PUNITIVE DAMAGES, LIQUIDATED DAMAGES, AND \textit{CLAUSES PÉNALES} IN CONTRACT ACTIONS: A COMPARATIVE ANALYSIS OF THE AMERICAN COMMON LAW AND THE FRENCH CIVIL CODE

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ABSTRACT

Although American common law allows punitive damages for reckless or intentional torts, it will neither allow a jury to assess punitive damages for breach of contract nor permit enforcement of a contractual damages clause that is deemed to be punitive. This approach is rooted in an early Chancery practice of granting equitable relief from oppressive penal bonds and has been more recently justified as a means of facilitating efficient breach. Economic efficiency, however, can be accomplished even if punitive damages could be assessed for intentional breach, because the parties would have an incentive to negotiate a release from the first contract to enable both to share in the surplus offered by an intervening contractual opportunity. Moreover, negotiation of an enforceable penalty clause would allow some parties to maximize their utility by exchanging a signal of assurance of performance for a premium fee. Additionally, the French experience invites a fresh look, because—although it generally disallows punitive damages of a judicial origin for any civil wrong, tort or breach of contract—it honors freedom of contract and the autonomy of the parties by enforcing a contractual penalty clause (although the court may reduce an excessive contractual penalty). Taking a cue from the French approach, American courts and legislatures should reconsider their refusal to sanction freely negotiated penalty clauses and enforce them to the extent that they permit the parties to maximize their collective utility.

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I. INTRODUCTION

Although the United States is infamous for headline-grabbing punitive damages awards in tort actions, most jurisdictions in the United States adhere to the traditional common law rule against punitive damages for breach of contract, if the breach neither constitutes nor is accompanied by tortious conduct. This hostility to punitive damages in contract actions extends to (or perhaps originates in) contractual liquidated damages clauses, which courts in the United States will not enforce if they are deemed to be punitive rather than compensatory. In contrast, even though the French Civil Code (the Code) limits judicial awards to compensatory damages in tort actions as well as those in contract, it specifically requires enforcement of clauses pénales, even if—as the term pénale suggests—they are designed to compel the breaching party to pay extra-compensatory damages. Although amendments to the Code authorize judges to reduce grossly excessive penalty clauses, the Code permits a punitive element to remain.

This article joins several other commentators in questioning the rule against judicial punitive damage awards for intentional breaches of contract, at least in those cases in which the breach is not efficient. More centrally, taking a cue from the French Civil Code, this article proposes enforcement of a freely negotiated stipulated damages clause for intentional breaches of contract, even if the clause is both prospectively and retrospectively punitive in nature.

II. PUNITIVE DAMAGES AND LIQUIDATED DAMAGES IN THE UNITED STATES

A. Legal Rules and Tests

Under the common law, juries in the United States have discretion\(^1\) to award punitive damages for egregiously tortious conduct, defined in most states as a tort committed with at least reckless disregard for the rights of others.\(^2\) Some statutes also authorize awards of punitive dam-

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ages, either open-ended or as a multiplier of actual damages. Although awards of punitive damages in tort actions are not as ubiquitous, excessive, and unjustified as they are often portrayed in popular culture, and though they are subject to constitutional limitations imposed by due process, they nonetheless hold out the possibility of total recovery that greatly exceeds the amount needed to compensate the plaintiff for actual injury.

Smith, 461 U.S. at 37–51 (reviewing the historical development of federal and state tort law, and requiring proof of intentional violations of federal law or “reckless or callous disregard for the plaintiff’s rights” for punitive damages for violations of 42 U.S.C. § 1983).


4. See Patrick S. Ryan, Revisiting the United States Application of Punitive Damages: Separating Myth from Reality, 10 ILSA J. INT’L & COMP. L. 69 (2003) (lamenting the urban legends and other inaccuracies about U.S. tort law and punitive damage awards that are circulated even by academics in Europe); Theodore Eisenberg, John M. Olin Program in Law and Economics Conference on “Tort Reform”: The Predictability of Punitive Damages, 26 J. LEG. STUD. 623, 634 (1997) (noting that punitive damages were awarded in only about three percent of tort cases in a study, with a modest median punitive damage award of $50,000, contrary to the popular perception, which is influenced by a few very large awards).

5. Pac. Mut. Life Ins. Co. v. Haslip, 517 U.S. 559 (1996) (requiring, among other things, meaningful judicial review of jury awards of punitive damages); BMW of N. Am. v. Gore, 116 U.S. 559 (1986) (finding that the state award of punitive damages violated due process by considering the defendant’s activities outside the jurisdiction, by permitting punitive damages 500 times greater than compensatory damages, and by failing to give adequate notice of the possibility of such liability). In 2003, the Supreme Court stated that due process does not impose a strict limit on the ratio of punitive damages to compensatory damages, but it hinted in dictum that a single-digit ratio is safest. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). In a more recent case, after the Supreme Court vacated a decision of the Oregon Supreme Court for reconsideration in light of Campbell, the Oregon Supreme Court applied the standards of Gore and Campbell and approved a punitive damages award far beyond a single-digit ratio for particularly outrageous tortious conduct, spurring the Supreme Court to grant review of the second decision. Williams v. Philip Morris, Inc., 127 P.3d 1165 (Or. 2006), cert. granted, Philip Morris USA v. Williams, 126 S.Ct. 2329 (2006).

6. See, e.g., Williams, 127 P.3d at 1171, 1181–82 (approving punitive damages of approximately 97 times the amount of compensatory damages awarded by the jury, or 159 times the amount of compensatory damages as capped by the trial court); Mathias v.
All but a handful of states, however, follow some version of the traditional common law rule denying punitive damages for breach of contract, subject only to a few exceptions.\(^7\) Under the traditional rule, punitive damages are not available for even a deliberate breach of contract.\(^8\) Possible exceptions to the traditional rule include: a breach of promise to marry; a public service company’s breach of contract that also constitutes a breach of duty otherwise owed by law to the public; and a breach of contract that also constitutes, or is accompanied by, either a breach of fiduciary duty or “a tort for which punitive damages are recoverable.”\(^9\)

Accor Econ. Lodging, Inc., 347 F.3d 672 (7th Cir. 2003) (approving punitive damages amounting to more than thirty-seven times the amount of compensatory damages). Because the Supreme Court has granted review in Williams, 126 S.Ct. at 2329, it may yet disapprove of punitive damages that greatly exceed compensatory damages, even if other circumstances seem to justify an unusually large award.

7. A few states permit punitive damages for any breach of contract that is accomplished with a certain level of culpability or that is accompanied by certain tortious elements, regardless of whether all the elements of an independent tort have been pleaded and proved. *E.g.*, Vernon Fire & Cas. Ins. Co. v. Sharp, 349 N.E.2d 173, 180 (Ind. 1976) (allowing punitive damages whenever “elements of fraud, malice, gross negligence or oppression mingle” with the contract breach, regardless of whether an independent tort is established) (quoting Taber v. Hutson, 5 Ind. 322, 324 (1854)); Wright v. Pub. Sav. Life Ins. Co., 204 S.E.2d 57, 59 (S.C. 1974) (allowing punitive damages for “the breach of a contract, committed with fraudulent intent, and accompanied by a fraudulent act”); Bank of N.M. v. Rice, 429 P.2d 368 (N.M. 1967) (permitting punitive damages for a malicious breach of contract or a breach that reflects a wanton disregard of the other party’s rights).

8. *See* Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 62–63 (2d Cir. 1985) (identifying this standard as a general rule in the United States); White v. Benkowski, 155 N.W.2d 74 (Wis. 1967) (holding that absent an independent basis for punitive damages in tort, punitive damages were not available for breach of a water supply contract, even though the jury found that the breaching parties had maliciously cut off the flow of water to the other parties for the purpose of harassing them).

9. *Dodge,* *supra* note 2, at 636; *Henry Mather,* *Contract Law and Morality* 117–18 (1999). *See, e.g.*, Brown v. Coates, 253 F.2d 36, 39 (D.C. 1958) (approving punitive damages for an agent’s flagrant and intentional contract breach constituting a breach of fiduciary duty to his principal). The final exception—stated in the Restatement (Second) of Contracts as a breach of contract that “is also a tort for which punitive damages are recoverable”—appears to state the obvious. *Restatement (Second) of Contracts* § 355 (1981). After all, if the plaintiff pleads and proves a tort that independently supports an award of punitive damages, why would the plaintiff need a contractual basis for punitive damages? This exception might still be meaningful if some states allow an award of punitive damages when the evidence showing breach of contract also establishes an egregious tort, even though only the contract claim is properly before the jury for procedural reasons. *Cf.* *Brown*, 253 F.2d at 39 (holding that punitive damages may be awarded for a calculated, flagrant contract breach in disregard of obligations of trust when it “merges with, and assumes the character of, a willful tort”).
In recent decades, courts in many states have authorized punitive damages for “bad faith” breaches of the implied contractual duty of good faith and fair dealing, at least in certain kinds of contractual relationships. This development, however, should not be viewed as a widespread expansion of exceptions to the traditional contracts rule because most courts following this trend have recognized the breaching party’s conduct to be tortious, thus providing an independent basis for awarding punitive damages. Alternatively, bad-faith breach in the context of


11. Courts in some states, for example, limit punitive damages for breach of an implied duty of good faith and fair dealing to “bad faith breaches” of duties in insurance contracts. E.g., Am. Health Care Providers, Inc. v. O’Brien, 886 S.W.2d 588, 590 (Ark. 1994). Others extend such treatment to a broader class of contracts involving “special relationships” with attributes similar to that between an insurer and insured. E.g., Rawlings v. Apodaca, 726 P.2d 565 (Ariz. 1986) (referring to contractual relationships implicating the public interest, giving rise to fiduciary responsibilities, or raising problems of adhesion).

12. See Slawson, supra note 10, at 122 (Although parties “ought not to be liable for punitive damages merely for breaching a contract . . . [b]ad faith breach is a tort, not a mere breach of contract . . . .”). With respect to courts that awarded punitive damages for bad-faith breach without recognizing it as a tort, some of them had already liberalized their law-of-contract remedies to permit punitive damages for egregious contract breaches. See, e.g., Romero v. Mervyn’s, 784 P.2d 992, 998 (N.M. 1989) (stating that punitive damages for bad faith breach in an insurance contract were available on the relaxed basis of gross negligence or recklessness, but noting that punitive damages had long been available for breaches of other kinds of contracts on a showing that the breaching party acted at least “recklessly with a wanton disregard for the plaintiff’s rights”).

13. Of course, if the courts characterized the breach of the implied duty as a tort solely to make punitive damages available for a particularly troublesome type of contract breach, then the “tort” label may draw no more than a semantic distinction and the authority to award punitive damages for this breach ought to be viewed as an expansion of contract remedies. See generally Dodge, supra note 2, at 637–38 (referring to punitive damages for breach of the duty of good faith and fair dealing as an “expansion of punitive damages for breach of contract,” regardless of whether characterized as contract or tort claims); Mather, supra note 9, at 132 n.24 (“Rather than tempt courts to invent new torts . . . it would be preferable to say that certain breaches of contract call for punitive damages, regardless of whether such breaches are tortious.”). Professor David Slawson, however, argues convincingly that the tort classification in the bad-faith cases reflects a finding that the defendant’s conduct does more than breach the private contractual obliga-
certain special relationships can be viewed as a breach of fiduciary duty, falling within one of the traditional exceptions. The trend of awarding punitive damages in this context eventually reached a plateau and even retreated in some states.

The general rule in the United States against awarding punitive damages for breach of contract extends to cases in which the parties’ agreement attempts to set the amount of damages that a party would owe for breaching the contract. In general, courts in the United States will not enforce such clauses if they are designed to impose a penalty for breaching the contract rather than to fix compensatory damages at a reasonable estimate of actual injury. The traditional common law test in the United States is a prospective one: courts will enforce a liquidated damages clause if, at the time of contracting, the liquidated damages clause represents a reasonable estimate of the damages that would flow from a breach, taking into consideration the difficulty in calculating damages in the event of a breach or the difficulty of estimating the damages in advance.

14. See, e.g., Romero, 784 P.2d at 998 n.3; Bruce Chapman & Michael Trebilcock, Punitive Damages: Divergence in Search of a Rationale, 40 ALA. L. REV. 741, 767–68 (1989) (speculating that intentional breach of a fiduciary duty might explain the “increasing number of American punitive damages cases in the context of insurance contracts”).
15. See Dodge, supra note 2, at 642–43 (describing the effects of a “backlash” against punitive damages); SLAWSON, supra note 10, at 110–12 (describing retrenchment in California jurisprudence).
16. Indeed, the historical basis for the common law’s rejection of punitive damages for breach of contract may be traced to penalty bonds, which are a form of contractual penalty clause. See infra notes 30–38 and accompanying text.
18. See Wasserman’s, 645 A.2d at 105–07 (tracing history, summarizing policy considerations, and synthesizing authorities). See also U.C.C. § 2-718(1) (1998) (stating that for a transaction in goods, a liquidated damages clause is assessed on the basis of its rea-
Under the modern trend, liquidated damages clauses may be upheld if they are reasonable in light of either the anticipated injury, viewed prospectively, or the actual injury caused by breach, viewed retrospectively. A retrospective test, however, generally will not be used to defeat a liquidated damages clause: if the liquidated damages clearly represent a reasonable estimate of actual injury in light of information available at the time of contracting, the clause will be upheld by most courts even though the actual injury caused by the breach is unexpectedly low or even non-existent. Still, a great disparity between the liquidated damages and the actual harm suffered by a breach may help raise doubts about the integrity of the parties’ estimate and may lead to particularly careful scrutiny of the clause under the prospective test. At bottom, the court must determine whether the evidence suggests that the parties, at the time of contracting, were less concerned with fixing uncertain damages than with compelling performance with an in terrorem penalty clause.

B. Historical Roots and Policy Justifications in the Common Law

1. Historical Dichotomy Between Torts and Contracts

Early references to extra-compensatory damages appear in the Code of Hammurabi and the Old Testament, but the first award of punitive

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19. See Wasserman’s, 645 A.2d at 107; U.C.C. § 2-718(1) (1998) (judging reasonableness in light of either the “anticipated or actual harm”); RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981). It is unlikely that this second bite at the apple, however, will greatly increase the number of liquidated damages clauses that are upheld. The additional retrospective branch of the test would rescue a clause only if (1) the parties’ estimate was unreasonably large in light of information available at the time of contracting, but (2) the actual harm turns out to be greater than could be anticipated, so that (3) the inflated estimate in fact corresponds reasonably to the actual damages suffered.


21. See generally Wasserman’s, 645 A.2d at 107 (citing to sources suggesting that hindsight may influence the application of a purportedly prospective test, including Wassenaar v. Panos, 331 N.W.2d 357, 364 (Wis. 1983)).

22. See Gotanda, supra note 3, at 194 & n.2.

23. See id.; White, 155 N.W.2d at 76 (quoting Exodus 22:1 for the mandate that a wrongdoer “shall restore five oxen for an ox, and four sheep for a sheep”).
damages in the common law is attributed to the eighteenth century English case of Wilkes v. Wood as part of the damages awarded for a warrantless search.\textsuperscript{24} Professor John Gotanda surmises that separate awards for punitive damages in appropriate cases grew out of an earlier judicial deference to extra-compensatory jury awards disguised as compensatory damages for non-pecuniary injury.\textsuperscript{25}

In the wake of Wilkes v. Wood, English courts allowed punitive damages for a wide variety of tort actions, but withheld them in actions on contractual undertakings.\textsuperscript{26} Even as England limited punitive damages more narrowly to a few categories of cases for four decades in the latter half of the twentieth century,\textsuperscript{27} courts in the United States continued to embrace the dichotomy of early English common law.\textsuperscript{28} U.S. courts granted punitive damages for a wide variety of tortious conduct, if committed intentionally or recklessly, but generally denied them for breach of contract.\textsuperscript{29}

Ironically, the English common law rule against punitive damages for breach of contract may have originated with judicial and legislative antipathy to a clever form of liquidated damages clause: the conditional bond.\textsuperscript{30} In such a bond, a debtor would, for a fee, make a bond to pay a certain sum of money to the creditor, which would be discharged if the debtor timely completed some other performance, such as constructing a bridge, which was the true object of the transaction.\textsuperscript{31} This manner of framing the obligation to construct the bridge allowed the creditor to enforce the obligation in an action on debt, which brought certain procedural advantages over an action for breach of covenant.\textsuperscript{32} Moreover, as with any form of liquidated damages, the fixed debt eliminated uncer-

\begin{itemize}
\item \textsuperscript{24} Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.) (discussed in Gotanda, supra note 3, at 196).
\item \textsuperscript{25} Gotanda, supra note 3, at 200–01.
\item \textsuperscript{26} See id. at 195–97.
\item \textsuperscript{27} See id. at 197–98; Andrew Tettenborn, Punitive Damages—A View from England, 41 San Diego L. Rev. 1551, 1551–56 (2004).
\item \textsuperscript{28} Id. at 1552.
\item \textsuperscript{29} See supra notes 1–13 and accompanying text.
\item \textsuperscript{31} See D.J. Ibbetson, A Historical Introduction to the Law of Obligations 29 (1999).
\item \textsuperscript{32} Id. at 28–30.
\end{itemize}
tainty about the damages that might be awarded for failure to construct the bridge in an action in covenant. 33

The creditor in a conditional bond normally had sufficient bargaining power to introduce a punitive element, so that the sum conditionally owed by the debtor could significantly exceed the cost or value of the alternative performance (in this example, constructing the bridge) or of any damages that the creditor likely would suffer from the obligor’s failure to render the alternative performance. 34 The punitive element of a conditional bond was most obvious if the alternative performance, the true object of the transaction, was itself the payment of money by a certain date. Failure to render that performance and thus discharge the bond would result in an obligation to pay a much higher amount, typically double the amount needed to discharge the bond. 35

During the fourteenth and fifteenth centuries, the device of the conditional bond was widely used and generally enforced with little regard for the penalties that it frequently imposed. 36 During the sixteenth century, however, the Chancery developed a practice of granting equitable relief from judgments at law enforcing punitive conditional bonds if the debtor had innocently failed to discharge the bond and if he promptly completed the necessary performance and paid damages for any remaining actual injury. 37 In 1697, this equity approach was extended by statute to actions at law, at least for conditional bonds with obvious penalties, thus eliminating the need for a two-step process of securing a full judgment at law on the bond and then adjusting the relief in a separate action in equity. 38

Thus, by 1763, when English courts began awarding punitive damages in tort actions, 39 a tradition against penalties in contract actions was well-established. The historical dichotomy in the common law between tort and contract in the availability of punitive damages, however, still begs the policy question: Why did the Chancery find that punitive conditional bonds violated principles of equity, a reaction later echoed by Parliament just seventy years before the advent of punitive damages awards in

33. Id.
34. See id. at 29.
35. Id. at 30.
36. IBETSON, supra note 31, at 28–29, 29 n.23.
37. Id. at 29 n.23, 213–14.
38. Id. at 214. See also RESTATEMENT (SECOND) OF CONTRACTS § 356(2) (1981) (as a matter of contemporary U.S. common law, declaring a conditional bond to be unenforceable on grounds of public policy to the extent that it imposes a penalty in excess of the loss caused by non-occurrence of the condition of the bond).
39. See supra note 24 and accompanying text.
common law tort actions? More to the point, because the rule against punitive damages in contract actions in the United States is defended now on grounds of public policy rather than purely as a historical holdover from English law, what are the policies that support the rule? Do these policies justify withholding punitive damages across the board for all contract breaches and withholding enforcement of all penalty clauses? In exploring the policy justifications for the general rule against punitive damages in contract actions, it may be impossible to fully separate post-hoc policy arguments from those that may have motivated early hostility to penalty clauses in the common law legal system. In a brief survey of the leading arguments, however, will inform a comparative analysis of the French approach.

2. Policy Justifications for the Rule Against Punitive Damages and Against Enforcing Penalty Clauses

Unlike civil law jurisdictions, common law jurisdictions within the United States cannot justify the contract rule against punitive damage awards on the ground that punishment should be reserved for the criminal justice system due to its elevated burden of proof and other procedural protections. In contrast to, for example, the French Civil Code, U.S. common law permits punitive damages in civil actions in tort, using the same general civil procedures and burdens of proof as would apply for any civil claim, including one for breach of contract.

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40. Cf. Dodge, supra note 2, at 630 & n.3 (quoting Timothy J. Sullivan, Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change, 61 MINN. L. REV. 207, 221 (1977) (other than simple adoption of the traditional English rule, the reasons for the U.S. contract rule against punitive damages are unclear)).

41. See GOTANDA, supra note 3, at 193.

42. See infra Part III.

43. See supra notes 1–4 and accompanying text.

44. True, the power to impose punitive damages outside the restrictions of the criminal justice system “increases our concerns” in the American judiciary about the administration of punitive damages. State Farm Mut. Auto. Ins. Co., 538 U.S. at 417. Accordingly, punitive damage awards are subject to constitutional review for possible violations of due process, see supra note 3, and the constitutional imperative to police punitive damage awards in turn mandates effective review procedures, see Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440–43 (2001) (engaging in an unrestricted review of the mixed question of law and fact of whether a jury’s award of punitive damages comports with due process). These due process restrictions on punitive damages, however, would apply equally to punitive damages awarded for breach of contract, and they do not import the full range of safeguards for which our criminal system is known.
One might attempt to explain the difference in availability of punitive damages between tort and contract actions in the United States on the basis of the source of the obligation in each type of action. While tort duties are based on community standards of conduct, contractual obligations are, for the most part, created and defined by the parties. It may be plausible to assume that parties normally do not intend to create mutual obligations that place themselves at risk of paying an uncertain amount of punitive damages in the event of breach. This assumption, however, might not hold true for all breaches. If they addressed the question, some parties might favor the availability of punitive damages for reckless or intentional breaches, particularly if each could not envision acting with such culpability himself. The inability of the parties to draft around the rule shows that the contract rule against punitive damages is based on broader public policy concerns, and not simply on generalizations about the intentions of the parties. Penalty clauses, even though voluntarily adopted by the parties, are unenforceable.

Our efforts to explain the different treatment of contracts and torts in the common law system likely will bear more fruit if we begin with the goals or purposes of punitive damages and then examine the extent to which the contract rule against punitive damages is consistent with those goals or purposes and with policies underlying contract law.

As underscored by the frequent characterization of punitive damages as “exemplary damages,” the primary purpose of punitive damage awards is to supplement compensatory damages as a means of deterring future reckless or intentional torts.

Secondarily, punitive damages serve a broad retributive purpose. Punitive damages allow the jury to express the community’s outrage at egregiously wrongful conduct by imposing punishment that the wrongdoer deserves. Moreover, punishment of the wrongdoer provides the victim of the wrongdoing with a sense of satisfaction that justice has

46. Of course, the parties’ agreement is subject to judicial interpretation, see Restatement (Second) of Contracts §§ 201-04 (1981), to judicial trimming of provisions that are unconscionable or that violate public policy, see id. §§ 178, 208, 356, and to the addition of legally implied obligations, such as the obligation of good faith and fair dealing, see id. § 205.
48. See supra notes 16–21 and accompanying text.
49. S. Lawson, supra note 10, at 122.
50. Mather, supra note 9, at 117.
51. S. Lawson, supra note 10, at 122–23.
been done or a sense of satisfaction that may come with exacting revenge on the wrongdoer.

Punitive damages also supplement compensatory damages as a means of substituting for, and thus discouraging, violent or otherwise antisocial self-help remedies. Finally, an award of punitive damages may help to cure any deficiency in the compensatory damage award’s redress of all injuries, as well as to pay for the costs of litigation.

The final two purposes of punitive damages described above need not detain us long. The goal of discouraging self-help remedies does not explain the tort/contract dichotomy because egregious breaches of contract,

52. SLAWSON, supra note 10, at 122 (referring to retribution that gives the defendant “his just deserts,” thus both “vindicat[ing] the public values against which the wrongdoer offended” and “assuag[ing] the suffering of the injured party”). “In the retributive view, the justification of any punishment is backward-looking and desert-based rather than forward-looking and consequentialist.” Chapman & Trebilcock, supra note 14, at 780. The secondary nature of the retributive purpose of punitive damages is underscored by Professor Mather: “Punishment is not justified when it is purely retributive . . . . But punitive damages can serve beneficial purposes.” MATHER, supra note 9, at 118–19. But cf. Chapman & Trebilcock, supra note 14, at 780 (discussing the Kantian view that retribution should be the primary goal of punishment, without constraints induced by other benefits that might flow from punishment or from abandoning or reducing it).

53. Studies suggest that humans have an evolved tendency to punish others within their group who act unfairly or uncooperatively in the pooling or distribution of resources, even if the punishment would further reduce resources immediately available to the punishing party. Karl Sigmund, Ernst Fehr & Martin A. Nowak, The Economics of Fair Play, 286 SCI. AM. 82, 83–87 (2002) (referring to “an ambitious cross-cultural study,” to variations of an “ultimatum game” studied by economists, to an evolutionary model studied by authors Sigmund and Nowak and by Karen M. Page, and to experiments conducted by author Fehr and Simon Gächter). Early humans who acted this way may simply have derived a sense of satisfaction that outweighed the immediate economic cost of exacting the revenge. See id. at 86–87 (noting that “revenge is sweet”). Humans possessing that tendency, in turn, likely developed a reputation in the community that discouraged unfair behavior toward them in the future, thus increasing the chances that they would survive, thrive, reproduce, and pass their vengeful genes to offspring. See id. at 85–86. In other cases, their actions may have served to maintain discipline and cooperation in a group whose solidarity is threatened by external forces, thus increasing the possibility that the entire group will survive. Id. at 87. Interestingly, although the punishing parties may have acted solely in response to an emotional desire to exact revenge, rather than in response to a conscious calculation of the long-term effects of their actions, id., an evolutionary observer should conclude that the vengeful actions incidentally served the policy of deterring others from directing unfair actions toward the punishing party in the future or of deterring antisocial behavior that threatens the entire group. Thus, a retributive desire for revenge may ultimately serve the goal of deterrence.

54. GOTANDA, supra note 3, at 195.

55. Id.
as well as egregious torts, presumably would increase pressures for self-help in the absence of adequate damages. Compensatory damages likely will be sufficient to discourage extra-legal self-help in the case of a tort or contract breach of low culpability that causes less offense to the other party. Conversely, some residual pressure for self-help likely will remain in the absence of punitive damages in the case of either a tort or contract breach that provides great offense to the other party, such as conduct taken with a malicious intent to harm.

At first blush, the final purpose of redressing deficiencies in non-punitive awards might support the rule permitting punitive damages in tort actions but not contract actions. Tort plaintiffs generally must pay attorneys’ fees out of their own pockets or damage awards, whereas prevailing parties in contract actions will frequently receive an award of reasonable attorneys’ fees, either by statutory authorization or by provision of the contract being enforced. Unless the means for calculating punitive damages were changed, however, punitive damage awards would provide an exceedingly crude and imprecise means of financing the costs of litigation. Moreover, punitive damage awards should not be employed as a covert means of correcting deficiencies in compensatory damages or addressing runaway costs in our adversary system. Such problems, to the extent they exist and can be redressed, should be addressed more directly.

Thus, even this cursory inquiry shows that the third and fourth goals of punitive damages are inadequate to explain the tort/contract dichotomy in U.S. law. The goals of retribution and deterrence, however, raise some interesting questions that warrant fuller discussion.

a. Retribution

If a reckless or deliberate breach of contract does more than disappoint the expectations of the other party, and if it constitutes a moral wrong or otherwise injures the public by offending community values, then the breaching party may deserve to be punished—and the community, through the jury, may be justified in expressing its disapproval—with extra-compensatory damages. If so, then this retributive purpose of punitive damages would also be served by judicially enforcing a penalty
clause if its application is limited to breaches reflecting a requisite degree of culpability.

On the other hand, the retributive purpose for punitive damages awards can be consistent with the current practice of awarding punitive damages for reckless or intentional torts, and not for similarly culpable breaches of contract, if such breaches of contract are viewed as less blameworthy than their counterparts in tort. Justice Holmes guaranteed himself a place at the table for any discussion of this issue with his widely quoted remarks about the nature of contractual obligations: “[i]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”

Accordingly:

The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.

All will agree that purely innocent breaches, such as ones arising from non-culpable oversight, miscalculation, or inability to accomplish a promised task despite best efforts, do not merit retributive punishment beyond compensatory damages. On their faces, however, Justice Holmes’ statements appear to support the argument that even a deliberate breach of contract is not a moral or legal wrong, but instead is a legitimate option open to the obligor who may exercise that option by paying compensatory damages, measured by expectation interest, in lieu of performance.

Professor Joseph Perillo has argued that Holmes’ statements have been misinterpreted and that Holmes’ private correspondence and utterances from the bench suggest that he would characterize contract breaches as wrongful conduct, on the same plane as tortious conduct. Aside from

58. O.W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897).
60. See, e.g., Mather, supra note 9, at 119 (arguing that unavoidable or negligent breaches, or ones that are the product of misinterpretation of the contract, are insufficiently blameworthy to justify punitive damages).
61. See Slawson, supra note 10, at 122 (stating that persons who breach contracts “have done nothing wrong if they pay full compensation”).
the intended meaning of Holmes’ remarks, others have argued that at least some kinds of breaches reflect moral fault.\textsuperscript{63}

One can hardly deny that some breaches are more morally blameworthy than others. For example, an innocent oversight that leads to installation of the wrong brand of pipe\textsuperscript{64} reflects less culpability than a malicious breach of contract committed for the purpose of harming the other party.\textsuperscript{65} The ultimate question is whether contract remedies should distinguish between these levels of culpability or leave notions of fault out of the equation.

Some have justified the denial of punitive damages for breach of contract by noting that contract liability, unlike most tort liability, is not fault-based.\textsuperscript{66} This assertion, however, is subject to critique. True, if a promisor undertakes to achieve a certain result, rather than merely exercise a certain degree of skill or effort, the promisor’s failure to achieve that result will constitute a breach of contract, regardless of the promisor’s degree of effort, skill, good faith, and conscientiousness,\textsuperscript{67} subject

\begin{footnotes}
\item[63] E.g., Mather, supra note 9, at 118–19 (arguing that contract remedies should depend on the degree of moral fault, justifying punitive damages for intentional breach of contract).
\item[64] Jacob & Youngs, Inc. v. Kent, 192 N.E. 889, 890 (N.Y. 1921) (finding that “the omission of the prescribed brand of pipe was neither fraudulent nor willful,” but the result of “oversight and inattention”).
\item[65] White, 155 N.W.2d at 75 (finding that the breaching parties had maliciously cut off the flow of water to the other parties for the purpose of harassing them). In White, evidence submitted at trial tended to show an escalating series of personal squabbles between the parties, who were neighbors, prior to the malicious breach of contract. See Robert A. Hillman, Enriching Case Reports, 44 St. Louis U. L.J. 1197, 1201 (2000) (quoting Robert S. Summers & Robert A. Hillman, Contract and Related Obligation 17 (3d ed. 1997)).
\item[66] E.g., Mather, supra note 9, at 117 (noting that the rule against punitive damages is partly based on the traditional rule that “the remedy for breach of contract should not depend on the degree of fault of the breaching party”).
\item[67] See, e.g., Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 750 (7th Cir. 1988). A finding that the breach was innocent, unintentional, or in good faith, rather than willful, however, may combine with other factors to help show that the breach was minor, rather than material, and that it thus satisfied constructive conditions for counter-performance. See, e.g., Walker & Co. v. Harrison, 81 N.W.2d 352, 355 (Mich. 1957) (quoting Restatement (First) of Contracts § 275(e) (1932), which refers to the “wilful, negligent or innocent behavior” of the breaching party as relevant to the determination of material breach); Jacob & Youngs, Inc., 192 N.E. at 891 (stating that the “wilful transgressor,” unlike one whose “default is unintentional and trivial,” has “no occasion to mitigate the rigor of implied conditions”). Restatement (Second) of Contracts § 241(e) (1981) (relevant to the determination of the materiality of breach is “the extent to which
only to limited legal excuses such as supervening impossibility. Conceding that breach may be found on the basis of strict liability, however, does not answer the question of whether retributive goals might yet be vindicated by awarding differing levels of recovery for breaches that reflect different degrees of culpability.

Thus, one might reasonably ask whether some highly culpable breaches of contract would sufficiently offend community values as to justify retribution in the form of punitive damages. Professor Henry Mather would find “damage to social trust and to the practice of contracting,” and would award punitive damages, in the case of any “clearly knowing and intentional breach” of contract, subject only to a narrow exception for breaches compelled by the need to perform a “higher moral duty to a third person” such as deliberately failing to pay a phone bill on time so that hungry children can be fed.

Not all intentional breaches, however, warrant punishment to satisfy the plaintiff’s and the community’s desire for retribution. Retribution may provide partial justification for punishing a defendant who has maliciously breached for the purpose of harassing the plaintiff, or perhaps one who has intentionally breached in an attempt to reallocate from the plaintiff to himself a greater proportion of a fixed amount of resources. Community values, on the other hand, may not be offended by even intentional breaches that are “efficient” in the sense that they serve to increase total wealth, rather than diminish or selfishly reallocate existing wealth.

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69. MATHER, supra note 9, at 119 (arguing also that punitive damages for such breaches satisfy a deterrence function and would educate the public that performing contracts “is an important community norm”). See also SLAWSON, supra note 10, at 123 (punitive damages would promote a private attorney general function by “encouraging people to identify and punish those who are guilty of civil wrongdoing”).
70. See, e.g., supra note 52.
71. See Dodge, supra note 2, at 652–57 (arguing for punitive damages for such breaches, which the author characterizes as “willful” breaches that are “opportunistic” rather than “efficient”).
72. See id. at 663 (even a deliberate breach “is not necessarily blameworthy” if supported by efficiency concerns) (quoting Judge Richard A. Posner in Patton v. Mid-Continent Sys., 841 F.2d 742, 750 (7th Cir. 1988)); SLAWSON, supra note 10, at 122 (People who breach contracts “have done nothing wrong if they pay full compensation. Indeed, society loses if people do not breach contracts that would cost them more to perform than to pay compensation for breaching.”).
Professor Mather reached his conclusions favoring punitive damages for intentional breaches of contract after rejecting efficient breach arguments.73 The arguments grounded in economic efficiency, however, merit further discussion in the context of the deterrence goals of punitive damages.

b. Deterrence

If the time for contract performance has not passed, and if the victim of a repudiation can overcome the significant hurdles to the extraordinary and discretionary equitable remedy of specific performance,74 a court can deter further breach of that contract in a most direct manner by issuing an injunction compelling performance.75 In the typical case, however, specific relief will be unavailable for practical or legal reasons,76 and the threat of liability for damages will serve as the main legal deterrent to breach. Although the prospect of paying compensatory damages for a civil wrong has deterrent value,77 the risk of liability for a potentially much larger award of punitive damages presumably enhances the deterrence considerably.

With assistance from the efficient breach doctrine, the policy of deterrence may help to explain the tort/contract dichotomy in the availability of punitive damages in the United States. Because reckless or intentional torts by their very nature offend community values, and because they often cause their victims to suffer significant physical or emotional injuries, legal rules that tend to deter such conduct, such as the availability of punitive damage awards, are viewed as appropriate in the common law system.78 The efficient breach doctrine, on the other hand, argues that some kinds of contract breaches will benefit the community and should

73. MATHER, supra note 9, at 118.
75. Specific relief would not necessarily serve a retributive purpose, nor would it necessarily deter other parties in the future as surely as would the availability of punitive damages. Its primary effect would be to prevent breach, or prevent further breach, in the case at hand.
76. See generally STEPHEN A. SMITH, CONTRACT THEORY 398–408 (2004) (critically examining explanations for the common law’s reluctance to grant the “secondary remedy” of specific performance).
78. See generally SMITH, supra note 76, at 419 (contrasting the seriousness of a physical assault with even a deliberate breach of contract that causes only pecuniary harm, particularly when the deliberately breaching party does not compound the breach by then denying liability).
be permitted, or even encouraged, rather than deterred with extra-compensatory damages.  

The most easily defended efficient breach is one that achieves Pareto optimality by leaving some entities better off because of the breach, while leaving no party in a worse position than if the contract had been performed. 80 For an illustration, suppose that Pierce Construction Company of Desert City (Pierce) is hired to excavate a site for a new parking garage at Mercado Shopping Center (Mercado), with a completion date of August 1, earning the owner an estimated $20,000 in profit after payment of materials, labor, and other expenses. After Pierce bound itself to Upstart Development Company (Upstart), but before commencement of performance, Upstart received the final permits and financing needed to begin construction on an upscale boutique shopping center on the edge of the city around a picturesque array of huge boulders. Anxious to break ground immediately, and recognizing that Pierce was uniquely qualified to perform the complicated grading and excavation around the boulders, Upstart offered Pierce a lucrative contract to perform that work, which would earn Pierce an estimated $60,000 profit. Pierce, however, did not have the capacity to complete both the Mercado contract and the Upstart project by August 1, and Upstart remained firm on the completion date, fearing that any delay would disrupt parking during the onset of the holiday shopping season in early November. If Pierce repudiated the Mercado contract, Mercado could hire another perfectly well qualified contractor to perform its rather routine excavation, but only at a fee of $10,000 above Pierce’s fee under the original contract because of extra costs associated with the short notice, causing Mercado to suffer $10,000 in damages.

In these circumstances, if Pierce breached the contract with Mercado, voluntarily paid (or was compelled to pay) $10,000 in compensatory damages to Mercado, and reallocated its resources to the Upstart project, then the community would benefit. With the $10,000 in damages, Mercado would realize its expectation of securing timely and competent excavation without expending any more of its own resources than it had

79. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 142 (5th ed. 1998); Dodge, supra note 2, at 631–32 nn.6–9 (citing to sources that promote the efficient breach argument).

80. See Dodge, supra note 2, at 652–53 (explaining the difference between Pareto efficiency, in which the breach causes some to be better off and no one to be worse off, and Kaldor-Hicks efficiency, in which the breach increases total wealth but the victim of the breach may be worse off for the breach); Perillo, supra note 62, at 1091–92, 1091 n.40.
originally bargained to pay Pierce. Indeed, because contract remedies thus protect the expectation interest of the victim of breach, Mercado theoretically should be "indifferent between performance and breach."81 In turn, having abandoned the Mercado contract, Pierce would have the opportunity to put its unique capabilities to full use in a new project that will boost its profits by $40,000, for a net gain of $30,000 additional profits after paying $10,000 in compensation to Mercado. Theoretically, Mercado is no worse off than if Pierce had performed its contract, Pierce is better off for having breached that contract, and the greater income to Pierce and the advancement of the Upstart project likely will have further multiplier effects on the local economy.

Pierce will have an economic incentive to breach its contract with Mercado if it is confident that, in a suit by Mercado to secure damages for Pierce’s breach of contract, a court would award only Mercado’s compensatory damages in the amount of Mercado’s expectation interest, which is $10,000 in this case. If the law instead would permit a jury to award additional and substantial punitive damages for Pierce’s intentional breach, Pierce would face the risk of total liability that exceeded the additional profit earned on the Upstart project, and Pierce likely would turn down the Upstart project to avoid that risk.

In sum, according to the efficient breach theory, the welfare of the community will be enhanced if the law does not permit the threat of punitive damages to deter parties in Pierce’s position from breaching. By extension, concerns about efficient allocation of resources would also support a rule that denies enforcement of contract clauses that go beyond liquidating compensatory damages and that contemplate penalties large enough to deter efficient breaches.82


82. Because Pierce’s performance, once provided to Mercado, cannot then be transferred to Upstart, economic efficiency would also support a court’s exercise of discretion to refrain from ordering specific performance of Pierce’s obligation to Mercado. See Walgreen Co. v. Sara Creek Prop. Co., 966 F.2d 273, 274 (7th Cir. 1992) (opinion by Judge Posner, citing to fact-based discussion in N. Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 279 (7th Cir. 1986)); COOTER & ULEN, supra note 81, at 240–41; SMITH, supra note 76, at 405. One scholar argues that specific performance should be more widely granted because setting awards of money damages presents uncertainties in valuation, which in turn complicates settlement negotiations and increases transaction costs. Thomas S. Ulen, The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies, 83 MICH. L. REV. 341, 365–66 (1984). Regardless of whether specific enforcement is widely or only rarely granted, it would not necessarily prevent efficient allocation of resources, because an efficiently breaching party can always seek...
Although the efficient breach theory is the dominant contemporary justification offered for the unavailability of punitive damages for contract breaches,\(^{83}\) it has attracted criticism on a number of grounds. Most obviously, not all breaches are economically efficient. The suppliers of water in \textit{White v. Benkowski} breached the water supply contract not to reallocate the water resources to a more valuable use\(^{84}\) but to maliciously harass the other parties with whom the suppliers had been embroiled in an escalating series of personal squabbles.\(^{85}\) In other cases, a party might breach a contract in an effort to gain a greater share of fixed resources in a zero-sum game with the other party, without increasing the size of the economic pie.\(^{86}\) In either case, unlike an efficient breach, the breach disappoints expectations without increasing total wealth. If such cases could be easily distinguished from efficient breaches, and if parties contemplating breach could accurately predict whether their breaches would be deemed to fall outside the category of efficient breaches, the threat of punitive damages for inefficient breaches could provide deterrence without offending the efficient breach doctrine.

In addition, some commentators reject the efficient breach doctrine even as applied to breaches that economists would define to be Pareto efficient. These critics argue that the victim of breach is in fact worse off for the breach because payment of compensatory damages, as defined by applicable legal standards, will not fully compensate the victim for all losses caused by the breach;\(^{87}\) that few breachers, efficient or otherwise, voluntarily offer to pay compensation, often causing victims of the breach to take less than is due to them to avoid litigation costs;\(^{88}\) that the

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\(^{83}\) Dodge, \textit{supra} note 2, at 630–31.

\(^{84}\) One could assert such a purpose if the jury had believed that the Benkowskis had shut off the Whites’ water supply for the purpose of conserving a scarce resource for a more valuable use than fulfilling the contract with the Whites; however, the jury found otherwise. \textit{See White}, 155 N.W.2d at 75.

\(^{85}\) \textit{See supra} note 63.

\(^{86}\) Dodge, \textit{supra} note 2, at 652–53 (discussing Posner’s views on such “opportunistic breaches”). \textit{See POSNER, supra} note 79, at 130.

\(^{87}\) \textit{E.g.}, Perillo, \textit{supra} note 62, at 1093–94. \textit{See also infra} note 216.

\(^{88}\) \textit{E.g.}, Dodge, \textit{supra} note 2, at 664. This objection to efficient breach theory is partially vindicated by the willingness of courts to award punitive damages for bad faith breaches in some contexts. \textit{See supra} notes 8–12 and accompanying text.
efficient breach doctrine fails to account for and internalize the social costs and harm to community values engendered by a breach of contract;\(^89\) that failing to allow for punitive damages will encourage deliberate breaches that are inefficient because the breaching party is apt to overestimate the gains to be earned by the breach and to underestimate the losses suffered by the victim of the breach;\(^90\) and that allowing punitive damages for a deliberate breach will not discourage efficient breaches but will simply force efficient breachers to negotiate a release in exchange for a share of the gain to be earned by the breach.\(^91\)

Indeed, as applied to enforcement of freely negotiated extra-compensatory liquidated damages clauses, some argue that enforcing the penalty helps to realize other efficiencies by permitting parties to allocate their risks in a way that best meets their interests.\(^92\) For example, suppose that a bride and groom have an intensely sentimental attachment to the five-piece swing band that performed at a local club the night they first danced together and fell in love. They greatly desire to hire the band to play at their wedding reception, but the bride and groom are terrified that the band might cancel and leave them scrambling for a substitute band or playing recorded music. The bride and groom will derive so much subjective benefit from the appearance of this band, and they will gain such peace of mind if they can secure special assurances of the band’s performance, that they are happy to pay $5,000—double the band’s normal rate of $2,500—if the band agrees to waive the right to that fee and be liable for additional damages of $6,000 in the event that it fails to perform at the appointed time and place. The bride and groom are willing to pay a premium for special assurance of performance, which we might cleverly call an “assurance of performance policy,” and which is more valuable to the bride and groom than insurance coverage from a third party, because—at least at the time of contracting—the bride and groom derive more value from the ability to compel performance than from the right to collect money for non-performance.\(^93\)

\(^89\) Mather, supra note 9, at 118.

\(^90\) Id.

\(^91\) Dodge, supra note 2, at 632–34, 665–99.

\(^92\) See, e.g., Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289 (7th Cir. 1985) (dicta criticizing the state common law rule that uniformly withholds enforcement of penalty clauses); Juergen Noll, Economic Implications of Contractual Penalties—Where Courts Go Wrong, in TRENDS IN MACROECONOMIC RESEARCH 143, 150–60 (Lawrence Z. Pelzer ed., 2005).

\(^93\) Charles Goetz & Robert Scott, Liquidated Damages Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model of Efficient Breach, 77
In turn, the band members are happy to agree to these terms, because they cannot foresee any event that would cause them to cancel their performance or even to arrive late, and they recognize that the penalty clause allows them to send a strong signal of their reliability, a signal for which the bride and groom are willing to pay a premium that is greatly valued by the impecunious members of the band.94 Assuming that the damages clause, coupled with the band’s waiver of the $5,000 fee, exceeds any reasonable estimate of the actual damages that the bride and groom could recover under legal standards in their jurisdiction, it will be viewed as a penalty, designed to compel performance. If it were enforceable, the band likely would be induced to take extra precautions to avoid breach in the days preceding the performance date, such as avoiding situations that might cause band members to become seriously ill, injured, or stranded at a faraway airport.95

The common law rule against enforcing such a penalty clause deprives the bride and groom of the peace of mind for which they are willing to pay a premium and also deprives the band members of the opportunity to double their pay in exchange for essentially surrendering the option of deliberately breaching—an option on which they placed little or no value—and for incurring the cost of taking reasonable precautions against an unintentional breach. A rule that enforced such a clause would enhance efficiency by allowing the parties to increase their total utility.96

COLUM. L. REV. 554, 578 (1977) (illustrating this point with their example of the Anxious Alumnus, an unusually loyal fan of his alma mater’s basketball team, who is concerned that a bus carrying friends to an important college basketball game will not arrive on time or at all); COOTER & ULEN, supra note 81, at 236–37 (discussing the case of the Anxious Alumnus); UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 179–81 (1997) (presenting his example of a bride’s father who is anxious to ensure that a builder renovates a country house in time for the wedding, and who wants to ensure performance rather than simply collect money from a third-party insurer in the event of breach).

94. See COOTER & ULEN, supra note 81, at 237 (explaining that a penalty clause may be the cheapest way to “convey information about the promisor’s reliability”); POSNER, supra note 79, at 142.

95. Some argue that the threat of penalty for breach will induce precautions to a degree that is inefficient. E.g., Samuel A. Rea, Jr., Efficiency Implications of Penalties and Liquidated Damages, 13 J. LEGAL STUD. 147, 166 (1984). The party assuming the risk of penalty, however, presumably can assess the precautions appropriate to comfortably assure performance and can determine the increase in fee that will compensate for the additional precautions and residual risk. If the other party is willing to pay that premium, then the value placed on that assurance of performance by the other party outweighs the costs of taking precautions.

96. Of course, courts would need to police penalty clauses to ensure that they are not the products of overreaching. Judge Posner has suggested a rule that ordinarily enforces a
Moreover, in the highly unlikely event that another client valued the band sufficiently to offer $10,000 to perform at the same time and date of the wedding reception, the band would not be absolutely precluded from taking advantage of the new opportunity. Even though the $6,000 net penalty exceeds the net benefits of an additional $5,000 in earnings to be derived from taking advantage of the new opportunity, the band could attempt to negotiate a release from the bride and groom. The latter would then have the opportunity to reassess the level of their desire for this band and to weigh it against other benefits that could be purchased with the settlement offered by the band.

True, the bride and groom set the penalty over and above withholding the band’s $5,000 fee at the *in terrorem* level of $6,000 for the purpose of compelling performance, and not because they prefer to collect the penalty, much less a smaller amount. Accordingly, they would not likely agree to a release on terms that made sense to the band. However, just as an intervening opportunity has altered the band’s valuations, changes in the circumstances of the bride and groom might increase their willingness to negotiate. For example, suppose the wedding reception guest list unexpectedly expanded by twenty percent after the bride and groom contracted with the band, with no additional funding from parents and other relatives available. In light of these changed circumstances and the great desire of the bride and groom to retain the quality of the food and drink that they plan to serve, the bride and groom might reluctantly accept the notion of hiring a substitute band if the contracted band agrees not only to forgo its fee of $5,000—more than sufficient to allow the bride and groom to hire a good substitute band—but also to pay an additional $4,000 in damages, which the bride and groom desperately need to meet the new catering budget. Unless other considerations outweigh their expected net gain of $1,000, the band will be willing to agree to this

penalty clause freely negotiated by a sophisticated party such as a “substantial corporation.” *Lake River Corp.*, 769 F.2d at 1288–89.

97. See Mattei, *supra* note 93, at 180 (explaining why the anxious father of the bride in his example prefers to compel performance over collecting money from a third-party insurer).

98. For example, non-pecuniary considerations might make the new offer less attractive than its fee suggests. The band members might be motivated to forgo the additional $1,000 if they were acquainted with the bride and groom and would derive considerable psychic income from performing at the wedding reception, and if the alternative performance imposed psychic costs because it was a fundraiser for a cause that the band members abhor.
settlement because obtaining a release from the contract permits it to increase its income by $5,000 while paying $4,000 in damages.

If, on the other hand, the circumstances of the bride and groom have not changed, and if they value performance more than an offered settlement of $5,000 in waived fees and up to $5,000 in additional damages, the band will not obtain a release. In that case, if the penalty clause was enforceable, the band would be forced to forgo the new opportunity even though the third party valued the band at $10,000, and the wedding couple will pay only $5,000, arguably resulting in an inefficient result. The supposed inefficiency, however, rests on acceptance of a measure of compensatory damages based on general market valuations. It may be that most wedding couples would suffer little damage if the contracted band canceled with ample notice, foregone its fee, and allowed the wedding party to arrange a substitute transaction at perhaps a slightly higher fee to obtain a comparable band on shorter notice. However, if the bride and groom in this case rejected the band’s offer to forgo its fee and pay up to an additional $5,000 in damages, the bride and groom apparently would have determined that their subjective injury exceeds the gains that the band could earn from breaching, so that the breach would not be efficient by those standards. Whether this more subjective valuation of damages should be honored is worth discussion and debate.

Moreover, although a rule enforcing the penalty clause, coupled with the band’s failure to obtain a release from its obligation, prevents the band from earning a higher fee, its position is similar to that of any party who feels regret after a change in the market. In this case, the band voluntarily committed itself irrevocably to an attractive fee—double its normal rate—while gambling that a still more lucrative but conflicting opportunity would not later present itself. It had the option of insisting on a contract promising payment of its normal fee and with no more than the usual consequences for breach, but it found the opportunity to earn double the normal rate to be sufficiently attractive to place economic restrictions on its Holmesian option to breach and to pay the standard expectation interest.99

**c. Summing Up but Suspending Judgment**

A review of the arguments outlined above suggest that some kinds of contract breaches—such as a deliberate breach accomplished solely for the purpose of depriving the other party of contractual benefits, without increasing total wealth—merit retributive punishment and justify an

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99. *See supra* notes 57–58 and accompanying text.
award that will deter such breaches in the future. Purely innocent breaches do not merit retributive punishment. Moreover, the risk of liability for compensatory damages should be sufficient to deter overly casual promising by those who lack the ability to perform, whereas the threat of extra-compensatory damages could discourage bargaining between honest and able parties.\footnote{Nicholas J. Johnson, \textit{The Boundaries of Extracompen-satory Relief for Abusive Breach of Contract}, 33 \textit{Conn. L. Rev.} 181, 185 (2000).} Between these extremes of the spectrum lie deliberate but efficient breaches, which promoters of the efficient breach doctrine would not punish, but for which Professor Dodge would award punitive damages in the hope of inducing the breaching party to buy a release from the victim of the breach, using part of the gains from the efficient breach.\footnote{Dodge, \textit{supra} note 2, at 682.} Alternatively, a legal rule could award the more certain amount of the breaching party’s gains from deliberate breach, once again providing an incentive for an efficiently breaching party to buy a release from the victim of the breach. The victim will be motivated to sell a release to pave the way for a share of the additional profits in an alternative opportunity.

The efficient breach argument is often advanced to justify the historical tort/contract dichotomy in the common law, which excludes punitive damages for all breaches. However, because the goals and purposes of punitive damages are advanced by awards of extra-compensatory damages for some kinds of breaches but not for others,\footnote{Supra notes 64–65, 69–72, 84–85.} public policy might be better vindicated with a more nuanced rule if the sheep can be separated from the goats. Because punitive damages are not a matter of right, but are left to the discretion of the jury,\footnote{Supra note 1.} contract law could permit punitive damages in all cases—or in a broadly defined class of cases, such as deliberate breaches—and could leave it for the jury to assess whether a particular breach is sufficiently antisocial in the circumstances to merit retribution and deterrence. However, because common law rules regarding compensatory damages are designed to control jury discretion,\footnote{Perillo, \textit{supra} note 20, §§ 14.5(a), 14.8.} any tinkering with the general rule against punitive damages would most realistically take the form of a relatively bright-line rule that identifies certain kinds of breaches generally warranting punishment and deterrence. Discretion would still be left to the jury within such categories to award or withhold punitive damages for such breaches, in light of the particular circumstances of the case.

101. Dodge, \textit{supra} note 2, at 682.
103. \textit{Supra} note 1.
Similarly, some kinds of penalty clauses might be consistent with the purposes and goals of punitive damages and with the policies underlying contract law. If so, and if the sheep again can be separated from the goats, a nuanced rule could permit enforcement of some penalty clauses though not others. For example, a rule that departs from the current common law approach might allow enforcement of a penalty clause that applies only to deliberate and inefficient breaches, but withhold enforcement of others. A more aggressive departure from the current rule might enforce penalties that applied even to efficient breaches—perhaps only if the penalty were limited to the gain to be realized from breach—on the ground that the parties likely would share the gain and would negotiate a release from the contract. An even more radical rule might enforce all penalty clauses, subject only to policing for overreaching, on the ground that parties can adequately assess the premium that will make it worth their while to take extra precautions against breach.

All of these considerations, however, have been presented and evaluated in the context of a common law system that has traditionally singled out contract actions for its rule excluding punitive damages and has applied that rule across the board to liquidated damages clauses that are penal in nature. Before finally assessing the various arguments supporting and opposing the enforcement of penalty clauses in a common law jurisdiction, this article will now turn to the approach in the French civil law system to determine whether the very different experiences and traditions of a contrasting legal system can provide any fresh insights.

III. PUNITIVE DAMAGES AND LIQUIDATED DAMAGES UNDER THE FRENCH CIVIL CODE

A. The French Civil Code and French Legal Method

As first of the original Napoleonic codes, the French Civil Code is a leading example of codification that is designed to, or at least purports to, comprehensively set forth the law on designated topics, such as property, torts, contracts, and domestic relations. Some modern amendments to the Code, such as Title V of the Third Book of the Code, which relates to community property rights and other legal incidents of

marriage, address the topic in great detail\textsuperscript{108} and in a manner similar to the style of legislation frequently seen in common law systems.\textsuperscript{109} Much of the Code, however, remains largely unchanged since its enactment in 1804, when it was drafted in a simple, concise style.\textsuperscript{110} This style of brevity and simplicity was influenced by the writings of Pothier, a judge and academic who sought to synthesize and simplify the chaotic mosaic of Roman Law, local and regional customary laws, and supplementary judicial doctrines that defined private law in France in the eighteenth century.\textsuperscript{111}

The exegetical school of thought, which dominated French legal method during the nineteenth century, advanced the view that the Napoleonic Codes were comprehensive and internally consistent.\textsuperscript{112} This view supported techniques of statutory interpretation that sought to discover and give effect to the original intentions of the legislature that enacted the Code provision in question.\textsuperscript{113} The post-revolutionary judiciary, on the other hand, was constrained by a backlash against the pre-revolutionary high courts, the Parlements, which had grown over several centuries from a royal advisory council to a system of central and regional courts that sometimes exercised quasi-legislative powers in the form of regulations or decrees.\textsuperscript{114} Corrupted by the sale of judicial offices and having earned a reputation for wielding excessive political and legal power, the Parlements did not long survive the French Revolution.\textsuperscript{115} The Constituent Assembly of 1790 prohibited the post-revolutionary courts from issuing regulations.\textsuperscript{116} In 1804, the Code prohibited the courts from announcing legal principles unrelated to the disputes before

\begin{itemize}
  \item \textsuperscript{108} See \textit{Code Civil} [C. CIV.] \textsuperscript{art.} 1387–1581; \textsl{The French Civil Code}, supra note 107, at 253–73.
  \item \textsuperscript{109} See \textsl{Steiner}, supra note 106, at 18–20 (comparing the greater complexity of English drafting style with that of Continental code systems such as the French Civil Code, but noting that some French legislation resembles the English style in verbosity and complexity).
  \item \textsuperscript{110} See, e.g., \textit{Code Civil} [C. CIV.] \textsuperscript{art.} 1382–1386 (Fr.) (setting forth a body of tort law in five concise articles); \textsl{Steiner}, supra note 106, at 15 (underscoring the brevity of articles 1382–1386, but noting that the Code currently addresses selected contemporary topics of tort law with additional groupings of articles).
  \item \textsuperscript{111} \textsl{Dawson}, supra note 105, at 349–50.
  \item \textsuperscript{112} \textit{Id.} at 392–93.
  \item \textsuperscript{113} \textit{Id.} at 394; \textsl{Steiner}, supra note 106, at 61.
  \item \textsuperscript{114} \textsl{Dawson}, supra note 105, at 273–74, 306–14.
  \item \textsuperscript{115} \textit{Id.} at 350–71.
  \item \textsuperscript{116} \textit{Id.} at 375–76.
\end{itemize}
them. Though such proscriptions might appear to do little more than restrict the publication and effect of dicta, which is not binding even in the United States, these restrictions in fact combine with other facets of the legal system to challenge the very power of the courts to make any law at all.

When viewed in light of the exegetical school of thought, the drafting and enactment of the apparently comprehensive Napoleonic Codes, the strong adherence to the separation of powers, and the restrictions on the judiciary, helped to create a legal paradigm in which the judiciary purportedly did not make law but only discovered and applied the relevant enacted law. Accordingly, the highest appellate court in private law matters, the Cour de Cassation, nearly always limits its ruling to a terse syllogism that applies one or more provisions of the applicable Code to material facts, leading to a conclusion either that the decision of the lower court correctly applied the Code and should be affirmed or that the decision should be quashed on the ground that the lower court misapplied the applicable Code provisions. Even in the rare instances in which the Cour de Cassation announces a general principle that applies to a broader category of cases than the single dispute before it, it will do

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117. “Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.” Code civil [C. civ.] art. 5 (Fr.); The French Civil Code, supra note 107, at 2 (translating article 5 to read: “[i]judges are forbidden to pronounce decisions by way of general and regulative disposition on causes which are submitted to them”; Steiner, supra note 106, at 78 (explaining the scope of article 5). See also Dawson, supra note 105, at 375–76, 379 (noting that the prohibition against judicial issuance of “regulations” originated in the Constituent Assembly of 1790 and carried over to the Code of 1804).


119. Steiner, supra note 106, at 29, 32–33 (discussing the form and appearance of the Code, and its claim to comprehensiveness).

120. Id. at 76–78 (noting that the Law of 16-24 August 1790, which precludes the judiciary from exercising legislative power or interfering with the legislative process, “forms the basis for the French doctrine of separation of powers”); Dawson, supra note 105, at 391–92.

121. See generally Dawson, supra note 105, at 390–93 (explaining that the exegetical school promoted the view that the legislature was the sole law-making body, to the exclusion of the judiciary, supported by the views of Proudhon, an academic who espoused consulting the text of the Code for the law without diverting attention to citations of prior judicial interpretations).

so only if the principle does apply to the case before it, as mandated by the Code.123

The narrow holdings of most French decisions, coupled with the occasional statement of broader principles, could form a body of case law if, in future cases, they were accorded deference to an extent similar to that mandated by the doctrine of stare decisis in the United States.124 French judicial decisions, however, are not officially recognized as sources of law and do not create binding precedent on questions of interpretation of Code provisions.125 Under such a regime, each case presents a new opportunity to discover the true meaning of a Code provision, without formal deference to previous and possibly mistaken judicial interpretations.

Nonetheless, many provisions of the French Civil Code, and in particular those of the original 1804 enactment, state general principles rather than detailed rules,126 thus creating gaps in the text in the context of specific disputes.127 An adherent to the exegetical school might argue that courts, without making law themselves, could fill such gaps by determining what meaning the legislature must have intended in light of the surrounding text and in the general context of the purpose, spirit, and structure of the entire Code.128 By the close of the nineteenth century, however, it became clear that the original Code could not keep up with transformations in French society,129 and the exegetical school had come under attack for promoting a fiction of discovering legislative intent in a process dominated by the subjective views and values of the judicial interpreters.130 The question of whether French judges in fact make law when filling textual gaps has “tortured French lawyers ever since . . . .”131

123. STEINER, supra note 106, at 78, 89–90.
125. STEINER, supra note 106, at 75, 79–82.
126. Id. at 15.
127. DAWSON, supra note 105, at 391–92 (noting that “great gaps and fissures” had appeared in the Code by 1830).
128. See generally supra notes 112–13 and accompanying text.
129. STEINER, supra note 106, at 61.
130. See DAWSON, supra note 105, at 394 (referring to an 1899 critique of the exegetical school). Courts may receive guidance in interpreting ambiguous legislation, however, from Parliament in subsequent explanatory statutes, from a government department in a written interpretation submitted in response to a question posed by members of Parliament, or from commentaries published by legal academics). STEINER, supra note 106, at 71–73, 179–85.
131. DAWSON, supra note 105, at 399. See also id. at 416–31 (reviewing theories that attempt to reconcile the formal prohibition of judicial lawmaking with the practical reality); STEINER, supra note 106, at 75 (noting that French legal academics “argue endlessly
One can reasonably assert that French courts have created at least a weak and informal species of case law that supplements the Code. Attorneys and court officials regularly argue or analyze previous decisions for their persuasive value, though courts generally do not formally acknowledge the precedent in their published judicial decisions. For example, repeated judicial decisions that reach the same result on an issue in a variety of factual contexts can provide a plausible basis for predicting how a court might react to a similar dispute in the future. It remains true, however, that previous decisions of even the highest French courts are not binding on them or even on lower courts; at most, therefore, they have the status as secondary sources of law.

With this explanation of the French Civil Code as background, this article next turns to the provisions of the Code that address, or indirectly shed light on, the enforceability of penalty clauses.

B. Punitive Damages and Penalty Clauses Under the French Civil Code

1. Damages Awarded by the Court in the Absence of a Contractual Damages Clause

Specific enforcement of contract obligations compels performance, thus deterring further breach in a particular case more directly than a threat of punitive damages. Contrary to the beliefs of many, however, specific performance of contracts is not sought and granted with substantially greater frequency in France than in the United States.

and inconclusively” over “[t]he contradiction between the traditional post-revolutionary concept that law can only be legislative in origin and the reality of judicial law making”); MATTEI, supra note 93, at 84 (citing French judicial development of the law of nuisance as an example in arguing that “[i]n practice, courts in civil law countries make law”).

132. STEINER, supra note 106, at 82, 97. See Lasser, supra note 122, at 1349–51.

133. STEINER, supra note 106, at 87–88 (discussing the concept of “jurisprudence constante, whereby a particular interpretation or principle is repeated in a series of decisions”); DAWSON, supra note 105, at 409–10 (using the metaphor of a kaleidoscope formed by multiple decisions).

134. See supra note 120 and accompanying text.

135. See Henrik Lando & Caspar Rose, On the Enforcement of Specific Performance in Civil Law Countries, 24 INT’L REV. L. & ECON. 473 (2004). Lando and Rose point out the tension between the apparent right to claim specific performance in France and French Civil Code article 1142, which limits the state’s authority to compel citizens to take certain actions; they report a consensus in the literature that damages for breach of contract are “by far the dominant form of relief” in Germany and France. Id. at 478. See also BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 211 (2d ed. 1992) (specific enforcement is a primary remedy in principle in France, but is less important in practice); James Beardsley, Compelling Contract Performance in France, 1 HASTINGS INT’L &
damages are the primary remedy in France for breach of contract\textsuperscript{136} and are a potential tool for deterrence and retribution.

The French Civil Code, however, explicitly provides for compensatory damages for torts\textsuperscript{137} and breaches of contract,\textsuperscript{138} without explicitly mentioning the possibility of punitive damages for either. As with many other civil law countries, punishment is generally reserved for the criminal law.\textsuperscript{139}

In the context of civil liability, the exclusion damages that are punitive in nature is not absolute. Some statutes authorize a court to impose a civil fine, known as \textit{amende civile}, for certain kinds of serious wrongs that warrant a punitive response but not necessarily criminal sanctions.\textsuperscript{140} A judge might also respond to a particularly egregious tort or breach of contract with a generous damages award that is compensatory in name but arguably includes a covert punitive element. For example, the French

\textit{Comp. L. Rev. 93, 93–96 (1977)} (specific performance in France often is constrained either by article 1142 or by broader considerations similar to those that counsel restraint in common law countries). Even in a case in which the parties could anticipate the availability of specific enforcement as a remedy, in practice this remedy would not necessarily prevent efficient breach and reallocation of resources, because the breaching party might succeed in persuading the victim to release it from obligations in exchange for a share of the profits in the new venture. \textit{See supra} note 82 (making the same point about specific performance under U.S. common law, after explaining that efficient breach is a factor in withholding specific relief in the common law system).

\textsuperscript{136} Lando & Rose, \textit{supra} note 135, at 478.

\textsuperscript{137} \textquote{\textit{Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.}} CODE CIVIL [C. CIV.] art. 1382 (Fr.). Professor Crabb translates article 1382 to read: \textit{“Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.”} \textit{The French Civil Code, supra} note 107, at 252.

\textsuperscript{138} \textquote{\textit{Les dommages et intérêts dus au créancier sont, en général, de la perte qu’il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après.}} CODE CIVIL [C. CIV.] art. 1149 (Fr.). Professor Crabb translates article 1149 to read: \textit{“Damages due to a creditor are, in general, from the loss which he incurred and from the gain of which he was deprived, apart from the hereinafter exceptions and modifications.”} \textit{The French Civil Code, supra} note 107, at 223. Article 1147 states that the debtor is liable to the creditor for non-performance or late performance, subject to some excuses for non-performance. \textit{Id.} at 222 (translating the French text of article 1147).

\textsuperscript{139} \textit{See Gotanda, supra} note 3, at 193.

\textsuperscript{140} \textit{See, e.g., Code de Commerce [C. COM.] art. L442-6 (Fr.)} (the French Commercial Code, modified in 2001, authorizes a fine, not to exceed two million euros, for distortion of competitive markets); Martine Behar-Touchais, \textit{L’Amende Civile Est-elle un Substitut Satisfaisant À L’Absence de Dommages et Intérêts Punitifs?} [Is the Amende Civile a Satisfactory Substitute in the Absence of Punitive Damages?], 232 PETITES AFFICHES 36, 36–44 (2002) (discussing whether the \textit{amende civile} is adequate to compensate for the absence of punitive damages under French law).
Civil Code permits a court to award the full damages caused by a bad-faith breach of contract, free of the foreseeability limitation that would otherwise apply.¹⁴¹ This lifting of the foreseeability requirement must cause some awards for bad-faith breach to blur the line between maximum compensation and punishment.¹⁴²

Finally, astreinte is a legislatively authorized judicial mechanism for compelling a breaching party to perform its obligations after a judicial finding of a breach of obligation.¹⁴³ An astreinte is an order compelling the breaching party to pay the victim of a breach a certain sum of money for each day, week, or other designated period that performance of the obligation is further delayed. Because the judge can impose the astreinte in addition to full compensatory damages,¹⁴⁴ its purpose is to deter further breach.

The astreinte might be likened to a front-loaded contempt sanction for violation of a court order, or perhaps as a penalty clause of judicial origin. This second analogy, in turn, raises the topic of our next inquiry.

2. Enforcement of the Clause Pénale Under the French Civil Code

   a. Textual Analysis of the Code as Enacted in 1804

In light of the absence of a formal doctrine of stare decisis in French law,¹⁴⁵ and in the spirit of the traditional view of the French Civil Code as comprehensive and internally consistent,¹⁴⁶ an analysis of the Code’s application to a particular issue ought to begin with the text of all of the Code’s articles that may shed light on the topic.

¹⁴¹. “Le débiteur n’est tenu que des dommages et intérêts qui ont été prévus ou qu’on a pu prévoir lors du contrat, lorsque ce n’est point par son dol que l’obligation n’est point exécutée.” CODE CIVIL [C. CIV.] art. 1150 (Fr.). Professor Crabb translates article 1150 to read: “A debtor is held only to damages which were foreseen or which could have been foreseen at the time of the contract, when it is not by his willfulness that the obligation is not executed.” THE FRENCH CIVIL CODE, supra note 107, at 223.

¹⁴². See generally 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1077, at 437–48 (1964) (commenting on the difficulty of relying on “nice distinctions between compensation and punishment” in contract remedies).


¹⁴⁵. Supra notes 124–34 and accompanying text.

¹⁴⁶. Supra note 112 and accompanying text.
The plain text of the French Civil Code supports an argument, albeit a strained one, that extra-compensatory stipulated damages are not recognized under the Code. Article 1226 of the French Civil Code defines “clause pénale” as a clause that is designed “pour assurer” performance of a contract by committing a breaching party to some alternative obligation or contractual liability. Modern French dictionaries define “assurance” as an indemnity insurance policy, and “assurer” as “to insure.” Thus, when article 1226 states that a clause pénale is designed “to insure” (“pour assurer”) performance, it could refer to a liquidated damages clause designed to provide indemnification in the sense of compensation for actual injury. Even section 1226’s use of the term “clause pénale,” which literally means “penalty clause,” might be assigned a counter-intuitive definition by article 1229 of the Code. The first line of article 1229 appears—at least when viewed in isolation—to limit a clause pénale to non-punitive liquidated damages because it states that a “penalty clause is the compensation for damages” (“[l]a clause pénale est la compensation des dommages”) suffered by the victim of a breach.

Finally, the first sentence of article 1152 (which sets forth the complete text of that article as originally drafted) refers to the enforcement of contractual provisions requiring payment of “a sum certain by way of

147. “La clause pénale est celle par laquelle une personne, pour assurer l’exécution d’une convention, s’engage à quelque chose en cas d’inexécution.” CODE CIVIL [C. CIV.] art. 1226 (Fr.). Professor John H. Crabb has translated article 1226 to read: “A penalty clause is one whereby a person, in order to insure execution of an agreement, binds himself to something in case of inexecution.” THE FRENCH CIVIL CODE, supra note 107, at 231.


149. MICHEL DOUCET, LEGAL AND ECONOMIC DICTIONARY 22–23 (1980).

150. See supra note 138 (setting forth language of the Code as well as Professor Crabb’s translation into English).

151. Id. When used outside the contractual context, “pénal” or “pénale” is an adjective that typically refers to things related to the criminal justice system, reinforcing its association with penalties. DAHL, supra note 148, at 244.

152. “La clause pénale est la compensation des dommages et intérêts que le créancier souffre de l’inexécution de l’obligation principale.” CODE CIVIL [C. CIV.] art. 1229 (Fr.). As translated by Professor Crabb, the first line of article 1229 reads: “A penalty clause is compensation for damages which the creditor suffers from the inexecution of the principal obligation.” THE FRENCH CIVIL CODE, supra note 107, at 232. Dahl defines “clause pénale” as a penalty clause or as “liquidated damages,” the latter being a common term for stipulated damages that are compensatory in nature. DAHL, supra note 148, at 57–58. Dahl does not indicate, however, whether that association with the broader term, liquidated damages, is a relatively recent phenomenon or might have been current in 1804.
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damages” (“une certaine somme à titre de dommages-intérêts”)\textsuperscript{153} for
breach and does not refer to the term “clause pénale.”\textsuperscript{154} It thus could be
read to provide only for enforcement of non-punitive liquidated damages
clauses, even if the term “clause pénale” refers to a true penalty clause in
articles 1226 and 1229.\textsuperscript{155}

An alternative explanation, however, gives the term “clause pénale” its
more natural meaning as one that provides for extra-compensatory dam-
ages. This explanation permits the broader language of article 1152 to
refer to enforcement of any stipulated damages clause, whether it be a
non-punitive liquidated damages clause or a true penalty clause. The
term “assurer” in article 1226, although sometimes translated to mean
“to insure” and sometimes associated with the provision of indemnity
insurance,\textsuperscript{156} could easily have been used to mean “to ensure” in the
sense of ensuring performance, or “to assure” in the sense of providing
reassurance by signaling an absolute commitment to perform.\textsuperscript{157} Indeed,
“assurer” is unambiguously used in that last sense in other, more
recently amended Code provisions.\textsuperscript{158} These possible connotations of
“assurer” would point to a clause that seeks to deter breach by requiring
payment of extra-compensatory damages, and such an interpretation
would fit more naturally with the literal meaning of “clause pénale” (lit-
erally, “penalty clause”)\textsuperscript{159} used in the same article. This interpretation is
also consistent with the diction and syntax of article 1226, which links
the verb “assurer” to performance (“pour assurer l’exécution”)\textsuperscript{160} rather

\textsuperscript{153.} The first sentence of article 1152 reads: “Lorsque la convention porte que celui
qui manquera de l’exécuter payera une certaine somme à titre de dommages-intérêts, il
ne peut être alloué à l’autre partie une somme plus forte, ni moindre.” \textsc{Code civil [C.
civ.]} art. 1152 (Fr.). As translated by Professor Crabb, this sentence reads: “When an
agreement provides that he who fails to execute it shall pay a sum certain by way of dam-
ages, there may not be awarded to the other party a greater or lesser sum.” \textsc{The French
civil code, supra} note 107, at 223.

\textsuperscript{154.} \textsc{Code civil [C. civ.]} art. 1152 (Fr.); \textsc{The French Civil Code, supra} note 107, at
223.

\textsuperscript{155.} \textsc{See Denis Mazaud, La Notion de Clause Pénale § 510, at 295 (1992).}

\textsuperscript{156.} \textsc{See supra} notes 148–50.

\textsuperscript{157.} \textsc{Cf. supra} notes 91–92 and accompanying text (discussing a penalty clause’s pos-
sible purpose of signaling a promisor’s reliability).

\textsuperscript{158.} \textsc{E.g., Code civil [C. civ.]} art. 80 (Fr.) (amended 1993) (“Celui-ci s’y transportera
pour s’assurer du décès et en dressera l’acte . . . .”). As translated by Professor Crabb,
this passage reads: “The latter will repair there to assure himself of the death and draw up
a certificate of it . . . .” \textsc{The French Civil Code, supra} note 107, at 13.

\textsuperscript{159.} \textsc{See supra} notes 147, 152 (setting forth language of the Code as well as Professor
Crabb’s translation into English).

\textsuperscript{160.} \textsc{Supra} note 147.
than to non-performance, suggesting that the article refers to ensuring performance rather than indemnifying for a breach.

Although the first line of article 1229, when viewed in isolation, may appear to equate the term “clause pénale” rather unnaturally to non-punitive compensation (“[l]a clause pénale est la compensation de dommages . . . .”), the second line suggests a different perspective. The second line of article 1229 prohibits the victim of a breach from simultaneously demanding both the stipulated damages and performance of the principal obligation, except when the stipulated damages are solely for breach due to delay. In that light, the first line of article 1229 may not be intended to state that the clause necessarily is limited to a compensatory measure of damages. Rather, it probably is intended to emphasize that the clause pénale generally provides the sole redress, in the sense of the exclusive remedy, for breach.

Finally, because article 1152 does not restrict its terms to stipulated damages clauses of a particular measure, its provision for enforcement of contractual agreements for payment of “damages” could refer quite naturally to payment of either compensatory or extra-compensatory damages. That the French Civil Code could contemplate enforcement of a penalty is suggested by the Code’s recognition of freedom to contract in article 1134, which is a manifestation of the post-revolutionary regard for individual liberty and autonomy.

161. Supra note 152 (setting forth language of the Code as well as Professor Crabb’s translation into English).

162. “Il ne peut demander en même temps le principal et la peine, à moins qu’elle n’ait été stipulée pour le simple retard.” CODE CIVIL [C. CIV.] art. 1229 (Fr.). As translated by Professor Crabb, the second line of article 1229 reads: “He may not claim at the same time the principal obligation and the penalty, unless it was stipulated for a mere delay.” THE FRENCH CIVIL CODE, supra note 107, at 232.

163. See supra note 153 (setting forth Professor Crabb’s translation of the term “dommages-intérêts” in article 1152).

164. Article 1134 provides that the law generally will defer to the will and the agreement of the parties when executed in good faith: “Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.” CODE CIVIL [C. CIV.] art. 1134 (Fr.). As translated by Professor Crabb, article 1134 reads: “Agreements legally made take the place of law for those who make them. They may be revoked only by mutual consent or for causes which the law authorizes. They must be executed in good faith.” THE FRENCH CIVIL CODE, supra note 107, at 221.

165. See MAEZEAUD, supra note 155, § 53, at 43 (referring to the principle of l’autonomie de la volonté (autonomy of the will), a fundamental concept of French contract law).
To help resolve a debate about which of the above textual analyses is most consistent with legislative intent, even the exegetical school of the nineteenth century would look beyond the text and gather evidence of legislative purpose from legislative history, or travaux préparatoires.¹⁶⁶ The legislative history of the 1804 French Civil Code supports the second textual analysis above, which in turn mandates the enforcement of contractual penalty clauses. A preliminary draft of article 1152 authorized judges to reduce stipulated damages that obviously exceeded actual damages. However, objections to that draft, based on respect for the parties’ agreement, prevailed.¹⁶⁷ The final language of article 1152, as enacted in 1804, provided that judges were bound to enforce the precise amount of stipulated damages agreed to by the parties.¹⁶⁸ Accordingly, the Cour de Cassation interpreted the 1804 French Civil Code to mandate judicial enforcement of clauses pénales as written, without judicial adjustment of any penalties.¹⁶⁹

It might seem anomalous, particularly to one with common law sensibilities, for French law to largely exclude judicial awards of punitive damages from a broad category of civil liability, including liability for torts as well as breaches of contract, but then to enforce contractual penalties originating with the contracting parties. The common law approach appears to earn higher grades for consistency, at least within the field of contract law. Even though it permits punitive damages for egregious torts,¹⁷⁰ it generally denies punitive damages for breach of contract, whether awarded independently by the court¹⁷¹ or originating with the parties in unreasonably large liquidated damages.¹⁷²

The approach of the 1804 French Civil Code, however, can be explained by the post-revolutionary backlash against the judiciary¹⁷³ and newly won respect for individual liberty and autonomy.¹⁷⁴ The Napole-

¹⁶⁶ See Steiner, supra note 106, at 61, 67–70 (noting that travaux préparatoires include: draft bills, statements by the minister or others in promoting a bill, reports by official parliamentary debates, discussed and proposed amendments, and parliamentary debates).
¹⁶⁷ Mazeaud, supra note 155, §§ 512–14, at 295–96.
¹⁶⁸ Supra note 153.
¹⁷⁰ Supra notes 1–6 and accompanying text.
¹⁷¹ Supra notes 7–15 and accompanying text.
¹⁷² Supra notes 16–21 and accompanying text.
¹⁷³ See supra notes 112–15 and accompanying text.
¹⁷⁴ Supra notes 164–65.
onic Codes could check the power of the judiciary by requiring criminal process for judicial imposition of penalties, while simultaneously requiring courts to respect the rights of individuals to freely enter into a contract in which they agreed to impose a penalty for breach.

b. Amendments to Article 1152

Beginning in the 1970s, the French devotion to freedom of contract was tempered by recognition that parties with greater sophistication and bargaining power could employ _clauses pénales_ to threaten the other party with excessive penalties or forfeitures for breach or to limit their own liability to an unconscionable degree. As a result, article 1152 was amended in 1975 to authorize the exercise of judicial discretion to reduce or increase the stipulated sum in a _clause pénale_ if the judge first determines that the clause is manifestly excessive or plainly inadequate. A companion amendment directs judges to apportion damages under a _clause pénale_ in the event that the victim of the breach has received the benefit of partial performance. This amendment still leaves the judge free to adjust the stipulated damages further, if appropriate, pursuant to article 1152. Both articles were amended in 1985 to permit the judge to adjust the stipulated damages on the judge’s own motion.

175. _See supra_ note 139 and accompanying text.
177. _See id._ §§ 40–52, at 35–42.
178. Article 1152 was amended again in 1985 to authorize a judge to take these actions on the judge’s own motion. The discretion to modify the damages seems squarely at odds with the original language of article 1152, _supra_ note 153, which remains in place and which directs a judge to enforce a damages clause in precisely the agreed amount, creating an awkward juxtaposition between the original text and the subsequent additions. As amended in 1975 and 1985, article 1152 now includes the following clauses, inserted as a new paragraph immediately after the language in the original 1804 provision: “Néanmoins, le juge peut, même d’office, modérer ou augmenter la peine qui avait été convenue si elle est manifestement excessive ou dérisoire. Toute stipulation contraire sera réputée non écrite.” _CODE CIVIL_ [C. CIV.] art. 1152 (Fr.) (amended 1985). Professor Crabb translates this passage to read: “Nevertheless, the judge, even on his own motion, may moderate or increase the penalty which had been agreed upon, if it is manifestly excessive or pitiful. Any contrary stipulation will be considered not written.” _THE FRENCH CIVIL CODE, supra_ note 107, at 223. Of course, if it were ever in doubt whether article 1152 authorized enforcement of contractual penalties, _see supra_ Part III.B.2.a, the language of the amended article puts that doubt to rest by specifically referring to penalties and to judicial authorization to moderate them.
179. _CODE CIVIL_ [C. CIV.] art. 1231 (Fr.).
180. _Id._
181. _CODE CIVIL_ [C. CIV.] art. 1152, 1231 (Fr.).
which is a significant development in light of new rules of civil procedure that generally limit judicial action to claims and issues raised by the parties.\textsuperscript{182} These articles are supplemented by other laws that permit judges, in narrow circumstances, to strike down rather than simply modify stipulated damages or limitations on liability.\textsuperscript{183}

The French courts have not been entirely consistent in the time frame that they employ to resolve the threshold question of manifest excess in clauses that impose extra-compensatory damages.\textsuperscript{184} In most cases, however, courts have applied an objective, retrospective test that compares the stipulated damages to the damages actually sustained.\textsuperscript{185} As discussed in Part III.A above, even published decisions of the Cour de Cassation do not constitute primary legal authority that binds itself or other

\textsuperscript{182} See THE FRENCH CODE OF CIVIL PROCEDURE IN ENGLISH 1 (Christian Dodd trans., 2004) (Article 4 provides that the “subject matter of a dispute shall be determined according to the respective claims of the parties.”); \textit{id.} at 2 (Article 5 provides that a “judge must rule upon all the points at issue and only upon them.”); MAZEAUD, supra note 155, §§ 61, 67, 69, at 46, 49 (referring to judicial discretion in article 1152, raising the issue on the judge’s own motion, and tension with new rules of civil procedure); STEINER, supra note 106, at 168 (referring to restrictions in the New Code of Civil Procedure on judicial initiatives).

\textsuperscript{183} See, e.g., CODE CIVIL [C. CIV.] art. 1134 (Fr.) (deference to the parties’ agreement in article 1134 is subject to execution of the agreement in good faith); \textit{id.} art. 1108, 1131, 1133 (a contract that violates public policy or morals lacks legitimate “cause,” a requisite for formation of an enforceable contract); Law No. 78-23 of Jan. 10, 1978, J.O. Jan. 11, 1978, art. 35, available at http://www.legifrance.gouv.fr (Fr.) (explaining that the highest court for administrative law, the Conseil d’Etat, is authorized to limit, regulate, or even prohibit abusive clauses (“\textit{clauses abusive}”) in contracts between professionals and consumers).

\textsuperscript{184} See MAZEAUD, supra note 155, § 86, at 57–58 (explaining that courts in a minority of cases have determined the excessive character of a \textit{clause pénale} based on a number of factors surrounding formation of the contract, while courts in the majority of cases have used an objective, retrospective test).

\textsuperscript{185} See \textit{id.}; Cour de cassation, Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction, commercial and financial law chamber], Jan. 22, 2002, available at http://www.legifrance.gouv.fr (Fr.) (approving the appellate court’s finding that the penalty clause was not grossly excessive when compared to actual damages). \textit{But cf.} Cour de cassation, Troisième chambre civile [Cass. 3e civ.] [highest court of ordinary jurisdiction, third civil law chamber], Jan. 12, 1994, Bull. civ. I 1994, Arrêt No. 5, Pourvoir No. 91-19.540, 3, 3–4 (Fr.) (enforcing the \textit{clause pénale} even though the victim of the breach suffered no actual injury, suggesting either a determination that the \textit{clause pénale} was not manifestly excessive when imposed in the absence of actual damages or that the court justified the award on the basis of a comparison of the penalty with the damages that could reasonably have been estimated by the parties at the time of contracting).
courts. However, general predictions may be based on the high court’s rulings that the breaching party’s bad faith in the performance and breach of the contract is not relevant to the initial question of manifest excess in the penalty clause, or at least cannot be the sole determining factor. It would not be surprising if the courts settle into a pattern of determining manifest excess solely or largely on the basis of the court’s comparison of the stipulated damages to actual injury or to the total value of the contract. The courts may do so while allowing nearly unlimited equitable discretion in determining the extent to which the punitive surplus should be reduced, if at all, once a penalty clause is found to be manifestly excessive. Such an approach would be consistent with the text of article 1152, which refers abstractly to a penalty clause’s status as manifestly excessive while more specifically and personally granting the judge authority, without stating any limitation, to moderate a manifestly excessive clause.

The amended version of article 1152 potentially gives French judges the power to bring their law regarding clauses pénales in line with the common law antipathy to penalty clauses. If judges consistently find extra-compensatory stipulated damages to be manifestly excessive, and if they reduce the stipulated damages to an amount that approximates either the actual injury or a reasonable prospective estimate of the injury that breach would cause, then the approaches of the two legal systems will be substantially identical.

The final sentence in amended article 1152, however, speaks not of moderating the total damages referred to in the first sentence, but of moderating the penalty. This suggests that the penalty portion of the total sum of damages will not be eliminated, leaving only compensation, but may be moderated, leaving compensation plus a smaller penalty. In practice, the courts have indeed retained the discretion to reduce a mani-

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186. Supra notes 124–34 and accompanying text.
187. See, e.g., Cour de cassation, Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction, commercial and financial law chamber], Feb. 5, 2002, available at http://www.legifrance.gouv.fr (Fr.) (finding that lack of bad faith and substantial fault in connection with a breach was not properly considered by the court of appeals in the determination of whether a penalty clause was manifestly excessive). Cf. Cour de cassation, Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction, commercial and financial law chamber], Feb. 11, 1997, Bull. civ. II 1997, Arrêt No. 47, Pourvoi No. 95-10.851, 42, 43 (Fr.) (finding that behaviors of the parties cannot be the sole basis for a finding of a manifestly excessive penalty; comparison of the penalty to the actual damages suffered is a necessary element of the analysis).
189. See supra note 176.
festly excessive clause pénale to a point that still exacts a penalty, albeit
a reduced one. Indeed, all members of two small groups of French
magistrates that I interviewed in 2005 stated that they would normally
retain an extra-compensatory element in a clause pénale, even after
moderating it to avoid a manifestly excessive penalty, in keeping with
the parties’ intent to discourage breach. Authority for retaining such a
punitive element arguably lies in article 1226, which defines without
condemning a clause pénale as one designed to ensure performance,
and thus to deter further breach of that particular contract by compelling
performance.

Additionally, if the breaching party acted in bad faith, judicial retention
of a punitive element in a clause pénale might be encouraged by article
1150’s expansive view of compensatory damages for a bad-faith
breach. When acting without the benefit of a clause pénale, judges are
accustomed to awarding an expanded measure of compensatory damages
for bad-faith breach. Thus, they likely will feel comfortable exercising
discretion to lessen their reductions of manifestly excessive clauses pé-
nales, leaving some extra-compensatory damages for bad faith breach
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discretion to lessen their reductions of manifestly excessive clauses pé-
nales, leaving some extra-compensatory damages for bad faith breach
when the parties have voluntarily agreed to a penalty. Even though the
Cour de Cassation has quashed lower court decisions that considered the
bad-faith, or lack of bad faith, of a party on the threshold issue of mani-
fest excess in the clause pénale, a judge almost certainly has broader
discretion to consider the breaching party’s bad faith when exercising
discretion to reduce stipulated damages that the judge has independently
found to be manifestly excessive.

Finally, in comparison to common law judges, French judges are gen-
erally more willing to view a contractual promise as a moral obligation

190. See Cour de cassation, Chambre commerciale et financière [Cass. com.] [highest
court of ordinary jurisdiction, commercial and financial law chamber], Jan. 29, 1991,
Bull. civ. I 1991, Arrêt No. 43, Pourvoi No. 89-16.446, 27 (Fr.) (approving an award with
a punitive element beyond compensation).
191. Supra notes 147, 154–58 and accompanying text.
compensation for loss is not the exclusive function of a clause pénale; it can also function
to compel performance). See also MAZEAUD, supra note 155, at 7 (in light of the purpose
of compelling performance, arguing that even a revised clause pénale should always
remain slightly higher than actual damages, and that the judge should award some
amount under a clause pénale even if the non-breaching party suffers no injury).
193. See supra notes 141–42 and accompanying text.
194. See supra note 184 and accompanying text.
and are less persuaded by arguments of economic efficiency.\(^{195}\) When coupled with the strong regard for freedom of contract and the pre-1975 tradition of enforcing penalty clauses as written, these values presumably will frequently translate into enforcement of penalties. In some cases, judges will find penalties to be fully enforceable rather than manifestly excessive; in other cases, they will moderate a manifestly excessive penalty but not to the point of eliminating all extra-compensatory damages.

c. Summary

In sum, in contrast to both the common law and the Uniform Commercial Code in the United States,\(^{196}\) the French Civil Code permits judges to enforce contractual penalties for breach of contract. The practice of enforcing penalty clauses was strongly established under the original language of article 1152, which mandated enforcement of stipulated damages without adjustment of the amount, thus respecting freedom of contract.\(^{197}\) Although the 1975 and 1985 amendments to article 1152 authorize the judiciary to moderate manifestly excessive penalty clauses,\(^{198}\) the judges retain the discretion to permit a punitive element to remain. When judges exercise their discretion in that manner, they have either made a determination that the breach is not efficient, or—and this is more likely in the context of French legal culture—they are acting on the assumption that economic efficiency is less important than respecting the parties’ freedom to agree to a monetary means of compelling performance, which can substitute for the coercive remedy of specific enforcement. This view is supported by the Code’s reference to the purpose of a clause pénale to ensure performance.\(^{199}\)

The wild card in this remedial scheme is the astreinte, which is the equivalent of a graduated penalty clause drafted by the court rather than the parties and imposed for the same purpose of compelling performance.\(^{200}\) This judicial power does not sit comfortably within a legal system in which punitive damages generally are excluded from civil liability except when interests in protecting autonomy and freedom of contract require enforcement of a contractual clause pénale. This apparent anomaly is minimized, at least, if commentators are correct in

\(^{195}\) Nicholas, supra note 135, at 211–13. This sentiment was echoed by French magistrates that the author interviewed in 2005.

\(^{196}\) See supra note 18.

\(^{197}\) See supra notes 161–67 and accompanying text.

\(^{198}\) Supra notes 187–90 and accompanying text.

\(^{199}\) See supra notes 147, 154–58 and accompanying text.

\(^{200}\) See supra notes 138–39 and accompanying text.
noting that this remedy, like specific performance, is enforced “in a very grudging manner.”

IV. LESSONS FROM THE COMPARATIVE ANALYSIS

A. Summary of the French and American Approaches

U.S. law and French law are consistent in their refusal, with some exceptions, to grant punitive damages for breach of contract in the absence of a contractual penalty clause. If the parties have freely negotiated a stipulated damages clause, however, the approaches of the two legal systems diverge. Although the divergence is less pronounced than might be apparent on the surface.

In the United States, stipulated damages clauses are enforceable only if they represent reasonable attempts to liquidate compensatory damages. Unreasonably large stipulated damages are unenforceable as a penalty. This reflects an antipathy that traces back 500 years to the English equity practice of granting relief from extra-compensatory conditional bonds. U.S. law, however, defers to the parties’ freedom to contract in one minor way: it will enforce a liquidated damages clause that is prospectively reasonable at the time of contracting, even if the liquidated damages exceed actual damages because the breach causes unexpectedly little injury.

Throughout much of the history of the Napoleonic Code, French law deferred to the contracting will of the parties to a far greater degree by enforcing validly negotiated clauses pénales, without adjustment, even if the clauses imposed penalties both from a prospective and retrospective view. After 1975, French law retreated from its position of total deference to the will of freely contracting parties. French law granted judges the authority to eliminate or moderate the punitive element of a clause pénale if it was found to be manifestly excessive, which the courts

201. KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 475 (1998) (referring to grants of specific performance and astreinte). See also Lando & Rose, supra note 135, at 478 (quoting Zweigert and Kötz and agreeing that this “special system of fines” is not strictly enforced by the courts).
202. See supra notes 5–13, 135–42, 201 and accompanying text.
203. Supra note 17 and accompanying text.
204. Id.
205. See supra notes 30–38 and accompanying text.
206. See supra notes 18–21 and accompanying text.
207. See supra notes 154–65 and accompanying text.
usually assessed by retrospectively comparing the clause with actual damages caused by the breach.\textsuperscript{208}

From a U.S. perspective, even after 1975, French law offers a more favorable environment for enforcing penalty clauses. French law will enforce any extra-compensatory clause that is not retrospectively manifestly excessive and will offer the probability of enforcing part of a penalty clause that is manifestly excessive and must be reduced.\textsuperscript{209} From a French perspective, however, U.S. law—although exhibiting greater hostility toward penalty clauses in its rhetoric—appears to give penalties a partial reprieve, because it enforces liquidated damages that are prospectively reasonable but turn out to be extra-compensatory after actual injury is sustained.\textsuperscript{210}

B. A Proposal to Consider Facets of the French Approach, While Retaining Goals of Efficiency and Guarding Against Abusive Penalty Clauses

One steeped in American law, and particularly in the school of law and economics, might advise the French Parliament to facilitate efficient breaches and encourage economic growth by eliminating the enforcement of all extra-compensatory clauses pénales, thereby completing the evolution of the Civil Code begun in 1975. This author believes, however, that U.S. law may have more to gain by adopting features of the French approach. By distinguishing contractual penalty clauses from court-awarded punitive damages and by adopting sufficient flexibility to distinguish efficient breaches from inefficient and malicious breaches, U.S. law could achieve results that are fairer to the victim of breach.

First, as shown in the approach of the French Civil Code, penalty clauses, if freely and fairly negotiated, need not be treated with the same hostility accorded to court-awarded punitive damages for breach of contract. If the parties with relatively equal bargaining position have negotiated a penalty clause for the purpose of providing one party with special reassurance against breach, the other party likely is agreeable to using the clause as a means of signaling its serious intention to perform. The party’s acceptance of the clause puts it in a better position to extract a higher fee for the promised services.\textsuperscript{211} A legal regime that signals at least partial enforceability of these agreements will give substance to

\textsuperscript{208} See supra notes 175–92 and accompanying text.
\textsuperscript{209} See id.
\textsuperscript{210} See supra notes 18–19 and accompanying text.
\textsuperscript{211} See supra notes 92–99 and accompanying text.
such clauses and help the parties maximize the benefits to be derived from bargaining.\footnote{212}{See supra notes 92–95 and accompanying text.}

This approach rests strongly on an assumption of mutual consent without overreaching, which requires vigilant policing by courts to guard against fraud, duress, and unconscionability. Indeed, courts might desire to take a modest step in the direction of this approach by enforcing only a penalty clause that is specifically negotiated by these parties, or—in the case of a standard-form clause—is brought to the attention of the non-drafting party.\footnote{213}{See supra note 96. Cf., e.g., U.C.C. § 2-205 (1998) (requiring separate signing of a promise to hold offer open if made on a form supplied by the other party).} Moreover, if the clause would operate solely against one party, that party should have the option during bargaining of paying a reasonable fee to delete the provision, rather than being stuck with the provision in an unalterable adhesion contract.\footnote{214}{See generally Crawford v. Buckner, 839 S.W.2d 754, 757–59 (Tenn. 1992) (holding that an exculpatory clause in a residential lease violated public policy, partly because it adhered to the contract and was not subject to removal in exchange for a tenant’s payment of additional fees).} Penalty clauses that do not meet these standards would generally be unenforceable as unconscionable contract terms or as ones that violate public policy.

The purpose of adopting a rule that permitted enforcement of penalty clauses would be to compel or ensure performance in transactions in which the victim of breach would find compensatory damages to be an inadequate substitute for actual performance and specific performance would be impractical or otherwise not readily obtainable. Recall, for example, the hypothetical wedding reception in which the wedding couple places great sentimental value on the appearance of a particular musical group;\footnote{215}{See supra notes 92–99 and accompanying text.} if that group repudiated at the last minute or simply failed to show up, the wedding couple would find it impossible to secure specific performance of that band and nearly impossible to secure the services of any comparable and available band. It is unlikely that a court would define the couple’s expectation interest in a manner that would allow compensatory damages to fully remedy their sense of injury.\footnote{216}{See supra notes 92–99 and accompanying text.} In such a
In one celebrated case, an appellate court declined to award damages of $29,000 measured by the cost to complete restoration of the non-breaching parties' farm land after the breaching party had strip-mined it for coal, and it instead awarded the sum of $300, representing the diminution in market value. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962). Finally, if the general marketplace would be equally satisfied with a substitute swing band that cost no more than the contract fee for the wedding couple's favored band, and if the court did not allow the sentimental value associated with the favored band to preclude a finding that another band was a valid substitute, then principles of avoidability could bar all compensatory damages other than the transactions costs of finding and hiring a substitute band. See RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) (barring recovery for loss that reasonably could have been avoided “without undue risk, burden or humiliation”).

217. See supra note 3.
218. See supra notes 5–38 and accompanying text.
of reasonableness in enforcing non-competition clauses, courts should enforce penalty clauses only to the extent that they are necessary to protect the legitimate interests of the parties.

This proposal contemplates that some parties will have a legitimate interest in deterring breach, perhaps because they reasonably believe that compensatory damages, if defined conventionally, will not adequately protect their interests. In such circumstances, a court could exercise its policing powers to enforce “reasonable” penalties, which are those designed to provide a reasonably effective extra-compensatory disincentive to breach. Such “reasonable” penalties would neither provide an additional windfall to the plaintiff nor reflect excessive vindictiveness toward the breaching party. A penalty clause that failed this test would be struck down on grounds of unconscionability or public policy, or would be modified to eliminate the objectionable surplus.

The proposed rule would apply effectively to intentional efficient breaches, even while retaining a strong policy of encouraging efficient allocation of resources. In balancing the parties’ freedom to contract, due recognition of their legitimate interests, and public policy favoring economic efficiency, a court could reduce any excessive penalty. This reduced penalty could facilitate reallocation of resources to a higher use but still guarantee some portion of the extra-compensatory damages for which the victim of breach bargained, particularly considering any premium that the victim paid in exchange for inclusion of the penalty clause. In keeping with the centuries-old practice of Chancery courts to grant equitable relief from oppressive penal bonds, but emulating the flexibility provided by the French Civil Code, a revised American law could vest courts with discretion to eliminate the portion of a contractual


224. See supra note 37 and accompanying text.
penalty that served no purposes except to produce a windfall and block a more economically efficient result.

For example, suppose that the victim of a breach expected to, and actually does, suffer net damages of $10,000, measured by conventional standards and after factoring in costs avoided by withholding the breaching party’s fee of $101,000. Because of great sentimental investment in the promised performance, which likely would not be fully protected by an award of compensatory damages under conventional market-based measures, the non-breaching party had paid a premium of $1,000 for a penalty clause that called for $20,000 in damages in the event of a breach—over and above the withholding of the breaching party’s fee. Before performance was due, the other party intentionally breached to take advantage of an intervening opportunity that will pay it $150,000 and will net for the breaching party a profit of $30,000, which amounts to $20,000 more than the $10,000 it would have earned under the first contract. If the penalty clause was unenforceable, the victim of the breach would be entitled only to a conventional measure of her compensatory damages, which would be $10,000, secured perhaps only after expenditure of significant transaction costs. Fully enforcing the penalty clause, however, would eliminate the breaching party’s economic incentive to reallocate its resources to a use that the market values more highly. Taking a cue from the French authority to moderate a clause pé nale in certain circumstances, a court could vindicate public policy and could recognize both freedom of contract and the legitimate interests of the parties by enforcing only part of the penalty clause, say $16,000. This amount would pay the $10,000 in conventional damages and $6,000 in additional “penalties,” $1,000 of which might represent the premium paid for the penalty clause, which is being only partly enforced. Such an award would allow the breaching party to retain an incentive of $4,000 to reallocate its resources while compelling it to share some of its new gains with the victim of the breach. Thus the victim would be at least partially compensated for subjective injuries that might not normally be compensable under market-based measures for damages, but for which the party bargained.

Indeed, if the court believed that the victim of the breach would suffer such subjective injury that complete deterrence of breach was a legitimate end of bargaining, the court might enforce the penalty clause in its entirety, eliminating the incentive for reallocating resources. This result could be justified on the basis that the alternative use for the breaching

225. See supra notes 177–95 and accompanying text.
party’s resources was not a higher use when taking into consideration the subjective needs of the victim of the breach. For example, if the band, with whose music the wedding couple fell in love, repudiates one day before the wedding, a conventional market-based measure of compensatory damages might bring an award of only $1,000, which represents the additional funds, beyond the canceled fee to the first band, needed to hire a band on short notice that the market would find to be comparable. If a court credited the notion, however, that compensatory damages, especially as measured by the market, could not substitute for actual performance in these circumstances, it might find that a breach would not be efficient. In other words, it might find that—by negotiating the penalty clause—the parties had honestly and reasonably defined the unusual subjective value of the band to the wedding event so that it not only exceeded the value that the general market would place on that performance but also exceeded the value of the band’s performance to the alternative client.

If the rules regarding enforcement of penalties are to influence the actions of the parties before performance or breach, however, they must be predictable. A party who receives a more valuable offer before its performance is due may decide to perform or breach the first contract depending on its ability to predict whether a court will enforce a penalty clause fully, partially, or not at all. In some cases, the prediction may not be difficult. For example, case law in a jurisdiction may establish that courts recognize the great subjective value of certain kinds of performances with sentimental meaning to a wedding party and—subject only to due process constraints—will fully respect a wedding couple’s negotiation of a penalty designed to deter breach. Courts may do so even if in the absence of a penalty clause, the case law would neither define compensatory damages so expansively nor permit a jury to award punitive damages.

The parties would not need to depend on the development of predictable lines of authority in various contexts, however, if the jurisdiction applies a rule of always fully enforcing any penalty clause that is: freely negotiated without overreaching; falls within a range consistent with the public interest;226 and proportionate to the parties’ legitimate interests to

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226. The public interest might come into play, for example, if the competing opportunity for the potentially breaching party is one that would not go forward without that party and is one that would bring benefits to the entire community. In such a case a court might not honor the non-breaching party’s full subjective valuations and could appropriately reduce the penalty clause to a point that rewarded reallocation of the breaching party’s resources, even after payment of the penalty. If such an approach was made pre-
satisfy special needs to ensure performance and to signal an elevated commitment to perform in exchange for a premium. Such an approach would not necessarily deter efficient breach; instead, it would help internalize the full costs associated with breach and force the breaching party to negotiate with the victim of a breach. If circumstances have not changed, and the victim of the breach truly places a higher value on performance than is reflected by additional profits available from a competing opportunity, then a negotiated settlement is unlikely—and indeed the breach is not even “efficient” as viewed from the non-breaching party’s subjective valuations—and the contracting party likely will perform rather than breach. On the other hand, if a share in the profits from a competing opportunity would more than fully compensate the non-breaching party for even their subjective sense of loss, or if circumstances and their valuations have changed, the parties likely will reach an agreement sharing the gains of breach with the non-breaching party, in place of enforcement of the penalty clause after possible judicial modification.

Return to the example of the wedding party above. If the musical group could accurately predict that a court would fully enforce the penalty clause, then it would not breach the contract unless it thought that the wedding couple would not assert their rights or unless it obtained a release from the wedding couple. In negotiations for a release, the wedding couple could reassess the value of the band’s performance in light of their own current circumstances and could determine whether voluntary payment by the band of less than the full penalty would fully assuage the couple’s sense of injury. If so, and if the modified penalty were low enough to permit the band to make an increased profit in the new enterprise after paying the penalty, the band could obtain a voluntary release from the wedding couple. This voluntary release thus preserves their goodwill and rebuts any argument that the couple’s damages are not fully redressed, while retaining an incentive to reallocate their musical resources to a more valuable use. If the couple refused to grant a release for a sum acceptable to the band, then the couple is placing a subjective value on the performance that makes the wedding the most valuable place to allocate the band’s resources. Breach would not be efficient, at least as defined by the wedding couple’s subjective valuations.

dictable by statute or case law, the breaching party might be encouraged to breach and reallocate its resources, or the non-breaching party might be encouraged to negotiate a release at a price that removes any disincentive for such reallocation.
In the absence of a penalty clause, the law would be reluctant to recognize subjective valuation to this extent and likely would find the breach to be efficient from the perspective of the marketplace. When the parties themselves have credited those subjective valuations by freely negotiating a penalty clause, however, the courts should take a cue from the French approach and honor their agreement. Although other players in the market might assess the relative values differently, enforcing the clause permits the parties to this agreement to maximize their utilities. Moreover, in the event that a substantial public interest might be served by a reallocation of the band’s resources, and if it were predictable that a court would accordingly reduce the penalty clause to a point below that which would recognize the couple’s subjective valuations, then the parties likely would consider that factor in their negotiations of a release. This would increase the possibility of a settlement and release.

Of course, the transaction costs of negotiating a release must be added to each party’s calculus. However, if the penalty clause were not enforceable, then the parties could easily dispute the amount of compensatory damages that would be owed for breach. The transaction costs of litigating that issue or negotiating a settlement likely would be at least as great as that of negotiating a release from a penalty clause to permit efficient breach.

C. Comparison with a Proposal to Liberalize Compensatory Damages

One may argue that parties would freely negotiate a penalty clause only when subjective valuations on performance would make market-based compensatory damages an inadequate substitute for actual performance. Further, one may argue that this inadequacy could be addressed more directly by expanding compensatory damages to fully redress subjective injuries, at least when the injuries are foreseeable because the circumstances giving rise to the special injuries have been communicated to the other party. This approach, too, has some merit. If the parties are aware of the subjective value of a performance during bargaining, and if the law predictably awards compensatory damages based on the full subjective value, then the obligor can determine the fee that will cover the risk of non-performance and the liability for disappointed expectations based on full subjective valuation. If the fee is a deal-breaker, then the obligee may need to sacrifice the availability of

227. See id. and accompanying text.
228. For an outline of limitations on recovery of damages for breach of contract, see supra note 216.
this fulsome measure of damages by agreeing to a liquidated damages clause that limits compensatory damages to a more conventional measure and allows the obligor to lower its price.

Simply expanding the availability of non-market-based or non-pecuniary losses will not help the members of our wedding party if they are not confident of their ability to persuade the band members at the time of breach of the full extent of their injuries, or of their ability to prove those subjective injuries to a court. Moreover, expanding the definition of recoverable compensatory damages might inject excessive uncertainty into the consequences of bargaining. Such an expansive definition may have a chilling effect on contract formation, even on the negotiation of some bargains to which the expansive definition would not ultimately apply.

Consequently, the better approach would retain the current default rules concerning compensatory damages and allow the parties to depart from those rules by explicitly agreeing to stipulated damages. If the stipulated damages exceed the normal measure of compensatory damages, they might be viewed as compensation supplemented by a penalty. Or, they might be viewed as liquidated compensatory damages with a stipulation that reflects an agreement to expand the normal range of compensable injuries. The distinction would be largely semantic, although some courts might find one framework to be a more palatable departure from the current regime than the other.

However the damages are characterized, enforcement of the penalty or expanded compensation would not depart from a general rule against extra-compensatory damages much more than the current rule, which allows enforcement of prospectively reasonable liquidated damages that exceed the damages actually sustained. In both cases, deference to the parties’ voluntary agreement concerning damages permits a departure from the damages that would be available in the absence of such an agreement.

V. CONCLUSION

Although U.S. common law achieves apparent consistency in refusing both to enforce contractual penalty clauses and to award punitive damages for breach of contract in the absence of such clauses, the French experience shows that the two cases can be distinguished in a principled manner. Even if a legal system adheres to a general rule against punitive damages for breach of contract, it can justify cautious enforcement of a freely negotiated penalty clause in the name of respecting the autonomy of the parties. This would permit the parties to achieve an economically
efficient result through an obligor signaling an unqualified commitment to perform and the obligee paying a premium for a highly valued assurance of performance.
CASES AND CONTROVERSIES: PREGNANCY AS PROOF OF GUILT UNDER PAKISTAN’S HUDOOD LAWS

Moeen H. Cheema*

ABSTRACT

Pakistan’s Hudood (Islamic criminal) laws have been a source of controversy since their promulgation by the military regime of General Muhammad Zia-ul-Haq in 1979. For their supporters, these laws are a welcome step towards the enforcement of shari’ah (Islamic law) and, as such, represent a logical and inevitable progression of those historic processes that had led to the creation of the Islamic Republic of Pakistan. To their opponents, these laws represent gross violations of fundamental human rights and constitutional norms designed to uphold democratic participation in lawmaking and the equality of citizens irrespective of their religion or gender. However, despite the protests at home and the notoriety generated in the international media, these laws continue to exist on the statute books and are enforced in the courts of law.

This paper will survey the contours of the controversies surrounding the Hudood laws, and seek to broaden the horizons of the debate surrounding these laws by incorporating an “Islamic critique” of these laws that has generally been lacking in the discourse. More importantly, the paper seeks to analyze the role that the Federal Shariat Court has played in substantively shaping the law, through a chronological analysis of the Court’s decisions on the most contentious aspects of the Hudood laws: the conviction of rape victims for zina (consensual adultery/fornication) regarding as proof the pregnancy caused by the rape. This analysis will indicate the strengths of the Islamic critique and propose reforms that may offer a viable avenue for alleviating the hardships perpetrated in the application of the Hudood laws.

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I. INTRODUCTION

The military regime of General Muhammad Zia-ul-Haq promulgated the controversial Hudood laws in its early years in power,

1. The Hudood laws were enacted through four Presidential Ordinances and one Presidential Order. See Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), reprinted in 31 P.L.D. 1979 Central Statutes 51 (1979) [hereinafter Offence of Zina Ordinance]; Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979), reprinted in 31 P.L.D. 1979 Central Statutes 56 (1979) [hereinafter Offence of Qazf Ordinance]; Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (VI of 1979), reprinted in 31 P.L.D. 1979 Central Statutes 44 (1979) [hereinafter Offences Against Property Ordinance]; Execution of the Punishment of Whipping Ordinance, 1979 (IX of 1979), reprinted in 31 P.L.D. 1979 Central Statutes 60 (1979) [hereinafter Execution of the Punishment of Whipping Ordinance]; Prohibition (Enforcement of Hadd) Order, 1979 (IV of 1979), reprinted in 31 P.L.D. 1979 Central Statutes 33 (1979) [hereinafter Prohibition Ordinance]. Article 89 of Pakistan’s Constitution empowers the President to create laws when the National Assembly is not in session and “circumstances exist which render it necessary to take immediate action.” PAK. CONST. art. 89, cl. 1, available at http://www.nrb.gov.pk/constitutional_and_legal/constitution. This provision enables the President to deal with any circumstances that require legisla-
ostensibly to further the process of “Islamization” in Pakistan. Grafted onto the country’s common law system, a remnant of British colonial
tive action when the Parliament is not in session, for example, in the transitory period between elections. Such ordinances were envisaged as temporary measures that would lapse after four months unless adopted by the Parliament. However, having taken over power in a military coup in July 1977, General Zia-ul-Haq dissolved the elected Parliament and replaced it with a nominated assembly called the Majlis-e-Shoora. In the absence of Parliament, General Zia-ul-Haq used these law-making powers extensively, especially to further the process of “Islamization” of laws in Pakistan. See Ann Elizabeth Mayer, Islam and the State, 12 CARDOZO L. REV. 1015, 1042–47 (1991). In 1985, parliamentary elections were held on a non-party basis and the newly elected Parliament passed the notorious Eighth Amendment to Pakistan’s Constitution. Article 270A of the Constitution was thereby amended to state that all ordinances, orders, and other laws made between July 5, 1977, and the date on which the Eighth Amendment came into force (thereby including the Hudood laws) were “affirmed, adopted and declared, notwithstanding any judgment of any court, to have been validly made by competent authority . . . .” PAK. CONST. art. 270A, cl. 2. Thereafter, the Hudood Ordinances were accorded the force equivalent to an Act of Parliament, and became entrenched in Pakistani law.

2. Many critics have questioned General Zia’s intentions as regards his Islamization program, or Nizam-e-Mustapha as he preferred to call it. See, e.g., ASMA JAHANGIR & HINA JILANI, THE HUDOOD ORDINANCES: A DIVINE SANCTION? 18 (1990). They allege that Zia, who had dismissed the government of Zulfiqar Ali Bhutto in a coup d’état, needed a political constituency in order to sustain his military rule and cunningly used the slogan of Islamization for this purpose. Id. Charles Kennedy contends that, despite sustained rhetoric, the Zia administration deliberately maintained a slow pace for Islamization. Charles H. Kennedy, Islamization and Legal Reform in Pakistan, 1979-1989, 63 PAC. AFF. 62 (1990) [hereinafter Kennedy, Islamization and Legal Reform in Pakistan]. In support of this argument, Kennedy provides the following evidence: (a) the Federal Shariat Court was created with significant restrictions on its jurisdiction under Article 203B of the Constitution, including a lack of jurisdiction in matters pertaining to Muslim personal law, fiscal laws, taxation, banking, and insurance; (b) Zia appointed a number of “Islamic moderates” to the Shariat courts, so that many of the judges who were responsible for interpreting the Islamic reforms were not the reforms’ most zealous advocates; (c) reform of the law of evidence (Qanoon-i-Shahadat) represented a much watered-down version of the obscurantist manifesto since it implemented only one of the amendments—arguably the one with least practical impact—recommended by the Council of Islamic Ideology; and (d) two weeks after dismissing the government of Prime Minister Junejo on the grounds that it had failed to hasten the process of Islamization, Zia nevertheless entrusted jurisdiction of the Enforcement of Shariah Ordinance to the Pakistani High Courts instead of the Shariat courts. Id. at 64–71. Anita Weiss suggests another agenda behind Islamization: that one primary objective of Islamization, rather than a mere side effect, was the systematic reduction in the power and participation of women in the public sphere. See Anita M. Weiss, Women’s Position in Pakistan: Sociocultural Effects of Islamization, 25 ASIAN SURV. 863, 876–77 (1985) (“Traditional Islamic law as applied in the South Asian context has favored the maintenance of extended patrilineal kinship networks and the control of women.”).
rule, the laws sought to criminalize extra-marital sexual relations\(^3\) and the consumption of alcohol,\(^4\) as well as to bring into conformity with Islamic injunctions rules relating to certain offenses against property.\(^5\) The laws also introduced punishments of *rajm* (stoning to death)\(^6\) and public whipping into the criminal laws of Pakistan.\(^7\) Concurrent with the promulgation of the Hudood laws, General Zia’s regime introduced a parallel judicial system consisting of the Federal Shariat Court (FSC) and the Shariat Appellate Bench of the Supreme Court\(^8\) empowered to review and declare invalid any law found to be inconsistent with *shari'ah* (Islamic law) injunctions.\(^9\)

3. See Offence of Zina Ordinance § 4, *supra* note 1, at 52.


5. See Offences Against Property Ordinance pmbl., *supra* note 1, at 44.

6. See Offence of Zina Ordinance §§ 5–6, 17, *supra* note 1, at 52, 55.

7. See Execution of the Punishment of Whipping Ordinance, *supra* note 1, at 60–62.

In fact, while *rajm* was indeed a novel introduction to Pakistan’s penal system, it may not be accurate to describe whipping as either a new or an exclusively “Islamic” form of punishment. Whipping was an available punishment prior to the Hudood laws under the Whipping Act, 1909. See Whipping Act, 1909 (IV of 1909), *available at* http://www.pakistanlawyers.org (follow “Statutes and Rules” hyperlink). For example, in Farzand Ali v. State, 1971 S.C.M.R. 715 (Sup. Ct. 1971), a case predating the Hudood Ordinances, the Supreme Court upheld a sentence for rape and kidnapping offenses, which included a penalty of twenty lashes. This case is rare, however, and except for whippings carried out in jails for disciplinary reasons, whipping was rarely employed as a punishment under the general criminal laws prior to the Hudood laws’ enactment.

8. Initially, the shariat courts constituted part of the Pakistani High Courts. These courts were given judicial independence on May 26, 1980, after the insertion of Article 203C to Pakistan’s Constitution. *See* PAK. CONST. art. 203C. The FSC consists of eight Muslim judges, three of whom are *ulema* (religious scholars). *Id.* cls. 2, 3A. The remaining judges are appointed from amongst those who are qualified to be judges of the High Courts. *Id.* cl. 3A. The Chief Justice must be serving on the High Courts, or should be qualified to be a judge of the Supreme Court of Pakistan. *Id.* cl. 3. Any judge of the High Courts who refuses appointment to the FSC faces automatic retirement. *Id.* cl. 5. The FSC has the power to review any and all Pakistani laws to determine whether they are repugnant to the injunctions of Islam. *Id.* art. 203D, cl. 1. FSC decisions are supreme, binding the High Courts and all lower courts. *Id.* art. 203GG. As regards the Hudood laws, the FSC acts as a court of appeals. *Id.* art. 203DD. Appeals from judgments of the FSC lie before the Shariat Appellate Bench of the Supreme Court. *Id.* art. 203F, cl. 1. The Shariat Appellate Bench consists of three Muslim judges of the Supreme Court as well as two ad hoc *ulema* judges appointed by the President. *Id.* cl. 3. These two appointed *ulema* judges are picked either from the FSC, or from a panel of *ulema* nominated by the President in consultation with the Chief Justice of the Supreme Court. *Id.* cl. 3(b).

9. Commenting on the significance of this event, Dr. Nasim Hasan Shah, retired Chief Justice of Pakistan, stated:

The conferment of such a power of judicial review, with a view to Islamising the existing laws, has no parallel in judicial history. No such power was con-
The promulgation of the Hudood laws received robust support from a small segment of Pakistani society: religious political parties and their most ardent followers. For these supporters, the laws were a welcome step towards the enforcement of shari’ah, and, as such, represented a logical and inevitable progression of those historic processes that had led to the creation of the “Islamic Republic of Pakistan.”

The laws referred on Courts during the Muslim Rule when Islamic Fiqh was the governing law. This indeed was a most awesome and far-reaching power, without any parallel in the history of the Islamic world and also a very potent instrument for accomplishing the process of Islamisation of laws within the shortest possible period. This power was, in fact, availed of fully both by the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court for bringing about the Islamisation of existing laws. Indeed as a result of the decisions of these Courts and the consequential steps taken to implement them, a silent revolution has come about in the legal field.


10. Religious political parties have historically failed to garner significant support in general elections. See Hassan Abbas, *Pakistan Through the Lens of the “Triple A” Theory*, 30 FLETCHER F. WORLD AFF. 181, 186 (2006). However, such parties have, at various times, enjoyed considerable power by virtue of their presence in governing coalitions. For example, the “MMA” (*Mutahida Majlis-e-Amal*), a coalition of six religious political parties, achieved unprecedented success in the latest general elections held in October 2002, and currently commands a majority in the provincial legislature of the North West Frontier Province. B. Muralidhar Reddy, *Pakistan’s Religious Parties Losing Ground?*, THE HINDU, Sept. 2, 2005, at 2.

11. The demands for Islamization of laws are as old as Pakistan itself. According to Maulana Abul A’la Maudoodi, a renowned religious scholar, political activist, and the founder of the *Jamaat’i Islami* religious-political party: “The Pakistan movement was an expression of Muslim India’s firm desire to establish an Islamic State. The movement was inspired by the ideology of Islam and the country was carved into existence solely to demonstrate the efficacy of the Islamic way of life.” MAULANA ABUL A’LA MAUDDODI, *The Islamic Law and Constitution* 10 (Khurshid Ahmad trans., Islamic Publications 4th ed. 1969) (1955). Dr. Nasim Hassan Shah has expressed similar sentiments: “The main reason why the Muslims of undivided India demanded Pakistan was that they wished to have a State where they could live according to their own cultural values, traditions and Laws.” Shah, supra note 9, at 37. However, despite expressing an aspiration of Islamization in the Objectives Resolution, 1949, the first Constituent Assembly of Pakistan, as well as later framers of the three Constituents of Pakistan, failed to give more than a lip service to the agenda of Islamization of laws. See Tayyab Mahmud, *Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT’L L.J. 40, 63 (1995). All three Constitutions, adopted in 1956, 1962, and 1973, included “Islamic provisions” which sought the Islamization of laws through legislation upon the advice of advisory councils composed of religious scholars. However, the process of Islamization did not take hold until the emergence of General Zia on the political scene, who gave the power of Islamization to the shariat courts. See William L. Richter, *The Political Dynamics of Islamic Resurgence in Pakistan*, 19 ASIAN SURV. 547 (1979),
immediately generated vehement protests and criticism from an equally partial sector of the society: urban, “liberal,” and “Westernized” members of human rights and women’s rights organizations who subscribed to the notion of “separation of church and state.” To these opponents, the laws represented gross violations of fundamental human rights, constitutional norms designed to uphold democratic participation in lawmaking, and the equality of citizens irrespective of their religion or gender. However, despite the protests, the majority of Pakistani citizens, ignorant

for a multi-faceted explanation of Islamic resurgence in Pakistan during the Zia regime in addition to Zia’s personal interest in raising the banner of Islamization. Richter attributes the revival to a number of socio-political factors: the search for a national identity after the Bangladesh debacle; increased ties and enhanced proximity with the Middle East; increase in the geo-political rise of the Middle East on account of oil wealth; broader Islamic revival in the region; and disillusionment with the failures of capitalism and socialism in Pakistan. Id. at 549–57.

12. For a pictorial presentation of the protests held in opposition to the Hudood laws and their violent suppression by the military regime, see JAHANGIR & JILANI, supra note 2, at 34–45.

13. See id. at 18, 21. According to these authors, one can group people into four categories based on their opinions of Hudood laws. First, there are the unrelenting obscurantists who fully support the laws. See id. at 18. Second, there are those amongst the fundamentalists who realize that these laws are defective but “do not ask for their repeal or amendment because they think it would generally undermine the process of Islamization of laws.” Id. at 21. Third, there are the patchworkers: “Theirs is the mission of peace making. They do not advocate any radical positions. They neither support the law in full nor seek its repeal. They want to appease both factions through amendments here and there.” Id. Fourth, and last, there are the secularist opponents who “reject religion as a basis or source of law.” Id.

14. Kennedy, Islamization and Legal Reform in Pakistan, supra note 2, at 74. Kennedy catalogues the criticisms leveled against the Hudood laws and Pakistan’s Islamization program as follows:

(a) The human rights argument. The punishments specified in the hudood ordinances (stoning to death, amputation, whipping) constitute cruel and unusual punishments, and border on barbarism. (b) The reactionary argument. Nizam-i-Mustapha is characterized as an attempt to set Pakistan back fourteen hundred years to the time of Rightly-Guided Caliphs. (c) The undemocratic argument. Zia’s Islamization program was designed to lend support to an unpopular military regime. His policies had the effect of banning political parties and silencing political opposition. (d) The anti-minority argument. The Nizam-i-Mustapha discriminates against non-Muslims, particularly the Ahmadiyya, and Christians. A corollary of this argument is that Nizam-i-Mustapha is dominated by the Sunni Hanafi fiqh, that is, it is anti-Shia. (e) The misogyny argument. Nizam-i-Mustapha discriminates against women. And (f) the anti-rational argument. Nizam-i-Mustapha is opposed to modernity and Westernization; and it is obscurantist.

Id.
of the laws’ questionable Islamic credentials, weak doctrinal foundations, and numerous procedural defects, were swayed by the misleading label and remained approvingly silent.15

Although the Hudood laws have been mired in controversy since their inception, limited meaningful public deliberation has occurred during the last two decades. The argumentation over the Hudood laws, as well as the process of Islamization, has been mostly journalistic and occasionally academic.16 This has served only to harden the two extreme positions, with the two sides talking at each other, rarely listening, and hardly changing any minds. Every democratically elected government constituted after the demise of General Zia, representing both sides of the political divide, has refrained from tinkering with the Hudood laws.17 This suggests an appreciation on the part of the country’s lawmakers that the ideology of Islamization, if not the Hudood laws themselves, has continued to command the allegiance of a substantial majority of the citizens.18

15. JAHANGIR & JILANI, supra note 2, at 22.

16. Whereas Pakistan’s print media has historically betrayed a sensationalist bent, Western news media have exhibited a distinct bias against Islamic reforms. See Naz K. Modirzadeh, Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds, 19 HARV. HUM. RTS. J. 191, 191–94 (2006). The portrayals of Hudood laws in both domestic and international media have also been particularly affected by the complexity of these laws, resulting in perpetual repetition of inaccurate assertions. Unfortunately, many of these inaccuracies have even filtered into academic discourse. See infra note 113 and accompanying text.

17. For example, Benazir Bhutto’s fierce opposition to Zia’s Islamization program formed the centerpiece of the Pakistan People’s Party’s (PPP) election campaign in 1988. However, upon forming her government, Bhutto let the issues over Islamization fade from the public debate. As a result, the Hudood laws remained intact during the PPP governments of 1988-1990 and 1993-1996. See Saeed Shafqat, Pakistan Under Benazir Bhutto, 36 ASIAN SURV. 655, 657–58 (1996).

18. The “undemocratic” critiques of General Zia’s Islamization program implicitly concede this point. See JAHANGIR & JILANI, supra note 2, at 22. However, Richard Kurin questions the assumption of widespread support for the Islamization process amongst Pakistan’s mostly rural population. Richard Kurin, Islamization in Pakistan: A View from the Countryside, 25 ASIAN SURV. 852 (1985). His personal observations from a village in Central Punjab, recorded during 1978 and 1983, indicated only a limited influence of state-sponsored Islamization upon the daily lives of the villagers. Id. at 861. Kurin remarks that the villagers continued to exclude religious teachers from public decision-making, play cards, listen to loud music, refrain from praying and fasting, and condone adulterous affairs long after the enforcement of shari’ah laws in Pakistan. Id. at 854–61. However, it hardly needs saying that one village in Central Punjab is not a representative sample. But cf. JAHANGIR & JILANI, supra note 2, at 18 (arguing that Islamization has taken hold in Pakistan “despite the lack of overall popular support” because “the Islamic
Hudood laws have come to symbolize to many Western observers the perceived retrogressive and discriminatory nature of Islam and Islamic laws. In the present geo-political environment characterized by the “Clash of Civilizations” and the “War on Terror,” the Hudood laws appear to highlight the dangers associated with the rise of Islamic fundamentalism.19

A major reason for the failure of anti-Hudood activists to win widespread public support has been an inability, or perhaps a conscious decision on their part, to effectively and credibly challenge the fidelity of these laws to their Islamic doctrinal foundations.20 Further, a bulk of the critique has focused on the language and the structure of the Hudood Ordinances and their misapplication in the trial courts.21 Inadequate attention has been paid thus far to the evolving jurisprudence of the Shariat appellate courts, which, compelled by the logic of traditional fiqh (Is-


20. In 2002, the National Commission on the Status of Women (“NCSW”) formed a fifteen-member Special Committee to review the Hudood Ordinances. The Committee held five meetings and recommended, by a sizable majority, that the Ordinances be repealed. NAT’L COMM’N ON THE STATUS OF WOMEN, REPORT ON HUDOOD ORDINANCES 1979 13–14 (2003) [hereinafter NCSW Report]. The NCSW Report, while refreshing the controversy, has added very little to the academic debate. It merely summarizes the diverse opinions expressed at the meetings, which, for the most part, are regurgitations of standard arguments. The superficiality of the analysis conducted in the NCSW Report is reflected most clearly in its discussions on the question of rajm, which the Report acknowledged required detailed study, yet with little hesitation recommended its repeal. See id. at 13–14, 36–38. Thus far, no action has been taken in pursuance of the NCSW Report. Like earlier efforts from the Commission of Inquiry for Women, the NCSW Report is likely to be ignored. See THE COMM’N OF INQUIRY FOR WOMEN, REPORT OF THE COMM’N OF INQUIRY FOR WOMEN (Aug. 1997) [hereinafter CIW Report]. In 1997, that commission had also recommended repeal of the Hudood laws after finding, without a thorough investigation, the laws to be “not in conformity with injunctions of Islam.” Id. at 75. However, this report had done a much better job than the NCSW Report as far as documenting the problems associated with the enforcement of the Hudood laws.

21. See JAHANGIR & JILANI, supra note 2, at 85–130, for a work representative of this approach. Jahangir and Jilani’s book contains extensive analysis of trial cases in which the Sessions courts have made glaring errors. Problem decisions handed down by the FSC have also been highlighted. However, the book makes only passing references to those FSC cases overturning Sessions courts’ decisions or overruling problematic FSC decisions, and it offers no analysis whatsoever of the FSC’s jurisprudence.
Islamic jurisprudence) doctrines, have managed to shape the substantive laws in a manner that appears to alleviate many of the criticisms directed against these laws.22 This lack of attention towards the role of the Shariat courts in shaping the Hudood laws may be attributable to a general perception amongst the critics that the Shariat courts espouse an essentially conservative ideology in consonance with the proponents of the Hudood laws. This perception, which is rooted in the political origins and the early history of the Shariat courts,23 does not fully accord with the recent practice or the present jurisprudential approach of the Shariat courts in Pakistan.24

22. Amira Sonbol contends that inattention to the practice of shari'ah courts in general is pervasive in Western scholarship of Islamic law. Amira Sonbol, Women in Shari'ah Courts: A Historical and Methodological Discussion, 27 FORDHAM INT’L L.J. 225 (2003). Studying the practice of pre-modern shari’ah courts in Egypt, Sonbol discovers that the legal precedents of these courts protected the rights of women to a greater extent than many of the religious and secular codes in force today. Id. at 252. She concludes that “ideological presumptions,” along with a lack of research, has led to almost total disregard for the “legal practices accumulated over the centuries which had constituted a common law” in Islamic societies. Id.

23. The establishment of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court generated substantial criticism on various constitutional grounds. See generally Kennedy, Islamization and Legal Reform in Pakistan, supra note 2, at 66–67. First, in establishing these “Islamic” courts, the President amended Pakistan’s Constitution in the absence of Parliament. Second, the President’s power of appointment of ulama judges to the judiciary gave rise to the concern that the Shariat courts would adopt the orthodox positions on interpretations of Islamic law espoused by a segment of the society that formed a numerically insignificant portion of the electorate. Having the power to overrule any legislation enacted by future democratically elected Parliaments, the Shariat courts, it was feared, would impose the views of this minority over those of the majority. Third, the creation of the Shariat courts appeared to undermine further the idea that the judiciary was an independent branch of Pakistani government.

24. See Julie Dror Chadbourne, Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance, 17 Wis. Int’l L.J. 179, 181 (1999) ("[W]hile the body of law relating to the Zina Ordinance is varied, the Pakistani judiciary is developing case law that may assist future advocates . . . in their efforts on behalf of their clients."). In fact, it has been argued that the FSC has always played less of a demonic role than has been attributed to it by its critics. See Charles H. Kennedy, Islamization in Pakistan: Implementation of the Hudood Ordinances, 28 ASIAN SURV. 307 (1988) [hereinafter Kennedy, Islamization in Pakistan]. In a statistical review of the jurisprudence of the FSC from 1980 to 1984, Charles Kennedy found that the FSC “accepts or partially accepts an extraordinarily high percentage of the appeals before it . . . [and] that the FSC ‘upheld fully’ only 19% of the convictions brought before it and that it acquitted 52% of the appellates.” Id. at 309. Kennedy also found that over ninety percent of the cases overturned by the FSC were reversed “because of misappreciation of facts, not misinterpretation of law, . . . [and that] even in cases in which it upheld the conviction of the sessions judge, the FSC was more lenient in its sentencing.” Id. at 309–10. Accordingly, Kennedy concluded that the “the net effect of FSC decisions . . . has been to moderate substantially
This paper will survey the contours of the controversies surrounding the Hudood laws and seek to identify the extent to which the divergent perceptions accord with the reality. The aim is to broaden the horizons of the debate surrounding the Hudood laws by incorporating an “Islamic critique,” something that has generally been lacking in the discourse. More importantly, the paper seeks to analyze the role that the FSC has played in substantively shaping the law, indicating thereby that Islamic critiques may offer a viable avenue for alleviating the hardships perpetrated in the application of the Hudood laws. Whereas, it may not be practical to undertake a holistic analysis of the FSC’s entire jurisprudence at this stage, this paper will put forward a chronological analysis of the Court’s decisions on one—arguably the most contentious—aspect of the Hudood laws: the conviction of rape victims for zina (consensual adultery/fornication) where the pregnancy caused by the rape is regarded as proof of the crime. Criticisms of this scenario have been repeated persistently in both international and domestic news media, and have even become cliché in most academic critiques of the Hudood laws. Most such critiques, however, offer little or no analysis of the relevant jurisprudence of the Shariat courts.

Part II of the paper will provide an overview of the provisions of the “Offence of Zina (Enforcement of Hudood) Ordinance, 1979” (Zina Ordinance), and outline the circumstances in which some trial courts have considered pregnancy as proof of zina in cases prosecuted under the Ordinance. Part III of the paper shall present a review of the jurisprudence of the FSC, indicating the extent to which the Court has addressed the criticisms engendered by the consideration of pregnancy as proof of zina. Part IV will then highlight the principal arguments presented by both the proponents and opponents of the Hudood laws, and analyze the major disagreements in their approaches. Furthermore, it will be argued that this debate has reached a stalemate primarily because it fails to incorporate a vital dimension: a thorough and credible Islamic critique.

the zeal of the sessions judges in enforcing the Hudood statutes.” Id. at 310. Kennedy attributes this moderation to the typical composition of the Shariat courts and the background of the judges. Kennedy, *Islamization and Legal Reform in Pakistan*, supra note 2, at 65–66. Whereas the critics complain about the presence of ulama judges on the bench, Kennedy points out that eighteen of the twenty-three judges appointed to serve on the FSC between 1980 and 1989 were former High Court judges, and that twenty possessed Western-style law degrees. Id. at 66.

25. See, e.g., JAHANGIR & JILANI, supra note 2, at 86–87; Weiss, supra note 2, at 870.

26. This part of the paper will incorporate detailed excerpts from the relevant judgments, many of which have been written in grammatically or stylistically deficient English. No attempt has been made to revise the language since it is important to let the judges, under scrutiny, speak for themselves.
evaluating the extent to which the Hudood laws, as presently enforced in Pakistan, accord with the traditional fiqh doctrines upon which they are supposedly founded. The paper shall also advance the argument that the positive developments in the jurisprudence of the FSC are not merely attributable to the political pressures generated by the opponents of the Hudood laws or to international media attention. Rather, it will be shown that the categorical imperatives embedded in the Islamic fiqh doctrines at the foundations of the Hudood laws necessitate many of the positions taken by the Court. Proposals for reform and a conclusion will follow.

II. THE ZINA ORDINANCE

A. Overview

It is said that the Zina Ordinance introduced the sexual offenses of zina and zina-bil-jabr (rape) into Pakistan’s criminal laws.27 Whereas zina was a previously unknown offense,28 the zina-bil-jabr provisions of the Ordinance replaced pre-existing rape provisions in the Pakistan Penal Code.29 However, the FSC has held that the Ordinance represents a

27. See Offence of Zina Ordinance §§ 4, 6, supra note 1, at 52. Additionally, the Zina Ordinance transferred some offenses from the general criminal laws of the Pakistan Penal Code to the Hudood laws, or created new offenses similar to those already existing. See, e.g., id. § 12, at 54 (prohibiting “[k]idnapping or abducting in order to subject person to unnatural lust”); id. § 14, at 54 (prohibiting “[b]uying person for purposes of prostitution”); id. § 15, at 55 (prohibiting “[c]ohabitation caused by a man deceitfully inducing a belief of marriage”); id. § 16, at 55 (prohibiting “[e]nticing or taking away or detaining with criminal intent a woman”).

28. While zina was a previously unknown offense, adultery was already punishable under the Pakistan Penal Code. The penal code provided:

Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

PAK. PEN. CODE ch. 20, § 497 (1860) (repealed by Zina Ordinance). Adultery, prior to the Zina Ordinance, was thus an offense that could only be committed by a man. Fornication, or consensual sexual intercourse between unmarried persons, was not an offense prior to the enforcement of the Zina Ordinance.

29. See PAK. PEN. CODE ch. 16-A, §§ 375–376 (1860), repealed by Offence of Zina Ordinance § 3, supra note 1, at 52.
“complete departure” from the previous law. Accordingly, “no offence by the name of rape exists in the corpus juris of Pakistan” any longer.

Section 4 of the Ordinance defines the offense of zina as willful sexual intercourse between a man and a woman who are not validly married to each other. Zina is liable to the punishment of hadd (punishment ordained by the Qur’an) if the following proof is presented to the Sessions Court (the trial court): the accused confesses to the commission of zina before the court, or the prosecution presents four credible adult male Muslim eyewitnesses who have seen the very act of penetration.

32. Section 4 of the Zina Ordinance provides:

4. Zina.—A man and a woman are said to commit ‘zina’ if they willfully have sexual intercourse without being validly married to each other.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of zina.

Offence of Zina Ordinance § 4, supra note 1, at 52.
33. Hudood are generally defined as those crimes for which punishment has been fixed by divine commandment. Though this definition is uniformly adhered to by the ulema, the catalogue of the Hudood crimes in fact varies. As such, some consider only those crimes to be Hudood which have been mentioned in the Qur’an and for which the punishment has been explicitly prescribed therein. Others include those crimes that, though mentioned in the Qur’an, punishment is not explicitly provided. For example, the consumption of alcohol is forbidden by the Qur’an, but it provides no punishment. Yet, a majority of the ulema consider this to be a hadd offense and derive its punishment from the Sunnah. A third category of ulema point out that there is no distinction between hadd and tazir in the Sunnah, and consider all those crimes which are referenced in the Qur’an or the Sunnah to be hadd crimes. There are only four crimes that have been explicitly mentioned in the Qur’an: zina, haraabah (variously defined as highway robbery, forcible taking of property, or waging war against the state); shurb al-khamr (consumption of wine); and qazf (unwarranted accusation of zina). Of these, the punishment for shurb al-khamr is not mentioned in the Qur’an. Verse 5:33 of the Qur’an, which deals with haraa-bah, mentions four possible punishments for this category of crimes: taqteel (execution), tasleeb (crucifixion), amputation of a hand and the opposite foot, or exile. As regards zina, although the Qur’an expressly mentions the punishment of one hundred lashes in verse 24:02, a majority of the ulema have relied on certain ahadith (narrations on what the Prophet Muhammad approved) to establish rajm as the appropriate hadd punishment. See Hazoor Bakhsh v. Federation of Pakistan, 33 P.L.D. 1981 F.S.C. 145, 153 (1981) (Durrani, J., dissenting) (“No doubt the punishment for a married woman . . . is stoning to death as against [an] unmarried one who is to be given 100 lashes.”).
34. Section 8 of the Zina Ordinance, which establishes the proof requirements, provides:

8. Proof of zina or zina-bil-jabri liable to hadd.—Proof of Zina or zina-bil-jabri, liable to hadd shall be in one of the following forms, namely:
hadd punishment for zina committed by a man or woman who is, or has previously been, married and has had sexual intercourse in the course of that marriage is rajm. The hadd punishment for zina committed by a

(a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or

(b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of tazkiyah al-shuhood, that they are truthful persons and abstain from major sins (kabair), give evidence as eye-witnesses of the act of penetration necessary to the offence. Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslims.

Explanation. In this section “tazkiyah al-shuhood” means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.

Offence of Zina Ordinance § 8, supra note 1, at 53. The FSC has consistently interpreted the confession requirement of subsection (a) to mean confessions freely given before the Sessions Court on four different occasions. Confessions made to the police or to a Magistrate in pre-trial proceedings do not fulfill this requirement. See, e.g., Zafran Bibi v. State, 54 P.L.D. 2002 F.S.C. 1, 14 (2002). The requirement of four Muslim adult male witnesses has been derived from the following Qur’anic injunction:

If any of your women Are guilty of lewdness, Take the evidence of four (reliable) witnesses from amongst you Against them; and if they testify, Confine them to houses until Death do claim them, Or God ordain for them Some (other) way.


35. Offence of Zina Ordinance § 5(2)(a), supra note 1, at 52. The distinction between adultery and fornication has proven to be one of the most debated aspects of the Zina Ordinance. The Qur’anic injunction in verse 4:15 has been widely understood to antedate verse 24:2, the only prescription in the Qur’an of a specific punishment for adultery and fornication:

The woman and the man Guilty of adultery or fornication, Flog each of them With a hundred stripes: Let not compassion move you In their case, in a matter Prescribed by God, if ye believe In God and the Last Day: And let a party Of the Believers Witness their punishment.

Qur’an 4:15 (Abdullah Yusuf Ali trans., The Islamic Center 3d ed. 1938). Verse 24:2 betrays no distinction between adultery and fornication and prescribes only one punishment for both offenses, one-hundred lashes in public. A majority of the Justices sitting on the FSC panel in Hazoor Bakhsh seized upon this verse to declare rajm un-Islamic. See Hazoor Bakhsh, 33 P.L.D. 1981 F.S.C. at 147 (Ali Hyder, J., concurring) (“[S]toning to death . . . is repugnant to the Injunctions of Islam.”). This decision resulted in significant embarrassment to the military regime of General Zia, which immediately amended the Constitution to grant the FSC the power to review its own judgments. JAHANGIR & JILANI, supra note 2, at 29. In 1982, the review petition was heard by a wholly reconstituted FSC: the three judges who had formed the Hazoor Bakhsh majority had since been removed, and the one dissenting judge, who had opined that rajm is a valid Islamic hadd
man or woman who is neither married, nor previously been married, is public whipping of one-hundred lashes.36 A sentence of hadd may only be executed if the FSC has confirmed it after a hearing, regardless of whether or not the defendant has filed an appeal.37

Section 6 of the Ordinance defines zina-bil-jabr as the act of having non-consensual sexual intercourse with a man or woman with whom the accused is not validly married.38 Zina-bil-jabr is committed when the accused has had intercourse either: (a) against the victim’s will; (b) without the victim’s consent; (c) after obtaining the victim’s consent by duress; or (d) after obtaining the victim’s consent by inducing a fraudulent belief of a valid marriage.39 Zina-bil-jabr is liable to hadd punishment if proof according to Section 8 of the Ordinance is presented before the Court.40 The hadd punishment for zina-bil-jabr committed by a man who is, or has previously been, married and has had sexual intercourse in the course of that marriage is rajm.41 The hadd punishment for zina-bil-jabr committed by a man who is not, and has never previously been, married is public whipping of one-hundred lashes, as well as any other punishment, including a death sentence, that the court may consider appropriate.

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36. Offence of Zina Ordinance § 5(2)(b), supra note 1, at 52.
37. Id. § 5(3).
38. Id. § 6. Section 6(1) of the Zina Ordinance makes it clear that a woman can be accused of committing zina-bil-jabr against a man, or possibly even a woman. Contrast this with the repealed rape provisions of the Pakistan Penal Code, which defined rape as the commission of sexual intercourse “with a woman . . . [a]gainst her will . . . [or w]ithout her consent.” PAK. PEN. CODE ch. 16-A, § 375 (1860) (repealed by Zina Ordinance). Other than the gender-neutrality of its language, section 6 of the Zina Ordinance mimics the repealed rape provisions. This gender-neutrality is somewhat perplexing since penetration is a requirement for criminal liability. See Offence of Zina Ordinance §4, supra note 1, at 52 (“Penetration is sufficient to constitute the sexual intercourse necessary to the offence of ‘zina-bil-Jabr’.”). It is, therefore, hard to conceive of a situation in which a woman may commit zina-bil-jabr with a man or another woman. Additionally, note that the section 6 definition of zina-bil-jabr excludes marital rape from its prohibition. See id. §6(1) (providing that the zina-bil-jabr prohibition applies only to those persons “not validly married”). This is a point of divergence between the Zina Ordinance and the repealed Pakistan Penal Code provisions, which provided for a punishment of up to two years imprisonment. PAK. PEN. CODE ch. 16-A, § 376 (1860) (repealed by Zina Ordinance).
39. Offence of Zina Ordinance § 6(1), supra note 1, at 52.
40. See supra note 34 and accompanying text.
41. Offence of Zina Ordinance § 6(3)(a), supra note 1, at 53.
having regard to the circumstances of the case. As with sentences of hadd for convictions of zina, sentences of hadd for convictions of zina-bil-jabr cannot be executed unless they are confirmed by the FSC.

If the proof required for hadd punishment is not available, a court may still convict the accused of either zina or zina-bil-jabr liable to tazir (discretionary punishment under the Zina Ordinance) where other direct or circumstantial evidence of the commission of the offense is available. The maximum tazir punishment for zina is rigorous imprisonment of ten years. The tazir punishment for zina-bil-jabr is rigorous imprisonment of four to twenty-five years. In cases of zina-bil-jabr committed by a

42. Id. § 6(3)(b). Note that this is the same punishment that the Qur'an prescribes for zina in verse 24:2. See supra note 35. The Qur'an does not explicitly take cognizance of, or prescribe punishment for, rape.

43. Offence of Zina Ordinance § 6(4), supra note 1, at 53.

44. As opposed to hadd punishments, tazir punishments are not statutorily fixed and may be left to the discretion of the judge. Compare id. § 5(2), at 52 (detailing punishment for zina liable to hadd), and id. § 6(3), at 53 (detailing punishment for zina-bil-jabr liable to hadd), with id. §§ 10(2), 10(3), at 54 (detailing punishments for zina and zina-bil-jabr liable to tazir).

45. Id. § 10(2), at 54. Asifa Quraishi has questioned the very logic of awarding tazir punishments for zina. Asifa Quraishi, Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman Sensitive Perspective, 18 MICH. J. INT'L L. 287, 313 (1997). She points out that punishment for zina as hadd requires the eyewitness testimony of four individuals, because the crime is prosecutable by the state only when it is a public act of indecency. Id. at 311–13. At the same time, the Qur'an strictly forbids qazf, or unsubstantiated accusations of zina. When an allegation of zina is made and four eyewitnesses are not forthcoming, the Qur'an declares:

And those who launch a charge against chaste women, And produce not four witnesses (to support their allegations), — Flog them with eighty stripes; And reject their evidence Ever after: for such men Are wicked transgressors; — Unless they repent thereafter And mend (their conduct); For God is Oft-Forgiving, Most Merciful.

Qu'a 24:4. Therefore, Quraishi argues, the Qur'an forbids prosecution for zina as tazir, since such charges are invariably brought only when four eyewitnesses are not available. Quraishi, supra, at 312. In such circumstances, she continues, the only offense that should be prosecuted is the qazf committed by the complainant. See id. at 299.

46. Offence of Zina Ordinance § 10(3), supra note 1, at 54. Sections 10(2) and 10(3) of the Zina Ordinance had prescribed a sentence of whipping of up to thirty lashes in addition to imprisonment for tazir offenses. However, the Abolition of the Punishment of Whipping Act, 1996 (VII of 1996) eliminated whipping as a punishment for all offenses, including tazir, other than those "where the punishment of whipping is provided for as hadd." See, e.g., Abdul Razzaque v. State, 2003 P.Cr.L.J. 1256 (Lahore High Ct. 2002) (setting aside the whipping portion of the petitioner's sentence for zina-bil-jabr liable to tazir).
gang of two or more people, the tazir punishment is a mandatory death sentence.47

B. Pregnancy as Proof of Guilt

One of the primary criticisms leveled against the Zina Ordinance is that it results in the equation of rape with consensual adultery/fornication such that when a victim of rape is unable to prove that she had been subjected to non-consensual intercourse, she herself stands accused of having committed zina and is convicted and punished for that offense. This criticism is indeed founded in the stark reality of the Pakistani criminal justice system. There have been many cases where women allege the commission of zina-bil-jabr against them, but the police, taking into consideration the pregnancy caused by the alleged rape and the delay in bringing the complaint, treat their case as one of zina instead.48 In a few of these cases, the Sessions Courts acquitted the accused rapists for lack of sufficient evidence against them, yet nonetheless convicted the female victims for the offense of zina, regarding as proof the pregnancy caused by the alleged rape. The circular argument adopted by the Sessions Courts in these cases is that extra-marital pregnancy amounts to proof that an act of sexual intercourse occurred, and since the woman has failed to prove the rape, through the absence of consent or otherwise, the sexual intercourse is therefore consensual and amounts to zina.49

47. Offence of Zina (Enforcement of Hudood) (Amendment) Act (VI of 1997) (amending the Zina Ordinance to provide this punishment through the addition of a new section, § 10(4)).

48. The role of the police in rape cases has been subject to severe criticism. The police in Pakistan are notorious for ill-treatment of rape victims and in many cases refuse to file charges. Police officials have also been accused of committing rape on women in their custody. See generally HUMAN RIGHTS WATCH, CRIME OR CUSTOM?: VIOLENCE AGAINST WOMEN IN PAKISTAN 45–47, 52–64 (2001). For recommendations on reform of police practice and rules, see id. at 10–11.

49. This represents a misunderstanding of the burden of proof in criminal cases. In order to convict an accused, the prosecution has to prove “beyond a reasonable doubt” that the accused committed the crime. See, e.g., 32A C.J.S. Evidence § 1308 (2006). In contrast, in order to win a civil case, a party has to prove that it is more likely than not that its claim is true. See, e.g., 32A C.J.S. Evidence § 1311 (2006). Therefore, one might legitimately say that in order to win a civil case a party has to bring sufficient evidence to show that the probability of its version of the events being true is more than fifty percent. On the other hand, it is not possible to assign a numerical value to the burden of proof in criminal cases. For example, when a trial judge in the United States instructed a jury that the standard of proof could be viewed as “seven and a half, if you had to put it on a scale” of ten, the Nevada Supreme Court reversed on appeal stating: “The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution’s burden of proof.” McCullough v. State, 657 P.2d 1157, 1159 (Nev. 1983).
those rape victims who ultimately escape conviction for zina end up suffering significant imprisonment prior to and during trial, and are subjected to unnecessary stigma, humiliation, and pain.  

In most jurisdictions, rape and other sexual crimes are usually exceedingly hard to prove. For example, these crimes are often committed in private, so invariably the victim’s word is pitted against that of the accused. Given that conviction for a crime, especially one as serious as rape, requires proof beyond a reasonable doubt, courts require the prosecution to adduce significant medical or other circumstantial evidence in corroboration of the victim’s testimony. In Pakistan, the possibility of credible medical evidence being available to a criminal court is minimal. When a victim alleges rape, the normal practice is to present the victim for a medical examination at a government hospital. In most cases, the medical examination reveals only limited evidence: (a) whether sexual intercourse has recently taken place as indicated by the presence of semen in the vagina; (b) whether the victim has been having sexual intercourse in the past; and (c) whether the victim has become pregnant.

Medical techniques which may identify the perpetrator, such as DNA testing of semen or paternity testing, have become widely available to the police and prosecution in most Western jurisdictions, but still remain unavailable in Pakistan except in the most high profile cases.

Nonetheless, should the prosecution fail to secure a conviction because it only managed to prove that its version of the facts was seventy-five percent probable, it may still be possible to hold that it is more likely than not that the prosecution is telling the truth. For example, whereas O.J. Simpson was found not guilty of murder at his criminal trial, he was, nonetheless, found liable at the subsequent civil trial. See Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 497 (Cal. Ct. App. 2001). By the same logic, if a victim brings a charge of zina-bil-jabr but fails to prove it beyond a reasonable doubt, she may still be telling the truth. As such, there is no reason to assume if she has fails to prove zina-bil-jabr, then she must have committed zina. Treating zina and zina-bil-jabr as either/or offenses represents a logical fallacy.

52. JAHANGIR & JILANI, supra note 2, at 13. But see 75 C.J.S. Rape § 94 (2006) (“Corroboration of a victim’s testimony in sexual offense cases is triggered only by contradictions in the victim’s trial testimony.”).
53. See Chadbourne, supra note 24, at 235–60 (describing the uses and limits of medical evidence in Zina Ordinance cases).
54. See HUMAN RIGHTS WATCH, supra note 48, at 47–49, 64–95 (detailing the lack of “medicolegal” capabilities and facilities in Pakistan). For recommendations on reform of Pakistan’s medicolegal system, see id. at 11–14.
Given Pakistan’s conservative social environment, with its stigma attachments and concerns regarding family honor such that “honor killing” is even a possibility, victims in most rape cases do not lodge complaints with the police. In cases where a complaint is filed, it is usually after long and careful deliberation by the family of the accused. In many cases, the rape is only reported after the victim becomes aware of her pregnancy and realizes that she has no choice but to complain. In such situations, the rudimentary medical examinations conducted are not likely to produce any helpful evidence. In fact, the medical evidence in most cases makes the victim’s position even more precarious, since it is assumed that she is making an accusation of rape only to excuse her illicit conduct. Thus, in choosing between reporting and silence, rape victims often find themselves in a lose-lose situation.

III. THE CASES

There have been at least eight reported cases in which the FSC has explicitly dealt with the question of whether pregnancy can be considered sufficient proof of zina in the absence of any other evidence. A chronological analysis of these cases, revealing the progressive development of the Court’s views on this narrow issue, as well as the laws pertaining to zina and zina-bil-jabr generally, is as follows:


Sakina and Wali Dad were married to each other at the time of their arrest for commission of zina. The prosecution, based on the First Information Report (F.I.R.) lodged by Sakina’s brother, alleged that Sakina and Wali Dad had had an illicit relationship prior to their marriage. At the time of her arrest, Sakina, according to the medical examiner, had been pregnant for thirty-two weeks even though less than eighteen weeks had elapsed since her marriage to Wali Dad. Sakina’s explanation for her pre-marital pregnancy was that it might have been the result of sexual acts she had been forced to engage in with certain visitors by her family. The Sessions Court disbelieved her, convicted both she and Wali Dad for zina.


57. The F.I.R. is the formal complaint of an offense lodged with the police. The F.I.R. is the pivotal document in Pakistani criminal prosecutions. Judges, both trial and appellate, frequently test the veracity of the prosecution’s evidence by comparing it to the version of the events alleged in the F.I.R.
liable to tazir, and sentenced them each to four years of rigorous imprisonment and thirty-three lashes.\(^{58}\)

In a brief judgment, a full bench of the FSC overturned both convictions. As regards Wali Dad, the Court found no credible evidence against him.\(^{59}\) In Sakina’s case, the Court stated:

> In these circumstances we have no material on record to enable us to hold that Mst. Sakina had been committing sexual intercourse with others willingly. In the absence of proof of her consent she cannot be held to have committed the offence of Zina.\(^{60}\)

As such, the Court affirmed a cardinal principle of criminal law, that the burden of proving all the elements of the crime beyond a reasonable doubt is on the prosecution.\(^{61}\) Until the prosecution satisfies that burden, the accused has no case to answer.

A woman’s consent is an essential element for any conviction for the crime of zina.\(^{62}\) This element has to be categorically proven by the prosecution, and cannot merely be inferred from the accused’s pregnancy or other surrounding circumstances. Here, the Sessions Court had treated the question of consent as if the absence of consent is a defense that the accused has to establish to the court’s satisfaction. This shifted the burden of proof to the accused. The FSC rightly corrected that error.

**B. Jehan Mina v. State (1983)\(^ {63}\)**

Jehan Mina was hardly sixteen at the time of her arrest. She was approximately five to six months pregnant, and claimed that her uncle and cousin had raped her while she was visiting their home to look after a sick aunt.\(^ {64}\) At the time of the discovery of her pregnancy, Jehan Mina was living with another uncle, Noor Said. Allegedly, Jehan Mina’s grandfather, her legal guardian, demanded that Noor Said hand Jehan Mina over to his custody so that he might kill her in order to preserve the family’s honor. Noor Said refused his family’s pressure, and lodged an F.I.R. with the police. Instead of initiating an investigation of zina-biljabr, the police made Jehan Mina a co-accused in a case of zina. The Sessions Court trying the case acquitted both of the accused males on the

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59. *Id.* at 322.
60. *Id.* at 323.
61. See supra note 49.
62. See Offence of Zina Ordinance § 4, *supra* note 1, at 52 (requiring persons to “willfully have sexual intercourse” for conviction).
64. *Id.* at 184.
grounds that they could not be convicted merely on the basis of Jehan Mina’s statement.65 However, the court convicted Jehan Mina for zina liable to hadd, and imposed a punishment of one hundred lashes.

The FSC upheld Jehan Mina’s conviction on appeal, but reduced her offense from zina liable to hadd to zina liable to tazir. Taking into consideration her “tender age” and the fact that she had been deprived of the “benefit of paternal affection,” the Court reduced her sentence to three years rigorous imprisonment and ten lashes.66 The Court provided the following rationale in justification of its decision: “[T]he basis of the conviction is her unexplained pregnancy coupled with the fact that she is not a married girl.”67 The Court added that since Jehan Mina had kept quiet for over five months, it was “difficult to believe her statement that zina-bil-jabr had been committed with her.”68 The Court also found it important that “she had the opportunity of complaining to her grandfather but . . . never did so.”69

Given that her grandfather had expressed a serious intent to kill her in order to preserve the family honor, how valid was the Court’s reasoning? This case has been widely criticized and cited as a representative example of the gross injustices perpetrated under the Hudood laws.70 According to one women’s rights campaigner:

Apart from the injustice that Jehan Mina suffered from society and the system of justice, the case had serious future implications for victims of rape resulting in pregnancy. While rapists would have to be proved guilty, victims would be presumed guilty and the burden would be on them to prove their innocence.71

The legal reasoning employed by the FSC in this judgment clearly conflicted with that in Sakina. The Court in Jehan Mina appeared to have forgotten the fundamental principles of criminal liability outlined in its own precedent. Further, the purpose of the creation of an independent FSC with three ulama on its bench was to decide cases according to the Islamic injunctions laid down in the Qu’ran and Sunnah.72 In this case, the Court based its decision exclusively on misapplied common law

65. Id. at 186.
66. Id. at 188.
67. Id. at 187.
68. Id.
69. Id.
70. See, e.g., SHAHLA ZIA, VIOLENCE AGAINST WOMEN & THEIR QUEST FOR JUSTICE 81 (2002).
71. Id. But see HUMAN RIGHTS WATCH, supra note 48, at 40 (“Such cases are far less frequent in the late 1990s than they were in the 1980s.”).
72. See supra note 8.
principles of criminal liability and evidence, without even once referring to Islamic principles of liability.

C. Siani v. State (1984)\(^{73}\)

The Siani case arose from the discovery of a stillborn fetus in a residential area. The prosecution alleged that Siani, wife of Pahalwan, had engaged in unlawful sexual intercourse with her co-accused, Ghulam Najaf, prior to her marriage, and that this relationship resulted in her pregnancy. The prosecution further charged that in order to conceal her zina and the resulting pregnancy, Siani had caused herself to miscarry and had disposed of the aborted fetus.\(^{74}\) The Sessions Court acquitted her male co-accused, finding no evidence against him. The only evidence against Siani was the report of the medical examiner, who had opined that Siani showed signs of recent pregnancy and had probably miscarried around the time of the discovery of the dead fetus.\(^{75}\) This was sufficient proof for the Sessions Court, which convicted Siani of the offense of zina liable to tazir under Section 10 of the Zina Ordinance and sentenced her to five years rigorous imprisonment and thirty lashes.

A single bench of the FSC, composed solely of Justice Muhammad Siddiq, overturned Siani’s conviction on appeal, holding that medical evidence of pregnancy alone cannot form the basis of a criminal conviction.\(^{76}\) The Court, affirming the stance adopted in Sakina, and without referring to Jehan Mina, made the following comment:

This Court has already said in several cases that a mere pregnancy/abortion or birth of an illegal child of an unmarried girl/widow or a married woman whose husband has no access to her during the relevant period, could not be sufficient to prove her guilty under section 10 of the Ordinance unless it is further proved by the prosecution that she was a consenting party for the said Zina resulting in her conception and then in abortion.\(^{77}\)

Unlike the accused in Sakina, Siani had not alleged that she had been subjected to zina-bil-jabr. In fact, she completely denied that she had ever had sexual intercourse prior to her marriage, or that she had miscarried. In this regard, Siani better illustrates the principle already stated: that the burden is squarely upon the prosecution to prove all of the elements of the offense, consent of the woman being the most essential.


\(^{74}\) Id. at 123.

\(^{75}\) Id. at 123–24.

\(^{76}\) Id. at 126.

\(^{77}\) Id.
The Court in *Siani* considered the status of medical evidence in the following terms:

In the instant case it is an admitted fact that there is no other direct or positive evidence produced by the prosecution to substantiate the charge . . . against Mst. Siani appellant. In addition to the medical evidence the prosecution should have produced some other direct or circumstantial evidence to connect the appellant with the offence charged.  

This pronouncement makes clear that in order to secure a conviction, the prosecution has to prove all the elements of the offense through credible direct or circumstantial evidence, including the fact that the accused “was a consenting party for the commission of sexual intercourse.” Medical evidence of pregnancy, and by logical extension, pregnancy itself, can only provide “a piece of independent corroboration.” Thus, the Court unambiguously declared that pregnancy, by itself, cannot form the basis for a conviction.


Rafaqat Bibi filed a complaint of zina-bil-jabr against Muhammad Suleman. However, when the medical examiner found her to be eight months pregnant, the police instead charged both of them with zina. The Sessions Court convicted Rafaqat Bibi for zina liable to tazir, and sentenced her to five years rigorous imprisonment and five lashes. The court, however, acquitted Suleman.

A single bench of the FSC overturned the conviction. The Court stated that though Rafaqat Bibi was in the ninth month of her pregnancy at the time of the examination:

"[T]he aforesaid evidence cannot be considered sufficient to convict the appellant for commission of offence of zina which has been defined in section 4 of the Ordinance, and *inter alia* involves willfully having sexual intercourse. In the instant case according to the appellant there was no willful participation in the sexual intercourse by her as Muhammad Suleman committed zina-bil-jabr with her."

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78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
83. *Id.* at 166.
84. *Id.*
The Court considered relevant the fact that Rafaqat Bibi had filed an F.I.R. of her own volition, “wherein she had expressly stated that she had been made to submit forcibly to sexual intercourse.” The Court did not refer to Rafaqat Bibi’s eight-month delay in filing the F.I.R., as if that fact were immaterial.

The Court also dealt with the extent to which an accused’s statement may be treated as a partial confession of the fact that sexual intercourse took place and answered it in the negative. An affirmative answer to this question forms the first vital limb of the irrational reasoning of the erring trial courts. Citing Safia Bibi v. State with approval, the Court said that the “[c]onfession should be read as a whole and exculpatory portions therein cannot be excluded from consideration unless there is evidence on record to prove those portions incorrect.”

E. Safia Bibi v. State (decided in 1983, reported in 1985)

This case resulted in widespread notoriety of the Hudood laws in the national as well as international media. Safia Bibi, a twenty-year-old girl suffering from acute myopia such that she was nearly blind, was engaged in domestic service at the household of Maqsood Ahmad. She alleged that on one occasion, while she was working, Ahmad subjected her to zina-bil-jabr. According to her testimony, Maqsood Ahmad’s father had also raped her on a different occasion, but he was not charged with any offense. Succumbing to social and family pressures, Safia Bibi did not file a complaint with the police until she could no longer hide her pregnancy. The police arrested Safia Bibi and implicated her in a case of zina along with Maqsood Ahmad, after her medical examination revealed that she had been pregnant and had given birth. At the ensuing trial, the Sessions Court acquitted Maqsood Ahmad, but convicted Safia Bibi of zina and sentenced her to three years rigorous imprisonment and fifteen stripes.

On appeal, a single bench of the FSC reversed Safia Bibi’s conviction for zina. However, the Court affirmed that there was no evidence to convict Maqsood Ahmad of zina-bil-jabr, stating that “[i]t is clear from this

85. Id.
86. See supra text accompanying note 49.
87. Interestingly, the FSC’s decision in Safia Bibi had not yet been reported at this time. For a treatment of the case, see infra Part II.E.
90. Id. at 121 (“This is an unfortunate case which received considerable publicity in the national and International Press”).
91. Id. at 122.
evidence that no offence was proved against Maqsood Ahmad as the bare statement of his co-accused [Safia Bibi] was not sufficient for his conviction."92 In its judgment, the Court analyzed the relevant principles of Islamic jurisprudence in some detail and summarized the positions of the different schools of fiqh:

If an unmarried woman delivering a child pleads that the birth was the result of commission of the offence of rape on her, she cannot be punished. This is the view of the Hanafis and the Shafis. But Imam Malik said she shall be subjected to Hadd punishment unless she manifested the want of consent on her part by raising alarm or by complaining against it later.93

The Court went on to elaborate:

There is little difference between the view of Imam Malik and others on the point of law that rape with a woman absolves her of criminal liability. The only difference is on the point of the evidentiary value of the self-exculpatory statement. Imam Malik places the burden of proving the self-exculpatory evidence on the woman, and this burden can be discharged by her by proving that she raised alarm or complained against it. She can discharge her burden by production of circumstantial evidence . . . . The others, however, consider her statement including the self-exculpatory portion thereof as sufficient for absolving her of the charge.94

So, as opposed to the view of Imam Malik, who places the burden of disproving consent on the woman, the opinion of the Hanafis and the Shafis is that the woman’s statement is sufficient in itself to absolve her of all charges. This view is preferable according to the FSC, since it “is in conformity with the modern law.”95


Rani was seven months pregnant when she lodged a complaint of zinab-il-jabr against her two male co-accused. She claimed that she had refrained from filing a complaint because of threats made against her and her family by these men until her pregnancy became impossible to hide. The Sessions Court acquitted both males because there was no evidence against them “except the word and accusations” of Rani. The court, however, convicted Rani after taking into account her pregnancy and the de-

92. Id.
93. Id. at 124.
94. Id.
95. Id. at 125.
lay in lodging the F.I.R. She was sentenced to two years rigorous imprisonment and seven lashes.\textsuperscript{97}

The appeal before the FSC raised all the issues that had arisen in the previous cases. In an incisive and articulate judgment, Justice Ghous Muhammad reviewed the Court’s earlier case law on the subject. First, the Court criticized the decision in \textit{Jehan Mina} and recommended that it be “confined to the annals of legal history.” That judgment, the Court found, was in conflict with established FSC jurisprudence.\textsuperscript{98} As regards the issue of pregnancy being considered as proof of guilt, the Court then concluded:

(i) mere pregnancy is not sufficient to convict a woman for \textit{Zina}, especially where she claims the pregnancy to have been caused due to her rape/\textit{Zina-bil-jabr} by man/men who later stand acquitted on any ground;

(ii) to convict a woman for \textit{Zina}, the prosecution would have to discharge the heavy onus of proof by bringing forth positive and independent evidence that the woman actually and in fact had committed \textit{Zina} with her own free will and consent with another man to whom she was not lawfully married to. In this regard it may also be stated that mere proof of pregnancy or some form of medical testimony/report on its own could be of no consequence as the latter would at best only serve to be corroborative in nature . . . .\textsuperscript{99}

Next, on the matter of delay in registering a complaint of \textit{zina-bil-jabr}, usually considered a detriment to the victim’s case, the Court opined:

On the contrary, this point would fall in favour of the female accused i.e. the appellant since she could well forward the plea that the inordinate delay by the prosecution in detecting her pregnancy would entitle her to an acquittal on the general principle that any delay in lodging the FIR/complaint weakens the case of the prosecution/complainant.\textsuperscript{100}

Finally, Justice Muhammad stated that:

\[B\]y its very nature ‘\textit{Zina}’ is a joint offence requiring positive identification of a man and a woman, distinctly, consenting [to] an unlawful sexual intercourse . . . . In case any one of them fails to be so identified, as has been in the present case, no offence of ‘\textit{Zina}’ can be made out by the prosecution.\textsuperscript{101}

\begin{footnotes}
\item[97] \textit{Id.} at 151.
\item[98] \textit{Id.} at 157.
\item[99] \textit{Id.}
\item[100] \textit{Id.} at 157–58.
\item[101] \textit{Id.} at 159.
\end{footnotes}
Though interesting and persuasive, these arguments are, nonetheless, only dicta and as such are not binding on the Court in future cases.


Despite such clear pronouncements of the FSC, history unfortunately repeated itself in the case of Zafran Bibi. The case brought to the fore, once again, many of the problems associated with the Hudood laws and reignited the criticisms.

On March 26, 2001, Zabta Khan, accompanied by his daughter-in-law Zafran Bibi, went to the police station to lodge an F.I.R. Zabta Khan did the talking, while Zafran Bibi stood quietly to the side. He claimed that about two weeks earlier, while Zafran Bibi had gone to a nearby hill to cut fodder, Akmal Khan had assaulted her and committed zina-bil-jabr against her. At the time of the incident, Zabta Khan had been away visiting his son, Zafran Bibi’s husband, who was serving a sentence in jail for murder. Because Zabta Khan was away, Zafran Bibi took the advice of her mother-in-law to wait for his return before deciding whether to report to the police.

Upon his return, and having heard about the incident, Zabta Khan decided to lodge the F.I.R. At least, this is what he claimed. The police directed Zafran Bibi, as well as Zabta Khan, to thumb-mark the F.I.R., and then sent her for a medical examination. The examination revealed that she was approximately seven to eight months pregnant. Based on the discrepancy between the alleged date of the incident and the estimated date of conception, the police arraigned Zafran Bibi as a co-accused along with Akmal Khan for the offense of zina liable to tazir.

The trial did not begin until a year later. By then, Zafran Bibi had given birth to a baby girl. In a statement recorded before the Magistrate, she claimed that Akmal Khan had repeatedly raped her and that she was willing to take an oath on the Qu’ran that no one except Akmal Khan had committed zina-bil-jabr with her. As the trial proceeded, Zafran Bibi changed her stance, contending that, since she was illiterate, she may have thumb-marked an incorrect account of the incident to the police at the time of lodging the F.I.R. She then made the following statement on oath before the trial court:

> Zabta Khan is my father-in-law. I was residing in the house of my husband along with his father. One day he took me to the Police Station

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103. *Id.* at 8.
104. *Id.* at 9.
. . . where he lodged the report. I have not given any statement in police station nor lodged any report to the police . . . . In fact Jamal son of Zabta Khan has committed Zina forcibly with me and my father-in-law to save his son Jamal involved accused in the case in hand. Accused Akmal has not committed Zina with me. He is innocent. 105

On April 17, 2002, the Sessions Court announced the verdict. Akmal Khan was acquitted of the offenses charged for lack of evidence. However, Zafran Bibi was found guilty of the offense of zina liable to hadd, and the court imposed the punishment of rajm. No action was directed against Jamal, Zafran Bibi’s brother-in-law, as he had neither been named in the F.I.R. nor charged with any offense.

Since a hadd punishment cannot be executed unless confirmed by the FSC, 106 Zafran Bibi’s conviction and sentence were appealed. Delivering the judgment of the Court, Justice Fida Muhammad Khan held:

[M]ere pregnancy, by itself when there is no other evidence at all, of a married lady, having no access to her husband, or even of an unmarried girl is no ground for imposition of Hadd punishment if she comes out with the defence that that was the result of commission of rape with her. 107

On the burden of proving consent, the Court reiterated that “the cardinal principle of Islamic Criminal Law that conviction of someone for commission of unlawful sexual intercourse, it is not only necessary to make certain that he/she committed that act, but it is also to be ensured that he/she committed that of his/her own free-will.” 108 Finally, as regards the requirements for confessions to form the basis for a conviction, the Court emphatically stated:

It is pertinent to mention that the confession to be effective in the context of the Ordinance, firstly must be voluntary, with free consent without any coercion or inducement, secondly must be explicit as to the commission of the actual offence of Zina with free-will, thirdly must be four times in four different meetings as held in a number of cases by Federal Shariat Court and Shariat Appellate Bench and, fourthly, must

105. Id. at 10.
106. See supra text accompanying note 37.
108. Id. at 17. Nonetheless, despite these forceful pronouncements, the Court managed to muddy the waters and negate the freshness of approach evidenced in Rani. On the one hand the Court insisted that the element of consent has to be proven by the prosecution, while on the other it kept referring to consent as a defense shown by the accused. Id. at 14.
be recorded by the Court who has competent jurisdiction to try the of-fence under the law.\textsuperscript{109}

In some measure of consonance with the dicta of \textit{Rani}, the Court stated that though delay in lodging a F.I.R. normally weighs negatively against an accused, that is not a hard and fast rule. In cases of zina, which invariably concern family honor, “mere delay per se is no ground for draw-ing [an] adverse inference.”\textsuperscript{110} Accordingly, the Court overturned Zafran Bibi’s conviction.

\textit{H. Gul Hamida v. State (2004)}\textsuperscript{111}

Yet another appeal from a conviction where pregnancy was used as proof of zina reached the FSC in 2004. Gul Hamida had been pregnant for approximately eight months at the time she lodged the F.I.R. She alleged that her pregnancy was the result of a rape committed by two men. The Sessions Court convicted her of zina, but acquitted the accused rap-ists.\textsuperscript{112} The court inferred Gul Hamida’s guilt from two circumstances: (i) her pregnancy, and (ii) her failure to disclose the rape for close to eight months.

The FSC overturned Gul Hamida’s conviction, noting that she had vol-untarily lodged the F.I.R. and had adequately explained her delay:

\begin{quote}
It is a known fact that in our societ y the girls are ordinarily hesitant to disclose such an unfortunate incident out of fear or infamy. There is always a lurking fear in the mind of the victim that she may herself be held an accused of the sin or the offence. The same apparently has hap-pened in case of the appellant.\textsuperscript{113}
\end{quote}

On the issue of the evidentiary value of pregnancy, the FSC held:

\begin{quote}
In the absence of any positive evidence merely on the basis of preg-nancy it cannot be presumed that the victim girl was a willing partner. To record conviction under the Hudood Ordinance, evidence of an un-impeachable character is required.\textsuperscript{114}
\end{quote}

\begin{footnotes}
\begin{enumerate}
\item[109] \textit{Id}.
\item[110] \textit{Id.} at 16.
\item[112] This was the result of an error by the police and prosecution. They framed the crime as falling under section 10(2) of the Zina Ordinance, which covers only consensual extramarital sexual relations. The charge should have been brought under sections 10(3) or 10(4), which deal with rape and gang rape respectively.
\item[113] \textit{Gul Hamida}, 2005 P.Cr.L.J. at 171.
\item[114] \textit{Id}.
\end{enumerate}
\end{footnotes}
I. Summation

With the exception of Jehan Mina, the FSC cases reviewed have clearly and consistently laid down the following rules regarding the use of the evidence of pregnancy in framing charges of zina against a woman:

1. Consent is a vital element of the offense of zina. It must be proven beyond a reasonable doubt through direct eyewitness testimony, and medical as well as other circumstantial evidence. Evidence of an unexplained pregnancy, in and of itself, is not conclusive proof of consent.115

2. When a woman alleges rape, she cannot be implicated in a case of zina. If a woman is charged with zina on account of her pregnancy and, in her defense, she alleges that she had been raped, then she must be acquitted regardless of whether or not she complained at the time of the rape. Any delay in lodging an F.I.R., or even an outright failure to do so, is irrelevant when rape is alleged.116

IV. THE CONTROVERSIES

The jurisprudence of the Federal Shariat Court analyzed in this paper provides valuable insight into the nature of the debate between the proponents and the opponents of the Hudood laws. The following are some of the main arguments and counterarguments advanced by both sides:

A. The Standard Critique

The opponents of the Hudood laws have argued all along that the Zina Ordinance is blatantly discriminatory on its face as well as in its consequences.117 For instance, they argue that the Zina Ordinance discriminates...
nates against women through its evidentiary rules requiring four Muslim male witnesses to impose hadd punishment in zina-bil-jabr cases.\(^\text{118}\) Since it is highly unlikely that a rape will be committed in the presence of, or be passively witnessed by, four men of a good character, it is almost inconceivable how a hadd conviction for zina-bil-jabr could ever materialize. Furthermore, if a rape is witnessed by four women instead of four men, hadd punishment cannot be awarded. As a result, this requirement deters rape victims from complaining, and indirectly encourages the incidence of rape.

An even more serious consequence of the promulgation of the Zina Ordinance has been the equation of rape with zina. This equation is not merely nominal, but substantive and substantial in that the Ordinance is regularly misused to convert complaints of zina-bil-jabr, or rape, into those of zina when the accuser fails to bring sufficient evidence to prove rape.\(^\text{119}\) This is invariably the case in a criminal justice system character-

with the implementation of the Hudood Ordinances, but gender bias against women is not one of them.” Id. at 313. For an explicit rebuttal of Kennedy’s argument, see JAHANGIR & JILANI, supra note 2, at 137–38. They contend that the figures are misleading since a number of cases are converted from rape to zina. Id. However, it is difficult to understand how this makes any difference, since both offenses are prosecuted under the Ordinance. If their point is meant to suggest that more men are convicted under the Ordinance because more men are charged with rape, then it becomes easier to understand the argument. This though would then suggest that at least some men who are guilty of rape, if not all, are charged with zina-bil-jabr and convicted of that offense, and that number far exceeds the number of women prosecuted for and convicted of zina. See Kennedy, Islamization in Pakistan, supra note 24, at 312–13.

\(^\text{118}\) As Salman Akram Raja has noted, this is not a fully informed argument:

The popular perception of the Zina Ordinance, largely based on the image carried in the press, is that a raped woman must produce four male witnesses against the accused for a conviction. The legal position that a conviction leading to a tazir punishment can be maintained on the basis of other evidence, including that of the woman herself, is generally absent in the popular understanding of the Zina Ordinance.


\(^\text{119}\) It has been recommended that until the Zina Ordinance is repealed, the offenses of zina and zina-bil-jabr should be separated out into separate sections of the statute. This is recommended because:

The police frequently register rape complaints simply under Section 10 of the Zina Ordinance, without specifying the applicable subsection. The ensuing ambiguity as to the type of crime in question not only mars the police investigation but also leads to additional trauma for the rape victim because of the potential created for a wrongful prosecution for adultery.
ized by inadequate investigative and evidentiary mechanisms. The victim’s situation is made worse should she become pregnant, in which case many trial courts are quick to assume that she is only alleging rape to cover up the illegitimate pregnancy. Thus, women, who are already relegated to a lesser status in various social, political, and economic settings in Pakistan, are unable and justifiably unwilling to complain when their physical sanctity is violated.

The Zina Ordinance has also provided disgruntled parents, brothers, and former spouses with an opportunity to malign young women in order to deter them from rebelling against the predominantly patriarchal family structures by asserting the rights of free choice in marriage and divorce, or sometimes even the right to live a financially independent life. A majority of zina cases, it is argued, are malicious prosecutions that have the net effect of reinforcing the socio-economic subservience of women to the entrenched patriarchal norms. These facets of the Hudood laws and their implementation support the discriminatory milieu of Pakistani society. So, even if such cases ultimately end in acquittal, the women who are subjected to the humiliations of trial have already suffered irreparable injustice.

B. A Staunch Defense

The above criticism is usually answered with the assertion that hadd punishments are fixed maximum punishments that are to be administered in the clearest of cases only: when the accused has freely confessed or evidence is available which proves the crime beyond all doubt. Since such proof is not usually forthcoming, hadd punishments act as a deterrent only, serving the vital function of laying down fundamental moral principles. In fact, there have been no cases in Pakistan in which hadd punishments have been executed for either zina or zina-bil-jabr. The majority of cases under the Hudood laws are cases of tazir offenses,

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120. See Kennedy, Islamization in Pakistan, supra note 24, at 316 (“Added to the normal social control mechanisms available to them, parents, husbands, and guardians have been empowered by the introduction of the Hudood Ordinances with the real or implicit threat of bringing criminal charges against their children or wives.”).

121. See Chadbourne, supra note 24, at 217–29.

122. For example, Chief Justice Fazal Ilahi Khan, in Zafran Bibi, stated that “it is much better that an Imam (i.e. Judge) should err in acquitting someone rather than he should err in punishing someone (who is not guilty).” Zafran Bibi, 54 P.L.D. 2002 F.S.C. at 17.

123. See, e.g., JAHANGIR & JILANI, supra note 2, at 47. Though acknowledging that a hadd punishment has never been executed, Jahangir and Jilani nevertheless argue that its existence and potential for misuse require its abolition. Id.
where convictions are based on the same evidentiary standards that are applicable in normal criminal trials.

It is also argued that though miscarriages of justice do occur during the trial stage of some Hudood laws cases, just as miscarriages occur in trials for all offenses in Pakistan’s defective criminal justice system, those errors are corrected by the appellate courts in all but a few cases. Thus, the Hudood laws’ supporters argue that there are no problems inherent in the substantive rules laid down by the Zina Ordinance, as the injustices and controversies result from their misapplication. Such sentiments were expressed by the FSC in Zafran Bibi:

On account of disinformation, misunderstanding, lack of knowledge of the facts and circumstances of the case, some organizations resorted even to take out processions and demand repeal of the Hudood Laws itself without realizing that it was not the laws of Hudood (i.e. fixed sentence prescribed by Holy Qur’an and Sunnah) but its misapplication that resulted in miscarriage of justice . . . . Like other laws, the prosecuting or other components of law-enforcing machinery may err in its application in respect to various facts and circumstances, however, the ideal nature of these laws . . . is admittedly far-superior to the man-made laws on account of its highly balanced approach to individual and public interest.

Therefore, in defense of the Hudood laws, their proponents ultimately argue that the laws themselves are not problematic. Rather, it is their misapplication and misuse by the police and trial courts that results in the miscarriage of justice.

C. Resolution of the Political Impasse

It is precisely at this juncture that the debate has come to an impasse; both sides believe that they have a sufficient basis for their respective positions, and a satisfactory resolution appears to be presently out of

124. As Charles Kennedy points out, “[b]ecause the percentage of acquittals on appeal is so high it is doubly important to note the speed with which cases are disposed by the courts.” Kennedy, Islamization in Pakistan, supra note 24, at 311. Kennedy’s study found that the average time taken by the FSC in disposing of cases was reduced from eleven months in 1981 to four months in 1987. The sessions courts, on the other hand, lagged behind, taking an average of eighteen months to decide cases after the F.I.R. was filed. Id.


126. See Kennedy, Islamization in Pakistan, supra note 24, at 311–15 (describing how the problems affiliated with the implementation of the Hudood Ordinances are precisely those which plague the entire criminal justice system in Pakistan).
reach. Further, the controversies have become politicized to such an extent that it is impossible for either side to retrench.

The opposition to the Hudood laws has thus far focused on campaigning for an outright repeal of these laws.\(^{127}\) This approach is unlikely to succeed so long as the vast majority of Pakistani citizens continue to believe that the Hudood laws correctly reflect the shari’ah, a conviction based on the fact that the Qu’ran expressly proscribes zina and assigns punishment for it.\(^{128}\) However, few are cognizant of the reality that the Hudood laws misrepresent the shari’ah in certain vital respects, and that there are glaring defects in the legislation, such as the provision for punishment of zina as tazir.

In such a situation, it is not only unfair to decry the shari’ah for the failings of the Hudood laws, which are only a cheap imitation, but it is also impractical to argue for their outright repeal. The only viable option is to advocate for such amendments to the Hudood laws that would obviate the injustices perpetrated in the name of the shari’ah. However, such amendments are not likely to be made until a convincing critique is generated, which questions the Hudood laws’ doctrinal foundations and highlights the discrepancies between the shari’ah doctrines and its counterfeit version presently in force. The possibility of such an “Islamic” critique has already been demonstrated.\(^{129}\)

Such a possibility can be seen in the jurisprudence of the FSC, which implicitly demonstrates the strength of such a critique. Consider again Zafran Bibi, where the Court, prior to reaffirming the principle that pregnancy by itself may not be used to prove the commission of zina, appeared to suggest the existence of some circumstances in which pregnancy will become sufficient corroborating evidence:

> There is nothing on record to even presume that she was a woman of easy virtue. There is also no iota of evidence to show even that she was having any illicit liaison with any male person. The available record is also completely silent about her having been seen in the company of any accused, nominated by her in her statements.\(^{130}\)

Likewise, in Gul Hamida, the FSC noted that conviction for zina may be based on circumstantial evidence, presumably including evidence of pregnancy:

\(^{127}\) See, e.g., HUMAN RIGHTS WATCH, supra note 48, at 7; see also supra note 20.

\(^{128}\) See Qur’an 4:15 and 24:2.

\(^{129}\) See Quraishi, supra note 45, at 313 (arguing that the Quranic requirements for the punishment of zina do not leave room for it to be tried as a tazir offense).

No doubt conviction can be based on the strength of circumstantial evi-
dence but the circumstances should be of such a nature which are unex-
ceptionable and which lead to no other inference or hypothesis except
the guilt of the accused and commission of the offence.\footnote{131}

This language is reminiscent to that found in \textit{Safia Bibi}, where the
Court stated that consent could not be established “in the absence of any
evidence . . . that [Safia Bibi] and Maqsood Ahmad had any sentimental
attachment for and were on intimate terms with one another.”\footnote{132} Like-
wise, in \textit{Rafaqat Bibi}, the Court held that “in absence of any evidence
to establish sentimental attachment for co-accused it could not be said that
sexual intercourse was indulged into willfully.”\footnote{133}

However, refer to the FSC’s mechanically precise statement of the
elements of the offense of zina in \textit{Rani}:

\begin{enumerate*}[i.]
\item there should be a man and a woman;
\item such man and a woman are not validly married to each other;
\item such man and woman should have committed sexual intercourse
     with each other;
\item such man and woman should have committed sexual intercourse
     willfully;
\item there ought to be a penetration.\footnote{134}
\end{enumerate*}

Important here is that consent has to coincide with the act of sexual in-
tercourse, or penetration. Even if the accused is reputed to be a woman of
“easy virtue,” the prosecution still has to prove beyond a reasonable
doubt that at the time of the alleged incident she willfully had had sexual
intercourse. The same holds true if a woman had had a prior “illicit liai-
sion” with her male co-accused, or if there was sentimental attachment.
More than talking, holding hands, kissing, touching, or even fondling is
required to secure a conviction. Also note that in \textit{Sakina} there was credi-
ble evidence that prior to elopement the accused had had an intimate rela-
tionship characterized by “sentimental involvement.”\footnote{135} Similarly, in
\textit{Rani} there were allegations that the accused was reputed to be a woman
of “easy virtue.”\footnote{136} In fact, the defense in \textit{Rani} was that the accused’s
family had forced her into prostitution. Yet, in neither case was the extra-

\footnotesize
\begin{itemize}
\item \footnote{131. \textit{Gul Hamida}, 2005 P.Cr.L.J. at 171.}
\item \footnote{132. \textit{Safia Bibi}, 37 P.L.D. 1985 F.S.C. at 123.}
\item \footnote{133. \textit{Rafaqat Bibi}, N.L.R. 1984 S.D. at 167.}
\item \footnote{135. \textit{Sakina}, 33 P.L.D. 1981 F.S.C. at 321.}
\item \footnote{136. \textit{Rani}, 35 K.L.R. 1996 Sh.C. at 152.}
\end{itemize}
marital pregnancy corroborated by such other evidence found sufficient to secure a conviction for zina.

If the above analysis is correct, in what circumstances may an accused be convicted for an offense of zina liable to tazir? Apparently, the only circumstances where a conviction can properly be secured is when there are eyewitnesses, but numbering less than four, or, hypothetically, when there is other conclusive evidence such as a video-recording. If there are less than four witnesses, initiating a prosecution for zina is tantamount to qazf (unwarranted accusation of zina) under recognized shari’ah principles.\(^{137}\)

In *Muhammad Masood v. Abdullah*,\(^ {138}\) Justice Maulana Muhammad Taqi Usmani, an alim (religious scholar) member, delivered the judgment of the Shariat Appellate Bench of the Supreme Court holding that someone who bears false witness in a case of zina will not be guilty of qazf until the Court formally declares that such a witness has lied.\(^ {139}\) However, the complainant in a case of zina will only avoid liability under the Qazf Ordinance if he or she can bring four eyewitnesses. In the absence of four eyewitnesses, the complainant will automatically be deemed guilty of qazf whether or not a court declares that he or she has lied. Further, the Court expressly overruled an earlier FSC decision which had held that a complainant of zina who fails to produce four eyewitnesses may only be liable for qazf if the accusation of zina had been made in bad faith.\(^ {140}\)

It is very difficult to reconcile *Muhammad Masood* with Section 10 of the Zina Ordinance. When a case of zina is prosecuted in the absence of four eyewitnesses, which is practically all zina cases since most are tazir cases, will the court convict the accused for zina while simultaneously convicting the complainant of qazf? Following this line of reasoning, it is extremely difficult to conceive of many circumstances in which a prosecution for zina liable to tazir may be initiated. Unfortunately, however, this contradiction in the FSC’s jurisprudence has not been pressed upon the Shariat courts or the Pakistani legislature.

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137. The law of qazf is derived from verse 24:4 of the Qur’an. See supra note 45. In practice, zina prosecutions have overwhelmingly outnumbered qazf cases. See CIW Report, supra note 20, at 70 (documenting that only forty-three qazf cases were filed in the FSC between 1980 and 1987, as compared to 3,399 zina cases).
139. Id.
D. Reformation of the Hudood laws

Reform, pursuant to an Islamic critique, rather than repeal, represents the only hope for resolving the intractable argumentation over the Hudood laws. Preferably, such reform should be implemented through appropriate amendments to the Hudood Ordinances. However, until such amendments become politically feasible, it is advisable to press for the reformation of Hudood laws before the Shariat courts. After all, the Shariat courts have the power to review legislation for compatibility with shari’ah principles.

At the least, the Shariat courts should be asked to harmonize their own jurisprudence so that their precedents may be widely known, followed where applicable, or critiqued if they represent a perversion of Islamic injunctions. Until now, the FSC has failed to regularly refer to its own previous judgments, or rationalize them. For example, in the cases reviewed, only Rani discussed prior FSC precedent. In Zafran Bibi, the Court failed to refer to any of its own precedents, including Safia Bibi, which followed a similar reasoning. A harmonization of the law will enable lawyers to cite the appropriate cases before the trial courts, ensuring that errors of law are reduced. In order to achieve this, academics, human rights activists, and women’s rights campaigners should give greater attention to researching and analyzing the jurisprudence of the Shariat courts in Pakistan. This will enable them to disseminate relevant and

141. See Rani, 35 K.L.R. 1996 Sh.C. at 151–59 (using the holdings of Sakina, Safia Bibi, and Siani to disagree with the holding of Jehan Mina).

142. The critics of the Hudood laws have thus far focused primarily on those decisions of the Sessions courts embodying miscarriages of justice and case studies of police brutality. Further, the critics have shown such a distrust of the FSC that they have failed to carefully analyze its decisions. See supra note 21 and accompanying text. As Julie Dror Chadbourne notes, this approach is not only incomplete, but it is also fundamentally unhelpful:

Despite the social, legal and political impact of the Zina Ordinance in Pakistan, there is still little or no analysis of the substantive law relating to the Offence of Zina. . . . Instead, Pakistani practitioners as well as the Western media have focused their energies on publicizing a few “shocking” cases and on expressing their beliefs that the Ordinance is wrong and must be repealed. While it is true that there are problems with the Ordinance and that it has the capacity to support a social system which is highly biased against women, it is crucial that activists stop the debate on these points long enough to understand how the Ordinance actually affects the lives of women and girls in Pakistan. Until they do, they will remain denuded in their advocacy efforts because they will see neither the true impact the Zina Ordinance has on people living in Pakistan nor will they see that in the eye of the storm the judiciary is their greatest ally in ameliorating the practical impact of the Zina Ordinance.
correct information to all concerned parties, including the public. Such efforts will also facilitate more effective representation of the innocent victims.

The second range of options that ought to be pursued is to advocate the adoption of enhanced procedural safeguards. For instance, Parliament passed the Criminal Law (Amendment) Act, 2004, which mandates that only a senior police officer of the rank of superintendent may conduct an investigation in a case of zina, and an arrest may be made only with the permission of the court. These provisions do not apply to cases of zina-bil-jabr. Other procedural safeguards may include the appointment of specialist and more qualified judges for Hudood trials in the Sessions Courts. Alternatively, the FSC may be decreed the trial court in Hudood laws cases. The FSC is arguably more competent to try such cases, and has demonstrated a much more refined approach towards the enforcement of Hudood laws than the Sessions Courts. Further, it may be made mandatory for adequate medical tests to be performed in cases of zina before any prosecutions are initiated. Though this would require significant expenditure for the necessary facilities and infrastructure, the development of adequate forensic investigation mechanisms is a pressing need and such an effort is feasible as well as easily justified.

Chadbourne, supra note 24, at 180.


144. Section 13 of the Act, which amends Section 156 of the Criminal Procedure Code, reads:

13. Amendment in Chapter XIV, Act V of 1898. —In the Code, of Criminal Procedure, 1898 (Act V of 1898), hereinafter referred to as the Code, after section 156, the following new sections shall be inserted, namely:—

. . .

. . .

156B. Investigation against a woman accused of the offence of Zina. Notwithstanding anything contained in this Code, where a person is accused of offence of Zina under Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), no police officer below the rank of a Superintendent of Police shall investigate such offence nor shall such accused be arrested without permission of the Court.

Examination. —In this section ‘Zina’ does not include ‘Zina-bil-Jabr’.

Id. at 79–80.

145. See generally HUMAN RIGHTS WATCH, supra note 48, at 10–16 (suggesting recommended reforms for police practice and the medicolegal system).
V. CONCLUSION

This paper has attempted to expand the debate concerning the Hudood laws and their enforcement in Pakistan. It has done so through examination of the FSC’s precedents on the controversial issue of pregnancy as proof of zina. Admittedly, sufficient evidence has not been adduced to conclusively prove that the Shariat courts have developed an approach that has rebutted the criticisms of the skeptics.146 In fact, it has not even been argued that the Shariat courts are capable, by themselves, of resolving all the difficulties. This is because many of the current problems are rooted in the investigative, prosecutorial, and procedural deficiencies of Pakistan’s criminal justice system, and are therefore beyond remediation through reform of substantive laws.

Nonetheless, it has been argued that the debate concerning the Hudood laws in Pakistan has been both misleading and unproductive, because not all of the relevant aspects and nuances of the issues have been explored. First, the role of the Shariat courts in shaping the law through the implementation of coherent and just Islamic doctrines of criminal liability has been overlooked. Second, the possibility of obviating some of the procedural defects in the criminal justice system, not only in the context of the Hudood laws but also other “secular” criminal laws, has also been underestimated. If a more nuanced perspective on the Hudood laws is adopted—incorporating the possibility of substantive reform in accordance with an Islamic critique implemented preferably through statutory amendments, coherent case law, enhanced procedural safeguards, and a general reform of the criminal justice system—this may lead to a resolution of these controversies. The alternative is a continuation of an ideological struggle in which the politicos win but the victims lose out.

VI. POSTSCRIPT

As of the date of publication, the processes of reform advocated in this paper have begun to materialize. For the first time since the enactment of the Hudood Ordinances, mainstream news media organizations in Pakistan have started a dialogue on the laws and their conformity to Islamic injunctions.147 Additionally, on November 15, 2006, the “Protec-
The bill proposes several major changes to the Zina Ordinance:

1. Abolition of the offense of zina-bil-jabr liable to hadd;
2. Abolition of the offense of zina-bil-jabr liable to tazir and reinstatement of the pre-Hudood rape provisions in the Pakistan Penal Code, including the removal of the marital rape exemption;
3. Abolition of the offense of zina liable to tazir;
4. Introduction of the offense of public lewdness in the Pakistan Penal Code;
5. Abolition of the penalty of rajm for zina liable to hadd;
6. Abolition of the mandatory death sentence for the offense of gang rape, and replacing in its stead a discretionary sentence of either death or life imprisonment;
7. Criminalization of the publication of a case of zina or rape;
8. Zina shall be cognizable only by a court of competent jurisdiction upon the presentation of four witnesses; and
9. Qazf proceedings may automatically be instituted by a court where a complaint of zina has been made but four witnesses are not presented.

The bill has been passed amidst steadfast claims by the government that the proposed amendments conform to Islamic injunctions. As noted in the bill’s statement of objects and reasons: “The primary object of all these amendments is to make zina and qazf punishable only in accordance with the injunctions of Islam as laid down in the Holy Qur’an and Sunnah, to prevent exploitation, curb abuse of police powers and

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148. A copy of the bill, as originally presented in the National Assembly, is available at http://www.dawn.com/2006/08/24/nat3.htm. The version passed by the National Assembly, however, includes certain amendments to the original version.
create a just and egalitarian society."151 Opponents of the bill from the religious right, however, have criticized it as being "un-Islamic."152 Some civil society and human rights organizations have also been vocal in their criticism of the bill. They believe the bill does not go far enough, and insist that the Hudood Ordinances be repealed outright.153 Nevertheless, most Pakistani commentators perceive the bill as being a step in the right direction.

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152. Id.

FREE TRADE, ECONOMIC RIGHTS, AND DISPLACED WORKERS: IT WORKS IF YOU WORK IT

I. INTRODUCTION

One-million, eight-hundred-thousand Bangladeshi workers depend on the textile and apparel industries for their livelihood. These two industries aid the stability of Bangladesh’s economy and provide incomes and independence for many Bangladeshi workers and their families, especially women who have experienced significant social improvement as a result of their employment. This stability is in danger. Free trade caused the majority of the textile and apparel markets to relocate to China, causing the world’s demand for goods from Bangladesh to decrease dramatically. The shift to China severely damaged Bangladesh’s textile and apparel industries and consequently eradicated the majority of jobs that rely on these industries. Eighty percent of the families of garment workers will likely plunge below the poverty line as the tex-

1. UNITED NATIONS DEVELOPMENT PROGRAM, MAKING GLOBAL TRADE WORK FOR PEOPLE 181 (2003), available at www.undp.org/dpa/publications/globaltrade.pdf [hereinafter GLOBAL TRADE]. Although the textile and apparel industries are in fact separate industries, often dictated by different economic considerations, they are considered together in this Note. They are related industries and are affected similarly by the liberalization of trade. For an extensive analysis of the intrinsic differences in the economic structures of the apparel and textile sectors, see SHEILA PAGE, HOW DEVELOPING COUNTRIES TRADE: THE INSTITUTIONAL CONSTRAINTS 14 (1994).

2. See GLOBAL TRADE, supra note 1 (noting that there are 1.8 million workers in the garment industry, who are mostly “girls or young women who migrated from rural areas”). See also Garment Industry, http://banglapedia.search.com.bd/HT/G_0041.HTM (last visited Nov. 27, 2006).

3. See GLOBAL TRADE, supra note 1 (noting the “potentially dangerous outcome” that may result from the changes in international trade).

4. See PIETRA RIVOLI, THE TRAVELS OF A T-SHIRT IN THE GLOBAL ECONOMY: AN ECONOMIST EXAMINES THE MARKETS, POWER, AND POLITICS OF WORLD TRADE 168 (2005) (noting that China has been able to produce goods at a lower cost than most other nations, and countries formerly importing from Bangladesh prefer lower costs and will now import from China).

5. Id.
tile workers, whose families rely on them for sustenance, lose their jobs.\(^6\) Bangladesh has no protection for these displaced workers who are now or will become unemployed.\(^7\)

Although Bangladesh and nations like it are suffering, the international community has increasingly supported the movement towards free trade.\(^8\) Free trade provides nations access to formerly unavailable markets, and greater diversity in the market helps economic integration accelerate on a global scale.\(^9\) Therefore, despite the international community’s initial hesitation, the incipient growth free trade has encouraged confirms that collective global economic growth will persist if nations continue to ap-

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6. Global Trade, supra note 1, at 181.
7. Rivoli, supra note 4 ("[T]he closest thing to a safety net that Bangladesh has ever known was the secure market share provided by [the quota scheme]."). Without that protection, Bangladesh workers face unemployment difficulties. Id. at 167–68. Bangladesh is a particularly poor nation, has economic instability due to political instability and corruption, and is unable to provide assistance to displaced workers. See CIA, The World Factbook: Bangladesh, https://www.cia.gov/cia/publications/factbook/geos/bg.html (last visited Nov. 18, 2006). In fact, Bangladesh is considered one of the Least-Developed Countries (LDCs). For a list of the countries recognized by the U.N. as LDCs, see UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing Countries, http://www.un.org/special-rep/ohrlls/ldc/list.htm (last visited Nov. 18, 2006).
8. See Douglas A. Irwin, Free Trade Agreements and Customs Unions, in The Library of Economics and Liberty: The Concise Encyclopedia of Economics (2002), http://www.econlib.org/library/Enc/FreeTradeAgreementsandCustomsUnions.html, for a general account of nations’ increasing acceptance of free trade, as demonstrated by their engaging in free trade agreements. Free trade is defined as “open and unrestricted import and export of goods without barriers, such as quotas or tariffs, other than those charged only as a revenue source, as opposed to those designed to protect domestic businesses.” Black’s Law Dictionary (8th ed. 2004).
9. See Global Trade, supra note 1, at 180. See also Alan S. Binder, Free Trade, in The Library of Economics and Liberty: The Concise Encyclopedia of Economics (2002), http://www.econlib.org/library/enc/FreeTrade.html (providing the example of how free trade makes it possible for nations like “Spain, South Korea, and a variety of other countries [which] manufacture shoes more cheaply than America can” to engage in trade with the United States, a economic situation that is possible only with free trade); Sungjoon Cho, Free Markets and Social Regulation: A Reform Agenda of the Global Trading System 12 (2003). World Merchandise Exports as a percentage of Gross Domestic Products were reported as 5.1 in 1850, rising to 7.1 in 1950, then to 22.4 in 1998. Evidence of rising global export percentages demonstrates that exports have accounted for a large portion of the income generated in the global economy. Andrew G. Brown, Reluctant Partners: A History of Multilateral Trade Cooperation 1850–2000, at 8 (2003).
ply free trade principles to the market.\footnote{10} An open market is now a widely supported initiative.\footnote{11}

Liberalization may promote growth in the global economy, but the effects are positive only in the aggregate.\footnote{12} There are economies that gain and economies that lose.\footnote{13} Specifically, the benefits to one nation’s

\footnote{10. See generally Global Trade, supra note 1 (assessing the problems, benefits, and developments of free trade and globalization and offering suggestions on how to make the multilateral trade regime benefit all, and especially developing, nations). The preface of the document provides an overview of the potential benefit of free trade:}

Trade can, and must, be made to work as an engine of growth and indeed of human development. What is needed to enable this is a serious, systematic effort to apply the lessons of history, which show that, with very few exceptions, today’s rich countries in the past enjoyed many of the protections they now seek to deny developing countries, only dismantling them after growing wealthier and more powerful. It is also more important to ensure that the multilateral trade regime is better aligned with broader objectives of human development: helping poor people everywhere gain the tools, opportunities and choices to build a better life for themselves, their families and their communities.

\footnote{11. See Brown, supra note 9, at 3. The liberalization of trade began when industrialization took root and inspired advances in technology, organization, and productive skills. The transportation of goods became less burdensome, physical barriers to trade dissipated, and the potential for exchange between areas far removed from each other began to grow. The freedom of movement drove economic growth in individual countries, and the integration of these growing markets accelerated on a global scale. See id.}

\footnote{12. See, e.g., Daniel A. Farber, Economic Efficiency and the Ex Ante Perspective, in The Jurisprudential Foundations of Corporate and Commercial Law 54, 59 (Jody S. Kraus & Steven D. Walt eds., 2000). An economic policy is evaluated on the basis of a cost benefit analysis. Specifically, changes are generally accepted where the “total benefits of a change outweigh the total costs, although some people may gain and others may lose.” Id. See also Judith Goldstein, International Institutions and Domestic Politics: GATT, WTO, and the Liberalization of International Trade, in The WTO as an International Organization 133, 133 (Anne O. Krueger ed., 1998) [hereinafter Int. Org.] (“Nations gain from trade in the aggregate, but those gains are not evenly distributed.”).}

\footnote{13. See Jim Chen, Epiphytic Economic and the Politics of Place, 10 Minn. J. Global Trade 1, 2 (2001) (“There are, in short, winners and losers.”). “The pure theory tells us that when resources are efficiently allocated the winners will gain more than the losers lose.” Joel R. Paul, Do International Trade Institutions Contribute to Economic Growth and Development?, 44 Va. J. Int’l L. 285, 301 (2003). Yet, it matters little to those that}
economy may come at a significant expense to another nation’s economy, as demonstrated by China’s gains at the expense of Bangladesh’s losses.\(^{14}\) To compound the problem, the benefit to a nation’s economy is often not evenly distributed within the nation.\(^{15}\)

In the textile and apparel industries, the progression towards liberalization affords the most advantaged nations access to cheaper products while causing great losses to developing nations.\(^{16}\) In developing nations, quotas and other protectionist measures controlled trade for decades, and these nations failed to diversify their industries in the midst of the protected quota age.\(^{17}\) Most developing nations are now bound to the textile and apparel industries, and they are neither able to compete equally in the free market nor prepared to pursue new and diversified industries.\(^{18}\)
As a country loses the majority of its export industries to more efficient manufacturing nations, millions of workers within the vanishing industries lose their jobs, and there is nothing in place to lessen the burden felt by these workers.\textsuperscript{19} This inflexibility threatens the preservation of developing nations’ economies and the well-being of their citizens.

The international community’s failure to consider and compensate for the occurrence of displaced workers demonstrates the instability of the community’s dedication to, and recognition of, the legally enforceable economic right to work.\textsuperscript{20} This right provides a guarantee to displaced workers that their nation’s government will consider their needs in economic planning. The right to work of displaced workers cannot be ignored in this most vital time as nations pursue economic integration in the open market. Nations must consider economic rights and adequately provide for these rights as they adjust to the free market. Part II of this Note examines the theory of liberalization and the history of the deregulation of the textile and apparel industries. Part III examines the presence of the economic right to work in international law, the right’s enforceability, and its capacity to protect displaced workers. Part IV briefly examines current attempts to coordinate globalization and economic development and the inability of global thinking to consider the plight of individuals. Part V proposes new negotiations within the World Trade Organization (WTO) to address additional consideration for the economic rights of displaced workers while maintaining the integrity of free trade and the pursuit of liberalization.

II. FREE TRADE, DEREGULATION, AND DISPLACED WORKERS

A. The Theory of and Support for Liberalization: Economically Sound but Is It Humane?

The free trade doctrine suggests that nations achieve the most efficient economic balance when all nations mutually agree to liberalize trade consistently, removing prohibitions or restrictions such as regulatory
quotas, self-imposed restrictions due to political or ideological differences, cultural preferences, or irreconcilable trade policies. A nation

21. See Cho, supra note 9, at 27 (explaining that the original document instituting free trade was “clear and unambiguous in prohibiting quantitative restrictions such as quotas”).


24. Irreconcilable trade policies impede a nation’s willingness to trade, and this unwillingness is an unwanted trade barrier.

   Trade barriers have a negative effect on exporters because they interfere with the normal supply and demand and make international trade more complicated. They also negatively impact importers and ultimately consumers since they interfere with competitive sourcing which can result in higher prices. The global trend in recent years has been to eliminate as many trade barriers as possible. Fast Facts, supra note 23. In comparison, liberal trade policies—policies that allow the unrestricted flow of goods and services regardless of particular policies—sharpen competition, motivate innovation, and breed success. See UNDERSTANDING THE WTO, supra note 10, at 14.


   Notably, some have argued that nations can still benefit from unilateral free trade (the reduction of barriers by individual nations), rather than multilateral or bilateral free trade. See, e.g., James K. Glassman, The Blessings of Free Trade (May 1, 1988) (CATO Institute Briefing Paper no. 1), available at http://www.freetrade.org/pubs/briefs/tpb-001.html (“Jagdish Bhagwati, who is the Arthur Lehman Professor of Economics at Columbia University, points out that Hong Kong and Singapore are conspicuous unilateral free traders, as is New Zealand. Those countries have done exceptionally well economi-
is consequently best served if it specializes in and exports what it produces most efficiently compared to other producing nations. Similarly, the nation must import what it produces least efficiently.

Many opponents of free trade, specifically free trade through the WTO, cite the growing costs to workers and the potential for detrimental effects on the economies of developing nations as reasons not to pursue liberalization. In the textile and apparel industries, liberalization is particularly
difficult because, like Bangladesh, many developing nations have no safeguards in place to protect their share of the shifting market and few other industries that can provide economic stability. Other economic and environmental costs include greater consumption of natural resources, growing income inequality, and the decline of wages for less educated workers. One important political cost is the subjugation of member nations’ territorial sovereignty to the international policies gov-

“WTO rules put the ‘rights’ of corporations to profit over human and labor rights. The WTO encourages a ‘race to the bottom’ in wages by pitting workers against each other rather than promoting internationally recognized labor standards.” Id. They have further argued:

Free trade is not working for the majority of the world. During [a] period of rapid growth in global trade and investment (1960 to 1998) inequality worsened both internationally and within countries. The UN Development Program reports that the richest 20 percent of the world’s population consume 86 percent of the world’s resources while the poorest 80 percent consume just 14 percent.


[Bangladesh’s] over-dependence on the exports of readymade garments . . . is fraught with danger as it [faces] the elimination of quotas. . . . Bangladesh export to US and European Union member countries constitutes 78 percent which is a high risk game. Both organizations have recommended the diversification of the exportable items as well as the markets. It further asks [the] Government to fasten the privatization process of the private companies.”

Id.

For information regarding other nations’ dependence, see RIVOLI, supra note 4, at 167–68 (describing the effects of nations’ reliance on the quota scheme and the problems they will face as the textile industry shifts to China, leaving them with few options). “Textile and apparel exports comprised more than half of manufacturing exports for a dozen countries, including Bangladesh, Mauritius, Honduras, and Sri Lanka, where the industries also provide the largest number of manufacturing jobs.” Id. at 167. See also, e.g., Kevin C. Kennedy, The Incoherence of Agricultural, Trade, and Development Policy for Sub-Saharan Africa: Sowing the Seeds of False Hope for Sub-Saharan Africa’s Cotton Farmers, 14 KAN. J.L. & PUB. POL’Y 307, 345 (2005) (arguing that the sub-Saharan nations are at a disadvantage because limited availability and high costs of yarn prevent diversification and there is no other industry to pursue).

Consequently, many individuals concerned with the costs of trade liberalization, such as textile company owners or human rights activists, work hard to maintain quotas and regulatory schemes. Nevertheless, support for free trade endures. The majority of the international community supports the fundamental proposition that the “substantial benefits [that] arise from the free exchange of goods between countries . . . ha[ve] not been overshadowed by the limited scope of various qualifications and exceptions.” The commonly held belief is that the net gains to the global economy are a substantial benefit and justify any losses from the pursuit of trade liberalization. Advocates assert that affected nations, which experience economic loss, will only temporarily decline and will eventually find an industry in which they can efficiently produce. Advocates also argue that the economic process of liberalization will ultimately aid the economic stability of nations, such as Bangla-


31. See RIVOLI, supra note 4, at 161.


33. See Robert Murphy, People Can Just Get Along, MIES.ORG DAILY ARTICLES, Dec. 6, 2004, http://www.mises.org/story/1684 (discussing how the benefits of free trade outweigh the negatives). Change, such as that accompanying free trade, may cause “short-term pain for some groups . . . . Yet in the long run everyone benefits from cooperation. We must abandon economic sophisms and recognize the obvious truth that political freedom, smarter workers, and better technology are cause for celebration, not fear.” Id. See also UNDERSTANDING THE WTO, supra note 10. The WTO asserts that open trading is supported by “the experience of world trade and economic growth since the Second World War” because there is a “definite statistical link between freer trade and economic growth.” Id. at 14.

Furthermore, all nations stand to eventually gain because “[a] country does not have to be best at anything to gain from trade. [They gain because of the] comparative advantage.” Id. at 15. See also supra note 10 and accompanying text. For some of the benefits in the United States, see U.S. Chamber of Commerce, Free Trade Agreements, http://www.uschamber.com/issues/index/international/fta.html (last visited Nov. 1, 2006) (arguing that Free Trade Agreements benefit “U.S. businesses, workers, and consumers in significant ways”).

34. BROWN, supra note 9, at 19. Developing nations will be able to provide developed nations with the products that the developed nations still need but are too busy to produce. Id.
deshe, which are presently experiencing detrimental economic effects from the movement towards free trade. With the expectation that all nations will ultimately benefit, the United States and many other nations recognize and embrace the elimination of quotas and the movement towards trade liberalization as the most effective way to stimulate both the global economy and the economies of individual nations. Currently, over 140 WTO member nations are actively engaged in the movement towards liberalization.

35. See Herman E. Daly, From Adjustment to Sustainable Development: The Obstacle of Free Trade, in THE CASE AGAINST “FREE TRADE”: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER 121, 125–26 (1993) (“[E]conomists have proved that free trade between high-wage and low-wage countries can be mutually advantageous thanks to comparative advantage.”). Under the principle of comparative advantage:

[C]ountries A and B still stand to benefit from trading with each other even if A is better than B at making everything. If A is much more superior at making automobiles and only slightly superior at making bread, then A should still invest resources in what it does best—producing automobiles—and export the product to B. B should still invest in what it does best—making bread—and export that product to A, even if it is not as efficient as A. Both would still benefit from the trade.

UNDERSTANDING THE WTO, supra note 10, at 15. Furthermore, nations will eventually, if gradually, benefit from the comparative advantage, even if they are initially negatively affected. Id. at 14 (“[A country could] become uncompetitive in some goods or services as its economy develops. However, with the stimulus of an open economy, the country can move on to become competitive in some other goods or services. This is normally a gradual process.”).

For example, Bangladesh is already experiencing benefits. “Poorer nations like Bangladesh and India, which have had no quotas on their exports since January, are expected to continue to increase their shipments.” James Kanter & Keith Bradsher, A Return to Quotas; Limits on Textiles Could Push China Toward Making Upscale Goods, N.Y. TIMES, Nov. 9, 2005, at C2. As China floods the market, its labor costs will rise, and Bangladesh will thereby become the cheapest exporter. See id.


37. See World Trade Organization, Understanding the WTO: The Organization; Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [hereinafter Members and Observers] (last visited Nov. 21, 2006). As of December 2005, there were 149 member nations and 32 observer states in the WTO. The observer states have not acceded to the WTO, but must start negotiations regarding accession within five years of becoming an observer nation. Id.
B. The Pursuit of Liberalization in the Textile and Apparel Industry

Free trade began to take root after the Second World War when global economic integration was foremost on the political and economic agenda. Pursuing a free market was considered the most viable manner in which the world’s nations could obtain international economic cooperation, a goal many hoped would repair the international community. Towards that end, in 1948, twenty-three nations drew up the General Agreement on Tariffs and Trade (GATT) to serve as a list of negotiated trade concessions and rules of economic conduct for participating nations. In accordance with the goals established under GATT, nations began to eradicate the legacy of protectionist measures governments had instituted. Many of the participating nations agreed to pursue privatization, specific deregulations, economic structural adjustment, promotion of foreign investment, and a multitude of trade agreements.

38. The global free market was important to the post-war community because economic protectionism in Europe was blamed for the outbreak of the Second World War. Cho, supra note 9, at 2.
39. Id.
42. Privatization is the process of transferring property from public ownership to private ownership and transferring the management of a service or activity from the government to the private sector. A government can continue “to finance provisions [while using] private suppliers instead of government-owned enterprises.” John Burton, Privatization and Regulation in the USA and the UK: Some Comparisons and Contrasts, in DEREGULATION AND PRIVATIZATION IN THE UNITED STATES 148, 148 (Paul W. MacAvoy ed., 1995).
43. Deregulation is a process through which governments remove restrictions on businesses in order to encourage efficient market operations. Deregulation, however, differs from liberalization. A liberalized market can include regulations to protect consumers’ rights. See Stacy K. Weinberg, Liberalization of Air Transport Time for the EEC to Unfasten Its Seatbelt, 12 U. PA. J. INT’L BUS. L. 433, 433 (1991) (“Liberalisation means the reduction of constraints imposed upon the existing actors in the marketplace . . . whereas deregulation refers to the abolition of all restrictions dominating the . . . marketplace, thus providing free access.”) (quoting Reports of Conferences, 12 AIR L. 303, 306 (1987) (Fourth Lloyd’s of London Press International Aviation Law Seminar, Algarve, Portugal, Oct. 11–16, 1987)). Critics of deregulation argue that regulation secures efficient allocations of resources. See, e.g., Stephen Dempsey, Market Fail-
To isolate and address the unique concerns raised by the liberalization of the textile and apparel industries, the GATT Committee on Textiles created the Multifibre Arrangement (MFA). The MFA, in opposition to...
GATT’s general thrust towards liberalization, guaranteed a percentage of the textile and apparel markets to developing nations. To create the guarantee, the MFA provided “selective quantitative restraints when surges in imports caused, or threatened to cause,” damage to a nation’s domestic industry. Textile manufacturing nations insisted on the MFA export quotas because the guaranteed share of the market provided security for their nation’s economy.

Many developing nations, however, are losing their guaranteed share of the market. Liberalization grew popular as rich, developed nations experienced increased welfare, and these nations sought further global integration. To further promote widespread liberalization, manufactur-
ing nations collectively created the WTO on December 31, 1994. The WTO drafted the Agreement on Textiles and Clothing (ATC), therein constructing a ten-year liberalization phase out of the MFA provisions and an integration of restricted products into GATT rules. In order to integrate imported products into the GATT framework, the ATC required importing nations to enlarge existing quotas annually and concurrently.

53. Created at the Uruguay Round of Multinational Trade Negotiations to replace GATT, the WTO is one of the few international economic institutions that place legally binding obligations on their members. See Richard Blackhurst, The Capacity of the WTO to Fulfill Its Mandate, in INT. ORG., supra note 12, at 31, 32 (noting that, in comparison, the IMF is not binding). The Uruguay Round is the most recent round in negotiations. The first was in Geneva in 1947, and each subsequent round has made trade more liberal. See World Trade Organization, Understanding the WTO: Basics; The GATT Years: From Havana to Marrakesh, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm#rounds (last visited Nov. 21, 2006).

54. See Press Brief, WTO, supra note 48. The ATC transitional agreement’s main elements are product coverage, the program of liberalization, the treatment of existing trade restrictions, the application of transitional safeguards, the fulfillment of commitments under GATT rules, the supervision of ATC implementation, and dispute settlement. World Trade Organization, Textiles Monitoring Body (TMB), The Agreement on Textiles and Clothing, http://www.wto.org/english/tratop_e/texti_e/textintro_e.htm#MFA (last visited Nov. 27, 2006) [hereinafter Textiles Monitoring Body].

55. Textiles Monitoring Body, supra note 54. The WTO textiles agreement planned for the textile industry’s integration into GATT by the following four steps: 1) on January 1, 1995, members would integrate no less than 16% of their total volume of 1990 imports; 2) on January 1, 1998, an additional 17% would be integrated; 3) on January 1, 2002, another 18%; 4) on January 1, 2005, the remaining percent, a maximum 49%, would be integrated. Id. The four WTO nations which maintained import restrictions were Canada, EC, Norway, and the United States. Id. The rules under GATT eliminated prohibitions or restrictions, “other than duties, taxes or other charges, whether made ef-
As of the start of 2005, member nations should have removed all quotas, thereby finalizing the integration process.56

C. The Market Effect of the MFA Phase Out: Developing Nations Compete for the Market

As quotas were phased out, and the amount an importing nation could demand increased, China took the opportunity to flood the market with cheaper goods.57 With its almost “limitless supply of cheap labor and its capacity for high-volume production[,]”58 it is clear that China is and will continue to be the leading exporter of textiles and apparels.59 Fearing China’s economic domination in this sector, the international community


57. See, e.g., RIVOLI, supra note 4, at 166.


59. See China’s Development Miracle: Origins, Transformations, and Challenges 124 (Alvin Y. So ed., 2003). “The vast pools of rural migrant labor provide a plentiful supply of cheap labor in sustaining China’s urban economic boom.” Id. The workers “are flexible, able and willing to move quickly into new growth areas.” Id. The migrant workers are also willing to work for less money, for more hours, and in unsafe conditions with minimal protection. Id. Due to China’s unparalleled labor force, from 1990 to 2004, China’s share in the world’s exports of textiles jumped from 6.9% to 17.2%. World Trade Organization, International Trade Statistics 2005: Trade by Sector 2005, Table IV.74, http://www.wto.org/english/res_e/statis_e/its2005_e/its05_bysector_e.htm [hereinafter International Trade Statistics 2005]. China was second only to the European Union for the highest percentage share in the world’s exports. Additionally, the rise in China’s share was nearly twice as great as all but one of the other top ten importer/exporters of clothing for countries within the WTO. Id.
opposed China’s rapid success. In exchange for WTO membership, China relented to Western pressure and agreed to endure additional American quotas until 2008 and announced that it would impose tariffs on textile exports in order to temper exporting. Even so, China’s domination and yearly growth in control over the market remains superior to all other nations.

As China gains a greater share of the market, competing nations’ economies suffer. China’s supremacy has caused the demand for textiles and apparel from other nations to reduce dramatically, thereby injuring the domestic markets of China’s trading partners. The demand for goods from China will continue to grow, further reducing the demand for goods from other nations. For many developing nations that are competing with China, the detrimental effects of China’s ascendancy are especially severe. Developing nations obtained large quotas under the MFA and felt “artificially protected from competition.” The artificial protections initially provided economic stability and thus an environment

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60. See, e.g., Bradsher, China Relents, supra note 56.
61. Id. In 2004, China announced that it would impose tariffs on some textile exports. It was assumed to have been done in order to avoid a trade war between China and the United States and the European Union. It is similar to the self-imposed quotas Japan set on its car exports in the 1980’s to “allay worries from Detroit that it would take over much of the American automobile market.” Id. Currently, however, the WTO provisions “prohibit the kind of semi-voluntary export quotas that Japan imposed on its car shipments in the 1980’s.” Id.
62. See also International Trade Statistics 2005, supra note 59, at IV.74, IV.82 (reporting that China’s increases from 2003 to 2004 were 24% in textiles and nineteen percent in clothing). See also Kanter & Bradsher, supra note 35. The quotas will not severely affect China because “[m]anufacturers are . . . likely to take the initial steps of cutting and sewing garments in China and then ship them elsewhere for final assembly, thereby bypassing quotas.” Id.
63. See RIVOLI, supra note 4, at 166.
64. Id.
65. Id.
66. There are many nations affected by China’s domination. See id. at 165–67. However, for developed nations it is less severe. “If the surges from China hurt South Carolina, the effects will be far worse in a number of developing countries.” Id. at 167.
67. Mustafizur Rahman, The Price of Free Trade Part I, YALE GLOBAL ONLINE, Sept. 29, 2004, available at http://yaleglobal.yale.edu/display.article?id=4608 [hereinafter Rahman, Free Trade Part I]. Both Bangladesh and Cambodia received large quotas in 2003, which enabled their markets to focus on growth in the areas in which they had quotas. See JAMES BOVARD, THE FAIR TRADE FRAUD 38 (1991) (“The MFA was supposed to be a transitional arrangement to help richer countries phase out of an uncompetitive industry. Instead, the MFA provided a blank check for wealthy importing nations to shackle poorer exporting nations.”); RIVOLI, supra note 4, at 166.
The success of the protected textile and apparel industries temporarily improved the economy of Bangladesh, as well as the economies of Cambodia, Mauritius, Honduras, and Sri Lanka.

Developing nations are now like children reliant on their parents, and they are facing extreme and detrimental effects because of their dependency. Nations could have used the MFA market security to create long-term protections by developing additional export industries and diversifying their economies. Instead, many developing nations used the quota guarantees to construct their economies around the textile and apparel industries, which have now shifted to China and away from many of the nations formerly protected by quotas.

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69. See Ellen Israel Rosen, The Wal-Mart Effect: The World Trade Organization and the Race to the Bottom, 8 CHAP. L. REV. 261, 264–65 (2005). See also RIVOLI, supra note 4, at 166–68 (demonstrating the positive effects quotas have on nations and how they will no longer be available to nations as quotas are phased out). In Bangladesh, for example, the Ready Made Garments sector was a primary driver of the economy, and the fact that it grew “from nearly zero in 1982 to over US$2 billion in 1995 is a notable achievement.” Bangladesh: Country Assistance Review, http://lnweb18.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/609C127BFF0A89B1852567F5005D6129 (last visited Nov. 27, 2006). The GDP of Bangladesh has increased from US$21.6 billion in 1985 to US$56.7 billion in 2004, an increase of 380% and at an annual growth rate of 5.3% from 1995 to 2005. World Bank Organization, Bangladesh at a Glance (Sept. 15, 2006), http://devdata.worldbank.org/AAG/bgd_aag.pdf. Similarly, the exports of goods and services in that time rose from US$4.130 billion to US$9.75 billion. Id. Notably, Bangladesh’s annual growth rate of exports of good and services has been steadily declining since the movement towards free trade. Id. For 2004, the annual growth rate of exports of goods and services was 12.5% and is predicted to be 11.6% from 2005 to 2009. Id. In Cambodia, similarly, the garment exports have risen from US$27 million in 1995 to US$1.607 billion in 2003. Omar Bargawi, Cambodia’s Garment Industry—Origins and Future Prospects 9 (Overseas Development Institute, Economic Statistic Analysis Unit, Working Paper No. 13, 2005), available at http://www.odi.org.uk/esau/publications/working_papers/esau_wp13.pdf.

70. See, e.g., BOVARD, supra note 67, at 40 (“Although the MFA was established to prevent disruption to companies producing specific items, the U.S. government has greatly expanded import controls through the use of group quotas.”). 71. See GLOBAL TRADE, supra note 1, at 170 (noting that nations thought it was in their best interests to pursue the growing textile industry). Despite the security provided by the quota regime, the fear is that China will “squeeze [other nations] out completely.” Edward Gresser, The End of Textile Quotas Will Redistribute Pain and Gain, YALE GLOBAL ONLINE, June 10, 2004 (explaining the risks faced by many developing nations due to their reliance on textile exports as the quotas are eliminated). For example, “[g]arment factories employ more than three million people in Southeast Asia, four million in Bangladesh and Pakistan, half a million in Egypt. Smaller countries often rely
Unfortunately, the opportunity to diversify is lost.\textsuperscript{72} Without the quota guarantees, the necessary funds are unavailable, natural resources are limited, and foreign investors are unwilling to risk the venture.\textsuperscript{73} Affected nations have few other industries in which they can pursue economic security.\textsuperscript{74}

These nations reluctantly continue to rely on the diminishing textile and apparel industries as the major exports and the principal source of employment.\textsuperscript{75} In Bangladesh in 2003, a time when free trade had clearly affected the nation, garments still represented 62.3\% of all of the country’s manufactured exports.\textsuperscript{76} Similarly, in Cambodia in 2003, garments accounted for a 75.5\% share of the economy’s merchandise exports.\textsuperscript{77}

Bangladesh, India, Cambodia, Pakistan, Vietnam, and many Caribbean and African nations are now competing for the small percentage of the demand for textile and apparels that remains after nations purchase China’s total supply of goods.\textsuperscript{78} The effects are dramatic. From 2001 to 2004, Bangladesh, significantly less able to compete with China’s cheap

\begin{footnotesize}
\begin{itemize}
\item[72.] See Rahman, \textit{Free Trade Part I}, supra note 67.
\item[73.] Id. As the quotas are disappearing, many nations are trying to diversify their export industries. “[U]nlike wealthier countries, poor countries with low literacy, weak infrastructure and other supply-side constraints may have limited capacity to benefit from free trade.” \textit{GLOBAL TRADE}, supra note 1, at 27. This capacity is limited further by economic instability. Id.
\item[74.] Most of the nations used the textile and clothing industries as their sole reliance. See \textit{RIVOLI}, supra note 4, at 166–68. See also supra note 28 and accompanying text. For example, in Bangladesh, “there is little other industry and no safety net of any kind.” \textit{RIVOLI}, supra note 4, at 168.
\item[75.] See Rahman, \textit{Free Trade Part I}, supra note 67. See also U.S. Department of State, \textit{Background Note: Bangladesh}, http://www.state.gov/r/pa/ei/bgn/3452.htm (last visited Nov. 18, 2006) (stating that the garment industry was the new source of employment in the last decade and describing the difficulty the government has finding alternative sources of employment for citizens).
\item[77.] See \textit{International Trade Statistics 2004}, supra note 76. Similar to Cambodia and Bangladesh, in Sri Lanka, garments represented a 50\% share in the economy’s total merchandise exports in 2003. In Honduras, garments represented a 38.3\% share in their economy in the same year. In Mauritius, garments represented a 49.9\% share. Id.
\item[78.] Rahman, \textit{Free Trade Part I}, supra note 67.
\end{itemize}
\end{footnotesize}
production, experienced a fall in market share of U.S. imports of nearly ninety percent.\(^79\)

**D. The Incidence of Displaced Workers in Nations Affected by the Phase Out**

Approximately thirty-million workers in developing nations could lose their jobs as surges in textile and clothing exports from China cause a decline in their nations’ exports.\(^80\) The lost jobs in the textile industry will also affect workers in related industries that rely upon the textile industry.\(^81\) Textile and apparel workers provide the primary source of income for their households and will have difficulty supporting themselves and their families as the reduction of exports causes the elimination of their jobs.\(^82\) “Nearly 70 percent of workers in the . . . apparel sectors are rural women who migrated to live and work in the cities,” and the extremely low-skill, low-paying jobs they are required to accept out of desperation are frequently demeaning.\(^83\)

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79. Rivoli, supra note 4, at 168.

80. See Magnusson, supra note 19 (“From the Dominican Republic to Bangladesh, some 30 million workers in dozens of developing countries could see their jobs suddenly evaporate.”). See also Gresser, supra note 71 (noting the millions of workers employed by garment industries and the possibly devastating effects of the elimination of quotas).

81. See Global Trade, supra note 1, at 181 (stating that transportation, hotel, banking, and shipping industries all derive business from the textile and apparel industry, and it is estimated that US$2 billion is generated from the linkages between these industries and the textile and apparel industry). See also Rivoli, supra note 4 (“[E]ach job in textiles and apparel may generate two jobs in ancillary services such as transportation or insurance, and these jobs are also at risk.”) (citing Nathan Associates, Changes in Global Trade Rules for Textiles and Apparel: Implications for Developing Countries 6).

82. See Global Trade, supra note 1, at 181.

Surveys have shown that without the wages of a garment worker, 80% of garment workers’ families would fall below the poverty line. Female garment workers provide 46% of their total family income, while 23% of unmarried garment workers (both male and female) account for their families’ primary source of income. Moreover, 70% of workers have migrated from rural to urban areas because of a push or crisis, such as displacement from flooding or erosion, or because the prime income earner has been injured or fallen sick. All in all, it is clear that workers’ families can be expected to face enormous financial difficulties when a factory closes.

*Id.*

as prostitution, are also frequently inhumane or lead to inhumane standards of living. 84

The problem of displaced workers exists in both developed and developing nations, yet developing nations are often in more challenging circumstances. 85 In developed nations, as unemployment increases, displaced workers often receive monetary assistance and retraining. 86 Although retraining programs are not ideal, developing nations have no such option, as they do not have the economic stability to compensate displaced workers. 87 Many government representatives within developing nations are also reluctant to protect workers from human rights viola-

84. Id. Occupations of displaced workers often include prostitution, work in brothels, or other forms of sex work. See Tom Fawthrop, The Price of Free Trade Part II, Global Policy Forum, Oct. 1, 2004, available at http://yaleglobal.yale.edu/display.article?id=4627. See also Elizabeth Becker, Low Cost and Sweatshop-Free, N.Y. TIMES, May 12, 2005, at C1. These women workers will likely suffer unwanted pregnancies and sexually transmitted diseases at very young ages, effectively compromising their productive lives. One article tells the story of Neb Vicheka, “a 31-year-old union shop steward at the Sportex factory” in Bangladesh. Becker, supra. “She is one of the 250,000 garment factory workers in [Bangladesh], most of them female, and she has seen young women laid off from factory jobs end up as hostesses in Phnom Penh’s karaoke bars or beer gardens, a variant of prostitution.” Id. Other possible alternatives for these women include “tailoring, domestic work and office cleaning,” but these occupations do not provide the “comparatively high and consistent wages” that the textile and apparel industry provides. GLOBAL TRADE, supra note 1, at 181. It is clear that “the loss of garment jobs would translate into higher poverty and the loss of employment opportunities for women.” Id.

85. In the United States, for example, the evolution of the textile industry has affected the employment of workers in the textile industry. Lower priced textile products from Asian countries are causing the American manufacturers to replace American made garments with Asian imports. See Barboza & Becker, supra note 16. After the end of all quotas on textiles and apparel around the world, imports to the United States from China jumped about 75%, according to trade figures released by the Chinese government. Many plants in the United States have been forced to close, causing the displacement of workers. RIVOLI, supra note 4. During the period between 2000 and 2003, “the odds of losing a manufacturing job were fifty times higher than losing a job in the greater economy as a whole.” TED C. FISHMAN, CHINA, INC.: HOW THE RISE OF THE NEXT SUPERPOWER CHALLENGES AMERICA AND THE WORLD 178 (2005).


87. Whether it is due to economic difficulties or political instabilities, developing nations rarely have the ability to compensate displaced workers. See, e.g., Amy Waldman, Helping Hand for Bangladesh’s Poor, N.Y. TIMES, Mar. 25, 2003, at A1 (“[S]uccessive governments, burdened by inefficiency and corruption, have struggled to fulfill basic needs.”). Outside assistance is usually necessary. See id.
tions, arguing that domestic policies designed to protect workers decrease their nations’ competitive advantage and thus their capacity to obtain a place in the international market. Developing nations often pursue nationwide, aggregate economic development and global economic participation in the hope that they will eventually benefit the majority of the population.

88. Countries often focus on the international interests over the domestic interests in order to promote development. “In other words, the relationship between free trade and state regulations tends to be a zero sum game: if one is pushed too far, a benefit for one is likely to come at a cost to the other.” Cho, supra note 9, at 2. See also Kym Anderson, Environmental and Labor Standards: What Role for the WTO?, in INT. ORG., supra note 12, at 231, 231–34 (examining nations’ concern for their competitiveness rather than their protection of workers, labor standards, or the environment).

Many in developing countries perceive the entwining of . . . social issues with trade policy as a threat to both their sovereignty and their economies . . . . As international economic integration proceeds, pressure increases to reduce differences in domestic policies that have significant trade consequences. . . . In poor countries . . . people fear being forced to raise standards at an earlier stage of development than they would otherwise choose, thereby reducing their competitive advantage.

Id. at 231–32. Many argue that the competitive advantage helps nations find a place on the international market. See, e.g., Aun Porn Moniroth, Economic Integration in East Asia: Cambodia’s Experience, in EAST ASIAN VISIONS: PERSPECTIVES ON ECONOMIC DEVELOPMENT 17, 28 (Indermit Gill, Yukon Huang & Homi Kharas eds., 2006), available at http://siteresources.worldbank.org/INTEASTASIAPACIFIC/Resources/226262-1158262834989/EA_Visions_2.pdf (arguing that Cambodia will be best off if it pursues the benefit from the “exploitation of competitive advantage, economies of scale, competition, and innovation”).

89. See, e.g., DOHA WTO Ministerial 2001: Ministerial Declaration, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf (describing the result of WTO negotiations with developing nations, which are focused on general economic integration). Through various provisions of the Doha Declaration, WTO member governments demonstrate their dedication to the improvement of the general welfare of member governments. For example, the declaration states, “[w]e recognize that the integration of the LDCs into the multilateral trading system requires meaningful market access, support for the diversification of their production and export base, and trade-related technical assistance and capacity building.” Id. Each of these examples of benefits to LDCs is a means to promote the general welfare of the country, which is the only possible way for the WTO to address development for all member countries. Id. para. 1. See also Cho, supra note 9, at 1. Cho explains that “thanks to this expansion of international trade, many countries including newly industrialized economies . . . such as Korea, have been able to escape from the misery of poverty and dramatically raise their standards of living.” Cho, supra note 9, at 1.
III. EVIDENCE IN INTERNATIONAL LAW OF AN ENFORCEABLE ECONOMIC RIGHT TO WORK

Whether nations are permitted to ignore the immediate welfare of their citizens depends in large part on whether there is an enforceable right to work under the international framework. Economic rights developed under the human rights agenda, and an international covenant, guarantees the right to work as well as other economic rights. Even so, implementation of economic rights is difficult, and enforcement has not been pursued extensively. Despite the struggles with implementation and enforcement, the international community now publicly recognizes economic rights as human rights, and the economic right to work is directly applicable to the struggle of displaced workers.

A. The United Nations and Economic Rights

The United Nations Charter commenced an important movement in the codification of international human rights, which aided the early development of economic rights. Although the U.N. Charter does not explicitly use the term “economic rights,” the Charter provides the general no-
tion of economic development as a goal for the U.N.95 The Charter states that the U.N. will promote “higher standards of living, full employment, and conditions of economic and social progress and development.”96 These goals are not achieved without providing individuals the opportunity to pursue employment, maintain an income, and escape poverty.97

The U.N. Charter also gave explicit attention to economic and social issues by creating the Economic and Social Council (ESC) to conduct studies regarding matters that give rise to a decent standard of living.98 The U.N. created the ESC to “make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters.”99 The Charter also states that the ESC “may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.”100 Furthermore, the Charter commands the ESC to “set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.”101 Although not specifying economic rights, by granting the ESC the ability to make recommendations with regard to human rights, the Charter demonstrates an early association between economic standards and human rights.

B. Universal Declaration of Human Rights and the Economic Right to Work

The United Nations first used and defined the term “economic rights” in the internationally recognized Universal Declaration of Human Rights (UDHR).102 The UDHR states:

95. See, e.g., U.N. Charter, arts. 55(a), 62. The U.N. created individual bodies to report on economic issues and made economic development an important part of the international framework. See id. art. 62 (creating the Economic and Social Council).
96. See id. art. 55(a).
97. See RUPERT LEE & EDMUND JAN OSMANCZYK, ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 2459 (2003) (finding that the higher standards of living, full employment, and economic benefits have not been fully implemented because developing nations still contain a considerable amount of impoverishment and fail to obtain and distribute economic benefits to their citizens).
99. Id. art. 62.1.
100. Id. art. 62.2.
101. Id. art. 68.
Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.\footnote{UDHR, supra note 102, art. 22.}

Here, the UDHR is clearly and explicitly advocating economic rights.

The UDHR also specifically provides the right to work.\footnote{Id. art. 23.} Crucially, the UDHR states that “[c]everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”\footnote{Id. art. 25.} The UDHR further provides that:

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

These provisions not only present the right to work, they also obligate states to provide the right to compensation while unemployed. Although the document is only a declaration, providing no legally enforceable rights, many human rights activists argue that the U.N. Charter and the UDHR form obligations under customary international law.\footnote{HENKIN, supra note 92, at 322. Customary international law is the “product of State practice and \textit{opinio juris}, or the opinion of judicial authority that these practices are regarded as legally binding.” THOMAS R. VAN DERVORT, \textsc{International Law and Organization} 71 (1998). If states act in conformance with a norm, it becomes binding on all states as an obligation under international law. \textit{Id}.}

Regardless of their enforceability, it is undeniable that these documents offer the foundation for the international community’s definition of human rights and the framework for subsequent codifications of human rights.\footnote{See HENKIN, supra note 92. Several organizations around the world that pursue protection of human rights, such as the Human Rights Watch and Amnesty International, are based upon the principles enshrined in the UDHR. See Amnesty International: Working to Protect Human Rights Worldwide, About Amnesty International, http://web.amnesty.org/pages/aboutai-index-eng (last visited Oct. 14, 2005); Human Rights Watch, About HEW, http://www.hrw.org/about/whoweare.html (last visited Oct. 14, 2005).}
C. International Covenants and Economic Rights

The most important document enumerating and protecting economic rights is the International Covenant on Economic, Social, and Cultural Rights (ICESCR).\textsuperscript{109} Created by the U.N., the ICESCR and the International Covenant on Civil and Political Rights (ICCPR) govern human rights protection.\textsuperscript{110}

The ICESCR provides necessary economic rights for developing nations and the individuals therein, such as the right to work, “which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.”\textsuperscript{111} The ICESCR further requires nations to protect the right to work.\textsuperscript{112} Article 6 of the Covenant states:

\begin{quote}
The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.\textsuperscript{113}
\end{quote}

The ICESCR also provides a right to secure wages sufficient to support an adequate standard of living.\textsuperscript{114} These rights unambiguously protect displaced workers and require that their governments provide employment, training for employment, or compensation while unemployed.

D. Complications with the Acceptance and Implementation of the ICESCR

The ICESCR has faced complications regarding both its conception and enforcement. People did not conceptually accept economic rights as human rights, which was an impediment to the enforcement of the ICESCR, and nations struggled with the implementation of the ICESCR due to its unique enforcement mechanism.

1. ICCPR Versus ICESCR: It Should Never Have Been a Fight

Although the UDHR did not distinguish between economic or political rights, political pressures at the time caused a divergence between na-
tions regarding which rights, economic or political, were human rights. The disagreement forced the U.N. to make separate documents. The U.N. still intended the ICESCR to work in conjunction with the ICCPR, yet separating the rights created a hierarchy and a resulting preference for the more easily implemented political rights within the ICCPR. The ICCPR, however, fails to provide the means for poor individuals to seek immediate assistance in obtaining food or an income, and it fails to provide redress for a state’s failure to provide an adequate standard of living. Therefore, although the ICCPR provides rights in-

115. HENKIN, supra note 92, at 321. The ICCPR and ICESCR were created together after World War II to address the issues disputed in the war. See, e.g., FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS 2 (3d ed. 2002). The rights were separated into these two documents, rather than one comprehensive document, due to pressures from the international community subsequent to World War II. It was thought that the two sets of rights could not live and function together in one document. See HENKIN, supra note 92, at 1106 (noting that disputes arose regarding the rights to be codified as human rights). The disputes included “disagreement over whether the mechanisms for implementation of positive rights should differ from those for implementation of negative rights; Cold War rivalries; and the emergence of Third World states that perceived a link between economic and social rights and their striving for economic development.” Id.

116. HENKIN, supra note 92, at 1106.

117. SKOGLY, supra note 44, at 52. The Covenants’ creators struggled to promote the indivisibility of economic and political rights by giving the ICESCR and the ICCPR similar structures. See HENKIN, supra note 92, at 1106 (“[T]he General Assembly affirmed that both sets of rights were ‘interconnected and interdependent.’”). In the years that followed, however, many nations discouraged economic rights and instead focused on political rights. See Robert Howse & Makau Mutua, Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization, in HUMAN RIGHTS IN DEVELOPMENT: THE MILLENNIUM EDITION 51, 77 (Hugo Stokke & Arne Tostensen eds., 2001), available at http://www.ichrdd.ca/english/commdocs/publications/globalization/wtoRightsGlob.html. “[M]any governments and human rights groups in the West became unsympathetic and even hostile to the idea of economic and social rights as ‘rights.’ . . . Further, it was argued that, unlike civil and political rights, these rights were not justiciable in courts of law.” Id. See also Kitty Arambulo, The International Covenant on Economic, Social and Cultural Rights and the Committee on Economic, Social and Cultural Rights, in SOCIAL, ECONOMIC AND CULTURAL RIGHTS: AN APPRAISAL OF CURRENT EUROPEAN AND INTERNATIONAL DEVELOPMENTS 57, 58–60 (Peter Van der Auwerdaert ed., 2002) (noting the intention to make the ICCPR and ICESCR indivisible and interdependent through “similar structures and common links” and, despite this intention, the many diverging elements of the Covenants and how they reflect political differences).

118. See Johan D. van der Vyver, Human Rights in the Twenty-First Century: A Global Challenge, 8 EMORY INT’L L. REV. 787, 799 (1994) (book review) (arguing that although democratic rights may prevent extreme conditions that deprive the country of its sustenance, political rights cannot guarantee economic rights for individuals). Citizens within nations are often removed from the political process, and this separation makes it
integral to a democratic life, the rights are related to the economic and social rights within the ICESCR, and the two sets of rights are most effective if enforced in conjunction with each other. “[I]t is now widely recognized and accepted that a society that denies basic social and economic rights cannot be stable and democratic and respect civil and political rights.” Thus, the ICESCR’s rights must be a mandatory and necessary aspect of international law.

2. Struggles with the Implementation of the ICESCR

Despite the unequivocal existence of economic rights, the ICESCR’s aspirational enforcement mechanism impedes the implementation of the Covenant’s rights. The ICESCR prescribes “progressive realization,” difficult for citizens to gain recourse for their immediate need for employment. Id. Essentially, “what is the use of the right to vote while one has no food to eat”? Id.

Economic exploitation is prevalent, if not rampant, even in democratically governed societies, often with the open approval of the voters. Likewise, many third-world governments, from Honduras to Bangladesh, have preferred to turn a blind-eye towards the sweat-shop employers, mainly because they are a major source of employment and precious foreign exchange.

Rapanagunta, supra note 20.

119. The ICCPR recognizes several rights, including the right to self-determination, to life, to be free from slavery, and to take part in public affairs. ICCPR, supra note 110, arts. 1, 6, 8(1), 25(a). The Covenant also recognizes many rights of individuals, including the right to legal recourse when their rights have been violated, the right to life, the right to liberty and freedom of movement, the right to equality before the law, the right to presumption of innocence until proven guilty, the right to appeal a conviction, the right to be recognized as a person before the law, the right to privacy, and freedom of thought, conscience, religion, opinion, expression, assembly, and association. See id.

120. Howse & Mutua, supra note 117, at 78. See also A.M. Mahmudur Rahman, Domestic Application of International Human Rights Norms and Access to Justice: The Bangladesh Experience, in Developing Human Rights Jurisprudence Volume 8, Eighth Judicial Colloquium on The Domestic Application of International Human Rights Norms 55, 55 (2001) [hereinafter Rahman, Domestic Application]. “In some developing countries . . . democratic government, based on the will of the people exercised through their elected representatives, has been subject to not infrequent interventions by extra-constitutional authorities. For example, Bangladesh has been under military rule twice in less than 30 years since its independence.” Id. The result is that “the Constitution of the People’s Republic of Bangladesh has been suspended on several occasions.” Id.

121. Howse & Mutua, supra note 117, at 77–78.

122. See id. at 77 (“It has been part of UN doctrine that the entire family of rights—civil and political as well as economic, social and cultural—are indivisible.”).

rather than full and immediate implementation, as the means eventually to achieve the protection of the Covenant’s rights.\textsuperscript{124} Specifically, Article 2.1 of the ICESCR limits implementation by requiring member nations to undertake steps only “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.”\textsuperscript{125} The Committee on Economic, Social and Cultural Rights (Committee), the body charged with the task of regulating the ICESCR,\textsuperscript{126} has stressed that nations cannot use their lack of available resources as an excuse for failing to undertake measures to respect, protect, and fulfill the rights.\textsuperscript{127} One comment the Committee made in regard to Article 2.1 states:

In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources

\textsuperscript{124} See ICESCR, supra note 91, art. 2.2; compare ICCPR, supra note 110, art. 2. The ICCPR uses immediate implementation of rights and requires states, which do not have the rights already “provided for by existing legislative or other measures,” to “take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Id. See also Ineke Boerefijn, The Human Rights Committee’s Role in Strengthening the Implementation of the Covenant on Civil and Political Rights, in SOCIAL, ECONOMIC AND CULTURAL RIGHTS, supra note 117, at 127, 128–31 (noting the difference between the ICCPR and the ICESCR’s implementations, finding the ICCPR “does not permit long delays or sanction the idea of ‘progressive’ application over time”).

\textsuperscript{125} ICESCR, supra note 91, art. 2.1 (emphasis added).

\textsuperscript{126} See JAYAWICKRAMA, supra note 91, at 62 (noting that the Committee was created to address the ineffective reporting mechanism mandated in the ICESCR).

that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.128

Despite the Committee’s attempt to encourage enforcement, using available resources as a limitation on progressive realization nonetheless provides nations with an excuse for failing to implement economic rights.129 Furthermore, assessing progressive realization is a difficult task.130 Due to the lack of resources available to analyze data, the Committee would likely be forced to excuse nations that show a lack of profit-bearing industries capable of providing jobs.131

In addition to problems with progressive realization, disputes also arose regarding the implementation of economic rights, the relative importance of the different rights within the ICESCR, Cold War rivalries, and the repercussions of implementation on a country’s resources.132

128. Id.
129. Many critics argue that the Covenant provides no obligatory rights, and they blame, in part, the progressive realization implementation method of the Covenant. See Tigerstrom, supra note 123, at 11 (“[I]f we cannot be sure of how a state is supposed to give effect to its obligations under the Covenant, and avoid violating the rights contained therein, how can we design programs designed to assist in the protection and promotion of these rights?”).
130. See Chapman, supra note 123, at 1162–63.

[E]valuating the progressive realization of economic, social, and cultural rights is very complicated. It requires the availability of comparable statistical data from several periods in time to assess trends, preferably disaggregated in relevant categories, including gender, race, region, and linguistic group . . . the Committee [does not] have regular access to relevant statistical data collected by other parts of the U.N. system and the World Health Organization. Moreover, analysis of these data to evaluate performance, were they to be available, involves statistical expertise that members of the U.N. Committee on Economic, Social and Cultural Rights, staff of the U.N. Centre on Human Rights, and nongovernmental organizations generally lack.

Id.
131. See, e.g., id. See also Fernando Alvarez de Miranda y Torres, Human Rights and Their Function in the Institutional Strengthening of the Ombudsman, in Ombudsman, supra note 123, at 146, 150 (“[T]here is no] procedure for interposing an interstate claim or individual claims . . . . There is no possibility of sanctioning those countries that do not fulfill their duties and the procedure [of reporting to the Committee] only aims at initiating dialogue between the supervisory agency and the states.”).
132. Henkin, supra note 92, at 1106. The disputes also reflected both a “disagreement over whether the mechanisms for implementation of positive rights should differ from those for implementation of particular rights . . . and the emergence of Third World states that perceived a link between economic and social rights and their striving for economic development.” Id. There have also been disagreements regarding whether the “right to work is satisfied if a society maintains or tolerates unemployment but provides adequate unemployment insurance and other welfare benefits.” Id. at 329.
Economic rights challengers complain that the financial costs of implementing economic rights are too high because they will detract from the nation’s resources and lead to “an overgrown state apparatus.”133 Many nations thus argue that a state must only provide a legal framework which encourages fairness and prohibits fraud, but leaves the responsibility of career selection to each individual.134

The obstructions to implementation are compounded by the “situation of persistent non-reporting by States.”135 States are required to submit reports to the Committee, but it is difficult to monitor the implementation of the rights, or the lack of available resources, if nations fail to submit reports.136

The implementation of economic rights, such as the right to work, remains, in essence, voluntary.137 Nations are not required to incorporate economic rights into their domestic laws, and they are rarely held ac-
countable for violating economic rights.\textsuperscript{138} Presently, a state must have the ambitious will to establish legal guidelines for these rights and a willing judiciary to enforce them.\textsuperscript{139} The courts of a nation will be unreceptive to complaints if there are no codified economic rights.\textsuperscript{140} Furthermore, a worker’s opportunity to adjudicate his or her claims in the international judicial system is limited because the International Court of Justice (ICJ) may only adjudicate issues between nations, not complaints between an individual and a nation.\textsuperscript{141} Unless a third-party nation chooses to take the displaced worker’s nation to the ICJ for noncompliance, and the violating nation agrees to submit to its jurisdiction, or they

\textsuperscript{138} See ICESCR, supra note 91, art. 2.1 (requiring nations only to undertake steps, rather than requiring nations to incorporate the rights into domestic law). This differs from the immediate implementation of the ICCPR. See Boereefijn, supra note 124, at 128–31 (noting that the ICESCR’s lax method for implementation in comparison to that of the ICCPR); supra note 124 and accompanying text. It is also important to note that voluntary implementation of economic rights has not yet risen to the level of customary international law. For a practice to become enforceable under customary international law, it must be a widespread practice among nations. See, e.g., Statute of the International Court of Justice, art. 38(1). See Christian J. Tams, Enforcing Obligations Erga Omnes in International Law (2005) for more on the history and implementation of customary international law practices.

\textsuperscript{139} Skogly, supra note 44, at 55. See also India Const. arts. 39, 41, 42. Although unenforceable in the courts, India’s constitution secures the right to work to the extent it is economically feasible and just. Furthermore, it guarantees humane conditions of work where work is secured. See also S. Afr. Const, Ch. 2, §§ 23(1), 22. Section 23 guarantees the right to fair labor practices, and section 22 guarantees the freedom to choose a trade, occupation, or profession. Id.

\textsuperscript{140} Few nations have created a judicially enforceable right to work in their domestic laws. See supra notes 138–39 and accompanying text. Nations will likely be unwilling to entertain cases regarding rights they have not codified. Furthermore, many nations that respect international law consider municipal law to be at a higher level of enforcement than international law, and if there is a conflict, municipal law will win. See, e.g., Mukul Madgal, Prisons and Custody: Application of International Human Rights Norms by the Supreme Court of India, in Developing Human Rights Jurisprudence, supra note 120, at 127, 128–29 (“[w]hen [the Rules of International Law] run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constitutional legislatures in making the laws may not be subjected to external rules . . . . Comity of nations or no, Municipal Law must prevail in case of conflict.”) (quoting Gramaphone Company of India Ltd v. Birendra Bahadur Pandey, A.I.R. 1984 S.C. 667 (India)). Developing nations are also often unable to assert certain democratic principles due to military rule. For example, in Bangladesh, “[a] result of military rule, democracy was destroyed and judicial activism in enforcing fundamental rights severely curtailed, with a consequent denial of access to justice.” Rahman, Domestic Application, supra note 120, at 55. Therefore, implementation of a right which is inherently controversial will most likely fail in unstable nations like Bangladesh.

\textsuperscript{141} Statute of the International Court of Justice, art. 34 (“Only states may be parties in cases before the Court.”).
agree to submit to the jurisdiction of another nation’s courts, the worker has few options. Therefore, displaced workers can point to the ICESCR, but they are unable to voice their complaint or seek redress.

E. Finding a Solution: Something More Immediate

Notwithstanding the arguments against economic rights, the ICESCR was “designed to establish, and did establish, legally binding obligations.” Although implementation may be problematic, this does not reduce the binding nature of the economic right to work and the state’s duty to protect the right and thus ensure its maximum potential. The tension between obligatory enforcement and the reality of nations’ actions dictates the solution.

Creating a new covenant for economic rights with a modified enforcement mechanism is an unlikely prospect. Disagreements regarding the current enforcement mechanisms would most likely impede progression.

142. The ICJ requires consent for nations to be party to a suit. Id. art. 36. There are also potential standing restrictions if a third party wishes to take a state to the ICJ for violating the rights of workers. There would be no standing to represent the displaced worker. As an alternative, a party may attempt to sue a violating nation in a court of a third-party nation, but in that case, the nation would have no jurisdiction. One option is to propose universal jurisdiction, but “universal jurisdiction is reserved for the most heinous crimes.” STEPHEN MACEDO, Introduction to Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law 1, 8 (Stephen Macedo ed., 2004) [hereinafter Universal Jurisdiction]. It is unlikely that courts will view the right to work as a “heinous crime” or a crime giving rise to the necessary level of concern required for universal jurisdiction to apply. See A. Hays Butler, The Growing Support for Universal Jurisdiction in National Legislation, in Universal Jurisdiction, supra, at 67, 68 (noting that crimes against humanity and genocide justify the use of universal jurisdiction). Furthermore, “sovereign immunity protects both foreign and domestic governmental actions. It places the legitimate exercise of governmental authority above the private rights of individuals or corporations to recover damages in civil legal actions.” DERVORT, supra note 107, at 309. Therefore, a nation cannot be sued in the courts of another nation by the principle of sovereign immunity. So long as the alleged actions are not commercial, the doctrine provides immunity from the jurisdiction unless the nation consents. Id. at 305.

143. HENKIN, supra note 92, at 329.

144. Id. at 1118 (“[O]bligations [regarding social and economic rights] exist and can in no way be neglected.”). Because the rights are binding, a state must do all it can to protect and enforce that right. See Eide, supra note 133, at 1115–18 (describing the state’s obligations in enforcing economic, social, and cultural rights, including respecting resources of individuals and protecting the resources against others).
towards a new draft of the ICESCR. Most nations would ask for less specific regulations, rather than more.

The international community needs a unified interpretation of ICESCR's right to work. The available resources requirement of the ICESCR must be interpreted to require nations to allocate resources in the manner most effective for economic security and maximum employment. Although it is impossible to provide a job for each person, a state need not employ each person to be in compliance. Compliance should be regarded as allocating and securing adequate resources so that the maximum amount of individuals will be able to pursue their right to work.

Furthermore, although free trade proposes an eventual natural remedy through the market, reliance on the eventual benefits from free trade

145. Eide, supra note 133, at 330.
146. The ICESCR's requirement of available resources “can be empirically investigated to prove the frequent assertion that it is not the lack of available resources, but their misallocation . . . which hampers the realization of human rights.” THE RIGHT TO FOOD 157 (Philips Alston & Katarina Tomaševski eds., 1984).
148. See, e.g., Stark, supra note 147, at 127 (“[All nations must] meet the subsistence needs of their inhabitants.”). See also note 144 and accompanying text.
149. Eide, supra note 133, at 1116. Eide argues that states are not obligated to provide a job for each individual. The individual must pursue employment through his own efforts and use of resources “to find ways to ensure the satisfaction of his or her own needs, individually or in association with others. Use of his or her own resources, however, requires that the person has resources that can be used.” Id.
150. See Tigerstrom, supra note 123, at 12. The economic rights do not have to be equated with their goal of full implementation. Individuals can be protected without having each person enjoy the full extent of the right. Id. See also Henkin, supra note 92, at 1116. For example, “States must, at the primary level, respect the resources owned by the individual, her or his freedom to find a job of preference and the freedom to take the necessary actions and use the necessary resources—alone or in association with others—to satisfy his or her own needs.” Id.
151. See Frequently Asked Questions About Free Trade, http://www.fretrade.org/faqs/faqs.html (last visited Nov. 27, 2006). The CATO Institute claims that free trade aids nations because:
The implementation of economic rights should focus on ensuring “that the multilateral trade regime allows people to fully benefit from the potential contributions that trade can make to human development.”

IV. THE UNITED NATIONS DEVELOPMENT PROGRAM, ECONOMIC DEVELOPMENT, AND INDIVIDUALS’ RIGHTS

Many human rights advocates have attempted to advance human rights protections and promote economic development, yet no programs or initiatives have been able to assist a nation at its most crucial moments. For example, the United Nations Development Program (UNDP), created by the U.N.’s Economic and Social Council, helps nations promote human rights and economic development by addressing issues arising out of the uneven distribution of wealth among nations. The UNDP is described

[W]herever globalization has taken hold, there has been a measurable improvement in incomes and working conditions. First, the competition that accompanies globalization provides an incentive for local employers in developing countries—the overwhelming source of labor abuses—to improve their practices. As foreign-owned businesses move into a country, they pay their workers more and provide a superior working environment in order to attract the best people. If they are to survive, local employers are forced to improve pay and working conditions, too. Second, Western businesses know that treating workers poorly is bad for business back home. American consumers demand that US companies respect worker rights, and US companies producing abroad pressure their local suppliers to do the same—a truly virtuous cycle. Without trade, that beneficial consumer pressure evaporates.

Id. Although free trade doctrines and implementations differ, the idea that free trade assists all nations is present in most doctrines. See GLOBAL TRADE, supra note 1, at 25 (“The common thread in these different [free trade] theories is that trade can contribute to growth by expanding markets, facilitating competition and disseminating knowledge.”).

152. See BROWN, supra note 9, at 134. The actions of developing nations demonstrated “a growing recognition among governments of the value that greater integration into the world market system held for their own economies.” Id. Yet, many developing nations faced significant difficulties improving the standards of the individuals within their nation. Id.

153. GLOBAL TRADE, supra note 1, at 16.

154. See United Nations Development Programme, Who We Are & What We Do, A World of Development Experience, http://www.undp.org/about (last visited Oct. 17, 2006). The UNDP works in conjunction with the World Bank, the International Monetary Fund, civil society, and others to help nations “attract and use aid effectively.” Id. The UNDP also promotes human development through “observations and experiences from around the world leading to a common understanding that places human beings at the centre of development concerns, in contrast with the primary pursuit of economic ends.” Anuradha K. Rajivan, Movement of Natural Persons for Human Development 3 (United Nations Development Programme, 2006).
as “the UN’s global development network, an organization advocating for change and connecting nations to knowledge, experience and resources to help people build a better life.”

The UNDP has had considerable success in implementing greater awareness of economic rights and higher standards of living within many developing nations.

The UNDP works towards a balance between globalization and development. Towards that end, the UNDP promotes the belief that development is multi-disciplinary, focusing on people, not markets and incomes. The UNDP also supports the hope that open markets will eventually provide economic stability.


155. United Nations Development Programme, Who We Are & What We Do, supra note 154.


The hope is to raise awareness and participation by developing nations in order to promote the protections of human rights. See id.


At a very fundamental level, the UNDP expects that nations provide their citizens with the opportunity for a long and healthy life, an education, and a decent standard of living. According to the UNDP doctrine, additional opportunities for the advancement of human dignity include the choices to participate in society, obtain political freedom, guarantee human rights, and maintain self-respect. Id.

158. The UNDP pursues human development through various means including, but not limited to, economic growth. See Human Development Report, supra note 157 (asserting that economic growth is essential if society is to sustain the welfare of its people, but this growth must be translated into improvements in people’s lives).

159. See Rajivan, supra note 154, at 6–8 (describing the UNDP’s method for human development and the eventual benefits free trade will provide). For example, the article describes the Millennium Development Goals put forth by the UNDP and how these goals in conjunction with the open markets will promote positive human development. Id. The article cites the “goal of eradicating extreme poverty and hunger, which is linked to opportunities for livelihoods among the relatively deprived sections of the population.”
The UNDP, however, is most adept at assisting nations that have established significant development. The UNDP acknowledges that growing nations will benefit more from free trade, and it views “integration into the world’s economy [as] an outcome, not a prerequisite, of a successful growth strategy.” Furthermore, the UNDP does not attempt to address economic adjustment or trade concerns, which are the sources of a nation’s unemployment. The UNDP is able to assist only after a nation has adjusted to the shifting market and established economic stability. As a result, it is difficult for the UNDP to provide adequate assistance for a nation like Bangladesh until its economy is stable and able to provide employment. Thus, despite the UNDP’s high levels of

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160. GLOBAL TRADE, supra note 1, at 27–28 (“Better human development outcomes, in the form of improved capabilities as the result of a healthier, better-educated and more skilled work force, with a strong focus on knowledge creation, contribute to higher economic growth and better trade outcomes.”). For example, Vietnam experienced an easy transition into the global economy, attributed to their initial development. “[Vietnam] has been phenomenally successful, achieving GDP growth of more than 8 percent a year since the mid-1980s, sharply reducing poverty, expanding trade at double-digit rates and attracting considerable foreign investment. And despite high trade barriers, it has rapidly integrated with the global economy.” In comparison, Haiti undertook comprehensive trade liberalization in 1994. The country reduced import tariffs and removed all quantitative restrictions. “Yet [Haiti’s] economy has gone nowhere, and its social indicators are deteriorating. Despite being a WTO member, it has made little progress in integrating with the global economy.” Id. The UNDP attributes Haiti’s difficult integration to its already poor economy. Id.

161. GLOBAL TRADE, supra note 1, at 28.

162. Participants in the UNDP are focused on general economic development, yet the UNDP does not implement economic policies. The goals for the UNDP, which they have termed as “the Millennium Project,” include eradicating extreme poverty and hunger, achieving universal primary education, promoting gender equality, empowering women, reducing child mortality, and improving maternal health. Millennium Project, Goals and Targets, http://www.unmillenniumproject.org/reports/goals_targets.htm (last visited Nov. 27, 2006).

163. See GLOBAL TRADE, supra note 1, at 28 (demonstrating that the UNDP assists nations who have stable governments and potential for economic growth).

achievement towards promoting human development, the program can address only limited aspects of ICESCR compliance.\footnote{165}

In addition to the current assistance provided by the UNDP, displaced workers deserve an immediate solution to the problems resulting from the shifting market. Trade causes the displacement of workers; thus the forum regulating trade is the most appropriate to address the allocation of resources, the effects of trade on nations, and the cause of displaced workers.

V. IMPLEMENTING ECONOMIC RIGHTS UNDER THE WTO FRAMEWORK

The WTO controls all aspects of trade liberalization and is thus the most suitable forum for addressing the displacement of workers. Admission into the WTO is highly regarded and deemed necessary to engage in contemporary trade.\footnote{166} Therefore, enforcement through the WTO has the potential to encourage greater implementation of economic right protections within nations.\footnote{167} Furthermore, if the WTO requires compliance with resource distribution provisions that are contrary to a nation’s desires, the nations will likely relinquish a limited amount of territorial sovereignty in order to maintain the other benefits of WTO participation.\footnote{168}

A. Current Provisions Addressing Human Rights

The limited measures the WTO provides to protect human rights are too narrow to adequately address economic rights and displaced workers.

\footnote{165. See, e.g., \textit{id}.}

\footnote{166. Many nations fulfill difficult requirements to obtain WTO membership. See World Trade Organization, Understanding the WTO: The Organization; Membership, Alliances and Bureaucracy, \url{http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm#join} (last visited Nov. 18, 2006), for a description of the requirements. For a full list of the member nations, see \textit{Members and Observers, supra} note 37. Despite any apprehension towards the requirements, the benefits are substantial. “The World Bank argues that WTO membership will strengthen government reforms, assist the private sector, and improve the investment climate.” \textit{Fawthrop, supra} note 84.}

\footnote{167. The current enforcement mechanism merely requires reporting to the Committee on Economic, Social and Cultural Rights. See ICESCR, \textit{supra} note 91, art. 16(1). \textit{See also} Chapman, \textit{supra} note 123, at 1160–67 (noting the limited monitoring and the difficult evaluating nations under the current structure); Tigerstrom, \textit{supra} note 123, at 13 (explaining the ineffectiveness of the reporting method); \textit{supra} notes 129–31 and accompanying text.}

\footnote{168. International law recognizes the sovereignty of nations, which gives them the right to manage international affairs, adopt any national law regarding its citizens and property, and the right to independently govern. \textit{R.P. Anand, International Law and the Developing Countries: Confrontation or Cooperation?} 80 (1987). For a discussion on sovereignty, international law, and developing nations, see \textit{id.} at 72.}
The original trade agreement, GATT, was created without full consideration for human rights and thus had no protections in place. In response to the human rights concerns that subsequently developed, the GATT agreement incorporated provisions recognizing supervening, non-trade, public values. GATT’s Article XX states, “Nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect public morals [or] necessary to protect human, animal or plant life or health.” These values are intended to prevail where there is conflict with free trade rules. The provision, however, fails to “address . . . human rights per se.” The provision has been interpreted narrowly and is applicable only to limited situations that do not include violations of an individual’s human rights.

169. See INTERNATIONAL FORUM ON GLOBALIZATION, ALTERNATIVES TO ECONOMIC GLOBALIZATION: A BETTER WORLD IS POSSIBLE 65 (2004). GATT was created to promote the expansion of trade and eventually began to “promote[ ] corporate rights over human rights and other social and environmental priorities.” Id. See also Howse & Mutua, supra note 117, at 62 (“Institutionally, the GATT developed in isolation, a fact which produced a single-minded free trade perspective.”). A more recent trend, however, is to acknowledge the possible conflict between promoting development and human rights violations, although the interest in human rights is admittedly mostly limited to political rights. See Philippe Sands, Sustainable Development: Treaty, Custom, and the Cross-Fertilization of International Law, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 39, 45 (Alan Boyle & David Freestone eds., 1999).

170. GATT, supra note 24, art. XX.

171. Id. art. XX(a). Article XX was intended for agriculture quarantine and other sanitary regulations, yet environmental advocates attempted to apply the article to measures taken in support of marine life. Lori Wallach, Hidden Dangers of GATT and NAFTA, in THE CASE AGAINST “FREE TRADE”, supra note 35, at 23, 33. If it would have succeeded with marine life, it would have been easier to apply it to other intervening factors as well.

172. GATT, supra note 24, art. XX. The article was construed to mean that the protective “measures might only be justified under Article XX if no less trade restrictive alternatives could be imagined to achieve the policy objectives in question.” Howse & Mutua, supra note 117, at 62. Even if the proposed measures were not possible to implement, so long as they were imaginable, they would satisfy the provision and thus prevent the trade restrictive measures. See id. (“[N]eo-classical economists can almost always find some policy instrument other than trade restriction that could hypothetical, and without regard to real world costs, achieve a given policy objective, this interpretation amounted to making Article XX largely superfluous.”). Thus, this limited justification fails to restrain countries. See id.


174. Id.
In addition to Article XX, the WTO provides special protections for nations designated as the Least-Developed Countries (LDCs). These protections include training courses, seminars, and workshops available through the WTO. These programs, however, “are not automatic . . . and must be requested by the member concerned.” Often, political and economic barriers prevent nations from seeking out assistance, and they fail to experience the full potential of the benefits offered by the WTO.

B. Proposed Solution

The WTO is capable of coordinating many nations and many forms of assistance for the benefit of developing nations. By controlling trade negotiations, trade conduct, and many multilateral institutions, the WTO can therefore provide a wide breadth of opportunities for developing nations. The WTO can provide special considerations for developing nations in negotiations. In addition, the WTO’s established and funded system of assistance for developing nations provides a working framework within which a new provision can be added. A new provision can

175. World Trade Organization, Preferential Tariff Treatment for Least-Developed Countries, available at http://www.wto.org/english/docs_e/legal_e/waiver1999_e.htm (last visited Nov. 27, 2006). The waiver allows exceptions “to the extent necessary to allow developing country Members to provide preferential tariff treatment to products of least-developed countries, designated as such by the United Nations, without being required to extend the same tariff rates to like products of any other Member.” Id. For the nations recognized by the WTO as LDCs, see World Trade Organization, Understanding the WTO: The Organization; Least-Developed Countries, http://www.wto.org/english/thewto_e/what_is_e/tif_e/org7_e.htm (last visited Nov. 18, 2006).


178. For many years there were many regulatory and administrative impediments to foreign investment in Bangladesh. See Rahman, Domestic Application, supra note 120, at 55 (noting the governmental corruption and the impediments created in the pursuit of equality and democracy). These impediments most likely prevented the Bangladesh government from seeking assistance from the WTO.


180. See CONSTANTINE MICHALOPOULOS, DEVELOPING COUNTRIES IN THE WTO 153 (2001). From the time the WTO was established there was “growing appreciation of the importance of observing international rules in the conduct of trade as well as the need to safeguard trading interest through effective participation in the activities of the new or-
make the existing assistance programs mandatory, thereby creating additional protections for displaced workers. Mandatory assistance will force developing nations to seek the most favorable method of adjusting to the changing market. The mandatory assistance will also encourage faster solutions, and nations will be able to provide more effective and immediate protections for displaced workers.

Towards that end, developing nations should be required to take the training courses, seminars, and workshops available through the WTO. These courses, offered to nations’ government leaders, provide necessary tools for developing nations to pursue the most advantageous method of implementing change. The courses should provide counseling regarding the best economic policies to promote diversification, easy adjustment to free trade, and methods for attracting foreign investment.

181. Economists suggest that the market will eventually provide a solution. For example, critics argue that:

The Chinese government may decide that it does not want to be seen primarily as a source of cheap clothing, and thus may force factories to raise prices and aim at a higher segment of the market . . . . This would ensure that big companies like Wal-Mart and other would maintain a strong presence in places like Bangladesh and Cambodia.

Tracie Rozhon, A Tangle in Textiles, N.Y. TIMES, Apr. 21, 2005, at C2. Even so, nations must seek assistance in adjusting to the change in order to maximize the use of their resources.

182. Outside, experienced assistance should provide better economic policies to developing nations who are unable to seek out help independently. Furthermore, better economic policies will promote integration into the market, thereby providing jobs for displaced workers.

183. WTO Training Courses, supra note 176.

184. The WTO offers seminars, workshops, technical missions, briefing sessions, and technical cooperation in electronic form. See Activities of WTO Technical Cooperation, supra note 180.

185. “Least developed countries require . . . increased external resources to generate employment, especially for women,” such as those who are displaced from the textile industry. Press Release, U.N. General Assembly, Speakers Stress Need to Help Developing Countries Build Human Resources, Jobs, Business Skills for Women as Second Committee Takes up Poverty Eradication, U.N. Doc. GA/EF/3130 (Nov. 14, 2005), available at http://www.un.org/News/Press/docs/2005/gaef3130.doc.htm. For example, one of the most beneficial methods of immediate assistance is microfinancing. Microfinancing is a process where institutions “of various types provide small loans in the order of several tens to several hundreds of dollars.” MICHAEL KLEIN & BITA HADJUMICHAEL, THE PRIVATE SECTOR IN DEVELOPMENT: ENTREPRENEURSHIP, REGULATION, AND COMPETITIVE DISCIPLINES 84 (2003). For an account of microlending in Bangladesh, see
These courses should help nations learn to use the available resources and find industries in which they can gain a market share. In addition, by helping nations diversify their economies, courses will better prepare nations for market shifts in the future, thereby insulating citizens’ economic right to work.\textsuperscript{186}

Nations should also be required to provide proof to the Committee governing the ICESCR of courses taken and the resulting protections that are implemented for displaced workers.\textsuperscript{187} More consistent monitoring will ensure compliance with the ICESCR, and it will also provide documented progression for the benefit of the WTO and other nations.\textsuperscript{188}


[Microfinancing directly assists poor individuals by providing] a small credit line to finance a small business. These “Grameen Banks” have been particularly beneficial to poor rural women who could not normally qualify for a bank loan. Instead of dispersing the loans to one woman, the banks have, instead, given the loans to groups of women who “exert pressure for repayment” on one another. With these loans, poor [workers] have the once inconceivable option of starting their own businesses and, thus, taking an active role in the economic future of the country.


In fact, in October 2006, “a Bangladeshi economist, Muhammad Yunus, was awarded the Nobel Peace Prize for establishing microcredit on a widespread basis in his poverty-stricken South Asian country starting in the 1970s, and for inspiring its spread to other countries.” Joseph P. Fried, \textit{From a Small Loan, a Jewelry Business Grows}, \textit{N.Y. Times}, Nov. 12, 2006, § 10 (Job Market), at 1. For a full description of microcredit in Bangladesh, see Shahidur R. Khandker, \textit{Fighting Poverty with Microcredit: Experience in Bangladesh} (1998). Despite microcredit’s success, many microlending institutions have experienced resistance from the Bangladeshi government. For example, the Bangladesh Rural Advancement Committee (BRAC) has been working in Bangladesh to provide 3.5 million women with microcredit. Yet, many “businesspeople have accused BRAC of elbowing in on their fields, especially banking. The government has accused another large group, Proshika, of political partisanship and . . . held up $40 million in donor funds while it investigates.” Waldman, supra note 87.

\textsuperscript{186} Diversification will prepare nations for future market shifts because they will not be focused on only one industry. \textit{See} \textit{Global Trade}, supra note 1, at 175. \textit{See also} supra note 28 and accompanying text.

\textsuperscript{187} ICESCR, supra note 91, art. 16. \textit{See also Economic Committee, supra} note 127 (addressing reporting and implementation of the ICESCR). The reporting requirement of the ICESCR should not be reduced or eliminated. To the contrary, it should be upheld and further promoted to ensure nations’ compliance.

\textsuperscript{188} \textit{See Economic Committee, supra} note 127. The documented progression will provide a means for analyzing which programs are offering valuable assistance to developing nations and it will also provide a basis for comparison with other nations so that economic policies can be harmonized.
In addition, the provision must offer protections and incentives to nations when negotiating the rules of trade conduct. For example, when nations are negotiating, the provision can provide a presumption in favor of developing nations who are experiencing significant loss. If a developing nation requests a limited tariff reduction and another nation requests additional tariffs, the provision will provide the measures in favor of the developing nation.\(^{189}\)

To illustrate, America’s remaining textile producers and clothing manufacturers protested certain liberalization measures, asking for continued tariffs in order to contain the surge of cheap imports from other nations.\(^{190}\) However, “the least developed countries want [greater tariff reduction], notably a fixed date by which rich countries would move to allow duty-free, quota-free imports in 100 percent of their categories. Rich countries have only been willing to set this as an eventual goal.”\(^{191}\)

To accomplish the goals for developing nations and displaced workers set out above, the developing nations should win in this debate and receive the date at which tariffs will be eliminated. In exchange, the requesting nations must provide documented proof to both the WTO and the Committee of measures taken to use the tariff to promote diversification or foreign investments.\(^{192}\) The measures requested from developing nations, however, must conform to the WTO’s rules on liberalization, and nations cannot seek unreasonable protectionist measures that would impede free trade.\(^{193}\)

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\(^{189}\) World Trade Organization, Understanding the WTO: Developing Countries; Some Issues Raised, http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm (last visited Nov. 21, 2006). Developing nations share common interests in the textile and apparel industries. Therefore, the provision can institute policies which assist all developing nations involved in the WTO.

\(^{190}\) See Rozhon, supra note 181.


\(^{192}\) Documentation will encourage proper use of resources. Nations are often unable to adequately implement changes because of inexperience. Furthermore, “[u]ncertainty surrounding [developing] countries’ treatment of direct foreign investment creates an unfavorable climate for investment in LDCs.” Patricia McKinstry Robin, The Bit Won’t Bite: The American Bilateral Investment Treaty Program, 33 Am. U. L. Rev. 931, 935 (1984). If the developing nations are monitored, the investments will be properly utilized. See id.

\(^{193}\) For example, the WTO permits tariffs. See TAR: What Is Market Access, http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto02/wto2_45.htm#note2 (last visited Nov. 21, 2006). A developing nation, however, should not be permitted to pursue security through reinstating quotas that were phased out by the MFA.
VI. CONCLUSION

In the pursuit of free trade, nations have experienced extreme gains and losses, and many economists consider the losses to be a necessary part of advancement. The detrimental effects faced by displaced workers, however, cannot be overlooked and regarded as an insignificant byproduct of the pursuit of liberalization. This byproduct is not only a human struggle; it is a struggle of people who are protected under international law. Displaced workers have a legal right under the ICESCR, and this right must be promoted to the maximum extent possible.

Therefore, despite the problems with ICESCR enforcement, developing nations must be accountable for their economic choices and offer protections for their citizens through the opportunities that trade provides. Industries have shifted and nations’ economic decisions will determine the future of their economic development and their ability to utilize foreign assistance. The proposed solution requires that nations, like Bangladesh and other affected nations, acknowledge their citizens’ right to work, and implement change without sacrificing the nation’s resources. Only then will nations be in compliance with the ICESCR.

Displaced workers’ rights, however, cannot come at the expense of free trade development. Free trade must be promoted as displaced workers’ rights are simultaneously protected. Towards that end, any measures taken must help nations adapt to the future of trade, rather than impede the progress of liberalization. This Note’s proposed solution of requiring participation in assistance programs and presumption in favor of developing nations also avoids the difficulties surrounding protectionist measures and quota restrictions which impede liberalization. Such protectionism injures all trading partners, impedes the growth of the global economy.

194. Free trade is essential to the progression of the global economy and the long-term economic stability for developing nations. See, e.g., Daniella Markheim, *Just the Facts: Debunking Some Myths About DR-CAFTA*, WebMemo (The Heritage Foundation, Wash., D.C.), June 16, 2005, available at http://www.heritage.org/Research/TradeandForeignAid/jtf5.cfm (citing the benefits of free trade). Trade “stimulates growth, improves investment and job opportunities, and leads to rising living standards . . . farmers, manufacturers, banks, and other service providers will become more competitive, have access to new markets, and benefit from stronger protection of property rights.” Id. Participating nations will be able to “develop and modernize their economies. This, in turn, will generate greater demand for U.S. goods and services.” Id. “[C]ountries adopting freer trade policies experienced higher average growth (2.8 percent) between 1995 and 2003 than countries that did nothing (2.4 percent) or that reduced their openness to trade (1.4 percent).” Id. (citing Index of Economic Freedom 2005).
economy, and injures the greater potential for securing the right to work in the future.\footnote{Protectionist measures are not effective because they hurt both the nation implementing the measure and the nation against which the action is taken. See, e.g., Fidelis Ezeala-Harrison, Theory and Policy of International Competitiveness 23 (1999) ("[I]t must be stressed that protectionist measures amount to implementation of uncompetitive actions . . . . Thus, the adoption of trade protectionist measures are apt to reduce the relative international competitiveness of a country."); Edward L. Hudgins, The Fundamental Freedom to Trade, in Freedom to Trade (Edward L. Hudgins ed., 1997), available at http://www.freetrade.org/pubs/freerotrade/chap1.html ("What is needed today is a refutation of new protectionism. Americans should understand that, as the world economy becomes more integrated, only free trade internationally and free markets domestically hold the promise of increasing living standards and productive job opportunities in the future.").}

The proposed solution acknowledges that human rights and economics may sometimes present conflicting interests but maintains that the two need not be separated. Economics is a powerful resource, with an enforceable body supporting its growth. Although it cannot always provide immediate solutions for individuals, it provides the most effective method for pursuing enduring solutions for protections of economic rights. Rather than divide economics and human rights, WTO nations will find they have a powerful tool for assisting developing nations pursue economic security, which will thereby secure the economic rights guaranteed to their citizens under international law.

Aleah Borghard*
MOTION PICTURE PIRACY IN CHINA:
RATEDARRRGH!

I. INTRODUCTION

Once viewed by many cultures as the sincerest form of flattery, copying is now universally considered an unforgivable crime.\(^1\) In fact, copyright theft has become “the largest irritant in the [multi-billion dollar] annual commercial relationship between the United States and China,”\(^2\) accounting for a loss of nearly $250 million in revenue in the United States each year. Blame it on Confucius.\(^3\) Blame it on poverty.\(^4\) Blame it on ignorance.\(^5\) Blame it on a weak police force.\(^6\) No matter how you spin it, the excuses boil down to the same basic tenet: copyright infringement is a serious problem in China and it is having an even more

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3. Peter K. Yu, From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century, 50 Am. U.L. Rev. 131, 165 (2000); K.C. Swanson, supra note 1 (explaining that in Chinese history, copying had a positive connotation, especially in the arts, and under Communism people were taught to share their resources). See also William P. Alford, To Steal A Book Is An Elegant Offense: Intellectual Property Law in Chinese Civilization 29 (1995) (explaining that in ancient Chinese civilization, copying was indicative of one's appreciation for the work of a particular author; copying “bore witness to the quality of the work copied and to its creator's degree of understanding and civility.”).
5. See Seth Faison, China Turns Blind Eye to Pirated Disks, N.Y. Times, Mar. 28, 1998, at D1 (discussing that Chinese storeowners and consumers often do not realize the implication that piracy is criminal. One storeowner defended herself saying, “There’s nothing wrong with selling pirated VCD’s. My son loves watching them.”).
serious impact on American industries, particularly the motion picture industry. In fact, the motion picture industry faces a 95 percent piracy rate in China each year, which means that 95 percent of all American home videos and films sold in China are illegal copies.

The Chinese economy, in turn, has become dependent upon revenues from piracy, thus fueling its popularity. Some estimates attribute about one-third of China’s GDP to piracy and counterfeiting. The profits are so great that many pirates, akin to drug dealers, will take huge risks to attain them and do not see anything wrong with their acts. And while

7. See, e.g., Pirates of the Caribbean: The Curse of the Black Pearl (Walt Disney Productions 2003); Peter Pan (Walt Disney Productions 1953); Hook (Columbia Pictures 1991); Treasure Island (Walt Disney Productions 1950); The Goonies (Warner Brothers 1985).


11. Seth Faison, supra note 5, at D1. In his article, Faison compares pirates to drug dealers and explains that:

‘[P]rofits are so great, [pirates] will take any risk . . . they’re like drug dealers. It is very difficult to arrange a crackdown. You have to coordinate all these different departments, the copyright publication department, the Industrial and Commercial Administration . . . . When it comes to copying a disk, most Chinese people don’t see what’s wrong.

Id. See also Greg Hernandez, China Piracy Costs High; Movies: Counterfeit DVD Sales Stealing Millions from Studios, LONG BEACH PRESS-TELEGRAM, Nov. 22, 2005, at A21 (citing an MPAA study claiming that revenue from piracy reached $512 billion in 2004, compared with $322 billion from the sale of illegal drugs); Greg Hernandez, It’s Even Bigger than Drugs: CD, DVD Piracy Makes Billions in China, DAILY NEWS OF LOS ANGELES, Nov. 22, 2005, at B1 (charging the profit margin for DVD piracy is “exponentially higher” than for drugs).

the Chinese government does not encourage piracy, current policy—such as the over-restrictive censure of releases—and weak law enforcement do nothing to discourage it.\footnote{See Kathleen E. McLaughlin & Christopher S. Rugaber, \textit{U.S., Chinese Trade Officials Make Progress on IPR, Market Access, but Stall on Textiles, Int’l Trade Rep., July 14, 2005, at 1162; Greg Hernandez, supra note 13, at 23. Piracy has become such a competitive market that it has been reported that “Chinese storekeepers who sell fake DVDs for ten yuan gripe about street vendors selling them for seven. And the street vendors complain about competitors offering two-for-one specials.” Blodget, supra note 9.}

But piracy’s boon to the Chinese economy is a threat to the United States’ economy—or at least to certain sectors of the economy. Notwithstanding the extraordinary rate of piracy in China, Jack Valenti, president of the Motion Picture Association of America (MPAA), boasts the United States copyright industries as “America’s greatest trade prize”—they represent the only sectors to maintain a surplus balance of trade with every other country in the world.\footnote{Alan Story, \textit{Don’t Ignore Copyright, the ‘Sleeping Giant’ on the TRIPS and International Educational Agenda, in \textit{Global Intellectual Property Rights: Knowledge, Access and Development} 125, 129 (Peter Drahos & Ruth Mayne eds., 2002).}

\footnote{“Losses” per se are very hard to calculate. The people who buy pirated DVDs in China often do so because they cannot afford to buy genuine products at full price. While the industry cites that it has lost roughly $280 million per year (compared to the estimated $60 billion losses estimated to all other industries) the industry is not necessarily losing out on sales to the pirates. See Special 301 Report, supra note 6; James M. Sellers, \textit{The Black Market and Intellectual Property: A Potential Sherman Act Section Two Antitrust Defense?}, 14 ALB. L.J. SCI. & TECH. 583, 605 (2004); Jon Healey & Chuck Philips, \textit{Piracy Spins a Global Web}, L. A. TIMES, Oct. 11, 2005. Andrew Mertha explains in his book, that the real uneasiness in Hollywood in relation to piracy, is a result of the unsettling notion of “free riding,” whereby “pirates reap profits from manufacturing—and...
the United States’ economy, affecting job availability, tax flow, quality of life for various other businesses, and cash flow for investments. These annual revenue losses have the copyright industries so riled up that they are lobbying for the World Trade Organization (WTO) to take action against China.

In reality the WTO, by way of its Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement is the kindling fueling many of the movie industry’s problems. The Agreement suffers from a lack of effective enforcement mechanisms and is thereby incapable of providing efficient criminal remedies for the acts of movie pirates. Parts II and III of this Note examine the flaws inherent in the TRIPS Agreement, focusing on China’s criminal code and motion picture piracy as illustrations of where the Agreement went wrong. Part IV suggests that the WTO reinitiate negotiations to amend TRIPS in order to better protect intellectual property rights; and Part V concludes that the piracy problem is not likely to be resolved without any WTO intervention, as illustrated by the drastic measures being taken in self-defense by Hollywood and the United States’ government.

II. THE TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS AGREEMENT

The Agreement on Trade-Related Aspects of Intellectual Property Rights requires member nations to uphold Intellectual Property Rights consumers enjoy the savings from purchasing—pirated goods that deny the rightholders their share of remuneration.” ANDREW C. MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 19 (Cornell Univ. Press 2005).

17. James M. Sellers, supra note 16, at 605–06 (discussing that the Business Software Alliance estimated a loss of 44,000 jobs lost directly, and 74,000 jobs through a trickle-down effect in 2001, plus a loss of $22 billion in 2001). See also John Malcolm & Lauren Nguyen, Criminal Prosecution Needed in Movie Piracy Cases, PROSECUTOR, July/Aug. 2005, at 37 (explaining that copyright theft is not a victimless crime because it affects not only producers but also carpenters, seamstresses, electricians, and other personnel).

18. Malcolm & Nguyen, supra note 17, at 37.

19. Swanson, supra note 1. See infra Part IV (discussing the counter-arguments that WTO action may not be the right technique to solve the piracy problem).


(IPR) and enforce their nation’s civil and criminal laws governing IPR.\textsuperscript{22}

In general, the TRIPS Agreement sets out minimum standards for IPR protection,\textsuperscript{23} basic principles of enforcement,\textsuperscript{24} and means for dispute settlement through the WTO that each member country must abide.\textsuperscript{25}

Initially entered into force in January 1996 as a compilation of and addition to the Berne and Paris Conventions,\textsuperscript{26} the TRIPS Agreement was referred to as an intellectual property milestone because it was the first agreement to create detailed rules, in the form of universal minimum standards, in the area of IPR enforcement.\textsuperscript{27} Idealists who look to the

\begin{itemize}
\item \textsuperscript{23} The importance of the agreement is that it:
\begin{quote}
[S]ets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with . . . . Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus Agreement.
\end{quote}
\item \textsuperscript{24} Id. (“[E]nforcement contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.”).
\item \textsuperscript{25} Id.
\item \textsuperscript{27} Gervais, \textit{supra} note 20, at 3. In his book, Gervais writes:
\begin{quote}
[The scope of TRIPS] is in fact much broader than that of any previous international agreement, covering not only all areas already (sometimes only partly) protected under extant agreements, but also giving new life to treaties that failed and protecting for the first time rights that did not benefit form any multilateral protection. In addition, and some would say perhaps more importantly than its broad coverage, the TRIPS Agreement enshrined detailed rules on one of the most difficult and, for rights holders, painful aspects of intellectual property rights: enforcement.
\end{quote}
\item \textsuperscript{28} See also Maria Strong, \textit{Copyright Enforcement: Basic Considerations and Strategies to Protect Copyrights Abroad, in International Trademarks and Copyrights:}
WTO to solve the global problem of IPR violations view TRIPS as “not only a trade agreement, [but] also a multifaceted project to export to all corners of the globe a particular set of values and presumptions about the need to protect both ideas and the expression of those ideas . . . .”28 It follows that the TRIPS Agreement was drafted to effectively protect IPR while encouraging international trade, not burdening it.29

TRIPS endeavors to achieve these results through two basic principles: national treatment and most favored nation status. National treatment requires that members treat their own citizens the same as citizens of other Member States with respect to IPR enforcement, while most favored nation status provides equal treatment under domestic laws, preventing one member country from getting a ‘better deal’ on IPR than another or one Member State from receiving unfair advantages over another.30

Members to the TRIPS Agreement are required to implement criminal sanctions for “willful trademark counterfeiting or copyright piracy31 carried out on a commercial scale.”32 In other words, TRIPS seeks to punish

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28. Story, supra note 15, at 129. See also Understanding the WTO—Intellectual Property: Protection and Enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (explaining that TRIPS is an attempt to unify IPR protection while simultaneously striking a balance between the long-term benefits of creation and invention with the short-term costs of protection mechanisms to society).

29. Overview of TRIPS, supra note 23.


31. International Chamber of Commerce Counterfeiting Intelligence Bureau, Enforcement Measures Against Counterfeiting and Piracy: An International Survey, at x n.21 [hereinafter Survey]. This survey indicates that the TRIPS Agreement defines pirated copyright goods as:

[A]ny goods which are copies made without the consent of the right holder or person duly authorized by him in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

32. Id. at xv. The TRIPS Agreement also creates civil and administrative policies and laws relating to IPR; the focus of this Note is the criminal aspect of TRIPS.
and deter people profiting from the business of piracy.\textsuperscript{33} Under Article 61(1) of TRIPS, the punishments imposed by a Member State against a copyright violator\textsuperscript{34} must be comparable to the penalties for similar crimes under the national law of the WTO member concerned and must respect Article 41(1) of TRIPS,\textsuperscript{35} which obliges Member States to put forth their best efforts to prevent infringement and to provide expeditious remedies to prevent and deter future infringements.\textsuperscript{36}

Actual enforcement of IPR in Member States in order to inflict these penalties upon pirates, however, is difficult to achieve. Although WTO members are required to enact statutes that conform to TRIPS, the Agreement does not include specific mechanisms or detailed rules governing the application of such provisions. Further, TRIPS requires sanctions relative to those for other similar crimes—a rather undefined standard—which yields inconsistent results among the member nations. Article 41(5) plainly states that “nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of [IPR] and the enforcement of law in general.”\textsuperscript{37} The Article elaborates that members need not implement a separate judicial system to enforce IPR.\textsuperscript{38} As a result, a member nation can easily skimp out on providing maximum enforcement of their IPR laws by claiming it does not have enough resources to do the job.\textsuperscript{39} As a WTO Agreement, disputes arising under TRIPS may be resolved through WTO procedures\textsuperscript{40} such as a dispute settlement panel, review by the Appellate Body, or cross-retaliations.

\textsuperscript{33} TRIPS Agreement, supra note 20.

\textsuperscript{34} Id. art. 61 (explaining that the TRIPS Agreement not only covers issues relating to copyright rights. The TRIPS Agreement covers the areas of intellectual property including copyright and related rights, trademarks including service marks, geographical indications including applications of origin; industrial designs; patents, including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data).

\textsuperscript{35} Gervais, supra note 20, at 327. See also Overview of TRIPS Agreement, supra note 23 (noting that enforcement must be in accordance with particular rules. Governments must ensure that IPR can be enforced under their laws and that the penalties for infringement are tough enough to deter further violations. The procedures must be fair and equitable, but at the same time they may not be unnecessarily complicated or costly. For example, they must not include unreasonable time limits or unwarranted delays.).

\textsuperscript{36} Masterson, supra note 30, at 8–9.

\textsuperscript{37} TRIPS Agreement, supra note 20, art. 41(5).

\textsuperscript{38} Id. art. 41(5).

\textsuperscript{39} See infra Part III (explaining the impact this has on China and, analogously, other developing countries).

\textsuperscript{40} See Masterson, supra note 30, at 3 (explaining that this is governed by Article 22 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes).
by Member States, these procedures are rarely—if ever—used. As of 2004, such WTO mechanisms had never been used to combat the inadequate enforcement of IPR.

Further complicating the implementation process is the caveat that the private parties, such as individual authors, artists, producers, or interest groups (e.g., the MPAA), who are most likely to see their rights directly violated and to feel the effects of an IPR violation, cannot enforce the TRIPS Agreement. Instead they must make complaints through government channels with access to settlement procedures. The United States, for example, provides such an option through section 301 of the 1988 Omnibus Trade and Competitiveness Act. This Act allows any interested person to “file a petition with the United States Trade Representative (USTR) requesting it take action to enforce the United States’ rights under a trade agreement or to prevent unreasonable foreign trade practices.” Upon such a request, the USTR will investigate the allegations made in the individual’s petition or explain the decision not to investigate. Then, the USTR may initiate WTO dispute settlement proceedings against a foreign country it has identified as having serious IPR deficiencies that warrant increased attention to particular problem areas or practices under the auspices of Special 301. Because such efforts are time consuming and onerous, they do not provide an effective tool for deterring piracy or punishing it. The United States has been particularly wary about pursuing WTO procedures against China for fear of straining the relationship between the two countries. Specifically, China and the United States have an interdependent trading partnership whereby the

41. Id. at 4 (explaining that Article 6 of TRIPS limits dispute settlement to concerning the “exhaustion of intellectual property rights” to violations of the national agreement and most favored nation obligations).
42. Masterson, supra note 30, at 6–7.
43. Only members to an agreement may enforce its provisions unless expressly provided for otherwise. In the case of the WTO, the only members are States, not individuals. See generally TRIPS Agreement, supra note 20, passim.
44. Survey, supra note 31, at xvi.
45. Id. at xvii.
46. Id.
47. Masterson, supra note 30, at 18–20 (referencing section 182 of the Trade Act of 1974, under which the USTR may identify countries that deny adequate protection of IPR or deny fair and equitable market access to U.S. persons that rely upon IP protection. It is under Special 301, however, that the USTR has power to designate countries to the Priority Watch List); Yu, supra note 3, at 128–29 (referring to the Special 301 as the “H-bomb of trade policy” because it is a dramatic measure aiming to completely eliminate unfair trade practices, while allowing the United States to impose sanctions upon countries it finds threatening to its economic progress).
48. See Yu, supra note 3.
United States absorbs nearly a third of China’s exports and China is the fifth largest market for U.S. exports. Similarly, the United States depends upon Chinese cooperation to peacefully resolve potential tensions involving Taiwan, Hong Kong, and North Korea.

Ultimately, as evidenced by the sky-high rate of copyright infringement around the world, sufficient enforcement of the TRIPS Agreement is sorely lacking. No matter how closely a country aligns its own laws with the standards of the TRIPS Agreement, the rate of piracy and respect for IPR will be difficult to improve without significant changes to the Agreement itself.

III. CASE STUDY: CHINA

Russia and China are the biggest thieving countries. If they wanted to take care of their IP problems, they could. They don’t belong in the WTO unless they do. Hopefully, they’re watching, because we mean business.

Sen. Orrin Hatch, R-Utah, Chairman of the Subcommittee on Intellectual Property of the Senate Judiciary Committee

There is a tendency to build unrealistic expectations regarding China’s ability to enforce policy. In particular, there is a propensity to oversimplify the issue and place the blame for failure squarely at the feet of China’s national leadership.

Andrew Mertha, author of The Politics of Piracy

49. See Id.
50. Id. at 17; Swanson, supra note 1.
52. Although TRIPS was drafted to reflect the United States’ laws regarding IPR, piracy is still rampant in this country. For example, on Manhattan’s Canal Street, police frequently overlook the sale of imitation goods which abundantly impale the market. Mertha, supra note 16, at 37–52; Barnett, Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis, 91 Va. L. Rev. 1381, 1381 (2005).
53. Graham, supra note 6, at 936.
A. China’s Piracy Problem

Consider a country where Spader-Man (not Spider Man)\textsuperscript{55} protects the streets from danger, workout enthusiasts don New Barlun sneakers (as opposed to New Balance),\textsuperscript{56} and movie buffs see films months before their scheduled release,\textsuperscript{57} and one would not be surprised to learn that China, one of the largest infringers of copyright rights in the world,\textsuperscript{58} has long been the target of pressure from both the United States and the World Trade Organization to tighten its protection of intellectual property rights.\textsuperscript{59}

However, China is also a country where criminal laws penalizing copyright infringement have been on the books since the early 1990s, a specialized court to prosecute IPR infringement was set up in 1996,\textsuperscript{60} and a number of bureaucratic agencies were established to implement the country’s copyright laws.\textsuperscript{61} The disparity between the expected result of China’s bold efforts to protect IPR and the reality of rampant piracy evokes many questions concerning the effectiveness of Chinese policy, the seriousness of enforcers, and the root of the problem with Chinese regulations.

B. China’s Criminal Law Pertaining to Copyright Infringement

For the first time in its millennia-long history, China amended its criminal law in 1990 to include a provision subjecting serious offenders of copyright to criminal sanctions such as fines and product confisca-


\textsuperscript{56} Yoon, supra note 4.

\textsuperscript{57} Swanson, supra note 1.

\textsuperscript{58} Id.

\textsuperscript{59} Id. See also ANDREW C. MERTHA, supra note 16, at 37–52 (explaining the long-term negotiations between the United States and China regarding IPR).


\textsuperscript{61} MERTHA, supra note 16, at 133–35 (citing examples of bureaucratic agencies created to fight piracy, including: the Ministry of Culture Publications Bureau—originally the Central People’s Government Publishing General Administration—the National Copyright Administration of the Ministry of Culture, National Publications Enterprises Management Bureau, National Press and Publications General Administration, and local Copyright Divisions).
tion. Although China was not yet a member of the WTO, it drafted these criminal laws to conform to the TRIPS requirements. While it is debatable whether this change was made to placate foreign powers fixated on reforming China’s disposition as a threat to copyright holders or because it hoped to eventually enter into the WTO is debatable, the gesture nevertheless signaled China’s willingness to take IPR seriously and to change policies that impliedly condoned piracy as a means of economic advancement.

In its simplest terms, China’s criminal law punishes copyright infringement, for example the reproduction or distribution of a motion picture without the permission of the copyright owner, for the purpose of making a profit. Where the amount of illegal gains from such infringement is “huge” or there are “situations of serious circumstances,” the individual infringer is subject to a fixed term of imprisonment of up to three years and a potential fine. However, if the amount of illegal gains from such infringement is “relatively large” or there are “especially serious circumstances,” the individual infringer is subject to a fixed term of

62. PETER FENG, INTELLECTUAL PROPERTY IN CHINA 140 (Sweet & Maxwell Asia 2003) (explaining that it took until 1990 for China to amend its criminal law because of the traditional view in China that intangible property—like a copyright—was not as valuable as tangible property. The author further describes the process by which major laws are issued by the National People’s Congress (NPC), the supreme legislative body in China. The NPC is made up of three administrative organs: the State Council, the Supreme People’s Procuratorate, and the Supreme People’s Court, and each of these administrative organs may issue binding administrative orders, such as a judicial interpretation of a law).

63. See Embassy of the United States, http://beijing.usembassy-china.org.cn/copyright.html (last visited Nov. 27, 2005). China first began its “negotiations” over IPR with the United States in 1979. The new criminal provisions were most likely added in response to mounting pressure by the USTR, as well as China’s co-signatories of the Paris Convention on International Trade, who had already become infuriated by China’s utter disregard for IPR. Andrew Mertha explains further that the United States used the draft TRIPS Agreement:

[A]s a “carrot” . . . to get China to agree to better protection of U.S. copyright in China: if China made sufficient progress, according to one US negotiator, the United States would support China’s bid to be a founding member of the [WTO]. Thus TRIPS provided a convenient substantive and symbolic link between U.S. IPR concerns and China’s desire to join the WTO.

MERTHA, supra note 16, at 127.

64. Id. at 37–52. See also RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 6–7 (Kluwer Law Int’l 1997).

imprisonment ranging from three to seven years and/or a potential fine. Further, a penalty of up to four years of imprisonment can be mandated for a person who, for the purpose of making a profit, knowingly sells motion pictures or video recordings reproduced by infringing upon the owner’s copyright. When one of the above referenced crimes is committed by a unit—rather than an individual—the Code provides that the unit be punished “in accordance with the provisions of the appropriate article.”

Drafted in a somewhat ambiguous and illogical fashion, the provisions’ key terms—for example, “huge” and “relatively large” illegal gains, the corresponding fines for such gains, and the term “knowingly”—are not defined. Explanations of these terms were later specified by the Supreme People’s Court (SPC) in the form of judicial interpretations of the

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66. *Id.* art 217. Article 217 of the Criminal Law states, in part:

> Whoever, for the purpose of making profits, commits any of the following acts of infringement on copyright shall, if the amount of illegal gains is relatively large, or if there are other serious circumstances, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the amount of illegal gains is huge or if there are other especially serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined: (1) reproducing and distributing a . . . motion picture . . . without permission of the copyright owner; . . . (3) reproducing and distributing an audio or video recording produced by another person without permission of the producer.

*Id.* Although these are not the only actions that are criminalized, motion pictures are the relevant medium that will be described for the purpose of this Note.

67. *Id.* art. 218. Article 218 of the Criminal Law states, in its entirety:

> Whoever, for the purpose of making profits, knowingly sells works reproduced by infringing on the copyright of the owners as mentioned in Article 217 of this Law shall, if the amount of illegal gains is huge, be sentenced to a fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined.

*Id.*

68. *Id.* art. 220. Article 220 of the Criminal Law states, in its entirety:

> Where a unit commits any of the crimes mentioned in the Articles from 213 through 219 of this Section, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be punished in accordance with the provisions of the Articles respectively.

*Id.*

69. BROWN, *supra* note 64, at 35–37 (discussing that the SPC is an independent judicial authority that does not receive any interference from administrative institutions, indi-

The SPC’s 2001 judicial interpretation of the criminal law defined the thresholds for a punishable copyright crime at a virtually unattainable level and penalized infringers with minimal fines. That infringers were undeterred from their acts is an understatement—enforcement remained severely deficient. Days after an infringing factory was fined and shut down it would reopen. Weeks after a raid confiscating hundreds of DVDs, perpetrators would pop-up at a different store in Beijing. And in 2003 only three cases were filed under criminal provisions (as compared to a mere nineteen criminal cases in 2002, which resulted in sentences ranging from six months to six years imprisonment). Not surprisingly, China is routinely cited on the USTR Priority Watch List and on the radar of other concerned countries that anticipated sustained detriments to their own copyright industries.

China’s attempt to better protect copyright—and thwart retaliation by its trading partners—culminated in its enactment in December 2004 of a new judicial interpretation (JI) of the criminal law pertaining to IPR in-

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70. A judicial interpretation is an interpretation of the law issued by a judicial organ and viewed by government and Party officials to have the same bearing as a traditional administrative order. Id. at 37 n.167.

71. Criminal codes are enforced in dual part by the Supreme People’s Procuratorate (SPP), which heads the prosecution system and has the ability to initiate criminal cases under the Law of Criminal Procedure, and the Supreme People’s Court (SPC), an independent judicial authority that issues judicial interpretations of the law. Id. at 8–10, 25–27.

72. Id. at 67–68 (explaining that SPC orders are the function of a judicial organ of the NPC. The NPC is made up of three bodies including the SPP and the SPC.).

73. Special 301 Report, supra note 6.

74. Id.

75. Id.


77. Yu, supra note 3, at 131–39 (explaining the cycle where the United States would put China on its “watch-list,” make threats of sanctions to bully it into making laws that would change its IPR, ultimately do nothing, and then put China on the priority list again).
fringement.\textsuperscript{78} The new JI redefines its key terms to more adequately meet the demands both of the WTO—particularly Articles 41 and 61 of TRIPS—and of “offended” countries.\textsuperscript{79}

Ostensibly, the 2004 JI would make it easier for China to prosecute copyright infringers by lowering monetary thresholds and recalculating the value of illegal gains necessary to trigger pirate prosecution.\textsuperscript{80} Specifically, the JI redefines “relatively large illegal gains” as a profit greater than RMB 30,000 (US$3,710) and “huge illegal gains” as a profit more than RMB 150,000 (US$18,552).\textsuperscript{81} The value gained is calculated based upon the selling price, not on the price of real goods for the products.\textsuperscript{82} Similarly, the JI lowers the volume of infringing products that a pirate may sell before he is subject to prosecution.\textsuperscript{83} It is considered a “serious circumstance” when an individual reproduces and distributes at least 1,000 illegal copies of a motion picture without the permission of the copyright owner and an “especially serious circumstance” where an individual reproduces and distributes at least 5,000 copies of the motion picture.\textsuperscript{84} Other “serious circumstances” include instances where the illegal business volume exceeds RMB 50,000 (US$6,326) and other “especially serious circumstances” include where the illegal business volume exceeds RMB 250,000 (US$31,632).\textsuperscript{85} Perhaps one of the most significant changes in the JI is the alteration of the rules pertaining to “units” committing a crime. The JI elevates the punishment level for units to a rate of three times that prescribed for an individual pirate, compared to the previous JI which assigned trivial punishments for group actions.\textsuperscript{86}

\subsection*{C. China’s Compliance with TRIPS}

The USTR and IIPA are famous for issuing reports that insist that if only China would change its laws or if only China would follow the TRIPS agreement, piracy would be eradicated—or at least greatly dimin-

\begin{itemize}
  \item[78.] Judicial Interpretation, \textit{supra} note 76.
  \item[79.] \textit{Id}.
  \item[80.] \textit{Id}.
  \item[81.] Currency conversion computations made using The Universal Currency Converter, \url{http://www.xe.com/ucc/convert.cgi} (last visited Oct. 23, 2006). For the text of the Judicial Interpretation, see Judicial Interpretation, \textit{supra} note 76, arts. 5–6, 14.
  \item[83.] Judicial Interpretation, \textit{supra} note 76.
  \item[84.] \textit{Id}.
  \item[85.] \textit{Id}, arts. 5–6.
  \item[86.] \textit{Id}, art. 15. \textit{See China Pirates Conjure Fake Potter, supra} note 10.
\end{itemize}
ished—in that country. This section will demonstrate that the new JI is even more closely aligned with the major standards regarding copyright infringement set out in Articles 41 and 61 of TRIPS than its predecessors. Yet, since the adoption of the JI, the rate of copyright infringement in China has neither seen the radical decrease once predicted, nor is one anticipated. This section will then demonstrate why apparent ambiguities and weaknesses inherent throughout the TRIPS Agreement are to blame for this failure.

Under Article 41(1) of TRIPS, Member States are required to incorporate enforcement procedures that “permit effective action against any act of infringement of intellectual property right covered by [the TRIPS] agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements” into their laws. In other words, each Member must allow its courts to “issue injunctions, award compensatory damages, costs, and attorney’s fees, allow the recovery of profits; and order the uncompensated seizure and disposition of infringing goods.”

An examination of China’s current policies shows that the country has implemented measures to comply with these requirements. In 1996 a new court was established expressly to hear IP cases. In 2004, as a result of 573 raids, 145 shops selling pirated DVDs were closed and 510 were fined. Also in 2004, over 22 million DVDs were seized, 34 cases were commenced, 30 indictments were made, and 21 cases resulted in


90. TRIPS Agreement, supra note 20, art. 41(1).


92. Jiang Zhipei Address, supra note 60.

93. Special 301 Report, supra note 6, at 196.
jail time. Despite these successes, the IIPA placed China on its Priority Watch List and charged that China has not met its TRIPS commitment to provide effective criminal enforcement against piracy and is at fault for not exhibiting the “political will” needed to bring about such changes.

It is true that China has not yet efficiently and effectively refined its mechanisms for preventing and punishing piracy. However, this is not inconceivable considering that the ambiguities and loopholes encompassed by Article 41(5) suggest that the objectives set out in Article 41(1) need not be enforced in their entirety. The effect, in whole, is that the potential benefits of “international IPR enforcement cannot be realized on a global scale.” Article 41(5) enunciates that it does not create any obligations on Member States to implement a new judicial system for the enforcement of IPR nor does it oblige Members to expend extra resources on IPR enforcement. Thus, developing countries whose legal systems are not adapted to such regulations are weak protectors of IPR. For example, the judicial system China implemented for IP cases is not yet very effective. Because Article 41(5) does not create any obligations with respect to the distribution of resources, China is not required to put forth more resources toward IPR than it does to the enforcement of law in general. As a result, China may uphold its existing law enforcement mechanisms, no matter how inadequate they are. Thus, the

94. Id. at 200. This data was estimated by the IIPA; China has not officially released its own data in this matter. The Bush administration, along with Japan and Switzerland, has demanded that China share information regarding the enforcement of IPR by January 23, 2006. Edward Alden, U.S. to Press China on Moves Against Piracy, FINANCIAL TIMES, Oct. 27, 2005, at 11.


98. TRIPS Agreement, supra note 20, art. 41(5).

99. See Jiang Zhipei Address, supra note 60.

100. Christian L. Broadbent & Amanda M. McMillian, Russia and the World Trade Organization: Will TRIPS be a Stumbling Block to Accession?, 8 DUKE J. COMP. & INT’L L. 519, 546 (1998). This article narrowly interprets TRIPS Article 41(5) to mean that:

Members are not required to put in place a system of judicial enforcement entirely distinct from that State’s already existing court system. However, the language that emphasizes a Member State’s autonomy in distributing resources between intellectual property enforcement and general enforcement may have a significant impact in countries like Russia where the government has limited resources to dedicate to enforcement of intellectual property laws.

Id.
police force, stymied by bribery and inadequate training, is incapable of curbing piracy and would be even if China had the most sophisticated system of laws.\textsuperscript{101}

The USTR and IIPA fault China as having weak law enforcement mechanisms.\textsuperscript{102} They call on China to increase fines for IPR infringement. They promote the idea of transparency by requesting that China make public IPR-related case rulings and statistics.\textsuperscript{103} And they demand that China “[m]ake administrative IPR enforcement actions deterrent.”\textsuperscript{104} However, these demands reach beyond the scope of the TRIPS Agreement, no matter how helpful they would be to foreign nations. TRIPS does not require a country to make fundamental changes to its national legal system\textsuperscript{105}—yet insisting that China make its case decisions public and change its enforcement actions would be such a fundamental change.

Ironically, the drafters envisioned the ambiguous language in Article 41 as a safety valve to ensure TRIPS was unanimously accepted by the Member States.\textsuperscript{106} The provisions allowed for broader interpretations, accounted for limited resources in developing countries, and avoided the requirement that each country develop a new judicial system.\textsuperscript{107} Instead, the ability to broadly interpret the agreement is easily exploited by member nations eager to find any excuse not to fully enforce TRIPS. The effect is that in Member States, measures are implemented “only as far as normally available judicial or administrative resources are available.”\textsuperscript{108}

D. The Impact of TRIPS’ Inadequacies on China’s IPR Law and Enforcement

Admittedly, the JI is not perfect. Current provisions that require a profit motive before criminalizing behavior and that provide weak punishments for accomplices must be amended in order for China to vigor-

\textsuperscript{101} See e.g., Pesek, \textit{supra} note 6.


\textsuperscript{103} Id. The USTR report explains that China refuses to give information to foreign governments about the severity of punishments given to pirates or what happens to goods confiscated during raids.

\textsuperscript{104} Id.

\textsuperscript{105} Survey, \textit{supra} note 31, at x–xi.

\textsuperscript{106} \textit{GERVAIS}, \textit{supra} note 20, at 287 (explaining that Article 41(5) addresses the “stumbling blocks” of negotiation dealing with conflicting legal systems and differing levels of available resources among the countries).

\textsuperscript{107} Id. at 287–89.

\textsuperscript{108} Id. at 289.
ously target pirates.\textsuperscript{109} But analyzed objectively as a country whose legal system is still developing, Chinese laws reflect the requirements set out in TRIPS to a remarkable degree.\textsuperscript{110} Even the United States, in the 2005 USTR Out-of-Cycle Review, acknowledged that, under the leadership of Vice Premier Wu Yi, China has made significant strides in the arena of protecting IPR.\textsuperscript{111} So, instead of faulting China’s legal system, international focus should turn to the real reason China’s laws are not having the immediate impacts desired by the United States and other foreign countries: the inadequacies of the TRIPS Agreement.

Despite China making changes to and enacting its own laws to meet the standards enunciated in TRIPS standards,\textsuperscript{112} the USTR has determined several years in a row that China has failed to adequately protect IPR. And in early 2005, China was officially placed on the USTR Priority Watch List because of universal concern that China is not in compliance with its WTO/TRIPS obligations and is not actually on the road to adequately protect IPR.\textsuperscript{113} China’s failure to significantly reduce the incidence of IPR violations is largely a consequence of the TRIPS Agreement’s failure to address issues such as the provision of resources for enforcement and fundamental changes to national legal systems.\textsuperscript{114} And as a result, China’s Judicial Interpretation of its criminal laws regarding IPR, although created to comply with TRIPS, cannot adequately succeed in producing significant decreases in copyright infringement.\textsuperscript{115}

From the perspective of Chinese lawmakers, the enactment of a new JI regarding the criminalization of IPR infringement was a bold step in the

\textsuperscript{109} See id.
\textsuperscript{110} See infra note 61; MERTHA, supra note 16, passim.
\textsuperscript{111} USTR Out-of-Cycle Review, supra note 88, at 1.
\textsuperscript{112} See infra Part III.C.
\textsuperscript{113} USTR Out-of-Cycle Review, supra note 88 (explaining that once a country is placed on the Priority Watch List it is subject to a special yearly review. The 2005 review concluded that China has not done enough to curb piracy and must continue to change its practices of implementing its IPR laws.).
\textsuperscript{114} See Survey, supra note 31, at xi.
\textsuperscript{115} Teng, supra note 12 (reporting that the Special 301 Report Card found that, in 2003, 85 percent of DVDs manufactured in China were pirated, as were 69 percent of VCDs. Further, it was reported that the Special 301 report estimated that in 2004 U.S. industries lost $2.5 billion to piracy in China. Overall piracy rates hover around 90 percent in China.); FENG, supra note 62, at 140 (explaining that in the January 1995 Judicial Interpretation, criminal sanctions would be imposed for “illegal sales exceeding RMB 100,000 for individuals and RMB 500,000 for units.” Additionally, the 1995 interpretation considered factors such as a previous record of criminal copyright infringement or political and social consequences. The current interpretation does not take these factors into consideration.).
pursuit of judicial reform. In fact, in the self-proclaimed era of “Justice and Efficiency,” which seeks to provide “effective protection for the legal interests of IP rights holders, promot[e] the prosperity and development of science, technology and culture, [help] to regulate the economic order of the market and [improve] the investment environment,” the JI would be the effort’s pinnacle.

In theory, it is a bold step forward. For decades, outsiders perceived China as having a moral void in the realm of IPR. The JI, in contrast, serves as a guide to judges, a tool to educate the public, and a promise to the international community to provide more effective protection. But in practice, the mechanisms to enforce such a bold plan are limited. The country faces challenges more serious than IP and therefore cannot focus its monetary resources on the problem. Further, customs agents are easily bribed to allow pirates to import and export pirated goods. The police force, relied upon to implement and enforce the law, does not have enough money in its budget to enforce the law or to properly train its officers in regard to IPR. And combined with the drafters’ failure to maintain TRIPS as an agreement capable of placing adequate pressure on a country to strengthen its IPR enforcement—or their failure to foresee the necessity of doing this—the ultimate result is that China will continue to move at a slow, but steady pace toward its goal of curbing piracy.

116. See Jiang Zhipei Address, supra note 60.
117. Id. In his speech regarding recent developments in China’s judicial protection of IPR, Zhipei stated:

Since China’s entry into WTO, reform in China has reached a new stage and the judicial reform of the Courts has been carried out even further. “Justice and Efficiency” has been declared the theme of the judicial system in the 21st century and a well-focused movement to make Chinese judges more professional has been put on the schedule. All of these measures have created a sound situation at home and abroad for the Court to carry out the difficult mission of IP law enforcement in China. I am confident that IP law enforcement will become ever more just and efficient.

Id.

118. Jiang Zhipei is a Member of the Judicial Committee of the Supreme People’s Court and has been involved in the formulation of legislation of intellectual property law in China. Id.
119. See generally ALFORD, supra note 3.
120. Buckley, supra note 89.
121. Id.
122. Faison, supra note 5.
123. Pesek, supra note 6; Special 301 Report, supra note 6.
124. Buckley, supra note 89.
IV. SOLUTION: PUTTING THE WTO BACK ON TRACK

And so, more than a decade after joining the WTO, piracy in China has not been significantly reduced. But the onus for change cannot be placed upon China—or comparable countries—alone. First, TRIPS does not provide mechanisms for harmonization, 125 which means that every country can choose its own method to cope with piracy and its WTO responsibilities. The result if every developing country did this, however, would be a jumble of rules and regulations. Second, China is doing all that it can—at this moment—to enforce IPR. As discussed in Part III, China has already developed a new court system and changed its laws to comply with TRIPS. 126 Further, China is working hard to educate government officials, as well as lawyers, businessmen, and trademark agents, about IP protection and laws at the Intellectual Property Training Center in Beijing which opened in January 1997. 127 The onus, instead, must be placed on the WTO itself to stimulate change. 128

But the ideas of imposing sanctions or filing an official complaint at the WTO, which have been advocated—or at least threatened—by the MPAA, IIPA, and USTR, are not certain to be viable options either. 129 This form of WTO action would likely embarrass China, rather than acknowledging and applauding the great strides it has already made. 130 Such action would set China up for more criticism from other countries and possibly alienate it. 131 Consequently, other developing countries would be deterred from changing their own laws to conform to IPR norms. As any grade school teacher knows, ambiguously defined rules lead to disorder in the classroom. Students who fully understood the reasons behind the rules their teachers impose and who have a say in the

125. A harmonization mechanism would provide a basic structure to which each member state must conform its rules. GEORGE A. BERMANN & ROGER J. GOEBEL ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 536–39 (West Group 2002) (1993).
126. See infra Part III.
127. Yu, supra note 3, at 151–52.
128. Because the WTO is a neutral body with a peaceful mission to promote fair trade, it is capable of promoting resolutions to these problems. Id. The United States needs to find a peaceful solution to the IPR problems, rather than imposing sanctions or a WTO hearing because it relies upon China to keep peace in North Korea and Russia, to fight terrorism in the Middle East and around the world, and for trade; the United States cannot afford to alienate China over the issue of piracy. See id.; Wang Jsi, China’s Search for Stability with America, FOREIGN AFFAIRS, Sept./Oct. 2005, available at http://www.foreignaffaris.org; Swanson, supra note 1.
129. Yu, supra note 3, at 166–70.
130. Id.
131. Id.
rulemaking, however, are more apt to abide by them. Analogously, China and other similarly situated countries must be held to clear standards. Like students in a classroom, each would benefit from a clear enunciation of these expectations in the TRIPS Agreement itself, rather than in subsequent documents produced by the IIPA and USTR to criticize China. Although China has worked to implement criminal laws to protect IPR, it cannot be expected to meet the stringent expectations of the United States and organizations like the IIPA when those expectations are expressed ambiguously in TRIPS, the defining document.

Although they did not foresee the specific problems affecting China today, the drafters of TRIPS did anticipate that with continued growth in technology, globalization, and potentially unanswered questions in the agreement itself, there would be an eventual need to amend the Agreement. As a result, Article 71 was adopted to provide a mechanism to review and amend TRIPS. Specifically, it calls for TRIPS to be reviewed at least every other year or at any time therein that the Council decides “in the light of any relevant new developments which might warrant modification or amendment of [the TRIPS] Agreement.” It is pivotal that Article 71 powers be used to tweak the provisions of the TRIPS Agreement to ensure the high quality of Member States’ legal systems and to adequately stop IPR infringement and punish pirates while maintaining due process. Through this process, member nations must—at a minimum—amend provisions to make the agreement self-executing, revise Article 41’s ambiguities, and ensure that adequate resources are available to enforce TRIPS.

Member States must assess, via the mechanisms available in Article 71, how the provisions of Article 41 can be fine-tuned to ensure every member’s concerns are met. The current ambiguities, as explained in Parts II and III, render it nearly impossible for Member States to implement measures to successfully protect IPR. Likewise, it is pertinent that China and other countries, in the process of changing their own systems, are key players in this negotiation process. By taking ownership and responsibility, China’s government and citizens will gain a greater understanding of the rules by which they will abide and negotiators can be certain that the measures agreed upon are both practicable and just.

133. Gervais, supra note 20, at 370 (explaining that the review mechanism was included to circumvent the need for another formal discussion forum).
134. TRIPS Agreement, supra note 20, art. 71.
135. Id.
136. Id.
Further, the TRIPS Agreement must be re-evaluated and amended to be a self-executing agreement. This would mean that a Member State could rely on the Agreement alone to set national standards and laws in order to ensure IPR are protected, rather than requiring Member States or non-government organizations to make their own pacts with infringing states. For example, instead of relying upon independent agreements such as the one made in July 2005 between the Motion Picture Association (MPA), an international organization designed to protect American films, and China, TRIPS itself should provide similarly specific mechanisms to curb piracy. The MPA-China agreement, for example, stipulated that the MPA will regularly submit a list of films which will be screened there in exchange for an agreement that Chinese officials would seize all illegal copies of the listed movies found on the streets. Although this agreement has resulted in a dramatic decrease in the availability of pirated DVDs in China—for example, none of the films listed on the first submission list were available in Shanghai—it would be more efficient if specific legal language was included in TRIPS which could be applied to all Member States, rather than forcing the motion picture industry to create separate agreements with infringing nations.

Finally, using its Article 71 power of review, the Council must initiate the negotiation of a mechanism to provide supplemental resources to states for the enforcement of TRIPS. For example, Member States could require that parties wishing to pursue an action in court pay a fee to access the court. This court fee would prevent Member States from using their lack of resources as an excuse for failing to prosecute IPR infringements. A second option would be to require Member States to pay dues to the WTO. Like the United Nations, the WTO is a treaty-based organization and does not have its own revenue sources to keep it afloat. Membership dues—paid on a sliding scale—allow the U.N. to pursue its mission. Similarly, membership dues could enable the WTO

139. Id. (citing that, as a result of the agreement, the availability of pirated titles fell 50 percent in Beijing during September and fell “sharply” in Guangzhou).
140. TRIPS Agreement, supra note 20, art. 71.
141. Jiang Zhipei Address, supra note 60.
143. Id.
to distribute resources on an as-needed basis to countries without ample resources to implement IPR protection mechanisms. By amending TRIPS to include a provision that would provide developing countries with the extra resources they need to protect IPR, the loopholes invited by Article 41 and which allow Member States to only enforce IPR to the extent they have the resources to do so, would be narrowed.

V. CONCLUSION: ‘HOLLYWOOD’ STRIKES BACK

A. Introduction

Although the MPAA and Hollywood executives are encouraged by the idea that China has conducted a few investigations into and raids of fraudulent businesses, the rest of the world nevertheless looks on confused and disgruntled at the slow pace with which change is occurring in China. But perhaps “Hollywood” has the right view—that China is forging new paths and is coming around to protect IPR, albeit slowly. As China has begun to recognize the influence of piracy on its own movie industry, its government has been more apt to acknowledge the idea that IPR protections are important. As a result, China has become more willing to work with the United States and the WTO to enforce IPR to the extent it can. But Hollywood—and now the U.S. government—have recognized that complacency is not an option; they must still take the initiative to protect themselves because TRIPS is not currently strong enough to do it.

B. Current Efforts to Protect U.S. Business Interests

Although some Hollywood experts might be optimistic about China’s progress, none can be accused of naiveté. Hollywood executives, the MPAA, and other organizations have taken their own initiatives to curb the impact of copyright piracy in China. For example, the MPAA recently filed lawsuits against six hubs for TV show trading because international markets are hurt by reduced demand for syndication and interna-

144. Id. (explaining that the purpose of collecting membership dues is to enable the United Nations to follow its mission of providing resources to promote world peace, humanitarian issues, etc.). In the context of the WTO, membership dues would allow nations to pool their resources to then distribute to nations incapable of financing their own IPR protection mechanisms. Helping poorer nations up-front would ultimately diminish the amount that nations often pay later to establish other mechanisms to protect IPR when a country cannot meet the demands of TRIPS because it lacks the resources to do so.

145. TRIPS Agreement, supra note 20, art. 41.

146. Special 301 Report, supra note 6.

147. See supra Part II.
tional sales when content is stolen. In addition, some movie production companies have asked that movie theater representatives wear night vision goggles during the first weeks of a movie’s release in order to effectively patrol for pirates. And at the Spiderman premiere, security was tighter than the named superhero’s own webs around arch-enemy the Green Goblin. The studio sent the footage to the theater locked in vaults and armed with digital tracking codes, and guests were sent through metal detectors and subject to identification checks in order to prevent illegal recordings of the movie from being made.

On an international front, movie production companies, such as Warner Brothers, have experimented with the simultaneous release of movies in theaters in the United States and on video in China. For example, the movie Sisterhood of the Traveling Pants, produced by Warner Brothers, was released in 1,500 stores in China on the same day it was released in American theaters. A Warner Brothers executive described this as “a way to offer movie buffs legal alternatives to stolen copies.” However, the studio in this case never planned to release this movie in Chinese theaters, so it is unclear what impact such a strategy would have on box office sales for movies that are planned for future release in China.

Another creative approach was taken by the MPA, which sponsored a merit badge for Boy Scouts in Hong Kong who took a course on international property rights and piracy. Even actor Jackie Chan and California Governor Arnold Schwarzenegger, a former actor himself, irate at lost revenues after their movies’ DVD release, have teamed up to fight piracy as real-life action heroes in a new public service announcement aimed at educating China’s citizens about the criminality of piracy.

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149. High-tech Hunt for Potter Pirates, CNN.COM, May 31, 2004, http://www.cnn.com/2004/SHOWBIZ/Movies/05/31/britain.potter/index.html (explaining that such practices have been in effect for at least two years in areas of the United States where movie piracy is considered a major threat).
150. Healey & Philips, supra note 16.
153. Landreth, supra note 151. Taking this idea one step further, the creators of the most recent Harry Potter movie opted to release it on the “big screen” in China before its U.S. release with the hope that “Chinese fans [would] pay for tickets before pirated DVDs show[ed] up in markets.” Bawa, supra note 10.
These creative attempts by the U.S. government and businesses at protecting IPR serve to compliment the efforts by the Chinese government and other international governments to educate people in China about the importance of protecting IPR and even about the existence of IPR. However, that these actions are even necessary is a clear signal to the international community that the current standards in TRIPS are not working and must be changed if they are to work independently from outside agreements and intervention to protect intellectual property rights.

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SOLOMON’S CHOICE:
THE CASE FOR GRANTING DERIVATIVE ASYLUM TO PARENTS*

I. INTRODUCTION

How could a parent choose between abandoning her child in a foreign country and taking the child back to her home country to face persecution? Indeed, it is difficult to imagine how a parent might even find herself in such a situation. Yet, this is precisely what can occur when a child confronts the type of persecution that targets children but does not directly affect adults. In those cases, the child would be eligible for asylum in the United States, but the parent would not. As a result, the parent would have no legal status in the United States and must choose between leaving the child here and taking her back to the country in which she was originally threatened with persecution. When the case is reversed—where a parent qualifies for asylum and the child does not—the child is eligible for derivative asylum status. As the name suggests, the status is derived from the person applying for asylum. To qual-

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* The title of this Note was inspired by Judge Manion of the Seventh Circuit Court of Appeals, who described parents of persecuted children as facing a “distasteful Solomonic choice.” Oforji v. Ashcroft, 354 F.3d 609, 616 (7th Cir. 2003).

1. Asylum is an immigration status that is granted to a noncitizen who is within the United States and satisfies the statutory definition of a refugee. The Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006). The INA states, in pertinent part:

   The term refugee means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.


ify for asylum under the Immigration and Nationality Act (INA), a person must be outside of her country of origin and have been persecuted or have a “well-founded fear” of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Because the status of a child is derivative of her parent, the child need not prove that she has a well-founded fear of persecution; she need only prove her relationship to the asylee. In other words, the family connection alone is sufficient to grant the status. Underlying this derivative asylum provision is the policy of family unification that recurs throughout the INA. But, despite the premium the INA places on family unification, the derivative asylum provision only expressly names children and spouses as potential beneficiaries. The provision is silent as to whether a parent can gain derivative asylum status from her child.

Several recent cases have foregrounded this question and forced courts to consider if the INA provides relief for parents who seek asylum because their minor child has a well-founded fear of persecution. The

3. The INA does not define the term “persecution,” but the dominant case law holds that persecution is “either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” In re Acosta, 19 I. & N. Dec. 211, 220–22 (1985). In addition, the “harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.” Id. at 222–23. Varying circuit court interpretations of persecution will be considered infra Part IV.

4. The term “well-founded fear” is discussed infra note 40.


6. 8 C.F.R. § 1208.21 (2006). This regulation sets out the criteria of the relationship to the asylee and places the burden of proof on the asylum applicant to establish, by preponderance of the evidence, that the potential beneficiary is an eligible spouse or child. Id.

7. The policy of family unification and reunification can be seen most distinctly in the provisions of the INA that create the preference system for family-sponsored immigration to the United States. Under this regime, an unlimited number of immediate relatives (spouses, minor children, and parents) of United States citizens over twenty-one are eligible for visas and not subject to numerical quotas. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2006). The category of immediate relatives is the most privileged class of family-based immigrants, with the visa quotas becoming more narrow as the family relation becomes less immediate. The entire scheme of family-based immigration to this country suggests how high a premium U.S. immigration law places on keeping families united and ensuring that immigrants have a familiar support system when they arrive in the country. For a hierarchy of the numerical quotas of family-sponsored immigrant visas, see INA § 203(a), 8 U.S.C. § 1153(a) (2006).


9. See Abebe v. Ashcroft (Abebe I), 379 F.3d 755 (9th Cir. 2004) rev’d en banc by Abebe v. Gonzales (Abebe II), 432 F.3d 1037 (9th Cir. 2005). See also Tchoukhrova v. Gonzales (Tchoukhrova I), 404 F.3d 1181 (9th Cir. 2005), rehearing denied by Tchouk-
cases in which this issue most frequently arises involve claims based on threat of female genital mutilation (FGM)\(^{10}\) to a minor daughter. In these cases, the child, if cognizant, has a well-founded fear of persecution on the grounds of FGM, but the parent does not.\(^{11}\) The parent, of course, has a well-founded fear of harm to the child, but does not have a fear of persecution in her own right. Thus, the only way to avoid a division of the family is to grant the parent derivative status. However, the courts and the applicants for asylum have generally resisted the argument that the parent can be a beneficiary of derivative asylum.\(^{12}\) Relying on the interpretation that the silence of the INA on the subject precludes derivative asylum status from flowing from child to parent, the courts have found other ways of granting status to the parent in a situation where the child is the object of persecution. Invariably, if courts are inclined to grant

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10. FGM refers to the practice of cutting the genitalia of young girls in certain African countries. It can cause extreme pain and severe medical complications. AMNESTY INT’L, FEMALE GENITAL MUTILATION: A HUMAN RIGHTS INFORMATION PACK (1997), http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm. See also IMMIGR. AND NATURALIZATION SERVICE, ALERT SER. AL/NGA/94.001, WOMEN: FEMALE GENITAL MUTILATION 1–5 (1994) [hereinafter INS FGM Alert]. Women and girls who object to the procedure have been granted asylum in the United States. See, e.g., In re Fauziya Kasinga, 21 I. & N. Dec. 357 (1996). FGM will be explained and discussed at length infra Part II. The nomenclature of this practice is varied: female genital mutilation, female genital cutting, and female circumcision. Critics of the procedure tend to use one of the former two terms, while those who condone it use the latter. The position of the U.S. asylum law and the author of this Note is that the practice is persecution, torture, and a ground for asylum. Therefore, the Note will employ the term that best conveys the severity of the procedure: female genital mutilation. FGM is also the most commonly used and recognized terminology that refers to the procedure. For a discussion of the contentious terminology of this practice, see Hope Lewis, Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide, 8 HARV. HUM. RTS. J. 1, 4–9 (1995). See also Bettina Shell-Duncan & Ylva Hernlund, Female “Circumcision” in Africa: Dimensions of the Practice and Debates, in FEMALE “CIRCUMCISION” IN AFRICA: CULTURE, CONTROVERSY, AND CHANGE 6–7 (Bettina Shell-Duncan & Yvla Hernlund eds., 2000) (arguing that female genital cutting is the appropriate term because “female circumcision” is misleading as an analogy to male circumcision, while “female genital mutilation” is too judgmental of African cultures that practice the procedure).

11. The most recent case of this type is Abebe II, which will be discussed in detail infra Part III. Abebe I was originally decided in 2004 by a panel of three judges on the Ninth Circuit Court of Appeals. 379 F.3d 755. It was later reheard en banc and decided as Abebe v. Gonzales in 2005. Abebe II, 432 F.3d 1037. This case will be discussed in detail infra Part III.

12. A notable exception to this approach is Judge Ferguson’s dissent in Abebe I, which forms a large part of the basis for the argument in this Note. Infra Part V. 379 F.3d at 760 (Ferguson, J., dissenting).
these cases, they do so under the theory that the parent herself has a well-founded fear of persecution if she tries to protect her child,\textsuperscript{13} or that the parent will be persecuted by virtue of her relationship to the child.\textsuperscript{14} In either case, the parent must show that she has a well-founded fear of persecution to her own person. Following this theory, courts have had to “stretch” to find persecution where, in any other type of case, the fate facing the parent would not rise to the level of persecution.\textsuperscript{15}

In late 2005, the Ninth Circuit decided two cases that involved the question of derivative asylum for parents. The first was \textit{Abebe v. Ashcroft} (\textit{Abebe I}), which centered around an Ethiopian couple and their fear that their U.S. citizen child would be subjected to FGM if the family were deported to Ethiopia.\textsuperscript{16} The Ninth Circuit, in a three-member decision, denied the petitioner’s claim,\textsuperscript{17} but later a majority of the regular active judges on the Ninth Circuit voted to rehear the case en banc.\textsuperscript{18} The case was then decided en banc in late 2005 in \textit{Abebe v. Gonzales} (\textit{Abebe II}).\textsuperscript{19} In addition, the Ninth Circuit recently voted not to rehear en banc another case that involved the issue of derivative asylum for parents. The case was \textit{Tchoukhrova v. Gonzales}, which concerned a mother who applied for asylum with her son and husband as derivative applicants.\textsuperscript{20} In this case, the son was the primary object of persecution because he was a fourteen-year-old boy with cerebral palsy in Russia.\textsuperscript{21} In April 2005, the court, in a three-member decision, held that Russian children with disabilities are eligible for asylum and that harm to the child can be imputed to the parents in support of their asylum applications.\textsuperscript{22} Unhappy with this ruling, the Department of Justice (DOJ) applied for rehearing, but

\begin{itemize}
\item \textsuperscript{13} See, e.g., Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004).
\item \textsuperscript{14} See, e.g., \textit{Tchoukhrova I}, 404 F.3d 1181. This case will be discussed in detail \textit{infra} Part III.
\item \textsuperscript{15} For example, in \textit{Abay v. Ashcroft}, the Sixth Circuit held that parents’ fear of ostracism resulting from refusing to subject the child to FGM may amount to persecution. \textit{Abay}, 368 F.3d 634. However, most courts find that ostracism does not rise to this level. This question will be discussed in depth \textit{infra} Parts II & IV.
\item \textsuperscript{16} \textit{Abebe I}, 379 F.3d at 760.
\item \textsuperscript{17} \textit{Id}.
\item \textsuperscript{18} Abebe v. Gonzales, 400 F.3d 690 (9th Cir. 2005) (vacating panel decision and ordering rehearing en banc).
\item \textsuperscript{19} \textit{Abebe II}, 432 F.3d 1037.
\item \textsuperscript{20} \textit{Tchoukhrova I}, 404 F.3d 1181, 1187.
\item \textsuperscript{21} \textit{Id.} at 1184. The son experienced a litany of harms that will be recounted \textit{infra} Part III.
\item \textsuperscript{22} \textit{Id.} at 1184, 1191.
\end{itemize}
the court decided not to rehear the case on December 5, 2005.\textsuperscript{23} In May 2006, the Department of Justice petitioned the Supreme Court for a writ of certiorari. On October 2, 2006, the Supreme Court granted certiorari, vacating and remanding the case.\textsuperscript{24}

The asylum seekers and the court in both \textit{Abebe} and \textit{Tchoukhrova} did not maintain that the parents could derive asylum status from their child.\textsuperscript{25} Instead, they contended that the parents themselves were subject to persecution of their own because of their relationship to the child. For instance, in their brief on appeal, the parents in \textit{Abebe} argued that they would face ostracism if they tried to protect their daughter from FGM; they did not argue that they were eligible for derivative asylum.\textsuperscript{26} Likewise, the courts have not decided these cases using the theory of derivative asylum. In \textit{Abebe I}, for example, the Ninth Circuit held that the parents did not qualify for asylum because ostracism did not rise to the level of persecution.\textsuperscript{27} A year later, the court in \textit{Abebe II} again decided the case without resolving the question of derivative asylum for parents.\textsuperscript{28}

Similarly, in \textit{Tchoukhrova}, the Ninth Circuit held that the child’s persecution harmed the family as a unit and therefore the family could claim asylum on the grounds that they made up a particular social group.\textsuperscript{29} a

\textsuperscript{23} \textit{Tchoukhrova II}, 430 F.3d 1222. The decision not to rehear the case en banc was affirmed very narrowly, with seven judges dissenting. The dissent, written by Judge Kozinski, will be discussed \textit{infra} Part IV and \textit{infra} note 197.

\textsuperscript{24} \textit{Tchoukhrova III}, 127 S. Ct. 57.

\textsuperscript{25} \textit{Tchoukhrova I}, 404 F.3d at 1184; \textit{Abebe I}, 379 F.3d at 758–60.

\textsuperscript{26} In their brief to the Ninth Circuit, the petitioners did not argue that they were eligible for derivative asylum through their daughter; in relation to the FGM claim, they limited the argument to the possibility that they would face ostracism if they refused to subject their daughter to FGM. Brief for Petitioners at 18–19, \textit{Abebe v. INS}, No. 02-72390 (9th Cir. Mar. 18, 2003). Similarly, the petitioner’s reply brief did not suggest that the parents were eligible for derivative asylum. Reply Brief for Petitioners, \textit{Abebe v. INS}, No. 02-72390 (9th Cir. May 20, 2003).

\textsuperscript{27} \textit{Abebe I}, 379 F.3d at 759.

\textsuperscript{28} \textit{Abebe II}, 432 F.3d at 1043.

\textsuperscript{29} The INA does not define the term “particular social group.” The leading case law on this ground for asylum is the Board of Immigration Appeals’ decision in \textit{In re Acosta}:

\begin{quote}
[W]e interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic . . . . However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.
\end{quote}

\textit{Acosta}, 19 I. & N. Dec. at 233. However, the Ninth Circuit took a different view of “particular social group” in \textit{Sanchez-Trujillo v. INS}, holding that the defining characteristic of
social group comprised of the family of a disabled child in Russia. Thus, in addressing the claims in both Abebe and Tchoukhrova, the Ninth Circuit declined to hold that parents could receive derivative asylum.

With these two cases in mind, this Note proposes that courts should grant asylum to the parents of persecuted children on the theory that they qualify for derivative asylum status through their child’s claim. Courts should not require that the parent show persecution to his or herself because this approach fails to place proper emphasis on the protection of the child. Moreover, requiring the parent to show persecution in her own right has the potential to affect the asylum laws adversely by diluting the very definition of “persecution.” In addition, the alternate theory on which these cases are granted—where the court considers harm to one member of a family as harm to the family unit—also serves to dilute the standards of asylum law by making grants of asylum too broad. As an alternative, this Note will consider the legal bases, policy concerns, and practical implications of granting cases on the theory of derivative asylum for parents. In short, this Note aims to construct a solid rationale by which courts might grant such cases and, in addition, why Congress should amend the INA to specify that parents of persecuted children are eligible for derivative asylum.

Part II of this Note provides a background of circuit court and Board of Immigration Appeals (BIA) cases that considered the question of whether parents may be eligible for derivative asylum through their minor child. Part III focuses on the two recent cases in the Ninth Circuit. Part IV critiques the prevalent approach of requiring the parents to prove that they fear persecution to themselves or considering persecution to the family unit. Offering an alternative, Part V presents the legal and policy arguments in favor of granting derivative asylum status to parents. Part VI concludes that granting derivative asylum to the parents of a minor child is the preferred approach to cases where a minor child is the target of persecution.

a “particular social group” is a “voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.” Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986). The two approaches of In re Acosta and Sanchez-Trujillo have been combined in the Department of Justice’s proposed rule on the topic that would revise the pertinent regulation of 8 C.F.R. § 208.15. 65 Fed. Reg. 76588, 76593–76595, 76598 (Dec. 7, 2000).

30. Tchoukhrova I, 404 F.3d at 1184, 1189–92.

31. In terms of the age limit on what it means to be a child, this Note adopts the INA’s definition of a child as “an unmarried person under twenty-one years of age.” INA § 101(b)(1), 8 U.S.C. § 1101(b)(1).
II. BACKGROUND OF DERIVATIVE ASYLUM CASES

The majority of cases that concern persecution of minor children involve the practice of FGM in certain African countries. According to Amnesty International, eighty-five percent of all FGM procedures in Africa are clitoridectomies, where all or part of the clitoris is removed. Amnesty International estimates that two million girls a year are at risk for undergoing some form of genital mutilation and that it occurs in twenty-eight African countries. FGM can lead to death, hemorrhage, infections, increased risk for contracting HIV, severe pain, psychological problems, and loss of sexual sensation. For these reasons, U.S. law has come to recognize FGM as both a federal crime and a ground for asylum.

32. Of the FGM cases discussed in this Note, five involve asylum seekers from Nigeria, Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. 2004); Azanor v. Ashcroft, 364 F.3d 1013 (9th Cir. 2004); Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003); Nwaokolo v. Ashcroft, 314 F.3d 303 (7th Cir. 2002); two from Ethiopia, Abebe I, 379 F.3d 755 (9th Cir. 2004); Abay, 368 F.3d 634 (6th Cir. 2004); and one from Gambia, In re Dibba, (unpublished) No. A 73 541 857 (BIA Nov. 23, 2001).

33. In addition to this practice, there is the more severe “infibulation” procedure, where all, or part, of the clitoris is removed. Then, all, or part, of the labia minora is removed and the labia majora are then stitched together in order to cover the vagina. Amnesty International estimates that fifteen percent of all FGM in Africa involves this radical version of the practice. Lastly, the least severe procedure consists of only the removal of the clitoral hood. The timing of the procedure also may vary in different countries, ranging from infancy to the time of the first pregnancy, but the average time is between the ages of four and eight years of age. AMNESTY INT’L, FEMALE GENITAL MUTILATION: A HUMAN RIGHTS INFORMATION PACK, supra note 10. See also INS FGM ALERT 1–5, supra note 10.

34. AMNESTY INT’L, FEMALE GENITAL MUTILATION: A HUMAN RIGHTS INFORMATION PACK, supra note 10.

35. Id.

36. 18 U.S.C. § 116 (2005). However, the widespread use of FGM in Africa suggests that many do not consider it to be a crime at all. The most common cultural explanations of the practice are that it ensures virginity, makes the girl marriageable, and ensures fidelity once married. See ELIZABETH HEGER BOYLE, FEMALE GENITAL CUTTING: CONFLICT IN THE GLOBAL COMMUNITY 27–31 (2002). For a multidisciplinary compilation on the tensions between human rights and cultural relativism in the context of FGM, see generally FEMALE “CIRCUMCISION” IN AFRICA: CULTURE, CONTROVERSY, AND CHANGE supra note 10. In addition, for a recent study of the incidence of FGM in Africa that considers the cultural, legal, medical, and ethical dimensions of the practice, see generally ROSEMARIE SKAINE, FEMALE GENITAL MUTILATION: LEGAL, CULTURAL AND MEDICAL ISSUES (2005).

37. The first instance was a BIA decision, In re Fauziya Kasinga, in 1996. Kasinga, 21 I. & N. Dec. 357. Kasinga, the asylum-seeker, was a woman from a particular tribe in Togo that practiced FGM. She was threatened with this practice when she was forced to marry at the age of seventeen and escaped before the procedure. Id. at 358. The BIA held that FGM, as practiced in Kasinga’s tribe, constituted persecution and that she was a
Since 2002 there have been at least a half-dozen cases in circuit courts where adult asylum applicants argued that their minor daughter would be subjected to FGM if she were returned to her country of origin. Parents in these cases have argued that the risk of FGM to their daughter formed the basis of a claim to some sort of immigration relief: asylum, withholding of removal, or relief under the Convention Against Torture.

Further, the BIA found that she had a well-founded fear of persecution in the form of FGM on account of her membership in this social group. The BIA relied, in large part, upon the then recent INS Alert on FGM. Although Kasinga was granted asylum on a rather limited fact pattern, the precedent has been expanded to apply to asylum applicants from a variety of countries who fear FGM or have been already subjected to FGM. See, e.g., Abankwah v. INS, 185 F.3d 18, 20, 25–26 (2d Cir. 1999) (holding that asylum seeker from Ghana had well-founded fear of persecution on account of her fear of FGM).

It should be noted that subsequent to the Second Circuit's decision in this case, Abankwah was found to have fabricated her story of persecution. Still, despite the unfortunate shadow such fraud casts over the facts of the case, the courts have continued to rely on Abankwah for its legal holding. This case solidified the holding in Kasinga, showing that the U.S. law recognizes both future fear of FGM and past FGM as persecution.

For a discussion of derivative asylum for parents within the framework of women refugees' rights, see Marissa Farrone, Note, Opening the Doors to Women? An Examination of Recent Developments in Asylum and Refugee Law, 50 ST. LOUIS U. L.J. 661, 684–89 (2006).

“Relief” is a term of art in immigration law that means that a citizen who is otherwise deportable is granted relief from deportation and is permitted to remain in the United States. Depending on the form of relief granted, the conditions and durations vary. For a discussion of the theories of relief in these cases and for an argument in favor of statutory revision of the INA to provide for derivative status for parents of girls who face FGM, see Kimberly Sowders Blizzard, Note, A Parent’s Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation, 91 CORNELL L. REV. 899 (2006).

“Withholding of removal”—also called “restriction on removal” or “withholding of deportation”—is usually applied for, in the alternative, with an application for asylum. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006); 8 C.F.R. § 208.16 (2006). The standard for asylum requires that a person have “well-founded fear” of future persecution. The Supreme Court held that a noncitizen need not show that it is “more likely than not” that she will be persecuted. INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987). Instead, fear that persecution is more than ten percent likely to occur is well-founded. Cordon-Garcia v. INS, 204 F.3d 985, 990 (9th Cir. 2000). In contrast, withholding of removal involves a higher standard that requires the noncitizen to establish that it is “more likely than not that he or she would be persecuted on account of race, religion, nationality, membership
One of the first circuit cases that addressed this issue was *Nwaokolo v. Ashcroft* in the Seventh Circuit in 2002. The asylum petitioner in the case was a Nigerian woman who had been in the U.S. legally, but had violated the employment terms of her visa and was ordered

in a particular social group, or political opinion” if returned to his or her home country. 8 C.F.R. § 208.16(b)(2) (2006). In other words, the grounds for asylum and withholding are identical, but the standards of proof differ. This difference accounts for the fact that asylum is a discretionary form of relief while withholding is not: when a noncitizen meets the statutory requirements of asylum, a judge may grant asylum; however, when a noncitizen meets the statutory requirements of withholding, a judge cannot remove that person to her home country. *Compare* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) with 8 C.F.R. § 208.16(b)(2).

Relief under the Convention Against Torture (CAT) is another form of relief (CAT relief) that is also usually applied for, in the alternative, with an application for asylum. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, 1465 U.N.T.S. 85 (1988) (codified in U.S. law at 8 C.F.R. §§ 208.16(c), 208.18 (2006)) [hereinafter Convention Against Torture or CAT]. Like withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), the standard for CAT relief is whether the applicant is “more likely than not” to be subjected to torture and, thus, is more strict than the “well-founded fear” standard of asylum status. 8 C.F.R. §§ 208.16(c)(4), 208.18. Also like withholding of removal, this form of relief is not discretionary and a person cannot be removed to a country where it is “more likely than not” that she will be tortured. 8 CFR § 208.16(d). However, CAT relief is more limited than either asylum or withholding under INA § 241(b)(3) because the torture in question must occur with the “consent or acquiescence of a public official or other person acting in an official capacity.” 8 CFR § 208.18(a)(1). The fact that much FGM is performed by private persons and may not be officially sanctioned by the government can lead to problems in making an FGM claim for CAT relief. In contrast, “persecution” in the context of asylum and withholding of removal can be conducted by either a public or private actor that the government is “unwilling or unable to control.” *McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir. 1981). Both withholding of removal under INA § 241(b)(3) and CAT relief are less generous than asylum because these forms of relief merely prevent the person from being deported and are not accompanied by the privileges of asylum status. For example, after one year of living in the United States, an asylee can “adjust status” to that of a legal permanent resident (“greencard” holder). 8 C.F.R. § 209.2 (2006). However, there is no similar provision for a person who is granted withholding of removal or CAT relief—meaning the person cannot become a legal permanent resident the same way. Clearly, asylum is the preferable status. However, often a noncitizen cannot apply for asylum because she has failed to apply for asylum within the one year provided by statute or because of a certain type of criminal conviction. INA §§ 208(a)(2)(B), 208(b)(2)(A), 8 U.S.C. §§ 1158(a)(2)(B), 1158(b)(2)(A). In such cases, the noncitizen will apply for withholding of removal and CAT relief. As a result, cases of asylum, withholding of removal, and claims under CAT are all quite similar. Although this Note focuses on asylum, other forms of immigration relief are discussed because they are analogous to asylum and because the argument for derivative status for parents relates to all forms of relief.

*42. Nwaokolo, 314 F.3d 303.*
deported.\textsuperscript{43} Relying on a case called \textit{Salameda v. INS},\textsuperscript{44} the court reasoned that the petitioner’s youngest daughter, who was an American citizen, would be “constructively deported” if the mother were deported because she was too young to remain alone in the United States and would have to accompany her mother.\textsuperscript{45} As a result, the \textit{Nwaokolo} court granted a stay of removal\textsuperscript{46} because the INS failed to consider that the applicant’s U.S. citizen children might be subject to torture\textsuperscript{47} if their mother were deported to Nigeria.\textsuperscript{48} While this case did not hold that “constructive deportation” could give rise to a derivative asylum claim for a parent of a

\begin{footnotesize}
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\item[\textsuperscript{43}] Id. at 304.
\item[\textsuperscript{44}] Salameda v. INS, 70 F.3d 447 (7th Cir. 1995). Although unrelated to FGM, \textit{Salameda} held that where a minor “will have to follow his parents into exile . . . he is constructively deported and should therefore, one might suppose, be entitled to ask—or more realistically his parents’ lawyer should be entitled to ask on his behalf—for [relief].” Id. at 451.
\item[\textsuperscript{45}] \textit{Nwaokolo}, 314 F.3d at 307–08.
\item[\textsuperscript{46}] A stay is defined as a “postponement or halting of a proceeding, judgment, or the like.” \textsc{Black’s Law Dictionary} 1425 (17th ed. 1999). In \textit{Nwaokolo}, the petitioner’s order of deportation was stayed pending the resolution of her petition for review. \textit{Nwaokolo}, 314 F.3d at 310. The term “removal” encompasses both deportation and exclusion. INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2006).
\item[\textsuperscript{47}] The court suggested that FGM is torture within the meaning of the Convention Against Torture. \textit{Nwaokolo}, 314 F.3d at 310. The position that FGM is torture was later confirmed by a statement by the Seventh Circuit: “It is undisputed that FGM as practiced in Nigeria constitutes ‘torture’ within the meaning of the CAT.” \textit{Oforji}, F.3d 609, 615 n.2. The first article of the Convention Against Torture defines torture as:
\begin{quote}
Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity . . . . This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.
\end{quote}
\textsc{Convention Against Torture, supra} note 41, art. 1. In the context of immigration relief, this definition was largely assumed by the corresponding Department of Justice regulation. 8 C.F.R. § 208.18(a) (2006). For an analysis of FGM cases in light of the relationship between torture and family unification, see Lori A. Nessel, \textit{Forced to Choose: Torture, Family Reunification, and United States Immigration Policy}, 78 Temp. L. Rev. 897, 941–42 (2005). In addition, for a general discussion of gender and the U.S. approach to the CAT, see Lori A. Nessel, “\textit{Willful Blindness}” to Gender-Based Violence Abroad: \textsc{United States’ Implementation of Article Three of the United Nations Convention Against Torture}, 89 Minn. L. Rev. 71 (2004).
\item[\textsuperscript{48}] \textit{Nwaokolo}, 314 F.3d at 308.
\end{itemize}
\end{footnotesize}
child who would be subject to FGM, it did establish that the INS\textsuperscript{49} must consider the potential harm to a child when granting or denying immigration relief.\textsuperscript{50}

In 2003, the Seventh Circuit considered and rejected a similar case involving derivative asylum in \textit{Oforji v. Ashcroft}.\textsuperscript{51} This case concerned an asylum seeker from Nigeria with two U.S. citizen daughters. The mother herself had already undergone FGM and therefore did not fear this form of persecution herself. Instead she feared that her daughters would be subject to the practice if she were deported and they returned to Nigeria with her.\textsuperscript{52} The court stated:

Oforji requests this court to “extend derivative asylum” to her based on “new expansions and considerations” reflected in case law such as \textit{Nwaokolo} . . . and \textit{In Re Kasinga} . . . . Oforji bases this request on her claim that “[t]his court has previously recognized that when an alien minor’s parent is deported, the minor will have to accompany the parent into exile and is also effectively deported.”\textsuperscript{53}

The court dismissed this argument by distinguishing the case from the “constructive deportation” that was avoided in \textit{Salameda} because the \textit{Nwaokolo} children are citizens who have the legal right to remain in the United States.\textsuperscript{54} The court stated that, if the mother can locate the father (or, presumably, another caretaker) in the United States, the children may be able to avoid going to Nigeria with their mother.\textsuperscript{55} Essentially, the mother faced what Judge Manion, in his majority opinion, called the “distasteful Solomonic choice” between leaving her children behind or subjecting them to FGM in Nigeria.\textsuperscript{56} Still, the court was unable to pro-

\textsuperscript{49} The Homeland Security Act of 2002 reclassified the INS and several other immigration agencies under the control of the Department of Homeland Security (DHS) and the Department of Justice (DOJ). Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135. As a result, cases prior to that date refer to the INS, while subsequent cases refer to the DHS or DOJ. For a discussion of this restructuring, see David A. Martin, \textit{Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements}, 80 No. 17 INTERPRETER RELEASES 601 (2003).

\textsuperscript{50} \textit{Nwaokolo}, 314 F.3d at 308–10.

\textsuperscript{51} \textit{Oforji}, 354 F.3d 609.

\textsuperscript{52} \textit{Id}. at 615.

\textsuperscript{53} \textit{Id}.

\textsuperscript{54} \textit{Id}.

\textsuperscript{55} \textit{Id}. at 616.

\textsuperscript{56} \textit{Id}. This statement is part of the majority opinion although, on the face of it, it sounds critical of the decision to deny relief in this case. Essentially, the court stated that the law is such that the “Solomonic choice” is the only option left to the mother in such a case. Judge Posner, in a concurring opinion, added that derivative asylum is logically impossible in this case since the children are U.S. citizens, and are therefore not eligible.
vide relief, holding that parents are not eligible for derivative asylum status.57

The Seventh Circuit again considered a case of this kind in Olowo v. Ashcroft in 2004.58 Like many in this line of cases, the petitioner was a national of Nigeria who had already been subjected to FGM and had two daughters. Before the Immigration Judge, and on appeal, Olowo claimed asylum on the basis that her children would have to return to Nigeria if she were deported and would then be forced to undergo FGM.59 The court, ostensibly relying on Oforji, suggested that a parent’s claim for derivative asylum is possible, stating that “claims for ‘derivative asylum’ based on potential harm to an applicant’s children are cognizable only when the applicant’s children are subject to ‘constructive deportation’ along with the applicant.”60 The court then cited the derivative asylum provision of the INA in support of this contention.61 However, the court found that Olowo did not qualify for derivative status because her children were legal permanent residents and could not be “constructively deported.”62 In short, Olowo’s case failed because the court did not find that the children would be “constructively deported,” but the court did leave open the possibility that in circumstances where a child faced “constructive deportation,” a parent might be granted derivative asylum status.63

for asylum because they have no need for it. Id. at 619 (Posner, J., concurring). As Posner pointed out, this distinction fails to have meaning because the children are in the same position as they would be if they were noncitizens granted asylum and their mother was deported: “although they are citizens they are treated as badly as aliens.” Id. at 620 (Posner, J., concurring). The logical problem of whether parents can derive asylum status from a U.S. citizen child will be addressed infra Part V.

57. Id. at 618.
59. Olowo, 368 F.3d at 697.
60. Id. at 701.
62. This decision suggests some disagreement about the difference between actual deportation and “constructive deportation” as elaborated in Salameda, 70 F.3d at 451. That case defined “constructive deportation” as a situation where minor children, who were legally free to remain in the United States, would be forced by necessity to follow a parent who was deported. Id. In Olowo, this outcome is exactly what the children faced because they would be forced to accompany their mother even though they were not themselves being legally deported. To that effect, Olowo argued that if she were deported, her husband would be unable to care for her daughters on his own and they would have to return with her to Nigeria. Olowo, 368 F.3d at 698.
63. Olowo, 368 F.3d at 701.
In May 2004, only eight days after the Seventh Circuit’s decision in *Olowo*, the Sixth Circuit decided the case of *Abay v. Ashcroft*.64 In this case, the petitioner and her daughter were both citizens of Ethiopia.65 Unlike *Olowo*, both the mother and the daughter applied for asylum on the grounds that they feared that the daughter would be subjected to FGM.66 Relying on the State Department Human Rights Country Report for Ethiopia67 that stated that FGM was “nearly universal” and testimony from the daughter, the Sixth Circuit easily concluded that the daughter had a well-founded fear of persecution vis-à-vis FGM.68 The case of the mother, Abay, however, was more problematic. The court did not consider the argument of whether derivative asylum might be possible. Instead, it framed the question as follows: “The issue before the Court is really whether Abay can seek asylum in her own right based on a fear that her child will be subjected to female genital mutilation.”69 Specifically, the court noted that Abay “acknowledges that there is no express statutory authority for a parent to claim ‘derivative asylum’ based on her child’s asylee status” and cited the derivative asylum provision of the INA.70 It is not clear what the court would have held on the derivative asylum question because the court did not formulate the question in that way.71

Instead, Abay argued that she was eligible for asylum because the BIA, in *In re C-Y-Z*, had previously held that a family member may be eligible for asylum if she witnessed harm to another family member.72 In light of the likelihood that the family would face ostracism if they refused to have the daughter subjected to FGM, the court agreed with Abay,73 citing a series of BIA decisions that granted withholding of removal74 to parents who feared that their daughters would be forced to undergo FGM. In particular, the court relied upon *In re Dibba*, where the BIA granted re-

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64. *Abay*, 368 F.3d 634.
65. *Id.* at 635.
66. *Id.* at 636.
67. *Id.* at 369.
68. *Id.* at 640.
69. *Id.* at 641.
70. *Id.*
71. *Id.*
72. The *Abay* court cited the following from a concurring opinion in *In re C-Y-Z*: “It not only constitutes persecution for the asylum applicant to witness or experience the persecution of family members, but it serves to corroborate his or her own fear of persecution.” *Abay*, 368 F.3d at 641 (quoting *In re C-Y-Z*, 21 I. & N. Dec. 915, 926–27 (BIA 1997) (Rosenberg, Board Member, concurring)).
73. *Abay*, 368 F.3d at 640–42.
74. *See supra* note 40 (discussing withholding of removal).
opening of a case to a petitioner so that she could proceed with an asylum claim based on fear that a daughter would be subject to FGM. The BIA stated that “normally a mother would not be expected to leave her child in the United States in order to avoid persecution.”75 In concluding that Abay had a valid claim for asylum, the court stated that the precedents “suggest a governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm.”76 The court decided that the mother’s fear of being forced to return her daughter to Ethiopia and to witness her mutilation amounted to a well-founded fear of persecution.77

Also in 2004, the Ninth Circuit considered a similar claim in *Azanor v. Ashcroft*.78 In that case, the court noted that the question of whether a parent can assert a derivative claim on behalf of a child was one of first impression to the circuit and had not been decided.79 The petitioner was a Nigerian woman with a U.S. citizen daughter.80 The mother had already been subject to FGM and feared that the same would be forced upon her daughter if she were deported.81 Because of an untimely filing of her motion to reopen the case, the court denied review of her asylum claim.82 It did, however, hold that the BIA abused its discretion in not reopening her case to consider CAT relief83 based on the threat of FGM to her daughter.84 The court remanded the case to the BIA to decide, among other issues, any claim the mother might have to a derivative claim under CAT.85 To this affect, Judge Wallace, writing for the majority, stated:

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75. Id. at 642 (citing *In re* Dibba, No. A73 541 857 (unpublished) (BIA Nov. 23, 2001)).
76. Id.
77. Id. In *Abebe I*, the Ninth Circuit suggested that the Sixth Circuit held that Abay was eligible for asylum because she faced ostracism if she did not permit her daughter to be subjected to FGM. *Abebe I*, 379 F.3d at 759. The Ninth Circuit then distinguished the cases by noting that ostracism did not rise to the level of persecution under Ninth Circuit case law and declined to follow the holding in *Abay*. Id. Although the Sixth Circuit did briefly discuss potential ostracism, the *Abay* court decided the case on the theory that witnessing harm to a family member amounted to persecution. *Abay*, 368 F.3d at 642. The *Abay* decision will be considered in greater depth infra Part IV.
78. *Azanor*, 364 F.3d 1013.
79. Id. at 1021.
80. Id. at 1016.
81. Id.
82. Id. at 1018.
83. See supra note 41 (discussing CAT relief).
84. *Azanor*, 364 F.3d at 1021.
85. Id.
“Moreover, we should not decide whether an alien may assert a derivative torture claim on behalf of her United States citizen children—a question of first impression in this circuit—without first allowing the Board to bring its considerable experience and expertise to bear on the issue.”

In essence, the court deferred to the BIA, but allowed for the possibility of a parent’s derivative claim by stating that it was a novel question for the courts and that prohibition of such a status was not a foregone conclusion.

III. RECENT NINTH CIRCUIT CASES: ABEBE AND TCHOUKHROVA

Despite Azanor’s holding that derivative asylum for parents was still an open question, the Ninth Circuit, in Abebe I, chose not to address the issue directly. As aforementioned, this case was decided by a panel of three judges, reheard en banc, and decided in late 2005. The case attracted a great deal of attention from asylee advocates and some degree of attention from the press. Abebe involved Ethiopian parents who claimed asylum, in part, under the theory that their daughter would be subjected to FGM if the family were deported. The court suggested that the FGM claim presented a close case, but denied the petition for review of the deportation order on the basis that the parents would be able to protect the daughter from the mutilation. The court based this conclusion on the fact that the parents failed to prove that the daughter’s subject to FGM was “inevitable or even probable” because the parents stated they would do anything they could to prevent FGM. The court

86. Id.
88. Id.
89. Abebe I, 400 F.3d 690 (granting rehearing en banc).
90. Abebe II, 432 F.3d 1037.
93. Abebe I, 379 F.3d at 756–57.
94. Id. at 759. The court referred to the FGM claim as a “closer case” in contrast to the father’s claim of political persecution, which the court rejected. Id.
95. Id. As Judge Ferguson pointed out in his dissent in Abebe I, this was an inappropriate standard. Id. at 760–61 (Ferguson, J., dissenting). He reasoned that the majority
also based this finding on a ten-year-old State Department document that stated that “women are able to prevent their daughters from being subjected to [FGM] by relatives.” Furthermore, the court reasoned that even if the family faced ostracism for protecting the daughter from FGM, ostracism did not rise to the level of persecution under Ninth Circuit case law and could not be a ground for asylum. To that effect, the court focused on the issue of ostracism in explaining why it need not follow the result in Abay. In Abebe I, the court stated that Abay was not analogous because the Sixth Circuit recognized ostracism as persecution, but the Ninth did not. This point of distinction, however, is somewhat misplaced since Abay did not center on ostracism as a basis for the mother’s asylum claim, but instead focused on the fear experience of witnessing harm to one’s family member. In short, Abebe I rejected the reasoning of Abay and eschewed the derivative asylum argument.

In 2005, the Ninth Circuit decided Abebe II and again declined to address the theory of derivative asylum directly. Instead, the court remanded the case to the BIA to address the question of derivative asylum for parents in the first instance. The court decided the case on a much narrower basis, holding that the Immigration Judge had erred in finding that the parents did not have a well-founded fear that their daughter would be subject to persecution. As a result, the Ninth Circuit held that the parents had made a prima facie case for asylum and remanded to the BIA to consider, in the first instance, if parents are eligible for derivative

was incorrect in suggesting that the parents needed to prove that the FGM was probable or likely to occur. Instead, Judge Ferguson, following the Supreme Court in INS v. Cardoza-Fonseca, quoted: “one can certainly have a well-founded fear of an even happening when there is less than a 50 percent chance of the occurrence taking place.” (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)). With this in mind, Judge Ferguson argued that the majority in Abebe I held the parents to an inappropriate standard and, even if it is likely that the parents can protect their daughter, “they may still have a well-founded fear of not being able to do so.” Abebe I, 379 F.3d at 761 (Ferguson, J., dissenting).

96. Abebe I, 379 F.3d at 759 (citing U.S. DEP’T. OF STATE, ETHIOPIA–PROFILE OF ASYLUM CLAIMS & COUNTRY CONDITIONS 5 (1994)).
97. Id.
98. Id.
99. Abebe I, 379 F.3d at 759; Abay, 368 F.3d at 640.
100. Abebe I, 379 F. 3d at 759; Abay, 368 F.3d at 640.
101. Id., 379 F.3d at 759–60.
102. Abebe II, 432 F.3d at 1043.
103. Id.
104. Id.
The case was very close, with only one vote affirming the decision. To date, the BIA has not decided this issue. 

Shortly after agreeing to rehear Abebe en banc, but before announcing its decision, the Ninth Circuit decided Tchoukhrova v. Gonzales. Like Abebe, Tchoukhrova received attention from advocates of asylum seekers and the disabled. In addition, news of the case appeared in the San Francisco Chronicle. Tchoukhrova differed from most of the

106. Commentary on this case has interpreted it to mean that the Ninth Circuit held that the parents were eligible for asylum. See, e.g., CGRS Wins en banc Genital Cutting Case—Abebe, Newsletter (Center for Gender and Refugee Studies, U.C. Hastings College of the Law, San Francisco, CA), Spring 2006, available at http://cgrs.uchastings.edu/new sletter/spring06/spring06.htm. Read literally, Abebe II actually remands the case to the BIA. Nevertheless, Judge Tallman, in his dissenting opinion in Abebe II, noted that the majority’s remand was illusory because the court did not dismiss the derivative claim as being without merit. Abebe II, 432 F.3d at 1048 (Tallman, J., dissenting). The decision to remand this issue to the BIA is based on the Supreme Court case of INS v. Ventura, which held that if an issue emerged in a circuit court that the executive agency’s adjudicatory bodies (the immigration judge and BIA) did not previously hear, the court must remand to allow the agency (here, the INS or DHS) to decide the matter in the first instance. INS v. Ventura, 537 U.S. 12, 17 (2002). To this effect, the Supreme Court held: “Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.” Id. at 16. Further, the Court noted: “The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.” Id. at 17.

107. Abebe II, 432 F.3d 1037.


109. Tchoukhrova I, 404 F.3d 1181.


cases in this Note because it did not involve FGM. However, it did address the question of derivative asylum for parents. After the case was decided in favor of the asylum applicants, the DOJ applied for a rehearing en banc. In early December 2005, the court voted not to rehear the case. However, the government petitioned the Supreme Court for a writ of certiorari in May 2006. In October 2006, the Supreme Court vacated and remanded the case.

In _Tchoukhrova_, Victoria Tchoukhrova, the mother of a severely disabled Russian boy, applied for asylum and named her son and her husband as derivative beneficiaries. However, the person in this case who was the primary object of persecution was the child, Evgeni. His cerebral palsy was caused by the negligence of the Russian state-owned hospital when, in 1991, his mother was giving birth to him. The staff induced labor and then left the mother alone overnight, so that the child was still inside the womb and deprived of oxygen. Then, when the staff returned to deliver the child, they broke his neck in the process of extracting him. Telling his mother that “they didn’t see the reason why he needed to live,” they threw Evgeni into a medical waste container. Evgeni lived and was removed from the medical waste bin. “Despite Victoria and her husband Dmitri’s attachment to their newborn son, government officials tried to intimidate the couple into abandoning him to a state-run orphanage. Notwithstanding his parents’ refusal to give their consent, Evgeni was transferred to an institution for orphaned children with birth defects.” Later, as a child, Evgeni was subject to verbal and physical assaults by strangers. Two attacks against him were so severe that Evgeni required hospitalization, but the police never investigated the incidents.

113. _Tchoukhrova I_, 404 F.3d 1181.
114. Anker Memorandum, _supra_ note 110.
115. _Tchoukhrova II_, 430 F.3d 1222, 1223.
117. _Tchoukhrova III_, 127 S. Ct. 57.
118. _Tchoukhrova I_, 404 F.3d at 1187.
119. _Id_. at 1184–87.
120. _Id_. at 1184.
121. _Id_.
122. _Id_.
123. _Tchoukhrova I_, 404 F.3d at 1184.
124. _Id_.
125. _Id_. at 1184–85.
126. _Id_. at 1185.
127. _Id_.
The Ninth Circuit, in deciding *Tchoukhrova*, was faced with a very compelling set of facts and it is not surprising that the court ruled in favor of the family. However, rather than advance the argument of derivative asylum for parents, the court decided the case under a different theory. First, the court held that Evgueni was a member of a particular social group of disabled children who faced persecution on account of their disabilities. Then the court turned to the question of whether a parent could receive derivative asylum through her child. In the first definitive statement by a majority opinion in the Ninth Circuit, the court interpreted the silence of the INA on derivative asylum for parents to mean that such status was not legally permissible. Instead, the court stated: “[i]f the child is the principal applicant and is granted asylum, the child can legally stay in this county, but his parents will be removed.” The court then recognized the dilemma inherent in such a rule: “Facing imminent removal, parents could be forced to make a choice between abandoning their child in the United States or taking him to a country where it is likely that he will be persecuted.”

In resolving the case, the court found a creative way to effectively grant asylum to the parents without literally calling it derivative asylum. The court concluded that parents of disabled children are part of the same particular social group as their children because the parent-child relationship is “immutable.” Then the court held that asylum claims of family members within this particular social group should be considered as a unit and that harm to one member of the family may be imputed to the entire family unit. Therefore, the harm to Evgueni could be imputed to his mother. To this effect, the court stated:

Taken as a whole, the harm to which Evygeni was subjected unquestionably rose to the level of persecution. Because this persecution is properly considered when adjudicating his mother’s claim, we hold that Victoria [the mother] has suffered past persecution, and note that the same would be true whichever parent was the principal applicant.

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128. *Tchoukhrova I*, 404 F.3d at 1188–89.
129. *Id.* at 1190–91.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 1189–90.
134. *Tchoukhrova I*, 404 F.3d at 1192.
135. *Id.* at 1195. The term “principal applicant” refers to the person applying for asylum—in this case, Evygeni’s mother. The finding of past persecution is significant here because past persecution creates a presumption of future persecution. 8 C.F.R. § 208.13(b)(1) (2006). However, this presumption can be rebutted by the Government with
In other words, the court concluded that Evgeni’s persecution could be imputed to his mother, making her eligible for asylum. Then, in a strange and circular twist, Evgeni and his father became eligible for derivative asylum status as the son and husband of Victoria. The court achieved the same outcome that would have resulted from holding that parents were eligible for derivative asylum. However, the implications of granting on the Tchoukhrova theory are not the same as those that flow from a derivative asylum approach.136

IV. THE PROBLEMS WITH REQUIRING PERSECUTION OF THE PARENT

The result of not extending derivative asylum to parents is that courts must find that the parent fears persecution in her own right. The Sixth Circuit in Abay and the Ninth in Tchoukhrova have granted137 cases of this type, and in both cases, declined to hold that the parents are eligible for derivative status.138 Both decisions present problematic legal and practical implications.

The Sixth Circuit approach in Abay was to find that the mother’s fear of being unable to prevent and having to witness her daughter’s mutilation constituted persecution.139 This assertion presumes that persecution can be purely psychological and fear of harm to another or fear of witnessing harm to another constitutes persecution. This issue is complicated by the fact that the INA does not define the term “persecution.”

a showing that changed circumstances make the fear of future persecution unfounded. Id. Yet, certain forms of past persecution have been found to be so severe that even an absence of a fear of future persecution cannot bar a grant of relief from deportation. See In re Chen, 20 I. & N. Dec. 16, 19 (BIA 1989) (holding that a favorable grant of discretion may be warranted on humanitarian grounds in certain extreme cases even if there is little likelihood of future persecution). See also 8 C.F.R. § 1208.13(b)(1)(iii)(A) (2006). In Mohammed v. Gonzales, the Ninth Circuit found that the experience of past FGM is an ongoing harm that may entitle the applicant to relief even if she does not fear future FGM. Mohammed, 400 F.3d at 802.

136. This point will be discussed infra Part IV.

137. Tchoukhrova I, 404 F.3d 1181; Abay, 368 F.3d 634. Technically, the circuit courts do not grant or deny asylum claims; only executive officials within the Department of Homeland Security and the Department of Justice have the authority to grant asylum. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006). A circuit court reviews the decisions of the executive bodies below (the immigration judge and the BIA) and remands the case to the BIA, which has the authority to grant or deny the claim. See, e.g., Abay, 368 F.3d at 642–43 (remanding the case to the BIA “for further consideration in light of our conclusions”).

138. Tchoukhrova I, 404 F.3d at 1191–92; Abay, 368 F.3d at 641.

There is ample, often contradictory, case law on the meaning of this word in the context of asylum. For example, according to the BIA in In re Acosta, prior to the 1980 Refugee Act, the term meant “either a threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive.” Acosta concluded:

As was the case prior to the enactment of the [1980] Refugee Act, “persecution” as used in section 101(a)(42)(A) [the refugee/asylee definition] clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.

In general, persecution tends to signify serious threats to life or freedom. For instance, the Ninth Circuit stated: “This circuit has defined persecution as ‘the infliction of suffering or harm’ upon those who differ (in race, religion or political opinion) in a way regarded as offensive.” Furthermore, the Ninth Circuit held that “persecution . . . is an extreme concept that does not include every sort of treatment our society regards as offensive.” Likewise the Seventh Circuit has held that persecution may occur from acts such as “detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture.” In contrast, the Sixth Circuit has suggested that ostracism may rise to the level of persecution.

142. Id. The requirement that the persecution must be intended to punish a person or overcome a certain characteristic she possesses does not fit well in the context of FGM, where the persecutors do not generally view their act as punishment or harm. As a result, FGM cases do not require that the perpetrator have the intent to persecute, harm, or punish. See Kasinga, 21 I. & N. Dec. at 365. For a different approach, compare the concurrence of BIA Board Member Rosenberg, where she argued that the requirement of intent does apply to FGM because the procedure is intended to overcome the applicant’s state of being “non-mutilated and accordingly, free from male-dominated tribal control.” Id. at 374 (Rosenberg, Board Member, concurring).
143. Korablina v. INS, 158 F.3d 1038, 1043 (9th Cir. 1998) (quoting Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995)). Both Korablina and Ghaly refer to the language used in In re Acosta.
144. Abebe I, 379 F.3d at 758 (quoting Fatin v. INS, 12 F.3d 1233, 1243 (3d Cir. 1993)).
145. Mitev v. INS, 67 F.3d 1325, 1330 (7th Cir. 1995), followed by Oforji, 354 F.3d 609.
146. Abay, 368 F.3d at 640.
In Abay, the court suggested that the mental harm of witnessing her daughter’s mutilation rose to the level of persecution. However, given the diversity of opinion among the circuits as to the meaning of persecution, it is doubtful that other circuits will follow the logic of Abay and hold that the mental harm is persecution. Those who support the approach in Abay and argue that mental harm is persecution cite instances where courts have granted asylum when the persecution was not physical. For instance, Marcelle Rice, in an article in Immigration Briefings, cited Kovac v. INS, where the Ninth Circuit found that persecution was not limited to physical acts. However, that case is not entirely apropos because it concerned economic harm and did not consider mental or psychological harm. Generally, where the courts have considered the question of mental harm, they have held that it may be a significant aspect of persecution, but only when coupled with physical harm or a threat of physical harm.

The argument in Abay that mental harm could constitute persecution relied on In re C-Y-Z, where the BIA granted withholding of deportation to a man because his wife had undergone forced sterilization as a part of China’s coercive family planning program. The Abay decision quoted the following section of In re C-Y-Z as an analogy to Abay’s claim: “It not only constitutes persecution for the asylum applicant to witness or experience the persecution of family members, but it serves to corroborate his or her own fear of persecution.” However, this section of the decision is part of a concurring opinion; the majority holding in In re C-Y-Z is narrower and does not focus on the element of mental harm.

147. Id. at 641–42.
148. See Rice, supra note 91.
149. Id.; Kovac v. INS, 407 F.2d 102, 105–07 (9th Cir. 1969).
150. Id. at 107.
151. See, e.g., Shoaira v. Ashcroft, 377 F.3d 837, 844 (8th Cir. 2004) (holding that the asylum applicant’s experience of witnessing her father’s forcible arrests on four occasions, which led to post-traumatic stress disorder, did not rise to the level of persecution, but acknowledging that mental harm may be an aspect of persecution).
152. See, e.g., Duarte de Guinac v. INS, 179 F.3d 1156, 1163 (9th Cir. 1999) (holding that “the physical and mental abuse he experienced is wholly consistent with the documentary evidence introduced by the INS and compels the conclusion that he was a victim of persecution”). In reviewing the precedent cases, there is no evidence that mental harm alone may rise to the level of persecution. A search of BIA and circuit court cases did not yield any examples, but, since some BIA decisions are not published, the author of this Note is unwilling to state conclusively that no such case exists.
153. This relief is synonymous with withholding of removal or restriction on removal. See supra note 40 (discussing the withholding of removal).
155. Id. at 926–27 (Rosenberg, Board Member, concurring); Abay, 368 F.3d at 641.
caused by witnessing harm to a family member. Instead, *In re C-Y-Z* held that “the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than him.”156

Thus, one potential shortcoming of the *Abay* argument that mental harm is persecution is that other circuits will resist following it because its reasoning stretches and dilutes the definition of persecution. The *Abay* decision extrapolated from a concurring opinion in *In re C-Y-Z* and proffered a broad interpretation of persecution that included purely mental harm. Although this holding is within the jurisprudence of the Sixth Circuit, it does not necessarily apply to other circuits that define persecution more narrowly.157 For instance, as aforementioned, in *Abebe I*, the Ninth Circuit acknowledged the holding in *Abay*, but explicitly declined to follow it, in part, because ostracism did not conform to their circuit’s conception of persecution.158 To date, no other circuit court has followed the holding of *Abay*.159

The practical result of proceeding on the *Abay* theory is that it fails to put proper emphasis on the child and, as a result, may fail to protect the child. The child’s protection is dependent on the parents’ ability to show that they themselves fear persecution. If the parents cannot convince an Immigration Judge or a court that their mental harm amounts to persecution, U.S. asylum law cannot protect the best interest of the child because her parents must choose between abandoning her or returning her to harm. In either case, the best interest of the child is not protected. In addition, requiring parents to make a showing of their own persecution complicates what might otherwise be a simple case: the case for granting asylum to the child may be solid, but the more tenuous claims of the parents must also be advanced and adjudicated. The result is to place an un-


157. The Sixth Circuit has tended to take a comparatively broad approach to the definition of persecution. For instance, the court in *Abay* suggested that ostracism might be a form of persecution, but the Ninth Circuit rejected that proposition in *Abebe I*. See *supra* text accompanying note 72 and compare to *supra* text accompanying notes 97–102.

158. *Abebe I*, 379 F.3d at 759.

159. Apart from the Ninth, other circuits have not directly addressed the issue of whether mental harm of this kind may rise to the level of persecution. The Seventh Circuit cited *Abay* in *Liu v. Ashcroft*, but cited in relation to a different issue. *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004).
necessary burden on the court system by adding additional claimants and layers of legal complexity.

In contrast to Abay’s focus on mental harm, Tchoukhrova maintained that harm to one person could be imputed to the family unit. In Tchoukhrova, the Ninth Circuit held that “disabled children and their parents constitute a statutorily protected group and that a parent who provides care for a disabled child may seek asylum and withholding of removal on the basis of the persecution that the child has suffered on account of his disability.” The court may have considered the question in this way because, arguably, nothing suffered by the parents of Evgueni constituted persecution per se. In particular, the court held that precedent on derivative asylum has not “formalistically divided the claims between ‘principal’ and ‘derivative’ applicants but instead, without discussion, have simply viewed the family as a whole.” Therefore, “a parent of a disabled child may file as a principal applicant in order to prevent the child’s forced return to the family’s home country and may establish her asylum claim on the basis of the persecution inflicted on or feared by the child.”

The problem with the argument that persecution of one person is persecution of the family unit is similar to the problem with the Abay argument that mental harm is persecution: both decisions take an idiosyncratic approach to the very notion of persecution. In the case of Tchoukhrova, the Ninth Circuit suggested that the lack of an express statute making parents eligible for derivative status is a formalistic procedural problem that can be overcome by treating the family as a unit. In support of this position, the Tchoukhrova court cited a series of cases where the court treated the family as a whole in the context of an asylum

160. “Unnecessary” because it could be avoided by following the derivative asylum argument. See infra Part V.
161. Tchoukhrova I, 404 F.3d at 1190–92.
162. Id. at 1184.
163. The parents were not permitted to see their son for two months and, when they were, they found the conditions in the institution “horrifying.” Id. at 1185. After their son was released, they were denied any public medical support because he was labeled as permanently disabled. Id. As a result of their experiences, the parents became advocates for disabled children in Russia. Id. at 1186. This activism led to further problems with society: people threw stones at the mother and vandalized their car, the father was fired, and at subsequent job interviews he was told to stop advocating for the rights of disabled children. Id. at 1186. Judge Kozinski, in his dissent to the decision not to rehear the case, wrote, “the harms suffered directly by Victoria are clearly not enough to amount to persecution.” Tchoukhrova II, 430 F.3d at 1225 (Kozinski, J., dissenting).
164. Tchoukhrova I, 404 F.3d at 1192.
165. Id.
166. Id. at 1191–92.
claim.\textsuperscript{167} However, none of the cited cases contemplated a situation where the persecution of a child was imputed to a parent, or considered to constitute harm to the entire family unit.\textsuperscript{168} In other words, even though the decision cited many cases as bases for its conclusion, the holding in \textit{Tchoukhrova} created a novel conception of persecution to the family unit. To this effect, Judge Kozinski, in his dissenting opinion to the later decision not to rehear \textit{Tchoukhrova} en banc, wrote:

> By allowing the harms suffered by a child to be imputed to the parent, the panel in effect creates a reverse derivative asylum claim . . . . This exotic reading of the immigration statute was never discussed by the [Immigration Judge], the BIA or even the parties—rather, it is something the panel comes up with on its own.\textsuperscript{169}

Had courts actually taken the approach that \textit{Tchoukhrova} suggests they did and treat families as a unit, the discourse on the question of derivative asylum for parents—spanning from \textit{Nwaokolo} to \textit{Abebe}—would have been unnecessary. If immigration judges and circuit courts had considered harm to one family member as harm to the unit, they could have granted those cases without much discussion.

In addition, the decision not to rehear \textit{Tchoukhrova} succeeded very narrowly; six of his fellow judges joined Judge Kozinski in his dissenting opinion.\textsuperscript{170} Judge Kozinski argued that the \textit{Tchoukhrova} decision was flawed because it expanded the notion of family as particular social group. To this effect, Judge Kozinski wrote: “[F]inding that a group was persecuted doesn’t mean that every member of the group was persecuted. Rather, once an asylum petitioner has shown that he is a member of a persecuted group, he must still show that he himself has suffered or is likely to suffer persecution.”\textsuperscript{171} In contrast, the \textit{Tchoukhrova} court did not consider whether the mother suffered persecution by virtue of being in the particular social group of parents of disabled children in Russia.\textsuperscript{172} Judge Kozinski maintained that it is important to consider the harms to

\textsuperscript{167}Id. at 1192. In particular, the court cited: Kaiser v. Ashcroft, 390 F.3d 653, 660 (9th Cir. 2004); Maini v. INS, 212 F.3d 1167, 1177 (9th Cir. 2000); Singh v. INS, 94 F.3d 1353, 1360 (9th Cir. 1996); Prasad v. INS, 47 F.3d 336, 339 (9th Cir. 1995).
\textsuperscript{168}\textit{Tchoukhrova I}, 404 F.3d at 1191–92.
\textsuperscript{169}\textit{Tchoukhrova II}, 430 F.3d at 1223 (Kozinski, J., dissenting). “Panel” in his quote refers to the three-member panel that decided \textit{Tchoukhrova}. In addition, Judge Kozinski referred to the “immigration statute” in this way because he concluded that a certain regulation about refugees statutorily precludes the possibility that parents can receive derivative asylum. See infra note 197 for a discussion of Judge Kozinski’s argument.
\textsuperscript{170}\textit{Tchoukhrova II}, 430 F.3d at 1223–27 (Kozinski, J., dissenting).
\textsuperscript{171}Id. at 1124 (emphasis in original).
\textsuperscript{172}\textit{Tchoukhrova I}, 404 F.3d at 1191–92.
all family members in order to identify the particular social group, but the harms may not be considered cumulatively. The strength of Judge Kozinski’s dissent and the amount of support it garnered among his peers indicate that courts might hesitate to follow the *Tchoukhrova* decision because its family unit argument is idiosyncratic and overly broad. To that effect, the Ninth Circuit itself declined to follow its own reasoning in *Tchoukhrova* when it decided *Abebe II* in favor of the asylum applicants. The court could have easily relied upon its reasoning in *Tchoukhrova* and held that the harm to the Abebes’ daughter was harm to the entire family unit. They declined to do so. Instead, the court only cited *Tchoukhrova* in relation to the proper standard of review. The court may not have found the reasoning in *Tchoukhrova* to be persuasive.

In addition, as Kozinski noted in his dissent, *Tchoukhrova* bypassed the derivative asylum statute and rendered it ineffectual: the statute has no meaning if harm to one family member can be imputed, cumulatively, to the entire unit and every family member becomes eligible for asylum. In support of this contention, Judge Kozinski stated:

> By assessing the harms cumulatively, the panel moots this carefully drawn statutory scheme, and obviates the need for derivative status in the first place. Under the panel’s reasoning, section 1158(b)(3) [the derivative asylum provision] becomes mere surplusage, since the spouse and children of the principal applicant will themselves file as principal applicants once the familiar harms are assessed “cumulatively.” This is all very new law.

Not only does the *Tchoukhrova* decision undermine the statute, as Judge Kozinski argued, it also has the potential to make some sort of

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173. *Tchoukhrova II*, 430 F.3d at 1225–26 (Kozinski, J., dissenting). After deciding *Tchoukhrova I*, the Ninth Circuit held in *Thomas v. Gonzales* that family may constitute a social group. *Thomas v. Gonzales (Thomas I)*, 409 F.3d 1177, 1187 (9th Cir. 2005), vacated by *Gonzales v. Thomas (Thomas II)*, 126 S. Ct. 1613 (2006). See also infra text accompanying note 182 (discussing *Thomas I*). Unlike in *Tchoukhrova I*, in *Thomas I*, the court did not “cumulate” the harm, but considered the treatment of the individual. *Thomas I*, 409 F.3d at 1188–89. The Supreme Court vacated the judgment of the Ninth Circuit and remanded, holding that the court of appeals must remand the case to the BIA to decide the issue of whether a family constitutes a particular social group. *Thomas II*, 126 S. Ct. 1613.

174. *Abebe II*, 432 F.3d at 1040–43.

175. *Id.*

176. *Id.* at 1040–42.

177. *Tchoukhrova II*, 430 F.3d at 1225 (Kozinski, J., dissenting) (emphasis in original). Judge Kozinski’s reference to the “carefully drawn statutory scheme” again refers to his contention that parents are statutorily excluded from derivative asylum. See infra note 197 for a discussion of Judge Kozinski’s argument.
quasi-derivative asylum available to anyone who can prove she is a member of a family unit in which at least one member is persecuted. One logical consequence is that courts will now have to grapple with the definition of family unit in order to limit the potential scope of this decision and avoid abuse of the system. In short, by reading the derivative asylum statute literally as to exclude parents, the court stripped the statute of any meaning.

Thus, like the mental harm argument in Abay, it is unlikely that other courts will follow the Tchoukhrova court’s theory concerning persecution of the family unit. The Supreme Court’s recent decision to vacate and remand the case\(^\text{178}\) only makes the future of Tchoukhrova more uncertain. The Court remanded the case to be considered in light of its decision in Gonzales v. Thomas.\(^\text{179}\) That case also originated in the Ninth Circuit.\(^\text{180}\) In June 2005—two months after the panel decision in Tchoukhrova—the Ninth Circuit held in Thomas that a family may constitute a social group.\(^\text{181}\) The case involved individual members of a white family in South Africa who were persecuted by black South Africans because of their family relationship to an allegedly racist boss.\(^\text{182}\) In April 2006, the Supreme Court vacated the judgment of the Ninth Circuit and remanded, instructing the Court of Appeals to remand the case to the BIA to decide, in the first instance, whether family may constitute a particular social group.\(^\text{183}\) Although the Ninth Circuit did not explicitly rely on this case in denying the rehearing of Tchoukhrova, its existence as precedent may have bolstered the petitioners’ claim that family could be a social group in that case. As a result, the Supreme Court’s decision in Thomas destabilized the Ninth Circuit’s decision in Tchoukhrova, making a remand the likely result in the latter case. In sum, the reasoning in Tchoukhrova has not proved to be persuasive and it is unlikely that the BIA will adopt this approach when considering the issue of derivative asylum for parents.

V. THE ARGUMENT FOR GRANTING DERIVATIVE ASYLUM TO PARENTS

In contrast to the approaches in Abay and Tchoukhrova, the argument that parents are eligible for derivative asylum is straightforward, easy to

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179. Id.; Thomas I, 409 F.3d at 1187.
180. Thomas I, 409 F.3d at 1187.
181. Id. at 1188–89.
182. Id. at 1188.
183. Thomas II, 126 S. Ct. at 1615. This decision was also based on the holding in Ventura, that the courts cannot decide factual or legal issues in the first instance, but must instead remand the case to the BIA for the agency to first decide the matter. Ventura, 537 U.S. at 17. See also supra note 106.
administer, and, most importantly, legally coherent. Until Tchoukhrova stated that derivative immigration status was not available to parents, it was considered an open question in the Ninth Circuit. Both the BIA or the Circuits could have decided the cases by holding that the derivative asylum statute applied to parents, but declined to do so. However, the dissenting opinions in several of these cases indicate that there is no clear consensus that parents are ineligible for derivative asylum status.

For instance, in Abebe I, Judge Ferguson’s dissent stridently disagreed with the majority for not reaching the question of derivative asylum. He stated that he would hold that the parents in the Abebe case qualify for asylum through their daughter. He argued that failing to grant the case along these lines is a “misreading of the law and an affront to basic human values.” The dissent recalled the case of Azanor and the fact that the Ninth Circuit remanded it to the BIA because the issue of a derivative torture claim was an issue of first impression that the BIA should decide. Similarly, in another 2004 Ninth Circuit decision, Mansour v. Ashcroft, Judge Pregerson’s dissent closely followed the reasoning of Judge Ferguson in Abebe I. First, he stated: “Whether aliens in removal proceedings may assert a derivative claim for relief from removal on behalf of their U.S. citizen children is an open question in this Circuit.” Likewise, Judge Pregerson wrote: “[A]s our colleague, Judge Ferguson, persuasively reasoned . . . this is a question that should be answered in favor of recognition of a derivative claim.” Furthermore, in favor of the derivative asylum argument, he wrote: “I share Judge Ferguson’s view and would hold that Petitioners may derivatively claim relief

184. Tchoukhrova I, 404 F.3d at 1191–92.
185. Mansour v. Ashcroft, 390 F.3d 667, 682 (9th Cir. 2004) (Pregerson, J., dissenting); Azanor, 364 F.3d 1013, 1021. Similarly, the Sixth Circuit considered it an open question until holding otherwise in Oforgji, 354 F.3d at 618.
186. Abebe I, 379 F.3d at 762 (Ferguson, J., dissenting).
187. Id. at 764.
188. Id. at 762.
189. Azanor, 364 F.3d 1013.
190. Abebe I, 379 F.3d at 762 (Ferguson, J., dissenting) (citing Azanor, 364 F.3d at 1021).
191. Mansour, 390 F.3d 667. The case involved Coptic Christian parents from Egypt who claimed that they feared that their U.S. citizen children would be persecuted for being Copts if the family were returned to Egypt. The majority rejected the parents’ petition for review, stating that the discrimination that the asylum applicant faced did not amount to persecution. Id. at 672–74. The majority did not consider the question of derivative status for the parents. Id.
192. Id. at 682–83. (Pregerson, J., dissenting).
193. Id. at 682.
194. Mansour, 390 F.3d at 682.
from removal because they have a well-founded fear that their U.S. citizen children will be persecuted if Petitioners and their family are forced to return to Egypt.\textsuperscript{195}

In Abebe I, Judge Ferguson based his argument that parents could receive derivative asylum, in part, on an analysis of the derivative asylum statute.\textsuperscript{196} He argued that the statutory silence of the INA’s derivative asylum provision vis-à-vis parents does not foreclose the possibility of granting such status.\textsuperscript{197} This interpretation is supported by other instances where the courts have concluded that silence in the INA does not indicate that a particular interpretation is precluded. For instance, the INA has separate sections on inadmissibility and deportation.\textsuperscript{198} Section 212(h) provides for a waiver for certain grounds of inadmissibility.\textsuperscript{199} Thus, a person can request a waiver if she is found inadmissible. Section 212(h) does not mention deportation at all. However, courts have interpreted the 212(h) waiver to apply to deportation as well as inadmissibility because the noncitizen in a deportation proceeding is “similarly situated” to one

\textsuperscript{195} Id.

\textsuperscript{196} The provision states: “A spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.” INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(2006).

\textsuperscript{197} Abebe I, 379 F.3d at 762–63 (Ferguson, J., dissenting). In contrast, Judge Kozinski, in his dissenting opinion in the decision not to rehear Tchoukhrova en banc, maintained that derivative asylum for parents was expressly prohibited by an immigration regulation. Tchoukhrova II, 430 F.3d at 1223. The regulation Judge Kozinski cited is titled “Derivatives of refugees.” 8 C.F.R. § 207.7(b) (2006). The regulation expressly names parents as ineligible for receiving derivative refugee status. However, as its name suggests, the regulation is about refugees—not asylees. Accordingly, there is another regulation in the Code of Federal Regulations that addresses the admission of an asylee’s spouse and children. 8 C.F.R. § 1208.21 (2006). Like the derivative asylum statute in the INA, this regulation on asylees is silent as to the question of derivative status for parents. \textit{Id}. Had the Department of Justice intended the refugee regulation to apply to both refugees and asylees, it would not have promulgated a separate asylum regulation. Moreover, the regulation that Judge Kozinski cited is not cited by any other case mentioned in this Note as authority that parents are ineligible for derivative asylum status.

\textsuperscript{198} A person may be found inadmissible on certain enumerated grounds (such as criminal conduct or contagious diseases) when she applies for admission to the United States. INA § 212(a), 8 U.S.C. § 1182(a) (2006). In addition, inadmissibility grounds apply to the case of a noncitizen present in the United States who attempts to adjust her status to that of a legal permanent resident. INA § 245(a), 8 U.S.C. § 1255(a) (2006). However, a person may be found deportable if she is already legally within the United States, but commits some act that is a ground for deportation. INA § 237, 8 U.S.C. § 1227 (2006). As the statute numbers suggest, these two provisions are found in different sections of the code and the grounds of inadmissibility and deportation, despite some overlap, are not the same.

\textsuperscript{199} INA § 212(h), 8 U.S.C. § 1182(h) (2006).
in an inadmissibility proceeding. In this sense, the courts have shown that silence in the INA does not mean that what is omitted, necessarily, is forbidden. Using the same logic as the courts vis-à-vis the 212(h) waiver, it can be argued that a parent of an asylum seeker is “similarly situated” to a child of an asylum seeker and the derivative asylum statute should apply to both.

Judge Ferguson specifically considered the silence of the INA on the question of derivative asylum for parents and concluded that Congress could not have intended for a parent to choose between leaving a daughter alone in the United States and taking her back to her home country where she might suffer FGM. He was highly critical of the majority’s position that Congress “has opted to leave the choice with the illegal immigrant, not with the courts.” When arguing that the statutory silence does not forbid the possibility of derivative asylum for parents, Judge Ferguson wrote:

I do not believe that Congress intended any parent to face that choice. If Congress failed to clarify, in so many words, that a parent may claim asylum on the basis of a threat to her child, that omission is attributable only to a failure to imagine that so many young children would be independently targeted for persecution. Our consciousness of FGM has now grown, as has our knowledge that hundreds of thousands of children are compelled to serve as child soldiers in deadly conflicts around the world.

200. Jankowski-Burczyk v. INS, 291 F.3d 172, 175 (2d Cir. 2002) (stating that the 212(h) waiver applies to noncitizens in deportation proceedings). The same was the case for a waiver under former section 212(c) of the INA. INA § 212(c), 8 U.S.C. 1182(c) (1995). See Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (extending applicability of the 212(c) waiver to deportation proceedings). 212(c) relief was repealed with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996., Pub. L. No. 104–208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1182(c) (2006)). Although that form of relief was repealed, it was another instance where courts “read into” a silence in the INA.

201. This Note argues that, in a narrow set of circumstances, parents should receive derivative status, but that such grants should be limited by the same age restrictions that govern derivative status for children. A child of an asylee can only receive derivative asylum status as long as she is a child within the meaning of the INA—in other words, an unmarried child under the age of twenty-one. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2006). Reciprocally, a child should only be able to provide derivative status to her parent as long as she is a child within the meaning of the INA. Limiting the grant of the derivative status in this way is still in keeping with the purpose of granting the status to a parent: protecting the child when she may not be able to protect herself.

202. Abebe I, 379 F.3d at 763 (Ferguson, J., dissenting).

203. Id. at 763 (quoting Oforji, 354 F.3d at 618).

204. Id. at 763.
In other words, Judge Ferguson concluded that the INA’s statutory silence with regard to parents was not the result of a deliberate decision to exclude parents, but an inability to imagine that it would be necessary to do so. Judge Ferguson concluded that it would be inappropriate to deny a grant of derivative asylum to parents simply because Congress could not have envisioned the need to expressly mention parents. Instead, the silence of the statute can be interpreted as leaving room for the interpretation that parents are eligible for derivative asylum in certain circumstances. Judge Ferguson also relied on Abay’s holding that earlier cases “suggest a governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm.”205 In this way, Judge Ferguson’s dissent also has echoes of the notion of “constructive deportation” discussed by the Seventh Circuit.206

Furthermore, not granting derivative asylum status to parents in these circumstances conflicts with one of the major underlying policies of U.S. immigration law: family unity.207 As Judge Ferguson stated in Abebe I, “U.S. immigration law prioritizes the value of keeping families together. Family reunification is the ‘dominant feature of current arrangements for permanent immigration to the United States,’ with special preferences for the immediate relatives of U.S. citizens.”208 Another example of the premium that immigration law places on family unity is the fact that several

205. Id. at 762–64 (citing Abay, 368 F.3d at 642).
206. Nwaokolo, 314 F.3d at 307–08. See also supra Part II (discussing “constructive deportation”).
types of waivers and relief require that the noncitizen prove that there would be hardship to an American citizen child if the family were returned. 209 In other words, the body of immigration law shows a preference for keeping families united. To interpret the provision as not permitting derivative asylum for parents in these extreme circumstances is inconsistent with the overall character of the INA. 210 However, derivative asylum status should not be available to the siblings or other family members of the persecuted child. The focus should be on protecting the principal applicant for asylum and allowing that child to remain in the care of her parents.

In addition to being legally coherent and preferable to interpret the derivative asylum statute to apply to parents, to do so also comports with international law on children and refugees. In particular, Judge Ferguson cited the Convention on the Rights of the Child, 211 which, even though Somalia and the United States have not ratified it, is the most widely ratified treaty in history. 212 Ferguson noted that the Convention requires

209. One example is the 212(h) waiver described supra text accompanying notes 199–201. That waiver requires that a noncitizen make a showing that her spouse, parent, or child, who is a U.S. citizen or legal permanent resident, would suffer extreme hardship if the noncitizen were denied admission or deported. INA § 212(h)(B). In addition, cancellation of removal, a type of relief that literally “cancels” the person’s deportation, also requires a showing of “exceptional and extremely unusual hardship” to a spouse, parent, or child who is a U.S. citizen. INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2006). For an analysis of gender in the context of cancellation of removal, see Jennifer Lindsley, Comment, All Relevant Factors: Gender in the Analysis of Exceptional and Extremely Unusual Hardship, 19 WIS. WOMEN’S L.J. 337 (2004).

210. In relation to this point, Judge Ferguson suggested that not granting derivative asylum to parents can lead to ridiculous results. For instance, he noted that the majority in Abebe I denied the parent’s claim, in part, because they did not testify that they would definitely be unable to protect their daughter from FGM. Judge Ferguson stated that it was absurd to require that parents testify that they would be powerless to protect their daughter because where a parent stated just that in Olowo, the Seventh Circuit chastised the mother for “seeking to take her daughters with her [if she were deported] and ordered notification of state agencies charged with protecting ‘minors from parents who allow acts of torture to be committed on minors.’” Abebe I, 379 F.3d at 762 (Ferguson, J., dissenting) (citing Olowo, 368 F.3d at 703–04). Thus, Judge Ferguson suggested that, under the majority’s logic, a parent will fail to establish a well-founded fear unless they argue that they are powerless to protect the child, but then face court-ordered removal of their children if their claim fails and they are deported. Id. at 761.


states to “ensure that a child shall not be separated from his or her parents against her will, except when . . . such separation is necessary for the best interests of the child.”

Additionally, Judge Ferguson noted that the practice of not granting derivative asylum to parents is inconsistent with statements by the United Nations High Commissioner for Refugees (UNHCR) that state that a “woman could be considered a refugee if her daughters feared being compelled to undergo FGM.” In addition, the UNHCR includes parents of minors in the list of persons eligible for derivative refugee status. The reference to the UNHCR is germane because U.S. refugee and asylum law, to a great extent, tracks the legal in-

the Law of Treaties, signing a treaty expresses a state’s consent to be bound, unless otherwise indicated. Vienna Convention on the Laws of Treaties art. 12, opened for signature May 23, 1969, 1155 U.N.T.S. 331. While the United States has also not ratified this treaty, it is viewed as a restatement of the customary international law governing treaties. Auguste v. Ridge, 395 F.3d 123, 141 n.15 (3d Cir. 2005); Ehrlich v. American Airlines, Inc. 360 F.3d 366, 373 n.5 (2d Cir. 2004). Similarly, it can be argued that the Convention on the Rights of the Child has attained the status of customary international law. A treaty is elevated to the status of international law and becomes binding upon all nations—even those states that have not ratified—when its contents become general and consistent practice of states followed out of a sense of legal obligation. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). However, in the recent case of Roper v. Simmons, the Supreme Court did not entertain the notion that the Convention on the Rights of the Child was an expression of customary international law. Roper v. Simmons, 543 U.S. 551 (2005). Instead, the Court stated that the failure of the United States to ratify the Convention indicates a lack of national consensus on the issue. Id. at 621–23 (referring specifically to the juvenile death penalty). For an argument in favor of ratifying the Convention on the Rights of the Child, see Howard Davidson, Children’s Rights and American Law: A Response to “What’s Wrong with Children’s Rights,” 20 EMORY INT’L L. REV. 69 (2006).


Instruments that created both the UNHCR and refugee law: the 1951 Refugee Convention and its 1967 Protocol.\textsuperscript{216}

Not only does granting parents derivative asylum status have a legal basis in the INA, U.S. case law, and international refugee law, this approach is also grounded by other policy rationales, like ease of administration. On a practical level, granting derivative asylum to parents is the most efficient and simplest way to achieve the goal that decisions like \textit{Abay} and \textit{Tchoukhrova} sought to achieve: ensuring that a persecuted child is protected and that a parent need not choose between abandoning their child and exposing her to harm. When courts are compelled to grant such cases they must construct elaborate theories of mental harm and family group that, as noted above,\textsuperscript{217} are based on idiosyncratic interpretations of the law that may not be followed by other courts. In contrast, following the derivative asylum approach would allow for a uniform rule that other circuits could follow without regard to their particular definitions of persecution or family as a particular social group. In addition, such a rule would be easy to administer because the family would present only the claim of the minor child and the court would not need to adjudicate additional claims of persecution by the parents. Having a blanket rule that, in cases where a child is the target of persecution, a parent is eligible for asylum would be far easier to administer than the approaches in \textit{Abay} or \textit{Tchoukhrova}. In addition, making parents eligible for derivative asylum in these cases has the administrative and economic benefit of preventing asylee children from becoming dependants of the state if their parents are deported. The U.S. immigration law has a strong policy against allowing potential “public charges” to enter the country and providing derivative status to parents would prevent asylee children from burdening the state’s child protective services administrations.\textsuperscript{218}

A potential policy argument against granting derivative asylum to parents is that to do so would open the “floodgates” and lead to abuse of the immigration system. The argument is that if the courts granted derivative asylum to parents, every parent of every girl in sub-Saharan Africa would rush to the United States to claim asylum for their daughter and reap the derivative benefits. A similar argument was made when FGM

\textsuperscript{216} For instance, the definition of refugee, found at INA § 101(a)(42), is directly modeled off the first articles of the 1951 Refugee Convention and its 1967 Protocol. 1951 Refugee Convention, supra note 1, art. 1; 1967 Protocol, supra note 1, art. 1.

\textsuperscript{217} See supra Part IV.

\textsuperscript{218} For example, potential to become a public charge is a ground of inadmissibility that may bar a noncitizen from entering the U.S. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2006). It would be contrary to this policy to admit asylee children with no means of supporting themselves.
became a ground for asylum—that massive numbers of African women would flee to the United States to claim asylum—and that has not proven to be so.\textsuperscript{219} Most likely, there would not be a dramatic increase in asylum petitions from Africa if courts followed the derivative asylum rule.

However, even if there were an increase in applications, arguably, the “floodgates” problem would be less massive than the “floodgates” that \textit{Tchoukhrova} may have opened by rendering the derivative asylum provision meaningless. The derivative asylum approach would just apply the existing statute to parents, while \textit{Tchoukhrova} entirely bypasses the statute and opened up the possibility that everyone who is part of a persecuted family unit might be eligible for asylum—even if the individual is not the victim of persecution. If that were the case, brothers, sisters, grandparents, and cousins could all claim to be members of that family unit and apply for status. Thus, even in a worst-case scenario where the extension of derivative asylum to parents did increase the number of people claiming asylum, the result could not be worse than what might result from the undefined family unit principle in \textit{Tchoukhrova}.

Another argument that is often argued against granting parents derivative asylum status is that in some cases the child is a U.S. citizen and is therefore ineligible for asylum.\textsuperscript{220} The argument is that derivative status is logically impossible because the child has a legal right to remain in the U.S. and cannot be deported.\textsuperscript{221} However, this formalistic approach fails to consider the realities of children who, although they may have an abstract legal right under U.S. immigration law, have no way to practically enjoy this right.\textsuperscript{222} In many cases, the child may not even be old enough to understand her predicament. As Judge Posner wrote in \textit{Oforji} in relation to U.S. citizen children in this situation, “although they are citizens they are treated as badly as aliens.”\textsuperscript{223} Thus, denying derivative status to

\begin{itemize}
  \item \textsuperscript{219} \textit{Kasinga}, 21 I. & N. at 369 (Filppu, Board Member, concurring). There is no reliable, publicly available source of statistics on the number of people who have applied for asylum on the ground of FGM. A search of federal cases on the Westlaw database yielded forty-two court and BIA cases involving FGM. Westlaw Research Page, http://www.westlaw.com (last visited Oct. 7, 2006). However, this is not an accurate number of total cases because it does not include unpublished cases before immigration judges and the BIA.
  \item \textsuperscript{220} \textit{Abebe II}, 432 F.3d at 1048–50 (Tallman, J., dissenting); \textit{Oforji}, 354 F.3d at 619–20 (Posner, J., concurring).
  \item \textsuperscript{221} \textit{Abebe II}, 432 F.3d at 1048 (Tallman, J., dissenting).
  \item \textsuperscript{223} \textit{Oforji}, 354 F.3d at 620 (Posner, J., concurring).
\end{itemize}
parents on such a formalistic basis would achieve an absurd result if the parent were forced to return to a country where the child would be persecuted. Refugee law was designed to protect against persecution and provide safe haven; it was not intended to remove children from safety and subject them to persecution. Such a result would be contrary to the very basic principles upon which international and U.S. refugee law is based.

In short, granting derivative asylum to parents is the preferable approach to cases where a minor child is the target of persecution. The derivative asylum approach can easily be read into the statutory silence of the INA on this matter and is in keeping with the U.S. immigration policy of family unity. Moreover, following the theory that parents are eligible for derivative asylum is easy for the courts to administer because it is a coherent and uniform rule.

VI. CONCLUSION

This Note has sought to present a solid rationale for granting derivative asylum to the parents of persecuted minor children. Beginning with an examination of the case law on the subject, it has traced how the courts proceeded from treating derivative asylum for parents as an open question in the early cases, to foreclosing the possibility in cases like Abay and Tchoukhrova, and now remanding the issue to the BIA to consider. The outcomes in those two cases were, arguably, consistent with existing asylum law, but the reasoning in each case was unnecessarily complicated and each case’s holding is overly broad. In other words, Abay took an idiosyncratic approach to mental harm as persecution, while Tchoukhrova constructed a novel theory for considering harm to the entire family unit. The reasoning in each case was outside the mainstream of asylum law and, in light of the recent Supreme Court decisions in Thomas and Tchoukhrova, it appears unlikely that the BIA or the courts will follow either case. As a result, meritorious claims will be denied because judges will continue to feel constrained by the silence of the INA on the issue of derivative asylum for parents.

Interpreting the derivative asylum provision of the INA to apply to parents is a better approach for the reasons discussed above. To do so is legally coherent because the silence in the INA does not preclude the extension of derivative immigration status to parents. A derivative asylum rule would be uniform and courts could follow it without the fear of diluting their constructions of the notion of persecution. Its uniformity also would further judicial and administrative efficiency because the rule is easy to apply and administer. Similarly, applying the statutory provision to parents is a way of saving it from the obsolescence to which the Tchoukhrova decision relegated it: Tchoukhrova stripped the derivative
asylum provision of any real meaning by considering harm cumulatively to the family unit and allowing any family member to make a claim. A rule that allows parents to receive derivative asylum status would preserve the efficacy of the derivative asylum provision and rein in the broad holding of Tchoukhrova. Granting derivative asylum to parents is in keeping with the policy of family unity in U.S. immigration law and with the instruments of international law that concern the rights of children and refugees. Finally, the derivative asylum approach avoids the terrible “Solomonic choice” where parents must decide between abandoning their child in the U.S. or taking her back to persecution at home. In sum, there is ample authority in the law to suggest that the silence in the INA can be read to allow for the extension of derivative asylum to parents, or, in the alternative, that Congress should amend the INA in order to expressly bring the statute in line with the realities of today’s child asylum seekers.

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224. Oforji, 354 F.3d at 616.

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UNCERTAINTY FROM ABROAD: ROME II
AND THE CHOICE OF LAW FOR
DEFAMATION CLAIMS

I. INTRODUCTION

The ease with which communication travels across borders via the Internet has caused defamation law\(^1\) to become an area of great public concern. Under the conventional publishing model, distribution of print copies into a given forum creates a clear and measurable jurisdictional limit for defamation claims.\(^2\) A publisher traditionally has control over extraterritorial jurisdiction by choosing where and where not to distribute print copies.\(^3\) However, when a publisher posts an article on the Internet, it becomes instantly accessible to over a billion readers across

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1. Defamation is an intentional tort that generally arises when a communication harms the reputation of another as to lower her in the estimation of the community or to deter third persons from associating or dealing with her. Restatement (Second) of Torts § 559 (1977). Defamation encompasses both the torts of libel and slander:

   (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.

   (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).

   Id. § 568. In many jurisdictions, the determination of whether a claim amounts to libel or slander will dictate the evidence of damages, but the Internet has collapsed distinctions between the torts. Dan Jerker B. Svantesson, The Characteristics Making Internet Communication Challenge Traditional Models of Regulation: What Every International Jurist Should Know About the Internet, 13 INT’L J.L. & INFO. TECH. 39, 60–61 (2005). For the sake of avoiding confusion, this Note refers broadly to “defamation” rather than the more precise terminology of “libel” or “slander” when discussing claims against publishers and others. Many commentators also treat these terms interchangeably. See, e.g., Judge Robert D. Sack, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2.1, n.3 (2004) [hereinafter SACK ON DEFAMATION].

2. From a U.S. perspective, for instance, the key question is whether a publisher has availed itself of a given state’s laws. Calder v. Jones, 465 U.S. 783, 785 (1984) (holding that California had jurisdiction over a defamation claim against a Florida corporation that had availed itself of California law by distributing 600,000 copies of a weekly newspaper to California).

3. See, e.g., Chaiken v. VV Pub. Corp. 119 F.3d 1018, 1029 (2d Cir. 1997) (holding that jurisdiction in Massachusetts was improper for a defamation claim against a New York publisher because the publisher had distributed less than 200 copies of a weekly newspaper into Massachusetts).
the world.\textsuperscript{4} While print newspapers face increasingly lower circulations, online publishing has become an effective means for publishers to attract readership.\textsuperscript{5} Although this shift from print to online publishing might strengthen the long-term viability of the newspaper industry, it also has far-reaching effects. Like many other areas of law,\textsuperscript{6} commentators have repeatedly noted that the Internet has wreaked havoc on the jurisdictional and choice-of-law aspects of international defamation claims.\textsuperscript{7}

Much of this difficulty stems from substantive differences in national approaches to defamation law and the ease with which plaintiffs can bring their claims in foreign jurisdictions. Central to these differences is

\textsuperscript{4} Over sixteen percent of the world’s population currently uses the Internet, with developing regions such as Africa, the Middle East, and Latin America experiencing the most rapid growth. World Internet Usage Statistics and Population Stats, http://internetworldstats.com/stats.htm (last visited Sept. 29, 2006).

\textsuperscript{5} Katharine Q. Seelye, Newspaper Circulation Falls Sharply, N.Y. TIMES, Oct. 31, 2006, at C1. See also Annys Shin, Newspaper Circulation Continues to Decline; Internet, Cable Cited as Competition, WASH. POST, May 3, 2005, at E3 (noting that circulation of print publications has declined over the past twenty years). At least one major news publisher is prepared for Internet publishing to continue to expand and likely one day supplant print publishing. Murdoch Reaffirms New [sic] Corp.’s Internet Policy, TIMES ONLINE (London), Nov. 24, 2005, available at http://business.timesonline.co.uk/article/0,,9071-1889201,00.html.

\textsuperscript{6} Dean Symeonides notes the following prescient observation by the Illinois Supreme Court about the impact of technological innovation on jurisdictional issues:

\begin{quote}
Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines. By the same token, today’s facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted.
\end{quote}


the fact that, compared to the United States, many countries “place much greater importance on the protection of personal reputation, dignity, and honor than they do on protecting the freedom of speech.”

While U.S. defamation law reflects the constitutional guarantees of freedom of speech and press under New York Times v. Sullivan and its progeny, Sullivan’s impact abroad has been mixed. Instead, every country possesses a different legal standard for resolving defamation claims based on their particular histories, values, and political systems. For instance, while the United States and the United Kingdom share the same tradition of common-law defamation, both countries have developed different legal standards for resolving defamation claims based on their particular histories, values, and political systems. For instance, while the United States and the United Kingdom share the same tradition of common-law defamation, both countries have developed different legal standards for resolving defamation claims based on their particular histories, values, and political systems.

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8. In the United States, modern protection of the press derives from N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). See also Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (“To ensure that true speech about matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”).


11. 376 U.S. 254.


13. For instance, one publisher argued that British defamation law differs from U.S. law because:

(1) the burden of proving truth of defamatory statements falls on the defendant;
(2) defamation is a strict liability tort and plaintiff need not prove that the defendant acted with any fault, in contrast with the “actual malice” standard that applies under American First Amendment principles; (3) protection for expression of opinion is severely limited; (4) only limited protection is available for statements about public officials or public figures; (5) aggravated damages are permitted for asserting certain defenses, for example, a defendant’s seeking to justify the publication; (6) plaintiff’s attorneys fees and costs must be paid by the unsuccessful defendant; (7) multiple, repetitive suits are allowed for each individual publication, for example, for different media or various places of publication.

oped divergent approaches to balancing free speech and reputation interests.\textsuperscript{14} This conflict-of-laws problem is exacerbated by the fact that foreign courts appear keen to adjudicate claims against U.S. publishers without regard for the free-press protections under U.S. law.\textsuperscript{15} As a result, publishers are now subject to new and unforeseen liabilities\textsuperscript{16} and are likely to begin constructing “virtual borders” around their Internet presence to avoid exposure to restrictive foreign defamation laws.\textsuperscript{17}

In assessing the current situation, one British government commentator noted that any substantive solution to the difficulty of international defamation law would come in the realm of international treaty accompanied by greater harmonization of substantive national laws.\textsuperscript{18} One such pending treaty that will perhaps encompass the problematic arena of international defamation law is “The law applicable to non-contractual

\begin{enumerate}
\item [15.] See Lewis v. King, [2004] EWCA (Civ.) 1329 (holding that jurisdiction in England was permissible for comments published on two websites even though all relevant events occurred in the United States). See also Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575 (Austral.) (holding that a plaintiff could successfully bring a claim under Australian defamation law against a United States publisher whose only contact with Australia was Internet publication); Eric Barendt, \textit{Jurisdiction in Internet Libel Cases}, 110 PENN ST. L. REV. 727, 737 (2006) (arguing that weighing American First Amendment rights in international defamation claims “confers on United States courts a decisive voice on the balancing of reputation and free speech rights”).
\end{enumerate}

The law [of jurisdiction for Internet-based defamation claims] has always been complex, and attempts within the EU to create greater legal certainty have added new ambiguities. There are no easy answers . . . . Although we have some sympathy with the concerns expressed about “unacceptable levels of global risks,” any solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation.

\textit{Id.}

19. In early 2006 the European Commission excised the defamation provision from Rome II, rendering the status of the convention uncertain. \textit{Infra} Part III.
obligations,” known commonly as “Rome II.” This agreement among the European Union’s Member States will determine the choice of law for cross-border defamation claims as well as a variety of other cross-border claims based in non-contractual relationships. Rome II will determine which law is applicable to all defamation claims brought within a Member State’s forum, although jurisdiction will continue to be available in any nation where a publication is read. As such, Rome II presents an opportunity for an international body of lawmakers to adopt a clearer and fairer standard of how to settle defamation claims against foreign publishers in the Internet age.


22. Rome II (European Parliament draft), supra note 20, art. 6.

23. Rome II will determine the choice of law for non-contractual claims, including such diverse subject matter as breaches of data-protection rights, id. recital 14; unjust enrichment claims, id. art. 9(a); automobile accidents, id. art. 3; as well as intellectual property claims. Id. recital 14. For an analysis of the potential impact of Rome II on intellectual property conflicts, see Annette Kur, Applicable Law: An Alternative Proposal for International Regulation—The Max-Planck Project on International Jurisdiction and Choice of Law, 30 BROOK. J. INT’L L. 951, 959–61 (2005).


25. However, the border between jurisdiction and choice of law as it relates to Rome II is “nebulous.” Christopher J. Kunke, Comment, Rome II and Defamation: Will the Tail Wag the Dog?, 19 EMORY INT’L L. REV. 1733, 1743 n.79 (2005). Indeed, once establishing that jurisdiction is proper, many courts do not reach the secondary issue of choice of law. See infra Part II.B.

26. Unsurprisingly, publishing groups have lobbied intensely for a clearer rule during the drafting process of Rome II. See, e.g., International Federation of Journalists, Euro-
Yet, despite the possibility of creating a clearer choice-of-law standard, Rome II’s defamation provision proved to be extremely difficult to resolve. In 2006, after over three years of work, the European Union found itself no closer to creating a rule that all members could agree upon. The European Commission eventually excised the defamation provision from Rome II, effectively forestalling a new framework for the choice of law for defamation claims within the European Union’s Member States.

Despite this setback, much can still be learned from Rome II, both in terms of its potential application as well as the issues raised and debated during the drafting process—issues that are emblematic of the broader complexities of defamation law in the Internet age. This Note will argue that the European Commission’s parliamentary maneuver is by no means the end of the story, but rather it is one chapter in a slow, difficult struggle to achieve a workable solution that satisfies publishers, national courts, and defamation plaintiffs. Part II of this Note examines the existing choice-of-law and jurisdictional rules for resolving defamation claims in Europe, the United States, and in other nations. Part III traces Rome II’s legislative history, focusing on the opposing place-of-harm and place-of-publication approaches to defamation claims. Part IV examines Rome II through the lens of the modern American approach to conflicts of law. This Note concludes that while the drafters of Rome II attempted to create a rule to protect publishers, their inability to successfully adopt such a provision reflects the intractability of balancing publishing and reputational interests. This Note will argue that American conflicts law provides key insights into both the policy behind protecting press interests and also how to create a more workable choice-of-law framework.

II. INTERNATIONAL LAW ADDRESSING CHOICE OF LAW AND JURISDICTION IN DEFAMATION CLAIMS

While Rome II is a choice-of-law provision, the distinction between choice-of-law and jurisdictional rules for defamation claims is notoriously murky. When a court holds that jurisdiction is proper, it usually determines not only the forum where a defamation claim will be heard, but also whether any legal protections a publisher possesses under its

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27. The European Commission and European Parliament have equal control over Rome II’s drafting through the European Union’s co-decision process. See infra note 156.
28. See infra note 194 and accompanying text.
domestic law are available. Much of this may result from the fact that courts are reluctant to apply foreign laws when the outcome would be outright dismissal of a plaintiff’s claim. This scenario is especially common when a plaintiff brings a claim in an English court against a U.S. publisher, since many actions that would be dismissed under U.S. law due to a violation of the First Amendment would nevertheless be proper under English law. Courts regularly impose their domestic laws over foreign publishers even when the publisher’s contact with the forum is tenuous at best, a practice which has resulted in a confusing web of jurisdictions and defamation laws.

The difficulty of applying defamation law in the Internet age is due in large part to the slippery definition of “publication.” The United States has adopted a “single publication rule,” which dictates that publication only occurs when a work is first distributed and also limits a defamation claim to a single action within one jurisdiction. The purpose of the single publication rule is to protect defendants from harassment by multiple actions in separate jurisdictions, since a single action in any one jurisdiction affords the plaintiff his day in court. In determining jurisdiction for cross-border defamation claims, many national courts, as well as the European Union, have rejected the single publication rule. The reason for rejecting such a rule is because it would theoretically deny plaintiffs the ability to seek an injunction in every forum where their reputation has been harmed. But, as a result of this flexibility, jurisdiction for a trans-

29. See supra note 25.
30. See, e.g., Lewis v. King, [2004] EWCA (Civ.) 1329. See also Stewart E. Sterk, The Marginal Relevance of Choice of Law Theory, 142 U. PENN L. REV. 949, 998–99 (1994) (noting the high burden that litigators face when they argue that choice-of-law principles should overcome a judge’s initial conclusion about who should win a lawsuit).
31. See infra Part II.C.
32. See infra Part II.B.
33. Traditionally, publication to a third party is one element of a successful defamation claim. Hebditch v. MacIlwaine [1894] 2 Q.B. 54, 58; RESTATEMENT (SECOND) OF TORTS § 558(b) (1977).
34. RESTATEMENT (SECOND) OF TORTS § 577A. In a single suit, a claimant may recover for all damages caused by the defamatory statement in all jurisdictions, whether domestic or foreign. Id. § 577A cmt. d.
35. Id. § 577A cmt. e.

[T]he single cause of action theory, if adopted by judicial decision in England, would disable a plaintiff from seeking an injunction in more than one jurisdiction. In the context of the multiplicity of state jurisdictions in the United States
national defamation claim typically exists simultaneously and concurrently in any and all states where a publication is read. As some have argued, this has amounted to “universal jurisdiction” for any communication posted on the Internet.

As is often the danger in this scenario, the ease with which a plaintiff can bring a claim of defamation against an online publisher in a foreign jurisdiction has given rise to forum shopping. Some have argued that

there is no doubt much good sense in the Uniform Single Publication Act. But the theory underpinning it cannot readily be transplanted to the consideration by English courts of trans-national publications.

Id.

38. See Rodney A. Smolla, LAW OF DEFAMATION § 12.33 (2006) (“A literal application of the ‘place of the wrong’ rule leads to the bizarre result that a multistate publication of a defamatory statement gives rise to a separate tort in each state in which publication occurs, and is governed by the law of each such state.”). See also Edmund L. Andrews, Germany’s Efforts to Police Web Are Upsetting Business, N.Y. TIMES, June 6, 1997, at A1; Kurt Wimmer, Comments of International Media Companies and Associations on Australian Defamation Law Reform 6 (Oct. 26, 2004), available at http://www.cov.com/download/content/brochures/australiandefamationreform.pdf. Rejection of the single publication rule also eviscerates statutes of limitations, since “every download of an article from an archive would start the clock running again.” Wimmer, supra, at 5.


“The Internet created a universal jurisdiction, so that once you are on the Internet you are subject to the laws of every country in the world,” said Chris Kuner, an American lawyer in Frankfurt who closely follows German cyber-space issues. “The Internet gives rise to jurisdictional problems that never happened before.”

Id.


It is becoming increasingly common for publishers based in the United States to find themselves on the receiving end of a defamation claim filed in Europe. England in particular has been a favorite forum for those aggrieved by an international publication because it historically has offered claimants friendly juries and a favorable burden of proof. Once a claimant has proved publication of a defamatory article in England, damage is assumed and the burden immediately shifts to the publisher, which must demonstrate that the defamatory statement is true or another substantive defense exists.

forum shopping is not problematic per se, in that it allows plaintiffs to find forums that are competent to adjudicate their claims and “drives out bad laws.” However, even under this view, so-called “parallel litigation” is clearly problematic since it creates a race to the court between plaintiffs and defendants seeking declaratory judgments and adds additional costs and burdens to lawsuits. Plaintiffs are likely to bring multiple lawsuits on the same subject matter in different countries, and actively seek a jurisdiction where they are most assured of success. Another significant danger is that defamation claims are also likely to be brought against U.S. publishers under foreign laws that lack equivalent free-speech guarantees. Adding to the uncertainty, U.S. courts have at times refused to enforce foreign defamation judgments against domestic publishers due to this very lack of First Amendment protection.

A. The Fiona Shevill Case and European Approach to Choice of Law in Defamation Claims

Central to the European Union’s movement towards a common market is the harmonization of the laws of Member States in order to reduce the transaction costs of operating in foreign states. In 1968, Europe

42. Id. at 282.
43. See, e.g., Lewis v. King, [2004] EWCA (Civ.) 1329 (holding for plaintiff in a defamation claim based on publication of comments on a California-based website, even though an identical claim did not survive under U.S. law).
44. See, e.g., Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575, 614 (Austl.) (holding that jurisdiction against U.S. publisher was proper even though Australia does not possess First Amendment protections).
45. See, e.g., Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997). See also infra Part II.C.
46. Prior to 1993, with the adoption of the Treaty on European Union, the European Union was titled the European Economic Community. Europa, The EU at a Glance: Europe in 12 Lessons, Historic Steps, http://europa.eu.int/abc/12lessons/index2_en.htm (last visited Sept. 29, 2006). To avoid confusion, this Note refers to the European Union to mean both the European Economic Community and the European Union as it stands today.
47. See T. Vogelaar, Director-General for the Internal Market and Approximation of Legislation at the Commission, Opening Address as Chairman of the Meeting of Government Experts (Feb. 26, 1969) excerpted in Prof. Mario Giuliano & Prof. Paul Lagarde, GIULIANO LAGARDE REPORT, 1980 J.O. (C 282) (“[T]here are still legal fields in which the differences between national legal systems and the lack of unified rules of conflict definitely impede the free movement of persons, goods, services and capital among the Member States.”) available at http://www.rome-convention.org/instruments/i_rep_lagard e_en.htm. The seeds of the European Union were first sown in 1951 with the Treaty of
reached its first choice-of-law agreement, informally titled the Brussels Convention.48 The Brussels Convention applied to disputes between citizens of Member States based in both contract49 and tort.50 Today, jurisdiction in the European Union is governed by the “Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters” (Brussels I Regulation).51 As with the Brussels Convention, defamation claims under the Brussels I Regulation can be brought wherever the harmful event occurred—in other words, wherever an allegedly defamatory communication is read.52 This rule reflects the European preference for bright-line jurisdictional rules as opposed to the American market-driven approach that focuses instead on the parties’ contacts with the forum.53

In Handelskwekerij G. J. Bier BV v. Mines de potasse d’Alsace SA, the European Court of Justice (ECJ) interpreted the Brussels Convention rule and held that the “place where the harmful event occurred” must be understood to “acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it.”54 Under Bier, European courts allow plaintiffs considerable freedom to bring a cause of action in any state where they


49. Id. art. 5. Choice of law for contractual claims is now governed by Rome I. Rome I, supra note 21.
50. Brussels Convention, supra note 48, art. 5.
52. Brussels Convention, supra note 48, art. 5(3). See also Vick & MacPherson, supra note 13, at 972 (noting that the drafters of the Brussels Convention deliberately created an ambiguous choice-of-law rule).
claim they were harmed. Rather than interpreting existing choice-of-law conventions in a limited manner by focusing on the place where the act occurred, the ECJ interpreted the harmful “act” to have taken place wherever it is felt or perceived. According to Professors Vick and MacPherson, this approach enlarged the plaintiff’s choices and thus gives rise to forum-shopping. Even though European courts only permit a plaintiff to bring a defamation claim in forums where her reputation was actually harmed, under Bier’s permissive rule jurisdiction exists over a defamation claim wherever a publication was read.

Perhaps the most important and emblematic European decision relating to the choice of law for defamation claims is Fiona Shevill v. Presse Alliance SA, in which the ECJ specifically applied the reasoning of Bier to a defamation context. In 1989, the French newspaper France-Soir printed an article accusing an English student of money laundering. Although the student was working in Paris at the time the alleged incident took place, she returned to her native England and brought a defamation suit in the British High Court of England and Wales. The French newspaper disputed whether the British court had jurisdiction because, within the meaning of the Brussels Convention, “the place where the harmful event occurred” was France and “no harmful event had occurred in England.” The matter was referred to the ECJ, which

55. See Vick & MacPherson, supra note 13, at 973.
57. Vick & MacPherson, supra note 13, at 973.
58. Id. at 985. Professors Vick and MacPherson explain:

The difficulties inherent in the Bier approach are exacerbated in the defamation context, though, by the confluence of three factors: the number of potential forums reached by internationally disseminated publications; the related growth in the number of persons with international reputations, at least within their fields of specialty, who can be harmed in multiple localities by a single newspaper article; and the wild variation in defamation policies from member state to member state.

61. Id. para. 11.
64. Id. Both the High Court of England and Wales as well as the Court of Appeal ruled that jurisdiction was available to the plaintiff in England. Id. The defendant then
held that, under Bier, when a person has been defamed in two or more European Union states, the Brussels Convention allowed the plaintiff to bring a claim wherever her reputation was harmed and the plaintiff was not required to prove damages before bringing suit in a given forum.65

Under the ECJ’s analysis, if the plaintiff sued in France, she could claim any and all damages caused to her reputation throughout the European Union.66 However, she could also elect to bring her claim in England,67 but would be limited to only damages caused within England.68

Thus, under Fiona Shevill, a defamation claim can be brought either in the country of publication or in any country where the plaintiff’s reputation was harmed, but the available remedy might be limited if the plaintiff elects the latter.69 Fiona Shevill also impacts the choice of law for defamation claims.70 The case has been interpreted to mean that if a

appealed the decision to the House of Lords, which referred the case to the ECJ to determine the proper interpretation of the Brussels Convention. Id.

65. Id.
66. Id. para. 25 (“The court of the place where the publisher of the defamatory publication is established must therefore have jurisdiction to hear the action for damages for all the harm caused by the unlawful act.”).
67. Id. paras. 29–30.

In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places.

It follows that the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim’s reputation.

Id.

68. States in which a publication was distributed and where the victim claims to have suffered injury to her reputation “have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.” Id. para. 33.
69. Id. paras. 49–57.
70. The ECJ noted that the Brussels Convention only governed jurisdiction and that choice of law is a matter to be determined by national conflict-of-laws rules, provided that the effectiveness of the Brussels Convention is not impaired. Id. para. 36. This stipulation is misleading, however, because states rarely elect to apply foreign law to defamation claims. Instead, choice of law usually attaches once a court determines that jurisdiction is proper. See Vick & MacPherson, supra note 13, at 937–38.

The irony of Shevill lies in its insistence that the Brussels Convention was not intended to impose substantive rules of law on the member states of the European Union, even though it is a paradigmatic example of how a matter of procedure can fundamentally shape the substantive direction of the law.
plaintiff brings a suit in a country where her reputation was harmed, then
the law of that jurisdiction applies; but, if a plaintiff brings a suit for all
 DAMAGES in the state where the publication is based, then the court will
apply foreign laws on a “distributive basis.”71 In practice, Fiona Shevill
creates a flexible rule whereby courts can exercise jurisdiction and apply
domestic law against foreign publishers as long as a citizen was harmed
in some way in a given forum.72 At least compared to the American ap-
proach, this permits a plaintiff to have considerable discretion in choos-
ing where to bring a defamation claim.73

There are numerous problems that occur when a plaintiff elects to sue
in a forum other than the place of publication. Although courts limit
damages to only harm caused within that forum,74 damages caused by
defamation are inherently ephemeral.75 The deduction of damages under

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[I]f the victim decides to bring the action in a court in a State where the publi-
cation is distributed, that court will apply its own law to the damage sustained
in that State. But if the victim brings the action in the court for the place where
the publisher is headquartered, that court will have jurisdiction to rule on the
entire claim for damages: the [law of the place of publication] will then govern
the damage sustained in that country and the court will apply the laws involved
on a distributive basis if the victim also claims compensation for damage sus-
tained in other States.

under Fiona Shevill jurisdiction in Ireland was proper for a defamation claim by an Irish
citizen against an English publisher given that it “was almost inevitable that [the booklet
in question] would be published in Ireland”); Skogvik v. Sveriges Television AB, [2003]
I.L.Pr. 24 (Nor.) (holding that under Fiona Shevill jurisdiction in Norway was proper for
a defamation claim against a Swedish television broadcast that was also received in Nor-
way).

73. Moritz Keller, Lessons for the Hague: Internet Jurisdiction in the Contract and
Tort Cases in the European Community and the United States, 23 J. MARSHALL J.
COMPUTER & INFO. L. 1, 61 (Fall 2004).

74. Hunter v. Gerald Duckworth & Co., [2000] I.L.Pr. 229 (Ir.) (“[T]hese proceed-
ings seek to recover damages only in respect of any loss of reputation suffered by the
plaintiffs within the jurisdiction of this court.”).

75. See Shawn A. Bone, Private Harms in the Cyber-World: The Conundrum of
Fiona Shevill is often rendered irrelevant because by merely establishing jurisdiction, a plaintiff has raised considerable leverage for a settlement. Thus, Fiona Shevill’s limitation does not provide any substantive barrier to recovery for a defamation claim even when the contact between the publisher and a given European forum is minimal. Under the American view, protracted litigation has a chilling effect on First Amendment rights, which is entirely unmitigated by a reduction in damages. In other words, under Fiona Shevill, a plaintiff might only be compensated for a portion of her damages, yet she has still “won the war” by vindicating her rights and by putting the public on notice not to make similar statements.

Furthermore, in rejecting the single publication rule, Fiona Shevill permits forum shopping and enables plaintiffs to bring harassment suits. One justification for rejecting the single publication rule is that such a rule would prevent a plaintiff from enjoining a defendant in every jurisdiction where she is defamed. However, it is unclear why this is true, because courts regularly issue injunctions that are intended to have extraterritorial reach. This belief also is inconsistent with the way that litigants typically view defamation claims, which is to vindicate one’s reputation and to receive compensation for the harm caused. Thus, without

76. See Vick & MacPherson, supra note 13, at 977–78.
78. The following statement about the recent Jameel v. Wall Street Journal case, supra note 13, shows that plaintiffs are often far more concerned with vindication of their reputation than recovery of damages:

“Mr. Justice Eady and the Court of Appeal ruled that I was libeled” Jameel said. “The House of Lords ruled that I was not, because it was reasonable for The Wall Street Journal Europe to print something that was false. So be it. I was only ever interested in proving that the allegations were untrue.”


80. See supra note 37.
82. Bone, supra note 75, at 311–12.
a single publication rule, plaintiffs are able to bring multiple claims abroad as they actively seek the court with the most favorable substantive defamation law. Despite these strong criticisms,\textsuperscript{83} Fiona Shevill is the European Union’s status quo approach to choice of law for defamation claims and has been defended by one French practitioner as creating a “sensible rule” for dealing with the ephemeral nature of such damages.\textsuperscript{84}

\textbf{B. The Exercise of Domestic Jurisdiction over Foreign Publishers}

A number of cases addressing defamation claims highlight the growing trend of national courts exercising jurisdiction over foreign publishers and individuals. In many of these cases, the speaker or publisher is domiciled in the United States and only has contact with the forum state via the Internet. Courts nonetheless routinely adjudicate plaintiff’s claims under domestic law when the forum’s only interest is protecting the reputation of individuals—some of whom are not even citizens of the given forum—which is minimal compared with the U.S. interest of protecting free speech interests.\textsuperscript{85}

\textit{Dow Jones & Co. v. Gutnick} occurred in Australia and is therefore beyond the scope of Rome II, yet this case has become both symbolic and admonitory in terms of the dangers of universal jurisdiction for defamation claims arising from publication on the Internet.\textsuperscript{86} Furthermore, courts in other English common-law countries have found \textit{Gutnick}’s rationale to be persuasive.\textsuperscript{87} In \textit{Gutnick}, the High Court of Australia exercised jurisdiction and imposed Australian law over Dow Jones, the United States-based publisher of \textit{Barron’s Online}.\textsuperscript{88} While acknowledging the defendant’s argument that subjecting foreign publishers to defa-

\textsuperscript{83} See Vick & MacPherson, supra note 13, at 997–99.
\textsuperscript{85} While it is true that publishers can avoid liability while still retaining their full free-speech interests domestically by limiting access to U.S. websites abroad, this “virtual bordering” of the Internet is problematic. Svantesson, supra note 1, at 65–69.
\textsuperscript{86} Notably, \textit{Gutnick} has been cited with approval by a number of courts within Europe. See, e.g., Lewis v. King, [2004] EWCA (Civ.) 1329, paras. 29–31.
information actions “may have substantial consequences,” the court nonetheless held that creating certainty does not mean the court was bound to enforce foreign law.89 Thus, the court was unconcerned with the expectations of the publisher90 and, furthermore, the court held that publication on the Internet did not create a special circumstance as far as applying Australian law was concerned.91

The court also was not persuaded that the fact that the United States provides greater protection to publishers under the First Amendment should be determinative, holding that Australian law “provides an appropriate balance which does justice to both a publisher and the subject of a publication.”92 While Gutnick was decided on jurisdictional grounds, the key to the court’s analysis was Australia’s right to exercise Australian law over a foreign publisher.93 As one commentator noted, two undercurrents seem to have motivated the court’s decision: first, the court was

89. “[C]ertainty does not necessarily mean singularity. What is important is that publishers can act with confidence, not that they be able to act according to a single legal system, even if that system might, in some sense, be described as their ‘home’ legal system.” Id. at 599–600 (majority opinion).
90. Id. at 649 (Callinan, J., concurring).

The appellant argued that the respondent, having set out to make money in the United States, must expect to be subjected to lawful scrutiny in that country. No doubt the fact of lawful scrutiny in that country, if such the publication was, would provide a defence to the appellant to defamation proceedings there. That fact does not however have anything to say about unlawful publication in this country.

Id.
91. Id. at 649–50.

If people wish to do business in, or indeed travel to, or live in, or utilise the infrastructure of different countries, they can hardly expect to be absolved from compliance with the laws of those countries. The fact that publication might occur everywhere does not mean that it occurs nowhere. Multiple publication in different jurisdictions is certainly no novelty in a federation such as Australia.

Id.
92. Id. at 651.
93. See id. at 640–42 (Kirby, J., concurring). It should be noted that, instead of challenging the judgment’s enforcement in U.S. courts, see infra Part II.C, Dow Jones instead brought a suit in front of the United Nations Human Rights Committee (“UNHRC”) for violation of Article 19 of the ICCPR. Melissa A. Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 GEO. L.J. 487, 549 (Jan. 2005). While the UNHCR suit was likely abandoned when Dow Jones settled the Australian defamation case, this suit does raise an interesting question as to how international courts might become involved in resolving the balance between free speech and reputation in defamation claims. Id.
troubled by the entrenchment of U.S. courts in adjudicating defamation claims; and second, the court was not persuaded that the Internet posed unique communication possibilities. Yet, as Justice Kirby noted in his concurrence, the court’s decision substantially raised the risk of imposing global liability on publishers. Gutnick stands at least symbolically at a troubling extreme of courts imposing domestic defamation law over foreign publishers.

Gutnick is hardly alone, especially in European courts. England has similarly exercised its right to apply domestic law over a foreign publisher in a non-Internet context. In Berezovsky v. Forbes Inc., a Russian tycoon sued the U.S. publication Forbes for false allegations of corruption and unscrupulous dealings. Although only 2,000 of the 765,000 total copies were distributed in the United Kingdom, a divided House of Lords nonetheless held that the United Kingdom was a proper forum to hear the plaintiff’s claim. The court’s analysis focused on the defendant’s awareness of where the publication would be received, which some have argued mirrors the U.S. approach. Berezovsky reveals a far more flexible approach whereby the dissemination of only 2,000 issues is deemed “significant,” with the court instead focusing on the plaintiff’s injury rather than the defendant’s connection with the forum. This flexibility has also extended to other contexts of English defamation claims, including permitting a plaintiff to amend his claim when he mis-
takenly referred to the American, rather than English, edition of an allegedly defamatory publication.  

Further evidence of the English permissive approach can be seen in Harrods Ltd. v. Dow Jones & Co., where the Queen’s Bench exercised jurisdiction against Dow Jones, the United States publisher of the Wall Street Journal, in connection with material published about the English department store Harrod’s. Citing Gutnick and Fiona Shevill, the court concluded that the Wall Street Journal was circulated in England based on the “small number of copies” of the newspaper received by English subscribers as well as the “limited number of hits emanating from [England] on the relevant page” of Wall Street Journal’s website. The English Court also rejected Dow Jones’ forum non conveniens argument. Notably, Dow Jones appealed to the United States District Court for the Southern District of New York, which in turn held that the English proceedings would provide a more appropriate remedy and therefore declined to intervene on the jurisdiction of the English Court. The Southern District of New York also rejected Dow Jones’ argument that the court should prevent all proceedings in foreign courts, noting that it was unlikely that foreign courts would recognize such an injunction. Harrods confirms that, under Fiona Shevill’s flexible approach, England’s pro-plaintiff defamation laws have provided potential litigants with an attractive forum to bring claims against publishers, and that protection from U.S. courts is not always granted.

Outside of the journalism context, English courts have consistently held that merely publishing a statement on the Internet gives rise to a defamation case within domestic jurisdiction. In Godfrey v. Demon Internet Ltd., the English Queen’s Bench held that a defamation claim

104. Id. para. 36.
105. “The doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought.” Black’s Law Dictionary 416 (2nd Pocket Ed. 2001).
108. Id. at 412.
109. Supra note 13.
could be brought against an Internet provider based on an Internet newsgroup posting. Because the Internet provider did not respond to the plaintiff’s request to remove the offensive content, the court held that the Internet provider played an active role and, like a bookshop, library, or magazine wholesaler, was liable for the content it carried on its server.

Litigation between public figures also reveals that England is an attractive forum for a plaintiff to bring a defamation claim, even when the defendant has little connection with the forum. In Lewis v. King, the English Court of Appeal held that U.S. boxing promoter Don King had permission to bring a defamation suit in England against another U.S. defendant. Even though both parties were domiciled in the United States, the court held that jurisdiction in England was proper because the allegedly defamatory statement had been downloaded in England and the plaintiff claimed an interest in protecting his reputation in England. Lewis v. King highlights the problem of forum shopping in England, in that the court acknowledged that if the plaintiff’s claim had been brought in the United States, it would not have survived. Here, it is notable that the court made no reference to Fiona Shevill.

More recently, actor and the Governor of California Arnold Schwarzenegger was sued by a U.K. television presenter for making allegedly defamatory remarks in response to accusations about past infidelities. Citing Gutnick, Lewis, and Fiona Shevill, Justice Eady of the Queen’s Bench easily found that England was a proper forum to hear the plaintiff’s claim, since “internet publication takes place in any jurisdiction where the relevant words are read or downloaded,” “[t]here is no ‘single publication rule’” in multi-state defamation claims, and the plaintiff had

111. Id. In the United States, internet providers are protected under the Communications Decency Act of 1996 § 230(c)(1), which states that: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Further, courts have held that under the Act, an Internet provider is not liable for any defamatory content even when a plaintiff contacts the provider to remove the content. See, e.g., Zeran v. America Online, 958 F.Supp. 1124 (E.D.Va 1997). One commentator has noted that if Zeran were heard in England, the issue would instead be whether the provider had “acted expeditiously to remove material following complaints.” LAW COMMISSION SCOPING STUDY NO. 2, supra note 18, at 17.
113. Lewis v. King, [2004] EWCA (Civ.) 1329 (pertaining to comments by the lawyer of boxer Lennox Lewis about boxing promoter Don King published on two websites).
114. Id.
115. Id.
proved that she “has suffered at least some damage” within the forum.\textsuperscript{117} The court also dismissed the defendant’s forum non conveniens argument since, under Berezovsky and Lewis, “the scales come down positively in favour of the English Court.”\textsuperscript{118} Schwarzenegger ultimately chose to settle the lawsuit rather than contest it in the English courts.\textsuperscript{119}

Courts only decline to exercise jurisdiction when a publisher limits access via the Internet. In Bangoura v. Washington Post, the Court of Appeals of Ontario held that a defamation claim against the Washington Post by a citizen of Guinea who had moved to Ontario could not be heard by a Canadian court.\textsuperscript{120} The court noted that the Washington Post had only seven subscribers in all of Ontario.\textsuperscript{121} Further, while the article was available over the Internet free of charge for only fourteen days after publication, thereafter readers had to pay to view the article.\textsuperscript{122} Only one person had paid for the article after the fourteen-day window, and that

\begin{itemize}
  \item \textsuperscript{117} Id. (citations omitted).
  \item \textsuperscript{118} Id. The court noted the following factors:
    \begin{itemize}
      \item (i) The Claimant is a United Kingdom citizen;
      \item (ii) She is resident here;
      \item (iii) She works here;
      \item (iv) She is widely known through work here and has an established reputation in this country;
      \item (v) She has no comparable connection with any other jurisdiction, including the United States;
      \item (vi) In the light of the presumption, to which I have referred, damage to her reputation has been suffered here;
      \item (vii) The underlying events, if there is ever to be a plea of justification, took place here at the Dorchester Hotel in December 2000;
      \item (viii) English law is applicable to the publication in this country.
    \end{itemize}
  \item Id. paras. 28-29.
  \item \textsuperscript{119} Michael R. Blood, \textit{Schwarzenegger Settles Groping Lawsuit}, \textsc{The Guardian} (U.K.), Aug. 26, 2006 (“The agreement spares the governor from what could have been a potentially embarrassing trial as he campaigns for a second term.”).
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Id.
was the plaintiff’s counsel. Bangoura is rare in that a domestic court declined to exercise jurisdiction over a defamation claim against a foreign publisher, but this might be due solely to the case’s unique facts and circumstances. It is particularly notable that a Canadian court rendered this decision, and that English courts have rejected similar arguments.

Further, the decision shows that restricting access to online publications is one method for publishers to avoid defamation claims in foreign jurisdictions. Given that journalism reaches its public function through free access, Bangoura highlights the growing danger that publishers might start limiting online access in order to cope with defamation claims from abroad. In other words, at best only a de minimus contact with the forum will permit a court to dismiss a defamation claim, meaning that publishers have a strong incentive to limit access abroad.

C. Enforcement of Foreign Defamation Judgments in U.S. Courts

U.S. publishers have one additional remedy available: convincing a domestic court to refuse to enforce a foreign judgment. In the European Union, judgments made in other Member States are enforceable through multilateral treaty. However, there is no such reciprocity in the United States, and American courts have, at times, refused to enforce foreign judgments. In the U.S., enforcement of foreign judgments is generally recognized under the principle of international comity, but foreign

123. Id.

124. The Bangoura court stated it did not find Gutnick to be “helpful in determining the issue before [the] court.” Id. The English Queen’s Bench rejected a similar argument by a publisher whose article was downloaded only five times within the given forum. Jameel v. Dow Jones & Co. [2005] Q.B. 946, 951.

125. For instance, the First Amendment right of access is based upon “the common understanding that a ‘major purpose of that Amendment was to protect the free discussion of governmental affairs.’ By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (citation omitted). U.S. courts apply heightened scrutiny to prior restraints of the press out of a recognition that access to communication is vital to free expression under the First Amendment. See, e.g., DeBoer v. Village of Oak Park, 267 F.3d 558, 573–74 (7th Cir. 2001).

126. Regulation (EC) creating a European Enforcement Order for uncontested claims, supra note 51. However, courts can refuse to recognize foreign judgments “if such recognition is manifestly contrary to public policy of the Member State in which recognition is sought.” Brussels I Regulation, supra note 51, art. 34(1).

127. “The international comity principle counsels for recognition of foreign proceedings to the extent that such proceedings are determined to be orderly, fair, and not detrimental to the nation’s interests.” 45 Am. Jur. 2d Int’l Law § 7 (2005).
defamation judgments present an exception where the U.S. court could refuse if the judgment cannot be sustained under the First Amendment.  
Notably, in Bachchan v. India Abroad Publications Inc. a New York court held that a defamation judgment in the High Court of Justice in London against a New York wire service was unenforceable. The court stated that enforcing the judgment would violate the First Amendment given that, in England, the burden of proof in a libel action rests with the defendant. Telnikoff v. Matusevitch is an even more extreme and famous example of a U.S. court refusing to enforce a foreign defamation verdict. The Maryland Court of Appeals refused to enforce an English judgment against an English citizen who, prior to moving to the United States, had written a letter to the editor that was published by an English newspaper. The court upheld the trial court’s decision that English law was antithetical to the United States and Maryland free speech guarantees, and therefore “repugnant to the public policy” of Maryland and unenforceable.

These cases show the uncertainty wrought when courts impose their domestic law on foreign publishers, especially when those nations have vastly divergent standards of protecting free expression. U.S. courts have indeed acted to protect the free-speech interests of American publishers. One commentator has argued that the “non-enforceability of foreign judgments that contravene the First Amendment may alleviate United States defendants’ fears of violating the libel laws of other countries.” This protection, however, only occurs after proceedings in foreign jurisdictions, amounting to a notable waste of judicial resources. This protection also does not curtail the chilling effect imposed on publishers, who must now decide whether continued publication on the

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128. Sack on Defamation § 15.4. A number of states have adopted the Uniform Foreign Money-Judgments Act (UFMJA), 13 U.L.A. 419 (1980), which seeks to increase the likelihood that foreign judgments will be recognized in the United States and restates the common law rules. Symeonides, supra note 6, at 820–21.
130. Id. at 664–65.
132. Id. at 251.
133. Id. at 236. Notably, Maryland has adopted the UFMJA, but the court held that non-enforcement in this instance was proper under the UFMJA’s public policy exception. Id. at 238.
Internet is worth the likelihood of protracted litigation abroad. Furthermore, liability in foreign jurisdictions still presents a major point of concern to publishers with assets in a given forum. When one considers that today, almost all major newspapers have bureaus, foreign editions, and personnel spread across the globe, the non-enforcement route seems even less viable.

III. ROME II WASN’T BUILT IN A DAY

Even though Rome II can be seen as part of the European Union’s attempt to harmonize the laws of Member States, the backdrop of foreign liability for defamation claims has colored the convention’s drafting process. Given publishing groups’ unease with the status quo approach, they saw Rome II as an opportunity to create a more stable rule for defamation claims that would, hopefully, protect their interests.

The first European Union treaty governing choice of law was the Brussels Convention, which was interpreted by the ECJ in Bier and Fiona Shevill. However, the Brussels Convention created a number of methods for claimants to opt out of one jurisdiction in favor of another, rendering the treaty ineffective. Throughout the 1970s, the European Union worked towards creating a more stable choice-of-law agreement for disputes, beginning with claims based in contractual relationships. Eventually the European Community produced Rome I, which states that the choice of law for contractual claims is “the law of the country with which it is most closely connected.” Rome I is applicable to parties

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137. See Wimmer, supra note 38, at 6.
138. Blake Cooper, Note, The U.S. Libel Law Conundrum and the Necessity of Defen-
sive Corporate Measures in Lessening International Internet Liability, 21 CONN. J. INT’L.
140. Brussels Convention, supra note 48.
141. Supra Part II.A.
142. Brussels Convention, supra note 48, arts. 2–6.
143. The Brussels Convention’s flexible rules allowed litigants to actively and easily
choose the jurisdiction with laws most favorable to their claim. Rome II (European
Commission 2003 draft), supra note 20, at 3.
144. Giuliano & Lagarde, supra note 47.
145. Rome I, supra note 21, art. 4(1). In comparison:

[T]he country which is “most closely connected” with the contract usually
means the country where the performer of the contract, if it is a business, has its
central administration or, in the case of a trade or a profession, the location of
its principal place of business. This alternative most closely resembles choice
of law principles applied by United States courts.
residing in any state in the world, not just European Union Member States.\textsuperscript{146} In turn, Rome II will be the “natural extension” of unification rules relating to private international law in the European Union.\textsuperscript{147}

Two provisions of the Treaty on European Union\textsuperscript{148} affect the drafting and scope of Rome II. Article 2 of the Treaty on European Union requires that “litigants can assert their rights in the courts and before the authorities of all the Member States, enjoying facilities equivalent to those they enjoy in their own country.”\textsuperscript{149} Declaration 20, which the European Union amended to the Treaty on European Union in 1997, states that choice-of-law measures “shall not prevent any Member State from applying its constitutional rules relating to freedom of the press and freedom of expression in other media.”\textsuperscript{150} Member States drafted Declaration 20 due to concerns that, under Article 2, they would be required to enforce judgments antithetical to their domestic free-speech protections.\textsuperscript{151} Although neither the European Parliament nor the European Commission made any explicit reference to Declaration 20 while drafting Rome II,\textsuperscript{152} it paved the way for the drafters of Rome II to carve out

\begin{footnotesize}
\textsuperscript{146} Rome I, \textit{supra} note 21, art. 1.
\textsuperscript{147} Rome II (European Commission 2003 draft), \textit{supra} note 20, at 3.
\textsuperscript{148} [2002] O.J. (C 325). In addition to changing the title of the “European Economic Community” to simply the “European Community” or “European Union,” the Treaty on European Union established a European governing body and called for a common monetary system. \textit{Id.}
\textsuperscript{149} Rome II (European Commission 2003 draft), \textit{supra} note 20, at 2.
\textsuperscript{151} Declaration 20 was drafted by Sweden due to worries about enforcing defamation judgments that are in violation of Swedish constitutional protections of freedom of speech and expression. European Group for Private International Law (EGPIL), \textit{Working Sessions of the Fourteenth Annual Meeting} (Sept. 17–19, 2004), \textit{available at} http://www.drt.ucl.ac.be/gedip/reunionstravail/gedip-reunions-14t-en.html [hereinafter EGPIL Working Sessions]. These concerns mirror the refusal of U.S. courts to enforce foreign defamation claims. \textit{Supra} Part II.C.
\textsuperscript{152} The European Parliament did, however, note that one other European Parliament directive, the so called “e-commerce directive,” colors the application of Rome II. European Parliament and Council Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 2000 O.J. (L 178) 1 (EC). This directive enshrines a country-of-origin rule to e-commerce claims, but also provides that the directive “does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.” \textit{Id.} Thus, the drafters of Rome II created a rule in the field of e-commerce that if the application of Rome II’s choice-of-law provisions “result in an unjustified barrier to
\end{footnotesize}
an exception to the general rule for the choice of law relating to defamation claims. Rome II’s drafters also noted that the divergent defamation laws of Member States would raise “difficult issues” requiring special consideration.

Rome II’s drafting process has been slow and deliberate, owing to the fact that consensus must be achieved among not only all Member States, but also between the European Parliament (the European Union’s legislative branch) and the European Commission (the European Union’s executive branch) as part of the treaty’s co-decision process. The European Union began drafting Rome II in 2002. In addition to public hearings, the European Commission sought and received over eighty written commentaries from interested parties. The position of newspaper and broadcasting groups reflected the growing concern with foreign defamation liability, in that publishers must comply with foreign press laws under a flexible rule. These groups suggested that courts instead apply publishers’ national defamation laws, since they reflect each country’s particular tradition and values regarding freedom of the press.

trade, the national court would be obliged . . . not to apply that law.” Rome II (Working Document), supra note 71, at 2–3.

153. Rome II (European Parliament draft), supra note 20, art. 3.
154. “Article 6 in the proposed Rome II Regulation has something to do with this declaration. It probably made it easier to introduce the exception to Article [6] for the protection of freedom of the press.” EGPIL Working Sessions, supra note 145.
156. Rome II (European Commission 2003 draft), supra note 20, at 5–6.
157. Drafting of Rome II was triggered in 1998 by the Action Plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. 1999 O.J. (C 19) 1 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999Y0123(01):EN:HTML. All European Union nations participated in the drafting as well as the adoption of Rome II except for Denmark. Rome II (Working Document), supra note 71, at 2 n.1. Thus, once the European Union adopts Rome II, Member States will apply the Rome II conflict-of-laws rules as regards the application of Danish law, but Denmark will continue to apply existing rules of international law. Id.
ademic commentators, in turn, noted that the status quo choice-of-law approach permitted plaintiffs to bring a defamation claim in any forum where their reputation was harmed. These commentators suggested that Rome II should continue to permit plaintiffs to choose where to bring a defamation suit while adopting certain exceptions to address publishing groups’ expectations.

From these discussions, the European Commission advanced the first draft of Rome II on July 22, 2003. Unlike some choice-of-law rules that attempt to create a standard black-letter rule applicable to all types of claims, Rome II adopted the academic commentators’ approach of creating a general rule and then carving out exceptions based on the content of certain claims. The first draft of Rome II, however, created a place-of-harm approach for defamation claims that reads:

As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable, but a manifestly closer connection with a particular country may be deemed to exist having regard to factors such as the country to which a publica-

Each Member State has its own traditional approach to press freedom in their press law. It is a right which evolves nationally in harmony with their moral, legal historical, religious and political values and traditions. Newspapers are usually addressed to and bought by their national, regional or local readers as their articles reflect the values which characterise their readership. It is therefore natural and logical that publishers first respect and apply their national press law, which is based on these values.

Id.

161. Summary and contributions, supra note 159.
162. Id.
163. The European Commission is the executive branch of the European Union and currently consists of 25 Commissioners, one from each member of the European Union. The European Parliament, on the other hand, is the EU’s parliamentary body and consists of MPs directly elected by each member nation.
165. See, e.g., European Group for Private International Law (EGPIL), Proposal for a European Convention on the law applicable to non-contractual obligations (Sept. 25–27, 1998) available at http://www.drt.ucl.ac.be/gedip/documents/gedip-documents-7pe.html. The EGPIL choice-of-law proposal was drafted by a private organization free from political pressure or compromises, and has been described as being “as close to perfection as humanly possible.” Symeonides, supra note 158. Funding for the EGPIL proposal derived from the European Commission, and the text became the basis for the early drafts of Rome II. Rome II (European Commission 2003 draft), supra note 20, at 4.
166. Rome II (European Parliament Draft), supra note 20, art. 3.
tion or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size or a combination of these factors. This provision shall apply mutatis mutandis to Internet publication.168

The “manifestly closer” exception was intended to address publishers’ concerns, but publishing groups viewed this as too vague to be effective and the rule was greatly criticized.169

In particular, publishing groups noted that a place-of-harm rule would make it necessary to employ legal advisors with expertise in each foreign jurisdiction, which would create practical and financial burdens in addition to a chilling effect caused by self-censorship out of fear of suit under foreign defamation laws.170 Even in the United Kingdom, which has proplaintiff defamation laws,171 British publishing groups opposed the place-of-harm rule, noting that they were at least knowledgeable about their domestic defamation law and would be guaranteed the opportunity to defend their actions.172 Given the myriad of overlapping forums capable


169. See ICRT Comments on the Wallis Report on the Rome II Regulation (June 21, 2004), www.icrt.org/pos_papers/2004/040621_EE_Rome%20II.pdf [hereinafter ICRT Comments]. The International Communications Round Table, which includes such corporations as Amazon.com, Google, Microsoft, News Corp., Sony, and the Walt Disney Corporation, noted:

Cross-border cases in the field of defamation and privacy occur very infrequently. Moreover, when they do occur, the applicable law is de facto the law of the country where the media provider is established. Figures clearly demonstrate the exceptional character of cross-border cases applying a law other than the law of the forum in this area. Freedom of expression in the media is not, and should not be, within the sphere of the proper functioning of [the European market].

Id.

170. European Federation of Journalists, Opinion of the EFJ Regulation on the law applicable to non contractual obligations (Jan. 24, 2005), available at http://ifj-europe.org/default.asp?index=2916. Publishing groups also noted that a place-of-harm rule could lead to “farcical” situations where, for example, the editor of a British newspaper aimed at a British audience could nonetheless be sued in a Belgian court for breaching Belgian defamation law for writing about a Belgian criminal. Gordon Darroch, When Talk Is No Longer Cheap, THE SCOTSMAN, Mar. 16, 2004.

171. See Vick & MacPherson, supra note 13, at 937–49.

172. “If you have a country which doesn’t recognise truth as a defence against libel, who’s to say we wouldn’t have to apply those rules here?” Darroch, supra note 174, (quoting Clare Hoban, Head of Legal Affairs for the Periodical Publishers’ Association).
of hearing a given defamation claim, the place-of-harm rule would allow courts to apply domestic law to publications whose only contact was via the Internet and would thus only add to publishers’ uncertainty.

The policy behind the place-of-harm approach was crystallized in the draft of Rome II produced by Legal Affairs Committee of the European Parliament: “Whereas to select the lex loci delicti commissi as the basic solution has its attractions, more flexibility needs to be built into the rules so as to allow the courts to do justice in individual cases. Moreover, it is important to respect party autonomy.” Academic commentators also noted that “very few legal systems appl[y] the law of the place of publication” and that the draft did in fact take steps to protect publishing interests.

However, in 2005, the European Parliament responded to intense lobbying by publishing groups and produced a substantially different approach to Rome II. Specifically, the new draft adopted a place-of-

173. See supra Part II.B.
174. “The law of the place where the offense was committed.” BLACK’S LAW DICTIONARY 416 (2nd Pocket Ed. 2001). In other words, the law of the place of harm.
175. Rome II (Legal Affairs Committee draft), supra note 172, recital 7, amend. 3 justification.
176. Summary and contributions, supra note 163.
177. In 2003, the first Rome II draft was transmitted by the European Council to the European Parliament as part of the co-decision process between the two bodies. From 2003 through 2005, Rome II was substantially edited by the European Parliament’s Legal Affairs Committee under the leadership Rome II’s rapporteur and Member of the European Parliament (MEP) Diana Wallis. Rome II (Legal Affairs Committee draft), supra note 168. On June 27, 2005, the Legal Affairs Committee produced a new draft that kept intact the place-of-harm approach with minor modifications. Id. The European Federation of Journalists and other groups representing journalists and media lobbied the MEPs to reject the place-of-harm rule. David S. Korzenik & Aaron Warshaw, EU Parliament’s Last Minute Surprise Changes to “Rome II” Rescue Press Rights, MLRC MEDIA LAW LETTER (Media Law Resource Center, New York, N.Y.), July 2005, at 50. This lobbying was particularly aimed at an ad hoc committee of MEPs who shared an interest in matters pertaining to freedom of expression and the press. Id. The ad hoc committee was persuaded to modify the draft of Rome II to create a place-of-publication approach to defamation claims at a plenary session in Strasbourg on July 6, 2005. Rome II (European Parliament draft), supra note 20. The European Parliament transmitted its working place-of-publication draft to the European Council which, on September 29, 2005 in Brussels, began considering the defamation provision of Rome II. General Secretariat, Council of the European Union, Notice of Meeting and Provisional Agenda (July 28, 2005), available at http://register.consilium.eu.int/pdf/en/05/cm02/cm02802.en05.pdf. By the time of the European Council’s meeting, the only provision of Rome II not settled was Article 6 relating to defamation claims because, over the prior three years, all other issues relating to Rome II had been substantially resolved.
publication rule for the choice of law for defamation claims in lieu of the first draft’s place-of-harm rule:

As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable.

Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country’s law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.  

Under this approach, Member States would apply the defamation law of the publisher’s country of origin as determined by where the publication is directed and where editorial control is exercised. The European Parliament drafters noted that the place-of-publication rule was necessary to safeguard European Union “press traditions,” and would create a more stable and predictable result for publishers. Publishing groups hailed the new draft as a “victory for press freedom and a testament to the efforts” of media lobbyists who had communicated the potential damage of the place-of-harm rule. Under the place-of-publication rule, publishers would therefore only be judged under their domestic defamation law,

178. Rome II (European Parliament draft), supra note 20, art. 6(1), amend. 57 (emphasis added).
179. Id. art. 6(1), amend. 57.
180. Id. art. 26a, amend. 54(3).

In a communications environment operating increasingly on a continent-wide basis, the various forms of law relating to the personality and historically established press traditions in the European Union point to the need for more uniform prerequisites and rules for dispute resolution. The very nature, which merits safeguarding, of press freedom and its role in society would suggest, however, that in the process priority should be given to media which deal responsibly with rights relating to the personality . . . .

Id.

while litigants would continue to have the ability to bring their claim in any forum where they were harmed.

Arguably, a more restrictive choice-of-law provision would allow publishers to know in advance which defamation law is applicable when an article is posted online. 182 However, balanced against this need for greater certainty is the claimants’ right to bring suit in the country where their reputation was damaged under the law of that jurisdiction. 183 These two policy concerns led to the contrasting approaches to the drafting of Rome II, reflecting flexibility in the place-of-harm rule 184 and certainty in the place-of-publication rule. 185 As such, the place-of-harm rule embodies the status quo approach to choice of law for defamation claims, 186 while the latter place-of-publication rule was drafted in response to lobbying efforts by publishing groups and reflects a departure from the

183. See LAW COMMISSION SCOPING STUDY NO. 2, supra note 18, at 39.
184. Rome II (Legal Affairs Committee draft), supra note 168, art. 6(1), amend. 30. The Legal Affairs Committee draft also created an exception to the place-of-harm rule when “a manifestly closer connection with a particular country may be deemed to exist.”
185. Rome II (European Parliament draft), supra note 20, art. 6, amend. 57. Indeed, every system of private international law reflects a tension between the opposing needs for both certainty and flexibility. Symeonides, supra note 158, at 2.
186. Rome II (Legal Affairs Committee draft), supra note 172, art. 6, justification. The Legal Affairs Committee draft made explicit reference to preserving the flexible approach utilized by the Court of Justice of the European Communities in Fiona Shevill. Id.
growing trend of applying domestic defamation law to foreign publications. 187

By the winter of 2005, France, Belgium, and Hungary were most supportive of the place-of-publication approach, but it appeared uncertain whether they could muster enough support for its adoption. 188 Newer members of the European Union, in contrast, were most in favor of the place-of-harm rule. 189 Ireland and Sweden seemed to support excluding defamation claims from Rome II altogether and instead rely on national choice-of-law provisions, and the United Kingdom sought a consensus position. 190 Germany supported adoption of a rule based on Fiona Shevill, 191 which would limit the choice of law to only the nation of publication and the nation of harm. 192 European publishing rights groups pressed for adoption of the place-of-publication rule. 193


The measure provides for a certain degree of flexibility for judges, in order to allow them to take account of exceptional circumstances. Such flexibility, however, has to be limited, in order to avoid compromising the general objective, or rather legal certainty. In that regard, it is clear that allowing judges to exercise full discretion would make it difficult to predetermine the legal certainty that is one of the main objectives of this initiative, since economic operators and citizens wish to know in advance which law will apply to their situation . . . . I fully agree with the solution reached . . . on sensitive issues, such as press defamation and the link between international private law and the internal market. They are two extremely delicate sectors and I believe that the compromise reached is satisfactory.

Id. See also EU Proposal Adopted with Publisher-Friendly Amends, MAGAZINE WORLD, available at http://www.fipp.com/1053 (last visited Dec. 26, 2005) (“Successful lobbying from the European Magazine Publishers Association (FAEP) resulted in the Commission refining the proposal. The law applicable to defamation will now be consistent with the law applicable to all other non-contractual obligations and will ensure greater clarity for publishers.”).

188. E-mail from Pamela Morinière, Authors’ Rights Campaigner, International Federation of Journalists (Oct. 14, 2005) (on file with Brooklyn Journal of International Law).

189. Id.

190. Id.

191. Supra Part II.A.


Rather than resolving this internal conflict among Member States, in early 2006, the European Commission submitted a new draft that altogether removed the defamation provision from the agreement. On one level, this maneuver reflected some Member States’ uneasiness with the place-of-publication rule, since it would favor the press too greatly over the reputational interests of litigants. As a parliamentary maneuver, this step—while appearing to merely postpone a substantive solution to the issue—essentially preserved the place-of-harm rule, which is the status quo approach to defamation claims, and prevented further debate on the issue. Thus, one representative of the European Parliament described the European Commission’s action as “incredibly disappointing.”

At least for the short term, it appears doubtful that the European Union will adopt a blanket place-of-publication rule for publication claims, because Member States have to approve such a provision unanimously and, as per the view of the European Commission, such a rule would fa-

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195. The European Commission noted that:

[The place-of-publication rule] would change the substance of the rule applicable to violations of privacy, particularly by the press. The Commission cannot accept this amendment, which is too generous to press editors rather than the victim of alleged defamation in the press and does not reflect the solution taken by a large majority of Member States. Since it is not possible to reconcile the Council’s text and the text adopted by Parliament at first reading, the Commission considers that the best solution to this controversial question is to exclude all press offences and the like from the proposal and delete Article 6 of the original proposal.

196. Rome II (Diana Wallis MEP), http://www.dianawallismep.org.uk/pages/rome2. html (last visited Nov. 15, 2006). Ms. Wallis noted that:

It is incredibly disappointing that the Commission has decided to withdraw the provision relating to defamation from Rome II. Clearly this has pre-empted Member States from having detailed discussions in the Council. For the Council to re-include defamation into the scope of the Regulation, Member States will have to unanimously agree on a common rule which at this stage proves to be impossible.

197. Id.
The current draft of Rome II is left with a “gaping hole” where the rule for defamation claims should be. While publishing groups only managed what some have called a “magnificent gesture” in pressing for the place-of-publication rule, their efforts have brought forth their concerns without bringing the European Union any closer to a workable solution. Yet this impasse should not come as a surprise when looking at conflicts of law generally. As will be discussed in the next section, the modern American approach might, in some ways, be preferable to one


I must acknowledge that you publishers—and the broadcasters—have undertaken a rather brilliant campaign in support of the “country of origin” principle. Because of you, the European Parliament has rejected “country of destination” in favour of “country of origin,” ignoring the advice of its own legal affairs committee. This puts the Commission in a difficult position. In spite of our strong belief in the country of origin principle, we know well that Member States will never accept the full “country of origin” principle in Rome II. It favours, in their view, publishers too much compared with victims. And Member States point out that the right to privacy is as much a fundamental right as freedom of expression.

Id.


We know only too well that this issue has been politically sensitive with the media, but why give up in the search for a solution now? The Parliament indicated a starting point which the media agreed to at first reading; this should have been built on not disregarded.

The failure to deal with this aspect of applicable law will leave a gaping hole in the legislation in a world where media is increasingly global and editors need certainty about which law will apply to their publications. Leaving it out just perpetuates the uncertainty about which of 25 or more legal regimes might apply and helps no-one, least of all the media.

Id. (internal quotation marks omitted).

200. Reding, supra note 198.

Commenting on a spectacular, but very bloody British cavalry charge against Russian artillery during the Crimean war, a French General said “C’est magnifique, mais ce n’est pas la guerre.” If I translate freely, “What a magnificent gesture, but how impractical.” This is my view of your insistence on the “country of origin” principle in this context.

Id.
that instead focuses on a given place (i.e., either the place of harm or the place of publication).

IV. A WAY OUT OF THE MAZE? THE INTERESTS ANALYSIS APPROACH TO CHOICE OF LAW

In addition to Rome II’s place-of-harm and place-of-publication rules, a number of other approaches have been proposed to create a workable solution to conflicts in defamation law. Even within contemporary choice-of-law approaches, there is a great deal of variety of rules and analyses. Despite the volume of suggested rules available to Rome II’s drafters, international defamation law is no closer to a solution—let alone a compromise among interested parties—as shown by the failure of the European Union to adopt a choice-of-law rule applicable to defamation claims. We should not be surprised by this difficulty. As Dean Prosser wrote over fifty years ago:

The realm of the conflict of laws [in defamation cases] is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.

The Internet has caused this swamp to become even more dismal. It has also caused a head-on collision between American defamation jurisprudence under the First Amendment and the laws of other nations. Rather than adding another layer to the quagmire, this Note argues that the solution lies not in formulating rules, but in re-approaching the problem with an eye toward the underlying substantive defamation laws. The American experience with conflicts of laws provides some insight.

201. See, e.g., Svantesson, supra note 17, at 195 (proposing a rule whereby courts would never have jurisdiction for defamation claims arising from the Internet).

202. See O’Connor v. O’Connor, 519 A.2d 13 (Conn. 1986) (reproduced in Symeonides, supra note 6, at 145–50) (noting that modern approaches include the Restatement (Second) of Conflicts of Laws, the “governmental interest” analysis of Professor Brainerd Currie, and Professor Robert A. Leflar’s “choice-influencing considerations” analysis); Sack on Defamation § 12.33 (noting that “about a dozen different approaches have been suggested to the problem of choice of law in multistate defamation cases”) (citation omitted).


205. Christopher J. Kunke recently made a similar argument about incorporating state interests analysis into Rome II, Kunke, supra note 25, at 1762–70, although his analysis
U.S. courts have grappled with choice-of-law rules for defamation claims in ways that mirror the struggles of the European Union. Thus, it should be no surprise that Rome II’s drafters studied the U.S. approach to choice of law for defamation claims, including the Restatement (Second) of Torts, when weighing which approach to adopt. Yet, as is true of the European approach in general, Rome II’s drafters focused on territoriality—i.e., creating a rule based on certain contacts between the publisher, the victim, and the forum—in attempting to promulgate a uniform rule applicable to all cases. Rome II’s drafters would have been well-advised to consider adopting one key attribute of the modern American approach, namely a choice-of-law system that includes an examination of the policies that underlie competing laws.

Just as nations possess varying defamation laws based on their particular standards and traditions, U.S. jurisdictions also resolve defamation claims under differing standards. Under the Restatement (Second) of Conflict of Laws, courts should weigh, inter alia, “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue” when determining the choice of law. For defamation claims arising from “aggregate communications” such as the multi-state publication of a newspaper, the Restatement (Second) creates a presumptive rule in favor of a plaintiff’s domicile. Professor Pielemeier has argued that, as applied, this rule is weak and ambivalent; therefore, the Restatement (Second) has failed to accomplish the kind of policy analysis that was envisioned under the modern interests analysis approach developed by Professor Brainerd Currie. It should also be noted that a number of U.S. states continue to apply the

does not consider whether application of foreign defamation law undermines First Amendment jurisprudence. See supra Part II.C. Kunke suggests that “Rome II should favor the place of injury but allow for an adequate state interests analysis” and proposes an alternate rule for defamation claims. Kunke, supra note 25, at 1770.

206. See Pielemeier, supra note 7, at 56–57.
207. Rome II (Legal Affairs Committee Draft), supra note 168, at 40.
209. See Pielemeier, supra note 7, at 68–69 (describing Professor Currie’s interests analysis as applied to multistate defamation claims).
211. Pielemeier, supra note 7, at 56–57.
212. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1977).
213. Id. § 150.
214. Pielemeier, supra note 7, at 64–65, 68.
traditional *lex loci delicti* rule,\textsuperscript{215} which essentially mirrors Rome II’s place-of-harm rule.\textsuperscript{216}

Therefore, in resolving conflicts of laws, some U.S. states have moved one step beyond the Restatement (Second) rule because, like the traditional *lex loci delicti* rule, it does not adequately reflect important policy considerations in defamation cases.\textsuperscript{217} Among these considerations is that permitting a plaintiff to bring a suit in any forum where she has been harmed leads to forum shopping.\textsuperscript{218} Some U.S. courts instead apply a more flexible choice-of-law analysis that respects the underlying policies of each forum’s law, as well as the reasonable expectations of the litigants.\textsuperscript{219} While this approach is not without criticism\textsuperscript{220} and also has been applied imperfectly,\textsuperscript{221} it does reflect a decision by some U.S. judges to give substantial weight to the policy implications that occur when local law is applied to publishers located outside of a given forum.\textsuperscript{222} Furthermore, the American approach places greater emphasis on the relationship between the publisher and the forum, whereas the prevailing approach of foreign courts focuses more heavily on the rights of the party affected by a defamatory statement.\textsuperscript{223}

Professor Pielemeier has also described a “floor effect” in U.S. choice of law for defamation claims, whereby “courts should not apply to the entire claim any state’s law that is more speech-inhibiting than that of a

\textsuperscript{215} Symeonides, *supra* note 6, at 117–18.

\textsuperscript{216} See Kunke, *supra* note 25, 1752–53.

\textsuperscript{217} Pielemeier, *supra* note 7, at 67–68. However, like most foreign courts, U.S. courts tend to automatically apply the law of the plaintiff’s domicile without regard to the underlying policies involved in the choice-of-law determination. *Id.* at 116.

\textsuperscript{218} *Id.* at 67–68.

\textsuperscript{219} *Id.* at 68–69.

Unlike [the territorialist] approach, Professor Currie argued that courts should explicitly consider the content and underlying policies of the arguably applicable laws, and inquire “into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies.”

Stripped to its basics, Professor Currie’s approach provides that if, after such an inquiry, the court finds that only one state has an interest in the application of its laws (characterized today as a “false conflict”), the court should apply the law of that state. If the court determines that more than one state has such an interest (characterized today as a “true conflict”), the court should reconsider.

*Id.* U.S. state courts that have adopted this approach include New York, California, and Pennsylvania. *Id.* at 69–84.

\textsuperscript{220} *Id.* at 69.

\textsuperscript{221} *Id.* at 103.

\textsuperscript{222} *Id.* at 77–78.

\textsuperscript{223} Di Bari, *supra* note 87, at 131.
state with a relatively significant interest in compensating the plaintiff.”

As has been shown, one of the strongest critiques of international defamation case law is that the imposition of foreign law against American publishers undermines the First Amendment. While it is not surprising that courts outside of the United States are unconstrained by U.S. constitutional law in rendering verdicts, the fact that American courts at least weigh such constitutional interests stands in stark contrast to the prevailing approach among foreign jurisdictions.

A strict application of Brainerd Currie’s interests analysis, however, would usually lead to results that mirror the status quo, in that the court would apply the law of the forum. The typical scenario in an international defamation case amounts to a “true conflict”: the two states each have a competing and legitimate policy interest, with forum law seeking to protect the plaintiff’s reputation and U.S. law seeking to protect publishers’ free speech interest. Under Currie’s rule-selecting process, true conflicts should be resolved by applying the law of the forum, which is an identical outcome in most international defamation cases. However, this reflects Currie’s belief that true conflicts are best resolved through legislative means, and has been greatly criticized. This should not lead us to reject Currie’s analysis. Instead, we should focus on the fundamental and revolutionary principle that Professor Currie espoused, namely that choice-of-law systems should reflect the substantive policy considerations in a given conflict.

In terms of an objective approach to Rome II’s defamation provision, the most important analysis is to fully appreciate the way in which national interests are furthered or undermined by the application of domestic law to foreign publishers. In particular, the cases in Part II.B show that foreign courts routinely undermine U.S. policy interests by applying overly permissive choice-of-law rules to modern defamation claims. From an American perspective, the greatest harm is that applying foreign

226. See Gary Chan Kok Yew, Internet Defamation and Choice of Law in Dow Jones & Company Inc. v. Gutnick, 2003 SING. J. LEGAL STUD. 483, 496–98 (2003) (arguing that, as applied to the Gutnick scenario, Currie’s rule of applying the law of the forum to true conflicts does not provide a more workable framework than the status quo).
227. Id.
228. SYMEONIDES, supra note 6, at 116 (citing Brainerd Currie’s interests analysis).
229. Id. at 182–83 (noting that “in Currie’s view, a judge is neither constitutionally empowered nor otherwise qualified to weigh conflicting state interests”).
230. Id. at 183. See also Arthur Taylor von Mehren, Recent Trends in Choice-of-Law Methodology, 60 CORNELL L. REV. 927, 938 (1975) (noting that “legal order” is an overriding concern in conflicts scenarios).
law to U.S. publishers undermines the well-established First Amendment guarantees that protect our marketplace of ideas.231 While American courts have long held that the press should be shielded from onerous defamation laws,232 that protection is severely weakened when a plaintiff can merely choose to bring a defamation claim in a forum where the likelihood of success is far greater.

That is not to suggest that foreign courts currently ignore policy implications altogether when exercising jurisdiction over a foreign publisher. Rather, the cases in Part II.B show that courts consider foremost the right of a plaintiff to bring a claim against a publisher wherever her reputation was harmed. But courts do not fully appreciate the broader effects of that decision, which includes forum shopping, nuisance suits, and uncertainty.233 Also, publishers must now become knowledgeable about every defamation law from abroad, which will in time become unduly prohibitive.234

If publishers continue to incur costly lawsuits under a place-of-harm rule—either under Fiona Shevill’s status quo framework or under Rome II—this trend will lead to a chilling effect on Internet publishing as publishers are continually exposed to defamation claims from foreign courts under foreign laws.235 The very real danger is that publishers will limit online access in jurisdictions perceived as lacking free-speech guarantees or that regularly impose undue liability.236 Cases such as Bangoura show that a publisher’s only recourse, assuming that it wishes to avoid universal liability, is to limit access via the Internet.237 While this remedy appears to satisfy both the publisher’s and the forum state’s interests, “virtual borders” around a publisher’s online presence threaten to destroy the


234. With decreased sales of print publications, supra note 4, the publishing industry can likely ill-afford such litigation.

235. “[I]f adopted, the [place-of-harm rule] will create judicial insecurity, promote judicial forum-shopping, and, in the end, lead to self-censorship by the media. This chilling effect would be extended to any publication, especially on the Internet.” European Digital Rights, Rome II: Applicable Law and Freedom of Expression (June 29, 2005), available at http://www.edri.org/edrigram/number3.13/RomeII.

236. Wimmer, supra note 38, at 6.

237. Supra Part II.B.
functioning of the Internet. Additionally, jurisdictional avoidance will impact those citizens who most greatly need access to online publications from abroad, because repressive regimes also tend to restrict free expression by the press.

On a fundamental level, limiting access and self-censorship are “re-pugnant” to the profoundly American principles of disseminating information and ideas. While newspapers certainly have a duty to refrain from publishing defamatory statements, the access that citizens now enjoy will likely be curtailed if courts continue to impose national defamation laws on publications operating on the Internet without restraint. This should give policymakers great pause, since access to the press is vital to the health of global democracy. Indeed, the United States has long held that “liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.” These aspirations are in danger when international courts refuse to acknowledge the harm caused by exercising jurisdiction over foreign publishers.

It is for these reasons that Rome II’s drafters should consider including a policy-analysis approach to the choice-of-law rule for defamation.

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238. Supra note 17 and accompanying text.
241. As Justice Brennan held:

[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only “the principle that debate on public issues should be uninhibited, robust, and wide-open,” but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

claims. The European Parliament’s proposed place-of-publication rule reflected such considerations due to the intense lobbying of the press, but this amounted to an a priori preference for publishers over plaintiffs. This approach is contrasted with the more flexible conflict resolution mechanism that requires judges to examine whether imposing domestic defamation law would undermine the policy and national interests of another nation. A more flexible approach would be more assured of passage by the European Commission and European Parliament, since the interests of both publishers and plaintiffs would be considered in each particular case.

While such an approach might be antithetical to the European preference for black-letter laws, Brainerd Currie’s revolutionary interests analysis has steadily gained acceptance in the United States and abroad. Given that foreign courts are routinely adjudicating defamation claims in ways that undermine U.S. constitutional free speech concerns—and what greater and clearer policy interest could a state possibly have that a constitutional interest?—Rome II’s choice-of-law rule should consider conflicting policy interests, either at either the a priori stage or in the adjudication of individual claims.

V. CONCLUSION

This Note has explored Rome II’s place within the broader scope of transnational defamation law. As demonstrated by the European Union’s difficulty in formulating a rule that would satisfy both defamation plaintiffs and the press, international defamation law is facing a large-scale conflict between reputational and free-press interests. One possible solution is for the European Union to adopt a rule that includes an American-style interests analysis as well as the adoption of the single publication rule. Such an approach provides a framework to weigh the governmental interests of other states, seeks to minimize forum shopping, and is more honest about whether applying domestic law might undermine the laws of another nation.

From the perspective of the American press and practitioners, the status quo is troubling. Unless there is a meaningful effort to reform jurisdictional rules, we can expect to see publishers adopt jurisdictional avoidance as a means to avoid liability abroad. The failure of Rome II’s defamation provision shows that reform requires a concerted effort by American academics, policymakers, and the press to show the profound harm that occurs when foreign courts apply domestic laws to U.S. publishers. On a broader level, we can hope that our American experiment with free speech gains further traction abroad. Some of this movement
has already occurred through reforms by national courts.\textsuperscript{243} As the world continues to realize the wisdom of limiting defamation laws in order to protect the free press, the conflict between national laws will likely diminish. As a result, choice-of-law agreements like Rome II will become achievable. Until then, the landscape continues to be “a dismal swamp.”\textsuperscript{244}

\textit{Aaron Warshaw}\textsuperscript{*}


\textsuperscript{244} \textit{Supra} note 207 and accompanying text.

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