This is roughly the time that it takes in Canada or the United States. This differs from the long-gone system of apprenticeship, and accompanying attitudes towards legal science. Sir Walter Scott wrote in his journal in December 1825:

> There is a maxim almost universal in Scotland, which I should like much to see control. Every youth, of every temper and almost every description of character, is sent either to study for the Bar, or to a writer's office as an apprentice. The Scottish seem to conceive Themis the most powerful of goddesses. Is a lad stupid, the law sharpen him;—is he too mercurial, the law will make him sedate;—has he an estate, he may get a Sheriffdom;[22]—is he poor, the richest lawyers have emerged from poverty;—if a tory, he may become a deputy-advocate. . . .[23]

Since the 1960s, great emphasis is placed in Scottish university law schools on obtaining an honors degree. The extra "fourth"-year program offers in-depth study not obtainable in the three-year "ordinary"[24] degree. Many students nevertheless find that a three-year degree offers sufficient academic legal training.

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22. This is a judge of first instance.

23. PETER HAY, THE BOOK OF LEGAL ANECDOTES (1989).

24. The term "ordinary" is somewhat counter-intuitive since law degrees are not plain or undistinguished qualifications.

Before the 1960s the LL.B degree was taught on a part-time basis with lectures and practical work in lawyers' offices. A Bachelor of Laws (B.L.) previously existed through full-time study, yet was perceived as a poor-man's degree. The present Lord Chancellor, Lord McKay of Clashfern, graduated LL.B. with "distinction" from Edinburgh University because there were no honors degrees in law prior to the 1960s.

Before the 1960s, admission to an LL.B program required an undergraduate M.A.[25] degree, as is the present practice in Canada and the United States. It is a moot question whether this deficiency contributes to the accusation that law is a pseudo-intellectual autocracy. In addition to "black-letter" or core substantive law subjects like property or contract, the typical LL.B attempts to broaden a student with liberal doses of jurisprudence and other so-called "soft" law subjects. But some say that first year Scottish law students are too young at age 17 or 18. Mature or graduate students tend to perform better on average, but this may be due to broader academic experience as well as greater motivation.[26] Conversely, Scottish students tend to finish their secondary school education with better writing skills than American or Canadian high school students, some of whom cannot write after four years of college.

V. METHODOLOGY AND CURRICULUM

A more obvious factor is the curriculum and method of instruction. Since the energy available for social regulation at any time and place is limited, control by law takes on an aspect of engineering.[27] It is

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25. In Scotland, the Bachelor of Arts degree is labelled as a "Master of Arts" degree which can fool Philistines across the Atlantic. Rather than proceed to a regular postgraduate degree like an American M.A., Scottish arts students proceed into a Ph.D. program. In England, an M.A. degree may sometimes be obtained by B.A.s who pay a fee after an interval, such as lawyers who take a B.A. in law from Oxford and after a year's work describe themselves as "M.A. (Oxon.)".

26. *See* Sandra Klein, *Legal Education in the United States and England: A Comparative Analysis*, 13 LOY. L.A. INT'L & COMP. L.J. 601 (1991), for discussion of mandatory implementation of clinic type courses in American law schools as a means of replicating British apprenticeship requirement. This article also discusses *de facto* perfunctoriness of much of apprenticeship requirement.

27. "[L]aw operates under the principle of scarcity. The energy available for social regulation at any time and place is limited . . . Because of this fact, control by law takes on the aspect of engineering. We require . . . to invent such machinery as, with least waste, least cost and least unwanted by-products, will give most nearly the desired result." K. N. Llewellyn, *The Effects Of Legal Institutions Upon Economics*, 15 AM. ECON. R. 666 (1925).

highlighted by the common law case method which teaches a principled system of objective doctrines, albeit with mechanistic answers. Yet, the case study involves investigation of the solutions to problems, not how to solve new problems. Law schools promote reasoned judgement by lectures (or semi-dramatic monologues), seminars, and tutorials.

Lectures have historically dominated Scottish legal education, and most Scottish university disciplines due to the smallness of the jurisdiction. This difference was partly due to a paucity of adequate legal texts and casebooks, although the present information age has cured that defect. Lectures last 50 minutes and are fairly structured with main courses having three lectures per week, sometimes four. They are supplemented by tutorials (an innovation since the 1960s) every fortnight; thus the Scottish tradition contrasts with the predominance of a different tutorial structure at Oxford and Cambridge.[28] Yet, the value of a lecture, an important tool in legal education, is arguably underestimated, especially in its ability to inculcate structured and analytical legal argument. The value of a lecture consists partly in the communication of "vital lawyer-like skills and attitude by the lecturer as role model" promoting the approach to law being elicited by the whole educational program.[29] Some American law professors have reverted to variants of the lecture approach.

Seminars seem best for small groups (20 or so) of senior students whose legal research and comprehension skills are better developed. Tutorials are akin to a question-and-answer technique or "quiz." The same technique of case study, rather pretentiously known in the United States as the Socratic method,[30] is difficult and takes considerable effort to use effectively.

> The case method fulfilled the latest requirements in modern education: it was "scientific," practical, and somewhat Darwinian. It was based on the assumption of a unitary, principled system of objective doctrines that seemed or were made to seem to provide consistent responses. In theory, the case method was to produce mechanistic answers to legal questions;

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28. Alan J. Gamble, *Law Teaching: Lecture and Case Book*, *in* J.P. GRANT, ET AL., LEGAL EDUCATION: 2000 155, 157 (1988).

29. *Id.* at 158.

30. ROBERT STEVENS, LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s 53 (1983). *Cf.* David Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 453, 455 (1943). "In the casebook study of cases, the student is studying solutions of problems, not how to solve problems." *Id.*

yet it managed to create an aura of the survival of the fittest."[31]

However, it is not settled that Socratic taught students end up "knowing" about the Kingdom of Oz better than the lecture or apprentice system. The Socratic method of law teaching is more like a Marine Corps Drill version of learning the legal ABC's. What would Socrates have thought about "a method" that resembles a Jane Fonda diet or exercise?

Professors with seating diagrams of students push participation in the classroom. The third or fourth failure to correctly answer a question could result in being expelled from the class, or, at the least, suffering ridicule from one's peers. However, proof of this exodus story is lacking in modern practice. Unfortunately, tutorials in Scotland are less motivated despite their mystique as being a medium for low ratio teacher-student interaction.

VI. ECONOMICS AND LEGAL EDUCATION

Like the medicine men of tribal times, or priests in the middle ages, lawyers help run contemporary civilization.[32] In Britain, great post-secondary educational change is underway. The forty or so "universities" have been augmented by a similar number of "colleges" or "polytechnics" which have recently received University "status." A competitive higher education market-place is emerging in Britain. It consists of the new players as well as the ancient universities like Glasgow, Edinburgh, St. Andrews, Oxbridge (Oxford & Cambridge), Durham, the not so-ancient ones like London, the so-called "red-brick" universities established in the 1920s and 1930s (such as Reading), and the expansionary 1960s (such as Keele and Essex).

Especially considering the increased number of law degrees now available, it is fair to say that Scottish and English law students do

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31. STEVENS, *supra* note 30, at 55.

32. FRED RODELL, WOE UNTO YOU, LAWYERS! 3 (1939) *reprinted in* George D. Copen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333 (1987). "In tribal times, there were the medicine-men. In the middle ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade, jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running after its own pattern, the civilization of its day." *Id.*

not realize the value of their state subsidized law degree,[33] namely an economic opportunity cost of $20,000-$30,000 (which is true of all subjects). Admittedly, the term "economic opportunity cost" may not be used aptly here. Those who stay in school instead of earning income from jobs may be said to incur an opportunity cost (over and above the cash outlay and loans incurred) although in the long run it may be a sensible investment. Although the cost of subsidizing a student would not be counted as an opportunity cost, subsidization of students in general and law students in particular has an impact upon the infrastructure and ethos of the United Kingdom.

Most students receive a government grant for all tuition and almost all living expenses. Even British students from wealthy families receive state tuition funding although living expenses are means tested. It is no surprise that students regard the "grant" almost as of right. Following Prime Minister Thatcher's government(s), these subsidies are being reduced with the difference funded through student loans. The cost of state funding is arguably more if the student has previously completed an arts or science degree then opted for a "second first-degree," a counter-intuitive yet patently British label.[34] As with any "acquired right," students in the United Kingdom have perceived the "grant" as sacrosanct.

This value judgement often reflects the virulent political gulf between the free enterprise Conservative party and the socialist Labour party, and until recently, the elitism attached towards university study. Comparatively, it is safe to say that the two leading political parties in Canada or the United States are not so diametrically opposed ideologically and might instead be comparatively bland. North America's development has been spared the comparative obsequiousness and stratified class consciousness rife in England (less apparent in Scotland),

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33. Annual Tuition Fees 1993/94: All Home (Britain) and EC (European Community) Undergraduates in law who are self financing pay $755. LL.B Graduate entry students are those who are not state funded for a so-called "2nd first" degree pay $5,320 (as do overseas students). By contrast, all Home and EC Medical students pay $7360 per pre-clinical year tuition and $13,550 for clinical year tuition. In December 1992, the British government announced a 30% reduction in funding to Arts-based subjects (including Law) in attempt to promote science innovation and technology.

34. Compare Canadian universities which classify the LL.B. degree as a "higher degree," i.e., superior to a Bachelor's degree. Many aspects of British life differ from Canadian or American culture, such as the English habit of calling private schools "public schools" or by placing the salt in the multi-holed shaker and the pepper in the single-holed one.

which imposes a sort of social determinism upon individuals.[35] Indeed, the U.S. and Canada are young and restless as compared to the "old country," a term frequently used by immigrants from Europe. Yet this Anglo-Scotian generalization is not impervious to change, the global information age seems to be raising the estimation and demand for university education including law school education.

The increased demand for lawyers precipitated by the "global village," or at the very least the "European" village, makes all the more critical the efficient structuring of law studies in Britain. This process requires a national consensus because the structure of a legal system, including legal studies, leads to different outcomes as shown by the contrast between the United States and Japan.

> The US has been criticised as being a [sic] 'over-regulated, over-lawyered, overly litigious society preoccupied with distributional conflicts at the expense of cooperative efforts to advance economic welfare and that the US economy is accordingly losing out in world competition with other nations, such as Japan, that have avoided these entanglements.'[36]

While Britain is certainly much closer to the United States in cultural values, important differences exist, such as the cradle-to-grave social safety net, the discouragement of high damages awards and the lack of a contingent fee system and class action form of litigation. Another factor involves the calibre of personnel who wander into the legal bramble bush.

A high-quality product requires the participation of top notch professors and top practicing lawyers. Roughly half of those in British legal academia have never practiced law, a factor which accentuates the gulf between ivory tower theory and real-life. Unfortunately, poor

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35. This view seems widespread. An Alberta lawyer wrote after graduate school in Cambridge and sabbatical in Strasbourg: "I was able to discover the advantage Canadian trained lawyers have over our international colleagues. As a rule, we are better trained, more well-rounded in our general knowledge base, work harder and generally have a stronger and more creative entrepreneurial spirit. I am not sure of the reason for this, but it probably has a lot to do with the standard of education we enjoy and the belief that if you work hard you can get ahead regardless of class." Bryan Mahoney, *Changing Times - Career Options*, 17 LAW SOCIETY OF ALBERTA NEWSLETTER 4 (September 1992).

36. *See* D. Bok, *Report of the President of Harvard University 1980-1981* and L. Furro, *The Zero-Sum Society: Distribution and the Possibilities for Economic Change* (1980) *quoted in* S.B. BREYER & R.B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY (3rd ed. 1992).

funding is a substantial impediment in the way of achieving these goals. Full-cost fees and evening or part-time degrees for some students are being proposed as solutions to this dilemma; it is hoped that increased revenue will enable the attraction of a nobler breed of law lecturer. Law lecturers[37] should arguably command a salary level at a differential higher than other disciplines—as the external market for lawyers constitutes a demand that does not exist for philosophers, for example[38]—much like those who teach medicine and who are paid on "clinical" scales.

Poor funding has also retarded the development of vanguard subjects such as medical ethics law, European law, and energy and environmental law. The political structure of the European Community as well as Britain's economic vitality necessitate a competence in these areas. Consequently, a redistribution of wealth may be a necessary means to the end. Conversely, the argument for higher salaries for law academics than other academics is subject to criticism. It is unclear whether higher salaries would bring in a "nobler" breed of law lecturer. Indeed, it would be ironic if higher salaries achieved this result.

VII. COURSE ASSESSMENT

Attending the Course Examiners meeting for an Honors law degree is a somber and mysterious experience for a North American. Fortunately, it is usually followed by lunch. While course teachers usually set and examine candidate's scripts, an external examiner from outside the particular university is appointed to vet the Honors as well as ordinary results. All the scripts in small classes of 10-15 may be sent for review while borderline passes and all failures would normally be sent along with a representative sample of the top and lowest performance. The external's decision is usually final. Presumably, the external system arose in order to ensure fairness, especially since exams are not anonymously graded. The movement towards anonymous marking is only recently taking root.

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37. Law lecturers are classified as Assistant Professors in North America.

38. *Cf.* H.J. Glasbeek and R.A. Hasson, *Some Reflections on Canadian Legal Education*, 50 MOD. L. REV. 777, 790 (1987), who suggest that differentially higher (than other non-professional university teachers) remuneration justifies profession-supporting work. Consequently, this may advance the narrow needs of the profession rather than furthering university ideals of education and research. But to the extent that they see similarities in university study and vocational training, law schools do not necessarily see pedagogical aims being undermined.

Like some English Universities, Scottish ones generally choose to mark Honors courses by relative class position using the Greek Alpha-Beta system. Scottish law schools feel that this allows them to assess the student's quality without being tied to numbers. Proponents of the system (i.e., the majority of Faculty) say that the system gives fair weight to all papers and allows a consistent approach. The Honors system used at the University of Glasgow has the following parameters:

1st Class:	Alpha 73-74, Alpha-minus 72, Alpha-double-minus 71, Alpha-beta 70.
2nd class upper:	Beta-Alpha 69, Beta-double-plus 67-68, Beta-plus 66.
2nd class lower:	Beta 65, Beta-minus 63-64, Beta-double-minus 61-62, Beta-gamma 60.
3rd Class:	Gamma-beta 59, gamma-double-plus 57-58, Gamma-plus 55-56, Gamma 53-54, Gamma-minus 52, Gamma-double-minus 51, Gamma- delta 50 (a bare pass).

Scottish law faculties feel that a percentage or other numerical indices lacks subtlety. As a Scottish colleague explained, the manipulation of Alpha-Beta shows the preponderance of the Alpha quality. Clearly this is a different system than a grade-point average or percentage system which facilitates numerical performance positioning (i.e., top 5% of class). Samuel Johnson must have encountered something like this because he shrewdly recognized that "there are lies, damn lies and statistics."[39]

VIII. SEPARATION OF SUBSTANTIVE AND PROCEDURAL LAW

Another curriculum issue concerns "academic" law as opposed to "practical" law. In North American law schools, civil and criminal procedure are taught. In Scottish law schools, procedural law (with the exception of evidence courses) is not usually taught during the LL.B program since the curriculum concentrates on substantive rules of law. There also appears to be historical distrust among elements of the English legal profession who consider universities incompetent to teach "vocational" courses.[40] British university legal education "is responsible

39. Klein, *supra* note 26, describing the relative merits and demerits of the American practice of putting so much stock in first-year grades. Many students at Cornell, for instance, feel that the results from their first year determine their overall ranking upon graduation.

40. E. Brunnet, *The Need for Legal Theory at all Stages of Legal Education*, *in* LEGAL EDUCATION: 2000, *supra* note 28, at 187, 190.

for the academic and theoretical development of legal principles."[41]

In Scotland, it is anomalously left for the Diploma in Legal Practice to teach an element of what should be viewed as an integrated whole. The Diploma was officially instituted to remedy perceived deficiencies in a lawyer's schooling. It increases the basic standard of lawyers in relation to the increase of lawyers in the marketplace: the so-called numbers problem. However, it fails to address many practical points such as computerized document production techniques, file storage, and billing.

Besides lack of law school resources, part of the problem lies with the idea that law is a gentlemen's, or "old boy's game," when it is in fact a profession-business. The profession alleges to support competition yet retains restrictive practices despite the palliative partial fusion of solicitors with advocates. In a fused profession, any lawyer can convey or plead in the highest court. As in a statistical distribution chart, lawyers in Canada or the United States find their own niche or specialty, or rise to their level of incompetence reflecting the "Peter principle."

IX. CALEDONIA: CRITICISM OF SCOTTISH LEGAL EDUCATION

British law faculties fail to effectively advocate for themselves in the absence of concrete support from the profession. A good idea would be a few substantial scholarships for post-graduate study. The Law Society of Scotland should fund a yearly practitioner-in-residence in each law school. This would give the practitioner a sabbatical allowing cross-fertilization of ideas with ivory tower lawyers. In North America, academic lawyers are subtly expected to take up causes. Law schools should be more proactive (including relations with the Law Society) and promote social issues including the litigation of certain class actions. Unfortunately, the promotion of social issues involves political activism and to this extent has little to do with legal "education" and "learning."

In the Unites States, the altruistic desideratum for lawyers is to "assume direction of all phases of the areas of human conflict inherent in a complex society and economy." This may partially be due to the influence of American constitutional arrangements. Thus there is a need for lawyers who can advise their clients with foresight and provide leadership to society. A good lawyer is professional and versatile, having "acquired certain abilities that enable him or her to operate effectively

41. *Id.* (citing Berger, *A Comparative Study of British Barrister and American Legal Practice and Education*, 5 NW. J. INT'L L. & BUS. 540, 563 (1983).

in any enterprise . . . to diagnose its problems and to contribute significantly to solutions."[42]

His or her basic qualities should include fact consciousness, a sense of relevance, comprehensiveness, foresight, lingual sophistication, precision and persuasiveness of speech, and, most importantly, self-discipline in habits of thoroughness. These qualities can be inculcated from teacher to student although other qualities are native to individuals: insight, ingenuity, imagination, judgement, and ultimately "character."[43]

However, altruistic desideratums concerning social change written by lawyers are suspect since lawyers would want their cut of the action. After all, consider where lawyers rank in popular esteem—there may not be any neutral ground in law to assay law! Rational people would not believe DuPont about what should be done with the chemical industry, so why should a rational person believe lawyers regarding the legal system or their non-partners, law teachers?

Law is a service industry which provides information concerning rules, yet unlike most industries, is self-regulated. The legal industry faces increased competition for resources and reacts to global trade-bloc changes such as are occurring in the European Community, North America and Japan-Asia countries. As Lucretius said, the only thing that exists are atoms, space, and law, with the primary law being evolution and dissolution.

> No single thing abides, but all things flow.
> Fragment to fragment clings; the things thus grow.
> Until we know and name them. By degrees
> They melt, and are no more the things we know.[44]

Thus the economic squeeze throughout history helps explain civilization and rules which create a measure of predictability in a chaotic world. Lawyers reflect this psychological need for certainty, thus there are limits on what society can functionally expect from them. Even if some of the loftier goals were realized by society, lawyers or some other group would want their percentage of the transaction costs. Whether British or American legal education can achieve altruistic goals remains an enduring controversy.

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42. A. JAMES CASNER AND W. BARTON LEACH, CASES AND TEXT ON PROPERTY 1-2 (3rd ed. 1984).

43. *Id.* at 3.

44. *Lucretius on Life and Death*, paraphrase by Mallock, *cited in* WILL DURANT, THE STORY OF PHILOSOPHY: THE LIVES AND OPINIONS OF THE GREATER PHILOSOPHERS 96 (1962).

Who Holds the Employment Contract 'Trump Card'? Comparing Labor Laws in Germany and the United States for the International Investor

*by Carol D. Rasnic**

I. INTRODUCTION

The incremental numbers of German companies investing in American businesses as well as American enterprises undertaking operations in Germany pose mutual demands for a manageable knowledge of the new situs' commercial laws. Perhaps no component of a successful business is more basic than is the relationship between the company and its employees, making an understanding of the applicable labor laws critical.

German investments in American businesses continue to show a near geometric growth, having surged from Deutsche Mark (DM) 5 billion in 1976 to some DM 39 billion less than 10 years later.[1] The primary reason usually cited is the mounting cost of doing business in Germany, a nation which has not only the highest corporate tax rates in the world[2] but also the highest average wage of any major country.[3]

Despite these foreboding statistics, American businesses can also be expected to increase investments in Germany, due to the privatization of companies in former East Germany. The reunification treaty between the Bundesrepublik Deutschland (West Germany, or BRD) and the Deutsche Demokratische Republik (East Germany, or DDR)[4] included

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1. WALTER TREUMANN ET AL., U.S. AMERIKANISCHES WIRTSCHAFTSRECHT 6 (2d. ed. 1990).

2. *Seeking Lower Costs, Germans Moving Plants to U.S.*, RICHMOND TIMES-DISPATCH, May 26, 1992, at A-8, col. 1-4.

3. The average hourly pay and benefits for the German worker in 1991 translated into a U.S. dollar value of $25.14, compared with $15.88 for the average U.S. worker. (Note: This amount does not include workers in the former Deutsche Demokratische Republik, or East Germany, where the average wage at that time was roughly 2/3 that of the worker in West Germany.) Frederick Kempe, *Germany's Huge Bill for Bailing Out East is Riling its Workers*, WALL STREET JOURNAL, May 15, 1992, at A-1, col. 6.

4. Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen De-

the implementation of plans to convert from non-public ownership the businesses formerly the property of the now defunct communist government. The agreement created the Treuhand, a governmental entity charged with selling to private purchasers the former DDR's more than 12,000 companies (with some 4 million employees).[5] As the temporary owner and business manager, the Treuhand applies a three-prong test in its choice of which bidders might purchase these properties: (1) amount of the proferred price, (2) guarantee from the purchaser of continued investment in the former DDR-owned enterprise for at least 5-6 years, and (3) commitment from the purchaser to provide jobs during the same period. Over 600 non-German investors have already bought such companies from the Treuhand, and many American businesses likely will share in this limited opportunity.[6]

This Article will summarize for those seeking to undertake such a trans-Atlantic venture in either direction the more striking of the differences between the labor and employment laws of Germany and the United States. Part II compares those laws characterized as "labor laws," i.e., governmental regulations applicable to units such as unions or other collective bodies of workers, and laws which apply to all workers, without regard to any distinguishing characteristics. Part III discusses laws referred to as "employment laws," i.e., those regulations designed to protect the rights of individual workers. The latter focuses largely on laws prohibiting discrimination in employment by reason of a worker's status.

II. LABOR LAWS

A. *Labor Unions and Management: The Collective Bargaining Agreement*

1. *United States*

Since 1935, workers in the United States have had the right under federal law to choose a bargaining representative.[7] The Wagner Act

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mokratishen Republik über die Herstellung der Einheit Deutschlands (Einigungsvertrag), August 31, 1990, 1990 Bundesgesetzblatt (BGBl.) II S. 889.

5. Ulrike Grünrock, representing the *Treuhand Anstalt*, Address at the Fulbright Commission Seminar, Berlin, (Mar. 30, 1993).

6. *Id.*

7. The original statute, the Wagner Act, was considerably augmented and amended in 1947, and is usually referred to by its latter popular name, the Taft-Hartley Act, Ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

(now Taft-Hartley Act) created the National Labor Relations Board (NLRB), a federal body authorized to determine the appropriate unit for bargaining purposes.[8] A majority of that unit might then choose to be represented by a union.[9]

Thirty percent of the workers in the bargaining unit must evince a desire that the NLRB conduct a union election before it will do so.[10] However, the statute does not require that the method of indicating the majority choice be an election, only that there be clear evidence of more than 50% support. The U.S. Supreme Court has acknowledged, however, that the election manner is both the "most commonly traveled route" and the "preferred route."[11] This majority-choice rule makes the union the exclusive representative,[12] so that there is no possibility of more than one union within a single unit.

The right of labor in the United States to strike an employer over a labor dispute is implicit in the statutory right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[13] This statutory right can be bargained away by the union if arbitration has been accepted as an alternate form of dispute settlement.[14] Moreover, even if the right to strike had been expressly waived by the union via a contractual no-strike clause, accepted in exchange for a provision palatable to it, such a waiver refers only to economic strikes (i.e., those relating to wages, hours, or terms and conditions of employment). The right to strike over an employer's commission of an unfair labor practice cannot be waived.[15]

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8. 29 U.S.C. § 159(b) (1988). There are minor restrictions on the NLRB's powers in this regard which are not germane to this discussion.

9. 29 U.S.C. § 159(a) (1988). The courts have interpreted this concept of "majority" to mean a majority of those workers who actually voted, provided the number of the voter turnout was substantial and representative. See NLRB v. Standard Lime & Stone Co., 149 F.2d 435 (4th Cir. 1945), where the federal appellate court affirmed the NLRB's certification of a union even though less than a majority of the workers in the unit had even voted.

10. 29 U.S.C. § 159(c)(1) (1988). This 30% is usually obtained through signed authorization cards.

11. NLRB v. Gissel Packing Co., Inc., 395 U.S. 579 (1969). In *Gissel*, the Court approved certification of a union which had received *less* than a majority of votes cast. Such certification was held to be justified because of the union's showing that (1) a fair election was not possible because of the employer's pressure on its workers, and (2) the unambiguous language on the authorization cards signed by a substantial majority clearly proved support for the union.

12. 29 U.S.C. § 159(a) (1988).

13. *Id.* at § 157.

14. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

15. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

The Taft-Hartley Act makes it an unlawful unfair labor practice for an employer to discriminate against an employee because of his union or non-union affiliation.[16] Thus, the terms of a collective bargaining agreement between a union and an employer must apply to all employees in the unit, whether or not they are union members.

The typical collective bargaining agreement in the United States is between the union and a single employer, although there are indeed multi-employer bargaining groups.[17] An example is the Major League Baseball Owners' Association, comprised of the 28 professional major league baseball teams, which executes a single contract with the union, the Major League Players' Association. Membership of an employer in such a group is entirely voluntary, and it is permitted liberal withdrawal rights.[18]

Finally, the Taft-Hartley Act requires an employer to bargain with a certified union[19] with respect to wages, hours, and terms and conditions of employment.[20] The union is under the same statutory duty to bargain with the employer.[21]

2. *Germany*

The labor union in Germany bears little resemblance to the foregoing paradigm. First, a significant majority of companies belong to large inter-industrial groups of employers.[22] The largest is the Federal Association of German Employers (*Bundesvereinigung der Deutschen Arbeitgeberverbände*), or BDA, to which 80% of all German employers belonged in 1991.[23] The BDA itself is not permitted to be a party to a

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16. 29 U.S.C. § 158(a)(3) (1988).

17. *See* 48 AM. JUR. 2d *Labor and Labor Relations* § 669 (1985).

18. *See* 51 C.J.S. *Labor Relations* § 180 (1967). One recent example was the withdrawal of Pittston Coal Corporation from the Bituminous Coal Operators' Association (BCOA), comprised of more than 100 coal companies. The result was the BCOA's execution of one contract and Pittston's execution of a separate one with the United Mine Workers Association (UMWA).

19. 29 U.S.C. § 158(a)(5) (1988).

20. *Id.* § 158 (d).

21. *Id.* § 158(b)(3).

22. Manfred Weiss *et al.*, *The Settlement of Labour Disputes in the Federal Republic of Germany*, *in* INDUSTRIAL CONFLICT RESOLUTION IN MARKET ECONOMIES: A STUDY OF AUSTRALIA, THE FEDERAL REPUBLIC OF GERMANY, ITALY, JAPAN, AND THE U.S. 93 (Tadashi Hanami and Roger Blanpain eds., 1984).

23. WOLFGANG ZÖLLNER UND KARL-GEORG LORITZ, ARBEITSRECHT 101 (9th ed. 1992).

collective bargaining agreement,[24] but its sheer size is indicative of its power and influence.

German companies also belong to geographic regional groups of employers, organized along industry lines. It should be noted that the concept of "industry" in this context is quite an expansive one. To illustrate, the "metal industry" includes automobile, electric, shipbuilding, and machine-building companies, among others.[25] This regional group is the actual employer party to the collective bargaining agreement, and the contract is with all members of the union for that industry in the region. The boundaries for the region are negotiated by the union and the employers, and the several contracts for the various regions in the same industry do not usually vary substantially among the regions.[26]

Unions usually are not organized according to the workers' craft or skill, but rather along industrial lines.[27] The typical union in Germany is an enormous body, and Germany's IG Metall (*Industrie-Gewerkschaft-Metall*) is the world's largest, with some 3.6 million members.[28] In turn, most unions belong to a comprehensive association of unions, the German Labor Union Federation (*Deutscher Gewerkschaftsbund*), or DGB. This body consisted of 9.46 million members at the end of 1989.[29] As with the BDA, the DGB is not a party to the collective bargaining agreement, which is executed between the industrial union (representing all members in the geographical region) and the regional employer group for that industry. Indeed, it is lawful for a single employer to contract with a union,[30] but because of the prevalence of

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24. Richard Richardi, *Kommentar zum bürgerlichen Gesetzbuch mit Einfährungsgesetz und Naben gesetzen, in* RECHT DER SCHULDVERHÄLTNISSE, ¶¶ 611-15 (Julius von Staudinger ed., 12th ed. 1957).

25. Manfred Weiss, *The Role of Neutrals in the Resolution of Interest Disputes in the Federal Republic of Germany*, 10 COMP. LAB. L.J. 339 (1988).

26. *Id.* at 340.

27. Franz-Jürgen Säcker, *The German Model of Codetermination: Perspectives, Confrontative Issues, and Prospective Developments, in* MANAGEMENT UNDER DIFFERING VALUE SYSTEMS 319 (Günther Dugor *et al.* eds., 1981).

28. *Germans' Reactions to Strike Settlement Mixed*, RICHMOND TIMES-DISPATCH, May 9, 1992, at A-5, col. 2-6.

29. ZÖLLNER UND LORITZ, *supra* note 23, at 99. This refers only to workers in what was West Germany prior to reunification.

30. Richardi, *supra* note 24, at ¶ 938. Such a contract between a union and a single employer is called a "*Firmenvertrag*" (company collective bargaining), and a contract with the regional employer group is called a "*Verbandstarifvertrag*" (association collective bargaining agreement). *Id.*

employer memberships in a regional group, these single employer contracts are the exceptions rather than the rule.

The Federal Law on Collective Bargaining[31] regulates union-management contracts. Unlike the statutory duty to bargain under Taft-Hartley, there is no such duty on either union or employer under German law.[32] Further, there is not the same rule limiting one bargaining agent to a unit. German law requires only that a union have the support of enough employees to exhibit sufficient "*soziale Mächtigkeit*," or social power.[33] The law does not define union (*Gewerkschaft*), but merely simplistically states that it is one of the two parties to a collective bargaining agreement.[34]

German law implies that the union has committed itself not to strike during the unexpired term of a collective bargaining agreement over any item which is covered in the contract. Referred to as "*Friedenspflicht*," or duty to keep the peace, this obligation is not negotiable.[35]

A final distinction in this area of German law relates to the worker's right to representation by the union. The German Constitution (*Grundgesetz*) expressly protects workers' freedom of association.[36] The federal labor court has interpreted this right to include the freedom not to associate,[37] a concept similar to Taft-Hartley's protection of a worker's right to join a union and the right also to refrain from union membership.[38] However, while the collective bargaining agreement in Germany cannot expressly exclude non-union members from its provisions,[39] the law does allow the employer unilaterally to refuse to grant to non-union employees those benefits contracted for by the union.[40]

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31. Tarifvertragsgesetz (TVG), 1969 BGBl.I S. 1323.

32. Manfred Weiss, *Federal Republic of Germany*, in 5 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 128 (Roger Blanpain ed., 1986) [hereinafter "INTERNATIONAL ENCYCLOPAEDIA"].

33. Decision of the Federal Labor Court, Bundesarbeitsgericht (BAG) AP Nr. 25 zu § 2 TVG.

34. TVG § 2.

35. ZÖLLNER UND LORITZ, *supra* note 23, at 351.

36. Grundgesetz (GG) art. 9(3).

37. BAG, 1987 Der Betrieb 2312.

38. 29 U.S.C. § 157 (1988).

39. Wolfgang Däubler, *The Individual and the Collective: No Problem for German Labor Law?*, 10 COMP. LAB. L.J. 505, 511 (1988). Professor Däubler calls this a "remarkable consequence" that the union member must pay for his positive freedom of association. (He estimates that dues constitute about 1% of the worker's monthly income). However, one who exercises his negative freedom and does not pay for the privilege may not even be contractually "burdened with the loss of a vacation bonus."

40. TVG § 3, ¶ 1.

A hypothetical might illustrate these differences. Assume a tire manufacturing company in a small city has 75 employees, including blue-collar clerical workers and laborers. If the company were in the United States, the NLRB might decide that all 75 workers appropriately belong in the same bargaining unit. By signing authorization cards, 23 of those (30%) might initiate an election, the union petitioning the NLRB being on the ballot. Further assume that 60 of the 75 workers vote when the election is held. If at least 31, a majority, vote for the union, it will be certified as the bargaining representative for all 75 (including those who did not vote, and those who voted *against* the union). It is the statutory duty of both employer and union to bargain, and any resulting collective bargaining agreement covers all 75 workers. Any subsequent right to strike in the event of a labor dispute is implied, absent a no-strike clause in the contract. Even if such a provision is included, the workers nonetheless might strike in response to the employer's unfair labor practice.

The same company in Germany would be regarded as being in the metal industry (as part of the automobile industry), and as such would likely belong to the regional group of employers in that industry. Those of its employees who have joined a union will be members of IG Metall. The union contract binding upon these parties is between *all* employers in this regional group and the IG Metall regional branch. Neither the employer group nor the union is obligated by law to bargain. Once a collective bargaining agreement has been executed, however, there is no right to strike until it has expired. Also, it is clearly within the employer's rights to pay wages and grant benefits guaranteed in the contract only to those employees who are members of IG Metall.

B. *Works Councils and Employee Codetermination in Germany*

Two potent statutory rights of workers in Germany have no parallels in American law, and any enterprise contemplating doing business in Germany should be familiar with these principles.

1. *Works Council (Betriebsrat)*

Since the Work Councils Act (*Betriebsverfassungsgesetz*)[41] was passed by the German parliament (*Bundestag*) in 1952, all businesses with at least five employees are technically required to establish a works council

41. Betriebsverfassungsgesetz (BetrVG), 1988 BGBl. I S. 2261.

of elected representatives from labor.[42] There is no correlation between union membership and works council membership, and many works council members concurrently belong to a union.[43]

This body must be consulted by the employer prior to implementation of most significant decisions routinely considered in the United States as entirely within management's discretion. These include hiring or transferring an employee,[44] terminating or extraordinarily discharging (i.e., immediately discharging without notice),[45] and drafting of general work place rules. The latter encompasses 12 specific subject matters, including time, place and manner of payment of wages; work accident rules; amount of wages and other performance-related compensation; and hours of work.[46]

The employer's agreement with the works council regarding work rules (which, unlike the German collective bargaining agreement with a union, might be unwritten)[47] is comparable to the union-management collective bargaining agreement in the United States. While the employer might exclude non-union members from the collective bargaining agreement coverage, an individual employee is never allowed to disassociate from the works council.[48] The most striking distinction is that, regardless of the size of a company, as few as five employees can demand compliance with the works council law, whereas a majority of workers must choose a union as their representative under American law. Also, unlike the American collective bargaining agreement, the German statute does not allow employees to strike an employer in order to attain a works council-company agreement.[49]

In reality, not all German companies subject to the law have works councils.[50] Nonetheless, it is logical to assume that the potential of having to deal with such a body if employees so desire prompts many businesses to deal more favorably with labor.

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42. BetrVG § 1. The number of employees on the works council ranges from 1 to 31, increasing with the number of total employees. *Id.* § 9.

43. INTERNATIONAL LABOUR OFFICE, GENEVA, SWITZERLAND, WORKERS' PARTICIPATION IN DECISIONS WITHIN UNDERTAKINGS 85, 137-38 (1981).

44. BetrVG § 99.

45. *Id.* § 102.

46. *Id.* § 87.

47. TVG § 1(2) requires collective bargaining agreements to be written.

48. Däubler, *supra* note 39, at 513-14.

49. BetrVG § 76.

50. One German labor law authority has written that the general rule is that only those employers with more than 50 employees have works councils. Manfred Weiss, *Federal Republic of Germany*, 9 COMP. LAB. L.J. 82, 83 (1987).

2. *Employee Codetermination (Mitbestimmung)*

Larger businesses—i.e., those with more than 2,000 workers—are required by statute to allow workers to assist in determining management policy. The 1976 Codetermination Act (*Mitbestimmungesetz*)[51] provides for 50% of the corporate supervisory board (*Aufsichtsrat*) to be represented by labor.

The German corporation has not only a board of management (*Vorstand*), which corresponds to the board of directors in an American corporation, but also a supervisory board consisting of an equal number of employees and shareholders.[52] Although the supervisory board has no management functions[53] (the board of management actually directs and operates the company),[54] the supervisory board appoints members of the board of management. The latter board must report regularly to the supervisory board regarding all corporate affairs.[55]

The supervisory board has one vote per member,[56] so that a shareholder member does not gain power as his number of shares owned increases. This equates the voice of the 50% employee contingent on the board to that of all shareholder owners collectively, so that there results a true balance of power.

For the mining and iron and steel industries, workers are given some direct control in policy decisions. Since 1951, German federal law has provided for employee members on the board of management of companies in these industries with 1000 or more workers.[57] This is the one situation under German law in which there is an assurance of employee participation in actual management.

C. *Wage and Hour Laws*

1. *United States*

Since 1938, the United States has had a federal minimum wage law.[58] This statute, the Fair Labor Standards Act, was substantively

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51. Mitbestimmungsgesetz (MitbG), 1976 BGBl. I S. 1153.
52. Aktiengesetz (AktG), §§ 76(3), 84, 1965 BGBl. I S. 1089.
53. *Id.* § 111 ¶ 4.
54. *Id.* § 76.
55. *Id.* § 90.
56. MitbG § 27.
57. Gesetz über die paritätische Mitbestimmung der Arbeitnehmer in Bergbauunternehmungen des Eisen und Stahlindustrie—Montanmitbestimmungsgesetz (MontanMitbG), 1951 BGBl. I S. 347.
58. The Fair Labor Standards Act, 29 U.S.C. § 206 (1989), originally established

amended in 1963 by passage of the Equal Pay Act,[59] which requires equal pay for equal work between the sexes.

The same statute contains the so-called maximum hour law. It does not limit the number of hours an employee might work, but it requires one and one-half times the average hourly pay for those hours in excess of 40 per week.[60] Exempt from both the minimum wage and maximum hour provisions are workers who meet the statutory and regulatory definitions of executive, administrative, professional, and outside sales employees.[61] The effect of this exemption is to permit management's requiring these persons to work overtime without additional compensation.

For the most part, Congress has not addressed vacations and miscellaneous days off. One exception is the recently enacted Family and Medical Leave Act which allows employees to take up to 12 weeks of unpaid leave in the event of birth or adoption of a child; need to care for a seriously ill spouse, parent, son or daughter; or hardship imposed by the employee's own illness.[62]

2. *Germany*

Germany has no minimum wage laws, either at the federal or state (*Land*) levels.[63] Because of the widespread applicability of collective bargaining and works council agreements, however, German workers have no need for any statutory minimum. The German worker works fewer hours and has longer vacations and more holiday and sick leave—yet has higher wages—than does the worker in any other industrial country.[64]

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the minimum hourly rate of pay for covered employees at 25 cents. There have been periodic increases by amendment to the law, the most recent setting the minimum wage at $4.25 per hour, effective April 1, 1991. 29 U.S.C. § 206 (1989), Pub. L. 101-157, §§ 2, 4(b), and Pub. L. 101-239, Title X; § 10208(d)(2)(B)(i), 103 Stat. 2481.

59. 29 U.S.C. § 206(d)(1) (1963). *See infra,* notes 137-140 and accompanying text on Equal Pay Act.

60. 29 U.S.C. § 207 (1988).

61. Id. § 213(a)(1).

62. Family and Medical Leave Act, Public Law 103-3, *codified* at 29 U.S.C. § 2601 *et seq.* (1993). This law covers all employers with at least 50 employees during each work day in at least 20 calendar weeks in the current or preceding year. Eligible employees are those who have worked for the employer for at least 12 months and for at least 1,250 hours during the preceding 12 months.

63. PETER HANAU AND KLAUS ADOMEIT, ARBEITSRECHT 17 (9th ed. 1988).

64. John Dornberg, *German Strikers Mark End of Business as Usual,* RICHMOND TIMES-DISPATCH, May 24, 1992, at F-3, col. 1-6.

With respect to maximum hours, federal law specifies the usual workday as 8 hours.[65] German law distinguishes between "*Mehrarbeit*" ("more" work), which refers to work in excess of this statutory 8-hours, and "*Überstunden*" ("over" hours), which refers to work in addition to what is typical for that particular work establishment. The latter is established in the collective bargaining or works council agreement,[66] but the law requires additional pay for Mehrarbeit. This additional compensation (unless otherwise in the collective bargaining or works council agreement) is at least 25% more than the regular rate of pay.[67] German law also requires regular work pauses of 1/2 hour (or two 15-minute breaks) after 6 hours of work for male workers.[68]

Federal law also sets a minimum paid time off for vacation, or "*Urlaub*,"[69] as 18 work days, or nearly four weeks for one who works a 5-day week. Because of the prevalence of collective bargaining and works council agreements, the average German worker in 1983 actually enjoyed an average of 36 days—or an excess of seven weeks—paid vacation days per year.[70]

Two laws secure additional days off, one which mandates time off for Sundays and legal holidays, with stated exceptions.[71] A number of the legal holidays in Germany are Catholic holidays, some of which are mandatory even in predominately Protestant regions. The Land of Bavaria (*Bayern*) enjoys the greatest number, at 14 per year. All Länder, however, have no fewer than ten such annual holidays.[72] The second statute compounds these provisions from the employer's perspective, generally mandating official closing times and days for most establishments.[73]

Germany has long had a liberal parental leave statute. Although the original law granted leave to the mother, since 1985 either parent

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65. Arbeitszeitordnung (AZO) § 3, 1938 Reichsgesetzblatt (RGBl.) I S. 447.

66. ZÖLLNER UND LORITZ, *supra* note 23, at 169.

67. AZO § 15(2).

68. *Id.* § 12 abs. 2. The different rules for female and juvenile workers are discussed *infra* notes 159 and 114 respectively, and accompanying text.

69. Bundesurlaubsgesetz (BUrlG) § 3 abs. 1, 1963 BGBl. I S. 2. Additional time is assured for juvenile (*see infra* note 113 and accompanying text) and disabled (*see infra* note 129 and accompanying text) workers.

70. INTERNATIONAL ENCYCLOPAEDIA, *supra* note 32, at 69.

71. Gewerbeordnung (GewO), 1987 BGB. I S. 425. Exceptions generally relate to the type of establishment such as hospitals, pharmacies, gasoline stations, public transportation offices, etc.

72. ARBEITSGESETZE 82 (Reinhard Richardi ed., 41st ed. 1991).

73. Gesetz über Ladenschlub (LadschlG), 1956 BGB. I S. 875. There are similar exceptions as in the GewO. LadschlG §§ 4-10.

might take advantage of the permitted 18 months leave from work, with the job secure upon his or her return. Although the leave is not officially with pay, the federal government pays the employee DM 600 per month.[74]

A summary of the wage and hour laws shows that the U.S. statutes provide for minimum wages and 1 1/2 times the usual rate of pay for work exceeding 40 hours per week. On the other hand, Germany assures workers liberal vacations, and Sundays and holidays off work. In this area of law, only the overtime pay, at 25% more than the usual rate rather than the 50% increase under U.S. law, is less advantageous to the German worker than to his American counterpart. Augmenting the benefits the German worker enjoys are hefty union and works council contracts, which have compensated for the absence of a minimum wage law in Germany.

D. *Employee Rights Regarding Termination*

1. *United States*

Perhaps no other rule of law in the United States has provided more fodder for law reviews and legal commentary in recent years than has the so-called "employment-at-will" rule. This principle, which has been applied in all state courts, is founded on a statement in an 1877 treatise generally accepted as having been presumptively made by the author without any justifying judicial authority.[75] The employment-at-will rule states simply that an employment contract for an unspecified period is terminable at any time by either employer or employee, with or without cause.

The long-accepted exceptions which require an employer to have good cause for discharge are (1) contracts for a definite term,[76] and (2) contracts in which the employee has given the employer something in

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74. Bundeserziehungsgeldgesetz (BErzGG) § 5 abs. 1, 1989 BGBl. I S. 1550. After six months, this sum decreases. *Id.*

75. *See, e.g.*, J. Peter Shapiro and James F. Tune, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-42 n. 54 (1974). The origin of the rule was HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER & SERVANT § 134, at 272 (1877).

76. *See, e.g.*, Rochester Capital Leasing Corp. v. McCracken, 295 N.E.2d 375 (Ind. 1973). Usually, employment designated as "permanent" or "lifetime" is presumed to be for an indefinite term and therefore terminable without cause. *See* Annotation, Modern Status of Rule that Employer May Discharge at-Will Employee for Any Reason, 12 A.L.R.4th 54 (1984).

addition to the commitment to perform services.[77] In recent years, many states have recognized additional exceptions, the two most recurring ones being the employee handbook exception and the "public policy" exception.

Based on breach of contract, many courts have held that handbooks or employment manuals given by employer to employee create binding commitments. If the manual contains a provision that the employee will be retained as long as his work is acceptable, for example, some courts have held that a termination is lawful only if the employer can show good cause.[78] In addition to this substantive right, some states have held that the procedural steps such manuals specify prior to discharges also vest contractual rights in the employee and that these steps must be followed, whether or not good cause can be shown.[79]

The second exception is one based on tort concepts, making unlawful any termination when the employer's reason violated public policy. Some less proactive courts limit "public policy" to that which has been articulated through legislation.[80] More innovative courts less wedded to judicial restraint have created public policy beyond any directives from the legislature.[81]

It is not within the scope of this summary review to analyze exhaustively the exceptions to the employment-at-will rule. It is significant, however, that a draft uniform law which would require good cause for all terminations in businesses with five or more employees[82] in those states where it is enacted has been assessed as having "poor prospects" for adoption.[83] Further, a majority of jurisdictions continue to apply

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77. *See, e.g.*, Bondi v. Jewels by Edwan, Ltd., 73 Cal. Rptr. 494 (1968) (employee had sold his own business in response to the employer's hiring him upon that condition).

78. Generally recognized as the seminal case on this point is Toussaint v. Blue Cross, 292 N.W.2d 880 (Mich. 1980).

79. *See, e.g.*, Woolley v. Hoffman-LaRoche, Inc., 491 A.2d 1257 (N.J. 1985).

80. *See, e.g.*, Bowman v. State Bank of Keysville, 331 S.E.2d 797 (Va. 1985).

81. For example, in Wagenseller v. Scottsdale Memorial Hospital, 710 P.2d 1025, 1035 (Ariz. 1985), the Arizona Supreme Court did not view statutes and constitutions as being the sole embodiments of public policy, deeming the courts also capable of pronouncing what is in the public interest. Here, a nurse had been terminated allegedly for having refused to "moon" an audience of her colleagues at a hospital social function. The Court held such reason, if it were in fact the cause of her dismissal, to be clearly contrary to public policy, regardless of any specific state statute establishing such public interest. *Id.*

82. § 1(2) Draft Uniform Employment Termination Act, August 2-9, 1991, in Lab. Rel. Rep. (BNA), Ind. Empl. Rts. Manual, at 540:21-540:41.

83. *See* Michael J. Phillips, *Toward a Middle Way in the Polarized Debate Over Employment-at-Will*, 30 AM. BUS. L.J. 441, 442 (1992).

the rule that discharges need not be based on good cause if the employment is for an indefinite period.[84]

2. *Germany*

Under German law, any employee who has worked for an employer for at least six months may not be terminated without cause.[85] The only three reasons constituting such cause are (1) economic concerns, independent from the employee,[86] (2) personal characteristics of the employee which are beyond his control and which affect his work,[87] and (3) the employee's inferior work or misconduct at work.[88]

The employer must notify the works council before it implements a decision to discharge,[89] and the council's one week to respond defers the termination at least for this period.[90] Although the works council cannot actually prohibit the termination,[91] it can object on any one of five objective reasons specified in the statute.[92]

In addition, workers are entitled to notice before a termination. German law distinguishes between white-collar workers (*Angestellten*), who usually are paid a salary (*Gehalt*) and perform mental and/or discretionary work, and blue-collar workers (*Arbeiter*), who usually are paid an hourly wage (*Lohn*) and perform manual labor.[93] The statutes conflict as to required notice, guaranteeing white-collar workers no less than six weeks notice,[94] and blue-collar workers only two weeks notice.[95]

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84. *See* Progress Printing Co., Inc. v. Nichols, 421 S.E.2d 428, 429 (Va. 1992).

85. Kündigungsschutzgesetz (KSchG) § 1, 1969 BGBl. I S. 1317.

86. *Id.* § 1 abs. 3. This is referred to as "*Betriebsbedingtkündigung*," or "discharge because of workplace reasons." Even when an employer must layoff employees because of business difficulties, however, the statute requires that he consider their seniority, age, and number of dependents.

87. *Id.* § 1 abs. 2. This is referred to as "*Personenbedingtkündigung*," *e.g.*, the worker's inability to work because of his illness.

88. *Id.* This is referred to as "*Verhältungsbedingtkündigung*," or "discharge because of behavior." Discharge for this reason requires that the employer first warn the employee that he is being considered for termination and the reason(s) for such.

89. BetrVG § 99(1).

90. *Id.* § 102.

91. The employee discharged against the works council's recommendation must resort to an action against the former employer in a local labor court.

92. BetrVG § 102 abs. 3.

93. Richardi, *supra* note 24, at paragraph 334.

94. Gesetz über die Fristen für die Kündigung von Angestellten, 1926 RGBl. I 399, ber. 412, geändert durch Gesetz vom Dez. 1989, BGBl. I S. 2261.

95. Bürgerliches Gesetzbuch (BGB) , 1896 RGBl. 195, zuletzt geändert 1990 BGBl. I S. 2002, § 622 abs. 2.

Because the German constitution assures equality before the law,[96] a 1990 decision by the constitutional court held the disparity unconstitutional.[97] The present status is that an employer may determine which of the two pre-termination statutory notices it will adopt and apply it objectively to white-collar and blue-collar workers alike.

Clearly, employers in Germany face obstacles to terminating an employee which companies in the United States do not. These notification laws and requirements for communication with works councils have become accepted ways of life to businesses in Germany.

III. EMPLOYMENT LAWS

For particular categories of workers, laws in both countries afford special privileges and protections, and, in some cases, more restrictions. These major categories are non-citizens; employees under the age of majority; disabled workers; and (in the case of Germany) female workers, especially pregnant workers.

A. *Aliens*

1. *United States*

Beginning in 1986, Congress has attempted to control the entry of illegal aliens by eliminating the job opportunities which lure such persons into the country. The Immigration and Naturalization Control Act[98] initiated the scheme of requiring employers to secure proof of employment eligibility from all new hires.

Such eligibility can be evidenced through a single document which both identifies the subject and shows that he or she has the right to work in the United States. Examples are a American passport; a foreign passport endorsed by the Attorney General as authorizing the holder to work; or a resident alien card issued through the Immigration and Naturalization Service (INS), commonly referred to as a "green card." In the alternative, the work applicant might prove identity with one document (such as a driver's license) and his or her right to work with a second (such as a Social Security card or a birth certificate showing American nationality).

The employer must record the information on a special government form (the I-9) and retain it for three years, or one year after termination

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96. GG art. 3.

97. Bundesverfassungsgericht (Federal Constitutional Court) (BVerfG) Entscheidung 82 S. 126 = AP Nr. 28 zu § 622 BGB, May 30, 1990.

98. 8 U.S.C. § 1324a (1986).

of employment of the subject, whichever comes later. It is not required that the employer verify the authenticity of any documents, only that it act in good faith. Failure to comply with the paperwork requirements can result in a civil penalty of $100-1000 per person.[99] If the employer has been guilty of actually hiring an illegal alien, the civil penalty is $250-2,000 for a first offense, $2,000-5,000 for the second, and $3,000-10,000 for third and subsequent ones.[100] If the government proves a "pattern or practice" of violations, there is a potential criminal penalty of $3,000-10,000 fine and/or six months imprisonment.[101]

2. *Germany*

Non-citizen employees in Germany might be categorized in 3 classifications: (1) political refugees, (2) citizens of other European Community countries, and (3) all others.

The German constitution assures asylum to any one persecuted because of political reasons.[102] This has resulted in a veritable deluge of immigrants: some 368,000 political refugees from war-torn Eastern Europe and parts of Africa and the Middle East sought sanctuary in Germany in 1992, and during only the first three months of 1993, the figure was 330,000.[103] These non-citizens must have a means of support, so not only are they entitled to the many social provisions German law provides, but they also might obtain gainful employment where there are opportunities. The violence resulting from resentment over these "Ausländer," or non-Germans, merits comment. During February, 1993, there were some 429 manifestations of hostility against Ausländer throughout Germany,[104] often because of bitterness over jobs presumed usurped from Germans in a time of climbing unemployment.[105] Apparently a small minority of Germans are privy to such attacks, and frequent counterdemonstrations are regular events through-

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99. 8 U.S.C. § 1324a(e)(5) (1988).

100. *Id.* § 1324a(e)(4)(A).

101. *Id.* § 1324a(f)(1).

102. GG art. 16(2) (1988).

103. Craig Whitney, *New York Times* Bonn correspondent, addressing Fulbright Commission seminar, March 27, 1993, Berlin.

104. This figure reflects 18 arsons, 56 assault and batteries, and 355 miscellaneous attacks, such as misdemeanor thefts, verbal insults, and damage to property. BERLINER MORGENPOST, April 2, 1993, at 1, col. 6.

105. About 4 million people in all of Germany are presently unemployed. The official rate is approximately 7% in the BRD, but 14% in the former DDR. Whitney, *supra* note 103.

out the country. Nonetheless, the reality of such tortious and criminal activity is a fact which might be considered by the American business contemplating a business venture in Germany.

Secondly, Germany and the other member nations of the European Community[106] are parties to a treaty assuring "*Freizügigkeit*," or freedom of movement and privileges afforded citizens.[107] Thus, any national of another European Community is eligible to work in Germany.

Others might have indirect rights by virtue of conflict of law principles. For example, the employment contract of an American employee of a multinational concern who has worked a number years in London immediately prior to his or her transfer to a German branch would be governed logically by the law of Great Britain.[108] As such, he might be entitled to the European Community privilege of employment eligibility. The non-German who is neither a political refugee or a national of a European Community country, however, is subject to much the same work visa and work permit (*Arbeitserlaubnis*) requirements as are all aliens in the United States.[109]

B. *Working Minors*

The two countries' laws with respect to employees under the age of 18 are strikingly similar. For example, both the United States' Fair Labors Standards Act child labor provisions[110] and Germany's *Jugendarbeitsschutzgesetz*[111] restrict work for minors with remaining school obligations under applicable state or Land law. Both except from prohibited work employment such as newspaper deliveries and acting or performing on television, in motion pictures or on stage. Both deal separately with agricultural work or work a minor performs for his or her parents or guardians. Both prohibit minors from working if the activity is designated as hazardous.

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106. Other member nations are Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, and Great Britain.

107. Vertrag zur Gründung der europäischeer Wirtschaftsgemeinschaft, March 25, 1957, and Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer, December, 1989. *See* ZÖLLNER UND LORITZ, *supra* note 23, at 114.

108. ZÖLLNER UND LORITZ, *supra* note 23, at 120. In addition to the nationality of the employee, other relevant factors in determining the appropriate law are currency in which wages are paid, place of employment contract, and language of the employment contract. *Id.* at 121.

109. The applicable statute is Arbeitsförderungsgesetz (AFG) § 19 abs. 1 Satz 1, 1969 BGB1. I S. 582.

110. 29 U.S.C. §§ 203(1), 213(c) and (d) (1938).

111. Jugendarbeitsschutzgesetz (JASchG), 1976 BGB1. I S. 965.

The German statute, however, contains some additional measures that should be noted by the American manager. German law explicitly encompasses within the idea of the "hazardous" work proscription for minors not only the physically hazardous prohibition in the FLSA, but also any activity deemed morally deleterious or injurious to his spiritual well-being.[112] This is a somewhat nebulous concept which merits thoughtful reflection if workers under age 18 will be hired by a company doing business in Germany.

Also, the German statute augments many of the mandatory vacation and permissible work hour laws in effect for the adult worker. In particular, the 18-day paid annual vacation is increased for the working minor to 25-30 days, on a decreasing scale as he becomes older.[113] The obligatory rest pauses also are increased to 30 minutes for 4 1/2-hour to 6-hour work segments, and to 60 minutes for work segments over six hours.[114]

Finally, German law contains elaborate provisions for the employer to require periodic physicians' certifications that the minor is able and fit to perform the duties of the job.[115] Evidence of these examinations is required before the employment of a minor is lawful, but costs are borne by the Land government rather than the employer.[116]

C. *The Disabled Worker*

The statutes providing protection for disabled workers, The Americans with Disabilities Act[117] and the *Schwerbehindertengesetz*,[118] are radically dissimilar. Only the most fundamental sections will be mentioned,[119] but a company transacting business in either country should be thoroughly familiar with the applicable law outlining duties to employees with disabilities.

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112. *Id.* § 22 abs. 1(2) (exceptions are created for apprenticeships and where the minor has a direct supervisor).

113. *Id.* § 19.

114. *Id.* § 11. Compare with the usual 30-minute break after six hours work. *See supra* note 68 and accompanying text.

115. JASchG §§ 32 *et seq.* This section applies only for work that is to last more than two months. *Id.*

116. *Id.* § 44.

117. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (*codified as amended* in 29 U.S.C. § 706, 42 U.S.C. §§ 12101-12213, 47 U.S.C. §§ 152, 221, 225, 661) [hereinafter ADA].

118. Erstes Gesetz zur Änderung des Schwerbehindertengesetzes (SchwbG), 1989 BGBl. I S. 1110, und Gesetz zur Sicherung der Eingliederung Schwerbehindertes in Arbeit, Beruf und Gesellschaft (SchwbG), 1986 BGBl. I S. 1421, ber. 5.1550.

119. For a detailed comparison, see Carol D. Rasnic, *A Comparative Analysis of Federal Statutes for the Disabled Worker in the Federal Republic of Germany and the United States*, 9 ARIZ. J. OF INT'L. AND COMP. L. 283 (1992).

1. *United States*

The definition of a disabled person entitled to protection—any "qualified person with a disability"—is a three-part alternate one. One is disabled if he or she either (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment.[120]

An employer must comply with the ADA if it has 25 or more employees.[121] The company's duties under the law are to the individual disabled applicant or employee, and the statute does not refer to disabled persons as a group or entity. "Reasonable accommodations" must be made in the work place for a qualified person with a disability,[122] but the employer's obligations are limited insofar as it need not undergo an "undue hardship" to make such an accommodation.[123] Also, the worker is not entitled to the protection of the law if the employer can show that he or she poses a "direct threat" to others' safety or health.[124]

Violations can be quite costly for the noncomplying business. Not only can a plaintiff obtain injunctive relief, including hire, reinstatement, and/or back wages, but he is also entitled to a jury's award of compensatory and punitive damages in maximum amounts ranging from $50,000 to $300,000, according to the defendant's total number of employees.[125]

2. *Germany*

The Schwerbehindertengesetz expands for the disabled worker many of the statutory rights granted all workers. One such right is the required

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120. ADA, *supra* note 117, § 3(2). The same Health, Education and Welfare (HEW) regulations which apply to the Rehabilitation Act, 29 U.S.C. § 706(8)(B) (Supp. 1990) set the standard for "major life activities" in the ADA. These include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working and participating in community activities." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 334.

121. ADA, *supra* note 117, § 101(5)(A). The employee count will decrease to 15 or more on July 26, 1994.

122. *Id.* § 101(9).

123. *Id.* § 101(9), (10).

124. *Id.* § 102(4).

125. ADA, § 107(a). Section 107(a) expressly incorporates the remedies provided by Title VII of the Civil Rights Act of 1964, as amended in 1991. These amended sections are in 42 U.S.C. §§ 2000e-4 - 2000e-9 (1991).

notice before termination. Although the employer usually can choose either the 2-week notice before termination required by statute for blue-collar workers or the 6-week notice required under the white-collar law for all employees,[126] the law assures the disabled worker no less than four weeks' notice.[127] This 4-week provision applies, even if the particular employer as a rule adheres to the 2-week notice option.

For termination of a disabled person, the employer must notify not only the works council (*Betriebsrat*), as it must with respect to all employees, but it also must notify the welfare office (*Hauptfürsorgestelle*). This office then has four weeks within which to convey its position to the employer,[128] so the implementation of the intended termination is prolonged. Secondly, the disabled worker is entitled to five paid vacation days per year[129] in addition to the 18 days guaranteed for all workers.[130]

Under the German statute, a disabled person (*Schwerbehinderte*) is any one with a 50% or more reduced capacity to function in the daily activities of his life.[131] Official evidence of disability is a certificate (*Ausweis*) which is issued by a federal pension office, provided that office is satisfied that he has the requisite 50% limitation.[132]

All businesses with 16 or more work positions (*Arbeitsplätze*), whether or not such positions are currently filled, are covered by the law.[133] Employers subject to the Schwerbehindergesetz are required to meet a quota: 6% of the Arbeitsplätze are to be filled with disabled persons. The German business which has not complied with the 6% rule simply pays a monthly assessment of DM 200 for each Arbeitsplatz not filled by one with a disability.[134] The statute also provides opportunities for employers to obtain credit toward their quota obligation if they hire

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126. BVerfG, Entscheidung 82 S. 126 = AP Nr. 28 zu § 622 BGB, May 30, 1990.

127. SchwbG § 16. *See supra* notes 94-97 and accompanying text.

128. *Id.* § 18 abs. 1. *Cf. with* the 1-week response time for the Betriebsrat (works council) to the employer. BetrVG § 102.

129. SchwbG § 47.

130. *See* BUrlG § 3 abs. 1.

131. SchwbG § 1.

132. *Id.* § 4 abs. 1.

133. *Id.* § 5.

134. *Id.* § 11 abs. 2. This payment is referred to as an "*Ausgleichsabgabe*," or "payment to equalize duties." This infers that an employer which has not followed the statutory directive has met his burden through an alternate method, one which has not benefitted the disabled as an individual.

persons with special disabilities,[135] or if they participate in the statutory program for workshops ("*Werkstätten*") designed to rehabilitate and train disabled persons to learn a vocation.[136]

This summary reveals quite basic differences as to which persons are to be protected, the obligations imposed on covered businesses, and the consequences of noncompliance. The conscientious American employer has struggled to become knowledgeable of the substantive provisions in the new ADA, and the German business is accustomed to the quota method effected through the Schwerbehindertengesetz. Both must become familiar with an entirely antithetical statute if the decision is made to relocate operations.

D. *The Female Worker*

1. *United States*

The two primary laws in the United States designed to better working conditions for women are the 1963 Equal Pay Act[137] and Title VII of the 1964 Civil Rights Act, most recently substantially amended in 1991.[138] The Equal Pay Act requires equal pay for equal work between the sexes, such "equality" of work being measured by four cumulative criteria: (1) skill, (2) effort, (3) responsibility, and (4) working conditions. A defending employer might justify pay disparity between male and female workers performing equal work if it were based on any one of four affirmative defenses: (1) quality or quantity of work, (2) seniority, (3) merit, or (4) a factor other than sex.[139] Although the law is written in gender-neutral language, the Congress' purpose is generally accepted as having been to close the significant gap in compensation heavily favoring male workers.[140]

Title VII proscribes any differential treatment based on the employee's race, color, sex, religion, or national origin. Prohibited discrimination not only relates to compensation, but also to any "terms, conditions, or privileges of employment."[141] The main defense for an

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135. SchwbG § 10.

136. *Id.* §§ 54-58.

137. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (1988).

138. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000h (1988) (1991).

139. 29 U.S.C. § 206(d) (1988).

140. *See* DAVID P. TWOMEY, LABOR LAW AND LEGISLATION 445 (7th ed. 1985).

141. 42 U.S.C. §§ 2000e-2(a) (1988).

employer's intentional exclusion of one sex from any work position is proof that gender is a bona fide occupational qualification (BFOQ).[142] One of the most oft-cited successful uses of this defense in sex discrimination litigation was in *Dothard v. Rawlinson*[143] where the U.S. Supreme Court accepted the position of the defending Alabama state prison system that guards in an all-male maximum security facility must be men. Holding the essence of the job, or the "normal operations of the business," to be the maintenance of prison security,[144] the Court reasoned that the presence of a woman on the staff of such an institution would result in likely riots and violence.[145]

The Court has routinely applied the defense quite strictly,[146] however, and no decision indicates this more emphatically than does *UAW v. Johnson Controls*.[147] A unanimous Court in *Johnson Controls* struck down the defendant company's policy prohibiting any woman with childbearing capacities from working in jobs exposing her to lead-containing batteries, likely to be harmful to an unborn fetus. Pivotal in the decision[148] was the Pregnancy Discrimination Act amending Title VII,[149] which expressly prohibits discrimination because of pregnancy, childbirth, or related medical conditions. The Court viewed the "normal operation of the business" simply to be the making of batteries,[150] irrespective of whether a fetus was at risk, and thus did not accept the BFOQ defense.

The significance of *Johnson Controls* is twofold: it demonstrates both (1) the Court's narrow application of the BFOQ in sex discrimination cases; and (2) the near-absolute right of the female to be free from

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142. Title VII permits discrimination based on sex, religion or national origin if the discrimination is a "bona fide occupational qualification reasonably necessary to the normal operations of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1988).

143. 433 U.S. 321 (1977).

144. *Id.* at 335.

145. The inadequacy of staffing and facilities had created what the Court acknowledged to be a "jungle atmosphere," in which a woman staff member would invite assaults by the large percentage of sex offenders long deprived of normal heterosexual relationships. *Id.* at 334-36.

146. *See Dothard*, 433 U.S. 332-37.

147. 111 S.Ct. 1196 (1991).

148. *Id.* at 1203, n. 3.

149. The Pregnancy Discrimination Act, § 701(k) of Title VII, was added to the law in 1978. This amendment was Congress' response to an earlier holding by the Court in Gilbert v. G.E., 429 U.S. 125 (1976), that discrimination by reason of sex did not include discrimination by reason of the employee's pregnancy.

150. 111 S. Ct. at 1206.

work place discrimination, provided only that there be no adverse effect on her, the performance of the operation, or the employer's business or facility.

2. *Germany*

Contrary to the anti-discrimination laws of the United States, German statutory law actually mandates differential treatment for the female worker, albeit those presumably beneficial for her.

First is the law applicable to the pregnant worker and the mother, expressly requiring what the Pregnancy Discrimination Act prohibits. The Law for the Protection of Working Mothers (*Mutterschutzgesetz*)[151] assures special treatment both during pregnancy and during the time a working mother is nursing her child. It contains a litany of jobs based upon the degree of physical effort required which are prohibited for such workers.[152]

The pregnant woman is generally precluded from working during the six weeks preceding the projected birth of the child and for eight weeks afterward.[153] Overtime work is forbidden for the nursing mother,[154] and she is entitled to time off with pay to nurse the child, should she return to work during the time she is doing so.[155] The federal government provides for payment to the working mother of DM 25 per day during this mandatory time off,[156] and the employer is liable for any difference between this amount and her average pay.[157] Further, her job must be held for her for at least four months after the birth of the child.[158]

The working woman in general is provided privileges beyond those of her male counterpart. Although the male blue-collar worker must be given a break after six hours of work, the female is guaranteed a 20-minute break after only four and one-half hours of work.[159] The

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151. Mutterschutzgesetz (MuSchG), 1968 BGBl. I S. 315.

152. MuSchG § 4(2), and Arbeitsstoffverordnung (ArbStoffV) § 14(4).

153. MuSchG §§ 3(2) and 6(1). This post-birth hiatus is 12 weeks for premature and/or multiple births.

154. *Id.* § 8.

155. *Id.* § 7.

156. MuSchG § 14 and Reichsversicherungsordnung (RVO) §§ 200(1)-200(3). The payment to the mother but not to the father probably reflects the primary concern of the Bundestag as being the health of both mother and child, rather than the time the parent might spend with the new baby.

157. MuSchG §§ 11 and 14.

158. *Id.* § 9.

159. AZO § 18.

blue-collar female worker cannot work prior to 6 a.m. nor later than 8 p.m., and she cannot work later than 5 p.m. on a day preceding a Sunday or legal holiday.[160] The male worker has fairly liberal choices regarding overtime work, but the female worker is prohibited from working more than ten hours per day.[161] Finally, women are strictly forbidden to work in mines, in the iron and steel industries, in coke plants, and on most construction site jobs.[162]

The American employer which has conditioned its management decisions carefully to avoid any distinctions between the male and female worker must assume a completely different posture in the German work place. It is apparent that the German working woman is assured many privileges which would be patently unlawful in the United States.[163]

IV. CONCLUSION

It is logically foreseeable that cross-continental investments by businesses in Germany and the United States will continue to increase. Efforts to avoid the relative monetary burdens imposed on German companies in their home situs induces them to seek a more financially advantageous location, and the United States has been referred to as the "favorite investment land for Germans."[164] American concerns also will be attracted during the next several years to newly available opportunities in the former DDR. Such purchases can be quite desirable from the perspective of price and initial required costs.

That the essential utilitarian goal of the business enterprise is the production of income and maximization of profits is a truism. To a degree, tax liabilities, licensing fees, and potential financial burdens associated with purchasing materials and equipment are fixed costs which even entrepreneurial ingenuity cannot alter. A more variable

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160. *Id.* § 19(1).

161. *Id.* § 17.

162. *See generally* Carol D. Rasnic, *Germany's Legal Protection for Women Workers vis-a-vis Illegal Employment Discrimination in the U.S.*, 13 MICH. J. OF INT'L. L. 415, n. 22-25 (1992).

163. There are some in Germany who share the view of supporters of women's rights in the United States that these "privileges" are in fact hindrances. For example, a nationally televised news commentary recently reported a groundswell of discontent and frustration among women in Germany because of the perceived causal connection between these laws and their inability to acquire or retain full time jobs. Such pressure and hardship is particularly difficult in the former DDR, where overall unemployment has reached a critical level. *Bonn Direct* (Broadcast, February 21, 1993).

164. TREUMANN ET AL., *supra* note 1, at 9.

factor derives from costs of the employment relationship, at least to the extent that wages, salaries and benefits might be negotiated. This element of the investment decision is thus most significant, so the latitude permitted management with respect to its treatment of labor should be closely studied before the commitment is finalized.[165]

These cautionary remarks are not designed to deter transnational investments by German or American businesses. In particular, the American company should not be completely dissuaded by the "doom-and-gloom" forecasters insisting that western German labor is unwilling to assume its share in the reunification burden. This contingent does not envision their sacrificing 40 years of progressively uninterrupted higher wages, shorter hours, longer vacations, and more holidays and sick leave. This view portends much prolonged labor turmoil for Germany.[166] Other esteemed prognosticators, however, are confident that reunification will pose no insurmountable labor strife in the near future, since the average German "knows how to work" and will agree to work longer hours to prevent having to reduce his enviable standard of living.[167]

The message is simply one urging reflection in a critical area where German and American laws are notably disparate. The thorough business investor should assess the labor and employment laws of the new situs and look long before it makes the proverbial leap.

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165. Because there is a paucity of cross-referenced German and U.S. material on labor and employment law, there may be a tendency to downplay its import in business decisions. For example, TREUMANN ET AL., *supra* note 1, is an excellent resource, both for the German and U.S. business investing in properties in the other country. However, although it provides exhaustive treatment of the differences in the respective laws regarding taxation, forms of business organization, antitrust, intellectual property, and banking, its chapter on labor and employment is surprisingly meager. The 21 pages of this chapter make it the shortest in this otherwise valuable and informative investment guide, and the authors appear to have discounted the significance of these laws for the international business.

166. Dornberg, *supra* note 64.

167. Lothar Löwen, German news correspondent, addressing Fulbright Commission seminar, March 27, 1993, Berlin.

The Enforcement of Aboriginal Rights in Customary International Law

*Julie Cassidy**

I. INTRODUCTION

This article considers the viability of utilizing customary international law as a source for the protection of aboriginal minorities' territorial integrity.

The possible existence of a customary international law protecting the territorial rights of aboriginal peoples is canvassed and the materials supporting such a law are outlined. The other major component of the paper lies in a consideration of the enforcement of such rights. This latter component is perhaps as important as the very establishment of the norm, for a right is not really a right unless it can be enforced. In this regard, the options[1] available to aggrieved aboriginal peoples, the problems they may face,[2] and possible solutions to these problems are considered.

An examination of state practice[3] relating to the territorial rights of the indigenous occupants of Australia, the United States, New Zealand, and Canada[4] reveals a uniformity of practice sufficient, it is submitted, to maintain the existence of this norm.

It is also contended that suggested problems[5] facing litigants enforcing this norm are not impassible. Thus, it is submitted, customary international law, enforced in the municipal courts, provides a viable alternative method for protecting the aboriginal title. Aboriginal plaintiffs would no longer have to rely on the whim of their majority

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1. The forums available for enforcement.

2. For example, that international law can only give Nations rights.

3. "State practice" includes legislation, judicial determinations, and executive practice.

4. These nations share an unfortunate history relating to the treatment of the traditional occupiers. The parallels that can be drawn across governmental policies between the "nature" of the people and their predicament are striking, and justify the use of this particular "class" of countries to provide the basis of this special customary international norm.

5. *See supra*, note 2.

government, nor the doctrine of communal native title[6] to maintain their territorial integrity.

A. *Importance of an Alternative Source*

The existence of an alternative source of protection is particularly important for Australian Aboriginals and Torres Strait Islanders,[7] whose legal right to their traditional lands had until very recently been denied by the municipal courts.[8] While land grants have at times been made by the Australian authorities, these are often framed as acts of benevolence, mere gifts, rather than a recognition of these aboriginal peoples' legitimate enforceable rights.

Comprehensive Australian-wide legislation protecting the territorial rights of these peoples has not as yet been enacted. What legislation does exist is subject to the whim of the governments. The Aboriginal Land Rights (Northern Territory) Act, 1976 for example, could simply be repealed were the federal government to so wish.[9] Thus, for these aboriginal peoples, who lack the political clout necessary to ensure that their governments respect their rights, the establishment of inherent rights enforceable independently of the authorities is crucial to the protection of their aboriginal interests.

If the common law and domestic legislation fail to protect the territorial integrity of the aboriginal peoples of Australia, to where can these people turn for the recognition and protection of their rights? The avenue suggested in this article is customary international law.

B. *Customary International Law*

International law is essentially comprised of two bodies of law: "conventional" international law (treaty-based law) and "customary"

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6. The doctrine of communal native title was recently recognized by the Australian High Court in *Mabo and Others v. Queensland*, 175 C.L.R. 1 (1992).

7. Significant advancements have been made for the Torres Strait Islanders as a result of the High Court determination in Mabo v. Queensland, 63 A.L.J.R. 84 (1988). Here the Queensland Coast Islands Declaratory Act, 1985 (Queensl.), purporting to extinguish the peoples traditional rights, was held to be inconsistent with the Racial Discrimination Act, 1975 (Austl.) and thus inoperative in accordance with section 109 of the Act. The final determination recently recognized the existence of the traditional aboriginal title. 175 C.L.R. 1 (1992).

8. *Mabo and Others v. Queensland*, 175 C.L.R. 1 (1992).

9. This possibility is not as inconceivable as one may believe. It has recently been alleged, in Northern Land Council v. Commonwealth, 161 C.L.R. 1, that the Commonwealth government threatened to repeal this act if the traditional owners of the subject land refused to sign the Ranger Uranium Agreement.

international law (law based upon state practice).[10] A necessary preliminary to any discussion of customary international law is a consideration of the relationship between these two sources. In particular, when seeking to utilize customary international law, one must overcome the suggestion that this body of law is a "dead letter," surpassed by conventional law.

Some writers, notably former Soviet jurists, have gone so far as to suggest that the regulation of international relations through treaties is so extensive that there is no longer a place in international law for custom. In response to these suggestions, it is necessary to examine the very essence of international obligation and the ultimate source of responsibilities. Through a hierarchical analysis of the sources of international law, the "grund norm"[11] can be established. It is believed this reasoning process maintains the importance of customary international law:

> Why are the terms of legislation incorporating treaties into domestic law binding? Perhaps their authority lies in the sanction of the parent treaty. Why are the terms of the parent treaty binding? The answer lies in a "higher" source of international law, the principle of customary international law providing that parties to treaties must abide by the terms of such treaties. What is the source of the obligation to comply with this custom? The source of this obligation is the international principle Kelsen[12] formulated as "States ought to behave as they have customarily behaved." The source of this obligation is unintelligible.

What does this simple exercise reveal? It shows the "highest" determinable source of international law to be a principle of customary international law, thereby reiterating the importance of custom as a source of international law. It could even be suggested that conventional international law is merely a part of customary international law.

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10. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 34 (7th ed. 1972), identifies five principle sources of international law: custom, treaties, decisions of judicial or arbitral tribunals, juristic works and decisions or declarations of international institutions. Under Article 38 of the Statute of the International Court of Justice, the court is directed to apply international conventions, international custom, general principles of law recognized by civilized nations, and, as a subsidiary means of determining the law, judicial decisions, and the teachings of the most highly qualified publicists.

11. The "grund norm" is the basic law, or the ultimate source of legal obligation.

12. PRINCIPLES OF INTERNATIONAL LAW 553-88 (2nd ed. 1966).

International instruments and treaties themselves constitute part of state practice, evincing the existence of customary international law.[13]

Having demonstrated the authority of custom as a source of international law, the nature of customary international law and the source of evidence of such norms need to be briefly mentioned. "State practice" is constituted by, *inter alia*,[14] legislation, case law, and the practice of the executive. When these acts are sufficiently uniform[15] across all nations, or in the case of a regional[16] or special[17] customary international law, throughout a particular class of nations,[18] a customary international law can be said to exist.[19] Does such a uniformity of thought and practice exist in the subject nations regarding the territorial rights of aboriginal peoples?

II. THE EXISTENCE OF THIS CUSTOMARY INTERNATIONAL LAW

A comparative study of Australian, Canadian, New Zealand, and United States case law, executive practice, and legislation suggests there is sufficient uniformity of state practice[20] to support the existence of a special customary international law protecting aboriginal territorial integrity. A systematic examination of state practice in each of these nations during three distinct periods, annexation to the 1870s, 1880s to 1970s, and 1980s to 1990, provides strong evidence of the required

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13. This evidentiary value is reflected in the description of treaties provided by Article 38 of the Statute of the International Court of Justice; *see supra* note 10. It describes treaties as "establishing rules expressly recognized by the contesting States," that is, customary international law. *Id.*

14. As noted above, treaties themselves also constitute a source of state practice.

15. This uniformity must be accompanied by a conscious conviction that the conduct is obligatory as a matter of law, or *opinio juris sive necessitatis*.

16. Anglo Norwegian Fisheries, 1951 I.C.J. 116.

17. Right of Passage over Indian Territory (Portugal - India), 1960 I.C.J. 6; see also the Wimbledon, 1923 P.C.I.J. (ser. A) No. 1, where the court relied upon the practice of a limited number of Nations.

18. The Scotia, 81 U.S. (19 Wall.) 170 (1871). As Justice Strong noted, a principle of customary international law may emerge from legislation, ordinances, and practice of particular nations, as long as it gains the concurrent sanction of the relevant nations.

19. *See* CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 155 (1957).

20. In light of the atrocities committed during the settlement of these nations, it could be suggested that a sufficient commitment did not exist until the twentieth century.

uniformity of practice to support an international norm protecting the aboriginal title.

This is not to deny the atrocities unfortunately typifying the settlement of each of the subject nations. The aboriginal peoples of each of these countries were subjected to what was no less than attempted, and sometimes successful,[21] genocide. Settlers' hunger for land and a convenient ignorance[22] of aboriginal land "ownership" led to the forceful dispossession of these peoples from their traditional lands.

When brought to the courts' notice, however, the sacred nature of the aboriginal title was upheld and acts of dispossession declared unlawful. Thus, it is submitted, these acts of dispossession were not a denial of the existence of this custom, but rather a breach of its terms. As such, they stand apart as contrary to well established principles of law and practice.

A. *Annexation to 1870s*

While history books accurately paint the settlement of the subject nations as a violent time, involving much savagery on the part of settlers, the picture depicted in legal history is somewhat different. The degree of concern for the maintenance of the aboriginal title in this period is quite remarkable. Even in the Australian context,[23] extensive efforts were made to ensure the recognition and protection of the aboriginal title.[24] It is submitted that such practice was sufficiently

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21. For example, the Australian Aboriginals of Tasmania and Kangaroo Island in South Australia.

22. See Justice Murphy's opinion in Coe v. Commonwealth, 53 A.L.J.R. 403, 412 (1979).

23. Much to the author's surprise.

24. It is submitted that the decisions in Cooper v. Stuart, 14 App. Cas. 286 (1889) and R v. Jack Congo Murrell, [1836] Legge. 72, do not necessarily undermine this assertion. While the decisions have been criticized (for example, by Justice Murphy in Coe v. Commonwealth, 53 A.L.J.R. 403), they can be easily distinguished and/or confined to their facts. Cooper v. Stuart determined that Australia was "settled." This case was, however, only concerned with the consequence of settlement and the reception of laws for the determination of white settlers' rights. There was no consideration of the aboriginal position. Further, the decision in R v. Jack Congo Murrell, providing that Aboriginals were subject to white law, did not amount to a denial of aboriginal rights. The court was at pains to stress that the defendant was not a "traditional" aboriginal, but rather had accepted white society and thus had to be bound by the rules of that society.

uniform and established, at least by the end of this period,[25] to establish a custom protecting aboriginal territorial integrity.

By the time of the settlement of South Australia and New Zealand, anti-slavery groups, the Quakers, the influential Clapham Sect, the Aboriginal Protection Society, and humanitarians in general, exerted much influence upon the formation of the imperial aboriginal policy. These groups were not only effective lobbyists; their membership "infiltrated" government offices, holding influential positions in both Parliament[26] and the Colonial Office.[27] Thus, the Colonial Office and Parliament were not only subjected to strong pressure externally, but also within their ranks.

These men[28] acknowledged the need under international law to recognize the territorial rights of the original occupants. Through the influence of these early advocates, advances were made for indigenous people the world over.[29] As part of these developments, the House of Commons unanimously declared it their duty to protect the civil rights of aboriginal people.[30] The Chancellor of the Exchequer stressed this was not a revolutionary announcement, but rather the recognition of a "principle on which the British Government [had] for a considerable time been disposed to act."[31]

In accordance with this principle, parliamentarians such as Thomas Fowell Buxton continually declared aboriginal peoples to have "a right to their own land." The government, he said, was bound to compensate these people for any "evils" European settlement placed upon them.[32] Buxton's influence is reflected in the report of the Select Committee stating "the native inhabitants of any land have an incontrovertible

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25. That is, the end of the 1870s. While recognition of the aboriginal title can be found prior to this point, the governments of these Nations at times appeared to have sanctioned the forceful dispossession of the aboriginal peoples. This indicates an absence of the required *opinio juris sive necessitatis*.

26. For example, Thomas Fowell Buxton. HENRY REYNOLDS, THE LAW OF THE LAND 82 (1987).

27. For example, James Stephen. *Id.*

28. Influential positions being held by males.

29. For example, slavery was abolished and the House of Commons officially affirmed the status of indigenous peoples of the Cape Colony as the legal equals of Europeans. REYNOLDS, THE LAW OF THE LAND 83.

30. Colonial Office (C.O.), 323/218 (available in the Deakin University Library System, Australia).

31. British Parliamentary Papers, 5 (1837) (on file with author).

32. R.H. MOTTRAM, BUXTON THE LIBERATOR 108.

right to their own soil: a plain and sacred right which seems not to have been understood."[33]

1. *Australia*

The political influence of the humanitarians reached its zenith in 1835 when Charles Grant became Secretary of State,[34] Sir George Grey was appointed Parliamentary Under-Secretary, and James Stephen became Deputy to the Permanent Head. When the colonization of South Australia was under consideration, these men had full control of the Colonial Office and were determined to protect the rights of the Australian Aboriginals.

Soon after, Lord Glenelg, another prominent humanitarian, replaced Charles Grant as Secretary of State. Not long after taking up his position, Lord Glenelg received a letter from the Governor of Tasmania, Governor Arthur, warning that if South Australia was to avoid the bloodshed which had occurred in his colony, the territorial rights of the Aboriginals had to be recognized. Settlement should only proceed, he implored, if land acquisition was based upon the purchase of those lands the Aboriginals were willing to relinquish.[35] Glenelg sent a copy of the letter to the South Australian Colonization Commissioners, directing these matters to be "regarded as a first important [sic] in the formation of the new settlement."[36]

Aboriginal rights were to be assured in two ways. First, the Chairman of the Commission, Robert Torrens, was to provide for "the appointment of a Colonial Officer to be called Protector of the Aborigines."[37] Second, measures were to be taken for the protection of the aboriginal title and the eventual "[purchase of] the lands of the Natives."[38]

The Protector of Aborigines[39] was to oversee the granting of lands and to determine whether the lands "thus surveyed or any portion of

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33. British Parliamentary Papers (B.P.P.), 516 (1836), quoted in REYNOLDS, *supra* note 26, at 85.

34. Charles Grant was succeeded by Lord Glenelg.

35. *See* REYNOLDS, *supra* note 26, at 99. *See also* C.O. 280/55 (available in the Deakin University Library System, Australia).

36. *See* REYNOLDS, *supra* note 26. *See also* C.O. 396/1 (available in the Deakin University Library System, Australia).

37. MEMOIRS OF SIR THOMAS FOWELL BUXTON, 364 (C. Buxton, ed. 1926); REYNOLDS, *supra* note 26.

38. *Id.*

39. Similar instructions were given to the Governors of the other Australian colonies. *See, e.g.*, Letter from Glenelg to Gipps, (31 January 1838) HRA, I xix, at 252-55 (on file with author).

them . . . [were in the] occupation or enjoyment of the Natives." If the lands were so occupied, and the traditional owners did not wish to sell, it was the Protector's duty to "secure to the Natives the full and undisturbed occupation or enjoyment of their lands and to afford them legal redress against depredators [and] trespassers."[40]

In regard to the scheme for the purchase of the aboriginal title, it was considered necessary to provide some form of legislative protection of Aboriginal territorial integrity. This protection came in the form of a proviso to the Letters Patent,[41] reserving the Aboriginal's right to any lands in which they were in actual occupation.

The proviso declared:

> [N]othing in these our letters patent contained shall affect or be construed to affect the rights of any aboriginal inhabitants of the said colony . . . to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony now actually occupied or enjoyed by such natives.

Any "lands therein now actually occupied or enjoyed by such Natives" could not be alienated to colonists. The proviso, therefore, provided clear evidence that the Crown believed that "the territorial rights of the Natives as owners of the soil, must be recognized and respected."[42] This prerogative assertion confirmed Aboriginal dominion over their traditional lands, setting such lands apart from the area under the legislature's control.[43] Despite the proviso to the Letters Patent[44] and the Commissioners' promise to respect the aboriginal title, the Commissioners proceeded to grant away the Aboriginals' traditional lands.

Importantly, however, the dispossession of the Aboriginal people was not a result of a failure to recognize the aboriginal title. Rather,

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40. *See* REYNOLDS, *supra* note 26. *See also* C.O. 13/5 (available in Deakin University Library System, Australia).

41. Ultimately passed under the Great Seal of the United Kingdom, establishing South Australia and fixing the boundaries thereof. S. AUSTL. STAT. Vol II, 749.

42. Per Lord Russell with respect to the identical clause in the New Zealand Letters Patent. Letter from Russell to Hobson, (28 January 1841) Parl. Papers (Commons).

43. The Letters Patent is an important document delimiting the scope of the government's dominion.

44. This proviso was used by dispossessed Maoris to bring an action in Scire Facias. R v. Symonds, [1847] N.Z.P.C.C. 387, Nireaha Tamaki v. Baker, [1901] App. Cas. 561.

it was the dishonesty and greed of the Colonization Commissioners that led to the infringement of these rights. Despite the introduction of the above safeguards, white settlers forcibly dispossessed the Aboriginals, declaring these peoples to be too uncivilized to be legally recognized as in "occupation" of their lands. The Commissioners went so far as to say that the Waste Lands Acts[45] prevented them from setting aside reserve land for the Aboriginals.

While the territorial rights of aboriginal peoples were infringed as a matter of law, imperial and colonial state practice in Australia, even at settlement, supported the international protection of the aboriginal title. During this period, such recognition was echoed in each of the subject Nations.

2. *United States*

The United States Supreme Court, led by Chief Justice Marshall, entrenched into its legal system the doctrine of communal native title and the general recognition of aboriginal territorial integrity.[46] The Supreme Court affirmed the principle that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial."[47] The original inhabitants "were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion . . . ."[48]

The determinations of the Court, supported by the actions of the United States Congress, confirmed the need to respect the aboriginal title and the inability to extinguish that title except through consensual purchase. The legislative response was as strong as that of the Supreme Court. As early as 1629 the law of the colony of New Netherland provided that Indian lands could only be acquired by consensual purchase: "The Patroons of New Netherlands, shall be bound to purchase from the Lords Sachems in New Netherlands, the soil where they propose to plant their colonies, and shall acquire such right there unto as they will agree for with the said Sachems."[49]

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45. Which made no mention of the rights of the original occupants to their lands.

46. *See* in particular, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

47. *Worcester*, 31 U.S. at 559.

48. *Johnson*, 21 U.S. at 574.

49. Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 40 (1947).

Shortly thereafter, similar provisions were adopted in Connecticut, New Jersey, and Rhode Island,[50] and, with time, also became entrenched in United States federal law. Article 3 of the Northwest Ordinance of July 13, 1787 declared:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs done to them, and for preserving peace and friendship with them.[51]

In accordance with this principle, the settlement of the United States proceeded upon a policy of treatying with the Indians for their aboriginal title. In 1794, for example, the United States agreed to pay certain tribes of Indians an annual sum of $4,500 in "clothing, domestic animals, implements of husbandry, and other utensils" for the cession of their land.[52] Similarly, in 1835 the United States paid five million dollars for a tract of Cherokee land.[53] Thus, throughout the history of settlement, considerable sums changed hands in recognition of the aboriginal title.

This is not to deny the existence of unfair and forceful dispossessions. Despite the picture drawn in most history books and traditional "western" television and films, it was the white colonists, not the Indian peoples, who were the "savages." Despite the efforts of the judiciary, in particular, the Indian peoples were massacred by settlers and the survivors herded off their traditional lands towards the center of the country.[54] It has been estimated that Pre-Columbus, the Indian peoples numbered 5 million. By 1890, this had been reduced by disease and gunpowder to a mere 250,000.

While this slaughter and dispossession occurred despite the government's legal recognition of the territorial integrity of the Indian

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50. *Id.*

51. *Id.* at 41.

52. Treaty Between the United States of America and the Tribes of Indians Called the Six Nations, Nov. 11, 1794, 7 Stat. 44, 45.

53. Treaty with the Cherokees (full title omitted), Dec. 29, 1835, 7 Stat. 478, 479.

54. Settlement began on the eastern coast, proceeding towards the center of the country, eventually stretching to the west coast.

peoples, the magnitude of this breach undermines the existence of this custom at settlement. If this is so, it is submitted, in the later two periods considered, state practice protecting the aboriginal title crystallized into a binding customary international norm.

3. *New Zealand*

Significant support for the customary state practice of the recognition of aboriginal title can be found in the judicial and legislative practice of the New Zealand government. During this period, the New Zealand Court of Appeal entrenched the recognition of aboriginal territorial rights into its domestic legal system.[55] Further, this protection of the aboriginal title was acknowledged to be based on "principles of universal application,"[56] that is, international law and practice. This recognition was confirmed by the Treaty of Waitangi[57] and the Letters Patent, containing a protection clause identical to that in the South Australian Letters Patent.

4. *Canada*

Similarly in Canada, it was acknowledged to be

> beyond the power of the . . . Government of Canada to simply deny the legal viability of [aboriginal] rights. Native rights have a four hundred year history in international law and have been part of the common and statutory law . . . of Canada for well over two centuries. Rights which find their derivation in such a rich history cannot be easily ignored.[58]

While under the control of the French authorities, recognition of the aboriginal title was not well documented and thus possibly doubted. English settlement, on the other hand, proceeded on the basis of established principles of British colonial policy. According to this policy, the rights of the original occupants were to be recognized, and settlement

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55. *See, e.g.*, R v. Symonds, [1847] N.Z.P.C.C. 387.

56. *Id.* at 398.

57. Signed February 6, 1840. The major concern of the Treaty was to protect the traditional rights of the Maoris. Article II, for example, confirmed these peoples' right to "exclusive and undisturbed possession of their lands and estates . . . ."

58. PETER A. CUMMING AND NEIL H. MICKENBERG, NATIVE RIGHTS IN CANADA 275 (2nd ed. 1972).

was to proceed on the basis of treatying,[59] rather than forceful dispossession.

From the initial date of English settlement and throughout years of expansion, official documentation reveals a strong concern and respect for the territorial integrity of the aboriginal people of Canada. Steps were taken by both the British and local authorities to protect the territorial rights of these peoples and to ensure the undisturbed possession of their traditional lands.

Between 1662 and 1692, for example, a series of treaties was entered into between the Hudson's Bay Company and the aboriginal owners of Rupert's Land. The Royal Proclamations of 1761 and 1763[60] later confirmed this need to respect the aboriginal title.[61] To this end, The Royal Proclamation of 1761 stressed the need to "support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them." As a corollary, the governors of the colonies were strictly enjoined from granting any land "within or adjacent to the Territories possessed or occupied by the said Indians or the Property Possession of which has at any time been reserved or claimed by them." These sentiments were confirmed by The Royal Proclamation of 1763, which was held in *St. Catherine's Milling and Lumber Co v. The Queen*[62] to provide effective protection of the aboriginal title.

Moreover, these practices extended beyond the areas under the protection of the Royal Proclamation of 1763. In Quebec,[63] for example, the applicability of the sentiments reflected in the Royal Proclamation of 1763 was clearly appreciated by the imperial and colonial authorities. Governor Murray, Governor of Quebec in 1763, was told that "any Purchases or Settlements whatever, or Taking Possession of any of the Lands reserved to the several Nations of Indians" was strictly prohibited. He was instructed on no account "to molest or disturb [the Indians] in the Possession of such parts of the said Province, as they

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59. That is not to say all areas were subject to treaties. In Rupert's Land and the Northwest Territories, however, history reveals a consistent practice of negotiating with the Indians for their land.

60. Reprinted in R.S.C. app. 123, 125 (1970).

61. The proclamation also noted that despite the numerous instructions directing the Governors of the colonies to respect and protect the territorial rights of the Indians, many governors had acted "illegally, fraudulently and surreptitiously" resulting in dispossessions that were illegitimate and contrary to both the legal and moral rights of the Indians.

62. 14 App. Cas. 46 (1888).

63. Outside the perimeters of the "Indian Country" included in the Proclamation of 1763. *Supra* note 60.

at present occupy or possess." This implicit recognition of the aboriginal title outside the perimeters of the Royal Proclamations reinforces the generality of the practice of protecting the aboriginal title.

Despite these assurances, the territorial integrity of these peoples was infringed; pressures for land led to many "tribes" being driven from their land. Such dispossessions were, however, recognized by the government as an infringement of the Indians' pre-existing rights.[64] Consequently, in response to such breaches, prompt action was taken to rectify this disregard for the aboriginal title and to prevent further acts of dispossession.

Thus, at least as a matter of official policy, it is submitted, Canadian settlement was to proceed on the basis of consensual purchase, rather than uncompensated dispossession. All arms of government recognized this policy, and the aboriginal title underlying such, to be a well-established part of international and colonial law and practice.[65]

The above examples are only a small portion of an otherwise vast body of documentation recognizing the aboriginal title in the subject nations between the time of settlement to the 1870's. The uniformity of thought and practice is quite remarkable. The cross-fertilization of ideas from nation to nation and the consequent common threads found in each jurisdiction suggest the existence of a norm requiring the territorial integrity of these traditional peoples be respected.

While, as noted above, many acts of dispossession and cruelty befell the aboriginal peoples in each of these nations, it is submitted these were perceived as being the exception, not the rule. They were breaches of an otherwise entrenched practice in colonial expansion and, as such, were part of customary international law. If, however, these breaches are considered so significant as to undermine the validity of this conclusion, arguably such practice recognizing the aboriginal title not only continued, but strengthened in later periods. Thus, it will be contended that if such a norm did not exist by the 1870s, in subsequent years state practice did crystalize into a binding principle of customary international law.

B. *1880s to 1970s*

1. *Australia*

While it was in the 1970s that the Australian courts rejected the doctrine of communal native title,[66] legislative recognition of aboriginal

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64. *See, e.g.*, *supra* note 61.

65. Examples include the terms of the Royal Proclamation of 1763 and the decision in St. Catherine's Milling and Lumber Co. v. R, 14 App. Cas. 46 (1888).

66. Milirrpum v. Nabalco Mining Co., 17 F.L.R. 141 (1970). This decision,

interests was notable during this era. The enactment of the unique Aboriginal Land Right (Northern Territory) Act, 1976 in particular, evidenced an acceptance, even in Australia, of the legitimacy of aboriginal claims to their traditional lands.

Unlike other post-colonial Nations,[67] there has been a dearth of authority on the rights of Aboriginals in Australia. During the ninety years that passed between 1890 and 1980, apart from criminal trials, the status of these people and their land was rarely raised in courts of law.

Of the few cases handed down during this period, the decision in *Milirrpum v. Nabalco Pty. Ltd.*[68] appeared to have rung the "death knell" for judicial protection of the aboriginal title in Australia. While this case was only heard by a single judge of the Northern Territory Supreme Court, its rejection of the doctrine of communal native title became entrenched in the Australian legal system. At the close of the 1970s, however, this refusal to recognize the existence of the Aboriginal peoples' inherent right to territorial integrity was no longer indisputable and the courts became increasingly receptive to arguments in favor of the existence of traditional rights to land.

The way was opened by the decision in *Coe v. Commonwealth.*[69] In what were said to be poorly drafted pleadings,[70] the Aboriginal plaintiff claimed certain sovereign and territorial rights.[71] While the High Court remained divided as to the existence of Aboriginal sovereignty[72] and the proper classification of the annexation of the Australian continent,[73] all members of the Court[74] appeared willing to reconsider Milirrpum's case and its denial of the communal native title.

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it is submitted, was merely a result of the judicial circumstances at the time of the hearing. Judge Blackburn relied on a then-recent decision of the Canadian Court of Appeal where it was held the doctrine of communal native title had no part of the common law. Judge Blackburn could not have predicted that the Court of Appeal's decision would soon be overturned on appeal in Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145 (1973).

67. Except perhaps Canada, where, apart from the decision in St. Catherine's Milling and Lumber Co., 14 App.Cas. 46, the first significant judicial consideration of the aboriginal title had to await the decision in Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145.

68. 17 F.L.R. 141.

69. 53 A.L.J.R. 403.

70. *Id.* at 407 (see the opinion of Justice Gibbs).

71. Including the sovereign title to England. Justice Murphy was highly critical of the frivolous nature of such claims.

72. In accordance with an Austinian type of reasoning whereby the judiciary

Justice Jacobs, for example, declared it open to the plaintiff to argue that the Aboriginal people were entitled to the enjoyment of "the proprietary and possessory rights" they held by reason of their prior occupation of the continent,[75] the Commonwealth's usurpation of Aboriginal "rights, privileges, interests, claims and entitlements in respect of their lands"[76] being unlawful. Justice Murphy stressed that the decisions in *Cooper v. Stuart*[77] and Milirrpum's case[78] were not binding on the Court,[79] stating international law indicated the "settled" classification, and the consequent rejection of the aboriginal title, to be wrong.[80] Judicial pronouncements reinforcing the traditional view of the peaceful "settlement" of Australia were, he said, "made in ignorance or as a convenient falsehood to justify the taking of aborigines' land."[81]

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derived their authority from the Crown, Justice Jacks did not believe he could consider whether the Australian Crown had properly obtained its sovereign rights. He believed it beyond his jurisdiction to question the power of the body from whence he derived his authority as a Crown instrument.

73. That is, whether Australia was acquired by conquest or, as tradition would have it, by settlement. Justices Jacobs and Murphy believed it open to the plaintiff to argue that Australia was in fact acquired by conquest and therefore enjoyed any consequent benefits. Coe v. Commonwealth, 53 A.L.J.R. 403.

74. Even Justice Gibbs believed it was open to the plaintiff to question the accuracy of the decision in Milirrpum. He further suggested the appropriation of Aboriginal land might be contrary to the free exercise of religion protected by § 116 of the Australian Constitution. In this particular case, however, he felt the subject claimed had not been sufficiently identified. Implicitly, had the land claimed been so identified, it appears even Justice Gibbs would recognize the inherent right of the indigenous peoples to their land.

75. Coe v. Commonwealth, 53 A.L.J.R. at 411.

76. *Id.*

77. Cooper v. Stuart, 14 App. Cas. 286. The Australian continent was stated to have been acquired by settlement.

78. Milirrpum v. Nabalco Pty Ltd., 17 F.L.R. 141.

79. Viro v. R, 52 A.L.J.R. 418 (1978)(Austl.).

80. Quoting the *Western Sahara* case, *translated in*, Reports of Judgments, Advisory Opinions and Orders, 1975 I.C.J., and Professor Starke, INTERNATIONAL LAW 185 (8th ed. 1977). Justice Murphy noted the complexity of the social, political and legal systems of the Aboriginal people and stressed the fact that Australia was not uninhabited, the Aboriginal population being approximately 300,000 in 1788. Nor was Australia taken "'peacefully'; Aboriginal people were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide." Coe v. Commonwealth, 53 A.L.J.R. at 412.

81. 53 A.L.J.R. at 412.

In this way, the decision opened the way to a more thorough questioning of Justice Blackburn's finding.[82] While Australia was for a time out of step with the consistent judicial recognition of the inherent territorial rights of aboriginal peoples in other post-colonial nations, *Coe v. Commonwealth*[83] marked the beginnings of a return to this uniformity of thought.

Consequently, it is submitted Australia's failure to judicially recognize these rights in no way detracted from the strength of state practice affirming the aboriginal right to territorial integrity at this time. This is particularly so in light of Australian legislative responses to Milirrpum's case.[84] During this period, Australia legislatively[85] acknowledged Aboriginal territorial rights and, at least in this way, conformed with international state practice.

During the period between the early 1950s and the early 1980s, land rights legislation was passed in most Australian states. In the face of growing international pressures and increasing Aboriginal activism, the Australian governments appreciated the need to give substance to past promises and to recognize the aboriginal title. Some legislation simply made outright grants of land to individual communities or converted Aboriginal reserves into free-hold lands held by the aboriginal occupants,[86] while others established systems of land claims.[87]

These enactments were based on an acknowledgement of the pre-existing[88] customary title and the need to give these people a degree of independence and/or self government.[89] Steps were also taken to protect Aboriginal sacred sites in a bid to recognize the cultural rights

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82. *See, e.g.*, Northern Land Council v. The Commonwealth, 161 C.L.R. 1 (1986).

83. 53 A.L.J.R. 403.

84. 17 F.L.R. 141. The Aboriginal Land Rights (Northern Territory) Act, (1976) (Austl.) was enacted in response to this determination.

85. For example, through the enactment of the Aboriginal Land Rights (Northern Territory) Act (1976).

86. Such as the Lands Trusts Act, (1966) (S. Austl.).

87. Such as the Aboriginal Land Rights (N. Terr.) Act (1976).

88. For example, the Aboriginal Land Rights (N. Terr.) Act (1976) centered upon the notion of "traditional lands" and "traditional owners." In this way the legislation indicates this is the recognition of a pre-existing right, not an act of benevolence.

89. In particular, the enactments relating to the Torres Strait Islanders of Queensland conferred upon these peoples a great deal of self government. Torres Strait Islanders Act, (1976) (Queensl.).

of these peoples.[90] Through these enactments the parliaments recognized the inherent rights of Australia's aboriginal peoples and the responsibility to ensure their cultural and territorial integrity. Particularly in the last twenty years, Australian governments have begun to follow more closely the practice of other post-colonial nations, acknowledging their domestic and international responsibilities to the aboriginal peoples of Australia. These movements coincide with a similar intensification of recognition in the other Nations under consideration, providing strong evidence of the existence of a custom protecting indigenous territorial rights.

2. *United States*

In the United States, for example, throughout the nineteenth and twentieth centuries, the Marshall Court's recognition of the Indian title provided the foundations of both law and practice. The already well-established practice of treatying with Indians for their land became officially entrenched in the United States policy of settlement and expansion. As an examination of the records of the Department of the Interior show,[91] relatively large amounts were appropriated each year for the purpose of purchasing Indians lands.

Between the adoption of the United States Constitution and the latter half of the nineteenth century, it is estimated that approximately 393 treaties were signed with Indian peoples.[92] The lands acquired under these treaties, some 581,163,188 acres, had been purchased at a cost of $49,816,344.[93] With the beginning of the twentieth century, this amount multiplied. Cohen[94] has estimated that if commodities, services, and tax exemptions are taken into account, more than 800 million dollars has been paid for title to Indian lands. This figure should be further multiplied given the value of the dollar at the time.[95] While much of the dispossession of the Indian peoples was forcible, these payments of compensation are at least an indirect recognition of the legitimacy of the aboriginal title.

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90. Such as the Aboriginal Sacred Sites Act (N. Terr.), and the Aboriginal Relics Preservation Act, (1967) (Queensl.).

91. *See, e.g.*, the documents examined in Federal Indian Law, chapter III, "Administration of Indian Affairs" 1966.

92. *Id.* at 230.

93. *Id.*

94. *Supra* note 49, at 36.

95. *Id.* at 38-39. To emphasize the import of this factor, Cohen uses as a

The practice of treatying was supported by strong judicial protection of the aboriginal title. The courts[96] continued to stress throughout the nineteenth and twentieth centuries that, before the government could purport to grant land to the colonists, the aboriginal title had to be extinguished by consensual purchase.[97] The Marshall Court's sentiments were expanded upon and clarified by the twentieth century courts, which vigorously enforced the inherent rights of the Indians against both colonists and the United States authorities.[98]

Thus, in *Holden v. Joy*,[99] the court declared it "[b]eyond doubt the Cherokees were the owners and the occupants of the territory where they resided before the first approach of civilized man . . . deriving their title . . . from the Great Spirit, to whom all the earth belongs, and they were unquestionably the sole and exclusive masters of the territory."[100] The court considered it an established fact that "the Indians . . . have been considered as distinct independent communities, retaining their original, natural rights as the undisputed possessors of the soil since time immemorial . . . ."[101]

An examination of the official executive practice of the United States government, the statutes passed by the legislatures of the country, and the case law as administered by the courts, reveals a uniformity of thought and practice designed to recognize and protect indigenous

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striking example the sale of Manhattan Island which was said to have been purchased for $24. As he pointed out, were that $24 invested at a mere six per cent per annum, the compound interest would enable the Indians to buy back the Island at current prices and still be left with a sizeable surplus. *Id.*

96. *See, e.g.*, Holden v. Joy, 84 U.S. 211 (1872); Buttz v. Northern Pacific Railroad, U.S. 55 (1886); Jones v. Meehan, 175 U.S. 1 (1899); Cramer et al. v. United States, 261 U.S. 219 (1923); United States v. Shoshone, (1938) 304 U.S. 111 (1938); and United States v. Klamath Indians, 304 U.S. 119 (1938).

97. United States v. Sante Fe Railroad Company, 314 U.S. 339; Gila River Pims - Maricopa Indian Community v. United States, 494 F.2d 1386 (Ct. Cl. 1974); and Narrangansett Tribe of Indians v. Southern Rhode Island Land Development Corporation, 414 U.S. 661 (1976).

98. During this and earlier periods there were occasions when "Indian hating" frontiersmen came to positions of power and influence. These men incited much hatred towards the Indian peoples and were instrumental in the dispossession of Indian communities. It is submitted, however, that the true character of acts such as the illegal theft of the aboriginal title was perceived by the judiciary. Particularly in this later period, this perception of illegality was not confined to the judiciary, but rather held by all branches of government.

99. 84 U.S. 211 (1872).

100. *Id.* at 244.

101. *Id.*

territorial integrity. It was clearly believed by all branches of government that Indian peoples enjoyed certain rights in their traditional lands and a degree of self government.

While these rights were infringed by colonists,[102] it is submitted that such infringements were in violation of accepted United States law and practice. A breach of a law is not a denial of its existence; it is merely a condition which is determined by the law. These breaches do not, therefore, negate the existence of this custom.

3. *Canada*

While there was strong legislative and executive recognition of the aboriginal title in colonial Canada, subsequent eras were marked by a lack of judicial consideration of Canadian aboriginal rights.[103] As late as the 1970s there had been no definitive judicial pronouncement upon the territorial rights of the indigenous people of Canada. It was not until the decision in *Calder v. Attorney-General of British Columbia*[104] that the existence of the aboriginal title and the rights stemming from this title became firmly entrenched in the Canadian common law system.

While the courts[105] were at times divided on certain points, generally they recognized and vigorously enforced Indian and Inuit[106] tenure.[107] In turn this judicial development led to further action at the executive and legislative level. Once these inherent territorial rights were established in the courts, the government recognized the aboriginal title by proceeding to negotiate the settlement of traditional owners' claims. These negotiations, including those relating to the Nishga land claim and the final settlement of the James Bay Claim,[108] the establishment of the Berger Commission into aboriginal rights in the Mackenzie Valley,[109] and the creation of the Indian Commission of Ontario[110] were

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102. And at times apparently condoned by authorities led by frontiersmen.

103. The Privy Council in St. Catherine's Milling and Lumber Co. v. R, 14 App. Cas. 46, stressed that it was not necessary to determine the nature of the aboriginal title for the purpose of determining the dispute before it.

104. 34 D.L.R.3d 145.

105. See subsequent determinations such as Re Paulette and *Registrar of Titles (No 2)*, 42 D.L.R.3d 8 (1973).

106. *See* Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, 107 D.L.R.3d 513 (1980).

107. Existing independently of the Royal Proclamation of 1763. Re Paulette, 42 D.L.R.3d 8.

108. The James Bay Settlement Acts being proclaimed by the federal and Québec governments in 1977.

109. The Berger Commission report, presented on 15 April 1977, called for a

also designed to facilitate the resolution of, *inter alia*, land claims.

The decade closed with the federal government's announcement of a proposal for a new Constitution recognizing and protecting these peoples' indigenous rights. This marked the end of a crucial time for the aboriginal peoples of Canada, and the beginning of an era which promised even greater respect for their traditional rights.

4. *New Zealand*

In New Zealand, the turn of the twentieth century was marked by increasing activity by Maori representatives in the New Zealand Parliament. This in turn led to a re-emphasis upon the need to respect the Maoris' cultural, economic, and territorial rights. To ensure that this plea to respect Maori rights would not fall on deaf ears, The Native Representation Act, 1867, was enacted, assuring Maori representation in parliament. In this way, the rights of the Maori people could never be conveniently forgotten. These Maori parliamentarians, with the support of many paakehaas, were able to check purchases of Maori land and to take steps designed to promote Maori rights.[111]

Such rights were in turn vigorously enforced by the courts in accordance with the principles laid down by Chief Justice Martin and Justice Chapman in the earlier case, *R v. Symonds*.[112] Subsequent cases[113] reaffirmed the need to respect traditional Maori titles. The courts stressed that such titles could only be extinguished by consensual purchase. The Maori title was acknowledged to be a pre-existing right stemming from original occupation, which state practice and general principles of international law required imperial and colonial powers to recognize and protect.

Thus, in all the nations under consideration, state practice[114] strongly reaffirmed the sentiments of the Marshall court, recognizing and enforcing the rights of the traditional owners. The courts consistently took

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ten-year "moratorium" on the construction of the Mackenzie Valley pipeline to allow for the resolution of the claims of the traditional owners.

110. The Commission was established under an agreement between the federal and Québec governments and the Chiefs of Ontario.

111. For example, the Native Lands Acts of 1862 and 1865.

112. R v. Symonds, N.Z.P.C.C. 387.

113. Most importantly, *Nireaha Tamaki*, App. Cas. 561; Wallis and Others v. Solicitor General, [1903] N.Z.P.C.C. 23; and In re the Ninety Mile Beach, [1963] N.Z.L.R. 461.

114. Particularly that of the judiciary.

up the cause of the traditional aboriginal owner, even in the face of what was at times strong executive opposition.

It is submitted that such uniformity of thought and practice evidences a well-established international norm requiring the observance of the legitimate exercise of traditional aboriginal rights.

C. *1989-1990*

In addition to the continuing legislative and judicial support of the aboriginal title, the current period has been characterized by three new distinct developments. With respect to each of these developments, Canada has led the way.

1. *Canada*

First, moves have been made towards the recognition of aboriginal rights through constitutional instruments and other fundamental documents. In 1982 the aboriginal and treaty rights of the indigenous peoples of Canada were entrenched in the Canadian Constitution. The new Constitution Act contained five provisions either recognizing and protecting the special rights of the aboriginal people of Canada or the human rights of Canadians in general. These are:

> Section 15 guarantees the right of equality, while allowing temporary affirmative measures to be taken to support particular categories such as race and sex.
>
> Section 25 ensured that the provisions of the Charter of Rights and Freedoms were not to be taken as affecting "any aboriginal, treaty or other rights of freedoms that pertain to the aboriginal peoples of Canada. . . ."
>
> Section 28 guarantees to all males and females equal enjoyment of the rights and freedoms provided for in the Charter of Rights and Freedoms, notwithstanding anything in the Charter itself.
>
> Most importantly, section 35 recognizes and affirms the existing aboriginal and treaty rights of the indigenous people of Canada.[115]
>
> Section 37 provided for the convening of the Constitution's First Ministers Conference[116] to discuss the definition

115. This expressly included the rights of the Metis even though the federal government lacked legislative power with respect to these peoples.

116. The Conference was to be convened within one year of its enactment.

> of the aboriginal rights to be included in the Constitution. Section 37(2) provides that aboriginal representatives and the governments of the Northwest Territories and Yukon (section 37 (3)) were to be invited to consider matters directly affecting the aboriginal people.[117]

These protections are ensured by section 52 of the Constitution which establishes the Constitution of Canada as the "supreme law of Canada." Any inconsistent law has "no force or effect" to the extent of that inconsistency.

Second, the courts, notably the Canadian Supreme Court in *R v. Guerin*,[118] recognized the respective governments to be subject to a fiduciary obligation to safeguard the rights and interests of the aboriginal occupants. In *R v. Guerin*,[119] the Court declared this fiduciary duty to be "an acknowledgement of the historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which the reserve land is put will not interfere with it. . ."[120] The decision in *Calder v. Attorney General of British Columbia*[121] aside, this is probably the most important determination relating to aboriginal rights in Canada since *St. Catherine's Milling and Lumber Co. v. R.*[122]

A third development is found in Canada's push towards the recognition of aboriginal self-government. In October 1983, the Special Committee on Indian Self-Government released a report, recommending that "the federal government recognize Indian First Nation governments as a distinct order of government within the Canadian federation."[123]

In furtherance of these sentiments, aboriginal representatives were invited to participate in the Canadian First Ministers' conference. The initial First Ministers' conference led to the signing of a constitutional accord, under which working groups were formed to consider, *inter alia,* "aboriginal title and rights, treaties and treaty rights, land and resources, and aboriginal self-government."[124] Participants in the con-

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117. At the first of these in 1983, the First Ministers agreed to three additional conferences in 1984, 1985, and 1987.

118. 2 S.C.R. 335 (1984).

119. *Id.*

120. *Id.* at 349. See the opinion of Justice Dickson.

121. Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145.

122. 14 App. Cas. 46; *Cf.* Brad Morse, *Canadian Developments*, A.L.B. at 6.

123. Report of the Special Committee on Indian Self-Government in Canada (The Penner Report) 133 (1983).

124. *Id.*

ference proposed various ways self-government could be implemented, including constitutional recognition of the inherent aboriginal right to self government[125] as defined by the First Ministers and other participants.

Steps towards the implementation of self-government were taken, however, independently of the constitutional reform process. In October 1986, the Sechelt Indian Band Self-Government Act was proclaimed. This act was the first self-government legislation to be produced as a result of federal initiatives and negotiations with Indian peoples at the community level. Thus, the Sechelt people of British Columbia have been accorded control of their lands, resources, health and social services, education, and local taxation. Judicial initiatives have also recognized the inherent right to Indian sovereignty, adopting the principles espoused by Chief Justice Marshall in *Worcester v. Georgia*,[126] recognizing aboriginal sovereignty at the date of settlement and confirming its continuing existence even after the Royal Proclamation of 1763.[127]

As noted above, these three new developments were in addition to a continuity of practice recognizing the aboriginal title. The decision in *Calder v. Attorney-General of British Columbia*[128] spurred the renewal of the treaty making process and the development of a new federal aboriginal land claims policy.[129] In August 1973, the Minister of Indian Affairs and Northern Development announced the federal government was to introduce a comprehensive claims settlement policy. This settlement policy acknowledged the existence of the aboriginal title, stemming from traditional occupation, and the absence of any specific legislation taking precedence over such title.[130] The comprehensive claims policy was reaffirmed with a few modifications in 1981 and in December 1986.

Pursuant to this comprehensive claims system, in 1982 the first successful claim against Canada was made by the Indians of British Columbia. The Penticon Band received 14.2 million dollars and 4,855.2 hectares of land in settlement of their "cut-off" lands claim.[131] Inuit

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125. This inherent right has recently been recognized by the Canadian judiciary. *See infra*, note 127.

126. 31 U.S. 515.

127. *See, e.g.*, R v. Sioui, [1990] Mary 24. For a discussion of this case see R.H. BARTLETT, INHERENT ABORIGINAL SOVEREIGNTY IN CANADA - INDIAN SUMMER 1990 5.

128. Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145.

129. Department of Northern and Indian Affairs, *Comprehensive Land Claims Policy*, 5 (1973).

130. *Id.* at 8.

131. This was followed by the settlement of the Osoyoos Band's claim for $1

peoples also made a successful claim in this decade. In 1984 the Canadian parliament ratified, through the passage of a special statute, the comprehensive claim of the Inuvialuit of the Western Arctic.

Great advancements were made in the 1980s by the indigenous populations of Canada. Both federal and provincial governments took steps towards the recognition of the territorial integrity of aboriginal owners and their right to self-government and self-management. While such recognition had not been totally absent in earlier decades, it has since taken a different shape, representing a strengthening of the position of these peoples in Canadian state practice.

2. *New Zealand*

Canadian constitutional developments were paralleled in New Zealand through the determination of the New Zealand Court in *New Zealand Maori Council v AG.*[132] In this case, the Court resurrected the Treaty of Waitangi as a legally binding recognition of Maori rights. In determining the rights so protected under the Treaty, the High Court adopted the Maori translation of the instrument, thereby ending a long dispute as to the appropriate translation to be accorded legal force. This decision constitutes the most important act recognizing the indigenous rights of the Maori people in the 1980s, perhaps in the history of New Zealand. It marked the beginning of a new era in land rights in New Zealand, the flood of consequent claims being well documented.

Maori Council v. A.G. was supported by earlier developments designed to give effect to the sentiments of the Treaty of Waitangi. In response to concerns that the Treaty was not adequately reflected in paakehaa legislation and government policies,[133] the Treaty of Waitangi Act, 1975 was enacted in an attempt to give those rights enshrined in the Treaty some practical value.[134] A tribunal which could question the consistency of government actions in relation to the Treaty was established to hear Maori grievances. In the past, grievances could only be addressed through litigation in the paakehaa courts, a system which

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million and the settlement of the claims of the Wagmatcook Band of Nova Scotia for $1.2 million. A year later the claims of the Clinton Band of British Columbia were settled for $150,000 and the return of almost 70 of the original 90 hectares of reserve land taken in 1916. This was followed by the settlement of the claims of the Oromocto Band of New Brunswick for $2.5 million. These years were therefore marked by the more active pursuit of aboriginal territorial rights and the payment of compensation for past infringements of such rights.

132. Judgement of 29 June 1987, C.A. 54/87 (on file with author).

133. Kenderdine, *Statutory Separateness (2): The Treaty of Waitangi Act, 1975 and the Planning Process*, 1985 N.Z.L.J. 300.

134. *Id.*

was not thought to be entirely satisfactory for the determination of tangata whenue (Maori) rights.

During the 1980s the Tribunal carried out a number of important inquiries into the validity of certain bureaucratic decision-making processes and their impact upon traditional Maori rights.[135] A reaffirmation of the spirit and intent of the Treaty of Waitangi can be identified in these findings, and in the government's swift response to the Tribunal's recommendations. These findings of the tribunal, combined with legislative responses and judicial determinations[136] provide ample evidence of the New Zealand government's belief in a need to respect the traditional rights[137] of the Maori people, thereby supporting the existence of the subject norm.

3. *Australia*

Even in Australia we have seen movements towards the implementation of a treaty between the federal government and the Australian aboriginal peoples. While those sympathetic to the aboriginal cause are always skeptical of the promotion of a treaty or Makaratta as nothing more than an election exercise, such moves at least show that politicians believe they must appear to support the recognition of the aboriginal title.

In the Australian context, it also appears that the High Court[138] will adopt the reasoning in *R v. Guerin*[139] and find the Commonwealth government in breach of its fiduciary obligations owed to the traditional owners. This breach occurred as a consequence of the Ranger Uranium Agreement and the duress the government brought to bear on the traditional owners in forcing them to sign an agreement whose terms were not fully disclosed.

Increasing Aboriginal activism in Australia in the 1980s, coupled with growing international concern for the plight of these people, led

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135. *See, e.g.*, the Te Atiawa Inquiry; subsequently reaffirmed by the New Zealand Court of Appeal in North Taranaki Environment Protection Association v. Governor-General, 1 N.Z.L.R. 312 (1982). The Sir Charles Bennett Claim, and the Huakina - Te Puha Ki Manuku claim.

136. See Huakina Development Trust v. Waikato Valley Authority, 2 N.Z.L.R. 188 (1987), where the court used the Treaty of Waitangi Act, 1975, 1, and the findings of the Waitangi Tribunal to protect the plaintiffs' spiritual, cultural, and traditional relationship with the waters in dispute.

137. The dispute in Te Weehi v. Regional Fisheries Officer, 1 N.Z.L.R. 680 (1986), involved fishing rights.

138. *Supra* note 7.

139. 2 S.C.R. 335 (1984).

to greater awareness of the plight of indigenous minorities. This change in Australian perceptions is reflected in the development of an official Aboriginal policy geared towards more active preservation of their inherent rights.

Legislation recognizing the land rights of these people was enacted in South Australia,[140] Western Australia, New South Wales, Queensland, and, through a referral process, in Victoria.[141] The judiciary supported land grants under existing legislation [142] and returned significant parts of the Northern Territory to the traditional owners. In this way the Australian government acknowledged the existence of the right to territorial integrity inhering in this indigenous people.

Changes were also evident in judicial practice. After many decades characterized by little judicial consideration of aboriginal rights, there was a resurgence of confidence in the judiciary, spurred by the above-mentioned decision in *Coe v. Commonwealth*.[143] While cases concerning aboriginal rights were still rare outside the criminal law context, more cases were brought before the courts for consideration. The consequent determinations[144] reveal a willingness to support to a greater extent than hitherto, the existence and legitimacy of aboriginal territorial rights.

In this regard, three significant steps were made. First, Milirrpum's case[145] was questioned[146] and the inherent right to traditional land accepted.[147] Second, Australia's international responsibilities to Aboriginals and Torres Strait Islanders[148] were also acknowledged and enforced by the courts. Finally, as noted above, in accordance with Canadian developments, moves were made by the Australian courts towards recognizing the fiduciary responsibilities of the Australian Crown

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140. *See, e.g.*, The Pitjantjatjara Land Rights Act, 1981, the boundaries of which it is proposed to extend.

141. *See, e.g.*, the Aboriginal Land (Lake Condah and Framlingham Forest) Act and the Aboriginal and Torres Strait Islander Heritage Protection (Amendment) Act.

142. *See* Re Toohey (Aboriginal Commissioner); Ex parte Northern Land Council: The Kembi Land Claim, 56 A.L.J.R. 164 (1981); Re Kearney Ex Parte Northern Land Council (Jawoyn), 52 A.L.R. 1 (1984); Re Kearney Ex parte Japanangka 52 A.L.R. 31 (1984); and Re Kearney Ex parte Jurlama, 52 A.L.R. 24 (1984).

143. 53 A.L.J.R. 403.

144. Such as the findings with respect to the Torres Strait Islander's in Mabo, Passi and Rice v. State of Queensland (82/OB12), S.C. Judge Moynihan 16.11.90, and Northern Land Council v. The Commonwealth, 161 C.L.R. 1.

145. 17 F.L.R. 141.

146. *See* Northern Land Council v. The Commonwealth, 161 C.L.R. 1.

147. *Mabo and Others v. Queensland*, 175 C.L.R. 1 (1992).

148. *See* Koowarta v. Bjelke-Peterson, 39 A.L.R. 47 (1982).

and the correlative rights of Australian aboriginal peoples.[149]

4. *United States*

The United States judiciary continues to stress the need to respect the aboriginal title[150] and other traditional rights.[151] The courts reaffirmed that the government only acquired a bare title to lands and waterways[152] upon discovery, and that the aboriginal title needed to be purchased before a whole title was acquired.

These examples of state practice supporting a customary international norm protecting the inherent right to territorial integrity suggest that, if not fully crystallized into a binding norm in 1788, by the 1980s protection of aboriginal territorial integrity was well entrenched in state practice. This is significant because under the intertemporal rule, the rights and status of the Aboriginal people today will be determined, not by custom in 1788, but rather *opinio juris* as it stands today.

III. INTERNATIONAL PROTECTION OF INDIVIDUALS

The establishment of such uniformity of thought is far from the end of the matter. Once the norm has been established, many possible problems can be suggested. Perhaps the most formidable of these lies in the traditional view that international law only governs nations.

Can international law protect aboriginal minorities? Can minorities enforce and enjoy international rights? Traditionally, international law is seen as concerned exclusively with the rights and duties of nations, seemingly to the exclusion of the individual. The individual is only an "object," not a "subject" of international law.[153] International responsibility is owed to the nation of which the individual is a national, not the individual. Consequently, according to the traditional theory, as it is the nation's and not the individual's right which has been

149. *See* Northern Land Council v. The Commonwealth, 161 C.L.R. 1.

150. *See, e.g.*, County of Oneida, New York, et al. v. Oneida Indian Nation of New York State, 470 U.S. 226 (1984).

151. For example, fishing and hunting rights.

152. This included aboriginal title to river beds and banks; U.S. v. Pend Oreille County Public Utility District No. 1, 585 F. Supp. 606 (E.D. Wa. 1984); and Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983).

153. See the works of Oppenheim, the chief exponent of the traditional theory. He asserts that an "individual human being . . . is never directly a subject of International Law . . . But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations." INTERNATIONAL LAW 344 (1905).

infringed, only the nation may enforce that right in international courts.

Positivists allow no exception to this general rule. They suggest that even in the absence of citizenship, the individual has no legal significance in the international arena.[154] Any rights or obligations international law imposes in such cases are "enjoyed" through the exercise of a right held by the nation, not by virtue of the individual's international status.[155] It appears that positivists believe international law cannot, by its very nature, operate upon entities other than nations.

This position appears to have been adopted by both the Permanent Court of Justice and the International Court of Justice. In the Nottebohm case, the International Court of Justice stated:

> As the Permanent Court of International Justice has said and has repeated, 'by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its rights to ensure, in the person of its subjects, respect for the rules of international law.'[156]

It is the right of the nation, not of the individual, which is pursued.

Thus, according to positivists, any apparent rights or duties individuals seem to have are not truly imposed by international law. Before these rights can be enjoyed by, or are binding upon, individuals, they must be transformed into municipal rights and duties. Further, once these rights and duties have been so "transformed" they are no longer international, but municipal rights and duties. Thus, under traditional international law, individuals and minorities cannot enforce "their" international rights such as those provided under the subject norm.

An examination of the works of ancient international law jurists,[157] and modern state practice, however, reveals an acceptance of the individual as an international entity subject to international rights and duties.[158] Given the extent of modern state practice recognizing human and minority rights, individuals are arguably now considered inter-

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154. They suggest that even the rights and duties involved in the case of pirates and slaves are technically still the nations', not these individuals'.

155. Under the traditional theory, nationality is a precondition to an exercise of jurisdiction by a court redressing a wrong suffered by an individual.

156. 1955 I.C.J. 4.

157. *See, e.g.*, FRANCISCI DE VITORIA, DE INDIS ET DE JURE BELLI REFLECTIONES (1917) (First published in 1557) and HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (1964).

158. EMER DE VATTEL, LAW OF NATIONS 166-71. Vattel expressly confined the law of nations to relations between sovereigns, not individuals.

national juristic entities possessing enforceable international rights.

International law, like all legal systems, has its background and roots in the society it governs.[159] As the needs and values underlying that society change, so too should the principles which govern that legal system change. Thus, as a corollary of changing concerns in the international community, international law has changed and developed. Two consequent changes relate directly to the place of individuals and minorities in the international arena, extending international rights and obligations to individuals and minorities.

First, it is being appreciated that ultimately, individuals alone are subjects of international law. "The subjects of international law are like the subjects of national law—individual human beings."[160] The "duties and rights of States are only the duties and rights of the men who compose them."[161] This is now being accepted by the courts and tribunals applying international law. As one tribunal noted:

> It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals . . . [T]hese submissions must be rejected . . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[162]

Second, the interest which all nations have in the observance of international law and the preservation of international peace is being accepted. Increasingly, breaches of international law are seen as directly concerning all nations, not only those physically affected by the violation.[163] As a result of this shared concern with humanity, international law has moved into the so-called "domestic" arena, and with increasing vigor has defended the right of all nations to intervene where international peace is threatened.

It is submitted that these concerns are reflected in the vast body of international documents protecting individuals and minorities.[164] These

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159. PHILIP C. JESSUP, A MODERN LAW OF NATIONS 1 (1950).

160. KELSEN, *supra* note 12, at 194.

161. 1 THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 78 (L. Oppenheim ed., 1914).

162. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 4 (1950)(quoting the International Military Tribunal, Judgment of 30 September, 1946).

163. In re Piracy Jure Gentium, [1934] App. Cas. 586, 592. *Cf.* HALL, INTERNATIONAL LAW 25 (3d ed. 1889).

164. *See, e.g.*, the Charter of the United Nations; the Universal Declaration of

documents show that international law is not inherently incapable of being directly applicable to individuals and minorities. Thus, it is suggested that there is no reason to conclude that an international norm protecting the aboriginal title cannot be enjoyed and enforced by individuals or minority groups.

In the United States, individuals have enforced both customary and conventional international law in the municipal courts. In *Filartiga v. Pena-Irala*,[165] *Rodriguez - Fernandez v. Wilkinson*[166] and *Forti v. Suarez - Mason*[167] the courts rejected the notion that "the law of Nations extends only to relations between sovereign states."[168] At least in the context of human rights, the courts found that individuals enjoy certain international rights enforceable independently of the State.[169]

The courts, in enforcing international rights,[170] allowed these individual plaintiffs to rely on, *inter alia,* the terms of the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the custom reflected in these instruments.[171] In this way, the suggestion that international law is inherently incapable of affecting individuals was rejected as without foundation.

A. *Forum for the Enforcement of This International Norm?*

A right is, however, merely illusory if it is not enforceable. The enforceability of this special customary international law is, therefore, as crucial as the proof of its existence. Two possible forums exist for the enforcement of this norm: 1) the International Court of Justice, or 2) Municipal Courts.

Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the European Social Charter; the Declaration on the Granting of Independence to Colonia Countries and Peoples; the Declaration of Principles of International Law Concerning Friendly Relations; and the International Convention on the Elimination of all forms of Racial Discrimination.

165. 630 F.2d 876 (2nd Cir. 1980).
166. 505 F. Supp. 787 (D. Kan. 1980).
167. 672 F. Supp. 1531 (N.D. Cal. 1987).
168. *Id.* at 1540.
169. *Id.*
170. *See, e.g.*, Rodriguez - Fernandez v. Wilkinson, 505 F. Supp. 787.
171. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d at 882-85.

1. *Enforcement in the International Court of Justice*

While the view that only nations can have international rights is slowly being discarded as state practice increasingly recognizes individuals and minorities as direct beneficiaries of international rights,[172] these developments have not been incorporated into the jurisdiction of the International Court of Justice. The Statute of the International Court of Justice delineates the jurisdiction of this international court. Article 34, paragraph 1 provides that only "States may be parties before the Court."

Despite the developments made in the recognition of human rights, this constraint prevents individuals and minority groups from enforcing their rights in the International Court of Justice.[173] As only "States" can appear before the International Court of Justice, unless aboriginal minorities can establish they are sovereign States, they cannot bring an action before this international body.

The sovereignty of aboriginal peoples is, therefore, important to the international enforcement of any such custom. An examination of the work of international law jurists reveals a belief that "the aborigines undoubtedly had true dominion in both public and private matters. . ." They believed "their princes . . . could [not] be despoiled of their property on the ground of them not being true owners."[174] Thus, these jurists wrote, it was not only private rights to land which international law required to be respected, but the public or sovereign rights of these peoples also had to be acknowledged.

While some jurists required these peoples to comply with a certain standard of "civility,"[175] generally, the only prerequisite was a degree of governmental authority sufficient to maintain order within the group.[176] Such sovereignty could be exercised by a local community or com-

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172. *See* Philip C. Jessup, *The Subjects of a Modern Law of Nations*, 45 MICH. L. REV. 403 (1947).

173. That is, unless such groups can establish they constitute a sovereign State within the terms of the statute. Two other alternatives exist. The government might bring an action on behalf of the individual or minority group, or the United Nations may commence proceedings leading to an advisory opinion being given on questions pertinent to the rights and status of these peoples.

174. VITORIA, *supra* note 157.

175. *See* Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW 176 n.14, quoting WESTLAKE, *supra* note 161, at 145, (who required a "native government capable of controlling white men or under which white civilization can exist").

176. *See* CRAWFORD, *supra* note 175.

munities,[177] by a native "king,"[178] by many rulers across the nation,[179] or by small groups jointly exercising co-sovereignty.[180] Many Asian peoples, such as those of the Ottoman Empire, the Maratha Empire of India,[181] Thailand (Siam),[182] Japan, and Korea were recognized as sovereign entities.[183] Similarly, the peoples of Africa[184] and the Pacific[185] were recognized as independent States.

There is, therefore, no reason to deny the sovereignty of the subject aboriginal peoples. As the court pointed out in the Western Sahara case,[186] even nomadic peoples can exercise de facto sovereignty over the lands through which they roam. The nation considered in that case, consisting of nomadic tribes, confederations, and emirates, was found to "jointly exercise co-sovereignty over the Shinguitti country." Similarly, even nomadic bands in Australia, New Zealand, Canada, and the United States could be considered to jointly[187] exercise sovereign rights over these countries.

While international theory provides for the reversion[188] of such sovereignty, to be "States" within the Statute of the International Court of Justice these peoples would need to be recognized as nation-states by the international community. Sovereignty and nationhood may not coincide. Thus, despite the vast body of modern international law recognizing individual and minority rights,[189] in the absence of an amendment to the Statute of the International Court of Justice, the traditional view[190] may still provide a formidable barrier to minorities enforcing their rights in the international arena.

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177. As in Canada, the United States, and New Guinea.

178. As in New Zealand, Lagos, and Zimbabwe.

179. As in India.

180. For example, the tribes, confederations, and emirates of the Western Sahara.

181. Right of Passage, 1960 I.C.J. 6, 38.

182. Temple, 1962 I.C.J. 6.

183. While these States were not treated identically to the European States, the distinction was not made on the basis of "civility," but through the application of regional customs. CRAWFORD, *supra* note 175, at 176.

184. *See, e.g.*, Western Sahara, 1975 I.C.J (Morocco).

185. Treaty of Waitangi, February 6, 1840, (Parties to Treaty), (Where treaty can be found), (Maoris).

186. Western Sahara, 1975 I.C.J.

187. In conjunction with more settled groups.

188. That is, a resurrection of sovereignty illegally disregarded.

189. A distinction between individual and group rights should be born in mind. Questions of *locus standi* may vary in difficulty depending upon which "type" of right is under consideration.

190. That is, that only States can be the beneficiaries of international rights and obligations.

Given such difficulties, minorities will generally have to rely on the "good nature" of their "Eurocentric" government if they wish to enforce this norm in the international arena.[191] Enforcement, therefore, will depend upon the interests of the government, which is more likely to be the violator than the supporter of these aboriginal territorial rights. It therefore appears necessary to turn to the municipal courts for relief.

2. *Enforcement in the Municipal Courts*

The enforceability of international law in the domestic courts raises a number of issues, *inter alia*:[192]

- Is international law enforceable in the domestic courts?
- Does it require formal incorporation into municipal law before it can be so enforced?
- If international law is not expressly incorporated into national law, what rights do minorities have:
  a. if the government has not passed legislation in relation to this matter?
  b. if municipal law conflicts with international law?
- What obligations are placed on the State to bring municipal law into line with international rules?
- Are municipal tribunals required to apply both municipal and international law? Which must be accorded primacy?

Whether individuals and minorities can enforce their rights in the municipal courts may vary jurisdiction to jurisdiction, depending upon the practice of the domestic courts and whether the national government has incorporated these international rights and obligations into municipal law.

Ultimately, it is suggested, the "monist" theory of law, which sees both international and municipal law as a single body of law, is not only theoretically correct, but reflects judicial practice in the Anglo-American judicial systems. According to this theory, international law automatically flows into and becomes part of the domestic "law of the land," and is thus enforceable in the municipal courts. If this conclusion is accepted, unless the custom protecting aboriginal peoples' territorial integrity is clearly inconsistent with existing municipal law, the national courts must recognize and enforce this international law.

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191. Alternatively, the United Nations could ask for an Advisory Opinion on behalf of the aboriginal group.

192. A detailed consideration of which is beyond this article.

Moreover, if the national government legislates contrary to this custom, it will be breaching its international obligation to bring domestic law into line with international law. The establishment of this customary international law can, therefore, have a great impact upon the domestic protection of the aboriginal title. The availability of this alternative venue will allow individuals and minorities to avoid the hurdles entrenched in the Statute of the International Court of Justice, and to enforce their rights even against their own government.

a. *Theoretical Position*

There are four theoretical possibilities relating to the relationship between international and municipal law:

1) Monism: This theory sees international and municipal law as one unified legal system. While the opinions of the representative jurists vary significantly, this doctrine generally accords supremacy to international law in both the municipal and international arena. The Anglo-American courts accord supremacy to international law, unless clearly overridden by municipal legislation.
2) Dualism: The chief exponents of this theory are modern positivist writers who uphold the strength of the internal legal sovereignty of nations. They see international and municipal law as separate bodies of law, according primacy to municipal law in the municipal arena.
3) Reverse monism: This theory accords primacy to municipal law in both the international and municipal arenas and finds no support in judicial practice.
4) Theory of harmonization: Under this theory, the two spheres of law[193] are said to deal with different subject matters. Municipal law regulates domestic matters pertaining to the internal order of the State. International law governs matters of international concern, not domestic affairs. Consequently, exponents believe conflicts between international law and municipal law are not possible.

These considerations could be discussed in great detail. However, for the purposes of this article, monism will be the only consideration outlined.

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193. That is, international and municipal law.

b. *A Unified Legal System*

The most persuasive argument suggesting the applicability of monism stems from a hierarchical analysis of the source of legal force or authority similar to that utilized above with respect to the relationship between custom and conventional international law. Arguably both municipal and international legal systems derive their validity from the same basic norm Kelsen[194] formulates as "States (and thus the individuals who constitute states) ought to behave as they have customarily behaved."[195] The authority of municipal law can be traced back to this international norm:

> From where does a regulation made by a municipal institution derive its authority? This authority stems from the parent act of parliament giving this institution power to make delegated legislation. Where does the act of parliament derive its authority? The government's authority underlying the force of this legislation is dependent upon international law, in particular the recognition of nations and the rule of effectiveness.Where does this international law derive its authority? Its authority stems from customary international law and the rule "States ought to behave as they have customarily behaved."[196]

As noted above, according to Kelsen this norm provides the ultimate basis of legal obligation in both the national and international legal systems.

Both systems have, therefore, a common source of authority. Further, both bodies of law are part of a single unified legal system. Thus, nations and individuals are not regulated by two distinct polaristic legal systems.[197] As part of a single legal system, Monists believe there is nothing preventing municipal courts from applying international law. Aggrieved individuals and minorities can, therefore, rely on customary international law in these courts. Difficulties only arise if national legislation is inconsistent with this international norm.

c. *Question of Primacy*

If conflicting national legislation exists, which is to prevail? Hersch Lauterpacht's[198] skepticism of the State as a vehicle for protecting human

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194. *Supra* note 12, at 553-88.
195. *Id.* at 564.
196. *Id.*
197. STARKE, *supra* note 10.
198. *See supra*, note 162.

rights led him to accept the supremacy of international law in both the municipal and international arena in cases of inconsistency. This distrust of the State allowed him to detract from the nation's sovereignty without hesitation and to acknowledge international law as the more appropriate and supreme instrument for regulating human affairs. Thus, he believed that international law always prevails in the case of conflict, even in the face of clearly inconsistent municipal law.[199] While Lauterpacht's theory is the most favorable for the protection of the aboriginal title in the municipal arena, a slight variation[200] has found support in judicial practice. While most countries accept international law as part of the "law of the Land," the courts have not found any *a priori* legal reason for giving primacy to either system of law. Primacy is determined by the jurisdictional rules[201] governing the particular court.

Consequently, the effect international law may have in the municipal arena will depend upon judicial practice and the jurisdictional rules having authoritative force in the nations under consideration. These rules of practice are briefly outlined below.

d. *Transformation and Incorporation of International Law*

If it is accepted that international law can be enforced in the municipal arena, it needs to be determined whether such international norms need to be expressly incorporated or automatically flow into the municipal system. Some dualists believe national courts cannot apply international law as such. Before it can be utilized, they suggest it must be transformed into municipal law through an act of the sovereign will. An act of the national legislature must formally allow for the use of international law.

The preferable view, however, is the view of monists, who do not require formal transformation of international law into municipal law. Monists believe a municipal judge can and must utilize any relevant international law when determining a dispute, even if the sovereign has not actually declared that international law to be part of the municipal law. Once a sovereign concludes a treaty or a customary

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199. A variation of Lauterpacht's theory, monist-naturalism, places paramountly with a third order - natural law. This supreme order determines the respective spheres of operation of international and municipal law. *See* LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 58 (1927). *See also* STARKE, LAW, STATE AND INTERNATIONAL LEGAL ORDER: ESSAYS IN HONOR OF HANS KELSEN at 308-16. This theory has, however, never found support in the courts.

200. Found in Kelsen's works.

201. *Id.* Whether judge-made or statutorily determined.

international law is established, the court may presume it is given a mandate to treat that international law as part of the "law of the land." "The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law."[202]

International law can, however, only confer rights in the domestic arena if they are "recognized as included in the rules of the municipal law."[203] It is, therefore, still possible for higher municipal laws to refuse to recognize, and thus exclude, inconsistent international laws from consideration in municipal courts. In such circumstances municipal courts will be bound to apply this jurisdictional limitation.[204]

In the absence of specific inconsistent national legislation, aboriginal plaintiff's can, therefore, rely on such international norms in the municipal courts of their country. While the jurisprudence supporting this position cannot be detailed here, a few examples are outlined. As early as 1737 and the decision in *Buvot v. Bambuit*,[205] the English judiciary considered "the law of nations to its fullest extent" to be part of the "law of the land" and thus applicable in the British municipal courts.[206] Similarly, in *The Paquete Habana*,[207] the United States Supreme Court declared "[i]nternational law is part of our law, and must be ascertained and administered . . . as often as questions of right depending upon it are duly presented for determination."[208] Thus, in the subject ju-

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202. "But only so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals . . . ." Chung Chi Cheung v. R, [1939] App. Cas. 160, 167-68.

203. Commercial & Estates Co. of Egypt v. Board of Trade, 1 K.B. 271, 295 (1925). *See also* Lord Wright in Compania Naviera Vascangado v. Steamship Christina, [1938] App. Cas. 485, 502; and In re Ferdinand, Ex-Tsar of Bulgaria, 1 Ch. 107, 137 (1912).

204. Rules of judicial practice, such as canons of construction and rules relating to the proof of law, combine with legislative/constitutional principles especially designed to resolve actual inconsistencies, to minimize cases of inconsistency between international and municipal law. 1 D.P. O'CONNEL, INTERNATIONAL LAW 51-54 (2d ed. 1970).

205. (1735) Cas. T. Talb. 281.

206. The Duke of Montellano v. Christin, 5 M. & S. 503 (1816); The Parliament Belge, 5 P.D. 197 (1879); Hopkins v. De Robeck, 3 T.R. 79 (1789)(diplomatic immunity); Viveash v. Becker, 3 M & S 284 (1814)(consular immunity); Brunswick v. The King of Hanover, 6 Beav. 1 (1844)(sovereign immunity); DeHaber v. The Queen of Portugal, 17 Q.B. 171 (1851)(sovereign immunity); and Magdalena Steam Nav. Co. v. Martin, 2 El. & E 1. 94 (1859)(diplomatic immunity).

207. 175 U.S. 677 (1900).

208. *Id.* at 700.

risdictions, no specific piece of national legislation is considered necessary to incorporate customary international law into the municipal arena.

Originally the English courts tried to justify this practice through various abstract notions relating to the supremacy of parliament. By the nineteenth century, however, the English courts no longer felt any need to resort to English sovereignty to support their use of international law. By this time, the "Blackstonian" adoption theory,[209] deeming customary international law to be automatically[210] incorporated into the common law, was well established[211] and accepted by distinguished common law and equity judges.[212] Thus, Lord Alverstone reaffirmed in *West Rand Central Gold Mining Co. v. R*[213] the principle that, "whatever has received the common consent of civilized nations must have received the assent of our country" and is therefore part of the law of England.

As long as the rule is generally accepted by the international community,[214] it can be used in the domestic arena notwithstanding the absence of legislation specifically "transforming" the rule into domestic law. Similar reasoning exists in many determinations of the United States' courts. While there is still some degree of uncertainty,[215] it

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209. As Blackstone asserted, "the law of nations, wherever any question arises which is properly the object of its jurisdiction is here adopted in its full extent by the common law, and it is held to be a part of the law of the land."

210. In accordance with the "incorporation" or "adoption" theory.

211. Triquet v. Bath, 3 Burr. 1478 (1764) and Heathfield v. Chilton, 4 Burr. 2015 (1767).

212. Lord Eldon in Dolder v. Huntingfield, 11 Ves. 283 (1805); Lord Ellenborough in Wolff v. Oxholm, 6 M & S 92 (1817); Chief Judge Abbott in Novello v. Toogood, 1 B & C 554 (1823); and Chief Judge Best in De Wutz v. Hendricks, 30 L.J. Ch. 690, 700 (1861).

213. 2 K.B. 391 (1905).

214. As Lord MacMillan stressed in Compania Naviera Vascangado v. Steamship Christina, [1938] App. Cas. 485, 497, "[i]t is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text-books, practice, and judicial decisions." *See also* West Rand Central Gold Mining Co. v. R, 2 K.B. 391 (1905), Barbuit's case, 4 Burr. 2015 (1767) and Heathfield v. Chilton, 4 Burr. 2015 (1767).

215. In more recent years the term "adoption" has been used ambiguously and it is still uncertain whether the United States government must have "consented to" the relevant international norm before it becomes part of the municipal law of the States. *See, e.g.*, Cook v. United States, 288 U.S. 102 (1933); Santovincenzo v. Egan, 284 U.S. 30 (1931); The Scotia, 81 U.S. (14 Wall.) 170, 177 (1871); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); The Nereida, 13 U.S. (9 Cranch) 388 (1815); United States v. Claus, 63 F. Supp. 433 (W.D.N.Y. 1944); Banco Nacional

appears that customary international law becomes part of the municipal laws of the United States even "in the absence of congressional enactment."[216] As Judge Kaufman explained in *Filartiga v. Pena-Irala*,[217] "[t]he law of nations forms an integral part of the common law brought to America in the colonial years as part of the legal heritage from England" and therefore exists independently of statutory enactment. In *Filartiga*, the court promptly rejected the appellant's suggestion that express incorporation of international law was necessary, reaffirming the law of nations, including principles of international human rights, to be part of the "law of the land."[218]

Yet, in all the subject nations, a clear and valid municipal enactment will always prevail over an inconsistent principle of international law.[219] As the court explained in *R v. Keyn*,[220] whether that legislation was "consistent with the general law of nations or not, [the national laws] would be binding on the tribunals of this county;" the problem of such inconsistency being left to the government to resolve. Lord Dunedin reaffirmed in *Mortensen v. Peters* that:

> [The courts] have nothing to do with the question of whether the Legislature has or has not done what foreign powers may consider an usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is ultra vires as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms.[221]

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de Cuba v. Sabbatino, 376 U.S. 398 (1964); and Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987). The question is, however, of little practical importance for it is unlikely the courts will try to apply a principle of international law which has not been accepted by Congress. O'CONNELL, *supra* note 204 at 62.

216. Filartiga v. Pena-Irala, 630 F.2d at 886, quoting Chief Justice Marshall in The Nereida, 13 U.S. 388.

217. 630 F.2d at 886, quoting BLACKSTONE, COMMENTARIES, 264 (1765) and quoting Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 27 (1952).

218. 630 F.2d at 886-87.

219. For a United States example see The Over the Top, 5 F.2d 838, 842 (Conn. 1925). For a corresponding precedent in the English context, see The Zamora, 72 App. Cas. 77 (1916). The Prize Courts administer the international law of prize even when it conflicts with an Order in Council. *Id.* It is, however, bound by inconsistent English statutes. *Id.* at 93.

220. [1950] App. Cas. 186.

221. 14 S.L.T. 227 (1906). In March 1907, after protests by Norway, the foreign

Thus, if Parliament's intention to legislate inconsistently with international law is evident from the face of the statute, the municipal court is bound to give effect to its provisions.[222]

The only case[223] where such a clear intention was found was in the unsatisfactory[224] Australian decision in *Polites v. Commonwealth*.[225] The Australian High Court held that the conscription legislation before the court extended to resident aliens who were otherwise immune under international law. This was an extraordinary decision given the strength of the presumption against derogation of international law invoked by the judiciary in Anglo-American legal systems. According to this presumption,[226] legislation is to be construed to avoid conflict with international norms.[227] While originally developed in the early prize courts, this rule of construction is now recognized by the courts of many countries,[228] including the English,[229] Australian,[230] United

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office acknowledged that the "act of Parliament as interpreted by the High Court of Judiciary is in conflict with international law" (Hansard H.C., vol. 170, col. 472). In 1909, Parliament passed the Trawling in Prohibited Areas Prevention Act prohibiting the landing of trawlers which had caught fish contrary to earlier legislation.

222. The Marianna Flora, 24 U.S. 1 (1826); The Johannes, [1860] Lush. 182; and R v. Keyn, App. Cas. 186.

223. O'CONNELL, *supra* note 204, at 52.

224. *See* Cooperative Committee on Japanese Canadians v. Attorney-General for Canada, [1947] App. Cas. 87,104.

225. 70 C.L.R. 60 (1945).

226. As the court stressed in MacLeod v. U.S., 229 U.S. 416, 434 (1913), "[t]he statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposes to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law." *See also* Murry v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

227. "It has also been observed that an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. The Schooner Charming Betsy, 6 U.S. 64 at 118. "In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction accordingly." The Annapolis, [1861] Lush. 295, 306. *See also* Blosam v. Favre, 8 P.D. 101 (1883); Lerous v. Brown, 12 C.B. 801 (1852); Lopez v. Burslem, 4 Moo. 300, 305 (P.C.) (1843); and R v. Dudley, 14 Q.B.D. 273, 284 (1884).

228. *See, e.g.*, the Scottish case Mortensen v. Peters, 14 S.L.T. 227 (1906).

229. R v. Dudley, 14 Q.B.D. 273, and R v. Keyn, App. Cas. 186.

230. Croft v. Dunphy, [1933] App. Cas. 156, and Polites v. Commonwealth, 70 C.L.R. 60.

States[231], and Canadian[232] judiciaries.

The courts are sensitive to the possible embarrassment they may cause the government by interpreting a municipal law contrary to international precepts and try to reconcile the two bodies of law as best they may.[233] Thus, in the absence of inconsistent national legislation, this international norm protecting aboriginal territorial integrity would flow into the municipal arena and could be enforced by aggrieved groups independently of governmental support. To date, national legislation generally supports, rather than detracts from, the existence of this customary international norm; therefore, there should be no problem of inconsistency.

e. *Relationship Between International Obligations and Municipal Law*

If an inconsistent municipal law can prevail over international law in the municipal arena, does this negate any usefulness a customary international law protecting the aboriginal title may provide? Is there anything to discourage a government from simply legislating contrary to this norm?

Nations are prohibited from legislating contrary to international precepts. Moreover, each nation has a duty[234] to bring its municipal law into conformity with customary international law.[235] Thus, the subject governments are obliged to bring their domestic laws into line with this customary international law protecting the aboriginal title and will be in breach of international law if they fail to so act.

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231. Empresa Case, 372 U.S. 10, 21 (1963).

232. In re Noble & Wolf, 4 D.L.R. 123, 139 (1948).

233. This practice has been particularly important in the context of the protection of human rights. See, for example, the decision in Oyama v. California, 332 U.S. 633 (1948), where Justice Black thought it pertinent to question how the United States could "be faithful to this international pledge" under the United Nations Charter, if state laws contrary to its provisions "are permitted to be enforced?"

234. Certain eminent authorities, such as MCNAIR, LAW OF TREATIES 100 (1961), believe the failure to take positive steps is not in itself a breach of international law. In their eyes, no breach occurs until an individual's rights are infringed through this failure to accommodate and/or incorporate international law. In practice, however, this is not a crucial consideration for it is usually not before an individual's rights have actually been violated that legal action is taken.

235. The court in the Exchange of Greek and Turkish Populations, 1925 P.C.I.J. (Ser. B) No. 10, at 20, believed this duty to exist independently of the Treaty of Lausanne which expressly requires the relevant Nations to bring their law into line with the obligations under the treaty.

Nor can such violating nations rely on the provisions of their own laws or constitutions[236] to avoid their international obligations. Article 13 of the Draft Declaration on Rights and Duties of States 1949[237] provides that "[e]very state has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."

Numerous judicial and arbitral authorities support this declaration. For example, in the Alabama Claims Arbitration[238] the tribunal held that the lack of constitutional power to legislate with respect to the matter under consideration in that case was no answer to the charge brought against Great Britain. It was stated, "the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed."

Any constitutional restrictions will not, therefore, provide the subject nations with a defense to breaches of this international norm. This principle has consistently been applied by the Permanent Court of Arbitration, the Permanent Court of International Justice,[239] and the International Court of Justice.[240] The government is responsible for the acts of its legislature and cannot evade its obligations by pleading the deficiencies of its municipal law. Thus, the subject custom can be enforced in the municipal courts, and while the domestic government could legislate contrary to its provisions, this would itself amount to a breach of the nation's international obligations.

IV. CONCLUSION

Ultimately, it is submitted that aboriginal peoples need not rely on domestic legislation and the common law doctrine of communal

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236. As the Court stressed in the Polish Nationals in Danzig 1931 P.C.I.J. (Ser A/B) No. 44, at 24, '[i]t should . . . be observed that . . . a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present Persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig."

237. Y.B.I.L.C., 286, 288 (1949).

238. MOORE 1 INT. ARB. 485, 656. The charge related to the international law regarding neutrals.

239. *See* the Wimbledon, P.C.I.J. (Ser. A) No.1, at 29; Mavrommatis, (Ser. A) No. 5; German Interests in Polish Upper Silesia, 1926 P.C.I.J. (Ser. A) No. 7, at 19; Chorzow Factory, 1928 P.C.I.J (Ser. A) No. 17, at 33-34; Jurisdiction of the Courts of Danzig, 1928 P.C.I.J. (Ser. B) No. 15, at 26; Free Zones, 1929 P.C.I.J. (Ser. A) No. 24, at 12.

240. The leading cases are the Fisheries, 1951 I.C.J. 116, 132 and the Nottebohm, 1955 I.C.J. 4, 20-1. *See also* Guardianship, 1958 I.C.J. 55, 67.

native title to protect their territorial rights. By turning to the international arena, an alternative source of protection may be found, a source which Australia has not as yet tapped.

Diverging Child Protection Laws in the Commonwealth: A Comparison of Recent Legislation in England and New Zealand

I. INTRODUCTION

Several recent and well-publicized cases have forced the American court system to answer some difficult questions about the legal relationship between parents and their children.[1] Underlying the more novel and provocative issues in those cases have been two questions central to the dispute in each of them: 1) where do the boundaries of parents' rights and children's rights lie, and 2) what course of action is the state to take to ensure that the rights of both parents and children are protected? Those questions are arguably most pertinent, and yet their answers most elusive, when the state undertakes to legislatively define its power to intervene in family life to protect children from abuse.

Drafting child protection legislation involves the difficult task of trying to achieve a balance among the rights of children, the rights of parents, and the power of the state.[2] The boundaries of state power can be established. But since a child's best interests are frequently inseparable from his relationships with parents and with family, it is difficult, if not impossible, for the law to determine when it is wise

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1. *See, e.g.*, Kingsley v. Kingsley, 1993 Fla. App. LEXIS 8645 (Fla. Dist. Ct. App. 1993) (reversing the lower court's holding that a minor has the capacity to initiate an action against his parents for termination of their parental rights); In Re Clausen, 502 N.W.2d 649 (Mich. 1993) (holding that a child's constitutionally protected interest in family life does not exist independent of its parents absent a showing that the parents are unfit, and that the decision of Iowa courts not to hold a hearing on the best interests of the child in light of the circumstances of the case was insufficient to justify a refusal by Michigan courts to enforce Iowa judgments in the case); Twigg v. Forty-Two Year Old Resident of Sarasota, Florida, No. 88-4489CA (Sarasota County Fla. Cir. Ct. 1993) (holding that biological parents have no legal right to visit a teenage child who was switched with another child at birth). These and other similar cases do not involve judicial interpretation or application of legislative standards for state intervention into family life to protect children from abuse. Incorporation of these cases within the analysis of this Note would thus diffuse its focus and for that reason has not been attempted.

2. *See* Mary Hayes, *Child Protection in New Zealand and England*, 3 CANTERBURY L. REV. 53 (1960).

for the state to intervene.[3] Recent legislative acts in England and New Zealand both 1) exemplify the difficulty of trying to inject wisdom into the legislative formula for intervention, and 2) contain non-traditional approaches to child protection issues that legislative bodies in other jurisdictions should consider adopting.

The Children Act 1989 (the "England Act") went into effect in October, 1991, replacing the Children and Young Persons Act 1969. The England Act has been hailed as landmark legislation for its comprehensive reform of child law and for positing a fundamental shift in the state's role in family life.[4] In addition to provisions for the care, supervision, and protection of children, the Act contains principles of welfare and non-intervention to guide judicial decision-making.[5]

The Children, Young Persons, and Their Families Act 1989 (the "New Zealand Act") went into effect in 1989, replacing the Children and Young Persons Act 1974. It was introduced with accolades, having been described as remarkable legislation containing pervasive child law reform.[6] The inclusion of extensive statements of principles to guide all activity taken under the authority of the Act's provisions is a key innovation in the New Zealand Act. The principles of the Act not only bind courts, but also those persons who exercise any powers delegated by the Act.[7]

This Note will analyze aspects of both the England Act and the New Zealand Act that pertain to the power of the state to intervene in family life to protect children from abuse. The focus of the analysis will be on whether the principles contained in both acts combine with their provisions to preserve a balance among 1) children's rights to live free of abuse, 2) parents' rights to raise their children free of state intervention, and 3) the power of the state to intervene on behalf of children who are at risk. In addition, particular attention will be given

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3. *Id.*

4. *See, e.g.*, Janet Walker, *From Rights to Responsibilities for Parents: The Emancipation of Children*, (Introduction), FAM. L., Oct. 1990, 380; M.D.A. Freeman, *England's New Children's Charter*, 29 J. FAM. L. 343, 344 (1990-91).

5. Children Act, 1989, (Eng.) [hereinafter "England Act"].

6. *See, e.g.*, W.R. Atkin, *The Courts and Child Protection—Aspects of the Children, Young Persons, and Their Families Act 1989*, V.U.W.L.R., 1990, 319; P.D. Mahoney, *Family Law Developments*, N.Z.L.J., Nov. 1991, 382.

7. Children, Young Persons, and Their Families Act, 1989, (1 N.Z. Stat. 439) [hereinafter "New Zealand Act"]. The opening sentence of section 13 states, in part: "[A]ny Court which, or person who, exercises any powers conferred by . . . this Act shall be guided by the . . . principles."

to how much guidance the principles of the acts give to state authorities to help them determine when intervention is the wisest choice.

Each act affects child and parental rights differently because each act defines the role of the state in different terms. Of the two acts, the New Zealand Act comes closer to striking a balance among participants in the child-protection process. Each act, in its attempt to redefine the role of the state, seeks to limit access to courts. The England Act attempts to do this primarily by giving more discretion to social workers. The New Zealand Act is arguably more effective, in part, because the creation of the family group conference compensates for limiting access to courts; thus, the principles and provisions of the Act work more cohesively to protect both the rights of children and parents.

II. THE EFFECT OF THE ACTS ON THE RIGHTS OF CHILDREN TO LIVE FREE OF ABUSE

A. *The Effect of the England Act on Children's Rights*

1. *The Principles of the England Act and Children's Rights*

The two central principles of the England Act are 1) welfare, defined as the duty of the state to protect children, and 2) non-intervention, which suggests that the family is the best setting for the care of children.[8] The welfare principle requires courts to prioritize the child's welfare when determining any issue regarding the upbringing of a child.[9] In any proceeding wherein an issue regarding a child's care is addressed, the court is to follow the principle that "'any delay in determining the question is likely to prejudice the welfare of the child.'"[10] The definition of "child's welfare" is comprehensive, containing a checklist of concerns for the court to keep in mind when rendering decisions affecting children.[11]

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8. *See* Walker, *supra* note 4, at 380.

9. England Act, *supra* note 5, § 1(1). The statute provides:

When a court determines any question with respect to
a) the upbringing of a child; or
b) the administration of a child's property or the application of any income arising from it,
the child's welfare shall be the court's paramount consideration.

Id.

10. *Id.* § 1(2).

11. *Id.* § 1(3)-(4). The statute provides:

3) In the circumstances mentioned in subsection 4), a court shall have

It has been argued that the inclusion of a checklist within the section containing the welfare principle has, for the trial court, the rather diminutive purpose of focusing attention on specific issues which should guide the use of the court's discretion, and that any significant effect it might have will be at the appellate level.[12] However, the mere presence of a checklist in the Act is indicative of legislative concern about the wisdom of judicial decision-making. The previous Act required the judge to give no more attention to the child's welfare than attention to the past incidents and present situation which resulted in the child landing in his court. The 1989 Act requires the judge to consider how his decision will affect the child's future.[13]

Requiring the judge to ascertain the feelings of the child, to consider the child's emotional and educational needs, and to weigh the effect upon the child of a change in his circumstances must be viewed as an increase in the support of children's rights, even if the practical effect of the checklist might be difficult to discern. Requiring the judge to regard the wishes of the child suggests legislative recognition that the

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regard in particular to
a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
b) his physical, emotional and educational needs;
c) the likely effect on him of any change in his circumstances;
d) his age, sex, background and any characteristics of his which the court considers relevant;
e) any harm which he has suffered or is at risk of suffering;
f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
g) the range of powers available to the court under this Act in the proceedings in question.
4) The circumstances are that
a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or
b) the court is considering whether to make, vary or discharge an order under Part IV.

Id.

12. Andrew Bainham, *The Children Act 1989: Welfare and Non-Interventionism*, FAM. L., April 1991, at 143. Bainham notes that the House of Lords had established a high standard for appeal in children's cases, namely that the decision of the lower court had to be "plainly wrong." *Id.* Under the England Act, where it can be shown that a court has not considered one or more of the statutory factors, it should be easier to overcome that standard of review and thus easier to make a successful appeal. *Id.*

13. *See* England Act, *supra* note 5, § 1(3)(b)-(c).

promotion of children's rights entails both self-determination and protection.[14]

2. *The Provisions of the England Act and Children's Rights*

The primary tool in the England Act for protecting children who are believed to be in immediate physical danger is the emergency protection order (EPO). The EPO supersedes the place of safety order, which was deficient because it failed to address the emergency aspect of the need for intervention.[15] An authority's application for an EPO is appropriate when he has reasonable cause for believing a child will likely suffer significant harm unless 1) he is removed to accommodation provided by the authority, or 2) he is kept in a place where he is being provided safe accommodation.[16] The court may issue the EPO only when it is convinced that the requesting authority has such a reasonable belief, or that efforts to make inquiries about the safety of the child are being frustrated by denial of access to the child, and the requesting authority reasonably believes that access to the child is urgently necessary.[17]

An EPO operates as an order, to anyone in a position to do so, to produce the child for the authority.[18] It also authorizes removing the child from current accommodations at any time or preventing removal of the child from a hospital or any place he was staying prior to the issuance of the EPO.[19] The authority granted an EPO is cautioned not to take action under it in excess of that reasonably necessary to protect or promote the welfare of the child.[20]

The court has discretion regarding the amount of access to the child that will be allowed under the EPO,[21] although there is a presumption that reasonable access will be permitted.[22] The court also has discretion regarding the extent of the investigation and whether to require medical or psychiatric examinations.[23] However, the child may

14. Bainham, *supra* note 12, at 144.
15. Freeman, *supra* note 4, at 350.
16. England Act, *supra* note 5, § 44(1).
17. *Id.*
18. *Id.* § 44(4).
19. *Id.*
20. England Act, *supra* note 5, § 44(5).
21. *Id.* § 44(6).
22. Freeman, *supra* note 4, at 350; England Act, *supra* note 5, § 44(13).
23. England Act, *supra* note 5, § 44(6).

refuse to submit to medical examination or any other evaluation if he is discerning enough to make an informed decision.[24]

The authority has a duty to return the removed child to the person caring for him, a parent, or anyone with parental responsibility for the child after he has made an evaluation and it appears to him to be safe to do so.[25] But as long as the EPO is in force, the authority may remove the child again if circumstances make it appear necessary.[26]

An EPO may last a maximum of only eight days.[27] However, a person given parental responsibility for a child under an EPO may apply for a seven-day extension of the order.[28] The court may grant an extension only if it reasonably believes that the child will likely suffer significant harm unless the EPO is extended.[29] The court may grant only one extension.[30]

The child assessment order (CAO) is the mechanism the England Act provides for handling instances of suspected abuse. The CAO is only effective for seven days.[31] A CAO operates for the purpose of evaluating a child, either in or out of the home, to determine whether the child is at risk.[32] Authority is given to the person making such an assessment to do so according to the terms of the CAO.[33] Along with this grant of authority, there is recognition of child autonomy in the provisions: "If the child is of sufficient understanding to make an informed decision, he may refuse to submit to a medical or psychiatric examination or other assessment."[34]

3. *Conclusion on the England Act and Children's Rights*

The presence of the welfare principle in the England Act indicates its drafter's concern that the rights of children be prioritized. This principle will help ensure that children's rights will be kept in mind by the judges who make decisions affecting their futures. However, once a court issues either an EPO or a CAO, the welfare principle no

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24. *Id.* § 44(7). "The child may, if he is of sufficient understanding to make an informed decision, refuse to submit to the examination or other assessment." *Id.*
25. *Id.* § 44(10)-(11).
26. *Id.* § 44(12).
27. England Act, *supra* note 5, § 45(1).
28. *Id.* § 45(4).
29. *Id.* § 45(5).
30. *Id.* § 45(6).
31. England Act, *supra* note 5, § 43(5).
32. *Id.* § 43(1).
33. *Id.* § 43(7).
34. *Id.* § 43(8).

longer has any role; the principle is binding on court activity only, and has no power over persons carrying out the various orders under the authority of the Act.[35] The rights of children would be more adequately protected if the welfare principle bound all persons working under the Act's authority.

The brief duration of the CAO and the EPO leaves authorities acting under the England Act with insufficient means for evaluating the child's situation; the seven or eight days for which the orders last will not assist the child whose assessment may take a period of several weeks.[36] Application for a further order cannot be made until six months have passed since the prior one, unless the court gives leave; therefore, the only viable option for acquiring more time for assessment is to try to obtain an interim care order, which comes under the care provisions of the England Act, rather than the provisions for child protection.[37] This will escalate the intervention process, since the child will be remanded to the custody of the state merely to allow the state enough time to determine whether intervention was even necessary.[38] Arguably, the length of the CAO could be increased without an adverse effect on parental rights, since it is an order for assessment only.

B. *The Effect of the New Zealand Act on Children's Rights to Live Free of Abuse*

1. *The Principles of the New Zealand Act and Children's Rights*

The primary change in emphasis and philosophy under the New Zealand Act from its predecessor is that the welfare of the "child"[39]

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35. *See* England Act, *supra* note 5, § 1.

36. John Eekelaar, *Investigation Under the Children Act 1989*, 1990 FAM. L. 486, 488. To make his point, Eekelaar uses the rather extreme hypothetical example of a child who has physical symptoms that point to a severe psychological disorder, who is not receiving adequate care, who is not talking, and whose parents are deaf; an evaluation in this situation is likely to take longer than the time allotted under a CAO or EPO. *Id.* at 487-88. Although certainly extreme, and surely the exception rather than the rule, the example adequately supports Eekelaar's assertion that the England Act is not structured to cope with such difficult assessment situations.

37. *Id.*

38. *Id.* at 489.

39. The New Zealand Act defines a "child" as a boy or girl under the age of 14 years and a "young person" as a boy or girl over 14 years old but under 17 years old. New Zealand Act, *supra* note 7, § 2. The term "child" within this Note will thus refer to both children and young persons as defined by the New Zealand Act.

will no longer be the primary consideration; child welfare is only one of several factors which constitute an emphasis on the "family."[40] Instead of the state taking the leading role in protecting children, the primary role is given to the family.[41] "Family" is not narrowly defined by the Act. One of the main reasons for the change the Act brings to the law is that Maori and Polynesian groups in New Zealand insisted that the prior law disregarded their conceptualization of human relationships, which begins with the extended family or tribe instead of the primary family unit.[42] This concern is recognized in the Act by the emphasis on the "needs, values, and beliefs of particular cultural and ethnic groups."[43] The foundational policy of the Act is to support the family as the unit in society primarily responsible for raising children.[44]

The general objective of the Act is to promote the well-being of children and their families.[45] One of several ways this is to be accomplished is by assisting the family in carrying out its responsibility to prevent the "harm, ill-treatment, abuse, neglect, or deprivation" of children.[46] The objectives of the Act imply that its main emphasis is the rights of the family, and children are important only as members of the family.[47] However, the list of objectives does provide for the protection of children when family support cannot be enlisted.[48]

The autonomy of children is recognized by the Act, but within certain constraints. The wishes of the child must be considered where

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40. Atkin, *supra* note 6, at 319. The family, under the New Zealand Act, is not limited to the so-called "nuclear family"; the term not only refers to the nuclear family, but also to "whanau, hapu, iwi, and family group." New Zealand Act, *supra* note 7, § 5(a). " 'Whanau', 'hapu', and 'iwi' are Maori words referring (roughly) to family (widely defined), sub-tribe and tribe." Atkin, *supra* note 6, at 321. The term "family" within this Note thus refers to the extended family as defined in the New Zealand Act.

41. Atkin, *supra* note 6, at 320.

42. *Id.*

43. New Zealand Act, *supra* note 7, § 4(a).

44. Mahoney, *supra* note 6, at 382.

45. New Zealand Act, *supra* note 7, § 4.

46. *Id.* § 4(b).

47. Atkin, *supra* note 6, at 321.

48. *See* New Zealand Act, *supra* note 7, § 4(d)(e). The statute provides:

> 4) Objects: The object of this Act is to promote the wellbeing of children, young persons, and their families and family groups by . . .
>
> d) Assisting children and young persons in order to prevent them from suffering harm, ill-treatment, abuse, neglect, and deprivation:
>
> e) Providing for the protection of children and young persons from harm, ill-treatment, abuse, neglect, and deprivation . . . .

Id.

ascertainable, but are to "be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child."[49] This may result in a failure to preserve child autonomy in some instances; the principle can be read to mean that the mature child whose wishes can be determined might still be ignored if it is culturally acceptable to do so.[50] Nonetheless, where there is any conflict of principles or interests, the welfare and interests of the child are to prevail.[51]

Authorities acting under the New Zealand Act are also guided by the principle that children should live with their families, and that their education or employment should not be interrupted.[52] When a child needs protection, the necessary assistance and support should be given to the family to allow it to care for and protect the child.[53] Removal from the family will occur only when there is a serious threat to the child's safety.[54]

When the child is removed from the home, efforts are to be made to place the child in a "family-like setting" in the same vicinity as his home and in which his ties to his family can be maintained and supported.[55] If this is not practicable, efforts should still be made to place the child in a setting compatible with his personal and cultural identity.[56] The principles in the New Zealand Act thus indicate that promoting the child's welfare is best accomplished by protecting the child's total sense of identity.

2. *The Provisions of the New Zealand Act and Children's Rights*

The New Zealand Act defines a child who needs care or protection as one who "is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived."[57] A child whose development or emotional health is being, or will likely be, seriously impaired or neglected is also in need of protection.[58] Several other situations, not all of which necessarily involve physical

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49. New Zealand Act, *supra* note 7, § 5(d).
50. Atkin, *supra* note 6, at 323.
51. New Zealand Act, *supra* note 7, § 6.
52. *Id.* § 13(c).
53. *Id.* § 13(d).
54. *Id.* § 13(e).
55. New Zealand Act, *supra* note 7, § 13(f).
56. *Id.* § 13(f).
57. *Id.* § 14(9).
58. *Id.*

abuse, can also result in the child being in need of care.[59] If a child's situation is to be classified as a care and protection case, it must meet the demands of this definitional section of the Act.[60]

Anyone who believes a child has been, or will likely be, harmed or abused may report the matter to a social worker or to the police.[61] No civil or criminal sanctions may be imposed against a person who reports abuse unless the information is given in bad faith.[62] When such a report is received, the authority must conduct an investigation into the matter alleged in the report.[63]

If, after inquiry, the investigator believes the child needs care or protection, he must report the matter to a Care and Protection Co-ordinator (Coordinator).[64] The Coordinator must then convene a family group conference (Conference).[65] Before convening the Conference, the Coordinator must make reasonable efforts to consult with the child's family regarding the date, time, and place of the Conference, the persons who should attend, and the procedures to be adopted by the Conference.[66]

The Conference is the major innovation of the Act. Conference members may govern its procedure in any manner they think fit, subject to any restrictions in the care and protection provisions of the Act.[67] The broad definition of the term "family" indicates that the participation of the extended family should be engendered by the Conference.

The Coordinator is given discretion to control attendance at the Conference.[68] Those entitled to attend, subject to Coordinator discretion, are the child who is the object of the proceedings, and everyone

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59. *See* New Zealand Act, *supra* note 7, § 14.

60. *See* New Zealand Act, *supra* note 7, § 14(1); Atkin, *supra* note 6, at 335.

61. New Zealand Act, *supra* note 7, § 15.

62. *Id.* § 16. The statute provides:

> No civil, criminal, or disciplinary proceedings shall lie against any person in respect of the disclosure or supply by that person pursuant to section 15 of this Act of information concerning a child or young person (whether or not that information also concerns any other person), unless the information was disclosed or supplied in bad faith. *Id.*

Section 16 appears to be subject to the interpretation that even the abuser himself can obtain immunity from criminal prosecution simply by being the first person to report the abuse, which is a startling proposition.

63. *Id.* § 17.

64. *Id.* § 17(2).

65. New Zealand Act, *supra* note 7, §§ 18-20.

66. *Id.* § 21.

67. *Id.* § 26.

68. New Zealand Act, *supra* note 7, § 22(b).

who is a parent, guardian, or member of the child's extended family.[69] The Coordinator's decisions as to who will attend the Conference must be made with the best interests of the child in mind.[70] If the Coordinator excludes a qualified individual from attending the Conference, the Coordinator must make a reasonable effort to solicit that individual's views regarding the issues to be addressed at the Conference.[71] The Coordinator must also communicate those views to those persons who do attend the Conference.[72]

Giving complete discretion to the Coordinator to govern attendance at the Conference is arguably at odds with the principle that the family is to be regulating its procedures.[73] Legislative preoccupation with protecting the child, the most vulnerable member of the Conference, is evidenced by this internal contradiction. This section could have been drafted more consistently without necessarily jeopardizing the interests of the child. The child could be adequately protected by limiting the Coordinator's discretion to the power to keep the child out of the Conference if the child is too young or too immature to participate, or if the child would be too vulnerable in the presence of certain family members. Excluding family members as a basis for protecting the interests of the child will likely hinder the effectiveness of the Conference in working toward a resolution.

There are three functions of the Conference. Its members are to first consider issues pertaining to the care and protection of the child for whom the Conference was convened, in a manner the members deem appropriate.[74] Second, when the Conference participants have concluded that the child needs care or protection, they are to make decisions, recommendations, and plans which they consider necessary or desirable, in accordance with the principles of the Act.[75] And third, the Conference participants are to periodically review the implementation of the decisions, recommendations, and plans made during the Conference.[76]

When Conference members reach a decision or make a recommendation, the Coordinator is to seek approval of every authority

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69. *Id.*
70. *Id.*
71. *Id.* § 24(1).
72. New Zealand Act, *supra* note 7, § 24(2).
73. Atkin, *supra* note 6, at 329.
74. New Zealand Act, *supra* note 7, § 28(a).
75. *Id.* § 28(b), § 29.
76. *Id.* § 28(c).

necessary for the implementation of the Conference resolutions.[77] If consensus is not reached on implementation, the Coordinator may reconvene the Conference to enable its members to reconsider their plans.[78] The Conference participants may then affirm, rescind, or modify their previous resolutions, or draft new ones.[79]

When Conference members cannot agree on what to do, or the Coordinator is unable to obtain the agreement of those responsible for implementation, the Coordinator must report that indecision to the authority from whom it received its initial report.[80] That authority may then pursue the course which, under the provisions of the Act, it believes is appropriate.[81] This provision assures that the failure of the Conference will not mean the end of activity on behalf of the child; the Conference is to be the primary mechanism employed in child protection cases, but it is not the final forum.

Where the court suspects that a child is suffering from such harm that a medical examination is necessary, the court may order that one be performed.[82] If a social worker has the consent of any parent or guardian of the child, or has made reasonable efforts to obtain it, he may arrange for a medical examination of a child who was removed under warrant, or who is in the custody of the Director-General.[83]

Every child required to have a medical examination is permitted to have an adult present.[84] A medical examination must not include internal or genital examinations unless the medical examiner believes the child may have been the victim of recent physical or sexual abuse, and the child consents to such an examination.[85] Thus, the child is allowed to decide how extensive the medical examination will be. However, the New Zealand Act permits the medical practitioner to make at least a partial physical examination regardless of the child's feelings, which is better for assessment purposes than no examination at all.

The normal sequence of events in a care or protection case is expressly set forth in the Act. Normally, no application for a judicial

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77. *Id.* § 30(1).
78. New Zealand Act, *supra* note 7, § 30(3).
79. *Id.* § 30(4).
80. *Id.* § 31(1).
81. *Id.* § 31(2).
82. New Zealand Act, *supra* note 7, § 49(1).
83. *Id.* § 53(2).
84. *Id.* § 54.
85. *Id.* § 55.

declaration that a child needs care or protection may be made until a Conference has been held.[86] This requirement does not apply if a child is in the custody of the Director-General or if it is not possible to locate any members of the child's family.[87] The role of the family is thus given precedence in the New Zealand Act. If for some reason family support is not available, other provisions in the Act may be invoked to handle the situation, so that the child is not left at risk. Ultimately, the New Zealand Act allows the state to protect the child who is at risk.

3. *Conclusion on the New Zealand Act and Children's Rights*

In the New Zealand Act, the child's welfare is contextually situated within a thematic emphasis on the family. Protection of the child, however, is still the priority; the approach of the New Zealand Act is to force the family into the role of protector, thereby reducing the role of the state in the intervention process. The Act provides for the protection of children even if family support cannot be induced, so ultimately children's rights are not compromised in favor of the family. Where there is a conflict of principles or interests, the welfare and interests of the child are to be the deciding factor.

The new forum the Act provides for handling instances of abuse or suspected abuse, the Conference, is an appropriate setting for implementation of the principles of the Act. The Coordinator has too much discretionary power to control attendance of the Conference, which could hinder its effectiveness. Resolving that problem in the Act's provisions could result in the Conference becoming an adequate setting for enforcing all the principles of the Act. The new emphasis on the family and the introduction of the Conference in the New Zealand Act are laudable attempts to account for the fact that the interests of children and parents are often inextricable.

C. *Conclusion on the Effect of the Acts on Children's Rights*

The principles in the New Zealand Act, because they bind everyone who acts under the authority of the Act, are more effective in protecting children's rights than the England Act, where the principles only affect judicial decision-making. If the welfare principle in the England Act were to bind everyone who carried out judicial orders, the principles

86. New Zealand Act, *supra* note 7, § 70(1).
87. *Id.* § 70(2).

of the England Act would come closer to providing the amount of protection of children's rights found in the New Zealand Act.

The New Zealand Act does not place short time limits on assessment of the child's situation for determining whether the child is at risk. It is thus more effective than the England Act in assuring that, in a situation where extensive assessment might be necessary, the child will not be left unprotected. The England Act cannot protect a child in such a situation without substantially complicating the intervention process, which will increase the trauma suffered by the child, as well as impinge further upon parental rights.

Although the EPO and the CAO permit parents reasonable access to the child, they do not involve the parents and the family in the protection process as does the Conference. The New Zealand Act seeks to reduce the role of the state by forcing the family into the role of protector. Activating the family increases protection of children's rights, because perfunctory displacement of the parents by the state to protect the child, though it might end abuse, might also hinder the child's development emotionally, socially, and culturally. The most desired outcome is for the family to be induced to protect the child, because then the child's identity will not be jeopardized. For these reasons, the New Zealand Act gives greater protection to children's rights than does the England Act.

III. THE EFFECT OF THE ACTS ON THE RIGHT OF PARENTS TO RAISE THEIR CHILDREN FREE FROM STATE INTERVENTION

A. *The Effect of the England Act on the Rights of Parents*

1. *The England Act Principles and Parents' Rights*

Juxtaposed with the welfare principle in § 1 of the England Act is the principle of non-intervention. This principle requires a court, when considering whether to take action, not to issue an order under the authority of the Act "unless it considers that doing so would be better for the child than making no order at all."[88] With this principle surfaces the legislative intent that access to courts will be limited under the England Act. Indeed, adherence to the principle will have the effect of reducing the court's role in many cases to a marginal level.[89] The

88. England Act, § 1(5).

89. Bainham, *supra* note 12, at 144.

emphasis on non-intervention is reflected in many of the Act's provisions.[90] One of the themes of the Act is resolution of child-related issues outside the court system whenever possible.[91]

The attempt to provide a check on the possible adverse effects of the non-intervention principle on children's rights is present in the next two sections of the England Act, which redefine the interests of parents in terms of responsibilities rather than rights.[92] "Parental responsibility" encompasses "all the rights, duties, powers, responsibilities, and authority which by law a parent of a child has in relation to the child and his property."[93] The Act definitively lists the types of relationships to which parental responsibility will attach and allows for it to be shared by a number of people at once.[94] This change in terminology is more than one of semantics;[95] it implies that children are "persons to whom duties are owed" and that they are not to be treated as property.[96] It will require that more input by children be included in decisions which affect them, including decisions made by parents and legal authorities.[97]

Defining the role of parents with respect to their children in terms of responsibilities may or may not present any difficulties when implementing those aspects of the Act pertaining to care and provision for children. But protection of children not only involves ensuring that a principle of welfare works when parent and child interests conflict; it also involves the extent to which the state can intervene in family life to protect the child. In this sense, the parents do have rights. They have the right to raise their child free from unjustified state intervention. Once the threshold for intervention is reached (that is, once a court decides to issue an order), the non-intervention principle no longer provides a check against state power and activity. The principle is effective only at the pre-intervention stage as a restraint on judicial decision-making.[98] The danger in submerging the concept of parental

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90. *Id.*

91. Linda Feldman, *Getting Ready for the Children Act*, 134 SOL. J. 1142, 1143 (1990).

92. *See* England Act, *supra* note 5, §§ 2-3.

93. *Id.* § 3.

94. *Id.* § 2.

95. Freeman, *supra* note 4, at 346. Parental rights have often been viewed as similar to property rights; parental responsibility defines the relationship in terms of obligations. *Id.*

96. Andrew Bainham, *The Children Act 1989: Adolescence and Children's Rights*, FAM. L., Aug. 1990, at 311.

97. *Id.*

98. *See* England Act, *supra* note 5, § 1(5). The statute provides:

rights within the definition of parental responsibility is that it relaxes the necessity of the state to justify the action it takes upon intervening, which is an unwarranted delegation of power to the state.

2. *The England Act Provisions and Parents' Rights*

The primary tool the England Act provides for handling instances of suspected abuse is the child assessment order (CAO).[99] Any local authority or authorized person may apply to a court for a CAO.[100] The court may issue a CAO only if it is satisfied that: 1) the applicant reasonably believes that the child is or will likely suffer significant harm; 2) an evaluation of the child is necessary for the authority to decide whether the child is at risk; and 3) it is not likely that an evaluation will take place without the order.[101] When a CAO is in force, any person in a position to produce the child who is at risk has a duty to do so, and also has a duty to comply with any directions the court includes in the order.[102]

The child is not to be removed from the home unless it is necessary for the purpose of assessment and may be kept out of the home only for periods designated in the CAO.[103] If a child is taken from the home, the CAO must include directions for the regulation of access the child will be allowed to have with other persons while the child is kept out of the home.[104] The Act requires the applicant for the CAO to take reasonable steps to assure that notice of the application is given to the child, to the child's parents, to any person who has parental responsibility for the child, and to any person who is caring for the child.[105]

> Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all. *Id.*

See also William Ackroyd, *The Orkney and Rochdale Cases*, FAM. L., June 1991, at 207, 208. Ackroyd states that:

> The courts and the lawyers, under the Children Act 1989, can still avoid involvement in the child's future, and once a care order is made the court will have no control over how it is acted upon unless someone brings it back to the court. These problems are not going to be resolved by the 1989 Act . . . . *Id.* at 208.

99. *See supra* Part II.A.2.
100. England Act, *supra* note 5, § 43(1).
101. *Id.*
102. *Id.* § 43(6).
103. *Id.* § 43(9).
104. England Act, *supra* note 5, § 43(10).
105. *Id.* § 43(11).

The CAO is only effective for seven days.[106] These requirements for carrying out a CAO are intended to prevent unjustified state intervention into family life; assessment is to have minimal interference with family life.

3. *Conclusion on the Effect of the England Act on Parents' Rights*

Including a principle of non-intervention in the England Act is evidence of legislative efforts to protect parents' rights to live free from unjustified intervention. However, the same problem arises with adherence to this principle as arises with adherence to the welfare principle; it is only effective up to the point at which the court decides to issue an order. After the court issues an EPO or a CAO, the authorities carrying out the order do so without the guidance or restraint of any of the Act's principles.

Some constraint on state authorities is provided in the regulations governing activity taken under the CAO, which provides parents with some protection when abuse is suspected. But there are no such constraints under an EPO. Under an EPO, parental rights are left unprotected from state power. Making the principles of the Act binding at every step in the child-protection process would increase protection of parental rights.

B. *The Effect of the New Zealand Act on Parents' Rights*

1. *The New Zealand Act Principles and Parents' Rights*

Under the New Zealand Act, wherever possible the child's family is to participate in making decisions regarding the child, and consideration must be given to the views of the family.[107] The relationship between a child and his family must be maintained and supported.[108] Consideration must always be given to how decisions made with respect to the child will affect the child's welfare and the stability of the child's family.[109] These principles indicate that the welfare of the child should not be viewed as isolated from the stability of the family.[110]

In addition to these general principles guiding action under the entire Act, there are specific principles to guide action taken to protect

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106. *Id.* § 43(5).
107. New Zealand Act, *supra* note 7, § 5(a).
108. *Id.* § 5(b).
109. *Id.* § 5(c).
110. Atkin, *supra* note 6, at 323.

children. Children are to "be protected from harm, their rights upheld, and their welfare promoted."[111] However, the family has the primary role of caring for and protecting them.[112] In accordance with these two principles, the family is to be "supported, assisted, and protected as much as possible."[113] Thus, intervention into family life is to be no more than that required to guarantee the safety and protection of the child.[114]

This combination of principles can be viewed as a strong statement to discourage action taken solely to uphold the interests of the child. The child's interests might therefore be viewed as compromised by the minimalist intervention philosophy that favors the family, and consequently the rights of parents.[115] Arguably, the principles can be read as promoting the family for the purpose of strengthening the family unit as the primary caretaker of the child; thus, the role of the state is reserved to ensuring that the family is fulfilling its role in protecting the interests of the child. The principles in the New Zealand Act constitute legislative recognition of the notion that the welfare of the child is not necessarily best served by the state acting to displace the family as the primary caretaker when intervention is necessary.

2. *The New Zealand Act Provisions and Parents' Rights*

The primary innovation in the New Zealand Act is the Conference.[116] The purpose of having the Conference is to involve the family in the intervention process. Reducing the role of the state and increasing the role of the family serves to protect parents' rights. If the child is taken from the parents, but remains with the family, the parents' interests in preserving the child's identity as a member of that family and in preserving the child's cultural values are upheld. The family, by having a more active role in the intervention process, will also have a greater voice in the decisions made regarding the future of the child.

It is only when the parents or the family cannot be enlisted to participate in the Conference that more drastic intervention by the state will occur. This assures that the parents are given a chance to have an active role and a meaningful voice in the intervention process, which will minimize the potential for unjustified state intervention.

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111. New Zealand Act, *supra* note 7, § 13(a).
112. *Id.* § 13(b).
113. *Id.*
114. *Id.* § 13(b).
115. Atkin, *supra* note 6, at 324-325.
116. *See supra* Part II.B.2.

3. *Conclusion on the New Zealand Act and Parents' Rights*

The New Zealand Act principles and provisions go a long way toward preserving and protecting parents' rights to raise their children free of state intervention. By including a detailed list of principles, along with giving parents and the family an active role in the intervention process, protection of parental rights is accomplished without jeopardizing the interests of the child.

The primary purpose of a child protection law is to protect children at risk. A secondary, but necessary facet of such a law must be its ability to preserve the family as the primary societal unit for raising children. A law that can accomplish both goals without compromising the rights or interests of any participant in the process is to be desired. The New Zealand Act comes close to achieving both goals because its provisions contain protection of both parents' rights and the rights of children.

C. *Conclusion on the Effect of the Acts on Parents' Rights*

The non-intervention principle in the England Act fails to completely protect the rights of parents because it is not effective beyond the judicial stage of the intervention process. The philosophy of non-intervention accomplishes preservation of parental rights under the New Zealand Act because it does provide a check on state activity throughout the entire child-protection process.

The non-intervention principle in the England Act is the means by which the Act reduces the role of courts at the intervention stage. Beyond the judicial stage, authorities acting under an EPO or a CAO need not involve the parents in either the protection or the assessment process. The lack of a principle to check state activity under the EPO and the CAO leaves parents' rights under the England Act in jeopardy.

By prioritizing the family throughout the intervention stage, and by including the family in the decision-making process, the New Zealand Act protects parents' rights from excessive state power. Thus, the New Zealand Act comes closer to the goal of preserving the family unit as the primary caretaker for the child.

IV. THE EFFECT OF THE ACTS ON THE POWER OF THE STATE TO INTERVENE IN FAMILY LIFE TO PROTECT CHILDREN

A. *The Effect of the England Act on the Power of the State*

1. *The England Act Principles and State Power*

The two major innovations in the England Act are the presence of principles to guide court action and an attempt to limit access to

courts by giving social workers more discretion at the investigatory stage. These innovations are attempts to change the role of the state. A statement of principles, in particular a principle of non-intervention, to guide court activity is an effective way to reduce unwarranted state intervention into family life. The non-intervention principle evinces legislative belief that too much state power reduces protection of both the rights of children and parents.

Unfortunately, the non-intervention principle is incorporated into the England Act in such a way that it inconsistently affects both children's rights and parents' rights. The inclusion of the non-intervention principle and the omission of a duty to investigate allegations of abuse combine to leave abused children at risk.[117] There is a distinct possibility that some abused children will not be protected because of the influence of the non-intervention principle upon the subjective discretion employed by the investigating authority.[118]

Parents are the beneficiaries of the combination of the presence of the non-intervention principle and the omission of a duty to investigate, because that combination minimizes the chances of state intervention. However, the non-intervention principle applies only to courts, so state actions taken pursuant to court order are left unchecked.[119] Thus, parents' rights, which are sheltered during the investigatory stage, are left exposed to potential unjustified state actions taken under the guise of court order.

2. *The England Act Provisions and State Power*

The provisions of the England Act do not impose a duty upon social workers to investigate allegations of abuse. If a local authority 1) knows a child is the subject of an EPO, 2) knows a child is in police protection, or 3) reasonably believes a child is suffering, or will likely suffer, significant harm, the authority then has a duty to make inquiries extensive enough to determine whether further action is needed.[120] It

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117. *See infra* text accompanying notes 120-23.

118. *See infra* text accompanying notes 120-23.

119. *See supra* text accompanying note 98.

120. England Act, *supra* note 5, § 47(1). The statute provides:

1) Where a local authority
   a) are informed that a child who lives, or is found, in their area
      i) is the subject of an emergency protection order; or
      ii) is in police protection; or
   b) have reasonable cause to suspect that a child who lives, or is found,

has been noted that the duty under this section is only to make inquiries and not to conduct an investigation.[121] This is confirmed by the Act itself, which states that if "a local authority conclude [sic] that they should take action to safeguard or promote the child's welfare they shall take that action."[122] Thus, the authority is only under a duty to take action that it decides to take, which is a subtle way of informing that the authority has complete discretion as to whether it will take any action at all.

Since investigating authorities are not bound by the welfare and non-intervention principles, and there is no actual duty to bring the situation within the reach of those principles, abuses of discretion by investigating authorities will be essentially immune from appeal. Therefore, the rights of the child at the investigatory stage are severely undermined.[123] The intention to make the child's welfare paramount at the judicial stage of the proceedings is of no help to the child left at risk because of an improper use of discretion by the investigator.

An important power reserved to the state under the England Act is that of removing children in cases of emergency. When a constable has "reasonable cause to believe" a child will likely suffer significant harm, he may remove the child to other accommodations or prevent the removal of the child from a safe accommodation.[124] "Reasonable cause to believe" requires not only reasonable cause, but that the

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> in their area is suffering, or is likely to suffer, significant harm, the authority shall make, or cause to be made, such inquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare.

Id.

121. Eekelaar, *supra* note 36, at 486.

122. England Act, *supra* note 5, § 47(8).

123. *See* Eekelaar, *supra* note 36, at 487. Eekelaar notes that:

> It may be thought unlikely that a social services department, having investigated and discovered that a child is in significant danger, will decide it 'should' take no action, or no realistic action . . . But is it? Might it decide that it 'should' do no more because: i) personnel resources are so stretched that taking on this case will jeopardise other children; ii) there is an industrial dispute; iii) such action might jeopardise community relations? It is surprising that the imposition of extensive and elaborate duties to inquire do not [sic] lead to a clear and unambiguous duty to take action on the basis of the results of the inquiries where the child is likely to be harmed if no such action is taken.

Id.

124. England Act, *supra* note 5, § 46(1).

person actually believes the child is at risk.[125] This high standard provides some assurance that intervention will be justifiable, and that family life will not be interrupted unless the situation is actually serious.

The constable is given several duties to perform once he has taken a child into police protection which will ensure that his emergency protective power is not abused.[126] After making necessary inquiries into the report which led to the belief that the child was at risk, the constable must release the child, unless he still reasonably believes the child is at risk.[127] Children may not be kept under police protection any longer than 72 hours.[128] However, if the constable believes it is necessary, he may act on behalf of the local authorized official and apply for an EPO.[129]

A constable who has taken a child into custody is not charged with parental responsibility for the child.[130] The duty of the constable is similar to that contained in the welfare principle; he must "do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare."[131] The constable also has discretion regarding the amount of access to the child that interested individuals will be allowed to have.[132]

3. *Conclusion on the England Act and State Power*

The attempt to reduce state power in the England Act was accomplished inconsistently, so that while both children and parents have adequate protection at some stages in the child-protection process, both are left vulnerable at other stages. The non-intervention and welfare principles should bind all state authorities throughout the entire process of intervention. The investigating authorities should be given an actual, unequivocal duty to conduct at least minimal investigation in every instance where there is a substantive allegation of child abuse. These changes would bring the England Act closer to balancing the rights and interests of the participants in the child-protection process. As it is, the England Act leaves the state with too much power.

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125. *See, e.g.*, R v. Banks, 2 K.B. 621, (1916-17), All E.R. Rep. 356, (1916); R v. Harrison (1938), 3 All E.R. 134, 159 L.R. 95; Nakkuda Ali v. Jayaratne (1951), App.Cas. 66, P.C.

126. England Act, *supra* note 5, § 46(3)-(4).

127. *Id.* § 46(5).

128. *Id.* § 46(6).

129. *Id.* § 46(7)-(8).

130. England Act, *supra* note 5, § 46(9).

131. *Id.* § 46(9)(b).

132. *Id.* § 46(10).

The state's interest in protecting children in emergency situations is upheld by giving police the power to remove children when they reasonably believe that an emergency exists. The parents are adequately protected from unjustified police intervention by: 1) the requirement that the police actually believe the child is in danger; 2) the requirement that the police release the child when they believe it is safe to do so; and 3) the limiting of police protection of the child to 72 hours.

B. *The Effect of the New Zealand Act on the Power of the State*

1. *The New Zealand Act Principles and State Power*

The principles of the New Zealand Act not only bind courts, but also bind any persons who exercise any powers conferred by the Act.[133] Thus, the philosophy of promoting the family at all stages of the proceedings, except when doing so would jeopardize the interests of the child, is an effective check on state power. The comprehensiveness of the list of principles and objectives in the Act gives authorities adequate guidelines for implementing their decisions and policies. Little is left solely to the discretion of the authorities under the New Zealand Act principles, which should result in strictly controlled actions taken under the Act's provisions.

2. *The New Zealand Act Provisions and State Power*

When a social worker or the police receive a report alleging child abuse, they must conduct, or arrange for the conduction, of such investigation "as may be necessary or desirable" into the situation alleged in the report.[134] Thus, the investigator under the New Zealand Act is given some discretion; however, there are effective checks on that discretion. Investigatory activity must be made in consultation with a Care and Protection Resource Panel.[135] When a decision is made not to investigate a report, the investigator must make an effort to inform the reporter of that decision.[136] The investigator is also bound by the principles of the New Zealand Act, which require him not to endanger the welfare of the child.[137]

The Director-General has several duties under the New Zealand Act. He is to review every resolution of the Conference, and "unless

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133. New Zealand Act, *supra* note 7.
134. *Id.* § 17.
135. *Id.* § 17(1).
136. *Id.* § 17(3)(b).
137. New Zealand Act, *supra* note 7, § 5.

it would be clearly impracticable or clearly inconsistent with the principles'' of the Act, must implement those resolutions and provide the services and resources necessary for the taking of such action.[138] The Director-General may also provide financial assistance to ensure the implementation of the Conference resolutions.[139]

The Director-General thus has a duty to make sure the principles of the Act have not been deviated from in the handling of the case and can refuse to implement Conference resolutions if they fail to adhere to the principles. This provides a check on the discretionary power of the Coordinator and the actions taken by the Conference. It should be noted, however, that the standard is weighted in favor of implementation; the Director-General is to implement the resolutions unless it is ''clearly impracticable'' or they are ''clearly inconsistent'' with the principles of the Act.[140]

One unwarranted source of state power under the New Zealand Act is the rule that proceedings of a Conference are privileged. No evidence from a Conference is admissible in any judicial setting.[141] This restriction is a barrier to appealing from Conference decisions.[142] It might serve the intent of limiting access to courts, but it also makes the power of the Coordinator loom even larger, increasing the chances that the welfare of the child and the interests of the parents might not be properly promoted. The Coordinator needs a significant amount of authority to ensure that the family does not improperly control the Conference; however, providing the Coordinator with immunity from judicial scrutiny gives the state too much power.

The Conference is the normal route through which a care and protection case proceeds. If the Conference is unsuccessful, an application to the court can be made for a declaration that the child needs care or protection, and the court will then take over.[143] If it is necessary, the Conference may be bypassed initially.

A judicial official who is satisfied that there are reasonable grounds for suspecting a child is suffering, or is likely to suffer, deprivation, abuse, or harm may issue a warrant authorizing the police or a social worker to search for that child.[144] If the authorized person reasonably

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138. *Id.* § 34(1).
139. *Id.* § 34(2).
140. *Id.* § 34(1).
141. New Zealand Act, *supra* note 7, § 37.
142. Atkin, *supra* note 6, at 335.
143. *Id.* at 330.
144. New Zealand Act, *supra* note 7, § 39(1).

believes that the child is in danger, he may remove the child, by force if necessary.[145] Any member of the police who reasonably believes that it is critically necessary to act to protect a child from injury or death may, without a warrant, enter, search, and remove that child, by force if necessary.[146]

Children removed from home with or without a warrant are considered in the custody of the Director-General, who may place them in accommodations consistent with those described in the principles of the Act.[147] A parent or guardian may make court application for the release of a child, or for access to a child who is in the custody of the Director-General.[148] A child placed in the custody of the Director-General must be brought before a court within five days after being detained or must be released.[149]

3. *Conclusion on the New Zealand Act and State Power*

The principles of the New Zealand Act are a formidable barrier to abuse of state power because they bind all who act under the authority of the Act and they are consistent in application. The Director-General's duty to ensure that the principles of the Act are followed in every child-protection situation provides an additional check on state power. The Act places checks on the investigator's discretion, minimizing the potential for its abuse.

The Conference proceedings should not be privileged from judicial scrutiny. This gives the Coordinator too much control over the happenings in the Conference and results in a portion of the Act's provisions being essentially immunized from its principles. Giving the judiciary power to scrutinize Conference proceedings would discourage Coordinator impropriety and give participants in the process a means for appealing abuses of Coordinator discretion.

The police power to protect children in emergency situations effectively preserves the interest of the state in ensuring the physical safety of children. The high standard that must be met before intervention can occur and the limitations on the power of the police to keep children in custody provide protection for both the interests of children and parents.

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145. *Id.* § 39(3)(b).
146. *Id.* § 42(1).
147. *Id.* § 43.
148. New Zealand Act, *supra* note 7, § 44.
149. *Id.* § 45(a).

C. *Conclusion on the Effect of the Acts on State Power*

The England Act would benefit from having a list of principles as comprehensive as those found in the New Zealand Act, and would benefit from the imposition of those principles upon all participants in the child-protection process. The principles in the New Zealand Act, because they are both comprehensive and binding on all authorities, provide an effective check on state power throughout virtually all of the provisions in the Act. The principles in the England Act are inconsistently applied, so state power is too great, even though the role of the courts is reduced. Under the New Zealand Act, court action is reduced without placing at risk the rights of children or parents.

Another problem in the England Act is that the investigator has no duty to investigate, which protects parental rights at the expense of the rights of children. The New Zealand investigator is given some discretion, but there are effective checks on his power; thus, children who are at risk should not be left at risk because of an abuse of investigator discretion.

The privilege surrounding proceedings of the Conference leaves the Coordinator with too much power. Removing this barrier to judicial scrutiny would bring the Conference and the Coordinator in line with the amount of state power delegated by the other provisions of the New Zealand Act. Both Acts give proper amounts of power to the police to protect children in emergencies. Comparatively, the New Zealand Act comes closer than the England Act to giving the state the appropriate amount of power necessary for it to fulfill its interest in protecting children from abuse.

V. CONCLUSION

Protecting the rights and interests of participants in the child-protection process involves balancing the concept of non-intervention with that of welfare. However, there are difficulties involved in adhering to both a principle of welfare, which asserts that the child's interests are paramount, and a principle of non-intervention, which implies that parents have the superior interests.[150]

Compared to the England Act, the concepts of welfare and non-intervention embodied in the New Zealand Act are more mutually supportive; the concept of parental responsibility posited by the England

150. Bainham, *supra* note 12, at 144-145.

Act, which translates into family responsibility in the New Zealand Act, tends to harmonize the two principles in the New Zealand Act.[151] The England Act develops the notion of parental responsibility in a section separate from the welfare and non-intervention principles, which leaves the two principles in an uncomfortable co-existence.[152]

With the New Zealand Act, however, the inclusion of parental responsibility within the welfare and non-intervention principles increases the effectiveness of both principles. Since the principles apply to anyone acting under the authority of the Act, they have a pervasive influence on any action taken that affects the interests of children and parents. Limiting the state's role to intervening only enough to ensure that the family is acting to protect the child protects both the parents and the child, without compromising the interest the state has in protecting the child. Giving the family a substantive role in the decision-making process protects its rights, even though its interests are defined in terms of responsibilities.

The drafters of both Acts had the same goal of reducing state power and court activity. However, the authors of the New Zealand Act recognized that, in attempting to balance the interests of the participants in the child-protection process, the role of the parents would also have to be adjusted. If the role of the state must be reduced, then the parents' role must be increased; changing the role of only one of these two participants adversely affects the rights of the child. A significant problem with the England Act is that it reduces the state's role without increasing the role of the parents or the family in the child-protection process.

The formula for protecting children at risk in the New Zealand Act is one that seeks to align the interests of the state with those of the parents, so that both work together to protect the interests of the child. The New Zealand Act is not without flaws; and, since it creates a new forum for handling child-protection cases, implementation of the Act may reveal practical difficulties with its approach. However, the effort that went into drafting the Act has resulted in a child-protection measure that theoretically, at least, comes close to achieving a balance among children's rights, parents' rights, and the interests of the state.

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151. New Zealand Act, *supra* note 7, § 13(b).

152. *See* England Act, *supra* note 5, §§ 1-2.

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Achieving United States-Canadian Reciprocity in Sub-National Government Procurement: Federalism and the Canada-United States Free Trade Agreement

I. INTRODUCTION

The Canada-United States Free Trade Agreement (FTA)[1] went into effect on January 1, 1989.[2] The United States and Canada entered the agreement for the purpose of increasing the economic activity between them and promoting an atmosphere of fair competition.[3] In contrast to this purpose, many states have enacted buy-American legislation which requires state government entities to restrict their procurement of foreign goods. These state restrictions on foreign products appear to cut against the federal government's policy of loosening the trade barriers with Canada. One federal appellate court held that the state restrictions did not conflict with the legislative intent when Congress ratified the treaty with Canada.[4] The conflict between the FTA and the buy-American statutes goes to the heart of the forces pulling at United States economic development in the international economic system.

This Note will address the conflict between buy-American statutes and the FTA. The attitude reflected by the federal government in the

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1. Free Trade Agreement, Jan. 2, 1988, Canada-United States, 27 I.L.M. 281. The I.L.M. outlined the background stating:

> In March, 1985, President Reagan and prime Minister Mulroney asked their trade officials to explore ways to eliminate barriers to trade and investment between the United States and Canada. Under congressionally granted "fast track" authority, negotiations began in Ottawa, May 21-22, 1986. The United States and Canada reached agreement on the framework of a free trade area on October 3, 1987. The final text of the agreement was signed as indicated above. This agreement creates the world's largest free trade area, affecting trade of about $125 billion. The agreement is expected to strengthen and stimulate the economies of both Canada and the United States, providing benefits for consumers and businesses.

Id. at 281.

2. Trojan Technologies, Inc. v. Pennsylvania, 916 F.2d 903, 906 (3d Cir. 1990) *cert. denied,* 111 S.Ct. 2814 (1991).

3. Free Trade Agreement, *supra* note 1, at 293.

4. 916 F.2d at 903.

FTA is one of opening a free market system with a major trading partner. The attitude reflected by the states in their buy-American statutes is one of protectionism. There are two relevant questions raised by these conflicting concerns. First, how do we balance the concerns of the federal government and the concerns of the individual states in the area of international trade? Second, how narrowly or broadly should the courts interpret trade agreements entered by the United States? This discussion leads to constitutional issues on the supremacy of the foreign commerce clause and the foreign affairs power over the laws of the states. Moreover, in order for the United States government to effectively negotiate in the area of sub-national government procurement policy, it is imperative to understand the power the federal government of Canada has in enforcing international economic agreements over the Provinces.

II. BUY-AMERICAN STATUTES

The question whether the Canada-United States Free Trade Agreement preempts the Pennsylvania Steel Act was addressed by the United States Court of Appeals for the Third Circuit in *Trojan Technologies, Inc. and Kappe Associates, Inc. v. Commonwealth of Pennsylvania*.[5] The court looked at the Pennsylvania Steel Products Procurement Act ("Pennsylvania Steel Act").[6] This Act is an example of how the states attempt to set up guidelines to protect American or local interests or businesses through laws or regulations. Generally, these laws require that suppliers contracting with the local government for public works projects provide products which have been American-made. The Pennsylvania Steel Act provides:

> Every public agency shall require that every contract document for the construction, reconstruction, alteration, repair, improvement or maintenance of public works contain a provision that, if any steel products are to be used or supplied in the performance of the contract, only steel products as herein defined shall be used or supplied in the performance of the contract.[7]

The Pennsylvania Steel Act continues:

> This section shall not apply in any case where the head of the public agency, in writing, determines that steel products

5. *Id.*
6. PA. STAT. ANN. tit. 73, §§ 1881-1887 (Supp. 1992).
7. *Id.* at § 1884.

> as herein defined are not produced in the United States in sufficient quantities to meet the requirements of the contract.[8]

The *Trojan* case is the only case in which a federal court has addressed the question of whether buy-American statutes are unconstitutional. The Pennsylvania Steel Act is challenged on several grounds: 1) whether the Act is preempted by various federal statutes and executive agreements regulating foreign commerce, 2) whether the Act unconstitutionally burdens foreign commerce, 3) whether the Act interferes with the federal government's exercise of the foreign relations power, 4) whether the Act is unconstitutionally vague, and 5) whether the Act violates the equal protection clause.[9] This Note will examine the first three issues and then turn to a comparison with Canadian law on these issues.

Several states have similar statutes to control the purchasing practices of their public agencies.[10] Since much has already been written on this subject in other law review articles and notes, only a brief survey of the history and types of the statutes involved is needed.[11] The United States Congress enacted the Buy American Act in 1933.[12] This Act requires federal agencies to purchase American-made materials. Also, any contractors working on federal public works projects are required to use American-made materials. However, the Act makes exception for "impracticability" of acquiring American-made material, an unreasonable increase in cost, or where the product is not made in

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8. *Id.*

9. 916 F.2d at 904.

10. *See, e.g.*, ALA. CODE § 39-3-4 (1987 Supp.); ILL. REV. STAT. ch. 48, para. 1801 (1986); IND. CODE ANN. § 5-16-8-2 (West 1984); MASS. GEN. LAWS ANN. ch. 7, § 22 (West 1969); MD. STATE FIN. & PROC. CODE ANN. § 12-401 (1985); N.Y. STATE FIN. LAW § 146 (1988); W. VA. CODE § 5-19-1 (1987); R.I. GEN. LAWS § 37-2.1 (1984); OHIO REV. CODE ANN. § 153.011 (Anderson 1987); and N.J. STAT. ANN. § 40A:11-18 (West 1973).

11. Several law review articles have already discussed and analyzed the history and background of these statutes. *See* Robert Fraser Miller, *Buy-American Statutes - An Assessment of Validity Under Present Law and a Recommendation for Preemption*, 23 RUTGERS L.J. 137 (1991); James D. Southwick, *Binding the States: A Survey of State Law Conformance With the Standards of the GATT Procurement Code*, 13 U. PA. J. INT'L BUS. L. 57 (1992); James C. Olson, *Federal Limitations on State "Buy American" Laws*, 21 COLUM. J. TRANSNAT'L L. 177 (1982); James L. Kenworthy, *The Constitutionality of State Buy-American Laws*, 50 UMKC L. REV. 1 (1981); Notes, *State Buy-American Laws - Invalidity of State Attempts to Favor American Producers*, 64 MINN. L. REV. 389 (1980).

12. 41 U.S.C.A. §§ 10a-10d (West Supp. 1993) (amended in 1988 with a "sunset provision" providing that the Act shall cease to be effective on April 30, 1996, unless Congress extends that date).

sufficient and reasonable quantities in the United States.[13] The pertinent parts of the Act state:

> Notwithstanding any other provision of law, and unless the head of the Federal agency concerned shall determine it to be inconsistent with the public interest, or the cost unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles . . . for the use outside of the United States, or if articles . . . of the class or kind to be used or the articles . . . are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.[14]

This federal statute was first enacted in 1933 at the height of the Great Depression. The Congressional concern is noted in the legislative history of the statute: "With 12,000,000 men walking the streets of this country, this work, which will be paid for by American taxpayers, should be awarded to an American manufacturer, who in turn will employ American labor."[15] Indeed, the statute was an attempt by Congress to alleviate the pressures on American industries during the Great Depression.[16]

The federal Buy American Act is much broader than the Pennsylvania Steel Act because it covers all American-made products and is not limited to steel. However, several states have modeled their statutes on the federal Buy American Act. These states have some of the same economic and protectionistic concerns as the federal statute.[17]

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13. *Id.* § 10a-b.

14. *Id.* § 10a.

15. Miller, *supra* note 11, at 138 (quoting 76 CONG. REC. 1892, 1896).

16. *See* Denis Lemieux, *Legal Issues Arising From Protectionist Government Procurement Policies in Canada and the United States*, 29 LES CAHIERS DE DROIT 367, 379 (1988).

17. *See, e.g.*, N.J. Stat. Ann. § 52:32-1 (West 1986); MINN. STAT. § 16B.101 (1991); OKLA. STAT. tit. 61, § 51 (1991). *See also* Miller, *supra* note 11, at 142; and Lemieux, *supra* note 16, at 379-80.

The distinction between the federal-type Act and the Pennsylvania-type Act has been labelled by some commentators as comprehensive and product-specific.[18] A comprehensive statute is one that requires only domestic materials be used in the public works. By contrast, the product-specific statute, exemplified by the Pennsylvania Steel Act, specifies that domestic materials, such as steel, must be used in local public works projects.[19]

In addition to the categories of product-specific and comprehesive statutes, the statutes have been categorized as absolute and flexible.[20] An absolute statute is one that does not allow state officials to use discretion when carrying out the provisions of the statute which require the use of American-made products. That is, state officials must carry out the provisions of the statute without exception.[21] A flexible statute is one that contains discretionary language (like the federal statute),[22] or that relies on specific percentages between the domestic and foreign bids to determine unreasonable costs.[23]

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18. *See* Miller, *supra* note 11, at 140-41.

19. *See id.* at 141.

20. *Id.*

21. *Id.* at 144. *See, e.g.*, CAL. GOV'T CODE §§ 4300-4305 (West 1980); *But see Bethlehem Steel Corp. v. Los Angeles*, 276 Cal. App. 2d 221 (1969) (holding this statute unconstitutional).

22. Miller, *supra* note 11, at 142. *See, e.g.*, N.J. Stat. Ann. § 52:33-2. This statute provides:

> Notwithstanding any inconsistent provision of any law, and unless the head of the department, or other public officer charged with the duty by law, shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only domestic materials shall be acquired or used for any public work.
>
> This section shall not apply with respect to domestic materials to be used for any public work, if domestic materials of the class or kind to be used are not mined, produced or manufactured, as the case may be, in the United States in commercial quantities and of a satisfactory quality.

23. Miller, *supra* note 11, at 142-43. *See, e.g.*, Md. State Fin. & Proc. Code Ann. §§ 17-303 to -304 (1988). This statute provides in pertinent part:

> (a) IN GENERAL. - Except as otherwise provided in this subtitle, a public body shall require a contractor or subcontractor to use or supply only American steel products in the performance of a contract for:
>
> (1) constructing or maintaining a public work; or
>
> (2) buying or manufacturing machinery or equipment that
>
> (i) is composed of at least 10,000 pounds of steel products; and
>
> (ii) is to be installed at a public work site.
>
> (b) EXCEPTIONS. - This section does not apply if the head of a public body

Also, these statutes can be divided into the categories of buy-American preference and buy-state preference.[24] Buy-American statutes grant a preference to American-made products.[25] Buy-state statutes grant a preference to in-state manufactured products and businesses.[26] These categories are not mutually exclusive; so there can be a flexible, product-specific, buy-American statute like the Pennsylvania Steel Act.[27]

III. CANADA-UNITED STATES FREE TRADE AGREEMENT

The *Trojan* court first looked at the preemption challenge to the Steel Act under the Canada-United States FTA and the Agreement on Government Procurement, which was entered into in 1979 pursuant to the Tokyo Round of GATT negotiations.[28] The appellant, Trojan Technologies, Inc., was a Canadian corporation.[29] Trojan Technologies, Inc. contended that the Pennsylvania Steel Act "runs counter to the Agreement's stated purpose of liberalizing government procurement policies and thus is preempted."[30] The *Trojan* court held that the Canada-United States FTA did not preempt the Pennsylvania Steel Act because it cannot be inferred that "the executive and legislative branches intended to require the unilateral elimination of state trade

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determines that:

(1) the price of American steel products is not reasonable, as provided in § 17-304 of this subtitle;

(2) American steel products are not produced in sufficient quantity to meet the requirements of the contract; or

(3) the purchase of American steel products would be inconsistent with the public interest.

(c) NOTICE. - The public body shall give notice of the requirement for American steel products in the invitation for bids or request for proposals.

The statute continues:

[A]n American steel product shall be considered reasonable if it does not exceed the sum of the bid or offered price of a similar steel product of foreign origin, including duty, plus:

(1) 20% of that bid or offered price; or

(2) 30% of that bid or offered price if the steel product is produced in a "substantial labor surplus area" as defined by the United States Department of Labor.

24. Miller, *supra* note 11, at 143.

25. *Id.*

26. *Id.*

27. It is arguable whether Pennsylvania's Steel Products Act is flexible or absolute. *See* Miller, *supra* note 11, at 144 note 54.

28. 916 F.2d at 906-08.

29. *Id.* at 905.

30. *Id.* at 906.

barriers," given Congress' concern "with achieving reciprocal trade barrier reduction" in the legislative history of the Congressional ratification of the FTA.[31]

The Government Procurement section of the Canada-United States FTA is found in chapter 13.[32] Its objective is outlined in article 1301:

> In the interest of expanding mutually beneficial trade opportunities in government procurement based on the principles of non-discrimination and fair and open competition for the supply of goods and services, the Parties shall actively strive to achieve, as quickly as possible, the multilateral liberalization of international government procurement policies to provide balanced and equitable opportunities.[33]

Thus, the objective explicitly emphasizes that the liberalization of the government procurement policies between the two nations is "based on the principles of non-discrimination and fair and open competition."[34]

Coverage of the Canada-United States FTA is limited to "procurements specified in Code Annex I . . . ."[35] The Code Annex specifies thirty-two federal Canadian agencies[36] and fifty-four federal United States agencies.[37] The Code Annex does not include any state or provincial agencies in its list of applicable agencies.

However, the Canada-United States FTA has provided for further negotiations on government procurement in Article 1307.[38] This Article provides:

> The Parties shall undertake bilateral negotiations with a view to improving and expanding the provisions of this chapter, not later than one year after the conclusion of the existing multilateral renegotiations pursuant to Article IX:6(b) of the Code, taking into account the results of these renegotiations.[39]

So, the Canada-United States FTA does not require the opening up of sub-national government procurement legislation.

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31. *Id.* at 907.
32. Free Trade Agreement, *supra* note 1, at 353-60.
33. *Id.* at 353.
34. *Id.*
35. *Id.* at 354.
36. *Id.* at 355-56.
37. *Id.* at 357-58.
38. *Id.* at 355.
39. *Id.*

As of September, 1992, the United States, Canada, and Mexico have proposed the text to a new agreement creating the North American Free Trade Agreement (NAFTA).[40] Article 102 of NAFTA outlines the objectives of the proposed agreement, and states that its principles and rules include national treatment, most-favored-nation treatment, and transparency.[41] Article 1003 puts government procurement between Canada, Mexico and the United States within the non-discrimination principle of national treatment.[42] Article 1003 provides:

> 1. With respect to measures covered by this Chapter, each party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party treatment no less favorable than the most favorable treatment than the Party accords to:
>
> (a) its own goods and suppliers; and
>
> (b) goods and suppliers of another Party.
>
> 2. With respect to measures covered by this Chapter, no Party may:
>
> (a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or
>
> (b) discriminate against a locally established supplier on the basis that the goods or services offered by the supplier for the particular procurement are goods or services of another Party.
>
> 3. Paragraph 1 does not apply to measures respecting customs duties or other charges of any kind imposed on or in connection with importation, the method of levying such duties or charges or other import regulations, including restrictions and formalities.[43]

Unlike the Canada-United States FTA, which explicitly incorporates the GATT's Procurement Code, NAFTA outlines the principle of national treatment as it applies to the area of government procurement. In effect, however, NAFTA's language incorporates the language of the GATT's Procurement Code.

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40. North American Free Trade Agreement, *done* December 17, 1992, 32 I.L.M. 289 (1993)(comes into effect after all three countries complete the legal review of the document to ensure the Agreement's overall consistency and clarity).

41. *Id.* at 297.

42. *Id.* at 613-14.

43. *Id.*

However, the proposed NAFTA agreement shifts the scope of coverage found in the Canada-United States FTA:

> ARTICLE 1001: SCOPE AND COVERAGE
>
> 1. This Chapter applies to measures adopted or maintained by a Party relating to procurement:
>
> (a) by a federal government entity set out in Annex 1001.1a-1, a government enterprise set out in Annex 1001.1a-2 in accordance with Article 1024;
>
> (b) of goods in accordance with Annex 1001.1b-1, services in accordance with Annex 1001.1b-2, or construction services in accordance with Annex 1001.1b-3; and
>
> (c) where the value of the contract to be awarded is estimated to be equal to or greater than a threshold calculated and adjusted according to the U.S. inflation rate as set out in Annex 1001.1c,
>
> (i) for federal government entities, US$50,000 for contracts for goods, services or any combination thereof, and US$6.5 million for contracts for construction services,
>
> (ii) for government enterprises, US$250,000 for contracts for goods, services or any combination thereof, and US$80 million for contracts for construction services, and
>
> (iii) for state and provincial government entities, the applicable threshold, as set out in Annex 1001.1a-3 in accordance with Article 1024.[44]

Annex 1001.1a-1, on federal government entities, lists one hundred Canadian federal agencies,[45] twenty-two Mexican federal agencies,[46] and fifty-six United States federal agencies.[47] Annex 1001.1a-2, on government enterprises, lists eleven Canadian federal projects,[48] thirty-six Mexican federal projects,[49] and seven United States federal projects.[50] In addition, NAFTA proposes to expand the scope and coverage of

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44. *Id.* at 613.
45. *Id.* at 622-23.
46. *Id.* at 623-24.
47. *Id.* at 624.
48. *Id.* at 624-25.
49. *Id.* at 625.
50. *Id.*

the Canada-United States FTA in the area of services for the entities listed in Annex 1001.1a-1 and Annex 1001.1a-2.[51]

Annex 1001.1a-3, on state and provincial government entities, provides:

> Coverage under this Annex will be the subject of consultations with state and provincial governments in accordance with Article 1024.[52]

This Annex has not made any direct changes in the respective positions of the United States and Canadian governments on the sub-national government procurement strategies. It merely indicates that the federal government of each nation is willing to address this issue with their respective states or provinces.

Article 1024, on further negotiations, indicates that the parties intend to continue negotiations on the liberalization of the government procurement markets and agree to begin these negotiations no later than December 31, 1998.[53] Article 1024 further provides:

> [T]he Parties will endeavor to consult with their state and provincial governments with a view to obtaining commitments, on a voluntary and reciprocal basis, to include within this Chapter procurement by state and provincial government entities and enterprises.[54]

In addition, Article 1024 provides that this Agreement is to comply immediately with any changes in the GATT Agreement on Government Procurement, if the GATT negotiations are completed prior to the further negotiations provided for in NAFTA.[55]

The General Agreements on Tariffs and Trade (GATT)[56] has a section that applies to government procurement which is called the Agreement on Government Procurement.[57] The Government Procurement Code is an attempt by the signatory governments "to provide transparency of laws, regulations, procedures and practices regarding

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51. *Id.* 626-29.
52. *Id.* at 625.
53. *Id.* at 621.
54. *Id.* at 622.
55. *Id.*
56. The General Agreement on Tariffs and Trade and Protocol and Provisional Application, Oct. 30, 1947, 55 U.N.T.S. 194, B.I.S.D. IV (1969).
57. Agreement on Government Procurement, April 12, 1979, GATT, 26 B.I.S.D. 33-55.

government procurement . . . ."[58] for what has been for many countries, unlike the United States, "ad hoc bidding and award procedures that are less than transparent."[59]

Article I provides for the scope and coverage of the Government Procurement Code. Article I limits the coverage of the Code to "entities under the direct or substantial control of parties . . . ."[60] Further, Article I limits the coverage to entities specified by the lists in Annex I.[61] Also, Article I specifies that local and regional governments of the signatory countries are not included, but the sub-national governments shall be informed of "overall benefits of liberalization of government procurement."[62]

Currently, the international agreements to which the United States government is a party do not affect sub-national government procurement practices. In fact, it is clear from the language of the agreements that the sub-national government procurement laws and regulations are not addressed by any of these agreements. Instead, the sub-national government procurement laws and regulations are merely open to further negotiations in all the agreements.

IV. FEDERALISM AND FAIR TRADE

Several commentators have suggested that the United States should extend its agreements to include state government procurement.[63] One commentator recommended that "[t]he next logical step for the United States is to negotiate and ratify a trade agreement which includes state government procurement."[64] This same commentator suggested that "the United States now stands poised to bring itself and its trading partners closer to achieving the benefits of international free trade."[65]

However, the *Trojan* court suggested, in a footnote, that "achieving United States-Canadian reciprocity in sub-national government procurement may require more than national legislation."[66] The *Trojan*

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58. *See id.* (Preamble).

59. Theodore W. Kassinger, *Introduction and Bibliography,* 1 Basic Documents of International Economic Law 165 (November 1989).

60. Agreement on Government Procurement, *supra* note 57, at art. I.

61. Lists in the Annex are available in the practical Guide to the GATT Agreement on Government Procurement which has been published by the GATT Secretariat. *Id.*

62. *Id.* at art. I, par. 2.

63. *See, e.g.,* Miller, *supra* note 11, at 161; Southwick, *supra* note 11, at 57-58.

64. Miller, *supra* note 11, at 161.

65. *Id.* at 164.

66. 916 F.2d at 907 n.6.

court noted that Article 1301 of the Canada-United States FTA "speaks of achieving '*mutually* beneficial trade opportunities in government procurement based on the principles of non-discrimination and *fair* and open competition.'"[67] But the court noted that in the legislative history in which Congress adopted the Canada-United States FTA, there was concern "about the negative effect that provincial procurement barriers can have on the ability of U.S. exporters to compete for government procurement contracts in Canada."[68]

In a footnote, the *Trojan* court suggested that "on the United States' side, Congress would have authority to act preemptively in this area [sub-national government procurement] as an exercise of its power over foreign commerce . . . ."[69] However, the court continued, "it is not at all clear that the Canadian Parliament has cognate authority."[70] So, in order to take the "next logical step," it is important to understand the complicating factors of working with other legal and governmental systems.

Despite commonalities, working out an agreement between the United States and Canada on the sub-national government procurement practices of both nations may require more than a desire to reduce these barriers to trade. It may require greater understanding of the diverse nature of the two different legal and political systems under the constitutions of both nations. Even though both nations are governed by federal systems, each nation has developed its own unique brand of federalism. Hence, the question is not whether the United States should attempt to open up free trade with other nations in the area of government procurement. Instead, the question is a much more practical one: what is the most effective way to implement the move toward free and fair trade between nations in the area of sub-national government procurement?

V. THE UNITED STATES CONSTITUTION AND FEDERALISM

The concern about federalism is among the oldest concerns in the history of United States constitutional law, dating back to the time of

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67. *Id.* at 907 (quoting Free Trade Agreement, *supra* note 1, at art. 1301).
68. *Id.* (quoting S. REP. No. 100-509, 100th CONG., 2d SESS. at 65).
69. *Id.* at 907 n.6.
70. *Id.*

our founding fathers.[71] The tension in the United States Constitution revolves around the federal powers enumerated in Article I, § 8 of the Constitution for Congress[72] and the powers reserved for the states in the Tenth Amendment.[73]

A. *Commerce Power*

The Constitution is straightforward on the power granted to the federal government in the area of international trade. Article I, § 8 explicitly states that Congress has the power to "regulate Commerce with foreign Nations."[74] It is well-established that the foreign commerce power granted to Congress in the Constitution may act as a prohibition to state regulatory activity, absent preemptive federal legislation.[75] Through negative implication, the courts have often found that the foreign commerce clause proscribes state regulation of foreign commerce.[76]

The foreign commerce power, though broadly interpreted, has some limitations. The Supreme Court has recognized that when a state is acting as a market participant, and not functioning as a regulator of foreign or interstate trade, then the state is not subject to the constraints of the commerce clause.[77] In *South-Central Timber Development,*

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71. New York v. United States, 112 S.Ct. 2408, 120 L.Ed.2d 120, 133 (1992) (noting that the constitutional question of "discerning the proper division of authority between the Federal Government and the States" is as old as the constitution).

72. U.S. CONST. art. I, § 8.

73. U.S. CONST. amend. X.

74. U.S. CONST. art. I, § 8, cl. 3.

75. 916 F.2d at 909.

76. *See* Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-21 at 468 (2d ed. 1988); JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.2 (4th ed. 1991).

77. *See, e.g.,* Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachussetts Council of Construction Employers, Inc., 460 U.S. 204 (1983); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984); TRIBE, *supra* note 76, § 6-21 at 469. Tribe describes the limitation as follows:

> A distinction must be drawn between state regulation of foreign commerce, and state participation in foreign commerce. The former activity is tightly proscribed by the negative implications of what might be called the foreign commerce clause. Thus, a state or local government that opposed the regime of apartheid in the Union of South Africa could not, absent congressional authorization, enact a measure denying South African companies the privilege of doing business within its jurisdiction; nor could a state or locality

Inc. v. Wunnicke,[78] an Alaskan timber purchaser and shipper brought an action challenging Alaska's requirement that timber taken from state lands be processed within the state prior to export. It should be noted that the Alaskan timber corporation that brought the suit was engaged in the business of purchasing, logging, and shipping timber into foreign countries (almost exclusively with Japan).[79] Often, the company sold unprocessed logs, since it did not operate a mill in Alaska.[80] The Supreme Court held that the state was not protected by the market-participant doctrine for three reasons.[81] First, the state was not "merely subsidizing local timber processing in an amount 'roughly equal to the difference between the price the timber would fetch in the absence of such a requirement and the amount the state actually receives.'"[82] Instead, the state was imposing "conditions downstream in the timber-processing market."[83] Second, the market-participant doctrine is not an unrestrained exception to the commerce power. Instead, the Court suggested that the doctrine might be limited by a more rigorous scrutiny "when a restraint on foreign commerce is alleged . . . ."[84] Third, the Court suggested that the market-participant doctrine might be limited when the state is involved in the sale of natural resources (like timber) and not the sale of a product which was "'the end product of a complex process whereby a costly physical plant and human labor act on raw materials . . . .'"[85] Thus, the Court limited the use of the market-participant exception in the areas of foreign commerce, natural resources, and when the state's regulation has a downstream effect.

The *Trojan* court looked at the Pennsylvania Steel Act in light of the foreign commerce power. The court held that the Steel Act did

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> forbid its citizens and resident corporations from investing in or trading with multinational corporations which have affiliates or subsidiaries in South Africa. But under the Supreme Court's market participant exception to the commerce clause, a state would be free to pass laws forbidding investment of the state's pension funds in companies that do business with South Africa, or rules requiring that purchases of goods and services by and for the state government be made only from companies that have divested themselves of South African commercial involvement.

Id. at 469.

78. 467 U.S. 82 (1984).
79. *Id.* at 85-86 n.4.
80. *Id.* at 85-86.
81. *Id.* at 99.
82. *Id.* at 95 (quoting *Alexandria Scrap*, 426 U.S. at 794).
83. *Id.*
84. *Id.* at 96 (quoting *Reeves*, 447 U.S. at 438 n.9).
85. *Id.* (quoting *Reeves*, 447 U.S. at 443-444).

not violate the commerce clause because it fit within the market-participant doctrine. The court defined the market-participant doctrine as protecting states "when they are acting as parties to a commercial transaction rather than . . . [when] they are acting as market regulators."[86] The *Trojan* court bypassed the suggested limitation on foreign commerce under the market-participant doctrine by noting the Supreme Court's "rule that State restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny."[87] Then, the *Trojan* court held that the Pennsylvania statute survived "even the most searching review."[88]

The *Trojan* court gleaned from *Japan Line, Ltd. v. County of Los Angeles*[89] "two concerns that underlie the application of a more probing analysis to state statutes that affect foreign commerce."[90] The *Trojan* court listed these two concerns: 1) "the danger of multiple taxation," and 2) "state enactments may 'impair federal uniformity in an area where federal uniformity is essential.'"[91] The court concluded that the first concern was "not implicated by the Steel Act."[92] Also, the *Trojan* court concluded that the second concern about impairing federal uniformity was not a problem with state procurement practices since "reconciling conflicting policy among multiple national sovereigns" was not the kind of area where federal uniformity was essential.[93]

However, we need to look at the language used in *Japan Line* to describe the unanimity principle:

> [A] state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is preeminently a matter of national concern. 'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power . . .' Although the Constitution, Art. 1, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the

86. 916 F.2d at 910.
87. *Id.* at 912 (quoting *Wunnicke*, 467 U.S. at 100).
88. *Id.*
89. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).
90. 916 F.2d at 912.
91. *Id.*
92. *Id.*
93. *Id.*

> scope of the foreign commerce power to be the greater. Cases of this Court, stressing the need for uniformity in treaties with other nations, echo this distinction. In approving state taxes on the instrumentalities of interstate commerce, the Court consistently has distinguished oceangoing traffic . . . [T]hese cases reflect an awareness that the taxation of foreign commerce may necessitate a uniform national rule . . . . Finally, in discussing the Import-Export Clause, this court, in *Michelin Tire Corp. v. Wages* . . . spoke of the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.' The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign nations' under the Commerce Clause.[94]

The *Japan Line* court suggested that the negative implications of the foreign commerce clause should be subjected to the unanimity principle, and that the states in the area of foreign commerce are limited if the state enactment "may impair federal uniformity in an area where federal uniformity is essential."[95] One commentator suggested that this principle would apply to buy-American statutes, and noted that this principle "raises an interesting question as to the effect of this essentially novel commerce clause principle in a possible constitutional test of state Buy-American statutes."[96]

However, the *Trojan* court reasoned that the unanimity principle did not apply to the Pennsylvania Steel Act because there are "no problems of reconciling conflicting policy among multiple national sovereigns."[97] Since the Supreme Court has not addressed the issue of whether the unanimity principle applies to state government procurement practices, it is not clear how the Court would rule. But it is clear that the federal government has the power to regulate foreign commerce and could preempt the state government procurement practices and statutes by passing legislation or making agreements explicitly proscribing state buy-American statutes.

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94. 441 U.S. at 448-49 (quoting Board of Trustees v. United States, 289 U.S. 48, 59 (1933) and Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

95. *Id.*

96. Kenworthy, *supra* note 11, at 15-16.

97. 916 F.2d at 912.

B. *Foreign Affairs Power*

Next, the *Trojan* court looked at the effect of the foreign affairs power on the Pennsylvania Steel Act.[98] A commentator noted:

> Foreign relations are national relations. The language, the spirit and the history of the Constitution deny the States authority to participate in foreign affairs, and its construction by the courts has steadily reduced the ways in which the States can affect American foreign relations. And yet, despite many light, flat statements to the contrary, the foreign relations of the United States are not in fact wholly insulated from the States, are not conducted exactly as though the United States were a unitary state.[99]

The Constitution explicitly denies the states powers over foreign affairs in Article I, § 10. It provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
>
> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.
>
> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded or in such imminent Danger as will not admit of delay.[100]

This constitutional list clearly restricts the states' involvement in the area of foreign affairs, including the making of treaties.[101]

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98. *Id.* at 912-13.

99. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 228 (1972).

100. U.S. CONST. art. I, § 10. *See also* HENKIN, *supra* note 99, at 228-34.

101. *See* U.S. CONST. art. II, § 2. This section provides that the president "shall

In addition to this constitutional list, the Supreme Court in *United States v. Pink*[102] held that the power over foreign affairs is vested in the federal government exclusively.[103] The *Pink* case dealt with the Litvinov Assignment, an executive agreement which arose out of the United States' diplomatic recognition of the Soviet Union.[104]

The Litvinov Assignment's main purpose was to settle outstanding American claims against the Soviet Union by assigning all Soviet interests in the assets of a Russian insurance company located in New York to the United States government. The state of New York refused to enforce the Litvinov Assignment because the Assignment was based on foreign law that ran counter to the public policy of the forum.[105] The Supreme Court held:

> No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts. For such reasons, Mr. Justice Sutherland stated in *United States v. Belmont* . . . 'In respect of all international negotiations and compacts, and

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have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." *Id.*; U.S. CONST. art. I, § 10. This section expressly prohibits the states from making treaties. It provides, "No State shall enter into any Treaty, Alliance, or Confederation . . . ." *Id.* Further, it provides, No State shall, without the Consent of Congress, enter into any Agreement or Compact with . . . a foreign Power . . . ." *Id.*; U.S. CONST. art. VI, cl. 2. This clause provides for the scope of the treaty power as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

From this text, it is clear that treaties entered into by the United States are "supreme Law of the Land" and preempt contrary state law. *See also* Missouri v. Holland, 252 U.S. 416 (1920); Reid v. Covert, 354 U.S. 1 (1957).

102. United States v. Pink, 315 U.S. 203 (1941).

103. *Id.* at 233-34.

104. *Id.* at 211.

105. *Id.* at 231.

> in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.'[106]

Thus, the foreign policy doctrine gives the power to make foreign policy to the federal government. This doctrine is not based on explicit words in the Constitution; rather, it is based on the structure of the federal system.

In *Zschernig v. Miller*,[107] the Supreme Court explicitly uses a structural analysis of the federal government to support its position that an Oregon probate statute was unconstitutional. The Oregon statute provided that a foreign heir's claims from an Oregon decedent for real or personal property would escheat unless the foreign claimant can carry his burden of proving three requirements: 1) there is a reciprocal right for United States heirs to take property from estates in the foreign country; 2) Americans are assured the right to receive payment from estates in the foreign country; and 3) the citizens of the foreign country have the right to receive the proceeds of the estate without confiscation.[108] The Court held that the Oregon statute was unconstitutional because "the history and operation of this Oregon statute make clear that . . . [the statute] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[109] Further, the Court stated that the statute "seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own."[110] The Court concluded: "The present Oregon law is not as gross an intrusion in the federal domain as . . . others might be. Yet . . . it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."[111]

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106. *Id.* at 233-34 (quoting United States v. Belmont, 301 U.S. 324, 331 (1937)). *See also* NOWAK & ROTUNDA, *supra* note 76, § 6.9 at 217. Nowak and Rotunda stated: "*Pink* merely reaffirmed the president's ability to enter into agreements which would override state law, provided the agreement itself did not violate any provision of the Bill of Rights." *Id.*

107. Zschernig v. Miller, 389 U.S. 429 (1968).

108. *Id.* at 430-31.

109. *Id.* at 432. *See* Tribe, *supra* note 76, § 4-6 at 230. Tribe stated "It follows that all state action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional infringement upon an exclusively federal sphere of responsibility." *Id.*

110. *Zschernig*, 389 U.S. at 440.

111. *Id.* at 441. *See* Harold G. Maier, *Preemption of State Law: A Recommended*

Justice Stewart's concurrence clearly based the result of the case on the structure of the federal system of government.[112] Justice Stewart stated:

> We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government not to the probate courts of the several States.[113]

The question is whether the states have any power in areas that have an effect on foreign affairs.[114] The *Zschernig* court indicated that the

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Analysis, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 126 (Louis Henkin et al. eds, 1990). Maier commented on *Zschernig*:

> In a murky opinion by Justice Douglas, the Court found the Oregon statute unconstitutional "as applied." Justice Douglas based his opinion on what careful analysis reveals to be three alternative grounds. He found that the statute had a "direct" adverse effect on foreign relations, that it had a general potential for creating diplomatic embarrassment for the national Government and that the reciprocity and benefit-and-use requirements made criticism of foreign governments by state courts unavoidable. No one of these conclusions is effectively supported by the facts in the *Zschernig* case. There was no showing of an adverse effect on relations with East Germany and no evidence of overt or implicit criticism of the East German Government by any of the Oregon courts; and the U.S. Department of State submitted a statement that such statutes did not interfere with the conduct of foreign policy. *Id.* at 230.

112. 389 U.S. at 441-43.

113. *Id.* at 443.

114. *See* Maier, *supra* note 111, at 131. Maier noted:

> *Zschernig* is the last major pronouncement by the U.S. Supreme Court on federal preemption of state law in the foreign affairs field that is based on structural analysis. The case should not be taken, however, as a statement that all state laws or decisions that may have foreign affairs implications are necessarily unconstitutional. All the cases dealing with this issue recognize the continuing role of the concept of federalism in appropriately dividing governmental decision-making authority.
>
> The principle of federalism echoes a fundamental principle of democracy: that governmental decisions made at the local level are more likely to reflect the will of the people most directly affected by them. As long as the United States continues to exist as a federal nation, decisions in cases involving

states' power is limited by the very nature of the federal structure of government. One commentator noted that "deciding whether a state action is preempted by the national power over foreign affairs requires determining whether the values of local self-government inherent in the federal structure are appropriately given effect in the circumstances of the case."[115]

The *Trojan* court held that the Pennsylvania Steel Act was not preempted by the foreign affairs power of the federal government. The *Trojan* court reasoned:

> The Pennsylvania statute exhibits none of the dangers attendant on the statute reviewed in *Zschernig*, for Pennsylvania's statute provides no opportunity for state administrative officials or judges to comment on, let alone key their decisions to, the nature of foreign regimes. On its face the statute applies to steel from any foreign source, without respect to whether the source country might be considered friend or foe. Nor is there any indication from the record that the statute has been selectively applied according to the foreign policy attitudes of Commonwealth courts or the Commonwealth's Attorney General.[116]

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possible state intrusion into foreign affairs must continue to strike an appropriate balance between preservation of the values of local self-government and the need for national uniformity in matters of international affairs. *Id.*

See also HENKIN, *supra* note 99, at 241. Henkin suggested:

> The *Zschernig* doctrine does not, of course, substitute the judgment of the federal courts for that of the federal political branches; it asserts only the authority of the courts to strike down state acts when the political branches have not acted. In the Commerce Clause cases . . . the Court recognized the right of Congress to permit burdens on commerce which would have been invalid had Congress not spoken. While in *Zschernig* the Court seemed to hold that a communication expressing State Department toleration of the Oregon law was not enough to validate it, it was perhaps resisting *ad hoc* direction to the courts in particular cases. It is difficult to believe that the Court would find constitutionally intolerable state intrusions on the conduct of foreign relations which the political branches formally approve or tolerate. Domestic considerations apart, there might be foreign relations reasons why the political branches might deem it desirable to leave some matters to the States rather than deal with them by formal federal action. *Id.*

115. Maier, *supra* note 111, at 131. Maier suggested that buy-American statutes are an area where national and local concerns compete.

116. 916 F.2d at 913.

Moreover, the *Trojan* court noted that Congress could preempt sub-national government procurement restrictions through federal legislation but has taken no steps to do so.[117]

It is clear that the national government has the exclusive power to deal with foreign affairs. However, there are instances where the states and the national government have overlapping authority. In these instances, the states are permitted to pass legislation that has an impact on foreign affairs, so long as the states are not having a "direct impact upon foreign relations" and the impact of the state legislation does not "adversely affect the power of the central government to deal with those problems."[118] Buy-American statutes do have a direct impact on the foreign relations of the United States. Also, buy-American statutes may have an adverse effect on the power of the central government to deal with problems that may arise in the area of free and fair trade. However, the states' power to regulate their own government procurement practices is a local concern that must be balanced against the national interest promoting free trade. Perhaps the national government has not preempted the states' buy-American legislation as a means to promote a fair and reciprocal agreement between nations in the area of sub-national government procurement. To preempt state legislation at this point may be counterproductive in the negotiating process of GATT and NAFTA.

VI. THE CANADIAN CONSTITUTION AND FEDERALISM

Unlike the United States Constitution, the Canadian Constitution is not a single document. The Constitution of Canada is defined in the Constitution Act, 1982:

> 52.(2) The Constitution of Canada includes
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> (a) the Canada Act 1982, including this Act;
>
> (b) the Acts and orders referred to in the schedule; and
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> (c) any amendment to any Act or order referred to in paragraph (a) or (b).[119]

The supremacy clause of the Constitution of Canada provides as follows:

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions

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117. *Id.* at 913-14.

118. *Zschernig,* 389 U.S. at 441.

119. CAN. CONST. (Constitution Act, 1982) pt. VII, (General), § 52(2)(describing the primacy of the Constitution of Canada).

> of the Constitution is, to the extent of the inconsistency, of no force or effect.[120]

The supremacy of the Constitution of Canada is the foundation for their federal system of government, and "gives priority to the 'Constitution of Canada' where it is inconsistent with other laws."[121] The pertinent question for the analysis here is whether the provincial governments of Canada have power under their federal system over foreign trade and commerce, as well as in the areas of treaty-making or foreign affairs. If so, the question becomes whether the central government of Canada has the power to require the provincial governments to conform to agreements made between the Canadian government and the United States.

A. *Trade and Commerce Power and the Property and Civil Rights Power*[122]

Section 91(2) of the Constitution of Canada provides for the distribution of the federal legislative power of Parliament:

> [I]t is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—
> 2. The Regulation of Trade and Commerce.[123]

However, the federal power over trade and commerce comes into conflict with the express provincial legislative power:

> 92. In each province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of

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120. *Id.* at § 52(1).

121. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 96 (2d ed. 1985).

122. *Id.* at 455. Hogg noted that civil rights in the context of "property and civil rights"

> does not bear the meaning which it has acquired in the United States, that is, as meaning the civil liberties which in that country are guaranteed by the Bill of Rights. Civil rights in the sense required by the Constitution Act, 1867 are juristically distinct from civil liberties. The civil rights referred to in the Constitution Act, 1867 comprise primarily proprietary, contractual or tortious rights; these rights exist when a legal rule stipulates that in certain circumstances one person is entitled to something from another. But civil liberties exist when there is an absence of legal rules: whatever is not forbidden is a civil liberty. *Id.* at 455.

123. CAN. CONST. (Constitution Act, 1867) pt. VI (Distribution of Legislative Power), § 91(2)(describing the legislative authority of parliament of Canada).

> Subjects next hereinafter enumerated; that is to say,—
> 13. Property and Civil Rights in the Province.[124]

In *Citizens Insurance Co. v. Parsons,*[125] the Privy Council[126] discussed the relationship between the federal power over the regulation of trade and commerce and the provincial power over property and civil rights. The issue presented was whether a provincial statute was valid that prescribed conditions to be included in all fire insurance policies.[127] Specifically, the respondent was concerned with whether the provincial statute in question "had relation to matters coming within the class of subjects described in No. 13 of sect. 92, viz., 'Property and civil rights in the province.'"[128]

The Privy Council held that the "Act in question is valid."[129] The Privy Council reasoned that the words "regulation and trade"

> would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.[130]

The Privy Council continued:

> It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over

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124. *Id.* at § 92(13).

125. Citizens' Ins. Co. v. Parsons, [1881] 8 App. Cas. 406 (P.C. 1880)(appeal taken from Can.).

126. HOGG, *supra* note 121, at 4. Hogg described the Judicial Committee of the Privy Council in England as the final appellate authority for British North America. After Canada was granted independent national status, the framers were content to leave the appellate authority in the British hands of the Privy Council. Hogg noted, "When the Supreme Court of Canada was established in 1875, it was established by an ordinary federal statute, and the right of appeal to the Privy Council was retained; the abolition of Privy Council appeals did not occur finally until 1949." *Id.* at 4.

127. *Parsons*, [1881] 8 App. Cas. at 422.

128. *Id.*

129. *Id.* at 432.

130. *Id.* at 426.

> property and civil rights assigned to the legislature of Ontario . . . .[131]

Therefore, it has been generally held since the *Parsons* case that the provinces have power over intraprovincial trade and commerce under their constitutionally granted power over "property and civil rights."[132] The federal power over trade and commerce has been limited to the areas of international and interprovincial trade, and general regulation of trade "affecting the whole Dominion."[133]

In *Dominion Stores v. The Queen,*[134] the Supreme Court of Canada held that Part I of the federal Canada Agricultural Products Standards Act[135] was inapplicable to the completely intraprovincial events under which this case was brought.[136] The federal Act sought to establish grading plans for agricultural products. Part I outlined a plan that, "so far as it applies within a Province, is voluntary in the sense that the strictures of the statute do not apply unless and until the products in question are offered for sale under a grade name prescribed pursuant to the statute."[137] Part II was a compulsory plan for international and interprovincial trade requiring products in international and interprovincial trade to conform to the statute's grading standards.[138]

The voluntary provincial plan of the federal statute is complicated by the fact that Ontario had a statute that required grading of farm products that applied grade names to apples that were the same as the names used under the federal statute. So, the farmer, meeting the requirements of the Ontario statute, must conform to the standards of the federal statute. Thus, any of his products that were sold intraprovincially were subject to federal regulation under the trade and commerce power.[139]

The Court held that Part I of the federal statute was an invalid attempt of the federal government to regulate local trade under its power to regulate trade and commerce.[140] However, Part II of the

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131. *Id.* at 426-27.

132. *See* CAN. CONST. (Constitution Act, 1867) pt. VI (Distribution of Legislative Powers), § 92(13)(describing the subjects of exclusive Provincial legislation).

133. *Parsons,* [1881] 8 App. Cas. at 426.

134. Dominion Stores Limited v. The Queen, 106 D.L.R.3d 581 (1979)(Can.).

135. Canada Agricultural Products Standards Act, R.S.C., ch. A-8 (1970)(Can.).

136. 106 D.L.R.3d at 598 (1979)(Can.).

137. *Id.* at 592.

138. *Id.* at 591.

139. *Id.* at 592.

140. *Id.* at 598-99.

federal statute was valid federal legislation of international and interprovincial trade. The Supreme Court reasoned that Part I of the federal statute was the "regulation of local as well as interprovincial and international marketing . . . ."[141] The Court continued:

> [t]he statute . . . requires provincial participation in order to make the application of the federal statute inevitable in local trade. The true nature, the pith and substance, of the federal programme is exposed by the circumstances and context in which it was enacted and now enforced. The presence of the provincial Act did not of itself invalidate the federal action, but it forms part of the surroundings to be scrutinized in discerning the substantive core of the federal legislation.[142]

Hence, the Court held that the provinces had power to control "purely intraprovincial transactions," even if the province's control over the intraprovincial transaction might have an impact on international or interprovincial transactions.[143] By contrast, the United States' commerce power gives the federal government the power to control any state activity or transaction that has an "affect" on interstate or international trade. The United States courts only need to inquire whether Congress' determination that an activity affects interstate commerce has a rational basis.[144]

Further, the analysis suggested by the court in the *Dominion Stores* case interpreted the trade and commerce power as only a federal power over international and interprovincial transactions. This interpretation suggested that "purely intraprovincial transactions" are not a matter with which the federal parliament may interfere. Thus, the division of federal and provincial power in the area of trade and commerce gives the federal government power if the transaction is interprovincial or international and is not related to "purely intraprovincial transactions."

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141. *Id.* at 595.

142. *Id.*

143. *Id.* at 598-99.

144. *See* Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264, 277 (1980)(holding that when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational).

Justice Rehnquist concurred with the result in the case, but criticized the majority's statement of the test. He stated:

> In my view, the Court misstates the test. As noted above, it has long been established that the commerce power does not reach activity which merely "affects" interstate commerce. There must instead be a showing that regulated activity has a *substantial effect* on that commerce. *Id.* at 312.

If a transaction is "purely intraprovincial," then the federal government cannot interfere with the transaction and the Provinces have the power to regulate the transaction despite the possibility of whether the transaction may have an impact on international or interprovincial transactions.

In addition, the *Trojan* court suggested that the "Canadian provinces may enjoy rights similar to those accorded states under the market participant . . . doctrine."[145] Section 92(5) of the Constitution Act of 1867 provides:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-
>
> 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.[146]

An Ontario case, *Smylie v. The Queen,*[147] based its decision on section 92(5) of the British North American Act. In *Smylie,* a timber harvester had been granted a license to harvest from provincial lands. Then, the provincial legislature passed an Act that required any timber harvester taking timber from provincial land to process the timber in Canada before the timber could be exported.[148] The timber harvester argued that this condition on the exportation of timber interfered with the trade and commerce power of the federal legislature under section 91(2) of the British North American Act.[149] The *Smylie* court held that the timber harvester must comply with the exportation condition that the provincial legislature had imposed on licenses that it sold. The court rejected the timber harvester's argument on the grounds that the provincial legislature had the power to dictate how it disposed of its property under section 92(5) of the British North American Act.[150] The court reasoned that the

> Provincial Legislature in passing this Act are dealing with property belonging to the Province, over which they have the fullest power of control. They are entitled to sell it or to refuse to sell it; and if they sell, they have the right, in my opinion,

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145. 916 F.2d at 907 n.6.

146. CAN. CONST. (Constitution Act, 1867) pt. VI (Distribution of Legislative Powers), § 92(5)(describing the subjects of exclusive Provincial legislation).

147. Smylie v. The Queen, 31 O.R. 202, 222-23 (1900)(Ontario).

148. *Id.* at 213.

149. *Id.* at 220.

150. *Id.* at 222-23.

> to impose upon the purchaser such conditions as they deem proper with regard to the destination of the timber after it is cut, including the state in which it shall be exported, just as they have the right in selling cattle from the farm at their Agricultural College to stipulate that the purchaser shall not export them alive. The condition that the timber shall be sawn into lumber before exportation in the one case no doubt reduces the quantity of logs exported, just as the supposed stipulation in the other case reduces the quantity of live cattle exported, but in each case the matter is one purely of internal regulation and management by the Province of its own property, for the benefit of its own inhabitants.[151]

Thus, the *Smylie* decision gives the provincial legislature wide latitude when it is acting as the proprietor in disposing of its own property.[152]

B. *Treaty Power*

Section 132 of the Constitution Act, 1867 provides for the treaty power of the Canadian government. It provides:

> 132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.[153]

The language of section 132 explicitly gives the federal Parliament the power to make legislation that would give force to treaties. However,

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151. *Id.* at 222.

152. *See* HOGG, *supra* note 121, at 570. Hogg noted:

> Section 92(5) of the Constitution Act, 1867 confers the power to make laws in relation to "the management and sale of the public lands belonging to the province and of the timber and wood thereon". The general legislative power over "property and civil rights in the province," among its many functions, gives power over provincially-owned property which is not covered by s. 92(5), for example, personal property. These legislative powers over public property enable the provincial Legislature to act like a private proprietor in disposing of the province's own property. This means provincial Legislature may legislate terms as to the use or sale of provincial property which it could not legislate in other contexts, for example, a stipulation that timber be processed in Canada, or that no Chinese or Japanese labour be employed in cutting timber. *Id.*

153. CAN. CONST. (Constitution Act, 1867) pt. IX (Miscellaneous Provisions), § 132 (describing treaty obligations).

these treaties are to be made between the British Empire and other foreign countries.[154] This unusual constitutional provision is a result of the gradual evolution of Canada from a colony of the British Empire to a fully, independent nation.[155] As a result of this unusual provision and the unforeseen position of Canada in the international community, it is uncertain what powers the federal Parliament has in the area of treaty-making and enforcement. Also, it is uncertain what powers the provincial Parliaments have in these areas.

One Canadian commentator noted that once Canada attained "international personality independent of support from or subservience to Great Britain," section 132 became obsolete.[156] The question of what effect section 132 had in the foreign affairs of Canada was addressed in the *Labour Conventions* case.[157] In the *Labour Conventions* case, the federal government of Canada had adopted conventions as a member of the International Labour Organization of the League of Nations.[158] The conventions dealt with limiting working hours of employees in industrial activity, creating minimum wages, and requiring a weekly rest for employees.[159] Then, three statutes were passed by the federal Parliament to enforce the conventions.[160] The question that was presented to the Privy Council was whether the treaty entered by the federal government of Canada was properly enacted by the federal

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154. *See* HOGG, *supra* note 121, at 249. Hogg explained:

> [I]n 1867 the conduct of international affairs for the entire Empire was still firmly vested in the British (imperial) government, and it was the British government which negotiated, signed and ratified all treaties which applied to the Empire or to any part of the Empire. The treaties were then submitted to the colonial governors for implementation in their colonies. The framers of the Constitution Act, 1867 assumed correctly that the international obligations of the new Dominion of Canada would also be created by the imperial government in Britain. Accordingly, the Constitution Act, 1867 was silent as to the power to make treaties, and contemplated the performance only of "Empire" treaties. *Id.*

155. *See id.* at 249-250.

156. ALBERT S. ABEL, LASKIN'S CANADIAN CONSTITUTIONAL LAW 218 (4th ed. 1973).

157. A.-G. Can. v. A.-G. Ont., 1 D.L.R. 673 (1937)(Can.). *See* HOGG, *supra* note 121, at 250. Hogg stated: "Once Canada had obtained the power to conclude treaties on its own behalf, the question arose whether s. 132, with its reference to 'Empire' treaties, could be interpreted as conferring power to implement Canadian treaties." *Id.*

158. *Id.* at 673.

159. *Id.* at 677.

160. *Id.* at 678.

legislature or whether the obligations of the treaty were in the area exclusively assigned to the provincial legislature under section 92(13) of the Constitution, viz., Property and Civil Rights in the Province.[161]

The Privy Council held that the federal statutes were invalid. The Council reasoned:

> For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions probably the most essential condition, in the inter-provincial compact . . . .[162]

The Council continued:

> It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by provincial parliaments need only agree with a foreign country to enact such legislation: and its Parliament would be forthwith clothed with authority to affect provincial rights to the full extent of such agreement. Such result would appear to undermine the constitutional safeguards of provincial constitutional autonomy.[163]

Hence, the Council held that the provincial parliament had the authority to enact legislation in the area of labor under its power within the class of subjects "property and civil rights in the province."[164]

Despite other options available for Canada to make international agreements,[165] "the *Labour Conventions* decision has impaired Canada's

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161. *Id.* at 674.

162. *Id.* at 681-82.

163. *Id.* at 682.

164. *See* HOGG, *supra* note 121, at 252. Hogg criticized the result. He suggested that even if section 132 is no longer literally applicable to modern treaties, it "shows by its very existence that treaty legislation is a distinct constitutional 'matter' or 'value' under the power-distributing provisions of the Constitution, and that it is no part of provincial legislative power." *Id.*

165. *See id.* at 253. Hogg suggested the following options:

> The federal government can consult with the provinces before assuming treaty obligations which would require provincial implementation, and if

capacity to play a full role in international affairs . . . ."[166] Thus, the *Trojan* court's concern about the possibility of achieving reciprocal agreement between the United States and Canada in the area of subnational government agreement is well-founded,[167] since the federal Canadian government may not have adequate power to enforce such an agreement without consent of the provincial Parliaments, and subnational government procurement could fall within one of the enumerated classes of provincial power.[168]

VII. CONCLUSION: RECIPROCITY AND THE "NEXT LOGICAL STEP" IN FAIR TRADE

Miller recommended that "[t]he United States should take the next logical step and enter into a trade agreement which includes state government procurement."[169] Further, he stated: "Such an agreement should be reciprocal, and offer benefits to United States industry commensurate with those given by free access to United States state procurement market."[170] Moreover, he noted: "If the United States negotiates an agreement which includes state procurement, it will preempt state buy-American legislation."[171] By contrast, the *Trojan* court observed that

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all provinces (or all affected provinces) agree to implement a particular treaty, then Canada can adhere to the treaty without reservation. Even where prior provincial consent has not been obtained, Canada may feel free to adhere to a treaty because it includes a "federal state Clause"; under such a clause a federal state undertakes to perform only those obligations which are within central executive or legislative competence, and undertakes merely to bring to the notice of the provinces (or states or cantons), "with favourable recommendation" for action, those obligations which are within regional competence. Another device which enables a federal state to adhere to a treaty upon a subject matter outside central legislative competence is a "reservation"; upon the ratification of the treaty, if it contains no federal state clause, and if provincial agreement has not been obtained, the federal state may add a reservation in respect of obligations within provincial competence, which will make clear that the federal state is not binding itself to those obligations. *Id.*

166. *Id.*

167. 916 F.2d at 907 n.6.

168. *See* CAN. CONST. (Constitution Act, 1867) pt. VI (Distribution of Legislative Powers), § 92 (describing subjects of exclusive Provincial legislation).

169. Miller, *supra* note 11, at 161.

170. *Id.* at 163.

171. *Id.* at 166.

> achieving United States-Canadian reciprocity in sub-national government procurement may require more than national legislation. While it is clear that on the United States' side, Congress would have authority to act preemptively in this area as an exercise of its power over foreign commerce, it is not at all clear that the Canadian Parliament has cognate authority.[172]

Both Miller and the *Trojan* court recognized the need for reciprocity in order to develop fair trade between Canada and the United States in the area of sub-national government procurement.

However, the need for reciprocity may be a stumbling block to achieving free and fair trade in the area of sub-national government procurement. As the above discussion has suggested, the framework of the American brand of federalism under its Constitution gives agreements entered by the federal government supremacy over state statutes and regulations. The discussion of the Canadian brand of federalism under its Constitution has made it clear that the same relationship is not true between the federal government of Canada and the Provincial governments. Indeed, the Canadian brand of federalism gives the Provincial governments power over parts of international agreements that fall within the enumerated provincial power outlined in section 92 of the Canadian Constitution.

Promoting free trade within the international community may have many economic benefits. However, achieving fair trade requires an understanding of how other systems of government work. The United States and Canada are close trading partners and both have federal systems of government. Despite these similarities, there are differences that require thought and analysis before binding sub-national governments to international agreements.

The "next logical step" may be for the United States to enter into an agreement with Canada to open up sub-national government procurement between the two nations. However, this "next logical step" may become a stumbling block to the creation of free and fair trade between the two North American federations. Instead of calling for the opening up of sub-national government procurement at this time, government procurement at the federal level should be scrutinized and there should continue to be an expansion of the list of federal

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172. 916 F.2d at 907 n.6.

agencies and organizations which are included in international agreements.

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Snuffing Out A National Symbol What The United States Can Learn From France's New No-Smoking Law

I. Introduction

For many French citizens, the cigarette is as much a national symbol as the baguette or beret. Since tobacco first appeared on the scene[1], the French have been able to puff away at will in cafés, restaurants, and in virtually any other place they have desired. However, on November 1, 1992, this changed.[2] On that ill-fated day for smokers, the French government introduced a comprehensive national law that, for the first time, told people in France when and where they could light up. This Note will analyze the new French law, why it was enacted, and whether it has a chance to succeed. This discussion will then cross the Atlantic and compare the French law to smoking regulations in four jurisdictions in the United States to discover what restrictions exist on smoking at the federal level in this country and to analyze whether the United States will ever adopt a national no-smoking law similar to that enacted in France.

II. The French Reaction

Smoking in France is a national pastime. More than 40% of French citizens smoke[3], one of the highest rates in Europe,[4] and 60%

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1. David W. Opderbeck, *Blowin' In The Wind: A Federal Answer to Environmental Tobbacco Smoke*, 15 Seton Hall Leg. J. 231 (1991).

2. Code de la Sante Publique ("Code of Public Health"). Partie Reglementaire. ("Regulation Section") ART. R. §355-28-1 Nouveau, Decret # 92-478 du 29 mai 1992. Art. 17. [hereinafter "French Statute"] (LEXIS, Intlaw Library, Frcode File) (unofficial translation by Deborah Levin):

> I. To be inserted into the code of Public Health (Second part: Decrees in The Council of State) book III entitled: "The Struggle Against Social Problems"
>
> II. The Title VIII of this book to be entitled: "The Struggle Against Addiction to Smoking" and includes a first chapter entitled: Ban on Smoking in places assigned a collective use
>
> III. Articles 1 to 9 and 11 to 14 of the present decree become respectively articles R. 355-28-1 to R. 355-28-13 of the public health code.
>
> Art. 1. The ban on smoking in places assigned a collective use by article 16 of the aforementioned law of July 9, 1976 shall apply in all closed and covered places accommodating the public or which constitute places of work.

3. Helen Evans, *French Plan to Ban Smoking in Public Places*, United Press Int'l,

of all 18-year olds in France are smokers.[5] Even more shocking is the fact that 10% of all smokers in France are under the age of twelve.[6]

A. *The Cost of Smoking*

More than 61,000 French citizens die from smoking-related ailments every year, which is approximately as many people as live in the seaside town of Cannes.[7] French health officials fear that if something is not done to curb the health habits of French citizens, smoking-related deaths will more than double to 135,000, by the year 2010.[8]

Smoking-related deaths are not unique to France. Annually, more than 3 million people around the world die from smoking-related ailments,[9] while in 1992, 700,000 will die in Europe alone.[10] Officials from the World Health Organization fear that unless smoking habits are changed and stringent anti-smoking regulations are imposed worldwide, 250 million people will have died from smoking by the year 2025.[11]

French officials say that their concern with curbing the nicotine habit is partially motivated by economics. Studies show that smoking costs the French $8.8 billion in health care and $2.6 billion in lost production annually, for a total social cost of $11.4 billion.[12] Arguably, these statistics motivated French lawmakers to draft the nation's first smoking regulations. Although just 700 people died in France last year from causes directly related to second-hand smoke,[13] officials say a major purpose in the law is to protect the 60% of non-smoking French citizens from the dangers of "passive smoke."[14]

May 31, 1992 (LEXIS, Nexis Library, Omni File). The smoking rate is shockingly high among women. Nearly two out of every three women smoke in France and the proportion of women who smoke more than one pack a day has doubled in the past five years from 6% to 12%. *Id.* This trend shows no signs of abating.

4. *Id.*

5. *Id.*

6. Judson Gooding, *An Ambivalent War Against Smoking*, THE ATLANTIC, June 1992, at 51.

7. *Id.* at 50.

8. Evans, *supra* note 3.

9. *Id.*

10. *Id.*

11. *Id.*

12. Gooding, *supra* note 6, at 50.

13. Evans, *supra* note 3.

14. Alan Raybould, *Stubbed-Out Gauloises May Ignite Workplace War*, October 21, 1992 (LEXIS, World Library, Txtnws File).

B. *Law Seeks to Limit Smoking*

On May 30, 1992, French lawmakers added a new chapter to their public health code, entitled "The Struggle Against Addiction to Smoking."[15] The law went into effect on November 1, 1992. The law affects the entire nation and regulates smoking in all public areas and in the workplace. The law bans smoking in all enclosed public places[16] and orders business owners to create a "fumoir" or "smoking room" where all their smoking patrons or employees may continue to indulge in their habit while minimizing the effect on non-smokers.[17] The law also restricts smoking on domestic airplane flights that last more than two hours and completely bans smoking on flights shorter than two hours.[18] The law also restricts smoking on board all commercial ships and on other forms of river transportation.[19] Smoking is completely

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15. *French Statute*, *supra* note 2.

16. *French Statute*, *supra* note 2, at Art. 4:

Art. 4. - I. Under reservation of the application of the following articles; in the establishments mentioned in articles L. 231-1 and L. 231-1 of the work code, it is forbidden to smoke in closed and covered premises assigned to the totality of the workforce, to include reception areas and areas used for collective dining, meeting and training rooms, relaxation rooms, areas reserved for leisure activities, cultural activities, and sports activities, sanitary and medically sanitary areas.

II. The employer shall establish, after consultation of the work doctor, committee of hygiene and security and working conditions, or in place of this, delegated personnel:

a) For the areas the above-mentioned I., an arrangement drawing of places which can be if the case arises reserved especially for smokers

b) For the areas of work other than those envisioned in the above-mentioned I., a drawing of organization or arrangement destined to ensure the protection of non-smokers. This drawing shall be updated as is needed every two years.

17. Suzanne Lowry, *Will the Smoking Dog Kick the Habit?*, THE DAILY TELEGRAPH, (London) October 9, 1992, at 17. *See also Departures: 'Non' smoking*, THE INDEPENDENT, (London), January 9, 1993, at 42. Air France recently took the new law one step further by making all of its international flights less than two hours smoke-free. A recent survey indicated that 71% of French fliers found the new law "acceptable" while 91% of fliers believed it was possible to refrain from smoking for one to two hours. *Id.*

18. *French Statute*, *supra* note 2, at Art. 11:

Art. 11. In commercial French aircraft or those aircraft incompliance with French regulations, with the exception of domestic flights of a duration of less than two hours, spaces can be reserved for smokers under the condition that the placement of these spaces will ensure the protection of non-smokers.

19. *French Statute*, *supra* note 2, Art. 12:

banned in all Metro stations.[20] The law allows for "fumoirs" to be put in all public schools, but restricts access to anyone under sixteen.[21] Thus, this provision effectively bans smoking in all French public schools.

1. *Ventilation Requirements Imposed*

Locations that choose to continue to allow smoking must abide by the law's minimum ventilation requirement, which regulates the amount of fresh air that must be circulated throughout the entire enclosed space where smoking is permitted.[22] The law specifically sets out a requirement of seven liters per second and per person for the premises if smoking is allowed in the building; it also states that seven cubic meters of fresh air should be circulated per occupant irrespective of whether that person is a smoker.[23] The law further requires all public places to contain

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Art. 12. On board commercial ships and river transportation boats including stationary boats receiving the public which are in compliance with French regulations on organization of spaces, possibly adjustable can be envisioned in order to put spaces at the disposal of smokers, in the limit of 30 per 100 of rooms.

20. Daphne Angles, *France is set to put curbs on smokers*, THE NEW YORK TIMES, Oct. 25, 1992, §5 at 3.

21. *French Statute*, *supra* note 2, at Art. 8:

Art. 8. In the enclosure of public and private teaching establishments as well as all premises used for teaching, specific rooms, separate from rooms reserved for teachers can be placed at the disposal of non-smoking teachers and staff.

Moreover, in the enclosure of high schools when these places are distinct from those middle schools, and in public and private establishments in which are undertaken higher education and professional training, rooms, with the exception of classrooms and meeting rooms can be placed at [the disposal of smokers].

22. *French Statute*, *supra* note 2, at Art. 3:

Art. 3. Without prejudice to the specific arrangements of title II of the present decree, the locations put at the disposal of smokers are to be either specific premises or designated spaces.

These premises or spaces are to respect the following standards:

a) Minimal flow of ventilation of 7 liters per second and per occupant for the premises in which the means of ventilation is ensured by mechanical or natural conduits

b) Minimal volume of 7 cubic meters per occupant, for premises in which ventilation is ensured by exterior openings.

An order made conjointly by the minister of health, if need be, with the competent minister, can establish higher standards for certain premises in function with their conditions of use.

23. *Id.*

signs indicating where smoking is allowed and where it is not.[24] Aside from each workplace in France, this requirement also applies to each cafe, bistro, restaurant, or any other enclosed space open to the public. Hotels and restaurants are free to decide on the dimensions of the smoking area, but they must provide a non-smoking section.[25]

2. *Stiff Fines for Violators*

Although the law may be difficult to enforce in a practical sense, because it would require the presence of police officers in every cafe and restaurant in the nation, the statute does provide for some stiff fines for violators. Anyone who smokes in an area designated as a non-smoking section is subject to a "class three" police fine.[26] A class three fine entails penalties between 600F to 1,300F ($115 - $250).[27]

Fines are much more severe for employers or proprietors who fail to abide by the new law. Anyone who does not create a non-smoking section or provide proper ventilation, or who does not post appropriate and adequate signs reflecting the division between smokers and non-smokers, will be subject to a class five police fine.[28] A class five fine entails penalties from 1,300F to 3,000F ($250 - $575).[29]

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24. *French Statute*, supra note 2, at Art. 6:

Art. 6. A visible sign will recall the principle of the ban on smoking in the areas provided by Article 1 of the present decree and will indicate the areas which are at the disposal of smokers.

25. Angles, *supra* note 20.

26. C. PEN. Art. R. 25 Decr. #85-956 of Sept. 11, 1985.

27. J.O., C. ADM. CONTRAVENTIONS DE POLICE ET PEINES. Chapitre I - Des Peines. Art. R. 25 (Decr. #85-956 du 11 Sept. 1985, art. 3) (unofficial translation by Deborah Levin). Currency exchange rates are based on listings in WALL ST. J., Oct. 29, 1992, §3 at 15.

28. *French Statute*, *supra* note 2 at Art. 14:

Art. 14. To be punished by fine for violations of the third class, whoever shall smoke in one of the places cited by the first article of the present decree, outside of the area made available to smokers

To be punished by fines for violations of the fifth class

a) Whoever does not reserve areas conforming to the provisions of this decree.

b) Whoever does not respect the standards of ventilation provided by article 3 of this decree.

c) Whoever does not put in place a sign provided in article 6 of this decree.

29. J.O., C. ADM. CONTRAVENTIONS DE POLICE ET PEINES. Chapitre II - Contraventions et Peines. Section I. - Premiere Classe. Art. R. 26 (Decr. #90-897 du 1 oct. 1990, art. 21 (unofficial translation by Deborah Levin). Currency exchange rates are based on listings in WALL ST. J., Oct. 29, 1992, §3 at 15.

Enforcement of the new law will certainly be a problem. Although most French citizens support the law,[30] violations are likely to occur because of what smokers call a government intrusion into their way of life. In fact, French officials have already said that they do not intend to send police officers out in the streets to enforce the new law.[31] However, on the Paris Metro, ticket inspectors will be asked to make sure passengers are complying with the new rules.[32]

Despite the public posturing by various special interest groups both for and against the law, initial public reaction has been ambivalent.[33] Many French citizens continue to smoke in the newly created non-smoking sections of cafes and restaurants.[34] Despite the initial resistance, government officials say they still remain firmly committed to the restrictions.[35]

C. *The French Resistance*

Resentment to the new law began even before it went into effect.

1. *Problems at Work*

Employers resent the money they will have to spend reconfiguring their offices and buying ventilation systems.[36] Because the law does not allow workers to be fired for violations, employers are worried that employees may use their smoking habits as excuses for disrupting the office environment, then hide behind the law as protection, claiming that they are being singled out because they are smokers.[37] Labor leaders see the law a little differently. They are already calling it "repressive," because it not only discriminates against smokers, but in their view, gives employers a powerful tool to use against employees by refusing to hire smokers.[38] For its part, the government hopes to avoid a virtual war between smokers and non-smokers and believes the

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30. Evans, *supra* note 3.

31. Angles, *supra* note 20.

32. *Id.*

33. Dana Thomas, *Paris is (Still) Burning; Smokers Snub New French Law,* THE WASH. POST, December 26, 1992, §C at 1.

34. *Id.*

35. *Id.*

36. Raybould, *supra* note 14.

37. *Id.*

38. Elaine Gangley, *French Smokers To Be Curtailed,* THE CALGARY HERALD, October 23, 1992, §A at 13.

law will be able to strike a balance.[39] The government has been stressing the need for what it calls "progressive reforms."[40]

Labor leaders are also concerned that the government's new campaign against tobacco will cost jobs.[41] At least one trade union is predicting a new 30% tax increase on cigarettes will cut consumption by 20%.[42] As proof, the CGT trade union points to a move by government tobacco producer SEITA, made in the wake of the new tax increase, to close three of its plants, thus eliminating 443 jobs by mid-1993.[43] In fact, the first budget proposed by France's newly elected government calls for an even higher tax on cigarettes.[44]

2. *Hitting Close to Home*

The French government's attempt to reduce smoking is ironic in that it is the largest producer of cigarettes in the country. Any reduction in smoking that is not offset by higher taxes will have an impact on the government coffers. A pack of cigarettes is estimated to cost SEITA, the government company, just nine francs. But for each pack of Gauloises or other brand it sells, SEITA produces five francs, or nearly $1, in tax revenue for the state.[45]

Smoking is big business in France, generating nearly $5.5 billion in taxes for the state.[46] To put that number in perspective, SEITA produces the equivalent of 2.3% of France's National Budget.[47] Yet despite an apparent addiction to tobacco revenue, the French government continues to try to reduce the incidence of smoking in its population. Previous government efforts have included restrictions on advertising,[48] specifically, the introduction of a larger warning label on all packages sold in the country.[49] In 1991, the government increased

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39. Raybould, *supra* note 14.

40. *Id.*

41. *Muted Inflation Impact From Tobacco Rise-Beregovoy*, REUTERS, December 24, 1992 (LEXIS, Nexis Library, Omni File).

42. *Id.*

43. *Id.*

44. Mark Brasier, *France braced for budget squeeze*, THE DAILY TELEGRAPH, May 10, 1993, at 23. The government plan also includes tax increases for wine and gasoline. The extra money is needed to help close a growing deficit and spur economic growth and infrastructure development. *Id.*

45. Gooding, *supra* note 6, at 50.

46. *Id.*

47. *Id.*

48. *Id.* at 54.

49. *Id.* at 54.

cigarette prices by 5%.[50] In December, 1992, the parliament passed a law increasing cigarette prices by an additional 30%. This two-step tax increase pushed prices up 15% in January, 1993, and another 15% in May, 1993. The additional $830 million the tax is expected to raise is slated to help close the country's $3.9 billion social security budget deficit and help fund programs aimed at deterring children from smoking.[51] Yet, all of the previous government efforts have failed to reduce the percentage of smokers by more than a meager 0.4% per year, despite a belief by 76% of the population that smoking is a health hazard.[52]

D. *French Government Committed to Curbing Smoking*

France has one of the highest rates of smoking in the European Community[53] and, prior to the enactment of the new law, stood alone with England as the only nation without any national no-smoking policy governing public places.[54] Despite all the money that a tax on cigarettes may bring the French Government, lawmakers believe that the habit still costs France more than it brings in. Since smoking and its related ailments cost France a total of $11.6 billion dollars, the $5.5 billion brought in by SEITA does not outweigh the cost of smoking to the general public. The increased health care costs that France must pay because of smoking are not only a drain on the national treasury, but also increase the price of French products, thus reducing France's competitive position both inside the European Community and in world markets. It is clearly within the best interests of the French people to reduce their nation's addiction to cigarettes. Despite the short-term economic and social costs that may be associated with the new law and the government's effort to reduce smoking, lawmakers obviously believe that the nation is best served in the long run by enacting the new law. Although it will be difficult to enforce and violations will be rampant, the government will probably continue to support the law. French lawmakers will do so in the hope that, in the long run, along with tax increases and advertising restrictions, smoking will be reduced and the French people will willingly snuff out one of their national symbols.

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50. *Id.* at 54.

51. *See Muted Inflation*, *supra* note 41. The tax increase was twice as much as originally planned. *Id.*

52. Gooding, *supra* note 6, at 54.

53. *A survey commissioned by the Tobacco Institute, which is sponsored by US Tobacco Companies, looks into the attitude towards smoking in offices*, INT'L HERALD TRIBUNE, Oct. 16, 1985.

54. *Id.*

III. UNITED STATES FEDERAL SMOKING LAW

A. *The State of Smoking in the United States*

Unlike France, the United States has no national law regulating smoking in either private or public places. The federal government launched its first attack on smoking in 1964, when the Surgeon General released his groundbreaking report, entitled *The Surgeon General's Advisory Committee on Smoking and Health*.[55] That report was the first official statement by the government linking smoking with a plethora of health hazards.[56] When the report was issued in 1965, 40% of the U.S. population smoked, about the same percentage of French citizens who smoke today.[57] Twenty-eight years later, the rate of smoking in the United States had dropped to 29%.[58] Health officials claim that the United States has been able to reduce its percentage of smokers through the use of increased awareness of the health hazards associated with smoking,[59] increased federal and state taxes on cigarettes,[60] increased effectiveness of smoking cessation programs,[61] and an overall change

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55. *Reducing the Health Consequences of Smoking: 25 Years of Progress, A Report of the Surgeon General* (1989). The report found that after 25 years of intense governmental effort in getting Americans to quit smoking, many major accomplishments had been achieved. The report had five conclusions:

1. The prevalence of smoking around adults decreased from 40 percent in 1965 to 29 percent in 1987. Nearly half of all living adults who ever smoked have quit.
2. Between 1964 and 1985, approximately three-quarters of a million smoking-related deaths were avoided or postponed as a result of decisions to quit smoking or not to start. Each of these avoided or postponed deaths represented an average gain in life expectancy of two decades.
3. The prevalence of smoking remains higher among blacks, blue-collar workers, and less educated persons than in the overall population. The decline in smoking has been substantially slower among women than among men.
4. Smoking begins primarily during childhood and adolescence. The age of initiation has fallen over time, particularly among females. Smoking among high school seniors leveled off from 1980 through 1987 after previous years of decline.
5. Smoking is responsible for more than one of every six deaths in the United States. Smoking remains the single most important preventable cause of death in our society.

56. *Id.* at ii.
57. *Id.* at 11.
58. *Id.* at 12.
59. *Id.* at 263.
60. *Id.* at 264.
61. *Id.* at 409.

in the public perception of smoking.[62] Government officials observe that although an estimated 390,000 Americans still die each year from smoking-related diseases,[63] at least 750,000 deaths have been either avoided or postponed as a result of decisions to quit smoking or not to start.[64] Yet, in contrast to the French Government's plan, all of these accomplishments were achieved in the United States without the enactment of a national no-smoking law.

B. *Federal Smoking Regulations*

In 1965, Congress passed the first nationwide smoking regulation, when it ordered all cigarette manufacturers to print "CAUTION: Cigarette Smoking May Be Hazardous to Your Health" on each package sold in the country.[65] This law was followed up four years later when lawmakers banned all cigarette advertising on television and radio[66] and required manufacturers to strengthen warnings on all packages with a new and more direct warning: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."[67] Fourteen years later, Congress tightened up the regulations a notch by requiring a series of rotating warnings to be placed on all cigarette packaging, and by requiring advertisements that carried more direct and menacing warnings.[68] As a general rule, the tobacco

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62. *Id.* at 11.

63. *Id.* at 12.

64. *Id.* at 11.

65. Julie Rovner, *Anti-Smoking Forces Stoke Legislative Fires*, 44 CONG. Q. 3049 (1986). Although this was not technically a government law that regulated the smoking behavior of people, it was the first government attempt to pass a law that it hoped would affect smoking habits. Up to this point, there was no law requiring warning labels on cigarettes despite knowledge by many health officials that they were dangerous to one's health. *Id.*

66. *Id.* The law was originally supposed to go into effect on January 1, 1970, but both cigarette companies and broadcasters asked that the ban take effect the next day so they could advertise on the big college football bowl games. *Id.*

67. *Id.*

68. Cigarette Labeling and Advertising Act of 1965, 79 Stat. 283, *as amended*, 15 USCA §1333 (1982). The Act was amended again in 1983 to require a series of four rotating warning labels to appear on all cigarette packages and advertisements. The rotating warnings are:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to your Health.

SURGEON GENERAL'S WARNING: Smoking by Pregnant Women

industry and its allies in Congress did not oppose the advertising regulations and more stringent warnings.[69] Numerous judicial decisions have allowed tobacco companies to escape tort liability for the harms caused by cigarette smoking by arguing that the labels act as waivers absolving the manufacturers of any responsibility for the harms that may occur due to a smoker's decision to smoke. In short, the companies have been able to successfully argue that since Congress imposed these warning labels upon the companies, smokers have long been aware of the risks involved with their activities and have assumed the risk for any harms that may result.[70]

One law the tobacco industry fought was the 1989 decision by Congress to ban smoking on virtually all domestic airline flights.[71] Despite the industry's opposition, the bill passed overwhelmingly.[72] In areas where the federal government does have complete control, it has exercised restrictions upon smoking. The General Accounting Office, which controls nearly a third of all government office space, passed regulations in 1986 designed to guarantee all federal workers "a reasonably smoke-free environment."[73] The United States Military has also taken steps to eradicate smoking from its ranks.[74] Aside from these limits, the federal government also has policies in place for all of its offices that require smoking "to be held to an absolute minimum in areas where there are non-smokers."[75] These regulations ban smoking in such places as elevators, restrooms, corridors, and libraries.[76] Although many of these policies are not mandatory, they do give agency heads a wide range of powers to regulate smoking within their jurisdictions.[77]

May Result in Fetal Injury, Premature Birth, And Low Birth Weight SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

69. Rovner, *supra* note 65, at 3051.

70. ROBERT E. GOODIN, NO SMOKING 16-20 (1989).

71. Ken Fireman, *Flying Cold-Turnkey; Health Groups Cheer Planned Cigarette Ban On Most U.S. Flights*, NEWSDAY, Oct. 18, 1989, at 5.

72. 49 U.S.C.A. § 1374 (West supp. 1992). The tobacco industry argued that the present ventilation systems on board aircraft were sufficient to handle any problems. Despite their opposition, Congress passed a temporary smoking ban on domestic flights in 1987. Two years later, the temporary ban became permanent.

73. Rovner, *supra* note 65, at 3050.

74. *Id.*

75. Federal Property Management Regulation, 41 C.F.R. § 101-20.105-3 (1991).

76. *Id.*

77. *Id.*

C. *Conclusion*

Although the federal government has taken steps to curb smoking in some areas, it has yet to attempt to regulate smoking in non-government workplaces or in public areas. Although efforts to regulate smoking have been attempted by Congress, as will be discussed below, there are currently no federal statutes with the scope of the French no-smoking law. Despite the Surgeon General's efforts to educate Americans about the dangers of smoking, the federal government has left most of the regulatory responsibility up to the individual states.

IV. STATE SMOKING REGULATIONS

After the Surgeon General's Report on Smoking came out in 1964, most states limited their regulation of smoking to restricting behavior that might cause fires. At the time the report was issued, 19 states had laws that prohibited smoking near explosives, fireworks, or other hazardous fire areas.[78] Only 13 states had regulations on the books that limited smoking in specific public places.[79] Nine years later, Arizona became the first state to restrict smoking in public areas specifically because smoking was a health hazard.[80] The following year, Connecticut became the first state to restrict smoking in restaurants.[81] When Minnesota passed its landmark Clean Indoor Air Act in 1975,[82] it became clear that the most aggressive and innovative smoking regulations in the country would not come from the federal government, but rather from the states.

A. *Oregon: A Legislative Pioneer*

In 1981, Oregon enacted its "Indoor Clean Air Act."[83] The law was the first statewide attempt to regulate smoking in public and private areas. The purpose of the law was to protect non-smokers in confined areas from the health hazards generated by tobacco smoke.[84] The law is the most stringent non-smoking regulation in the Pacific Northwest.[85]

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78. *Surgeon General's Report*, *supra* note 55, at 557.
79. *Id.*
80. *Id.* at 558.
81. *Id.* at 558.
82. MINN. STAT. ANN. § 144.391-144.417 (1989).
83. OR. REV. STAT. § 443.835-443.875 (1992).
84. OR. REV. STAT. § 443.840.
85. Rick Kershenblatt, *An Overview of Current Tobacco Litigation and Legislation*, 8 U. BRIDGEPORT L. REV. 133 (1987).

Unlike statewide non-smoking laws in Washington and California, Oregon regulates smoking in the workplace.[86]

1. *The Oregon Indoor Clean Air Act*

The Indoor Clear Air Act restricts smoking in all public places.[87] A public place is defined as "any enclosed indoor area open to and frequented by the public."[88] The law lists such places as retail stores, banks, grocery stores, meeting rooms, and commercial establishments as examples.[89] Despite this seemingly broad ban, the law is not totally inclusive of all public places nor is it as restrictive as the Minnesota Clean Indoor Air Act.[90] Oregon's law exempts such places as cocktail lounges,[91] offices occupied solely by a smoker,[92] a public meeting hall being used in a private capacity,[93] a store that sells tobacco products,[94] and any restaurant that seats less than 30 people.[95]

a. *Let My People Know*

As with the French law, Oregon requires that proprietors whose establishments are subject to the regulation post appropriate signs.[96] The French law requires merely that an area be identified as smoking or non-smoking,[97] while Oregon states that signs must be posted in the building being affected by the regulation and it must be a "sign posted conspicuously on all entrances normally used by the public."[98]

b. *Ventilation Guidelines Make Breathing Easy*

Oregon also specifies that public places with smoking sections must also provide for appropriate ventilation,[99] but, unlike the French law, there is no minimum requirement for the amount of fresh air to flow

86. OR. REV. STAT. § 243.350.
87. OR. REV. STAT. § 433.835.
88. *Id.*
89. *Id.*
90. MINN. STAT. ANN. § 144.391-144.417.
91. OR. REV. STAT. § 433.850(a).
92. OR. REV. STAT. § 433.850(b).
93. OR. REV. STAT. § 433.850(c).
94. OR. REV. STAT. § 433.850(d).
95. OR. REV. STAT. § 433.850(e).
96. OR. REV. STAT. § 433.850(4).
97. *French Statute*, *supra* note 2, at Art. 6.
98. OR. ADMIN. R. 333-15-040 (1992).
99. OR. ADMIN. R. 333-15-050 (1992).

through the ventilation system.[100] The Oregon law merely requires that the mechanical air filtration system be of "adequate capacity to serve the entire dining and waiting area."[101] As long as the mechanical air filtration device is sufficient, a restaurant is exempt from the requirement to separate smokers and non-smokers.[102] However, the law was not intended to impose an economic burden upon Oregon businesses by requiring them to make any changes in their ventilation system,[103] something about which many French businesses complain.[104] The Health Division's administrative rules require only that smoking and non-smoking sections be reasonably proportionate to the preferences of customers.[105] If that requirement has been met, the establishment is not required to seat a non-smoker in a non-smoking section if none is available.[106]

c. *Proprietors Pay the Price, Not Smokers*

The law imposes penalties upon violators who fail to post or maintain appropriate signs or who fail to designate a no-smoking area in a public place.[107] Penalties include a fine of up to $100 for any single violation in any 30-day period,[108] thus giving the State Health Division or local board of health the right to petition a court to enjoin further violations.[109] The Oregon State Health Division also provides individuals with the opportunity to file a complaint with the Division about an alleged violation.[110] Although the law gives the Health Division any power available under the law to enforce the regulations,[111] there

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100. *French Statute*, *supra* note 2, at Art. 3.

101. OR. ADMIN. R. 333-15-050(c) (1992).

102. *Id.*

103. Sally Christensen, *More Non-Smoking Seating Not Required*, OREGONIAN, June 18, 1991, §D at 6. Health Officials say the state legislature was wise in not trying to mandate how much seating should be reserved for non-smokers. When the law was put in place five years ago, smoking areas were much larger than they are today. Since the law is not restrictive in its requirements, officials say they have been able to expand the non-smoking sections in restaurants as more and more Oregonians stop smoking. *Id.*

104. Raybould, *supra* note 14.

105. OR. ADMIN. R. 333-15-035(3).

106. Christensen, *supra* note 103.

107. OR. REV. STAT. § 433.990(5).

108. *Id.*

109. OR. REV. STAT. § 433.860.

110. OR. REV. STAT. § 433.855.

111. *Id.*

are no specific penalties for smokers who violate the restrictions, unlike the French law, which imposes a $100 - $250 fine on smokers who light up in a no-smoking area.[112]

2. *Other Oregon Restrictions*

Aside from the restrictions imposed by the Oregon Indoor Clean Air Act, state law also restricts smoking in hospital rooms,[113] state office buildings,[114] public meeting rooms,[115] elevators,[116] and public buses.[117] Although Oregon is not as restrictive as some states, it is still one of the most aggressive regulators of cigarette smoking in the country and is the most aggressive regulator in the Pacific Northwest.

B. *Minnesota: Extending Restrictions to the Workplace*

In 1975, the State of Minnesota broke legislative ground when it passed its Clean Indoor Air Act.[118] Unlike the nation's first no-smoking law enacted in Arizona in 1973, which merely recognized that smoking was a hazard, or the country's first clean air act, passed in 1974 by Connecticut, the Minnesota law was the first to extend smoking restrictions to public places and private worksites.[119]

1. *The Minnesota Clean Indoor Air Act*

When the Minnesota legislature passed the new law, it specifically laid out its public policy justifications for the stringent restrictions:

> The Legislature finds that:
>
> (1) smoking causes premature death, disability, and chronic disease, including cancer, heart disease, and lung disease;
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> (2) smoking related diseases result in excess medical care costs; and
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> (3) smoking initiation occurs primarily in adolescence. The legislature desires to prevent young people from starting

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112. *French Statute*, *supra* note 2, at Art. 14.
113. OR. REV. STAT. § 441.815.
114. OR. REV. STAT. § 243.350.
115. OR. REV. STAT. § 192.710.
116. OR. REV. STAT. § 479.015.
117. OR. ADMIN. R. 860-65-095.
118. MINN. STAT. § 144.411.
119. *Surgeon General Report*, *supra* note 55, at 558.

> to smoke, to encourage and assist smokers to quit, and to promote clean indoor air[120]

The law requires that non-smoking sections be created in all public places, which are defined as any enclosed indoor area used by the general public or that serves as a place of work including restaurants, retail stores, and other commercial establishments.[121] The law also completely bans the use of tobacco products in day-care centers,[122] health care facilities, clinics,[123] and all public elementary and secondary schools.[124]

The law does not mandate no-smoking areas in bars,[125] enclosed areas hosting private social functions,[126] factories, warehouses, or other similar areas not frequented by the general public.[127] Unlike Oregon's Clean Indoor Air Act, there is no exception for businesses with certain types of ventilation systems. Unlike the French law, there is no minimum requirement for ventilation in an enclosed area, except for a vague statement requiring that the existing barriers and ventilation minimize the effect of cigarette smoke on people in the adjacent no-smoking section.[128]

a. *Minor Fines and Injunctions for Violators*

The law requires all proprietors in charge of a public place to ensure that the law is enforced by posting appropriate signs, arranging seating to provide a smoke-free environment, and asking smokers who light up in a no-smoking section to refrain from doing so if asked by a client or an employee.[129] The law is enforced by the State Commissioner of Health[130] and provides for two types of penalties. Smokers who do not abide by the restrictions are subject to a petty misdemeanor, which provides for fines between $100 - $200.[131] If proprietors violate

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120. MINN. STAT. § 144.391.
121. MINN. STAT. § 144.414.
122. MINN. STAT. § 144.414(2).
123. MINN. STAT. § 144.414(3)(a).
124. MINN. STAT. § 144.4165.
125. MINN. STAT. § 144.415.
126. MINN. STAT. § 144.414.
127. *Id.*
128. MINN. STAT. § 144.415.
129. MINN. STAT. § 144.416.
130. MINN. STAT. § 144.417(1).
131. *Id.* The penalties for a petty misdemeanor are described in MINN. STAT. § 609.0331.

the law, the board of health or any affected party may obtain injunctive relief for repeated violations from any court with jurisdiction.[132]

b. *The Minnesota Law: Comparatively Tough*

By imposing penalties for smokers who violate the law, the Minnesota law is more restrictive than the Oregon Indoor Clean Air Act.[133] The penalties under the Minnesota law parallel those of the French anti-smoking law, in that individual smokers who violate the law are subject to financial penalties;[134] however, the Minnesota law does not impose the stiff, monetary punishment that the French law provides for proprietors who violate its provisions.[135] The purpose of the French law is punitive in nature, imposing fines up to $600 on violators,[136] while the Minnesota statute stresses compliance through penalties, such as court-ordered injunctions, upon the violators.[137]

2. *Tobacco Industry Extinguishes New Restrictions*

Recent legislative attempts to broaden the Minnesota Clean Indoor Air Act were defeated the 1992 legislative session.[138] The proposal that failed would have banned smoking in the common areas of apartments and condominiums and would have required factories and warehouses, two types of indoor buildings presently excluded under the current statute, to create the same type of no-smoking sections that presently exist in office buildings. The bill also would have required private offices to ban smoking entirely if smoke from smoking sections drifts or is recirculated into the no-smoking sections.[139] Although just 20% of Minnesota residents smoke, lawmakers blame the bill's defeat on the increased clout and "big money politics" of the tobacco industry in the state.[140] Some legislators lamented that, had the industry been as powerful and as organized in 1975 as it is today, even the Clean Indoor Air Act itself might have been defeated.[141]

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132. MINN. STAT. § 144.417(3).

133. OR. REV. STAT. §§ 433.835-433.875.

134. *French Statute*, *supra* note 2, at Art. 14.

135. *Id.*

136. *Id.*

137. MINN. STAT. § 144.417(3).

138. Dennis J. McGrath, *Antismoking Bills Lost in Political Haze*, MINNEAPOLIS STAR TRIB., April 6, 1992, at 1B.

139. Dennis J. McGrath, *Smoking Squeeze; Tobacco Lobby Gets Help in Fighting Tax, Restrictions*, MINNEAPOLIS STAR TRIB., January 1, 1992, at 1A.

140. McGrath, *supra* note 138.

141. McGrath, *supra* note 139.

3. *Judicial Challenges*

A lawsuit filed in Hennepin County District Court in September, 1992, is the second known legal challenge to the Minnesota statute.[142] In the suit, an employee alleges that her employer did not provide her with a smoke-free environment because the employer did not stop smoke from the smoking section of the office from drifting into her workstation. She claims that the smoke provoked an outbreak of her asthma, which forced her to eventually be hospitalized. When she returned to work, she was terminated and is now claiming that she is the victim of an essentially illegal form of employment discrimination that is a by-product of the statute.[143] The woman's attorney claims that the state's Clean Indoor Air Act is unclear as to whether it provides any monetary remedy for employees harmed by violations and whether employers can hire or fire an employee because of their smoking preferences.[144] The attorney hopes the lawsuit will resolve ambiguities in the statute.[145]

The other known lawsuit involving the act was filed by a woman who claimed that she was the victim of discrimination because she smoked in her office. It is unclear how that suit was resolved, but most complaints involving violations of the statute are handled administratively by local health departments.

In a case involving the enforcement of the Clean Indoor Air Act, a Minneapolis area county employee won a $150,000 judgment for harassment she suffered on the job after reporting that several of her co-workers were violating the provisions of The Act by lighting up in a no-smoking section.[146]

The Minnesota Clean Indoor Air Act is the most restrictive anti-smoking law in the nation. Although its intent does not appear to be as punitive in nature as that of the French law, it has been instrumental in changing the behavior of the people of Minnesota by reducing the percentage of smokers in the state. It has not caused a serious public

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142. Jill Hodges, *Employment Suit Invokes Minnesota's Clean Indoor Air Act*, MINNEAPOLIS STAR TRIB., Sept. 23, 1992, at 1D. The Clean Indoor Air Act prohibits smoking in a common space that is smaller than 200 square feet unless all employees who work in that space agree to allow it. The plaintiff is also claiming her employer violated the Minnesota Human Rights Act—a statute that covers various forms of discrimination. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *County Workers Who Reported Smoking Violations Wins Lawsuit*, MINNEAPOLIS STAR TRIB., May 9, 1993, (Metro ed.) §B, at 3.

outcry, nor been subjected to legal tests or judicial modification.

C. *New York: "Protecting" The Empire State*

After 13 years of bitter partisan politics and a constitutional challenge, New York's Clean Indoor Air Act finally became law in July, 1989.[147] When the law took effect on January 1, 1990, New York State's Clean Indoor Air Act became one of the most stringent smoking regulations in the country.[148] Legislators say that the purpose of the law is to protect rather than to regulate.[149]

The law imposes strict smoking regulations on virtually every public place in the State of New York.[150] "Smoking is banned in the following places:" auditoriums,[151] elevators,[152] gymnasiums,[153] classrooms,[154] all forms of public transportation,[155] all public and private schools,[156] hospitals,[157] museums,[158] libraries,[159] banks and other financial institutions,[160] and restrooms.[161] All employers are required to adopt and implement a written smoking policy[162] and all non-smoking employees are entitled to a smoke-free work area.[163]

1. *Specific Areas Exempted*

The New York law included many of the proposed changes that failed to clear the Minnesota Legislature via a series of amendments

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147. Elayne G. Gold, *New York State's Clean Indoor Air Act*, N.Y. ST. BAR J., March/April 1991, at 18.

148. *Id.*

149. *Id.*

150. N.Y. PUBLIC HEALTH LAW § 1399-o (McKinney 1990).

151. N.Y. PUBLIC HEALTH LAW § 1399-o (1)(a).

152. N.Y. PUBLIC HEALTH LAW § 1399-o (1)(b).

153. N.Y. PUBLIC HEALTH LAW § 1399-o (1)(c).

154. N.Y. PUBLIC HEALTH LAW § 1399-o (1)(f).

155. N.Y. PUBLIC HEALTH LAW § 1399-o (1)(g).

156. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(a).

157. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(b).

158. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(e).

159. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(f).

160. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(k).

161. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(l). The statute also covers such places as indoor areas, waiting areas in public transportation terminals, service areas in cafeterias and businesses selling food for on-premises and off-premises consumption and retail stores where goods are for sale.

162. N.Y. PUBLIC HEALTH LAW § 1399-o (6).

163. N.Y. PUBLIC HEALTH LAW § 1399-o (6)(a).

to this state's Clear Indoor Air Act.[164] However, the New York law contains several exceptions to the smoking prohibitions which exist in the French statute, but are absent from the Oregon and Minnesota statutes. The New York law exempts private homes, residences, automobiles,[165] private social functions being held at public places, and in conventions and trade shows if it is not advertised that smoking is normally banned in the facilities hosting the event.[166] This anomaly occurs even though the public places hosting those events are normally smoke-free. The effect of this exception is basically to allow smoking at conventions and trade shows in New York.

The law also has two exceptions that were subjected to a constitutional attack prior to its enactment.[167] The statute exempts limousines under private hire and wholly or partially owned luxury boxes in indoor arenas. Although smoking may occur in the private luxury boxes, the rest of the arena is still smoke-free.[168] As a result of these two exceptions, a suit was filed in State Supreme Court prior to the law's enactment, alleging the statute was elitist.[169] The judge who heard the complaint refused to delay the implementation of the statute, claiming the overwhelming evidence of the dangers of cigarette smoke outweighed the claimant's individual charges. The judge said that the constitutional claims of the plaintiff were without merit.[170]

2. *Stiff Fines for Violators*

Failure to comply with any of the provisions of the statute renders the violator subject to court-imposed civil penalties.[171] Penalties for a violation of the law can go as high as $1,000.[172] Although the statute imposes stiff fines on violators, it does not subject them to liability based solely upon their violation of the statute. Despite this exception, violators can still be held accountable for harms resulting from the exposure to smoke.[173]

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164. McGrath, *supra* note 136.
165. N.Y. PUBLIC HEALTH LAW § 1399-q (1).
166. N.Y. PUBLIC HEALTH LAW § 1399-q (2)-(3).
167. Gold, *supra* note 147 at 21.
168. N.Y. PUBLIC HEALTH LAW § 1399-q (6)-(7).
169. Gold, *supra* note 145, at 21.
170. Gold, *supra* note 145, at 21.
171. N.Y. PUBLIC HEALTH LAW § 1399-s.
172. N.Y. PUBLIC HEALTH LAW § 1399-v
173. N.Y. PUBLIC HEALTH LAW § 1399-w.

The New York Clean Indoor Air Act potentially carries more severe penalties than the Oregon, Minnesota, or French laws. Yet New York law is vague about what constitutes a violation, while the other three laws are specific. Also, the New York law does not provide for any means of obtaining an injunction against a violator. The New York law speaks generally about any violation, while the other three lay out specific penalties for employers who fail to abide by the ventilation or sign requirements and smokers who ignore the restrictions.

D. *Arkansas: Fewer Restrictions in the South*

With just over 2.3 million people, Arkansas is the 17th least populous state in the country.[174] Yet it is one of the few states in the South to have any regulations on smoking at all.[175]

1. *Arkansas Smoking Regulations*

In 1977, Arkansas passed its first smoking restrictions. This is the state's only statute aimed directly at smoking. In the text of the statute, the drafters laid out their justifications for passing the law. They cited "recent" scientific data as showing that non-smokers often receive damage to their health from second-hand smoke.[176] The law merely banned smoking in medical waiting rooms, hospital corridors, nurses' stations and clinics, all hospital rooms, and on school buses.[177] The law has not been modified and still does not allow smoking in those previously cited areas if those areas have been designated for smoking.[178] The statute also clearly exempts hotels, motels and restaurants.[179] The law sets up no enforcement measures, except that it declares a violation of the statute a misdemeanor and provides for fines between $10-$100 if convicted. The other United States jurisdictions compared in this

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174. MARK HOFFMAN, THE WORLD ALMANAC AND BOOK OF FACTS 627 (1992).
175. Kershenblatt, *supra* note 83, at 175-82.
176. ARK. CODE ANN. § 20-27-701 (Michie 1987).
PUBLIC POLICY:
(a) Information available to the General Assembly based upon scientific research data has shown that nonsmokers often receive damage to their health from the smoking of tobacco by others.
(b) It is therefore declared to be the public policy of the State of Arkansas that the rights of nonsmokers be protected in the manner provided in this subchapter.
177. ARK. CODE ANN. § 20-27-703 (A).
178. ARK. CODE ANN. § 20-27-703 (B).
179. ARK. CODE ANN. § 20-27-703 (C).

Note clearly lay out the causal connection of the harms they believe non-smokers can suffer from second-hand smoke and their reasons for implementing their laws.[180] In contrast, the Arkansas statute does not directly acknowledge the health hazards of second-hand-smoke.

a. *Independent Agencies Set Their Own Rules*

Arkansas has several other smoking regulations not connected with its statutory section on public smoking. The state allows the chief administrator of each state agency to formulate his own general office smoking policy, as long as the rights of both smokers and non-smokers are taken into consideration.[181] Smoking in public schools is also regulated, yet, unlike the other United States jurisdictions compared in this Note, it is still allowed as long as it occurs in a specially designated area.[182] The state legislature does ban smoking in state-licensed day-care centers, conceding that children exposed to smoking face a potential health hazard.[183]

b. *No Public or Workplace Restrictions*

Arkansas is still far behind in the number and type of regulations it imposes upon smoking. Unlike Oregon, New York, Minnesota, and France, it has no regulations restricting smoking in the workplace or indoor areas open to the public. In fact, Arkansas does not even recognize what 18 other states have - a non-smoker's right to a smoke-free workplace.[184]

2. *Smoking Regulations in Other Southern States*

Arkansas is not alone in its paucity of smoking regulations. North Carolina and Alabama have no smoking regulations whatsoever,[185] while states such as Tennessee, Louisiana, and Missouri have fewer restriction on an individual's right to smoke than Arkansas.[186] Although tobacco is a $43.8 billion dollar business in the United States,[187] it is proportionally an even bigger business in tobacco-rich states, such as North

180. ARK. CODE ANN. § 20-27-701.
181. ARK. CODE ANN. § 25-1-102 (B).
182. ARK. CODE ANN. § 6-21-609.
183. ARK. CODE ANN. § 20-78-217.
184. Kershenblatt, *supra* note 85.
185. *Id.*
186. *Id.*
187. McGrath, *supra* note 139.

Carolina. Lawmakers from tobacco states look at any restriction upon smoking that may cut the consumption of the product as a direct threat to the economic well-being of their citizens. [188]

Arkansas and many of the other Southern states, with little or no regulation of smoking, are clearly in the minority of jurisdictions in the United States. There is a distinct lack of uniformity of smoking regulations in the United States. Despite the strong public policy interests in states such as New York, Oregon, and Minnesota in protecting the rights of citizens to live and work in a smoke-free environment by heavily regulating an individual's right to smoke, that same policy impetus does not exist uniformly throughout the country. If the United States ever wants uniform national no-smoking regulations such as the recently enacted French law, they must come from the federal government.

V. EFFORTS BY UNITED STATES LEGISLATORS TO PASS A NATIONAL LAW

Despite legislative successes on the state and local levels, the powerful tobacco industry has been able to halt attempts by Congress to pass equally broad restrictions on the federal level.

A. *Tobacco Is Big Business*

The tobacco industry in the United States is responsible for more than 6.2 million jobs and more than $11 billion dollars in government revenue.[189] The industry, through its lobbying group, "The Tobacco Institute," is also generous in distributing financial support, particularly to members of Congress.[190] However, for all the money tobacco brings to the government's coffers, some reports show that tobacco costs

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188. *Designation Of Smoking Areas in Federal Buildings: Hearings on H.R. 4488 and H.R. 4546 Before the Subcomm. on Health and the Environment*, 99th Cong., 2nd Sess. 125-28 (1986) (statement by Rep. Walter Jones of North Carolina).

189. Alyson Pytte, *Tobacco's Clout Stays Strong Through Dollars, Jobs, Ads*, 48 CONG. Q. 1542 (1990). The tobacco industry is a powerful presence in minority communities. The large companies contribute tens of millions of dollars in grants to minority causes and public schools. Leaders of those communities say that they depend on that money to help fund important programs. Lawmakers believe that that money from the tobacco companies helps silence what they believe are legitimate minority concerns over rising rates of smoking within their communities. *Id.*

190. *Id. See also* Kathleen Sylvester, *The Tobacco Industry Will Walk A Mile To Stop An Anti-Smoking Law*, GOVERNING, May 1989, at 38.

Americans at least $52 billion in health and insurance costs and lost productivity, far more than tobacco brings in.[191] Despite the political clout of the tobacco industry, some members of the administration appear to be set on turning the country into a smoke-free society. The Bush Administration's Health and Human Services Secretary, Louis Sullivan, called tobacco revenue "blood money" and referred to cigarette manufacturers as "merchants of death."[192]

B. *Constitutional Problems*

Traditionally, health and safety regulations have been left to individual states.[193] Since regulating smoking is considered a health and safety concern under the Commerce Clause, laws affecting smoking could be viewed as remaining within an individual state's police power. When it involves smoking, Congress has asserted its ability to regulate by banning smoking on domestic airline flights and other forms of public transportation[194]. In fact, when Congress banned smoking on all domestic flights, lawmakers cited the Commerce Clause as their justification, as if it affected interstate commerce.[195] It is likely that should Congress choose to create a national no-smoking law, such as the one in France, it could be justified under the current expansive view of the Commerce Clause.[196]

C. *Congressional Attempts to Curb Smoking*

When Congress fought off a bitter attack by the tobacco industry and its allies and passed a bill virtually banning smoking on board all domestic airline flights, it won a great victory. In the past three years, lawmakers have been unable to build upon that success. Like the French government, most Congressional attempts to curb smoking have followed three paths: 1) reduce consumption by increasing the price of cigarettes though higher taxes, 2) impede the recruitment of new smokers and reduce the demand of present smokers by further restrictions

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191. Pytte, *supra* note 187.

192. *Id.*

193. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 222-42 (12th ed. 1991) and U.S. CONST. art. I, §8, cl. 3.

194. 49 U.S.C.A. § 1374 (West Supp. 1992).

195. 137 CONG. REC. 391-401 (Sept. 14, 1989).

196. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Philadelphia v. New Jersey, 437 U.S. 617 (1978); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); and South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. 177 (1938).

on advertising, and 3) reduce smoking by restricting the places where smoking is allowed.

1. *Reclassifying Tobacco*

Currently, the only two governmental agencies with power over tobacco are the Federal Trade Commission, which oversees health warning labels, and the Justice Department, which enforces the ban on television and radio advertisements.[197] Despite lawmakers' best attempts to curb tobacco use, they have been unable to escape the basic fact that many options are closed to them because they are trying to regulate a legal product. Several attempts have been made to rectify that situation. One bill attempted to define tobacco as a drug, thus bringing it under the control of the Food and Drug Administration.[198] Another attempt sought to define tobacco as a chemical substance, thereby making it the purview of the Environmental Protection Agency (EPA). This bill would have required the EPA to evaluate the safety of chemicals emitted by tobacco products.[199] Another effort tried to make tobacco a controlled substance, which would put it under the control of the Drug Enforcement Agency.[200] Each of these legislative initiatives has failed, mainly due to the power of the tobacco lobby in Congress.[201]

2. *Taxing Cigarettes Out of Style*

Although state taxes range from $.02 per pack in North Carolina to $.56 a pack in New York,[202] the federal government imposes a tax of just $.24 per pack, which is imposed before the individual states levy their own taxes.[203] To reduce the federal deficit as well as consumption, some members of Congress tried, but failed, to increase the excise tax on cigarettes to $.32 per pack. Officials said the increase

197. Pytte, *supra* note 189, at 1546.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. Stuart Vincent, *Smokers Taxes But Say They'll Find Ways To Deal With Boost Of 17 Cents A Pack*, NEWSDAY, June 2, 1993, at 7. Although New York State has the highest tax of any state on cigarettes, New York City recently approved a tax increase which brings its total tax to $.64 per pack. New York State officials say the new tax increase will raise an additional $170 million in revenue. The State Health Department expects the new tax to cut the number of smokers in the state by 88,000. *Id.*
203. 26 U.S.C. § 5701 (1991).

would raise an additional $2.8 billion in revenue each year.[204] So far, all other attempts to raise the excise tax, even just by one penny per pack, have also failed, despite strong evidence that as prices increase, consumption decreases.[205] The tobacco industry has been able to successfully argue that cigarette taxes are regressive, since any increase in price disproportionately punishes lower income Americans, who make up the majority of smokers.[206]

3. *President Clinton's Health Plan*

In September, 1993, President Clinton unveiled a proposal for a new system of national health care.[207] A major component of the plan is to provide health insurance for an estimated 42 million uninsured Americans.[208] This new proposal is expected to cost the American People $100 billion.[209] The plan is expected to be financed by a series of administrative efficiencies and a new round of taxes.[210] Included in those planned tax increases is a broad hike in the federal excise tax on cigarettes.[211] Although the details of the plan's financing have yet to be worked out, President Clinton has said he would like to see an increased tax of between $.75 and $1.00 per pack of cigarettes.[212] The President's proposed tax increase is expected to raise up to $16 billion a year in additional revenue.[213] Recent polls have shown that public support is behind a higher cigarette tax to pay for health care reform.[214] President Clinton has said that higher cigarette taxes are justified in

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204. Pytte, *supra* note 187, at 1546.

205. Pytte, *supra* note 187, at 1547. *See also* Rovner, *supra* note 63, at 3052 and Goodin, *supra* note 68, at 108.

206. Rovner, *supra* note 65, at 3052.

207. Alissa J. Rubin, *Clinton Sets Health Agenda: Security For Everyone*, 55 CONG. Q. 2551 (1993).

208. Stuart Silverstein, *Clinton's Health Plan: A User's Guide*, THE LOS ANGELES TIMES, September 26, 1993, at 5.

209. James Risen, *Entitlements Haunt Congress' Budget Cutting*, THE LOS ANGELES TIMES, July 26, 1993, §A at 1.

210. *Clinton Decides Mix Of Taxes, But Trades Details For Broad Concepts*, Daily Labor Report, September 23, 1993 (LEXIS, Nexis library, Omni File).

211. *Id.*

212. Doug Fischer, *Tobacco Industry Fires Up For Fight*, THE OTTAWA CITIZEN, October 1, 1993, §A at 6.

213. Daily Labor Report, *supra* note 210.

214. Fischer, *supra* note 212. A recent survey indicated that two-thirds of U.S. voters prefer to pay for health reform with a cigarette tax of up to $2.00 per pack over a general tax increase. *Id.*

that "smoking-related disease kills an estimated one in five Americans, and it's believed to cost the county $68 billion a year in health-care expenses and productivity losses."[215] The tobacco industry is already gearing up for a fight. Industry officials are saying that since higher taxes cut cigarette consumption, the President's plan will put even more Americans out of work.[216] One industry official estimates that the President's proposal will cost the jobs of 75,000 people working in the growing and manufacturing of tobacco products.[217] Although it is almost certain that the present federal excise tax will increase from its current $.24 per pack level, it is not known just how much of an increase Congress will approve. As a result of the public's support of health care reform and a higher cigarette tax to pay for that reform, the tobacco industry can only hope to use its powerful Washington influences to minimize that tax increase.

4. *Other Legislative Efforts*

A proposal to ban all cigarette advertising was defeated in 1987.[218] Although similar proposals are brought up in each legislative session, a complete ban on cigarette advertising, similar to one being proposed in France, appears unlikely. Aside from obvious First Amendment issues that would come with a complete elimination of advertising for a legal product, the advertising industry has also expressed concern over a law that would eliminate the more than $2 billion dollars a year tobacco companies spend on advertising in the United States.[219]

Another proposal that was defeated was a plan offered by Massachusetts Senator Edward Kennedy, which would have created a committee within the Department of Health and Human Services that would have had a $110 million dollar budget to "regulate tobacco additives and distribute state grants for antismoking campaigns."[220] In March 1993, Ohio Representative James Traficant introduced a bill that would ban smoking in all federal office buildings including congressional offices and the Capitol building.[221] So far, that effort has yet to be brought to a vote.

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215. *Id.*
216. *Id.* at 7.
217. *Id.*
218. Pytte, *supra* note 189, at 1542-43.
219. Rovner, *supra* note 65, at 3052.
220. Pytte, *supra* note 189, at 1543.
221. Holly Yeager, *Traficant Continues To Spark Debate*, States News Service, March

5. *The Second-Hand Smoke Wild Card*

In December, 1992, the Environmental Protection Agency published a report blaming second-hand smoke for 3,000 cancer deaths and 300,000 respiratory illnesses each year.[222] The report unleashed a wave of public sentiment calling for more anti-smoking regulations to protect non-smokers from the dangers of second-hand smoke.[223] Prior to leaving office, President Bush was urged, but ultimately refused, to sign an executive order banning smoking in all federal buildings.[224] The tobacco industry fears such an order since, as the largest employer in the country, the federal government could serve as an example for a new wave of smoking regulations throughout the country.[225] President Clinton has not taken specific action because of the EPA report. There is no evidence that the report has dislodged the obstacles placed in Congress by the tobacco industry towards enacting federal smoking regulations. In fact, despite a renewed legislative push for more restrictions at the state and local level, EPA Director Carol Browner has "declined to endorse an explicit government ban on smoking."[226]

D. *Conclusions*

Despite yearly attempts to increase regulation of smoking, the legislative muscle of the tobacco industry has blocked Congress' attempts to pass any major piece of anti-smoking legislation introduced since the 1989 law banning smoking on virtually all domestic flights. It is unlikely that President Clinton will pursue a more aggressive anti-smoking agenda. While he was Governor, Arkansas remained one of

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4, 1993 (LEXIS, Nexis Library, Omni File). Presently, each member of Congress is able to formulate their own office smoking policies. Although most members of Congress favor tighter controls on smoking in federal office buildings, House Speaker Thomas Foley has said that he "wouldn't support a completely smoke-free situation." *Id.*

222. Jerry Moskal, *Labor Secretary Considers Regulating Workplace Smoke*, Gannett News Service, January 12, 1993 (LEXIS, Nexis Library, Currnt File).

223. *New Regs Likely In Wake Of EPA Report*, American Political Network, Inc. January 8, 1993 (LEXIS, Nexis Library, Currnt File). Outgoing EPA Administrator William Reilly called on President Bush to enact more smoking regulations before he leaves office saying "I don't think there's a factory in the country that runs the risk to its workers that all of us run from exposure to tobacco smoke." *Id.*

224. Michael Kranish, *Bush is Urged to Bar Smoking at Federal Sites*, THE BOSTON GLOBE, January 13, 1993, §a at 3.

225. *Id.*

226. *Second-Hand Smoke: EPA Launches Full-Court Press*, American Political Network, July 22, 1993 (LEXIS, Nexis library, Omni File).

a handful of states with little or no regulation in this area. Congress appears content to allow the individual states to determine their own no-smoking policies, based upon the needs of their citizens, even if that means a lack of uniformity in smoking regulations from state to state.

VI. ANALYSIS

A. *Reaction to the French Law*

The initial French reaction to the no-smoking law has been mixed. Although a recent poll indicated that 84% of the population and 66% of smokers approve of the new decree,[227] most people appear to be ignoring it. Some restaurant owners are refusing to go along with the new restrictions for fear it may hurt business, while others put their mandatory no-smoking sections in basements or near kitchens.[228] Government officials say that, despite the sharp penalties built into the law, police have been told to be lenient until people get used to the new restrictions.[229]

Although the French law will likely remain on the books, it is unclear whether the law itself will have any effect on curbing smoking. The new law is just one of three lines of attack being taken by the French Government to reduce this deadly habit. In addition to proposals banning advertising and increasing the price of cigarettes, the new law should help reduce cigarette consumption in France in the long run. Despite their aggressive three-pronged attack, the French Government should be patient. In 1964, when the United States government began its anti-smoking effort, 40% of its population were smokers, the same as in France today. After 28 years of smoking restrictions, price increases, and advertising regulations, the smoking rate was reduced to

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227. Robin Smyth, *Puffing In The Last Chance BAR-TABAC - Anti-Tobacco Law*, REUTERS, November 1, 1992 (LEXIS, Nexis Library, Omni File).

228. Frances Kerry, *Public Smoking Ban Just A Wheeze, French Cafes Say*, REUTERS, November 1, 1992 (LEXIS, Nexis Library, Omni File). Some French Cafe owners say they would rather pay the fine than throw out loyal customers who continue to smoke. Some angry owners even say brazenly, "[n]othing will change." *Id.*

229. *Id.*

26.5%.[230] With the exception of its national law, the French Government is embarking upon a course of attack similar to the one taken by the United States. Although progress will come, it is likely to be slow.

B. *American No-Smoking Laws*

The federal government appears willing to allow state and local governments to lead the battle against smoking in public places and in the workplace. All but two states have some restrictions on smoking in public places and hundreds of local ordinances regulate smoking, even in states without any restrictions.[231] Although the tobacco industry is aggressively fighting any restrictions on smoking at the local and state level, the trend is clearly towards more regulation and further restrictions of smoking in both public places and the workplace, especially in the wake of the EPA report on the dangers of second-hand smoke. The industry has chosen to fight new smoking regulations on the state level, lobbying for laws that preempt local attempts to impose more stringent rules.[232] Initial industry efforts have proven to be successful. At least nine states have passed "smokers' rights" laws, which attempt to protect the smoker by defining smoking as a civil right or preempting local ordinances that may be more stringent than those at the statewide level.[233] As more and more state legislatures consider laws imposing further restrictions on smoking, the industry will intensify its

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230. Opderbeck, *supra* note 1, at 11.

231. *Surgeon General's Report*, *supra* note 55, at 570.

232. Kathleen Sylvester, *Smoking Laws: After The Air War*, GOVERNING, August 1991 at 24. Aside from the 45 states with some limitations on smoking in public places, at atleast 600 localities have also imposed regulations that are in many cases more stringent than those at the state level. Because it is virtually impossible for the tobacco industry to oppose every local smoking restriction, the industry has decided it is more realistic to lobby for state laws which include language that preempts local ordinances. *Id.*

233. *Id. See* ARZ. REV. STAT. ANN. § 36-601.02 (f) (State no-smoking policies cannot discriminate against smokers); 1991 CONN. PUB. ACTS 91-271 (employers cannot discriminate against employees who smoke and cannot regulate employees smoking behavior outside of work); FLA. STAT. § 386.209 (preemption of all local smoking ordinances); ILL. REV. STAT. Ch. 111 1/2 Para. 8209 (preemption of local smoking ordinances and protection of employees who smoke from discrimination by employers); LA. REV. STAT. ANN. § 23:966 (employers cannot discriminate against employees who smoke); OKLA. STAT. tit. 63 § 1-1522 (preemption of local smoking ordinances); 35 PA. CONS. STAT. ANN. § 1235.1 (preemption of local smoking ordinances); R.I. GEN. LAWS. § 23-20.7.1-1 (employers cannot discriminate against employees who choose to smoke at home); VA. CODE ANN. § 15.1-291.4 (preemption of local smoking ordinances).

efforts to maintain the status quo and promises to do whatever it takes to protect the rights of the smoker from further erosion.

VII. CONCLUSION

The French Government has taken some drastic steps to try to reduce cigarette consumption. With one of Europe's highest smoking rates, at a cost of $11.4 billion a year, the government did not have a choice. The scope of the French law, affecting every public enclosed space and worksite in the country, is an important element in trying to change the traditional French custom of smoking. The nationwide law affects every French citizen, rather than those in a particular city or region. The new law, coupled with more advertising restrictions and price increases, should eventually produce a decrease in the number of smokers.

It took the United States 28 years to reduce its percentage of smokers from 40% to 26.5%. However, the United States never has, and probably never will, have a national no-smoking law as restrictive as the one in France. Although the United States has had price increases and advertising restrictions similar to those being offered in France, behavioral restrictions in public places and at work have been left to individual states and, thus, subsequently vary on a state by state basis. Despite this apparent inconsistency, the United States continues to win the war against smoking as evidenced by the decrease in consumption levels. Individual states have proved to be more innovative and aggressive in their regulation of smoking. Although the tobacco lobby continues to fight any new restrictions, their ability to stop legislation aimed at regulating smoking is severely diminished outside of Washington D.C. and the halls of Congress. The French may not like their national government telling them when and where they can smoke, but in the long run, resistance should wane. When it does, the French people may willingly snuff out one of their national symbols, thereby clearing the blue clouds of cigarette smoke that have so long been a tradition in the cafes of Paris.

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International Regulation of Driftnet Fishing: The Role of Environmental Activism and Leverage Diplomacy

I. Introduction

The latter half of the twentieth century may well be remembered for both the gravity of human-induced environmental destruction and the birth of an earth-wide environmental human conscience. These environmental issues transcend national boundaries to encompass global issues.[1]

> [A]s humanity believes increasingly that in a theoretical sense the planet belongs to all . . . the notion of legitimate interests seems to extend far beyond traditional notions of harms. Consequently, there is a perception that all have an interest in preventing the loss of a species, the destruction of cultural heritage, and the waste of natural resources.[2]

In the United States, interest in the preservation of American wilderness and the ecological diversity contained therein became part of the agenda of the national government after the Civil War and was a prominent issue during the presidency of Theodore Roosevelt in the early part of this century. The creation of Yellowstone National Park,[3] with its unique geological features and threatened wildlife, was representative of America's concern for diminishing wilderness, but that concern was domestic in its focus. Whether Brazil and its people were destroying the Amazon rain forest was considered irrelevant for Americans, since the area was so vast and remote and most Americans had no idea of the global implications of deforestation. Environmental issues were localized and generally confined within national borders or between contiguous nations.

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1. Stockholm Declaration on the Human Environment, adopted by the UN Conference on the Human Environment at Stockholm, June 16, 1972, Section I of Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 and Corr.1 (1972), *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter "Stockholm Declaration"].

2. Caron, *The Law of the Environment: A Symbolic Step of Modest Value*, 14 Yale J. Int'l L. 528, 529 (1989).

3. Yellowstone National Park was the first area in the United States designated a national park and wilderness area in 1872. 12 Encyclopaedia Britannica, 833 (15th Ed. 1986).

Historically, the vast common oceans of the world have been important to many nations for various purposes: the ocean's natural resources, for commerce and transportation, and for the dumping of garbage. Environmental concerns about the exploitation or pollution of the marine environment, if those concerns were expressed at all, extended only to a particular nation's coastline or waterways.[4] Conflict between nations over the navigational use of seas and waterways dates from ancient times; the Punic Wars between Rome and Carthage were conflicts over the control of shipping lanes and ports to determine who would control trade in the Western Mediterranean.[5] The living and mineral marine resources that were found beyond the coastlines and an approximately two to three mile territorial zone[6] were considered the property of all people. As long as the resources seemed plentiful, the freedom of all nations to harvest the bounty of the oceans in an unlimited fashion was generally unquestioned.[7]

Conflicts over fishing practices on the high seas are an outgrowth of the twentieth century realization that the oceans are not as vast and inexhaustible as once thought. Efficient and extensive whaling has brought many species of cetaceans to the brink of extinction.[8] Large scale driftnets, which indiscriminately trap everything that enters them, have significant effects on many populations of marine life.[9] Consequently, the driftnetting practices of Taiwan in the North Pacific and the decision of Norway to resume whaling can no longer be viewed solely as the responsibility or concern of Taiwan and Norway. What one nation does in its exploitation of the high seas has consequences

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4. Regulation of fishing methods in rivers and inland waters dates back to the Middle Ages. *See* Johnston, *The Driftnetting Problem in the Pacific Ocean: Legal Considerations and Diplomatic Options*, 21 OCEAN DEV. & INT'L. L., 5, 7 (1990).

5. 20 ENCYCLOPAEDIA BRITANNICA 317-21 (15th Ed. 1986).

6. Krueger & Nordquist, *The Evolution of the 200-mile Exclusive Economic Zone: State Practice in the Pacific Basin,* 19 VA. J. INT'L L. 321, 322 (1979).

7. Fishing for Salmon in North America has historically been regulated. *See* J.A. GULLAND, THE MANAGEMENT OF MARINE FISHERIES (1974), *quoted in* Johnston, *supra* note 4, at 27 n.23.

8. "[T]he history of whaling has seen overfishing of one area after another and of one species of whale after another to near extinction." International Convention for the Regulation of Whaling, preamble, Dec 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72.

9. *High Seas Driftnet Fishing: Hearing before the National Ocean Policy Study of the Senate Committee on Commerce, Science, and Transportation*, 102nd Cong., 1st Sess. 30 (1991) (statement of Dr. Michael F. Tillman, Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce) [hereinafter "Senate Hearing"].

that impact every other nation that utilizes marine resources. The exploitation also raises conservation protests from independent environmental groups because of threats to endangered species, pollution, and destruction of the oceans' ecosystems. The oceans are common territory that neither belong to a particular nation nor to the human race as a species. "The environment belongs to all of us. In this new world of freedom the world citizens must enjoy this common trust for generations to come."[10]

Global environmental problems present international law with the challenge to address the tragedy of the commons.[11] "Ruin is the destination toward which all men rush, each pursuing his own best interest in a society which believes in the freedom of the commons. Freedom in a commons brings ruin to all."[12] This Note will address the ways in which international law has thus far dealt with an environmental issue of the commons of the high seas: large-scale pelagic driftnet fishing. Nations have been reluctant to surrender individual autonomy in the exploitation of marine resources. Treaties and customary law are the sources of hard international law, defined as law which is considered binding by nations. Hard law has achieved limited success in regulating fishing practices on the high seas. Soft law, often contained in declarations, is not binding but carries persuasive weight; soft law, leverage diplomacy, and public awareness created by activist environmental groups have been critical in promoting and forcing change in international treaties and resolutions which address large-scale driftnet fishing. This Note will first explore the sources of international environmental law. It will then trace the regulation, or lack thereof, in the practice of driftnet fishing and the roles that environmental activism and leverage diplomacy have, or are likely to play, in international regulation of these activities.

II. SOURCES OF INTERNATIONAL LAW

International law consists of hard law: that which has been negotiated and ratified in treaties or law which has its source in state custom or practice of a long-standing nature.[13] The nature of global environmental problems involves factors which make it difficult to apply

10. President George H. W. Bush, *Excerpts from Bush's Speech at the Opening of the U.N. General Assembly*, N.Y. TIMES, Sept. 26, 1989, at A8.

11. Hardin, *The Tragedy of the Commons, reprinted in* ECONOMICS, ECOLOGY, AND ETHICS 100 (H. Daly ed. 1973) [hereinafter "Hardin"].

12. *Id.* at 104.

13. Geoffery Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L., 259, 269 (1992).

and solve these problems primarily with hard international law. Three factors contribute to this difficulty: the formidable nature of environmental issues being negotiated; the condition of the international organizations relating to the environment, particularly the U.N. system; and those methods currently used to make international law.[14] Addressing such issues as ozone depletion, climatic change, reduction of bio-diversity, or disposal of nuclear waste requires the input of the world's scientific community, political leaders, business interests, agricultural interests, and health professionals. Global environmental issues can be discussed in terms of security.

> [I]f global environmental security is taken to mean security against those risks that threaten our common survival, the focus of collective legal action may indeed be sharpened considerably. A tentative priority list of genuine survival risks would thus, as a minimum, have to include the following essential concerns: climatic security, biological security, chemical security.[15]

Considering the complexity of world environmental problems, the lack of a U.N. institutional organ to deal with the environment is illustrative of how recently these problems have been recognized. "In no respect is the [U.N.] Charter more a product of its times than in its disregard of the environment. Aside from a reference to 'good neighborliness', it contains nothing."[16] Environmental tasks are spread among different U.N. agencies, including the World Health Organization, the Food and Agricultural Organization, and the International Maritime Organization. The UN Environment Programme (UNEP) was established by a General Assembly resolution to stimulate environmental action and coordination.[17] UNEP can claim some successes, but has no formal powers and as presently constituted is an inadequate organ for the magnitude of world environmental problems.[18] Why has the U.N. not been restructured to create an environmental agency with the scope

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14. *Id.* at 259.

15. P. Sand, International Law on the Agenda of the United Nations Conference on Environment and Development 15 (unpublished paper on file, Victoria University of Wellington), *quoted in* Palmer, *supra* note 13, at 260.

16. Palmer, *supra* note 13, at 260.

17. *Institutional and Financial Arrangements for International Environmental Co-operation*, G.A. Res. 2997, U.N. GAOR, 27th Sess., Supp. No. 30 at 43, U.N. Doc. A/8730 (1972).

18. See Palmer, *supra* note 13, at 261-63 for a discussion of UNEP and its accomplishments and limitations.

and power to adequately address these problems? Inaction on the part of member nations may well be explained by their hesitancy to surrender any autonomy.

> To produce the conditions necessary for sustainable development, a great deal more in the way of regulation and prohibition will be required at the international level than we have been prepared to tolerate up to now . . . both developed and developing countries have an interest in resisting change—their freedom of action as nations is likely to be reduced and they know it—hence the lack of enthusiasm for new institutions and methods of international lawmaking.[19]

III. METHODS OF MAKING INTERNATIONAL LAW

A. *Customary International Law*

Customary international law exists when nations conform their conduct to an "international custom, as evidence of a general practice accepted as law."[20] Customary norms are created by national practice "followed by . . . [the nations] from a sense of legal obligation."[21] Customary norms require both acceptance by many nations and widespread observance over a *period of time* to be accepted as binding law. Since many environmental concerns, including the adverse effects of driftnet fishing on marine ecosystems, have been recognized only recently, customary law offers only modest protection for the environment.[22] Environmental practices of individual nations have historically been considered the concern of those nations alone, not matters for international regulation. However, as the number of environmental protection treaties between nations increases, the web of legal standards tightens and multiplies the number of occasions on which credible arguments can be made that customary international law has been breached.[23] While customary international law has the advantage of

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19. *Id.* at 260.

20. Statute of the International Court of Justice, Art. 38(b), 59 Stat. 1031, T.S. No.993, 1976 U.N.Y.B. 1052.

21. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. VI, § 102(2) (1987).

22. I. Brownlie, *A Survey of International Customary Rules of Environmental Protection*, 13 NAT. RESOURCES J. 179 (1973).

23. Palmer, *supra* note 13, at 264-65.

flexibility in being able to change as new norms develop and are adopted by nations, "it is not a regulatory system and cannot be turned into one."[24] Therefore, many global environmental issues that require regulation and monitoring of environmental practices cannot be adequately addressed by customary international law.

B. *Treaties*

Treaties form the other branch of hard or binding international law and can be bilateral (between two countries) or multilateral (negotiated and ratified by a number of countries). Many environmental treaties have been negotiated in the past twenty years.[25] Treaties regulating driftnet fishing will be addressed specifically at a later point in this article. Treaties generally require long negotiation processes and often intentionally lack specificity.[26] However, the major difficulty in making international law by treaty lies in the principle of consent.[27] There is an "underlying principle that no State can be bound by any treaty provision unless it has given its assent, and that principle is applicable equally to all types of treaty."[28] Article 11 of The Vienna Convention on the Law of Treaties provides: "The consent of a State to be bound by a treaty may be expressed by signature . . . or by any other means if so agreed."[29] In negotiating multilateral treaties, the requirement that a nation must consent to be bound by a treaty often means negotiating to the lowest common denominator because "a single nation can resist the development of a common position and demand concessions as the price of securing unanimous consent."[30] Since all interested nations must agree on treaty terms, treaty law is often inadequate to effectively regulate environmental problems, because unanimity is difficult to achieve when complex global problems are being negotiated.

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24. *Id.* at 266.

25. Register of International Treaties and other Agreements on the Environment, UN Doc. UNEP/G.C.16/Inf.4 (1991).

26. Palmer, *supra* note 13, at 271-72.

27. *Id.* at 272.

28. A. MCNAIR, THE LAW OF TREATIES 162 (1961), *quoted in* Palmer, *supra* note 13, at 272.

29. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF.39/27 (in force Jan. 27, 1980) U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

30. Palmer, *supra* note 13, at 264.

C. *Soft Law*

Soft international law exists when international responsibilities are based on general consensus, rather than on hard law obligations based on treaty law or customary law.[31] Soft law is often stated in standards that are discretionary but that can produce a climate for the creation of hard law down the road. "Soft law is where international law and international politics combine to build new norms."[32] Soft law relating to the environment can be found in several declarations issued by international conventions.

1. *The Stockholm Declaration of the United Nations Conference on the Human Environment*[33]

The Stockholm Declaration deals with many of the environmental issues of global significance, often in statements that are inconsistent with each other, but does affirm that we have a "solemn responsibility to protect and improve the environment for present and future generations."[34]

2. *The Hague Declaration on the Environment*[35]

The Hague Declaration is stated at the level of general principle and avoids details on issues that pose disagreement.[36] Its significance is that it undertook, by a soft law method, to undermine the rule of unanimous consent. The signatories pledged themselves to promote the development of new institutional authority, within the framework of the United Nations, responsible for combating any further global warming of the atmosphere. That authority shall "involve such decision-making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved."[37]

> Acceptance [of the principle] that nations can be bound without their consent opens the door to a quite different legal context

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31. Johnston, *supra* note 4, at 21.

32. Palmer, *supra* note 13, at 269.

33. Stockholm Declaration, *supra* note 1.

34. Stockholm Declaration, *supra* note 1, Principle 1, *quoted in* Palmer, *supra* note 13, at 266.

35. Hague Declaration on the Environment, March 11, 1989, *reprinted in* 28 I.L.M. 1308 (1989).

36. Palmer, *supra* note 13, at 277.

37. Hague Declaration, *supra* note 35, at 1310, *quoted in* Palmer, *supra* note 13, at 278.

> from that in which international law has developed. It offers the prospect of fashioning an international legislative process for global environmental issues. It offers the practical means of securing the higher standards that may be required by an objective assessment of the scientific evidence, however politically inconvenient a particular measure may be for an individual country.[38]

This departure from the requirement that states must consent in order to be bound by international law has ramifications that are significant for the regulation of driftnet fishing and will be addressed in the discussion of weaknesses in current applicable international law.

3. *The Third United Nations Conference on the Law of the Sea (UNCLOS III)*[39]

> Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.[40]

Stated in the preamble of UNCLOS III is the tension that hampers effective regulation of international fishing practices and other environmental marine problems: the hard law principle of national sovereignty to utilize the high seas without interference from other nations versus the soft law norms promoting efforts to conserve and regulate the marine environment to protect it from over-exploitation and destruction. UNCLOS III was opened for signature on December 10, 1982, when 117 states, including Japan and South Korea, became signatories. The United States did not sign because of the convention's provisions relating to the sea bed and the exploitation of its mineral resources.[41] The treaty is to enter into force 12 months after 60 states

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38. Palmer, *supra* note 13, at 278.

39. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. No. A/Conf.62/122, 21 I.L.M. 1261 (1982).

40. *See id.* (preamble).

41. President's Statement on United States Oceans Policy, 1 PUB. PAPERS 378 (1983).

or parties to the Convention have ratified it.[42] As provided in the Vienna Convention, "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."[43] Therefore, UNCLOS III is not yet binding even on signatory nations, but these nations do have an obligation not to frustrate the treaty's goals.[44]

UNCLOS III divides the oceans of the world into three areas: (1) the territorial sea, an adjacent belt of sea to a coastal state not to exceed 12 nautical miles,[45] (2) the Exclusive Economic Zone (EEZ), an area beyond and adjacent to the territorial sea in which the rights of the coastal nation and the rights of other nations are governed by this convention,[46] and (3) the high seas, which comprise all parts of the sea that are not included in EEZs, territorial seas, or the internal waters of a nation.[47] Part V concerns the rights, jurisdiction and duties of a coastal nation in its EEZ. "With regard to animals occurring in the EEZ of a State, the sovereignty of the State concerned has been explicitly established by article 56. . . ."[48] Article 61 specifies that the coastal state shall determine the allowable catch of the living resources in its EEZ, taking into account the best scientific evidence available to it, and thereby ensuring through proper conservation and management measures that the living resources in the EEZ are not endangered by over-exploitation. Large-scale driftnetting targets migratory species that are found at various times in the EEZs of different coastal nations and on the high seas. Article 64 specifies cooperation directly and through appropriate international organizations among coastal nations and other nations whose nationals fish in a region for highly migratory species with a view to ensuring conservation. Two problems arise in applying these articles to the legal status of highly migratory species. First, there is no definition of highly migratory species

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42. UNCLOS III, *supra* note 39, art. 308. As of March, 1990, 40 states (2/3 of the required number) had ratified the treaty. Davis, *North Pacific Pelagic Driftnetting: Untangling the High Seas Controversy*, 64 S. CAL. L. REV. 1057, 1076 n.151 [hereinafter "Davis"].

43. Vienna Convention, *supra* note 29, art. 28.

44. *See* Davis, *supra* note 42, at 1077 n.154.

45. UNCLOS III, *supra* note 39, arts. 2 & 3.

46. UNCLOS III, *supra* note 39, part V, art. 55.

47. UNCLOS III, *supra* note 39, part VII, art. 86.

48. Cyril de Klemm, *Migratory Species in International Law*, 29 NAT. RESOURCES J. 935, 938.

other than a list of species contained in an annex,[49] which would be difficult to amend if the need arises to add other species. Second, because article 56, which gives coastal nations sovereign rights over the living resources of their EEZ, makes no exception for highly migratory species, coastal nations are empowered to determine on their own what should be the maximum allowable catch of these species.[50] "Conversely, where no State has sovereign rights, that is to say in the high seas, animals become international *res nullius* that anybody may exploit, over-exploit or destroy as he pleases. This latter principle is embodied in international law under the name of freedom of fishing in the high seas." [51] UNCLOS III enunciates this principle in Article 87(1) and in Article 116. Therefore, even though the comprehensive themes of UNCLOS III are the soft law duties of conserving[52], cooperating,[53] and negotiating[54] to preserve the marine environment and its living resources, nations still can point to the freedom of fishing provisions, which are also in the treaty as justification for the legality of disputed fishing practices. Article 65 applies to marine mammals and allows coastal nations and international organizations to prohibit, limit, or regulate the exploitation of marine mammals more strictly than provided in the treaty,[55] thereby recognizing the competence of the International Whaling Convention[56] to regulate whaling wherever it is prosecuted.[57]

IV. HIGH SEAS DRIFTNET FISHING

A. *Impacts of Large-Scale Driftnet Fishing on the Living Marine Environment*

The Department of Commerce released the "Final Report of the 1990 Observations of the Japanese High Seas Squid Driftnet Fishery

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49. *Id.* at 942.

50. *Id.*

51. *Id.* at 938.

52. The duty to conserve is stated in Articles 117, 119, and 194(5) and, implicitly, in the comprehensive obligation to preserve and protect the marine environment in Article 192. *See* Johnston, *supra* note 4, at 22.

53. The duty to cooperate is articulated in Article 197, as well as in provisions relating to highly migratory species (Article 64), marine mammals (Article 65), and anadromous stocks (Article 66). *See* Johnston, *supra* note 4, at 22.

54. The duty to negotiate conservation arrangements is stated in Article 118, as well as Articles 64(1) and 66(4). *See* Johnston, *supra* note 4, at 22.

55. de Klemm, *supra* note 48, at 941.

56. International Whaling Convention, Dec. 2, 1946, T.I.A.S. No. 1849, 161 U.N.T.S. 72 (signed at Washington, D.C.).

57. de Klemm, *supra* note 48, at 941.

in the North Pacific Ocean" to the public on June 14, 1991. The report is the result of cooperative efforts by scientists and fishery observers from the United States, Japan, and Canada to determine the catch and bycatch of Japan's 1990 high seas squid driftnet fishery in the North Pacific. The data were collected by 35 United States, 29 Japanese, and 10 Canadian scientific observers on 74 Japanese commercial driftnet vessels.

> Scientific observers reported that in addition to the 7.9 million squid caught by the 74 vessels, 3.2 million pomfret, 252,900 tuna, 81,956 blue sharks, 30,464 sea birds, 1,758 dolphins and 9,747 salmonids were entangled in squid driftnets. The 1990 observer program covered approximately 10 percent of the total Japanese squid driftnet fishery.[58]

"North Pacific stocks of albacore tuna, once the target of a selective hook-and-line troll fishery conducted by United States fishermen, have dramatically declined in recent seasons possibly due to over-fishing by driftnetting nations."[59] "The over-exploitation of sharks is of serious concern. Most species of sharks mature and reproduce very slowly, and hence are extremely susceptible to over-fishing. They also play an important role in the marine ecosystem as apex predators, so their over-exploitation may result in impacts to associated species."[60]

> If these aforementioned observations are indicative of what is happening elsewhere in the driftnet fisheries—and we have no evidence to indicate otherwise—complete marine ecosystems are being methodically "strip-mined" of their living marine resources—both fish and wildlife. Driftnets are not selective and the data uncovered so far from the 1989 and 1990 observer programs are frighteningly telling.[61]

The United States Congress, after considering data from the scientific observer program on driftnet fishing, made the following findings in the "High Seas Driftnet Fisheries Enforcement Act":[62]

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58. *Senate Hearing*, *supra* note 9, at 30 (statement of Michael Tillman).

59. *Senate Hearing*, *supra* note 9, at 46 (statement of Ben Deeble, ocean ecology campaigner, Greenpeace).

60. *Id.*

61. *Senate Hearing*, *supra* note 9, at 61 (statement of Albert Manville, II, Ph.D., Senior Staff Wildlife Biologist for Defenders of Wildlife and Chair of the Entanglement Network Coalition).

62. High Seas Driftnet Fisheries Enforcement Act, Pub. L. No. 102-582, 106 Stat. 4901 (*amending* 16 U.S.C. §1801 *et seq.*).

(1) Large-scale driftnet fishing on the high seas is highly destructive to the living marine resources and ocean ecosystems of the world's oceans, including anadromous fish and other living marine resources of the United States.

(2) The cumulative effects of large-scale driftnet fishing pose a significant threat to the marine ecosystem, and slow-reproducing species like marine mammals, sharks, and seabirds which may require many years to recover.

(3) Members of the international community have reviewed the best available scientific data on the impacts of large-scale pelagic driftnet fishing, and have failed to conclude that this practice has no significant adverse impacts which threaten the conservation and sustainable management of living marine resources.

B. *Regional and U.N. Efforts to Regulate Driftnetting*

Worldwide concern over the destructive effects of large scale driftnet fishing has resulted in action by the U.N. General Assembly. General Assembly resolutions are "collective opinions on particular subjects."[63] Resolutions are not binding as hard international law, but do serve the soft law function of providing discretionary standards for international behavior.

> At the very least, widely supported and repeatedly affirmed UN resolutions reflect and articulate agreed upon principles on the basis of which international legal rules can and do develop. Hence, the statement that UN General Assembly resolutions are not binding, although true in a formal sense, contributes little to an understanding of the significant effect these resolutions at times have on the development of international law.[64]

The U.N., via General Assembly Resolutions numbered 44/225[65], 45/197[66], and most recently 46/215[67] (adopted on December 20, 1991),

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63. U.N. CHARTER art. 27, ¶ 3.

64. T. BUERGENTHAL & H. MAIER, PUBLIC INTERNATIONAL LAW 76 (2d ed. 1990), *quoted in* Davis, *supra* note 41, at 1082.

65. G.A. Res. 44/225 on driftnet fishing, adopted December 22, 1989, 29 I.L.M. 1555 (1990).

66. G.A. Res. 45/197, 29 I.L.M. 1449 (1990).

67. United Nations: General Assembly Resolution on Large-Scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas, G.A. Res. 46/215, 31 I.L.M. 241 (1992).

called for a worldwide moratorium on all high seas driftnet fishing by December 31, 1992, on all the world's oceans, including enclosed seas and semi-enclosed seas.

Before discussing this most recent resolution (G.A. Res. 46/215) and its implications, it is important to briefly outline the agreements and resolutions preceding it.

1. *Regional Agreements*

a. *The North Pacific Region*

The chief regional forum for discussion of the high seas driftnetting problem in the North Pacific has been the International North Pacific Fisheries Commission (INPFC),[68] which was established in 1953 by Canada, Japan, and the United States. The primary focus of this commission was the Japanese high seas salmon fishery in the Northeast Pacific, which was regulated by creating an "abstention line" which prohibited the Japanese from fishing to the east of 175 degrees west longitude.[69] However, Japanese fleets gradually moved further east; and research by INPFC concluded that significant numbers of maturing and immature salmon of North American origin migrated west of the abstention line and were being exposed to Japanese fishing. Consequently, renegotiations were sought by the United States and Canada, but because any change in the treaty required unanimous agreement, a stalemate existed until 1978.[70] The adoption by the United States of the Magnuson Fishery Conservation and Management Act in 1976[71] created a 200-mile Fishery Conservation Zone (FCZ) off the United States coastline and gave the United States control over significant areas that had been fished by the Japanese.[72] The creation of the FCZ or Exclusive Economic Zone (EEZ) resulted in progress in INPFC negotiations in 1978, but United States concerns about continuing

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68. International Convention for the High Seas Fisheries of the North Pacific Ocean, signed at Tokyo, May 9, 1952, 4 U.S.T. 380; T.I.A.S. No. 2786, 25 U.N.T.S. 65 [hereinafter "INPFC"].

69. *Senate Hearing*, *supra* note 9, at 50 (statement of David Benton, Director of External and International Fisheries Affairs for the State of Alaska Department of Fish and Game).

70. *Id.*

71. Magnuson Fishery Conservation and Management Act, Pub. L. No. 94-265 (1976); codified, as amended, at 16 U.S.C. §§ 1801-1882 (1988).

72. *See* Krueger & Nordquist, *supra* note 6, *quoted in* Davis, *supra*, note 41. Over 90% of the world's fish catch occurs within the first 200 miles of coastal state water.

interceptions of North American salmon led to another round of negotiations in 1985-86 and resulted in a planned phase-out of certain Japanese fishing in the Bering Sea by 1994.[73] However, large-scale driftnetting for salmon is not precluded under the agreement south of the United States' EEZ.[74] The INPFC has achieved some cooperation and conservation goals in the regulation of Japanese driftnet fishing where the target fish is salmon,[75] but, under hard international law, only nations that are parties to an organization and agree to its regulations are bound.[76] Taiwan and Korea, nations that also have large driftnetting fleets, are not parties to the INPFC.

In the late 1970s, the squid driftnet fleets of Japan, Korea, and Taiwan began fishing the waters of the North Pacific, and by 1991 "roughly a thousand vessels, with some deploying 40 miles of net a night, [were fishing] the North Pacific".[77] The Japanese claim "that their vessels are not permitted to engage in pelagic fishing of protected stocks in Convention waters, and that the chief offenders are Taiwanese 'bandits'."[78] Various proposals for a broader-based international organization to deal with fishing controversies in the North Pacific have been suggested,[79] but countries have failed to agree as to which species would be regulated and what acceptable harvests might be.

In the squid fisheries, regulation has been non-existent on the high seas of the North Pacific because there is no broad-based regulatory mechanism that includes all the affected nations. To amend INPFC regulations to totally ban large-scale driftnet fishing by members would require unanimity on the part of Japan, Canada, and the United States[80] and would still not bind non-member nations. In North America, normally warring factions such as environmentalists, commercial fishermen, fish processors, native Americans, and sport fishermen have joined forces to pressure the governments of Canada and the United

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73. *Senate Hearing*, *supra* note 9, at 50 (statement of David Benton).
74. *Id.*
75. Davis, *supra* note 42, at 1076.
76. McNair, *supra* note 28.
77. *Senate Hearing*, *supra* note 9, at 51.
78. Johnston, *supra* note 4, at 12.
79. *See* Johnston, *supra* note 4, at 32 n.71-76. Japan, Canada, the United States, the former Soviet Union, and Korea have stated support for a broader-based organization, but have not agreed on what species of fish would be covered or various other issues.
80. INPFC, *supra* note 68, art. II.

States to take national action against driftnetting nations and to support an international ban of the practice.[81]

The establishment of EEZs is one method taken by the United States and other countries to control over-fishing in coastal waters.[82] However, as more states establish these zones, the traditional high seas commons encompass a smaller area, and more pressure is created to over-fish this area. Without an international mechanism to regulate and conserve living resources on the high seas, the threat posed by large scale driftnetting is only shifted to the commons.[83]

b. *The South Pacific Region*

The high seas driftnet tuna fishery has been of extreme concern to the island nations of this area. "Although driftnetting in the South Pacific is on a much smaller scale than the North Pacific, . . . its impact on the regional economy is potentially much greater."[84] Many of these islands are developing states with economies highly dependent on the fishery resources within their 200-mile zones. The Forum Fisheries Agency (FFA) was established by 15 nations, including New Zealand and Australia, to attempt to protect their interests in these fishery resources.[85] Its membership is restricted to regional nations. The FFA functions primarily as a bargaining coalition, but it has been effective in using access to the EEZs of its members to negotiate with nations such as Japan. The practice of driftnetting was particularly threatening in this region because the catch consists largely of "juvenile albacore tuna, which come to the surface between the latitudes of 38 and 41 as they migrate to warmer waters."[86] "During the 1988-89 fishing season, driftnetting fisheries took almost 25,000 tons of albacore, which gave rise to some serious concerns regarding the continued viability of the stock."[87] A treaty prohibiting driftnetting in the EEZs of South Pacific Forum nations was concluded at Wellington, New Zealand, on November 24, 1989.[88] It requires signatories to prohibit

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81. Johnston, *supra* note 4, at 13.

82. Johnston, *supra* note 4, at 31 n.61. Five of the North Pacific nations had introduced 200-mile zones of one kind or another.

83. Hardin, *supra* note 11.

84. Johnston, *supra* note 4, at 14.

85. *Id.*

86. *Id.*

87. *Senate Hearing*, *supra* note 9, at 30 (statement of Michael Tillman).

88. Convention on the Prohibition of Driftnet Fishing in the South Pacific, opened for signature Nov. 29, 1989, 29 I.L.M. 1449 (1990) [hereinafter "Wellington Convention"].

driftnets larger than 2.5 kilometers within their EEZs, to prevent the landing or processing of driftnet catches, and to deny harbor access to driftnet vessels.[89] Because a large expanse of the South Pacific is included in the EEZs of the signatory nations, and because the Wellington Convention prohibits driftnet vessels from crossing through those nations' EEZs, driftnetting is effectively illegal in much of the South Pacific. The United States, because of the presence of United States territories within the region, was eligible and did sign the Wellington Convention on November 14, 1990. Japan announced on August 15, 1990, that it had suspended driftnet fishing in the South Pacific, and Taiwan also agreed to suspend driftnetting by July 1, 1991.[90]

c. *Other Regional Agreements*

Italy and France are discussing the creation of an international marine reserve in the occidental Mediterranean; the sanctuary will be created for cetaceans and other endangered species. The working group will be suggesting new restrictions on fishing concerning driftnets and additional monitoring of fishing by third countries.[91]

2. *U.N. Resolutions*

Initially, the United States and 17 other nations proposed a draft that recommended a "moratorium on all high-seas driftnet fishing by 30 June 1992 unless or until it is agreed that the unacceptable impact of such a practice can be prevented and that the conservation of the world's resources can be ensured."[92] "The effect of this draft would have been to terminate the use of driftnets on the high seas unless *proponents of their use* could carry the burden of securing agreement on means of preventing an 'unacceptable impact' and of ensuring conservation."[93] The Japanese countered with a resolution,[94] noting that

89. *Id.*

90. *Senate Hearing*, *supra* note 9, at 30 (statement of Michael Tillman).

91. French Minister Announces Dolphin Sanctuary, Ban of Nets, INT'L ENV'T DAILY (BNA), Oct. 26, 1992.

92. The draft was entitled "Large-scale Pelagic Driftnet Fishing and Its Impact on the Living Resources of the World's Oceans and Seas," UN Doc. A/C.2/44/L.30/Rev.1, 15 November 1989. Other sponsors included Australia, Canada, Chile, Colombia, Fiji, Mauritania, Mexico, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Sweden, Vanuatu, Zaire and Zambia.

93. William T. Burke, *Driftnets and Nodules: Where Goes the United States?*, 20 OCEAN DEV. & INT'L L. 237 (1990).

94. Draft G.A. Res. A/C.2/44/L.28 (Nov. 2, 1989).

since *some* countries were concerned with the effects of driftnetting, regulation should be based on scientific data and analysis that would be regularly reviewed and a moratorium would be implemented *if* scientific data confirmed the need.[95] The burden of proving detrimental effects was placed on nations opposing driftnetting. On December 22, 1989, a compromise resolution[96] was adopted unanimously, which called for a review of the "best available scientific data on the impact of large-scale pelagic driftnet fishing" by June 30, 1991, and "for the implementation of effective conservation and management measures which are based upon statistically sound analysis to be jointly made by concerned parties of the international community with an interest in the fishery resources of the region. . . ."[97] The issue thus became how to gather scientific data on the impact of driftnet fishing on marine resources.

In the United States, concerns about the adverse effects of driftnetting were being heard from many constituencies.[98] In response Congress passed and the President signed the Driftnet Impact Monitoring, Assessment, and Control Act of 1987.[99] This Act required the United States government to negotiate cooperative agreements with those countries that take United States marine resources in the North Pacific.[100] Furthermore, the Act "called for negotiation of (1) adequate monitoring and assessment programs involving the deployment of scientific observers on driftnet vessels, and (2) adequate enforcement programs where significant U.S. marine resources, particularly salmon, may be taken."[101] To encourage the negotiation of these cooperative agreements, the Act also required the Secretary to certify, under the Pelly Amendment,[102] any country that failed to enter such an agreement with the United States by June 29, 1989. If a country was certified, then the President has 60 days to report to the Congress on what, if any, imports

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95. Davis, *supra* note 42, at 1083.

96. G.A. Res. 44/225, *supra* note 65.

97. *Id.*, *quoted in* Burke, *supra* note 93, at 239.

98. *Senate Hearing*, *supra* note 9. *See* opening statements of Senators Adams, page 5; Burns, page 9; Gore, page 8; Gorton, page 6; Hollings, page 12; Kerry, page 1; Packwood, page 3; Stevens, page 10; and prepared statements of Senator Akaka, page 11; and Senator Inouye, page 74.

99. Driftnet Impact Monitoring, Assessment, and Control Act, 16 U.S.C. § 1822 (1988) [hereinafter "1987 Driftnet Act"].

100. *Id.* § 4004.

101. *Senate Hearing*, *supra* note 9, at 28 (statement of Michael Tillman).

102. 22 U.S.C.A. § 1978 (West Supp. 1993).

of fish and/or fishery products of the certified country would be embargoed under the Pelly Amendment.[103]

Under this threat of certification, Japan concluded such an agreement with Canada and the United States on June 23, 1989. Negotiations with Korea and Taiwan were concluded after the deadline and therefore, these countries were certified; however, no sanctions were imposed. The agreements were similar and provided that scientific observers tabulate catches on squid driftnet vessels, and that satellite transmitters on driftnetting vessels verify fishing locations.[104] The results of data gathered by these scientific observation teams are summarized in the previous discussion dealing with the impacts of driftnet fishing.[105]

The U.N. again considered the use of large-scale driftnets on the high seas and adopted Resolution 46/215 without a vote on December 20, 1991.[106] The resolution called upon the international community to take three steps under section 3: (a) achieve a 50% reduction in the driftnet fishing effort by June 30, 1992 by reducing the number of vessels involved, the length of the nets, and the area of operation;[107] (b) continue to ensure that areas of operation of large-scale driftnet fishing are not expanded, but in fact are reduced in accordance with paragraph 3 (a);[108] (c) and "ensure that a global moratorium on all large-scale pelagic driftnet fishing is fully implemented on the high seas" by December 31, 1992.[109] The resolution further encourages members to "take measures individually and collectively, to prevent large-scale pelagic driftnet fishing operations on the high seas of the world's oceans."[110] The Secretary-General is to bring the resolution to the attention of both governmental, intergovernmental, and non-governmental organizations, as well as to scientific institutions with expertise in the field of living marine resources.[111] U.N. members and the other organizations referred to in ¶ 5, are to report to the Secretary-General concerning activities or conduct inconsistent with this moratorium.[112]

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103. *Senate Hearing*, *supra* note 9, at 28 (statement of Michael Tillman).
104. *Id.* at 28, 29.
105. *See supra* Part IV.A. (reported driftnet catch data).
106. G.A. Res. 46/215, *supra* note 65.
107. Res. 46/215, ¶ 3(a), *supra* note 67.
108. Res. 46/215, ¶ 3(b), *supra* note 67.
109. Res. 46/215, ¶ 3(c), *supra* note 67.
110. Res. 46/215, ¶ 4, *supra* note 67.
111. Res. 46/215, ¶ 5, *supra* note 67.
112. Res. 46/215, ¶ 6, *supra* note 67.

The Preamble to Res. 46/215 states a number of considerations which indicate the need for imposing this global moratorium. The most compelling consideration is that "members of the international community have reviewed the best available scientific data on the impact of large-scale pelagic driftnet fishing and have *failed* to conclude that this practice has *no adverse impact* which threatens the conservation and sustainable management of living marine resources,"[113] and that the "*grounds for concern* expressed about the unacceptable impact of large-scale pelagic driftnet fishing in resolutions 44/225[114] and 45/197[115] *have been confirmed* and evidence has not demonstrated that the impact can be fully prevented."[116] (emphasis added). Further considerations mentioned in the Preamble were that driftnetting was being expanded on the high seas to the Indian Ocean in contravention of the earlier resolutions,[117] that several regional organizations had expressed their opposition to large-scale pelagic driftnet fishing,[118] and that other members had decided to cease large-scale driftnet fishing on the high seas.[119]

V. ROLE OF LEVERAGE DIPLOMACY AND ENVIRONMENTAL ACTIVISM

Without the pressure created by nations opposed to the practice of large-scale driftnetting, this indiscriminate method of fishing the high seas would still be flourishing today. The actions of the United States in threatening sanctions under the Driftnet Monitoring and Assessment Act[120] resulted in agreements that placed scientific observers on driftnetting vessels. The data collected by these observers allowed the international community to conclude that the concerns about the destructive effects on many species of marine life being voiced by the opponents of large-scale driftnetting were justified. No longer could driftnetting

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113. Res. 46/215, *supra* note 67 (preamble).

114. Res. 44/225, *supra* note 65.

115. Res. 45/197, *supra* note 66.

116. Res. 46/215, Preamble, *supra* note 67.

117. *See, e.g., Senate Hearing, supra* note 9, at 54 and 55 (statement of Nancy Daves, spokesperson for the Entanglement Network).

118. Wellington Convention, *supra* note 88. *See also* Castries Declaration, in which the Organization of Eastern Caribbean States resolved to establish a regional regime in the Lesser Antilles that would outlaw the use of driftnets, see A/46/344, annex. of Res. 46/215, *supra* note 67.

119. *South Korea Pressed to Ban Drift Nets; Japan's Decision to Quit Using Deadly Gear Puts the Focus on Seoul*, LOS ANGELES TIMES, November 27, 1991, at A17.

120. 1987 Driftnet Act, *supra* note 99.

nations argue that reliable scientific data was unavailable to assess the adverse impacts of the practice. The Wellington Convention closed much of the South Pacific to vessels that fished with large-scale driftnets.[121] Nations, such as Japan, who wished access to the EEZs of this region, were forced to employ other, less destructive fishing techniques.

A number of environmental groups have expressed concern about the practice of large-scale driftnet fishing since it became widely practiced in the early 1980s.[122] In 1983 and twice during 1990, Greenpeace launched expeditions in the Pacific to document driftnet fishing and its effects.[123]

> During January 1990, . . . Greenpeace, using marine scientists, photographers, translators, scuba divers, and a skilled crew were able to obtain the first ever documentation of the impacts of this fishery. We observed over 16 species of fin fish, sharks and marine mammals dead and dying in the driftnets, including extremely rare species.[124]

In July, 1993, Greenpeace released video footage documenting the killing of whales by Italian fishing vessels using driftnets well in excess of the maximum 2.5 kilometre length sanctioned by the European Community.[125] "Greenpeace has joined some 60 other non-governmental organisations in urging governments to commit themselves to 'fundamental, long-term and legally-binding reform to address the problems of declining fish stocks.'"[126] The public awareness created by the Greenpeace and Entanglement Network documentation of driftnetting in newspapers across North America and in Europe increased the call for action by governments.[127]

On November 3, 1992, President Bush signed a bill mandating trade sanctions against any country fishing with driftnets in the North Pacific in 1993 and extending the penalties to the North Atlantic in 1994.[128] In the act, Congress finds that the U.N. specifically "encourages all members . . . to take measures individually and collectively, to

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121. Wellington Convention, *supra* note 88.

122. *Senate Hearing*, *supra* note 9, at 51.

123. *Senate Hearing*, *supra* note 9, at 41-48 (statement of Ben Deeble).

124. *Id.* at 45.

125. *Greenpeace Accuses EC Vessels of Flouting Driftnet Laws*, Europe Information Service, July 20, 1993, at 414.

126. *Id.*

127. *Groups Urge Signing of Drift-Net Bill*, SEATTLE TIMES, Oct. 24, 1992, at A8.

128. High Seas Driftnet Fisheries Enforcement Act, *supra* note 62.

prevent large-scale pelagic drift-net fishing operations on the high seas . . .''[129] It is the stated policy of the United States to implement Res. 46/215 and to secure a permanent ban on the use of destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing beyond the Exclusive Economic Zone of any nation.[130] The United States therefore will enforce sanctions against nations whose nationals or vessels are identified by the Secretary of Commerce as conducting such fishing.[131] Sanctions include the denial of port privileges and prohibitions on imports of fish and fish products. If the prohibitions established under paragraph 3 are ineffective, additional sanctions on other imports such as televisions and cars are authorized.[132] In March, 1993, the United States State Department announced that ''if U.S. enforcement authorities have 'reasonable grounds' to believe any foreign flag vessel is conducting or has conducted large scale driftnet fishing, . . . [and] [i]f the vessel is correctly registered, U.S. authorities will take appropriate 'law enforcement' action in accordance with agreements. . . .''[133]

Why is the United States taking this action to provide sanctions for driftnetting when the U.N. has passed Resolution 46/215 establishing a global moratorium on the practice, and the major driftnetting countries have announced that they will comply with the moratorium? Unfortunately, reports indicate that driftnetting is operating illegally. ''Taiwanese officials have publicly stated that since 16 February 1990, it has been illegal for its driftnet vessels to operate in the Atlantic Ocean west of 20 degrees east longitude. However, as many as 160 Taiwanese boats are reported to be fishing . . . around Tristan da Cunha, in the South Atlantic.''[134] Often fishermen attempting to avoid their own government's scrutiny sail under a flag-of-convenience, a flag purchased from another, often poorer country.[135] Environmental activist groups have been important in documenting the existence of this pirate industry. The Sea Shepherd Conservation Society, led by Paul Watson,

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129. Res. 46/215, *supra* note 67.

130. 138 Cong. Rec. § 11042(b)(3) (1992).

131. Title I, § 101(3)(B)(b).

132. *Bush Signs Drift-Net Bill*, NEW YORK TIMES, Nov. 3, 1992, at D6, col. 6.

133. *U.S. Says It Will Enforce Driftnet Fishing Moratorium*, Reuter Asia-Pacific Business Report, March 8, 1993.

134. *Senate Hearing, supra* note 9, at 55.

135. *Driftnet Use Continues Despite Ban*, THE GAZETTE (Montreal), July 19, 1993, at B2.

"infiltrat[ed] heavily guarded docks in Kaosiung, Taiwan, [and] counted 40 new or refurbished boats, [and] another 27 being refitted for driftnetting. . . ."[136] "The National Marine Fisheries Service has documented millions of pounds of illegal salmon for sale on the world market, including at least 10 million pounds which was smuggled through the United States and sold in Japan."[137] In May 1993, the United States Coast Guard sent two Chinese vessels believed to be violating the U.N. moratorium on driftnetting back to China.[138]

VI. CONCLUSION

Without the existence of sanctions for countries that openly or illegally violate the U.N. moratorium, the difficulty of enforcement in the vast area of the world's oceans and the lure of quick profits provide a great temptation to continue driftnetting. Unilateral action to punish driftnetting nations with sanctions is one of the only enforcement tools that exist, given the lack of a U.N. environmental agency with regulatory power. Individual nations and regional organizations will need to use sanctions or denial of access to EEZs to pressure compliance with the U.N. moratorium on large-scale pelagic driftnetting until a binding multinational treaty exists which not only bans driftnetting but also has enforcement powers. In addition, environmental groups will play an important role by documenting illegal driftnetting in whatever dramatic ways they can and thereby continue to keep this issue before the world community.

"Driftnets are the scourge of our seas which indiscriminately destroy marine life and rapidly deplete our oceanic resources."[139] Until the international law exists to adequately address the global environmental issues of today, the use of leverage diplomacy by individual nations and the activist confrontational techniques of groups such as Greenpeace and the Sea Shepherd Society will continue to play a critical role in addressing issues such as large-scale pelagic driftnetting.

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136. *The Modern-Day Mariner Who Gives Piracy a Good Name*, INDIANAPOLIS STAR, Aug. 30, 1992, at F3.

137. *Senate Hearing, supra* note 9 at 51.

138. *Coast Guard Sends Second Chinese Driftnetter Home*, REUTERS, LTD., May 20, 1993.

139. *Senate Hearing, supra* note 9, at 11 (statement of Senator Akaka).

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