A PASSIVE COLLABORATION:
BUREAUCRACY, LEGALITY, AND THE
JEWBS OF BRUSSELS, 1940–1944

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I. INTRODUCTION

Leading historian Jean-Philippe Schreiber argues that there are still remarkable lacunae in the history of the Holocaust in Belgium. He writes that “[o]ne of the issues still to be thoroughly investigated for Belgium is the relations between Jews and non-Jews under the Occupation.”1 The role played by local Belgian administrations and elected officials in implementing the initial German measures against the Jews of Belgium is one area in which study has only just begun.2

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2. See generally Lieven Saerens, Vreemdelingen in een Wereldstad: Een geschiedenis van Antwerpen en zijn Joodse bevolking (1880–1944) (2000) (describing the peculiar situation in Antwerp during this time period) (French-language translation forthcoming); Thierry Delplancq, Des paroles et
For the most part, Belgian historiography has focused on the wartime period and the Occupation generally, rather than on the specificities of anti-Jewish persecution. In most accounts, the question of Belgian participation in Nazi atrocities is subsumed under the broader rubric of collaboration and resistance. In this article, I want to elucidate one of the most vexing and fascinating, yet under-studied, areas of Belgian Holocaust history: the role played by the Belgian state and its legal apparatus in the exclusion of the Jews of Belgium. An assessment of the daily practices and discourses of administrators and elected officials in Brussels casts light on the clash between ideas of

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citizenship, “Belgianness,” Constitutional duty, and the bureaucratic necessity of efficiently complying with German legal edicts. This examination provides a more nuanced understanding of Belgian historical reality, as well as a more insightful inspection of the institutional and political dynamics of modern governance, legality, and the Holocaust.

For a variety of reasons the question of local participation in Jewish persecution in Belgium has been ignored or downplayed in collaboration debates. It is morally and politically easier to blame the Germans and a few local fanatics for anti-Jewish acts than to engage in a careful and nuanced study of Belgian complicity. This complex psychosocial, historical, political, and, I argue below, legal matrix of “forgetting” in Belgium has led to the creation of a glorious tradition of resistance to the Occupier. I do not mean to suggest that resistance by Belgians was simply mythological. There was resistance and there were resisters to the Holocaust, non-Jewish and Jewish alike, just as there was collaboration and there were collaborators. Instead, I argue that the creation of a mythological legal structure of resistance to Nazi measures has obscured the mechanisms by which Belgians did share responsibility for the exclusion, persecution, and killing of Jews in Belgium.

The common Belgian resistance myth concludes that the occupying military forced local administrators to identify, register, and exclude “Jewish” individuals and businesses, and that these administrators resisted through delay and obfuscation by

4. See Constitution Belge arts. 6, 14–16 (1924) (Article 6 guaranteed equality, while Articles 14, 15, and 16 established religious freedom.).

5. “Jewish” is used here as it is in the foreign-born, anti-Belgian taxonomical structure of Nazism. Throughout this article, I use the English “Hebrew” as an imperfect rendering of the French Israélite. In French, the difference between Israélites, who identify themselves as citizens of a national community who happen to practice a particular religion or share a specific heritage, and Juifs, who identify as a group in a religious or ethnic sense and are therefore not members of the national community, is clear. This distinction played a significant semiotic and practical role in the Belgian Holocaust; the difference between Belgian and foreign-born Jews was exploited by all sides in the complex arrangements of the bureaucracy of destruction. See generally David Fraser, The Fragility of Law: Anti-Jewish Decrees, Constitutional Patriotism and Collaboration in Belgium 1940–1944, 14 Law & Critique 253 (2003) [hereinafter Fraser, Fragility of Law] (exploring this distinction).
relying on constitutional guarantees of equality and freedom of religion. For example, the post-war Belgian War Crimes Commission, outlining the first set of anti-Jewish decrees issued by the Germans, described the role played by municipal institutions in implementing anti-Jewish measures on Belgian soil as tactical obfuscation: “[A] number of municipal administrations systematically sabotaged the creation of a Register of Jews, under the pretext of overwork, lack of material or manpower. On this point, it is useful to note that the majority of Jews invited to register themselves obeyed. Forty-two thousand gave their names.”

Official governmental records, detailing the role played by local officials in the administration of the preliminary phases of the Holocaust in Belgium, support this mythology. The records seem to indicate that, first, the Germans imposed the anti-Jewish measures on Belgian officials; second, Belgian officials responded to these directives with passive compliance, and occasionally, active resistance. The use of passive voice and non-accusatory grammatical construction, such as reflexive verbs, in these records reinforces the first two pillars of the myth structure by insinuating that Belgium did not register Jews; instead, the Jews registered themselves. According to the official legal texts (the historical memory of the Holocaust in Belgium), thousands of Jews who had fled pogroms in Poland and Russia, or who had left Germany after Hitler’s rise to power, declared themselves. This is the official story of the Holocaust in Bel-

6. U.N. INFO. ORG., Persecution of the Jews, in CONDITIONS IN OCCUPIED TERRITORIES 1 (1943). The Allied governments issued a report in 1943 praising the Belgian population for its lack of enthusiasm for, and resistance to, anti-Jewish measures imposed by the Germans. Id. at 3–4. The report notes: “[t]o the annoyance of the Nazis, these measures met with but little response from the Belgian population.” Id. at 4.

7. These anti-Jewish decrees were called “Verordnung” in German. I use the English terms “decrees” and “orders” instead of the German “Verordnung” or the French “Ordonnance.” Both terms convey that administrative decisions made by the Occupying Power had legislative force and effect.

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2005] Germany as told by the Belgian War Crimes Commission and the prosecutors at Nuremberg. This is the legal history of the Holocaust in Belgium.9

It is this somewhat bizarre historical category, “passive collaboration,” which I argue characterizes the myths about local participation in the persecution of Jews. And this passivity is a direct result of the interpretation of the limits of constitutional conduct by the highest legal authorities in the country. While dominant myths support the story of resistance and reluctant compliance by Belgian officials in implementing anti-Jewish orders, the records used to support these myths can also be interpreted another way.10 This article examines the ways in which these records support the theory that Belgian officials did, in fact, carry out the identification and registration of Jewish individuals and businesses. The records demonstrate, moreover, that these Belgians were not proponents of the New Order;11 they were elected officials and civil servants who perceived themselves as patriotic Belgians. The question then, is how did loyal, patriotic Belgians, aware of the Belgian constitutional guarantees of equality and religious freedom, participate in the economic and physical exclusion of those identified as Jews?

Part of the answer lies in notions of citizenship and in the historical reality of the Belgian Jewish population in 1940. At that time, most of the Jews in Belgium were not Belgian citizens, but rather, immigrants from Eastern Europe, Poland, and Russia, and German refugees.12 Protests based on the funda-

9. See Delplancq, une cité occupée et ses juifs, supra note 2, at 128.
10. Dan Michman, Problematic National Identity, Outsiders and Persecution: Impact of the Gentile Population’s Attitude in Belgium on the Fate of the Jews in 1940–1944, in NAZI EUROPE AND THE FINAL SOLUTION 455, 464 (David Bankier & Israel Gutman eds., 2003) (Michman notes that “the implementation of the anti-Jewish measures—both the legal and the economic—could be carried out (even if only partially) by the Belgian bureaucracy.”).
11. The term “New Order” came to stand for the Nazis’ political conquest of Europe. See Joseph Goebbels, The Coming Europe, Address to Czechoslovakian Artists and Journalists (Sept. 11, 1940) (“Our well populated Reich and Italy will lead Europe. That will happen. There is no changing it. For you, this means that you are part of a large Reich that will give a new order to Europe.”), available at http://www.calvin.edu/academic/cas/gpa/goebb31.htm.
12. See Fraser, Fragility of Law, supra note 5, at 273–74. The topic of police operations in Belgium during the pre-war era, particularly those involving
mental constitutional guarantees of equality and religious freedom did not occur, with one notable exception: opposition to the Yellow Star Order, which made mandatory the wearing of the Yellow Star by all Belgian Jews. 13 This failure is attributable, at least in part, to the legal framework established by Belgian authorities, in particular, the Permanent Council of Legislation and the Secretaries-General. 14 The Permanent Council was a body established by Royal Decree and exercised purely advisory jurisdiction. Because it was made up of the highest ranking members of the judiciary and legal worlds, its real powers of aliens (police des étrangers), offers fertile ground for further historical research.

13. See Rozenblum, supra note 2, at 31–32 (noting the protest by Mayor Bologne of Liège over the Yellow Star). Other types of protests, relating specifically to the creation or operation of Jewish schools and the use of Belgian police in arresting Jews, also took place. Id. The Yellow Star order led to other isolated acts of refusal and resistance by officials in Occupied Europe. See, e.g., DAVID FRASER, THE JEWS OF THE CHANNEL ISLANDS AND THE RULE OF LAW 1940–1944: QUITE CONTRARY TO THE PRINCIPLES OF BRITISH JUSTICE 119–43 (2000) (depicting the story of the Bailiff and Attorney-General of Jersey).

14. Vivian Grosswald Curran, The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France, 50 HASTINGS L.J. 1, 8 (1998) (national constitutions are not sterile texts, but documents that live in the hearts and minds of those who enforce them, those who apply them, and those who live under them). Discussions focusing on the implementation of anti-Jewish laws, such as the viewpoint provided by Thierry Delplancq in his recent article, Des paroles et des actes, supra note 2, overemphasize the unconstitutional nature of Brussels’ implementation of anti-Jewish laws and downplay the importance of the Hague Convention (II) with Respect to the Land and Customs of War on Land (Hague Convention). See generally Hague Convention (II) with Respect to the Land and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 (entered into force Sept. 4, 1900). Interpretation of the Hague Convention provided the overriding legal norm from June 1940 onward, governing relations between the Occupiers and the Secretaries-General and providing a template for the Conseil de Législation’s interpretation of the Belgian Constitution. Delplancq is no doubt correct that a complete understanding of the attitude of Brussels’ administration would involve a multi-factorial analysis. As a lawyer, however, I would insist that we never underestimate the legitimizing impact of a clearly established legal framework for persecution. See generally STEINBERG, UN PAYS OCUPÉ ET SES JUIFS, supra note 3; Pim Griffioen & Ron Zeller, La persécution des Juifs en Belgique et aux Pays-Bas pendant la Seconde Guerre mondiale: Une analyse comparative, 5 CAHIERS D'HISTOIRE DU TEMPS PRESENT 73 (1998); Wolfgang Seibel, The Strength of the Perpetrators—The Holocaust in Western Europe, 1940–1944, 15 GOVERNANCE 211 (2002).
persuasion and authority far exceeded its formal consultative jurisdiction. The Secretaries-General were the senior, ranking civil servants in each government department, the equivalent of British Permanent Secretaries.

The Belgian experience exemplifies the legitimizing functions law and legality can play by demonstrating how they permitted compliance with the German anti-Jewish measures. Thierry Rozenblum, in his path-breaking work on the history of the Jews in the city of Liège during the Occupation, highlights the ways in which local officials complied with the anti-Jewish laws. At the same time, Rozenblum underscores the undoubted historical reality of Liège as a major center of the Belgian resistance. Rozenblum begins his exhaustive study by asking:

[Why did the administration and Mayor of Liège so scrupulously execute the anti-Jewish decrees promulgated by the Occupier, without ever having denounced them as being clearly contrary to the Belgian Constitution, when at the same time they constantly invoked that very same Constitution to obstruct, sometimes successfully, any number of other measures commanded by the German authorities?]

The failure of officials in Brussels, like their counterparts in Liège, to invoke the Belgian Constitution (Constitution) in defense of compatriot Jews can be understood, albeit not exhaustively, by carefully studying the legal background of the passive collaboration phenomenon. The Constitution was, in large part

15. See generally Rozenblum, supra note 2 (describing treatment of Jews by local officials in Liège).
16. Id. (Local officials, including the Mayor, Joseph Bologne, did not hesitate to obstruct German demands, either through outright refusal or by legal argument. They invoked provisions of the Hague Convention in order to place legal and constitutional sticks in the wheels of German actions. The one area in which they failed to act in such a way was in the implementation of anti-Jewish laws.).
17. Id. at 10

((Pourquoi l'administration communale liégeoise et son bourgmestre ont-ils si scrupuleusement exécuté les ordonnances antijuives promulguées par l'occupant, sans jamais dénoncer leur caractère foncièrement contraire à la Constitution belge, alors que dans le même temps ils ne cessaient d'invoquer cette même Constitution pour faire obstruction, parfois avec succès, à quantité de mesures ordonnées par les autorités allemandes?).}
at least, rendered irrelevant to the implementation of anti-
Jewish measures in Belgium by the operation of Belgian law
itself. The Constitution was limited by a series of legally bind-
ing interpretations of its force and effect under German Occu-
pation, such that Belgium’s Jews became extra-legal subjects,
ripe for administrative, but not aggressive, identification as un-
Belgian. Thus, passive collaboration was lawful by the opera-
tion of the normative and legitimizing structures of the Belgian
state and juridical apparatus under the Occupation.

Research into municipal records made during the Occupation
of Belgium is beset with practical problems, making any explo-
ration into the fundamental factual and ideological questions
regarding the Holocaust all the more difficult. Many archives
are closed and require special permission for access; the “hun-
dred year rule” prevents scholars from identifying the subjects
of many records from the Second World War; further, many files
are incomplete or missing. Archival files from the Mayor’s Of-
fice (Cabinet de Bourgmestre), pertaining to the Occupation
years, are incomplete. Indeed, the file concerning the Register
of Jews bears the following note from the 1970’s: “The Register
of Jews for Brussels has disappeared.”

18. See Delplancq, une cité occupée et ses juifs, supra note 2, at 133–34.
19. See Inventaire No. 33, Cabinet du Bourgmestre, Archives de la Ville de
Bruxelles [hereinafter AVB], at VIII (transcript on file with the Brooklyn
Journal of International Law). Indeed, the Inventory summarizes the state of
the holdings as follows:
The part of the holdings relating to the war 1940–1945 is much less
interesting. The documents, especially the correspondence with the
Occupying Power were found in a state of extreme disorder, which
could only be remedied to a small degree. Moreover, it appears that
many of the files have been destroyed or removed.

Id.

(La partie du fonds relative à la guerre 1940–1945 offre beaucoup
moins d’intérêt. Les documents et surtout la correspondance avec
l’autorité occupante ont été trouvés dans un désordre extrême, auquel
il n’a été possible de remédier que dans une faible mesure. Il semble
dauphins que beaucoup de dossiers aient été détruits ou emportés.).

20. Dossier relating to the Register of Jews (Dossier relative au registre des
juifs), Cabinet du Bourgmestre, AVB, File 866 bis Guerre 40–45 Direction de
l’Etat Civil (transcript on file with the Brooklyn Journal of International
Law). This does not mean there was no Register of Jews for Brussels. In
Liège, several versions of the Register were created and transferred to various
authorities during and after the war. See Rozenblum, supra note 2, at 20–29.
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Many of the documents examined in this Article derive not from files and records held and maintained by the Mayor, but from copies maintained by Mr. Gries, the translator. Gries translated into German not only communications between the Mayor and German authorities, but also communications between the Germans and other city officials. Likewise, Gries translated those communications originating with the Occupiers into French prior to their distribution to appropriate departments or officials. Thus, many of the documents to which I refer here are carbon copies, not originals.

This article, then, is about bureaucratic action as embodied in the writings of the bureaucrats themselves, nothing more and nothing less. There are, of course, counter-narratives, subtleties of distinction and real stories behind the documents. For example, it may well be that in Brussels, as in other parts of Belgium, local authorities aided Jews by supplying them with “real false papers,” such as official birth certificates, nationality papers with non-Jewish origins, or food ration coupons under false identities for those Jews in hiding. These acts of resistance and rescue, however, will appear nowhere in official written communications between departments or with the German authorities.

A copy of the Register of Jews for Brussels is available at the USHMM; the Centre d’Etudes Guerres et Sociétés (CEGES), RG. 65.003 P, Reel 431; and the Jewish Museum of Belgium (Musée Juif de Belgique) in Brussels. I am grateful to Bernard Suchecky and Thierry Rozenblum for clarifying the history of the Register of Jews for me. In the immediate post-war period, Monsieur Warans of the Population Office of the City of Brussels provided a brief history of anti-Jewish measures and the City administration for the Office of the Registry of Births, Deaths and Marriages. On Nov. 9, 1944, Warans noted that the Ministry of the Interior requested that the Register of Jews be handed over to them; this was done on Nov. 30, 1944. Note sur les ordonnances concernant les Juifs, Cabinet du Bourgmestre, AVB, File 866 bis (Dec. 9, 1944) (on file with the Brooklyn Journal of International Law). City officials maintained two copies of the Register, one of which they kept from public scrutiny and safeguarded in case of the loss of the other. See Instruction concernant le registre des juifs (Nov. 15, 1940), Cabinet du Bourgmestre, AVB, File 866 bis (on file with the Brooklyn Journal of International Law).

21. Until the appointment of Mayor Coelst, almost all extant correspondence involving the municipal administration and its officials was in French.

22. As a lawyer, this troubles me. The files are, in fact, incomplete copies, so the analysis to which I subject the documents in this Article is inevitably incomplete.
Nonetheless, an analysis of these texts tells a story of Belgian acceptance, however reluctant, of the new subject, “the Jew,” and exemplifies the fundamental importance of a legal framework for the operation of antisemitism. The belief in the legality of passive collaboration allowed Belgian officials to adopt the “hermeneutic of acceptance.”

II. ESTABLISHING THE LEGAL FRAMEWORK OF ANTISEMITISM

A brief examination of the constitutional basis and governmental structure under which the City administration operated during the Nazi Occupation is helpful for understanding the bureaucratic and legal application of anti-Jewish laws in Brussels. Although local officials worked under arduous and sometimes dangerous wartime conditions, they were nevertheless operating within a functioning legal system; Belgian government and law continued to function during the Occupation. Indeed, the German Occupation of Belgium from 1940 to 1944 was to a large extent both premised and dependent upon the continuation of Belgian governmental and legal structures.

After the defeat of the Belgian armed forces in the Blitzkrieg of May 1940, the elected government of Prime Minister Hubert Pierlot fled first to France, and then to London, where Pierlot established a government-in-exile. Despite certain difficult issues of continuation and succession of state governments in international law, the legitimate and internationally-recognized embodiment of the Belgian state was the Pierlot regime in London. Unlike France, which continued to have a functioning state apparatus in Vichy, as well as a counter-claim to legiti-

24. See Fraser, Fragility of Law, supra note 5, at 257 (noting that the Secretaries-General chose the lesser of two evils, opting to remain in Belgium as the Belgian government; Belgian pre-war legislation allowed them to take executive measures in emergency situations).
macy in the form of DeGaulle’s “Free French” in England, the Belgian government, in the political and constitutional sense, was the government-in-exile in London.

At the same time, however, the Belgian King, the head of state, remained in Belgium and continued to play a governmental role during the Occupation. More importantly, the bulk of judicial and civil service structures remained on Belgian soil and had ongoing interaction with the occupiers. The Secretaries-General, the highest-ranking public servants from every governmental department, stayed in Belgium and carried out the day-to-day practical and constitutional operation of the country. As with King Leopold, the legitimate role and activities of the Secretaries-General during the Occupation remains controversial.

At the end of the period of the “phony war,” the Belgian Parliament passed the “Law Relating to the Delegation of Powers during Wartime” (Delegation Law). Article Five provided that:

When, as a consequence of military operations, a judge or a civil servant, or a body of judges or of civil servants ... is unable to communicate with the appropriate superior authority, or if this authority has ceased its functions, he possesses, in


27. See generally JEAN STENGERS, LEOPOLD III ET LE GOUVERNEMENT : LES DEUX POLITIQUES BELGES DE 1940 (1980).


29. See Fraser, Fragility of Law, supra note 5, at 257.


31. Loi relative aux délégations de pouvoirs en temps de guerre, MONITEUR BELGE, May 11, 1940, at 2860 (on file with the Brooklyn Journal of International Law) (All Belgian laws are passed in both French and Flemish; the French version is published in the Moniteur Belge, the Flemish version in the Belgisch Staatsblad. For the sake of brevity, I will limit myself to the French text and citation throughout this Article.).
cases of emergency and within the limits of his professional activity, all the powers of that authority.\textsuperscript{32}

Under the Delegation Law, the Secretaries-General subsequently found themselves with the de facto power to govern Belgium until the return of the Pierlot government.\textsuperscript{33} After the fall of Belgium and the installation of the German Military Administration (GMA), however, the Secretaries-General were unsure of the extent of their authority.\textsuperscript{34} Like all Belgians, the Secretaries-General bitterly remembered the brutality of the German Occupation during the First World War, and were reluctant to repeat that experience.\textsuperscript{35} They wished, to the greatest extent possible, to maintain the continued functionality of Belgian legal institutions and government.\textsuperscript{36} Since the Germans also wanted a fully functioning and efficient Belgian government administration to which to delegate or, more accurately, upon whom to impose,\textsuperscript{37} the legal question of the nature and extent of the delegation envisaged under Article Five of the Delegation Law became one of central importance.

The Secretaries-General sought a legal opinion from two leading jurists, Joseph Pholien and Paul Tschoffen, concerning the nature and extent of their powers under the Delegation Law;\textsuperscript{38} Pholien’s and Tschoffen’s response was central to the subsequent history of the anti-Jewish measures. The Secretaries-General inquired whether they possessed legislative power under the terms of the delegation contained in Article Five and, if

\begin{footnotes}
\footnote{32. Id. (Lorsque par l’effet des opérations militaires, un magistrat ou un fonctionnaire, un corps de magistrats ou de fonctionnaires ... est privé de toute communication avec l’autorité supérieure dont il dépend, ou si cette autorité a cessé ses fonctions, il exerce dans le cadre de son activité professionnelle et pour les cas d’urgence, toutes les attributions de cette autorité.).}
\footnote{33. Id.}
\footnote{34. See id.}
\footnote{35. Fraser, Fragility of Law, supra note 5, at 257.}
\footnote{36. See id.}
\footnote{37. See Trial of German Major War Criminals, supra note 28, at 37.}
\footnote{38. See Consultation Letter from Joseph Pholien and Paul Tschoffen to Secretaries-General (June 6, 1940), reproduced in Pierre Leclercq, L’Équivoque d’une Loi 62, 62–64 (1946) [hereinafter Letter from Pholien & Tschoffen, June 6, 1940].}
\end{footnotes}
they did not possess such powers, whether the German Occupiers could confer them.\textsuperscript{39}

The answer from Pholien and Tschoffen set out the juridical framework within which the Belgian government would operate for the next four years. First, they clearly established that the delegation in question took place only within “the limits of [the] professional activities” of the Secretaries-General, and thus, the sole authority that could be delegated was ministerial, not legislative.\textsuperscript{40} While the Secretaries-General could not legislate, they could release “ministerial decrees” (\textit{des arrêtés ministériels}).\textsuperscript{41} Second, Pholien and Tschoffen affirmed that under Article 43 of the Hague Convention, the occupying power was vested with legislative authority to maintain peace and order over the conquered territory, and that such power could not be delegated.\textsuperscript{42}

Based on this interpretation, the German Military Commander and the Secretaries-General signed an agreement formalizing their joint understanding of the operative legal framework of the Occupation.\textsuperscript{43} In short, the Secretaries-General had a theoretically limited, but realistically quite extensive, power to enact measures having legal force in Belgium. They could not, however, be granted more extensive authority by the Germans, who retained legislative jurisdiction to enact

\begin{itemize}
\item \textsuperscript{39} See \textit{id}. See generally Francis Delpérée, Joseph Pholien, juriste. \textit{Trois consultations et les Mémoires: Le pouvoir exécutif en temps de guerre, in Joseph Pholien: UN HOMME D’ÉTAT POUR UNE BELGIQUE EN CRISES} 113 (Françoise Carton de Tournai & Gustaaf Janssens eds., 2003) (hagiography of Pholien).
\item \textsuperscript{40} See generally Letter from Pholien & Tschoffen, June 6, 1940, \textit{supra} note 38; Delpéré, \textit{supra} note 39.
\item \textsuperscript{41} See Letter from Pholien & Tschoffen, June 6, 1940, \textit{supra} note 38. The nature and extent of the power to rule by way of these decrees would continue to vex not only the relations between the Germans and the Belgian governing authorities, but also the relations between these actors and the Belgian courts, which continued to insist that they had the authority to conduct judicial review of the decisions of the Secretaries-General. See, e.g., Anthoine et Consorts [\textit{PASICRISIE BELGE}] [Cour de cassation] (Apr. 7, 1941) (Belgium); Halleux et Consorts [\textit{PASICRISIE BELGE}] [Cour de cassation] (Mar. 30, 1942) (Belgium); Procureur du Roi de Nivelles, C. Malarme et Jacques [\textit{PASICRISIE BELGE}] [Cour de cassation] (Jan. 27, 1943); Verhulst [\textit{PASICRISIE BELGE}] [Cour de cassation] (Dec. 20, 1943). See René Hanquet, \textit{LES POUVOIRS DES SECRETAIRES GENERAUX PENDANT L’OCCUPATION} (1946).
\item \textsuperscript{42} See Letter from Pholien & Tschoffen, June 6, 1940, \textit{supra} note 38.
\item \textsuperscript{43} See \textit{Le Protocole Allemand du 12 Juin 1940, in Pierre Leclercq, L’EQUIVOQUE D’UNE LOI} 65 (1946).
\end{itemize}
measures having the same effect as Belgian law under the laws and customs of war.\textsuperscript{44}

In early October 1940, the GMA in Belgium decided to introduce measures regulating the legal status and rights of Jews.\textsuperscript{45} On October 10, a meeting was held between the Secretary-General for the Interior, Jean Vossen, and General Harry von Craushaar, deputy head of the GMA, to discuss the practical implementation of the German decision to introduce anti-Jewish measures. Von Craushaar informed his interlocutor that the Germans wanted the Belgian authorities to impose an order excluding Jews from public employment, registering Jews and their property, making compulsory signage indicating that certain businesses were “Jewish,” and forbidding all Jews who fled the country from returning.\textsuperscript{46} If local authorities refused to take these steps under Belgian law, the GMA threatened to require Vossen to enforce the decree. If the Belgians still refused, the Germans would enforce the anti-Jewish measures themselves.\textsuperscript{47}

The Secretaries-General met the next day and, “after a brief exchange of views,” asked Vossen to convey their unanimous opinion to the Germans.\textsuperscript{48} On October 11, 1940, Vossen wrote to von Craushaar, outlining the legal position of the Belgian government: “[T]he Committee of Secretaries-General is of the opinion, after an in-depth examination, that it cannot, for constitutional reasons, take on the responsibility for the measures envisioned concerning the Jews.”\textsuperscript{49} This statement is followed by a rather detailed description of the Belgian Constitution’s

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\item[44.] \textit{Trial of German Major War Criminals}, supra note 28, at 37 (“At the order of the Germans this administrative power after a time became a real legislative power.”).
\item[45.] See \textit{Steinberg, \La Question Juive}, supra note 3, at 103–19.
\item[46.] Letter from Jean Vossen, Secretary-General for the Interior (Oct. 11, 1940), Archives Jean Vossen, CEGES, Microfilm 74, at 78 (on file with the Brooklyn Journal of International Law) [hereinafter Letter from Vossen, Oct. 11, 1940].
\item[47.] Minutes, Meeting of the Secretaries-General (Oct. 11, 1940) (on file with the Brooklyn Journal of International Law).
\item[48.] \textit{Id.} (“Après un bref échange de vues...”).
\item[49.] Letter from Vossen, Oct. 11, 1940, supra note 46 (“[L]e Comité des Secrétaires Généraux estime, après un examen approfondi, qu’il ne peut assumer, pour des raisons d’ordre constitutionnel, la responsabilité des mesures envisagées à l’égard des juifs.”).
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guarantee of equality and an outline of Article 43 of the Hague Convention, which permitted the Occupying Power to legislate itself. At first blush, this letter appears to demonstrate the beginnings of an administrative and governmental resistance to anti-Jewish measures based on a constitutional discourse of equality and the rule of law. However, a closer examination of the language and meaning of this letter undermines such a superficial analysis.

First, Vossen (and the Secretaries-General as a body) used the term *Juifs* and not *Israélites*. Use of the latter term might have emphasized their commitment to notions of Belgian citizenship and equality as broadly understood and applicable. Second, although Vossen and his colleagues said they could not, for constitutional reasons, assume the responsibility for anti-Jewish measures, the letter goes on to assert that Germany does have the jurisdiction, as a matter of international law, to enact such measures. The Secretaries-General could have stated that domestic Belgian law, the Constitution, as well as the Hague Convention, all prohibited such discriminatory acts. Instead, they based their refusal on purely domestic grounds and yielded without protest to a German claim of jurisdiction to identify, record, and exclude Jewish individuals and businesses.

Article 43 of the Hague Convention permits the Occupier to introduce legally binding measures “to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Therefore, the Secretaries-General could have asserted that the Hague Convention did not permit the legalized persecution of Jews because such persecution is not a matter of public safety or national security. Instead, the Secretaries-General explic-
itly objected to Belgian anti-Jewish measures, not to anti-
Jewish measures in general. Under the Secretaries-General's
interpretation of the Hague Convention, German anti-Jewish
legal measures would have the full force and effect of Belgian
law and all Belgian government agencies would be bound
thereby, notwithstanding the fact that the Belgian Constitution
prohibited discrimination based in race or religion.

Faced with the prospect that the Germans would introduce
anti-Jewish laws themselves and “charge the Department con-
cerned with the application of the decree,” the President of the
Committee stated that “under these conditions, the Belgian
administration could not avoid complying with the enforcement
of such a decree.” Thus, while the Secretaries-General could
not accept legislative responsibility by promulgating a Belgian
order, they could not avoid administrative responsibility for en-
forcing a German decree against the Jews. The juridical stage
was set for the next series of legal positions and dispositions
which would seal the fate of Belgian Jews and establish the
lawful framework for a Belgian passive collaboration in enforc-
ing anti-Jewish measures.

III. “THE DIRTY WORK”:
THE CONSTITUTIONAL LEGITIMIZING
OF ANTI-JEWISH LAW IN BELGIUM

The Brussels administration’s involvement in the Holocaust
began in earnest after the introduction of two explicitly anti-
Jewish orders in 1940. However, full understanding of Belgian
involvement in “the Jewish question” begins earlier, with the
influx of Jews into Belgium, and the policing system for aliens
(Police des Étrangers).

56. See Fraser, Fragility of Law, supra note 5, at 258.
57. See id. at 258–59.
58. Minutes, Meeting of the Secretaries-General (Oct. 25, 1940) (on file
with the Brooklyn Journal of International Law) (“M. le Président fait obser-
ver que, dans ces conditions, l’administration belge ne peut se soustraire à la
mise en pratique de l’ordonnance susdite.”).
59. PIERRE STÉPHANY, 1940: 366 JOURS DE L’HISTOIRE DE BELGIQUE ET
D’AILLEURS 337 (1990) (“And in implementing these measures, it had to be the
Belgians who did the dirty work.”) (“Et dans la mise en oeuvre de ces mesures,
il aurait fallu que ce soient les Belges qui fassent le sale travail.”).
60. See generally LES JUIFS EN BELGIQUE: DE L’IMMIGRATION AU GENOCIDE
(Rudi van Doorslaer ed., 1994).
One piece of official correspondence serves as a harbinger of what would follow. On May 28, 1940, in the earliest days of the Occupation, the head of the Brussels public welfare agency wrote to the Mayor. According to this agency, two Germans sent by the Military Command visited their office to inform them that German citizens, including Austrians and Sudeten Germans, should henceforth be sent to the German social assistance office for medical care or other aid. Germans were treated and cared for by Germans and within the German Occupier’s bureaucratic and administrative structure. This would not be particularly noteworthy, except for the imposed recognition by Belgian officials of the annexations of the Sudetenland and Austria. One key word, however, marks this document as the precursor for events that would follow in the autumn: Aryan. Only Aryan Germans were covered by the instruction given to the Brussels government.

Two interrelated points of bureaucratic inscriptive practice are worth noting. First, the Germans did not hesitate to contact City bureaucrats directly to enforce anti-Jewish practices. Here, it is difficult to tell whether the City employees were merely reporting the German instructions or were requesting advice from elected decision-makers. There was no specific request for instructions and the document is simply entitled a “note” for the Mayor. In other words, the document merely passes on information between government agencies and im-

61. Note pour Monsieur le Bourgmestre (May 28, 1940), Cabinet du Bourgmestre, AVB, File 937 (Commission d’assistance publique, 1940–1943) (on file with the Brooklyn Journal of International Law) [hereinafter Note pour Monsieur le Bourgmestre, May 28, 1940].
   62. Id. German anti-Jewish legal norms were applied to Germans in Belgium in other circumstances as well. The War Damages Order, which regulated compensation for German citizens seeking to recover war-related losses, required a statement of Aryan background in the claim form and the production of proof of Aryan descent. See Verordnung über die Entschädigung deutscher Staatsangehöriger für Kriegssachschäden [Kriegssachschäden-Verordnung] [decree of 14 August 1940, Regulating the remuneration of German citizens for war damages to property], Question 1 F (Aug. 14, 1940), reprinted in VERORDNUNGSBLATT DES MILITÄRBEFEHLSHABER IN BELGIEN UND NORDFRANKREICH [Official Gazette of the Military Command in Belgium and north France] [hereinafter VERORDNUNGSBLATT] (Aug. 17, 1940).
plies, by silence, at least, that the welfare agency will comply with the German command.63

Second, official correspondence of the Brussels administration replicates, without hesitation, the language of Nazi antisemitism. For example, “Aryan” is not a term recognized in the Belgian Constitution. One might plausibly argue that the administrators were doing nothing more than replicating language received from their German visitors, and were not adopting such terminology as their own. Even this, however, is the “hermeneutic of acceptance.”64 The discursive and epistemological universe of Nazi antisemitism became normalized within Belgian administrative practice.

At the end of October 1940, the Germans introduced the first set of orders that were explicitly anti-Jewish.65 The first, called the “Jewish Decree” (Jodenverordening) offered a definition of the new legal subject, the “Jew,” banned Jews who had left Belgium from returning, required the creation of a register of Jewish individuals, and made compulsory the identification and...
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declaration of all businesses defined as “Jewish.”66 The second decree ordered the removal of public employees identified as “Jews” and forbade similarly defined individuals from practicing as lawyers, teaching in public schools and universities, or from holding management positions in newspapers or radio; Jews were to be removed from these functions by December 31, 1940.67 This order also charged the Belgian government with ensuring that the instructions for the anti-Jewish provisions were given to all concerned agencies.68

At their meeting on November 8, 1940, just after the decrees were published, the Secretaries-General discussed not whether they should award civil service pensions to government employees who would lose their jobs because they were Jews, but also the more basic question of how would they know if a public servant was Jewish.69 The answer came from Secretary Vossen, who stated that “interested parties must make the declaration to the municipal administration. If they do not make this declaration, they will be liable for very severe penalties. As a result, all the administrations must, within the limit of their ju-

66. Verordening van 28 Oktober 1940, houdende maatregelen tegen de Joden (Jodenverordening) (Decree of 28 October 1940 concerning measures relating to Jews (First Jewish Decree)) (Oct. 28, 1940), reprinted in VERORDNUNGSBLATT (Nov. 5, 1940) [hereinafter Verordening van 28 Oktober 1940, houdende maatregelen tegen de Joden]. Section 3(1) provided that appropriate municipal officials would create and maintain a Register of Jews for all male individuals over the age of 15 identifiable as Jews. Id. § 3(1). This Register was to include an individual’s name, place and date of birth, address, profession, nationality and religion; it was also to include the same information for the individual’s wife, parents and grandparents. Id. Additionally, the files of foreign Jews were to indicate how long each had lived in Belgium, as well as the location of their previous home. Id. In the event of a Jew’s change of residence, section 3(3) obligated the municipal authority to forward the individual’s files to the appropriate officials in the Jew’s new abode. Id. § 3(4). Finally, section 3(4) required that the identity cards of registered Jews contain mention that the individual was listed in the Register of Jews. Id. § 3(4).

67. Verordnung über das Ausscheiden von Juden aus Aemtern und Stellungen (Decree of 28 October 1940 concerning the removal of Jews from their positions and employment (Second Jewish Decree)), reprinted in VERORDNUNGSBLATT (Nov. 5, 1940) [hereinafter Verordnung über das Ausscheiden von Juden aus Aemtern und Stellungen] (Jewish schools and religious education were exempted from the operation of section three.).

68. Id. § 4.

69. Minutes, Meeting of the Secretaries-General (Nov. 8, 1940) (on file with the Brooklyn Journal of International Law).
risdiction, consider what steps to take.”

Similarly, regarding pension benefits for dismissed employees, the Belgian government “invite[d] the Jewish employees concerned (by the measures) to request their retirement.”

Two aspects of this correspondence are relevant in understanding the implementation of anti-Jewish laws by Belgian government actors, as well as the post-war construction of a passive collaboration paradigm. First, the correspondence uses the passive voice and French reflexive verb construction: Jews must present themselves and request their registration. This language effectively transforms the municipal employee who fills in the registration card into a mere transcriber of the will of the Jews themselves. Second, the Secretaries-General do not question whether they should implement the orders; they only discuss how they should be carried out. There is no “should” (devraient), only a compulsion, “must” (doivent). Thus, the die is cast for the highest Belgian officials. Later in November, when the Germans requested that the Secretaries-General create a model for the registration cards, the President of the Secretaries-General, Ernst de Bunswyck, informed his colleagues that he had already drafted a procedure for removing Jewish employees. He reiterated that Jewish employees would present themselves, thus, “[t]here was no need [ ] for local authorities to take steps for this registration.”

The themes repeat and reinforce. Jews must declare themselves. The use of the reflexive verb structure creates the image of the Secretaries-General as ethically, practically and legally

70. Id. (“[L]es intéressés doivent faire la déclaration à l’Administration communale. S’ils ne font pas cette déclaration, ils sont passibles des peines les plus sévères. En conséquence, les administrations devront, chacune dans la limite de leurs attributions, envisager quelles sont les mesures à prendre.”).

71. Minutes, Meeting of the Secretaries-General (Nov. 22, 1940) (on file with the Brooklyn Journal of International Law) (“d’inviter les agents juifs intéressés à demander leur mise à la retraite”).

72. The use of the French verbs s’exécuter and s’inscrire in Belgium’s official presentation at the Nuremberg Trials semiotically illustrates that its officials were aware of their legal responsibility.

73. Minutes, Meeting of the Secretaries-General (Nov. 19, 1940) (on file with the Brooklyn Journal of International Law) (“Il rappelle que les personnes juives doivent faire elles-même [sic] leur déclaration à l’Administration communale, sous peine de se voir appliquer des sanctions les plus sévères. Il n’y a donc pas lieu pour les administrations de s’occuper de cette inscription.”).
divorced from the processes of identification and segregation of Jews. At the same time, however, interim Secretary-General Henri Charles Adam began drafting a series of instructions to municipalities throughout the country for the implementation of the registration process.\(^74\) Gone, as quickly and quietly as it came, was Baron de Bunswyck's assertion that no steps needed to be taken by local government authorities because the Jews were responsible for registering themselves.

Although by November 1940 the Secretaries-General seemed to have accepted the inevitable fate of their Jewish colleagues, they did seek advisory opinions on the constitutional validity of legal measures promulgated by the Permanent Council before they reached any final decisions on the modalities of implementation.\(^75\) In essence, the Permanent Council did nothing more than provide a more explicit legal basis for the position already adopted by the government well before the Council delivered its advice on November 21, 1940.\(^76\)

The first legal principle the Council discussed was the supremacy of the Belgian Constitution.\(^77\) The Council noted, in its letter to the Secretaries-General, that the provisions of Articles six and fourteen, which guaranteed equality and religious freedom, and Article 100, which assured judicial independence, were the textual embodiment of the Belgian state structure.\(^78\) According to the Council, the racial and religious exclusions found in the anti-Jewish orders clearly violated these constitu-

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\(^74\). See Letter from Adam, Secretary-General, to Provincial Governors, Local Administration, Mayors & Councilors (Dec. 6, 1940) (on file with the Brooklyn Journal of International Law) [hereinafter Letter from Adam to Provincial Governors, Dec. 6, 1940].

\(^75\). See, e.g., STEINBERG, UN PAYS OCCUPÉ ET SES JUIFS, supra note 3, at 46–51 (noting the importance played by the Permanent Council of Legislation in giving legitimacy to Belgian compliance with German anti-Jewish decrees).

\(^76\). Letter from R. Hayoit (de Termincourt), Secretary of the Permanent Council of Legislation, to the Secretary-General of Justice (Nov. 21, 1940), Archives Jean Vossen, CEGES, Microfilm 74 (on file with the Brooklyn Journal of International Law) [hereinafter Letter from Permanent Council of Legislation, Nov. 21, 1940].

\(^77\). See id.

\(^78\). Id. These provisions "are the fundamental principles of our public law, situated as the very basis for our administrative and judicial organizations." Id. ("sont des principes fondamentaux de notre droit public placés à la base même de notre organisation administrative et de notre organisation judiciaire.").
tional principles. Therefore, as a matter of constitutional principle and criminal law, the Council concluded that “participation in these decrees clearly exceeds the legal power of the Secretaries-General and of all public servants, since it would constitute a breach of their oath of loyalty to the Constitution....”

This assertion could have served as the basis for a “jugular”—a constitutionally based refusal by the highest authorities to enforce the measures set out in the decrees. After denouncing participation as contrary to the Belgian Constitution, however, the letter defines it in such a way as to provide a textual basis for passive collaboration. The Council wrote that “[t]he person in relation to whom, or against whom a measure is taken by the Occupying Power and who, under the compulsion on which the Authority bases its power, completes the material act imposed by the law, submits to the provision, he does not participate therein.” The result is that, as matter of law, submission to the legal compulsion which accompanies these decrees is not “participation,” and, therefore, not a violation of the Constitution.

The Permanent Council’s letter then expands and clarifies its position regarding compliant Belgian officials:

79. Id. (“[L]a participation à ces ordonnances excède manifestement le pouvoir légal de MM. les Secrétaires généraux et de tous les fonctionnaires, puisqu’elle constituerait la violation de leur serment d’obéissance à la Constitution....”).

80. See Fraser, Fragility of Law, supra note 5, at 263–67 (Indeed, Louis Braffort, President of the Brussels Bar, adopted this position during the Occupation. Invoking the Constitution, Braffort refused to hand over a list of names identifying his colleagues as Jews. When the Germans insisted that he provide them with the entire list of the Bar’s membership, he refused to comply by failing to compile a list of lawyers for that period.).

81. Letter from Permanent Council of Legislation, Nov. 21, 1940, supra note 76 (“Celui à l’égard de qui ou contre qui une mesure est prise par l’autorité occupante et qui, sous la contrainte sur laquelle s’appuie cette autorité, accomplit l’acte matériel qu’elle lui impose, subit la mesure, il n’y participe pas.”).

82. See, e.g., Steinberg, La Persécution des Juifs, supra note 3; Steinberg, 1942 Les cent jours, supra note 3; Steinberg, La question juive, supra note 3; Steinberg, La traque des Juifs, supra note 3; Steinberg, Un pays occupé et ses Juifs, supra note 3. As Steinberg so powerfully argues in his works, this theory makes the Belgian government the first and primary victim of Nazi antisemitism.
The following are not acts of illegal participation: the submission of persons defined in § 1 of the 1st decree to the prohibitions and obligations imposed on them by §§ 2 and 3, paragraph 2, § 14 of the 1st decree and § 1 of the 2nd decree; submission to § 9 of the 1st decree; keeping a Register of Jews by municipal or local administrations as a result of the spontaneous declarations of interested parties (§ 3 of the 1st decree); the posting of signs by municipal authorities requested from them by interested parties pursuant to § 14 of this decree.

“Passive” submission to the Occupying Power was permissible and permitted, but “active” participation was still clearly in violation of the basic norms and fundamental principles of the Belgian constitutional state.\(^8^3\) In addition to the theme of passive collaboration, the Permanent Council adopted the idea that the Register would be compiled on the basis of declarations of “in-

\(^{83}\) Letter from Permanent Council of Legislation, Nov. 21, 1940, *supra* note 76

\(^{84}\) See *id.* The Council distinctly prohibited active participation:

Any initiative, all investigations or complementary steps, with the aim of ensuring the full efficacy of any of the provisions of the decrees by Belgian public servants is forbidden. The taking of such an initiative or such steps would mean no longer being compelled to submit to the enforcement of the decrees, but would be their promotion, and as a consequence would mean participating in the transformation of our public law.

*Id.*

The Secretaries-General finalized the modalities of passive collaboration during their meetings on December 3 and 6, 1940.
interested parties,” and the signage for Jewish businesses would be “requested of them by the interested parties.”

To the Secretaries-General, the Permanent Council, and the post-war reconstructionists, passive collaboration was not unconstitutional or un-Belgian, but rather, faithful in its grammatical construction, rhetorical deployment, and practical implementation to the highest norms of public service and the constitutional rule of law.

The taxonomical question concerns collaboration and its concomitant mirror image, resistance, in Holocaust history. While the divisions between active believers in the New Order and those who took up arms against the German invaders are fairly unambiguous, passive collaboration is the “grey area [where] bystanders confront the risk of becoming accessories to the devil and turning into perpetrators.”

IV. THE DEVIL IS IN THE DETAILS

A micro-level examination of the implementation of the Jewish decrees in Belgium is helpful in understanding the role and self-characterization of Belgian officials. This grey area of

85. Id. (“requis auprès d’elles par les intéressés”).
87. See generally Luc Huyse & Steven Dhondt, La Repression des Collaborations 1942–1952 (1993); Ganshof van der Meersch, Réflexions sur la répression des crimes contre la sûreté extérieure de l’état belge, 2 Revue de Droit Penal et de Criminologie 7 (1946–47); M. H. Bekaert, Problèmes sociaux de l’incivisme, 2 Revue de Droit Penal et de Criminologie 203 (1946–47). The construction of post-war repression reflected complex notions of, and conflicts over, Belgian identity and citizenship. French-speaking Belgians understood the necessity of punishing anti-Belgian Flemish collaborators and bemoaned the process of reconciliation and amnesty which followed. Meanwhile, the Flemish understanding of collaboration differed sharply from that of their Walloon fellow citizens, who seemed blind to their own history of collaboration. See generally Collaboration, Repression: Un Passee Qui Resiste (José Gotovitch & Chantal Kesteloot eds., 2002). All parties, however, no matter how flawed their actions, shared the foundational notion that collaboration was illegal. For a more detailed discussion of the postwar trials, see Martin Conway, Justice in Postwar Belgium: Popular Passions and Political Realities, in The Politics of Retribution in Europe: World War II and Its Aftermath 133 (István Deák et al. eds., 2000); Luc Huyse, The Criminal Justice System as a Political Actor in Regime Transitions: The Case of Belgium, 1944–50, in The Politics of Retribution in Europe: World War II and Its Aftermath 157 (István Deák et al. eds., 2000).
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obedience, compliance, and self-described passivity embodies the very dilemma of law and legality during the Holocaust.  

From the earliest negotiations concerning the role of the Belgian state apparatus in applying anti-Jewish measures, Belgian collaboration was never “collaboration” in the legal sense. Nevertheless, Jewish persecution in Belgium was embedded in a complex matrix of law and legality; it was not a momentary rupture from the rule of law or a descent into unmitigated barbarity. As the actions of Belgian officials demonstrate, the Holocaust in Belgium could not have happened without municipal officials registering, identifying and excluding the Jewish population of Brussels under the protective cover of a self-justifying legality.

A certain ambiguity in the process of registration and exclusion of Jews in Brussels has been used to characterize their actions as resistance. One example is the response to Secretary-General Adam’s letter in December 1940. When referring to the type of card to be used in the Register of Jews, Secretary-General Adam stated that “[t]he German Military Authority has decided that unless enforcement measures have already been taken, the system put into place by the towns of the Brussels area must be adopted in the whole country.”

The response from Brussels to Adam’s letter was vociferous. Georges Pêtre, Mayor of the municipality of Saint-Josse-ten-Noode, wrote to the Mayor of Brussels, Joseph Van de Meulebroeck, to protest the dangerous misunderstanding of the City’s position regarding implementation of the anti-Jewish orders.


89. See Fraser, Fragility of Law, supra note 5, at 258. The City of Brussels’ history with anti-Jewish laws illustrates both the legacy of collaboration and persecution in Belgium and the argument that law can be found at the core of the Holocaust. The Shoah was constituted in constitutional discourses and lawful practices and the Brussels example embodies this. See id.

90. Letter from Adam to Provincial Governors, Dec. 6, 1940, supra note 74 (“L’autorité militaire allemande décide qu’à moins que des mesures d’exécution aient été déjà prises, le système mis en pratique par les communes de l’agglomération bruxelloise doit être adopté dans tout le pays.”).

91. Letter from Georges Pêtre, Mayor of Saint-Josse-ten-Noode, to Van de Meulebroeck, Mayor of Brussels (Dec. 7, 1940), AVB, Guerre 40–45 (on file with the Brooklyn Journal of International Law).
Pêtre characterized the orders as blatantly unconstitutional.\footnote{Id.} At its meeting on December 10, the regional Conference of Mayors discussed the issue and decided to write to Secretary-General Adam. Van de Meulebroeck, in his capacity as leader of the Conference of Mayors for the Brussels region, sent an angry reply to Adam, attacking the wording of the December 6 letter.\footnote{See generally Delplancq, Des paroles et des actes, supra note 2 (discussing possible interpretations of the Mayor’s response).} He wrote:

Without question, certain municipal employees have together drawn up a model card \textit{fiche} for the eventuality of the application of the German decree … but the Mayors, meeting together in Conference, have in no way adopted the model, nor have they taken a decision for its use in their area. On the contrary, taking into account that Paragraph 16 of the German decree of 28 October stipulates that “the head of the general military administration will decide the necessary provisions in order to carry out and to complete this decree,” the Mayors decided to wait until the necessary provisions for the application of the decree of 28 October had been set out, to decide on their position. They have become aware of the publication of these provisions only by way of your aforementioned letter. They wish to underline that they will only apply these instructions because they are compelled and forced to do so.\footnote{Letter from Van de Meulebroeck, Mayor of Brussels, to the Secretary-General of the Interior (Dec. 13, 1940), USHMM, RG. 65.003P, Reel 430 (on file with the Brooklyn Journal of International Law) [hereinafter Letter from Van de Meulebroeck to Secretary-General, Dec. 13, 1940]}
Although the Conference of Mayors objected to the rush to enforce the anti-Jewish orders, Van de Meulebroeck’s letter points out that the authority and order for compliance came from both the Secretaries-General and the Germans, and that the City of Brussels was simply complying with hierarchical demands. The Mayor asserted the official Brussels’ position, seeking to position the City as a passive collaborator acting only under instruction and compulsion. What is intriguing is that Pètre’s assertion, that the decrees violated the Belgian Constitution, disappeared in the interval between his letter to Van de Meulebroeck and the latter’s response on behalf of all his colleagues several days later. What happened?

There is no doubt that the decrees violated any number of provisions guaranteeing equality and liberty under the Belgian Constitution; that was never the legal question facing either the Secretaries-General or the local officials. The legal framing of relevant inquiry, rather, was shifted from whether the anti-Jewish measures were constitutional to whether Belgian law limited their application. When did participation become participation punishable by law?

On the same day he wrote the letter of protest to the Secretary-General, Van de Meulebroeck posted the public notice to all Jews about the registration process. The temporal coincidence of the two documents appears to undermine the mythological claim of passivity and compulsion. On November 12, one week after the publication of the decrees in the Verordnungsblatt, the Director of the Office of the Register of Births, Deaths, and Marriages wrote to the Conference of Mayors, raising for their consideration a series of practical legal questions relating to application of the decrees.

95. Id.
96. Id.
97. Ordre de Service No 1979, Ordonnance du 28-10-40 relative aux fonctions et activités exercées par les Juifs (Dec. 12, 1940), Cabinet du Bourgmestre, AVB (on file with the Brooklyn Journal of International Law) [hereinafter Ordre de Service No 1979, Dec. 12, 1940].
98. Rapport au Collège (Nov. 12, 1940), Cabinet du Bourgmestre, AVB, File 866 bis (on file with the Brooklyn Journal of International Law). Those questions were:
While the Conference of Mayors (Conference) may not have made a binding legislative or quasi-judicial decision regarding the Register of Jews, it was intimately involved in the construction of the bureaucratic process and mechanisms by which Belgian civil servants were to register the Jews of Brussels. Records throughout Belgium demonstrate that many municipalities were well ahead of the Secretaries-General in putting into place a bureaucracy for identification and exclusion of Jews. In fact, a review of registration documents from municipalities other than Brussels shows that different forms were used.

1. What department will be charged with keeping the Register of Jews? Will it be the Police, Religious Affairs or the Registry of Births, Deaths and Marriages?

2. Is it appropriate to invite Jews by public notice, to present themselves for registration to the office of the competent department?

3. On the other hand, given that the decree in questions says in article 16 that the Head of the Military Administration will issue edicts containing the necessary rules for the application and completion of this decree, should we ask for complementary instructions from the German Authority?

4. If need be, can the designated department call together delegates for the towns of greater Brussels in order to transmit to them any information compiled in order to ensure uniformity in applying the decree?

Id.

1° Quel service sera chargé de la tenue du registre des Juifs? Sera- ce la Police, les Cultes ou l’Etat civil?

2° Convient-il d’inviter les Juifs par affiche, à se présenter pour inscription au Bureau compétent?

3° Ou bien, étant donné que l’ordonnance dont il s’agit dit dans son article 16 que le Chef de l’administration militaire arrétera les prescriptions nécessaires afin d’exécuter et de compléter la présente ordonnance, y a-t-il lieu de demander des instructions complémentaires à l’Autorité allemande?

4° Le cas échéant, le Service désigné pourra-t-il réunir les délégués des communes pour leur transmettre les renseignements recueillis afin d’arriver à l’uniformité d’application?).

99. See, e.g., Ordre de Service No 1979, Dec. 12, 1940, supra note 97. The Germans subsequently indicated that Brussels’ bilingual registration formula was to be adopted by other municipalities unless registration had already begun. See Letter from Adam to Provincial Governors, Dec. 6, 1940, supra note 74.
throughout the country. This indicates, therefore, either an overt refusal to adopt the Brussels form, or more likely, as the Adam letter recognized, that steps to register Jews in various municipalities were already underway before the Permanent Council issued its verdict on the legal limits of local compliance.

By November 12 1940, the Conference had already taken steps to implement the registration process and did not feel compelled to await German instructions. Six days later, the Conference met again to establish, in further detail, the way information concerning the Jews of Brussels would be entered into the Register. Eleven separate decisions concerning the registration process were taken at this meeting. The assembled Mayors decided that, as a matter of policy and practice, they would immediately put the decree into effect without involving themselves in its application. They would not “send away for a later date, Jews who present themselves for inclusion on the ad hoc register. The Administration has not at this time the task of determining who should be considered a Jew according to the decree.”

This declaration demonstrates the city’s willingness to comply with the impending deadline imposed by the order, even in

100. Note pour Monsieur le Bourgmestre (Nov. 21, 1940), USHMM, RG 65.003P, Reel 430 (on file with the Brooklyn Journal of International Law) [hereinafter Note pour Monsieur le Bourgmestre, Nov. 21, 1940]. The document states:

The Conference, in its meeting of 12 November, decided that the Register of Jews will be, as you know, kept by the Office of the Register of Births, Deaths and Marriages. The Conference was of the opinion that it was not necessary to request complementary instructions from the German Authority, and that the opening of the Register should take place in any event.

Id. (“Le Collège, en sa séance du 12 novembre, a décidé que le registre des Juifs sera, comme vous le savez, tenu par l'État civil. Il a estimé qu'il ne convenait pas de demander des instructions complémentaires à l'autorité allemande, mais qu'il y avait néanmoins lieu d'ouvrir le registre.”).

101. Conférence du 16 novembre 1940, relative à l'ordonnance en date du 28 octobre 1940 concernant les mesures contre les juifs, Cabinet du Bourgmestre, AVB, File 866 bis (Nov. 16, 1940) (on file with the Brooklyn Journal of International Law) [hereinafter Conférence du 16 novembre 1940].

102. Id. para. 1 (“Ne pas renvoyer à une date ultérieure les Juifs qui se présenteraient pour se faire inscrire sur le registre ad hoc. L'Administration n’a pas pour l'instant la mission d'établir qui doit être considéré comme Juif au sens de l'Ordonnance.”).
the absence of further instructions from the GMA or the Secretaries-General. Without official guidelines as to which procedure and format to follow, Brussels enacted ad hoc measures in order to comply with the order:

[A]s a result, the inscription placed by the Municipal Population Office on the identity card must not allow it to be believed or to be asserted that the administration has classified someone as a Jew. It must appear clearly that it is the interested party who has come to declare himself.

Decisions made at the November 16 meeting also involved uniting into one register the records of Jews who “entered themselves” at the Municipal Records Office and those whose files were found in the Office of Aliens (Bureau des Étrangers). To engage in such an endeavor, Belgian officials must have looked for religious indicia in the files of the Office of Aliens. Since the Belgian Constitution guaranteed republican citizenship, no one would have been entered in these files as a “Jew.” Some form of investigation for the improved efficacy of the decree was required. The assembled Mayors also decided to mark the records of individuals identified as Jewish with the letter “J” in the Municipal Registry of Births, Deaths and Marriages, as well as the Office of Aliens records. Nowhere in the German decree is such a step required as a matter of law. Thus,

103. Id. paras. 3, 4, & 5. “For each Jew who presents himself and comes to declare himself, a provisional file card will be established. This file card will be completed later in the manner indicated by occupying authority. The Population Offices will take no other initiative.” Id. (“Pour tout Juif qui se présente et vient se déclarer, une fiche provisoire sera établie. Cette fiche sera complétée ultérieurement dans le sens qui nous sera indiqué par l’ordonnance de l’autorité occupants. Les bureaux de Population ne prendront pas d’autre initiative.”).

104. Note entitled “Ne pas inscrire simplement ‘Juif’” (Nov. 15, 1940), Cabinet du Bourgmestre, AVB, File 866 bis (on file with the Brooklyn Journal of International Law) (“[I]l résulte que l’inscription faite par les bureaux de la population sur la carte d’identité ne peut pas faire croire ni permettre de soutenir que l’administration a désigné quelqu’un comme juif. Il faut qu’apparaisse clairement que c’est l’intéressé qui est venu se déclarer.”). While § 4 of the Jewish order required the marking of the identity card of registered Jews, it sets out only that the registration itself be mentioned. See Verordening van 28 Oktober 1940, houdende maatregelen tegen de Joden, supra note 66.


106. Id. para. 8.
the highest elected officials in the Brussels region undertook this measure without instructions from the GMA or the Secretaries-General.

All of this decision-making seems to have occurred in an atmosphere of urgency and with a desire to efficiently establish the registration machinery:

As a result, since the declarations must be made before 30 November … one of our civil servants telephoned the Ministry of the Interior, in order to learn if any decision or instructions were to be given. The response was negative. Today, however, it would appear that that Department has decided to take an interest in the question because M. Warans, head of the Population Department, was requested to send a copy of the model card which was designed by your Departments and adopted by the delegates of the various towns of the region, at a meeting at the City Hall last Saturday, presided over by Councilor Verhaeghe de Naeyer.107

At some point after this flurry of activity, however, the Mayors of the Brussels region had a change of heart. At their November 21 meeting, they decided to await further instructions from the Occupying Authority before making any definitive de-

107. Note pour Monsieur le Bourgmestre, Nov. 21, 1940, supra note 100

(En conséquence, comme les déclarations doivent être faites avant le 30 novembre…un fonctionnaire de notre Administration a téléphoné au Ministère de l’Intérieur, afin de savoir si une décision quelconque ou des directives allaient être données. La réponse a été négative. Aujourd’hui cependant, il semblerait que le dit Département a décidé de s’intéresser à la question, car, M. Warans, Chef de la Population, a été prié de faire parvenir le modèle de feuille qui a été établi par vos Services et adopté par les délégués de toutes les communes de l’agglomération, réunis à l’Hôtel de Ville samedi dernier sous la présidence de M. l’Echevin Verhaeghe de Naeyer.).

Verhaeghe de Naeyer presided over the meeting on Nov. 16, 1940; the Council reached eleven decisions regarding the practical implementation of the anti-Jewish decree. Conférence du 16 novembre 1940, supra note 101. Additionally, Germans contacted various municipal authorities to ensure that the processes of registration and signage for Jewish businesses were proceeding according to plan. See Letter from Houtart, Governor of Brabant, to the Secretary-General for the Interior (Nov. 28, 1940), Archives Houtart, CEGES, Microfilm 79 (on file with the Brooklyn Journal of International Law). Stadtkämmer Kahn, the Occupation official in charge of relations with the City of Brussels, was informed in late November of 1940, before the Dec. 6 letter and the Dec. 13 protest, that the register was ready. Id.
cisions. Indeed, instead of entering Jews in an ad hoc register, the Mayors decided to grant any Jew presenting himself for registration a note indicating that he had done so, but could not be registered because no instructions had been received from the Occupying Authorities. There can be little doubt that this backtracking by the Conference of Mayors coincided with the constitutional opinion of the Permanent Council.

This is the “legal” reason informing the letter of protest sent by Van de Meulebroeck on December 13, 1940. Once the constitutionally-recognized taxonomy of participation was established, it became evident to elected officials that there would be, at the very least, serious doubts regarding their decision-making process. By their own records, it appears that administrative officials set up their own administrative structures and arrangements for the registration process without referring any further questions to the Germans. If so, their actions arguably violated not only their oaths of office, but their legal obligations as elected officials.

108. Séance de la Conférence des Bourgmestres de l’Agglomération Bruxelloise du 21 Novembre 1940, 66ème séance, Cabinet du Bourgmestre, AVB, File 866 bis (on file with the Brooklyn Journal of International Law) [hereinafter Séance de la Conférence des Bourgmestres, Nov. 21, 1940] (“Provisoirement, on pourrait donner acte aux juifs de ce qu’ils se sont présentés et que, faute d’instructions, ils n’ont pas encore pu être inscrits.”). See also Note pour Monsieur l’Echevin Coelst: Registre des Juifs from the Director of the Office of the Registry of Births, Deaths and Marriages (Nov. 21, 1940) (on file with the Brooklyn Journal of International Law); Handwritten note replying to Note pour Monsieur l’Echevin Coelst: Registre des Juifs from the Director of the Office of the Registry of Births, Deaths and Marriages (on file with the Brooklyn Journal of International Law).

109. I am not suggesting that compliance and resignation were the universal reality. In January 1942, the Office of the Secretary-General of the Interior informed local officials that the Germans were unhappy with their response to the Jewish registration requirement; certain municipalities had failed to send information to the Security Police. Brussels officials made internal inquiries and informed the Secretary-General that the City of Brussels had complied with the obligations imposed by the order. See Letter from Croonenberghs (Jan. 22, 1942), USHMM, RG. 65.003 P, Reel 430 (on file with the Brooklyn Journal of International Law); Letter from Joostens to Coelst (Jan. 26, 1942), USHMM, RG. 65.003 P, Reel 430 (on file with the Brooklyn Journal of International Law); Letter from Coelst to Romsée (Jan. 27, 1942), USHMM, RG. 65.003 P, Reel 430 (on file with the Brooklyn Journal of International Law). Municipal compliance to, and resistance against, the Jewish registration requirement is one area of Belgian history in need of clarification.
Two aspects of this correspondence are relevant to the mythology of resistance. First, employees directly responsible to the Mayor, not just “certain municipal employees” as Van de Meulebroeck asserted in his December 13 letter, constructed the standardized form for the registration of Jews.\textsuperscript{110} Second, the November 21 memo to Van de Meulebroeck demonstrates the early legal conceptualization of Jews as active parties. Questioned during post-war investigations about possible illegal collaboration by government officials during the Occupation, the Mayor of Brussels stated for the legal and historical record that:

As far as my own case is concerned, I consented to the opening of the Register on which Jews had to enter their names pursuant to the decree, because I considered that they had the choice of registering themselves or not. They had this choice of complying or not complying with the decree. I had received requests from several Jews wishing to register themselves in order to be in compliance. Only one Jew wrote me a protest letter.\textsuperscript{111}

What does seem clear, however, is that Brussels was not a hotbed of resistance.

\textsuperscript{110} See Letter from Van de Meulebroeck to Secretary-General, Dec. 13, 1940, \textit{supra} note 94. Other records establish that the Mayors were ready, willing and able to proceed with an ad hoc registration form using provisional documentation. Careful discussions ensued about how best to process registration, i.e., the stamping of each Jew’s identity cards so that it would appear that registration had occurred at the behest of the Jews themselves. \textit{See Séance de la Conférence des Bourgmestres, Nov. 21, 1940, supra note 108.}

\textsuperscript{111} Interrogation of Van de Meulebroeck before Emile Janson (Jan. 3, 1945), Archives Houtart, CEGES, Microfilm 79 (on file with the Brooklyn Journal of International Law)

(En ce qui me concerne, j’ai consenti à ouvrir le registre sur lequel les juifs devaient s’inscrire aux termes de l’ordonnance, parce que j’ai considéré qu’ils avaient la faculté de s’y inscrire ou de ne pas s’y inscrire. Ils conservaient donc la faculté de se soumettre ou de ne pas se soumettre à l’ordonnance. J’avais reçu des demandes de certains juifs qui désiraient s’inscrire pour se mettre en règle. Un seul juif m’a écrit une lettre de protestation.).

Here, Van de Meulebroeck uses small grammatical distinctions to demonstrate his passive collaboration in the registration of the Jews of Brussels. When explaining his “consent” to the opening of the Register of Jews, Van de Meulebroeck uses the past perfect tense \textit{j’ai consenti}; when attributing active agency to Jews, however, he employs the pluperfect \textit{j’avais reçu}. \textit{See id.}
Two patterns of bureaucratic self-legitimizing are apparent. On the one hand, it appears that Belgian officials engaged in repeated preparation and decision-making regarding the Register of Jews. On the other, there is a consistent semiotic construction of the process as one in which Jews actively participated and bureaucrats of Brussels simply concretized their wishes to be identified for the German Occupiers. After the November 21 letter from the Permanent Council, many of the preparatory acts were put on hold pending instructions from the Germans but, interestingly, the construction of passivity continued in official documents.  

V. THE SECOND ORDER AND JEWISH EMPLOYEES IN THE CITY OF BRUSSELS

The ambit of bureaucratic involvement extended beyond the registration of individuals and businesses. The second order of October 28, 1940, banned Jews from public service and from certain professions, including the law. Section four of the order placed the responsibility for the enforcement of the provisions excluding Jews on the relevant offices of the public administration. On January 3, 1941, the National Institute for Radio Broadcasting asked the officer in charge of public records in the First District of Brussels to supply him with the birth certificates of six named employees “in order to permit me to comply with the enforcement of the present legislation concerning Jews....”

This letter, written by a municipal employee, carries a handwritten annotation, “Aryan origin” (origine aryenne). It is not

112. Letter from Permanent Council of Legislation, Nov. 21, 1940, supra note 76. Van de Meulebroek’s letter and post-war testimony may have been an attempt to “salt” the judicial files by creating an official correspondence between the Brussels’ officials and the Secretaries-General demonstrating the officials’ non-compliance with the German order and their status as “passive collaborators” under Belgian law.

113. Verordnung über das Ausscheiden von Juden aus Aemtern und Stellungen, supra note 67, § 1 (“Direktoren und Schriftleiter in Presse und Radiofunkunternehmen....”).

114. Letter from Brussels’ Civil Officer, First District (Jan. 3, 1941), Cabinet du Bourgmestre, AVB, File 866 bis (on file with the Brooklyn Journal of International Law) (“Pour me permettre de me conformer à l’application de la législation actuelle concernant les juifs....”).

115. Id.
possible to determine if that notation refers to the results of the search of the birth records or if it simply makes reference to a topic for administrative filing purposes. Regardless, the notation represents the adoption of the racial language of Nazism by employees of the City of Brussels as a matter of bureaucratic routine.

There were, of course, grey areas of legal application for Belgian authorities. One of the most vexing areas for local bureaucrats arose from the interaction between registration under the first anti-Jewish order and the second order targeting Jewish employees. How, for example, could one who believed he was not a Jew have proven it?\footnote{In addition to the technical legal question of how to prove one’s non-Jewish origins, two subsidiary questions also arose. First, to whom did one make this proof and, second, how did one who successfully established non-Jewish status obtain removal from the list of registered Jews?}

In Belgium, Jews were defined and registered in late 1940 and early 1941 under the legal regime established by German decrees and “administered” by the Belgian state apparatus in accordance with the norms of acceptable participation set out in the opinion of the Permanent Council.\footnote{In Belgium, Jews were defined and registered in late 1940 and early 1941 under the legal regime established by German decrees and “administered” by the Belgian state apparatus in accordance with the norms of acceptable participation set out in the opinion of the Permanent Council. The orders are silent as to any notion of jurisdiction, and provide no guidance for establishing administrative mechanisms to deal with cases of legal application for Belgian authorities. One of the most vexing areas for local bureaucrats arose from the interaction between registration under the first anti-Jewish order and the second order targeting Jewish employees. How, for example, could one who believed he was not a Jew have proven it?}

116. See Verordening van 28 Oktober 1940, houdende maatregelen tegen de Joden, supra note 66. The order, in defining “Jew” as a legal category, provided that anyone with three Jewish grandparents was a Jew. Id. § 1(1). The second order stated that when there was doubt about an individual’s Jewish origins, that individual would be treated as a Jew until the question could be determined definitively. Verordnung über das Ausscheiden von Juden aus Aemtern und Stellungen, supra note 67, § 2(2).

117. I am aware that this is precisely the type of unethical question that Richard Weisberg labels the “hermeneutic of acceptance” and which he finds repugnant. I do not disagree, but feel obliged to explain and examine these issues because they did arise. See generally Weisberg, supra note 23.

118. Letter from Permanent Council of Legislation, Nov. 21, 1940, supra note 76. In France, a complex bureaucratic system under the jurisdiction of the General Commission for Jewish Questions (Commissariat Général aux Questions Juives) was established under French law. The General Commission conducted investigations and issued certificates attesting that certain individuals were not Jewish. The French system could operate as it did because its anti-Jewish laws were pieces of domestic legislation. See Richard Weisberg, VICHY LAW AND THE HOLOCAUST IN FRANCE 2 (1996).
gally problematic Jewishness. This was the result of the GMA’s deliberate decision in Brussels. On January 28, 1941, German officials in Belgium explained their position to their Parisian colleagues as follows:

The above definitions have been left out of the Jewish decree of the Military Command in Belgium and the North of France, because they are not relevant to the implementation of the Belgian Jewish orders, and because, in the interest of facilitating their implementation by Belgian authorities, every unnecessary complication of the “definition of Jewishness” should be avoided.\(^{119}\)

By the second week of January 1941, the question of who was a Jew and what to do about it was now firmly part of the bureaucratic reality in Brussels.\(^{120}\) While section four of the first Jewish order permitted any person, upon a simple request, to consult the Register of Jews, the various municipalities in Brussels soon found themselves with not just a line of visitors wishing to see the Register, but with a multitude of individuals seeking the Belgian equivalent of a French “certificate of non-registration” (\textit{certificat de non-appartenance}). Arguably, any measures by municipal employees to determine someone’s status would be active implementation of the orders and would constitute illegal participation.\(^{121}\) The lack of definition became


\(^{120}\) \textit{See, e.g.,} Letter from OFK 672 (Sept. 22, 1941) (on file with the Brooklyn Journal of International Law) (Issues arose as to how to remove, according to legal norms, a stamp JUIF-JOOD, placed in error on the documents of an individual whose father had been “mistakenly” entered in the Jewish Register.); Letter from the Aliens Office to OFK (Feb. 1942), Police, AVB, Guerre 40–45, File 791.94 (on file with the Brooklyn Journal of International Law) (regarding K. and the exact legal definition of Jew). \textit{See also} Rozenblum, \textit{supra} note 2, at 28 (discussing the removal of individuals from the Register of Jews in Liège).

\(^{121}\) \textit{See} Letter from Permanent Council of Legislation, Nov. 21, 1940, \textit{supra} note 76. Indeed, the Brussels’ Population Bureau specifically decided that if it
increasingly problematic as employers began requesting certificates of non-registration before making hiring decisions.\textsuperscript{122}

The first reaction to this problem was ad hoc. In early January 1941, the newly appointed medical inspector for the schools of Brussels requested a certificate of non-registration in order to take up his new post and conform to the anti-Jewish decrees. The Office of Births, Deaths and Marriages responded that no such certifications existed but, nevertheless, informed the school department that the doctor had not requested entry on the Register of Jews.\textsuperscript{123} Here, again, is an example of city office...
cials taking the initiative to implement anti-Jewish orders. In this case they do so even while waiting for instructions from their legal superiors. At best, this is bureaucratic routine, the administrative classification of inhabitants of Brussels as “Jews” and “non-Jews.” At worst, this is an instance of steps taken to protect the new category of Belgians, the concomitant counterpart of the “Jew,” the legally recognized “non-Jew.”

The use of ad hoc confirmation for each new employee could not continue, however, if the rule of law and orderly bureaucratic routine were to be followed. City officials asked that a mechanism for dealing with such requests be established. The Conference of Mayors and the Permanent Council decided that in order to undertake the recruitment of personnel in a reasonable and orderly fashion, they would specifically “[a]uthorize the Office of Births, Deaths and Marriages to deliver declarations attesting that interested parties had not requested their entry into the Register of Jews.”

This authorization goes beyond mere passive application of anti-Jewish measures. Brussels, through its highest governmental office, created the very means for compliance when the law was itself silent. Declarations confirming that Belgian citizens seeking employment in public agencies of the Belgian state were not Jews became part of the legal, documentary discourse of the City of Brussels.


125. Extrait du Registre aux Délibérations du Collège des Bourgmestres et Echevins (Jan. 24, 1941), Cabinet du Bourgmestre, AVB, File 866 bis (on file with the Brooklyn Journal of International Law) (“Autoriser la Direction de l’Etat civil à délivrer des déclarations attestant que les intéressés n’ont pas requis leur inscription au registre des JUIFS.”).

126. See id. The declarations stated that the individuals in question “had not requested their entry into the Register of Jews;” they did not state that the individuals were non-Jews, nor did they use the phrase created by French bureaucrats and law and state that the individuals “did not belong to the Jewish race.” See id. Thus, city officials did not directly classify anyone as a Jew or non-Jew; they simply reported a bureaucratically recorded fact. See id. The province of Brabant appears to have adopted a somewhat more complex procedure. Brabant province offered anyone seeking to establish non-Jewish status a written deposition stating that section one of the first anti-Jewish order (the definitional provisions) did not apply to them. This type of procedure seems to more clearly implicate the administration in a decision-making
On December 6, 1940, the Ministry of Labor wrote to city officials informing them of their obligation to gather information concerning Jewish employees, including their names, places and dates of birth, and the nationality of their parents and grandparents. The Belgian government did not ask whether an employee was “registered” as a Jew, but rather, asked him to identify himself and his ancestors according to criteria established under the Nazi legal order. The line between passive collaboration and participation became very fine indeed.

In February and March of 1941, at the request of the GMA, the governmental hierarchy swung into action to determine the success of the effort to remove Jews from Belgian civil service. The Brussels Archive contains an extensive set of documents recording the number of municipal employees who were removed from their jobs because they were identified as Jews. For example, thirteen employees of the Municipal Welfare Agency were removed, and in the Office of Births, Deaths and Marriages, the agency charged with ensuring the successful completion of the registration process, Mr. Joostens was able to report a “nil return.” In total, twenty-two employees of the City of Brussels were dismissed because they were identified as Jews. Although this is a record of compliance and not resist-
tance, it is prudent to note that the record regarding dismissals is incomplete. At this stage, however, there is little evidence at all that the City did anything other than comply fully with the letter and spirit of the German order.

VI. COMMUNICATING, INFORMING, AND DECIDING: PASSIVE COLLABORATION 1941–1944

After the orders of 1940, the Germans continued to seek full compliance with their anti-Jewish orders and the municipality continued to comply with German instructions. In May 1941, for example, the Mayor transmitted a list of all German Jewish men, including their names and addresses.

In June 1941, as new anti-Jewish measures began to have a direct economic impact on Jewish families, municipalities were faced with the issue of Jews moving into their area. The issue was exacerbated by the exile of Jews from Antwerp; the Germans forced them to move to the Province of Limburg. Several Antwerp Jews obtained permission from the Military Commander in Hasselt to move again, this time to Brussels, but only on the condition that they provide written authorization from the Mayor of the Brussels to local officials in the area to which they wished to relocate. The order imposing the obliga-

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131. See Delplanq, Des paroles et des actes, supra note 2, at 174.
132. Ordre de Service No. 1979, Dec. 12, 1940, supra note 97; Letter from A. Buez, Ministry of Education, to the Head of Public Education, Brussels (Jan. 9, 1941), Secrétariat, AVB, Guerre 40–45, Personnel Enseignant (on file with the Brooklyn Journal of International Law); Letter from Tits, Director of Public Education, to City Secretary (Jan. 11, 1941), Secrétariat, AVB, Guerre 40–45 (on file with the Brooklyn Journal of International Law). Tits’ letter does contain a typewritten annotation by Catteau indicating that there may be certain reasons to temper both the harshness of the order and a strict application of Belgian law. Technically, the employees were not fired because they were Jews; instead, they were made redundant. Id.
133. Letter from Hauptmann Döring, Ortskommandantur to the Mayor and handwritten annotation (May 13, 1941), Cabinet du Bourgmestre, AVB, File 884 (on file with the Brooklyn Journal of International Law).
134. Neufassung: Verordnung über wirtschaftliche Massnahmen gegen Juden (Dritte Judenverordnung) [Decree of 31 May 1940 concerning economic measures against the Jews (Third Jewish Order)] (May 31, 1940), reprinted in Verordnungsblatt (June 10, 1941).
135. See Steinberg, UN PAYS OCCUPÉ ET SES JUIFS, supra note 3, at 52–54.
tion to create the Register of Jews and to transfer the appropriate records to the new locality of registered Jews, who subsequently moved, did not, however, include any mention of such an authorization. Once again, the silence of the law and the practical exigencies of the system of Occupation posed a legal and practical dilemma for local authorities.\footnote{Letter from the Director of the Population Office to Putzeys, Secretary of Brussels (June 27, 1941), Cabinet du Bourgmestre, AVB, File 866 bis (on file with the Brooklyn Journal of International Law).}

At the same time, city officials continued to receive specific instructions from their Belgian superiors and the Germans. For example, all identity cards of registered Jews now had to carry the bilingual stamp, in red ink, “JUIF-JOOD.”\footnote{Letter from Romsée, Secretary-General, to Commissioners, Mayors, and Governors (July 29, 1941), USHMM, RG. 65.003 P, Reel 430 (on file with the Brooklyn Journal of International Law).} The list of registered Jews, including those who had neglected to have their cards stamped, was to be forwarded directly to the German Security Police (Sicherheitspolizei).\footnote{Id.} City officials began, at some level, to distance themselves from the process of marking Jews by insisting that no posters announcing the stamping requirement be issued or displayed. Instead, they relied on Secretary-General Romsée’s circular, in which he stated that the new process would be announced by notice in the press. The circular did not state that the city could not proceed by way of public notices themselves but, in this instance, no innovation or self-motivated actions were forthcoming; city officials would simply prepare themselves for any Jew who chose to comply.\footnote{Letter from Joostens to Verhaeghe de Naeyer (Aug. 5, 1941), USHMM, RG. 65.003 P, Reel 430 (on file with the Brooklyn Journal of International Law).}

The Office of Births, Deaths and Marriages, however, in order to proceed with stamping identity cards and constructing a list with special markings indicating which registered Jews had chosen to have their cards stamped, borrowed five employees from the Public Procurement Agency and maintained temporary employees from their own service to assist in the task.\footnote{Letter from Joostens to the College (Aug. 12, 1941), USHMM, RG. 65.003 P, Reel 430 (on file with the Brooklyn Journal of International Law); Letter from the College to Dienstelle des Sicherheitspolizei (Aug. 29, 1941),}
Contact with the German Security Police continued in the fall of 1941. Romsée informed the Mayors that, in the future, information compiled under the Jewish orders relating to the change of address of registered Jews was to be sent to the headquarters of the Secret Police. At the same time, this information took on ever more sinister overtones as the Germans decreed that Jews were henceforth forbidden from moving anywhere other than the four cities of Antwerp, Brussels, Charleroi and Liège.

During the same period, the various municipalities of greater Brussels were compiling their own lists of municipal government employees who were identified, or had “identified themselves,” as Jews. Mayor Coelst forwarded that information to the German authorities on October 24, 1941. Later, in the autumn of 1941, German authorities in Belgium introduced an order stripping Jews outside of Germany of their German citizenship. The Brussels Administration had already handed over, at the request of the German Ortskommandantur, a list of German Jewish men figuring in the Register of Jews. The new Reich provision quite naturally led the local German authorities to seek all information from the Belgian administration concerning “former” German Jews. While waiting for other

USHMM, RG. 65.003 P, Reel 430 (on file with the Brooklyn Journal of International Law).

141. Letter from Romsée, Secretary-General, to Commissioners, Mayors, and Governors (Sept. 23, 1941), USHMM, RG. 65.003 P, Reel 430 (on file with the Brooklyn Journal of International Law).


143. Letter from Oesterhelt, Oberfeldkommandantur, to Coelst (Oct. 15, 1941), and reply from Coelst (Oct. 24, 1941), Cabinet du Bourgmestre, AVB, File 845 (on file with the Brooklyn Journal of International Law) (Correspondance avec l’autorité allemande).

144. 11th Order Concerning the Imperial German Nationality Law (Nov. 25, 1941) (local application of Germany’s 11th regulation depriving Jews of their citizenship). For a discussion of this measure’s role in the German anti-Jewish legal order in Belgium and in other jurisdictions, see generally David Fraser, This is Not Like any Other Legal Question: A Brief History of Nazi Law Before U.K. and U.S. Courts, 19 CONN. J. INT’L L. 59 (2003).

145. Letter from Döring to the Mayor (May 13, 1941), Cabinet du Bourgmestre, AVB, File 884 (on file with the Brooklyn Journal of International Law). The list of names and addresses was due May 15, 1941; it was delivered May 16, 1941 at 11:00 a.m. There seems to be little evidence of obfuscation or delay here. See id.
departments to decide how they would deal with their obligations under the order, the Office of Births, Deaths and Marriages decided to take a position on how to deal with requests to marry and for travel documents by newly stateless Jews.\footnote{Perte de la Nationalité Allemande par les Juifs Séjournant à l’Etranger (Nov. 25, 1941), USHMM, RG. 65.003 P, Reel 430 (on file with the Brooklyn Journal of International Law).} As they bemoaned the absence of an official attestation by the German authorities on how to deal with the loss of citizenship by “former” German Jews, the officials of the Passport Office and the Registry of Births, Deaths and Marriages were quick to underline the distinction between measures that involved them as Belgian bureaucrats doing their legal jobs and activities undertaken by the Germans for German purposes. Thus, Belgian bureaucrats were perfectly willing to use the Register of Jews for their own domestic purposes, but would not be bound by the prescriptions of the 11th Order, which was viewed as a purely

\begin{longtable}{p{\textwidth}}
\end{longtable}

\begin{enumerate}
\item an extract from the Register of Jews
\item an extract from the Population Register(s) as required.
\end{enumerate}

Without a doubt, the real guarantee would be found in the production of a document originating with the German Authority itself stating that the person in question has lost German nationality through the application of the November decree.

It does not appear that for the present at least it is possible to obtain such a declaration.

\textit{Id.}

(Pour nous couvrir, nous avons exigé la production par les intéressés d'origine allemande:

\begin{enumerate}
\item d'un extrait du registre des juifs
\item d'un extrait du ou des registres de population, selon le cas.
\end{enumerate}

Sans doute la véritable garantie serait trouvée dans la production d'une pièce émanant de l'autorité allemande elle-même et constatant que l'intéressé a perdu la nationalité allemande par l'application de l'ordonnance de novembre.

Il ne semble pas qu'actuellement tout au moins il soit possible d'obtenir pareille attestation.)
German measure.\textsuperscript{147} This distinction, between the powers of the Occupiers under their own domestic laws and the jurisdiction and practices of local officials under Belgian law, was consistent with the idea of a Belgian state apparatus distinct from the German Occupiers. Yet, at the same time, it must be noted that the Brussels officials established their own ad hoc system of recordkeeping and official documentation concerning stateless former German Jews and their marriage and travel documents.

Although the 11\textsuperscript{th} Order did not mandate specific action by the Belgian government, the Germans insisted that the Conference of Mayors ensure proper notation on population registers, the Register of Jews itself, identity cards and other documents serving as valid identification; they also insisted on the withdrawal of all other documents such as nationalization papers, passports, and identity cards dealing with German nationality.\textsuperscript{148}

The effect of the 11\textsuperscript{th} Order in Belgium continued to trouble local officials. They insisted that they lacked jurisdiction over substantive definitional issues under the Regulation, and that the sole German power was to issue documents required by individuals. The Secretary-General of the Interior, for example, inquired as to whether the Alien Police would enter a Mr.

\textsuperscript{147} Id. For Brussels officials, their power to act was not determined by the actions of the Security Police.

\textsuperscript{148} Letter from Richter to Mayor Coelst as Chair of the Conference of Mayors (Aug. 18, 1942), Cabinet du Bourgmestre, AVB, File 844 (on file with the Brooklyn Journal of International Law). The demand for compliance derived from the office charged with the “administration” of property, more precisely defined as the Aryanization office. The principal effect of the 11\textsuperscript{th} Order was to expropriate the property of expatriate German Jews. Here, Brussels provides Aryanization officials all of the information necessary to identify those individuals whose property could be taken from them. \textit{See id.}
Wilhelm Loeb in their records as a stateless person pursuant to his loss of German citizenship. The Police representative, Mr. Standaert, replied that the question was beyond the jurisdiction of the Belgian authorities and that Mr. Loeb should address himself to the appropriate German authorities. However, the Police also stated that once Loeb was in possession of an appropriate document identifying him as someone who had lost his citizenship, he could be entered into the Belgian files as a stateless person.

VII. THE YELLOW STAR ORDER AND THE LEGALIZED EXCLUSION OF THE JEWS

On May 27, 1942, the German Military Command for Belgium and Northern France introduced the so-called Yellow Star Order. All Jews over the age of six were forbidden to appear in public without wearing the “Jewish Star.” The second order relating to the Star was passed the same day and stated, in section four, that Jews bound by the obligation to wear the Star

149. Letter from Monsieur Standaert, Alien Police, to the Secretary-General of the Interior (Mar. 3, 1942), USHMM, Reel 430 (on file with the Brooklyn Journal of International Law) [hereinafter Letter from Standaert to Secretary-General, Mar. 3, 1942]. On Oct. 7, 1942, the Population Bureau for the suburb of Ixelles compiled a supplementary list of German Jews and included Benjamine Billa, who had registered himself as a stateless person. Liste Complementaire de Juives allemandes (Oct. 7, 1942), USHMM, RG. 68.001 M, Reel 50 (on file with the Brooklyn Journal of International Law). Belgian officials not only complied with the letter of German law, but with its spirit. For example, Billa was not even a German Jew under German law; Ixelles municipal officials, however, classified him as a German Jew, in part because that is what the Germans themselves wanted. See id.

150. Letter from Standaert to Secretary-General, Mar. 3, 1942, supra note 149.

151. Id.

152. Verordnung über die Kennzeichnung der Juden [order of 27 May 1942 establishing a distinctive marking for Jews] (May 27, 1942), reprinted in VERORDNUNGSBLATT (June 1, 1942) [hereinafter Verordnung über die Kennzeichnung der Juden].

153. See STEINBERG, UN PAYS OCCUPÉ ET SES JUIFS, supra note 3, at 84. The star was six-pointed, made of yellow cloth with black markings, palm–size, and contained the letter “J.” Verordnung über die Kennzeichnung der Juden, supra note 152, § 1(1). It had to be conspicuous and sewed permanently on the left side of the breast. Id. § 1(2).
had to obtain them from the same municipal authorities where they were registered.\footnote{154}

The Mayor of Brussels, after meeting with his colleagues from the various towns and municipalities of the region, wrote to the Germans on behalf of the Conference of Mayors on June 4, 1942.\footnote{155} This letter was a radical departure for the City of Brussels from its previous stance of implementing anti-Jewish decrees. Mayor Coelst wrote in part:

> It is not incumbent upon us to discuss with you the expediency of this measure taken against the Hebrews, but we do have the duty to inform you that you can not demand our collaboration in its enforcement.

> A large number of Jews are Belgians, and we cannot resolve to associate ourselves with a prohibition which damages the dignity of every man, whoever he may be.

> This prejudice is all the more grave as it carries with it, for those who are subjected thereto, a prohibition against wearing the insignia of our national honors systems.

> We are convinced that you will recognize the legitimate nature of our feelings...\footnote{156}
A PASSIVE COLLABORATION 411

The letter from the Conference is a key document in the history and myth of Brussels and its Jews under the Occupation. On the surface, it is a refusal grounded in ideas of basic human dignity ("a prohibition which damages the dignity of every man"). It is an act of resistance wherein the City of Brussels categorically refused to implement, or play any role in implementing, this particular anti-Jewish order. Indeed, after meeting with a delegation of the Conference on the following day, the German authorities yielded to the Belgian refusal and undertook the distribution of the Stars themselves. The Germans asked only that a notice be posted in the place where the Register of Jews was held, informing Jews of the time and place distribution of the Stars.

However, an undated document from the Mayor’s Office, entitled “Number of Stars of David,” lists the number of Stars by locality, from 6,500 for Brussels down to twelve for Ganshoren. It would seem that Belgium made preparations for compliance even when making its principled protest. Interestingly, this letter uses the French term, Israélites, which I render imperfectly as “Hebrews,” instead of the term Juifs, although they did return to the latter in the next sentence. This is not, I believe, a slip of the pen or typewriter, but rather an attempt to distinguish the Nazi policy of identifying Jews from the Belgian concept of not identifying Hebrews. The term Israélites carries with it Belgian understandings of equality and dignity inherent in the Constitution. At some level, the Mayors

157. Id.
158. See id. See also Letter from Van Glabbeke, head of the Mayor’s Office, to Joseph Bologne of Liège, Cabinet du Bourgmestre, AVB, File 866 (on file with the Brooklyn Journal of International Law) (communicating refusal to collaborate in enforcement of the anti-Jewish decrees). After keeping a close eye on the developments in Brussels, the Mayor of Liège also refused to implement the order. See Rozenblum, supra note 2, at 31–32.
159. Letter from Dr. Gentzke to the Mayor of Brussels (June 8, 1942), Cabinet du Bourgmestre, AVB, File 866 (on file with the Brooklyn Journal of International Law) [hereinafter Letter from Gentzke, June 8, 1942].
160. Ordonnance 27.5.42 établissant une marque distinctive pour les Juifs (May 27, 1942), AVB, Police, Guerre 40–45, File 791.94 (on file with the Brooklyn Journal of International Law).
considered the distinction between Belgian and foreign Jews to be of some importance.\footnote{Fraser, \textit{Fragility of Law}, supra note 5, at 273 (“The history of the Holocaust in Belgium ... is informed by the operative and operating distinction between ‘Belgian’ Jews and foreign Jews. Of the 55,671 Jews registered in Belgium under the anti-Jewish decrees, 3,680 were Belgian citizens.”).}

It is also certain that the process of implementing the Yellow Star Order was not entirely outside the practice of municipal officials in Brussels. The German request, to place notices in the offices where the Register of Jews was kept, passed through the various municipalities with some haste. The contents of the letter from Dr. Gentzke to Mayor Coelst, received at five fifteen in the afternoon on June 8, 1942, were communicated the next morning by telephone to all municipalities represented at the Conference.\footnote{Letter from Gentzke, June 8, 1942, \textit{supra} note 159 (handwritten annotation).} Given that the distribution was to begin on June 9 and that the letter itself was marked urgent and hand-delivered to Mayor Coelst’s office, a certain degree of compliance is apparent in the shared haste of the series of telephone calls from the Mayor’s office.\footnote{See \textit{id}.} Furthermore, the police of Brussels assured the Germans of their presence at the offices of the Association of Jews in Belgium (AJB) every day the Stars were to be distributed.\footnote{Report from Girthy (June 12, 1942), AVB, Police, Guerre 40–45, File 791.94 (on file with the Brooklyn Journal of International Law).}

Finally, correspondence in the Mayor’s files demonstrates that Jewish citizens attempted to get exemptions from the obligation of wearing the Star. Section one of the second order on the implementation of the Yellow Star permitted requests for exemption for those who were Jewish husbands living in mixed marriages in which there were non-Jewish children, and for Jewish wives in childless mixed marriages.\footnote{See, e.g., Letter from Coelst to Dr. Callies, Stadtkommissär for Brussels (June 19, 1942), Cabinet du Bourgmestre, AVB, File 845 (on file with the Brooklyn Journal of International Law).} In at least one case, Mayor Coelst intervened in favour of an eighty-year-old woman whose late husband had connections with the Belgian Royal family and who had been a local Mayor. She had refused
to leave her house out of fear and embarrassment if she had to wear the Star.\footnote{166}

As the German Occupiers expanded the exclusion of Jews from Belgian society, they continued to call upon Brussels officials to assist in the implementation of the steps leading towards the Final Solution. The December 1, 1941, the Jewish Education Decree set up a system of distinct Jewish schools, thus excluding Jewish students from the public education system.\footnote{167} Under section three of the decree, the Ministry of Public Education was given overall jurisdiction, while local education officials in the towns and cities of Belgium were called upon to implement the exclusion of Jewish students.

In Brussels, the Mayor had already been asked to supervise the census of all Jewish students in public secondary schools and to contact private educational institutions to obtain the relevant information from them.\footnote{168} Three weeks later, all but one of the towns in the City of Brussels had completed the census of Jewish students and had sent reports to the German authorities.\footnote{169} At this stage, the municipal authorities continued to operate with the bureaucratic efficiency with which they had completed the other tasks of compiling and distributing information about Jewish residents. There was no delay, there was

\begin{itemize}
\item \footnote{166} Id. The Widow W. was born in the United States and belonged to a very honourable family. Her husband had connections to the Belgian Royal Family and elected officials. At some level, therefore, we might read this letter as an intervention on behalf of a “good Jew,” an Israélite, not a Juif. This interpretation would make the Mayor’s intervention on her behalf consistent with the views he adopted in his “letter of protest” only a few days earlier. Once more, narrow and restrictive understandings of citizenship and “Belgianess” may be at play here. Id. In a similar case, the Mayor of Brussels, Mr. Grauls, intervened on behalf of a Mr. B. because B. was a man of upstanding reputation and was well-known in the right circles, particularly those related to Belgium’s colony in the Congo. See Letter from Grauls and related correspondence (Nov. 9, 1942), Cabinet du Bourgmestre, AVB, File 946 (on file with the Brooklyn Journal of International Law).
\item \footnote{167} Verordnung über das jüdische Schulwesen [Decree of 1 December 1941] (Dec. 1, 1941), §§ 1, 2, \textit{reprinted in Verordnungsblatt} (Dec. 2, 1941).
\item \footnote{168} Écoliers juifs dans les Écoles moyennes (Feb. 4, 1941) (on file with the Brooklyn Journal of International Law).
\item \footnote{169} Écoliers juifs dans les Écoles moyennes (Feb. 22, 1941), Cabinet du Bourgmestre, AVB, File 884 (on file with the Brooklyn Journal of International Law).
\end{itemize}
no refusal, there were no protests—there was “participation” without collaboration.

In April 1942, about the same time as the Yellow Star Order was raising serious doubts about Belgian complicity, the AJB had difficulty obtaining buildings and other facilities for the establishment of Jewish primary schools. German officials demanded assistance from Brussels in finding space. Mayor Coelst replied, in the name of the Conference of Mayors, that local administrations were unable to comply with the demands for space for primary schools. He wrote:

We must tell you that the assistance which until now has been given to the Hebrews by local governments for the creation of kindergartens has resulted in numerous expressions of satisfaction.

A large number of the children who attend these schools are Belgians, and many among them are unhappy. On this ground, they deserve our concern. Please rest assured that we have done, and will continue to do, everything possible to alleviate the harshness of the measures taken against them.

But it is important that you also know that what we have done for the kindergartens we cannot do for the other types of schools.

170. Letter from Löffler (Apr. 21, 1942), Cabinet du Bourgmestre, AVB, File 845 (on file with the Brooklyn Journal of International Law). See generally LES CURATEURS DU GHETTO: L’ASSOCIATION DES JUIFS EN BELGIQUE SOUS L’OCCUPATION NAZIE (Jean-Philippe Schreiber & Rudi Van Doorslaer eds., 2004). The order on Jewish education granted sole jurisdiction over Jewish education to the AJB. Created by another order a week earlier, the AJB was the Jewish umbrella organization established as a “Judenrat” in Belgium. Verordnung über die Errichtung einer Vereinigung der Juden in Belgien [Decree of 25 November 1941 creating an Association of Jews in Belgium] (Nov. 25, 1941), reprinted in VERORDNUNGSBLATT (Dec. 2, 1941). The role of the AJB is a complex and fascinating one, but beyond the scope of this article.

171. Letter to Dr. Callies from Coelst (May 30, 1942) (on file with the Brooklyn Journal of International Law) [hereinafter Letter to Dr. Callies from Coelst, May 30, 1942]

(Nous tenons à vous dire que l’aide apportée jusqu’à ce jour par les administrations communales aux Israélites pour la création d’écoles gardiennes nous a valu de leur part de nombreux témoignages de satisfaction.

Un grand nombre d’enfants qui fréquentent ces écoles sont belges, beaucoup d’entre eux sont malheureux. A ce titre ils méritent notre
Mayor Coelst invokes the term *Israélites* because many of the children are Belgians and “[o]n this ground they deserve our concern.” In the context of administrative compliance, it appears that something had changed. It may be that city officials were shocked because they saw, as they may not have seen through the simple act of registration, the real human suffering imposed by Nazi antisemitic laws. It may also be that the suffering of Belgians (*Israélites*) shocked them. Finally, we come to the concluding remarks in Mayor Coelst’s letter which again render the stance taken by the Conference morally and legally ambiguous. The last paragraph indicates that what had been done for one type of educational establishment could not be done for primary schools. The French construction here is pertinent. The Mayor wrote that they would not be able to do what they had done previously. The French verbs Coelst used, however, create the impression of a refusal, subject to some qualification. Coelst says *nous ne pourrons le réaliser* which translates into “we will not be able to accomplish what we have done for the other schools.” This reads less as a protest grounded in principle than as a complaint that the resources are not available to give practical effect to the desired outcome.

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sollicitude. Soyez convaincu que nous fai et que nous continuerons à faire tout ce qui est possible pour atténuer la rigueur des mesures prises contre eux.

Mais il importe que vous sachie que ce que nous avons fait en faveur des écoles gardiennes nous ne pourrons pas le réaliser pour les autres établissements scolaires envisagés.

172. *Id.*

173. Other factors are important here. We know that city administrations did not hesitate to assist in establishing separate Jewish schools. Therefore, this protest, if that is what it is, did not result from an ethical awareness that the separation of Jewish children was wrong, but from the realization that the practice of separation carries with it certain cruel consequences. This is the distinction between the hermeneutics of rejection and acceptance. *See generally* Weisberg, *supra* note 23.


175. *Id.*

176. *Id.* (“[N]ous ne pourrons pas le réaliser pour les autres établissements scolaires envisagés.”).

177. Neither by definition, nor by the exclusion of all other possibilities, is this the real, or only, reason for non-compliance. The post-war construction of local resistance placed a strong emphasis on the use of obfuscation and ex-
How are we to understand resistance in the Belgian context and in the context of Belgian municipal administrators? Against whom and against what were they protesting? The Belgian administration was willing to set aside some facilities for the exclusive use of the AJB but would not, or could not, provide more. They had already provided lists of Jewish pupils in February 1941, but when asked to provide the same information to the Department of Public Education, Mayor Coelst offered the Conference’s regrets that they could not provide such information. Here, the city and its officials seem to be taking a firm stance, whatever the grounds, in refusing to hand over any more facilities for the creation of Jewish schools pursuant to the German decrees.

In response to Belgian protest, the GMA finessed the situation. The Germans acknowledged the letters from Mayor Coelst and declared that the legal obligations for Jewish education were henceforth matters between the City and the AJB, upon whom the decree placed the burden to establish separate Jewish schools. The problem was now uniquely Belgian, which compelled the Belgian Jewish organization to comply with the German order. In such a situation, the Conference of Mayors was informed that the municipalities had decided to assist the Jews to the greatest extent possible.

Around the same time, that the city responded to demands for separate Jewish schools, the Mayors refused to allow local police to help in arrests for compulsory labour. In addition, the Conference issued a formal protest concerning deportations for “military labour” outside Belgium. Here, the Conference of Mayors intervened in an unambiguous fashion. After expressing their profound emotion at hearing stories of compulsory de-

178. Letter to Principal Inspector Janssen (June 26, 1942), Cabinet du Bourgmestre, AVB, File 866 (on file with the Brooklyn Journal of International Law).
179. Letter from Coelst to the Conference (July 6, 1942), Cabinet du Bourgmestre, AVB, File 845 (on file with the Brooklyn Journal of International Law).
180. Conference of Mayors (July 9, 1942), Cabinet du Bourgmestre, AVB, File 866 (on file with the Brooklyn Journal of International Law).
portations, the Conference requested that the Secretaries-General intervene with the Germans in order to bring a halt to the deportations. They invoked, for the first time in any official correspondence, the limitations imposed on the Germans by the provisions of the Hague Convention.181

VIII. BUREAUCRATIC ROUTINE, ADMINISTRATION, AND JEWISH PROPERTY IN BRUSSELS

While the city was charged with ensuring compliance with the signage regulations for restaurants, cafes and bars (section fourteen of the Jewish Order), the vast majority of actions and legal measures involving Jewish businesses, their registration, and administration were left in the hands of the Germans.182 This did not mean, however, that the city administration was completely insulated from dealing with aspects of the Aryanization process. For example, municipal officials had to deal with the provision of utility services such as gas, electricity and water for Jewish businesses.

In August 1943, for example, the accounts department of the City Gas and Electricity Board wrote to the German administrator, Karl Schneider, concerning premises owned by Mr. C., a Jew. The German administrator had sought the deposit paid by C. to the Gas and Electricity Board as an “Aryanized” Jewish asset. City officials insisted that because the account had been opened by Mr. C., and he had not cancelled his subscription, they could not release the funds. This is, in the mythology of Belgian resistance, administrative recalcitrance under the guise of strict obedience to legal obligations. The letter went on to ask, however, for permission to seal the meters, and assumed that once this technical procedure was completed, the Board would be free to disburse the funds in question to the Nazi bank account.183

181. Letter to Secretary-General Nyns (July 3, 1942), and reply from Nyns (July 9, 1942), Cabinet du Bourgmestre, AVB, File 947 (on file with the Brooklyn Journal of International Law).
183. Letter to Schneider (Aug. 14, 1943), Cabinet du Bourgmestre, AVB, File 851 (on file with the Brooklyn Journal of International Law). See also Letter re: Mr. G (July 24, 1943), Cabinet du Bourgmestre, AVB, File 851 (on
Finally, it is worth briefly mentioning that the Brussels police also participated in the processes of Aryanization. In the autumn of 1941, for example, the police of the District of Saint-Gilles mounted a special surveillance operation at the open-air market on Boulevard Jamar following reports that the requirement that Jewish businesses carry a sign pursuant to the order was not being respected. The report to the German Ortskommandantur indicated that the problem was caused by the wind blowing merchandise about, momentarily covering the Jewish Undertaking signs. The next year, the Brussels police were charged with delivering liquidation notices to Jewish businesses and obtaining signed receipts of notification. The order from the Chief of Police, Van Autgaerden, also carried a specific indication that, should service be impossible because the business had changed address, the notices were to be returned to headquarters so that they could be served by the police authorities in the appropriate district.

Once more, the historical construction of Brussels officials as resistant to any active role in the implementation of anti-Jewish orders should be questioned. The Permanent Council specifically forbade any investigations or similar measures meant to ensure a more perfect compliance with the decrees. Yet, in each case, the Brussels Police conducted inquiries and surveillance, and provided further information in order to enable more complete adherence to measures aimed at Brussels' Jews. The line between passive collaboration and participation appears to have been crossed even by the police force that, throughout the Occupation and afterwards, portrayed itself as

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184. Report (Sept. 8, 1941), AVB, Police, Guerre 40–45, File 791.94 (on file with the Brooklyn Journal of International Law).
loyal to the Belgian Constitution and to its legal duties thereunder.\textsuperscript{186}

IX. CONCLUSION

What characterizes the City of Brussels and its agents with regard to the “Jewish question” is both passive collaboration and participation. Yet, what is truly important here are two interrelated phenomena found in different contexts throughout occupied Europe. Brussels officials, as well as the Secretaries-General, operated in a system in which law continued to exist, in which the Belgian Constitution still had effect and in which the powers of the Occupier were, in theory, limited by the terms of the Hague Convention. Yet, there was no principled protest about the registration and marking of Jewish cafes and restaurants. There was no invocation of constitutional and international law principles when Jewish property was expropriated or when schools were segregated.\textsuperscript{187}

The second phenomenon is the hermeneutic of acceptance. Once Belgians accepted the lawfulness and legitimacy of registration, identification, exclusion, separation, and expropriation, principled objection was almost impossible. From the very beginning, the terms “Jews” and “Aryans” appeared in official documents and daily administrative practice. It is at this level of stark bureaucratic routine that we can begin to see what happened in Brussels and elsewhere in Belgium. The “Jewish question” became a new administrative category and emerged in everyday practices to which the bureaucracy adjusted itself without a second thought.

This bureaucratic routinization, which characterized much of the history of the fate and treatment of the Jews of Brussels throughout the Occupation, is exemplified by the use of the Star of David by certain parts of the bureaucracy in their internal system of documentation and filing. Brussels officials did object, based on humanitarian concerns, to the very idea of marking Jews with the Yellow Star. Yet, several documents from the Mayor’s Office found in the City Archives include the $\star$ mark,

\textsuperscript{186} See id.
sometimes alone, sometimes with the letter “J” inside, marking the documents as ones dealing with “Jews.”

The ♠ indicates, both literally and figuratively, that Jews, or matters pertaining to Jews, became a separate matter of bureaucratic, legally justified categorization. The constitutional equality of all Belgians was replaced in daily practice by a common, accepted and understood discourse of exclusion. At a very practical level of bureaucratic compliance, the ♠ marks the new Nazi legal category of the “Jew” as part of the routine in the Office of the Mayor of Brussels. The road to Auschwitz to no small extent begins at the point at which a file can be marked by a patriotic and loyal Belgian civil servant or municipal employee with a ♠. This is the mundane reality of the concrete material practices of the Brussels bureaucracy. Participation is this semiotic participation in the world-view of Nazi taxonomy. Collaboration in Brussels is written ♠.

188. Although I cannot be absolutely certain, it appears that the marking with the ♠ was contemporaneous with the document itself. The documents so marked are found in the files of the Mayor’s office, which do not deal explicitly or exclusively with the “Jewish question.” Instead, they are on copies of letters to the German authorities contained in general correspondence files.
TRANSFORMING HUMANITARIAN INTERVENTION FROM AN EXPEDIENT ACCIDENT TO A CATEGORICAL IMPERATIVE

Mirko Bagaric* and John R. Morss**

I. INTRODUCTION

History, even if one focuses on the past fifty years, is replete with almost countless instances of preventable mass killings of people at the hands of their own government.¹ In nearly all cases, the rest of the world has stood idly by, sometimes apparently frozen into inaction. Wealthy nations have remained deliberately ignorant of events, their citizens glued to MTV or the next major sporting event. Despite their power, these nations consistently fail to intervene militarily in order to bring a quick end to government-sponsored mass killings.²

This is not to deny that there has been considerable discussion regarding the merits of humanitarian military interven-

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¹ See, e.g., Kadic v. Karadic, 70 F.3d 232 (2d Cir. 1995) (assessing the complaints of Croat and Muslim citizens of the internationally-recognized nation of Bosnia-Herzegovina, formerly a republic of Yugoslavia, who claimed that they were victims of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign during the Bosnian civil war); J. L. Holzgrefe, The Humanitarian Intervention Debate, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 15–17 (J. L. Holzgrefe & Robert O. Keohane eds., 2003) [hereinafter HUMANITARIAN INTERVENTION] (describing the atrocities in Rwanda beginning in 1994).
As observed by James Upcher in his analysis of international law and humanitarian intervention: “[w]hether seen as right, responsibility or missionary enterprise, the merits of intervention are commonly framed within a wider debate about the putative conflict between human rights and state sovereignty.”

Formally, the main obstacle to humanitarian intervention is the notion of state sovereignty. In reality, however, the main disinclination to stop preventable mass killings of strangers in other parts of the world is simply that they are strangers and are in other parts of the world. On rare occasions, the world (or parts of it) has “stepped up” and drawn a line in the sand—a line inscribed on a moral or political plane, as contrasted with the geographical line marking a state's boundary—and said “no” to despot(s) to stop them from more mass killings of their citizens. While this has been rare, the success of these interventions, combined with an absence of criticism following such

3. See, e.g., Beyond Westphalia? State Sovereignty and International Intervention (Gene M. Lyons & Michael Mastanduno eds., 1995) [hereinafter Beyond Westphalia] (collecting essays from presentations on international intervention and theoretical issues about the nature of state sovereignty and the evolution of international society); Anne Orford, Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law 83–85 (James Crawford et al. eds., 2003) (stating that those who favor humanitarian intervention see intervention as a necessity which restores human rights and democracy; argues that principles of sovereignty and non-intervention should be abandoned); Holzgrefe, supra note 1, at 17 (discussing the legal and ethical issues implicated by the international community's lack of intervention into the Rwandan crisis and those which might have arisen if it had intervened).


5. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 111 (June 27) (state sovereignty is closely linked with the principles of the prohibition of the use of force and of non-intervention codified in, inter alia, Article 2.1 and 2.4 of the United Nations Charter); U.N. Charter art. 2, paras. 1, 4.

6. As is discussed infra, state sovereignty is, at least at the pragmatic level, not a barrier to humanitarian intervention. There are numerous examples of successful armed military humanitarian intervention which have been declared as being contrary to international law.

actions, demonstrates that state sovereignty is no barrier to humanitarian interventions.\(^8\) Indeed, this suggests that respect for state sovereignty is an excuse, rather than a reason, for the inaction of the world community.

At present, humanitarian intervention is subject to the vagaries of geo-political forces beyond the comprehension of even the most ardent student of or commentator on international affairs.\(^9\) The only clear trend seems to be that proximity to Western Europe enhances the chances that intervention will occur.\(^10\) Overall, intervention is adventitious, almost accidental, or even opportunistic in nature.\(^11\) In this Article, we suggest a process whereby humanitarian intervention can be systematized and, moreover, transformed into a duty upon nations. Human life, especially when there are thousands at stake, is too important to leave to chance.

We need some kind of “bureaucratizing [of] the Good Samaritan.”\(^12\) That is to say, altruism needs to be established in an administrative manner, rather than left to voluntaristic happenstance. The principles that properly govern humanitarian intervention must be international ones, neutral as to the spe-

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8. Id. at 220.
10. Compare Kosovo (intervention) with Somalia and Rwanda (no intervention). Id.
11. There is a long history of opportunistic interventions justified on supposed human rights grounds (such as protecting minorities), including: Japan’s 1931 invasion of Manchuria, Hitler’s 1938 invasion of Czechoslovakia, and India’s 1987 military intervention in Sri Lanka. Thomas G. Weiss & Jarrat Chopra, Sovereignty under Siege: From Intervention to Humanitarian Space, in BEYOND WESTPHALIA, supra note 3, at 93. Ad hoc intervention is typified by, for example, the military intervention carried out after the first Iraq war, to protect the Kurds of Northern Iraq, without the consent of the government of Iraq. Robert H. Jackson, International Community Beyond the Cold War, in BEYOND WESTPHALIA, supra note 3, at 79. Negative consequences of the ad hoc approach are discussed by Orford, supra note 3, at 13.
12. Tony Waters, Bureaucratizing the Good Samaritan: The Limitations to Humanitarian Operation 3 (2001). Today, the task of engaging in and completing humanitarian operations is more efficient for the victim and the donor than in the past because organizations providing relief have become more bureaucratized. Id. Bureaucracy allows the inherent functions of the organization to be broken down into tasks done by specialists hired and trained to do each action efficiently and effectively. Id. In this way, today’s Good Samaritan agencies are not unlike the large bureaucracies of modern business and government. Id.
specific States involved in any particular case.\textsuperscript{13} For this reason, the imperative for intervention, when it exists, will be a categorical imperative in a (at least quasi-) Kantian sense: the rule must be such that in willing it, we must will it as universal.\textsuperscript{14} Further, its imperative nature will be of the essence: when the necessary conditions are fulfilled, corresponding action must be taken; failing to take action results in extending culpability to bystanders.

It is undeniable that the world’s population, as a whole, continues to suffer in large numbers. Poverty is a major cause: “about 2.8 billion people still live on less than $2 a day and the richest one percent of the world’s people receives as much income each year as fifty-seven percent of the poorest.”\textsuperscript{15} Moreover, armed conflict and internal strife have continued unabated. A perfect example of this is the 1994 genocide in Rwanda that “left some 800,000 ... murdered in 100 days,” while France “armed and diplomatically defended the genocidal government.”\textsuperscript{16} During the twentieth century alone, it is estimated

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\item \textsuperscript{13} The neutrality that is sought may be something of an ideal, given the problematic nature of neutrality in the context of humanitarian intervention. Amy Bartholomew, \textit{Human Rights and Post-Imperialism: Arguing for a Deliberative Legitimation of Human Rights}, 9 \textsc{Buff. Hum. RTS. L. Rev.} 25, 35 (2003).
\item \textsuperscript{14} Immanuel Kant argued that true moral imperatives are “categorical”; that is, they are demands upon individuals and entities that would be accepted by all as universally applicable, irrespective of preferences, convenience or cost-benefit analyses on any particular occasion. \textit{See H. J. Paton, The Categorical Imperative: A Study in Kant’s Moral Philosophy} 127–32 (1948).
\item \textsuperscript{15} Ivan Simonovic, \textit{Relative Sovereignty of the Twenty First Century}, 25 \textsc{Hastings Int’l & Comp. L. Rev.} 371, 380 (2002).
\item \textsuperscript{16} Samantha Power, \textit{Raising the Cost of Genocide, in The New Killing Fields: Massacre and the Politics of Intervention} 250 (Nicolaus Mills & Kira Brunner eds., 2002). The Rwandan genocidal campaign began when a plane carrying Rwanda’s Hutu President, Juvenal Habyarimana, was destroyed by a surface-to-air missile. Rwanda Marks Genocide Anniversary, \textsc{BBC News}, June 6, 2004, \textit{available at} \url{http://news.bbc.co.uk/1/hi/world/africa/3602859.stm}. “The crash served as a signal to Hutu extremists, supporters of the government, to start the systematic liquidation of minority ethnic Tutsis and any Hutu opponents of the regime.” \textit{Id.} Despite France’s denial of involvement in the mass killings, Rwandan President Paul Kagame has asserted that France trained the Rwandan “militia to kill, knowing they intended to kill.” \textit{Id.} According to the BBC, France was the closest ally of the
\end{itemize}
that governments killed 170 million of their own citizens.\textsuperscript{17} This is greater than the total number of people killed in wars between States, including both World Wars.\textsuperscript{18}

In essence, the gap between rich and poor nations is not diminishing.\textsuperscript{19} As a result, many of the world’s citizens do not enjoy the most basic of amenities required for subsistence, let alone the opportunity to flourish.\textsuperscript{20} Today, despite the popularity of human rights as a discussion topic,\textsuperscript{21} the fight for gender

Hutu regime in 1994 and it was known that French military advisers worked with the Hutu government army right up to the beginning of the genocide. \textit{Id.}

\textsuperscript{17} UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 2, 6 (2002).

\textsuperscript{18} Simonovic, \textit{supra} note 15, at 376. During the First World War, approximately 8.5 million military combatants died, compared to approximately 13 million civilian casualties. \textit{See, e.g.,} ZBIGNIEW BRZEZINSKI, OUT OF CONTROL: GLOBAL TURMOIL ON THE EVE OF THE TWENTY-FIRST CENTURY (1993). The death toll for the Second World War is estimated at 71 million, which includes military deaths, civilian deaths as a direct result of hostilities, civilians killed during the Sino-Japanese War, and as a result of Hitler’s murders. \textit{Id.} at 9. However, different sources estimate different counts; the median death toll approximated by these sources is 50 million. \textit{See} Matthew White, \textit{Twentieth Century Atlas: Worldwide Statistics of Casualties, Massacres, Disasters and Atrocities}, Matthew White’s Homepage, at http://users.erols.com/mwhite28/20centry.htm (last visited Jan. 8, 2005). White estimates that during the twentieth century, approximately 188 million people have died as a result of genocide and tyranny, military conflicts including both combatant and civilian deaths, and man-made famine. \textit{Id.}

\textsuperscript{19} BOARD ON SUSTAINABLE DEVELOPMENT, NATIONAL RESEARCH COUNCIL, OUR COMMON JOURNEY: A TRANSITION TOWARD SUSTAINABLE DEVELOPMENT 71 (1999), available at http://www.nap.edu/books/0309067839/html/ (last visited Feb. 8, 2005) (“Recent increases in wealth could be seen as leading to a world characterized both by the popular economics maxim—a rising tide raises all boats big and small—and by the increasing division between rich and poor in absolute as well as relative terms.”).

\textsuperscript{20} Roughly 2.8 billion people live on less than $2 a day and the wealthiest one percent of the world’s population receives as much income annually as fifty-seven percent of the world’s poorest. Simonovic, \textit{supra} note 15, at 380.

\textsuperscript{21} \textit{See, e.g.,} Upcher, \textit{supra} note 4, at 263 (discussing debate over the conflict between human rights and state sovereignty in the context of humanitarian intervention); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002) (discussing the use of force in cases of egregious violation of human rights and humanitarian law); Katherine M. Culliton, \textit{Finding a Mechanism to Enforce Women’s Right to State Protection From Domestic Violence in the Americas}, 34 HARV. INT’L L.J. 507 (1993) (discussing the enforceability, under international human rights law, of American women’s fundamental right to state protection from domestic violence).
equality continues,\textsuperscript{22} unemployment and poverty are increasing,\textsuperscript{23} people are dying of hunger and illness every day\textsuperscript{24} and the right to asylum is being questioned.\textsuperscript{25}

In this Article, we do not attempt to propose a solution to the general problems afflicting the world's citizens not fortunate enough to be born in a First World nation. The analysis within this Article is confined to one particular problem faced by millions of non-First World citizens: how to reduce the chance that they will be summarily killed by their own government. If this problem is not expressly addressed now, legal and social commentators will be forced to address the same issue into the twenty-second century. We should not wait until then. It is only reasonable to believe that waiting will result in future generations seeking solutions while lamenting the killing of another 170 million or more people by their own government. One century with 170 million preventable deaths is sufficient reason to seriously consider fundamental reform of the global approach to government-sponsored killings of their own people.

It is important to note from the outset that the prospect of developing a workable principle for humanitarian intervention is realistic only if carried out in full awareness of the difficulties

\textsuperscript{22} See Culliton, supra note 21, at 507. \textit{See also} Craig v. Boren, 429 U.S. 190 (1976) (striking down an Oklahoma statute for reasons of gender-based discrimination); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny).

\textsuperscript{23} \textit{See}, e.g., Carina J. Miller, \textit{Protecting the Argentine Jewish Community and Jewish Identity in Times of Crisis: Local Efforts, Global Community, and Foreign Support}, 16 FLA. J. INT'L L. 677, 680 (2004) (“The process of economic liberalization and restructuring undertaken in the mid-1990s increased the concentration of income in the wealthiest sectors of society, generated increasing rates of unemployment and poverty, and left millions of Argentines with precarious jobs or with multiple poorly paid jobs.”); Paul Lewis, \textit{World Bank Says Poverty is Increasing}, \textsc{N.Y. Times}, June 3, 1999, at C7 (the number of people living on less than $1 per day rose from 1.2 billion to 1.5 billion from 1987 to 1999).

\textsuperscript{24} \textit{See} Lewis, supra note 23.

involved. First, the circumstances under which humanitarian intervention will be permitted must be clearly designated. This requires specific articulation of the rights to be protected. Second, a proportionality requirement must be included to ensure that the cure is not worse than the illness. Finally, rules of reasonableness must be implemented to prevent occupying forces from exploiting the other State.

The following section of this Article provides a brief overview of the law on humanitarian intervention. Part III discusses the moral dimension of altruistic conduct in relation to intervention. The final substantive section of this article, Part IV, discusses development of a workable principle for humanitarian intervention and the circumstances in which States should be compelled to use force to save strangers in distant places.

II. LAW OF HUMANITARIAN INTERVENTION AND THE SLOW DEMISE OF SOVEREIGNTY

A. Problems Associated with Humanitarian Intervention

Since the second half of the twentieth century, wars for territory (i.e., interstate wars) have largely been replaced by struggles for power within States. This trend both reflects, and contributes to, the decline in significance of state sovereignty in the twenty-first century. In relation, human rights abuses, often associated with internal State conflicts, present stark challenges to traditional State-based international law. With intrastate conflicts it becomes necessary to ask whether, and/or under what circumstances, a State may declare that an emergency situation legitimises the abrogation of its human rights

obligations. Humanitarian law has adapted and expanded in recognition of the changing nature of conflicts around the world, but it has not yet satisfactorily answered the question: “How can military intervention ever be humanitarian?” As state sovereignty weakens and intervention becomes increasingly likely, the urgency in finding an answer to this question increases.

Humanitarian intervention always takes place in a political, as well as a legal and moral environment. As observed by James Upcher, “[p]roponents of intervention have a double task: both justifying the legality of a doctrine of intervention, and exposing the antiphonal pronouncements of governments pursuing illicit and venal motives behind humanitarian rhetoric.” Some international commentators have identified an emergence of intervention in the human rights law that has developed since the inauguration of the UN Charter. These commentators discern a recalibration of sovereignty in favour of ethical concerns. Citing Michael Ignatieff, Upcher notes that, for such commentators, “to defend the principle of non-intervention, contained in Article 2(4) of the Charter, is to de-

29. See generally JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992) (examining the international standards governing protection of human rights in situations of public emergency).

30. Humanitarian law is generally defined as the law relating to armed conflict. See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 654 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987) (stating that the expression of international humanitarian law applicable in armed conflict means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict).


32. Michael Ignatieff, State Failure and Nation-Building, in HUMANITARIAN INTERVENTION, supra note 1, at 299.

33. Upcher, supra note 4, at 263.

34. Jane Stromseth, Rethinking Humanitarian Intervention: The Case for Incremental Change, in HUMANITARIAN INTERVENTION, supra note 1, at 245.

35. Id.
fend, in many cases, the perpetration of tyranny and terror.\textsuperscript{36} Consistent with the views of such pro-interventionist commentators, it has been argued that “the drafting history of the UN Charter displays an awareness that, despite the prohibition on intervention in Article 2(4), force can be a permissible response to humanitarian catastrophe.”\textsuperscript{37}

B. Humanitarian Intervention as Condoned Anomaly in International Law

Specific examples of (putative) humanitarian intervention illustrate various general features of the process. Commonly cited examples of broadly successful intervention include: India’s intervention in the war between Pakistan and East Pakistan (Bangladesh) in 1971,\textsuperscript{38} Vietnam’s invasion of Cambodia in 1978 and 1979,\textsuperscript{39} and Tanzania’s intervention to remove Idi Amin from Uganda in 1979.\textsuperscript{40} On the basis of these examples, it has been claimed that “state practice...demonstrate[s] that states believe the right of unilateral humanitarian intervention is available to them as an option grounded in either the Charter or customary international law.”\textsuperscript{41} However, neither India, Vietnam or Tanzania sought legitimacy for their actions by reference to a norm of humanitarian intervention. Indeed, the General Assembly of the United Nations called upon India to withdraw its troops from East Pakistan,\textsuperscript{42} despite India’s claim

\begin{itemize}
\item \textsuperscript{36} Upcher, \textit{supra} note 4 (citing Michael Ignatieff, \textit{Why are We in Iraq? (And Liberia? And Afghanistan?)}, N.Y. TIMES MAG., Sept. 7, 2003, at 38); see also Ignatieff, \textit{supra} note 32, at 299. U.N. \textsc{charter} art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).
\item \textsuperscript{37} Upcher, \textit{supra} note 4, at 269; see also Franck, \textit{supra} note 7, at 204.
\item \textsuperscript{38} Franck, \textit{supra} note 7, at 216 (“[I]n 1971, India invaded East Pakistan after military repression against separatists in that province had escalated to the point where a million persons had died and 8 million had fled to India.”).
\item \textsuperscript{39} \textit{Id.} at 217 (“Vietnam invaded Cambodia, in 1978, to rid it of a Khmer Rouge regime responsible for the deaths of at least 1 million people.”).
\item \textsuperscript{40} \textit{Id.} at 219 (“[I]n 1978 ... Tanzania invaded Uganda to topple the murderous regime of Field Marshal Idi Amin. Some 300,000 deaths had been attributed to [Amin’s] rule.”).
\item \textsuperscript{41} Francis Kofi Aboye, \textit{The Evolution of the Doctrine and Practice of Humanitarian Intervention} 133 (1999).
\item \textsuperscript{42} The territory formerly known as East Pakistan is now the nation of Bangladesh. Oscar Schachter, \textit{The Right of States to Use Armed Force}, 82
\end{itemize}
of self-defence and its comments on human rights-based necessity.\textsuperscript{43} Vietnam and Tanzania both (if implausibly) claimed self-defence.\textsuperscript{44}

In 1979, France’s contribution to the overthrow of Bokassa in the Central African Empire, a clear breach of Article 2(4),\textsuperscript{45} was not justified by France on humanitarian grounds.\textsuperscript{46} The only modern-era assertion of a unilateral humanitarian justification for military intervention was by one of the three intervening States in the 1991 Iraq no-fly zone situation, constituting “a single partial exception in a half-century of non-intervention on humanitarian grounds.”\textsuperscript{47} Thus, even a “successful” intervention struggles to find legitimacy in terms of humanitarian factors. Additionally, the United Nations has been implicated in several “horrendous failures” based upon its unwillingness or inability to intervene in intrastate conflicts (e.g., Bosnia,\textsuperscript{48} An-

\textsuperscript{43} India’s self-defense claim was based upon the large influx of refugees from East Pakistan. Franck, \textit{supra} note 7, at 216–17.

\textsuperscript{44} \textit{Id.} at 217, 219.

\textsuperscript{45} Article 2(4) of the UN Charter states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER art. 2, para. 4.

\textsuperscript{46} Franck, \textit{supra} note 7, at 220.


\textsuperscript{48} In the 1990s, the former nation of Yugoslavia dissolved and erupted into religious and ethnic genocide among Bosnian Serbs, Muslims and ethnic Albanians. In July 1995, thousands of Muslims were killed by Bosnian Serb forces in the Bosnian town of Srebrenica in a campaign of “ethnic cleansing.” From March to June of 1999, Serbian forces intensified attacks on Kosovo and forcibly expelled more than 850,000 ethnic Albanians. Rape and sexual violence were major components of the Bosnian Serb’s ethnic cleansing. U.N. peacekeeping efforts were inadequate throughout. Finally, NATO responded with a bombing campaign on Serb forces around Kosovo. For further information, see Human Rights Watch, \textit{Bosnia and Herzegovina: The Fall of Srebrenica and the Failure of U.N. Peacekeeping, 7 HUM. RTS. WATCH REP., no. 13, at Summary (1995), available at http://www.hrw.org/summaries/s.bosnia9510.html (last visited Feb. 28, 2005). \textit{See also} Human Rights Watch, \textit{A Village Destroyed: War Crimes in Kosovo, 11 HUM. RTS. WATCH REP., no. 13(D), at Summary (1999), available at http://hrw.org/reports/1999/kosovo3/ (last visited Feb. 28, 2005).
Clearly, something needs to be done.

III. THE NORMATIVE AND PSYCHOLOGICAL DIMENSION: (UNSOULD) REASONS FOR RESISTING HUMANITARIAN INTERVENTION

It is necessary to look closely at the moral dimension of humanitarian intervention and to examine what has been called the “breadth” or “weight” of the moral concern. There are two

49. In April 2002, the signing of a cease-fire agreement brought to an end nearly three decades of civil war in Angola. During the war, hundreds of thousands died and millions were displaced. Between 1991 and 1992, an estimated 1.3 to 2 million Angolans fled their homes. Between 1998 and 2002, an additional 3.1 million people fled their homes. The international community was slow to respond with adequate funds and logistics, even failing to respond in some situations. For more information, see Human Rights Watch, Struggling Through Peace, Return and Resettlement in Angola, 15 HUM. RTS. WATCH REP. No. 1, 5–8 (2003), available at http://www.hrw.org/reports/2003/angola0803/angola0803.pdf (last visited Feb. 28, 2005).


51. Between April and July of 1995 alone, an estimated 800,000 Rwandans, mostly Tutsi, were killed in the genocide by Rwandan Hutus, a loss representing an estimated 75% of the Tutsi population. Although the U.N. had peacekeeping troops on the ground, it did not order them to try to stop the violence. The Belgian troops in the U.N. peacekeeping forces even withdrew from the country. The United States took essentially no action. For more information, see HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA (1999), available at http://www.hrw.org/reports/1999/rwanda/ (last visited Feb. 28, 2005).


53. Holzgrefe, supra note 1, at 51. Holzgrefe states:

What should the breadth and weight of one's moral concern be? Should it extend beyond one's family, friends and fellow citizens? Should it extend to those nameless strangers in distant lands facing
main grounds, apart from the sovereignty consideration, that enable powerful States to deny moral culpability for refusing to prevent mass killings. They are the “Acts and Omissions Doctrine” and the “Doorstep Principle.” The following two sections explore each these grounds and explain why they need to be abandoned.

A. Acts and Omissions Doctrine

1. Overview of the Doctrine

The Acts and Omissions Doctrine is relied upon by First World nations as a basis for deflecting liability for mass killings in other parts of the world. The Doctrine provides that people are only responsible for their positive acts, as opposed to events that they fail to prevent (omissions).\textsuperscript{54} This Doctrine demarcates the circumstances in which individuals must help others in order to prevent life itself from becoming intolerably burdened. The Acts and Omissions Doctrine describes (and possibly explains) the fact that people tend not to feel obliged to devote substantive resources to assisting people who are worse off than themselves. The Doctrine acknowledges that individuals feel less responsible for the deaths and tragedies they fail to prevent than those they directly cause.\textsuperscript{55} Thus, the Doctrine is


\textsuperscript{55} The Acts and Omissions Doctrine states that, morally, it is less egregious to omit doing an act which leads to a foreseeable negative result than it is to actually commit an act which leads to the same negative result. For example, under the Doctrine it is a lesser evil to fail to throw a life preserver to a person who is drowning than it is to push someone one knows cannot swim into the water to drown him or her. This moral distinction generally rests upon the notion that an omission is equivalent to not intervening in events which have already unfolded, i.e., the person was already drowning, versus an act which actually sets events into motion, i.e., pushing someone into the water to drown them. Thus, passive inaction, or omission, is less morally irreprehensible than action, because the person is not the source of causation. See
one justification for why failure to provide food to starving people in other nations is generally not equated with the reprehensibleness of shooting one’s neighbour. 56 Nonetheless, this Doctrine is unsound.

Morality seems to make very few positive demands of individuals.57 Generally, morality is delineated into a set of negatively-framed rules proscribing certain behaviours. 58 However, it is premature to conclude that we have discharged our moral obligations simply because we have not violated these negative rules. There are occasions when acting morally requires us to do more than merely refrain from certain behaviour, occasions when we must actually do something.59 Defining morality exhaustively as a set of negative proscriptions fails to explain why refusal to act in various situations would be considered morally repugnant.60

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56. Kuhse, supra note 55, at 297. Kuhse states:

Is the distinction between killing and letting die ... morally significant? ....If killing and letting die were morally on a par, so the argument goes, then we would be just as responsible for the deaths of those whom we fail to save as we are for the deaths of those whom we kill—and failing to aid starving Africans would be the moral equivalent of sending them poisoned food ... but even if a morally relevant distinction can sometimes be drawn between killing and letting die, this does not, of course, mean that such a distinction always prevails.

Id.


58. See id. at 163–80.

59. See, e.g., Kuhse, supra note 55, at 298; Peter Singer, Practical Ethics 206–08 (2d ed. 1993).

60. Examples of inaction being deemed morally repugnant include such scenarios as: Bill Gates refusing to give his loose change to a starving peasant, or declining to save a child drowning in a puddle in order to avoid getting one’s shoes wet, or refusing to throw a life-ring to a person drowning beside a pier. John Gardner has discussed the implications of a “self-effacingly extreme care” for others as a hypothetical model for tort. John Gardner, Obligations and Outcomes in the Law of Torts, in Relating to Responsibility: Essays for Tony Honore on His Eightieth Birthday 111, 112 (Peter Cane & John Gardner eds., 2001).
2. The Maxim of Positive Duty

Morality demands performance of a positive action infrequently. When such situations do arise, however, the obligations can be so clear, pronounced and unwavering that it would be implausible to postulate an account of morality which is not consistent with and explicable of such a requirement. In addition to the negative postulates of morality is one very important positive one: we must assist others in serious trouble when assistance would immensely help them at little or no inconvenience to ourselves. This is the Maxim of Positive Duty.

The Acts and Omissions Doctrine is incapable of explaining why individuals are appalled when they learn of clear breaches of this maxim. The public loathing directed at the passive witnesses of the 1964 murder of Kitty Genovese in Queens, New York is a practical illustration of the operation of the maxim (although as always, hindsight does wonders for moral judgement). Whether harm ensues as a result of an act or omission

61. See Kuhse, supra note 55, at 297–98.
63. See Singer, supra note 59, at 230–31. There are some who would deny that any such duty exists. See, e.g., E. Mack, Bad Samaritans and the Causation of Harm, 9 Phil. & Pub. Aff. 230 (1980) (arguing against the implementation of Bad Samaritan Laws as a cure for the harm caused by inaction). However, we agree with John Harris, who labels the denial of such a duty as “very odd,” at least in an intuitive sense. John Harris, The Value of Life 31 (1985).
64. See generally Bagaric, A Utilitarian Argument, supra note 57 (includes the Maxim of Positive Duty in a list of universal moral principles). See, e.g., Amarasekara & Bagaric, supra note 55 (concluding that legalization of euthanasia is misguided because the right to die for a few is outweighed by the right to live by the many; states that the “high demands of morality” at times requires the few to suffer in order to promote the common good); Craig Scott & Patrick Macklem, Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution, 141 U. Pa. L. Rev. 1, 55 (1992) (providing examples from international human rights law suggesting that there is a principle of positive duty regarding prevention and protection of human rights).
65. Kitty Genovese was beaten and stabbed by her assailant over a 35 minute period in Queens, New York. The assault took place within the view of 38 “normal,” law-abiding citizens who did nothing to assist her. Witnesses failed to call the police or even yell at the offender. When a 70-year-old woman finally called the police, it took them only two minutes to arrive. Yet, by this time, Genovese was already dead. See, e.g., Louis P. Pojman, Ethics: Discovering Right and Wrong 1 (1990).
is not central to the moral appraisal of an action. The critical issue is whether one is responsible for the harm, where responsibility is assessed from the perspective of all of the norms and rules of morality, including the Maxim of Positive Duty.

Arguably, the Maxim of Positive Duty, as compared with the Acts and Omissions Doctrine, provides a far more accurate and coherent basis for rejecting intolerable demands on one’s time and resources. Morality is essentially a set of negative constraints plus the Maxim of Positive Duty. The proviso to the Maxim, “when there is little or no inconvenience to oneself,” readily explains why our duty to assist others is extremely limited. As one commentator on humanitarian intervention observed, “rescuing others will always be onerous.” As this statement makes clear, the definition of “little or no inconvenience” is crucial in determining what level of altruistic performance will be required by the Maxim.

This Maxim of Positive Duty ties in neatly with humanitarian intervention. As a maxim guiding behaviour, it explains why we are required to make some sacrifices for other people, even in distant parts of the world. Within the Maxim’s proviso is the necessary limitation that we need not be “slaves” to the needs of others, running to every skirmish in any part of the world. Additionally, as will be discussed in the following section, it is important to note that our more distant fellow populations (our “non-neighbours,” so to say) are included in this Maxim by virtue of the fact that there is no logical or normative basis for ranking the interests of one person higher than another. The Maxim of Positive Duty always involves the need to weigh the

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66. Bagaric, *A Utilitarian Argument*, supra note 57, at 174 (rejecting a subjectivist and cultural relativist approach to morality, the author lists four universal moral principles: (1) do not kill; (2) do not steal; (3) do not lie, and; (4) assist others when it will result in little or no inconvenience to oneself).


68. Fernando Tesón, *The Liberal Case for Humanitarian Intervention*, in *HUMANITARIAN INTERVENTION*, supra note 1, at 129.

69. Bagaric, *A Utilitarian Argument*, supra note 57, at 177 (arguing that utilitarian morality is premised on widespread community support based on a reciprocal pursuit of happiness).
number of lives at stake against the resources that will be re-
quired to save those same lives. Where the persons in need are “overseas,” the resources that will be required are of an in-
ternational nature.

B. The Doorstep Principle

In order for the Maxim of Positive Duty to have a practical ef-
fect it is necessary to address the Doorstep Principle. The Doorstep Principle describes the empirical fact that proximate suffering matters more to individuals than anonymous, distant suffering. The fact that individuals are reluctant to advance the interests of their non-neighbours has no normative founda-
tion. The Doorstep Principle may be simply a general aspect of human nature, i.e., people have an increased psychological re-
sponse to immediate perceptual events rather than remote ones. Of course, it should also be acknowledged that socio-
political forces and media influences have created a cultural milieu that prioritizes certain people (especially family) as de-
serving a significantly higher level of care than other people.

For whatever reason, it appears that humans are driven to far greater lengths to assist those whose suffering they are forced to directly confront than those whom they can ignore.

70. This necessarily follows from the criteria used in the formula when applied to the context of humanitarian intervention.

71. See SINGER, supra note 59, at 224 (suggesting that when the people harmed are not identifiable individuals, it is difficult for people to comprehend a duty to attempt to save them).

72. The extent of another’s suffering is not measured by our capacity to directly sense it, neither is the scope of our moral duties. SINGER, supra note 59, at 229–31 (arguing that the duty to save a child from drowning is no less compelling than assisting those living in absolute poverty).

73. Just as babies respond much more strongly to a “looming” object (i.e. an object approaching them on a “hit course” and thus perceptually expanding in a rapid and symmetrical manner) than to an approaching object that will safely bypass them. T.G.R. BOWER, HUMAN DEVELOPMENT 55 (1979).

74. The “global catastrophe” genre in literature and films tends to reinforce the special status of close kinship. The movie The Day After Tomorrow represents this tradition in its portrayal of a father’s commitment to fulfill a promise made to his son, that promise acquiring the status of an oath. THE DAY AFTER TOMORROW (20th Century Fox Film Corp. 2004).

75. Robert Jackson, International Community Beyond the Cold War, in BEYOND WESTPHALIA, supra note 3, at 79 (noting that several highly-publicized attempts at mass immigration into First World nations resulted in
Of course, humans have a staggering capacity to ignore even very proximate suffering. A good example of individual willingness to ignore suffering is the notorious obedience experiments of Stanley Milgram.\textsuperscript{76} Milgram’s research subjects believed themselves to be taking part in an experiment on learning (which, in a sense, they were).\textsuperscript{77} In the course of the experiment, subjects were directed to “punish” a stranger for his mistakes by using electric shocks.\textsuperscript{78} The degree of pain the subjects believed they were inflicting upon the stranger was remarkable, even when the research subjects themselves were directly controlling the delivery of (supposed) electric shocks.\textsuperscript{79} Additionally, when research subjects instructed a third person to administer the shocks, the voltage level used on the stranger increased dramatically.\textsuperscript{80} Even when “victim” and subject were sitting next to each other, and delivery of the shock required that the subject physically place the victim’s hand on a metal plate, many subjects still complied—turning their bodies away from the victim at the same time.\textsuperscript{81}

Milgram’s experiments show that humans are able to distance themselves from the suffering of others, even suffering they are directly inflicting. At another level, the infliction of pain on another person may be cognitively re-configured by the perpetrator as being unavoidable, beneficial, or the fault or desire of the other person. It is a small wonder that a majority of the citizens of the Third Reich were able to ignore the suffering of those persecuted by the government and placed in concentra-
tion camps. Thus, immediate lives weigh far more heavily on the sympathy scale than distant ones—at least when perceived immediacy is accepted as having more than a merely physical dimension.

1. Ignoring the Interests of Our Non-Neighbours is Unjustified

Most adults in the First World are aware that every minute of the day people are dying in distant parts of the world due to readily preventable causes. The fleeting glimpse of starving children on the evening news appears to evoke some sense of sympathy, guilt or responsibility in most people. Unfortunately, humans are too good at escaping these feelings. Rather, we need to be educated that the limits of personal and State responsibility are not exhausted by our capacity to successfully block out “distant” human suffering and recognize that “nothing justifies valuing one life ahead of another.”

There is simply no logical or normative principle which can be universally applied for ranking one person’s happiness above the next person.

The Doorstep Principle sums up why nations have been slow to stop the mass killing of other countries’ citizens by their own governments. Additionally, it explains why First World countries have been, despite an overt commitment to human rights and equality, spectacularly successful in ignoring the plight of


83. This seems to be one explanation for the fact that in 1995, the Australian Government spent $5.8 million rescuing French sailor Isabelle Autissier, who was stranded while on a solo voyage around the world, when the same money could have saved thousands from starvation. Gender, Sexualities and Sport, The Sports Factor, June 27, 1997, at http://www.ausport.gov.au/fulltext/1997/sportsf/sf970627.htm.


85. Self-interest or self-preservation may explain an agent ranking his or her interests over those of another person, but these considerations cannot ground a general principle justifying such conduct. From the perspective of the other person, the same considerations support a preference in his or her favor.
those in Third World countries.\textsuperscript{86} In order for humanitarian intervention to become an established norm, it is necessary to debunk the Doorstep Principle and to adopt the Maxim of Positive Duty. It is only after such a change that genuine, effective moral pressure can be placed on States. Eliminating the Doorstep Principle from our collective psyche is, admittedly, not likely to be an easy matter. However, as with any reform, the first step to progress is identification of a problem.

IV. CIRCUMSTANCES IN WHICH HUMANITARIAN INTERVENTION IS JUSTIFIED: TOWARDS “RULES OF ENGAGEMENT”

A. Overview of Problems

In setting the boundaries for legitimate humanitarian intervention, it is important to be cognisant of the difficulties of such measures. The first difficulty of humanitarian intervention stems from the inherent contradiction in using force in order to protect rights.\textsuperscript{87} Force invariably results in the killing of people, and hence violates what might be thought of as the most fundamental right of all—the right to life itself.\textsuperscript{88} The “rules of engagement” for humanitarian intervention must surely take account of this \textit{proportionality} issue. Issues concerning the proportionality of force arise both with respect to the initiation of military conflict (\textit{jus ad bellum}) and the conduct of military forces in conflict situations (\textit{jus in bello}). Generally, it is difficult to determine the exact interests that the international community should defend via force.\textsuperscript{89} Questions as to whether other nations should forcibly defend only the basic right to life, or whether they should also be concerned with lesser rights, such as the right to own property, to vote, to privacy, to freedom

\textsuperscript{86} Simonovic, \textit{supra} note 15, at 380.

\textsuperscript{87} \textit{See} generally CHRISTOPHER G. WEE RAMANTRY, ARMAGEDDON OR BRAVE NEW WORLD: REFLECTIONS ON THE HOSTILITIES IN IRAQ (2003) (discussing the possible effects the U.S./U.K. invasion of Iraq will have on international law; advocating for the international community to embrace the United Nations and its fundamental policy against the use of force).


\textsuperscript{89} Yoo, \textit{supra} note 9, at 794.
of association, and so on, must be addressed. The broader the scope of protected rights, the greater likelihood for interpretative arguments, and hence abuse.

A second difficulty is that any principle prescribing humanitarian intervention is likely to be imprecise—leaving ample scope for self-serving interpretation. As one well-known commentator observed,

[T]he pages of history abound with instances of governments waging war to edify citizens marooned on unenlightened shores, the loftiness of ethical ambition matched only by imperial appetite. Cicero’s theory of jus gentium sanctioned the expansion of the Roman Empire and the slaughter of the barbarians at the gates; Alberico Gentili infamously justified the Spanish conquest of the new world by the need to correct the behaviour of savages ignorant of natural law; and Hugo Grotius’ stout legitimation of the ‘right to punish’ complemented perfectly the ascent of Dutch colonial ambition.

More recently, it was observed that: “[s]tates strong enough to intervene and sufficiently interested in doing so tend to have political motives. They have a strong temptation to impose a political solution in their own national interest.” Thus safeguards, in the form of a reasonableness requirement, must be developed to prevent states from manipulating the principle authorising humanitarian intervention to serve their narrow


92. As in “the ideology of the redeemer nation,” described by Deborah Weissman, where the intervening state entertains a perception of itself as the savior of the populous of the occupied state. Deborah Weissman, The Human Rights Dilemma: Rethinking the Humanitarian Project, 35 COLUM. HUM. RTS. L. REV. 259, 266 (2004). See also Gathii, supra note 90, at 555 (describing how there is typically an encounter based on a “self-righteous Western cultural project” contrasted with a non-Western civilization that is perceived as “backward, barbaric, poor, smelly, and lazy.”).

93. Upcher, supra note 4, at 265.

94. Schachter, supra note 42, at 1629.
political interests. Development of the principle may well stand or fall on the effectiveness of such safeguards of reasonableness.\textsuperscript{95} Therefore, such safeguards should be built into any “rules of engagement.”

B. Setting Out the Criteria

To begin, it is important to tentatively identify grounds for military intervention into another nation based upon humanitarian concerns. The issue of necessity is clearly central to humanitarian intervention.\textsuperscript{96} As James Upcher comments:

In many respects, necessity serves as a repository of assorted doctrines that can wheel international law into a place at the table. It is a pliable friend, serving both moral and strategic masters ... necessity is sufficiently amorphous to respond to the asymmetric threats posed by terrorism, unshackling states from the self-defence mechanisms of the UN Charter, and massaging pre-emption into a legitimate legal category.\textsuperscript{97}

Thus, necessity as a legitimation of intervention must be scrutinised in the broad context of the international use of force. This Article is not intended to support the employment of the necessity argument by military aggressors. Therefore, (humanitarian) necessity needs to be defined to exclude military adventure and opportunism. In so doing, the present status of necessity as a general category for international action should not be affected.\textsuperscript{98} Certainly, once humanitarian necessity is better defined, other putative forms of necessity will require corresponding clarification. It may well be that outside of (properly

\textsuperscript{95} See e.g., Keohane, supra note 28, at 275.

\textsuperscript{96} At the International Court of Justice in 1999, the Federal Republic of Yugoslavia claimed that the NATO bombing of Kosovo was against international law. Belgium responded that NATO action was justifiable under the principle “of necessity ... which justifies the violation of a binding rule in order to safeguard, in the face of grave and imminent peril, values which are higher than those protected by the rule which has been breached.” Upcher, supra note 4, at 275 (citing Oral Pleadings of Belgium, Legality of the Use of Force (Yugo. v. Belg.), CR/99/15 (May 10, 1999) (uncorrected translation available at http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm)).

\textsuperscript{97} Upcher, supra note 4, at 274.

delimited) self-defence and humanitarian necessity, necessity is a vanishingly small category of defence for a state’s activities, as it has proved to be within individual criminal justice.

An innovative extension of necessity, in the context of humanitarian intervention, has been urged by Antonio Cassese. Traditionally, in order to substantiate use of customary international law, state conduct needed to be accompanied by a more subjective sense of legal obligation—the *opinio juris sive necessitatis*. Cassese explored the idea that the subjective element of *opinio juris* is not required, as such, if a state believes that it is acting out of political, economic or moral necessity. Cassese calls this concept the *opinio necessitatis*. In the case of Kosovo, for example, Cassese proposes that the evidence of such *opinio necessitatis* was “strong and widespread.”

Cassese’s theoretical claim is speculative and perhaps premature, but his related list of preconditions for humanitarian countermeasures is illuminating. Political, social and moral necessity are not boundless concepts. Rather, Cassese provides

99. Presumably, a natural disaster like a tidal wave or earthquake, or even perhaps a man-made localised catastrophe, might justify mass incursion of one state’s population into another state to escape the danger.


103. Cassese, *A Follow-Up*, supra note 100, at 797. An unfortunate term in view of the complete phrase, *opinio juris sive necessitatis*. Cassese’s concept was that the act was considered necessary, rather than compliance with an international customary law being necessary or obligatory (as with the orthodox requirement of *opinio juris*). *Id.*

104. *Id.* at 798. Cassese argued that those (NATO) states that intervened in Kosovo did so on the genuine basis that genocidal aggression would continue until such action was taken. *Id.* at 797.
six conditions for armed intervention in the absence of Security Council authorisation: (i) gross breaches of human rights by a government or with its connivance or resulting from its collapse; (ii) inability or unwillingness by the government to prevent the breaches, or to allow outside help; (iii) inability or unwillingness of the Security Council to take action; (iv) exhaustion of practicable peaceful options; (v) involvement of a group of states in the intervention and with some measure of General Assembly approval; (vi) rapid termination of military action once abuses have been terminated.105

While the sentiments expressed by the cumulative operation of these conditions are laudable, ultimately the conditions may well be too expansive. The fourth condition, requiring the exhaustion of practicable peaceful options, may in particular introduce unnecessary obstacles to (or at least delays to) intervention. Humanitarian intervention is appropriate when large-scale killings are government sanctioned and/or conducted by elements within a State which cannot be stopped by the government. This is the only condition that needs be satisfied in order to justify armed humanitarian intervention. It is important to emphasise that the only currency we are concerned with is the death of innocent people. Other human rights abuses, no matter how likely and how egregious, are unlikely to warrant intervention—given the inevitable loss of life caused by military intervention and the requirement of proportionality.

1. Proportionality

Necessity, properly defined, may thus fulfill the requirements of “ad bellum”—the decision to initiate intervention—but cannot fully determine the “in bello”—the conduct during the intervention. To ensure that intervention is not self-defeating, a principle must be adopted that acknowledges that the number of lives that are likely to be lost as a result of the intervention cannot exceed the number that are likely to be lost if no action is taken.106 This condition has its root in the Principle of Proportionality. As Richard Fox notes, the notion that any response must be commensurate to the harm caused, or sought to be pre-

105. Cassese, Ex Inuria Ius Oritur, supra note 100, at 27.
106. This requirement is also suggested by Cassese’s sixth condition for military intervention without Security Council approval. Id.
vented, strikes a strong intuitive chord.\textsuperscript{107} The concept of proportionality underpins many domestic and international legal maxims.\textsuperscript{108} In its most simplistic (and most persuasive) manifestation, proportionality provides that “the punishment should fit the crime.”\textsuperscript{109} It is also part of the reasoning behind civil law damages, which aim to compensate for the actual loss suffered, and equitable remedies, which are proportional to the detriment sought to be avoided.\textsuperscript{110}

Proportionality also underpins the notion of self-defence at the individual level. Self-defence, as a defence to an individual crime, would be unavailable to a person whose response to being pushed in a crowd was the use of lethal force.\textsuperscript{111} Such a violent response would not be considered self-defence because it is entirely out of proportion with the initial action. Lethal force is generally considered self-defence only when an individual’s life is threatened.\textsuperscript{112} Additionally, the notion of self-defence may extend to the defence of another. In certain circumstances, an individual may use lethal force to protect the life of a third person.\textsuperscript{113} Such parallels between humanitarian intervention and

\begin{itemize}
\item \textsuperscript{109} The phrase is derivative from W. S. Gilbert’s \textit{The Mikado}, but may be said to characterise a sentiment going back at least to the “an eye for an eye” of the Old Testament. W. S. Gilbert, \textit{A More Human Mikado}, in \textit{THE MIKADO OR THE TOWN OF TITIPU} (Opera: First perfomed on Mar. 14, 1885).
\item \textsuperscript{110} Fox, \textit{supra} note 107, at 491.
\item \textsuperscript{111} Other potential examples include: a homeowner shooting a person before he entered the homeowner’s property or a homeowner who captures the burglar and keeps him chained up as his slave.
\item \textsuperscript{112} \textit{See Model Penal Code} § 3.04, \textit{reprinted in} JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW CASES AND MATERIALS 1175 (3d ed. 1996). Lethal force may be used in self-defense only if it is necessary to prevent the individual’s death, but may not be used if: the individual provoked the use of force, the individual is able to retreat from the situation, or otherwise surrender possession of an item or comply with a demand. MPC § 3.04(2)(b). \textit{Id.} at 1176.
\item \textsuperscript{113} \textit{See Model Penal Code} § 3.05, \textit{reprinted in} KAPLAN ET AL., \textit{supra} note 112, at 1176. The right to use force to protect a third person is justifiable under MPC §3.05 when: (1) the actor would be justified in using force to protect himself if he were in the situation of the third person, and (2) under the circumstances as he believes them to be, the third person would be justified in using force, and (3) the actor believes the intervention is necessary. \textit{Id.}
self-defence are important. In effect, the principle of humanitarian intervention advanced in this Article seeks to establish a norm of defence of another, similar to that provided by criminal law, as a maxim of international law.

The proportionality requirement will necessarily be crude when it comes to comparing the likely loss of lives that will stem from military intervention as opposed to inaction. However, with increasingly sophisticated weaponry and intelligence equipment now being used in modern day combat (as was demonstrated in Iraq in 2003)\(^ {114} \) and the supreme military advantage enjoyed by the United States and other Western powers over those States who are likely objects of humanitarian intervention,\(^ {115} \) we argue that a meaningful estimate of the number of lives to be lost as a result of intervention is possible. This estimate must include the likely loss of personnel defending a State from what they perceive or are instructed to perceive as an invasion. As noted above, there is no moral bookkeeping mechanism that justifies prioritising the loss of one life over another. While the conditions in which humanitarian intervention is justifiable can be clearly stated to avoid misuse of this power, there are several constraints that must be developed.

2. Reasonableness

In devising an effective principle of humanitarian intervention, an important objective is to prevent (as much as possible)
occupying forces profiting or otherwise benefiting from their intervention. Once stationed in another state, it is not difficult for an occupying force to argue for ongoing occupation on the basis of the ongoing need to preserve law and order, even if the occupation has contributed to the problem.\footnote{116} As a result, an occupation that was initially lawful may later become unlawful.\footnote{117} This problem raises issues that go beyond straightforward proportionality.

This danger can be minimised by ensuring that a minimum number of nations with seemingly disparate interests must form part of any “intervening team.”\footnote{118} This should be buttressed with the principle that the occupying force must exit immediately upon a new government being installed, which must be done within a defined period after the removal of the (presumably totalitarian) regime.\footnote{119} This period should be no more than twelve months. To ensure timely exit of occupying forces, a reciprocal citizenship principle should be established, giving citizens of the “liberated” state automatic citizenship rights in the state of the occupier(s) if the occupation extends beyond the twelve month period.\footnote{120}

A cautious analogy may be drawn with respect to the conditions under which human rights protection may be abrogated.

\footnote{116} This is patently the case in present-day Iraq. More generally, democratic accountability mechanisms are inadequate in relation to troops dispatched overseas. Michael Glennon, The United States: Democracy, Hegemony, and Accountability, in Democratic Accountability and the Use of Force in International Law 344 (Charlotte Ku & Harold Jacobson eds., 2002).

\footnote{117} Schachter, supra note 42, at 1630–31. Generally, this is an issue of necessity. \textit{Id.} If the intervention is prolonged beyond the need that initially gave rise to the intervention, or if the interveners abuse their power through subsequent interference with the state, the intervention loses its legal quality. \textit{Id.}

\footnote{118} Again, this is in line with Cassese's proposals. Cassese, \textit{Ex Inuria Ius Oritur}, supra note 100, at 27.


\footnote{120} See Bagaric & McConvill, supra note 91, at 174. The twelve month period for humanitarian intervention settling and reconstruction is the only exception that should be permitted to the reciprocal citizenship principle. \textit{Id.}
by states of “emergency.” It is usually held that under certain narrow and short-term conditions, some human rights protections may be suspended by a state. The state of emergency in such a case may be analogized to the emergency arising from human rights violations that instigate outside intervention. While seemingly representing the very opposite of the situation addressed by this Article—in one case a government-declared emergency giving rise to human rights concerns; in the other, human rights concerns giving rise to external intervention—the question addressed in both is the conflict of obligations and how this conflict may be resolved in a principled manner. Indeed, for one state or group of states to invade another in the name of a humanitarian crisis is precisely to declare a state of emergency that legitimizes the displacing of usual conventions. Accordingly, for a state of emergency to legitimate the derogation of certain rights, several specific conditions must be met. These include exceptionality, proportionality, non-discrimination, last resort, and a “principle of temporariness.” These conditions clearly parallel the prerequisite conditions necessary for legitimate military intervention.

3. Rules of Engagement

The suggested rules of engagement, namely necessity, proportionality, and reasonableness, all correspond to the accepted limits on self-defence in both individual criminal and in inter-

122. See generally ORAA, supra note 29. Also note, for a state to proclaim an emergency (putatively, to legitimate derogation of rights) is itself not an exclusively internal affair according to the UN Commission on Human Rights. Id. at 247. Parallel to this is the international status or salience of a serious humanitarian crisis within the boundary of a state. Id. In both circumstances, “normal” state sovereignty is called into question. Id.
123. Id. at 34.
125. Id. at 225, 260.
national contexts. This is no accident. In both humanitarian intervention and self-defence, force is being sanctioned; however, that sanction is highly conditioned. As noted above, humanitarian intervention and self-defence are highly analogous. Yet, there is also one important difference: self-defence (despite the implicit factor of necessity) cannot represent an imperative, as we are advocating should be the situation with humanitarian intervention.

4. The Move from Grace and Favour to Expectation

Humanitarian intervention may rarely be justified, but when cases arise it surely must be considered an imperative. While it may generally be thought philosophically dubious to move from “is” to “ought,” the move seems legitimate in such situations. Facts should drive actions. The difficulty, perhaps, lies in the fact that States (or other organisations, such as NGOs), rather than individuals, would be subject to the “ought.” Yet, a parallel could be drawn with Article 39 of the United Nations Charter, under which the Security Council is directed to “determine the existence of any threat to peace...” and to make appropriate recommendations or take action in response to such a threat. Moreover, there are international obligations under the 1982 Law of the Sea Convention for States to “cooperate to the fullest possible extent in repression of piracy,” an obligation that derives from long-standing custom. Heinous acts, such as genocide, give rise to not only universal jurisdiction, but also (at least arguably) to some obligation to take appropriate action. The organ that should be charged with this duty is the Security Council.

126. See infra Part IV.B.1.
127. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).
Council, given that it is the U.N. entity authorised to approve military action.

Presently, there are two situations in which the Security Council can authorise the use of force. These relate to:

1. The right of individual or collective self-defence in response to an armed attack provided under Article 51 of the Charter.

2. Specific authorisation of the use of force by the Security Council as a last resort to maintain international peace and security under Chapter VII of the Charter.

Military action aimed at preventing the killing of people by their own government does not fit neatly into any of these categories unless it has the potential to escalate into a wider conflict. However, as noted in Part II, although humanitarian intervention is rarely (clearly) permitted under existing international law, it is seldom the subject of wide-ranging or intense criticism. In part, this is no doubt a result of the malleable and seemingly directory, as opposed to compulsory, nature of international law. In order to clearly accommodate humanitar-


131. U.N. CHARTER art. 51. Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

132. U.N. CHARTER art. 42. In addition to this, it has been argued that a customary international law right of pre-emptive self-defense may exist. See generally Christopher Posteraro, Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention, 15 Fla. J. Int’l L. 151 (2002) (discussing preemptive self-defense); see also Robert J. Beck & Anthony C. Arend, International Law and Forcible State Response to Terrorism, 12 Wis. Int’l L.J. 153, 213 (1994) (discussing various scholars’ opinions on the topic, but ultimately concluding that there is no general consensus).

133. See infra Part II.B.
ian intervention, it is desirable to amend the Charter to expressly provide for a norm of intervention in the circumstances outlined in this Article.

The most effective means to achieve the goal underpinning humanitarian intervention is to make military intervention mandatory in cases of actual or impending human catastrophe. History shows us that (even if one ignores self-interest) left solely as a discretionary aspiration goal, States have too much armoury at their disposal—in the form of the Acts and Omissions Doctrine and the Doorstep Principle—to expect more than token or patchy adherence to saving the lives of innocent people in distant parts of the world. We are not suggesting that the members of the Security Council should alone assume the military responsibility for providing troops and weapons to neutralise tyrannical regimes. This would be best achieved by giving the Security Council the authority to muster “Coalitions of the Willing,” perhaps selected by ballot, to supply the necessary resources.

Unfortunately, the notion of compulsion in international law is not well-defined. It is even less well-policed and enforced. This is especially the case where the (potential) violators are powerful States, such as those forming the Security Council. Clearly, threats of military action or economic sanctions will not be countenanced against such States if they breach their duty of humanitarian intervention. Certainly, these States would not agree to a resolution proposing the possibility of tangible sanctions against themselves. Therefore, a more modest, yet equally effective, mechanism is required.

A way forward is to expand the provisions of the Convention Relating to the Status of Refugees 1951 to accord a right of asylum in Security Council nations to people who manage to


135. Universality, where it exists, is thus a matter of jurisdiction which empowers rather than compels States to undertake certain extraordinary actions. McCORQUODALE & DIXON, supra note 129, at 288.

136. See supra note 115 and accompanying text.

escape a humanitarian disaster when the Security Council, for whatever reason, has been remiss in discharging its obligations. Of course, this provision would require a body which could serve as arbiter to determine if the Security Council has breached its duty. It would be reasonable to have the arbiter role filled by providing extraordinary jurisdiction to the International Court of Justice (ICJ), coupled with a stipulation that ICJ jurisdiction could be invoked by an individual who claims standing as a refugee from a nation torn by military conflict. If expanding this provision is thought to be too ambitious (or for any other reason unachievable), there is still considerable utility in mandating a requirement of humanitarian intervention. Even absent a tangible sanction against those putatively responsible for launching the intervention, the detriment to a State’s reputation is a powerful tool against their inaction. The moral condemnation that stems from breaching a duty, while not an irresistible lever, is infinitely preferable to the total impotence that stems from the mere “adoption” of aspirational ideals.

V. CONCLUSION

The lessons of history show that there is little, if any, appetite to provide humanitarian assistance to other States. Thus, any force sanctioned on this basis will often be for an ulterior, self-interested motive. This is not necessarily a problem. As long as the humanitarian crisis is resolved, the motive that underpinned the intervention may be of secondary importance. However, impure motives can lead to continuing problems—“protectors” can readily become “exploiters.” Once a State has a foothold in another State, the potential for self-interest to dominate is immense. The tendency toward self-interest provides a window into the international community’s hesitance to mandate military intervention for humanitarian purposes. It has been said that “[t]he human rights project must be fixed to prevent it from becoming a system that facilitates the self-serving desires of a dominant nation.”

However, an absolute rule preventing the use of force in such circumstances might lead to unthinkable tragedies in the future. The horror of such situations urges strongly in favour of
humanitarian intervention in extreme circumstances. Such intervention should be constrained to situations of impending large scale tragedy. The executions by Idi Amin’s Ugandan government of approximately 300,000 people in the 1970s would surely satisfy this requirement, as would the killing of over two million people between 1975 and 1979 in Cambodia by the Pol Pot-led Khmer Rouge. Situations akin to the selective food distribution in Ethiopia in 1987, which led to millions of people starving, would also justify humanitarian intervention. Indeed, with starvation continuing to be a massive problem in Ethiopia, it is arguable that humanitarian intervention would be justified in Ethiopia at the present time. At the time of writing this Article, the Sudanese government was in the process of slaughtering and driving out thousands of members of the Zaghawa, Masalit and Fur tribes in the Dafur region of Sudan, through its instruments, the Janjaweed militias. It is estimated that 320,000 Sudanese will be killed in 2004. This is a situation crying out for humanitarian intervention. Situations like it will no doubt continue to arise until humanitarian intervention is transformed from an expedient accident to a categorical imperative.

141. Bazyler, supra note 2, at 611–18.
142. There were reports late in 2002 of at least eleven million Ethiopian people close to starvation and about thirty million people throughout Africa on the verge of starvation. See Sudarsan Raghavan, Eleven Million Ethiopians May Face Starvation by March, KNIGHT RIDER WASH. BUREAU, Dec. 12, 2002.
144. Nicholas Kristof, This is Genocide and it is Happening NOW, THE AGE (Austl.), June 18, 2004, at 15.
145. This is considered a conservative estimate provided by the U.S. Agency for International Development. Id.
ONLY TIME WILL TELL: THE GROWING IMPORTANCE OF THE STATUTE OF LIMITATIONS IN AN ERA OF SOPHISTICATED INTERNATIONAL TAX STRUCTURING

Hale E. Sheppard*

I. INTRODUCTION

When pondering sexy legal issues, it is doubtful that tax law crosses the minds of many. It is also safe to assume that, even if one were to consider tax law intriguing, issues centered on tax procedure would not pique a great deal of interest. However, with the recent proliferation of complex international tax-avoidance schemes, attention to tax law in general, and tax procedure in particular, is on the rise.

Several issues have emerged from this increased focus on tax procedure, including the significance of the statute of limitations for assessing tax. There are two main problems in this area. First, due to the large amount of entities and transactions involved in many of the burgeoning tax-avoidance schemes, the U.S. Internal Revenue Service (IRS) has significant problems simply catching taxpayers who participate in such ploys. Second, even if the IRS manages to catch the non-compliant taxpayers, it has difficulty doing so in time to assess the tax.

Part II of this Article provides a general overview of a typical tax-avoidance scheme characterized by the use of multiple foreign entities and convoluted transactions among related parties. Part III then explains the considerable efforts made thus far by the U.S. government to identify abusive tax arrangements and the taxpayers who take advantage of them. Part IV describes the general three-year limit for assessing tax and the special six-year limit in cases where the taxpayer “omits” a substantial amount of income from her tax return. Part IV analyzes judicial interpretations of what constitutes “adequate dis-

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A typical tax-avoidance scheme involves the use of multiple flow-through entities such as partnerships and trusts. Generally speaking, a “flow-through entity” is not a taxable entity itself; rather, it serves as a conduit through which its income, gains, losses, deductions, etc. pass directly through to its owners. Each owner then reports her share of the entity's income on her individual tax return (Form 1040) and is taxed accordingly.

According to the IRS, many tax schemes in use today are highly complex and entail “multi-layer transactions for the purpose of concealing the true nature and ownership of taxable income and/or assets.” In other words, instead of simply not reporting income to the IRS (which would raise red flags immediately), a taxpayer may create numerous entities and then cause such entities to enter into a multiplicity of transactions with each other in order to obfuscate the fact that the taxpayer is the true recipient of the income and should be taxed as such. Certain tax experts explain that this phenomenon of entity tiering, especially in the international context, presents a major obstacle for the IRS:


This may require the IRS to undertake the arduous task of poring through each of the tiered entities in order to find out what it needs to know about the lower-tier entity . . . . This is not necessarily different from what happens domestically, but the work gets harder when the tiers of corporations cross national boundaries or consist of different types of entities created under foreign law, and information may not be readily available from all the entities involved, even if they are ultimately U.S.-owned.³

An abusive tax scheme ordinarily begins with a series of domestic trusts, which are designed to create the appearance that the taxpayer has relinquished her business to the trusts and, therefore, no longer has control over it. In reality, the taxpayer continues to indirectly control the business (and the income derived from that business) through strategically-placed trustees or through other entities that the taxpayer controls in some fashion.⁴

Common structures employed by taxpayers include the “business trust,” the “equipment trust,” and the “service trust.”⁵ In simplified terms, the taxpayer first signs various documents that supposedly serve to transfer her business to a business trust.⁶ The equipment trust then purports to lease equipment to the business trust at inflated rates.⁷ Similarly, the service trust claims to supply the business trust with various services in exchange for sizable fees.⁸ The business trust then takes hefty tax deductions for these alleged business expenses paid to the equipment trust and the service trust.⁹ As a result, the an-

3. THE CRISIS IN TAX ADMINISTRATION 45 (Henry J. Aaron & Joel Slemrod eds., 2004).
4. See, e.g., ABUSIVE TRUST TAX EVASION SCHEMES, supra note 1; Needle et al., supra note 1, at 19–24; CERTAIN TRUST ARRANGEMENTS, supra note 1.
7. Id.
8. See, e.g., TRUST TAX EVASION SCHEMES: FACTS, supra note 5.
nual income of the business trust is virtually eliminated, and its tax liability drops accordingly.\textsuperscript{10}

Next, the equipment trust and the service trust transfer their income to another trust, which is established in a foreign country that imposes little or no income tax and has strong financial secrecy laws, i.e., a tax haven. This foreign trust subsequently distributes most or all of its income to a second foreign trust. Shortly thereafter, the second foreign trust opens a bank account and/or a securities-trading account in the tax haven and deposits the income. At the time the foreign accounts are opened, the taxpayer (often in the name of the second foreign trust) is issued a credit card. The funds located in the tax haven accounts earn tax-free interest, dividends and capital gains. When the taxpayer desires to access these offshore funds, she simply uses the credit card to withdraw cash or to make payments anywhere in the world. The records of such account activity are strictly maintained in the tax haven.\textsuperscript{11}

III. PROBLEM NUMBER ONE: CATCHING NON-COMPLIANT TAXPAYERS

The efforts by the U.S. government to identify abusive foreign tax schemes and taxpayers who participate in them have been laudable. For example, Congress has held at least four separate hearings in recent years to explore diverse aspects of abusive tax schemes.\textsuperscript{12} These hearings featured lengthy testimony and written submissions by a variety of persons, including officials from the U.S. Treasury Department and the IRS, taxpayers

\textsuperscript{10} Id.
\textsuperscript{11} Id.
who participated in abusive tax schemes, former scheme promoters, academics, and tax attorneys.\textsuperscript{13} Congress has further collaborated by examining during the last few years various legislative proposals addressing tax shelters.\textsuperscript{14} The titles of many of these bills, such as the Abusive Tax Shelter Shutdown and Taxpayer Accountability Act, leave little ambiguity as to their purpose.\textsuperscript{15}

Assorted governmental agencies such as the well-respected U.S. Government Accounting Office (GAO) have joined the cause by issuing reports analyzing the actions taken thus far to combat abusive tax schemes and identifying the challenges that still remain.\textsuperscript{16} For its part, the U.S. Treasury Department is in the process of reforming Circular 230, which contains the rules governing the practice of attorneys, accountants, enrolled agents, and others before the IRS.\textsuperscript{17} If all goes as planned, the revised Circular 230 will severely limit a taxpayer’s ability to avoid penalties for participating in certain tax schemes since all

\begin{itemize}
\item[\textsuperscript{13}] See, e.g.,\textit{ Who's Buying, Who's Selling?}, supra note 12; \textit{Schemes, Scams & Cons}, supra note 12; \textit{Looking Under the Roof}, supra note 12; \textit{Taxpayer Beware}, supra note 12.


\item[\textsuperscript{15}] See generally Abusive Tax Shelter Shutdown and Taxpayer Accountability Act (articulating Congressional goals of preventing abusive tax shelters).


\end{itemize}
tax practitioners will be required to disclose whether they have certain types of compensation arrangements or referral agreements with any person who is engaged in promoting, marketing or recommending a particular tax scheme.\textsuperscript{18}

The U.S. Department of Justice (DOJ) has also contributed by convincing courts to issue “John Doe” summonses to Visa International, American Express and MasterCard to acquire information regarding the identities and financial activities of U.S. taxpayers holding credit cards issued by banks in tax havens such as Antigua, Barbuda, the Bahamas, and the Cayman Islands.\textsuperscript{19} Displaying its characteristic tenacity, the DOJ next directed its attention toward businesses where taxpayers used offshore credit cards and persuaded federal courts to allow the DOJ to serve John Doe summonses on more than 100 businesses, including airlines, hotels, car rental companies, and Internet retailers.\textsuperscript{20} Further, the DOJ has initiated numerous legal actions to obtain lists of taxpayers who participated in potentially abusive tax schemes marketed by accountants,\textsuperscript{21} law firms,\textsuperscript{22} and banks.\textsuperscript{23} The DOJ has also taken considerable steps to halt those who promote abusive tax schemes.\textsuperscript{24} In terms of

\begin{itemize}
\item \textsuperscript{18} \textit{Id}. For a detailed description of a variety of efforts made by the U.S. Treasury Department to combat abusive tax practices, see \textit{Looking Under the Roof}, supra note 12 (statement of Mark A. Weinberger, Assistant Secretary of the Treasury for Tax Policy).
\item \textsuperscript{20} \textit{Id}.
\item \textsuperscript{23} \textit{See, e.g.}, Doe v. Wachovia Corp., 268 F. Supp. 2d 627 (W.D.N.C. 2003).
numbers, in 2003 the DOJ filed 35 lawsuits, 28 of which resulted in injunctions.\textsuperscript{25}

Other efforts to thwart abusive foreign tax schemes do not involve brandishing the tax-enforcement stick; rather, they offer cooperative taxpayers a carrot for their “voluntary” compliance. In particular, the IRS has recently introduced several tax-amnesty programs to induce non-compliant taxpayers to come forward in return for leniency from the IRS and the DOJ with respect to interest and penalties. Among these programs are the Offshore Voluntary Compliance Initiative,\textsuperscript{26} the Last Chance Compliance Initiative,\textsuperscript{27} and the Son of Boss Settlement Initiative.\textsuperscript{28}

Enlisting state tax authorities is another technique employed by the U.S. government to foil abusive tax schemes. In September 2003, the IRS and nearly all 50 states signed a Memorandum of Understanding aimed at detecting and penalizing U.S. taxpayers involved in abusive tax avoidance transactions (ATAT Partnership).\textsuperscript{29} Under the ATAT Partnership, the IRS and state tax authorities agreed to periodically exchange lists of participants in ATATs, share audit results from ATAT cases, inform one another regarding newly-discovered ATATs, jointly

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participate in ongoing ATAT training and other educational activities, appoint members to the cross-functional ATAT council, and initiate communications on an as-needed basis in order to facilitate the purposes of the ATAT Partnership. Based on the success of this federal-state alliance during the early stages, the IRS and the states expanded the ATAT Partnership in June 2004 by introducing three new joint initiatives: (i) the State Income Tax Reverse Filing Match, under which the IRS will compare the information provided by taxpayers on state income tax returns with federal data to identify non-filers and those taxpayers underreporting their income; (ii) the Federal-State Offshore Payment Card Matching Initiative, which contemplates increased use of state databases by the IRS to identify taxpayers who have participated in offshore credit/debit card abuses; and (iii) the Title 31 Money Servicing Businesses Memorandum of Understanding that establishes a framework for the federal-state information exchange to increase compliance by particular businesses in the financial services industry.

In addition to acquiring the help of state tax authorities, the U.S. government has also procured assistance from other nations in its quest to eradicate abusive foreign tax schemes. Since 2001, the U.S. Treasury Department has entered into tax information exchange agreements with the Cayman Islands, Antigua and Barbuda, the Bahamas, the British Virgin Islands, the Netherlands Antilles, Guernsey, the Isle of Man, and Jersey. In addition, the United States recently entered into an agreement with Switzerland under the existing bilateral income tax treaty to facilitate a more effective exchange of tax-related data between the two nations. The United States is also in the

30. See IRS SB/SE Releases Memo of Understanding on Abusive Transactions, supra note 29.
process of negotiating tax information exchange agreements with several other nations, including Belize, El Salvador, Nicaragua and Panama.34

Finally, adhering to the time-honored theory that an ounce of prevention is worth a pound of cure, the IRS has recently released several publications designed to inform taxpayers of the nefarious nature of certain tax schemes. Among these publications are “Should Your Financial Portfolio Include Too-Good-to-be-True Trusts?,”35 “Is It Too Good to Be True? Recognizing Illegal Tax Avoidance Schemes,”36 and “Do You Have a Foreign Bank Account?”37

Despite these efforts, the U.S. government has encountered significant difficulties in reaching one of its primary goals in the tax arena; simply stated, the relevant authorities have discovered that catching non-compliant taxpayers is extremely challenging. According to a study by the General Accounting Office (GAO), the IRS recently estimated that approximately 740,000 taxpayers had participated in various abusive tax-avoidance schemes which resulted in a loss to the U.S. government of between $20 billion and $40 billion in tax revenue.38 A separate report by the U.S. Treasury Department suggests that participation may even be more widespread. Indeed, it calculates that as many as one million taxpayers have unreported foreign bank accounts.39

The current situation is troubling and several factors indicate that it may get worse. For instance, the situation is exacerbated by the fact that abusive tax schemes are constantly evolv-

39. U.S. Treasury Dep’t, A Report to Congress in Accordance with §361(b) of the USA Patriot Act, 2002 TAX NOTES TODAY, April 26, 2002, at 84.
ing. In the words of one IRS official, “scheme promoters try to stay in the business of tax avoidance; when one type of scheme is discovered and addressed, another scheme will take its place.” The task of catching those taxpayers involved in abusive foreign tax schemes is also hindered because the IRS has experienced troubles allocating its limited resources. A recent GAO study recognizes that the IRS has begun to shift its resources to address abusive tax schemes, but warns that “how future resources will actually be used remains to be seen [and] the future volume of cases [the] IRS will need to examine and the rate at which [the] IRS will be able to close examinations are unclear.” Others are more alarmist and claim that “tax legislation, globalization, financial innovation, and budgetary parsimony have combined” to create a “crisis in tax administration.”

IV. PROBLEM NUMBER TWO: CATCHING NON-COMPLIANT TAXPAYERS IN TIME

The preceding section establishes that, in spite of the commendable efforts by diverse segments of the U.S. government, catching taxpayers involved in abusive tax schemes has proven to be enormously challenging. Much has been written on this difficulty and it needs no further elaboration here. However, legal analysis of a related problem is surprisingly scarce. Few articles or cases address an issue that is inextricably related to the first; that is, even if the IRS manages to catch a non-compliant taxpayer, can it do so in time to assess the tax? As explained in detail below, this is a formidable task in the case of modern tax-avoidance schemes that involve submitting to the IRS numerous tax and information returns regarding multi-layer entities engaged in multi-party transactions in an attempt to obfuscate the true source, amount and/or owner of the income.

41. Id. at 19.
42. THE CRISIS IN TAX ADMINISTRATION 2, supra note 3, at 2.
2005] ONLY TIME WILL TELL 463

A. The Statute of Limitations for Assessing Tax

Section 6501(a) provides the general rule that the IRS has three years from the date that a taxpayer files a return to assess a tax related to that return. 44 If the IRS reviews a return and believes that the taxpayer owes additional amounts, then it ordinarily “assesses” the tax by issuing a notice of deficiency to the taxpayer. There are several exceptions to the general three-year rule. For example, Section 6501(e)(1)(A) provides that if a taxpayer “omits” from gross income an amount that should have been included and the amount “omitted” exceeds 25 percent of gross income that the taxpayer actually reported on her tax return, then the IRS may assess tax at any time within six years after the taxpayer files the return. 45 In other words, if there is a “substantial omission” of gross income from the tax return, then the time frame during which the IRS may assess tax increases from three years to six years. A key issue, therefore, is whether income is “omitted.”

The amount of income a taxpayer omitted under Section 6501(e)(1)(A)(ii) does not include the amount that is disclosed either on the tax return itself or in a statement attached to the return in a manner that is “adequate to apprise the [IRS] of the nature and amount of such item.” 46 Likewise, regulations under Section 6501 provide that an item of income shall not be considered omitted if information that is “sufficient to apprise the [IRS] of the nature and amount of such item is disclosed in the return or in any schedule or statement attached to the return.” 47

In summary, if the taxpayer adequately discloses particular items of income to the IRS either directly on her tax return or on any schedule or statement attached to the tax return, then the taxpayer has not “omitted” such income. It follows that if the taxpayer has not “omitted” these items from gross income, then the six-year assessment period under Section 6501(e) does

44. Unless otherwise stated, all references in this article to “Section” are to the Internal Revenue Code of 1986, as amended. Section 6501(a) clarifies that the tax must be assessed within three years after the taxpayer files the return, regardless of whether the return was filed on or after the filing deadline. I.R.C. § 6501(a) (2000).
45. Section 61(a) generally defines the term “gross income” as “all income from whatever source derived.” I.R.C. § 61(a).
46. § 6501(e)(1)(A)(ii).
not apply, and the IRS must assess tax by issuing a notice of
deficiency within three years after the taxpayer files her tax
return. If the IRS fails to do so, it may permanently lose the
opportunity to collect this tax revenue.\(^\text{48}\) The magnitude of this
matter has not escaped certain tax practitioners, who explain
that

\[\text{[t]he significance of the SOL [statute of limitations] as an is-
\text{suue cannot be overemphasized. It may provide a complete and}
total victory to the taxpayer if the IRS violates it. Its import-
tance is evident by the fact that it can be raised at any time}
\text{prior to . . . a decision on the merits in a litigated case. Conse-
\text{quently, one should consider the SOL's applicability in each}
\text{and every case.}\(^\text{49}\)\]

\(\text{B. Judicial Interpretation of Adequate Disclosure}\)

Whether a taxpayer’s disclosure is adequate has been ad-
dressed in numerous cases and certain general standards have
developed. The following sections address these standards.

1. The Taxpayer Must Give the IRS a “Sufficient Clue”

In \textit{Colony v. Commissioner},\(^\text{50}\) the sole issue was whether the
ordinary three-year statute of limitations or the five-year stat-
ute of limitations applied under Section 275(c) (the predecessor
to Section 6501(e)).\(^\text{51}\) In reaching its decision, the court made
the following statement, which has become the benchmark in
cases applying Section 6501(e):

\[\text{48. Under Section 6501(c)(1), the IRS may assess tax at any time (i.e.,}
\text{there is no statute of limitations) where a taxpayer submits a “false or fraudu-
\text{lent” return with the “intent to evade tax.” I.R.C. § 6501(c)(1). Likewise, Sec-
\text{tion 6501(c)(2) provides that the IRS may assess tax at any time in the case of}
a “willful attempt in any manner to defeat or evade tax.” I.R.C. § 6501(c)(2).}
\text{From a practical point of view, meeting the civil fraud or tax evasion exception}
is often difficult for the IRS since it must prove that the taxpayer intended to
engage in tax evasion. Meeting this standard may entail the challenging task
of providing sufficient evidence to demonstrate that a taxpayer acted in “bad
faith” and with a “sinister motive.” See, e.g., Payne v. Commissioner, 224 F.3d}
\text{49. EFFECTIVELY REPRESENTING YOUR CLIENT BEFORE THE “NEW” IRS 1240}
\text{50. See generally Colony v. Commissioner, 357 U.S. 28 (1958) (court articulated “sufficient clue” requirement for Section 6501(e)).}
\text{51. See id.}\]
We think that in enacting § 275(c) Congress manifested no broader purpose than to give the [IRS] an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the [IRS] is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item.\(^{52}\)

This “clue” standard was subsequently refined in *Quick Trust v. Commissioner*,\(^{53}\) where the court found that the taxpayer had adequately disclosed a particular item of income to the IRS, explaining that

> [t]he touchstone in cases of this type is whether [the IRS] has been furnished with a “clue” to the existence of the error. Concededly, this does not mean simply a “clue” which would be sufficient to intrigue a Sherlock Holmes. But neither does it mean a detailed revelation of each and every underlying fact.\(^{54}\)

2. The Taxpayer Must Not Be Stingy or Misleading

Satisfying *Colony* and *Quick Trust* may appear relatively undemanding at first glance; however, courts have clarified that supplying a sufficient “clue” requires the taxpayer to exhibit a certain degree of forthrightness.

*Estate of Fry v. Commissioner*\(^{55}\) addressed whether the information provided in Schedule D to the taxpayers’ Form 1040 apprised the IRS of the nature and amount of an item of income. The taxpayers’ Schedule D, on which a taxpayer reports her capital gains and losses, showed that the taxpayer received $150,000 in a transaction described as “a sale.” Based on this description, the court held that a reasonable IRS examiner would have assumed that the payment in question was made in cash and that the transaction involved a sale of stock to an un-

\(^{52}\) Id. at 36–37 (emphasis added). But see CC&F Western Operations v. Comm'r, 273 F.3d 402 (2001) (criticizing the broad interpretation of Colony in several U.S. Tax Court decisions).


\(^{54}\) Id. at 1347 (citations omitted).

\(^{55}\) See generally *Estate of Fry v. Commissioner*, 88 T.C. 1020 (1987) (court held that taxpayer’s description of transaction as cash sale on Schedule D was materially misleading).
related party. Schedule D failed to show that the transaction actually involved the exchange of stock for property (rather than for cash) and that it was a stock redemption (rather than a stock sale). The court stated that any transaction between a closely-held corporation and one of its shareholders necessitates special scrutiny. Moreover, explained the court, a stock redemption may require determining which amounts constitute “dividends” and may involve the stock attribution rules. As a result, the court held that the taxpayer’s description of the transaction on Schedule D as a cash sale, presumably to an unrelated party, was “materially misleading” and insufficient disclosure for purposes of Section 6501(e).

The courts also demanded a certain degree of candor from taxpayers in earlier cases. For instance, in Thomas v. Commissioner, the taxpayers were waiters and waitresses who failed to maintain formal records regarding their tip income. After auditing their tax returns for the 1963-1965 tax years, the IRS issued a notice of deficiency in March 1970. The taxpayers argued that the tax assessment was barred because the three-year limit under Section 6501(a) had expired. The IRS, on the other hand, argued that the notice of deficiency was timely because the six-year limit under Section 6501(e) governed. The taxpayers argued that (i) they described their occupations as waiters/waitresses on their Forms 1040, (ii) they reported their tips in “round figures,” and (iii) it was common knowledge that tip income was frequently understated. The court summarily dismissed the taxpayers’ arguments, labeling them “too slim a justification.” As for the contention that there is adequate disclosure if merely the type (and not the amount) of income is re-

56. Id. at 1023.
57. Id.
58. Id.
59. Id.
60. Id.
61. See generally Thomas v. Commissioner, T.C.M. (P-H) 1973–261 (court declined to include description of type of income within adequate disclosure required by Section 6501).
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
vealed on Form 1040, the court explained that accepting this position would “emasculate” Section 6501, and thus refused to do so.\(^{67}\)

3. The Taxpayer Cannot Solely Rely on Disclosures by Others

In addition to determining that taxpayers who are miserly or misleading in their disclosures are not entitled to benefit from the shorter three-year limit under Section 6501(a), the courts have held that a taxpayer cannot depend entirely on disclosures made by third parties.

In *Hess v. United States*,\(^ {68}\) the taxpayers timely filed Forms 1040 for the 1983 and 1984 tax years and left most lines blank or stating “$0.” The IRS later determined that the taxpayers’ gross income was approximately $56,000 in 1983 and $64,000 in 1984.\(^ {69}\) Therefore, the IRS issued a notice of deficiency in June 1988, more than three years after the taxpayers filed the relevant returns.\(^ {70}\) The taxpayers argued that the IRS notice was untimely because the three-year period under Section 6501(a) had expired.\(^ {71}\) The IRS, not surprisingly, claimed that the assessment period remained open because the six-year period under Section 6501(e) applied.\(^ {72}\)

The court recognized that the taxpayers presented the “rather ingenious argument” that a tax return should consist not only of Form 1040 and the schedules attached thereto, but also of all the information provided by others “on behalf of, or with respect to” a taxpayer.\(^ {73}\) Under Section 6103(b)(1), the term “return” is defined as “any tax or information return . . . which is filed with the [IRS] by, or on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return.”\(^ {74}\) Following this logic, the taxpayers

\(^{67}\) *Id.*

\(^{68}\) See generally *Hess v. United States*, 785 F. Supp. 137 (E.D. Wash. 1991) (court declined to expand Section 6501’s definition of “return” to include information provided by others on behalf of taxpayers).

\(^{69}\) *Id.* at 138.

\(^{70}\) *Id.*

\(^{71}\) *Id.*

\(^{72}\) *Id.*

\(^{73}\) *Id.* at 139.

\(^{74}\) 26 U.S.C.A. §6103(b)(1).
claimed that Form W-2 (which an employer is required to provide to the IRS annually to report the wages it paid to, and the taxes it withheld from, each of its employees), Form 1099 (which certain institutions are required to provide to the IRS annually to report the interest, dividends, etc. earned by each of their investors), and other information-returns all become part of the taxpayers’ return.\(^{75}\) Since the taxpayers’ employers filed the necessary Forms W-2 and their banks filed the mandatory Forms 1099, the taxpayers maintained that the IRS had been given “adequate disclosure.”\(^{76}\)

The court rejected the taxpayers’ argument and declined to apply Section 6103. In particular, the court explained that the prefatory language in Section 6103(b)(1) clearly states that the definition of “return” set forth therein is for purposes of Section 6103 only.\(^{77}\) The court concluded that if it were to hold otherwise “no one would ever be required to file a return at all so long as employers and banks submitted information returns on the taxpayer’s behalf.”\(^{78}\)

A few years later, the U.S. Tax Court again recognized the principle that a taxpayer cannot depend entirely on disclosures about the taxpayer made by third parties. In *Edelson v. Commissioner*,\(^{79}\) the taxpayer and her husband lived in California, which is a community property state.\(^{80}\) The husband was a longstanding tax protester, as a result of which the IRS maintained special files on him.\(^{81}\) During the tax years at issue, the taxpayer timely filed her Form 1040, but she failed to report her share of the community income earned by her husband.\(^{82}\) For each year in question, the amount that the taxpayer omitted from her Form 1040 far exceeded 25 percent of gross income.

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75. See Hess, 785 F. Supp. at 139.
76. Id. at 137.
77. §6103(b)(1).
78. Hess, 785 F. Supp. at 139.
79. See generally Edelson v. Commissioner, 66 T.C.M. (CCH) 1210 (1993) (court held that Section 6501 requires taxpayers to disclose on tax returns or attached statements).
81. Edelson, 66 T.C.M. 1210.
82. Id.
that she actually reported.\textsuperscript{83} The IRS issued a notice of deficiency.\textsuperscript{84} The taxpayer argued that the notice of deficiency was invalid since it was issued more than three years after she submitted her Form 1040.\textsuperscript{85} The taxpayer contended, in essence, that the three-year limit under Section 6501(a) should apply because the IRS already had in its possession information related to her husband’s income.\textsuperscript{86} Specifically, she emphasized the fact that the IRS maintained special files concerning her husband due to his tax-protestor status and received Forms W-2 from her husband’s employer reporting his income.\textsuperscript{87} The court quickly rebuffed the taxpayer’s assertion by explaining that Section 6501 and its corresponding regulations require that the disclosure be made on the tax return itself or on a statement attached to the return.\textsuperscript{88} The court concluded that “[t]he possibility or even the fact that information may have been furnished to [the IRS] in connection with other returns is not enough to comply with these explicit requirements.”\textsuperscript{89}

4. The Taxpayer Cannot Benefit from the Toil of the IRS

Logic dictates that if the courts are unwilling to allow a taxpayer to rely on the efforts of third parties to satisfy the disclosure requirement in Section 6501(e), then they would be loath to allow a taxpayer to benefit from the labors of the IRS. This principle has been verified in several cases, among them \textit{Insulglass v. Commissioner}.\textsuperscript{90} In this case, the taxpayers omitted substantial amounts of income from their Forms 1040 for the 1976 and 1977 tax years.\textsuperscript{91} The IRS initiated an audit of the taxpayers and discovered these omissions before the three-year

\begin{itemize}
  \item[83.] \textit{Id}.
  \item[84.] \textit{Id}.
  \item[85.] \textit{Id}.
  \item[86.] \textit{Id}.
  \item[87.] \textit{Id}.
  \item[88.] \textit{Id}.
  \item[89.] \textit{Id}.
  \item[90.] \textit{See generally} \textit{Insulglass v. Commissioner}, 84 T.C. 203 (1985) (court held that Section 6501 expressly refers to amount disclosed in return or statement attached to return).
  \item[91.] \textit{Id} at 205.
\end{itemize}
limit under Section 6501(a) had expired.\textsuperscript{92} These discoveries notwithstanding, the IRS did not issue a notice of deficiency until April 2003, nearly six years after the taxpayers had filed Form 1040 for the 1976 tax year.\textsuperscript{93}

In their defense, the taxpayers contended that the six-year limit was inapplicable because the rationale behind enacting Section 6501(e) was to give the IRS additional time to investigate tax returns in situations where a taxpayer's omission places the IRS at a disadvantage in detecting errors.\textsuperscript{94} Since the IRS discovered the substantial omissions during an audit before the three-year limit had expired, the taxpayers claimed that the IRS was not placed at a disadvantage and thus did not need an additional three-year period to assess the tax.\textsuperscript{95} Noting the fact that the taxpayers failed to cite any cases in support of their position, the court reviewed the language of Section 6501(e) and concluded that it expressly refers to an amount disclosed in the return or in a statement attached to the return.\textsuperscript{96} It does not, held the court, mention the knowledge of omitted income that an IRS agent obtains during an audit.\textsuperscript{97}

5. Individual Returns Considered Together with Other Returns

As explained above, flow-through entities are not taxable entities; rather, they serve as conduits through which their income, gains, losses, deductions, etc. pass directly through to their owners.\textsuperscript{98} Each owner then reports her share of the entity's income on her individual tax return (i.e., Form 1040) and is taxed accordingly.\textsuperscript{99} As flow-through entities, partnerships, S corporations and trusts generally pass any income that they earn directly through to their owners, that is, to the partners,

\textsuperscript{92} Id. at 206.  
\textsuperscript{93} Id.  
\textsuperscript{94} Id.  
\textsuperscript{95} Id. at 207.  
\textsuperscript{96} Id.  
\textsuperscript{97} Id.  
\textsuperscript{99} Id. \textit{See also} \textit{ABUSIVE TRUST TAX EVASION SCHEMES: FACTS (SECTION II)} [hereinafter \textit{ABUSIVE TRUST TAX EVASION SCHEMES II}], \textit{available at} http://www.irs.gov/businesses/small/article/0,,id+106538,00.html (last visited Feb. 17, 2005).
the shareholders, or the beneficiaries, as the case may be.\textsuperscript{100} Although these entities are not taxed, they are required to comply with certain IRS filing requirements: a partnership files Form 1065 (U.S. Return of Partnership Income), an S corporation files Form 1120-S (U.S. Income Tax Return for an S Corporation), and a trust files Form 1041 (U.S. Income Tax Return for Estates and Trusts).\textsuperscript{101} Among other things, each of these three forms must describe any income that flowed from the entity to the owner.\textsuperscript{102} In this manner, the IRS is able to cross-check the amounts reported (as income received) by the owners of the entities on their Forms 1040 with the amounts reported (as income distributed or allocated) by the entities on their Form 1065, Form 1120-S or Form 1041.

Having a basic understanding of flow-through entities and the relevant IRS forms is important in grasping the significance of the following cases where the courts have been amenable to considering the tax returns of the owners along with the returns of the entities in deciding whether the taxpayer/owner omitted income for purposes of Section 6501(e).

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\textsuperscript{100} “S Corporations” are incorporated entities whose shareholders file an election with the IRS to be taxed primarily under Subchapter S of Chapter 1 of the Internal Revenue Code (i.e., Sections 1361 to 1379), as opposed to under the normal rules in Subchapter C. For a corporation to be eligible to make an “S” election, it must qualify as a “small business corporation.” This means that (i) it must be a domestic corporation, (ii) it must have a limited number of shareholders, (iii) all of the shareholders must be individuals, estates, trusts and/or certain tax-exempt organizations, (iv) none of the shareholders may be nonresident aliens, (v) it has only one class of stock, and (vi) it is not one of several “ineligible corporations.” The main tax effect of making an “S” election is that the corporation’s income, deductions, gains and losses are generally not subject to tax at the entity level. Rather, these items pass through to the shareholders of the S Corporation, who each report their share of these items on their individual income tax returns, i.e., Forms 1040. See \textsc{Leandra Lederman}, \textit{Understanding Corporate Taxation} 179–98 (2002).

\textsuperscript{101} See, e.g., Instructions for Form 1065, available at http://www.irs.gov/instructions/i1065/ch01.html#d0e216 (last visited Feb. 17, 2005). See also \textsc{Abusive Trust Tax Evasion Schemes II}, \textit{supra} note 99, at 1.

\textsuperscript{102} See, e.g., Instructions for Form 1065, \textit{supra} note 101 (“Form 1065 is an information return used to report the income, deductions, gains, losses, etc., from the operation of a partnership. A partnership does not pay tax on its income but “passes through” any profits or losses to its partners. Partners must include partnership items on their tax returns.”).
a. Individual Returns and Partnership Returns

On several occasions courts have considered Forms 1040 and Forms 1065 together in determining whether the taxpayer, who is a partner in a partnership, made an adequate disclosure under Section 6501(e) of partnership income.

In *Rose v. Commissioner*, the taxpayers received a notice of deficiency more than three years after they filed their Form 1040 for the tax year at issue. The IRS argued that the appropriate statute of limitations was five years under the predecessor to Section 6501(e). The taxpayers, on the other hand, contended that the general three-year statute of limitations was applicable because their Forms 1040 suggested the existence of a partnership return, which, in turn, disclosed the relevant income.

The taxpayers operated two clothing stores, one of which was located in Ventura, California. The court found that the Ventura store was part of the taxpayers’ community property and that any income derived from the Ventura store was therefore community income. Accordingly, each of the taxpayers should have reported one-half of the income from the Ventura store on his or her respective Form 1040. Forms 1065 were filed for the Ventura store for the relevant tax years. Each year, one-half of the income reported on the Ventura store’s Form 1065 was transferred to each of the taxpayers’ Form 1040. Specifically, each Form 1040 expressly reported certain “Income from partnerships.” It later turned out that the Ventura store was not actually operating as a partnership.

103. *See generally Rose v. Commissioner*, 24 T.C. 755 (1955) (IRS attempt to assess tax barred by statute of limitations because one-half of gross income in Form 1065 should have been imputed to Form 1040).
104. *Id.* at 767.
105. *Id.* at 768.
106. *Id.* at 771.
107. *Id.* at 768.
108. *Id.*
109. *Id.* at 769.
110. *Id.*
111. *Id.* at 759.
112. *Id.* at 768.
The IRS argued that the taxpayers had omitted from their Forms 1040 the income derived from the Ventura store. Rejecting this argument, the court held that “we think it is unrealistic to say that the [taxpayers] did not report the gross income from the Ventura store” because they did so on Form 1065. Although no partnership actually existed with respect to the Ventura store, the taxpayers filed Form 1065 for the relevant tax years pursuant to the suggestion of an IRS agent, who informed the taxpayers (albeit incorrectly) that filing Form 1065 would facilitate reporting community income from the Ventura store.

Based on this, the court held that “the so-called partnership return filed for the Ventura store was merely an adjunct to the individual returns of [the taxpayers] and must be considered together with such individual returns and treated as part of them.” Thus, one-half of the gross income appearing in Form 1065 for the Ventura store should have been imputed to the Form 1040 filed by each of the taxpayers in determining the amount of gross income omitted. The court found that when it considered jointly the Ventura store’s Form 1065 and the taxpayers’ Forms 1040 the amount of income omitted was not in excess of 25 percent of the gross income reported. The court therefore held that the IRS’s attempt to assess tax was barred by the three-year statute of limitations.

The courts have reached similar results in several other cases. More importantly, the courts have recently extended

113. *Id.* at 769.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 770.
120. See, e.g., Estate of Klein v. Commissioner, 537 F.2d 701 (2d Cir. 1976) (“Congress could not have intended that the statute of limitations be extended against a taxpayer when that taxpayer has properly reported all of his items of gross income [yet] that would be the technical result if the partnership return were to be isolated from examination in determining what gross income was 'disclosed' in the partner's return for the purposes of § 6501(e)(1)(A)(ii).”); Davenport v. Commissioner, 48 T.C. 921 (1967) (“[T]his court has recognized that a partnership return is to be considered together with an individual return in determining the total gross income stated in the individual return for the purpose of determining whether the 6-year statute of limitations is appli-
Rose to situations involving not just one partnership, but rather multi-layer partnerships. In Harlan v. Commissioner, the taxpayers were two couples, the Harlans and the Ockels. The Harlans filed their joint Form 1040 for the 1985 tax year in August 1986. The IRS issued a notice of deficiency to the Harlans regarding the 1985 tax year in June 1992, which was more than three, but fewer than six, years after the Harlans filed their Form 1040.

The Harlans' Form 1040 showed an ordinary loss from several partnerships, which were all identified by name, address, and tax identification number (TIN). During the 1985 tax year, Mr. Harlan was a partner in two multiple-tier partnerships, namely Pacific Real Estate Investors Partnership (Pacific) and Carlyle Real Estate Limited Partnership VI (Carlyle). Pacific was a partner in another partnership. Pacific's Form 1065 showed an ordinary loss from the partnership in which it was a partner, and identified this partnership by name and TIN. Carlyle was a partner in four other partnerships. Carlyle's Form 1065 for the 1985 tax year showed ordinary income from the four partnerships, and identified each partnership by name and TIN.

121. See generally Harlan v. Commissioner, 116 T.C. 31 (2001) (court held that it must consider other forms, schedules, and statements attached to Form 1065 of first-tier partnerships to determine gross income). The parties to this case agreed that, although the issue raised in this case has existed since 1934 when the predecessor to Section 6501(e) was enacted, this is a matter of first impression. Id. at 39.
122. Id. at 33.
123. Id.
124. Id. at 34.
125. Id.
126. Id.
127. Id.
128. Id.
129. Id.
The Ockels’ Form 1040 for the 1985 tax year showed ordinary income from several partnerships identified by name and TIN. During the 1985 tax year, Mr. Ockels was a partner in one multiple-tier partnership, Mission Resources Development Drilling Program – Belridge II (Mission). Mission was a partner in another partnership. Mission’s Form 1065 showed ordinary income from the other partnership, which it identified by name.

The IRS argued that the six-year statute of limitations under Section 6501(e) was applicable because the Harlans and the Ockels omitted from their gross incomes more than 25 percent of the amount of gross income reported. The Harlans and Ockels countered that the normal three-year statute of limitations under Section 6501(a) applied because (i) their Forms 1040 should be treated as having disclosed their shares of gross income that were disclosed on the Forms 1065 of Pacific, Carlyle, and Mission (i.e., the first-tier partnerships) and, (ii) the Forms 1065 of Pacific, Carlyle and Mission should be treated as having disclosed their shares of gross income that were disclosed in the Forms 1065 of the partnerships in which they were partners (i.e., the second-tier partnerships).

The court explained that although the key term in Section 6501(e)(1)(A) is “gross income,” a taxpayer does not state this amount anywhere on her Form 1040. Instead, one must review various schedules and statements attached to a taxpayer’s Form 1040 to identify the components of gross income. The court then explained that

[i]t has long been accepted that, for these purposes, the information return of the taxpayer's properly identified 1st-tier partnership is treated as part of the taxpayer's tax return. But the 1st-tier partnership’s information return suffers from the same “defect” in that we must look through the various forms, etc., attached to the 1st-tier partnership's information

130. Id. at 35.
131. Id.
132. Id. at 36.
133. Id. at 37.
134. Id.
135. Id. at 37–38.
136. Id. at 38.
137. Id.
return in order to identify the components of gross income that
must be added together in order to determine the total amount
of gross income stated in the 1st-tier partnership's information
return. Every explanation that has been drawn to our atten-
tion, or that we have discovered, as to why we must treat the
properly identified 1st-tier partnership's information return as
part of the taxpayer's tax return applies with equal force to
treating the properly identified 2d-tier partnership's informa-
tion return as part of the 1st-tier partnership's information re-
turn. 138

The court explained that Forms 1065 for the first-tier part-
nerships for the 1985 tax year did not provide for disclosure of
gross income. 139 Forms 1065 contained a line for total income,
but several components of this amount were net figures. 140 In
such situations, the court said that it must consider other
forms, schedules, and statements that are attached to the
Forms 1065 of the first-tier partnerships in order to determine
the amount of gross income. 141 This amount, in turn, is neces-
sary to determine the amount of a partner's gross income on
Form 1040. 142 Continuing this analysis, the court explained that
if the first-tier partnerships' Forms 1065 disclose net income
from a second-tier partnership, then the court should consider
the second-tier partnership's Form 1065 as merely another
document that is an adjunct to, and part of, the partner's Form
1040. 143

b. Individual Returns and S Corporation Returns

Just as the courts have recognized the appropriateness of
viewing a partner's Form 1040 in conjunction with the partner-
ship's Form 1065, they have also accepted the need to consider
together a shareholder's Form 1040 and the S corporation's
Form 1120-S.

The taxpayers in Roschuni v. Commissioner 144 were share-
holders in an S corporation (Gilbert Hotel). In 1958, Gilbert

138. Id. at 37–38 (emphasis added).
139. Id. at 38.
140. Id.
141. Id.
142. Id. at 56.
143. Id. at 56–57.
144. See Roschuni v. Commissioner, 44 T.C. 80, 81 (1965).
Hotel was sold, which generated significant capital gains. Gilbert Hotel duly filed Form 1120-S for the 1958 tax year and disclosed in a statement attached thereto all the data concerning the sale, including the selling price, adjusted basis for determining gain or loss, expenses, profit, and mortgages assumed by the buyer.\footnote{145} Lest there be any ambiguity, the statement was entitled “COMPUTATIONS FOR INSTALLMENT REPORTING OF GAIN ON SALE OF [GILBERT] HOTEL.”\footnote{146} The taxpayers duly filed Form 1040 for the 1958 tax year.\footnote{147} In Schedule D to Form 1040, the taxpayers reported the capital gain from the property sale and stated “See – Gilbert Hotel, Inc. (Schedule D, Form 1120-S), $34,190.00”\footnote{148} Claiming that the taxpayers had underpaid their taxes, the IRS issued a notice of deficiency for the 1958 tax year. Since this notice was issued more than three years after the taxpayers’ Form 1040 was filed, the taxpayers alleged that the proposed assessment was barred by the three-year statute of limitations under Section 6501(a).\footnote{149} The IRS, for its part, argued that the six-year statute of limitations under Section 6501(e)(1)(A) applied because there was a substantial omission from gross income.\footnote{150}

The court held that the Schedule D of the taxpayers’ Form 1040, together with the statement attached to Gilbert Hotel’s Form 1120-S, were adequate to apprise the IRS of the nature and amount of the income.\footnote{151} In reaching this conclusion, the court explained that

\begin{quote}
the so-called omitted amount is due entirely to including the gain from the sale of [the property] on a completed basis rather than on the installment basis. All the facts for either basis were shown “in a statement attached to the return” filed by [Gilbert Hotel] and incorporated by reference in [the taxpayers’] individual return.\footnote{152}
\end{quote}
A similar conclusion was reached in *Benderoff v. United States*. In this case, the taxpayers were shareholders in an S corporation (Benderoff Company), whose taxable year ended on March 31. In May 1959, the Benderoff Company made a distribution of cash to the taxpayers in the amount of $45,207. The trial court held that the taxpayers should be taxed on this cash distribution. However, since the IRS did not attempt to assess this tax until April 1964, the taxpayers claimed that the IRS was prohibited from doing so because the three-year limit under Section 6501(a) had elapsed. The IRS countered that the six-year limit under Section 6501(e) applied since the cash distribution made in May 1959 was not adequately disclosed.

One of the schedules attached to the taxpayers’ Forms 1040 stated the following: “tax option corporation – V.C. Benderoff Co. Inc.,” followed by the proper amount of their share of undistributed income from the Benderoff Company. The balance sheet attached to the Benderoff Company’s Form 1120-S for the taxable year ended March 31, 1959 showed $45,207 of undistributed taxable income, which was precisely the amount of cash distributed to the taxpayers in May 1959. The balance sheet attached to Form 1120-S for the following year (i.e., that ending March 31, 1960) showed $45,207 of undistributed taxable income at the beginning of the year and $49,782 at the end of the year. The $49,782 amount was also shown on directly on the Benderoff Company’s Form 1120-S as “taxable income.”

Based on these disclosures, the court held that it should have been “obvious to a competent examiner” that the only undistributed income that the Benderoff Company had on hand at the end of the tax year ending March 31, 1960 was the income

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153. *See generally* *Benderoff v. United States*, 398 F.2d 132 (8th Cir. 1968) (court held that taxpayers’ Forms 1040, supplemented by Form 1120-S and attached balance sheet, provided the IRS with an adequate clue).
154. *Id.* at 134.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 137.
161. *Id.*
162. *Id.*
that the corporation earned during that year. Indeed, explained the court, if there was neither an actual distribution of cash to the taxpayers nor an allocation of undistributed income to the taxpayers, then the balance sheet attached to Form 1120-S would have shown the $45,207 on hand at the beginning of the year, plus the $49,782 of undistributed income earned during the year, for a total of $94,990. This was not the case. In holding that the taxpayers’ Forms 1040, supplemented by the Benderoff Company’s Form 1120-S and the attached balance sheet, provided the IRS with an adequate clue, the court explained that:

[t]he clue provided by the undistributed taxable income item was there for the [IRS] to observe, heed and investigate and a reasonable follow-up on such clue would have confirmed the fact that a distribution had been made of undistributed taxable income in the same manner that such fact was established in the belated investigation.

While Roschuni and Benderoff demonstrate courts’ willingness to concurrently examine Forms 1040 and Forms 1120-S in determining the amount of gross income disclosed by a taxpayer, these holdings have been limited by later cases. For example, in Taylor v. United States, the taxpayers timely filed a Form 1040 for the 1961 tax year reporting as income only the wages that they received from working as teachers. One of the taxpayers owned 25 percent of the stock of an S corporation (Huxford). During the tax year at issue, Huxford earned $100,000 of income, which it properly reported on its Form 1120-S. The taxpayers mistakenly believed that the distributions from Huxford were not reportable as gross income on their Form 1040. Accordingly, their Form 1040 contained no reference to Huxford or the income received from Huxford.

The IRS argued that it was given neither an indication of the existence, nature, or amount of the omitted income nor a refer-

163. Id.
164. Id.
165. Id.
166. See Taylor v. United States, 417 F.2d 991, 992 (5th Cir. 1969).
167. Id. at 992.
168. Id.
169. Id. at 993.
ence to any other source of such information.\textsuperscript{170} In response, the taxpayers argued that the information necessary to determine their tax liability was contained in Huxford’s Form 1120-S; therefore, there was adequate disclosure.\textsuperscript{171} In rejecting the taxpayers’ argument, the court stated that the “obvious flaw” in that theory was that the Forms 1040 did not refer to Huxford or to Huxford’s Form 1120-S.\textsuperscript{172} According to the court, since the taxpayers’ Form 1040 contained “no suggestion or inference that relevant information may have been contained elsewhere, it cannot be seriously contended that the ‘adequate disclosure’ referred to in section 6501(e)(1)(A)(ii) was made.”\textsuperscript{173}

c. Individual Returns and Trust Returns

In an attempt to build on the decisions in earlier cases involving partnerships and S corporations, taxpayers have urged the IRS to examine jointly a beneficiary’s Form 1040 and a trust’s Form 1041 in deciding whether there was adequate disclosure under Section 6501(e). Although the decisions have been largely unfavorable to taxpayers in these scenarios, they demonstrate that courts are willing to consider the argument.

In \textit{Sampson v. Commissioner},\textsuperscript{174} the taxpayers were husband and wife. During the tax years at issue, the husband provided medical services through a corporation (Corporation).\textsuperscript{175} In April 1975, the wife, as the grantor, executed a trust agreement to create a so-called pure equity trust (Trust).\textsuperscript{176} The husband, the wife and their two children served as both the trustees and beneficiaries of the Trust during the relevant tax years.\textsuperscript{177} Later

\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.} at 994.
\textsuperscript{172} \textit{Id.} at 993.
\textsuperscript{173} \textit{Id.} at 994. \textit{See also} Reuter v. Commissioner of Internal Revenue, 51 T.C.M. (CCH) 99 (1985) (holding that “the receipt of a Form W-2 from [the taxpayer], reporting wages paid, from a corporation, without more, does not provide a sufficient clue to the existence of an omission from income.”).
\textsuperscript{174} \textit{See generally} Sampson v. Commissioner, 51 T.C.M. (CCH) 1148 (1986) (court held that IRS did not have sufficient clue concerning income and, thus, six-year statute of limitations applied under Section 6501(e)).
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.} (court noted that the use of the term “trust” did not necessarily indicate a holding that the trust was a valid trust for either federal tax or state law purposes).
in April 1975, the husband executed an agreement with the Trust, which dictated that the husband would provide medical services to the Trust in exchange for (i) use of the Trust property (including the taxpayers’ home), (ii) unlimited use of the Trust telephone, and (iii) use of a leased car for purposes other than Trust business. In September 1975, the Trust executed an agreement with the Corporation, whereby the Trust would furnish the husband’s medical services to the Corporation in return for a fee that was essentially equal to the annual income earned by the husband for the Corporation.

The Corporation filed Forms 1120 for the 1975 through 1978 tax years and reported certain deductions for “professional fees,” “professional services,” and “cost of goods sold.” The Corporation did not report any taxable income during these tax years. The Trust filed Forms 1041 for the same years, reporting certain income, deductions, and distributions to the taxpayers and their children. Like the Corporation, the Trust did not report any taxable income. The taxpayers filed joint Forms 1040 for the relevant tax years reporting thereon the income from Trust distributions that matched the amounts shown in the Trust’s Forms 1041.

In January 1981, the IRS issued a notice of deficiency to the taxpayers, who argued that the notice was barred for the 1975 and 1976 tax years by the three-year limit under Section 6501(a). The court rejected the taxpayers’ argument, holding that [the taxpayers'] disclosure of the fact of income from the Trust was not sufficient to give [the IRS] a clue as to the existence of additional omitted income. Neither the Trust returns nor [the taxpayers'] individual returns disclosed the fact that [the husband] was purportedly employed by the Trust as an independent contractor. The Trust returns did state that the Trust was engaged in a business, but did not identify which business it

178. Id.
179. Id.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
was engaged in. The only hint which [the IRS] had that [the taxpayers] had omitted items of gross income was the fact that [the husband's] profession was listed as osteopath on [the taxpayers'] 1976 income tax return and yet there was no entry for income from salary or wages or trade or business income. We decline to find that this was a sufficient "clue" as to the existence of the omitted income.  

Since the IRS did not have a sufficient clue as to the income, the court concluded that the six-year statute of limitations under Section 6501(e) applied, and upheld the notice of deficiency for the 1975 and 1976 tax years.  

Courts have entertained similar arguments and rendered comparable decisions in recent cases. In *Connell Business Co. v. Commissioner*, the taxpayers were involved with four trusts: the Connell Business Company, the Connell Vehicle Company, the Connell Vehicle Company #101, and the Connell Family Trust. Each of the four trusts timely filed its Forms 1041 for the 1995, 1996 and 1997 tax years. Forms 1041 for the Connell Business Company, the Connell Vehicle Company, and the Connell Vehicle Company #101 each identified the Connell Family Trust as the beneficiary. The Connell Family Trust’s Form 1041, in turn, identified the taxpayers as the beneficiaries and reported distributions of $6,068 to each of the taxpayers during the 1996 tax year.  

The taxpayers timely filed their Form 1040 for the 1995, 1996 and 1997 tax years; however, they made no reference to the four trusts or in any way indicated that they were associated with, beneficiaries of, or recipients of income from, the four trusts. With respect to the $6,068 of income allocated to each of the taxpayers on the Connell Family Trust’s Form 1041, the taxpayers reported that income on Schedule C to their Form 1040

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186. Id.
187. Id.
188. See generally Connell Business Co. v. Commissioner, 87 T.C.M. (CCH) 1384 (2004) (court held that taxpayers could not rely on Forms 1041 to demonstrate adequate disclosure under Section 6501(e) because the forms did not refer to trusts).
189. Id.
190. Id.
191. Id.
192. Id.
193. Id.
as “gross receipts or sales.”\textsuperscript{194} However, Schedule C contained no information suggesting that the Connell Family Trust was the source of that income.\textsuperscript{195}

The taxpayers argued that the income they received from the Connell Family Trust was not “omitted” because it was adequately disclosed.\textsuperscript{196} Accordingly, the taxpayers claimed that the IRS was barred from assessing deficiencies for the 1995 and 1996 tax years because the three-year limit under Section 6501(a) had passed.\textsuperscript{197} The court rejected this argument, holding that the taxpayers could not rely on the Forms 1041 to demonstrate that there was adequate disclosure for purposes of Section 6501(e) because the taxpayers’ Forms 1040 “made no reference” to the four trusts.\textsuperscript{198}

V. CONCLUSION

The following general rules emerge from the cases examined above. A taxpayer will be deemed to have adequately disclosed an item of income to the IRS if the tax return on its face provides a sufficient “clue.” Providing the requisite clue means that the taxpayer may not be stingy or misleading, but it does not obligate her to make a “detailed revelation of each and every underlying fact.” The taxpayer may not rely solely on disclosures made to the IRS by third parties and may not benefit from the toil of the IRS in cases where an audit uncovers income that the taxpayer previously omitted. Individual tax returns may be considered together with returns of related flow-through entities (such as partnerships, S corporations and trusts) in determining whether the taxpayer omitted a particular item of income, provided that the taxpayer makes a reference to the entity in her Form 1040. This consideration-of-various-returns-at-the-same-time rule also applies in the context of multi-tiered flow-through entities, such as when a taxpayer is a partner in a partnership, which, in turn, is a partner in another partnership.

\begin{itemize}
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id.
\end{itemize}
Analyzed in a vacuum, these legal principles may mean little. However, when examined in the context of modern international tax-avoidance schemes, these broad judicial interpretations of Section 6501(e) take on considerable importance. As discussed earlier, many tax schemes utilized today are tremendously complex, involving multiple foreign entities, offshore financial accounts, and related-party transactions. Participants in such structures do not simply fail to report income or refuse to submit returns; rather, they tend to inundate the IRS with numerous tax and information returns in an attempt to muddle the real source, amount and/or owner of the income.

As the IRS gradually identifies more of the estimated one million U.S. taxpayers involved in such schemes, a key issue will be whether the returns filed with respect to the tiered foreign entities and the related-party transactions provide the IRS with a sufficient “clue” as to the income. If so, many taxes may go unassessed due to the three-year limit under Section 6501(a). Based on the standards derived from Colony, Quick Trust, Rose, Harlan, Roschuni, Benderoff and the rest, this prophecy may become a reality. But, only time will tell—literally.
LABELING PROGRAMS AS A REASONABLY AVAILABLE LEAST RESTRICTIVE TRADE MEASURE UNDER ARTICLE XX’S NEXUS REQUIREMENT

John J. Emslie∗

I. INTRODUCTION

Product labels, as the term is used throughout this Article, are labels placed on the outside of a product which illustrate the product’s effects on the environment or human health.¹ The use of product labels by manufacturers, producers, and packagers as a method to communicate such information is increasing in international trade. It is nearly impossible to walk through a local store or supermarket and not see dozens of labels affixed to a variety of products. Some producers voluntarily place labels on their products to communicate the positive effect the product may have on the environment or human life or health, for example, “made from recycled paper.” Other producers are required to place a label on their products that warn customers of certain dangers, for example, “this product con-

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¹ The term “product label” could be used to define almost every form of communication placed on a product’s packaging, i.e. advertisements, price tags, the ubiquitous nutritional information labels which are required on all food fit for consumption in the United States, etc. This Article, for the sake of brevity, limits the definition of product labels to those labels which communicate a product’s effects on the environment and human health. Such labels are commonly referred to as “eco-labels” and “health warnings.” Hereinafter, the terms “labels” and “labeling programs” will exclusively refer to labels and labeling programs which are implemented to communicate a product’s effects on the environment or human life or health.
tains ozone-depleting substances” or “cigarette smoke contains carbon monoxide.” However, regardless of the message or its impetus, product labels are likely to become an important component of international trade and international law. This Article presents the argument that product labeling programs could become a default or catch-all reasonably available least restrictive trade measure under Article XX of the General Agreement on Tariffs and Trade (GATT).²

Part II of this Article further defines product labels and explains the three principal categories of labeling programs. These programs are mandatory government sponsored schemes, voluntary government sponsored schemes, and voluntary privately-sponsored schemes. Additionally, Part II demonstrates the advantages and disadvantages of labels and labeling programs. Generally, labeling programs provide advantages to the consumer, business and manufacturing sectors. Labeling program disadvantages include a labeling program’s potential for abuse, the potential inconsistency and inaccuracy of labels, and the increased costs associated with poorly-managed or regulated labeling programs.

Part III sets forth the dispute settlement mechanism of the GATT/World Trade Organization (WTO), the forum under which disputes involving Article XX are decided. Generally, under the GATT/WTO dispute settlement system, a complaining party requests a panel to be established to hear the dispute and prepare a report. The panel then applies regime rules to the facts of the dispute, which results in a binding decision that is reviewed by the Appellate Body. Part III also explains and provides an analysis of three major provisions of the GATT: Article I: General Most-Favoured-Nation Treatment; Article III: National Treatment on Internal Taxation and Regulation; and, Article XI: General Elimination of Quantitative Restrictions.

Part IV analyzes Article XX of the GATT. Generally, Article XX provides a limited exception to GATT's default rules, which permit a trading Member to institute a trade restriction if the restriction is necessary to protect, *inter alia*, human, animal or plant life or health, or the conservation of exhaustible natural resources. Part IV explains the three-step Article XX analysis established by recent GATT/WTO decisions: (1) the policy test; (2) the nexus requirement; and (3) the chapeau. A trading Member must satisfy each of these requirements in order to successfully invoke an Article XX defense. The Shrimp Turtle dispute, discussed at length in this Part, provides a perfect example of the Article XX exception analysis.

Part V focuses upon the principal GATT/WTO decisions that have confronted the issue of product labels and labeling. The Thai Cigarettes dispute between the United States and Thailand, the EC Asbestos dispute between Canada and the European Communities (EC), and the Tuna I dispute between the United States and Mexico all discussed the legality and availability of labeling programs under Article XX. Each of the situations presented was factually distinct and, therefore, the decisions concerning the availability of a labeling program as a least restrictive trade alternative were different in the disputes.

Part VI concludes that it may be possible for labeling programs to develop into a default or catchall least restrictive trade measure under Article XX. However, such a labeling program must possess certain attributes and characteristics, which are explored in this section. For example, the labeling program must be effective, international support or agreement must exist, and, finally, the program must be reasonably fair to all trading Members. These characteristics were developed by the panel and Appellate Body reports discussed throughout the Article.

II. LABELING PROGRAMS

Put simply, a product label is a label placed on the outside of a product that communicates various information about the product, whether it be the product’s composition, production method, or the possible effects the product has on the environ-
ment, or human health.\footnote{Matthias Vogt, \textit{Environmental Labelling and Certification Schemes: A Modern Way to Green the World or GATT/WTO – Illegal Trade Barrier?}, 33 \textit{Envtl. L. Rep.} 10522 (2003). \textit{See also} Elliot B. Staffin, \textit{Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and its Role in the “Greening” of World Trade}, 21 \textit{Colum. J. Envtl. L.} 205, 206–20 (1996) (discussing the use of labels to warn consumers about human health and environmental issues, production methods, and the effects of the product on plant and animal species).} The information may be negative, positive, or neutral. A labeling program establishes the requirements or conditions that a producer must satisfy to place a label on the product. Labeling programs may exist on a domestic, regional, or international level. There are three major types of labeling programs: (1) mandatory government-sponsored programs; (2) voluntary government-sponsored programs; and (3) voluntary private-sponsored programs. Labeling programs provide advantages to both the consumer and business and manufacturing sectors. However, the proliferation of labeling programs has resulted in some well-founded criticisms as well. Specifically, if not adequately monitored and regulated, labeling programs present the potential for abuse, labels may be inconsistent and inaccurate, and producers fear the increased costs associated with labeling programs.

\textbf{A. Defining Labels and Labeling Programs}

Product labels are typically labels placed on the outside of a product that contain information concerning the product’s potential effect on the environment, human, animal or plant life.\footnote{Atsuko Okubo, \textit{Environmental Labeling Programs and the GATT/WTO Regime}, 11 \textit{Geo. Int’l Envtl. L. Rev.} 599, 601 (1999).} However, labels may also be affixed to products in an effort to pursue other socially-conscious goals, such as the eradication of child labor.\footnote{\textit{See Janelle M. Diller & David A. Levy, Child Labor, Trade and Investment: Toward the Harmonization of International Law}, 91 \textit{Am. J. Int’l L.} 663, 680 (1997) (discussing GATT and the potential use of product labeling in the context of child labor). \textit{See also} discussion of RUGMARK, infra notes 19–24 and accompanying text.} Environmental labels, which are gaining popularity, are labels that communicate the product’s interaction with the environment.\footnote{Teresa Hock, \textit{Note, The Role of Eco-labels in International Trade: Can Timber Certification be Implemented as a Means to Deforestation?}, 12 \textit{Colo. J.}} These labels communicate to the consumer...
that use of the product may adversely effect the environment or, conversely, that the product is more friendly to the environment than its competitors.7

Labels are not basic standard requirements for products. Instead, basic standards are the minimum requirements for a product being commercialized in a given country.8 Conversely, labeling programs do not pose “internal requirements” on the product (i.e., the minimum composition and/or ingredients the product must contain for it to be sold to the public), but rather impose an “external requirement” (i.e., a requirement as to which information must be contained on the label).

One common category of product labels, environmental labels, has become more prominent in the United States and Europe where consumers have expressed greater concern about the effects that industrialization and consumption patterns have on the environment.9 The information usually communicated to the consumer on an environmental label is that the particular product is, for example, more environmentally friendly than other products in the same category.10 For example, a label that explains that the product contains organically-grown ingredients conveys the message that such a product is more environmentally friendly than products that use pesticides and other chemical treatments.

Environmental labels often transmit messages to consumers that promote the consumption and production of alternative products that are more environmentally friendly than products currently used by the market.11 For example, a label may be placed on reusable canvas shopping bags that explains that the


9. Lehtonen, supra note 7, at 8.
10. Id. at 10.
11. Okubo, supra note 4, at 601.
use of such bags is more environmentally friendly than the use of paper or plastic bags currently used by grocery stores. Thus, the producer, through use of a label, could either attempt to set itself apart from its own product class (i.e., with the use of a biodegradable container) or it can promote the environmentally friendly aspects of the entire class versus another class of products (i.e., canvas bags versus paper and plastic bags). Therefore, the most proper definition is a “catchall,” one that defines labels and labeling programs as a “range of labels” used to communicate information about a product to the consumer.12

Labeling programs exist on a domestic, international, or regional level. An example of a domestic labeling program is the dolphin-safe label on tuna and tuna products in the United States.13 A typical international labeling program is that established by the International Organization for Standardization (ISO).14 The ISO is a network of national standards institutes from 147 countries, working in partnership with international organizations, governments, industry, business, and consumer representatives.15 The ISO provides standards and guidelines for environmental labeling.16 These guidelines are typically referred to as ELP.17 In addition, various United Nations Conferences have directly supported labeling programs.18


15. Id.


17. Nuyda, supra note 16.

To obtain an ELP certification, a company or manufacturer must first apply to the ELP administrator who processes the forms and ar-
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An example of a regional labeling program would be the RUGMARK program.\textsuperscript{19} RUGMARK is a nonprofit organization that works to end child labor and offers educational opportunities for children in Nepal, India and Pakistan.\textsuperscript{20} RUGMARK recruits producers and importers of carpets to make and sell carpets that are free from illegal child labor.\textsuperscript{21} Producers agree to adhere to RUGMARK’s strict no child-labor guidelines and permit random inspections of carpet looms. In doing so, RUGMARK grants the producers the right to place the RUGMARK label on their carpets. RUGMARK contends that this system provides the best assurance that children were not employed in the making of the carpet.\textsuperscript{22} In addition, a portion of the carpet price is contributed to the rehabilitation and education of former child weavers.\textsuperscript{23}

The RUGMARK labeling program is very similar to environmental and health-related labeling programs in that it shares similar implementation, influence, philosophy, and underlying ranges the site visiting and product testing by technical experts. If the experts’ assessment is favorable, the ELP administrator then declares the product as having passed. The ELP board gives it approval and the label or certification is awarded to the applicant. It takes about two months to process applications.


\begin{quote} 4.21 Governments, in cooperation with industry and other relevant groups, should encourage expansion of environmental labeling and other environmentally related product information programmes designed to assist consumers to make informed choices.\end{quote}

4.22 They should also encourage the emergence of an informed consumer public and assist individuals and households to make environmentally informed choices by ... (b) Making consumers aware of the health and environmental impact of products, through such means as consumer legislation and environmental labelling.

\textit{Id.}\textsuperscript{19} See generally RUGMARK Foundation, \textit{at} http://www.rugmark.org (last visited Jan. 21, 2005).

\textsuperscript{20} See RUGMARK Foundation, \textit{About RUGMARK, at} http://www.rugmark.org/about.htm (last visited Jan. 21, 2005).

\textsuperscript{21} See \textit{id}.

\textsuperscript{22} See \textit{id}.

\textsuperscript{23} See \textit{id}.
“socially friendly” intention. First, with its similarities to environmental and health-related labeling programs, its ingenuity and success reinforces the argument of the need for a cohesive and standardized labeling program. Second, it demonstrates that worldwide acceptance of labeling programs and their potential international success makes labeling programs applicable not only to the protection of the environment and human health, but also to other important objectives such as human rights and various other socially friendly goals. Therefore, it is possible that in the future successful labeling programs may be extended to a wealth of other causes, where demand shifts generated by socially conscious consumers having access to the information contained on the labels can affect the supply of other socially friendly products to the detriment of socially unfriendly products.

The goals of a labeling program are fairly straightforward. Generally, the purpose of a labeling program is to increase demand for environmentally friendly or more health-conscious products with the hope that the products will gain a larger market share. The labels placed on tuna and tuna products


25. See Staffin, supra note 3, at 209:

While there are many different types of environmental labeling schemes, they all share a common goal: to identify for the consumer those products that are environmentally less harmful than other competing goods within the same product category, either because of their ingredients, the PPMs by which they were generated, or both, so that the consumer will become motivated to purchase only these ‘green’ goods, thereby increasing the ‘green’ producer’s market share to the detriment of its competitors.

Id.

PPMs are “Processing and Production Methods.” They “address the way in which products are manufactured or processed and natural resources are extracted or harvested, and are often the basis for national regulations.” Elizabeth Barham, What’s in a Name?: Eco-Labelling in the Global Food System, Paper Presented at the Joint Meetings of the Agriculture, Food, and Human Values Society and the Association for the Study of Food and Society,
are a perfect illustration of this technique and its success. Although the American embargo on Mexican tuna was lifted in 1999 in response to the GATT panel’s decision in the Tuna I dispute, since U.S. law prevents Mexican tuna from being labeled Dolphin Safe, virtually no retailer in the United States will stock it. In addition, labeling programs hope that providing certain information to the public will “serve as a normative process to influence and shape international behavior over time, with a goal of sustainable development.”

Therefore, labeling programs are usually designed to achieve four basic goals: “(i) to improve the sale or image of the labelled product; (ii) to raise the environmental [or health-conscious] awareness of consumers; (iii) to provide accurate and timely information for consumers to make informed judgments; and, (iv) to direct manufacturers to account for the ... impact of their products.” However, the manner in which these labeling programs meet these goals and the compliance level attributed to each of these programs depends on the way in which these programs are structured.

B. Types of Labeling Programs

To date, there are at least thirty different labeling programs implemented in forty different countries worldwide, each bearing its own, sometimes intriguing, name. Germany’s is called Blue Angel, Japan’s program is Eco Mark, Canada’s is Environmental Choice, and, in the United States, it is Green Seal. The degree of governmental oversight and regulation varies from country to country and among organizations. There are


26. For a full discussion of the Tuna I dispute, including the panel’s decision, see infra notes 180–194 and accompanying text.

27. See Tangled Nets, THE ECONOMIST, Oct. 4, 2003, at 38. This fact is especially interesting considering that tuna demand is increasing worldwide. Id.

28. Okubo, supra note 4, at 601.

29. FIELD Briefing Paper, supra note 12, at 5.

30. Nuyda, supra note 16.

31. Id.

32. For example, sometimes environmental labels are based on a tool known as a life cycle assessment (LCA), which is a “method in which the environmental effects of a particular product are evaluated by analysis of the in-
three main categories of labeling programs: (1) mandatory government-sponsored schemes; (2) voluntary government-sponsored schemes; and (3) voluntary private-sponsored schemes.\footnote{Okubo, supra note 4, at 603.}

1. Mandatory Government-Sponsored Schemes

Under a mandatory government-sponsored scheme, producers are required to attach labels to their products which convey either the negative, neutral, or positive contents or effects of their products.\footnote{Id.}

The primary purpose of a program requiring the labeling of negative content is to warn consumers of the adverse effect such a product may have on human health or the environment. The aspirations of such a program are to persuade manufacturers to switch to a more “friendly” or “healthy” process or, instead, have the consumer avoid the product altogether and find an alternative.\footnote{See Staffin, supra note 3, at 211.} One example of such a scheme is the U.S. Clean Air Act Amendments of 1990.\footnote{See Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, reprinted in 26 I.L.M. 1550 (1987) (entered into force Jan. 1, 1989). The purpose of the Montreal Protocol was to eliminate substances that cause ozone depletion by instituting a total phase out of such products. See id. pmbl.}


the labeling of any product that contains or was manufactured with certain chemical substances known to deplete the stratospheric ozone layer....The required label must read: “Warning: Contains [or Manufactured with] [name of substance], a sub-

puts and outputs of materials and energy and other important factors related to the product.” FIELD Briefing Paper, supra note 12, at 5. Although not all programs apply a comprehensive LCA, the recent trend supports its inclusion or a similar technique. \textit{Id.} at 5–6.

stance which harms public health and the environment by destroying ozone in the upper atmosphere.\textsuperscript{38}

The primary purpose of a neutral labeling program is to provide consumers with information that is not necessarily negative or positive, but would be considered valuable information to the consumer in his or her decision making. The label is neutral because the information provided may not be sufficiently material to generate a negative or positive response \textit{per se}. For example, in the United States, the Environmental Protection Agency (EPA) requires car manufacturers to place a sticker on the window of a new automobile stating the fuel economy the consumer can expect from the car.\textsuperscript{39}

The positive type of labeling program allows a producer to place a label on the product illustrating the product’s positive feature, as compared to other products in the same category. An example of this program is the labeling of tuna and tuna products in the United States.\textsuperscript{40} This label allows the producer to communicate the lengths taken to ensure that the product was produced with positive environmental intention. Although these products often cost more than products that do not bear the label, the seller is hoping to “cash in” on the environmentally or health conscious segment of the market, thereby gaining an economic advantage.\textsuperscript{41}

2. Voluntary Government-Sponsored Labeling Schemes

Voluntary government-sponsored labeling schemes vary greatly in content.\textsuperscript{42} These programs involve government participation in the formation, administration, and sometimes fi-

\textsuperscript{38} Staffin, \textit{supra} note 3, at 211–12 (discussing the Clean Air Act).
\textsuperscript{39} Fuel Economy Regulations for 1977 and Later Model Year Automobiles—Labeling, 40 C.F.R. § 600.307-95 (1994).
\textsuperscript{40} Dolphin Protection Consumer Information Act, 16 U.S.C.A. § 1385 (1990).
\textsuperscript{41} Okubo, \textit{supra} note 4, at 601 (explaining that where consumers’ environmental awareness is well developed, labeling programs should create demand pressures in favor of environmentally friendly products). \textit{See also} FIELD Briefing Paper, \textit{supra} note 12, at 8 (stating that “the potential for growth in the market share of eco-labeled products makes eco-labeling a compelling marketing tool”).
\textsuperscript{42} Okubo, \textit{supra} note 4, at 605.
nancing of the program without creating the “adversarial posture of the mandatory requirements” because peer and public pressure are the only factors for the producer to consider. One example of this type of program is the German Blue Angel program, which is credited as being the world’s first environmental labeling program.

Launched in 1977 to promote more environmentally-sound products, Blue Angel is administered by the German government through three bodies: the Federal Environmental Agency (FEA), the Environmental Label Jury (ELJ), and the Institute for Quality Assurance and Labeling (RAL).

The FEA performs a streamlined LCA in order to determine which stages of the product’s life cycle results in the most significant environmental impacts. The FEA next drafts criteria regarding these significant impacts, which are to be met by recipients of the ‘Blue Angel’ award. It forwards these criteria to the [RAL] for review. RAL ... then convenes a panel of experts, drawn from manufacturing, environmental, consumer, and union groups to critique the draft criteria. It then forwards this critique to the ELJ, which possesses the final authority on whether to approve the new set of ecolabeling criteria. In the past, the ELJ has approved between three to six new eco-label categories each year. This entire process of establishing a new eco-label can last from between six months to two years.

Another example of a voluntary government sponsored program is a so-called “seal of approval.” In such a program, the government, or an institution closely connected to the government, gives compliant products a government “seal of approval”

43. FIELD Briefing Paper, supra note 12, at 6 (explaining that government involvement would help to “ensure consistency of criteria, balance of views of different parties, greater accountability to the public and greater transparency”).
44. Okubo, supra note 4, at 605.
45. FIELD Briefing Paper, supra note 12, at 6 n.16.
46. Id.
47. For a definition of LCA, see supra note 32 and accompanying text.
or other similar positive label.\textsuperscript{49} Both the German Blue Angel program and other similar seals of approval garner more credibility than voluntary privately-sponsored programs discussed below.\textsuperscript{50}

3. Voluntary Private-Sponsored Labeling Programs

The voluntary private-sponsored labeling program is a newly-developing area.\textsuperscript{51} This type of program is significant because it does not require the support of individual governments, and thus, should not conflict with GATT/WTO rules. This is so because GATT/WTO rules are normally understood to cover only state activities.\textsuperscript{52} These programs do not involve government oversight or participation, as they are either administered by a third party or based on self assessment, i.e. a declaration by the manufacturers themselves.\textsuperscript{53}

One example of such a program is Green Seal in the United States.\textsuperscript{54} Green Seal is an independent non-profit organization that identifies and endorses products and services that cause less toxic pollution and waste, conserve resources and habitats, and minimize global warming and ozone depletion.\textsuperscript{55} On the basis of proposals made by industry and the public, Green Seal selects product categories for its program based on a number of factors including: significance of environmental impact, the opportunity for its reduction, public interest, manufacturer interest and promotional opportunity.\textsuperscript{56}

\begin{thebibliography}{9}
\bibitem{49} Okubo, \textit{supra} note 4, at 605.
\bibitem{50} \textit{Id.} at 605–07 (discussing the advantages of government involvement).
\bibitem{51} \textit{Id.} at 607.
\bibitem{52} \textit{Id.} at 609. The author goes on to note that some arguments remain as to state responsibility for the activities of private groups. \textit{Id.}
\bibitem{53} FIELD Briefing Paper, \textit{supra} note 12, at 6–7 (explaining that typically voluntary privately-sponsored labeling programs receive no government sponsorship, funding or assistance and are typically made without third party certification or investigation).
\bibitem{54} See Green Seal Website, \textit{About Green Seal}, at \texttt{http://www.greenseal.org/about.htm} (last visited Nov. 21, 2004).
\bibitem{55} \textit{Id.}
\bibitem{56} See OECD, \textit{supra} note 48, at 28. Green Seal’s specific programs include: (1) \textit{Greening Your Government} (technical assistance to all levels of government in their purchasing, operations, and facilities management); (2) \textit{Product Standards and Certification} (development of environmental standards for leadership products in specific categories and certification of prod-
One attribute that all three types of labeling programs share is their common advantages and disadvantages. However, the level of compliance and regulation associated with each type of program may help to alleviate some of the disadvantages present in all labeling programs.

C. Advantages of Labeling Programs

The following is a list of the possible advantages of a labeling program. The advantages can be broken down into the following sections: (a) advantages to the consumer; (b) advantages to business and manufacturing; and (c) advantages to the environment or human health.

1. Advantages to the Consumer

Perhaps the most obvious advantage to the consumer is heightened consumer awareness. For example, consider labels on alcoholic beverages that warn a pregnant consumer that consumption of the product could adversely affect the pregnancy. Likewise, environmental labels provide an environmentally-conscious consumer with the necessary information to make an informed decision. Labels may be a powerful tool to express the health or environmental component of a product, so much so that certain producers may fear the requirement of a label. However, many critics argue that it may be difficult for the consumer to determine whether statements on a product
are truthful. It is possible that a consumer may mistake a label on a product as an advertising ploy or attention grabber. This concern emphasizes the need for a supervised governmental program, independent third-party oversight, or expert assessment techniques that are able to provide the consumer with the necessary verification.

2. Advantages to Business and Manufacturing

Labeling may create greater efficiency for manufacturers. Companies that are forced to meet the requirements of a label either through government regulation or market pressures will feel pressure to comply with the standards to compete in the marketplace. Such companies will be forced to invest in cleaner or safer technologies which may, in turn, increase production, efficiency, and profitability. In addition, companies that earn the reputation of being more “green” or healthy than others will likely enjoy greater sales, customer loyalty, and consideration.

3. Advantages to the Environment

Unsurprisingly, the environmental advantage is perhaps the main goal of an environmental program; the same is true for a labeling program that seeks to reduce potential negative effects on human health. Labeling provides the opportunity to differ-

59. See George Richards, Note, Environmental Labeling of Consumer Products: The Need for International Harmonization of Standards Governing Third-Party Certification Programs, 7 GEO. INT’L ENVTL. L. REV. 235, 247 (1994) (arguing that, “consumers are unable to determine the truthfulness of whether a product is, for example ‘ozone friendly.’ Verification of such a claim is beyond the capacity of the typical consumer.”).

60. See id. (noting that the result of an “objective verification is a reduction of the information gathering cost to the consumer, which translates into greater use and acceptance of the program by consumers and a greater demand for the products”).

61. Id. at 247–48.

62. See Okubo, supra note 4, at 601, 602–03 (explaining that many producers use labels to gain a competitive advantage through their green image, especially where environmental awareness is high). See also Richards, supra note 59, at 238 n.16, 17 (citing surveys that place the percentage of “green” consumers as 82% to 90% of the total population and noting the significant impact of “green labeling” on the production and advertising of products).

63. For a discussion of the purposes and goals of a labeling program see supra notes 25–29 and accompanying text.
entiate products that are produced in a healthier or more environmentally-sound way from those that are not, perhaps without even violating the rules of the WTO. A labeling program may avoid violating WTO rules because labeling programs are often regarded as a less restrictive trade measure than traditional legislative and administrative policy instruments and "governments tend to support these schemes because labeling provides incentives for producers to lessen the environmental [or health] impact of their products without establishing binding restrictions or direct bans on products." For example, successful environmental labeling protects the environment in two ways. First, it assures that the labeled products are more environmentally-friendly than could be expected without the label, and second, it gives environmentally-concerned consumers the ability to avoid products with negative environmental impacts.

Some argue that labeling programs aim to help improve the environment "in each country by reducing the pollution that unconcerned, non-compliant companies might otherwise cause."

A labeling program’s success hinges on its ability to use its greatest characteristic: its ability to attack the use of damaging products from the demand side of the market. Shifts in demand will create a competitive incentive to suppliers and manufacturers to raise the level of environmental quality of their products. Hopefully, such shifts will lead directly to less environmental damage or decreased medical costs. By addressing the


65. Id. at 5. A country with high environmental demands may legislate for its domestic industry, ensuring that domestic products are produced in an environmentally sound way. However, the domestic products face competition with imported products that may have been produced in a more polluting manner. In the WTO, the country is not allowed to differentiate between the foreign and domestic products when the characteristics of the products are the same. Id.

66. Okubo, supra note 4, at 602.

67. Henriksen, supra note 64, at 2.

68. Nuyda, supra note 16.

69. Richards, supra note 59, at 248.
demand side, labeling cannot be overruled by suppliers, largely because labeling programs use market mechanisms. Market mechanisms and demand shifts are especially important because “protection measures addressing the supply side are often overruled by lobbying.”

D. Labeling Disadvantages

A labeling program has potential disadvantages if not administered properly. These disadvantages include: (a) its potential for abuse as a restrictive trade measure, which serves as a source of continuing debate between developed and developing nations; (b) a label’s potential inconsistency and inaccuracy; and (c) fear among producers that labeling programs may be too costly to implement.

1. The Debate between Developing Countries’ and Developed Countries’ Labeling Programs and their Potential for Abuse When Used as Restricted Trade Measures

The debate between the principal of uninhibited free trade and a nation’s right to protect the health of its citizenry and environment has revealed sharp distinctions between the positions of developed and developing countries. Developed countries enjoy a higher per capita standard of living than developing countries. Due to a greater amount of disposable income, citizens in developed countries can choose between different products. Recognizing this ability, “developed countries have been prone to utilize (or at least threaten to utilize) trade measures, such as import bans, in order to cause producers in developing countries to change their environmentally harmful PPMs to more benign methods.” However, developing coun-

70. Henrisken, supra note 64, at 6. See also Staffin, supra note 3, at 210 (stating that “eco-labeling schemes attempt to marshall the forces of consumer demand in order to effect environmentally beneficial changes on the supply side”).

71. Henrisken, supra note 64, at 5.


73. See Staffin, supra note 3, at 207 (noting that while their standard of living is high, developed nations have recently become conscious of the devastating environmental harm caused by unfettered economic growth).

74. For a definition of PPMs, see supra note 25 and accompanying text.
tries see this use of trade measures “as a unilateral attempt to export the [developed country’s] domestic environmental laws, which may be appropriate for the [developed country’s] ... level of industrial development, but which are too restrictive for ... [the developing] countries.”76 Developing countries view these trade restrictions as an unfair attempt to punish them for environmental damage that was arguably caused by the developed countries themselves.77 Additionally, developing countries argue that such restrictions are “protectionist, discriminatory, and in violation of their sovereign rights to develop and exploit their own resources.”78

These arguments have some import. Labeling requirements set forth by a protectionist country can be abused as a non-tariff trade barrier in numerous ways.79 For example, criteria can be designed to favor the domestic production, application procedures for compliance with the label program can be made exceedingly difficult for foreign producers, or the choice of product category can be heavily influenced by local industries’ needs.80 However, developing countries are equally concerned with ensuring that labels will not become yet another restrictive business practice which further limits market access for their products. After all, many national economies of developing countries depend greatly upon the export earnings with which to pay for food imports and social services.81

2. The Potential Inconsistency and Inaccuracy of Labels

Labels can send a dubious message. Some labels currently in use may not clearly communicate the harm the product or process is seeking to avoid or the protection the product offers. Consider, for example, labels that encourage consumers to buy locally.82 One could walk the aisles of a local grocery store’s

75. Staffin, supra note 3, at 208.
76. Id.
78. Staffin, supra note 3, at 208.
79. Henriksen, supra note 64, at 7.
80. Id.
81. Barham, supra note 25.
82. See id. For example, such labels may be used by local farmers to attract sales.
produce department and see these labels affixed to a variety of goods, including farm produce. One argument is that such purchases might reduce the environmental costs of excess pollution that accompany the additional transportation of the produce shipped from greater distances. However, these labels may have other connotations than simply escaping the pollution associated with transportation. They can be used to support local business and, therefore, stymie other domestic or foreign goods. Without government checks and qualification assessments on these labeling techniques, the messages sent by producers are, at least, dubious and, at worst, worthless. Of course, the level of regulation of the truth and accuracy of the label may depend on who, in fact, sponsors the labeling program. If it is a government-sponsored labeling program, then it stands to reason that the government would regulate the truth and accuracy of the label. If it is a voluntary privately-sponsored program, then the industry, trade group, or non-governmental organization (NGO) sponsor of the program would regulate the label’s truth and accuracy.

It has been argued that some labels are ineffective because they are susceptible to abuse by manufacturers who may deceive customers into thinking that a product is safer than it is. Additionally, environmentally-friendly production is rarely the cheapest method and it often requires a higher price. Moreover, an additional argument which supports the conclusion that labels are ineffective is that “labelling is not an effective instrument in guiding the consumers to choose between products that belong to different categories, but serve the same purpose,” i.e., “rechargeable batteries in comparison with non-rechargeable.” Therefore, in such a situation, it may be difficult for a producer to significantly increase its market share.

83. See id. The reasons supported for buying locally often reference non-market, non-commodifiable values of a social or ethical basis as well as ecological. Id.
84. See discussion supra Parts II.B.1, II.B.2.
85. See discussion supra Part II.B.3.
86. Henriksen, supra note 64, at 2 (discussing single issue labels).
87. Id at 3. The reward for this process is that the label may give the product a marketing advantage, which hopefully offsets the higher price. Id.
88. Id.
3. Fear Among Producers Could Inhibit a Labeling Regime from Coming to Fruition

Labels provoke fears among producers. This fear stems partially from the producer’s concern that it may be unable to comply economically with a mandatory labeling scheme which will result in a loss of market share. Needless to say, a change of procedure or production method requires a tremendous amount of capital expenditures. In addition, this fear and concern could create tension between NGOs and producers. If the birth of an international label regime is in the near future, this tension may result in the granting of too many concessions by label supporters to the arguably more powerful producers, which may, in turn, give rise to the hasty adoption of an ineffective regime.

This situation is compounded by the unbalanced level of bargaining power between the collectively strong producers and the relatively weak label supporters. A successful labeling program would require tremendous support from the producers themselves. The producers must have faith that the investments required to meet the labeling requirements will pay off in the market. However, risk-averse producers will fear the significant up-front costs and worry that the label will not have its intended effect. In addition, a producer’s decision to join a labeling program may quell other possible innovation which necessarily will be foregone to satisfy the labeling program’s requirements. Research and development for other solutions may cease so that the company can focus all attention on being a leader in its label program. In addition, in the case of environmental labeling, the “label requires good marketing when introduced in order to gain credibility. The label has no effect if the consumers do not consider it a guarantee for an environmentally-friendly product.”

In order to fully understand how these programs will interact with the GATT rules, specifically Article XX, it is first necessary

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89. Freire de Oliveira Souza, supra note 8, at 164.
90. Id.
91. See id. at 164–65.
92. See Richards, supra note 59, at 250 (discussing the lack of industry support).
93. Henriksen, supra note 64, at 6.
to set forth the GATT/WTO dispute settlement mechanism and the major provisions of the GATT. This discussion is necessary because Article XX is used as a defense to the following rules and the validity of the Article XX defense is usually determined within the GATT/WTO dispute settlement mechanism.

III. GATT/WTO LAW AND DISPUTE SETTLEMENT

A. The Dispute Settlement Mechanism Under the World Trade Organization

One of the problems with the status quo of reconciling free trade with environmental or human health measures that may restrict free trade is that the WTO has the only worldwide mandatory and binding dispute settlement mechanism. Therefore, because they often incite trade measures, unresolved environmental conflicts have great potential for facing a WTO panel.94 This problem lies in the fact that environmental conflicts are often resolved by trade experts on WTO panels who may not be sufficiently educated in environmental or human health related issues to resolve disputes concerning them.95 Because, for better or worse, such disputes will often end up before the dispute resolution machinery of the WTO, it is imperative that this Article set out the dispute settlement procedures under the WTO.

Before the Uruguay Round of Trade Negotiations,96 the dispute settlement mechanism of the GATT was not binding. It was not until the establishment of the WTO and the creation of the Dispute Settlement Understanding (DSU) that decisions were binding.97 The DSU is administered by the Dispute Set-


96. The Uruguay Round of Trade Negotiations resulted in the establishment of the World Trade Organization. See WTO Agreement, supra note 2.

tlemcnt Body. First, the parties to the dispute are encouraged to solve the dispute between themselves. If a solution cannot be reached between the parties, the complaining party may request that a panel be established to complete a report. The panel will apply the regime rules to the dispute and set forth an appropriate decision. If requested, the Appellate Body will review legal appeals from the panel’s decision. The panel consists of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, or have served as a representative of a Member or of a contracting party to the GATT, or have served as a representative to the Council of Committee of any covered agreement or its predecessor agreement, or in the Secretariat, or have taught or published on international trade law or policy, or have served as a senior trade policy official of a Member. During the interim review stage, the panel shall issue a report to both parties. Upon completion of this report three things may happen: (1) the parties can appeal the report, in which case the DSB would await the decision of the Appellate Body; (2) the report is adopted at a DSB meeting; or (3) the DSB decides by consensus not to adopt the report.

The losing party to the trade dispute is provided three options under the DSU: (1) it can bring the measure found to be inconsistent with the Agreement into compliance or otherwise comply

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98. See id. art. 2.
99. Id. art. 4.
100. Id. art. 6.
101. Id. arts. 6, 11
102. Id.
103. Id. art. 8
104. Id. art. 15.
105. Id. art. 17.
106. Id. art. 16.4.
with the recommendations and ruling within the reasonable period of time determined; (2) it may enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation; or (3) if no satisfactory agreement on compensation is reached within a reasonable time period, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend any concessions entered under the covered agreements. However, the DSU promotes "prompt compliance" to ensure effective resolution of disputes to the benefit of all members.

B. GATT/WTO Provisions and Laws

This Article discusses the Article XX exception to the GATT/WTO rules and its application to labeling programs. However, to fully understand Article XX’s application with respect to labeling programs, it is first necessary to understand how it interacts with other GATT/WTO rules. Article XX is invoked by a WTO Member as a defense to that Member's challenged trade restriction. Therefore, it is essential to provide a background explaining the challenges which may be brought by an “attacking” Member who is claiming that a trade restriction is being imposed on them by the “defensive” Member who has imposed the trade restriction. Defensive Members will invoke the Article XX exception. It is also important to note that the provision which Article XX is intended to shelter may perhaps be a violation of one of the following provisions and rules. However, as long as the trade restriction is acceptable under Article XX, meaning the least restrictive trade measure necessary to satisfy the protected policy covered under Article XX, it will be permitted under GATT/WTO rules.

108. See DSU, supra note 97, art. 22.2.
111. See infra Part IV discussing Article XX.
1. Article I: General Most-Favoured-Nation Treatment

Article I, often considered the cornerstone of the GATT, provides that:

[With] respect to customs and duties and charges of any kind imposed on, or in connection with, importation or exportation or imposed on the international transfer of payments for imports or exports ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Contracting Parties.

Essentially, Article I requires “that in the administration of their tariffs and other regulations relating to trade in goods, WTO members [must] not discriminate between their trading partners; [and must] accord each other most-favored-nation (MFN) status.” Thus, for example, all members must pay the same custom duties or be subject to the same regulations as the MFN.

2. Article III: National Treatment on Internal Taxation and Regulation

Custom duties or “tariffs” are covered by Article I and thus, are not covered by Article III. However, other types of taxes are covered by Article III. Article III sets forth the principle of “National Treatment,” which provides that a country may not discriminate against imported products via use of an internal tax or other internal measure. Thus, Article III prohibits internal taxes, as well as internal charges, laws and regulations, and other requirements that may affect the sale of the product in the country. Article III:2 provides, in relevant part, that “the products of the territory of any contracting party imported

113. WTO Agreement, supra note 2, art. I.
114. SWAN & MURPHY, supra note 112, at 481.
115. Yavitz, supra note 94, at 209.
116. Id.
117. Id.
into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." While Article III:4 concerns differential treatment of all laws, regulations, and requirements, and provides, in relevant part, "the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale..."

One example of a WTO panel report and subsequent Appellate Body decision that addressed Article III is the Gasoline Case. In the Gasoline Case, the United States imposed a measure which prohibited the sale of conventional gasoline in metropolitan areas and only permitted the sale of reformulated gasoline in an effort to reduce the pollution caused by conventional gasoline. The U.S. law provided that certain domestic refiners had to create individual quality baselines (representing the quality of gasoline produced by them in 1990) and subsequent domestic production need only satisfy such baselines, whereas foreign manufacturers were required to satisfy the statutory baselines provided in the law. The panel report concluded that the rule violated Article III:4 because imported gasoline was required to meet the statutory baseline, while domestic gasoline need only meet the applicable individual baseline. Clearly, the United States was in violation of Article III because it did not treat like products alike.

3. Article XI: General Elimination of Quantitative Restrictions

Article XI may be the GATT rule with which most people are familiar. Essentially, Article XI prohibits any kind of quantita-
A quantitative restriction on imports. Article XI provides in relevant part:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The most typical quantitative restriction on imports is the use of a quota or an outright ban either through direct or indirect action. An example of an indirect ban or quota would be the requirement of a license to import goods.

There have been many panels through the GATT/WTO's relatively short history which have addressed Article XI claims. The most notable include the Beef Hormone dispute, and the Tuna I, Tuna II, and Shrimp Turtle disputes. In the Beef Hormones dispute, the EC attempted to prohibit imports of beef containing hormones from Canada and the United States. In the Tuna I and II disputes, the United States attempted to ban the importation of tuna which was fished using methods that

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124. See WTO Agreement, supra note 2, art. XI.
125. Id. art. XI:1.
130. Beef Hormones Case, supra note 126.
were not considered “dolphin-safe.”\footnote{131} In the Shrimp Turtle dispute, the United States attempted to ban the importation of shrimp that were harvested using methods which were not sea-turtle friendly.\footnote{132} In each of these disputes, the trade restrictions were considered violations of Article XI.\footnote{133}

The rules discussed above provide an illustration of the legal rules a trading Member may use to challenge a trade measure or restriction of another trading Member. However, there is an important exception to these rules provided for in Article XX. Generally, Article XX provides that a Member may institute a trade restriction if that restriction is necessary to protect human, animal or plant life, or, \textit{inter alia}, is related to the conservation of exhaustible natural resources.\footnote{134} Part IV, \textit{infra}, discusses in greater depth the application of the Article XX exception.

IV. ARTICLE XX GENERAL EXCEPTIONS CLAUSE

A. Description of the General Exceptions Clause

The Article XX General Exceptions Clause is of particular importance to the WTO’s most contentious issue in recent years—the relationship or, more precisely, conflict between trade and environmental protection.\footnote{135} This trade-environment conflict first came to a head in the Tuna I and Tuna II disputes.\footnote{136} Even though the results of Tuna I and Tuna II were never adopted by the GATT Council,\footnote{137} the cases received wide-
spread attention and caused many to view the GATT in a very unfavorable light.\textsuperscript{138}

As discussed above, Article XX is a defense to a trade restriction\textsuperscript{139} that is invoked by the trading member who imposed a measure that another trading member argues is a restriction on trade in violation of the GATT Agreement. The practice of the DSU panels “has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked.”\textsuperscript{140} A discussion of the structure of Article XX is necessary for understanding its analysis in DSU panels. This Article will focus solely on three of the exceptions articulated in Article XX: XX(b)’s protection of health exception,\textsuperscript{141} Article XX(d)’s enforcement exception,\textsuperscript{142} and Article XX(g)’s conservation exception.\textsuperscript{143} The reason for this focus is because these three exceptions, compared to the other exceptions of Article XX, “have been the subject of an extraordinarily detailed Appellate Body jurisdiction developed during the first seven years of WTO’s existence.”\textsuperscript{144}

Article XX consists of three main parts, which the next section of the Article addresses in turn. First is the list of measures a contracting party may impose that fall within Article XX’s scope.\textsuperscript{145} This part is often referred to as the “policy test.”\textsuperscript{146}

\begin{itemize}
\item[(a)] necessary to protect public morals;
\item[(b)] necessary to protect human, animal or plant life or health;
\item[(c)] relating to the importation or exportation of gold or silver;
\item[(d)] necessary to secure compliance with laws or regulations which are not inconsistent with GATT rules themselves;
\end{itemize}

\textsuperscript{138} See, e.g., Jessica Mathews, Dolphins, Tuna and Free Trade; “No Country Can Protect Its Own Smidgen of Air or Ocean”, WASH. POST, Oct. 18, 1991, at A21 (arguing that the analysis and reasoning of the panel would invalidate laws designed to protect endangered species in the United States).

\textsuperscript{139} See JACKSON ET AL., supra note 110, at 533 (explaining the proper analysis of an Article XX defense).

\textsuperscript{140} Tuna I, supra note 127, para. 5.22.

\textsuperscript{141} For the language of article XX(b), see infra note 145.

\textsuperscript{142} For the language of article XX(d), see infra note 145.

\textsuperscript{143} For the language of article XX(g), see infra note 145.

\textsuperscript{144} JACKSON ET AL., supra note 110, at 532.

\textsuperscript{145} WTO Agreement, supra note 2, art. XX. The list of measures which fall within Article XX’s scope includes those which are:
Second is what is called the “nexus requirement.” Third is Article XX’s introduction, which is often referred to as the “chapeau.”

**B. Analysis of Article XX**

1. **The Policy Test**

The Appellate Body has declared that a proper analysis of an Article XX defense must begin with a determination of whether the trade measure at issue is covered under one of Article XX’s enumerated measures. For example, under Article XX(b), the panel would inquire whether the trade measure or provision is

- (e) relating to the products of prison labor;
- (f) imposed for the protection of national treasures;
- (g) relating to the conservation of exhaustible natural resources;
- (h) undertaken pursuant to obligations of certain international commodity agreements;
- (i) involving restrictions on exports necessary to ensure domestic supplies when the domestic price is held below the world price by the government for price stabilization reasons; and
- (j) essential to the acquisition or distribution of products in short supply.

*Id.* See also *Jackson et al.*, *supra* note 110, at 532–33.


147. Although typically referred to as the necessary requirement, this definition is a misnomer. Although Art. XX(b) and (d) require that the measure be necessary for the goal sought, Art. XX(g) does not require the restrictive measure to be necessary to the objective of protecting the exhaustible natural resource; instead, it only requires that it “relate” to the objective. *WTO Agreement, supra* note 2, art. XX(b),(d),(g). However, this difference may not have a significant impact, “presumably because any measure that limits depletion of a natural resource is justified per se” and, arguably, would meet a necessary requirement in any event. Philip Bentley Q.C., *A Re-Assessment of Article XX, Paragraphs (B) and (G) of GATT 1994 in the Light of Growing Consumer and Environmental Concern About Biotechnology*, 24 *Fordham Int’l L.J.* 107, 112 (2000). Therefore, to avoid any confusion, this Article will use the term “nexus requirement” to avoid any further confusion in developing this term.

148. For the language of the chapeau, see *infra* note 219 and accompanying text.

necessary to protect human, animal or plant life or health. Analysis of this requirement is fairly straightforward and the easiest of the three requirements to apply and satisfy.\(^{150}\) To illustrate this point, many of the challenged measures brought under the GATT/WTO Dispute Settlement Procedures that were found inconsistent with GATT/WTO rules, in fact, satisfied this first requirement under Article XX. Examples of such disputes include: the Thai Cigarettes dispute,\(^ {151}\) where the panel concluded that a measure to reduce cigarette use was within the policy area, but later found the measures Thailand imposed inconsistent with the GATT rules on other grounds;\(^ {152}\) Tuna II, where the panel determined that the protection of dolphin life was in the policy area, however, later found that the measures imposed by the United States were inconsistent with the GATT rules on other grounds;\(^ {153}\) and, with the same result for the United States as that in Tuna II, the Shrimp Turtle dispute, where the panel found that the protection of turtles as an endangered species was within the policy area.\(^ {154}\)

2. The Nexus Requirement

In order for a WTO Member to successfully raise a defense under Article XX (b) and (d), the measure must be strictly necessary for the objective pursued with respect to the defenses raised.\(^ {155}\) For defenses raised under Article XX(g), the measure must be “related to” the conservation of an exhaustible natural resource.\(^ {156}\) In other words, the nexus test prohibits a Member

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150. See Yavitz, supra note 94, at 215.
152. For a full discussion of the Thai Cigarettes dispute, see notes 159–179 and accompanying text.
154. Shrimp Turtle AB Report, supra note 129, para. 160 (explaining that the panel agreed that the US measure falls within the terms of Article XX(g), but the issue was whether the US measure constituted “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or “a disguised restriction on international trade” under the chapeau).
155. See, e.g., WTO Agreement, supra note 2, art. XX(b) (requiring that the measure be necessary to protect human, animal or plant life or health).
156. See id. art. XX(g).
from adopting a measure that is inconsistent with any other GATT/WTO provision if an alternative, which is not inconsistent with other GATT/WTO provisions, can reasonably be employed by such Member. However, this nexus test is not whether the policy underlying the measure is necessary but, rather, whether the measure is necessary to achieve the stated policy objective.

3. Application of the Nexus Requirement

a. Thai Cigarettes Dispute

The best way to illustrate the nexus requirement is through analysis of the Thai Cigarettes dispute. The Thai Cigarettes dispute involved a challenge brought by the United States with regards to the Thai government’s restrictions on imports of, and disproportionate taxes on, foreign-made cigarettes. The panel found that Thailand’s restrictions on imports were in violation of Article XI:1 because the government had not granted licenses for the importation of cigarettes in ten years. However, the panel found that the regulations relating to the excise, business, and municipal taxes on cigarettes were consistent with Thailand’s obligations under Article III of the GATT. The

157. Thai Cigarettes, supra note 151, para. 74.
158. Yavitz, supra note 94, at 215.
159. See Thai Cigarettes, supra note 151, para. 1. Under section 27 of the Tobacco Act, 1966, the importation of various types of tobacco was prohibited except by license granted by the Director-General of the Excise Department or a competent officer authorized by him. But licenses have only been granted to the Thai Tobacco Monopoly, and the monopoly has only imported cigarettes on three occasions in the previous 25 years. Id. para. 6.
160. Id. para. 67. Article XI:1 provides in relevant part that “[n]o prohibitions or restrictions ... made effective through...import licenses...shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party....” WTO Agreement, supra note 2, art. XI:1.
161. Thai Cigarettes, supra note 151, para. 88. This conclusion was reached because there was no showing on the part of the United States that the taxes were applied contrary to Article III, only that they could have been applied inconsistent with Article III, and the possibility that the Thai Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement.” Id. para. 86. See also id. paras. 84, 85 (discussing the excise tax and business and municipal tax, respectively). Both paragraphs state the same result and rationale.
United States argued, *inter alia*, that the restrictions on imports could not be defended under Article XX(b) because the Thai measures were not necessary to protect human health.\(^{162}\) The United States asked the panel to recommend that Thailand eliminate its offensive restrictions and amend its tax regime to conform with its obligations under the GATT.\(^{163}\)

Thailand argued that its restrictions were justified under Article XX(b) because chemical and other additives contained in U.S. cigarettes might make them more harmful than Thai cigarettes.\(^{164}\) Thailand also argued that the more harmful imported cigarettes could only be eliminated through a prohibition on cigarette imports and, therefore, the measure was “necessary to protect human health” as permitted under Article XX(b).\(^{165}\) Additionally, Thailand argued that the production and consumption of tobacco undermined the objectives set forth in the Preamble of the GATT. These objectives included raising the standard of living, thus ensuring full employment thus increasing real income and demand, and developing the full resources of the world.\(^{166}\) Thailand argued that smoking lowered the standard of living and increased illness, leading to large and unnecessary disbursements attributable to increased medical costs, which consequently reduced real income and prevented the efficient use of resources.\(^{167}\) The United States countered that Thailand “could pursue the objective of seeking to prevent the increased number of smokers without imposing a ban on imports ... through education and the recognition of the effects of smoking rather than restraints on the availability of cigarettes.”\(^{168}\) Moreover, the United States responded that Thailand could not successfully “argue that the ban on imports was necessary to protect human life or health since domestic produc-

\(^{162}\) See id. para. 12. Article XX(b) states in relevant part that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human ... life or health.” WTO Agreement, *supra* note 2, Art. XX.

\(^{163}\) See Thai Cigarettes, *supra* note 151, para. 13.

\(^{164}\) See id. para. 14.

\(^{165}\) Id. para. 21.

\(^{166}\) See id. para. 21.

\(^{167}\) See id.

\(^{168}\) See id. para. 23.
tion, sales and exports of cigarettes and tobacco remained at high levels. 169

The panel accepted that smoking was a “serious risk to human health” 170 and that measures “designed to reduce the consumption of cigarettes fell within the scope of Article XX(b),” which clearly permits contracting parties to give priority to human health over trade liberalization. 171 However, this ability is not without limits. The measure, even for the purpose of giving priority to human health had to be “necessary.” 172 The panel concluded that the import restrictions imposed by Thailand could be considered necessary only if there were no alternative measures consistent or less inconsistent with the goals of the GATT. 173 The panel then examined whether the objectives of the Thai government could be met through other measures more consistent with the GATT. 174 The panel noted the strict, nondiscriminatory labeling and ingredient disclosure regulations implemented by other governments which allowed them to better control the content of cigarettes and increase consumer awareness of the dangers associated with tobacco use. 175

The panel ultimately determined that these alternative, nondiscriminatory labeling programs may be more consistent with the GATT than an outright ban on cigarette importation. These measures could be implemented on a national treatment 176 basis in accordance with Article III:4 and could require complete disclosure of ingredients coupled with a ban on unhealthy substances. 177 Another possibility suggested by the panel was a ban on cigarette advertising of both domestic and foreign-made cigarettes. 178 These are some examples of “various measures

169. See id.
170. Id. para 73. This conclusion was influenced by reports prepared by the World Health Organization, whose work created a number of recommendations designed to reduce smoking. Id. para. 56.
171. See id. para. 73.
172. See id.
173. See id. para. 74.
174. See id. para. 77.
175. See id.
176. For a discussion of national treatment, see supra note 117 and accompanying text.
177. See Thai Cigarettes, supra note 151.
178. See id. para. 78. The panel concluded that a ban on advertising would normally meet the requirements of Article III:4. Id. A general ban on adver-
consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI.1.\textsuperscript{179}

\textbf{b. Tuna/Dolphin Dispute (Tuna I)}

The U.S. Marine Mammal Protection Act of 1972 (MMPA)\textsuperscript{180} requires a general prohibition of the “taking” and importation of marine mammals into the United States.\textsuperscript{181} On August 28, 1990, the United States imposed an embargo on imports of commercial yellowfin tuna and yellowfin tuna products harvested with purse-seine nets\textsuperscript{182} in the Eastern Tropical Pacific

\begin{itemize}
  \item[taking] would create unequal competitive opportunities between existing Thai producers and new foreign producers, however, the measure would satisfy Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes. \textit{Id.}
  
  179. \textit{Id.} para. 81.
  
  180. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended in scattered sections of 16 USC). For example, 16 U.S.C. § 1371 provides that “there shall be a moratorium on the taking and importation of marine mammals and marine mammal products … during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States.”
  
  181. \textit{See Tuna I, supra note 127, para 2.3.}
  
  182. \textit{Id.} para. 2.1.
  
  A fishing vessel using this technique locates a school of fish and sends out a motorboat (a “seine skiff”) to hold one end of the purse-seine net. The vessel motors around the perimeter of the school of fish, unfurling the net and encircling the fish, and the seine skiff then attaches its end of the net to the fishing vessel. The fishing vessel then purses the net by winching in a cable at the bottom edge of the net, and draws in the top cables of the net to gather its entire contents.

\textit{Id.}

\begin{itemize}
  \item[Studies monitoring] ... catch levels have sown that fish and dolphins are found together in a number of areas around the world and that this may lead to incidental taking of dolphins during fishing operations. In the Eastern Tropical Pacific Ocean (ETP), a particular association between dolphins and tuna has long been observed, such that fisherman located schools of underwater tuna by finding and chasing dolphins....
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Ocean. The United States considered the provisions of the MMPA to be justified under Article XX(b) because they served the purpose of protecting dolphin life and health and were ‘necessary’ within the meaning of the provision. The United States argued that with respect to the protection of dolphin life outside its jurisdiction, there was no alternative measure reasonably available to achieve this purpose. However, Mexico, the party who brought the dispute, argued that Article XX(b) was not applicable to a measure imposed to protect the life or health of animals outside the jurisdiction of the United States. Mexico also submitted that the import measure was not “necessary” because alternative means, consistent or less inconsistent with the GATT, were available to the United States to protect dolphin life. Mexico specifically noted international cooperation as a more consistent alternative action.

The panel concluded that even if Article XX(b) was interpreted to permit extrajurisdictional protection of health and life, the United States would not meet the requirement of necessity set out in Article XX(b). This failure to satisfy the Article XX(b) necessity requirement was because the United States:

[H]ad not demonstrated to the panel - as required of the party invoking an Article XX exception - that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.

Not only were less restrictive alternatives available, but the U.S. measure was also not necessary within Article XX(b). The measure was deemed unnecessary because, under the

Id. para. 2.2.
183. See id. para 2.7.
184. See id. para 5.24.
185. Id.
186. Id.
187. Id.
188. See id. para 5.28.
189. Id.
190. See id.
MMPA, the United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period as a condition for importing tuna, to the taking rate actually recorded for U.S. fisherman during the same period.\textsuperscript{191} Thus, Mexican authorities could never predict whether, at any given time, their policies conformed to that of the United States.\textsuperscript{192} The panel found that limitations on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.\textsuperscript{193} The panel’s conclusion was based largely on the U.S. failure to exhaust all reasonably available options to pursue its dolphin protection objectives.\textsuperscript{194}

c. The EC Asbestos Dispute\textsuperscript{195}

The EC Asbestos dispute provides an important component to the Article XX analysis and its necessity requirement. The EC Asbestos dispute represents the first time both a panel and Appellate Body decision condoned a ban on imported goods pursuant to Article XX(b).\textsuperscript{196} The EC Asbestos dispute concerned a

\begin{itemize}
\item Techniques and nets have been changed to allow the mammals to escape. In 1998, an international agreement - now endorsed by the United States, the European Union, Vanuatu and 13 Latin American countries - set rules to limit dolphin death to fewer than 5,000 a year, a number thought to be sustainable. Last year, out of an estimated population of more than 9m dolphins in the eastern Pacific, fewer than 1,600 died, compared with 133,000 in 1986.

\textit{Id.}
\item Kelly, \textit{infra} note 109, at 716–17.
\end{itemize}
French Decree prohibiting the importation of white asbestos from Canada due to the negative health concerns associated with the use of white asbestos.\textsuperscript{197} The panel held that the EC (defending the French Decree) made a \textit{prima facie} case for the non-existence of a reasonably available alternative to an outright ban of asbestos products, and the need for substitute products.\textsuperscript{198} The panel gave great consideration to the comments provided by experts consulted in the course of the proceeding.\textsuperscript{199}

At the Appellate Body level, Canada made four arguments. First, based on the scientific evidence presented, Canada argued that the panel erred in finding that asbestos and asbestos products pose a risk to human health.\textsuperscript{200} Second, the panel had an obligation to quantify the risks associated with asbestos and could not simply rely on the hypotheses of French Authorities.\textsuperscript{201} Third, the panel erred by concluding that a ban was necessary to halt the spread of asbestos-related health risks.\textsuperscript{202} Finally, Canada argued that “controlled use” was a reasonably available alternative to the French Decree.\textsuperscript{203}

As to the first argument, the Appellate Body dismissed Canada’s contention that the evidence before the panel was insufficient to support its findings. All four scientific experts consulted by the panel concurred that asbestos products “constitute a risk to human health, and the panel’s conclusions on this point are faithful to the views expressed by the four scientists.”\textsuperscript{204} As to Canada’s second argument, the Appellate Body held that there is no requirement under Article XX(b) to quantify the risk to human life or health.\textsuperscript{205} With regards to the third argument, the Appellate Body noted that:

\textsuperscript{197} See Asbestos Panel Report, \textit{supra} note 195, paras. 2.3–5. \textit{See also} Kelly, \textit{supra} note 109, at 717.

\textsuperscript{198} Asbestos Panel Report, \textit{supra} note 195, para. 8.222

\textsuperscript{199} \textit{Id.}

\textsuperscript{200} See Asbestos AB Report, \textit{supra} note 195, para. 165.

\textsuperscript{201} \textit{See id.}

\textsuperscript{202} \textit{See id.}

\textsuperscript{203} \textit{See id.}

\textsuperscript{204} \textit{See id.} para. 166. In addition, the carcinogenic nature of asbestos has been acknowledged since 1977 by international bodies. \textit{Id.}

\textsuperscript{205} \textit{See id.} para. 167 (citing Beef Hormones Case, \textit{supra} note 126, para. 186). The Appellate Body concluded that a risk may be evaluated either in quantitative or qualitative terms. \textit{Id.}
It is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined and the panel accepted, that the chosen level of health protection by France is a ‘halt’ to the spread of asbestos-related health risks.

Accordingly, the Appellate Body found that it was “perfectly legitimate” for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place.

The fourth, and most compelling, argument made by Canada related to the availability of “controlled use” as an alternative measure. The measures of controlled use that Canada presented were influenced by ILO Convention 162. These measures included:

(i) making work in which exposure to asbestos may occur subject to regulations prescribing adequate engineering controls and work practices, including workplace hygiene; (ii) prescribing special rules and procedures, including the authorization of a competent authority in the field, for the use of asbestos or of certain types of asbestos or products containing asbestos or for certain work processes; (iii) where necessary to protect the health of workers and technically practicable, replacement of asbestos by other materials or products evaluated as harmless or less harmful; and, (iv) total or partial prohibition of the use of asbestos or of certain types of asbestos or products containing asbestos in certain work processes.

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206. See id. para. 168.
207. See id.
208. Asbestos Panel Report, supra note 195, para. 3.139 (referencing Convention Concerning Safety in the Use of Asbestos). For more information on the Convention Concerning Safety in the Use of Asbestos see infra note 260 and accompanying text.
209. Asbestos Panel Report, supra note 195, para. 3.139. In addition, national regulations should:

(i) establish procedures for the notification by the employer of certain types of work involving exposure to asbestos; prescribe adequate engineering controls and work practices to prevent or control exposure to asbestos; (ii) enforce laws and regulations through an adequate and appropriate system of inspection, including appropriate penalties; (iii) prescribe limits for the exposure of workers to asbestos and
The Appellate Body balked at the opportunity to support unrestricted free trade and took a more narrow view of the term “reasonably available.”\textsuperscript{210} However, the Appellate Body, by incorporating the holdings of various other panel reports that struck down assorted Article XX defenses, did not provide much opportunity for subsequent attempts to eliminate reasonably available alternatives.\textsuperscript{211} Consequently, the Appellate Body held that an “alternative measure” is one that can achieve the same objective as the challenged measure but is consistent or less inconsistent with the GATT (and hence less restrictive).\textsuperscript{212} In other words, an “alternative measure did not cease to be reasonably available simply because the alternative measure involved administrative difficulties for the Member.”\textsuperscript{213}

The Appellate Body held that the determination of whether an alternative measure is reasonably available is the extent to which the alternative measure contributes to the realization of

\begin{itemize}
\item make employers reduce exposure to as low a level as is reasonably practicable;
\item (iv) measure the concentrations of airborne asbestos dust in workplaces and monitor the exposure of workers to asbestos at intervals; take appropriate measures to prevent pollution of the environment;
\item (v) ensure that employers have established policies and procedures on measures for the education and periodic training of workers on asbestos hazards and methods of prevention and control;
\item (vi) establish standards for respiratory protective equipment and special protective clothing for workers;
\item (vii) recognize contractors qualified to carry out the demolition of plants or structures containing friable asbestos insulation materials, and removal of asbestos from buildings or structures;
\item (viii) ensure that workers who are or have been exposed to asbestos are provided with free medical examinations to supervise their health in relation to the occupational hazard; and,
\item (ix) prescribe adequate labelling of containers, including material safety data sheets indicating the asbestos content, the health risks and the appropriate protection measures concerning the materials or the product.
\end{itemize}

\textit{Id.} para. 3.140.

\textsuperscript{210} See Asbestos AB Report, \textit{supra} note 195, paras. 160, 170.

\textsuperscript{211} See, \textit{e.g.}, \textit{id.} para. 170 (explaining that in determining whether a suggested alternative measure is reasonably available one factor that must be taken into account is the conclusion drawn by the Panel in Thai Cigarettes).

\textsuperscript{212} Asbestos Panel Report, \textit{supra} note 195, para. 3.318.

\textsuperscript{213} Asbestos AB Report, \textit{supra} note 195, para. 169 (citing Gasoline Case, \textit{supra} note 120).
the end pursued.\textsuperscript{214} In this case, France claimed that the restriction was aimed at preserving human life and health, through the elimination of the well-known and life-threatening health risks posed by asbestos products.\textsuperscript{215} Thus, the remaining question would be whether controlled use would achieve the same end as the Decree and constitute a less restrictive trade measure than the Decree. In the panel’s view, “France would not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to halt.”\textsuperscript{216} More importantly, the panel noted that “even in cases where ‘controlled use’ practices are applied ‘with greater certainty,’ the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a ‘significant residual risk of developing asbestos-related diseases.’”\textsuperscript{217} For these reasons, the Appellate Body upheld the panel’s finding that the EC had demonstrated that there was no reasonably available least restrictive alternative to the French prohibition, and therefore, the Decree was necessary to protect human life or health within the meaning of Article XX(b).\textsuperscript{218}

4. The Chapeau

If the trade restriction satisfies one of the provisions set forth in Article XX(a–j) and the provision satisfies the nexus requirement discussed above, then the final step in the analysis is to determine whether the measure complies with the requirements of the chapeau. The chapeau conditions the availability of the Article XX exception by subjecting the measure to the requirement that:

\textsuperscript{214} Id. para. 172 (citing WTO Report of the Appellate Body, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R (Jan. 10, 2001) [hereinafter Korea Beef Dispute]).
\textsuperscript{215} See id.
\textsuperscript{216} See id. para. 174.
\textsuperscript{217} See id.
\textsuperscript{218} However, the Appellate Body’s conclusion in the EC Asbestos dispute did differ from that of the panel report. Unlike the panel report, the Appellate Body determined that chrysotile asbestos and PCG fibres were not like products within the meaning of Article III:4. See Asbestos AB Report, supra note 195, para. 126. However, even if they were like products, the Appellate Body would agree with the panel that the French Decree would satisfy Article XX(b). See id. para. 175.
Such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of [the] measures [listed in Art. XX(a)-(j)].

Therefore, the “scope for Member Countries to adopt public health or environmental protection measures that restrict free trade is limited by the prohibition on arbitrary or unjustifiable discrimination and disguised restrictions on trade contained in the chapeau to Article XX.” The Shrimp Turtle dispute provides the perfect illustration of the analysis of the three requirements of Article XX.

C. The Embodiment of Article XX’s Three Requirements: The Shrimp Turtle Dispute

The Shrimp Turtle dispute is a particularly telling example of how Article XX is applied because it contains the most detailed consideration of the meaning of the chapeau. In 1987, the United States issued regulations, pursuant to the 1973 Endangered Species Act, which required all U.S. shrimp trawlers to use turtle excluder devices (TEDs) while fishing in areas where there was a possibility that shrimp trawling would interfere with sea turtles. In 1989, the United States enacted Section 609 of Public Law 101-162 which imposed an import ban on shrimp harvested with fishing techniques that may adversely

219. See WTO Agreement, supra note 2, art. XX.
220. Bentley, supra note 147, at 112.
221. Shrimp Turtle AB Report, supra note 129, paras. 146–86. The Shrimp Turtle dispute “stands in stark contrast to Tuna-Dolphin dispute under GATT.” Kelly, supra note 109, at 711.
223. JACKSON ET AL., supra note 110, at 552 (providing a summary of the regulations promulgated under the 1973 Endangered Species Act as it existed in 1987).
affect sea turtles.\(^{225}\) This was followed by the U.S. Department of State issuance of its 1996 Guidelines which provided that, “all shrimp imported into the United States must be accompanied by a form attesting that the shrimp was harvested either in the waters of a certified nation or under conditions that do not adversely affect sea turtles.”\(^{226}\) Although the United States legitimately sought to protect turtles by differentiating between shrimp caught with TEDs and those caught without TEDs, the WTO found that the United States violated the GATT rules.\(^{227}\)

The Appellate Body held that although the U.S. measure served a legitimate environmental objective under Article XX(g), the measure, as applied by the United States, constituted arbitrary and unjustifiable discrimination between the WTO Members, and was thus contrary to the chapeau of Article XX.\(^{228}\) The Appellate Body began its analysis of Article XX’s chapeau by stating that:

\[
\text{[In] order for a measure to be applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, three elements must exist. First, the application of the measure must result in \textit{discrimination}. As we stated in United States — Gasoline, the nature and quality of this discrimination is dif-}\
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\(^{225}\) Id. However, there were certain exceptions. For instance, the import ban would not apply to harvesting nations that are certified as (i) having a fishing environment (e.g., lack of sea turtles or use of artisanal harvesting methods) which does not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting or (ii) providing documentary evidence of a regulatory program governing the incidental taking of sea turtles in the course of shrimp trawling comparable to the US program and having an average rate of incidental taking of sea turtles comparable to that of US vessels.

\(^{226}\) Appropriations Act, supra note 224.


\(^{228}\) Shrimp Turtle AB Report, supra note 129, para. 186.
ferent from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be arbitrary or unjustifiable in character... Third, this discrimination must occur between countries where the same conditions prevail.... Thus, the standards embodied in the language of the chapeau are not only different from the standard used in determining that Section 609 is violative of the substantive rules of Article XI:1 of the GATT 1994. 229

Therefore, “a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members.” 230

The Appellate Body found the controlling fact to be that the actual application of the U.S. measure which, “required other WTO Members to adopt a regulatory program that is not merely comparable, but rather essentially the same, as that applied to U.S. shrimp trawlers.” 231 The Appellate Body concluded that, “thus the effect was to establish a rigid and unbending standard by which U.S. officials determined whether or not countries would be certified, thus granting or refusing other countries the right to export shrimp to the United States.” 232

The Appellate Body was unmoved by the uniform standard the United States imposed throughout its territory and further concluded that although it might be acceptable for a government in establishing its domestic policy to adopt a single standard, it was not acceptable with regards to international trade:

[F]or one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members. 233

The problem was exacerbated because there were instances in which shrimp caught using methods identical to those em-

229. *Id.* para. 150 (emphasis in original).
230. *Id.* para. 156 (emphasis in original).
231. *Id.* para. 163 (emphasis in original).
232. *Id.*
233. *Id.* para. 164 (emphasis in original).
ployed by U.S. fisherman were excluded solely because those countries were not certified by the United States.\textsuperscript{234} This result was difficult to reconcile with the stated policy objective of the United States and was therefore found “unnecessary.”\textsuperscript{235}

Another problem with the U.S. measure was that the United States did not engage in any “across-the-board negotiations” with any of the other Members before enforcing the import prohibition.\textsuperscript{236} The Appellate Body cited both the Rio Declaration on Environment and Development\textsuperscript{237} and Agenda 21\textsuperscript{238} and found that “[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.”\textsuperscript{239} Although one regional agreement with selected states existed, it alone was insufficient\textsuperscript{240} because it was clear to the Appellate Body that the United States “negotiated seriously with some, but not with

\begin{itemize}
\item\textsuperscript{234} Id. para. 165.
\item\textsuperscript{235} Id.
\item\textsuperscript{236} Id. para. 166. The Appellate Body considered these negotiations vital because “the protection and conservation of highly migratory species of sea turtles ... demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations.” Id. para. 168.
\item\textsuperscript{237} Id. para. 168.
\item\textsuperscript{238} Id.
\item\textsuperscript{239} Id. (emphasis omitted). Furthermore, the Shrimp Turtle Appellate Body report notes that:
\begin{quote}
WTO members in the Report of the CTE, forming part of the Report of the General Council to Ministers on the occasion of the Singapore Ministerial Conference, endorsed and supported: ... \textit{multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature.} WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue \textit{shared goals}, and in the development of a mutually supportive relationship between them, \textit{due respect must be afforded to both}.
\end{quote}
\end{itemize}
\textsuperscript{Id.}
\textsuperscript{240} Id. para. 172.
other Members (including the appellees)” and that effect was “plainly discriminatory” and “unjustifiable. 241

In order to discuss whether product labels and labeling programs may satisfy the three requirements of Article XX or, in the alternative, whether any other restrictive trade measure may pass Article XX analysis when there is a potential for the existence of a successful and efficient labeling program, a discussion of the GATT/WTO panel and Appellate Body reports that have confronted the issue of labeling is necessary. Part V will explore these disputes and the requirements for labeling programs which have resulted from them.

V. GATT/WTO PANELS THAT HAVE CONFRONTED THE ISSUE OF LABELING

Although there have been quite a few GATT/WTO panels that have considered the issue of labeling, this Article will focus on three: (1) the Thai Cigarettes dispute; (2) the EC Asbestos dispute; and (3) the Tuna I dispute. These disputes were chosen because they best reflect the broad spectrum that Article XX was intended to cover. The Thai Cigarettes panel preferred labeling as a substitute to an outright ban or other more restrictive trade barriers supposedly created to protect human health, yet the EC Asbestos panel concluded that labeling and other methods of controlled use are insufficient to ward off the dangerous effects of asbestos on human health. Last, in the Tuna I dispute, the panel decided that the labeling program, designed to protect the environment and wildlife, was permissible under the GATT.

A. Thai Cigarettes Dispute

As discussed earlier, the GATT panel concluded that the import restrictions imposed by Thailand242 could be considered necessary with respect to Article XX(b) only if there were no

241. Id. In addition, there was differing treatment of countries desiring certification because of the difference in the level of effort made by the US in transferring the required TED technology to specific countries. Id.

242. The Royal Thai government placed restrictions on imports of foreign made cigarettes and applied disproportionate taxes on foreign made cigarettes. Thai Cigarettes, supra note 151, para. 1.
alternative measures consistent with the GATT. The panel found that there were other measures that Thailand could incorporate, especially considering that contracting parties to the GATT may, in accordance with Article III:4 of the GATT, “impose laws, regulations and requirements affecting the internal sale, offering for sale, purchase transportation, distribution or use of imported products provided they do not thereby accord treatment to imported products less favourable than that accorded to ‘like’ products of national origin.” In fact, as the panel noted, other countries have introduced strict, non-discriminatory labeling requirements which allowed their governments to control, and the public to be informed of, the contents and hazards of cigarettes. Therefore, the panel decided that such labeling programs and dangerous content bans, implemented on a national treatment basis in accordance with Article III:4, would be appropriate alternative measures to import bans and disproportionate tax treatment that had been deemed inconsistent with the GATT.

Two factors were critical to the panel’s determination. First, the panel was influenced by the testimony of World Health Organization (WHO) representatives. The WHO made a number of recommendations designed to reduce smoking based on the findings of an expert Committee convened to study smoking control strategies in developing countries. These recommendations included activities aimed at curbing the promotion and sale of tobacco products and a compilation of standards of conformity in terms of health warnings and product information to be used in the form of product labeling. Second, the panel noted that Thailand had already implemented non-discriminatory controls on demand including, inter alia, warnings on cigarette packs. Such non-discriminatory controls are examples of “various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which,

243. Id. para. 75.
244. Id.
245. Id. para. 77.
246. Id.
247. Id. para. 56.
248. Id. paras. 56, 78.
249. Id.
taken together, could achieve the health policy goals that the Thai government pursued by restricting the importation of cigarettes inconsistently with Article XI:1.\footnote{250}

The Thai Cigarettes dispute determined that a labeling program coupled with other programs, such as advertising regulations and educational programs, could be deemed a reasonable or feasible alternative to a trade restriction under Article XX. However, it is important to note that, arguably, a reasonable or feasible alternative under Article XX need not be in complete compliance with the GATT. An alternative measure that is less inconsistent with the GATT than the challenge restriction may suffice. However, with regards to labeling programs this distinction may be academic because, as decided in the Tuna I dispute,\footnote{251} labeling programs are fully consistent with the GATT.

B. EC Asbestos Dispute

The EC Asbestos dispute, admittedly, complicates the labeling solution. This case also concerned trade restrictions designed to address products that pose a risk to human health. In this case, the French attempted to ban the use, production, and import of asbestos and asbestos products because of their adverse health effects.\footnote{252} The EC, on behalf of France, argued that because of asbestos’ carcinogenic nature,\footnote{253} asbestos fibers cannot be considered a “like product” to other fibers that do not share the same chemical composition as asbestos.\footnote{254} However, the panel determined after extensive review that it was not decisive that asbestos and asbestos products do not have the same chemical composition, nor that asbestos was “unique.” Rather, the panel focused on “market access” and whether the products

\begin{itemize}
\item \footnote{250}{Id. para. 81.}
\item \footnote{251}{For a full discussion of the Tuna I dispute, see supra notes 180–194 and accompanying text.}
\item \footnote{252}{See generally Asbestos AB Report, supra note 195. The health risks posed by contact with asbestos are mesothelioma, a cancer of the lining of the chest and the abdominal cavity; lung cancer; and asbestosis, in which the lungs become scarred with fibrous tissue. See U.S. Environmental Protection Agency Website, Asbestos – Asbestos in Your Home, at http://www.epa.gov/asbestos/ashome.html (last visited Jan. 21, 2005).}
\item \footnote{253}{The carcinogenicity of asbestos and its fibers has been acknowledged for some time by international bodies. See Asbestos Panel Report, supra note 195, para. 8.188.}
\item \footnote{254}{Id.}\
\end{itemize}
have the “same applications” and can “replace” each other for some industrial uses.\footnote{255}

However, the Appellate Body found that the panel had erred in its analysis.\footnote{256} Their decision centered on the fact that different products often have similar uses and, although two products’ end uses might be similar, their physical properties may be different.\footnote{257} The Appellate Body therefore concluded that when evaluating the criterion of physical property, evidence relating to health risks associated with that product may be pertinent in an examination of ‘likeness’ under Article III:4 of the GATT.\footnote{258}

In addition to the analysis of likeness under Article III:4, the EC Asbestos panel considered Canada’s argument for the use of labels as a least restrictive trade measure vis-à-vis the use of the restrictions placed by the EC. This argument addressed the overall proposal by Canada of the controlled use approach.\footnote{259} Canada relied on the principles of controlled use outlined in ILO Convention 162.\footnote{260} ILO Convention 162 included in its proposal, \textit{inter alia}, that national regulations should prescribe adequate labeling on containers, including material safety data sheets indicating the asbestos content, the health risks and the appropriate protection measures concerning the materials of the product.\footnote{261} It is important to stress that Canada’s argument was not for a labeling program per se; instead, it argued for the principle of controlled use, which included the implementation of a labeling program.

The panel concluded that controlled use would not be reasonably available or feasible to the EC.\footnote{262} Although it was possible to apply controlled use successfully “upstream” (mining and manufacturing) or “downstream” (removal and destruction), controlled use could not be applied to the building sector and

\footnote{255. \textit{Id.} See also Vogt, \textit{supra} note 3, at 7.}
\footnote{256. See generally Asbestos AB Report, \textit{supra} note 195.}
\footnote{257. \textit{Id.} para 112. See also Vogt, \textit{supra} note 3, at 7.}
\footnote{258. Vogt, \textit{supra} note 3, at 7–8.}
\footnote{259. Asbestos Panel Report, \textit{supra} note 195, para. 3.139.}
\footnote{261. \textit{Id.}}
\footnote{262. Asbestos Panel Report, \textit{supra} note 195, para. 8.212.}
was, therefore, not a true alternative measure. Therefore, the difficulties of applying controlled use to these sectors made such a program inadequate in relation to the decree’s policy objectives.

This decision may rest on the fact that the exposure to dangerous asbestos and asbestos products is not restricted exclusively to workers who consistently use the products or to those people responsible for its disposal. In fact, asbestos may pose a risk to people in the general work area, as well as to spouses of exposed workers. Moreover, as one of the experts who presented at the panel illustrated, exposure to asbestos may be the result of pure chance. This observation is corroborated by the U.S. Environmental Protection Agency (EPA). The EPA explains that asbestos can be found in a variety of household items including steam pipes, boilers, furnace ducts, resilient floor tiles, cement sheet, decorative material sprayed on walls, patching and joint compounds, roofing, shingles, and siding. If these items are disturbed, even by an individual involved in home improvements, they may damage health.

Can the Thai Decree and the French Decree be reasonably distinguished even though one panel found that labeling and similar programs were feasible alternatives to the Thai Decree, but the other held that labeling and controlled use was not a feasible alternative to the French Decree? The following may help explain the reasoning. Arguably, a distinction may be drawn between the underlying products in the two disputes.

263. Id. para. 8.209. The panel noted that the building sector was one of the areas more particularly targeted by the measure contained in the decree. Id. para 8.212.
264. Id. para. 8.209.
265. Id. para. 8.215.
266. Id.
267. Id. para. 8.215 n.185 (discussing the examples of the lecturer and the fireman mentioned by Dr. Henderson during the meeting with experts).
268. See generally U.S. Environmental Protection Agency Website, supra note 252.
269. Id.
270. Id. However, “[m]ost people exposed to small amounts of asbestos, as we all are in our daily lives, do not develop these health problems.” Id. Even still, if the home-improver is interested or required to disturb products containing asbestos, the EPA encourages the use of a trained expert in asbestos-removal. Id.
Although both products are clearly injurious to health, the products are used and distributed differently and, therefore, the effectiveness of a labeling program would differ for each product. One would assume that cigarette smokers typically purchase packs of cigarettes for themselves for personal use. Therefore, a cigarette user would see the warnings on the pack. On the other hand, asbestos and asbestos products are likely to harm more than just the user of the product. Had the panel or the Appellate Body found that controlled use was a feasible alternative to the French Decree and a labeling program was created, the program would likely have proven ineffective. Consider the situation of a builder using ceiling products containing asbestos. If the label was on the asbestos product itself, the builder would be cautioned on the effects of asbestos use. However, that would not adequately protect the homeowner, who may later install a ceiling fan and become exposed to asbestos dangers. In this example, a labeling program would not work to warn all those who may be exposed to the hazardous product.

Surely, one could make a similar argument for cigarettes in that cigarette users are not the only people who are endangered by cigarette smoke, as evidenced by the growing studies on the danger of second-hand smoke. A label on the cigarette pack, which the non-smokers do not have contact with, will not adequately alert non-smokers to the dangers of inhaling second-hand smoke. Thus, the Thai government could have argued that labeling alone could not be deemed a feasible alternative because it does not protect the non-smoking population from the dangers of cigarette smoke. This concern may have played a role in the Thai Cigarette panel's determination that a labeling program alone would not be a feasible alternative. Rather, the labeling program needed to be coupled with other programs such as a restriction on advertising and/or educational programs. Such programs should help offset the dangers of second-hand smoke. Based on the results in the Thai Cigarettes and EC Asbestos disputes, a labeling program alone may not be a

reasonable and feasible alternative to a defending party’s trade restriction if it is designed to protect human health under Article XX(b)’s necessary requirement. 272

C. Tuna I Dispute

The Tuna I dispute is a famous case, largely because of the press coverage that it received and the U.S. public support behind the dolphin-safe labels at issue in the case. 273 It involved a challenge to the U.S. Dolphin Protection Consumer Information Act (DPCIA), which provided a labeling standard for any tuna product exported from, or offered for sale, in the United States. 274 Any producer, importer, exporter, distributor, or seller of tuna or tuna products who labeled the product “Dolphin Safe” or included any other term falsely suggesting that the tuna was fished using a method that was not harmful to dolphins violated the statute. 275 Mexico argued that the labeling requirements of the DPCIA were marking requirements within the scope of Article IX:1. 276 The panel disagreed because the DPCIA’s labeling provisions did not restrict the sale of tuna products. Tuna products could be sold freely with or without the Dolphin Safe label, and the provisions did not establish threshold require-

272. Recall that Article XX(b) requires that the trade restriction be “necessary to protect human, animal or plant life or health.” WTO Agreement, supra note 2, art. XX(b) (emphasis added).

273. See Tangled Nets, supra note 27, at 38 (discussing the difficulty of selling tuna that is not dolphin-safe in the United States despite increased demand for tuna products).

274. Tuna I, supra note 127, para. 2.12 (referencing Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(d) (1990)). Tuna products include any food product containing tuna processed for retail sale, except perishable items with a shelf life of fewer than three days. 16 U.S.C. § 1385(c)(5).

275. Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(d)(1)(A)&(B). This requirement is applicable if the tuna was fished in either of two situations: (1) in the Eastern Tropical Pacific Ocean by a fishing boat using purse-seine nets which do not meet the U.S. requirements of being dolphin safe, or (2) fished on the high seas by a fishing boat through drift net fishing. Id. § 1385(d)(1)(A)&(B). Violators are subject to civil penalties. Id. § 1385(e).

276. Tuna I, supra note 127, para. 5.41. Article IX:1 provides that “[e]ach contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.” WTO agreement, supra note 2, art. IX:1.
ments that must be met in order to obtain an advantage to the United States. 277 The labeling provision, therefore, “did not make the right to sell tuna or tuna products, nor the access to a government-conferred advantage affecting the sale of tuna or tuna products, conditional upon the use of tuna harvesting methods.” 278 Hence, the only remaining issue was whether the DPCIA met the requirements of Article I:1. 279 The panel found that the controlling fact was that

[U]nder United States customs law, the country of origin of fish was determined by the country or registry of the vessel that had caught the fish; the geographical area where the fish were caught was irrelevant for the determination of origin. The labelling regulations governing the tuna caught in the ETP thus applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in Mexico and products originating in other countries. 280

The panel concluded that, for these reasons, the DPCIA and its labeling requirements were not inconsistent with the obligations of the United States under Article I:1. 281 Therefore it is now safe to conclude that labeling requirements similar to the DPCIA are not inconsistent with the GATT generally.

277. Tuna I, supra note 127, para. 5.42 (“Any advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the ‘Dolphin Safe’ label.”).
278. Id.
279. WTO Agreement, supra note 2, art. I:1. Article I:1 provides that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Contracting Parties.

Id.
280. Tuna I, supra note 127, para. 5.43.
281. Id.
The above cases support the general proposition that labeling programs are consistent with GATT/WTO rules, although they may not always be a reasonable alternative to other measures. Moreover, these cases provide a framework for determining what attributes and characteristics a labeling program must possess in order to satisfy Article XX analysis. Further, pursuant to these cases, a labeling program that possesses these attributes and characteristics may in fact be considered the least restrictive trade measure available to a defending trading Member. However, this ability may, in fact, be a double-edged sword. If a labeling program satisfies Article XX analysis, it may be found to be the least restrictive trade measure compared to other measures available to a defending nation. This available alternative may stymie other restrictive trade measures that the defending trading member is considering or has implemented under Article XX. Such a result is possible because, as discussed previously in Part IV of this Article, the nexus requirement of Article XX mandates that a Member may not adopt a measure inconsistent with the GATT if an alternative measure is available which is not inconsistent, or is less inconsistent, with other GATT provisions, and is as effective as the more restrictive measure. A labeling program which possesses the attributes and characteristics discussed in the next part of this Article may fill this role in many situations.

VI. MAY LABELING PROGRAMS DEVELOP INTO A CATCHALL LEAST RESTRICTIVE TRADE MEASURE?

The development of labeling programs, their successes (both real and potential), and the relative acceptance of these programs by GATT/WTO panels, raises the question of whether labeling programs may develop into a catchall least restrictive trade measure for the purpose of Article XX analysis. If that were to be the case, then if the possibility of a labeling program exists, other trade measures may not survive the nexus requirement of Article XX. Given the successes of labeling programs in the past, the potential for greater successes in the

282. For example, the amendments to the Clean Air Act in the United States have been successful in establishing U.S. compliance with the Montreal Protocol. See Staffin, supra note 3, at 211–12.
future, and the legality of labeling programs under Art. III:4 of the GATT labeling programs may potentially trump other challenged restrictions under Article XX. This is particularly true because it is difficult to conceptualize other trade measures that would be less restrictive than a labeling program. However, recent decisions by the GATT/WTO suggest that proposed labeling programs must have certain attributes, abilities and conditions in order to be reasonably considered a least restrictive trade measure.

A. How Such a Labeling Program Would Need to Function

It is possible that successful labeling regimes could become reasonably available alternative measures to many other more restrictive trade measures proposed by trading members seeking an Article XX defense. This may be an attractive route for Members challenging a trade restriction, chiefly because an alternative measure can only be ruled out if it is shown to be impossible to implement. Moreover, an alternative measure does not cease to be reasonably available simply because it would involve administrative difficulties. However, it must be reasonably available, meaning it must contribute to the realization of the end pursued and, last, it absolutely must not involve a continuation of the very risk that the challenged restriction seeks to combat. A successful labeling program could

283. For a discussion of the advantages of labeling programs, see supra Part II.C.
284. The Thai Cigarettes panel held that labeling programs are consistent with Art. III:4 so long as the regulations and restrictions placed on imported products treat the latter no less favorably than like products of national origin. See Thai Cigarettes, supra note 151, para. 75. Therefore, it stands to reason that, if the requirements of a labeling program are applied equally to imported products and products of national origin, the labeling program requirements are consistent under Art. III:4.
285. A reasonably alternative measure is one that can achieve the same objective as the challenged measure, but is consistent or less inconsistent with the GATT (and hence less restrictive). See Asbestos Panel Report, supra note 195, para. 3.318.
286. See Asbestos AB Report, supra note 195, para. 169 (citing Gasoline Case, supra note 120).
287. Id.
288. Id. para. 172 (citing Korea Beef Dispute, supra note 214).
289. Id. para. 174.
surely act as a least restrictive alternative in many circumstances; recent panel and Appellate Body decisions have established standards and qualifications for such acceptable labeling programs.

1. The Labeling Program Must Be Effective

In order for the labeling program to be a reasonably available alternative measure under Article XX, the label must be “effective,” which means it must be both informative and credible. In the Thai Cigarettes dispute, the panel held that nondiscriminatory labeling and ingredient disclosure regulations were reasonably available least restrictive trade measures, making the measures instituted by the Thai government overly restrictive and therefore unnecessary. These alternative labeling regimes would not have been reasonable alternatives had they failed to “contribute to the realization of the end pursued.” However, the panel found that the labeling regulations were a reasonably available alternative under Article XX because the labeling and disclosure regulations were effective measures and were used successfully by other countries to reduce smoking and its harmful effects.

In addition, it would be prudent to augment a labeling program’s effectiveness by coupling it with other successful measures. For example, the Thai Cigarettes panel suggested education, a ban on unhealthy substances, and a ban on advertising. However, such measures must apply to both foreign and domestic products equally in order to meet the requirements of Art. III:4. These supplemental steps will likely raise the effectiveness of a labeling program, thus helping it rise to the level of an effective alternative measure.

Unfortunately, the threshold level of a label’s effectiveness has not yet been established by a panel or an Appellate Body.

290. Thai Cigarettes, supra note 151, para. 77.
291. Id.
292. Id. para. 80.
293. Id. para. 77.
294. Id. para. 78.
295. Id. para. 78 n.1.
296. With the exception of Thai Cigarettes, GATT/WTO panels have not measured a label’s effectiveness. Although the label placed on tuna fish was scrutinized in Tuna I, the issue in that case was whether the label was consis-
But, the cases suggest that the required level of effectiveness might be relatively low. For instance, in the Thai Cigarettes dispute, the panel held that labels could be a reasonably available alternative under Art. XX, yet there was evidence that the Thai government had already implemented non-discriminatory controls including, \textit{inter alia}, warnings on cigarettes packs.\footnote{Thai Cigarettes, \textit{supra} note 151, para. 78.} These controls were implemented prior to the establishment of the challenged restrictive measures at issue in the dispute.\footnote{Id.} Consequently, the panel did not investigate how effective the non-discriminatory controls (i.e., the warnings on the cigarette packs) must be to rise to the level of a reasonably available alternative. If so, the panel could have determined that the cigarette warnings, which arguably were ineffective, were not a reasonable alternative to the Thai Decree. Therefore, the required level of a labeling program’s effectiveness may not be relatively high. However, in the Thai Cigarettes dispute, there was also evidence presented by WHO which suggested that labeling programs, coupled with other measures, could be effective in reducing the harmful effects of tobacco use.\footnote{Id. para. 56.}

The EC Asbestos dispute stands for the proposition that the effectiveness of the alternative measure must be real and not just a mere possibility. Both the panel and the Appellate Body held that controlled use, which would include a labeling program, would not meet the goal sought by the French Decree. Taken together, the decisions in the Thai Cigarettes and EC Asbestos disputes may stand for the proposition that although the alternative trade restriction does not have to be completely effective, it must be reasonably effective. Moreover, simply because controlled use was not an available alternative to the French decree, it does not automatically follow that the French Decree was the least restrictive measure.

At first glance, the EC Asbestos decision may be seen as a limitation to both labels and the notion of controlled use. Many observers could conclude that the panel and Appellate Body decided as they did because asbestos is simply too dangerous for a
controlled use program. However, this reason misses the important point that for a label to be effective it must reach the end user or persons at risk. This requirement is especially true in situations where the label serves as a warning rather than as a simple information source. Therefore, a labeling program would not work in situations where the label or warning is not read or observed by the end user of the product. For example, a label placed on commercial food might not be effective. Suppose that the production of truffle oil involved socially unfriendly or unsafe procedures. The label on the bottle explaining such procedures should notify those who keep truffle oil at home. However, most people experience the enjoyment of truffle oil while dining at restaurants, and a label on the bottle of truffle oil at a fancy restaurant would not reach the consumer at table six. Likewise, a label on the fertilizer bag used to treat a soccer field would not serve as a warning for the players but would only alert the groundskeeper. However, sometimes the strategic placing of the label would cure this problem. For instance, the groundskeeper of the soccer field might place a sign on the sidelines of the field, thus alerting end users of the danger. Of course, the effectiveness of the label or labeling program not only augments the program’s ability to satisfy the requirements set forth by the discussed cases, it also increases the chances of satisfying its paramount goal, i.e., the promotion of healthy, environmentally-friendly, or socially-conscious products.

2. The Importance of International Support or Agreement

International support, agreement, or evidence of international negotiations should increase the legitimacy of a labeling program, thereby increasing its effectiveness. However, GATT/WTO panels and Appellate Bodies have also suggested that such a feature may actually be a requirement for a measure requiring an Article XX defense. For example, the Tuna I panel required the United States to first exhaust all options reasonably available to it before seeking to invoke an Article XX exception. In particular, the panel looked to see if the United States had entered into any negotiations or international cooperative arrangements. Therefore, international agreement or

300. Tuna I, supra note 127, para. 5.28.
negotiations may be required or, at the very least, considered an important element to any proposed labeling program.

International acceptance of the measure was also investigated in the Thai Cigarettes dispute, where the regulatory programs instituted by other Members clearly influenced the panel's decision.\(^{301}\) Additionally, the recommendation of the WHO was given great weight by the panel.\(^{302}\) Similarly, in the Shrimp Turtle dispute, the Appellate Body's decision was influenced by the fact that the United States did not engage in any "across-the-board negotiations" before enforcing their restrictive provision;\(^{303}\) instead, the Appellate Body found that the negotiations were impermissibly selective because the United States negotiated seriously with some countries and not with others.\(^{304}\) The Appellate Body concluded that "[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus."\(^{305}\)

At the very least, the above decisions may require acceptance of a labeling program's effectiveness on an international level. It is important to emphasize that a labeling program must be reasonably effective and available to be the least restrictive trade measure. If the labeling program is time-tested in other countries or is recommended by international organizations, then it is more likely to be found a reasonably effective alternative measure. However, it is questionable under these disputes whether labeling programs that are new and untested will meet the requirements of being reasonably effective.

3. The Labeling Program Must be Fair

A labeling program instituted by one trading Member must be fair to all other trading Members. A labeling program must be fair because, as the Appellate Body in the Shrimp Turtle dispute concluded, under the chapeau of Article XX "a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to

\(^{301}\) Thai Cigarettes, \textit{supra} note 151, para. 77.
\(^{302}\) \textit{See id.} para. 56.
\(^{303}\) Shrimp Turtle AB Report, \textit{supra} note 129, para. 166.
\(^{304}\) \textit{Id.} para. 172.
\(^{305}\) \textit{Id.} para. 168.
respect the treaty rights of other Members.” Further, the Appellate Body held that although it might be acceptable for a government in establishing its domestic policy to adopt a single standard, it is not acceptable with regard to international trade “for one WTO Member ... to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal...without taking into consideration different conditions, which may occur in the territories of those other Members.”

Therefore, the Shrimp Turtle decision may require the Member instituting the labeling program to consider the capabilities of developing nations. The requirements of a labeling program cannot be unattainable to other Members such that compliance would be impossible and, in effect, would result in a trade ban on the products of that country. This requirement is consistent with Article III:4, which provides that a Member can regulate the products bought and sold in its territory; however, foreign and domestic goods, which are considered alike, must be treated similarly.

The real issue, which is beyond the scope of this Article, is how far this requirement should be taken. It is relatively simple to imagine a situation where a surmountable requirement for a product in a developed nation could seem impossible for a developing nation to implement. It is unclear whether such a situation would inhibit the formulation of a labeling requirement. Although industry is far more sophisticated in a developed nation, it seems unlikely that the requirement of a label on a product would be considered too great a burden on a developing nation.

However, if the label requires certain content, then the program may be seen as a disguised restriction on trade and, thus, impermissible. However, in such a situation the issue would likely be addressed when applying the chapeau. In other words,

306. Id. para. 156.
307. Id. para. 164.
308. See WTO Agreement, supra note 2, art. III:4.
309. For example, one trading Member may require that if a product does not contain an ingredient that can only be obtained through a domestic producer for an economically unfeasible amount, then the product’s label must read “Obnoxious Waste” or “The Modern Day Lead Paint.” Such a requirement would make it impossible for the producer to meet the requirement and the label would destroy the hope of selling any of the product in that country.
the challenge would be that the label is a disguised restriction or trade barrier because the label requires that the product itself meet certain qualifications. Such a requirement, however, is entirely different than simply requiring a label with the sole purpose of conveying information.

The Tuna I panel held that a labeling program possessing certain attributes complies with the GATT Agreement. Yet, the role labeling programs play in international law is incomplete. More specifically, labeling programs could develop into a default least restrictive trade measure to other challenged trade restrictions. The existence, or potential existence, of a labeling program may provide an attacking Member with additional arguments to challenge other restrictive trade measures. Any given attacking Member could argue that most, if not all, restrictive trade measures fall short of satisfying the “necessary requirement” under Art. XX due to the existence of the least restrictive alternative labeling program.

Therefore, a defending Member may be forced to defend its trade restriction under not only the GATT, but also from the argument that an existing or obtainable labeling program, as the least restrictive measure, should be implemented in its stead. As such, labeling programs could act as “catchall” least restrictive trade measures under WTO jurisprudence. Such an opportunity was present and successfully raised by the United States in the Thai Cigarettes dispute.

The increased use of labeling programs in international trade will support such arguments in the future. In turn, future WTO panel and Appellate Body decisions that support the use of labeling programs will sustain the use and international acceptance of labeling programs in general. Consequently, it is imperative that labeling programs incorporate the required attributes set forth by the aforementioned cases. Hence, labeling programs should diligently implement all steps necessary to ensure that the program is effective, international support or agreement of its effectiveness and relevance exists, and its requirements are fair. Prospective WTO decisions supporting the use of labeling programs will only increase the clout of such programs, hopefully resulting in decreased environmental damage and human health risks.
VII. CONCLUSION

The development and use of labeling programs in international trade is rapidly increasing. These programs have many advantages and some disadvantages. In the near future, labeling programs may change the face of Article XX analysis in the WTO. Disputes involving labeling programs are increasing in stature and frequency in the WTO dispute panels. A Member seeking to defend a challenged restriction under Article XX may, at some point in the future, be required to defend its restriction both from the challenge of the attacking Member and from the argument that a labeling program would be a reasonably available alternative measure. This contention would be especially true if the labeling program was found to be effective, agreeable to the international community or accepted in an international agreement, and reasonably fair to all trading members.
IRRECONCILABLE DIFFERENCES? A CONSTITUTIONAL ANALYSIS AS TO WHY THE UNITED STATES SHOULD FOLLOW CANADA’S LEAD AND ALLOW SAME-SEX MARRIAGE

INTRODUCTION

In June 2003, the Ontario Court of Appeals handed down the landmark decision of Halpern v. Toronto, which sanctioned same-sex marriage. A mere two months after the decision, nearly 600 same-sex couples had applied for marriage licenses in Toronto’s city hall. More than one hundred of these couples were U.S citizens, who had traveled to Canada to legally marry. Not only did the Halpern court rule that the Canadian federal law limiting marriage to heterosexual couples violated the 1982 Charter of Rights and Freedoms, part of the Canadian Constitution, but the court also changed Canada’s legal definition of marriage to encompass same-sex unions. Prior to Canada’s allowance of same-sex marriage it had been

legal in the Netherlands since April 2001, in Switzerland since September 2002, and in Belgium since early 2003.\footnote{6}

In stark contrast to the recent developments in Canada and Western Europe, the United States lags far behind in recognizing the right of homosexuals to marry.\footnote{7} The reason why the U.S. couples had to cross the border to marry is that only one of the fifty states permits same-sex couples to legally marry.\footnote{8} While Senators in the United States are working to amend the Constitution to say that marriage can only be between one man and one woman, the United States lags far behind in recognizing the right of homosexuals to marry.\footnote{7}

\footnote{6}{\textit{Developments in the Law: II. Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe}}, 116 HARV. L. REV. 2004 (2003); Weiser, supra note 3, at 50.

\footnote{7}{Steve Sanders, \textit{U.S. Lags on Gay Rights; Supreme Court Can Help}, CHI. TRIB., June 22, 2003, at C3.}


Six months after gay and lesbian couples began legally marrying in Massachusetts, opponents of same-sex marriage swept Election Day, with voters in eleven states approving constitutional amendments codifying marriage as an exclusively heterosexual institution. The amendments won in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Utah and even Oregon – the one state where gay rights activists had hoped to prevail. The amendments passed with a 3-to-1 margin in Kentucky, Georgia and Arkansas, 3-to-2 in Ohio and 6-to-1 in Mississippi. Bans passed by narrower margins in Oregon, about 57%, and Michigan, about 59%.


Since Massachusetts began allowing gay and lesbian couples to wed last May, 13 states have approved constitutional bans on same-sex marriage. This number includes Missouri, which approved such a measure in August. The amendments in Mississippi, Montana and Oregon refer only to marriage, specifying that it should be limited to unions of one man and one woman. The measures in Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, Oklahoma and Utah call for a ban on civil unions or other partnership benefits as well. ... Since the Massachusetts ruling, more than 35 states have introduced legislation aimed at preserving the traditional definition of marriage as a union between a man and a woman.

\textit{Id.}
and one woman,\(^9\) the Canadian courts are ruling that the same declaration in their country is unconstitutional.\(^{10}\) Furthermore, in 1996, the U.S. federal government enacted the Defense Of Marriage Act (DOMA),\(^{11}\) which established that no state has an obligation to recognize a same-sex union performed in another state.\(^{12}\) DOMA also codified the federal definition of marriage as the union of one man and one woman.\(^{13}\) In addition to the

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10. Janice Tibbetts, *MPS Want Quick Vote on Same-Sex Marriage*, THE OTTAWA CITIZEN, Sept. 10, 2003, available at http://canada.com/national/story.asp?id=887A9FC7-D85D-4BC0-A8D2-E199736F900D. Courts in three provinces – Toronto, British Columbia, and Quebec – have said that the federal ban on same-sex marriage is unconstitutional and currently Toronto and British Columbia permit same-sex marriages. All other provinces are waiting for federal legislation to pass before allowing same-sex unions. \textit{Id.}

11. 28 U.S.C.A. § 1738(C) (2005), which provides that

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, or tribe, or a right or claim arising from such relationship.

\textit{Id.}


13. 1 U.S.C.S. § 7 (2005), which provides that:

[in determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies or the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife.

\textit{Id.}

See also Elizabeth Kristen, *Recent Developments: The Struggle for Same-Sex Marriage Continues*, 14 BERKELEY WOMEN’S L.J. 104, 113 (1999).

With the enactment of DOMA, Congress for the first time limited States’ obligation to give full faith and credit to ‘public acts, records and judicial proceedings’ of other states. Some commentators have argued that DOMA is unconstitutional since it exceeds Congress’s
federal DOMA, thirty-nine states have enacted “junior DOMAs”, which essentially provide for the same rules as their federal counterpart.\footnote{DOMA Watch, available at http://www.domawatch.org/index.html (last visited Jan. 23, 2005). The eleven states that do not have junior DOMA’s are the following: Connecticut, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Wisconsin, and Wyoming. Peterson, supra note 8. But it should be noted that in New Hampshire and Wyoming there is a state law that bans same-sex marriage and predates DOMA laws; and in Wisconsin there has been a state Supreme Court ruling stating that only heterosexual marriages are legal. Id.}

While the Canadian government did not pass a specific marriage law establishing the rights of gay and lesbian couples to marry, the court, of its own accord, determined that prohibiting same-sex unions was in violation of the Canadian Constitution.\footnote{See generally Halpern, 65 O.R.3d 161 (holding that the prohibition on same-sex marriage violated the Canadian Charter of Rights and Freedoms).} If changes regarding same-sex marriage are to be made in the United States, they will likely follow a similar path, as it seems probable that any changes, if and when they come, will come through the courts, rather than through the legislature.

This Note seeks to establish that the U.S. Supreme Court should raise the level of judicial review afforded to sexual orientation for purposes of the Equal Protection Clause.\footnote{U.S. Const. amend. XIV § 1.} Once the Court makes this change, it should reach the same conclusion as the Ontario Court of Appeals did in Halpern because Canada’s mode of constitutional analysis is similar to U.S. analysis of equal protection under an intermediate level of scrutiny. Although Halpern is analogous to the U.S. judicial review standard of intermediate scrutiny, the Halpern court’s analysis of the arguments given by the Attorney General would yield the same result under a rational review standard.

In Part I, this Note examines Canadian case law leading up to Halpern with an emphasis on how judicial opinion regarding homosexuality and equality has evolved since the Charter’s inception. Part II focuses on the reasoning used by the Ontario Court of Appeals in declaring that prohibiting same-sex mar-
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Marriages violated the Canadian Charter of Rights and Freedoms and promoted principles “that are not justified in a free and democratic society” and how the court was able to reach its conclusion. 17 Part III examines how the U.S. Supreme Court interprets the Equal Protection Clause of the Constitution, with a particular focus on case law regarding sexual orientation. Part IV discusses how the analysis used by the Canadian courts compares to that used by U.S. courts, and why U.S. courts should apply heightened scrutiny to laws that discriminate on the basis of sexual orientation, as the Canadian courts do. Part V shows that the Canadian court’s analysis is also applicable to the rational review test, so that under the rational review test the U.S. courts should determine that a ban on same-sex marriage is unconstitutional. Finally, Part VI shows that regardless of what standard of review the U.S. Supreme Court uses, it will be able to reach the same conclusion as Halpern.

Traditionally, the U.S. Supreme Court has not looked to the decisions of other countries in interpreting the U.S. Constitution, and this Note does not propose that it do so. 18 Instead, this Note proposes that if the U.S. Supreme Court affords sexual orientation the heightened level of scrutiny that it deserves, the court must draw the same conclusions as the Halpern court because the constitutional analysis is analogous.

17. See generally Halpern, 65 O.R.3d 161 (holding that the prohibition on same-sex marriage violated the Canadian Charter of Rights and Freedoms).


However, evidence of the U.S. Supreme Court looking to foreign courts can be found in Lawrence v. Texas where the court stated,

[T]o the extent Bowers relied on values we share with a wider civilization, it should be noted that the reasoning and holding in Bowers have been rejected elsewhere. The European Court of Human Rights has not followed Bowers but its own decision in Dudgeon v. United Kingdom. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the government interest in circumscribing personal choice is somehow more legitimate or urgent.

I. HISTORY OF LEGAL DEVELOPMENTS LEADING TO HALPERN

The court’s decision in Halpern was monumental, but it was only able to reach its conclusion by looking back to prior decisions regarding sexual orientation and the Charter of Rights and Freedoms. The Charter, which was adopted in 1982, is the Canadian Bill of Rights and it forms part of the Constitution of Canada. The purpose of the Charter is to ensure that the government respects the individual rights and freedoms of Canadian citizens. Challenges to laws regarding the rights and freedoms of homosexuals are often analyzed under Section 15(1) and Section 1 of the Charter. Section 15(1) states that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Section 1 states that “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” If a law is challenged as being discriminatory under Section 15(1) of the Charter, the court must first determine whether the law actually is discriminating against a particular individual or group of people. If the law is found to be discriminatory the court then turns to Section 1 and determines whether the discrimination imposed by the law can be justified by a legitimate state interest.

Challenges regarding gay rights based on Section 15(1) and Section 1 of Charter of Rights and Freedoms began shortly after

19. Gutierrez, supra note 3, at 180 (The Charter applies to all federal and provisional levels of government and guarantees a set of civil liberties and fundamental rights that are protected from the actions of Parliament, provincial legislatures, government agencies and officials.).
20. Id.
25. Id. at 190–91. See Part II for a more thorough discussion of Section 15(1) and Section 1 of the Charter.
the Charter's inception in 1982. Some of the earliest Charter cases involving same-sex discrimination were heard by appellate courts. The first case worthy of note is *Andrews v. Ontario (Minister of Health)* for its use of a biological argument in supporting discrimination against homosexuals. In *Andrews*, the court ruled that the Ontario Health Insurance Program did not violate Section 15(1) of the Charter by excluding same-sex couples and their children from the program. The court did not find a violation because it determined that, since heterosexual couples could marry, procreate, and raise children and same-sex couples could not, there are biological differences between the two groups. This “difference” allowed the court to determine that same-sex couples were not entitled to formal equality with heterosexual couples. The approach of heteronormativity articulated in *Andrews* reverberated in subsequent cases.

One such case is *Layland v. Ontario*. In reaching its decision that same-sex couples were not legally entitled to marry, the court relied on the common law definition of marriage and what the court determined was the principle purpose of mar-

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27. *See generally* Andrews v. Ontario (Minister of Health), [1988] 64 O.R.2d 258 (holding that the Ontario Health Insurance Program did not violate Section 15(1) of the Charter by excluding same-sex couples and their children from the program).

28. *Id.*
29. *Id.* at 21.
30. *Id.* at 38.
32. *See generally* Layland v. Ontario, [1993] 104 D.L.R. 214 (holding that same-sex couples were not legally entitled to marry).
riage – procreation. Procreation, the court wrote, cannot be achieved in same-sex unions “because of the biological limitations of such a union.” Although the court found that discrimination on the basis of sexual orientation violated Section 15(1) of the Charter, given that discrimination on the basis of sexual orientation was analogous to discrimination against any of the classes specifically referenced in Section 15(1) of the Charter, it did not find any discrimination in the prohibition against same-sex unions.

It was however, Justice Greer’s dissent in Layland that, a decade later, the majority in Halpern would echo. Greer believed that it was not sufficient to simply look at the pre-Charter cases to determine the definition of marriage. Instead, the concept needed to be placed “in the larger social context of our modern-day society and its mores and expectations.” He went on to say that “choice” is a benefit of the law and a fundamental right which applies to marriage. Under Section 15(1), the right to choose is protected. Section 15(1) is also designed to protect those who are disadvantaged in society, and traditionally homosexuals have been subjected to discrimination. In addition to finding a violation under Section 15(1),

33. Id. at 219–23. The court determined that the petitioners tried to use Section 15 of the Charter to alter the common law definition of marriage and the Charter does not serve that function. Id. at 223. Furthermore, the definition does not constitute a violation of Section 15. Id. A homosexual person is entitled to marry; he or she can marry someone of the opposite sex. Id.

34. Id. at 223. The court did note that although not every heterosexual marriage produces children, the institution of marriage is intended by the state, religions, and society to encourage procreation. Id.

35. Id.

36. Id. at 228 (Greer, J., dissenting).

37. Id.

38. Id.

39. Id. at 229.

40. Id.

The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes and violence directed at them specifically because of their sexual orientation. They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation. ... The stigmati-
Greer concluded that the law could not be saved by Section 1, because the government was not able to prove that the discrimination imposed by the law was justified.41

The first Charter case to reach the Supreme Court of Canada involving the issue of sexual orientation and equality was Egan v. Canada (A.G.).42 In Egan, a homosexual couple challenged the definition of “spouse” as it appeared in the Old Age Security Act, claiming that the definition violated Section 15(1) of the Charter.43 The court unanimously held that even though sexual orientation was not explicitly listed in Section 15(1) of the Charter, it was analogous to those classes that are enumerated in

zation of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexual persons to conceal their orientation. This imposes its own associated costs in the workplace, the community and in private life. Holpern, 65 O.R.3d at 184 (quoting Egan v. Canada, [1995] 2 S.C.R. 513, 600-02).

41. Layland, 104 D.L.R. at 233 (Greer, J., dissenting). Justice Greer stated that while it is in the interest of the state to protect family relationships, this interest should apply equally to both same-sex and heterosexual unions. Id. It is discriminatory to say that the state only needs to preserve heterosexual families, and a rule with a discriminatory purpose is not justified under Section 1. Id.

42. See generally Egan, 2 S.C.R. 513 (holding that the Old Age Security Act was constitutional because although declining benefits based on sexual orientation was discriminatory under Section 15(1) of the Charter, the government established sufficient reasons for why the law was justified under Section 1). The first case to reach the Supreme Court of Canada involving gay equality rights was Mossop v. Canada, in which a gay man was denied the right by his employer to receive bereavement leave when his partner's father died. Mossop v. Canada (A.G.), [1993] 1 S.C.R. 554 construed in Cossman, supra note 26, at 226–27. The petitioner, however, did not challenge on Charter grounds. Id. Instead, the petitioner claimed he was being discriminated against under the Human Rights Act on the basis of family status and not sexual orientation. Id. The Supreme Court dismissed the case stating that the denial was based on sexual orientation and not family status. Id. Since the petitioner did not raise any constitutional challenges there was no basis for his claim. Id.

43. Egan, 2 S.C.R. at 527. “Spouse” is defined in 19(1) of the Old Age Security Act, R.S.C. 1985, which states that “spouse, in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for a least one year, if the two persons have publicly represented themselves as husband and wife....” Id. This definition extends to common law relationships. Id. The appellants claim that the definition is a violation of Section 15 of the Charter in that it discriminates on the basis of sexual orientation. Id. at 527–28.
this section and, therefore, discrimination based on sexual orientation was prohibited.\textsuperscript{44} Then, in reaching the conclusion that Section 1 permits the discrimination, the court determined that it was sound public policy for Parliament to favor and provide support for heterosexual married couples.\textsuperscript{45} Marriage, the court said, is “deeply rooted in our fundamental values and traditions, values and traditions that could not have been lost on the framers of the Charter.”\textsuperscript{46}

The \textit{Egan} court then turned to the biological argument, that marriage is by nature heterosexual and grounded in the biological and social realities that only heterosexual couples can procreate.\textsuperscript{47} Due to the important position marriage holds in society and the unique needs of the union, the court held that Parliament is permitted to afford it special support and, therefore, the discrimination based on sexual orientation was found to be reasonable under Section 1.\textsuperscript{48}

Just five years after \textit{Egan}, the Supreme Court ruled in \textit{Vriend v. Alberta} that the denial of formal equality to homosexuals was a violation of Section 15(1) and could not qualify as an exception under Section 1.\textsuperscript{49} In \textit{Vriend}, a science laboratory coordinator was fired from his job at a Christian college because he was gay.\textsuperscript{50} While \textit{Vriend} was not about same-sex marriage, it was a sign of the future: no longer would discrimination on the basis of sexual orientation survive a Charter challenge.\textsuperscript{51}

In the next case to reach the Supreme Court, \textit{M. v. H.}, the court declared the term “spouse,” as it appeared in the Family Law Act (FLA),\textsuperscript{52} a violation of the Charter.\textsuperscript{53} The court held

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44. \textit{Id.} at 528.
45. \textit{Id.} at 536–37.
46. \textit{Id.} at 535.
47. \textit{Id.} at 536.
48. \textit{Id.} See also Cossman, \textit{supra} note 26, at 229.
50. \textit{Id.}
52. Family Law Act, R.S.O., ch. F.3, § 29 (1990) (Can.) (The Family Law Act provides a means for a person to petition the court to receive support from a spouse, or a man or woman with whom a person lived with in an opposite-sex conjugal relationship.).
\end{footnotesize}
that the definition encompassed only opposite-sex couples and, as such, was a violation of Section 15(1) because it discriminated entirely on the basis of sexual orientation. In reaching this conclusion, the court determined that the denial of the potential benefit gained from spousal support may create an economic burden that would contribute to the "general vulnerability by individuals in same-sex relationships." The court held that when analyzing a benefit under Section 15(1), it must look beyond whether a party is conferred a benefit and examine whether he or she is denied access to a process that can give an economic or non-economic benefit. Moreover, there is a societal significance to receiving benefits under the FLA. By excluding same-sex couples, the legislature was essentially stating that these relationships are less worthy of recognition and protection and are not able to create the intimate relationships that derive from economic interdependence.

Under the Section 1 analysis, the court determined that the government did not meet its burden, which is to prove that the discrimination imposed by the law is justified. To meet this burden, the legislature has to provide the court with evidence to support its claim and justification.

53. See generally M. v. H., [1999] 2 S.C.R. 3 (holding that the definition of spouse at it appeared in the Family Law Act was a violation of Section 15(1) because it discriminated on the basis of sexual orientation).
54. Id. at 57.
55. Id. at 61.
56. Id. at 60.
57. Id. at 62.
58. Id. at 63.
59. Id.

In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution. ... This court has often stressed the importance of deference to the policy choices of the legislature in the context of determining whether the legislature has discharged its burden of proof under Section 1 of the Charter. ... Deference is not a kind of threshold inquiry under Section 1. As a general matter, the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make. The simple or general claim that the infringement of a right is justified under Section 1 is not such a decision. The notion of judicial deference to legislative choices should
the exclusion of same-sex couples was not rationally related to the government’s objective under the FLA. The court noted that the objective of the FLA was to alleviate the financial burden on a spouse when a relationship dissolved and that the objective would actually be enhanced if it included same-sex couples under the FLA.

It should be noted that the court specifically announced that it was not making any statement regarding same-sex marriage or on any related issues. Because the FLA applied to both married and unmarried opposite-sex couples, the court was only able to determine whether the FLA discriminated against same-sex couples who were cohabitating in ways equivalent to cohabiting opposite-sex couples.

Although the court did not make any determination with regard to same-sex marriage, it did recognize that same-sex relationships are legitimate and entitled to legal protection. Furthermore, the aftermath of the decision had other far reaching consequences. The Ontario government amended sixty-seven statutes that included the term “spouse” to include same-sex partners in An Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H. However, the Ontario government made these changes reluctantly. Prime Minister Mike Harris stated “[t]his legislation is not part of our…agenda. We are introducing this bill because of the Supreme Court of Canada’s decision.” Moreover, the legislature responded in a way the Supreme Court had not intended. Instead of creating a gender-neutral definition of the word

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Id. at 59–60.
60. Id. at 69.
61. Id. at 73.
62. Id. at 58.
63. Id. The court determined that same-sex couples are capable of forming conjugal relationships, even though they cannot “hold themselves out” as husband and wife. Id. at 51.
64. See generally M. v. H., 2 S.C.R. 3 construed in Cossman, supra note 26, at 235.
65. Id.
67. Id.
“spouse,” the government established a new category of relationship by calling it “same-sex partner,” thereby creating a separate but equal approach.

The federal government responded to *M. v. H.* by approving a motion stating that “it is necessary to state that marriage is and should remain the union of one man and one woman to the exclusion of all others,” and that Parliament “will take all necessary steps within its jurisdiction to preserve this definition of marriage in Canada.” Although this motion was only symbolic as it had no legal force, its symbolism was important because it reflected the federal government’s opposition to same-sex marriages.

By the time *M. v. H.* was decided, it appeared that the Supreme Court of Canada had moved away from the biological argument used to deny equality based on sexual orientation, and towards recognizing equality for same-sex couples. However, it is equally as clear that the elected government had not.

The specific amendment to s. 29 of the *FLA* in that act inserted the following definition alongside that of "spouse": 'same-sex partner' means either of two persons of the same sex who have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

*Id.* at n. 27.

*Id.* at 306.

This separate but equal approach clashed dramatically with the position held by same-sex rights activists that the order in *M. v. H.* required legislatures to include both opposite-sex and same-sex couples within a single definition of spouse. To do otherwise, they argued, went against the very spirit of the decision by affixing separate labels on the basis of sexual orientation.

*Id.*


In Canada, as well as other jurisdictions around the world, same-sex marriage has been the subject of legal, political, and moral debate. In increments, the Supreme Court of Canada has extended certain benefits and rights to gays and lesbians. It was, therefore, only a matter of time before a challenge to the

II. HALPERN V. TORONTO

As of this publication, Halpern has not been appealed and the federal government announced that it would not appeal the decision. Elliot, supra note 26, at 613–14. Instead, on July 16, 2003, the legislature referred a draft Bill entitled Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes (“Proposed Act”) to the Canadian Supreme Court for an advisory opinion. Reference re Same-Sex Marriage, 2004 Can. Sup. Ct. LEXIS 76 *16. The Court was to determine the validity of the act. Id. The relevant sections are as follows: Section 1: Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others; Section 2: Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs. Id. (construing Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes (“Proposed Act”)).

Three questions were presented to the Canadian Supreme Court to determine the validity of the act. The three questions were as follows:

1. Is the annexed Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes within the exclusive legislative authority of the Parliament of Canada? 2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the Canadian Charter of Rights and Freedoms? 3. Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious official from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs.

Id. at *17

In answering these questions, the Supreme Court determined that Section 1 of the Proposed Act is within the exclusive legislative competence of Parliament, while Section 2 is not. Id. Furthermore, the new definition of marriage is constitutional, and religious officials cannot be compelled to perform marriages contrary to their religious beliefs. Id. After the decision by the court, the Bill will then be submitted to Parliament for a vote. Elliot, supra note 26, at 613–14. However, the legal definition of marriage has already been changed. Id.

refusal to allow same-sex marriages appeared before the Canadian courts.  

A. Facts of Halpern v. Toronto

The lawsuit began over three years ago when seven same-sex couples (Couples) applied for civil marriage licenses from the Clerk of the City of Toronto. Instead of denying the licenses, the clerk stated that she would hold them in abeyance while waiting for directions from the courts. The Couples decided not to wait on the clerk and, instead, commenced their own application. On August 22, 2000, the Couples’ application was transferred to the Divisional Court.

At about the same time that the Couples began their application, the Metropolitan Community Church of Toronto (MCCT) decided it would marry homosexual couples in religious ceremonies. The reason for this decision was MCCT’s learning that under the application of the laws of Ontario, the ancient Christian tradition of publishing the banns of marriage was a lawful alternative to a marriage license issued by municipal authorities. Two same-sex couples decided to marry at MCCT

73. In addition to Halpern, there were two other Canadian courts that sanctioned same-sex marriages. Halpern, 65 O.R.3d at 173. In Quebec, in Hendricks v. Quebec (Attorney General) the court “declared invalid the prohibition against same-sex marriages caused by the intersection of two federal statutes and the Civil Code of Quebec on the basis that it contravened Section 15 (1) of the Charter and could not be saved under Section 1.” Id. (quoting Hendricks v. Quebec, [2002] R.J.Q. 2506). The declaration was stayed for two years to allow the legislature to respond. Id.

In British Columbia, in EGALE Canada Inc. v. Canada (Attorney General), the Court of Appeals “declared the common law definition of marriage unconstitutional, substituted the words ‘two persons’ for ‘one man and one woman’ and suspended the declaration of unconstitutionality until July 12, 2004, the expiration of the two-year suspension ordered by the Divisional Court in this case.” Halpern, 65 O.R.3d at 173 (quoting EGALE v. Canada, [2003] B.C.J. 994).

74. Halpern, 65 O.R.3d at 169.
75. Id.
76. Id.
77. Id.
78. Id.
in a religious ceremony, and thereafter, Reverend Brent Hawkes published their banns during services. Reverend Hawkes then married the couples, registered the marriages in the Church register, issued the couples marriage certificates, and submitted the required documents to the Office of the Registrar General. The Registrar refused to accept the documents, stating that the federal prohibition on same-sex marriages prevented him from registering the marriages. In response to the registrar's assertion, MCCT brought an application to the Divisional Court.

On July 12, 2002, for the first time in Canadian history, a court found that the common-law rule barring same-sex marriage was unconstitutional. The Divisional Court found that the law was unconstitutional because it violated Section 15(1) of the Canadian Charter of Rights and Freedoms and was not saved by Section 1 of the Charter. Although the decision regarding constitutionality was unanimous, the court was divided as to the appropriate remedy. The court, therefore, decided to suspend the remedy for twenty-four months to allow “Parlia-

81. Id. at 170.
82. Id.
83. Id.
86. Halpern, 65 O.R.3d at 170.

Smith A.C.J.S.C. was of the view that Parliament should legislate the appropriate remedy and that it should be given two years to do so, failing which the parties could return to the court to seek an appropriate remedy. LaForme J. favoured immediate amendment, by the court, of the common law definition of marriage by substituting the words “two persons” for “one man and one woman.” Blair R.S.J. adopted a middle position; he would have allowed Parliament two years to amend the common law rule, failing which the reformulation remedy proposed by LaForme J. would be automatically triggered. It is Blair R.S.J.’s position that is reflected in the formal judgment of the court.

Id.
ment to respond to the Charter violation by engaging in debate with respect to the social, religious, and other values related to marriage. Before Parliament responded, however, the Attorney General of Canada appealed and the Couples and MCCT cross appealed.

B. Decision in Halpern v. Toronto

The question on appeal was whether Canada’s definition of marriage, which excludes same-sex couples from marrying, violates Section 2(a) or Section 15(1) of the Canadian Charter of Rights and Freedoms in a way that cannot be permitted in a free and democratic society under Section 1 of the Charter. The court put forth a detailed analysis, which ultimately led to its decision that denying same-sex couples the right to marry violated the Charter.

The court began by establishing that the definition of marriage is found at common law. The definition was first espoused in Hyde v. Hyde and Woodmansee by Lord Penzance, in which he stated, “I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”

The court determined that there was no violation of Section 2(a). The court determined that the common law definition

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88. Chapman, supra note 85, at 425.
89. Halpern, 65 O.R.3d at 171 (appealed on the equality issue).
90. Id. The couples cross-appealed on the question of remedy alone. Id. They sought “a declaration of unconstitutionality and a reformulation of the definition of marriage, both to take place immediately, and related personal remedies in the nature of mandamus.” Id. MCCT cross-appealed on the question of remedy. Id. In addition, it cross-appealed that the current definition of marriage infringes its §§ 2(a) and §15(1) rights as a religious institution. Id.
91. CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §§2(a). Section 2(a) of the Charter of Rights and Freedoms states, “Everyone has the following fundamental freedoms (a) freedom of conscience and religion.” Id. The court determined that there was no violation of Section 2(a). Halpern, 65 O.R.3d at 171.
92. Halpern, 65 O.R.3d at 171.
93. See generally Halpern, 65 O.R.3d 161 (holding that the prohibition against same-sex marriage violated the Charter of Rights and Freedoms).
94. Id. at 173.
95. Hyde v. Hyde and Woodmansee L.R. 1 P&D. 130, 133 (1866). “This has been the definition of marriage in Canada for all of the nation’s 136 years. Halpern, 65 O.R.3d at 166.
of marriage violated the Couples’ equality rights on the basis of sexual orientation under Section 15(1) and that this violation could not be justified under Section 1.\footnote{Id. at 196. The court ultimately determined that the common law definition did not infringe freedom of religion rights under §§ 2(a) of the Charter.}{\textit{Id}.}

In addition to the common law definition, the court noted that the word “marriage” appears in the Constitution Act, raising the question of whether a constitutional amendment was needed to change Canada’s definition of marriage.\footnote{Halpern, 65 O.R.3d at 174 (construing \textit{CAN. CONST.} (Constitution Act, 1867) §§ 91(26), 92(12)).} The court decided that an amendment was not needed because “marriage” did not have a constitutionally-fixed meaning, but was, instead, a flexible term that could change as Canadian society changed.\footnote{Halpern, 65 O.R.3d at 176.} The court did not want to “freeze” the definition of marriage as to how it was defined in 1867 because that would be contrary to Canada’s progressive constitutional interpretation.\footnote{Halpern, 65 O.R.3d at 175.} The court noted, “must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.” Since the term “marriage” was flexible there was no need for constitutional amendment procedures.\footnote{Halpern, 65 O.R.3d at 175.} Because a constitutional amendment was not needed, both the courts and Parliament were free to alter the law without resorting to the intricacies and difficulties of the amendment process. After determining that an amendment was not needed, the court went on to discuss whether prohibiting same-sex marriage violated the Charter.

The Association for Marriage and Family in Ontario takes the position that the word ‘marriage as used in the Constitution Act, 1867 is a constitutionally entrenched term that refers to the legal definition of marriage that existed at Confederation’... that being the ‘union of one man and one woman.’ As such the definition can only be amended by formal constitutional amendment procedures.\footnote{Halpern, 65 O.R.3d at 175.} The court also noted that “[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.” \textit{Id}. at 175 (quoting \textit{Edwards v. A.G. Canada} [1930] A.C. 124, 136).

\footnote{Id. at 176.}
1. Section 15(1) of the Charter

As stated above, Section 15(1) provides that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”\(^{102}\) Not every distinction created by the legislature, however, is discriminatory.\(^{103}\) A Section 15(1) violation is found only when the law in question conflicts with the purpose of Section 15(1).\(^{104}\) The purpose of Section 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantaging, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.\(^{105}\)

To determine whether a conflict exists under Section 15(1), the Supreme Court in *Law v. Canada* created a three-stage inquiry:

1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?

2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit for the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a


\(^{103}\) *M. v. H.*, 2 S.C.R. at 59.

\(^{104}\) *Halpern*, 65 O.R.3d at 179.

human being or as a member of Canadian society, equally de-
serving of concern, respect, and consideration? 106

Stage 1:

In Stage 1, the court must determine whether the law: a) draws a formal distinction between the claimant and others on the basis of one or more personal characteristics; or b) fails to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics. 107 Here, the claimant must decide the relevant group to compare himself or herself to for the purpose of determining if the claimants are receiving differential treatment. 108 In Halpern, the couples determined that the relevant group was opposite-sex couples, since only opposite-sex couples have the legal right to marry. 109 The Attorney General argued that, due to the enactment of the Modernization of Benefits and Obligations Act, 110 which gave same-sex couples substantive equal benefits and protection of the federal law, same-sex couples do not receive differential treatment. 111 The court disagreed with the Attorney General’s argument and found that, even with the Modernization of Benefits and Obligations Act, same-sex couples were, in fact, receiving differential

106. Law, 1 S.C.R. at 548–49. The claimant has the burden of establishing each of these factors on a balance of probabilities. Halpern, 65 O.R.3d at 179.
109. Id.
111. Halpern, 65 O.R.3d at 180. The government argued that the institution of marriage does not allow a distinction between opposite-sex and same-sex couples: “The word marriage is a descriptor of a unique opposite-sex bond that is common across different times, cultures and religions as a virtually universal norm.” Id. Additionally, the government argued that marriage is not a common law concept, but instead is a historical and worldwide institution that predates the Canadian legal framework. Id. Moreover, the definition of marriage is not the source of the differential treatment, the source is the legislation that gives the authority to provide government benefits and obligations. Id. Since the Modernization of Benefits and Obligations Act was enacted, same-sex couples receive substantive equal benefits from the government and protection of the federal law. Id.
treatment. This determination was founded on the fact that legislatures give various rights and obligations based on the institution of marriage, such as licensing and registration, so that the marriage can be recognized by law. Same-sex couples are denied access to these rights and obligations, and this denial constitutes differential treatment. Moreover, the common law definition of marriage creates a distinction between opposite and same-sex couples on the basis of their sexual orientation. Since a distinction between same-sex and opposite-sex couples was found, the first stage of the Section 15(1) inquiry was satisfied.

Stage 2:

In determining Stage two of the inquiry the court looked to the Canadian Supreme Court’s decision in Egan v. Canada. Recognizing that although there are specific grounds enumerated in Section 15(1) such as race and religion, the Egan court determined that sexual orientation was analogous to those already listed in the Charter. In Egan, the Supreme Court first recognized sexual orientation as an analogous ground deserving of protection when it stated that sexual orientation is a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.” Since the Supreme Court had previously determined that sexual orientation was an analogous ground, Stage two was met.

113. Id. at 181.
114. Id. (“Once the state does provide a benefit it is obliged to do so in a non-discriminatory manner. ...In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons.”).
115. Id.
116. Halpern, 65 O.R.3d at 182. See generally Egan, 2 S.C.R. 513 (holding that sexual orientation is analogous to the specific grounds already listed in Section 15(1) of the Charter).
117. Egan, 2 S.C.R. at 528.
118. Id.
Stage 3:

For the third stage of the inquiry, the court focused on substantive equality, not formal equality, with the emphasis on human dignity. Here, the court was required to consider the individual’s or group’s traits, history, and circumstances to evaluate whether a reasonable person in similar circumstances would find that the law in question differentiates the couples in a way that demeans their dignity. The court also examined the purpose and effect of the law. A law that has a discriminatory purpose cannot survive Section 15(1) scrutiny. However, in order to successfully challenge the law, the claimant does not have to show a discriminatory purpose; a discriminatory effect will suffice.

To determine if a law has a discriminatory purpose or effect, the court examines four factors. These four factors are 1) pre-existing disadvantage, stereotyping or vulnerability of the claimants; 2) correspondence between the grounds and the

120. *Id.*

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon the personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status of position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

*Id.* (quoting Law, 1 S.C.R. at 530).


122. *Id.* at 183.

123. *Id.* (“[A]ny demonstration by a claimant that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society...will suffice to establish an infringement of Section 15(1).”).

124. *Id.*
claimant’s actual needs, capacities or circumstances; 3) ameliorative purpose or effects on more disadvantaged individuals or groups in society; and 4) nature of the interest affected.  

While not dispositive, the first factor is “probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory.” The court stated that homosexual persons have been disadvantaged throughout Canada’s history. However, the court also noted that a particular legislation may not be discriminatory if the distinction created by the law respects the group’s or individual’s liberty interest in making fundamental decisions regarding their lives.

One of the essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one’s life. Limitations imposed by this court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.

The court held that the common law definition, requiring marriage to be between two people of the opposite sex denies people in same-sex relationships a fundamental choice, whether or not to marry their partner.

The second factor is the “correspondence, or lack thereof, between the grounds on which the claim is based and the actual

125. Id. at 183–90.
126. Id. at 183 (“The list of factors is not closed and not all of the factors will be relevant in every case.”).
127. Id. at 183–84 (quoting Law, 1 S.C.R. at 534).
128. Id. at 184.
129. Id.
130. Id.
131. Id.
needs, capacities, or circumstances of the claimant or others with similar traits. Legislation that accommodates the actual needs, capacities, and circumstances of the claimants is less likely to demean dignity. Here, the government argued that marriage relates to the needs, capacities, and circumstances of opposite-sex couples. The court rejected this argument because the question to be determined is whether the law takes into account the needs, capacities, or circumstances of same-sex, not opposite-sex couples. The purpose and effect of the law in question must be viewed from the perspective of the claimant, and here, the court determined that from the perspective of same-sex couples, the law did not meet their needs, capacities, or circumstances.

The reason the law did not meet same-sex couple’s needs, capacities, or circumstances was because the law prevented them from receiving the benefits of marriage. The court determined that the recognized purposes of marriage include companionship, societal recognition, economic benefits, blending of two families, and intimacy. In addition to the denial of these benefits, prohibiting same-sex couples from marrying would perpetuate the view that same-sex couples are not capable of having the same type of relationship as opposite-sex couples and that their relationships are not deserving of the same respect and recognition afforded to opposite-sex couples.

Moreover, the court determined that the government’s argument here is more suited for a Section 1 and not a Section 15(1) analysis because the Section 15(1) analysis at this stage re-

132. Id.
133. Id.
134. Id.
135. Id. at 186. (“[T]he fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the § 15(1) guarantee.”).
136. Id. at 187.
137. Id.
138. Id. The government also argued that marriage as an institution is for the capacities, needs and circumstances of heterosexual couples: “The concept of marriage – across time, societies and legal cultures – is that of an institution to facilitate, shelter and nurture the unique relationship of a man and a woman who, together, have the possibility to bear children from their relationship and shelter them within it.” Id. at 185–86.
quires the court to “define the scope of the individual’s right to equality, not to balance that right against societal values and interests or other Charter rights.” Any balancing is done under Section 1.

The third factor is whether the law has “an ameliorative purpose or effect upon a more disadvantaged person or group in society.” It was clear to the court that throughout Canada’s history opposite-sex couples were more advantaged than same-sex couples. In effect the court took judicial notice of the existence of this advantage, which allowed the court to determine that the third factor was met.

The fourth factor is the “nature of the interest affected by the law.” The court stated that “[T]he more severe and localized the effect of the law on the affected group, the greater the likelihood that the law is discriminatory.”

Although a search for economic prejudice may be a convenient means to begin a Section 15 inquiry, a conscientious inquiry must not stop here. The discriminatory caliber of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society (e.g. voting, mobility). Finally, does the distinction constitute a complete non-recognition of a particular group? It stands to reason that a group’s interests will be more adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction does recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like.

Halpern, 65 O.R.3d at 188 (quoting Law, 1 S.C.R. at 540).
pointed to the Modernization of Benefits and Obligations Act to preclude a finding of discrimination.\textsuperscript{145} The court, however, found that the Act did not give the same benefits and obligations to same-sex couples\textsuperscript{146} and, moreover, even under the Act, same-sex couples were excluded from the actual act of participating in a legal marriage, an important and vital social institution.\textsuperscript{147} The court held that Section 15 guarantees more than equal access to economic benefits; it also guarantees equal access to fundamental social institutions, such as marriage.\textsuperscript{148}

Once the court determined that the common law definition of marriage violated Section 15(1) of the Charter, the court then examined whether the violation could be justified under Section 1 of the Charter.\textsuperscript{149}

2. Section 1 Analysis

Section 1 states that “the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”\textsuperscript{150} If a law violates Section 15(1) of the Charter, it can be upheld if it is justified under Section 1.\textsuperscript{151} The party who wants the law up-

\textsuperscript{145} Id.
\textsuperscript{146} Id. at 189. (In numerous cases, benefits and obligations under the Modernization of Benefits and Obligations Act are only given to same-sex couples after they have lived together for a certain period of time, whereas opposite-sex couples got them immediately.).
\textsuperscript{147} Id. (The court must consider whether the affected group has been excluded from “fundamental societal institutions.”).
\textsuperscript{148} Id. at 190.
\textsuperscript{149} Id.
\textsuperscript{150} CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §1.
\textsuperscript{151} Halpern, 65 O.R.3d at 190. Section 1 analysis requires a balancing of an individual’s right against the state’s interest, however a Section 15(1) analysis does not have this requirement. CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §1, \textit{construed in} Lavoie v. Canada, [2002] 1 S.C.R. 769, 809–10. Section 15(1), requires the courts to “define the scope of the individual right to equality.” Id. Under Section 15(1), a claimant must provide a rational foundation for the experience of discrimination and demonstrate that a similarly situated rational person would share that experience; however, Section 1 requires the government to justify that discrimination, not to explain it or deny its existence. Id.
held must establish the justification for the law and has the burden of proving that:

1. the objective of the law is pressing and substantial; and

2. the means chosen to achieve the objective are reasonably and demonstrably justifiable in a free and democratic society. This requires:

   (A) The rights violation to be rationally connected to the objective of the law;

   (B) The impugned law to minimally impair the Charter guarantee; and

   (C) Proportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgment of the right.\(^\text{152}\)

At this stage, the burden was on the government to demonstrate a justification for the breach of human dignity caused by the law.\(^\text{153}\) To meet its burden, the government could show the practical, moral, economic, or social aspects of the law by demonstrating a need to protect other rights in the Charter, or by establishing that what the law purports to do outweighs its negative impact on human dignity.\(^\text{154}\)

When the law in question is challenged as being underinclusive, as it is here, the objective of the entire law must be examined along with the objective of the exclusion.\(^\text{155}\) Here, the Attorney General argued that throughout history marriage has always been between a man and a woman, and the purpose of marriage is for uniting the opposite sexes, promoting companionship, and encouraging procreation.\(^\text{156}\) While the court agreed

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\(^{152}\) Halpern, 65 O.R.3d at 191 (quoting R. v. Oakes, [1986] 1 S.C.R. 103 at 138–39). The Oakes court was the first court to formulate the test for determining whether a law is a reasonable limit on a Charter right or freedom in a free and democratic society. Halpern, 65 O.R.3d at 191. This became known as the Oakes test. Id. The first stage of the Oakes test involves two steps: first the objectives of the impugned law must be determined, and secondly, the objective of the impugned law must be evaluated to see if the objective is capable of justifying limitations on Charter rights. Halpern, 65 O.R.3d at 191 (interpreting R. v. Oakes, 1 S.C.R. at 138–39).

\(^{153}\) Id.

\(^{154}\) Id. at 186.

\(^{155}\) Id. at 191.

\(^{156}\) Id. at 191–92.
that this has historically been the accepted notion of marriage, the question before the court was whether perpetuating this concept is a valid objective and whether the Attorney General had given valid arguments for the court to support and perpetuate this definition of marriage.\(^{157}\) The court determined it was not a valid objective and disagreed with all three rationales put forth by the Attorney General.\(^ {158}\)

First, the court noted that merely stating that marriage is heterosexual because it always has been that way is not an objective that can justify infringing upon a Charter value.\(^ {159}\) The court then went on to dismiss the other arguments provided by the Attorney General. The first purpose given by the Attorney General stated that marriage unites the opposite sexes.\(^ {160}\) The court held that this purpose values one form of relationship over another and suggests that same-sex relationships are not as legitimate as opposite-sex relationships.\(^ {161}\) A purpose that demeans the dignity of same-sex couples cannot be pressing and substantial, since it is contrary to the values of a free and democratic society.\(^ {162}\) Second, the encouragement of procreation will not be impeded by allowing same-sex couples to marry and heterosexual couples will not stop procreating if same-sex couples are entitled to marry.\(^ {163}\) Moreover, heterosexual couples and same-sex couples can adopt and heterosexual couples can choose to not have children.\(^ {164}\) Last, the third argument was dismissed because encouraging companionship only between opposite-sex couples perpetuates the notion that same-sex couples are not equally capable of forming loving relationships.\(^ {165}\)

While the court’s conclusion under the first stage of the analysis was sufficient to determine that the Attorney General did not meet his burden, the court went on to consider the remainder of the test.\(^ {166}\) Under the rational connection test, the

\(^{157}\) Id. at 192.
\(^{158}\) Id. at 193.
\(^{159}\) Id. at 192.
\(^{160}\) Id.
\(^{161}\) Id.
\(^{162}\) Id.
\(^{163}\) Id.
\(^{164}\) Id. at 192–93.
\(^{165}\) Id. at 193.
\(^{166}\) Id.
party seeking to uphold the law must show that the violation of rights is rationally related to the objective. Here, the government would have to show that the exclusion of same-sex couples from marriage is required to encourage procreation, childrearing, and companionship. The court held that the rational connection test was not met because the “exclusion of same-sex couples from marriage is not necessary for the promotion of procreation, childrearing, and companionship.” The court found that the law was both under and over-inclusive. It was over-inclusive because the ability to naturally conceive children and willingness to raise children are not prerequisites for opposite-sex marriage. The law was under-inclusive because it excluded same-sex couples who have and raise children. The court determined that even if it had concluded that the Attorney General’s objectives were pressing and substantial, these objectives were not rationally connected to the opposite-sex requirement for marriage.

As for minimal impairment, because same-sex couples were completely excluded from the institution of marriage, it was clear that there was significantly more impairment than “minimal.” Furthermore, the court stated that any alterna-

167. Id. at 194.
168. Id.
169. Id.
170. Id.
171. Id.
172. Id.
173. Id.
174. Minimal impairment relates to the second prong of the Oakes test. See supra Part II.B.2.
175. Id. at 196. The Attorney General submitted that the means chosen by Parliament to achieve its objectives impairs the rights of gays and lesbians as minimally as possible:

Although same-sex relationships are not granted legal recognition, gay men and lesbians have the right to choose their partners and to celebrate their relationships through commitment ceremonies. Additionally, same-sex couples have achieved virtually all of the federal benefits that flow from marriage with the passing of the Modernization of Benefits and Obligations Act.

Id. at 195.

The court, however, did not accept this assertion, and stated it did not believe that same-sex couples have achieved equal access to government bene-
tive to the legal institution of marriage was not an adequate substitute. 176

Under the Section 1 analysis, the court determined that the Attorney General's objectives for the prohibition against same-sex marriage did not justify the exclusion of same-sex couples from the institution of marriage. 177

3. Remedy

To remedy the situation, the court replaced the common law definition of marriage with a new definition of its own creation: "The voluntary union for life of two persons to the exclusion of all others." 178 The court also determined that this definition was to have immediate effect, that the Clerk of the City of Toronto was to issue marriage licenses to same-sex couples, and that the Registrar General of the Province of Ontario was to accept the marriage certificates of same-sex couples. 179

III. THE EQUAL PROTECTION CLAUSE IN THE UNITED STATES

Canada is not the only nation to grapple with same-sex marriage, nor are its courts the only courts to establish under which standard of constitutionality a law prohibiting same-sex couples to marry should be scrutinized. The U.S. court system has also been called upon to address issues of gay rights, although its highest court has not yet addressed the issue of same-sex marriage. Looking at how the U.S. courts interpret the Equal Protection Clause and how the Supreme Court of the United States has applied the clause to laws which discriminate on the basis of homosexuality will help to understand how the Court will rule on the issue of same-sex marriage if, or when, it appears before it.

fits and that marriage should not be viewed purely in economic terms. *Id.* at 194–95.
176. *Id.* at 195 ("Same-sex couples and their children should be able to benefit from the same stabilizing institution as their opposite-sex counterparts.").
177. *Id.* at 196.
178. *Id.* at 197.
179. *Id.* at 199.
A. Origins and Background

Justice Harlan, in his dissent in *Plessy v. Ferguson*, stated “in view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. The Equal Protection Clause neither knows nor tolerates classes among citizens.” The basis for equal protection is found in the Fourteenth Amendment to the U.S. Constitution. It states that no state shall “deny to any person within its jurisdiction the equal protection of the law.” The interpretation of the amendment has been left mainly to the Supreme Court. The Equal Protection Clause comes into play whenever the government treats two groups differently.

When determining whether a particular statute is a violation of equal protection rights, a U.S. court must first decide the appropriate standard of review. To do this, the court must ascertain the basis for the claim of discrimination, such as race, gender, or sexual orientation. These and other categories of discrimination have been divided into three levels of review; strict scrutiny, intermediate scrutiny, and rational basis.

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182. *Id.*

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

183. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW, 601–04 (2002). “More than a century after the adoption of the fourteenth amendment, the question of the inherent content of equal protection continues to be a subject of intense debate.” *Id.* at 601.


185. *Id.*

186. *Id.*
Strict scrutiny, the highest standard of review, is applied to classes of discrimination that the court deems “suspect classes.” This includes claims of unequal treatment based on race, alienage, or national origin. If a law is subjected to this level of review, it will be declared unconstitutional unless the state can provide a "compelling state interest" and that the discriminatory means employed substantially relate to the achievement of the state interest. Under this analysis, most statutes will be struck down. This is because the state must show the law is “necessary to the accomplishment of some permissible state objective, independent of the discrimination…,” which places an exceptionally high burden on the state.

At the middle level, which encompasses “quasi-suspect classes” such as gender and illegitimacy, the court will apply heightened, or intermediate scrutiny. This level requires the state to show that “the legislative use of the classification reflects a reasoned judgment consistent with the ideal of equal protection that furthers a substantial interest of the state.” Under intermediate scrutiny, the party seeking to defend the law must show an “exceedingly persuasive justification” for the law. The Court in United States v. Virginia stated that the state must show “at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” The Court went on to state that “[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation.”

187. Id.
188. Id.
190. See e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967).
191. Maxwell, supra note 184, at 159.
192. See, e.g., Loving, 388 U.S. at 11.
193. SULLIVAN & GUNTHER, supra note 183, at 647.
194. Maxwell, supra note 184, at 159–60.
195. See e.g., United States v. Virginia, 518 U.S. 515 (1996) (This case concerned a gender based law.).
197. Id. at 533.
Classification based on gender receives heightened review because these classifications “very likely reflect outmoded notions of the relative capabilities of men and women.” Moreover, classifications based on illegitimacy receive intermediate scrutiny because “illegitimacy is beyond the individual’s control and bears no relation to the individual’s ability to participate in and contribute to society.”

The lowest level of review, the “rational basis” test, is used when there is no suspect classification involved. The Supreme Court has determined that age, poverty, mental retardation, and sexual orientation are not suspect classes. Under rational review it is the petitioner who has the burden of demonstrating that the discrimination is not “rationally related to a legitimate government interest.” Typically, statutes which come under the rational basis test are found to be constitu-


199. City of Cleburne, 473 U.S. at 441 (quoting Matthew v. Lucas, 427 U.S. 495, 505 (1976)). See also Drew, supra note 198, at 287.

200. Id. at 313.

201. See generally Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (holding that laws that discriminate on the basis of age should only receive rational basis review).

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a “history of purposeful unequal treatment” or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

202. See generally James v. Valtierra, 402 U.S. 137 (1971) (holding that laws that discriminate on the basis of wealth should only receive rational basis review). See also Harris v. McRae, 448 U.S. 297, 323 (1980) (stating that this Court has held repeatedly that poverty, standing alone, is not a suspect classification).

203. See generally City of Cleburne, 473 U.S. at 441–43 (holding that laws that discriminate on the basis of mental retardation should only receive rational basis review).

204. See generally Romer v. Evans, 517 U.S. 620 (1996) (holding that laws that discriminate on the basis of sexual orientation should only receive rational basis review).

205. Id.
tional, since all the court requires to uphold the law is a legitimate government reason for the discrimination, a very low burden for the state.\footnote{206}

To determine whether a suspect class or quasi-suspect class is involved, the court uses a three-part analysis.\footnote{207} The origin of this three-part test comes from often cited Footnote 4 of the United States v. Carolene Products.\footnote{208} First, the court looks to see if the class has a history of discrimination.\footnote{209} Second, the court determines the immutability of the class characteristic.\footnote{210} Finally, the court examines whether the class is politically powerless enough to command extraordinary protection from the majoritarian political process.\footnote{211}

B. Equal Protection Cases and Their Application to Sexual Orientation

The two most notable Supreme Court cases addressing sexual orientation and equal protection are Romer v. Evans and Lawrence v. Texas.\footnote{212} In Romer, the Colorado legislature enacted a law that denied homosexuals any express statutory protections.\footnote{213} The law prohibited “all legislative, executive or judicial action at any level of state or local government designed to protect the named class.”\footnote{214} The named class was homosexual persons.\footnote{215} By applying the rational basis test the Court deter-
determined that the Colorado state law was a violation of equal protection. Since the Court concluded that the law’s only purpose was animus towards a particular group of people, namely homosexuals, the Court found that the law could not survive even under the rational review test. Since the Court held that the law failed under rational review, it did not need to address the question of whether a heightened standard of review for sexual orientation was required.

Of particular concern to the Court was how the state attempted to use the Equal Protection Clause to further its desire to harm a politically unpopular group. The Court stated that at a bare minimum the Equal Protection Clause could not allow this. It further determined that a statute that “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else” will be unconstitutional. This

216. See generally Romer, 517 U.S. 620 (striking down the Colorado law and holding that the law was a violation of the Equal Protection Clause). In this case, Colorado enacted a law known as Amendment 2 which essentially denied homosexuals the right to receive aid from the government. Id. at 624. The statute stated:

No protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at 624.

217. Id. at 633 (“[B]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”).

218. See generally Romer, 517 U.S. 620 (striking down the Colorado law and holding that the law was a violation of the Equal Protection Clause).

219. Id. at 634. The state argued that by removing these rights from homosexual citizens of Colorado, it was putting them in the same place, politically, as the rest of its citizens. Id. at 626. The statute, the state said, does no more than deny homosexuals special rights. Id.

220. Id.

analysis is in line with Canada’s determination that homosexuals in Canadian society have been subjected to discrimination in a way that makes them unequal to everyone else and, therefore, under Section 15(1) and Section 1 of the Charter, are entitled to protection.\textsuperscript{222} The purpose of the Equal Protection Clause of the Constitution, like Section 15(1) of the Charter, is to protect politically unpopular and disadvantaged groups.\textsuperscript{223}

The \textit{Romer} Court’s decision demonstrates that the Supreme Court is gradually becoming more sensitive to gay and lesbian rights.\textsuperscript{224} However, \textit{Romer} only determined that a bare desire to harm a group is not a legitimate interest.\textsuperscript{225} Therefore, with only \textit{Romer} as precedent it would be difficult for the Court to strike down a state law that banned same-sex marriage. The rational basis test would likely allow a state to produce what the Court could determine to be a legitimate government interest.\textsuperscript{226} Moreover, many lawyers have found the Court’s reasoning in \textit{Romer} evasive, and have criticized it for not providing an enduring or workable legal framework, which the Court had done in previous race and gender cases.\textsuperscript{227}

It is yet to be determined whether \textit{Lawrence v. Texas}, the next case addressing constitutional questions concerning sexual orientation and equal protection, created the legal framework necessary to extend marriage rights to same-sex couples and expand the rights of homosexuals in general.\textsuperscript{228} While the \textit{Lawrence} majority decided the case on due process grounds,\textsuperscript{229} Just-

\begin{itemize}
\item \textsuperscript{222} Halpern, 65 O.R.3d at 184.
\item \textsuperscript{223} U.S. CONST. amend. XIV §1. \textit{See also} United States v. Virginia, 518 U.S. at 557; \textit{CAN. CONST.} (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §15 and §1; \textit{See also} Layland, 104 D.L.R. at 223 (Greer, J., dissenting).
\item \textsuperscript{224} \textit{See generally} \textit{Romer}, 517 U.S. 620 (holding that the Colorado law which discriminated on the basis of sexual orientation could not survive even rational basis review).
\item \textsuperscript{225} \textit{Id}.
\item \textsuperscript{226} \textit{See infra} Part IV for a more thorough discussion.
\item \textsuperscript{227} Sanders, supra note 7, at 3C.
\item \textsuperscript{228} \textit{See generally} \textit{Lawrence}, 539 U.S. 558 (striking down a law that imposed criminal sanctions for engaging in sodomy).
\item \textsuperscript{229} \textit{Lawrence}, 539 U.S. at 564. The \textit{Lawrence} majority relied on the Due Process Clause and its implicit protection of the right to privacy. \textit{Id} (holding that the Texas law was unconstitutional under the Due Process Clause). The Court found that the consequences of the Texas law, which made it a crime for a person to “engage in deviate sexual intercourse with another individual or
practice O'Connor stated in her concurrence that she would have decided the case on equal protection grounds. While O'Connor's conclusion may help the overall plight of homosexuals, it hampers similar progress in relation to same-sex marriage because she specifically stated that in her opinion, a state could put forth a legitimate reason to prohibit same-sex marriage.

O'Connor stated that, under the rational basis test, the law in Lawrence was unconstitutional since it applied only to homosexuals. Although she noted that most laws survive under the rational basis test, she stated that when the challenged legislation inhibits personal relationships, the Court is most likely to find the law unconstitutional. Here, she determined that there is no legitimate government interest in protecting the morals of a particular group. She stated that the Court has never held that “moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.” Moral disapproval, she stated, like a bare desire to harm a group, should not satisfy the rational basis test.

However, O'Connor ended her concurrence by stating that all laws differentiating between heterosexuals and homosexuals would not automatically be considered unconstitutional. If the state puts forth a legitimate reason, the law will be upheld. Under this reasoning, the state could hide its moral disapproval, the same sex,” involved more than denying the right to engage in sexual acts, it also involved criminal penalties and sought to control behavior involving personal relationships in the privacy of one's own home. Id. at 567–69. Adults, the court said, may choose to enter into a sexual relationship in their own home and private lives, and still maintain their dignity and freedom: “The liberty protected by the Constitution allows homosexual persons the right to make this choice.” Id. at 576.

230. Lawrence, 539 U.S. at 579–85 (O'Connor, J., concurring) (Since the Texas sodomy law only applied to homosexuals, O'Connor relied on the Equal Protection Clause of the Fourteenth Amendment.).
231. Id. at 585 (O'Connor, J., concurring).
232. Id.
233. Id. at 580.
234. Id.
235. Id. at 582.
236. Id.
237. Id. at 585.
238. Id.
approval of homosexuals behind what the Court will accept as legitimate state interests. One such instance, she stated, would be to preserve the institution of marriage. She did not however, provide any rationale for why the protection of marriage includes reserving it for couples of the opposite sex.

O'Connor’s reasoning is similar to the rationale used by the Canadian Supreme Court in Egan. In Egan, the court was willing to proclaim that most laws that discriminate on the basis of sexual orientation are unconstitutional but, unlike the court in Halpern, it was unwilling to hold that a prohibition on same-sex marriage was unconstitutional as well.

IV. SEXUAL ORIENTATION SHOULD BE ELEVATED FROM A “NON-SUSPECT” CLASS TO A “SUSPECT” CLASS

Both the United States and Canada have constitutional guarantees for fundamental freedoms and equality. Both countries’ constitutions can be, and have been, used to litigate in the area of relationship recognition. As noted above, the litigation in Canada has fallen under Section 15(1) and Section 1 of the Charter of Rights and Freedoms, and U.S. claims have been made under the Equal Protection Clause of the Constitution.

There are notable differences between the modes of analysis used by Canadian courts and the U.S. courts. Canadian courts have determined that a law cannot discriminate based on the

239. Id.
240. Id.
241. See generally Egan, 2 S.C.R. 513 (The court found that most laws that discriminate on the basis of sexual orientation are unconstitutional, however, the court was not willing to extend this rationale and hold that a prohibition on same-sex was unconstitutional.).
242. Id. In O’Connor’s concurrence in Lawrence, she stated that although she thought the law in question was unconstitutional, she specifically declared that her opinion should not be extended to laws prohibiting same-sex marriage. Lawrence, 539 U.S. at 585 (O’Connor, J., concurring).
244. Nicole LaViolette, Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada, 19 CAN J. FAM. L. 115, 161 (2002).
traits enumerated in Section 15(1) of the Charter, nor on any ground analogous to those listed, including sexual orientation. If a law is challenged as being discriminatory under Section 15(1) of the Charter, the court must first determine whether the law actually is discriminating against a particular individual or group of people. If the law is found to be discriminatory, the court then turns to Section 1 and determines whether the discrimination imposed by the law can be justified by a legitimate state interest. Canada, unlike the United States, does not first determine which class the recipient of the disparate treatment falls into before determining which level of scrutiny to apply to the law; instead, the Canadian courts afford the same level of review to all laws that are found to be discriminatory under Section 15(1).

Therefore, in Canada, discrimination based on sexual orientation receives the same level of scrutiny as discrimination based on race, whereas in the United States discrimination based on race receives a level of scrutiny significantly higher than the level afforded to discrimination based on sexual orientation. In the United States, the level of scrutiny will determine how strong the state’s interest must be in order for the state’s law to be upheld, whereas in Canada the state’s interest does not vary based upon who or what group is being discriminated against.

The Canadian courts have determined that barring same-sex couples from the institution of marriage is a violation of Section 15(1) of the Charter since it is discriminatory and the violation cannot be saved under Section 1 because the legislature did not put forth any pressing and substantial objective for the law. The Canadian analysis under Section 15(1) and Section 1 is most similar to the U.S. level of intermediate scrutiny.

245. CAN CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §15 (Section 15(1) lists race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.).
246. Egan, 2 S.C.R. at 528.
248. Law, 1 S.C.R. at 529. See discussion supra Part II.
249. Maxwell, supra note 184, at 159; Halpern, 65 O.R.3d at 179–90.
250. Maxwell, supra note 184, at 159; Egan, 2 S.C.R. at 528.
251. Maxwell, supra note 184, at 159; Halpern, 65 O.R.3d at 179–90.
252. See generally Halpern, 65 O.R. 3d 161 (holding that the denial of marriage rights to same-sex couples violated Section 15(1) of the Charter).
Under the current state of the Equal Protection Clause, it would be harder for the U.S. Supreme Court to reach the same conclusion as the Halpern court did. This is because sexual orientation has been deemed a "non-suspect" class, and therefore only receives rational review. As stated earlier, under rational review it is the plaintiff who has the burden of demonstrating that the discrimination is not "rationally related to a legitimate government interest." This is a lower standard than Canada’s “pressing and substantial objective” for the law. Typically, statutes which come under the rational basis test are found to be constitutional, since all the court requires to uphold the law is a legitimate government interest for the discrimination.

When a plaintiff brings a claim under the Equal Protection Clause stating that a law is discriminatory based on sexual orientation most courts will apply rational basis review. However, based on the three criteria from Carolene Products Footnote 4 discussed in Part III, this level of review is arguably incorrect. This is because gays and lesbians have suffered a history of discrimination, sexual orientation is an immutable characteristic, and while it may be claimed that gays and lesbians

253. See generally Romer, 517 U.S. 620 (holding that sexual orientation should only receive rational basis review).
254. Maxwell, supra note 184, at 159.
255. Id.
256. See In re Cooper 592 N.Y.S.2d 797 (App. Div. 1993) (applying rational basis review in response to 14th Amendment claims challenging classifications based on sexual orientation); Doe v. Perry Cmty. Sch. Dist., 316 F. Supp. 2d 809, 829–30 (S.D. Iowa 2004) (in the Eighth Circuit, discrimination based on sexual orientation is subject to rational basis review); Miguel v. Guess, 51 P.3d 89, 97 n3 (Wash. Ct. App. 2002) (concluding that the court need not reach question of suspect classification based upon sexual orientation as policy in question violated federal Equal Protection Clause based even upon rational basis test), review denied by Miguel v. Guess, 2003 Wash. LEXIS 171 (Wash. 2003); Weaver v. Nebo Sch. Dist., 29 F. Supp.2d 1279, 1287–89 (D. Utah 1998) (holding that the decision not to assign a teacher to the position of volleyball coach based on her sexual orientation had no rational basis and violated Equal Protection Clause); Cleaves v. City of Chicago, 21 F. Supp.2d 858, 862 (N.D. Ill. 1998) (sexual orientation does not involve a suspect classification or impact a fundamental interest, and thus, equal protection claims on this basis are examined under the rational basis test); Anderson v. Kind County, 2004 WL 1738447 *5 (finding homosexuals not a suspect class on basis that older federal cases had ruled homosexuals were not a suspect class).
257. See supra notes 206–10 and accompanying text.
are not politically powerless, other groups that have political power receive heightened scrutiny. 258

The first criteria under Carolene Products is that the class must have a demonstrated history of discrimination. 259 It is basically conceded, even by opponents of elevating sexual orientation to heightened scrutiny, that homosexuals have had a history of discrimination in the United States. 260 Moreover, the only courts that have addressed the issue agree that while homosexuals are not a suspect class, they have a history of discrimination. 261 The Halpern court easily made the same determination. Citing Egan, the court stated “[T]he historic disadvantage suffered by homosexual persons has been widely recognized and documented.” 262

While historic disadvantage remains uncontroversial, the second criteria from Footnote 4, immutability, has been strongly debated. 263 Gay rights advocates say that sexual orientation is a genetically influenced characteristic and not a choice and, therefore, is immutable. 264 The Canadian Supreme Court agrees with this. 265 In Egan, the court stated that sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.” 266 In part because of its immutability, the court in Egan unanimously affirmed that sexual orientation is an analogous ground to those enumerated in Section 15(1). 267

Opponents of granting heightened review to sexual orientation say that anti-sodomy laws single out homosexuals for voluntary behavior, not a common orientation. 268 Most courts have accepted this argument: 269 “[a]s the Sixth Circuit stated, ‘Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation

258. Drew, supra note 198, at 303; Egan, 2 S.C.R. at 528.
259. Drew, supra note 198, at 303.
260. Id.
261. Id.
263. Drew, supra note 198, at 304–05.
264. Drew, supra note 198, at 304.
265. Egan, 2 S.C.R. at 528.
266. Id.
267. Id.
268. Drew, supra note 198, at 304.
269. Id. at 305.
but rather by their conduct which identifies them as homosexual."\textsuperscript{270} Furthermore, the Ninth Circuit stated that “homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes.”\textsuperscript{271} But this argument is no more than a semantic sleight-of-hand. When one says that a person is “gay” or a “lesbian” they are not saying merely that the person engages in sexual activity with others of the same sex.\textsuperscript{272} Rather, they are recognizing something fundamental about the person, which is that the person’s most intimate feelings of love and companionship are directed towards members of the same sex.\textsuperscript{273} Clearly, the Canadian Supreme Court does not think that sexual orientation is fundamentally different from race, gender, or alienage.\textsuperscript{274} In fact, when the court determined that sexual orientation was analogous to those classes already listed in Section 15(1), it gave sexual orientation the same status as race, gender, and alienage.\textsuperscript{275}

Political powerlessness is the third criterion from \textit{Carolene Products}\textsuperscript{276} and, like immutability, whether homosexuals are in fact politically powerless has been the subject of ongoing debate.\textsuperscript{277} When courts determine whether a group is politically powerless, they tend to consider whether the group has been


\textsuperscript{271} High Tech Gays, 895 F.2d at 573–74. See also Darren Lenard Hutchinson, \textit{Discrimination and Inequality Emerging Issues “Gay Rights” for “Gay Whites”? Race, Sexual Identity, and Equal Protection Discourse}, 85 CORNELL L.REV. 1358, 1379 (2000).

\textsuperscript{272} This notion was articulated in \textit{Egan} when the court stated that sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.” \textit{Egan}, 2 S.C.R. at 528.

\textsuperscript{273} The dissenting opinion in \textit{Egan} stated that “sexual orientation is more than simply a ‘status’ that an individual possesses: it is something that is demonstrated in an individual’s conduct by the choice of a partner.” \textit{Egan}, 2 S.C.R. at 601 (Cory, J. and Iacobucci, J., dissenting).

\textsuperscript{274} \textit{Egan}, 2 S.C.R. at 528.

\textsuperscript{275} \textit{Id}.

\textsuperscript{276} Drew, supra note 198, at 303.

able to attract the attention of lawmakers.\(^{278}\) In *City of Cleburne*, the Court stated that “any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.”\(^{279}\) This view was adopted by the Ninth Circuit when it found that homosexuals were not politically powerless. It stated that “legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do ‘attract the attention of the lawmakers,’ as evidenced by such legislation.”\(^{280}\)

Justice Scalia’s dissent in *Romer* is in line with the view that homosexuals are not politically powerless.\(^{281}\) Scalia stated because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.\(^{282}\)

Scalia, in describing gays and lesbians as wealthy and politically powerful, is asserting that he believes they are “undeserving of judicial protection.”\(^{283}\) But Scalia does not provide any support for his factual assertions. Rather, the fact that thirty-nine states have enacted Defense Of Marriage Acts, and only one state supports gay marriage (and only by virtue of a court

\(^{278}\) *City of Cleburne*, 473 U.S. at 445 (In regard to subjecting the mentally retarded to rational review, the court stated that this class was not politically powerless: "[T]he legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.").

\(^{279}\) *Id.*

\(^{280}\) *High Tech Gays*, 895 F.2d at 574.

\(^{281}\) *Romer*, 517 U.S. at 645–46 (Scalia, J., dissenting).

\(^{282}\) *Id.*

\(^{283}\) Hutchison, *supra* note 271, at 1382 (arguing that Scalia characterizes gay and lesbian civil rights efforts as an exertion of this disproportionate power).
decision, not legislative action) indicates that homosexuals do not have political clout. The Ninth Circuit is correct in stating that homosexuals do attract the attention the lawmakers, but this attention is to the overwhelming detriment of gays and lesbians.

Moreover, the argument that heightened scrutiny depends in part on whether a group is politically powerless no longer holds water. Gender discrimination or, rather, laws that discriminate against women, receive heightened scrutiny; however, it is no longer plausible to say that women are a politically powerless group. Currently, women occupy fourteen seats in the Senate and sixty-eight seats in the House of Representatives. In his dissent in United States v. Virginia, Scalia argued that women are not politically powerless. He stated “it is hard to consider women a ‘discrete and insular minority’ unable to employ the ‘political process ordinarily to be relied upon,’ when they constitute a majority of the electorate…. Moreover, a long list of legislation proves the proposition false.” The court in Halpern did not even examine whether homosexuals were politically powerless, presumably because it is irrelevant. Presumably

284. DOMA Watch, available at http://www.domawatch.org/index.html (last visited Jan. 23, 2005). The eleven states that do not have junior DOMA’s are the following: Connecticut, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Wisconsin, and Wyoming. Peterson, supra note 8. But it should be noted that in New Hampshire and Wyoming there is a state law that bans same-sex marriage and predates DOMA laws; and in Wisconsin there has been a state Supreme Court ruling stating that only heterosexual marriages are legal. Id. See generally Goodridge, 798 N.E.2d 941 (holding that the prohibition on same-sex marriage violated the Massachusetts constitution).


Canada has anti-discrimination laws much like the United States, but the Canadian courts do not use these laws against those claiming discrimination.

We see that sexual orientation meets the first two criteria for heightened scrutiny and, arguably, the third test (if it is necessary to apply it) as well. In fact, there have been some state courts that have granted sexual orientation the heightened level of scrutiny it deserves. The Court of Appeals of Oregon had “no difficulty” concluding that sexual orientation is a suspect class and stated that “sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.”

If sexual orientation is granted heightened scrutiny, as it should be, then it would be nearly impossible for a law prohibiting same-sex marriage to survive. Under the heightened scrutiny test, the state must show that “the legislative use of the classification reflects a reasoned judgment consistent with the ideal of equal protection that furthers a substantial interest of the state” and the party seeking to defend the law must show an “exceedingly persuasive justification” for the law. The standard for the Canadian courts is virtually the same, which is that the law must be pressing and substantial and the means chosen to achieve the objective are reasonably and demonstrably justifiable in a free and democratic society.

Applying the Canadian courts standard to the case before it, the Halpern court’s analysis led it to its holding that there was no “pressing and substantial” legislative reason for justifying the discrimina-

288. See generally Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (dismissing case in which same-sex couples sought to be married based on intervening amendment to the state constitution, but noting that sexual orientation constitutes a suspect classification and therefore would be subject to heightened scrutiny); Tanner v. Oregon Health Sciences Univ., 971 P.2d 435, 524 (Or. Ct. App. 1998) (same-sex couples constitute a suspect class for purposes of constitutional discrimination analysis).

289. Tanner, 971 P.2d 524 (The court did not discuss the politically powerlessness of homosexuals.).

290. Maxwell, supra note 184, at 159–60.


tory law. Using the same analysis and applying it to the U.S. standard of heightened scrutiny, the U.S. courts should come to the same conclusion as the Canadian courts.

V. UNDER CURRENT UNITED STATES JURISPRUDENCE, THE U.S. SUPREME COURT SHOULD REACH THE SAME CONCLUSION AS HALPERN

While the U.S. Supreme Court should give sexual orientation heightened scrutiny, even under a rational review standard the Court should conclude that a ban on same-sex marriage is unconstitutional. Although Halpern’s analysis is most similar to intermediate scrutiny, the court’s analysis of the arguments given by the Attorney General would yield the same result under a rational basis review standard. Support for this conclusion is found in Goodridge v. Department of Public Health, in which the Massachusetts Supreme Court applied a rational review standard to the arguments advanced by the Massachusetts Attorney General in support of denying the right to marry to same-sex couples. In Goodridge, the court held that a prohibition on same-sex marriage failed the rational review test, and was therefore unconstitutional under Massachusetts law.

In Goodridge, the state proposed three reasons to justify the refusal to allow same-sex marriages: (1) the traditional notion that marriage’s primary purpose is procreation; (2) opposite-sex marriage ensures that children are raised in the optimal set-

293. Goodridge, 798 N.E.2d at 961. The Massachusetts courts use the same language as the Supreme Court of the United States for rational review: “[a] regulatory authority must, at the very least, serve ‘a legitimate purpose in a rational way’; a statute must ‘bear a reasonable relation to a permissible legislative objective.’” Id. at 960-61. In Goodridge the court stated that since the statute did not survive rational basis review it did not need to consider whether sexual orientation was entitled to heightened scrutiny. Id. at 961.

294. Mark E. Wojcik, The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?, 24 N. ILL. U. L. REV. 589, 657 (2004) (“The court found that the exclusion of marriage for same-sex couples failed to pass the rational basis test for both Due Process and Equal Protection. The decision was hailed as the wedding bell that might be heard around the world.”).

SAME-SEX MARRIAGE

The first argument was rejected for the same reasons the argument was rejected in Halpern. The court found that procreation is not a condition of marriage; instead it said that the essence of marriage is a mutual commitment. Furthermore, the court stated that marriage should not remain a heterosexual union merely because historically it has only been a heterosexual union. The Halpern court rejected the same argument made by the Attorney General. In Halpern, the Attorney General wanted to preserve the institution of marriage as heterosexual because it had always been that way. In response, the court stated that “stating that marriage is heterosexual because it has always been heterosexual is merely an explanation for the opposite-sex requirement of marriage; it is not an objective that is capable of justifying the infringement of a Charter guarantee.”

As for the second argument, the court held that while protecting children is a legitimate state policy, denying same-sex marriage will not achieve that policy because the best interest of a child does not depend on a parent’s sexual orientation. The court found there was “no rational relationship between the marriage statute and the Commonwealth’s proffered goal of protecting the ‘optimal’ child rearing unit.”

Under the third rationale, the state argued that same-sex couples are more financially independent than married couples and less reliant on public resources. The court rejected this argument, stating that the “absolute statutory ban on same-sex

296. Goodridge, 798 N.E.2d at 960. See also Wojcik, supra note 294, at 663–67. Other arguments, which were not as strong as these three, were put forth by the state and were subsequently rejected by the court. Goodridge, 798 N.E.2d at 965–69.
297. Goodridge, 798 N.E.2d at 961. See also Wojcik, supra note 294, at 664.
298. Id. at 332.
300. Id.
301. Id.
302. Goodridge, 798 N.E.2d at 961–63. “The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” Id. at 963.
303. Goodridge, 798 N.E.2d at 963.
304. Id.
marriage bears no rational relationship to the goal of economy. The Halpern court rejected a similar argument finding that because both same-sex and opposite-sex couples raise children, the argument that only opposite-sex couples should receive an economic benefit from the state is not viable.6

There were other arguments advanced by the state and subsequently rejected by the court.7 While they were not as strong as the first three, one of them is worthy of note. The Commonwealth argued that same-sex marriage would “trivialize or destroy the institution of marriage as it has historically been fashioned.”8 The court rejected this argument, stating that same-sex couples did not want to abolish the institution of marriage, but wanted access to it.9 The rejection of this argument by the court echoes Halpern, which stated that “it is not disputed that marriage has been a stabilizing and effective societal institution. The Couples (same-sex couples) are not seeking to abolish the institution of marriage; they are seeking access to it.”10

Not only did the Goodridge court reach the same conclusion as Halpern under a rational review test, but it also cited Halpern when it determined the proper remedy to apply. The Goodridge court found that Canada’s new definition of marriage, being “the voluntary union of two persons as spouses, to the exclusion of all others,” should also be Massachusetts’ new definition of marriage.11 The Massachusetts court made a powerful statement by declaring that even under a rational basis review, a prohibition on same-sex marriage is unconstitutional. However, since the Massachusetts court did not discuss whether a prohibition on same-sex marriage violated the U.S. Constitution, and because this case was decided completely as a violation of the state constitution, it remains to be seen.

305. Id.
306. Halpern, 65 O.R.3d at 188.
308. Id.
309. Id.
312. Goodridge, 798 N.E.2d at 958.
whether the U.S. Supreme Court would reach the same conclusions based on a rational level of review. However, as demonstrated by both Halpern and Goodridge, there is no rational reason for the prohibition on same-sex marriage.

After examining the arguments in these cases it seems clear that the only remaining argument for banning same-sex marriage is that marriage traditionally has been only between opposite-sex couples. But as Halpern and Goodridge stated, arguing that marriage should be heterosexual because it has always been that way is not a sufficient reason for discriminating against a certain group of people. Moreover, the argument that our society should continue to do something because it is the way it has traditionally been done is not a sufficient ground for upholding a discriminatory practice. If tradition were permitted to be a rationale for upholding a discriminatory law, then different races would not be permitted to marry, women essentially the same language. That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.

Id. at 959 (quoting Arizona v. Evans, 514 U.S. 1, 8 (1995)).

313. Halpern, 65 O.R.3d at 192.

314. For a more thorough discussion, see RANDALL KENNEDY, INTERRACIAL INTIMACIES (2003) (describing and assessing the beliefs, customs, laws, and institutions of interracial relationships).
would be considered the property of their husbands,\textsuperscript{315} and slavery would still exist.\textsuperscript{316}

VI. CONCLUSION

Once it is established that a statute discriminates against a recognized class, the Canadian courts determine the constitutionality of the statute by analyzing whether the purpose of the statute is pressing and substantial and whether the means chosen to achieve the objective are reasonably and demonstrably justifiable in a free and democratic society.\textsuperscript{317} The U.S. courts should use the same analysis under the heightened scrutiny test, although under the current state of the law the U.S. courts would use the rational review test. Regardless of the test used by U.S. courts, as Halpern and Goodridge demonstrate, the arguments made to justify prohibitions on same-sex marriage, including that the purpose of marriage is to unite the opposite sexes, encourage procreation, and companionship, are insufficient to support a continued ban on same-sex unions.\textsuperscript{318}

Whether sexual orientation is granted the heightened scrutiny it deserves or the courts choose to continue to use rational review, there is no constitutional basis for denying same-sex couples the same right to marry enjoyed by heterosexual couples. Many people in both the United States and Canada hold strong religious and moral views against same-sex marriages

\textsuperscript{315}. For a more thorough discussion, see Alvah L. Stinson, Women Under the Law (1914) (discusses the rights, privileges, and disabilities of women under the law at the turn of the 20th century). See also Michael L. Rustad & Thomas H. Koenig, Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory, 68 Brooklyn L. Rev. 1, 20 (2002) (“At common law, women were classified as personal property of the male head of household.”); Craig A. Bowman & Blake M. Cornish, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 Colum. L. Rev. 1164, n.102 (1992) (“At common law, the husband had extensive rights in his wife’s property, and she lacked the power to contract or engage in litigation except through her husband.”); Sandra L. Rierson, Race and Gender Discrimination: A Historical Case For Equal Treatment Under the Fourteenth Amendment, 1 Duke J. Gender L. & Pol’y 89, 89–94 (1994).

\textsuperscript{316}. For a more thorough discussion, see Alexander Tsesis, The Thirteenth Amendment and American Freedom (2004) (discussing the history and ratification of the Thirteenth Amendment and the concept of freedom).

\textsuperscript{317}. Halpern, 65 O.R.3d at 191.

\textsuperscript{318}. Id. at 188–94.
and homosexuality, based on their personal religious beliefs and views of morality.\textsuperscript{319} However, as a legal matter, these beliefs and views do not determine whether a law is unconstitutionally discriminatory.\textsuperscript{320} As stated by the court in \textit{Goodridge},

\begin{quote}
Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. "Our obligation is to define the liberty of all, not to mandate our own moral code."\textsuperscript{321}
\end{quote}

Both Canadian and U.S. courts have found that “tradition” is not a sufficient constitutional justification for discrimination.


\textsuperscript{320} Justice Scalia, however, does believe that morality can and even should influence the court. In his dissent in \textit{Romer}, he stated that he believed that the Colorado legislature was not hiding behind a “bare desire to harm” homosexuals, but preserving what it determined to be traditional sexual mores. \textit{Romer}, 517 U.S. at 636 (Scalia, J., dissenting). The State, he believes, is entitled to make this determination. \textit{Id.} Under Scalia’s interpretation of the Equal Protection Clause, a state legislature would be permitted to determine that a particular practice, even if based on race, is morally unacceptable, and thus, is not a violation of the Equal Protection Clause. With Scalia’s analysis of the Equal Protection Clause, states could still have anti-miscegenation laws. If Scalia’s reasoning is followed to its logical conclusion, then even under the strict scrutiny test, a law supporting segregation could be upheld if it were based on traditional customs, which at one point in our country’s history there were. Scalia seems to be saying that as long as a law is in accord with the majority of society’s view of morality, it will be constitutional.

Justice Stevens, however, stated in his dissent in \textit{Bowers} that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” \textit{Bowers} v. \textit{Hardwick}, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

\textsuperscript{321} \textit{Goodridge}, 798 N.E.2d at 948 (quoting \textit{Lawrence}, 539 U.S. at 571).
As stated by Lord Sankey in *Edwards v. A.G. Canada*, “[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.”\(^{322}\) This “living tree” is the Canadian Constitution and as *Halpern* aptly stated,

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.\(^{323}\)

The U.S. courts have utilized a similar approach. As stated in *United States v. Virginia*, “[a] prime part of the history of our constitution is the story of the extension of constitutional rights and protections to people once ignored or excluded.”\(^{324}\) The U.S. courts should not permit “tradition” any more than personal religious beliefs or views of morality to substitute for the kind of legal and logical analyses used by the courts in *Halpern* and *Goodridge*. Those courts’ analyses show that prohibitions on same-sex marriage cannot withstand heightened scrutiny or


\(^{324}\) *United States v. Virginia*, 518 U.S. at 557.
rational review, and should be held to be unconstitutional under the U.S. Constitution, as they were under the Canadian Charter.

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* B.S., University of Illinois Urbana-Champaign (2000); J.D., Brooklyn Law School (Expected 2005). I would like to thank my family for their continued love, support, and encouragement. I especially want to thank my father, who has provided me with guidance and inspiration throughout my education and who tirelessly read through drafts of this note.
SUBSISTENCE WHALING IN THE NATIVE VILLAGE OF BARROW: BRINGING AUTONOMY TO NATIVE ALASKANS OUTSIDE THE INTERNATIONAL WHALING COMMISSION

“An Eskimo is born to be an Eskimo, and he may talk like the white man (my grandchildren do more and more), but he will never stop being part of our people.”

“We’re not just Eskimos anymore. That’s what my grandmother told me. At first I didn’t know what she meant, but now I do ... [s]he said I’d be lucky if I even remember when I’m older what it used to be like in our village.”

INTRODUCTION

The Inupiat Eskimo villages of northern Alaska have long relied on the hunting of the bowhead whale (Balaena mysticetus) for clothing, food, tools, shelter, and fuel. For the Inupiat, or “real people,” the bowhead whale hunt is tradition-

2. Id. at 431 (Anonymous Alaskan Eskimo granddaughter).
3. DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 349 (1984). The Native Village of Barrow, on the northern-most coastal tip of the state, is one of ten Alaskan Inupiat whaling villages that has traditionally engaged in the bowhead whale hunt. Gambell, Savoonga, Wales, Little Diomede, Kivalina, Point Hope, Wainwright, Nuiqsut, and Kaktovik are the nine other Alaskan Eskimo whaling villages in the region. Barrow is highlighted for discussion in this note primarily because of its status as the most modernized and populous of the whaling communities. The impact and importance of the subsistence exemption is, arguably, most easily observed when juxtaposed against this backdrop of modernity.
4. Gambell and Savoonga are communities on the northern portion of St. Lawrence Island inhabited by Yup’ik Eskimos. All of the other whaling communities are inhabited by Inupiat Eskimos. Id.; See also Stephen R. Braund & Elisabeth L. Moorehead, CONTEMPORARY ALASKA ESKIMO BOWHEAD WHALING VILLAGES, in HUNTING THE LARGEST ANIMALS 258, 261 (Allen P. McCartney, ed., 1995) [hereinafter Braund & Moorehead].
ally characterized as one of the most culturally and nutritionally significant hunting activities in Eskimo life. Indeed, the hunt forms a cornerstone of Inupiat society, as the whaling crew members who engage in the hunt help cement kinship bonds and community ties. Furthermore, the sharing of “mattak,” which is considered to be of unparalleled nutritional value, is one of the primary means by which the Inupiat create a sense of social cohesion and demonstrate generosity toward one another in their communities.

The modern industrial world, acting under the aegis of the International Whaling Commission (IWC), has intruded into the Inupiat culture and poses a threat to its social traditions and community structure. The International Convention for the Regulation of Whaling (ICRW), of which the United States is a signatory, is the international agreement that currently

5. Case, supra note 3, at 350. The Northern Alaskan Eskimo of Barrow is one of two sub-groups of Inupik speaking peoples. The Inupiat are often considered a sub-group of the Inuit, which inhabit the same region. See A.W. Harris, Making the Case for Collective Rights: Indigenous Claims to Stocks of Marine Living Resources, 15 Geo. Int’l Envtl. L. Rev. 379, 390 (2003) citing Henry P. Huntington & Nikolai I. Myrmin, Bering Strait’s Indigenous Peoples Share Knowledge of Beluga Whales in 14 Surviving Together 12 (1996). Throughout this note, the peoples of the native Alaskan whaling communities will be referred to as Native Alaskans or, alternately, by the preferred designation of Inupiat Eskimo or Alaskan Eskimo. The Eskimos of Barrow are sea-mammal hunters (Tauremiut). The other group, caribou hunters (Nunamiut), resides further inland. See generally Arthur A. Hippier & Stephen Conn, Northern Eskimo Law Ways and Their Relationship to Contemporary Problems of Bush Justice 3 (1973).


7. Id. Mattak is bowhead whale meat, including the skin and fatty tissue underneath the skin. Mattak is sometimes spelled alternatively as “mataq” or “muktuk.”

8. Freeman, supra note 6, at 31–33.


|Communities could have landed more whales if the [IWC-imposed hunting] quotas had not restricted their harvests ... of all subsistence pursuits, bowhead whaling is the one on which the communities concentrate the most time, effort, money, group organization, cultural symbolism and significance. Indeed, being a whaling community is a large part of a community’s cultural tradition and its modern cultural identity.

Id.
governs the commercial, scientific, and aboriginal subsistence whaling practices of fifty-nine member nations. The IWC is a consortium that operates as the enforcement mechanism for the ICRW. The IWC however, is an inadequate mechanism for regulating Alaskan subsistence whaling, and the misguided governance of subsistence whaling by the IWC forces Alaskan Eskimos to continually defend their ongoing subsistence practices. Since its inception in 1977, the Alaska Eskimo Whaling Commission (AEWC), a non-governmental organization (NGO) representing the ten Eskimo whaling villages of the Arctic region, has worked closely with the IWC to ensure that the subsistence needs of its members are not overshadowed by environmental lobbies and commercial whaling agendas. Despite all their cooperative efforts with the IWC, however, Alaskan Eskimos have been unable to secure for themselves a stable and
permanent subsistence scheme that allows them to continue to practice their cultural traditions unthreatened.\textsuperscript{15}  

The modern international community has been regulating aboriginal subsistence whaling through the IWC, despite the lack of any provision in the Convention specifically assigning it that responsibility.\textsuperscript{16}  The pressures exerted on the IWC by commercial or non-subsistence whalers\textsuperscript{17} and the international conservation movement\textsuperscript{18} have negatively affected the subsistence needs of the Alaskan Eskimo\textsuperscript{19} such that the IWC should no longer retain such dominion over those rights. A permanent subsistence solution for the Native Village of Barrow and other Alaskan Eskimos is long overdue, and it is incumbent upon the United States to reconsider the needs of its native peoples objectively and in light of the IWC's apparent short-comings.\textsuperscript{20}

\textsuperscript{15} See, e.g., John Tepton, Japan Does About-Face on Promise; Alaska Eskimo Whaling Commission Ponders Next Move, TRIBAL NEWS, Aug. 8 2002 (on file with author); Final Press Release of the 54th Annual Meeting of the IWC [hereinafter 2002 IWC Press Release], at http://www.iwcoffice.org/meetings/meeting2002.htm (last visited Jan. 17, 2005). At this meeting, a proposal for providing continued subsistence catches was defeated. See infra note 23 and Part III.

\textsuperscript{16} See generally Whaling Convention, supra note 10.

\textsuperscript{17} See generally Adrienne M. Ruffle, Note, Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort, 27 BROOK. J. INT'L L. 639 (2002). These pressures began mounting in the 1970s, and, in large measure, took the form of opposition by commercial whaling states to the abandonment of the IWC's previous “laissez-faire” policies in favor of a new “preservationist” agenda being advocated by both old and new IWC members. See, e.g., Catherine Lee Francis, Bartering for Leviathan 86 (1996) (unpublished M.A. thesis, Carleton University) (on file with the National Library of Canada). Although commercial whaling was technically banned by the IWC in 1982, states continue to engage in whaling practices that may be characterized as commercial. See infra Parts II & III. Throughout this note, whaling outside the scope of aboriginal subsistence will be referred to generally as commercial or non-subsistence whaling.

\textsuperscript{18} See, e.g., Steinar Andresen, The International Whaling Commission, in ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE 379–403, 394 (Edward L. Miles et. al., 2002).


\textsuperscript{20} The United States and Native Americans are involved in what has been described as a trustee/beneficiary relationship referred to as “the trust doctrine.” For a thorough and informative discussion of the trust doctrine, which is beyond the scope of this note, see Benjamin W. Thompson, The De
The solution may well lie in a more independent voice for the AEWC, which should ultimately be able to govern Alaskan Eskimo subsistence needs in the international forum.\footnote{Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination, 24 AM. INDIAN L. REV. 421, 424 (2000). Essentially, and most relevantly, the trust doctrine imposes upon the federal government a fiduciary duty to Native Americans wherein the federal government is legally and morally bound to assist Native Americans in protecting their rights and property. \textit{Id.}}

This note asserts that the IWC is an organization whose mechanism is flawed for regulating Alaskan subsistence whaling, as it is ill-designed for the task. It argues that commercial or non-subsistence whaling and environmental interests hinder the effective management of subsistence whaling needs, and that cooperative, native-run NGOs are better suited to this purpose.\footnote{See, e.g., WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 30 (1995) (noting an increasing trend of indigenous peoples in both the United States and Canada toward cooperative self-government).} The note examines the whaling practices of countries regulated by the Convention and of countries, such as Canada, that are not parties to the Convention, and concludes that the AEWC should independently regulate its own subsistence hunt outside and apart from—though not necessarily in breach or in contravention of—the tenets of the Convention.

Part I of this note provides a brief background history of traditional whaling in the Native Village of Barrow and describes the structure and development of the IWC through the mid-1970s. Part II explores the modern conflict surrounding aboriginal subsistence whaling. It traces developments in the IWC since the mid-1970s, the founding of the AEWC, and states’ political conflicts arising at the intersection of a burgeoning environmental conservation movement and commercial whaling interests. Part III details the whaling bans of the 1980s, the subsequent fluctuations in IWC membership resulting from these bans, and the treatment of the aboriginal subsistence exemption at the 2002 and 2003 meetings. It highlights the ad-
verse effects that the commercial whaling industry and international conservation efforts have had on the Barrow hunt, as evidenced by developments at these recent IWC meetings. Part IV takes a comparative and critical look at the Canadian approach to aboriginal subsistence whaling and the role of native-run NGOs in subsistence whaling practices. Finally, Part V offers suggestions for implementing a more independent role for NGOs in general, and the AEWC in particular, in regulating subsistence practices. The note concludes that the IWC has proven a generally ineffective international body for securing Alaskan subsistence needs. In arguing that the IWC is better suited to the regulation of competing commercial and non-subsistence whaling and conservation efforts—not aboriginal subsistence—this note explores the proposition that, at least with respect to Alaskan Eskimos, the responsibility for regulating subsistence quotas should shift almost entirely to NGOs.


such as the AEWC, despite an obvious departure from the cooperation afforded by the uneasy partnership between the Alaskan Eskimos and the IWC. The note further concludes that, in light of its responsible management practices, the AEWC is capable of independently balancing the conflicting interests involved in the whaling debate, determining its own needs, and fairly establishing and regulating its own whaling quotas in harmony with the efforts of the international community. Therefore, an appropriate measure would be for the AEWC to assume regulation of the subsistence exemption outside of the IWC, in keeping with established principles of self-determination and the growing trend in self-regulation by native peoples.

I. BACKGROUND

A. The Native Village of Barrow: Whaling Traditions and Contemporary Whaling

Barrow, a coastal city on the Chukchi Sea, was traditionally referred to by its native Inupiat inhabitants as “Ukpeagvik,” or the “place where snowy owls are hunted.” Ukpeagvik was renamed in 1825 for Sir John Barrow by Captain Beechey of the Royal Navy while he was charting the Arctic coastline of North America. Barrow is the economic and administrative hub for the North Slope Borough, a municipality encompassing almost 90,000 square miles in the northernmost arctic region of

26. See generally Huntington, The AEWC: Effective Local Management, supra note 24 (discussing the general efficacy and success of independent subsistence management by the AEWC).

27. Id.; Final Report of the Inuit Bowhead Knowledge Study, Nunavut Wildlife Management Board at 20, 74 (March 2000) [hereinafter Nunavut Study] (observing hearty bowhead whale populations are likely sufficient to sustain subsistence hunting by the Canadian Inuit).

28. See, e.g., KYMLICKA, supra note 21, at 30 (noting the increasing trend of indigenous peoples toward cooperative self-government); Firestone & Lilley, supra note 25, at 10765 (“[i]n light of the growing awareness surrounding the role of indigenous people in the international arena, their demands to be viewed as separate autonomous actors are increasingly being heard.”).


30. Id.
Alaska. Though remote, Barrow is an economically robust city benefiting from the presence of various community organizations and agencies. The North Slope Borough, which has prospered from major investments in community development and is largely responsible for Barrow’s healthy economy, is the major employer of area natives.

Of Barrow’s nearly 4,500 residents, approximately 59% are Inupiat Eskimo, comprising the Native Village of Barrow. Many of these native residents are employed in modern workplaces such as schools, oil companies and city government, but continue to hunt and fish for a significant portion of their food. Despite familiarity with Western material goods and the availability of Western food supplies, the Inupiat generally believe that there are nutritional benefits to bowhead whale meat that cannot be acquired from other food sources. Thus, the Eskimos of Barrow continue to rely on whale meat in their diet, despite contact with Westernized food sources and incorporation of modernity into Eskimo life. Barrow natives still express...
fear that tribal elders will become ill if whale meat were eliminated from their diet and assert that native peoples accustomed to whale meat cannot subsist wholly on Western foods like “butter and beef and chicken fat.”

In addition to providing food, the hunt for the bowhead whale and consumption of mattak also preserves the culture and traditions of the Alaskan Eskimo. The start of the bowhead hunt, as well as the whale’s capture and consumption, are accompanied by elaborate ceremony and ritual. Those who advocate an end to whaling altogether question whether the bowhead hunt may still be characterized as truly “traditional,” but there is really little doubt that it can be, and is. Furthermore, native whalers have been attentive to the concerns of animal rights activists, abandoning traditional killing methods in favor of more modern methods precisely because such methods are more efficient and are considered more humane. Ultimately, the hunt is an interaction between human, land and animal, and the successful capture of a bowhead is treated with reverence in recognition of its importance as a source of food, tools, and clothing. Thus, despite the trappings of modern life in northern Alaskan Eskimo villages, the subsistence whaling culture remains an integral part of the local society and its economy.


1. The ICRW and the IWC

The International Convention for the Regulation of Whaling (ICRW) was signed in Washington, D.C., on December 2, 1946,
by fifteen states, more than a thousand years after Alaskan Eskimos are first estimated to have begun hunting the bowhead whale. The Convention’s goals included protecting and increasing whale stocks, the prevention of over-fishing, the implementation of sustainable whaling practices, and the development of the whaling industry. This last objective—the continued vitality of whaling—was arguably the most important for the original parties to the ICRW, as the first contracting states were mostly whaling nations eager to protect whale populations to continue a sustainable harvest. From the outset, the ICRW sought to implement a system of quotas designed to manage whaling on a global scale. An integral part of the ICRW is its accompanying “Schedule.” The Schedule, updated periodically by the IWC, is a general outline containing interpretive definitions of whale species, guidelines for the timing of hunting seasons, methods of capture, procedures for treatment and processing of landed whales, protocols for the supervision and control of whaling operations, and required permits and applicable regulations for reporting catches. Because the Schedule governs the actual mechanics of the whale hunt for the member states and is subject to amendment from year to year, it has a greater impact on the whaling community than the Convention’s articles themselves. The contents of the Schedule determine exactly which species will be designated as protected or unprotected, the dates on which hunting seasons will open and close in certain waters, the size and catch limits for each species, the methods and implements to be used in the

46. Whaling Convention, supra note 10, at art. III; art. XI; Freeman, supra note 6, at 100.
47. Huntington, ICC Special Issue, supra note 12.
50. Id.; See also Whaling Convention, supra note 10.
51. Whaling Convention, supra note 10, at art. 1.
hunt, and the maximum catch of whales to be taken in any one season.\textsuperscript{53} The text of the Convention does not address the effect of these hunting quotas on aboriginals or the aims of aboriginal subsistence whaling, and makes no mention of subsistence goals.\textsuperscript{54}

The International Whaling Commission (IWC), the organ charged with enforcing the ICRW, reviews and establishes the quotas periodically, and its current membership consists of fifty-nine states.\textsuperscript{55} Any state that formally adheres to the terms of the 1946 Convention may become a member of the IWC and name a Commissioner to represent it therein.\textsuperscript{56} The stated aims of the IWC are to “provide for the conservation of whale stocks and thus make possible the orderly development of the whaling industry” throughout the world.\textsuperscript{57} The other primary duties of the IWC are to conduct and publish scientific research on various whale species and set the whaling Schedule.\textsuperscript{58}

The IWC also currently governs subsistence whaling by aboriginal communities in Denmark, the Russian Federation, The Grenadines, and the United States (Alaska).\textsuperscript{59} Although the text of the original Convention supplies no specific provision regulating aboriginal subsistence,\textsuperscript{60} the IWC draws on the efforts of an Aboriginal Subsistence Whaling Sub-Committee to issue annual reports on subsistence catches for member states with aboriginal populations and to consider their cultural and nutritional needs in light of the most recent scientific findings regarding the status of the various whale populations.\textsuperscript{61}

\begin{itemize}
\item 53. Whaling Convention, \textit{supra} note 10, at art. 5, paras. 1–2.
\item 54. \textit{See generally id.}
\item 55. IWC History & Purpose, \textit{supra} note 11; IWC Membership, \textit{supra} note 10.
\item 56. \textit{Id.}; Whaling Convention, \textit{supra} note 10, at art. III.
\item 57. IWC History & Purpose, \textit{supra} note 11.
\item 58. \textit{Id.}
\item 59. \textit{Id.}
\item 60. \textit{See generally} Whaling Convention, \textit{supra} note 10.
\end{itemize}
2. Whaling Under the ICRW: Practice and Enforcement in the IWC

As with many international agreements, the major criticisms of the ICRW and IWC concern institutional failures stemming from ambiguous jurisdiction and ineffectual enforcement of the Convention. Lenient membership criteria allow almost any nation to join, whether it has a material interest in whaling or a population that engages in any whaling activities. Thus, nations with adverse interests—that is, “pro-whaling” and “anti-whaling”—member nations disagree about the scope of the Convention’s jurisdiction and its purposes. The result of this friction, arguably, is a disregard for the Convention altogether by the majority of IWC members.

Whale preservationists accuse whaling nations of committing infractions of the Convention that go unpunished for lack of an effective enforcement infrastructure, while states with an interest in or history of whaling feel marginalized, accusing the IWC of losing sight of its original aims by yielding to environmentalist pressures. Furthermore, the structure of the Convention allows for considerable leeway in compliance, since it delegates the ultimate enforcement responsibilities to member

62. It remains unclear, for example, whether the IWC has legal jurisdiction over certain species of small whales or whether Alaskan natives may sell edible whale products. See Freeman, supra note 6 at 100.
63. Ruffle, supra note 17, at 653 (“[n]o procedure exists by which the IWC can itself enforce its regulations at an international level.”).
65. Andresen, supra note 18, at 397.
66. Freeman, supra note 6, at 100–01.
67. Id.
68. See, e.g., Ruffle, supra note 17, at 668–69 (“[t]he history of the IWC has been marked by a series of infractions committed by whaling nations in the interest of profit. These infractions ... are a direct result of poor monitoring and ineffective enforcement mechanisms.”).
nations. Provisions allowing member states to lodge timely objections to amendments in the IWC’s Schedule effectively permit whaling activities to continue at the will of the state lodging the objection. Meanwhile, states that remain non-parties to the Convention are essentially free to pursue whaling activities of their own accord, with only admonitions and threats of sanctions from non-whaling nations and the IWC to deter them. Thus, the IWC relies almost entirely on the honor of its member states to comply with the terms of the Schedule, and has no apparently effective means of punishing infractions.

3. Whaling in the IWC (1950s and 1960s)

State membership in the IWC and its successes and failures as perceived by signatory and non-signatory states have fluctuated over the course of the Commission’s contentious forty-seven year history. The 1950s saw a great deal of uncertainty in scientific estimates of whale populations, and quotas based on inadequate scientific knowledge arguably led to a depletion

70. Whaling Convention, supra note 10, at art. IX(1) (“[e]ach Contracting Government shall take appropriate measures to ensure the application of the provisions of this Convention and the punishment of its infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction.”).

71. Id. at art. V(3)(a) (“... if any Government presents to the Commission objection to any amendment ... the amendment shall not become effective with respect to any of the Governments for an additional ninety days ....”).

72. See, e.g., President’s Message to Congress Transmitting a Report Regarding Certification by the Secretary of Commerce that Canada had Conducted Whaling Activities that Diminish the Effectiveness of a Conservation Program of the International Whaling Commission (IWC), Pursuant to 22 U.S.C. 1978(b) (Feb. 11, 1997), at http://www.highnorth.no/Library/Trade/GATT_WTO/th-us-do.htm [hereinafter Clinton’s Message to Congress] (“Canada’s unilateral decision to authorize whaling outside the IWC is unacceptable ... I believe that Canadian whaling on endangered whales warrants action at this time ... [President Clinton then went on to state, inter alia, that the United States would continue to “urge Canada to reconsider its unilateral decision ... to authorize whaling outside the IWC,” but declined to impose import prohibitions.]).

73. See Suhre, supra note 49, at 316; Whaling Convention, supra note 10, at art. IX.

74. Andresen, supra note 18, at 379–81.
in Antarctic whale stocks—a result in direct conflict with the goals of the Convention.\textsuperscript{75}

This depletion was particularly sharp in the southern Antarctic region, but by the 1960s populations had improved markedly, due to improved scientific information and more heavily regulated procedures for devising quotas.\textsuperscript{76} At this time, based on lessons learned from the depletions in the Antarctic, the IWC began to more heavily regulate northern whaling areas such as the Atlantic and North Pacific,\textsuperscript{77} the hunting ground of Native Alaskan Eskimos.\textsuperscript{78}

II. MODERN CONFLICT


In 1969, the bowhead whale was federally listed as an endangered species, but subsistence hunts by Arctic natives were still permitted.\textsuperscript{79} Starting in about 1972, several proposals for a moratorium on all commercial whaling were raised, but did not garner sufficient votes within the IWC to sustain them.\textsuperscript{80} During this time, the bowhead take by Alaskan Eskimos experienced a resurgence, as natives continued to hunt the bowhead.\textsuperscript{81} By 1976, every hunted whale species had an IWC-imposed quota, in keeping with the increasing regulation of whaling practices that was the hallmark of the 1960s.\textsuperscript{82} Meanwhile, other commercial whaling moratoria, which put a halt to commercial whaling practices, were established for blue, gray, right, and bowhead whales—the last being the quarry of the

\textsuperscript{75} Id. at 384.
\textsuperscript{76} Id. at 385.
\textsuperscript{77} Id.
\textsuperscript{78} See, e.g., Map of Alaska Eskimo Villages, in Braund & Moorehead, supra note 4, at 255.
\textsuperscript{81} During this time, the annual take increased from 12 to 30, in addition to whales which were struck but not caught. See Bering Land Bridge National Preserve, supra note 79.
\textsuperscript{82} Andresen, supra note 18, at 385.
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Alaskan Eskimo. One such moratorium prompted the formation of the Alaskan Eskimo Whaling Commission (AEWC) in 1977 to protect Eskimo subsistence. The IWC imposed the 1977 ban based on information that the bowhead population was dwindling, data that Alaskan Eskimos contended were inaccurate. The ban was lifted in 1978, only to be replaced by a small quota that was vigorously contested until 1981. In that year, the AEWC reached an agreement with the federal National Oceanic and Atmospheric Administration (NOAA), whereby the AEWC was to report to the NOAA but exercised governance over the whale hunt, leaving the hunt relatively free from federal interference.

Although Eskimo subsistence was threatened by the 1977 moratorium, this era in IWC history may have been the golden age of harmony between conservationists and sustainable whaling interests because of the general stability of the whale populations and efforts at cooperative management with the native-run AEWC.

B. The Alaska Eskimo Whaling Commission

In light of the importance of whaling in Alaskan Eskimo culture, Alaskan Eskimos banded together in 1977 to form the Alaska Eskimo Whaling Commission (AEWC). The ban imposed by the IWC on the aboriginal hunting of bowhead whales by Alaskan Eskimos was the impetus for the formation of a local NGO to exercise stewardship over subsistence whale hunt-

83. Id.; CASE, supra note 3.
84. Huntington, ICC Special Issue, supra note 12.
85. See Bering Land Bridge National Preserve, supra note 79.
86. Huntington, ICC Special Issue, supra note 12.
87. FREEMAN, supra note 6, at 120; Huntington, ICC Special Issue, supra note 12.
88. Andresen, supra note 18, at 386; See Bering Land Bridge National Preserve, supra note 79 (improved methods for conducting censuses on the bowhead raised the western estimate from 600-2000 to 3,800).
89. Specifically, whaling captains from all of the Alaskan whaling villages (except Little Diomede) organized to form the AEWC, developed a bowhead management plan, attended IWC meetings, and cooperated with U.S. delegates to the IWC in an attempt to rescind the subsistence whaling moratorium. Braund & Moorehead, supra note 4, at 257.
90. See, e.g., Huntington, ICC Special Issue, supra note 12.
The AEWC is a nonprofit corporation whose stated aims are to preserve and protect the population and habitat of the bowhead whale, protect the subsistence whaling, cultural and nutritional interests of Alaskan Eskimos, and conduct scientific research on bowhead whales to support the health of the species and monitor its population in the region. The North Slope Borough, home to Barrow and the AEWC registered office, now has an annual budget of approximately $2 million reserved for bowhead whale management and research, of which about $500,000 is allocated to the AEWC.

The AEWC operates under a set of bylaws structured in a convention-like format similar to that of the ICRW. Unlike the ICRW, however, the bylaws state specifically that the AEWC’s objectives are to “preserve and enhance the marine resource of the bowhead whale including protection of its habitat; to protect Eskimo subsistence bowhead whaling; to protect and enhance Eskimo culture, traditions, and activities associated with bowhead whales and bowhead whaling; and to undertake research and educational activities related to bowhead whales.” Thus, the AEWC bylaws reflect preservation and protection objectives similar to those of the ICRW, but different in the specific premium they place on Eskimo subsistence on the bowhead whale.

The membership of the AEWC consists of registered whaling captains (voting members) and crews (non-voting members).

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91. Id.; Freeman, supra note 6, at 120–21.
92. AEWC Overview, supra note 14.
93. AEWC BYLAWS, supra note 13, at art II. §2.1
94. Freeman, supra note 6, at 121. Funds and resources allocated to the AEWC are managed by the federal government through the NOAA via the Marine Mammal Protection Act (MMPA). See also Cooperative Agreement Between the National Oceanic Atmospheric Administration and the Alaska Eskimo Whaling Commission, in Huntington, The AEWC: Effective Local Management, supra note 24, at Appendix I (“NOAA has primary responsibility within the United States Government for management and enforcement of programs concerning the bowhead whale ... NOAA may withdraw the authority of the AEWC for management and will manage the bowhead whale hunt in a manner consistent with federal law ...”).
95. Compare AEWC BYLAWS, supra note 13, with Whaling Convention, supra note 10.
96. AEWC BYLAWS, supra note 13, at art. 1, §1.2.
97. See Whaling Convention, supra note 10, at Preamble.
from all ten Alaskan whaling villages, which collectively represent some 7,500 Inupiat and Yup’ik Eskimos. The AEWC is governed by an elected board composed of ten commissioners (one representing each village), a Chairman, Vice-Chairman, Secretary, Treasurer, and administrative staff. The board members, known as Commissioners, can revoke the membership of any member who violates any of the organization’s policies with respect to bowhead whale harvesting.

C. Modern States’ Conflicts: Environmental Conservation and Commercial Whaling

To understand the events of the 2002 and 2003 IWC meetings with respect to the Alaskan Eskimo subsistence exemption, it is necessary first to analyze the dueling policy objectives of commercial or non-subsistence whaling states and the conservation movement that are at play within the IWC. A brief orientation to the politics of the whaling debate is helpful, for somewhere between the aims of the international conservation community and those of the industrial commercial whaling states lie the interests of small Native American subsistence communities such as the Native Village of Barrow.

98. These villages are Gambell, Savoonga, Wales, Little Diomede, Kivalina, Point Hope, Wainwright, Barrow, Nuiqsut, and Kaktovik. See also supra note 3.
99. AEWC Overview, supra note 14; Mary Pemberton, Japan Drops Opposition to Alaska Eskimo Whaling, ASSOCIATED PRESS, June 21, 2002, at KENAI PENINSULA CLARION ONLINE, http://peninsualclarion.com/stories/062102/ala_062102ala0040001.shtml. Membership in the AEWC is open to any resident of the aforementioned ten villages who is a registered whaling captain or crew member, although only registered captains may cast votes within the organization to pass policy initiatives and elect board members. See AEWC BYLAWS, supra note 13, at arts III, §3.2 & V, §5.3.
100. AEWC Overview, supra note 14.
101. AEWC BYLAWS, supra note 13, at art. III, §3.3. See generally Suhre, supra note 49.

In exercising their cultural rights, however, several questions arise about ... native whaling: Do [native whalers] have the legal and moral right to determine what their cultural rights are and pursue them even if they conflict with the views of the dominant [non-native]
1. The United States

The United States no longer supports any type of large-scale whaling, but does continue to support subsistence hunts of the gray whale by the Makah Indian Nation of the Pacific North-Western United States and the bowhead whale by Alaskan Eskimos. The United States has also consistently supported international conservation efforts and has decried whaling outside the IWC, including the hunting of bowhead whales under Canadian permits. For example, in 1997, President Clinton condemned the Canadian practice of issuing licenses for the taking of endangered bowhead whales, though he emphasized that he “[understood] the importance of maintaining traditional native cultures” and voiced his support for “aboriginal whaling that is managed through the IWC.”

In this regard, the United States has publicly voiced its support for aboriginal subsistence as managed through the IWC, but has also been characterized as “[leading] the fight in the international arena” for the continuance of the Alaska Native bowhead whale hunt despite the IWC’s protection of the bowhead and the potentially chilling effect on its international reputation as a state generally opposed to whaling. Some say that United States whaling policies are hypocritical and exhibit a “double-standard,” because they demonstrate clear support for Inupiat Eskimo bowhead whaling while at the same time...

society or the views of some animal rights groups? ... [s]ome people would answer these questions in the negative either because they are whale preservationists who think whale rights to life trump human cultural rights or because they fear [native subsistence] whaling is the first step down a “slippery slope” to the resumption of worldwide commercial whaling.

Id.


105. Id.

106. Clinton’s Message to Congress, supra note 72.

107. Id.

108. Miller, supra note 103, at 228.

109. Id.

opposing subsistence whaling of more populous whale species by aboriginals of other IWC member states such as Norway, Iceland, and Japan.\textsuperscript{111} As has been demonstrated at recent IWC meetings, these perceptions have operated to the detriment of Alaskan Eskimos.\textsuperscript{112}

2. Norway

Norway is a state with strong whaling interests and an established tradition of hunting minke whales (\textit{vagehval}) dating back more than 1,500 years.\textsuperscript{113} Minke, the smallest of the baleen whales, is harvested today from the North-East Atlantic under a quota fixed by the Norwegian government.\textsuperscript{114} There is heated debate, however, over whether the Norwegian minke whale harvest is “strictly regulated,”\textsuperscript{115} or is in fact “subject to weak regulations” that undermine international whale management.\textsuperscript{116} The flashpoint of this debate is the legality of Norway’s decision to resume whaling in 1992 despite the fact that the IWC had placed a moratorium on the practice almost ten years earlier.\textsuperscript{117} Meanwhile, Norwegian whalers have directly

\begin{footnotesize}
\begin{enumerate}
\item[111.] Nicholas D. Kristof, \textit{Whale on the Table}, Op. Ed., \textsc{N.Y. Times}, Sept. 17, 2003, at A27 [hereinafter Kristof, Op. Ed.] (“for all its ‘save the whales’ piety in international forums [sic], the U.S. has strongly and quite properly backed the right of American Indians and Eskimos to kill whales the way they traditionally have.”).
\item[112.] See, e.g., 2002 IWC Press Release, supra note 15. The Alaskan Eskimo temporarily lost the subsistence exemption at this meeting.
\item[115.] \textit{Id.}
\item[116.] Greenpeace, Norwegian Whaling: Neither Small Scale Nor Traditional, \textit{at} \url{http://archive.greenpeace.org/comms/chio/norweg.html} (last visited Feb. 9, 2005).
\item[117.] One side of the debate supports current Norwegian whaling practices, contending that Norway’s hunt is legal, ultimately “economically insignificant” in the global market, and does not violate the ICRW because Norway had officially registered its objection to the moratorium. The other side of the debate contends that Norwegian whaling is “neither small-scale nor traditional,” and is geared toward an “export-oriented industry” aiming to profit from trading in whale meat. This conservation-oriented argument, advanced
\end{enumerate}
\end{footnotesize}
asked their government to oppose traditional Inuit whale hunts.\textsuperscript{118} Norwegian fishing and whaling interest groups have urged Norway to block future United States requests for bowhead subsistence quotas, previously set at 280 whales.\textsuperscript{119} Norwegian whalers have expressed frustration at the United States setting its own quotas for Alaskan Eskimos and then “immediately resuming [its] crusade against other whaling countries.”\textsuperscript{120}

In whatever terms Norwegian whaling practices are characterized, it is obvious that whaling is an integral part of Norway’s economy.\textsuperscript{121} Norwegians depend on whaling for the continued financial solvency of their fishing communities,\textsuperscript{122} and yet endeavor to understate this element of their commerce. In 2002, for example, the government of Norway was encouraged by four of its fishing and whaling associations to oppose traditional Alaskan whaling at the 2002 IWC meeting. The groups lobbied the Norwegian foreign ministry to oppose the specious distinction between “so-called aboriginal hunts” and “so-called commercial hunts.”\textsuperscript{123} International environmental lobbies like Greenpeace maintain that this distinction is very real, and that in fact Norway is effectively using other states’ aboriginal subsistence whaling practices as a means to justify its own commercial whaling ends.\textsuperscript{124}

3. Japan

Japan has been instrumental in spearheading the effort against the Eskimo subsistence exemption, as it has long been

\textsuperscript{118} Mellgren, \textit{supra} note 110.
\textsuperscript{119} Id.
\textsuperscript{120} See id. (comments of Rune Frovik of the High North Alliance).
\textsuperscript{121} See, e.g., \textsc{Norwegian Institute for Urban and Regional Research, Whaling in Norwegian Waters in the 1980’ies [sic]: The Economic and Social Aspects of the Whaling Industry and the Effects of its Termination} 65 (1990).
\textsuperscript{122} See, e.g., \textit{id}.
\textsuperscript{123} Mellgren, \textit{supra} note 110.
\textsuperscript{124} Id.
opposed to the IWC’s failure to grant Japanese coastal peoples a subsistence exemption of their own for the harvest of minke whales.\footnote{See Tepton, supra note 15; 2002 IWC Press Release, supra note 15; Andrew C. Revkin, Asia: Japan: Moves for Commercial Whaling, World Briefing, N.Y. TIMES, July 21, 2004, at A13.} Japan argues that the United States unfairly awards its natives a subsistence quota while refusing to recognize Japanese small type coastal whaling (STCW) as a form of aboriginal subsistence, a sentiment that is a large part of the reason for the Japanese stance against the Alaskan Eskimo subsistence exemption.\footnote{Harris, supra note 5, at 382.} Yet Japan, where whale meat is considered a delicacy, has engaged in a notoriously aggressive commercial whaling campaign over the years, which the state frames as a defense of subsistence exemptions and scientific research.\footnote{See Ruffle, supra note 17, at 651–52; Kristof, Op. Ed., supra note 111 (“the Japanese ‘scientific’ whaling effort is more about sushi than science.”).} In fact, the Japanese vote at the 2002 meeting—which temporarily put an end to the Eskimo subsistence hunt—was a direct response to United States and British efforts to block Japan’s attempts to lift the IWC’s commercial whaling ban.\footnote{See Pemberton, supra note 99.} Shortly after the June 2002 meeting, Japan reversed its vote and released a statement indicating that it would not oppose subsistence whaling by Alaskan Eskimos,\footnote{Id.} only to reaffirm its original opposition to such practices on August 7 of the same year and return the members of the AEWC to a tenuous, quota-less position where further attempts to meet subsistence needs would put AEWC members in direct contravention of an IWC consensus.\footnote{See Tepton, supra note 15.}

4. Alaskan Eskimos: Effects and Responses

The relative impact of the “tiny subsistence hunts of Arctic natives,”\footnote{Richard N. Mott, (V.P. for International Policy for the World Wildlife Fund), Hunting Whales, Letter to the Editor, N.Y. TIMES, Sept. 20, 2003, at A12 [hereinafter Mott, Letter to the Editor].} conducted from wooden frame boats paddled in pursuit of individual whales that are towed ashore once caught,\footnote{Braud & Moorehead, supra note 4, at 270.} are readily distinguishable from the “million-dollar whale
hunts\textsuperscript{133} of these commercial whaling states that have been alleged to employ factory-like boats complete with on-board whale-meat processing operations.\textsuperscript{134} Additionally, Alaskan Eskimos have responded to IWC concerns by forsaking some of their traditional hunting methods for more modern means that are deemed more efficient and humane.\textsuperscript{135}

Thus, international objections to the Alaskan Eskimo subsistence hunt seem to be driven more by political tensions between the United States and major whaling states like Japan and Norway.\textsuperscript{136} The apparent hypocrisies and double standards therefore do not necessarily reflect preferential treatment by the United States of its native peoples over those of other IWC member states.\textsuperscript{137} Rather, they illustrate the difficult position in which the United States finds itself as it attempts to support the international conservation movement,\textsuperscript{138} which may sometimes interfere or conflict with its responsibilities to support its own native peoples’ cherished traditions.\textsuperscript{139} The United States seeks to preserve Alaskan Eskimo whaling needs, which are admittedly far less substantial than, for example, those of Norway and Japan.\textsuperscript{140} However, it is also bound to the IWC by a certain degree of conservationist political pressure. Greenpeace, for example, has voiced strong opposition to commercial whaling while supporting some subsistence hunting by native Alaskan Eskimos.\textsuperscript{141} While a Greenpeace spokesperson commented after the 2002 IWC meeting that “aboriginal peoples in Alaska ... cannot be held hostage for Norwegian commercial whaling”\textsuperscript{142}, the United States has sought to preserve these hunting rights while also supporting international conservation efforts.

\begin{thebibliography}{141}
\bibitem{133} Mott, Letter to the editor, \textit{supra} note 131.
\bibitem{134} Greenpeace, \textit{supra} note 116.
\bibitem{135} Gillespie, \textit{supra} note 43, at 126.
\bibitem{136} \textit{See, e.g.}, Mellgren, \textit{supra} note 110.
\bibitem{137} \textit{See, e.g.}, Mott, Letter to the Editor, \textit{supra} note 131.
\bibitem{138} This support is possibly best illustrated by the Fishermen’s Protective Act (Pelly Amendment), 22 U.S.C. §§1971-1979 (1995). The Pelly Amendment “authorizes the President to prohibit the importation of products from countries that allow fishing operations that diminish the effectiveness of an international fishery conservation program or that engage in trade or taking that diminishes the effectiveness of an international program for endangered or threatened species.” \textit{Id.} at Overview.
\bibitem{139} \textit{See, e.g.}, discussion of the trust doctrine in Thompson, \textit{supra} note 20, at 424.
\bibitem{140} Kristof, Op. Ed., \textit{supra} note 111.
\bibitem{141} Mellgren, \textit{supra} note 110.
\end{thebibliography}
Whaling," the 2002 IWC meeting demonstrated just how quickly such a hostage situation can unfold. The United States may in fact be engaging in "hypocrisy" to the extent that it voices inconsistent policies by criticizing nations such as Canada for whaling outside the IWC,\textsuperscript{144} permits Alaskan Eskimos to whale "notwithstanding the protection of bowheads by the IWC,"\textsuperscript{145} and still seems to expect the global whaling community to support the Alaskan subsistence exemption. Despite recent press attention,\textsuperscript{146} global factions, enforcement failures, and inter-state strife within the IWC unfortunately seem to remain part of the Commission's standard operating procedure.\textsuperscript{147} One commentator has observed the IWC's inability to effectively and uniformly regulate the whaling activities of states that deviate from the IWC Schedules, noting the danger that "failing to make concessions to the needs of [the IWC's] pro-whaling states will fragment the IWC into regional, self-regulating whaling organizations."\textsuperscript{145}

But the management of aboriginal whaling through the IWC has, over time, proven itself ineffective. Indeed, today's Alaskan Eskimos have their own "management regime that most hunters view as responsive to their needs and that many outsiders regard as a model for effective management,"\textsuperscript{149} and even the IWC's own Aboriginal Subsistence Sub-Committee in 2003 expressed its appreciation for Alaskan local hunters' coopera-

\textsuperscript{142} Id. (comments of Frode Pleym, Greenpeace campaigner).
\textsuperscript{143} Kristof, Op. Ed., supra note 111.
\textsuperscript{144} Clinton's Message to Congress, supra note 72.
\textsuperscript{145} Miller, supra note 103, at 228.
\textsuperscript{148} Hodges, supra note 113, at 328.
\textsuperscript{149} FREEMAN, supra note 6, at 117.
tion with IWC scientific research objectives.\textsuperscript{150} Self-regulation might therefore be a positive development for the Alaskan Eskimo,\textsuperscript{151} and the international community at large, even if this increased autonomy ultimately redefines the relationship between the United States and the IWC.

III. WHALING BANS, RESPONSES & THE IWC IN 2003

A. Bans of the 1980s and Membership Responses

In 1982, the IWC imposed a complete ban on all commercial whaling, which entered into force for the 1985 and 1986 seasons.\textsuperscript{152} The IWC’s decision promised that, by 1990, the Commission would comprehensively assess the effects of the ban on whale stocks in consideration of modifying the decision or lifting the ban to provide for new catch limits.\textsuperscript{153} That year, Canada withdrew from the IWC and has refused to rejoin the Commission at least in part based on its perception that the IWC is inattentive to subsistence whaling needs.\textsuperscript{154} In 1988, Japan became the last nation to officially cease commercial whaling, although it still arguably whales commercially under cover of a scientific research exemption.\textsuperscript{155} This wholesale commercial ban was imposed mostly in response to increasing pressures from environmental NGOs that were shifting public opinion, and in turn IWC policy, to a stance that made non-whaling synonymous with sound environmental policy.\textsuperscript{156} The 1982 ban—which

\textsuperscript{150} ASW Sub-Committee Report, \textit{supra} note 61 (“[t]he Committee appreciated the fact that in Alaska, landed whales are measured and sampled in cooperation with local hunters.”).

\textsuperscript{151} See, e.g., Huntington, The AEWC: Effective Local Management, \textit{supra} note 24, at 51–55. (“[t]he AEWC has forcefully shown the effectiveness of local, hunter-oriented management in the context of subsistence hunting.”).


\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{See Canadian Inuits Say No to IWC, The High North News,} no. 7, (Apr. 10, 1994) (comments of Rosemari Kupanat, President of the Canadian Inuit Council, noting the Council’s “support [for] Canada’s historical position that the IWC should be dedicated to the conservation and sustainable use of whales”), at \url{http://www.highnorth.no/Library/Management_Regimes/IWC/cain-sa.htm}.

\textsuperscript{155} Andresen, \textit{supra} note 18, at 388; Ruffle, \textit{supra} note 17, at 640.

\textsuperscript{156} Andresen, \textit{supra} note 18, at 394.
remains in effect today—was a complete ban on whaling except for the purposes of minimal aboriginal subsistence and scientific research.\(^{157}\)

Iceland withdrew from the IWC in 1992. The Icelandic delegate to the IWC subsequently referred to the IWC as “a non-whaling commission rather than a whaling commission,”\(^{158}\) a reference to what Iceland has argued is the IWC’s demonstrated bias toward the position of environmental NGOs over the concerns of whaling states.\(^{159}\) Eleven years later, in 2001, Iceland rejoined the IWC because it concluded that the IWC had demonstrated more of a commitment to cooperative management and was working toward sustainable whaling.\(^{160}\) In contrast, Canada has stayed out.\(^{161}\)

B. *The Alaskan Eskimo: Responses to Aboriginal Subsistence*

Recent scholarship examining the rights of the Inuit to continue and sustain whaling activities for subsistence purposes in light of these prior whaling bans has reached varying conclusions regarding the efficacy of the IWC in regulating subsistence rights.\(^{162}\) One argument is that the IWC ultimately is an effective regulator of subsistence practices because it is sensitive to the aboriginal subsistence exemption and pays “close attention to indigenous rights.”\(^{163}\) An alternative and somewhat opposing view calls for greater Inuit involvement in the conservation discourse under a revised human rights framework, holding that the Inuit subsistence exemption is in constant


\(^{158}\) See *Iceland Battles to Resume Whaling*, CNN.COM, *supra* note 69.

\(^{159}\) *Id*.

\(^{160}\) *Id*. Mr. Asmundsson pointed out that many of these same problems still remained, but that there were indications that the IWC member states were working toward sustainable whaling and that Iceland now preferred to be part of these discussions rather than allow them to continue without Icelandic input.

\(^{161}\) The Icelandic and Canadian defections may thus be merely illustrative of the larger problem the IWC has had in retaining credibility as an organ of international enforcement.

\(^{162}\) Compare Harris, *supra* note 5, with Gupta, *supra* note 19.

\(^{163}\) See generally Harris, *supra* note 5.
danger of termination by the vote of any single member state of the IWC.\footnote{164}{Gupta, supra note 19, at 1751–52 (anticipating events akin to those of the 2002 IWC meeting in Shimonoseki, when the Japanese vote temporarily eliminated the Alaskan subsistence exemption).}

Proponents of this latter argument have recognized the Native Village of Barrow as one of several indigenous groups whose long-standing cultural traditions are threatened for lack of native input.\footnote{165}{Id. at 1763.} One commentator discusses the importance of increased involvement for NGOs and other non-state actors.\footnote{166}{Id. at 1769.} This view suggests that NGOs such as the AEWC may hold the key to greater self-government of Inuit subsistence needs while at the same time maintains that international organizations remain “the appropriate dispute-resolution mechanism” for settling disagreements over indigenous subsistence exemptions.\footnote{167}{Id. at 1770.}

The suggestion that international organizations like the IWC are generally and theoretically viable dispute-resolution mechanisms for disagreements over subsistence exemptions may be accurate.\footnote{168}{See Harris, supra note 5, at 381 (observing that the “bowhead quota had been sustained without interruption since 1977,” and that the loss of the quota in 2002 was quickly remedied by an inter-sessional meeting of the IWC).} But the IWC—which arguably still retains the greatest influence over the fate of Alaskan Eskimo subsistence whaling—has failed to demonstrate its viability as a mechanism for consistent and predictable dispute resolution over all whaling issues.\footnote{169}{Hodges, supra note 113, at 304; Yasuo Iino & Dan Goodman, Japan’s Position in the International Whaling Commission in The Future of Cetaceans in a Changing World 4–6 (William C.G. Burns & Alexander Gillespie eds., 2003); see also supra notes 146, 147.} The ICRW, under which the IWC assumes its authority, is likewise a nebulous document that provides little security for native peoples seeking to ensure permanent subsistence hunting activities.\footnote{170}{See generally Whaling Convention, supra note 10.}
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Events at recent meetings of the IWC have shed light on these inefficacies, illustrating that the IWC may be incapable of effectively managing native subsistence issues, and demonstrating that the presence of a cooperative tribal voice alone may not be enough to secure a permanent subsistence exemption for the Alaskan Eskimo.171 The state of the Alaskan Eskimo subsistence exemption between the IWC meetings of 2002 and 2003 illustrates the extent to which the IWC holds Alaskan Eskimo subsistence culture in the balance.172

In 2002, Alaskan Eskimos lost their quota for the aboriginal subsistence exemption,173 when fewer than three quarters of the IWC voted for it.174 Barrow, with forty-four whaling captains plus their crews, is usually permitted twenty-two whales per year, but in part as a result of the IWC’s defeat of the subsistence exemption, Barrow whalers harvested only three during the 2002 season.175 The exemption was defeated in 2002 despite reports from the IWC’s Scientific Committee that year that the bowhead whale population was hearty enough to endure the subsistence harvest, and the fact that the IWC was well informed of Eskimo cultural and subsistence needs.176

The defeat of the subsistence exemption left the native population of Barrow with no bowhead whale quota for 2003, and since they were forbidden to whale by the IWC, Barrow natives were left with very little whale meat to carry them through the winter.177 The pre-2002 quota was ultimately reinstated at a special inter-sessional meeting of the IWC in October of 2002.178

171. See, e.g., 2002 IWC Press Release, supra note 15. It was at this meeting that the Alaskan Eskimos lost the subsistence exemption as a result of the Japanese vote, despite their cooperative role in IWC dialogue.
172. The 54th and 55th annual meetings of the IWC were held in Shimonoseki, Japan and Berlin, Germany respectively. See 2002 IWC Press Release, supra note 15; 2003 IWC Press Release, supra note 23.
173. The quota consisted of 280 bowhead over five years with an annual average harvest of 67 whales for the Alaskan Inupiat and native population of Chukotka, Russia. See Cambridge Meeting Press Release, supra note 23.
175. Tepton, supra note 15.
177. Tepton, supra note 15.
making the AEWC’s rigorous campaign to re-instate the exemption successful.

Before the 55th annual IWC meeting in June 2003 in Berlin, the Alaskan Eskimo subsistence exemption had already been reinstated at the special meeting (in October of 2002). Fortunately for the native Alaskan whaling villages, this quota remained undisturbed at the 2003 meeting, with the IWC noting that the Scientific Committee was continuing to make strides toward helping aboriginal whalers manage whale stocks. Despite these strides, however, it was also noted in 2003 that some of the small Arctic bowhead populations were suffering because of catches made outside of IWC regulations, including one made by Canadian Eskimos in 2002. Apparently, the IWC “attached great importance to trying to improve the survivorship of these stocks.” Yet at the same time, the Revised Management Procedure (RMP) accepted and endorsed at the 2003 meeting, acknowledged that there was scientific uncertainty over the population levels of different whale species. Given the loss of the exemption at the 2002 meeting and the unreliable data presented in 2003, it is not difficult to imagine the Alaskan Eskimo losing its subsistence exemption or bowhead quota again in the future.

180. See Cambridge Meeting Press Release, supra note 23. During this meeting, the bowhead whale quota was set at 280 whales for the 2003-2007 period, with no more than 67 whales to be struck in one year and with a provision requiring the Scientific Committee’s review of the quota from 2004 onward.
182. See “Status of Whales,” in id.
183. Id.
185. Id.
186. See, e.g., Gupta, supra note 19, at 1749. ("[The Inuit subsistence exemption] is itself under continual attack ...."). It is worth noting that no changes were made to the bowhead catch limits at the 56th annual IWC meeting in Sorento, Italy. See Final Press Release of the 56th Annual Meeting of the IWC, at http://www.iwcoffice.org/meetings/meeting2004.htm (last visited Jan. 17, 2005). Nonetheless, this does not mean that subsistence whaling is
IV. THE CANADIAN APPROACH AND OTHER WHALING NGOs:
   ALTERNATIVE MANAGEMENT SCHEMES?

A. Canadian Aboriginal Subsistence Whaling

Canada is considered to be one of the largest whaling nations in the world, with several active aboriginal whaling communities. Like the Alaskan Eskimo, Canadian Aboriginals have been whaling for thousands of years, and the unforgiving temperatures and harsh Arctic climate are similar to the environment of the Northern Alaskan Eskimos in Barrow and neighboring villages. Canadian Inuit live in both the eastern and western Arctic, and hunt primarily for beluga and narwhal whales. Canada is cognizant of and committed to indigenous rights, and those rights are explicitly codified and provided for in the Canadian Constitution. While the AEWC remains at the mercy of the IWC's annual subsistence quota vote, Canada's refusal to rejoin the IWC at the behest of that country's whaling communities is viewed by some tribal leaders, such as World Council of Whalers Chairman Chief Tom Mexsis Happynook of the Nuu-chah-nulth Tribe, as evidence of Canada's "increasing awareness of the central importance of [aboriginal] rights, and the effectiveness of local management regimes based sufficiently protected from future reductions. The 57th annual IWC meeting is scheduled for May 2005 in Ulsan, Republic of Korea.


188. Chief Tom Mexsis Happynook, Traditional Rights versus Environmental Protection of a Species, presented at The Conference on Environmental Law and Canada's First Nations, PAC. BUS. & L. INST. (Nov. 18–19, 1999), available at http://www.worldcouncilofwhalers.com/Resources/Mexsis1.html. The main Canadian aboriginal whaling communities are the Western Arctic Inuvialuit, the Eastern Arctic Inuit, and the Nuu-chah-nulth.

189. See id.

190. See map of Alaska Eskimo Villages, in Braund & Moorehead, supra note 4, at 255; map of Canadian Inuit Villages, in Nunavut Study, supra note 27, at 5.


on science and traditional resource management knowledge.\textsuperscript{194} Chief Happynook observes that much of the language of international conventions such as the ICRW pays only “lip service” to the subsistence rights of indigenous people.\textsuperscript{195} In the late 1990s, the Inuit assumed control over the beluga whale hunt absent a quota, which may indicate that Canadian aboriginals are moving toward greater autonomy in their subsistence hunting practices.\textsuperscript{196}

Like the Eskimo communities of northern Alaska, eastern Canadian whaling communities have also hunted the bowhead whale.\textsuperscript{197} After European and American whalers began to commercially whale these waters in the early 1900s, however, the bowhead population was depleted, leaving few whales for aboriginal subsistence hunting.\textsuperscript{198} When this commercial whaling came to an end, Canadian Inuit harvested bowheads only sporadically, and the bowhead hunt has not resumed with regularity.\textsuperscript{199} The bowhead hunt is considerably smaller than the beluga and narwhal hunts, and just six bowheads were taken by Canadian Inuit between 1991 and 1998.\textsuperscript{200} Nonetheless, the bowhead remains culturally significant and there has been some effort by the Canadian Inuit to resume the bowhead hunting tradition in both eastern and western Canadian Arctic waters.\textsuperscript{201} There is also a general consensus among Canadian Inuit that a return to sustainable bowhead whaling would be cultur-

\textsuperscript{194} Happynook, supra note 188.
\textsuperscript{195} See id.
\textsuperscript{196} See id.
\textsuperscript{197} In 1995, a formal study of Canadian Inuit bowhead whaling practices in Nunavut, Canada, was conducted by a special research committee pursuant to the Nunavut Land Claim Agreement of 1993. The study included analysis of the whaling practices in ten of the 18-20 eastern Arctic bowhead whaling communities in Nunavut. The communities studied were Igloolik, Hall Beach, Coral Harbour, Repulse Bay, Kimmirut, Cape Dorset, Kugaaruk, Pangnirtung, Qikiqtaaluk, and Clyde River. See Nunavut Study, supra note 27, at 1–3, 55.
\textsuperscript{198} Id. at 9.
\textsuperscript{199} Id. at 10.
\textsuperscript{201} See Clinton’s Message to Congress, supra note 72. (President Clinton criticized Canadian natives for taking both eastern and western bowheads in 1991 and 1994 without Canadian permits, and for taking both eastern and western bowheads in 1996 with permits issued by the Canadian government).
ally and nutritionally valuable. In interviewing members of the Canadian Inuit communities, researchers have found that, similar to Native Alaskans in Barrow and nearby whaling villages, the bowhead whale hunt holds traditional significance. Furthermore, studies have suggested that bowhead whale populations in the region have either remained stable or have been steadily increasing since the 1950s, such that a more regularized, sustainable hunt would be feasible.

Conservationists who oppose whaling under almost any circumstances, however, view Canadian whaling practices as a serious threat to the future of certain whale species. Additionally, scholars argue that Canada has been slow to adopt fundamental principles of international environmental law, and that the Canadian government should consider seriously the values and principles of environmental treaties even where those treaty obligations have not been specifically implemented. Those who would argue, however, for a stronger implementation of environmental practices and principles codified in international treaties also concede that such treaties are often too broad and general to make effective use of international law within Canada.

Many also criticize “so-called ‘traditional’ [whale] hunts,” concerned about threats to population size and convinced that a growing market demand for certain whale parts is influencing

203. Id. at iii; see generally Chiropolos, supra note 42.
204. See Nunavut Study, supra note 27, at 20, 74. Much of the population information gathered here was based on the observations of local whalers.
205. These concerns rest, in particular, with the status of the beluga whale population. See Kieran Mulvaney & Bruce McKay, Small Cetaceans: Status, Threats and Management [hereinafter Mulvaney & McKay] in THE FUTURE OF CETACEANS IN A CHANGING WORLD 194 (William C.G. Burns & Alexander Gillespie eds., 2003).
207. Id.
208. Id. (“The slowness of the Canadian legal community to make use of international law, and particularly environmental treaties and principles ... may ... be attributed to the breadth of issues often covered by environmental treaties, and the general objectives that tend to be used in them instead of specific measures.”).
209. Mulvaney & McKay, supra note 205, at 194.
these hunts. Yet, even these critics concede that catch statistics used to monitor the whale populations hunted by Canadian indigenous peoples are unpredictable, and that the commercial component of the hunt in these communities is dubious.

B. Other Alaskan Eskimo Whale Management NGOs: The WCW and the ICC

The Alaska Eskimo Whaling Commission is one of several whale management NGOs currently addressing subsistence whaling needs. Alaskan Eskimos are active in two of these NGOs, The World Council of Whalers (WCW) and the Inuit Circumpolar Conference (ICC).

The WCW is an international NGO formed in 1997 by whaling states interested in specific and decidedly pro-whaling objectives. The WCW's stated objectives may be construed to...
support both commercial and aboriginal subsistence whaling. The first official meeting of the WCW was held in Victoria, British Columbia, in 1998, with more than 100 delegates representing some nineteen countries, as well as “sympathetic observers, committed to community-based management as a conservation and development tool and the preservation of the world's rich variety of cultures and traditions.” Through its stated objectives, the WCW serves the interests of those states where whaling cultures form an integral component of the national identity. These states are sometimes willing to risk sanctions imposed by formidable international powers, such as the United States, in order to continue whaling, and bristle at environmentalists who would try to alter their practices based on accusations that those practices are covertly commercial. The WCW does not claim to directly manage any of the hunted whale species, but is effectively a forum to encourage and provide support for whaling among aboriginal and non-aboriginal peoples alike.

The Inuit Circumpolar Conference is an NGO representing approximately 150,000 Inuit. Like the AEWC, the Inuit Cir-
The ICC was instrumental in bringing together Inuit from Canada, Greenland, Russia, and Alaska, thus melting the “ice curtain.” This enabled different groups of Inuit from across the Arctic to come together in Barrow in order to celebrate a common ancestry and address common concerns. While whaling is certainly one of the concerns of ICC members, this NGO takes a broader approach to issues with potentially adverse implications for the Inuit and the Arctic. Over the course of the past decade, the major concerns of the ICC have been geared toward issues related to Arctic sus-

These Inuit reside in Russia (Chukotka), Canada, Denmark (Greenland), and the United States (Alaska).

225. Id.; Francis, supra note 17, at 69.
228. Francis, supra note 17, at 70. The “ice curtain” is a phrase that has been invoked to describe the vast geographical distances separating Inuit groups from one another. Id.
229. Id.
230. Every four years, the ICC determines the scope of its focus at General Assembly meetings. Recently, the major focus has been on sustainable development, the transport of pollutants, and climate change. See The Inuit Circumpolar Conference, at http://www.inuitcircumpolar.com/index.php?ID=40&Lang=En (last visited Jan. 28, 2005).
tainability, with an emphasis on subsistence and harvesting among indigenous people.  

V. SELF-REGULATION OF ALASKAN ESKIMO SUBSISTENCE

A. Toward an Independent Role for NGOs?

As outlined above, Alaskan Eskimos remain active in several non-governmental organizations focusing on whaling issues. Indeed, there is an increasing trend toward self-government by indigenous groups. As one minority rights scholar observes, “Indian tribes/bands have been acquiring increasing control over health, education, family law, policing, criminal justice, and resource development. They are becoming, in effect, a third order of government, with a collection of powers that is carved out of both federal and state/provincial jurisdictions.” Self-government and self-regulation by indigenous peoples is an internationally recognized priority. But, because of the reality that indigenous groups such as the Alaskan Eskimo and Canadian Inuit are physically located in states and provinces, their self-government must somehow be coordinated with those state and provincial governments and agencies. Because native groups striving for self-regulation must necessarily interact somehow with extant federal and provincial governments, “the exact scope and mechanisms of indigenous self-government ... remain unclear.” The blurry lines of this interaction may also be illustrated by the 1996 establishment of the Arctic Council,

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233. KYMLICKA, supra note 21, at 30.
234. Id.; see also, e.g., CONSTITUTION AND BYLAWS OF THE NATIVE VILLAGE OF BARROW, supra note 34.
236. KYMLICKA, supra note 21, at 30.
237. Id.
an international governmental organization formed by the eight states that border the Arctic circle.\textsuperscript{238} The Joint Communiqué and Declaration on the Establishment of the Arctic Council\textsuperscript{239} is the Council’s founding document,\textsuperscript{240} and is intended to promote the cooperation and coordination among Arctic States on common regional issues with the involvement of Arctic indigenous communities.\textsuperscript{241} The Arctic Council accords certain indigenous NGOs such as the ICC, for example, the status of “Permanent Participant.”\textsuperscript{242} The Council, however, requires that the number of Permanent Participants always be less than the number of member states, and it is those states that are the ultimate arbiters of who may join the Council as Permanent Participants.\textsuperscript{243}

Native Alaskans are entitled to tribal sovereignty under fundamental principles of Native American law to the same extent as other Native American tribes.\textsuperscript{244} While the intricacies of the relationship between the federal government and Native Americans are beyond the scope of the whaling debate, the normative debates at play do inform the discussion.\textsuperscript{245} One commentator has observed that even in the midst of an ongoing trend toward increasing self-determination among Native Americans, Native Alaskans, in particular, are facing threats to their tribal sovereignty at the hands of the federal government as a result of various treaties the United States has entered into.\textsuperscript{246} These threats are compounded by deficiencies in the federal government’s trust relationship with Alaska Natives.\textsuperscript{247}

\begin{footnotesize}
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\item \textsuperscript{238} These are Canada, Denmark (including Greenland), Finland, Iceland, Norway, Russia, Sweden, and the United States. See Jeffrey L. Dunoff et. al., International Law: Norms, Actors, Process 242 (2002) [hereinafter Dunoff et. al.].
\item \textsuperscript{239} Joint Communiqué and Declaration on the Establishment of the Arctic Council, 35 I.L.M. 1382 (1996).
\item \textsuperscript{240} Dunoff et. al., supra note 238.
\item \textsuperscript{241} Joint Communiqué and Declaration on the Establishment of the Arctic Council at para. 1(a), 35 I.L.M. 1382 (1996) (emphasis supplied).
\item \textsuperscript{242} Id. at para. 2(b) (“The category of Permanent Participation is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council.”).
\item \textsuperscript{243} Id. at para. 2.
\item \textsuperscript{244} Thompson, supra note 20, at 438.
\item \textsuperscript{245} See generally, id.
\item \textsuperscript{246} Id. at 432.
\item \textsuperscript{247} William M. Bryner, Toward a Group Rights Theory for Remedyng Harm to the Subsistence Culture of Alaska Natives, 12 Alaska L. Rev. 293,
\end{itemize}
\end{footnotesize}
and by the treatment of indigenous whaling in the international arena in general.\footnote{248}

\textbf{B. The AEWC as Independent Manager of Eskimo Subsistence Whaling}

The Draft Declaration of the Rights of Indigenous Peoples,\footnote{249} while not yet adopted by the U.N. General Assembly or necessarily destined to become binding law, is evidence of a customary view within the international community that an integral part of the indigenous right to self-determination includes autonomy in management of environmental resources.\footnote{250} That the AEWC is the NGO best suited to achieving this goal for the Alaskan Eskimo bowhead whale hunt was suggested long before events at the 2002 and 2003 IWC meetings threatened the Eskimo subsistence exemption anew.\footnote{251} That the IWC is ill-suited to regulate issues of culture and subsistence is likewise a proposition that was suggested before the events of those meetings.\footnote{252} In fact, it has been argued that for all of the IWC’s attempts to effectively regulate aboriginal subsistence, only two broad guidelines regarding such regulation have been estab-

\footnote{247 Firestone & Lilley, \textit{supra} note 25, at 10786 ("... [i]nstruments such as the ICRW were conceived and crafted by dominant societies and imposed on indigenous peoples based on the values, interests and norms of those societies.").
}

\footnote{248 See generally, \textsc{Draft Declaration}, \textit{supra} note 235.
}

\footnote{249 Id. at Part VII, art. 31. The text of article 31 reads, in relevant part, "[i]ndigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their ... economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions." Id.
}

\footnote{250 Id. at 55.
}

\footnote{251 Huntington, \textit{The AEWC: Effective Local Management}, \textit{supra} note 24, at 55.
}

\footnote{252 See Gillespie, \textit{supra} note 43, at 119–20 ("[t]he function of the IWC is to regulate the catching of cetaceans, not to affect the focus of anthropological discourse.").
}
lished to date in order for an exemption to be appropriate—namely that the act of whaling must be central to a culture, and that the loss of that exemption would be detrimental to that culture.\footnote{253} Furthermore, in the case of Alaskan Eskimos, the IWC has been inconsistent and unclear in delineating what constitutes subsistence whaling practices.\footnote{254}

In recent years, the AEWC and the United States government have been cooperatively reporting to the IWC regarding the status of bowhead whale populations and continued subsistence needs of Alaska Natives.\footnote{255} It has become apparent from bowhead whale population data collected through these efforts that Alaska Natives are capable of sustainably hunting the bowhead to meet their subsistence needs.\footnote{256} But the events at the IWC 2002 and 2003 meetings underscore the need for “native peoples ... to remain ever vigilant and always ready to defend ... their cultural practices.”\footnote{257} In the interest of such vigilance, it would make sense for the AEWC to assume independent stewardship over the bowhead whale hunt, particularly in light of the fact that, increasingly, indigenous groups such as the Alaskan Eskimo are viewed as separate, self-governing entities.\footnote{258}

CONCLUSION

The Native Village of Barrow and other northern Alaskan whaling communities rely on the bowhead whale for nutritional and cultural sustenance.\footnote{259} In a global society that must become increasingly conscious of shared resources, it may seem regressive policy for Native Alaskans to disassociate themselves from the IWC and forge an insular, self-governing unit to manage their own subsistence practices. Yet the AEWC has been successfully regulating the bowhead whale hunt since the organi-
The 2002 and 2003 IWC meetings, between which the Alaskan subsistence exemption was preserved only by the thinnest margin, highlight the inadequacies of the IWC as an international forum capable of properly protecting the interests of Native Alaskans. In light of the United States’ prominent role in the IWC, its withdrawal from the Commission is wholly unrealistic and unnecessary to meet the objective of protecting Alaskan Native subsistence whaling.

The international community’s willingness to grant aboriginal peoples such as the Alaskan Eskimo subsistence exemptions at all reflects acknowledgement that these communities are viewed as somehow distinct from the states within whose boundaries they reside. The interests of these communities are historically different from those of both commercial or non-subsistence whalers and the conservation movement, and the IWC is perhaps too preoccupied with these latter concerns to adequately protect Alaskan Eskimo subsistence. The IWC should officially relinquish management of the bowhead whale hunt to the AEWC and other native-run NGOs, at least to the extent that the subsistence exemption can no longer be voted away by the international community. Practically, this would relieve the IWC of a thorny regulatory task. As policy, it would have positive implications for the self-determination and cultural preservation of Native Alaskans.

Elizabeth M. Bakalar

260. See Braund & Moorehead, supra note 4, at 258.
262. See, e.g., Suhre, supra note 49, at 305, 316.
263. See, e.g., Firestone & Lilley, supra note 25.

* B.A. Brown University, 1999; J.D. Brooklyn Law School, 2005 (expected). I would like to thank my parents, Nick Bakalar and Dr. Francine Cournos, and my grandparents, Ruth and the late Alan Bakalar, for their unconditional support of my education, as well as my partner, Geoff Kirsch, for his patience and encouragement. I am extremely grateful to Professor Maryellen Fullerton of Brooklyn Law School and the staff at the Brooklyn Journal of International Law for their generous supervision. Any remaining errors are, of course, my own. This note is dedicated to Mark Regan of Alaska Legal Services. Mark’s selfless advocacy on behalf of his clients is an inspiration and a reminder. His work is greatly admired and his friendship is deeply valued.
CROLL v. CROLL AND THE UNFORTUNATE IRONY OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: PARENTS WITH “RIGHTS OF ACCESS” GET NO RIGHTS TO ACCESS COURTS

I. INTRODUCTION

International parental child abduction is a complex and serious problem.¹ This problem has become increasingly common due to the relative ease and accessibility of international travel.² Due to the increase in the interconnectedness among citizens of different countries, it is not surprising that there has been an increase in international family relationships.³ As the number of international family relationships has increased, so too have the problems in the area of international child abductions.⁴ One of the main legal problems caused by international child abductions is that when a child has been taken abroad it is very difficult to enforce one’s parental rights in one’s home state.⁵ Instead, the left-behind parent must pursue a remedy in the country where the child is located.⁶ As the problems with enforcing parental rights internationally became apparent, it became more and more critical for the international community to reach a satisfactory agreement on what to do

³. Id.
⁴. Id.
⁶. Id.
about international child abductions. The international community needed not only to decide the best way to prevent the occurrence of international child abductions, but also to provide the courts in different countries with a method for handling the complex problems that arise after an international child abduction. Consequently, The Hague Convention on the Civil Aspects of International Child Abduction, which was finalized and adopted in 1980, was created due to the worldwide recognition of the harmful effects on the children of parental kidnapping and the desire to deter future abductions.

In her article, Weiner points out that:

[T]he Hague Convention was drafted based upon the prediction that a noncustodial father, or a father who was unlikely to win custody, would typically be the abductor.... As it turns out, the drafters' vision of a typical abduction has proven incorrect. Published figures indicate that seventy percent of the abductors are now mothers, typically the child's primary caretaker. Often these mothers are victims of domestic violence, and they are fleeing transnationally with their children in order to escape domestic violence.

In light of these concerns, courts often face the troublesome possibility of having to send domestic violence victims to return to their abusers, which was certainly not the original intent of the Convention. Therefore, some courts have attempted to fashion their own remedies to protect women who have fled to another country in order to escape domestic violence. These remedies aim to protect victims of domestic violence while still returning them to the country of habitual residence for custody determinations. For a critical view of these court-fashioned remedies, see Roxanne Hoegger, What If She leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy, 18 BERKELEY WOMEN'S L.J. 181, 183 (2003). Hoegger argues that these remedies are “illegal, dangerous, unfair, and inefficient.”

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international child abduction continues to be a major concern, many 2005, the Convention was in force between the United States and fifty-five treaty partners. U.S. Dep’t of State Official Website, List of Hague Convention Signatory Countries at http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html (last visited, Feb. 22, 2005). Additionally, a number of other countries have acceded to the Convention, but have not yet been accepted as partners by the United States. U.S. Dep’t of State Official Website, Hague Convention Abduction Issues, at http://travel.state.gov/family/abduction/hague_issues/hague_issues_568.html (last visited Feb. 22, 2005). The State Department has provided a great deal of information to help parents whose children have been abducted internationally on its website. U.S. Dep’t. of State Official Website, Hague Convention Abduction Issues at http://travel.state.gov/family/abduction/hague_issues/hague_issues_578.html (last visited Feb. 22, 2005). Whereas all of the original signatories of the Convention were obliged to accept all of the other original signatories, there is now a review process for any new country that wants to be a party to the treaty. U.S. Dep’t. of State Official Website, Hague Convention Abduction Issues, at http://travel.state.gov/family/abduction/hague_issues/hague_issues_568.html (last visited Feb. 22, 2005). The review process gives every original signatory the right to choose whether to accept the new member. U.S. Dep’t. of State Official Website, Hague Convention Abduction Issues at http://travel.state.gov/family/abduction/hague_issues/hague_issues_578.html (last visited Feb. 22, 2005). The stated rationale behind the review process is that member states want to ensure that new members are willing to comply with Convention so that it will be uniformly applied. See Report to Congress on International Child Abductions in Response to the Statement of Managers Accompanying F–103 Omnibus Appropriations Bill P.L. 108–07, available at http://travel.state.gov/family/abduction/hague_issues/hague_issues_573.html (last visited Feb. 22, 2005).

12. It is interesting to note that while international child abduction continues to be an area of major concern, neither the Hague Convention nor the European Convention on Recognition of Children sought to address the criminal aspects of child abduction. Hutchinson & Setright, supra note 5, at 10. While both of these conventions have sought to ensure that the home state’s law is enforced, they have also tried to avoid having countries interpret and question foreign law. Id. at 3. Perhaps the reason that there has not been an agreement concerning criminal liability for international child abductions is that the difficulty of interpreting foreign criminal law would pose too large a problem. It has also been argued that the impact of criminal prosecutions or threats of prosecution would not greatly benefit the abducted child. Jacqueline D. Golub, Note, The International Parental Kidnapping Crime Act of 1993: The United States’ Attempt to Get Our Children Back—How is it Working?, 24 Brook. J. Int’l L. 797, 812 (1999) (discussing commentary presented at 1990 hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary). According to Golub:

Many opponents to the criminalization of international parental kidnapping feared that such a statute would actually impede the United States’ ability to have its children returned from the international
feel that the Hague Convention accomplished much of what it set out to do. The Convention’s return remedy for parents with rights of custody has proven to be quite successful, and “it has dramatically advanced both the deterrence of international abductions and the likelihood of having children returned.” Nevertheless, while the Convention has achieved many of its initial goals, it still has an important flaw that has become more evident since it was adopted.

community. Supporters of the Hague Convention opposed the criminalization of international parental kidnapping, citing the success of the Hague Convention as an encouraging end to the problem of parental abductions.

Id. While the U.S. Congress created the International Parental Kidnapping Crime Act to establish international parental abduction as a criminal act, the Act does not include cases where a child is illegally brought into the United States. See International Parental Kidnapping Crime Act of 1993, 18 U.S.C. §1204 (2005) [hereinafter IPKCA]. In addition, the United States has chosen the Hague Convention as the preferred remedy, but the IPKCA can be used under some circumstances, especially when children are abducted from the United States to countries which are not a party to the Hague Convention. United States v. Amer, 110 F.3d 873, 881–82 (2d Cir. 1997). While the Hague Convention has been considered successful and is the preferred remedy in returning children who are abducted internationally, it is, nevertheless, quite possible that an agreement about international criminal liability for international child abductions would help deter international child abductions. For a case where the United States sought to impose criminal liability after a parent was returned via a Hague proceeding see United States v. Ventre, 338 F.3d 1047 (9th Cir. 2003). In Ventre, the defendant tried to avoid criminal liability by claiming that being held criminally liable after being subject to Hague Convention proceedings would detract from the Hague Convention. Ventre, 228 F.3d at 1051–52. However, as the court notes, “the IPKCA criminalizes the removal of a child to another country with the intent to obstruct parental rights.” Id. at 1052. As a result of this law, parents who want to interfere with another parent’s custody rights cannot simply choose to move to a country that is not a signatory to the Hague Convention. This court also finds that the IPKCA demonstrates that the United States appreciates the seriousness of international child abduction. Therefore, the court holds that it is appropriate to proceed with a criminal investigation even after one has been returned pursuant to the Hague Convention. Id. at 1054.


15. Id. at 222.
The Second Circuit’s decision in *Croll v. Croll* has received much scholarly attention, and it is a good demonstration of one of the Hague Convention’s main flaws. The *Croll* majority did not view a noncustodial parent’s rights of access, even when coupled with a *ne exeat* clause, to amount to rights of custody within the meaning of the Hague Convention. The court held that a *ne exeat* clause can protect rights of access as well as rights of custody, but it does not change rights of access into rights of custody. As a result, while the court found that Mr. Croll had some limited remedies available to him under the Hague Convention, he was not entitled to a return remedy.

The *Croll* decision was quite controversial and has faced significant criticism. Judge Sotomayor, in her dissent, argued...
that the *ne exeat* clause should have transformed Mr. Croll's rights of access into rights of custody. Judge Sotomayor recognizes that international case law has been split on whether the *ne exeat* rights amount to rights of custody. Nevertheless, she asserts that the majority ignored most other foreign courts' interpretations of the Hague Convention by interpreting rights of custody too narrowly. Judge Sotomayor believes that the

26. *Croll*, 229 F.3d at 144 (Sotomayor, J., dissenting). Judge Sotomayor points out that one of the purposes of the Hague Convention was to ensure that the law of one Contracting State is respected in other Contracting States. *Id.* Judge Sotomayor has a valid point that allowing a parent to take a child abroad “in violation of *ne exeat* rights granted to the other parent by an order from the country of habitual residence…nullifies that country's custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody.” *Id.* at 147. Additionally, Sotomayor points out that “[t]o read the Convention so narrowly as to exclude the return remedy in such a situation would allow such parents to undermine the very purpose of the Convention.” *Id.*

27. *Id.* at 150.

28. *Id.* Judge Sotomayor points to the Family Court in Australia as an example of a country interpreting rights of custody broadly:

Australia…has characterized the “spirit of the Convention” as ensuring “that children who are taken from one country to another wrong-fully, in the sense of in breach of court orders or understood legal rights, are promptly returned to their country so that their future can properly be determined within that society.” *Id.* (emphasis added). Based on this interpretation of the Hague Convention, Australia recognized “rights of custody” in an otherwise noncustodial father. In the Marriage of: Jose Garcia Resina and Muriel Ghislaine Henriette Resina, Appeal no. 52, 1991 (Fam.) (Austl.), para. 26. On this issue, there seems to be quite divergent opinions regarding the appeals court’s handling of relevant foreign case law. Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369, 378–79 (2001). For example, Reimann credits the *Croll* case for attempting to take foreign law into account when interpreting the Hague Convention. *Id.* However, Reimann also notes that the court may not have found the foreign decisions to be that helpful due to the wide variety of decisions in relative case law. *Id.* It seems that Reimann believes that the court failed to use the foreign law properly in order to reach its decision, but he did think that it was a step in the right direction for an American court to look to foreign law when interpreting a treaty. *Id.* at 379. For an English case where rights of custody under the Convention were construed in a more broad fashion, see C. v. C., [1988] 1 W.L.R. 654 (Eng.):

[The] right to give or withhold consent to any removal of the child from Australia, coupled with the implicit right to impose conditions, is a right to determine the child's place of residence, and thus a right
broader interpretation is more in accordance with the purpose and structure of the Hague Convention. 29

In addition to Judge Sotomayor, others have criticized the Second Circuit for ignoring “compelling authority...with respect to both case law and scholarship as well as to the interpretation approved by the Special Commissions that review the operation of the Child Abduction Convention.” 30 Those who believe that the court’s interpretation was too narrow argue that it was contrary to the Hague Convention’s overarching purpose. 31 The results of this decision can be far-reaching. 32 In fact, some fear it will lead more parents to kidnap their children because they would not be as likely to be returned by a friendly forum. 33 Even among those who support the substantive outcome of the Croll decision, some have criticized the court for what they perceive to be a lack of deference to the existing international interpretations of the Hague Convention. 34

... of custody within the meaning of arts 3 and 5 of the convention...this conclusion is in accordance with the objects of the convention.

Id.

29. Croll, 229 F.3d at 150.
31. See Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, 3 Acts and Documents of the 14th Session 426, 447 (1980). Pérez-Vera, whose report is the official history and commentary of the Convention, indicates that the Convention’s intention was to protect all of the ways that parents exercise child custody. Id. While some scholars choose to argue that the recognition of all types of child custody shows intent upon the framers of the Convention to include those with rights of access, it is clear based on the definitions provided by the Convention that the distinction was intended. Hague Convention, supra note 9, at art. 5. However, given the fact that Pérez-Vera also indicates that a child’s country is best suited to make custody and access determinations, it is quite puzzling that the Convention chose to make the distinction.

33. Id.
While the Croll decision has received much valid criticism, much of it is misdirected. In Croll, the majority accurately interpreted and correctly applied the Hague Convention. The decision, however, points out an inherent flaw in the Hague Convention, namely that the Convention does not place enough value on a noncustodial parent’s rights of access—especially those who have agreements which contain a *ne exeat* clause. As a result, the drafters, unfortunately, did not give the judicial or administrative authorities enough power to help enforce the laws of the child’s habitual residence. Therefore, it is necessary to create an amendment to the Convention which will grant noncustodial parents a remedy of return in situations where the custodial parent has violated the noncustodial parent’s rights of access by removing the child from the child’s habitual residence, despite the existence of an order with a *ne*

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35. Thomson v. Thomson, [1994] 3 S.C.R. 551, 589. (“The right of access is, of course, important, but, as we have seen, it was not intended to be given the same level of protection by the Convention as custody.”).

36. Weiner, *supra* note 34, at 308. Weiner maintains that:

*Croll* reaches the right substantive result: a *ne exeat* clause does not convert rights of access into rights of custody. Yet, *Croll* is still a failure of American Hague Convention jurisprudence. Although I believe the substantive result was right, the opinion rests on, and emphasizes the Convention’s wording and the drafter’s intent, and pays only minimal lip service to the purpose and design of the Convention and case law from sister signatories.

*Id.*

37. Of course, some foreign courts have found that a *ne exeat* clause does give a father veto power over a mother’s ability to move, and it confers on him rights of custody. C. v. C., [1988] 1 W.L.R. 654 (Eng.) (Judgment of L.J. Neill). However, even though some could argue that some foreign courts (even a majority) have come to a different conclusion than *Croll*, this still does not indicate that the *Croll* decision was wrong. After all, the main problem is the interpretation of rights of custody, which may very well be different in different countries. In fact, the discrepancy provides even more support for the notion that the Convention should have defined its terms to provide a better way for determining what constitutes rights of custody.

38. *Croll*, 229 F.3d at 135. (“Because courts in the United States have jurisdiction to enforce the Convention by ordering a child’s return to her habitual residence only if the child has been removed in breach of a petitioning parent’s custodial rights, the district court lacked jurisdiction to order return in this case.”).

39. The Convention did not define the meaning of a child’s habitual residence, so it has been left up to the courts of the Contracting States to determine what makes a country a child’s habitual residence. *Pérez-Vera, supra*
exeat clause issued by a valid judicial body located in the child’s habitual residence.40

In Part II, this Note will describe the elements of the Hague Convention as it is presently constituted and its available remedies and exceptions. In Part III, this Note will examine the Croll decision and will demonstrate that the court accurately recognized the distinction between rights of custody and rights of access under the current Hague Convention. Part III will also argue that while the Croll decision is technically correct, it illustrates a weakness in the Convention. In Part IV, this Note will illustrate this weakness and suggest a solution by exploring the different ways in which courts in the United States have enforced court-ordered visitation, which demonstrate the high value placed on visitation by noncustodial parents. Part V will discuss how courts in foreign jurisdictions have interpreted situations similar to the Croll case and argue that these contrasting decisions further reveal an inherent problem with the Convention. It will suggest that the Hague

note 31, at 441 (“The convention, following a long-established tradition of the Hague Conference, does not define the legal concepts used by it.”). Therefore, “many of the significant terms used by the Child Abduction Convention – habitual residence, custody rights, grave risk of harm – are inherently ambiguous and subject to varying interpretations.” Silberman, supra note 14, at 246. While different States may have different ways of determining the habitual residence of a child, it is generally determined with regard to the physical location of the child and the settled intention as to the residence of the custodial parent. Hutchinson & Setright, supra note 5, at 6. Nevertheless, habitual residence is a crucial question of fact that can determine whether a case can be brought under the Hague Convention. Id.

40. However, it is also worth noting that the ne exeat clause need not be the be all and end all. After all, since the best interests of a child are generally presumed to be better served by contact with both the custodial and noncustodial parents, there is no reason to limit the remedy of return to noncustodial parents. A remedy of return does not necessarily mean that the noncustodial parent will get custody of the child, and it does not mean that the custodial parent will not be allowed to move. Instead, such a remedy would merely ensure that the child’s home state would have the opportunity to make the decision. As Weiner points out, “[n]owhere does the Convention suggest that the remedy of return delivers the child to a custodial parent. In fact, the Convention has no position on this issue, other than that the children are to be returned typically to the habitual residence.” Weiner, supra note 34, at 320. Thus, a return remedy would likely lessen the incentive to move without the consent of the noncustodial parent and the court’s permission.
Convention would similarly benefit from placing a high value on a noncustodial parent’s rights of access, that the Convention should be amended to include some of the same remedies that U.S. courts have made available to noncustodial parents. Finally, this Note will suggest that granting a return remedy to parents with rights of access will help rectify the problems created by the Convention to better meet the Convention’s stated objectives. While the return remedy will not always prevent a person with custody from moving with his or her child, it will make it more likely that the proper protocol will be followed. In addition, it will provide the left-behind parent with an adequate remedy for situations when the proper protocol is not followed.

II. THE HAGUE: ELEMENTS AND EXCEPTIONS

A. The Purpose of the Hague Convention

The express purpose of the Hague Convention (Convention) is to protect the interests of children in custody matters by providing a method “to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”\(^{41}\) The Convention considers removal or retention to be wrongful when a parent removes a child from his or her habitual residence in violation of the other parent’s rights of custody.\(^{42}\)

\(^{41}\) Hague Convention, supra note 9, at art. 1. The Hague Convention was created to “apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.” \textit{Id.} at art. 4.

\(^{42}\) \textit{Id.} at art. 3. Article three states:

It is a breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

\textit{Id.}
B. The Procedure Set Forth by the Hague Convention

When a child abduction has occurred, the Convention affords the opportunity for a “requesting” Contracting State to make an application on behalf of the person seeking return of a child from another “requested” Contracting State. Each Contracting State has established a central authority under the Convention for the purpose of processing such applications, although the way the central authorities have been set up differs in different States. In the United States, a petitioner may file a petition with a state trial court or Federal District Court. Different states follow different rules and procedures, and there will also be differences in the rules and procedures between state and federal Court. After the filing of the petition, the Central Authority supports the petitioner by aiding the petitioner’s attorney. In addition, the Central Authority sends a letter written by the State Department to the judge who will preside over the hearing which informs the judge about the Convention and explains its impact. Generally, the procedures established by the Convention have been successful at returning children who have been wrongfully removed from their home state, especially when compared with countries that are not parties to the Convention.

C. Exceptions to the Remedy of Return

The Convention fashioned six narrow exceptions to the return remedy even in cases where it was proven that a child had been
“wrongfully” removed or retained in a foreign country. Many courts have been inclined to construe these exceptions narrowly and thereby order the return of the child even when an exception has been established. These courts recognize that courts in the “abducted-from country” are still equally or better suited to determine the proper outcome of cases. Therefore, the courts see little harm in returning a child to the courts of his or her habitual residence for dispute resolution. In fact, the Conven-

50. Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1357–58 (M.D.Fla. 2002). These exceptions, which were created to protect the best interests of the child, are as follows:

A court is not bound to order the return of a child if respondent demonstrates by a preponderance of evidence that: (1) the person having care of the child was not actually exercising the custody rights at the time of removal or retention … or (2) the person having care of the child had consented to or subsequently acquiesced in the removal or retention of the child … or (3) “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.” … or (4) the proceedings were commenced more than one year after the date of the wrongful removal or retention and “the child is now settled in its new environment.” … Additionally, a court is not bound to order the return of a child if respondent demonstrates by clear and convincing evidence that: (5) there is a grave risk that the child's return would “expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” … or (6) return of the child would not be permitted by fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. [However], [e]ven if an exception is established, the Court has discretion to order the return of a child if return would further the aims of the Hague Convention.

Id. Note that inconsistent interpretations of article 13 are possible under the Convention because:

The Child Abduction Convention does not define what constitutes a grave risk of physical or psychological harm or an intolerable situation, nor at what age a child may decide for him or herself not to return, but rather depends upon the judge to make the determination within the object and purpose of the Child Abduction Convention as a whole.


52. For an explanation of the rationale behind the exceptions to the return remedy, see Pérez-Vera, supra note 31, at 432.
tion was not intended to settle disputes about legal custody rights.53 Instead, the Convention was intended to “restore the factual situation that existed prior to a child's removal or retention”54 so as to ensure that an “international abductor [was] denied legal advantage from the abduction to or retention in the country where the child is located.”55 Unfortunately, the Convention did not go far enough to ensure that international abductors would be denied legal advantage from their abductions.56 As the Croll case reveals, one can still escape the decree of a child’s habitual residence by absconding from the country as long as the parent they are leaving does not have rights of custody.57

III. CROLL V. CROLL: BACKGROUND AND ANALYSIS

A. The Facts of Croll

In Croll, Stephen Croll filed a petition to force his wife, Mei Yee Croll, to return their child to Hong Kong under the Hague Convention.58 Mr. and Mrs. Croll, who are both U.S. citizens, got married in Hong Kong in 1982.59 Eight years later, Mrs. Croll gave birth to their child, Christina, in Hong Kong, and they lived there together for another eight years.60 In 1998, Mr. and Mrs. Croll separated.61 Christina lived with her mother, but she continued to see her father regularly.62 That same year, Mr. Croll brought divorce proceedings in the District Court of the Hong Kong Special Administrative Region, Matrimonial Causes, and Mrs. Croll was granted “sole 'custody, care and control' of Christina.”63 Mr. Croll, however, was to continue to

54. Id.
55. Id.
56. It is evident that the failure to provide a remedy for parents with rights of access can have deleterious effects on a child regardless of whether a child was removed from a parent with rights of custody or rights of access. See Pérez-Vera, supra note 31, at 428–29.
57. Croll, 229 F.3d at 135.
58. Id. at 134.
59. Id. at 135.
60. Id.
61. Id.
62. Id.
63. Croll, 229 F.3d at 135.
have a right of ‘reasonable access.’ In order to ensure that there was no misunderstanding as to the meaning of the custody decree, the Hong Kong court inserted a *ne exeat* clause, which stated that Christina could not leave Hong Kong until she reached the age of eighteen without leave of the court or consent by both parents.

On April 2, 1999, while Mr. Croll was away on a business trip, Mrs. Croll and Christina traveled to New York City without leave of the court or Mr. Croll’s consent. Upon Mr. Croll’s return, he was informed that his wife and child had gone to the United States. When they had not returned more than a month later, Mr. Croll filed a Hague petition in the Southern District of New York in order to compel Christina’s return.

When the case was brought in the District Court, both sides agreed that Christina was a habitual resident in Hong Kong within the meaning of Article 3 of the Hague Convention. Mrs. Croll also did not claim that her right to remove Christina was based on one of the exceptions to the Convention’s return remedy. Apparently, Mrs. Croll did not believe there was suf-

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64. *Id.*
65. While the *ne exeat* clause provided that Christina could not leave until she was eighteen years old, unless she had permission from her father or the court, the Hague Convention only provides a return remedy for children under sixteen years of age. Hague Convention, *supra* note 9, at art. 4. Since Christina was only about eight years old at the time of the divorce, the Convention obviously still applied to her. *Croll*, 229 F.3d at 135. However, in jurisdictions where the courts decide to honor *ne exeat* clauses coupled with rights of access, it will be interesting to see whether courts would also choose to honor *ne exeat* clauses such as the one in *Croll*, which prohibits the noncustodial parent from taking a child out of the country until she is over eighteen, or if courts will limit the return remedy to children sixteen and under as provided in the Convention. Hague Convention, *supra* note 9, at art. 4. Since it is much less common for a child near the age of majority to be kidnapped, this may be a moot point. Either way, it is doubtful that a court would extend the return remedy beyond the age of sixteen—even if there was a violation of a *ne exeat* clause. Furthermore, since the Hague provides older children with the opportunity to voice their opinions in order to avoid return, the problem might be solved by asking the children’s preference in such a case.
66. *Croll*, 229 F.3d at 135.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
sufficient evidence to prove that Mr. Croll had failed to exercise his custody rights or that he had consented to her leaving. In addition, Mrs. Croll did not attempt to show that there would be a grave risk to Christina if she were forced to return to Hong Kong. Instead, Mrs. Croll argued that Mr. Croll did not have rights of custody over Christina and that he merely had rights of access, thus, he was not entitled to relief in the Federal District Courts because the court lacked subject matter jurisdic-

72. Croll, 229 F.3d at 135.
73. See Weiner, supra note 34, at nn.214–17. In reality, at the trial court level, Mrs. Croll attempted to enter evidence of domestic violence against herself and Christina. Id. Mrs. Croll alleged that she had previously attempted to get an order of protection against her husband, and that she filed a complaint with the police alleging assault. Id. at n.214. Mrs. Croll also testified to other instances of violence, including a fight that she alleged occurred in front of Christina. Id. In addition, Mrs. Croll alleged that Christina had been physically abused. Id. Nevertheless, the court never came to a factual determination as to whether Mr. Croll was a batterer, likely due in part to the fact that the charges Mrs. Croll had brought were dismissed based on lack of evidence. Id. at n.216. Instead, the court ruled that Christina did not witness any of the alleged abuse, so the evidence was not relevant to the Hague petition. Id. While the trial court did not seem to find the allegations of abuse relevant, it is possible the allegations had an impact on the Second Circuit’s decision. It is possible that since there is a difficult burden in establishing a grave risk, the court may have found it easier to deny jurisdiction rather than try to grant a grave risk exception to the return remedy.
74. Hague Convention, supra note 9, at art. 13. The Hague Convention provides that:

[T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution, or other body which opposes its return established that a person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention or there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views...the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child’s habitual residence.

Id.
The District Court, however, accepted Mr. Croll's argument that the *ne exeat* clause provided by the Hong Kong Court gave him the right to determine his child's place of residence. The court then found that Mr. Croll's right to determine Christina's place of residence was equivalent to rights of custody within the meaning of the Hague Convention. Since Christina's removal from Hong Kong was deemed to be in violation of her father's rights of custody, her removal was found to be wrongful within the meaning of the Convention.

On appeal, the case was reviewed *de novo* in order to determine whether Mr. Croll had rights of custody or rights of access within the meaning of the Hague Convention. The method for interpreting treaties is similar to the method for interpreting statutes. Since the issue of whether rights of access joined with a *ne exeat* clause amounts to rights of custody under the Hague Convention had never arisen before the *Croll* case, this was a case of first impression. The Second Circuit distin-

75. *Croll*, 229 F.3d at 135.
77. *Id.*
78. *Id.*
79. *Croll*, 229 F.3d at 136.
80. *Id.* Here, the court explains that it must first look to the ordinary meaning of the Convention. *Id.* If the ordinary meaning is ambiguous, the court "may resort to extraneous tools of interpretation such as a treaty's ratification history and subsequent operation." *Id.*
81. *Id.* While this was a case of first impression, other federal courts have subsequently addressed this issue. Fourth and Ninth Circuits both followed *Croll's* reasoning. *See generally* Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003) (reversing district court's holding that Scottish law giving mother a right to determine a child's residence created a right of custody under the Convention); Gonzalez v. Gutierrez, 311 F.3d 942 (9th Cir. 2002) (holding that *ne exeat* clause combined with visitation did not amount to right of custody under the Convention). For a critical view of the Hague Convention and the Ninth Circuit's interpretation in Gonzalez v. Gutierrez, see Sara J. Bass, *Note, Ne Exeat Clauses Proven Ineffective: How the Hague Convention Renders Access Rights Illusory*, 29 N.C. J. INT'L L. & COM. REG. 573 (2004). Conversely, the Eleventh Circuit chose not to accept *Croll's* interpretation of rights of access. Instead, it found that a Norwegian father's statutory *ne exeat* right coupled with a right of access amounted to a right of custody under Norwegian law. *See Furnes v. Reeves*, 362 F.3d 702, 715 (11th Cir. 2004) (“Given that the goal of the Hague Convention is to deter international abduction, we readily interpret the *ne exeat* right as including the right to determine the child's place of residence because the *ne exeat* right provides a parent with decision-making authority regarding the child's international relocation.”). The court
recognized that the parents in Norway had joint parental responsibility; therefore, while Ms. Reeves could decide where in Norway the child could live, she had to remain in Norway or get consent to move. *Id.* at 709. Since Ms. Reeves did not ask permission to move beyond Norway, the court found the removal to be wrongful under the Hague Convention, and it issued a return order *Id.* at 710. The Eleventh Circuit reasoned that:

In American courts, we tend to think of custody rights primarily in the sense of physical custody of the child. However, in applying the Hague Convention, we must look to the definition of “rights of custody” set forth in the Convention and not allow our somewhat different American concepts of custody to cloud our application of the Convention’s terms. Specifically, in this case we must think of “rights of custody” as including “rights relating to the care of the person of the child,” and in particular, “the right to determine the child's place of residence.” *Id.* at 711. Interestingly, while the legal arguments put forth by the plaintiff, Furnes, are similar to the arguments made in *Croll* and Gutierrez, the factual backgrounds of the cases are quite different. In *Furnes*, the petitioner was more sympathetic, and the defendant much less so. *Furnes*, 362 F.3d at 704 (“Plaintiff Furnes and Defendant Reeve’s relationship was marked by constant conflict. Defendant Reeves...commonly thwarted Plaintiff Furnes’s attempts to exercise his visitation rights. Defendant Reeves also made serious allegations against Plaintiff Furnes...which were...groundless....In contrast,...Furnes was an understanding and cooperative parent and was able to offer Jessica a secure home.”). *Id.* at 704–05. While the Eleventh Circuit does construct valid arguments when interpreting Norwegian law, and these arguments are similar to those in Sotomayor’s passionate dissent in *Croll*, one can still wonder if the courts in *Croll*, Gutierrez, and *Furnes* allowed the character traits of the litigants to affect their respective decisions. Clearly, this would be the type of decision-making that the Convention tried to avoid. Pérez-Vera, *supra* note 31, at 430 (“The Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal.”). *Id.* The Eleventh Circuit’s decision addresses this concern by pointing out that they did not reach the merits of the custody case, but rather it simply ordered that it be addressed in the child’s habitual residence prior to the abduction. *Furnes*, 362 F.3d at 721. The court also criticized the *Croll* decision:

Accordingly, our construction of the ne exeat right does not alter the terms of the custody agreement. Rather, it simply would inconvenience Mrs. Croll as the custodial parent by requiring that she comply with its terms. The Convention’s purpose is to prevent the international abduction of children and is thwarted, not satisfied, by the Croll majority’s construction of the ne exeat right. *Id.* While it is true that the main purpose of the convention is thwarted by *Croll’s* interpretation, the Convention’s failure to adequately define rights of access and rights of custody will continue to force courts to make their own
guished rights of access from rights of custody and held that Mr. Croll’s *ne exeat* clause did not elevate his rights of access to rights of custody.\(^\text{82}\) As a result, the court denied having jurisdiction under the Convention and reversed the order to return Christina to Hong Kong.\(^\text{83}\)

In finding that Mr. Croll merely had rights of access, the court rejected Mr. Croll’s argument that since “a *ne exeat* clause gives an otherwise noncustodial parent a power that amounts to ‘a right to determine the child’s place of residence’ [and that this clause] thereby creates a ‘right of custody’ that is protected by the Convention’s return remedy.”\(^\text{84}\) While Mr. Croll was not granted the return remedy that he desired, the court argued that he was not without a remedy.\(^\text{85}\) On the contrary, pursuant to one of the remedies under the Convention, the court suggested that Mr. Croll could obtain a “writ ordering the custodial parent who has removed the child from the habitual residence to permit, and to pay for, periodic visitation by the noncustodial parent with access rights.”\(^\text{86}\) However, due to the great distance between Hong Kong and New York City, it is unlikely that this remedy will provide Mr. Croll with nearly the same amount of visitation as he enjoyed pursuant to the Hong Kong divorce agreement.\(^\text{87}\) Therefore, this alternative is not only unrealistic, but unreasonable.

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82. *Croll*, 229 F.3d at 135.
83. *Id.* at 135–36.
84. *Id.* at 139.
85. *Id.*
86. *Id.* at 138.
87. Eric S. Horstmeyer, Note, *The Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of Tahan and Viragh and Their Impact on its Efficacy*, 33 U. LOUISVILLE J. FAM. L. 125, 127 (1994). Horstmeyer recognizes the Convention’s flaw when it comes to enforcing a noncustodial parents’ visitation rights. *Id.* at 127. (“The Court was unable to fashion a remedy for the noncustodial parent because of his indigent status and his inability to fund his legal visitation in a foreign country. This decision illustrates the Convention’s glaring weakness in terms of its ability to protect rights of access adequately.”). While Horstmeyer has a strong argument that the courts have failed to interpret the Convention carefully enough to make it effective, this problem is further elucidated in *Croll*, due to the fact that the child was taken in violation of a *ne exeat* clause. Therefore, even if one were to argue that the father in *Viragh v. Foldes*, should not be entitled to a return
B. Analysis of Court’s Interpretation of Custody Rights versus Access Rights

The Second Circuit correctly distinguished rights of custody from rights of access in accordance with Article 5 of the Hague Convention. Custody rights are those “rights relating to the care of the person of the child, and, in particular, the right to determine the child’s place of residence.” Rights of access, however, are defined as “the right to take a child for a limited period of time to a place other than the child’s habitual residence.” This distinction is quite important since the Convention only deems a removal to be wrongful where one has violated custody rights. Therefore, a parent with mere access rights cannot seek the return of the child for violation of these rights. Instead, a parent with access rights may attempt to prevent the breach of access rights by applying to the Central Authority of a Contracting State. The treaty, however, is silent regarding remedies for noncustodial parents whose rights of access have been obstructed. Given the fact that “unlawful remedy because he did not have rights of custody, the ne exeat clause coupled with rights of custody surely should be enough to warrant a return remedy. Viragh v. Foldes, 612 N.E.2d 241 (Mass. 1993).

88. Hague Convention, supra note 9, at art. 5.
89. Id.
90. Id. 91. Silberman, supra note 14, at 225.
92. Id. 93. Hague Convention, supra note 9, at art. 6.
94. Viragh, 612 N.E.2d 241, 247 (Mass. 1993). Viragh acknowledges that:

[N]ations are instructed in art. 21 to “promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject,” as well as to “take steps to remove, as far as possible all obstacles to the exercise of such rights.”

Id. In this case, the court found that even though the “children’s presence in the United States makes practically impossible the exercise of the precise visitation schedule ordered by the Guardianship Authority [t]at, however, does not mean that [the noncustodial parent] is prevented from effectively exercising his access rights to the children in the United States.” Id. at n.9. This finding, however, should be questioned for it shows a lack of respect for the Guardianship authority in Budapest, and it seems as though it is letting the United States substitute its own decision for the decision in the habitual residence of the child. Whereas the Budapest Guardianship Authority determined that it would be in the best interests of the children for Mr. Gabor to have visitation on “alternate weekends, two weeks each in July and August,
unilateral removals – as well as real abductions – are harmful to children, whether the parent who removes is a mother or a father,\footnote{Silberman, supra note 14, at 225 (citations omitted).}

and three days during the children’s winter and spring holiday,” the U.S. court decided that other arrangements could be equally in the best interests of the child. \textit{Id.} In \textit{Viragh}, there was not a ne exeat clause. However, Hungarian law requires custodial parents to get permission from the noncustodial parent or the court before permanently removing a child from Hungary. \textit{Id.} at 246. Clearly, such a law would have the same effect as a ne exeat clause. Nevertheless, since the court recognized that the Convention was silent with regard to rights of access, and since the court probably did not want to be involved in interpreting Hungarian law, the court did not grant the return remedy. Horstmeyer, \textit{supra} note 87, at 138. It should also be noted that Mrs. Foldes had good reason for leaving Hungary without notifying Mr. Viragh, and the Supreme Judicial Court of Massachusetts had some good reasons for wanting to deny a return remedy:

Gabor had not been a model husband. He physically abused and verbally threatened Maria [Mrs. Foldes] on a number of occasions both prior to and following the divorce, one time attacking her when she was seven months pregnant with their second child. At the time Maria requested the divorce, Gabor was so distressed that he threatened to kill himself and the two children and also told Maria that, if she continued with her divorce action, she would never see the children again....She also believed....that Gabor would file a new law suit or petition for custody thus forcing her to remain in Hungary to appear and answer new allegations. It was Maria’s understanding that she would not be permitted to fly overseas during the last three months of pregnancy, and therefore any potential litigation in Hungary would result in her separation from Mihaly [her new husband] until after the birth of her child.  

\textit{Viragh}, 612 N.E.2d at 244. While there is certainly a compelling argument that Mrs. Foldes should not have been returned to Hungary, it would still show more respect for international law to have denied the return remedy based on the grave risk exception to the Convention. Hague Convention, \textit{supra} note 9, at art. 13b. Unfortunately, since the burden of proving a grave risk is so difficult, and since the Convention does not give a return remedy unless the left-behind parent has a right of access, the court did not choose to follow this route. \textit{Viragh}, 612 N.E.2d at 243.

\footnote{Pérez-Vera, \textit{supra} note 31 at 432. Pérez-Vera noted that:}

| In the literature devoted to a study of this problem, ‘the presumption generally stated is that the true victim of the ‘childnapping’ is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbrining, the uncertainty and frustration which come
Similarly, since the Convention’s goal was “to restore the factual situation that existed prior to a child’s removal or retention,” the Convention should allow the courts to do just that.

The court in *Croll*, however, was limited by the Convention’s distinction between rights of custody and rights of access so it did not have the jurisdictional authority to issue a return remedy. Since the Hong Kong courts had implemented the *ne exeat* clause into the Croll’s divorce, when Mrs. Croll wanted to alter the divorce agreement, she should have attempted to have it altered in Hong Kong. As the dissenting judge in *Croll* pointed out, because Mrs. Croll was required to remain in Hong Kong, this “impliedly gave the [Hong Kong] court and the parent without physical custody the right to veto an international move, [and] it vested both with the power to determine the child’s residence.” However, due to the distinction between rights of access and rights of custody under the Convention, the court was powerless to issue a return remedy, which would have been the proper solution under the circumstances.

### C. Remedies Granted to Parents with Rights of Access

Under the Hague Convention, a parent who merely has rights of access cannot file a petition claiming that there was a wrongful removal. If there is no allegation or evidence of wrongful removal or retention outside the country of habitual residence, then the District Courts do not have “independent authority to

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98. Pérez-Vera, *supra* note 31, at 445. Pérez-Vera explains: Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent.

99. *Croll*, 229 F.3d at 151.
100. *Id.* at 135.
remedy the situation. However, this is not supposed to leave the left-behind parent completely without recourse. Instead, the left-behind parent may file a claim for visitation rights in state court under the state's visitation statute. The Convention also allows the petitioner to file a petition with the Central Authority to aid in his or her request for the enforcement of visitation. Unfortunately, however, the remedies presented to a noncustodial parent are insufficient; they do not adequately serve the interests of justice, they may not be in the best inter-


102. Terron, 2003 Wash. App. LEXIS 456, at n.4 (“A separate provision, Article 21, provides that a party may apply to secure the ‘effective exercise of rights of access.’ In addition, the Convention imposes an obligation on Central Authorities to ‘make arrangements for organizing or securing the effective exercise of rights of access.’”).

103. Bromley, 30 F. Supp. 2d at 862. The court in Bromley expressed one rationale for refusing jurisdiction in the federal courts:

The arena of child custody matters, except for the limited matters of international abduction expressly addressed by the Convention, would be better handled by the state courts which are more numerous and have both the experience and resources to deal with this special area of the law. There is a growing trend towards establishing specialized state family courts, which avoid a piecemeal approach to domestic relations problems. Id. Unfortunately, however, this remedy is unlikely to be satisfactory due to the lack of power to issue a return remedy. While the left-behind parent can file for visitation, it may be very difficult for the visitation actually to occur. Nevertheless, in some circumstances, this may be a suitable outcome.


105. Linda Silberman, *Hague Convention on International Child Abduction: A Brief Analysis and Case Law Analysis*, 28 FAMILY L.Q. 9, 11 (1994). (“The Convention does not offer uniform international standards for determining custody rights.”). This failure makes it difficult for courts to determine whether a return remedy should be granted and forces the requested State to determine whether there were rights of custody under the requested State’s law when it is supposed to be enforcing determinations in the requesting State.
IV. DOMESTIC POLICY REGARDING VISITATION AND RELOCATION

A. Presumption in Favor of Noncustodial Visitation

In order to propose a solution to the problem presented by the Croll case, this Note will examine how courts in the United States address similar issues. In general, U.S. domestic policy supports the idea that it would be unfair and contrary to the best interests of the child to prevent a noncustodial parent from visitation “absent exceptional or compelling circumstances.”

This is due to the recognition that a child is likely to be harmed by a custodial parent’s choice to separate the child from a parent who has been granted rights of access. The rationale is that “visitation is a right jointly enjoyed by the noncustodial parent and the child and that interest is served best when ‘nur-


107. Pecorello v. Snodgrass, 142 A.D.2d 920, 920 (N.Y. App. Div. 1988). In Pecorello, the court states that “absent exceptional or compelling circumstances, a geographic relocation by a custodial parent which will effectively deny a noncustodial parent visitation will not be permitted.” Id. at 920–21. In the Pecorello case, however, the court found that the custodial parent’s remarriage of a divorced parent was an exceptional circumstance and allowed her to relocate. Id. Unlike in Pecorello, in the Croll case, however, Mrs. Croll did not remarry and would be unable to demonstrate such an exceptional circumstance. Similarly, the Hague Convention has a system in place to prevent against returning an abducted child to a noncustodial parent:

108. See Pérez-Vera, supra note 31, at 428.
tured by regular, frequent and welcomed visitation.\textsuperscript{109} Because of the value that courts place on a noncustodial parent’s rights to visitation, there is a “heavy burden of proving exceptional circumstances or pressing concerns for the welfare of the custodial parent or the child which would warrant relocation.\textsuperscript{110}

B. Best Interests of the Child

Due to the presumption that contact with both parents is in the best interests of a child, if Mrs. Croll had been divorced in the United States, it is unlikely that the court would have viewed her decision to move as being justified by exceptional circumstances. In fact, when Mrs. Croll brought Christina to the United States, she claimed that she only intended to remain for a few weeks.\textsuperscript{111} Therefore, her decision to make a short visit to the United States would not likely lead one to the conclusion that there was a pressing concern or exceptional circumstance requiring the move—even if one were to believe her testimony that she thought about remaining permanently.\textsuperscript{112} After all, if the move was motivated by some pressing concern, Mrs. Croll likely would have known when she left Hong Kong that she was leaving for good. Either way, it was clear that if she intended to move, the Hong Kong court required her to get consent from either Mr. Croll or from the court itself.\textsuperscript{113}

In the United States, when the court attempts to determine the best interests of the child and whether to let a divorced parent relocate with his or her child, no single factor or circumstance is controlling.\textsuperscript{114} On the contrary, the court must balance many factors in deciding the best interests of the child.\textsuperscript{115} The

\textsuperscript{109} Pecorello, 142 A.D. 2d at 921 (Pine and Balio, JJ., dissenting) (citations omitted).
\textsuperscript{110} Id. at 921.
\textsuperscript{111} Croll, 229 F.3d at 135.
\textsuperscript{112} Id. at 135.
\textsuperscript{113} Id.
\textsuperscript{114} Pecorello, 142 A.D.2d at 922.
\textsuperscript{115} Id. While the court in Pecorello found there to be exceptional circumstances, there does seem to be a trend in American family law towards allowing parents to relocate and modify their visitation arrangements with less than exceptional circumstances. Enrico A. Mazzoli, Note, \textit{The Court’s Role Facilitating an Effective Relationship Between Noncustodia Parent and Child When the Custodial Parent Relocates with Child}, 37 \textit{BRANDEIS L.J.} 259, 262 (1999). Courts are increasingly prone to changing the standard for allowing a
Hague Convention, however, does not specifically provide for an
move from the exceptional circumstances standard to the best-interests-of-
the-child standard. Id. Additionally, more courts are finding that it is in the
best interests of the child to move. Id. While the courts have moved towards
allowing custodial parents to move for good reasons, this is not to say that is a
forgone conclusion. In *McRae v. Carbno*, 404 N.W.2d 508 (N.D. 1987), the
court denied a mother’s motion to move closer to her parents and sisters with
her child away from the noncustodial parent even though she had been offered
Taking into account the fact that the job did not pay significantly more than
her current job, the court found that the mother had failed to prove the move
was in the best interests of the child. Id. at 508, 510–11. Clearly, these cases
show that there is a high burden to prove a move to be in the best interests of
the child. As the dissent in *McRae* points out, however, visitation orders can
be modified. Id. at 513. Therefore, the recent trend seems to be to allow the
move but to modify the visitation arrangement to protect. See Edwin J. (Ted)
Terry et al., *Relocation: Moving Forward, or Moving Backward*, 15 J. AM.
ACAD. MATRIMONIAL L. 169 (1998). Terry points out that:

Courts that traditionally have taken a very restrictive view of reloca-
tion have recently retreated from their previously entrenched posi-
tions against allowing a primary custodian to move to another loca-
tion with his or her children. In highly publicized cases from Califor-
nia and New York, the highest courts of both states enunciated new
standards for determining the outcome of relocation cases. The fact
patterns and the court’s holdings are noteworthy because they signal
some important changes in how relocation cases are being handled
from coast to coast. *Id.* Terry also points out that much of the difficulty that the courts have in
deciding whether to let custodial parents relocate with their children is that
there are two different theories proposed by social and forensic scientists
about how to protect children of divorce from emotional scarring. *Id.* at 167–
68. Terry notes that:

One holds that children need both of their parents and prosper so-
cially and emotionally when both parents remain actively involved in
their lives...The second proposition is that while children need con-
tact with both parents, the quality of the relationship between the
noncustodial parent and the child may be far more important than
daily contact between them, and further, that the child’s well-being is
affected more by the stability of the new family unit – including the
happiness and adjustment of the custodial parent. *Id.* at 168. Regardless of which proposition one believes is more accurate and
beneficial to the child, certainly these matters should be decided on a case-by
case-basis. In any event, “the clear trend today favors standards allowing
modifications to accommodate relocation by the parent with primary custody,
so long as the relocation occurs in good faith.” Katherine T. Bartlett, *U.S.
Custody Law and Trends in the Context of the ALI Principles of the Law of
inquiry into the best interests of the child.  

While the ultimate decision regarding custody, visitation, and the best interests of the child should ultimately be left up to the home state, the Convention should allow the requested state to perform a best interests test in considering whether a child to be returned to his or her home state. However, since the court has no authority to consider the best interests of the child in cases where parents have rights of access, the court in Croll must refuse jurisdiction.

By refusing to return Christina to Hong Kong for a determination as to whether it would be in her best interests to move away from her father to the United States, there was no inquiry into what was in her best interests. As a result, by allowing a parent with rights of custody to move without the consent of the parent with rights of access or the permission of the courts, the child’s best interests may be endangered without an inquiry into whether there was a sufficient reason to relocate and thereby disrupt the noncustodial parent’s regular rights of access. In Croll, the court does not attempt to see whether there

116. Pérez-Vera, supra note 31, at 431. “While the Convention does not specifically address the interests of the child, it “upholds unequivocally the idea that access rights are the natural counterpart of custody rights, a counterpart which must in principle be acknowledged as belonging to the parent who does not have custody of the child.” Id. at 432. Clearly, if the Convention viewed access rights to be such an important counterpart, then it must be amended in such a way that it can actually protect such rights.

117. This best interests test would not be to decide who should be awarded custody ultimately. Pérez-Vera, in her commentary to the Convention points out some of the problems with having the abducted-to countries performing best interests test and making custody determinations:

[W]e cannot ignor[e] the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social, etc. attitudes which themselves derive from a given nationally community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched. Pérez-Vera, supra note 31, at 431.

118. Actually, it is likely that the best interests of the child were determined in Hong Kong, for it is unlikely the Hong Kong matrimonial court would have included a ne exeat clause if they thought it was contrary to the child’s best interests. Therefore, the problem is not that there was no best interests test, but, rather, that a parent is allowed to act contrary to a best interests determination.
was any proof of educational, health or economic need to relocate. Therefore, the Convention leaves all of the power in determining the best interests to Mrs. Croll simply by removing Christina from the home State.  

Whereas the Convention gives sole power to the custodial parent to decide where a child can live by failing to fashion a return remedy for violation of a parent’s rights of access, in many parts of the United States, noncustodial parents have a statutory right to reasonable visitation as well as decision-making power with regard to the residence of their child. In fact, some courts refer to a noncustodial parent’s right to visitation as a natural right. Courts and legislatures recognize that reasonable visitation (unless proven otherwise) is in the best interests of the child. While the right of visitation is not unlimited, visitation requirements must be in the best interests of the child. Therefore, if a court is to grant stringent visita-

119. Ironically, it is courts’ inability under the Convention to consider a child’s best interests which has been credited with making the Convention a success. Marguerite C. Walter, Note, Toward the Recognition and Enforcement of Decisions Concerning Transnational Parent-Child Contact, 79 N.Y.U. L. Rev 2381, 2386 (2004) (“It is the Abduction Convention’s simplicity, along with its purposeful avoidance of the difficult underlying issue of the best interests of the child, that is largely responsible for its success in attracting a large number of States Parties and in achieving a high level of returns of abducted children.”).

120. Adamson v. Chavis, 672 So. 2d 624, 626 (Fla. Dist. Ct. App. 1996) (quoting Section 61.13(2)(b)(1)., Florida Statutes (1994). Here, the statute provides that:

It is public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities of childrearing. After considering all relevant facts, the father of a child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child.

Id.

121. Maxwell v. LeBlanc, 434 So. 2d 375, 376 (La. 1983). In Maxwell, the parent seeking visitation rights was an out-of-wedlock parent, but the court still found that parents are entitled to visitation even if they are not the legitimate parents of a child. Id. at 377.

122. Id. at 379.

123. Id. at 377. “The presumption in favor of visitation can only be overcome by conclusive evidence that the parent has forfeited his right of access by his
tion requirements, they too must be in the best interests of the child.\textsuperscript{124}

As a result of the great distance between New York and Hong Kong, reasonable visitation is unlikely to be feasible.\textsuperscript{125} Mrs. Croll's actions, therefore, have created a situation similar to those where stringent visitation is granted. However, since there is no evidence that stringent visitation is in Christina's best interests, this situation is not only unfair to Mr. Croll, but it may very well be detrimental to Christina.\textsuperscript{126} In addition, this power gives Mrs. Croll the discretion to decide how, when, and if visitation occurs. Public policy should not award such decision-making power to the custodial parent. This type of power would seem to encourage visitational vigilantism rather than enforce the belief that custodial parents must have a respect for the law of their home State. In order to prevent this from occurring, there should be an amendment to the Convention which would allow the possibility of a return remedy for parents who have rights of access coupled with \textit{ne exeat} clauses so that the court in the child's habitual residence can make sure that relocation is in the best interests of the child.

conduct or that exercise of the right would injuriously affect the child's welfare." \textit{Id.} at 379.

\textsuperscript{124} \textit{Id.} at 378.

\textsuperscript{125} \textit{See generally} Viragh v. Foldes, 612 N.E.2d 241 (Mass. 1993). In \textit{Viragh}, the court found itself unable to fashion a remedy for the noncustodial parent due to the fact that he was indigent and unable to pay for trips to visit his child. Horstmeyer, \textit{supra} note 87, at 138 (discussing Viragh v. Foldes, 612 N.E.2d 241 (Mass. 1993). While it is not necessarily the case that Mr. Croll is indigent, it is clear that continued visitation between the United States and Hong Kong would prove to be quite costly and could utterly frustrate his right of access. \textit{Croll}, 229 F.3d at 142.

\textsuperscript{126} \textit{Maxwell}, 434 So. 2d at 379.

Visitation is important for a child's whole growth, mental, physical and spiritual and a denial of visitation can make a child feel rejected and confused. The child's experience of family continuity and connection is a basic and fundamental ingredient of his sense of self, of his sense of personal significance and his sense of identity. While a child is cut off from one of his parents...there is, for the child and the parent...a mutual sense of deep personal loss.

\textit{Id.}
C. Modification of Visitation Agreements

Some states seek to ensure that the trial court visitation agreements are fair by providing trial courts with the statutory right to modify visitation rights if such a modification would be in the best interests of the child.\(^{127}\) One recognized basis for such modification is when there has been a change of circumstances.\(^{128}\) For example, in Missouri, if a custodial parent moves a considerable distance from a noncustodial parent, it can be deemed a change of circumstances, and the court may adjust visitation to meet the best interests of the child.\(^{129}\) In *Dover v. Dover*, when a custodial parent moved more than two hundred miles away from the noncustodial parent, the court recognized that such a long distance impeded the noncustodial parent’s visitation because it could diminish the quality of visitation and lead to resentment on the part of the child, the parent, or both.\(^{130}\) As a result, the court modified the visitation schedule in order to make sure that it created the best opportunity for meaningful contact with that parent.\(^{131}\) This decision was due to Missouri’s presumption that “frequent and meaningful communication with both parents is in the child’s best interest.”\(^{132}\)

Another way of illustrating how courts value visitation rights is to examine how difficult it is to lose such rights. In West Virginia, for example, visitation may be suspended only under the most severe circumstances, such as in cases of sexual abuse or aggravated domestic violence.\(^{133}\) However, even in cases where visitation was interrupted due to sexual abuse and aggravated domestic violence, the courts have attempted to maintain the bond between noncustodial parents and their children.\(^{134}\) In *Hawk v. Hawk*, the court did this by restoring supervised visitation as soon as it was no longer deemed detrimental to the child’s well-being and if the noncustodial parent agreed to fam-

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128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 496.
132. *Id.*
133. *Dover*, 930 S.W.2d at 496. See *Hawk v. Hawk* 506 S.E.2d 85, 88 (W. Va. 1998) (“Total suspension of visitation is justified only under the most severe circumstances.”).
134. *Id.*
ily therapy counseling.\textsuperscript{135} In fact, even in cases where the parent has had his or her parental rights terminated due to neglect or abuse, the court recognizes the importance of a strong bond between a parent and a child and may continue to allow visitation.\textsuperscript{136}

In the Croll decision, there is no discussion of abuse or neglect,\textsuperscript{137} and it is clear that Mr. Croll had been exercising his rights of access.\textsuperscript{138} However, as we can see from domestic policy, even if there had been abuse or neglect, there could still have been reason to believe that it was in Christina’s best interests to maintain ties with her father.\textsuperscript{139} Due to the courts’ predilection towards allowing the noncustodial parent to maintain constant contact with the child, it is not surprising that courts are also reticent to permit the removal of a child from the jurisdiction without the noncustodial parent’s consent.\textsuperscript{140} Some courts have found that before a court will permit the removal of a minor child from the jurisdiction, “the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child’s best interests to con-

\begin{footnotesize}
\begin{enumerate}
\item[135.] Id.
\item[136.] In re Katie S. v. David S., 479 S.E.2d 589, 601 (W. Va. 1996). The court noted that:
\begin{quote}
Circuit courts should be aware that post-termination visitation, either with siblings or parents, may be in the best interest of the child, especially when there is a close bond and the child maintains love and affection for either her siblings or parents. Where no bond exists, the consideration of post-termination visitation is not required. When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court shall consider whether a close emotional bond has been established between parent and child and the child’s wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child’s well being and would be in the child’s best interest.
\end{quote}
\item[137.] See Weiner, supra note 34.
\item[138.] Croll, 229 F.3d at 135.
\item[139.] In re Katie S., 479 S.E.2d at 601.
\item[140.] Id.
\end{enumerate}
\end{footnotesize}
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tinue to live with that parent.”\(^{141}\) It is unlikely that the Croll
case would have met this standard since the mother testified
that she did not even know that she was going to stay in the
United States.\(^ {142}\)

D. Federal Statutes Aimed At Parental Abductions

While the rules regarding international child abduction are
quite complex and require the cooperation of courts from differ-
cent countries to interpret the Hague Convention, parental child
abduction has also been a challenge for the courts within the
United States. Therefore, Congress enacted a number of stat-
utes in order to deter the abduction or unilateral removal of
children by parents in order to obtain custody awards.\(^ {143}\) The

(N.D. 1987). The Mcrae court noted:

Where the noncustodial parent has been given and has exercised visi-
tation rights, the custodial parent has the burden of securing an or-
der for a change of residence of the child to another state by demon-
strating that it is in the best interests of the child to do so. There is a
legally recognizable right of visitation between a child and the non-
custodial parent, which is considered to be in the best interests of the
child. The statutory recognition of visitation rights between a child
and the noncustodial parent is consistent with placing the burden
upon the custodial parent to show that moving the child to another
state is in the child's best interest. There is no presumption that a
custodial parent's decision to change a child's residence to another
state is in a child's best interests.

McRae, 404 N.W.2d at 509.

\(^ {142}\). Mrs. Croll's testimony that she did not plan on staying in the United
States is questionable because she did admit that "in the back of her mind'
she intended to remain in the United States permanently." Croll, 229 F.3d at
135. However, since the court accepts her testimony, for the purposes of this
Note, her testimony should be accepted as true.

\(^ {143}\). Peterson v. Peterson, 464 A.2d 202, 204 (Me. 1983) (citing Congress-
ional Findings and Declarations of Purposes for Parental Kidnapping Pre-
Peterson, it is clear that one of the goals of the Uniform Child Custody Juris-
diction Act and the PKPA was to avoid a race to the courthouse effect. Id. By
instituting a home state requirement, the statutes take away the incentive for
a parent to take a child to a foreign jurisdiction in order to get a custody de-
cree. Id. Therefore, in Peterson, even though the father filed first in Maine,
the state did not actually have jurisdiction over the case, so it could not bar
the mother from filing for custody in the child's home state. Id.
Uniform Child Custody Jurisdiction Act (UCCJA), which was later modified by the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act (PKPA) have some of the same stated goals as the Hague Convention, but they attempt to meet those goals in different ways.  

1. The Uniform Child Custody Jurisdiction Act

Under the UCCJA, the state that makes an initial custody decree (assuming it had jurisdiction to do so) maintains continuing jurisdiction as long as one of the parties remains in that state.  

The Supreme Court of Washington in Greenlaw v. Smith effectively protects and preserves the jurisdiction of its trial court even in situations where a child has established a

144. In Act Dec. 28, 1980, P.L. 96–611, § 7, 94 Stat. 3568, Congress found that:

[I]t is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other jurisdictions. 

Id. Congress indicated the general objectives of the PKPA were to:

[P]romote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child; promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child; facilitate the enforcement of custody and visitation decrees of sister states; discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child; avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well being; and deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

Id.


146. Id.
new “home state” under the UCCJA. Therefore, even if the child has moved to a new home state, the old state has jurisdiction over the case, and it may modify the decree as it sees fit. Greenlaw holds that as long as one of the parents remains and the child maintains sufficient contact with the state, no parent can simply escape its jurisdiction by moving to another state. As the court in Greenlaw notes, “interpreting the UCCJA to allow an automatic shift in modification jurisdiction simply because a child establishes a new home state would not further the purposes of the Act as it would permit forum shopping and instability of custody decrees.” This interpretation makes sense because it eliminates instability and also prevents parents from benefiting from their bad actions. After all, if one were to remove one’s child without consent and in violation of the court order, it would be unfair for the place where the parent moves to get home state jurisdiction. The court does not

147. Under the UCCJA, a state is considered to be the “home state” if it is where the child lived for at least six consecutive months with his or her parents. Id. at n.4

148. Id. at 1024.

149. Id.

150. Id. at 1033. Thus, the court interprets the UCCJA and PKPA:

[T]o mean that jurisdiction to modify a custody decree continues with the decree state so long as: 1) that state's decree is entered in compliance with the UCCJA and PKPA; 2) one of the parents or other contestants continues to reside in the decree state; and 3) the child continues to have more than slight contact with the decree state. The child's continued visitation with the parent who remains in the decree state may constitute more than slight contact within the decree state.

Id.

151. Greenlaw, 869 P.2d at 1033.

152. This is not to say that the home state jurisdiction will never change. It would still behoove the parent in the left-behind state to file for custody quickly in the home state and to maintain contact with the child so that the court will not voluntarily give up its jurisdiction to the new state. This is because “even though a decree state has jurisdiction to modify its own decree, that state is not required to retain jurisdiction if another state appears to be a more appropriate, more convenient forum.” Id. Since Mr. Croll filed in a short period of time, there is no reason to think that the Hong Kong Court would choose not to exercise its jurisdiction. Croll, 229 F.3d at 135. While he may not have continued to visit with his child, this is more due to the fact that visitation became impracticable, and it would be unfair to penalize him by saying that Christina no longer had slight contact with Hong Kong.
distinguish between reasonable visitation rights and custody rights but, rather, seeks to enforce them both equally because they are both legitimate concerns and should be considered equally important.

2. Parental Kidnapping Prevention Act

The PKPA was also designed to eliminate some of the same problems caused by interstate child kidnapping, such as forum-shopping and conflicting state decrees.\textsuperscript{153} Congress also had policy reasons for wanting to penalize parents for attempting to evade custody decrees by taking children out of their home state.\textsuperscript{154} While the PKPA was not created to grant or deny initial jurisdiction, it was created to ensure that the issuing state court would be granted full faith and credit to the custody decrees of other states.\textsuperscript{155} When it comes to jurisdiction, preference is initially granted to the child's home state under the PKPA.\textsuperscript{156} However, if no state has home state jurisdiction, another state may take jurisdiction as long as it has a significant connection to the child and either of the parties.\textsuperscript{157} The reasoning behind allowing states to take emergency jurisdiction over cases is to ensure that there will be a forum in order to protect the best interests of the child.\textsuperscript{158}

\textbf{E. Domestic Remedies for Enforcing Visitation Agreements}

In cases where a parent attempts to circumvent a court's decision, as the mother did in \textit{Croll}, courts in the United States take the responsibility of enforcing visitation agreements seriously. As the New Jersey state court noted:

\begin{quote}
It is well settled that the law favors visitation and protects against the thwarting of visitation rights....The courts should endeavor that children of separated parents should be imbued
\end{quote}

\textsuperscript{153} For a comprehensive review of the circumstances leading up to the enactment of the PKPA, see Ann T. Wilson, \textit{The Parental Kidnapping Prevention Act: Is There An Enforcement Role For The Federal Courts?}, 62 WASH L. REV. 841 (1987).
\textsuperscript{155} Id.
\textsuperscript{156} \textit{Greenlaw}, 869 P. 2d at 1024.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
with love and respect for both parents, and where children are in custody of one parent, the court should endeavor to effect this facet of the children's welfare by conferring reasonable rights of visitation of the other parent. Accordingly, when one parent willfully violates the visitation of the other parent, the court must act swiftly and affirmatively.\textsuperscript{159}

One of the most drastic ways that the court may act to ensure that its decisions are followed is to order a change of custody.\textsuperscript{160} In \textit{Clark v. Bullard}, Mrs. Bullard had been awarded permanent custody of their child and moved to Florida without Mr. Clark's consent or knowledge.\textsuperscript{161} When this occurred, Mr. Clark made a motion for a change of custody which was denied.\textsuperscript{162} However, on appeal, the State Supreme Court added that if Mrs. Bullard continued to thwart Mr. Clark's visitation, the trial court could reconsider the motion to change custody.\textsuperscript{163} While Mrs. Bullard remained in Florida, she continued to evade Mr. Clark, and he could not locate his child for six months, whereupon he again moved for a change of custody.\textsuperscript{164} Mr. Clark served Mrs. Bullard's attorney, but the attorney was unable to contact Mrs. Bullard about the hearing.\textsuperscript{165} After a hearing, the court ordered a change of custody, and Mr. Clark was given custody of his child.\textsuperscript{166} Then Mrs. Bullard returned to Minnesota and moved for relief based on the fact that she had not been notified of the hearing, and the Court of Appeals reversed and remanded the case for a full evidentiary hearing.\textsuperscript{167}

After the trial, the court found that Mrs. Bullard had done everything possible to frustrate Mr. Clark's visitation privileges.\textsuperscript{168} As a result, Mrs. Bullard had violated a Minnesota statute which said that "proof of an unwarranted denial of or

\textsuperscript{159} Paterno v. Paterno, 603 A.2d 137, 139 (N.J. Super. Ct. App. Div. 1991) (court maintained jurisdiction over all equitable remedies and powers of relief available to the court, but the defendant could also be found liable in criminal court).
\textsuperscript{160} Clark v. Bullard, 396 N.W.2d 41, 42 (Minn. Ct. App. 1986).
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Clark, 396 N.W.2d at 43.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
interference with duly established visitation may constitute contempt of court and may be sufficient cause for reversal of custody. Consequently, the court awarded Mr. Clark custody. The Court of Appeals of Minnesota affirmed the modification of custody based on the findings that the trial court had not abused its discretion by transferring custody to Mr. Clark.

While there have been cases where custody has been transferred due to the frustration of visitation, this is not the most common remedy for a number of reasons. Some courts do not elect to award custody to someone as a punishment to the custodial parent because the noncustodial parent is not necessarily a better caretaker of the child. Consequently, it will not always be in the best interests of the child to switch custody in order to punish the custodial parent from evading the visitation order. Nevertheless, it is well within the court’s power to

169. Id. at 44 (citations omitted).
170. Id.
171. Id. at 45.
172. Laloggia-Vonhegel v. Vonhegel, 732 So. 2d 1131, 1133 (Fla. Dist. Ct. App. 1999). This case is a good example of a court deciding against a change of custody merely based on a parent’s interference with visitation. In this case, the mother moved to from Florida to New York without providing notice to her ex-husband, and the trial court wanted to sanction her by making a temporary change of physical custody. Id. The decision, however, was reversed because the appellate court did not believe a change of custody to be the appropriate sanction. Id. The court found that:

[T]he general purpose of a civil contempt order is to obtain compliance with the trial court’s initial order. The sanction of changing custody does not coerce compliance; rather, it may, in the absence of a finding that such a change is in the best interest of the children, penalize the children for the parent’s contumacious conduct. In comparison, an award of make-up or additional visitation may serve both to redress the wrong to the parent and to effectuate compliance with the court’s authority.

Id. As a result, the court reversed the change of custody because there was “insufficient evidence to ground a finding that it would be in the children’s best interest to be placed in Mr. Von Hegel’s custody, even temporarily.” Id.
173. Id. (“The custodial parent’s relocating the children to another state is insufficient by itself to warrant a change in custody.”). In reversing the change of custody, the court demonstrated that there is an “extraordinary burden of proving a substantial and material change of circumstances such that it would be detrimental to the children to remain in the custody of [the custodial parent.]” Id.
174. In J.B. v. A.B., the court held that “the award of custody ‘should not be an exercise in punishment of an offending spouse. In punishing the offending
award temporary legal and physical custody to the noncustodial parent when there are repeated violations of visitation orders.\textsuperscript{175}

Due to the potential pitfalls related to ordering a change in custody, courts are more inclined to hold parents in civil contempt for violating custody decrees in order to coerce them into complying with visitation rights.\textsuperscript{176} In fact, parents can be held in civil or criminal contempt and sentenced to jail time even when they attempt to comply with the court order and do not intentionally disregard a court order.\textsuperscript{177} Furthermore, one does

spouse one may also punish the innocent child, and our law will not tolerate that result.” J.B. v. A.B., 242 S.E.2d 248, 256 (W. Va. 1978) (citations omitted). For a case in which a trial court’s modification of a change in custody is reversed, see Arnold v. Gouvitsa, 735 S.W.2d 458 (Tenn. Ct. App. 1987). In this case, the appeals court voided a trial court’s order to change custody based on a mother’s refusal to abide by its prior orders. \textit{Id.} at 463. The decision, however, was voided in this case because of a jurisdictional matter. \textit{Id.} at 463–64. Under the UCCJA, the court found that the trial court erred by making a custody determination under the guise of a contempt proceeding. \textit{Id.} at 463. Since the custodial parent was not given notice regarding a custody proceeding, the court found that notice was defective, and the case was reversed. \textit{Id.}

\textsuperscript{175} See Shonkwiler v. Kriska, 780 So. 2d 703, 704 (Ala. Civ. App. 2000). In this case, the father was granted temporary custody because the mother had deliberately moved twenty times in a four-year period in order to deny him visitation rights. \textit{Id.} at 704. In addition, the mother had left the state with the children for a full year. \textit{Id.} Consequently, the court found that it would be in the child’s best interests to temporarily switch custody over to the father. \textit{Id.} In addition, the mother was sentenced to 30 days in prison. \textit{Id.} at 705.


\textsuperscript{177} See Kurincic v. Kurincic, No. 76505, 2000 Ohio App. LEXIS 3957, at *1 (Ohio Ct. App. Aug. 31, 2000) for an example of a parent being held in civil contempt. \textit{See also} Whitman v. Whitman, 2000 Ohio 1935, 1935 (Ohio Ct. App. 2000) for a case of criminal contempt. It is not easy to draw a line between civil contempt and criminal contempt, but the test for determining whether to impose a sentence of civil or criminal contempt was established in \textit{United States v. Shillitani.} US v. Shillitani, 384 U.S. 364, 364 (1966). The test that the \textit{Whitman} court used asks the appellate court to discern what the trial court primarily sought to accomplish by imposing sentence.

While both types of contempt contain an element of punishment, courts distinguish criminal and civil contempt not on the basis of punishment, but rather, by character and purpose of the punishment....The purpose of a civil contempt citation is to coerce, whereas the purpose of criminal contempt is to punish.
not even have to prevent visitation to be held in contempt; instead, it is enough to engage in behavior that undermines or alienates a child’s relationship with his or her noncustodial parent. In these instances, punishment is considered proper and justified because one cannot use the defense to a charge of civil contempt that one unintentionally disregarded the court order. Generally, when one is placed in civil contempt, it is within the parent’s power to get freed from jail by purging his or her contempt by complying with the order.

Judges are not limited to the remedy of incarceration, but, rather, are authorized to provide other remedial relief such as fines in order to coerce the plaintiff’s compliance with the visitation schedule. In Olexovitch v. Carralero, for example, when the court found that a mother had been alienating her child from her father, the court ordered her to take the child to therapy sessions in order to heal the relationship that she had attempted to wound.

V. ANALYSIS OF INTERNATIONAL INTERPRETATIONS OF RIGHTS OF ACCESS

A. Thomson v. Thomson

While the Convention does not authorize a return remedy for parents with rights of access, it still leaves it up to the courts to decide whether a person had rights of access or rights of custody. In Thomson v. Thomson, both parents were seeking custody of their seven month old child in Scotland. The Scottish

Id. (citations omitted). In general, domestic relations cases are more likely to impose civil contempt than criminal contempt. A.G. v. R.M.D. 19896 Mo. App. LEXIS 4630, at *3 (Mo. Ct. App. Sept. 2, 1986).


179. See Pugh v. Pugh, 472 N.E.2d 1089 (Ohio. 1984). “[N]o inquiry into intent to disobey is required to determine whether a civil contempt has been committed.” A.G. v. R.M.D, 1986 Mo. App. LEXIS, at *8–9. Since intent is irrelevant, good faith is also not considered a valid defense to civil contempt. Id. at *9. Instead, one just has to knowingly violate a court mandate. Id. at *10. However, judges may take intent into consideration when they are creating a punishment for civil contempt. Id.


181. Id.

Court granted interim custody to the child’s mother and interim access to the father. Additionally, the court ordered that the child remain in Scotland pending a final order. Nevertheless, Mrs. Thomson took the child to Canada and eventually decided to stay in violation of the court order. If the Canadian court followed Croll’s rationale that the father only had rights of access, it would have had to refuse jurisdiction to order a return remedy. However, the court in Thomson did not refuse jurisdiction. Instead, the court found that “while the Convention does not provide specifically for remedial flexibility, a court must be assumed to have sufficient control over its process to take the necessary action to meet the purpose and spirit of the Convention.” The court found that ordering the return of the child would meet the purpose and the spirit of the Convention.

B. David v. Zamira

In 1991, a New York family court had to decide whether to return two children to Canada. The facts in this case were similar to Croll in that the mother had custody of their son, and the father was granted regular visitation according to their separation agreement. At some point after Zamira gave birth to their second child, David applied for an order to prevent Zamira from removing the children from Ontario and from getting passports for them. The Supreme Court of Ontario granted the request. Nevertheless, Zamira left Ontario and David filed an application pursuant to the Hague Convention. The

183. Id.
184. Id.
185. Id.
186. Id.
187. Id.
190. Id. at 632.
191. Id. While Zamira had been granted custody of the older child when the couple separated, she was never granted custody of the younger child because she was born after the separation agreement. Id. Therefore, while one could argue that Zamira was only violating David’s rights of access with regard to their older son, there is no question that she was violating his rights of custody with regard to their younger daughter. Id. at 635.
192. Id.
193. Id.
Ontario Ministry of the Attorney General forwarded the application to the U.S. Department of State, and the Department of State communicated with the New York State Clearinghouse for Missing and Exploited Children.\textsuperscript{194} Eventually, the children were located in Brooklyn, New York.\textsuperscript{195}

When David located the children in New York, he returned to the Supreme Court of Canada and was granted temporary custody of both children.\textsuperscript{196} One month later, the Supreme Court of Ontario made a finding that Zamira had wrongfully and improperly removed the children from Ontario.\textsuperscript{197} The following month, the Supreme Court of Ontario issued a similar order stating that Zamira was withholding her children from David even though he was entitled to custody and access.\textsuperscript{198} Then, David filed a motion for enforcement of the Supreme Court of Ontario’s order.\textsuperscript{199}

In \textit{David v. Zamira}, as in \textit{Croll}, there was a \textit{ne exeat} clause as a result of the separation agreement.\textsuperscript{200} This case differs from \textit{Croll} in that it is governed by Canadian law, which ordinarily presumes that both parents are equally entitled to custody of a child.\textsuperscript{201} While David had given up his right with regard to his

\begin{footnotes}
\item 194. \textit{Id.}
\item 195. \textit{David}, 151 Misc. 2d at 635.
\item 196. \textit{Id.}
\item 197. \textit{Id.} at 632–33.
\item 198. \textit{Id.} at 633.
\item 199. \textit{Id.}
\item 200. \textit{Id.}
\item 201. \textit{David}, 151 Misc. 2d at 634. The New York Supreme Court took judicial notice of the fact that in Ontario’s Children’s Law Reform Act, which provides that “father and mother of a child are equally entitled to the custody of the child.” \textit{Id.} It is worth noting that Ontario’s recognition that parents are equally entitled to custody of the child is not universally revered. For example, the National Association of Women and the Law (NAWL) submitted a brief to the Special Joint Committee on Child Custody and Access in March of 1998. \textit{National Association of Women and the Law, Custody and Access: An NAWL Brief to the Special Joint Committee on Child Custody and Access} (1998), \textit{available at} http://www.harbour.sfu.ca/freda/reports/custody.htm (last visited Feb. 12, 2005). NAWL is a “national, non-profit, feminist organization active in legal research, law reform, and public education.” \textit{Id.} As part of its brief, NAWL believed there was a “growing and disturbing trend by Canadian courts to eliminate the distinction between sole custody with access and joint custody, by giving access parents almost the same rights as custodial parents.” \textit{Id.} NAWL also lists a great number of assumptions that it believes are inaccurate. \textit{Id.} For example, NAWL believes
\end{footnotes}
son in the separation agreement, which was executed prior to the birth of his daughter, David was still entitled to equal custody of his daughter. Additionally, according to the separation agreement, Zamira was not permitted to leave Toronto, much less Canada.

However, in contrast to Croll, the court was willing to ensure that the Canadian ruling would be allowed to take effect. In fact, the court disregarded the access rights versus custody rights debate by finding that Zamira’s “contemptuous conduct, and the subsequent orders of the Supreme Court of Ontario which give temporary custody of both children to the petitioner” made her argument lose its merit. Therefore, unlike in Croll, the court found that there was a wrongful removal within the meaning of the Hague Convention. Since the court also did not find any of the exceptions to the Hague Convention to be applicable, they ordered the return of the children.

Croll and David, may seem inconsistent. However, there is no question that the court in David came to the correct decision, for it actually did what the Hague Convention should have set out to accomplish, which is to ensure that the country of habitual residence is able to determine custody disputes, under the presumption that the habitual residence is best equipped to handle such cases. This case can, however, be reconciled with Croll because of the differences between Canadian and U.S. law. Since Ontario presumes that both parents have rights of custody, the court did not find that they had to refuse jurisdic-

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203. Id. at 635.
204. Id.
205. Id. Once David was granted temporary custody of both children, Zamira could not longer successfully argue that she was only violating his rights of access as opposed to rights of custody. Id.
206. Id.
207. Id. at 637.
208. See Pérez-Vera, supra note 31, at 446–47.
tion even though when interpreting an international treaty, treaty definitions should take precedence over State law.\footnote{210} Instead, the court found a wrongful removal and ordered that the child be returned under the terms of the Convention.\footnote{211}

Since there is no such presumption in Hong Kong, however, the Croll court could not proceed once it determined that Mr. Croll did not have rights of custody.\footnote{212} However, even if Hong Kong did have such a presumption, it is the requested State’s decision whether there are rights of access or rights of custody.\footnote{213} Therefore, due to some courts’ aversion and inability to interpret foreign law, results in similar cases can be quite different. These two separate outcomes in factually similar situations point out that the Convention fails to precisely define the scope of protected rights. In David, the court was forced to interpret Canadian law in order to determine whether the parent had and was exercising rights of custody.\footnote{214} Similarly, in Croll, the court had to interpret Hong Kong law to determine whether the parent had and was exercising rights of custody.\footnote{215}

The problem is that the Hague Convention was not designed for courts to interpret the family law of foreign countries; this procedure is fraught with problems and is bound to lead to misinterpretation and inconsistent adjudications.\footnote{216} Instead, the
Hague Convention should simply ensure that the custody determinations in a child’s habitual residence are respected, for there is a strong presumption that the courts in the child’s habitual residence are in the best position to protect the best interests of child.\textsuperscript{217} Since there is no reason that a court in a child’s habitual residence is any less capable of protecting a child’s best interests in cases where a parent has rights of access, there is no reason that these court determinations should not be upheld and reinforced. The best way to ensure that these decisions are respected is by issuing a return remedy, which should be extended to situations in which a parent’s rights of access have been unilaterally violated.

VI. CONCLUSION

The Hague Convention on the Civil Aspects of International Child Abduction has not settled with any certainty how States should handle cases where rights of access are violated.\textsuperscript{218} While the \textit{Croll} court tried to interpret the Convention as literally as possible, the court in \textit{Thomson} made a decision based on what it thought were the interests of justice as well as the purpose and spirit of the Convention. Therefore, while \textit{Croll} followed what it was mandated to do by the Convention, the result of that act is questionable because the solution did not reflect the purpose and spirit of the Convention. As a result, it is necessary for an amendment to the Hague Convention to harmonize the purpose and spirit of the Convention with the interests of justice. To do so, the Hague Convention should authorize a return remedy for parents with rights of access. Such an amendment would not only benefit the left-behind parent with rights of access, but would also benefit the international community because it would ensure that the custody determina-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{217} Pérez-Vera, supra note 31, at 434–35. As Pérez-Vera noted:
\begin{quote}
\textquote{Signatory States [must] be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child’s habitual residence – are in principle best placed to decide upon the questions of custody and access.}
\end{quote}
\item \textsuperscript{218} Id.
\end{itemize}
\end{footnotesize}
tions of the habitual residence would be enforced. Most importantly, however, it would benefit the child, because there is no reason to believe that the harmful effects of separation from a parent are lessened based on whether the child’s parent had custody or merely rights of access. In addition, the return remedy will ensure that the laws of the home state are respected and enforced, another important goal of the Convention. As a result of this change, even more abductions would be prevented, for there would be even less incentive to forum shop. Further, justice will be served because the best interests of the child will be given paramount importance. While the majority opinion claimed that the Convention would be unworkable if a ne exeat clause were to lead to a mandatory return,219 this is simply evidence of the Convention’s failure to take into consideration the likely harmful effect such a disruption will have on a child’s life.

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219. Croll, 229 F.3d at 143. See Weiner, supra note 34, at n.125. Here, Weiner argues that the court’s reasoning for claiming that the Convention would become unworkable if it required return of a parent who left the country in violation of a ne exeat clause was problematic (“The court’s reasoning was tautological. Only by defining the issue at hand as ‘rights of access’ could it reach this result.”).

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BANKRUPTCY BEYOND BORDERS: RECOGNIZING FOREIGN PROCEEDINGS IN CROSS-BORDER INSOLVENCIES

INTRODUCTION

As the globalization of the world’s economies continues apace, so will the number of insolvencies that cross national borders. The increase in transnational bankruptcies has presented a unique and challenging dilemma, namely, to what extent should foreign bankruptcy proceedings be recognized locally? Unfortunately, this quandary has not been answered by the formation of a body of international bankruptcy law. Instead, domestic law determines how local courts will administer the claims of local creditors in connection with insolvency proceedings pending in foreign jurisdictions. This piecemeal approach to complicated cross-border issues impedes the successful administration of transnational insolvency cases.

The problem is illustrated in the following hypothetical. Imagine Foreign, Inc. (“Foreign”), a corporation that is incorporated and has its principal place of business in the nation of Far-and-Away. Foreign’s main business operation is the production of gizmos. It has plants all over Far-and-Away and has built itself up to be one of the largest manufacturers of gizmos. The CEO of Foreign, a learned businessman with a propensity for expansion, decides to export gizmos to the United States. In doing so, Foreign exclusively transacts with American Pride, a U.S. retailer of gizmos. A few years later, in order to cut export costs and satisfy the avid demand for gizmos by the children of America, Foreign builds a gizmo manufacturing plant in the United States. Unfortunately, shortly after the U.S. plant is built, parents all around the world discover that children are using gizmos as weapons and forbid their children to play with them.

Foreign takes a hard hit, as the production of gizmos generates the majority of its earnings. Soon thereafter, unable to generate sufficient revenue to satisfy its debt obligations, Foreign decides to seek bankruptcy protection in its home jurisdiction of Far-and-Away. American Pride, realizing that Foreign has shut down all of its manufacturing plants, is angry because
it has already paid for another shipment of gizmos, which it has not yet received. With haste, American Pride gets a judgment in U.S. Federal district court against Foreign. Now American Pride wants to levy on Foreign's assets in the U.S., namely the manufacturing plant. Foreign contends that American Pride is stayed from collecting on the claim by the bankruptcy law of Far-and-Away.

The problem resides in the absence of a body of international bankruptcy law to address the complicated cross-border issues that inevitably arise in the administration of a transnational insolvency case. For example, can Foreign stop the collection efforts of American Pride? If so, through what remedies? To what extent is American Pride subject to Far-and-Away's priority scheme? Does the fact that U.S. law governed the sale of gizmos between Foreign and American Pride matter? Does the fact that Far-and-Away favors redistribution over efficiency, whereas the United States embraces efficiency as the core goal of bankruptcy proceedings matter? How is Foreign supposed to maintain its business as a going concern if American Pride is allowed to strip away its U.S. assets? What if Far-and-Away does not provide adequate protection for American Pride's collateral? There is no internationally recognized body of law that answers these difficult questions. Instead, we must rely on domestic law to determine which nation's bankruptcy laws will govern what assets.

In an effort to overcome the inherent conflicts that arise when different bankruptcy regimes intermingle and to provide uniform mechanisms to efficiently and equitably distribute a debtor's estate worldwide, Congress added a provision to title 11 of the United States Code (the "Bankruptcy Code" or the "Code"): Section 304.1 Section 304 of the Bankruptcy Code, titled "Cases Ancillary to Foreign Proceedings," allows U.S. bankruptcy courts to aid in the administration of foreign insolvency proceedings in accordance with the bankruptcy law of foreign jurisdictions.2

Section 304(c) of the Bankruptcy Code provides the criteria that the Bankruptcy Court must consider in determining whether and how to aid in the administration of a foreign insol-
vency proceeding.\(^3\) Congress created the section 304(c) factors with two important policy considerations in mind: international cooperation and protection of U.S. creditors.\(^4\) The tension between these two goals can be seen in the individual factors of section 304(c).\(^5\) Unfortunately, Congress did not assign priority to any section 304(c) factor or make any factor dispositive,\(^6\) thereby granting the Bankruptcy Court broad discretion in balancing them to determine whether relief should be granted to a foreign representative.\(^7\) The lack of guidance in section 304 has led to an ad hoc balancing approach by the courts, which, in turn, has contributed to inconsistent outcomes in case precedent.\(^8\) Thus, section 304 has not proved to provide sufficient guidance to the administration of ancillary cases within the U.S. in connection with foreign insolvency proceedings.

This Note argues that section 304 lacks concrete guidance to govern the way in which international insolvencies are treated in the United States. It proposes that the problem rests within the factors enumerated in section 304(c), which are meant to guide the Bankruptcy Court in determining whether and how to aid in the administration of a foreign insolvency proceeding and to grant relief to the foreign representative. The Note specifically looks at two divergent approaches U.S. courts have taken in determining section 304 relief. On one hand, some courts overemphasize the section 304(c)(5) factor, comity,\(^9\) and on the other hand, courts weigh all section 304(c) factors equally, including the desire to protect U.S. creditors.\(^10\)

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3. *Id.*
4. *See* Maxwell v. Barclays Bank (*In re* Maxwell), 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994) (stating the policy of § 304). Section 304 embraces "a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors." *Id.* at 816.
5. *See* 11 U.S.C. § 304(c). *See also*, discussion *infra* Part II.A (discussing conflicting factors of § 304(c)).
8. *See* discussion *infra* Part II.B (discussing divergent approaches courts have taken when interpreting section 304).
9. *See* cases cited *infra* note 70 (emphasizing the desire to use comity as the guiding factors of § 304(c)).
10. *See* cases cited *infra* note 114 (emphasizing the desire to weigh all § 304(c) factors equally).
Part I of this Note describes the statutory framework of section 304, including the predicates to commencing an ancillary proceeding, the relief available to foreign debtors, and limitations imposed on that relief. Part II discusses the statutory gaps and contradictory language of section 304 and then examines how the language of section 304 has resulted in courts taking divergent attitudes in interpreting how ancillary insolvency cases are to be managed. This section also introduces two polar approaches that have been followed in adjudication—universalism and territorialism—and the extent to which each has contributed to the divergent attitudes of the courts. Part III discusses a solution to the uncertainty and frustration created by the current section 304: the proposed Chapter 15. This section first explores the anticipated benefits of the proposed chapter, and then reveals the reasons for which those benefits are merely illusory. Part III concludes that the same uncertainty that exists under the current Code will persist under the proposed Chapter 15. Finally, the Note will conclude that in order to affect a true departure from the current inconsistency in case law dealing with international insolvencies, we must adopt a purer form of universalism.

I. STATUTORY FRAMEWORK

A. Gaining Access to U.S. Bankruptcy Jurisdiction by Filing a § 304 Petition

Section 304(a) establishes the predicates necessary for invoking section 304. To commence an ancillary proceeding under section 304 of the Bankruptcy Code, a foreign representative of a foreign debtor, who is subject to a pending foreign proceeding, must file a petition under section 304. Additionally, the petition must be filed in the appropriate Bankruptcy Court in accordance with the venue requirements of 28 U.S.C. section 1410.

12 Id. Section 304(a) provides that “[a] case ancillary to a foreign court is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.” Id.
1. Foreign Representative

The term “foreign representative” is defined in section 101(24) of the Bankruptcy Code as a “duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.”^{14} Generally, courts have defined foreign representative broadly, recognizing that the term can vary greatly from country to country.^{15} A foreign representative can either be (i) a court appointed representative, or (ii) the debtor’s board of directors where there is no statutory or other requirement that a separate representative be appointed.^{16}

2. Foreign Proceeding

The true core of section 101(24)’s definition of foreign representative resides in the term “foreign proceeding.” A foreign proceeding, as defined by section 101(23) of the Bankruptcy Code, is:

[A] proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor’s domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.^{17}

This definition is notably broad and the presence of an administrative proceeding, as opposed to a judicial one, does not appear to affect the proceeding’s status as a foreign proceeding.^{18} In fact, the language of section 101(23) anticipates that a qualified foreign proceeding might take place in the form of either a judicial or administrative proceeding, or even a proceeding outside the perimeter of a foreign country’s bankruptcy laws, as long as

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18. See In re Koreag, Controle et Revision S.A., 130 B.R. 705, 711 (Bankr. S.D.N.Y. 1991) [hereinafter In re Koreag I] (“[a] foreign proceeding is one which is either judicial or administrative”).
the goal of the proceeding is to liquidate an estate, adjust debts or effect a reorganization.\footnote{Id.}

The breadth of the definition has prompted courts to include a wide variety of foreign-pending proceedings in the term “foreign proceeding” for the purpose of section 304.\footnote{See, e.g., In re Netia, 277 B.R. 571 (Bankr. S.D.N.Y. 2002); In re Hopewell, 238 B.R. at 50-51.} For example, the court in \textit{In re Netia} held that the arrangement applications of two debtors in a Polish proceeding was a “foreign proceeding” for the purposes of section 304—even though the applications had not yet been granted—because the Polish court had held hearings, examined witnesses, maintained the right to grant injunctions against the enforcement of claims, and provided the creditors a significant right to be heard.\footnote{In re Netia, 277 B.R. at 581.} Similarly, the court in \textit{In re Hopewell} held that a foreign reinsurer’s stand-alone scheme of arrangement under Bermuda law, although not consistent with any other statutory vehicle for debt adjustment, qualified as a foreign proceeding because the court substantially reviewed the arrangement, resolved classification disputes, approved schedules, allowed creditors to object to the proceedings, and oversaw the administration of the creditor-approved scheme.\footnote{In re Hopewell, 238 B.R. at 50-51.} The case law suggests that determining whether a procedure is judicial or administrative, or even under the foreign country’s bankruptcy law, is less important to U.S. bankruptcy courts than determining the extent and scope of judicial involvement and degree of access to the courts afforded to creditors.\footnote{See, e.g., In re Ward, 201 B.R. 357, 361-62 (Bankr. S.D.N.Y. 1996) (discussing the importance of determining the extent and scope of judicial involvement in a foreign proceeding). In \textit{Ward}, the court determined that a Zambian voluntary winding-up proceeding, which was neither a judicial nor administrative proceeding, could qualify as a foreign proceeding under section 304. \textit{Id.} at 361. While admitting that a Zambian winding-up proceeding was not “strictly a judicial proceeding,” the court found that the Zambian proceeding was accompanied by court supervision, a right to appeal the actions of the liquidator and a substantial opportunity for creditors to be heard. \textit{Id} at 361-62. Thus, \textit{Ward} dictates the minimum level of court intervention in a foreign process tolerated by U.S. courts in order to qualify as a foreign proceeding. \textit{Id.} That is, judicial supervision and an opportunity for creditors to be heard. \textit{Id.}}
3. Foreign Debtor

In several early cases, bankruptcy courts concluded that to qualify as a foreign debtor for the purpose of filing a section 304 proceeding, the debtor in the foreign proceeding had to be a “debtor” within the meaning of section 101(13) of the Bankruptcy Code and had to satisfy the eligibility requirements of section 109(a). The bankruptcy court in In re Goerg concluded that a bankruptcy trustee appointed under German law to administer the estate of a German decedent could not file a section 304 petition because the decedent’s estate did not qualify as a “person,” nor, therefore, as a “debtor,” under the section 109(a) definition contained in the Bankruptcy Code.

On appeal, the Eleventh Circuit reversed the bankruptcy court’s decision in In re Goerg. The Court of Appeals recognized the impracticality of restricting the term debtor to that contained in the Bankruptcy Code when dealing with foreign debtors. The court turned to the definition employed by the law of the country in which the foreign proceeding was pending, arguing that this would further the purpose of section 304 of aiding in the administration of foreign proceedings. Thus, to qualify for a section 304 proceeding, a foreign debtor is only required to be “properly subject, under applicable foreign law, to a proceeding commenced ‘for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.’”

4. Venue

The final requirement for commencing a section 304 petition is the filing of the petition in the proper Bankruptcy Court in accordance with the venue requirements of 28 U.S.C. section 1410. Section 1410 addresses three types of relief available

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25. See id. at 325.
27. See id. at 1566-67.
28. Id. at 1568.
29. Id.
under Bankruptcy Code section 304(b). When the purpose of the filing is to enjoin the commencement or continuation of any action in a U.S. court, venue is proper only in the district court where the action sought to be enjoined is pending. When the purpose of filing is to enjoin the enforcement of a lien against property, or to require turnover of property, venue is proper only in the district in which such property is found. When the purpose of filing is neither to obtain injunctive relief nor the turnover of property, venue is proper only in the district in which the foreign debtor's principal place of business or principal assets in the United States are located. Courts tend to apply the section 1410 venue rules liberally in order to advance section 304's goal of preserving a foreign debtor's U.S. assets and to avoid unnecessary and excessive litigation costs.

31. 28 U.S.C. § 1410 provides:

(a) A case under § 304 of title 11 to enjoin the commencement or continuation of an action or proceeding in a State or Federal court, or the enforcement of a judgment, may be commenced only in the district court for the district where the State or Federal court sits in which is pending the action or proceeding against which the injunction is sought.

(b) A case under § 304 of title 11 to enjoin the enforcement of a lien against property, or to require the turnover of property of an estate, may be commenced only in the district court for the district in which such property is found.

(c) A case under § 304 of title 11, other than a case specified in subsection (a) or (b) of this section, may be commenced only in the district court for the district in which is located the principal place of business in the United States, or the principal assets in the United States, of the estate that is the subject of such case.

Id.

33. 28 U.S.C. § 1410(b).
34. 28 U.S.C. § 1410(c).
35. See, e.g., In re Hopewell, 238 B.R. at 45; In re Evans, 177 B.R. 193, 196-97 (Bankr. S.D.N.Y. 1995). It is unclear from 28 U.S.C. § 1410 whether venue requirements under § 304 require the presence of assets in the United States. However, in Haarhuis v. Kunnan Enterprises, the court held that it did not. Haarhuis v. Kunnan Enterprises, Ltd., 177 F.3d 1007, 1012 (D.C. Cir. 1999). At issue in Haarhuis was the filing of a section 304 petition by the reorganizers of a Taiwanese corporation to enjoin a breach of contract action pending against the foreign debtor in that district. The petition was filed under § 304(b)(1)(A)(i) and (b)(3). Id. at 1010. The plaintiff in the pending action argued that the bankruptcy court lacked jurisdiction under § 304 since the for-
B. Relief Available Under § 304(b)

Section 304(b) of the Bankruptcy Code allows the Bankruptcy Court to (i) enjoin any proceeding in the United States against a foreign debtor with respect to property involved in the foreign proceeding, or against such property; (ii) order the turnover of property of the foreign estate; or (iii) compel any other appropriate relief. Although the Bankruptcy Court is guided only by the considerations set forth in section 304(c) and has the power to “broadly mold appropriate relief in a near blank check fashion,” a section 304 proceeding is an ancillary proceeding and does not vest the foreign representative with any rights or remedies under U.S. law. Instead, foreign representatives are limited to the relief provided by section 304(b), which is instituted to “assure an economical and expeditious administration of [the debtor’s] estate” in the United States.

1. Injunctive Relief

The most commonly sought form of relief available to a foreign representative under section 304(b) is injunctive relief. Since filing a section 304 petition does not prompt the automatic stay provision of the Bankruptcy Code, the Bankruptcy Court must issue an injunction to enjoin actions against a foreign debtor with respect to property involved in the foreign proceeding or the enforcement of any judgment against the foreign debtor owned no assets in the United States. Id. The bankruptcy court studied § 304(b)(1)(A)(i), which provides for the enjoinment of an action against a debtor with respect to property involved in a foreign insolvency proceeding, and concluded that the section did not limit itself to property located in the United States, but rather included all property tied up in the foreign proceeding. Id. at 1012. The court then turned to § 304(b)(3), which applies to any other appropriate relief not addressed in the other sections of § 304(b), and determined the provision does not expressly require the presence of assets in the United States. Id. The court, therefore held that the presence of property in the United States was not a jurisdictional requirement of § 304 relief, and that since the plaintiff in the pending action was suing the debtor in the United States with respect to property tied up in an insolvency proceeding abroad, jurisdiction was proper. Id.

40. See In re Goerg, 844 F. 2d at 1568.
debtor, or its property.  There is no express language in section 304(b)(1) requiring a foreign representative to adhere to all the substantive or procedural requirements for injunctive relief under Rule 7065 of the Federal Rules of Bankruptcy Procedure, such as the requirement of imminent and irreparable harm. This absence of such stricter requirements has enabled the U.S. Bankruptcy Court to liberally grant injunctive relief to foreign representatives in connection with the commencement of an ancillary proceeding under section 304.

2. The Turnover of Property

Under section 304(b)(2), the Bankruptcy Court may order the turnover of a foreign debtor's property located in the United States to the foreign representative. Turnover allows the foreign representative to expatriate the property to the foreign country and distribute it under the supervision of the foreign court. For this reason, the turnover of local property to the foreign representative appears to be the ultimate form of relief available under section 304(b).

Although section 304(b)(2) refers to the foreign debtor's "estate," the term "estate" may not be defined in the same manner under foreign law as it is under the Bankruptcy Code section 541. Early case law held that the court must look to the law of

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41. 11 U.S.C. § 304(b)(1). § 304(b)(1) provides the Bankruptcy court broad power to enjoin the commencement or continuation of:

(A) any action against

   (i) a debtor with respect to property involved in such foreign proceeding; or

   (ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate.

Id.


43. See, e.g., In re Bird, 222 B.R. 229, 234 (Bankr. S.D.N.Y. 1998); In re Culmer, 25 B.R. at 621.

44. 11 U.S.C. § 304(b)(2).

45. See 11 U.S.C. § 541(a) (2003). 11 U.S.C. § 541(a) provides in pertinent part that "the commencement of a case under section 301, 302 or 303 of this
the jurisdiction in which a foreign proceeding is pending to determine whether assets located in the United States are property of the foreign estate and therefore eligible to be turned over to the foreign representative. In *In re Culmer*, a bankruptcy court ordered the turnover of property under section 304 for the first time. In *Culmer*, the foreign representative filed a petition under section 304 requesting the turnover of the foreign debtor's property to the Bahamas for administration in the Bahamian proceeding. Many U.S. creditors opposed this request, stating that the interests of U.S. creditors should be determined under U.S. law in a U.S. court. The bankruptcy court, how-

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1. All legal or equitable interests of the debtor in property as of the commencement of the case.
2. All interests of the debtor and the debtor's spouse in community property as of the commencement of the case.
3. Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.
4. Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.
5. Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date -
   (A) by bequest, device, or inheritance;
   (B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or
   (C) as beneficiary of a life insurance policy or of a death benefit plan.
6. Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.
7. Any interest in property that the estate acquires after the commencement of the case.

*Id.*

47. *Id.* at 628.
48. *Id.* at 623.
49. *Id.* at 627.
ever, granted the turnover application, stating that deference must be given to foreign insolvency proceedings, which afford equal distribution of the available assets.\(^{50}\)

In 1992, however, the Second Circuit made clear that before issuing a turnover of property under section 304, a court must determine whether the foreign debtor has a valid ownership interest in the property.\(^{51}\) In *In re Koreag*, a Swiss debtor sought relief under section 304, requesting that the district bankruptcy court stay a creditor's action to obtain access to one of the Swiss debtor's New York bank accounts.\(^{52}\) The debtor also sought an order directing a local bank to turn the debtor's account over to the foreign representative.\(^{53}\) The bankruptcy court granted the foreign representative's motion and held that property involved in a foreign proceeding could be turned over to a foreign representative as long as the section 304 proceeding was filed properly.\(^{54}\) The court further indicated that it would be the foreign court's responsibility to determine the fate of the disputed property.\(^{55}\)

Focusing on the distinction between the language in section 304(b)(1) and (b)(2), the Court of Appeals vacated the bankruptcy court's order.\(^{56}\) The Court of Appeals determined that, before permitting the turnover of property under section 304(b)(2), it must be concluded that the property in dispute is in fact property of the foreign estate where there is a challenge by an adverse claimant.\(^{57}\) This conclusion, the court held, must be reached through the application of U.S. law.\(^{58}\)

According to the holding in *Koreag*, a dispute over the ownership of property turns on both the law of the foreign jurisdiction that defines the scope of the estate created in the foreign proceeding and on the principles of local law mandated by the venue provisions of 28 U.S.C. section 1410(b).\(^{59}\) Thus, “for the

\(^{50}\) Id. at 628.

\(^{51}\) *See In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 349 (2d Cir. 1992), *cert. denied*, 506 U.S. 865 (1992) [hereinafter *In re Koreag II*].

\(^{52}\) *See In re Koreag I*, 130 B.R. at 709.

\(^{53}\) Id.

\(^{54}\) Id. at 711-12.

\(^{55}\) Id. at 716.

\(^{56}\) *In re Koreag II*, 961 F.2d at 350.

\(^{57}\) Id. at 350.

\(^{58}\) Id. at 351.

\(^{59}\) *See id.* at 348-49.
purpose of section 304, the estate of a foreign debtor is defined by the law of the jurisdiction in which the foreign proceeding is pending, with other applicable law,” namely that of the jurisdiction in which the property resides, which serves to define the estate’s interest in particular property.

3. Other Appropriate Relief

In addition to injunctive and turnover remedies available under section 304(b)(1) and (b)(2), the Bankruptcy Court can issue “other appropriate relief” under section 304(b)(3). The courts have read section 304(b)(3) expansively by broadly interpreting the scope of other relief available to a foreign representative. For example, some forms of other appropriate relief have taken the form of requiring parties to submit to discovery demands made by foreign representatives, appointing a co-trustee responsible for assets of the foreign estate that reside within the United States, and issuing a confidentiality order to protect the identity of creditors. When determining the availability of discovery as an appropriate form of relief, the court in In re Hughes noted that it is necessary to keep in mind Congress’ intention to aid foreign tribunals. The considerable flexibility afforded to the courts in ordering other appropriate relief under section 304(b)(3) is indicative of Congress’ desire to provide a

60. 2 COLLIER ON BANKRUPTCY ¶ 304.06 at 304-23 – 304-24 (Lawrence P. King et al. eds., 2003).
62. See 11 U.S.C. § 304(b)(3). Section 304(b)(3) has been used by the Bankruptcy Court to, among other things, order parties to submit to discovery by a foreign representative, appoint co-trustees with responsibility for a debtor’s assets in the U.S., and authorize a foreign representative to maintain foreign causes of action. See cases cited infra notes 63-65.
63. See, e.g., In re Hughes, 281 B.R. 224, 226 (Bankr. S.D.N.Y. 2002); In re Brierly, 145 B.R. at 169.
64. In re Lineas Aereas de Nicaragua, S.A., 13 B.R. 779 (Bankr. S.D. Fla. 1981) (“[Section] 304(b)(3) which gives this court authority to ‘order other appropriate relief’ permits this court to appoint a co-trustee whose authority and responsibility does not extend beyond the debtor’s assets and affairs in this country”). Id. at 780.
forum for maintaining litigation under the substantive laws of
the jurisdiction in which the foreign proceeding is pending. 67

C. The Scope of § 304 Relief

As demonstrated above, the Bankruptcy Court may utilize
section 304 of the Bankruptcy Code to enjoin the commence-
ment or continuation of any action against property of the
debtor, to order the turnover of property in the U.S. to the ju-
risdiction in which the foreign proceeding is pending, and to
order any other relief the Bankruptcy Court deems appropriate.
However, the broad relief afforded by section 304 is subject to
the discretion of the Bankruptcy Court. 68 In addition to striving
for the economic and expeditious administration of the debtor’s
estate, the Bankruptcy Court must consider the six factors
enumerated in section 304(c) in determining which relief, if any,
it should grant under a foreign representative’s section 304 pe-
tition:

(1) the just treatment of all holders of claims against or inter-
ests in such estate;

(2) the protection of claim holders in the United States against
prejudice and inconvenience in the processing of claims in
such foreign proceeding;

(3) the prevention of preferential or fraudulent dispositions of
property of such estate;

(4) the distribution of proceeds of such estate substantially in
accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh
start for the individual that such foreign proceeding con-
cerns. 69

Although the statute does not bestow greater weight to any one
of the above six factors, as will be discussed in Part II infra, a
number of courts have interpreted comity to supersede the re-

67. See, e.g., In re A. Tarricone, Inc., 80 B.R. at 23.
69. 11 U.S.C. § 304(c).
maining considerations when granting foreign representatives access to and relief under the United States Bankruptcy Code.70

II. LACK OF CONCRETE GUIDANCE PROVIDED BY § 304

In the absence of formal treaties and international law to govern cases involving transnational insolvency, the United States needs a concrete provision that U.S. judges can follow when cases involving cross-border insolvencies arise. Unfortunately, section 304 fails to guide courts in administering assets of a foreign debtor in ancillary proceedings. Thus, it is not the answer to governing transnational insolvency. The absence of guidance in section 304 has contributed to inconsistent outcomes in individual cases.

On first impression, it seems that Congress intended section 304 to enable the U.S. Bankruptcy Court to broadly grant ancillary proceedings and relief under those proceedings to foreign debtors. Indeed, the mere existence of section 304 implicitly indicates that U.S. courts should grant deference to foreign insolvency proceedings.71 Moreover, section 304 provides that the court should aid in the “economical and expeditious” administration of the foreign debtor’s assets. This language seems to indicate Congress’ preference to administer all assets in one rather than multiple proceedings, preferably that of the foreign jurisdiction.

Yet, courts have still demonstrated uncertainty in how they are supposed to approach foreign bankruptcy proceedings, as is shown by the split in case law surrounding the issue of whether or not they should grant a foreign representative relief under section 304. This uncertainty is related to the factors enumer-
ated in section 304(c) with which the Bankruptcy Court must be in accordance when aiding in the “economical and expeditious” administration of the foreign debtor’s assets. While three of the section 304(c) factors are in line with the implicit goal of granting deference to foreign insolvency proceedings, two of the remaining factors favor the interest of U.S. creditors and the protections afforded to them under the Bankruptcy Code. The existence of these two competing goals in subsection (c) of the provision is the principal reason for which courts have adopted diverging interpretations when determining whether to grant section 304 relief if at all. These diverging interpretations have created inconsistency in case law and exemplify the frustration and confusion created through the attempt to administer a foreign debtor’s assets under section 304.

This section of the Note will, first, reveal the statutory gaps and contradictory language of section 304. The Note will then examine how section 304 has been a source of frustration and confusion by analyzing divergent approaches the bankruptcy courts have taken in interpreting the language of section 304, and why it is unlikely that the bankruptcy courts will ever adopt a uniform interpretation of these factors under the existing Code.

A. The Lack of Concrete Guidance in the Statutory Language of § 304

The lack of concrete guidance provided by section 304 results from a discrepancy between Congressional intent and statutory language. While legislative history supports the interpretation that Congress intended for comity to be the guiding principle in the determination of whether to allow an ancillary proceeding and relief under that proceeding, the language of section 304(c) suggests otherwise. Moreover, the mere existence of a provision allowing a foreign debtor’s assets to be channeled back to the

foreign jurisdiction and distributed according to foreign law suggests that deference to foreign proceedings is an important goal in the management of bankruptcy cases that reach across borders.

The legislative history of section 304 of the Bankruptcy Code suggests that Congress fully intended for deference to the proceedings of foreign jurisdiction to be the guiding factor in the management of a section 304 ancillary case.\(^{76}\) The legislative history confirms that, in drafting the section 304(c) guidelines for determining whether to allow a foreign representative to commence an ancillary proceeding, Congress intended to “give the court the maximum flexibility in handling ancillary cases. Principles of international comity and respect for the judgments and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules.”\(^{77}\) In addition, the statutory language of section 304 indicates that, in an ancillary proceeding, courts should be principally guided by what will “best assure an economical and expeditious administration of the estate.”\(^{78}\) The economic and expeditious administration of an estate can be met through a sole proceeding, since a sole proceeding would cut the cost of filing, attorney’s fees, and redundant litigation. Therefore, Congressional language implies that a foreign debtor’s estate should be administered in the foreign proceeding alone.

However, if the question of whether Congress intended to provide comity as a guiding factor in the management of ancillary proceedings is left up to statutory construction, Congressional intent is not forthright. There is no affirmative Congressional intention clearly expressed in the language of section 304 placing the importance of comity over any of the other factors in section 304(c). While the provision does call for the “economical and expeditious administration of the estate,”\(^{79}\) it further asks that this be done in accordance with the principles enumerated

\(^{76}\) See In re Metzeler, 78 B.R. 674, 676 (Bankr. S.D.N.Y. 1987) (discussing congressional intention behind enactment of § 304). Congress enacted § 304 to further the policy of extending comity to foreign bankruptcy proceedings. Id.


\(^{78}\) 11 U.S.C. § 304(c).

\(^{79}\) 11 U.S.C. § 304(c).
in subsection (c). However, the factors listed in section 304(c) are not completely in accordance with one another. Therein lies the problem. Representing the “legal interests inherent in every multinational bankruptcy case,” section 304(c) factors embody the balancing of both Congressional goals to defer to the foreign proceeding and the protection of U.S. creditors. Instead of discussing each goal in the language of section 304, Congress simply incorporated them both into section 304(c), stating only that the section 304(c) factors are “designed to give the court maximum flexibility in handling ancillary cases.”

The factors listed in section 304(c) include: the just treatment of all holders of claims, the protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings, the prevention of preferential or fraudulent dispositions of property, the distribution of proceeds substantially in accordance with U.S. bankruptcy law, comity, and the provision for the debtor’s fresh start. Upon weighing these factors, the Bankruptcy Court is supposed to determine whether to allow or deny the foreign representative section 304 relief. However, in doing so, courts are often presented with the problem of weighing two conflicting policy goals—international cooperation and protection of U.S. creditors. On one hand, section 304(c) asks the court to consider the just treatment of all claim holders, the prevention of preferential dispositions of property of the estate, and comity. On the other hand, it requires the court to protect U.S. creditors from inconvenience, prejudice, and foreign law not in accordance with U.S. law. While the former reflects U.S. acknowledgement of the laws of foreign jurisdictions, the latter reflects U.S. interest in protecting its own citizens and the protections afforded them under the Bankruptcy Code. Therefore, the result of balancing the six factors will largely be motivated by which of the dual goals—deferring to foreign jurisdictions or protecting U.S. creditors—the court thinks is more important.

80. 2 Collier on Bankruptcy ¶ 304.08 at 304-28 (Lawrence P. King et al. eds., 2003).
82. 11 U.S.C. § 304(c).
83. See 11 U.S.C. §§ 304(c)(1), (c)(3), (c)(5).
84. See 11 U.S.C. §§ 304(c)(2), (c)(4).
Since Congress did not make any individual 304(c) factor dispositive, nor did it prioritize any one factor over the others, the statutory language of section 304 does not represent Congressional intent, as discussed above, to provide comity as the guiding principle in determining whether to grant a foreign representative section 304 relief. Therefore, it had largely been left to the courts to grant or withhold relief based on an examination of the competing interests listed in section 304(c).

B. A Split in Case Law: The Application of § 304(c) by U.S. Courts

The courts, in grappling with Congress’ lack of instruction concerning the interpretation of the section 304(c) factors, have been decidedly inconsistent in their analysis. Such inconsistency supports the conclusion that Congressional intent is not as clear as it should be in guiding the management of international insolvencies. The inconsistency is embodied by two divergent approaches in determining whether to grant a foreign representative relief under section 304. Specifically, some courts are willing to emphasize “universalism” when interpreting section 304, while others emphasis the polar opposite, “territorialism.” The two paradigms have contrary results, and as a result, case law is widely inconsistent.

Under the universalist model, courts have been largely willing to grant deference to the foreign jurisprudence in order to ensure that the assets of the estate are administered in accordance with the substantive laws of the debtor’s “home” country. Thus, courts that adhere to universalism are likely to follow comity as the guiding principle in section 304(c), defining comity as:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citi-

zens or of other persons who are under the protection of its laws.  

Although the application of comity requires analyzing the interests of local parties, the reliance on comity as the guiding section 304(c) factor generally results in deference to the foreign insolvency proceeding. As noted in *In re Culmer*, the “analysis of [comity] has traditionally favored its regular application unless egregiously unjust consequences would flow from its implementation.” Therefore, the use of comity by courts following universalism will generally result in deferring to the laws of the foreign jurisdiction unless egregiously unjust consequences would result. As a result of the deference, the debtor’s assets would be distributed in accordance with the law in which the foreign proceeding takes place. Proponents of universalism contend that the approach more efficiently allocates capital worldwide, eliminates the desire to forum shop, reduces the number of proceedings and therefore administrative costs, and most importantly, provides certainty of law for interested parties. 

Alternatively, critics of universalism argue that the approach forces nations to overlook their own substantive law, thereby stripping local citizens of certain historical protections afforded them. Additionally, critics argue, conflicting priority rules subject foreign creditors to disparate substantive law that results in discriminatory treatment. 

Territorialism advocates the idea that “courts in each national jurisdiction [can] seize the property physically within their control and distribute it according to local rules.” Under this approach, courts have advanced the claims of national creditors by protecting the supremacy of local procedures and

protections in the distribution of local assets. Courts that adhere to territorialism are likely to administer a local reorganization or liquidation proceeding according to local bankruptcy laws. \(^{92}\) Critics of the territorialist approach contend that the approach promotes protectionism and the preferential treatment of certain creditors over others, depending on the location of the debtor's assets. \(^{93}\) Moreover, they argue, territorialism "sacrifices international cooperation," \(^{94}\) which results in a diminished estate through duplicative proceedings and administrative expenses.

Although conflicting approaches to the administration of assets involved in foreign insolvency proceedings are generally defined within the framework described above, universalism and territorialism are merely two opposite extremes of a single spectrum. U.S. bankruptcy courts, while not favoring one extreme over the other, have generally leaned toward universalism. \(^{95}\) In the past decade, the Bankruptcy Court's position on the universalism-territorialism continuum has been referred to as "modified universalism." \(^{96}\) Under modified universalism, the Bankruptcy Court has generally accepted the governing principle of universalism—that assets should be amassed and distributed worldwide by a "home-country" court—but has reserved discretion in determining the fairness of the foreign country's proceedings and the extent to which U.S. creditors are protected. \(^{97}\) Therefore, while the Bankruptcy Court will deny section 304 relief when that relief would substantially prejudice a U.S. creditor, U.S. courts will generally cooperate with and aid in the expeditious administration of a foreign insolvency proceeding when the foreign debtor retains certain assets within the United States.

\(^{92}\) See LoPucki, Cooperation in International Bankruptcy, supra note 89, at 701.


\(^{95}\) See cases cited supra note 70.

\(^{96}\) In re Maxwell, 170 B.R. at 816.

\(^{97}\) Id.
The landmark case illustrating the Bankruptcy Court's willingness to adopt a universality-oriented, pro-recognition approach is In re Culmer. In that case, a Bahamian debtor commenced a liquidation proceeding in Bahamian court. The foreign debtor then petitioned the U.S. Bankruptcy Court under section 304, requesting that its assets located in the United States be turned over to the insolvency proceeding in the Bahamas. The court, noting that Congress intended that courts have "maximum flexibility" in handling ancillary cases, ultimately granted the relief through setting up a presumption of comity. The presumption of comity resulted from the court's decision to extend comity to a foreign proceeding unless it would be "wicked, immoral or [in] violat[ion of] American law and public policy" to do so. Furthermore, the court noted that the extension of comity generally results in deference to the foreign insolvency proceeding "unless egregiously unjust consequences would flow from its implementation."

After examining the provision of Bahamian law, the court determined that the foreign proceeding would not favor national creditors over U.S. creditors, nor was the Bahamian law in violation of the Bankruptcy Code. Instead, the court stressed that the Bahamas was a "sister common law jurisdiction," which required protection of fairness and due process. Moreover, the court decided that deferring to the foreign proceeding would best ensure the "economical and expeditious administration" of the foreign estate based on the location of the debtor’s records, employees, and liquidation staff. Therefore, the Bahamian court could best deal with the debtor’s creditors. Finally, the court stated that there was no real compelling U.S. public policy in the matter before it. Thus, the Culmer court found that, in the presence of comprehensive procedures for the economical and expeditious distribution of the debtor's assets and the omission of substantial discord with the Bankruptcy Code, extending comity was not only appropriate, but presumed.

99. Id. at 629.
100. Id. at 633.
101. Id. at 631 (holding that Bahamian law required supervision of the liquidators, limited creditors' claims in liquidation, avoided fraudulent conveyances and the preference of domestic over foreign claims, and allowed the right to appeal).
A similar result occurred in *Cunard Steamship Company Limited v. Salen Reefer Services AB.*\(^\text{102}\) In *Cunard*, a Swedish debtor commenced a bankruptcy proceeding in Sweden. A creditor had obtained an attachment on the foreign debtor's assets within the United States.\(^\text{103}\) The debtor moved to vacate the attachment in deference to the Swedish bankruptcy proceeding and the court, relying on the principle of comity, complied. In doing so, the court followed the same line of reasoning as did the *Culmer* court, noting that, “The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.”\(^\text{104}\)

In *In re Gee*, the court not only used comity to justify granting relief to the foreign debtor, but overemphasized the element to the point of excluding the other section 304(c) factors.\(^\text{105}\) In *Gee*, a Cayman debtor, who had commenced a bankruptcy proceeding in the Cayman Islands, filed a section 304 petition, seeking discovery against parties in New York, and an injunction against disposing the debtor's assets, books, and records located in the Southern District of New York. In granting relief to the foreign debtor, the court proclaimed that “although comity is only one of six factors to be considered in determining whether to grant relief, it often will be the most significant.”\(^\text{106}\) Although the court briefly looked at the other section 304(c) elements, it was obvious that the court believed “comity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated.”\(^\text{107}\) The *Gee* court further emphasized the central role of comity when it stated, “Particularly where the foreign proceeding is in a sister common law jurisdic-

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102. *See* Cunard Steamship Co. v. Salen Reefer Services, 773 F.2d 452 (2d Cir. 1985).
103. Interestingly, this was not a U.S. creditor, but a British one, a fact that did not influence the court's final decision. *See* Cunard Steamship Co. v. Salen Reefer Services, 49 B.R. 614, 617 (S.D.N.Y. 1985).
104. *See* Cunard Steamship Co., 773 F.2d at 458.
106. *Id.* at 901.
107. *Id.* (citing Cunard, 773 F.2d at 457).
tion with procedures akin to our own, exceptions to the doctrine of comity are narrowly construed.”

The courts in Culmer, Cunard, and Gee all emphasized comity over the other factors enumerated by Congress in section 304(c). The trend to emphasize comity as “much more than a discrete element or factor to be considered as part of a larger analysis” and as “a pervasive principle of international law” can be attributed to the widely held belief that “the foreign court presiding over the original proceeding is in a better position to decide when and where claims should be resolved in a manner calculated to conserve resources and maximize assets.”

In addition, many courts believe that the other five factors enumerated in section 304(c) are merely present to ensure that comity be granted in appropriate cases. The court in Koreag, for example, held that comity is the preeminent factor in determining whether to grant section 304 relief since the other factors “are inherently taken into account when considering comity.”

In Koreag, a Swiss foreign debtor was placed into involuntary liquidation under the guidance of a Swiss court. The foreign debtor filed a section 304 petition, requesting the turnover of the debtor’s funds located in New York bank accounts. The Bankruptcy Court granted the requested relief, following several prior cases that trumped comity as the most important section 304(c) factor and rejecting other cases that afforded equal weight to all section 304(c) factors. The Koreag court asserted that the orderly distribution of the debtor’s estate could best be served by granting recognition to the foreign proceeding, and only withholding that recognition when the law of the foreign jurisdiction is “vicious, wicked or immoral, and shocking to the prevailing moral sense.” The court concluded that comity should be granted to the proceedings in Switzerland since the “laws of Switzerland are not repugnant and violative of our fundamental notions of fairness.”

108. See id. at 901 (citing Clarkson Co., 544 F.2d at 630).
111. In re Koreag I, 130 B.R. at 712.
112. Id. at 713 (citing Intercontinental Hotels Corp., 15 N.Y. 2d 9, 13 (1964)).
113. Id. at 716.
The trend towards granting deference to the laws of a foreign jurisdiction, and thus towards universalism, does not, however, mean that courts will always blindly extend comity. A minority of bankruptcy cases give individualized consideration to the section 304(c) factors and recognize the necessity of “reserving to local courts discretion to evaluate the fairness of [foreign] country procedures and to protect the interests of local creditors.” For example, the court in In re Treco recognized the importance of cooperating with foreign jurisdictions in cases of international insolvency and said that it expected, in many or most cases, the “analysis required by section 304 will ... support the granting of the requested relief.” Nonetheless, the court recognized that it had a duty to examine the remaining five factors of section 304(c) and that “comity does not...automatically override the other specified factors.”

In In re Treco, a Bahamian debtor sought, under section 304(b)(2) of the Bankruptcy Code, the turnover of certain bank accounts, which were held in the United States by a secured U.S. creditor. In support of its application, the foreign debtor argued that comity had always and should now be given greater weight than the other section 304(c) factors. The U.S. creditor, in support of its refusal to turnover the funds, argued that it had a security interest in the funds pursuant to a security agreement. Moreover, the U.S. creditor argued, there was a great disparity between the laws of the two jurisdictions, particularly those dealing with secured creditor’s claims, and the disparity would generate insurmountable injustice to U.S. creditor.

The Bankruptcy Court relied on the theory of universalism and insisted that the principle of comity required the court to grant the foreign debtor’s petition. In doing so, the court held

116. See In re Treco, 240 F.3d 148 (2d Cir. 2001) [hereinafter In re Treco II].
117. Id. at 161.
118. Id. at 156.
that the turnover of assets subject to security interests was appropriate because it would not deprive the creditor the benefit of the security interest. On appeal, the Second Circuit determined that comity is not the most important factor under section 304(c), reasoning that if Congress had intended to give comity more weight, it would have been addressed in the preamble along with the terms “economical and expeditious,” and not as a separate factor. Instead of relying on comity to guide its decision, the Second Circuit stressed the importance of comparing the U.S. and Bahamian schemes. The court, paying particular attention to section 304(c)(4), considered the “effect of the difference in law on the creditor.” It determined that an inequity existed in the discrepancy between the priority schemes of the two laws: namely, under Bahamian law, the secured creditor was unlikely to receive any distribution on account of its claims after the payment of administrative claims, taxes, and pre-petition wages in the Bahamian proceeding. Thus, the court determined that the Bahamian scheme was not “substantially in accordance” with the priority prescribed in section 304 of the Bankruptcy Code, which affords special protection to secured creditors. Therefore, the Second Circuit determined that comity would not be extended in this case, and the turnover was precluded.

120. Id. at 291-92.
121. See In re Treco II, 240 F.3d at 157.
122. See 11. U.S.C. § 304(c)(4). Section 304(c)(4) provides that the extent to which the distribution of the proceeds of the foreign estate is in accordance with the Bankruptcy Code should be considered in determining what relief, if any, should be granted to a foreign representative. Id.
123. In re Treco II, 240 F.3d at 159.
124. Id. at 155.
125. Id. at 159.
126. Id. In addition to cases where granting relief in the form of injunction or the turnover of property would result in the unjust treatment of or prejudice to American Creditors, the Bankruptcy Court has denied section 304 relief where litigation concerning the debtor's property is allowed to proceed outside the boundaries of the foreign proceeding. See, e.g., In re Smouha, 136 B.R. 921 (S.D.N.Y.), appeal dismissed, 979 F.2d 845 (2d Cir. 1992); Internal Revenue Service v. Ernst & Young, Inc., 135 B.R. 521 (S.D. Ohio 1991). One example is when government interests are involved. The justification behind this is that the doctrine of sovereignty prevails over comity and, therefore, the court must be more guarded when enjoining the federal government from taking action against a foreign debtor's property or issuing an injunction...
The court in *In re Compania General de Combustibles* analyzed the holding in *Treco*. In *Combustibles*, an Argentinean debtor filed a section 304 petition, requesting the turnover of funds located within the United States. The U.S. creditors objected to this request, stating that under Argentinean law they would be subject to a stay, whereas under U.S. law they would not. Before reaching a decision, the *Combustibles* court analyzed *Treco* under three interpretations. Under the first interpretation, the decision in *Treco* could mean that a divergence in the treatment of creditors under foreign and U.S. law would require the Bankruptcy Court to deny the turnover of property. The *Combustibles* court declined to follow this interpretation since it would undermine the purpose of section 304 and was contrary to many other decisions involving the provision. Under a second interpretation of *Treco*, the decision could warrant a rejection of the turnover of property when, under foreign law, secured creditors are not afforded the same special protections as afforded to them under the Bankruptcy Code. The court rejected this interpretation as well, stating that section 304 nowhere indicates that secured creditors are exempt from the operation of section 304. Under the *Combustibles* court's final interpretation, "*Treco* requires denial of section 304 relief where the court finds clear evidence of maladministration or corruption." In adopting this approach, the *Combustibles* court approved the foreign debtor's request to turn over its assets located in the United States and required the U.S. creditors to submit to the jurisdiction of the court in Argentina.

against the IRS's collection efforts. See *In re Smouha*, 136 B.R. at 926. Another example is when public policy is so strong that it outweighs the principle of comity. See, e.g., *In re Banco Nacional de Obras y Servicios Publicos*, 91 B.R. 661 (Bankr. S.D.N.Y. 1988). In one such instance, a bankruptcy court found that the public policy behind allowing a union to continue a declaratory judgment action in federal court far outweighed the objections of the foreign representative and the general preference of deferring cases to the foreign tribunal. See *id.* at 668.

128. *See id.* at 111.
129. *See id.*
130. *See id.*
131. *Id.*
132. *See id.* at 114.
While Treco and Combustibles represent cases where the Bankruptcy Court refused to give comity a paramount role over the other section 304(c) factors and have instead purported to weigh all of section 304(c) equally in their determination, other courts have allowed factors other than comity to dominate their determination of granting relief. In In re Lineas, a Nicaraguan debtor filed a section 304 petition, requesting the turnover of its assets located within the United States. The court granted the requested relief, but on the condition that the foreign representative apply the assets to the claims of the foreign debtor's U.S. creditors. In coming to its decision, the only section 304(c) factor that the Bankruptcy Court looked at was section 304(c)(2), that is, protecting the claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings. In doing so, the court effectively protected the interest of U.S. creditors at the expense of other section 304(c) factors, namely, equally distributing the debtor's assets to all creditors and preventing preferential dispositions of property of the estate.

Based on the foregoing discussion of the split in case law, it is clear that section 304 does not lend itself to ready comprehension. Instead, the provision is open to broad interpretation by the courts. Since this interpretation can be swayed by an adherence to a particular theoretical approach, namely, universalism, territorialism, or something in between, the application of section 304 can be somewhat unpredictable. The unpredictability in the current application of section 304 presents an intractable weakness in the current legal framework, since each proceeding under section 304 will invite a courtroom battle and unnecessary litigation. In order to remedy this, Congress needs to provide the Bankruptcy Court concrete guidelines to follow when determining whether to grant relief to foreign debtors and what role comity should play in this determination.

134. See id.
III. THE PROPOSED CHAPTER 15: A SOLUTION?

As described above, the Bankruptcy Code leaves many questions unanswered with respect to cross-border insolvencies. Specifically, when a foreign corporation with assets in the United States becomes insolvent, section 304 of the Code is silent as to how those assets should be distributed. The confusion and uncertainty resulting from the Code’s silence ultimately creates a lack of predictability, which hampers the efficient administration of cross-border insolvencies, impedes capital flow and discourages cross-border investment. Ultimately, in the absence of more concrete guidelines from Congress, the existence of section 304 alone renders the United States ill equipped to adequately handle international insolvency issues.

The need to improve international bankruptcy systems, however, is not a novel idea. Protocols and international treaties have been adopted as measures to improve the system of international insolvencies. Yet, some commentators contend that the only way to affect an improvement in the international insolvency system is to first act on a national level.\(^{138}\) One critic has said:

\[\text{[E]fforts to harmonize the operation of conflicting insolvency systems by treaties have not been notably successful. It remains, then, for individual nations, motivated by the desire to promote international co-operation and to avoid wasteful duplication of effort, to establish unilateral procedures for the recognition of rights arising under foreign bankruptcy statutes.}\(^{139}\)\]

A recent effort to improve international insolvency systems has done just that.

In response to the lack of a consistent international body of law governing international insolvencies and the recent spike in bankruptcy proceedings that cross national borders, the United Nations Commission on International Trade Law (UNCITRAL) has proposed a Model Law on Cross-Border Insolvencies (Model Law). Unlike a treaty or convention, the Model Law does not mandate a change in the substantive rules in any country’s

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139. See id. at 729.
bankruptcy law. Instead, it has been offered as a model for participating countries to enact, with the hope that its adoption will set into motion cooperation among countries in regards to multinational bankruptcies.

In general, the Model Law, which imparts procedures meant to surmount the great disparity between international business and national insolvency regimes, has been considered the best prospect for international cooperation in respect to ancillary proceedings. The objective of the Model Law is to provide countries with an internal legal regime for the effective, equitable, and efficient treatment of international insolvencies. Under the Model Law, the country that is the center of an insolvent company's main interest or is its principal place of business would be the home of the central, or “main” proceeding. Upon judicial recognition of a main proceeding, a stay goes into effect, which applied to foreign and domestic creditors equally.

As part of the Bankruptcy Reform Act of 2001, Congress has proposed Chapter 15 as an addition to the Bankruptcy Code in an effort to incorporate the Model Law into the current bankruptcy legislation. Chapter 15 would substitute section 304 and would govern the initiation and conduct of ancillary proceedings in the United States. Chapter 15, although modeled on section 304, presents certain clarifications absent under


141. Id. “The foreign proceeding shall be recognized: (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests”. Model Law, art. 17.


144. See id. § 1501(b)(1). This provision would also govern relief sought in a foreign jurisdiction in connection with a bankruptcy proceeding under the Code, in parallel proceedings, and in cases commenced or joined by foreign creditors under the Code. See id. §§ 1501(b)(2), (b)(3), (b)(4).
the current Code that could seemingly impact the way in which ancillary proceedings are administered.

Through its incorporation of the UNCITRAL Model Law, Chapter 15 purports to have a more efficient system, yet it is not clear that its adoption will resolve the uncertainty and confusion that exists under the current Bankruptcy Code. While the proposed Chapter provides the authority for a court to recognize and provide assistance to a foreign insolvency proceeding, it also establishes certain requirements that must be met before recognition can be granted and the extent of assistance can be determined. Accordingly, Chapter 15 suffers a measure of unpredictability similar to that which exists under section 304. This raises the question: to what extent will Chapter 15 clear up the confusion as it currently exists under section 304?

A. The Recognition of Foreign Proceedings and Public Policy Considerations

As stated above, Chapter 15 provides for the commencement and conduct of an ancillary proceeding. Section 1504 provides that an ancillary case can be commenced by filing a petition of recognition of a foreign proceeding. Section 1515 provides the

145. The preamble of the Model Law explains that its purpose is to provide an effective mechanism for dealing with cross-border insolvencies so as to promote five articulated objectives:

(1) cooperation between courts involved in cases of cross-border insolvency;
(2) greater legal certainty for trade and investment;
(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested parties, including the debtor;
(4) protection and maximization of the value of the debtor's assets; and
(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Model Law, supra note 140, at 2.

146. See H.R. 333, § 1504. The term “foreign proceeding” is defined as “a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of a debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.” H.R. 333, 107th Cong., § 802(b) (2001) (amending 11 U.S.C. §
specific requirements for filing a petition of recognition, including a certified copy of the decision commencing the foreign proceeding, certification from the foreign court affirming the existence of the foreign proceeding, and the appointment of a foreign representative.\textsuperscript{147} In light of the legislative intent “to make recognition as simple and expedient as possible,”\textsuperscript{148} section 1516(a) provides that the court can presume that the requirements for recognition are met if the filing documents indicate that the proceeding is a foreign proceeding and that the representative is a foreign representative.\textsuperscript{149} In addition, section 1517(a) makes recognition of a foreign proceeding mandatory if a foreign representative is present as defined by the proposed language and the filing requirements are met.\textsuperscript{150} Section 1517(a) mandates a withdrawal from the section 304 requirement for judicial analysis over whether to recognize a foreign proceeding since the decision to grant recognition under Chapter 15 “is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c).”\textsuperscript{151} Therefore, under Chapter 15, all that is required to grant recognition to a foreign proceeding is the performance of the above requirements.

At first glance, this seems to be a significant departure from the approach taken under section 304 of the Bankruptcy Code. Whereas the Bankruptcy Court could use its discretion to affect a dismissal of a section 304 petition, even if the proceeding qualified as a foreign proceeding, the Court does not seem to have the same authority to deny recognition to a foreign proceeding under Chapter 15. However, the section 1517(a) limits placed on the Bankruptcy Court to deny recognition to a foreign proceeding are qualified by section 1506. Section 1506 declares

\textsuperscript{101(23))}. Chapter 15 further defines a “foreign main proceeding” as “a foreign proceeding taking place in the country where the debtor has the center of its main interest.” \textit{See} H.R. 333, § 1504.  
\textsuperscript{147}. \textit{See} H.R. 333, § 1515(b).  
\textsuperscript{149}. \textit{See} H.R. 333, § 1516(a). Under Chapter 15, a foreign representative is defined as “a person or body…authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.” H.R. 333, § 802(b) (amending 11 U.S.C. § 101(24)).  
\textsuperscript{150}. \textit{See} H.R. 333, § 1517(a).  
“[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.” ¹⁵² Therefore, due to the allowance of policy considerations, the Bankruptcy Court will have at least a certain amount of discretion when determining whether to recognize a foreign proceeding under Chapter 15.¹⁵³ This is especially true since Chapter 15 does nothing to define American public policy. Thus, courts are given broad discretion in determining what constitutes important U.S. public policy. If the recognition of a foreign proceeding would be contrary to whatever a specific court deems to be U.S. public policy, that court could use its discretion to deny recognition of the proceeding and thereby deny the relief that accompanies it. The disadvantage here is that courts could manufacture public policy to achieve territorialist ends, thus bypassing Chapter 15’s attempt to universally recognize and respect foreign law.

B. Relief and the Inclusion of § 304(c) Factors

Another provision exists in the proposed Chapter 15 that seems to alter the conduct and outcome of ancillary proceedings in the United States. Section 1520(a) of Chapter 15 provides that, upon entering an order recognizing a foreign proceeding, sections 361¹⁵⁴ and 362¹⁵⁵ of the Code will automatically go into

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¹⁵². See H.R. 333, § 1506.
¹⁵³. See generally id. However, the House Report notes that “public policy” is to be narrowly read and that the “word ‘manifestly’ in international usage restricts the public policy exception to the most fundamental policies of the United States.” H.R. REP. NO. 107-3, pt. 1, at 79.
¹⁵⁴. See 11 U.S.C. § 361. 11 U.S.C. § 361 provides that when adequate protection is required under §§ 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by:

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
effect with respect to the foreign debtor’s property located within the United States and sections 363, 362, 549, 549 and 552 of (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity’s interest in such property.

Id. 155. See 11 U.S.C. § 362(a). 11 U.S.C. § 362(a) provides for an automatic stay against:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

Id. 156. See 11 U.S.C. § 363 (11 U.S.C. § 363 provides for the use, sale, or lease of property by the trustee).


158. See 11 U.S.C. § 552. 11 U.S.C. § 552 provides:

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.
the Code will automatically go into effect with respect to the transfer of the foreign debtor’s property located in the United States.\footnote{159 That is, once the foreign proceeding is recognized, which is virtually automatic upon proper filing, the foreign representative is entitled to certain relief including, among other things, a stay against the commencement or continuation of all actions against the foreign debtor and the debtor’s property located in the United States, the right to operate the debtor’s business in the United States, and the right to sell and lease property in the same manner as a trustee in the United

(b)

(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

(2) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such rents and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

\footnote{Id. See H.R. 333, §§ 1520(a)(1), (2). Section 1520(a) states that these sections should be applied to the foreign debtor’s property to the same extent that they would apply to property of an estate under the Bankruptcy Code. See H.R. 333, § 1520(a).}
Therefore, section 1520 represents a great departure from the scheme of relief under section 304 since it provides for automatic relief in place of judicial discretion, even though the factors of section 304(c) might not be satisfied.

At first glance, the proposed Chapter 15 seems to eliminate the need for bankruptcy courts to weigh the section 304(c) factors. This is true in terms of the relief provided in sections 361, 362, 363, 549, and 552 that automatically go into effect upon the recognition of the foreign proceeding. However, in order to receive “any additional relief that may be available to a [U.S.] trustee” the foreign representative must satisfy the section 304(c) factors.

The proposed section 1507 provides that “additional assistance” may be granted if, “consistent with the principles of comity,” such assistance will also be consistent with the first four factors of section 304. Therefore, although Chapter 15 would replace section 304 if enacted, the 304(c) factors will still be necessary to determine whether “additional assistance” will be granted.

160. See H.R. 333, § 1520.
161. See H.R. 333, § 1507.
162. See id. H.R. 333, § 1507 provides:

(a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Id.
Since the proposed chapter restricts the application of section 304(c) factors to determining the availability of “additional assistance,” Chapter 15, seemingly, will not generate as much confusion as does section 304, which requires the Bankruptcy Court to balance the section 304(c) factors before providing any relief to a foreign representative. However, under Chapter 15, the denial of relief based on extrinsic factors is not limited to “any additional assistance.” For example, the turnover of property addressed by section 304(b)(2) of the Bankruptcy Code remains a discretionary process under Chapter 15. Section 1521(b) provides that:

Upon recognition of a foreign proceeding...the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor’s assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of the creditors of the United States are sufficiently protected.163

Thus, the turnover of property located in the United States to a foreign representative will require the court to inquire whether “the interests of creditors in the United States are sufficiently protected” under Chapter 15, instead of an inquiry into all of the section 304(c) factors.164 Yet, the Bankruptcy Court is likely to look to precedent under section 304(c) concerning the turnover of property, such as the In re Treco decision discussed above. Moreover, the House Report, in describing the intention behind section 1521, states that the section should not expand or reduce the scope of the relief currently available under section 304 of the Code.165 Since the scope of relief available under section 304 has been determined by case law, case precedent will continue to be a guiding factor and the section 304(c) considerations will continue to be visited. In addition, the drafter of the Model Law did not intend for the court to authorize the turnover of assets until it assured that the interests of local creditors were protected.166 This intention further supports reliance on the section 304(c)(2) and 304(c)(4) factors.

163. See H.R. 333, § 1521(b).
164. See id.
166. See Guide, supra note 140, at 157.
The denial of relief based on extrinsic factors can arguably extend even past the determination of “additional assistance” and the turnover of property to the stay, even though the stay purports to be automatic under the proposed Chapter 15. As noted above, section 1520(a) incorporates section 362 of the bankruptcy code, which provides for an automatic stay. By doing so, section 1520(a) makes the limitations on the stay under section 362 equally applicable to ancillary proceedings. The House Report states that the Bankruptcy Court, under section 1520(a) has the power to terminate the stay in an ancillary proceeding pursuant to section 362(d) for cause, including the failure of adequate protection. In determining whether the creditor was adequately protected, it would be an outrage not to allow the Court to consider the existence of prejudice to U.S. creditors or the deviation of the foreign insolvency scheme from the Code. Instead, the term “adequate protection” presumes that the foreign scheme must be substantially in accordance with the Code, a factor listed for consideration under section 304(c). Therefore, if a foreign proceeding discriminates against a U.S. creditor in a way that offends the provision of the Bankruptcy Code, the Bankruptcy Court may deny certain relief under Chapter 15. Under this analysis, the proposed Chapter 15 seems to reject the notion that considerations of creditor protection and the fair operation of insolvency proceedings should only be considered when determining “additional assistance.”

C. Comity

Although the section 304(c) factors have been incorporated into the proposed Chapter 15, it is important to note that it was done with a substantial modification, which was meant to clarify the role of comity in ancillary proceedings. Section 1507 eliminates comity as an individual factor and instead places it in the introductory language, making it clear that comity is the central consideration to be addressed. However, this clarifica-

167. See H.R. 333, § 1520(a).
169. See generally H.R. 333, § 1507; see also H.R. REP. No. 107-3, pt. 1, at 80. The House Reports explains:

Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of
tion only goes so far in making comity the guiding factor. It does not make comity dispositive of the other factors and thus leaves room for a balancing of the other section 304(c) factors. In addition, as mentioned above, comity requires that the decision to defer to a foreign jurisdiction's law be weighted in light of local parties' interests. Therefore, courts that have traditionally weighed each of the section 304(c) factors individually can use the definition of comity to continue to balance the interests of U.S. creditors, since comity does not mean automatic deference to the law of the foreign jurisdiction. Conversely, courts that have traditionally followed a more universalist approach will use the placement of comity in the proposed Chapter 15 as a justification to continue granting deference to the law of the foreign jurisdiction. Under this analysis, it seems unlikely that the decisions of the cases discussed in Part II would result in a different outcome under the proposed Chapter 15.

IV. CONCLUSION: A PURER FORM OF UNIVERSALISM

Chapter 15 clearly mandates a high level of cooperation among the United States and other nations in administering bankruptcy proceedings, while allowing the United States to retain its own substantive bankruptcy law and public policy. As such, Chapter 15 represents only a cautious step towards a universalist approach to international insolvencies.

A stricter, purer form of universalism needs to be widely adopted and efforts to provide a global approach to cross border insolvencies need to be undertaken. By requiring a single insolvency proceeding, pure universalism will lower the expenditure of valuable resources (both time and money) and, by guaranteeing greater predictability, will lower lending costs. In addition, knowing which country's law will apply in the case of insolvency helps creditors to make better-informed invest-

six factors in subsection (c) of section 304 is misleading since those factors are essentially elements of the grounds for granting comity. Therefore in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.

Id.

170. See In re Treco II, 240 F.3d at 156-58.
ment choices. Finally, pure universalism promotes the fair and equal distribution of assets to all creditors. Ultimately, a scheme of pure universalism will minimize the costs of insolvency and will benefit both debtors and creditors alike.

In adopting a purer form of universalism, nations might look towards economic union legislation that link countries without regard to whether their legal systems are similar or not. The European Union Insolvency Regulation (the “E.U. Regulation”), which was enacted in 2002, provides for automatic recognition (without formality) of an insolvency proceeding that is opened in a member state—that is, the state in which the debtor has its domicile or principle place of business. The law of the state in which the proceeding is pending applies and the representative of the debtor may exercise all of its rights throughout the rest of the member states. The courts of other member states are required to render assistance and provide necessary relief.

In departing from an adherence to sovereignty, the E.U. Regulation is a significant step in the direction of pure universalism. It embraces countries of both common law and civil law and applies to countries with considerable differences in their respective insolvency law schemes. It is truly reciprocal. Moreover, it covers a considerable number of countries, namely, Austria, Belgium, Finland, Germany, Greece, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

The United States must follow in this vein and seek to enact reciprocal legislation with as many other nations as possible, regardless of their respective insolvency regimes. This legislation must provide for the automatic recognition of any insolvency proceeding that is opened in the state in which the debtor is domiciled or has its principle place of business. Only in this way can creditors predict with certainty which insolvency law will govern the bankruptcies of foreign companies with whom they transact. Creditors can, thus, educate themselves about the law of the foreign company’s jurisdiction and can make informed decisions regarding whether to proceed with the trans-

U.S. creditors may choose not to transact with foreign entities that are domiciled in jurisdictions whose insolvency laws are not favorable to creditors or that are not in accordance with the scheme and policies of the U.S. Bankruptcy Code. Countries whose insolvency laws unfairly prejudice foreign creditors will inevitably suffer a drop in foreign investment and trade.

There are also important trade and commercial benefits from the application of predictable rules. When laws are predictable, trade and commerce are encouraged and facilitated. In addition, predictability ensures lower transactional costs. Creditors can adjust the costs of loans to foreign debtors based on how likely (or unlikely) it is that one country’s laws will be applied to any future insolvencies of the debtor.\(^\text{172}\) In the absence of predictability, there is an increased risk and, therefore, an increased cost of lending.

There is, of course, the issue of whether it is practical to adopt a one-world view of international insolvency. The worldwide enforcement of a pure universalist regime unavoidably treads on traditional notions of national sovereignty. There is an obvious and understandable concern when enacting recognition and assistance legislation that a nation will be forced to surrender its sovereignty. The concern reflects the trepidation that exposing citizens of one country to the process and decisions of another detracts from the independence of the first country and its sovereign entitlement to control the affairs of its own citizens. It is for this reason that the benefit of any cross-border insolvency legislation hinges on worldwide participation and reciprocity.

Another problem is demonstrated by the apprehension that local creditors will be unfairly prejudiced if their claims cannot be realized in their local jurisdiction and if local assets are distributed not locally, but globally. Obviously, local creditors will receive less when local assets are made available for the global pool for the satisfaction of all creditors than when local assets are made available only to local creditors. However, it is necessary to remember that in a system of international insolvency

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172. See Westbrook, Theory and Pragmatism, supra note 85, at 466. This argument is similar to the “Transactional Gain” argument proposed by Professor Westbrook. Id.
cooperation there will always be some relatively “innocent” party or parties left unsatisfied. Therefore, it is not wise to make international insolvency legislation contingent on the dilemma of the local creditor standing. Instead, it is imperative to recognize that any loss to local interests in one case with be balanced by gain in another case.\(^{173}\)

The most obvious way to effect international insolvency cooperation is though treaty or convention. From a practical standpoint, multinational treaties and conventions have proved nearly impossible to enact. Save the European Union legislation, very few functioning international treaties on insolvency exist. However, the enactment of a multinational treaty is the exclusive means to achieve a significant improvement in the administration of international insolvencies. Therefore, progress in the international insolvency arena is highly dependent on the effort of the insolvency communities of every nation to develop a structure without any consideration of sovereignty and national interest. This might be a more realizable goal than one would imagine, considering that cooperating among nations in cross border insolvency cases has steadily increased in recent years.

Jennifer Greene\(^{∗}\)

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\(^{173}\) See id. at 464-65. This argument is similar to the “Rough Wash” argument proposed by Professor Westbrook. Id.

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“NO EXISTIRA LA PENA DE MUERTE”: DOES THE UNITED STATES VIOLATE REGIONAL CUSTOMARY LAW BY IMPOSING THE DEATH PENALTY ON CITIZENS OF PUERTO RICO?

INTRODUCTION

On July 31, 2003, after three days of deliberations, a San Juan jury composed of seven men and five women ended the federal trial that set off a clash between the United States and the Commonwealth of Puerto Rico. The defendants, Hector Oscar Acosta-Martinez (a.k.a “Gordo”) and Joel Rivera-Alejandro were acquitted of the charges of abduction and murder of Jorge Hernandez-Diaz, a grocery-store owner. The two men faced a penalty of death in the first capital trial in Puerto Rico in more than seventy-five years.

Puerto Rico effectively abolished the death penalty in 1929 and later incorporated the prohibition in its constitution, which was ratified by the U.S. Congress in 1952 and states: “The Death Penalty shall not exist.” Despite this prohibition, the Department of Justice continues to seek the death penalty in cases arising under the jurisdiction conferred to it by the Federal Death Penalty Act of 1994 and the “Memorandum of Understanding” between the local authorities and the local United States Attorney’s office.

2. Dahlburg, supra note 1.
3. The last time the death penalty was applied in Puerto Rico was in 1927 when a man was hanged for the murder of his boss. Ivan Roman, Not-guilty Verdict Thwarts Death Penalty Battle: The Case had Sparked a Fight about whether Federal Law on Capital Punishment Trumps Puerto Rico’s Ban on it, ORLANDO SENTINEL, Aug. 1, 2003, at A3.
4. 34 P.R. LAWS ANN. § 995 (1929).
6. P.R. CONST. art. II, § 7 (“No existirá la pena de muerte.”).
To place the present controversy in context, Part I of this note consists of a discussion of the evolution of the political relationship between the United States and Puerto Rico, as well as Puerto Rico’s ban on capital punishment. Part II discusses the Federal Death Penalty Act of 1994. Part III examines in detail the recent challenges to the applicability of the death penalty to Puerto Rico by defendants Acosta-Martinez and Rivera-Alejandro. Part IV of this note will show that the abolition of the death penalty has become a norm of regional customary law in the Latin American region and will argue that the U.S. Attorney’s office violates these regional norms by imposing its views of capital punishment on a Latin population which has expressly and unequivocally rejected the ultimate punishment.

I. PUERTO RICO’S RELATIONSHIP WITH THE UNITED STATES AND THE APPLICABILITY OF FEDERAL LEGISLATION TO PUERTO RICO

On December 10, 1898, the United States and Spain signed the Treaty of Paris which officially ended the Spanish-American War. As a result of this treaty, the island of Puerto Rico became a territory of the United States. In 1900, the Foraker Act introduced a civilian government on the island appointed by the U.S. President. The citizens of the island were not granted U.S. citizenship until the Jones Act of 1917 which also

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Penalty: History and Some Thoughts about the Department of Justice’s Role, 26 FORDHAM URB. L.J. 347, 357 n.36 (1999)) (“Because violent crime is unfortunately prevalent in Puerto Rico, the local authorities have entered into a ‘Memorandum of Understanding’ with the local US Attorney’s office, agreeing that the federal authorities will prosecute much of the ‘local’ violent crime, such as car-jackings, in Puerto Rico.”).

8. See generally Malavet, supra note 5.


10. Id. at art. 2 (“Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.”).


12. Malavet, supra note 5, at 24. The members of the local cabinet were also appointed by the President, as well as the Chief Justice and Associate Justices of the Supreme Court of Puerto Rico. Id.

changed the local government rule and gave the governor of the island the right to appoint his cabinet, with the advice and consent of the local senate. The new citizens, however, were not afforded the same constitutional protections as U.S. citizens residing on the mainland.

Thirty-three years after the Jones Act, on July 3, 1950, the U.S. Congress passed Public Law 600. The act was “adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.” It purported to “fully” recognize “the principle of government by consent.” Public Law 600 was submitted to the people of Puerto Rico and accepted by them in a referendum held on June 4, 1951. Pursuant to Public Law 600, a constitutional convention convened in Puerto Rico and adopted a constitution which was approved by Congress on July 3, 1952.

In March 1953, the United States sent a memorandum to the Secretary General of the United Nations regarding Puerto Rico’s new status. The memorandum stated that “at the request of the people of Puerto Rico and with the approval of the Government of the United States, Puerto Rico has voluntarily entered into the relationship with the United States that it has chosen to describe as a ‘commonwealth’ relationship.”

14. Malavet, supra note 5, at 27.
15. Id. For example, in Balzac v. People of Porto Rico, the Supreme Court of the United States held that the right to trial by jury did not apply to U.S. citizens residing in Puerto Rico. Balzac v. People of Porto Rico, 258 U.S. 298, 309 (1922).
17. Id.
18. Id.
report information concerning Puerto Rico to the United Nations, in compliance with Article 73(e) of the United Nations Charter.\footnote{23} The General Assembly of the United Nations subsequently passed a resolution accepting the new U.S. position regarding its reporting requirements under the Charter.\footnote{24}

Before Puerto Rico officially became a commonwealth of the United States, it passed a law in 1929 abolishing capital punishment.\footnote{25} Puerto Rico thereafter enshrined the prohibition in its highest document, its Constitution, in 1952.\footnote{26} Although Congress had amended the Constitution of Puerto Rico before approving it and returning it for ratification by the citizens of Puerto Rico, it allowed the phrase “The death penalty shall not exist” to remain in the text of the Constitution.\footnote{27}

\footnote{23. See id.; the United Nations Charter art. 73 states:}

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government, recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: ... (e) to transmit regularly to the Secretary-General for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

U.N. CHARTER art. 73.


\footnote{25. 34 P.R. LAWS ANN. § 995 (1929).


\footnote{27. Malavet, supra note 5, at 33. According to Malavet:}}

The amendments provided: (1) that students in private schools were exempt from the compulsory public education requirement of Article II, section 5, of the Puerto Rico constitution; (2) that Article II, section 20, of the proposed Puerto Rico constitution — a declaration of Human Rights — should be eliminated; and (3) that Article VII, section 3, should have added to it language that essentially would require Congressional approval of amendments to the Puerto Rico constitution.

\textit{Id.}
The applicability of Federal legislation to Puerto Rico is governed by the Puerto Rico Federal Relations Act (PRFRA).\(^{28}\) As provided in Public Law 600, many provisions of the Jones Act of 1917 were repealed.\(^ {29}\) The remaining provisions remained in force as the PRFRA pursuant to the compact between Puerto Rico and the United States Congress.\(^ {30}\) Section 9 of the PRFRA states in pertinent part that “the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States.”\(^ {31}\)

Section 9 has engendered a vast amount of litigation with seemingly inconsistent results.\(^ {32}\) In *United States v. Quiñones*,\(^ {33}\) the first case in a line of challenges to the applicability of Title III of the Omnibus Crime Control and Safe Streets Act\(^ {34}\) (Omnibus Act) to the citizens of Puerto Rico, the First Circuit Court of Appeals upheld the applicability of the Omnibus Act to Puerto Rico.\(^ {35}\) In *Quiñones*, the defendant challenged on appeal the applicability of the Omnibus Act’s provision authorizing "a person acting under color of law to intercept a wire, oral or electronic communication"\(^ {36}\) between a government informant and a 

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30. Id.
33. *Quiñones*, 758 F.2d at 43 (defendant appealed his conviction of aiding and abetting in the possession of cocaine with intent to distribute. The court held that “[t]he Omnibus Crime Control Act is the controlling law for federal prosecutions in Puerto Rico” and that “[t]he evidence of the recorded telephone conversation was properly admitted.”).
35. *Quiñones*, 758 F.2d at 43.
criminal suspect. The court rejected Quiñones' argument that the Constitution of Puerto Rico should be viewed as a federal statute and that its prohibition against wiretapping should control “because it has the force of federal law.” The court concluded, instead, that the “intent behind the approval of the Puerto Rico Constitution was that the Constitution would operate to organize a local government and its adoption would in no way alter the applicability of United States laws and federal jurisdiction to Puerto Rico.”

The same issue of the applicability of Title III of the Omnibus Act to the citizens of Puerto Rico was revisited in subsequent cases. In *United States v. Gerena*, the court once again ruled that Title III of the Omnibus Act was not locally inapplicable to Puerto Rico. In the process, however, the court acknowledged that all federal law does not automatically apply to Puerto Rico. The court concluded that federal laws would be locally inapplicable to Puerto Rico in matters concerning purely local issues.

Finally, in 1989, the First Circuit revisited the issue, this time in a civil context. In *Camacho v. Autoridad de Telefonos de Puerto Rico*, the plaintiffs, some of the criminal defendants in the *Gerena* case, sued two corporations that had assisted federal authorities in wiretapping the plaintiffs’ telephone calls. In its decision, once again upholding the applicability of Title III of the Omnibus Act to Puerto Rico, the court nonetheless noted that the “prohibition of wiretapping is an integral and indispensable part of the definition of Puerto Ricans as a people and a cornerstone of cultural values.” The court then stated

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37. Quiñones, 758 F.2d at 40.
38. Id. at 41.
39. Id. at 43.
40. See generally Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482 (1st Cir. 1989) (civil case in which the court once again upheld the validity of the application of Title III to Puerto Rico); United States v. Gerena, 649 F. Supp. 1183 (D. Conn. 1986).
42. Id. at 1186–87.
43. Id. at 1187.
44. Camacho, 868 F.2d at 484.
that Puerto Rico’s Constitution should be viewed as the equivalent of a state statute and that in matters in which federal and state law conflict, federal law must govern.\textsuperscript{46}

In part, as a result of these court decisions construing Section 9 to allow for the application to Puerto Rico of federal statutes that conflict with the Commonwealth’s Constitution, federal prosecutors in Puerto Rico continue to seek the death penalty in cases arising mostly under the jurisdiction conferred to the federal courts by the Federal Death Penalty Act of 1994.\textsuperscript{47}

\section*{II. The Federal Death Penalty Act of 1994}

The Federal Death Penalty Act of 1994 (FDPA) was passed as part of the Violent Crime Control and Law Enforcement Act of 1993.\textsuperscript{48} For the first time since the Supreme Court’s decision in \textit{Furman v. Georgia},\textsuperscript{49} the national government created a new set of procedural rules for implementing the federal death penalty.\textsuperscript{50} Along with the new procedural guidelines, the FDPA also created new substantive crimes.\textsuperscript{51} It also attached the death penalty to crimes which previously did not include death as a possible penalty.\textsuperscript{52}

\subsection*{A. The New Procedural Guidelines of the FDPA}

1. Notice of Intention to Seek the Death Penalty

The FDPA leaves the decision of whether to seek the death penalty to the federal prosecutor’s discretion, based on the par-
ticular circumstances of each case.\textsuperscript{53} Once the determination that the death penalty is the appropriate punishment for a defendant is made, the government must provide the court and the defendant with notice that it intends to seek the death penalty.\textsuperscript{54} Such notice must be provided within a “reasonable” time before the beginning of the trial or before the court accepts a guilty plea.\textsuperscript{55} It must also include the aggravating factors that the prosecution will seek to prove in order to justify a death sentence.\textsuperscript{56} The District Court of Puerto Rico held in \textit{United States v. Colon-Miranda}\textsuperscript{57} that the prosecution did not file its notice of intent to seek the death penalty within a reasonable time, where such notice was filed less than a week before the trial was set to begin and the government had no justification for its delay.\textsuperscript{58} Furthermore, the court took into account the fact that the defendants would be prejudiced because they would be unable to prepare an effective defense.\textsuperscript{59}

2. The Sentencing Hearing

Once the government has filed its notice of intent to seek the death penalty and the defendant has been found guilty at trial of the capital crime(s) charged, the FDPA mandates a sentencing hearing.\textsuperscript{60} The sentencing hearing is to be conducted before the same jury that determined the defendant’s guilt or, under special circumstances, before a new jury.\textsuperscript{61} Ultimate discretion as to the convicted defendant’s sentence rests with the jury.\textsuperscript{62} At the sentencing hearing, the jury must make a threshold find-


\textsuperscript{54} See 18 U.S.C. § 3593(a).

\textsuperscript{55} Id.

\textsuperscript{56} 18 U.S.C. § 3593(a)(2).


\textsuperscript{58} Id. at 39.

\textsuperscript{59} Id.

\textsuperscript{60} See 18 U.S.C. § 3593(b).

\textsuperscript{61} Id.

\textsuperscript{62} See 18 U.S.C. § 3594 (2000). See also Ring v. Arizona, 536 U.S. 584, 609 (2002) (the Supreme Court held that the Sixth Amendment right to trial by jury precludes a sentencing judge, sitting without a jury, from finding an aggravating circumstance necessary for the imposition of the death penalty).
The jury must find that the defendant:

(A) intentionally killed the victim; or

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim; or

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a result of the act.\(^64\)

In addition to one of these four aggravating factors, the jury must also find at least one additional aggravating factor from among the lists of factors defined in section 3592 of the FDPA.\(^65\) The prosecution may only present evidence as to the aggravating factors for which it has given notice to the defendant.\(^66\) The government must select its aggravating factors from one of three lists, depending on the type of crime that was committed.\(^67\) The aggravating factors for the homicide offenses include sixteen factors, three for espionage or treason and eight for the drug-related offenses.\(^68\)

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64. 18 U.S.C. § 3591(a)(2).
66. 18 U.S.C. § 3593(c) (“T]he government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a).”).
68. Id. Some of the factors for the homicide offenses are: when death occurs during the commission of another crime, 18 U.S.C. § 3592(c)(1); grave risk of death to additional persons, 18 U.S.C. § 3592(c)(5); heinous, cruel, or depraved manner of committing offense, 18 U.S.C. § 3592(c)(6); and continuing criminal enterprise involving drug sales to minors, 18 U.S.C. § 3592(c)(13). Some of the factors for the drug-related offenses are: a previous serious drug felony conviction, 18 U.S.C. § 3592(d)(3); use of a firearm, 18 U.S.C. § 3592(d)(4); and distribution to persons under 21, 18 U.S.C. § 3592(d)(5). The three aggravating factors for espionage or treason are: (1) prior espionage or...
In addition to these statutorily-defined aggravating factors, the jury may also consider the existence of any other non-statutorily defined factors for which the government has given notice. At the hearing, the government has the burden of proving these aggravating factors beyond a reasonable doubt, to every juror. On the other hand, the burden of establishing the existence of any mitigating factors rests on the defense. Furthermore, such factors must be proved only by a preponderance of the evidence, rather than beyond a reasonable doubt.

Section 3593 of the FDPA also provides the procedural guidelines to be followed at the sentencing hearing. As during the trial, “the government shall open the argument[,] the defendant shall be permitted to reply [and] the government shall then be permitted to reply in rebuttal.” The rules applicable to the admissibility of evidence during trial do not apply to the sentencing hearing. The FDPA specifies that parties may pre-

treason offense; or (2) grave risk to national security; or (3) grave risk of death, 18 U.S.C. § 3592(b)(1)-(3). Id.


70. 18 U.S.C. § 3593(c).

71. Id. Carter and Kreitzberg define mitigation evidence as follows:

Offered in the penalty phase, evidence of mitigation provides reasons why the defendant should not be sentenced to death. Mitigating evidence comes in many varieties. For example, the defense might emphasize that the defendant played a minor role in the crime, the defendant had no prior criminal record, the defendant has lasting effects from an abusive childhood, the defendant has an underlying mental disorder, the youth of the defendant, the defendant is remorseful for the crime, or that the defendant can live peaceably in prison. As an element of the selection decision, mitigation allows for the individualized consideration of the defendant. The life and circumstances of each defendant are considered in deciding whether death or life is the appropriate sentence for a particular individual.

LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 137 (2004).

72. 18 U.S.C. § 3593(c).

73. Id.

74. Id.
sent any evidence that is relevant to the sentence, and that both parties will be given a fair opportunity to develop their arguments pertaining to any mitigating or aggravating factors. The guidelines also specify the exclusion of evidence if “its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.”

At the close of the sentencing hearing, the jury is required to weigh the aggravating and the mitigating factors. The jurors may impose a sentence of death, life imprisonment without parole, or another lesser sentence. If the jury opts for some other sentence, the FDPA authorizes the judge to sentence the defendant to some lesser sentence according to federal sentencing guidelines. The FDPA also requires that the death sentence determination be by unanimous vote of the jurors.

75. Id.
76. Id.
77. 18 U.S.C. § 3593(e). This section states:

[T]he jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.

Id. In this respect, the FDPA is a weighing statute, which, instead of preventing the imposition of the death penalty in the presence of a mitigating factor, allows the jurors to weigh the aggravating factors against the mitigating factors when deciding whether to impose a sentence of death. Charles C. Boetchter, Note, Testing the Federal Death Penalty Act of 1994, 18 USC §§ 3591-3598 (1994): United States v. Jones, 132 F.3d 232 (5th Cir. 1998), 29 TEX. TECH L. REV. 1043, 1072 (1998).

78. 18 U.S.C. § 3594.
79. Id. 18 U.S.C. § 3595 sets out the guidelines for appeal by a defendant sentenced to death. 18 U.S.C. § 3595 (2000). For a discussion of the process of appellate review, as well as a discussion of a fairly recent challenge to the FDPA, see generally Boetchter, supra note 77.

80. 18 U.S.C. § 3593(e) (“[T]he jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.”).
B. Crimes Subject to the Federal Death Penalty

The Federal Death Penalty Act is applicable to three categories of crimes. First, the FDPA creates entirely new federal offenses, such as murder by a federal prisoner and use of weapons of mass destruction. Second, the FDPA authorizes the death penalty for pre-existing federal offenses which were not previously punishable by death. Finally, the FDPA applies its

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81. Boettcher, supra note 77, at 1058 (“It has been said that the FDPA created over sixty new death eligible crimes. However, the FDPA did not create sixty death eligible crimes, but actually created only around twenty new death eligible crimes.”). Boettcher clarifies that while the FDPA did create a few federal crimes, its major effect was to make its procedural provisions applicable to existing federal offenses, making them eligible for a penalty of death. Id.

82. Little, supra note 7, at 391 n.237. Other newly-created federal offenses include:


Id.

83. Id. Some of these pre-existing offenses include:


Id. at 391 n.238.
procedural guidelines to crimes which were previously eligible for the death penalty but whose death penalty provisions had been invalidated by the decision in *Furman*.

These death penalty provisions had never been removed from the Code nor amended. The FDPA effectively brought them back to life.

III. A CHALLENGE TO THE APPLICATION OF THE FDPA TO PUERTO RICO: THE ACOSTA-MARTINEZ CASES

The applicability of the FDPA to the citizens of Puerto Rico was challenged by two federal defendants charged with capital murder under the FDPA. The District Court of Puerto Rico granted the defendants’ motion to strike the death penalty certification based on the fact that, *inter alia*, Congress did not make the FDPA explicitly applicable to Puerto Rico.

The First Circuit, however, reversed the District Court’s decision, and found that the statutes defining the substantive crimes the defendants were charged with explicitly applied to Puerto Rico.

While Judge Casellas of the District Court acknowledged in a footnote that “a germane issue would be whether customary international law forbids the application of capital punishment in Puerto Rico,” neither the District Court nor the Circuit Court considered whether the application of the federal death penalty to citizens of Puerto Rico violates any norm of regional customary law.


Approximately seventeen of these referenced crimes were already eligible for imposition of the death penalty prior to the enactment of the FDPA. The statutes which make these crimes eligible for death, appropriately referred to as “zombie statutes” because of their dormant nature after *Furman*, were effectively revived from their “Never-Never Land” by the FDPA...Although the FDPA did make some new crimes death eligible, its most impacting effect on federal death penalty jurisprudence is its codification of procedures for the imposition of the death penalty which comport with the constitutional requirements outlined by the Supreme Court.

Id.
85. *Id.*
86. See generally *Acosta Martinez I*, 106 F. Supp. 2d 311.
87. *Id.* at 318.
88. United States v. Acosta Martinez, 252 F.3d 13, 19 (1st Cir. 2001) [hereinafter *Acosta Martinez II*].
A. Background of the Acosta-Martinez Cases

On June 2, 1999 defendants Hector Oscar Acosta-Martinez and Joel Rivera-Alejandro were charged with firearm murder in relation to a crime of violence and killing a person in retaliation for providing law enforcement officials with information relating to the possible commission of a federal offense, both punishable by death under the FDPA. Subsequent to the U.S. Attorney General’s authorization on January 24, 2000, the United States Attorney for the District of Puerto Rico filed the notice that the office intended to seek the death penalty in the event of a conviction.

On May 17, 2000 the defendants filed a motion to declare the federal death penalty inapplicable in Puerto Rico. The defendants argued, among other things, that the federal death penalty is “locally inapplicable” to Puerto Rico under Section 9 of the PRFRA due to the Puerto Rico Constitution’s explicit ban on capital punishment. The defendants also argued that applying the federal death penalty to citizens of Puerto Rico would be unfair due to their lack of representation in enacting federal law and thus, their lack of consent to this law in particular.

B. The District Court of Puerto Rico Decision in Acosta-Martinez

On July 17, 2000 District Court Judge Casellas granted Acosta-Martinez and Rivera-Alejandro’s motion to strike the death penalty certification. The district court based its decision on the defendants’ arguments that the federal death penalty is inapplicable in Puerto Rico under Section 9 of the PRFRA due to the Puerto Rico Constitution’s explicit ban on capital punishment. The court also rejected the defendants’ fourth argument that applying the federal death penalty to Puerto Rico violated Article X of the Treaty of Paris, which guaranteed the inhabitants of Puerto Rico the freedom to exercise their religion.
sion on two grounds. First, the court cited the First Circuit Court of Appeals’ decision in *United States v. Quiñones*. However, the district court distinguished that case based on “two important elements.” The first element was “the fundamental principle that death is different.” The court, quoting from the Supreme Court’s decision in *Furman v. Georgia*, emphasized the uniqueness of the death penalty in its “irrevocability,” its “rejection of rehabilitation of the convict as a basic purpose of criminal justice,” and its “absolute renunciation of all that is embodied in our concept of humanity.” The court distinguished the case before it from *Quiñones* on the ground that death is fundamentally and qualitatively different from any other type of punishment. As such, the court held that the administration of the death penalty requires a higher degree of fairness, consistency, and reliability.

Second, the court considered the language of the Federal Death Penalty Act and Congressional intent with regard to its applicability to Puerto Rico. It stated that, while the Omnibus Act at issue in *Quiñones* specifically extends to Puerto Rico, the FDPA does not. The court noted that while the Omnibus Act expressly mentions the Commonwealth of Puerto Rico in its definition of “state” for purposes of that act, the FDPA merely mentions Puerto Rico to include it “in a geographical sense” in the definition of “United States” for certain maritime offenses only. The court reasoned:

> However, on a matter as unique and extreme as the death penalty, the mention of Puerto Rico exclusively in the context

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97. See discussion *supra* Part I.
99. Id.
101. *Acosta Martinez I*, 106 F. Supp. 2d at 318 (citing *Furman*, 408 U.S. at 306 (Stewart, J., concurring)).
102. Id.
103. Id.
104. Id.
107. Id. at 319.
of these maritime offenses, cannot reasonably be taken as Congress’s manifest intention that the FDPA not fall within the “not locally inapplicable” provision set forth in section 9, particularly in view of the Commonwealth Constitution’s prohibition against capital punishment. The extraordinary nature of capital punishment requires a higher degree of clarity and precision. Reason and common sense dictate that had Congress intended to apply the death penalty in the Commonwealth, it would have done so by the plain declaration, and would not have left it to mere inference.  

The court then went on to discuss the context in which the Commonwealth drafted and the U.S. Congress approved the Puerto Rican Constitution. The court noted that the Framers, in enshrining Puerto Rico’s prohibition of the death penalty in its highest document, were acting on the Puerto Rican people’s “firm cultural, moral and religious convictions.” Judge Casellas also noted that Congress conditioned its approval of the constitution on several amendments, and that Congress had not required the elimination of Puerto Rico’s ban on the death penalty embodied in Article 2, Section 7. Therefore, Puerto Rican citizens’ expectations that the death penalty would not exist under the Puerto Rico-United States compact were reasonable.

The court summarized its finding that the FDPA is inapplicable to Puerto Rico in five short points: (1) Commonwealth status was established in Puerto Rico in order to promote and develop self-government and enhance Puerto Rico’s autonomy; (2) by accepting Public Law 600, the people of Puerto Rico ac-

108. Id.
109. Id. at 319–20.
110. Id. at 320.
111. Id. at 320–21; Malavet, supra note 5, at 33. Malavet states:

The amendments provided: (1) that students in private schools were exempt from the compulsory public education requirement of Article II, section 5, of the Puerto Rico constitution; (2) that Article II, section 20, of the proposed Puerto Rico constitution – a declaration of Human Rights – should be eliminated; and (3) that Article VII, section 3, should have added to it language that essentially would require Congressional approval of amendments to the Puerto Rico constitution.

Id.
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cepted Section 9 of the PRFRA which makes clear that federal law that is not locally inapplicable, applies to Puerto Rico; (3) the Commonwealth’s Constitution explicitly prohibits the death penalty in Puerto Rico; (4) the culture, values and traditions of the Puerto Rican people all reject the death penalty; and (5) Congress did not explicitly extend the FDPA to Puerto Rico.  

The district court went on to state that even if Congress explicitly declared its intent to make the FDPA applicable to Puerto Rico, such application “would not comport with the exigencies of substantive due process.” The court then discussed in detail the history of the adoption of the Commonwealth Constitution as embodying the principle of government by consent. The court explained that, for the first time, through the compact and through Section 9 of the PRFRA, the Puerto Rican people agreed to be governed by federal laws that were not locally inapplicable even though they did not have any participation in their enactment.

In the case of Puerto Rican federal relations, the court said that the principle of government by consent is eroding because of the “widening sphere of federal authority, which has ex-

113. Id.
114. Id. at 321–22.
115. Id. at 322. The court also remarked that the FDPA expressly acknowledges the principle of government by consent by establishing special provisions for Indian Country:

No person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country…and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction.

Id. at 325 (citing 18 U.S.C. § 3598 (2000) (emphasis in original)).

116. Id. at 322. The Court pointed out that:

Puerto Ricans residing in Puerto Rico do not vote for the President of the United States, nor do they elect senators or representatives to the United States Congress, except for a non-voting Resident Commissioner for Puerto Rico who sits in the House of Representatives. The Resident Commissioner can vote in the Congressional committees to which he is assigned, see Rules of the House of Representatives, Rule XII, but he cannot cast a final vote on legislation proposed in the House.

Id. at 322 n.37.
panded without local participation, and the concomitant reduction in the sphere of commonwealth authority.” The court then differentiated between applying, on the basis of the “generic consent” given in Section 9 of the PRFRA, federal laws aimed at furthering the common good and a federal law which allows for the “deprivation of life.” The court held that the latter application is unreasonable, unfair, directly cuts against the principle of government by consent, violates the substantive due process rights of the American citizens of Puerto Rico, and “constitutes a violation of the fundamental rights to liberty and life of the American citizens of Puerto Rico. The court ultimately granted the defendants’ motion to strike the death penalty certification and the prosecution appealed that decision to the Court of Appeals for the First Circuit.

C. The First Circuit’s Decision in Acosta-Martinez

After holding that it had appellate jurisdiction to hear the case before it, the First Circuit Court of Appeals considered the issue of whether Congress intended the federal death penalty to apply to Puerto Rico. The Court of Appeals found that the district court erred in focusing on the language of the FDPA rather than on the language of the substantive statutes which define the crimes with which the defendants were charged.

117. Id. at 324.
120. Id. at 325.
121. Id. at 326 (emphasis in original).
122. Acosta Martinez II, 252 F.3d at 16–17. The court held that it had jurisdiction to review the district court’s order under the Criminal Appeals Act, 18 U.S.C. § 3731. Id. According to the court of appeals, the district court had, by striking a statutorily authorized penalty, “effectively dismissed a significant portion of the counts against the defendants.” Id. at 17. The court also noted that the district court’s order affected more than merely the sentence; it materially affected the conduct of trial. Id. The court also concluded that the case before it also fell under its mandamus jurisdiction. Id.
123. Id. at 15.
124. Id. at 19. The court stated that while it accepted “the strength of Puerto Rico’s interest and its moral and cultural sentiment against the death
The FDPA, the court said, does not provide for the death penalty in and of itself. Instead, it merely provides a set of procedural rules to be followed before capital punishment is imposed. As the source of the penalty, the court instead looked to the substantive statutes which define the crimes and their punishments.

The court first looked at the language of 18 U.S.C. §924(j) under which the defendants were charged with firearm murder in relation to a crime of violence, then at 18 U.S.C. §1515(a)(1)(B), the basis for the defendant’s retaliatory killing charge. The court noted that both provisions punish those crimes with penalties that include the death penalty and that both crimes “and the consequent penalties are explicitly made applicable to Puerto Rico.” The court cited 18 U.S.C. §921 as evidence that the firearms murder offense is explicitly applicable to Puerto Rico and cited 18 U.S.C. §1513(d) to show that “the retaliatory killing offense applies not only within the United States, but also explicitly has “extraterritorial reach.” Additionally, the court stated that the federal criminal code itself is explicitly made applicable to Puerto Rico because the territorial penalty; the legal issue for the court is still one of what Congress intended.”

Id. 125. Id. 126. Id. 127. Id. 128. Id.

129. Acosta Martinez II, 252 F.3d at 19. 130. Id. 18 U.S.C. § 921(a)(2) states:

The term “interstate or foreign commerce” includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term “state” includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

definition of United States, for the purposes of the criminal codes, expressly includes Puerto Rico.\textsuperscript{133} The court further stated that the fact that Congress included Puerto Rico in its definition of state in the new maritime offenses it enacted along with the FDPA is also indicative of Congressional “intent to apply the death penalty in the statutes which define the crime and penalty and not in a procedural statute.”\textsuperscript{134} As the constitutions of the fifty states only govern proceedings in state courts, so, too, the Constitution of Puerto Rico only governs matters in the Commonwealth courts. Accordingly, the court concluded that Congress intended that the federal death penalty apply to federal criminal prosecutions in Puerto Rico.\textsuperscript{135}

The court then turned to the district court’s constitutional determination that the application of the federal death penalty to U.S. citizens who reside in Puerto Rico violated defendants’ substantive due process rights.\textsuperscript{136} The court claimed that the “shocking to the conscience test”\textsuperscript{137} used to test executive action was not met in this case.\textsuperscript{138} The court cited a string of cases which held federal law applicable to Puerto Rico and then stated that “it cannot shock the conscience of the court to apply to Puerto Rico, as intended by Congress, a federal penalty for a federal crime which Congress has applied to the fifty states.”\textsuperscript{139} The court went on to say that with the power to apply federal criminal laws to Puerto Rico comes the power to attach penal-

\begin{itemize}
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id. at 20.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} Id. at 21. The Court in \textit{Furman} explained that:
    
    In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless it shocks the conscience and sense of justice of the people... [W]hether or not a punishment is cruel and unusual depends, not on whether its mere mention shocks the conscience and sense of justice of the people, but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.
    
    \textit{Furman}, 408 U.S. at 360–61.
  \item \textsuperscript{138} \textit{Acosta Martinez II}, 252 F.3d at 21.
  \item \textsuperscript{139} Id.
\end{itemize}
ties to them. The court also found that it would be anomalous to grant U.S. citizenship to the people of Puerto Rico without affording them the protection of the federal criminal laws.

IV. THE APPLICATION OF THE FDPA TO PUERTO RICO AS A VIOLATION OF REGIONAL CUSTOMARY LAW

While there are differing views as to whether abolition of the death penalty has become a norm of customary international law, there is ample evidence to suggest that it has at the least become a norm of regional customary law in the Latin American region. Latin American countries have been at the forefront of the movement towards universal abolition of the death penalty, and the evidence strongly suggests that these countries have engaged in the practice of abolition with the opinio juris necessary for the development of a norm of regional customary law. On this basis, the application of the Federal Death Penalty to citizens of Puerto Rico clearly violates regional customary law.

A. Customary International Law in Brief

The Restatement Third of Foreign Relations Law § 102 defines a rule of international law as one “that has been accepted as such by the international community of states (a) in the form of customary international law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.” The Restatement further exp-

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140. Id. at 20.
141. Id. at 21.
143. See discussion infra Part IV.A.
144. Schabas, supra note 142, at 311.
145. See definition of opinio juris infra Part IV.A.
146. See discussion infra Part IV.B.
147. See generally Clive Parry, The Sources and Evidence of International Law (1965).
148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1) (1987). See also Article 38(1) of the Statute of the International Court of Justice which provides:
plains that a binding rule of customary international law results from the consistent general practice of states,149 followed out of a sense of legal obligation.150

The comments to Section 102 of the Restatement note that state practice may take numerous forms, and that there is no requisite duration for such practice as long as it is “general and consistent.”151 Different forms of state practice include “diplomatic contacts and correspondence; public statements of government officials; legislative and executive acts; military manuals and actions by military commanders; treaties and executive agreements; decisions of international and national courts and tribunals; and decisions, declarations, and resolutions of international organizations, among many others.”152

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.


149. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987). The word “state” in the context of international law has been defined as follows:

As stated in the 1933 Convention on the Rights and Duties of States (the Montevideo Convention), concluded among 16 states in the Western hemisphere, “[t]he state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; d) capacity to enter into relations with other states.

INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 109 (Jeffrey L. Dunoff et al. eds. 2002).

150. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

151. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. b (1987).

See also INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, supra note 149, at 74.

152. INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, supra note 149, at 74 (“State practice also includes inaction, at least in circumstances in which a state’s failure to object to actions by another state may imply acquiescence in those actions.”).
State practice alone does not constitute customary international law. In order for a state practice to become a rule of customary international law, states that engage in the practice must do so out of a sense of legal obligation which is referred to as *opinio juris sive necessitatis* or simply *opinio juris*. Since states usually do not refer to international law when acting, it is necessary to infer the *opinio juris* from the circumstances and the nature of the state practice itself.

Finally, there are circumstances, such as those which exist with relation to the death penalty in the Latin American region, in which the practice of states within a regional or other special grouping can result in the existence of “special,” “regional” or “particular customary law” for those states.

B. The Abolition of the Death Penalty as a Norm of Regional Customary Law in the Latin American Region

The abolition of the death penalty has become a general and consistent practice among Latin American states. Some Latin

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153. *Id.* at 75.
155. *International Law: Norms, Actors, Process*, supra note 149, at 75. “It is often difficult to determine when the transformation into law has taken place. Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; opinio juris may be inferred from acts or omissions.” *Restatement (Third) of Foreign Relations Law* § 102, cmt. c (1987).
157. There are differing views as to whether the abolition of the death penalty has become a norm of customary international law. For an overview of the current status of abolition in international law and for the view that the abolition of the death penalty has yet to reach the level of customary international law, see generally *Scharas*, supra note 142. *See also* Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. Tex. L. Rev. 1115, 1147 (2002). Bishop states:

While 111 countries have abolished capital punishment de jure or de facto, it is still too soon to claim that the use of the death penalty in general is prohibited by customary international law. There are still large regions of the world where the death penalty is widely used even for the most minor offenses.

*Id.* For the argument that abolition of the death penalty is a norm of customary law and that the United States’ use of the death penalty violates that law, see Michelle McKee, *supra* note 142.
American states abolished the death penalty as early as the nineteenth century and early twentieth century. In fact, Latin American states such as Uruguay and Venezuela have played a crucial role within the United Nations by advocating for the abolition of the death penalty. Many Latin American countries’ constitutions either limit the scope of the death penalty or abolish it completely. According to a study by Roger Hood, “the hundred year tradition of abolition in South America now holds sway over almost all of the region.”

1. The American Convention on Human Rights

Drawing on the United Nations’ Universal Declaration of Human Rights and the European Convention on Human Rights, the Organization of American States adopted the

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158. See Parts IV.B.1 and IV.B.2 infra for a discussion of relevant state actions which amount to general practice under customary international law.  
159. SCHABAS, supra note 142, at 311. Venezuela abolished the death penalty in 1863, Costa Rica in 1877, Brazil in 1882, Panama in 1903, Ecuador in 1906, Uruguay in 1907 and Colombia in 1910. Id.  
160. Id.  
161. Id. The language of some of these countries’ constitutions is as follows:  

Colombia (1886), art. 29: “The legislature may not impose capital punishment in any case;” Costa Rica (1871), art. 45: “Human life is inviolable in Costa Rica;” Ecuador (1946), art. 187: “The state shall guarantee to the inhabitants of Ecuador: (1) the sanctity of human life: there shall be no death penalty;” Panama (1946), art. 30: “There is no penalty of death, expatriation, or confiscation of property;” Uruguay (1934), art. 25: “The penalty of death shall not be inflicted on any person.”  

Id. at n.3.  
American Declaration of the Rights and Duties of Man\textsuperscript{166} in 1948, followed by the American Convention on Human Rights\textsuperscript{167} in the late 1960's.\textsuperscript{168} In all, through Article 4 of the American Convention, international law prohibits sixteen Central and South American states from imposing the death penalty.\textsuperscript{169} Inspired by the above-mentioned documents, Article 4 states:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.\textsuperscript{170}

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be

\textsuperscript{168} SCHABAS, supra note 142, at 312.
\textsuperscript{169} Id. at 353.
\textsuperscript{170} For the argument that the United States is in breach of international law, see Rachel J. Avery, “Killing Kids Who Kill” – An International Perspective on the Juvenile Death Penalty, 7 UCLA J. INT’L L. & FOREIGN AFF. 303 (2002-2003). The Supreme Court recently held that the execution of juveniles is unconstitutional. See generally Roper v. Simmons, 125 S. Ct. 1183 (2005) (holding execution of juveniles unconstitutional).
imposed while such a petition is pending decision by the competent authority.¹⁷¹

Although inspired by previously adopted international instruments,¹⁷² the American Declaration’s standards on the death penalty are much more radical than those of its predecessors.¹⁷³ In fact, the drafters of the Convention were the first to promote the idea of implementing an additional protocol that would altogether abolish the death penalty in the region.¹⁷⁴

2. The Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty

In 1990, the Inter-American human rights system of the Organization of American States adopted and later gave effect to the Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty.¹⁷⁵ The Protocol states in part:

The State Parties to this Protocol

Considering:

That Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty;

That everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason;

¹⁷¹ American Convention on Human Rights, supra note 167, at art. 4.
¹⁷² The Universal Declaration of Human Rights merely states: “Everyone has the right to life, liberty and the security of person.” Universal Declaration of Human Rights, supra note 164, at art. 3. Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 165.
¹⁷³ Schabas, supra note 142, at 350 (“By the inclusion of Article 4 § 3, the Convention is in fact abolitionist for those State parties – and they are the majority in the Organization of American States – that have abolished the death penalty in their internal legislation.”).
¹⁷⁴ Id.
That the tendency among the American States is to be in favour of abolition of the death penalty;

... That an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights; and That States Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas.

... Article 1

The State parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction. 176

The Protocol does not allow for reservations, 177 except to reserve the right to apply the death penalty in wartime. 178 The six countries that signed the protocol at adoption are Costa Rica, Ecuador, Nicaragua, Panama, Uruguay and Venezuela. 179 To date, nine states have ratified the Protocol; the United States clearly not one of them. 180

176. Id.
177. In the case where one or more states refuses to accept all of a treaty's provisions while still wishing to become a party to a multilateral treaty, the state "may seek to enter a reservation to the treaty to limit or exclude the application of one or more of the treaty's terms to the reserving state, provided that the treaty does not expressly prohibit the reservation at issue." INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, supra note 149, at 65.
178. Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, supra note 175, at art. 2(1).
3. The Requisite *Opinio Juris*

While the international agreements discussed above are dispositive evidence of a general and consistent practice of abolition of the death penalty among Latin American states, their widespread acceptance by Latin American countries is also evidence that these states have acted with the requisite *opinio juris* necessary for the creation of a norm of customary law. The mere fact that there remains only one Latin American country, Guatemala, which continues to employ the death penalty,\(^\text{181}\) is strong evidence that those states that have abolished the death penalty have done so out of a sense of legal obligation.

The *opinio juris* for the abolition of the death penalty in Latin America can also be inferred from some of the language used in reservations to the treaties and in the language of the treaties themselves.\(^\text{182}\) In its reservation to the American Convention on Human Rights, the Dominican Republic stated that “[t]he Dominican Republic, upon signing the American Convention on Human Rights, aspires that the principle pertaining to the abolition of the death penalty shall become purely and simply that, with general application throughout the states of the American Region.”\(^\text{183}\) It can be inferred from this language that the Dominican Republic, in signing onto the Convention, did so out of a sense of legal obligation and that it expected other countries in the American Region to subscribe to the principle now codified in the Convention that the death penalty ought to be abolished.

Furthermore, the language in the preamble of the Additional Protocol is also evidence of the necessary *opinio juris*. It can be inferred from the statement that the “State Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas”\(^\text{184}\) that the signatories were acting out of a sense

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\(^\text{181}\) See McKee, *supra* note 142, at 159 (“It is also important to realize that among North America, South America, Central America and Western Europe; the United States, Guyana, Guatemala and Belize are the only non-conformist nations.”).

\(^\text{182}\) *International Law: Norms, Actors, Process*, *supra* note 149, at 75.

\(^\text{183}\) *Schabas*, *supra* note 142, at 436–37.

\(^\text{184}\) Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *supra* note 175 (emphasis added).
of legal obligation and with the goal of codifying a practice that was already in existence among them.

4. The United States Violates Regional Customary Law by Imposing the Death Penalty on the Citizens of Puerto Rico

In 1953, in response to the United States Memorandum to the United Nations concerning the Cessation of Transmission of Information regarding Puerto Rico, the United Nations’ General Assembly passed Resolution 748. The resolution stated, in pertinent part, “that the agreement reached by the United States of America and the Commonwealth of Puerto Rico, in forming a political association which respects the individuality and the cultural characteristics of Puerto Rico, maintains the spiritual bonds between Puerto Rico and Latin America and constitutes a link in continental solidarity.”

This resolution evidences the importance that the international community places on the development of regional systems and on the incorporation into those systems of countries with similar cultures and beliefs. The almost unanimous abolition of the death penalty in the Latin American region is a result of those countries’ moral, cultural, and religious respect for human life. As discussed supra, in incorporating the abolition of the death penalty into the Commonwealth’s Constitution, the Framers “were acting upon the people of Puerto Rico’s firm cultural, moral and religious conviction against the death penalty.”

By imposing the federal death penalty on the citizens of Puerto Rico, the United States has acted and continues to act in opposition to General Assembly Resolution 748. The United States continues to disregard the “individuality and cultural characteristics” that led Puerto Rico to definitively abolish the death penalty in its Constitution. Furthermore, and most im-

185. See Memorandum Concerning Transmission of Information, supra note 21. See also Malavet, supra note 5.
186. Cessation of the transmission of information under Article 73(e) of the Charter in respect of Puerto Rico, supra note 24.
188. Acosta Martinez I, 106 F. Supp. 2d at 311.
189. Cessation of the transmission of information under Article 73 (e) of the Charter in respect of Puerto Rico, supra note 24.
190. Id.
portantly for the purposes of the present discussion, the United States is ignoring the “spiritual bond”\textsuperscript{191} or “link in continental solidarity”\textsuperscript{192} which exists between Puerto Rico and the rest of the Latin American region. By continuously seeking the death penalty against citizens of Puerto Rico, the United States is violating the norm of regional customary law that has developed in the Latin American region, which upholds respect for the right to life and prohibits imposition of the death penalty.\textsuperscript{193}

CONCLUSION

The Constitution of the Commonwealth of Puerto Rico states: “[s]e reconoce como derecho fundamental del ser humano el derecho a la vida, a la libertad, y al disfrute de la propiedad. No existirá la pena de muerte. Ninguna persona será privada de su libertad, o propiedad, sin el debido proceso de ley, ni se negará a persona alguna en Puerto Rico igual protección de las leyes.”\textsuperscript{194}

The Constitution of the Commonwealth of Puerto Rico, like so many of the constitutions of other Latin American countries,\textsuperscript{195} clearly and explicitly prohibits the imposition of the death penalty on its citizens. In fact, as recently as 1991, the people of Puerto Rico once again expressed their abhorrence for the death penalty when they voted against a proposed constitutional amendment that would have changed § 7 of the Puerto Rico Constitution to allow for the death penalty in cases of repeat first degree murder and multiple murders committed during the same act.\textsuperscript{196} The rejection of the constitutional amendment by the people of Puerto Rico shows that Puerto Rico’s long-

\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} See discussion supra Parts IV.B.1 and IV.B.2.
\textsuperscript{194} P.R. CONST. art. II, § 7 (“Recognizing the fundamental rights to life, liberty and property. The death penalty shall not exist. No person shall be deprived of liberty or property without due process of law, nor shall any person in Puerto Rico be denied equal protection of the laws.”) (emphasis added).
\textsuperscript{195} See discussion supra Part IV.B.
\textsuperscript{196} Juan Alberto Soto Gonzalez & Juan Carlos Rivera Rodriguez, La Pena de Muerte, Una Batalla entre una Ley Federal y la Constitución de Puerto Rico, 41 REV. DER. P.R. 253, 257–58 (2002) (Title translates as “The Death Penalty, A Battle between a Federal Law and the Constitution of Puerto Rico”).
standing sentiments against capital punishment remain very strong even in modern times.

While the new procedural and sentencing guidelines introduced by the Federal Death Penalty Act of 1994 effectively cure many of the constitutional problems denounced by the Supreme Court in *Furman v. Georgia*, they continue to defy and violate the will of the people of Puerto Rico as well as the norm of customary law developed in the Latin American Region. The Supreme Court of the United States has yet to address the issue of the applicability of the FDPA to citizens of Puerto Rico, but will have to eventually, as the Department of Justice continues to seek the death penalty in a large number of federal prosecutions in Puerto Rico.

The Supreme Court, like the District Court of Puerto Rico and the First Circuit Court of Appeals, is likely to focus on domestic issues of applicability of federal legislation to Puerto Rico. However, in order to comply with regional customary law, either Congress or the Court itself will have to address the issue and declare the Federal Death Penalty Act inapplicable to Puerto Rico as a violation of regional customary law.

*Monique Marie Gallien*

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197. See discussion supra Part II.
198. See discussion supra Part IV.
200. Little, *supra* note 7, at 357 n.36 (“The Puerto Rico U.S. Attorney’s office has submitted the largest number of potential death penalty cases (59) of any of the 94 federal districts since the Capital Case Review protocol was issued in 1995.”).
201. See discussion of Acosta Martinez cases *supra* Part III.

* B.A., CUNY Queens College (2002); J.D. Brooklyn Law School (expected 2005). I would first and foremost like to thank my parents, Evelyn and Jean-Pierre Gallien, and my sister, Eveliza Jimenez, for their unending love and support throughout my life. Thank you for always believing in me, I love you. Thank you to the staff of the *Brooklyn Journal of International Law*. I would also like to thank Queens College Associate Professor Dr. Michael A. Krasner for sparking my interest in political science, and ultimately in the law. Finally, I am grateful to Professor Ursula Bentele, Director of the Capital Defender and Federal Habeas Clinic at Brooklyn Law School, for all her guidance and inspiration in defending those facing the ultimate punishment.
CONFLICTING INTERESTS & CONFLICTING LAWS: RE-ALIGNING THE PURPOSE AND PRACTICE OF RESEARCH ETHICS COMMITTEES

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I. INTRODUCTION

In the early 1980s, that feeling of utter despair [felt by women diagnosed with aggressive breast cancer] started to change as women and their families began hearing of a new treatment that held out some hope.... Unfortunately, those stories of success quickly turned into a misleading bandwagon of enthusiasm. Sometimes fueled by greed and even fraud. Tragically, thousands of women were railroaded into making uninformed decisions.¹

Interest in high dose chemotherapy (HDC)² was already strong when Dr. Werner Bezwoda published research results supporting the procedure in 1995.³ In a 1996 publication, Dr. Bezwoda touted his research as proof that HDC was superior to conventional treatments for metastatic breast cancer.⁴ Influenced by Dr. Bezwoda’s claims, and despite the fact that other research had shown no benefit for women undergoing HDC, as many as 6,000 women a year paid between $100,000 and $200,000 apiece to undergo the procedure.⁵ HDC had become big business, providing a substantial profit margin to physicians and hospitals performing the procedure.⁶ No one wanted to question the benefits of HDC; it provided hope...and money.⁷

1. 20/20 Friday: A Betrayal of Hope; Breast Cancer Patients Urged to Have Bone Marrow Transplants for Money Rather Than Better Health (ABC television broadcast, Apr. 14, 2001) (statement made by reporter Dr. Timothy Johnson).
2. HDC treatment requires that patients have bone marrow stem cells removed from their body and stored prior to receiving extremely high doses of chemotherapy. National Women’s Health Network, High-Dose Chemotherapy Debacle Highlights Systemic Weaknesses, 25 NETWORK NEWS 3 (2000). If the patient survives the chemotherapy regimen, the stem cells are then transplanted back into her body in an effort to restore the bone marrow that was destroyed by the chemotherapy. Id.
7. Id. See also National Women’s Health Network, supra note 2, at 3; 20/20 Friday, supra note 1 (“Doctors knew that high dose had not been defini-
Dr. Bezwoda repeated his claims again before an international conference of cancer experts in 1999.\textsuperscript{8} That is when Dr. Bezwoda’s claims about HDC, and his reputation as a prestigious cancer researcher, began to fall apart.\textsuperscript{9} In an effort to discover why the doctor’s results were so different from other research projects, several researchers asked to review Dr. Bezwoda’s clinical trial data.\textsuperscript{10} In doing so, they discovered that much of the data used to support HDC’s effectiveness was non-existent or had been falsified.\textsuperscript{11} In a 2000 letter to his former employer, the doctor claimed that he had faked his research results “in a foolish desire to make the presentation more acceptable.”\textsuperscript{12}

Ensuring the integrity of research projects is an increasingly prominent topic in the field of medicine.\textsuperscript{13} In the last few decades, the number of medical research projects has increased exponentially.\textsuperscript{14} Paralleling this increase is an expansion in the geographic locations where research projects are situated, including many new research projects conducted at international locations.\textsuperscript{15} The global expansion of medical research has

\footnotesize{\textsuperscript{8} Denise Grady, \textit{Conference Divided Over High-Dose Breast Cancer Treatment}, N.Y. TIMES, May 18, 1999, at A19.\textsuperscript{9} Id. At the conference, all of the research presented on HDC, except Dr. Bezwoda’s, showed that the procedure had no benefit for patients. \textit{Id.} As a result of this discrepancy, researchers from the United States traveled to South Africa (where Bezwoda worked at the University of Witwatersrand Medical School) to review the doctor’s research data. Michael Hagmann, \textit{Cancer Researcher Sacked for Alleged Fraud}, 287 SCIENCE 1901, 1901 (2000). Bezwoda was fired by the University shortly thereafter. \textit{Id.}\textsuperscript{10} Hagmann, supra note 9, at 1901\textsuperscript{11} Id.; Maugh & Mestel, supra note 3.\textsuperscript{12} South Africa: Cancer Professor Was A Serial Fraud, AFRICA NEWS, May 4, 2001. For a further discussion of the implications of Dr. Bezwoda’s scientific misconduct, see Richard Horton, \textit{After Bezwoda}, 355 LANCET 942, 942–43 (2000). \textsuperscript{13} See, e.g., Chris Beyrer & Nancy E. Kass, \textit{Human Rights, Politics and Reviews of Research Ethics}, 360 LANCET 246, 246 (2002).\textsuperscript{14} See, e.g., Eve E. Slater, \textit{IRB Reform}, 346 NEW ENG. J. MED. 1402 (2002). Federal funding of medical research has more than doubled since 1995; private sponsorship of research has increase at the same rate. \textit{Id.}\textsuperscript{15} See generally Timothy Caulfield, \textit{Globalization, Conflicts of Interest and Clinical Research: An Overview of Trends and Issues}, 8 WIDENER L. SYMP. J. 31 (2001) (discussing general trends related to the globalization of clinical research and conflicts of interest).}
prompted many new questions about how to ensure the safety of human research subjects during clinical trials. Concerns involving clinical trials in the United States and abroad focus on five major areas: appropriateness of research designs; proper scientific and ethical review of research proposals; reasonableness of participant selection; assurance that voluntary informed consent was obtained from all research participants; and receipt of appropriate treatment during and after a clinical trial. Debate over the elements of these five topics is likely to

16. NATIONAL BIOETHICS ADVISORY COMMISSION, ETHICAL AND POLICY ISSUES IN INTERNATIONAL RESEARCH: CLINICAL TRIALS IN DEVELOPING COUNTRIES, at i (2001) [hereinafter NBAC INTERNATIONAL RESEARCH].

17. For the purposes of this Note, a “clinical trial” is defined as the administration of an intervention for diagnosis, treatment, or prevention:

The intervention could be a drug or biologic; a device; a behavioral intervention, such as counseling or education; a procedure, such as surgery, laser treatment, or a diagnostic test; or a specific service, such as home or hospice care. A clinical trial can be designed and supported for commercial reasons, such as approval of a new drug, or in response to interest by an individual investigator or research group.

INSTITUTE OF MEDICINE, RESPONSIBLE RESEARCH: A SYSTEMS APPROACH TO PROTECTING RESEARCH PARTICIPANTS 34 (2002). See also infra Part II.A.

18. Research design includes a complete description of types or levels of treatment that will be provided to clinical trial participants and how the new treatment will be compared to existing treatment, if any exists. INSTITUTE OF MEDICINE, supra note 17, at 8–9.

19. Ethical review is conducted by a committee whose purpose is to evaluate whether the proposed research is ethical according to ethical guidelines for medical research. Id. at 13.

20. This concern relates to whether the choice to conduct a clinical trial within a particular country or population group is reasonably related to the population’s health needs. Id. at 7–8.


22. Concern that cultural issues can impede a participant’s understanding of the clinical trial and the risks involved in becoming a participant. NBAC INTERNATIONAL RESEARCH, supra note 16, at 11.

23. Id. at 9, 12.
continue, particularly in light of ever-increasing research budgets and expansion of research into developing countries.24

A vital component of good medical research is analysis of research protocols, by an independent review body, for potential ethics violations.25 In the United States, most research projects that involve human participants must be submitted to ethics review committees, called Institutional Review Boards (IRBs), for approval.26 Internationally, many nations have their own regulations providing for ethical review of medical experiments through agencies and/or committees or groups generally referred to as Research Ethics Committees (RECs).27 IRBs and RECs are charged with approving or denying research protocols based upon whether the proposed research is scientifically valid and whether there are adequate protections to ensure the safety and well-being of participants.28

Despite their status as the gatekeepers in the conduct of clinical trials, RECs and IRBs lack uniformity nationally and

24. See, e.g., Trudo Lemmens & Paul B. Miller, The Human Subject Trade: Ethical and Legal Issues Surrounding Recruitment Incentives, 31 J.L. MED. & ETHICS 398, 401 (2003) (payment of finders fees to physicians for obtaining research participants for commercial trials may drive physicians to recruit inappropriate subjects and to be lenient with informed consent procedures); Ruqaiijah Yearby, Good Enough to Use for Research, But Not Good Enough to Benefit from the Results of that Research: Are the Clinical HIV Vaccine Trials in Africa Unjust?, 53 DEPAUL L. REV. 1127 (2004) (selection of research participants in Africa unjust and unethical because African populations, individual African research participants in particular, do not receive the benefits of therapies they helped to test); Jeremy Sugarman, Lying, Cheating and Stealing in Clinical Research, 1 CLINICAL TRIALS 475, 475–76 (2004) (discussing the considerable attention focused on the integrity of clinical research and need for clear guidance and transparency in situations involving scientific misconduct).


27. See Robert J. Levine, Research Ethics Committees, in 4 ENCYCLOPEDIA OF BIOETHICS 2311 (Stephen G. Post ed., 3d ed. 2004). Different countries may use different names, and some emulate the United States by calling their review committees IRBs, but for the purposes of this Note non-U.S. review committees will be referred to as RECs.

28. See infra Part III.
internationally. The IRB system in the United States is generally held out to other nations as the best existing format for ethical review of medical research. Despite this distinction, there are minimal specific regulations or procedures that all IRBs must follow. There is no one set of ethics guidelines that all review committees must use. Each institution that wishes to establish an ethics review committee is required to develop many of its own guidelines and operating procedures—resulting in substantial inconsistency between institutions. This problem only increases in magnitude for RECs in other countries that have less developed regulations and little experience managing ethics issues in medical research.

In the last several years, one of the most highly publicized safety issues has been how best to protect participants when researchers and research institutions have personal interests that may conflict with their obligation to protect participants' safety. However, despite heavy publicity, only minimal regu-
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Regulatory changes to the mandatory functions of RECs—specifically, changes to U.S. regulations—can minimize the risk of unethical research occurring in the United States and other nations. International collaboration on development of uniform, internationally-accepted regulations for RECs has been initiated by a few nations, but remains limited. Conflict of interest policies implemented in conjunction with REC oversight can strengthen the ethical review process and promote the purpose of ethical review—participant safety and well-being.

This Note posits that substantive and procedural weaknesses in the operations of ethical review committees should be amended, through revision of U.S. regulations for national and foreign clinical trials, in order to develop consistent policies for the management of conflicts of interest and enhance the protection of research participants. Part II provides an overview of bioethics and clinical trials, including several influential ethics guidelines that have directed post-World War II medical research. Part III gives a general overview of ethical review committees in the United States and abroad. This Part includes information on the different control mechanisms used within the United States to regulate IRBs. This Part also examines control mechanisms for RECs in other countries. Part IV investigates the issue of conflict of interest as it relates to medical research and clinical trials at the national and international level. Part V proposes regulatory solutions to clarify the role of IRBs and RECs and ameliorate deficiencies that currently exist in the regulation of conflicts of interest. Specifically, this Part suggests several regulatory changes that, if implemented, have the potential to increase national and international ethical review committees’ ability to fulfill their purpose of ensuring participant safety by providing them with all the information important for evaluating research proposals.

II. BIOETHICS

Historically, many cultural groups believed that illness stemmed from violations of social or natural law, and that the methods of the healer must be “right” and “good” in order to

36. See infra Part V.
37. See infra Part II.B.2.
return health to the sick person.\footnote{Albert R. Jonsen, The Birth of Bioethics 5–6 (1998).} Over the last twenty-five centuries, ethics in Western countries has been consistently linked to the moral beliefs of Western society.\footnote{Id. at 6.} Bioethics is the study and evaluation of the moral duties, obligations and principles governing the actions of individuals and groups within the medical field.\footnote{See, e.g., Lawrence O. Gostin, Public Health Law and Ethics 10 (2002).} The term “bioethics” was originally coined by a Wisconsin cancer researcher and was intended to encompass the ethical review of all biological sciences, such as ecology, agriculture and medicine.\footnote{Office of Technology Assessment, U.S. Congress, Biomedical Ethics in U.S. Public Policy—Background Paper 2 (1993) [hereinafter OTA Biomedical Paper] (Report # OTA-BP-BBS-105), available at http://www.wws.princeton.edu/cgi-bin/byteserv.pl/~ota/disk1/1993/9312/9312.PDF (last visited Feb. 16, 2005). The term “bioethics” was coined by Van Rensselaer Potter (1911-2001), a biochemist who worked as a professor of oncology at the University of Wisconsin. \textit{Id.} at 2 (citing Van Rensselaer Potter, Bioethics: Bridge to the Future (1971)).} However, the term “bioethics” is now synonymous with biomedical ethics and generally only covers issues in biomedical research, medicine and health care.\footnote{Id.} The study and practice of bioethics includes a variety of professional backgrounds—including philosophers, theologians, attorneys, clinicians, and researchers—with each providing a unique perspective on the moral obligations of caregivers and researchers toward patients.\footnote{Id.}

The import of bioethics has continued to grow over the last few decades, reflecting the vast increase and complexity of modern medical advances and the policy questions those advances raise for governments, medical professionals, and the public.\footnote{Id.} In the United States, the field of bioethics developed into a major area of academic discourse following revelations of several highly questionable research experiments during the late 1960s and early 1970s,\footnote{Id.} including the infamous Tuskegee syphilis...
Modern bioethical topics are varied and include such issues as study and government–sponsored radiation experiments. See, e.g., Allan M. Brandt, Racism and Research: The Case of the Tuskegee Syphilis Experiment, in Tuskegee’s Truths (Susan M. Reverby ed., 2000). For forty years, between 1932 and 1972, the U.S. Public Health Service (PHS) conducted an experiment on 400 black men with late stage syphilis. Id. at 15. These men, for the most part illiterate sharecroppers from Macon County in Alabama, were never told what disease they were suffering from or of its seriousness. Id. at 18, 21. As a means to enroll participants, the research subjects were told they would be treated for “bad blood,” the local term used to describe syphilis. Id. at 22. However, doctors never intended to cure the men’s syphilis, but rather intended to withhold all forms of treatment so they could analyze the natural progression of syphilis over time. Id. at 18. The experiment’s data was to be collected from autopsies of research subjects, and thus the men were deliberately left to degenerate under the ravages of tertiary syphilis, which can include tumors, heart disease, paralysis, blindness, insanity, and death. Id. at 23. “As I see it,” one of the doctors involved explained, “we have no further interest in these patients until they die.” Id. Researchers continued to withhold treatment for the men throughout the forty years of the study. Id. at 25. The men were prevented from participating in several nationwide campaigns to eradicate venereal disease. Id. at 26. When penicillin was discovered in the 1940s—the first real cure for syphilis—the Tuskegee men were deliberately denied the medication. Id. at 27. By the end of the experiment, twenty-eight of the men had died directly of syphilis and more than one hundred were dead of related complications. Id. at 15.

From 1945 until 1974, the U.S. government funded multiple research projects on the effects of radioactive substances on the human body. Id. Patients were injected with varying doses of uranium, plutonium, and other radioactive elements to determine the physiological effects these substances have on the body. Id. These experiments took place throughout the country and were run by government agencies, the military, as well as publicly-funded hospitals and other research programs. Id. Unlike the vast majority of medical research projects, federally-funded human radiation experiments were deemed “classified,” and all procedures and results were held in secret by the U.S. Government. Id. As a result, decisions on proper conduct of research by higher authorities were never shared with the personnel actually conducting the experiments and there was little to no guidance to researchers on what ethical guidelines should have been followed. Id. The records on these experiments, since de-classified, suggest that many research participants did not consent to being a part of the radiation experiments. Id. Additionally, there is substantial question as to the value of some of the treatment protocols undergone by participants, i.e. some experiments were done to further scientific knowledge rather than to provide an form of treatment to the patient. Id.
abortion, euthanasia, organ transplantation, cloning and stem-cell research.48

A. Clinical Trials

This Note will focus solely upon one of the many topics that fall within the field of bioethics, the ethics of clinical trials conducted with human participants. To better understand the ethics that are applied to clinical trials, it is important to understand the trials process. First, it is important to note that there are several different types of clinical trials, each having a different objective.49 Many clinical trials have treatment objectives and test new drugs, medical devices or surgical therapies.50 Other types of trials include prevention trials, diagnostic trials, screening trials and quality of life trials.51 This Note will focus its attention upon the process involved in treatment trials.

A second important fact is that clinical trials occur in a series of progressive steps, with each step building upon the information learned in the previous step.52 The first step in the clinical trials process is to determine whether the new drug compound or other product is safe for use with humans.53

48. OTA BIOMEDICAL PAPER, supra note 41, at 2–3.
50. Id. Treatment trials generally look at “experimental treatments, new combinations of drugs, or new approaches to surgery or radiation therapy.” Id.
51. Id. Prevention trials are aimed at increasing our ability to prevent occurrence or recurrence of disease. Id. Diagnostic trials are designed to improve a medicine’s ability to diagnose a particular disease or condition through improved testing or medical procedures. Id. Screening trials seek new or better ways to detect diseases or other medical conditions. Id. Quality of Life trials, also known as Supportive Care trials, are intended to improve the quality of life for patients who suffer chronic illnesses. Id.
process is called pre-clinical research (or non-clinical studies).\textsuperscript{54} After a new product has been developed, it must be tested on two or more non-human species of animals (one rodent, one non-rodent) to determine if it is safe to give the same product to humans.\textsuperscript{55} These safety evaluations are important for determining whether the product can be used at all, or whether specific limitations should be placed upon the product’s use in humans.\textsuperscript{56} This initial step can take a few weeks to several years.\textsuperscript{57}

Once pre-clinical research has shown that a product can be safely\textsuperscript{58} tested on humans, the clinical trial process begins in earnest. The steps in the clinical trial process are often referred


\textsuperscript{55} CDER HANDBOOK, supra note 54, at 6. Testing must be done on more than one species because different species may have different reactions to the product. Id. For pharmaceuticals, non-clinical studies usually include: “single and repeated dose toxicity studies, reproduction toxicity studies, genotoxicity studies, local tolerance studies, and for drugs that have special cause for concern or are intended for a long duration of use, an assessment of carcinogenic potential.” INTERNATIONAL CONFERENCE ON HARMONIZATION, GUIDANCE FOR INDUSTRY: M3 NONCLINICAL SAFETY STUDIES FOR THE CONDUCT OF HUMAN CLINICAL TRIALS FOR PHARMACEUTICALS 2 (1997) (hereinafter ICH NONCLINICAL SAFETY STUDIES). Other studies include pharmacology safety assessments and studies on absorption, distribution, metabolism and excretion (pharmacokinetics). Id.

\textsuperscript{56} See, e.g., ICH NONCLINICAL SAFETY STUDIES, supra note 55, at 2. For a pharmaceutical product:

The goals of the nonclinical safety evaluation include: a characterization of the toxic effects with respect to target organs, dose dependence, relationship to exposure, and potential reversibility. This information is important for the estimation of an initial safe starting dose for the human trials and the identification of parameters for clinical monitoring of potential adverse effects.

Id.

\textsuperscript{57} CDER HANDBOOK, supra note 54, at 6.

\textsuperscript{58} The fact that a product has been deemed safe to test on humans does not mean that research participants are not at risk for adverse effects. National Library of Medicine, supra note 49, at Risks. Rather, it means that the data from pre-clinical research shows that the risks are low and that the proposed benefit of the product outweighs any potential risk. CDER HANDBOOK, supra note 54, at 7.
Clinical trials of new drugs, one of the most common types of treatment trials, provide a good example of trial phases. The initial testing of the product on humans, called Phase I trials, are conducted with a small group of volunteers. Phase I trials are used to identify side effects, support earlier determinations that the product is safe for human use, and to find a safe dosage range. Once the process moves on to Phase II trials, the number of participants expands (generally 100–300 people) and researchers do further evaluations of effectiveness and safety. Phase II trials are usually the initial stage where the product is tested on individuals who have the disease or medical condition that the product is designed to treat. The number of people that the product is tested on increases into the thousands for Phase III trials. Phase III trials are often used to compare a new treatment to existing treatments, to monitor side effects, and to confirm effectiveness of the product for its intended purpose. After the conclusion of Phase III trials, a product that has proven itself safe and effective is generally approved for sale to the public.

60. National Library of Medicine, supra note 49, at What Are the Phases of Clinical Trials?. Initial testing is generally done on a group of twenty to eighty volunteers. Id. Volunteers in Phase I trials may be patients; however, they are usually healthy individuals. CDER HANDBOOK, supra note 54, at 8.
61. National Library of Medicine, supra note 49, at What Are the Phases of Clinical Trials?.
62. Id.
63. CDER HANDBOOK, supra note 54, at 8.
64. Id. at 9.
65. National Library of Medicine, supra note 49, at What Are the Phases of Clinical Trials?.
66. See, e.g., International Conference on Harmonization; Guidance on General Considerations for Clinical Trials, 62 Fed. Reg. at 66,117. Further testing of the product often occurs after it has been marketed to the public. Id. These tests, known as Phase IV trials, are not considered necessary for approval of the product but may be important for making further determinations of the best dosage and optimizing the product’s use. Id.
B. Ethics in Human-Subject Clinical Trials

One of the first questions many clinical trial participants ask is: “Is someone going to make sure that my safety is protected?” To protect the safety and well-being of clinical trial participants, all research done on human-subjects is governed by one or more ethical codes. One of the first texts dealing directly with ethics in medical practice was written in 1803. Medical Ethics, written by the English physician Thomas Percival, covered traditional medical decorum regarding physicians’ relations with their patients, as well as physician-physician relationships. Percival believed adherence to proper ethical decorum would render the profession worthy of the public’s trust. Ethics as a guide to decorum continued through the 1940s; however, medical ethics changed significantly in the decades following World War II. The following sections discuss the post-World War II documents on ethics in medical research that have been most widely accepted by the international community.

1. Internationally-Recognized Ethics Guidelines—1940 to 1980

a. Nuremberg Code

While medical research on humans is nothing new, the horrific experiments conducted on prisoners in Nazi concentration camps pushed ethics to the forefront of research discussions. In United States v. Brandt, the first case heard before the Military Tribunal on War Crimes at Nuremberg, often referred to as the “Medicine Case,” ten criteria for ethical and humane treat-
ment of research subjects were outlined as part of the final judgment. 74 Those ten criteria became known as the Nuremberg Code (Code), 75 one of the most cited codes for ethical research. 76

Analysis of the Code requires some knowledge of the Medicine Case and the experiments that were its core. The Medicine Case was conducted under U.S. military auspices at the Palace for Justice in Nuremberg, Germany. 77 Twenty-three defendants, all physicians but one, were tried by the tribunal; seven were sentenced to death for war crimes and crimes against humanity. 78 The research done by the Nazi physicians included


75. The ten principles laid out by the court in its final ruling, later called the Nuremberg Code, were held by the military tribunal as the minimum necessary to satisfy moral, legal and ethical responsibilities. Id. The primary emphasis of the Code was voluntary consent:

[P]ersons involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

Id. The other nine tenets of the Code directed that experiments were to be conducted only for the good of society, they needed to be unprocurable by other methods or means of study, and must not be random or unnecessary. Id. Physical and mental suffering and injury to research participants was to be avoided. Id. Researchers were not to conduct any experiments that they believed may lead to the death or disabling of research participants. Id. The degree of risk to research participants was never to exceed that determined by the humanitarian importance of the problem to be solved by the experiment, i.e., if the risk to participants was high, then the gain to society from the experiment must also be very high. Id. As well, experiments were only to be conducted by qualified scientific personnel who could ensure that the "highest degree of skill and care" would be used during all stages of an experiment. Id.

76. Beyrer & Kass, supra note 13, at 247.


78. Id.
both war-related and non-war-related activities.\textsuperscript{79} Research subjects were given no choice about their participation, nor were they given any choice in any matters affecting their health and well-being. Subjects were selected from prisoners in the concentration camps—men, women and children—by soldiers or physicians without being told what was going to happen to them.\textsuperscript{80} The research subjects endured extremely painful and denigrating experiments.\textsuperscript{81} Many research subjects died.\textsuperscript{82}

\textsuperscript{79} See generally Eva Mozes-Kor, \textit{The Mengele Twins and Human Experimentation: A Personal Account}, in \textit{NAZI DOCTORS}, supra note 77, at 54. The author and her twin sister were research subjects used by Dr. Josef Mengele at the Birkenau concentration camp. \textit{Id.} Mengele considered twins the perfect research subjects; one child to experiment upon and one child to act as the control. \textit{Id.} Mengele used the twins for two research programs: one program dealing with genetics and the other dealing with germ warfare. \textit{Id.} at 55. The germ warfare experiments consisted of injecting one twin with a biological agent used for germ warfare. \textit{Id.} at 55. When the child died from the injected agent, his or her twin was then killed in order for the doctors to compare the infected versus healthy organs of the two children at autopsy. \textit{Id.} at 56. Cross-transfusions and castrations were performed on twins to determine if an individual’s sex was interchangeable, as well as other experiments to determine how the human body could be manipulated—including experiments to determine how much blood children could have removed from their body before they died. \textit{Id.} at 57. Genetic experiments on individuals with physical abnormalities or defects were performed to determine causation. \textit{Id.} Dr. Mengele’s genetic experiments were particularly focused on means to “purify” the Aryan race. \textit{Id.}

\textsuperscript{80} \textit{Id.} at 55–58.

\textsuperscript{81} Telford Taylor, \textit{Opening Statement of the Prosecution December 9, 1946}, in \textit{NAZI DOCTORS}, supra note 77, at 67. The U.S. prosecutor’s opening statement provided a detailed description of twelve research activities for the court to consider as crimes against humanity. \textit{Id.} at 70–85. The experiments included high-altitude experiments in which prisoners were provided with gas masks and placed in a chamber that was pressurized to simulate high altitude (one experiment used pressure for an elevation of 47,000 feet); once the chamber was fully pressurized, the gasmask was removed and the reactions of prisoners were observed until they died. \textit{Id.} at 70. The subjects died in excruciating pain in a process that took more than half an hour. \textit{Id.} The researchers joked in their communiqués that any subject who survived the experiments should be pardoned to life in prison. \textit{Id.} The freezing experiments required prisoners to stand naked outside in freezing temperatures for nine to fourteen hours or to sit in tanks of iced water for three or more hours. \textit{Id.} at 73. In the mustard gas experiments, researchers intentionally wounded prisoners and then the wounds were infected with mustard gas. \textit{Id.} at 75–76. Other subjects were forced to inhale mustard gas, swallow it in liquid form, or were injected with the liquid form. \textit{Id} at 77. One of the most extensive experiments was on sterilization. \textit{Id.} at 82–85. The sterilization experiments
As a result of these atrocities, the Code focused upon protections that would clearly enunciate that the Nazi experiments were unethical. Therefore, the primary tenet of the Code is voluntary informed consent of research participants: “the voluntary consent of the human subject is absolutely essential. This means that the persons...should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion.”

The Code also emphasizes that research participants rights and well-being must be protected.

The Nuremberg Code, heavily influenced by the United States, became the stepping stone to the ethics guidelines used in medical research throughout the world today.

b. Declaration of Helsinki

The World Medical Association (WMA) is an international not-for-profit organization founded in 1947 to represent physicians around the world. In the summer of 1964 in Helsinki, Finland, the WMA officially adopted the “Ethical Principles for Medical Research Involving Human Subjects.” This document, known as the Declaration of Helsinki (Declaration), is the most influential international protocol to emerge since the Nuremberg were developed to find an inexpensive and quick method of sterilization that could be used “to wipe out Russians, Poles, Jews,” and other undesirables. Id. Sterilization techniques included injection with test drugs, surgical castration, and high-dose radiation through X-rays to the genitals. Id. Nazi doctors also conducted experiments with malaria, Sulfanilamide, drinking sea-water, infection with typhus, epidemic jaundice, poisoning with various poisons, and experiments in which prisoners were intentional burned with the chemicals from English incendiary bombs. Id. at 70–85.

82. Id. at 70–85.
83. The Medicine Case, supra note 74, at 181.
84. Id.
85. The U.S. government and the American Medical Association (AMA) heavily influenced the Code. JONSEN, supra note 38, at 135. Specifically, the language of the Nuremberg Code was drawn from an ethics report to the AMA by Dr. Andrew C. Ivy, the man later chosen by the United States to act as the prosecution’s medical expert during the trial. Id.
86. WORLD MEDICAL ASSOCIATION, ABOUT THE WMA, at http://www.wma.net/e/about/index.htm (last visited Feb. 27, 2005).
berg trials. The Declaration’s introduction heavily emphasized that the primary duty and obligation of all physicians is the health and welfare of patients. The Declaration also emphasizes that the only legitimate purpose of biomedical research involving human subjects is to “improve diagnostic, therapeutic and prophylactic procedures and the understanding of the aetiology and pathogenesis of disease.” One of the most noticeable stylistic differences between the Code and the Declaration is the placement of informed consent guidelines. Unlike the Code, the Declaration places informed consent in the middle of the document rather than as the primary tenet. The difference reflects the Declaration authors’ belief that “the essence of research ethics is the integrity and vigilance of the investigator.”

Since its adoption in 1964, the Declaration of Helsinki has been amended five times. The Declaration of Helsinki was substantially revised in 1975 from five to twelve basic guiding principals for ensuring ethical research. It was amended

89. The Declaration begins by declaring that,

[i]t is the mission of the physician to safeguard the health of the people. His or her knowledge and conscience are dedicated to the fulfillment of this mission...The Declaration of Geneva of the World Medical Assembly binds the physician with the words, “The health of my patient will be my first consideration,” and the International Code of Medical Ethics declares that, “A physician shall act only in the patient’s interest when providing medical care which might have the effect of weakening the physical and mental condition of the patient.” 1989 DECLARATION, supra note 87.
90. Id. Aetiology is defined as “the cause of a disease.” Webster’s Online Dictionary, at http://www.websters-online-dictionary.org (last visited Feb. 5, 2005). Pathogenesis is the origin or development of a disease. Id.
91. JONSEN, supra note 38, at 136.
92. Id.
93. 1989 DECLARATION, supra note 87.
again in 1983, 1989, 1996, and 2000. The Declaration’s 1983 and 1989 versions are currently codified in the Code of Federal Regulations for the U.S. Food & Drug Administration (FDA). The 2000 revision of the Declaration includes the most substantial revisions since the 1975 amendment. These revisions have been highly criticized due to the hasty passage of the new Declaration and because of the controversial nature of several additions. Currently, the FDA has declined to include the 2000 Declaration in its regulations and has retained the 1989 version. Part V of this Note discusses specific provisions within the 2000 Declaration in further detail.

c. Belmont Report

The majority of modern bioethics guidelines have been created by international committees; however, the guidelines formulated specifically for U.S. researchers have been highly influential at the international level. The National Research Act (Act) was signed into law by President Nixon in July 1974. The Act was the first U.S. legislation to include medical ethics principles as a regulatory mechanism for controlling and sanctioning behavior.

97. 21 C.F.R. 312.120(c)(4) (codifies 1989 Declaration for foreign clinical trials of new drugs); 21 C.F.R. 814.15(b) (codifies 1983 Declaration for foreign trials of medical devices).
98. Forster, supra note 94, at 1449.
99. Only two weeks were made available for comments on the proposed revisions before the assembly voted. Id. Some of the new additions included requiring disclosure of conflicts of interest, expansion of the definition of vulnerable populations that necessitate special protections, and a requirement that research participants be assured access to best proven methods of treatment identified by the study. Id.
100. FDA, GUIDANCE FOR INDUSTRY: ACCEPTANCE OF FOREIGN CLINICAL STUDIES 2 (2001) [hereinafter FDA GUIDANCE REPORT], available at http://www.fda.gov/cber/gdlns/clinical031301.pdf (last visited Feb. 27, 2005). The FDA report did not explain why the revised Declaration was not implemented other than to note that the agency was reviewing its regulations to determine whether changes were necessary. Id.
102. JONSEN, supra note 38, at 99.
ers all biomedical research performed by individual researchers or institutions that receive federal funding for their work. Additionally, the Act created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (National Commission). One of the mandates for the National Commission was to “identify the ethical principles which should underlie the conduct of biomedical and behavioral research with human subjects and develop guidelines that should be followed in such research.”

Despite the existence of internationally-accepted bioethics guidelines, such as the Nuremberg Code and the Declaration of Helsinki, the National Commission determined that ethical guidelines of the time did not have sufficient depth. The National Commission therefore commenced a series of meetings that culminated in the publication of the Belmont Report in April 1979. The Belmont Report contained the National Commission’s recommendations for ethical principles that should be used by researchers and institutions receiving federal funding.

The Belmont Report was designed as a general policy statement that provides a basic framework for discussions on biomedical research ethics. The National Commission determined that ethical research on human subjects included three overriding principles: respect for persons, beneficence and justice. Respect for persons incorporates protection for the autonomy of individuals and protections for individuals with

103. Id.
105. JONSEN, supra note 38, at 102 (quoting National Research Act of 1974).
106. Id. The authors of the Belmont Report also determined that the Nuremberg Code and the 1975 Declaration of Helsinki were often inadequate to cover complex situations and at times were in conflict with one another. NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH 3 (1979) [hereinafter BELMONT REPORT], available at http://www.fda.gov/ohrms/dockets/ac/04/briefing/2004-4066b1_22_Belmont%20Report.pdf (last visited Feb. 27, 2005).
107. JONSEN, supra note 38, at 102.
109. Id. at 21.
110. BELMONT REPORT, supra note 106, at Basic Ethical Principles.
diminished autonomy. The regulatory structure that insures respect for persons is informed consent. Beneficence is the obligation placed upon researchers to “(1) do no harm and (2) maximize possible benefits and minimize possible harms” to participants. The application of the beneficence principal is exemplified by thoughtful and thorough assessment of the risks and benefits associated with proposed research by investigators and IRBs/RECs. The final overriding principal of ethical re-

111. Id. In discussing the respect for persons, the National Commission defined an autonomous individual as a person “capable of deliberation about personal goals and of acting under the direction of such deliberation.” Id. Respect for individual autonomy recognizes the rights of individuals to have opinions and to make their own choices, so long as there is no detriment to others. Id. Individuals with diminished autonomy are children, those who have been incapacitated by physical or mental illness, or those whose liberty is severely limited (generally, prisoners). Id.

112. Id. at Applications. The application of respect for persons was broken down into three necessary requirements for informed consent: information, comprehension and voluntariness. Id. “Information” requires that individuals are provided sufficient information to make an informed opinion and choices about participation in a research project. Id. Sufficient information generally includes: research procedure, purpose of the research, anticipated benefits and potential risks, alternative procedures or treatments available, and “a statement offering the subject the opportunity to ask questions and to withdraw at any time from the research.” Id.

113. Id. at Basic Ethical Principles. The National Commission noted that this principle extends to the entire enterprise of research, and thereby places an obligation on society at large as well as on individual researchers. Id. It was also noted that there are some inherent difficulties in implementation. Id. It is difficult to avoid harm when researchers are often unaware of potential harms. Id. It is normal in research for there to be some risk of harm to participants; the difficulty for individuals and society lies in determining what constitutes a justifiable risk. Id.

114. Id. at Applications. Risk/Benefit assessment requires that researchers carefully sift through all existing, relevant data to determine potential risks and to evaluate alternative methods of obtaining the same benefits sought in the research. Id. Risk/benefit analysis is a means of examining the design of proposed research and to evaluate whether risks inherent to the research are justifiable. Id. Justifiability of research must, at minimum, reflect the following:

(i) Brutal or inhumane treatment of human subjects is never morally justified.... (ii) Risks should be reduced to those necessary to achieve the research objective.... (iii) When research involves significant risk of serious impairment, review committees should be extraordinarily insistent on the justification of the risk.... (iv) When vulnerable populations are involved in research, the appropriateness of involving
search is justice.\textsuperscript{115} Justice revolves around the concept of equal distributions of burdens and benefits.\textsuperscript{116} Application of the justice principal results in the development of fair procedures and outcomes in the selection of research participants.\textsuperscript{117} Despite being written almost thirty years ago, the \textit{Belmont Report} retains substantial influence on U.S. research policy and later international ethics guides.\textsuperscript{118}

2. Internationally-Recognized Ethics Guidelines—
1980 to Present

\textit{a. CIOMS International Ethical Guidelines for Biomedical Research Involving Human Subjects}

The Council for International Organizations of Medical Sciences (CIOMS) is an international nongovernmental organization founded in 1949 under the auspices of the World Health Organization (WHO) and the United Nations Educational, Sci-

\begin{itemize}
\item them should itself be demonstrated.... (v) Relevant risks and benefits must be thoroughly arrayed in documents and procedures used in the informed consent process.
\item \textit{Id.}\textsuperscript{115} \textit{Id.} at Basic Ethical Principles.
\item \textit{Id.}\textsuperscript{116} The burden of research, the risks to individual participants, should not fall unfairly or unequally on any one group or population of people. \textit{Id.} Additionally, the benefits derived from research, new techniques, or drugs should not go unequally to financially or socially advantaged groups or populations. \textit{Id.}
\item \textit{Id.}\textsuperscript{117} at Applications. Both social and individual justice are relevant to the discussion of equitable selection of research participants. \textit{Id.} Individual justice requires fairness and unbiased selection of participants. \textit{Id.} Social justice requires awareness of those who should or should not be allowed to participate in research based on a person’s ability to bear burdens or on the appropriateness of potentially increasing the burden on an already burdened class of individuals. \textit{Id.}
\item \textit{Id.}\textsuperscript{118} \textit{MALONEY, supra} note 108, at 20. A direct example of this influence can be found in the CIOMS Guidelines, \textit{infra} Part II.B.2.i. The CIOMS Guidelines specifically identify the three overriding principles of the Belmont Report as the ethical principles that were foundational to the CIOMS Guidelines. \textit{COUNCIL FOR INTERNATIONAL ORGANIZATIONS OF MEDICAL SCIENCES, INTERNATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS}, at General Ethical Principles (2002) \textit{[hereinafter CIOMS Guidelines]}, \textit{available at} http://www.cioms.ch/frame_guidelines_nov_2002.htm (last visited Feb. 2, 2005).
\end{itemize}
CIOMS began its work on ethics in biomedical research in the late 1970s. The goal of the organization was to create a set of guidelines that would “indicate how the ethical principles that should guide the conduct of biomedical research involving human subjects, as set forth in the Declaration of Helsinki, could be effectively applied, particularly in developing countries, given their socioeconomic circumstances, laws and regulations, and executive and administrative arrangements.”

Several bioethical documents regarding medical research have been created by CIOMS. In 1982, CIOMS, in collaboration with WHO, published *Proposed International Ethical Guidelines for Biomedical Research Involving Human Subjects* (Proposed Guidelines). Proposed Guidelines was the first document specifically designed to help countries, developing countries in particular, effectively apply the ethical guidelines in the Declaration to their existing socio-political structure. In 1993, revision of the Proposed Guidelines resulted in publication of *International Ethical Guidelines for Biomedical Research Involving Human Subjects*. Rapid changes in medical research—including the increased use of controlled clinical trials in developing countries, funded and conducted by external sponsors and investigators—required that the document receive further amendment. The revised *International Ethical Guidelines for Biomedical Research Involving Human Subjects* was published in 2002 (2002 Guidelines).

The 2002 Guidelines were heavily reviewed and influenced by the international community. Extensive opportunities for input by members of the international bioethics debate were provided over the four years, from 1998 to 2002, during which the revised

119. CIOMS Guidelines, *supra* note 118, at Background.
120. *Id.*
121. *Id.*
122. *Id.* Proposed Guidelines was created prior to the outbreak of the HIV/AIDS pandemic and the subsequent large-scale research trials that were required to deal with HIV/AIDS. *Id.* It was specifically targeted toward protection of research participants in developing nations who were involved in traditional small-scale, publicly-funded research protocols. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* *See infra* Part I.
126. CIOMS Guidelines, *supra* note 118, at Background.
guidelines were produced. The final redrafting committee included experts in ethics and research from every continent. The 2002 Guidelines, like the Belmont Report in the United States, emphasize three overarching ethical principles: respect for persons, beneficence, and justice. Unlike the Declaration of Helsinki, which includes broad, generalized principles, the 2002 Guidelines include extensive commentary designed to highlight the specific issues that have been discussed in academia regarding each guideline.

The 2002 Guidelines include twenty-one ethics guidelines for biomedical research at the international level. Unlike the primacy of informed consent in the Code, the primary tenet of the 2002 Guidelines aligns the guidelines with the Declaration by requiring a showing of ethical and scientific justification for all research. Guidelines on informed consent are numerous and detailed, but do not begin until Guideline 4. Guidelines 2 and 3 relate to ethical review of research and will be discussed in further detail in Part V of this Note. The 2002 Guidelines

127. Id.
128. Id.
129. Respect for persons includes respect for individual autonomy in making personal choices, as well as protection of persons with impaired or diminished autonomy. Id. at General Ethical Principles.
130. Beneficence is the “ethical obligation to maximize benefits and to minimize harms.” Id.
131. Justice primarily refers to “distributive justice,” which requires equitable distribution of burdens and benefits. Id.
132. Id. at Guidelines.
133. Id. Guideline 1 specifies:

The ethical justification of biomedical research involving human subjects is the prospect of discovering new ways of benefiting people’s [sic] health. Such research can be ethically justifiable only if it is carried out in ways that respect and protect, and are fair to, the subjects of that research and are morally acceptable within the communities in which the research is carried out. Moreover, because scientifically invalid research is unethical in that it exposes research subjects to risk without possible benefit, investigators and sponsors must ensure that proposed studies involving human subjects conform to generally accepted scientific principles and are based on adequate knowledge of the pertinent scientific literature.

Id.
134. Id. Informed consent is at issue in Guidelines 4–6; consent issues with those unable to give full, informed consent are covered in Guidelines 9, 14 (children), and 15 (mental/behavioral disorders). Id.
also include specific provisions for dealing with vulnerable populations\textsuperscript{135} and a controversial “choice of control” guideline.\textsuperscript{136} The specific focus of the 2002 Guidelines on medical research conducted at the international level makes this document particularly valuable to investigators, sponsors, and host countries wishing to ensure the ethical soundness of their research programs.

\textit{b. International Conference on Harmonization’s Good Clinical Practices}

The substantial increase in regulations and guidelines directed at clinical research during the 1960s and 1970s coincided with expansion of the pharmaceutical industry into the global marketplace.\textsuperscript{137} Despite common regulatory goals of assuring quality, safety and efficacy of new drugs, the specific technical

\textsuperscript{135} Id. Vulnerable populations generally include prisoners, minorities, the mentally ill, the hopelessly ill, poor people and children. Adil E. Shamoo & David B. Resnik, Responsible Conduct of Research 184 (2003).

\textsuperscript{136} Id. at Guidelines. “Choice of control” generally refers to the type of treatment that a member of the control group in an experiment will receive. See, e.g., Timothy S. Jost, The Globalization of Health Law: The Case of Permissibility of Placebo-based Research, 26 AM. J.L. & MED. 175 (2000). Considerable debate in bioethical circles is currently focused on the use of placebo-control studies. Id. A placebo is generally an inert substance given to a research participant in lieu of the treatment being received by the non-control group. Id. at 176. The debate around the use of placebo-control studies is particularly vociferous in research experiments that test drugs or procedures responsive to harms that already have alternative methods of treatment. Id. at 177. The question oft being: is it ethical to deny a known, proven treatment to any participant, even if that treatment would be unavailable to the participant outside of the research experiment? See, e.g., Finkenbinder, supra note 95.

requirements that a drug needed to meet prior to approval for sale to the public varied substantially between countries.\textsuperscript{138} As a result, the pharmaceutical industry was required to repeat time-consuming and expensive clinical trials\textsuperscript{139} in each country in which they wanted to sell their drugs.\textsuperscript{140} As a response to the growing globalization of the pharmaceutical industry and the regulatory burdens that new drugs faced when introduced to various countries’ markets, many began to call for international harmonization of regulatory requirements.\textsuperscript{141}

The International Conference on Harmonization of Technical Requirements for the Registration of Pharmaceuticals for Human Use (ICH) was established in 1990.\textsuperscript{142} The ICH is a joint initiative by regulators and industry in the three nations that

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\item \textsuperscript{138} ICH INFORMATION BROCHURE, supra note 137, at 4.
\item \textsuperscript{139} For example, in the United States, a new drug compound generally takes over ten years to proceed from the preclinical stage to approval for marketing at a cost of approximately $800 million. See, e.g., No New Drugs, WALL ST. J., July 21, 2003, at A10; PhRMA 2004 PROFILE, supra note 137, at 2 (average new drug takes ten to fifteen years to get to market and costs approximately $800 million to develop).
\item \textsuperscript{140} ICH INFORMATION BROCHURE, supra note 137, at 4. Repetition of clinical trials was burdening pharmaceutical companies’ research & development budgets, impacting the overall cost of health care, and creating substantial delay in bringing safe and efficacious new treatments to patients. \textit{Id}.
\item \textsuperscript{141} Official Website for the International Conference on Harmonization, History and Future of ICH, at http://www.ich.org/UrlGrpServer.jserv?@_ID=276&@_TEMPLATE=254 (last visited Jan. 28, 2005). Initial harmonization of regulatory requirements was done by the European Community (now the European Union) in the 1980s. ICH INFORMATION BROCHURE, supra note 137, at 4. See also David Vogel, \textit{The Globalization of Pharmaceutical Regulation}, 11 GOVERNANCE 1, 3–5 (1998). The desire to harmonize was expressed in diplomatic discussions between Europe, Japan and the United States during the same period. ICH INFORMATION BROCHURE, supra note 137, at 4. However, specific plans for action were not initiated until the 1989 WHO Conference on Drug Regulatory Authorities in Paris. \textit{Id}. The planning at the WHO conference led to discussions between the authorities and the International Federation of Pharmaceutical Manufacturers & Associations (IFPMA), which later hosted the first ICH meeting. \textit{Id}.
\item \textsuperscript{142} ICH Steering Committee, Statement by the ICH Steering Committee on the Occasion of the Fourth International Conference on Harmonization (July 16–18, 1997), available at http://www.ich.org/MediaServer.jserv?@_ID=348&@_MODE=GLB. A similar harmonization organization has been formed for the medical device sector, called the Global Harmonization Task Force, but this project is less formalized and is in an earlier stage of development than the ICH. D. B. Jefferys, \textit{The Regulation of Medical Devices and the Role of the Medical Devices Agency}, 52 BRIT. J. CLIN. PHARMACOLOGY 229, 233–34 (2001).
\end{itemize}
dominate the development of new pharmaceutical products: the United States, Japan and the European Union. The primary objective of the ICH is to:

[] Increase international harmonization of technical requirements to ensure that safe, effective and high quality medicines are developed and registered in the most efficient and cost-effective manner ... [in order to] promote public health, prevent unnecessary duplication of clinical trials in humans, and minimize the use of animal testing without compromising safety and effectiveness.

To further this objective, harmonization projects have focused on four categories: Safety, Quality, Efficacy, and a Multidisciplinary category for topics that do not fit nicely in the other categories. One of the most widely-recognized products of the ICH, published in 1996, is the ICH Good Clinical Practices guidelines (GCP) for conducting clinical research.

Unlike the previous guidelines, the ICH GCP is not focused solely upon ethical considerations in clinical research. Rather, the GCP is a technical document that includes guidance on the...
CONFLICTING INTERESTS & LAWS

development of a research protocol, scientific considerations and documentary requirements, as well as ethical considerations in the testing of new pharmaceutical products.\footnote{150}{See \textit{id.} at 1 ("GCP is an international ethical and scientific quality standard for designing, conducting, recording, and reporting trials that involve the participation of human subjects.").} Though the ICH focuses upon issues pertaining to pharmaceutical products, the GCP can be applied to all clinical investigations that use human subjects.\footnote{151}{\textit{Id.}} The GCP provides thirteen principles intended to ensure the safety of participants and production of accurate data from clinical trials.\footnote{152}{\textit{Id.} at 8–9.} The first GCP principle states that "[c]linical trials should be conducted in accordance with the ethical principles that have their origin in the Declaration of Helsinki, and that are consistent with the GCP and the applicable regulatory requirement(s)."\footnote{153}{\textit{Id.} at 8. There is no mention in the GCP of the version of the Declaration of Helsinki referred to in the Principles section; however, the publication date of the GCP, 1996, suggests that the GCP was influenced by the 1989 version of the Declaration.} In particular, ethical review by an independent review committee\footnote{154}{The GCP, like the Declaration of Helsinki, states that all clinical trials must be supervised by an Institutional Review Board or an Independent Ethics Committee. \textit{Id.} at 9. The specific requirements for review are very similar to the regulatory requirements of the Common Rule and the FDA. \textit{See \textit{id.} at 10–13; infra Part III. A. 1. & 2. See also \textit{GLOBALIZATION OF CLINICAL TRIALS, supra} note 34, at 3 ("ICH GCP guidelines are very similar to FDA regulations.").}} and informed consent by participants are emphasized.\footnote{155}{ICH GCP, \textit{supra} note 30, at 17–21.} The influence of the ICH GCP on regulations affecting clinical trials has been substantial in many nations, including the three ICH countries and many non-ICH countries.\footnote{156}{\textit{GLOBALIZATION OF CLINICAL TRIALS, supra} note 34, at 5 ("[M]any countries have adopted the Good Clinical Practice guidelines from the International Conference on Harmonization as their regulatory standard."); Ministry of Health, Malaysian Guidelines for Good Clinical Practices iii (1999) (Malaysia's Ministry of Health adopted the basic principles of the ICH GCP, with some minor modifications for local requirements), available at http://www.vadscorner.com/Malaysian_gcp.PDF (last visited Feb. 1, 2005).} As such, an ever-increasing number of clinical trials are being conducted under the guidance of the GCP.\footnote{157}{\textit{GLOBALIZATION OF CLINICAL TRIALS, supra} note 34, at 3.}
III. ETHICAL REVIEW OF PROPOSED HUMAN-SUBJECT RESEARCH

As one can see from the previous section, there is no shortage of ethical guides for researchers to choose from when conducting clinical trials. Yet, who is responsible for ensuring that ethical guidelines are followed? The answer to this question is not as simple or straightforward as many researchers, sponsors, and participants would hope. Rather, responsibility for ensuring ethical behavior in research projects varies depending on several variables, including: who has initiated the research project,158 how the project is funded,159 and the location where the research is going to take place.160

Society’s extensive use of research places duties of public responsibility and accountability on researchers.161 In designing a protocol, the individual researcher has initial responsibility for assuring that the project will be ethical.162 The next step in the

158. See discussion infra Parts III.A.–B. Research initiated by a U.S. pharmaceutical company will be guided by FDA regulations if the product is going to be marketed to the public. See infra Part III.A.2. Therefore, an IRB would be responsible for assuring ethical guidelines were followed. Id. However, if a research protocol was initiated by an individual researcher in the United States, who was not affiliated with a research institution, then U.S. regulations would not apply and the individual researcher would be the only entity responsible for assuring ethical conduct. See discussion infra Part III.A.

159. Projects funded in full or in part by the U.S. government are regulated by the Department of Health and Human Services, which requires research institutions to give assurances and ensure review by IRBs. See infra Part III.A.1. Projects funded entirely by private entities are not regulated unless the product will fall under FDA regulations. Id. at Part III.A.1.–2. Therefore, it would be up to the private sponsor to assure ethical behavior.

160. Most research projects in the United States are reviewed by IRBs, who ensure that ethical guidelines are followed. See infra Part III.A. However, if the project is conducted outside the United States, there is considerable variation in regulation of research and the identity of entities responsible for ethical conduct during clinical trials. See infra Part III.B.

161. Improper research has the potential to kill or harm participants during clinical trials as well as patients whose doctors use erroneous results in treatment; money or valuable resources can be wasted and improper or unreasonable laws and policies can result from unreliable or erroneous research results. SHAMOO & RESNIK, supra note 135, at 6. See also discussion of Dr. Bezwoda, infra Part I.

162. Standards of conduct binding all researchers emphasize honesty, integrity, trust, accountability, respect, confidentiality and fairness. SHAMOO & RESNIK, supra note 135, at 6. Adherence to these ethical tenets is useful in
chain of responsibility usually lies with a group of individuals who have volunteered to review other researchers’ projects. These groups, called Research Ethics Committees (REC), are often mandated by law. RECs are generally responsible for reviewing and approving all proposed research involving human subjects prior to the initiation of any clinical trials.

The primary purpose of RECs is to safeguard the rights and welfare of human research subjects. Prior to RECs, the responsibility of balancing “society’s interests in protecting the rights of subjects [with] developing knowledge that can benefit the subjects or society as a whole” fell solely to the researcher conducting an experiment. RECs allow individuals independent of a research project to evaluate scientific and ethical validity. Their main function is to determine whether research adequately addresses six general ethical norms: (1) good research design; (2) competent research investigators; (3) positive balance between potential harms and benefits; (4) informed consent; (5) equitable selection of research participants; (6) policy for dealing with research-related injuries. Each country or institution differs on other specific qualities of RECs, such as membership and types of research reviewed.

A. Research Ethics Committees in the United States

In the United States, ethical and scientific review of research proposals is conducted by a committee, called an Institutional Review Board, which is generally located at the site where the...
research is to be conducted. IRBs were originally established by the National Research Act of 1974171 as a response to several well-publicized cases of unethical medical interventions, including reports of research abuses at medical schools and hospitals.172 There are approximately three to five thousand IRBs located in the United States.173 IRBs are associated with hospitals, academic centers, managed care organizations, federal and state government agencies, and for-profit companies such as pharmaceutical companies and medical device manufacturers.174

1. U.S. Regulation—The Common Rule

The basic outline of IRBs is defined by U.S. Department of Health and Human Services (DHHS) Federal Policy for the Protection of Human Subjects,175 also known as the “Common Rule.”176 The Common Rule applies to all human-subject research conducted by researchers or institutions that have received funds from DHHS.177 The Common Rule has three major components: assurances,178 provisions on informed consent,

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172. OFFICE OF INSPECTOR GENERAL, DHHS, INSTITUTIONAL REVIEW BOARDS: PROMISING APPROACHES 3 (1998) (“[C]oncerns grew from stories of the abuse of subjects during the World War II trials at Nuremberg, the promotional distribution of thalidomide resulting in numerous children born with birth defects, the administration of cancer cells to chronically ill and senile patients at a hospital in New York, and others....”).
173. Id.
174. Id.
177. 45 C.F.R. § 46.101. The Common Rule also applies to research conducted outside the United States by researchers or institutions receiving DHHS funding. Id.
178. 45 C.F.R. § 46.103. An “assurance” is documentation stating that an institution will comply with all DHHS regulations. Id. The assurance must include the ethical principles/code that the institution will use to evaluate research, the designation of one or more IRBs, identification of IRB members, and IRB procedures for initial and continuing review of research (including adverse events). Id.
IRBs are required to have at least five members of varying professional backgrounds. At least one member must come from a non-scientific profession, such as a lawyer, ethicist, or theologian. Also, at least one member must have no direct affiliation with the institution at which the proposed research project will be completed. Members are required to recuse themselves from the evaluation of any research in which they have a conflict of interest. IRBs have the authority to “approve, require modifications in (to secure approval), or disapprove” research proposals.

The Common Rule requires IRBs to evaluate proposed research based on criteria that directly relate to the provisions of the Belmont Report. The Common Rule provides several criteria for approval of research proposals: (1) risks to participants are reasonably minimized; (2) risks are reasonable in relation to the expected benefits to the participant; (3) selection of participants will be equitable; (4) informed consent will be sought and documented from each participant; (5) provisions for data monitoring and protection of participants’ privacy. Research proposals must demonstrate beneficence by demonstrating that risks to participants have been minimized. Justice assessments require researchers to show that selection of participants
will be fair and equitable. Respect for persons is applicable to informed consent requirements.

2. U.S. Regulation—Food & Drug Administration

In order to sell a new drug or medical device in the U.S. market, a manufacturer must first obtain approval for the product from the FDA. Any product manufacturer that applies for FDA approval must have its product tested in pre-clinical trials and have designed a research protocol, approved by an IRB, for testing the product in human subjects. As a component of mandatory human-subject clinical trials, the FDA has its own regulations governing IRBs. Though the scope of the FDA's regulatory impact extends to commercial, as well as federally-funded research projects, the main components of the Common Rule discussed above are mirrored in FDA regulations.

B. Research Ethics Committees in Other Countries

In other nations, the responsibility for conducting ethical and scientific review of research proposals is held by various entities. A country's Ministry of Health may be the primary reviewer of proposed research. Some nations have national ethics boards, state or regional boards, or localized institutional review committees similar to those found in the United States. Often there is a combination of review mechanisms, such as review by multiple institutional RECs or review by a

189. See id.
190. See id.
192. See id. There are some exceptions to the rule that a research project and application for FDA approval should happen simultaneously, such as when a manufacturer has data already available from a foreign clinical study. See infra Part V.B.
196. Id.
national review board and an institutional REC. Some developing nations do not have regulations pertaining to human-subject research, and therefore responsibility for ethical review may lie with researchers or foreign sponsors. Different countries’ ethical review procedures are helpful to understand the similarities and differences that exist between the United States and other nations. In 2001, the European Union (EU) adopted Directive 2001/20/EC (Directive), modeled upon the ICH GCP and applicable to all member states, which directs harmonization in the EU of the technical requirements for the development of medicinal products. According to the Directive, all member states are required to have RECs that have the same purpose and functions as U.S. IRBs. RECs, similar to U.S. IRBs, are also mandated in Japan, Canada, Denmark, Finland, Iceland, Norway and Sweden. In Central America, Costa Rica utilizes institutional review committees followed by review through the Ministry of Health. A similar system of review exists in India.

197. See e.g., Hirtle, supra note 30, at 265–66.
198. See Kass & Hyder, supra note 195, at B-8.
200. See id. art. 1(2) (“Good clinical practice is a set of internationally recognized ethical and scientific quality requirements which must be observed for designing, conducting, recording or reporting clinical trials that involve the participation of human subjects.”).
204. See, e.g., C.M. Gulhati, Needed: Closer Scrutiny of Clinical Trials, 12 IND. J. MED. ETHICS 4 (2004) (research protocols are reviewed by a hospital ethics committee and the Drugs Controller General, India (equivalent to Min-
tries have adopted REC regulations that are almost identical to the Common Rule; however, these RECs generally limit their review to research on pharmaceutical products.\(^{205}\) In the vast majority of developing countries, RECs are non-existent or are mirrors of U.S. IRBs and rely heavily on U.S. regulations for procedural and substantive guidance.\(^{206}\)

\(^{205}\) \textit{See, e.g.,} Ock-Joo Kim et al., \textit{Current Status of the Institutional Review Boards in Korea: Constitution, Operation, and Policy for Protection of Human Research Participants}, 18 J. KOREAN MED. SCI. 3, 4 (2003). South Korean regulations are modeled upon the REC requirements outlined in the ICH GCP. \textit{Id.} As noted in the discussion of the ICH GCP, \textit{infra} Part II.B.2.ii., the guidelines for independent ethical review committees are almost identical to U.S. regulations. South Korea’s regulations have only been fully in place since 2001, and therefore many Korean IRBs are still struggling with implementation. Kim, \textit{supra}, at 4. Korean researchers and institutions have already complained of many of the issues that are prevalent with U.S. IRBs, including inconsistent regulation at the institutional level and insufficient national guidance on the actual functioning of RECs. \textit{Id.} Since Korean IRBs have limited their review efforts to drug trials, other forms of human-subject research receive no review at all. \textit{Id.} Singapore’s IRBs are regulated by the “Singapore Guideline for Good Clinical Practice,” which is based upon the ICH GCP. \textit{Bioethics Advisory Committee (Sing.), Research Involving Human Subjects: Guidelines for IRBs} 1 (2004) [hereinafter \textit{Sing. IRB Guidelines}], \textit{available at} \url{http://www.bioethics-singapore.org/resources/reports3.html} (last visited Feb. 6, 2005). In the last decade, Singapore has taken significant strides toward becoming a world-leader in biomedical research. \textit{Is S’pore’s Zeal Sending Wrong Signal?}, \textit{Bus. Times (Sing.)}, Apr. 8, 2003, \textit{available at} 2003 WL 2352450. Singapore has extensive regulations pertaining to pharmaceutical clinical trials. \textit{Sing. IRB Guidelines, supra}, at 12. However, it has not developed regulations for human-subject clinical trials that do not involve the testing of new drugs. \textit{Id.} Non-pharmaceutical research may receive ethical review \textit{if} conducted in certain hospitals, as Singapore’s Ministry of Health requires all government and restructured hospitals to have hospital ethics committees to review all types of human-subject research protocols conducted within the institution. \textit{Id.} at 13. \textit{See also} Ministry of Health \textit{Singapore, National Medical Ethics Committee: A Review of Activities, 1994–1997} (1998); Andy Ho, \textit{Medical Research—Who Watches Ethics Panels?}, \textit{Straits Times (Sing.)}, Apr. 16, 2003 (inspired by revelations that a prominent researcher, the head of the National Neuroscience Institute, had violated research ethics by failing to get IRB approval of his study and failing to obtain informed consent from research subjects), \textit{available at} 2003 WL 16359464.

\(^{206}\) Kass & Hyder, \textit{supra} note 195, at B-8.
Though the form of review may vary, consistent throughout the world is the fundamental purpose of RECs. They are the gatekeepers of research, charged with ensuring that clinical trials are scientifically and ethically valid. Research Ethics Committees and Institutional Review Boards are the protectors of the people, they are the entity primarily charged with assuring participant’s health and well-being will be protected. Yet, RECs and IRBs are often asked to make their determinations without information that may be crucial to the validity of the research, as well as participants’ safety. They are asked to make their determinations without knowing whether an investigator has a financial interest in the research she is conducting, an interest that may interfere with her obligations to participants.

IV. CONFLICTS OF INTEREST

A researcher’s scientific and academic credentials are a common piece of information provided to RECs and IRBs evaluating a new research protocol. Yet, are scientific and academic credentials sufficient information to evaluate researchers’ ability and willingness to abide by ethical guidelines? What if a researcher has been influenced by private interests that may impact the project and put participants’ safety and well-being at risk? Interests of a personal, financial, political, or other nature may conflict with professional, ethical, or legal obligations and duties. Conflicts of interest (COIs) arise when a conflict occurs between interests and duties. The first step in understanding the issues surrounding COIs is to properly define the phrase “conflict of interest.” An individual is described as having a conflict of interest when “he or she has personal, financial, or political interests that undermine his or her ability to meet or fulfill his or her primary professional, ethical, or legal obligations.”

207. See e.g., ICH GCP, supra note 30, at 10 (§ 3.1.2 requires IRBs to obtain investigators’ current curriculum vitae or other documentation evidencing qualifications).
208. SHAMOO & RESNIK, supra note 135, at 139.
209. Id.
210. Id. at 140.
211. Id. at 141, 145. This definition is limited to those conflicts which affect individuals, rather than organizations or institutions. Id.
subjects has a COI when she has any interests that undermine her duty to the health and safety of research subjects. An “apparent COI” is described as a situation in which there is no actual interference with a researcher’s obligations, but the researcher holds some private interest that suggests that she could have a conflict. The two primary concerns with COIs are that conflicts will: (1) interfere with an individual researcher’s judgment or reasoning and/or; (2) unduly influence a researcher’s motivation and behavior during the experiment.

Individual researchers are not the sole entities that may have interests that conflict. Institutions that conduct research also have conflicts of interest. Institutions, including research institutions, government agencies, professional associations, and peer review journals often have collective duties to professionals, clients, students, patients, and the public. An institution’s primary mission, be it research, education or public service, may be adversely affected by financial, political or other interests. Conflicts of interest at the institutional level occur throughout the various components of an institutions’ management structure. Institutional COIs and apparent COIs are a prominent discussion topic in academia due to the close collabo-

212. See e.g., Daryl Pullman, Conflicting Interests, Social Justice and Proxy Consent to Research, 27 J. MED. & PHIL. 523 (2002).
213. SHAMOO & RESNIK, supra note 135, at 142.
214. Id. at 140. Interference with judgment or reasoning can result in an individual forming a particular bias. The individual researcher’s judgment is thereby skewed in a particular pattern or direction attributable to the conflicting interest. Id. at 141.
215. Id. at 141. Motivational and behavioral effects of conflicts of interest are distinct from circumstances in which an individual’s judgment is impaired by the conflicting interests. Id. In these situations, the individual acts against his or her duties because of the temptation to advance the conflicting interest to his or her personal advantage. Id.
217. SHAMOO & RESNIK, supra note 135, at 145.
218. Id.
219. Id. Institutional COIs are created by the actions or behaviors of the institution, as well as by the judgment, decisions, and actions of the institution’s members—i.e., faculty, committees, advisory boards, deans, presidents and vice presidents. Id.
Conflicts of interest can affect virtually any area of research; however, peer review (including IRBs) and clinical trials are particularly susceptible to conflicts.

A. Intrinsic Conflicts of Interest

Some interests that conflict with an individual’s primary duty to protect participants are intrinsic. Intrinsic conflicts are ubiquitous in clinical research. These interests form the primary motivation for conducting a research experiment in a variety of instances. Intrinsic COIs are the self-interests of a researcher beyond the goals of advancing scientific knowledge or helping patients. The most common intrinsic COIs involve a researcher’s desire for career advancement, publication in prestigious journals or to pioneer a successful technique.

Certain intrinsic COIs are financial, though separate from types of individual financial gain that constitute financial COIs.


221. SHAMOO & RESNIK, supra note 135, at 142.


223. Id. See also Norman G. Levinsky, Nonfinancial Conflicts of Interest in Research, 347 NEW ENG. J. MED. 759, 760 (2002).

224. Levinsky, supra note 223, at 760–61. The author points out that many of the self-interests that are defined as intrinsic COIs have been and will continue to be a legitimate part of research. Id.

225. The more research an investigator successfully completes and has had accepted by her peers, the greater the investigator’s reputation and ability to direct her career as she wishes. See, e.g., Sollitto, supra note 222, at 85.

226. Id. (“The quality, placement, and number of the researcher’s publications will affect national reputation and eligibility for academic advancement.”).

227. Id. Other intrinsic COIs include “satisfaction of vindicating intellectual biases,” the desire to win research prizes or for recognition and respect from peers, and certain types of financial incentives (other than those bring monetary benefit directly to the individual researcher). Id. at 85–86. The events surrounding HDC and Dr. Bezwoda are a perfect example of how this type of intrinsic conflict of interest may endanger participants’ safety. See infra Part I.
The current funding scheme for medical research promotes intrinsic financial COIs, whether research is privately or publicly funded. Continued funding of privately-sponsored research depends, in part, on researchers’ and research institutions’ ability to accrue and retain participants. Publicly-sponsored research through government funding is also influenced by accrual and retention of participants. Renewal of existing government grants and the amount of funds allocated for a particular research project depends upon the ability to continue the research, by retaining previous participants, as well as enrollment of new participants. These intrinsic financial incentives motivate researchers and institutions to enroll as many participants as possible for research projects, including some that may not be entirely appropriate for the study, thereby creating a potential conflict with patient safety concerns. Despite their ubiquitous nature, intrinsic COIs have received little attention in academic discussions on medical ethics. However, intrinsic COIs are as much a threat to patient safety as the financial COIs that have received substantial academic, media and regulatory attention.

228. Sollitto, supra note 222, at 86. Intrinsic financial interests generally are broader than individual financial interests as they involve issues of funding for current and future research—research that will in turn further reputation and publication. Id.
229. Id.
230. Id. Industry-sponsored research generally includes a contractually negotiated payment to investigators based upon the number of participants she signs up and who thereafter complete the treatment being researched. Id. These payments are intended to cover the investigator’s research costs. See, e.g., Karine Morin et al., Managing Conflicts of Interest in the Conduct of Clinical Trials, 287 J. AM. MED. ASS’N 78, 78–79 (2002). Therefore, these funds generally pay the researcher’s and other research personnel’s salaries and for facility overhead costs. Sollitto, supra note 222, at 86.
231. Id.
232. Id. A discussion of the risk to patients due to intrinsic COIs is included supra note 234.
233. See, e.g., Levinsky, supra note 223.
234. Id. While much discussion of financial COIs followed revelation that a researcher and his research institution had significant financial COIs after a patient’s death in 1999, intrinsic COIs were not part of the discourse following several other well-publicized deaths of healthy research participants where financial COIs did not exist. Id. However, it has been suggested that intrinsic COIs were influential in research that resulted in several deaths at leading research institutions. See Sollitto, supra note 222, at 86. A poignant ex-
B. Financial Conflicts of Interest

Financial COIs are a major issue discussed in reviews of the current medical research environment. Research–industry collaborations often create concerns about conflicts of interest, bias, and impaired social responsibility in research findings. In particular, commentators have noted that the private industry concepts of profit and competition are at odds with the scientific ideal of objectivity. The substantial increase in funding of research by private industry has led to growing concern in recent years. Since 1980, private funding of research in all

ample of ethics violations related to intrinsic COIs recently occurred in Singapore. Is S'pore's Zeal Sending Wrong Signal?, supra note 205. In April 2003, the director of Singapore's National Neuroscience Institute was fired following revelations that he had conducted experiments on Parkinson's Disease patients without their consent and without submitting his research to ethical review. Id. The press pointed out that Singapore has openly campaigned for bring medical researchers to the country using various non-financial incentives. Id. An intrinsic financial COI existed as well, in the form of a ten million dollar government grant provided to the researcher's institution for his study. Zuraidah Ibrahim, Medical Ethics? It's Something Money Can't Buy, STRAITS TIMES (Sing.), Apr. 12, 2003, available at 2003 WL 16359084. See also, Move to Plug Loopholes in Medical Research, STRAITS TIMES (Sing,), Apr. 9, 2003, available at 2003 WL 16358611.

235. See, e.g., Henderson & Smith, Institutional Controls, supra note 220, at 251; Marci Angell, Is Academic Medicine for Sale?, 342 NEW ENG. J. MED. 1516, 1517 (2000) (“[C]lose and remunerative collaboration with a company naturally creates goodwill on the part of researchers and the hope that the largess will continue. This attitude can subtly influence scientific judgment in ways that may be difficult to discern.”).

236. SHAMOO & RESNIK, supra note 135, at 7. See also Sameer S. Chopra, Industry Funding of Clinical Trials: Benefit or Bias?, 290 JAMA 113, 113 (2003) (“Corporate financing of clinical research, which often includes incentives for academic investigators, may also create conflicts of interest that can bias study results.”); Justin E. Bekelman et al., Scope and Impact of Financial Conflicts of Interest in Biomedical Research: A Systematic Review, 289 JAMA 454 (2003) (evidence from multiple academic studies shows that financial ties between industry, researchers and research institutions leads to pro-industry research results).

237. See, e.g., SHAMOO & RESNIK, supra note 135, at 7; Chopra, supra note 236, at 113.

238. SHAMOO & RESNIK, supra note 135.

239. 1980 is particularly significant to reviews of private industry funding of research because this was the year the Bayh-Dole Act (35 U.S.C. § 200 et seq.) was passed. Henderson & Smith, Federal & State Controls, supra note 176, at 446. The Bayh-Dole Act changed intellectual property regulation of federally-funded research projects. The Act conferred ownership of intellectual prop-
scientific arenas increased four hundred percent. Private industry funding of medical research grew at an exponentially greater rate, increasing by over thirty-three times (3300%) from 1980 to 2002. A substantial portion of this increase in research expenditures has occurred in the last several years. In 2005, the total U.S. expenditure on biomedical research is estimated to top $100 billion.

Financial COIs affect individual researchers as well as the institutions in which research is performed. For the individual researcher, financial COIs and apparent COIs occur when the researcher has a financial relationship with a research sponsor or with the manufacturer of the medical technology being studied. Financial relationships may include ownership of company stock or stock options, unusually high consulting fees and speaking fees paid by manufacturers, or fees paid to community physicians for each patient they refer to participate in a company’s clinical trials.

Institutional COIs include many of the same financial relationships that occur with individual researchers, except that they accrue to the entities that performed the research, rather than the federal government. As a result, the Act allowed universities, nonprofit corporations, and other businesses to commercialize federally-funded inventions and new technologies by giving these entities the power to patent their work.

240. SHAMOO & RESNIK, supra note 135, at 7.


243. See OHLIN, supra note 242, at 7.


245. Id. at 340. Community physicians and physician-researchers are often paid between several hundred and several thousand dollars for every patient they enroll in an industry-sponsored clinical trial. Kurt Eichenwald & Gina Kolata, Drug Trials Hide Conflicts for Doctors, N.Y. TIMES, May 16, 1999, at 11.
searchers. Real and apparent financial COIs at the institutional level occur when the institution has a financial tie to a private industry research sponsor through ownership of stocks, industry sponsor fees paid to high-ranking individuals within an institution for patient referrals, and through corporate sponsorship of research. The issues associated with institutional COIs are particularly significant because most regulatory schemes make research institutions the primary protectors of research participants. Regardless of whether the researcher or institution holds a conflicting interest, the risk that the conflict will interfere with the project and endanger participants is of fundamental concern.

V. REGULATORY REFORM: RESEARCH ETHICS COMMITTEES AND CONFLICT OF INTEREST POLICY

In the expanding global arena of medical research, the influence of U.S. regulations is considerable. Efforts to harmonize pharmaceutical regulations have resulted in substantial similarity between U.S. drug regulations and the corresponding regulations in many developed and developing nations. Additionally, many clinical trials outside the United States, particularly those in developing nations, are financed by the U.S. government or by corporations that wish to market their product in the United States. Consequently, these trials are required to comply with U.S. regulations. As well, many developing countries conducting clinical trials do not have their own independ-

247. The COIs of high ranking individuals within an institution are synonymous with institutional COIs because these individuals are the controlling body that guide the institution’s actions and behavior. See, e.g., SHAMOO & RESNIK, supra note 135, at 145.
248. Gatter, supra note 216, at 342–47.
249. Id. at 348.
250. See infra Part III.B.
251. Adnan A. Hyder et al., Ethical Review of Health Research: A Perspective From Developing Country Researchers, 30 J. MED. ETHICS 68, 70 (2004) (study of researchers in developing nations reported that almost half of all the research projects in those countries were funded by U.S. sources); PhRMA 2004 PROFILE, supra note 137, at 39.
252. See infra Part III.
ently-created regulations. Rather, these countries use U.S. regulations as the guide for their medical research programs.

This increasingly global reach of U.S. regulations on human subject research necessarily extends the problems, as well as the benefits, associated with those regulations. One continuing problem is the U.S. government’s failure to give adequate regulatory guidance to RECs, researchers and research institutions on management of COIs. RECs are charged with protecting the health and safety of research participants. They are the ethical “watchdogs” of biomedical research. COIs promote bias that has the potential to impact participants’ health and safety. Yet, this important piece of information—whether a researcher has a COI—is often unavailable to the REC charged with evaluating a research project. As the influence of U.S. regulations expands, the failure to adequately deal with COIs, “one of the most contentious issues in medicine today,” broadens to become an international issue.

253. See Kass & Hyder, supra note 195, at B-8 (study of U.S. and international researchers showed that the vast majority believed that developing country investigators “sometimes or always relied on U.S. human subject regulations for guidance”); Hyder, supra note 251, at 70 (study showed that more than two thirds of researchers in developing nations stated that they had relied upon U.S. ethics regulations for guidance).

254. Kass & Hyder, supra note 195, at B–8. Nations may also choose to adopt the GCP produced by the ICH (or the similar version published by the World Health Organization). See infra Part II.B.2. However, adoption of the GCP has a similar effect, creating a regulatory system that is almost identical to U.S. regulations. See GLOBALIZATION OF CLINICAL TRIALS, supra note 34, at 3.

255. See infra Part III.


258. See, e.g., Elaine Larson et al., A Survey of IRB Process in 68 U.S. Hospitals, J. NURS. SCHOLARSHIP 260, 261 (2004) (noting that only 10.3% of the hospital IRBs surveyed required a conflict of interest statement for a new research protocol); S. Van McCrary et al., A National Survey of Policies on Disclosure of Conflicts of Interest in Biomedical Research, 343 NEW ENG. J. MED. 1621, 1623 (2000) (survey of 235 medical schools and research institutions showed that only three institutions required disclosure of COIs to IRBs).

259. Kassirer, supra note 257, at 149.
U.S. policy on COIs are potentially injurious to research participants within and without the borders of the United States. The following sections discuss two regulatory reforms that are needed to allow RECs’ review functions to properly align with their protective purpose.  

A. Conflict of Interest Regulation in the United States

Conflicts of interest in medical research are regulated at three separate levels in the United States: federal, state and institutional. These COI policies are directed solely at financial COIs. The federal level of COI controls consist of the Common Rule, Public Health Service (PHS) regulations, and FDA disclosure regulations. State control over regulation of COIs in medical research is not statutory, but emanates primarily from state court decisions. The vast majority of regulation of COIs occurs at the institutional level. Based upon the mini-

260. Admittedly, there are many more issues that require consideration when discussing realignment of RECs function and purpose; however, this discussion will be limited solely to the issue of COIs. For a few examples of IRB reform proposals, see, e.g., Michaele C. Christian et al., A Central Institutional Review Board for Multi-Institutional Trials, 346 NEW ENG. J. MED. 1405 (2002); Ezekiel J. Emanuel et al., Oversight of Human Participants Research: Identifying Problems to Evaluate Reform Proposals, 141 ANNALS INTERNAL MED. 282 (2004); Slater, supra note 14, at 1402.

261. The term COI in Part V. refers only to financial COIs. Intrinsic COIs would be almost impossible to regulate, as they are very difficult to identify and are ubiquitous in clinical research, and are therefore outside the scope of this discussion. See infra Part IV.A.

262. See, e.g., Henderson & Smith, Federal & State Controls, supra note 176 (providing overview of federal and state controls of medical research); Henderson & Smith, Institutional Controls, supra note 220 (providing overview of institutional controls of medical research).


264. Henderson & Smith, Federal & State Controls, supra note 176, at 453–54 (describing how the California Supreme Court decision in Moore v. Regents of University of California, a decision based on lack of valid informed consent, also dealt with issues of conflict of interest at the institutional level). See Moore v. Regents of Univ. of Cal., 793 P.2d 479 (Cal. 1990).

265. Federal regulations delegate the responsibility of creating COI policies to individual institutions. See 42 C.F.R. § 50.604; Office for Human Research Protection, DEP’T OF HEALTH AND HUMAN SERVICES, FINANCIAL
mal guidance provided by federal regulations, each individual institution creates its own COI policy—resulting in policies that vary greatly from one institution to another. This section emphasizes federal COI regulation and the impact of federal regulations on institutional COI policies.

There are various federal regulations of financial COIs. The Public Health Service (PHS) and FDA have regulatory provisions for financial COIs. However, neither agency’s regulations mention the role and responsibilities of IRBs in disclosure policies or management policies for financial COIs. Nor do the regulations make specific provisions for how research institutions should manage COIs—leaving this component to the discretion of the institution. Notably, the Common Rule, which represents the core of federal protections of human research subjects, lacks provisions for identification and management of institutional or investigator COIs entirely.


266. See Van McCrary, supra note 258, at 1621; Henderson & Smith, Institutional Controls, supra note 220, at 252.


269. PHS regulations require institutions to report the existence of COIs and management plans for COIs; however, there is no requirement to report the specific details of the COIs or the management plan. Van McCrary, supra note 258, at 1624. FDA regulations require specific, detailed documentation of COIs and management plans, but do not specify any particular management protocols that are preferable or considered more trustworthy. Id.

270. Henderson & Smith, Federal & State Controls, supra note 176, at 448. The only Common Rule statutory provision for COIs is the restriction of IRB membership against any individual who has an interest in the research being reviewed by the IRB. 46 C.F.R. § 46.107(e). The Office for Human Research
The lack of specificity in federal regulations has had a significant impact upon the development of COI policies at the institutions where research is conducted. A national survey of research institutions came to the conclusion that the only universal feature to all COI policies was that they were totally discretionary. Disclosure policies required that investigators disclose COIs to another member of the research institution; however, only one percent of institutions required disclosure to an IRB. Management of disclosed COIs is even less consistent. Many institutions require additional project monitoring, request investigators withdraw from the project, or require investigators to divest their interests prior to continuance of the project when a COI exists. However, none of the institutions required that COIs should be managed through disclosure to an IRB. Inconsistent COI policy at the institutional level reflects the lack of specificity at the federal level and makes the need for reform clear. Federal regulations need to specify exactly who must be informed of investigator COIs. So the question then becomes: who needs to know about investigator COIs? The FDA requires disclosure of COIs to the agency and to the sponsor of the research.

Protections (OHRP), the main research oversight body of the DHHS, developed a set of draft interim provisions for identification and management of financial COIs in January 2001. See OHRP Interim Guide, supra note 267. In May 2004, the OHRP published the agency’s Final Guidance Document. OHRP Final Guide, supra note 265. However, commentators have suggested that the final document “seem[s] to be more suggestions than hard and fast recommendation.” Alicia Ault, HHS Issues Rules on Financial Conflicts, 363 LANCET 1709, 1709 (2004). No COI guidance statements have been codified to date.

271. Van McCrary, supra note 258, at 1622.
272. Id. at 1623. Additionally, only 8% required disclosure to the funding agency, 7% disclosed to journals publishing the research and 1%—3 of 250 institutions—required disclosure to participants. Id.
273. Id. Subsequent disclosure to the funding agency, modification of the research plan, and public disclosure of the COI are other common management techniques used by institutions. Id.
274. Id. None of the management policies required subsequent disclosure to research participants. Id.
275. 21 C.F.R. § 54.4.
276. In this situation, the agency would also be one of the sponsors, since PHS regulations only apply to research projects funded in full or in part by the agency. See infra Part III.A.
research institution are informed of investigators’ COIs. 277 Federal agencies, sponsors and institutions are informed. What about the body that is charged by both of these agencies with ensuring that research is not initiated unless participants will be protected from undue risk? What about IRBs? No federal regulations specifically require that COIs be disclosed to a reviewing IRB. This failure needs to be remedied.

The purpose of ethical review is to “contribute to safeguarding the dignity, rights, safety, and well-being of all actual or potential research participants.” 278 While it is true that IRBs are heavily burdened by an ever-increasing load of research protocols to review, this does not mean that information on investigator COIs should be left out of the review process. 279 A primary function of the IRB is to analyze the protocol and ensure that the risks to participants have been accounted for, acknowledged, and then balanced with the potential benefits. 280 COIs, no matter how unlikely they are to actually harm a participant, are a risk. As such, they need to be included in any risk/benefit analysis done by an IRB. Without knowledge of investigator COIs, an IRB may not only fail to fulfill one of its functions but may also fail in its primary purpose—ensuring that research participants health and well-being is protected. Additionally, without COI disclosure, IRBs are unaware of the potential need for increased and/or more extensive evaluation of the project after approval—again interfering with its ability to safeguard participants.

Federal regulatory agencies’ failure to make it clear that IRBs need to be provided full documentation of COIs is unacceptable. Existing regulations merely give lip service to the import of COIs and their potential risk to participants. It is time for DHHS and its agencies to provide more definitive,

277. 42 C.F.R. § 50.604
279. See, e.g., Lars Noah, Deputizing Institutional Review Boards to Police (Audit?) Biomedical Research, 25 J. LEGAL MED. 267, 293 (2004) (“In the area of human research subject protection, better guidance from the FDA, HHS, and NIH would have the dual benefit of minimizing inconsistency and relieving already overburdened IRBs.”).
280. See infra Part III.A.
harmonized regulations for COIs. The best way to begin this reform process is to require that IRBs are always provided COI disclosure statements and management plans from investigators.

B. Regulations Affecting Foreign Clinical Studies

Changes to U.S. regulations, as described above, will help to re-align the purpose and function of research ethics committees in the United States and in other nations that host research projects funded in full or in part by the U.S. government. However, the scope of U.S. regulatory influence outside the United States extends beyond projects that receive funding from the U.S. government. The U.S. market is one of the world’s largest consumers of pharmaceuticals and medical devices. As such, manufacturers of these products often wish to have their products approved for marketing in the United States. Fortunately for international manufacturers, the FDA allows data from foreign clinical studies to be used in the approval process for drugs and medical devices. Most manufac-

281. Even some agencies within the federal government have recognized that this is a serious flaw in existing human-subject research regulations. See Government Accounting Office, Biomedical Research: HHS Direction Needed to Address Financial Conflicts of Interest 22–25 (2001) (Report # GAO-02-89), available at http://www.gao.gov/new.items/d0289.pdf (last visited Feb. 15, 2005). However, action has yet to be taken.

282. As noted earlier, the Common Rule and PHS regulations only apply to research that is funded, at least in part, by the U.S. government. See infra Part III.A.

283. See, e.g., Press Release, IMS Health, IMS Reports 8 Percent Constant Dollar Growth in 2002 Audited Global Pharmaceutical Sales to $400.6 Billion (Feb. 25, 2003), at http://www.imshealth.com/ims/portal/front/articleC/0,2777,6599_3665_41336931,00.html. U.S. pharmaceutical sales represented 51% of global sales in 2002. Id. The second largest pharmaceutical market was the European Union, with 22% of global sales. Id.


turers file an Investigational New Drug (IND) application with the FDA prior to beginning clinical trials. However, FDA regulations also allow manufacturers to support their market approval applications using data solely from previously conducted clinical trials located at foreign sites.

In addition to several general technical requirements placed upon foreign clinical data, the FDA regulations include an ethics component. Specifically, the FDA’s foreign clinical studies regulations require collection of clinical data consistent with “ethical principles acceptable to the world community.” The regulations specify adherence to the 1989 Declaration of Helsinki or “the laws and regulations of the country in which the research was conducted, whichever represents the greater protection of the individual.” Along with other documentary re-

clinical data was not allowed as primary safety and efficacy data until 1975, but only for drugs that treated uncommon diseases, provided a major health gain, or had an exceptionally favorable benefit/risk ratio. Id. Starting in 1984, the FDA accepted foreign clinical data as primary evidence for all drugs seeking approval for marketing in the United States. Id. at 334.


General technical components required by the FDA include: studies must be (1) well designed; (2) well conducted; and (3) performed by qualified investigators. 21 C.F.R. § 312.120(a). The data that is submitted to the FDA must include: (1) description of investigator’s qualifications; (2) description of research facility; (3) summary of the protocol and the study’s results; (4) full description of the substance and product used in the trials; and (5) information showing that the clinical trials were adequate and well controlled. 21 C.F.R. § 312.120(b).

The medical device regulations use a slightly different wording, requiring that clinical data must be “valid.” 21 C.F.R. § 814.15(b). With any application, foreign or domestic, if the FDA considers any data suspect, or believes it is unduly biased, the agency can reject the data outright. See Van McCrary, supra note 258, at 1624.

See infra Part II.

The regulations pertaining to premarket approval of medical devices states that an applicant must follow whichever
requirements, foreign investigators must submit attestations detailing how their research program complied with the 1989 Declaration or the host country’s ethical standards.

While the Declaration of Helsinki provides major guidance for researchers, the FDA’s insistence on usage of the 1989 Declaration results in an insufficient level of protection for research subjects. The 1989 Declaration has several significant deficiencies that reflect that this document is outdated. For example, the 1989 Declaration is not responsive to several of the largest issues confronting medical researchers today, including stem cell research and use of placebo-controls. Additionally, while the 1989 Declaration provides that all research proposals must be reviewed by an REC, there is no mention of continuing review to ensure that ethical standard are being applied in practice as well as on paper. Key to the discussion of COIs in biomedical research, the 1989 Declaration lacks any provisions for the disclosure or management of investigator COIs.

Significantly, the FDA has recently proposed a major change in its foreign clinical studies regulations. Acknowledging that standards for human subject protection have changed consid-

standard “accords greater protection to the human subject.” 21 C.F.R. § 814.15(b).

292. Even though 21 C.F.R. § 312.120 was adopted in 1991, the FDA has declined to revise the regulations to include the 1996 or the 2000 revisions of the Declaration of Helsinki. FDA GUIDANCE REPORT, supra note 100. In a 2001 published statement, the FDA stated that it was reviewing whether its regulations on foreign clinical studies needed revision to incorporate new or modified standards. Id. No action has been taken to date. Id.

293. If the research protocol followed the host country’s ethical standards and regulations, the investigator must provide a written explanation of how the host country’s standards are equivalent or superior to the 1989 Declaration. 21 C.F.R. § 312.120(c)(2).

294. See generally Forster, supra note 94. As an example of this assertion, one of the amendments to the 2000 Declaration was the addition of specific provisions on the use of placebos in medical research. Id. at 1452. An addendum on the same subject was added in 2002 in response to extensive discord in the ethics community over the use of placebos in developing countries. Id. Additionally, stem cell research would not accurately be regulated by the 1989 Declaration, as the 1989 Declaration only protects human subjects and not “human material.” Id. at 1451.

295. See 1989 DECLARATION, supra note 87.

296. Id.

erably in the last decade, the agency has proposed removing the 1989 Declaration from its foreign clinical studies regulations.\textsuperscript{298} In its stead, the FDA would require clinical trials to comply with the ICH GCP.\textsuperscript{299} As a more detailed guidance for foreign investigators, the inclusion of the ICH GCP will certainly remove confusion about FDA documentation requirements and the specific responsibilities of various parties in research programs and marketing approval applications.\textsuperscript{300} For the purposes of this Note, the question is whether the ICH GCP has provisions for COIs. Unfortunately, since the GCP mirrors U.S. human-subject research regulations, it also carries the same flaws discussed in the previous section. The ICH GCP requires documentation of financial arrangements among investigators, institutions and sponsors.\textsuperscript{301} Yet, these documents are only required to be maintained by the sponsor and research institution.\textsuperscript{302} As with the 1989 Declaration and U.S. regulations, the ICH GCP does not require that RECs are provided COI disclosure statements.\textsuperscript{303}

Current international ethics guidelines reflect recognition for the need to include RECs in the management of COIs. In acknowledging that COIs have the potential to impact research participants’ health and well-being, both the 2000 Declaration and the 2002 CIOMS Guidelines have made specific provisions that require RECs be provided information on investigators’ COIs.\textsuperscript{304} The revision of the Declaration of Helsinki in 2000 marked several major changes to the Declaration, including the

\begin{itemize}
\item \textsuperscript{298} Id. at 32,468. The FDA specifically stated that it felt the need to remove reference to the 1989 Declaration because modifications to the Declaration are outside of the agency’s authority and “could be modified to contain provisions that are inconsistent with U.S. laws and regulations.” \textit{Id.}
\item \textsuperscript{299} Id. at 32,467.
\item \textsuperscript{300} Id. at 32,468. \textit{See also} John Sweatman, \textit{Good Clinical Practice: A Nuisance, a Help or a Necessity for Clinical Pharmacology?}, \textit{55 Brit. J. Clin. Pharmacology} 1, 2–4 (2003).
\item \textsuperscript{301} ICH GCP, supra note 30, at 51 (§ 8.2.4).
\item \textsuperscript{302} Id.
\item \textsuperscript{303} IRBs are required to be given documentation of payments or compensation given to research subjects, but the ICH GCP does not mention providing IRBs with documentation of investigator’s financial interests with the project or its sponsors. \textit{Id.} at 10 (§ 3.1.2).
\item \textsuperscript{304} Provisions on COIs in both of these documents are provided in the remainder of this section. \textit{See supra} notes 303–305 (2000 Declaration), 306–308 (CIOMS Guidelines) and accompanying text.
\end{itemize}
adoption of three separate provisions that include requirements for disclosure of COIs.  

Provision 13 of the 2000 Declaration includes specific provisions for the information that investigators are responsible for providing to RECs. Under the 2000 Declaration, researchers are obligated to provide RECs with all information necessary for monitoring the project and submitting to the REC all “information regarding funding, sponsors, institutional affiliations, [and] other potential conflicts of interest.” The 2002 CIOMS International Ethical Guidelines for Biomedical Research Involving Human Subjects also ties RECs and disclosure of COIs. The 2002 Guidelines’ recommendations on RECs include commentary suggesting that RECs should be informed by investigators of any potential or apparent financial COIs.

305. 2000 Declaration, supra note 96. See also Forster, supra note 94, at 1449. Provisions 13, 22 and 27 include provisions for disclosing COIs. 2000 Declaration, supra. Provision 22 requires disclosure of possible COIs to research participants. Id. Provision 27 requires disclosure of COIs in publications of research materials and findings. Id.

306. Id. Unlike the 1989 Declaration, the 2000 Declaration requires all human-subject research be submitted to an independent ethical review committee. Id. Additionally, under the 2000 Declaration, RECs are specifically given the right to monitor ongoing research projects. Id.

307. Id.

308. CIOMS Guidelines, supra note 118.

309. CIOMS “Guideline 2: Ethical Review Committees” states:

All proposals to conduct research involving human subjects must be submitted for review of their scientific merit and ethical acceptability to one or more scientific review and ethical review committees. The review committees must be independent of the research team, and any direct financial or other material benefit they may derive from the research should not be contingent on the outcome of their review. The investigator must obtain their approval or clearance before undertaking the research. The ethical review committee should conduct further reviews as necessary in the course of the research, including monitoring of the progress of the study.

Id.

310. Id. The CIOMS “Guideline 2: Ethical Review Committees” commentary states:

Potential conflicts of interest related to project support. Increasingly, biomedical studies receive funding from commercial firms. Such sponsors have good reasons to support research methods that are scientifically and ethically acceptable, but cases have arisen in which the conditions of funding could have introduced bias .... As persons
A link between RECs and disclosure and management of COIs is gaining acceptance as an international standard. It is no longer appropriate for U.S. regulators to hold foreign clinical studies to a standard recognized by the international bioethics community as insufficient for modern ethical problems. While the FDA's proposal to replace the 1989 Declaration with the ICH GCP will ameliorate several deficiencies within the existing foreign clinical studies regulations, it still requires further amendment. In order to provide appropriate protection for research participants, U.S. foreign clinical studies regulations should respond to the current needs of medical research and specifically require review of foreign clinical studies by an REC that has been provided documentation regarding investigators' COIs.

VI. CONCLUSION

Intrinsic and financial conflicts of interest are a threat to the health and safety of research participants in the United States and abroad. Investment in clinical trials by industry and the federal government continues to increase in the U.S. and abroad, with industry financing now outpacing the U.S. government. With this change in the support structure of clinical research, comes an increased likelihood that investigators will have financial conflicts with research sponsors that may impact the integrity of the project and the safety of participants. Students directly responsible for their work, investigators should not enter into agreements that interfere unduly with their access to the data or their ability to analyse the data independently, to prepare manuscripts, or to publish them. Investigators must also disclose potential or apparent conflicts of interest on their part to the ethical review committee or to other institutional committees designed to evaluate and manage such conflicts. Ethical review committees should therefore ensure that these conditions are met.

Id. Researchers who participate in international clinical trials tend to believe that U.S. IRB review and application of U.S. regulatory requirements are often inappropriate outside the borders of the United States. Kass & Hyder, supra note 195, at B–64. Rather, these researchers suggest ethical review in the host country and that international guidelines should be the standard for evaluating projects; in particular, they suggest using the CIOMS guidelines for research in developing countries. Id.

311. See, e.g., PhRMA 2004 PROFILE, supra note 137, at 39; OHLIN, supra note 242, at 7.
ies have already shown that industry-funded clinical research is more likely to favor the sponsor than research conducted independent of industry funding.\(^{312}\) Such trends support the assertion that COIs will only increase in the future. Yet, policies for the disclosure and management of COIs are inconsistent or non-existent in developed, as well as developing, nations. This failure to adequately provide guidance on investigator COIs shows a breakdown in the protection of citizenry that is the mandate of national and international health regulators.

RECs are the bodies that have been consistently charged with ensuring the protection of human subjects in medical research. It is only logical that they should have access to the same information that investigators, agencies, and institutions have regarding potential risks to research participants. Yet, they often lack any knowledge of investigators’ financial interests that may cause bias or inappropriately influence decision-making. This failure is unacceptable, particularly since it is a failure easily remedied by simply adding regulations that mandate disclosure of COIs to IRBs. While there may be several other regulatory changes with greater potential to improve the system of human subject protection, this is one of the simplest. There is no excuse for the continuing lack of action by the federal government in this area.

Influence of U.S. regulations on medical research conducted throughout the world is substantial. With influence, comes responsibility. The fact that U.S. regulations propagate policies that are inconsistent with the goal of protecting the health and safety of research participants is unacceptable. The United States has a responsibility to conduct regulatory reform that

312. Bekelman, supra note 236, at 454.
will more reasonably protect participants and support the purpose of ethical review.

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* B.A., University of Washington (1994); M.Ed., University of Washington (1996); J.D., Brooklyn Law School (expected 2005). I dedicate this Note to my husband, Dr. Erik N. Kubiak, who inspired my interest in bioethics and has shown unending patience throughout my law school career. I wish to thank my friends and family for their continuing support of my life endeavors. I would also like to thank the staff of the Brooklyn Journal of International Law for their assistance and encouragement, and particularly Erin McMurray, Adrienne Oppenheim and Nicole Skalla for their support and patience as I struggled through the editing process.